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2012 IL App (4th) 110588-U

Filed 7/10/12

NO. 4-11-0588, 4-11-0602 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BANKCHAMPAIGN, NA,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
WELLS FARGO BANK, NA, Successor by)	No. 09CH200
Merger to WELLS FARGO HOME MORTGAGE,)	
INC.; and UNKNOWN OWNERS AND NONRECORD)	Honorable
CLAIMANTS,)	Charles McRae Leonhard,
Defendants-Appellants.)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Knecht dissented.

ORDER

- ¶ 1 *Held:* A mortgage signed by beneficial owners of a land trust individually, and not as trustees, was invalid as the beneficial owners had no authority to mortgage the subject property without designating themselves as trustees on the mortgage.
- ¶ 2 In June 2009, plaintiff BankChampaign, NA, filed a complaint for foreclosure on its May 2007 mortgage with William H. and Myra A. McWilliams as trustees on behalf of trusts in their names. In its complaint, BankChampaign alleged the March 2008 mortgage that defendant, Wells Fargo Bank, NA (Wells Fargo), had involving the same property was junior to its May 2007 mortgage. Wells Fargo disagreed. Wells Fargo maintained that its mortgage had priority, as it replaced an earlier mortgage the McWilliamses entered into with ABN AMRO Mortgage Group, Inc. (ABN). In response to BankChampaign's contention that the ABN mortgage was invalid, Wells Fargo also argued the trial court should treat its mortgage, which on its face was signed by the

McWilliamses as tenants in common, not as trustees, as an equitable mortgage with the trust.

¶ 3 Both parties filed motions for summary judgment. In June 2011, the trial court granted BankChampaign's summary-judgment motion and denied Wells Fargo's motion. Wells Fargo appeals, arguing subrogation principles mandate its mortgage has priority over BankChampaign's mortgage, and this court should find an equitable mortgage exists between Wells Fargo and the trusts. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 On October 13, 2004, William McWilliams and Myra McWilliams each created a land trust in their own names. They were each the trustee and beneficiary in the trust bearing his or her name. The trusts were revocable. The trustee in each trust had authority "[t]o borrow money from any lender, extend or renew any existing indebtedness, and mortgage or pledge any property in the trust."

¶ 6 On October 15, 2004, both William and Myra executed quitclaim deeds, conveying their interests in real estate, known as 14 Greencroft Drive, Champaign, Illinois, to their respective trusts. According to the quitclaim deeds in trust, the trustee had "[f]ull power and authority *** with respect to the real estate or any part or parts of it *** to *** mortgage, pledge or otherwise encumber it."

¶ 7 Beginning in February 2007, multiple mortgages were given in relation to 14 Greencroft Drive. On February 7, 2007, William and Myra, as "husband and wife," not as trustees, mortgaged 14 Greencroft Drive to ABN. On July 3, 2007, a mortgage was entered between William and Myra, "not individually" but as trustees of their respective trusts, and BankChampaign. On April 8, 2008, a mortgage with Revere Mortgage, Ltd., signed by William and Myra, "Husband and wife

as tenants in common," was entered and contemporaneously assigned to Wells Fargo. The debt secured by this mortgage was applied to pay off the debt secured by the ABN mortgage.

¶ 8 In May 2009, William and Myra, personally and as trustees of their respective trusts, executed a quitclaim deeds in lieu of foreclosure to BankChampaign.

¶ 9 In June 2009, BankChampaign filed its complaint for foreclosure against Wells Fargo, as well as against unknown owners and nonrecord claimants. Both Wells Fargo and BankChampaign filed summary-judgment motions.

¶ 10 In June 2011, the trial court granted BankChampaign's motion for summary judgment and denied Wells Fargo's motion. The court concluded the following:

"William and Myra, having previously conveyed their interests in the property to the respective trusts, simply had nothing to convey to defendant's predecessor. At last, the record, objectively viewed, establishes that William and Myra conveyed just that."

Having found William and Myra had nothing to convey, the court rejected Wells Fargo's subrogation argument.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Wells Fargo argues, because its April 2008 mortgage replaced the February 2007 ABN mortgage, the Wells Fargo mortgage had priority over BankChampaign's July 2007 mortgage under equitable-subrogation principles. Recognizing BankChampaign's argument that Wells Fargo's mortgage was signed by William and Myra, individually, and not by William and Myra, as trustees, Wells Fargo also urges this court to find an equitable mortgage exists between the

trust and Wells Fargo. Wells Fargo emphasizes the fact William and Myra are the sole trustees, beneficiaries, grantees, and settlors of their respective, revocable trusts.

