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2014 IL App (5th) 120440-U

NOTICE  
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NO. 5-12-0440

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FIRST CLOVER LEAF BANK, Successor in Interest to First Federal Savings and Loan Association of Edwardsville,

Plaintiff-Appellee,

v.

THE BANK OF EDWARDSVILLE, Trustee Under Trust Agreement Dated June 17, 1992, and Designated Trust Number 3042, MEGA HOMES, INC., f/k/a MEGA CONSTRUCTION, INC., STEVEN F. GARDNER, and TAMMY L. GARDNER,

Defendants-Appellants

(Associated Bank, Union Bank of Illinois, First Collinsville Bank, The Bank of Edwardsville, Gabriel's Perfect Painting, Nonrecord Claimants, and Unknown Other, Defendants).

) Appeal from the  
) Circuit Court of  
) Madison County.  
)  
)

) No. 08-CH-649  
)  
)

) Honorable  
) Clarence W. Harrison II,  
) Judge, presiding.  
)

JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Spomer and Schwarm concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court erred in treating a personal property interest as a real property interest, imposing a constructive trust, piercing a corporate veil, and granting summary judgment. Cause reversed and remanded.

¶ 2 The instant case is one of a number of lawsuits involving First Clover Leaf Bank (Clover Leaf), the Bank of Edwardsville, trustee of a land trust (Edwardsville), and Steven F. and Tammy L. Gardner, whose residential real estate at 2020 Golf Course View Drive, Edwardsville, Illinois (real estate), is a crucial factor in this litigation. The instant case, one of three appealed to this court, centers around the imposition of a constructive trust in favor of Clover Leaf on the proceeds of the sale of said real estate. The circuit court imposed a constructive trust on approximately \$9,800, the remaining funds of the foreclosure sale, and distribution of those proceeds of sale to various creditors and lienholders. This amount is the *res* or subject upon which the circuit court imposed a constructive trust. During the course of this litigation, Clover Leaf filed a *lis pendens* precluding a prior attempted sale of the real estate. The circuit court entered summary judgment in favor of Clover Leaf, ruled that the beneficiary of the land trust, Mega Homes, Inc. (Mega Homes), which was owned totally by the Gardners, was subject to piercing of its corporate veil, that, accordingly, the Gardners had an interest in the subject real estate, and, therefore, were subject to the appropriate filing of a *lis pendens*, and denied Edwardsville's counterclaims alleging an inappropriate filing of the *lis pendens*. For the reasons stated below, we reverse and remand for further proceedings.

¶ 3 STATEMENT OF FACTS

¶ 4 This appeal presents this court with, at best, a murky and complicated factual scenario. In 2003, Steven and Tammy Gardner executed various commercial guaranties with Clover Leaf. On that date, a promissory note was executed with the Gardners, and,

simultaneously, Clover Leaf obtained a mortgage to the real estate as security for the note. The mortgage listed the borrower as the land trust, of which Edwardsville is the trustee. Also concurrent with these notes and mortgage was a number of promissory notes and mortgages between Clover Leaf and Prime Development, Inc., a company of the Gardners involved in real estate development. These various notes and mortgages pertained to subdivision lots and Prime Development.

¶ 5 The instant land trust was created in 1992, the trustee being Edwardsville. The beneficiary of the land trust was Mega Homes and the sole shareholders in Mega Homes were Steven and Tammy Gardner, each owning 50% of the shares. At all times, the legal title was held by the land trust. It is also uncontested that Steven and Tammy Gardner were the sole shareholders in Mega Homes.

¶ 6 In 2008, a real estate sales contract was entered into on the real estate with a price of \$720,000. The entity handling the closing contacted Clover Leaf in order to obtain a payoff figure on the 2003 mortgage. The record reflects that the response by Clover Leaf was "surprising" in that Steven Gardner was not the named beneficiary of the land trust, although the record reflects all of this documentation was in the possession of Clover Leaf. Clover Leaf ultimately responded in the following manner.

¶ 7 Clover Leaf indicated during the course of contact between Clover Leaf and Edwardsville, that it had personal judgments against the Gardners in Madison County totaling \$450,624.33, that Clover Leaf would execute a release of this specific mortgage upon payoff, but that Clover Leaf had filed suit based on the various Prime Development

debts and had filed a *lis pendens* notice. As the *lis pendens* created an encumbrance on the real estate, the 2008 sale did not close.