¶ 14 BankChampaign contends equitable subrogation does not apply because the ABN and Wells Fargo mortgages are invalid. BankChampaign argues the express language in the mortgages and deed of trust must be strictly construed to establish third-party rights under the mortgages. BankChampaign maintains William and Myra, individually, as grantors, had nothing to grant. BankChampaign concludes, then, because Wells Fargo cannot establish an equitable mortgage exists, Wells Fargo's equitable-subrogation argument fails.

¶ 15 We review summary-judgment orders *de novo*. See *Lake v. Related Management Co., L.P.*, 403 Ill. App. 3d 409, 411 (2010).

¶ 16 Under Illinois law, a mortgage is defined as the following: "'Mortgage' means any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation." 735 ILCS 5/15-1207 (West 2010). The term "mortgage" includes, among other mortgages, "equitable mortgages." 735 ILCS 5/15-1207(d) (West 2010). When there are multiple mortgages on the same property, it is presumed the first mortgage recorded has priority over later-filed mortgages. See *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 704 (2000). There are exceptions. In *Aames Capital Corp.*, 315 Ill. App. 3d at 710, the Second District concluded, under principles of subrogation, a mortgage that refinances an original mortgage will have superiority over other mortgages filed in the time between the original mortgage and the refinancing mortgage:

"We hold that a refinancing mortgagee that records its mortgage lien is entitled to be subrogated to the original lien, and its

corresponding priority position, established by the original mortgagee, under the doctrine of conventional subrogation, up to the amount that the original mortgage secured at the time of its perfection. The doctrine of conventional subrogation will apply if the original mortgage lien is in full force and effect at the time the refinancing mortgage lien is recorded."

Wells Fargo contends the conventional-subrogation doctrine "unequivocally places [its] mortgage lien in a superior position to [BankChampaign's] mortgage lien."

¶ 17 BankChampaign does not dispute the holding in *Aames Capital* but does maintain its holding does not apply here. BankChampaign argues the ABN mortgage, the one replaced by Wells Fargo's mortgage, was not valid.

¶ 18 We turn to the mortgages. The borrowers on the ABN mortgage are identified as William and Myra, "individually." The property on which the lien was secured was 14 Greencroft Drive, property owned by the trusts. BankChampaign, citing *Village of Round Lake v. Amann*, 311 Ill. App. 3d 705, 718, (2000), contends a grantor can convey no greater interest in real estate than it possesses. BankChampaign maintains, in their individual capacities, William and Myra had nothing to give.

¶ 19 We note the briefs on appeal indicate a dispute over the type of trust involved. While Wells Fargo refers to the trust as a land trust, BankChampaign expressly denies it is a land trust. A land trust, under Illinois law, is "any trust arrangement under which the legal and equitable title to real estate is held by a trustee, the interest of the beneficiary of the trust is personal property" and the beneficiary has the exclusive power to control the trustee when dealing with the title to the trust

property and exclusive control over the trust property's management and operation. 735 ILCS 5/15-1205 (West 2010).

¶ 20 In the trusts here, the trusts include more than real estate; they also include "tangible personal property." For example, article 3.1 directs the trustee to distribute gifts on the settlor's death of personal property in the trust estate. This makes the trust likely to be a more conventional trust, in which "the trustee holds the legal title while the beneficiary holds the equitable title." *Culicchia v. Hupfauer*, 379 Ill. App. 3d 562, 565 (2008).

¶ 21 Regardless, the label of these trusts is irrelevant. William and Myra are the beneficiaries and trustees of these revocable trusts. As such, they both held legal and equitable title to 14 Greencroft Drive.

¶ 22 Not only did William and Myra, as trustees, hold title to 14 Greencroft Drive, but also they had the authority under the trust agreements to secure a loan with a mortgage. Article 11 of the trust agreements, entitled "Trustee Powers" sets forth the following: "In addition to all powers granted by law, the trustee shall have the following powers, to be exercised in a fiduciary capacity. *** To borrow money from any lender, extend or renew any existing indebtedness, and *mortgage or pledge any property in the trust*[" (Emphasis added.) The subject property, 14 Greencroft Drive, was "property in the trust."

¶ 23 The question then becomes whether William's and Myra's failure to identify themselves as "trustees" in the ABN mortgage renders the use of 14 Greencroft Drive as security for the loan renders the mortgage invalid. BankChampaign contends the trust documents establish William and Myra had no authority to encumber the real estate unless they were clearly acting in a fiduciary capacity as trustees. BankChampaign cites article 10.10 and emphasizes the language

"[t]he trustee's certification that the trustee is acting according to this instrument shall protect anyone dealing with the trustee."

¶ 24 When a party determines, for whatever reason, to place his or her property into a land trust, he or she (or as here, both) retains equitable title and conveys legal title to the trustee. The conveyance or encumbrance of a beneficial or equitable interest in the trust property does not affect legal title. "A security transaction involving the legal and equitable title of property held in the land trust must obviously designate the land trustee as the mortgagor and be signed by it." Henry W. Kenoe, *Kenoe on Land Trusts*, § 5.25 (Ill. Inst. for Cont. Legal Educ. 1989).

¶ 25 Because William and Myra wore two hats—legal and equitable—does not alter the analysis. When they executed a mortgage to ABN, they did not do so as trustees. While that mortgage encumbered their equitable title to the real estate, it did not attach to the legal title, which then remained unencumbered and held by them as trustees. In their individual capacities, they owned only a personal property interest. *Horney v. Hayes*, 11 Ill. 2d 178, 183 (1957).

¶ 26 Land trust beneficiaries, *vis-a-vis* third persons, act in their individual capacities, not as trustees. See *Gallagher v. Chicago Title & Trust Co.*, 238 Ill. App. 39, 43 (1925). As a consequence, when the ABN mortgage was executed by William and Myra individually, but not as trustees, it did not attach to or encumber legal title to the real estate.

¶ 27 As has been observed by the First District: "Retaining the nature of his interest in order to be entitled to the advantages of a land trust, he may not then deal with the property as if no such trust existed. The trustee's interest is in the title to the real estate and if the beneficiary wishes to deal with that title, he must do so through the trustee." *Schneider v. Pioneer Trust & Savings Bank*, 26 Ill. App. 2d 463, 466 (1960); see also *Dept. of Conservation v. Franzen*, 43 Ill. App. 3d

374, 379 (1976).

¶ 28 From this record, we do not know if ABN ever performed a title search. However, the loan documents are clear that William and Myra executed the note and mortgage as individuals and not as trustees. That error is fatal to Wells Fargo, which was assigned, at most, a security position in equitable, but not legal, title. That beneficial interest is personal property to which the real estate mortgage could not and did not attach. *Horney*, 11 Ill. 2d 178 at 183.

¶ 29 III. CONCLUSION

¶ 30 For this reason, we affirm.

¶ 31 Affirmed.

¶ 32 JUSTICE KNECHT, dissenting:

¶ 33 I disagree with the approach taken by the majority. William and Myra, as trustees, had the power to mortgage or pledge any property in the trust. They were the beneficiaries of the trust. It was a revocable trust. Neither the law nor logic required them to sign the mortgage "as trustees."

¶ 34 They held both legal and equitable power to the property. They could revoke the trust at any time. They could mortgage or pledge the property as security. "Generally, a trustee having legal title to real estate, together with the right of possession, is regarded as the owner of the property and is subject to all the liabilities of ownership." *Campos v. Campos*, 342 Ill. App. 3d 1053, 1061, 796 N.E.2d 1101, 1108 (2003).

¶ 35 Does Wells Fargo's mortgage of April 2008 have priority over BankChampaign's July 2007 mortgage? Wells Fargo says yes, because the 2008 mortgage replaced a February 2007 mortgage with ABN. BankChampaign says no because the February 2007 mortgage was signed by William and Myra as husband and wife, not as trustees.

¶ 36 ABN and Wells Fargo could have avoided this problem by doing a thorough title search. BankChampaign could have done a title search and discovered the subject property had a mortgage lien. Perhaps in the 21st century title searches are passé. Or perhaps lenders during the last decade were in a frenzy to acquire and provide new mortgages with hopes all would be well.

¶ 37 When William and Myra executed a mortgage to ABN, they had the authority to consent to a lien on property they had absolute power to control. This was a valid mortgage. In these circumstances, there is no reason to require William and Myra to write the words "as trustees" after their signature. If the banks think they were hoodwinked by William and Myra, then they should pursue them.