¶ 8 As to the aforementioned litigation, Clover Leaf filed a complaint against Edwardsville seeking to impose a constructive trust on the proceeds of the subsequent foreclosure sale of the real estate. The appeal of the foreclosure action will be addressed in a separate order. As noted above, a *lis pendens* was filed concurrently with this complaint. The pleading addressed in this order is Clover Leaf's second amended complaint filed in March of 2009.

¶ 9 The second amended complaint alleged that the basis for the constructive trust was the commercial guaranties executed by the Gardners. (There was some confusion in the record as to whether some guaranties were signed by Tammy Gardner, but this issue is not relevant to the questions before this court.) Clover Leaf further alleged that Mega Homes was, in fact, the alter ego of the Gardners, that any interest held by Mega Homes and the Gardners be held in constructive trust for the benefit of Clover Leaf, that the Gardners, as per the allegation of alter ego, be held as the beneficiaries of the land trust, and that Steven Gardner be held in breach of his various commercial guaranties. A motion by Edwardsville to dismiss the complaint was denied. Later, in 2009, Edwardsville, as trustee of the land trust, filed a counterclaim alleging that Clover Leaf improperly filed a *lis pendens* because the matters at issue did not involve any ownership interest of the Gardners in the real estate and that the consequence of Clover Leaf's filing of the *lis pendens* was the failure of the 2008 real estate sale. After the circuit court dismissed its multicount counterclaim, Edwardsville filed an amended counterclaim

alleging abuse of process in the filing of the *lis pendens*. Clover Leaf subsequently filed a motion pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) seeking dismissal of Edwardsville's counterclaim and a motion for summary judgment on its second amended complaint. After hearing, the circuit court denied Clover Leaf's motion to dismiss the amended counterclaim and granted a partial summary judgment in favor of Clover Leaf. In its summary judgment order, the circuit court held that Clover Leaf "has constructive trust as to Steven Gardner's equitable interest in the proceeds of sale of [the real estate]."

¶ 10 In January 2011, Edwardsville filed a motion for partial summary judgment relating to the validity of the *lis pendens*, seeking a ruling that the *lis pendens* was improper in that any interest or debts owed by Gardner personally did not involve the real estate.

¶ 11 In February 2011, the circuit court heard arguments on all pending motions by all parties. Subsequent to hearing and in its final order and judgment in September 2012, the circuit court granted Clover Leaf's motion to dismiss the amended counterclaim, denied Edwardsville's motion for partial summary judgment on the validity of the *lis pendens*, specifically finding that the original complaint involved the real estate, denied Tammy Gardner's motion to dismiss, granted Clover Leaf's motion for summary judgment as to Tammy Gardner, and found that Mega Homes was the alter ego of its shareholders, Steven and Tammy Gardner, effectively piercing the corporate veil. Edwardsville timely appealed.

¶ 13 There are two core questions which determine our disposition of this appeal. The first of these questions concerns the nature of the Gardners' interest in the land trust of which Edwardsville is the trustee, specifically whether the Gardners have any interest in the land trust and whether that interest is a personal property interest or a real estate interest. Dependent on the resolution of these questions is whether Clover Leaf's filing of a *lis pendens* was valid, and dependent on the answer to that inquiry is the ability of the amended counterclaim to state a cause of action. A secondary question, though involved with the question of the land trust, is whether Mega Homes is, in fact, the alter ego of the Gardners.

¶ 14 We begin by considering the land trust. The Illinois Supreme Court in *Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957), has held that when a land trust instrument expressly indicates that the interest of its beneficiary is personal property, the beneficial interest held in such trusts is personal property and not to be considered real estate. *Horney*, 11 Ill. 2d at 183, 142 N.E.2d at 97. The *Horney* case specifically noted that the trust instrument indicated that the interest of the beneficiary was personal property, as the legal and equitable title to the real estate was vested exclusively in the trustee. In the instant case, the land trust indicates that the interest of the beneficiary, Mega Homes, is personalty. See also *Ryder v. Bank of Hickory Hills*, 242 Ill. App. 3d 1042, 612 N.E.2d 19 (1993) (noting that a beneficial interest in a land trust is personal property and that article 9 of the Uniform Commercial Code is applied to creation of a security interest in personal property).

¶ 15 A determinative case in our disposition of this appeal is *Melrose Park National Bank v. Melrose Park National Bank*, 123 Ill. App. 3d 282, 462 N.E.2d 741 (1984). The question before the *Melrose Park* court was whether a security interest in a land trust was a personal property security interest or an equitable mortgage. The beneficiaries of the land trust had assigned their beneficial interest to Melrose in order to secure a loan and, upon default, Melrose filed an action under the mortgage foreclosure and characterized its security interest as an equitable mortgage. The circuit court determined that Melrose possessed a personal property security interest rather than an equitable mortgage and, as such, a judgment lien possessed by Countryside, another party, could not attach to a personal property security interest, but could to an equitable mortgage. Countryside, the appellant in *Melrose Park*, argued that this was, in fact, an equitable mortgage.

¶ 16 The appellate court held that assignment of a beneficial interest in an Illinois land trust transfers an interest in personal property and does not give the assignee a direct interest in the realty *res* subject to the trust, and such assignment of the beneficial interest to secure a note does not convert that interest into a real estate mortgage. Subsequently a lien on that beneficial interest is not a lien on the real property that is the *res* of the land trust. The court followed *Horney*, discussed above, and noted a number of supreme court and appellate court decisions following *Horney*. See also *Paine/Wetzel Associates, Inc. v. Gitles*, 174 Ill. App. 3d 389, 528 N.E.2d 358 (1988).

¶ 17 In the instant case, Clover Leaf, in its second amended complaint, alleges the Gardners had a definable interest in the real estate and pledged it as part of their personal guaranty to Clover Leaf. However, the record indicates that the land trust had the sole

interest in the real estate and that the beneficiary of the land trust was Mega Homes, not the Gardners. As noted above, Mega Homes' interest as beneficiary of the land trust was a personal property interest, not an interest in real estate.

¶ 18 In order to reach any interest the Gardners might have in the proceeds of the foreclosure sale of the real estate, Clover Leaf alleged in its second amended complaint that the Gardners were the alter egos of Mega Homes and, accordingly, a constructive trust could be imposed. The resultant position by Clover Leaf is that the Gardners, as alter egos of Mega Homes, the beneficiary of the land trust, pledged their interest in real estate as opposed to their personal property interest as shareholders of the beneficiary of the land trust. The problem with Clover Leaf's position is while having clearly alleged it in its second amended complaint, there is no evidence in the record that meets the requirement of piercing a corporate veil in determining that the Gardners were the alter egos of Mega Homes. In *Ted Harrison Oil Co. v. Dokka*, 247 Ill. App. 3d 791, 617 N.E.2d 898 (1993), the court enumerated the following factors that the court considers in piercing a corporate veil. They include inadequate capitalization, a failure to issue stock, a failure to observe normal corporate formalities, a nonpayment of dividends, insolvency of the corporation, nonfunctioning of officers or directors, an absence of corporate records, and whether, considering all of the circumstances, the corporation is a façade. The *Harrison* court also noted a general reluctance by courts to pierce a corporate veil and to do so, a party must make a substantial showing of these factors. *Harrison*, 247 Ill. App. 3d at 794-96, 617 N.E.2d at 901-02.

¶ 19 The record in this case indicates a failure by Clover Leaf to establish these factors as there is no evidence in the record constituting a substantial showing as required by *Harrison*.

¶ 20 The shares of Mega Homes, the beneficiary of the land trust, are personal property and, as such, are subject to any collection procedures by Clover Leaf via article 9 of the Uniform Commercial Code (810 ILCS 5/9-101 *et seq.* (West 2012)). The method pursued by Clover Leaf is not appropriate for the personal property involved here, and as the interest of the Gardners in the corporation, which is the beneficiary of the land trust, is personal property, such interest does not constitute a lien on any of the real estate held by the land trust.

¶ 21 Having determined that the interest of Mega Homes as beneficiary of the land trust was personal property and, accordingly, the shares of Mega Homes owned by the Gardners are also personal property and that legal title to the real estate was held by the land trust under Illinois law, we next consider whether Clover Leaf's filing of a *lis pendens* concurrently with its filing of its original complaint was appropriate. This issue stems from the propriety of the circuit court's imposition of a constructive trust on the *res* of the land trust and the proceeds of its subsequent foreclosure sale, and involves the question of the counterclaim filed by Edwardsville based on the filing of the *lis pendens*.

¶ 22 The statute indicates that a *lis pendens* may be filed only when real estate is involved ("other action seeking equitable relief, affecting or involving real property"). 735 ILCS 5/2-1901 (West 2012); see also *E&E Hauling, Inc. v. County of Du Page*, 77 Ill. App. 3d 1017, 1023, 396 N.E.2d 1260, 1265 (1979). Clover Leaf's second amended

complaint was intended to impose a constructive trust on the Gardners' interest in the real estate. As noted above, the Gardners' interest was not in the real estate, but as shareholders of Mega Homes, the beneficiary of the land trust and, accordingly, a personal property interest. The Gardners had no definable legal interest in the real estate. In order to create a definable interest in real estate, one upon which Clover Leaf could impose a constructive trust, Clover Leaf alleged in its second amended complaint, and the court found, that the Gardners were alter egos of Mega Homes and, in effect, substituted them for Mega Homes as beneficiary of the land trust and persuaded the circuit court to impose a constructive trust. This was clearly error. Even if the record reflected a basis upon which to pierce the corporate veil, the interest of the beneficiary of the land trust, Mega Homes, would still be a personal property, as opposed to a real property interest, and there is no indication in this record that the Gardners had a definable real property interest in the real estate.

¶ 23 Based on the above, we conclude that the *lis pendens* filed by Clover Leaf was inappropriately filed as it did not affect an interest in real estate. The amended counterclaim filed by Edwardsville alleging an abuse of process by Clover Leaf is based on its inappropriate filing of the *lis pendens*. The circuit court dismissed the amended counterclaim and we conclude said dismissal was error.

¶ 24 Clover Leaf argues that it can attach the proceeds of the sale of the real estate and the Gardners' alleged interest in the *res* since Mega Homes is the beneficiary of the land trust and the Gardners are the sole shareholders and alter egos of Mega Homes and the shareholders may direct the disposition of the *res*. Clover Leaf's argument runs counter

to our conclusions noted above. The land trust is the title holder of the real estate, not Mega Homes nor the Gardners. Mega Homes, as beneficiary of the land trust, has a personal property interest, as opposed to a real property interest which is held exclusively by the trust. Mega Homes is a corporation and the record does not substantiate the circuit court's piercing of Mega Homes' corporate veil. Accordingly, Clover Leaf's argument that the Gardners had an interest in real estate subject to imposition of a constructive trust via an equitable mortgage, has no basis in this record. The avenue for Clover Leaf for any interest the Gardners may have and any judgments against the Gardners is enforcement against personal property interests.

¶ 25 Clover Leaf cites various authorities to this court, but we determine that they are clearly distinguishable. For example, *Podvinec v. Popov*, 168 Ill. 2d 130, 658 N.E.2d 433 (1995), involves a citation to discover assets, namely proceeds from a lawsuit, clearly a question of personal property. The court in *Podvinec* cites and relies upon *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 389 N.E.2d 540 (1979), a tax case not similar to the instant appeal before this court. Clover Leaf also cites a case from this court, *First Mid-Illinois Bank & Trust, N.A. v. Parker*, 403 Ill. App. 3d 784, 933 N.E.2d 1215 (2010). *First Mid-America* is distinguishable as the interest at issue was an interest in a limited liability company and the methods of attaching said interest under the Limited Liability Company Act (805 ILCS 180 1-1 *et seq.* (West 2006)).

¶ 26 As the conclusions of the circuit court are based in large extent on its issuance of summary judgment, our standard of review is *de novo*. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 864 N.E.2d 176 (2007). It is well settled that in order to obtain a

summary judgment, the movant must convince the circuit court that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law (735 ILCS 5/2-1005(c) (West 2012)). As is shown by our summary of this convoluted fact scenario and the rules applicable to Illinois land trusts and the record in this case, there are many genuine issues of material fact in this record. Clover Leaf has failed to show that it is entitled to judgment as a matter of law, both as to the disposition of the *res* from the foreclosure sale of the real estate and its filing of a *lis pendens*, and the subsequent counterclaim by Edwardsville and its dismissal.

¶ 27 Accordingly, we vacate and reverse the following orders of the circuit court:

1. June 23, 2009, order denying Edwardsville's and Gardners' motion to dismiss the second amended complaint;
2. July 23, 2010, order granting Clover Leaf's motion to dismiss as to counts I, II, and IV;
3. January 5, 2011, order granting Clover Leaf's motion for summary judgment;
4. February 18, 2011, order granting Clover Leaf's motion for summary judgment;
5. February 18, 2011, order denying Edwardsville's motion to reconsider the January 5, 2011, order;
6. February 18, 2011, order denying Edwardsville's motion to dismiss;
7. February 18, 2011, order dismissing Edwardsville's motion for partial summary judgment on the validity of the *lis pendens*;

8. April 15, 2011, order denying a motion to reconsider the February 18, 2011, order; and

9. September 4, 2012, final order and judgment.

We remand for further proceedings not inconsistent with this order.

¶ 28 Reversed and remanded.