

¶ 2 The instant case involves foreclosure of real estate at 2020 Golf Course View Drive, Belleville, Illinois (real property). Plaintiff First Clover Leaf Bank's foreclosure on that property was based on a November 2003 mortgage, which the circuit court characterized as a binding, equitable mortgage. The subsequent sale of the real property and distribution of the sale proceeds based on judgments and liens judicially noticed by the circuit court posed issues for this court as to distribution of the surplus (\$9,800) and the question of attorney fees and costs. However, the basic underlying issues involving the long and convoluted history between First Clover Leaf Bank (Clover Leaf) and the Bank of Edwardsville (Edwardsville) have been considered by this court in detail and resolved in a companion case, No. 2014 IL App (5th) 120440-U. Accordingly, we hereby incorporate the entirety of our court's order in that appeal and will proceed to analyze and dispose of the particular questions remaining in the instant appeal of the foreclosure.

¶ 3 In the instant case, the circuit court ultimately issued a final order and judgment in which the circuit court confirmed the sale, found a surplus mentioned above, and proceeded to the question of distribution of said surplus. The circuit court, as part of its order, made the following findings:

"6. This [c]ourt takes judicial notice of the pleadings and orders from Case No. 08-CH-0649 entered previously to the date of this [o]rder. Specifically, this [c]ourt has determined the following:

a. At all times relevant herein the [I]and [t]rust was the sole legal and equitable title holder to the subject real estate;

b. At all times relevant herein the sole beneficiary of the [l]and [t]rust was Mega Construction, Inc.;

c. At all relevant times herein the beneficiary of the [l]and [t]rust held the power of direction;

d. At all times relevant herein the shareholders of Mega Construction, Inc., was Tammy Gardner and Steven Gardner, each holding a 50% interest in Mega Construction, Inc.;

e. Tammy Gardner and Steven Gardner are the 'alter egos' of Mega Construction, Inc.;

f. Steven Gardner executed a Commercial Guaranty in October 2006 for the benefit of [Clover Leaf] in order to secure loans from [Clover Leaf] to Prime Development, Inc.;

g. The [c]ourt took judicial notice of the judgments entered in favor of [Clover Leaf] and against Steven Gardner and Tammy Gardner in Case Nos. 08-AR-206; 08-L-310; 08-L-309; 08-CH-429 with principal and interest due as of June 15, 2009 in the amount of \$450,624.33; and

h. Created a constructive trust for the benefit of plaintiff comprised of Steven Gardner's equitable interest in the sale proceeds of the subject real estate.

7. This [c]ourt on June 17, 2011 entered an [o]rder distributing one half of the \$9,800 surplus from the sale of the subject real estate to [Clover Leaf] finding that [c]ounter-[p]laintiff, [Clover Leaf], holds an equitable lien on the sale

surplus proceeds from the sale for the subject real estate *due to Steven Gardner's equitable interest in the [l]and [t]rust.*

9. Concurrently with this [o]rder this [c]ourt has entered an order in Case No. 08-CH-0649 creating a constructive trust for the benefit of [Clover Leaf] comprised of *Tammy Gardner's equitable trust in the sale proceeds of the subject real estate due to her equitable interest in the [l]and [t]rust.*" (Emphasis added.)

¶ 4 The circuit court also entered an order awarding attorney fees to Clover Leaf based on its attorney's petition for fees. The circuit court, after a hearing, awarded Clover Leaf fees and costs. As in the companion case cited, Edwardsville timely appealed.

¶ 5 ANALYSIS

¶ 6 The questions before this court in this particular appeal relate to the distribution of the sale surplus and the award of attorney fees and costs. As per the distribution of the surplus, the circuit court awarded it to Clover Leaf based on the findings quoted above in its order. That award was based on the findings made in the companion case and used as the basis for the court's disposition of the questions before us. We determined that those findings were in error. In the companion case, Clover Leaf alleged that the Gardners had a definable interest in the real property and had pledged it as part of their personal guaranty to Clover Leaf. As our order indicates, however, the land trust had sole interest in the real estate and the beneficiary of that trust was Mega Homes. We also indicated in the companion order that Mega Homes' interest as beneficiary of the land trust was a personal property interest rather than a real estate interest. In order to reach the Gardners'

interest and still characterize it as a real estate interest, Clover Leaf alleged and the circuit court found that the Gardners were the alter egos of the land trust beneficiary, Mega Homes, and, as such, could be subject to imposition of a constructive trust. As indicated in the companion case, however, there is no evidence in the record that sustained Clover Leaf's position that the Gardners were the alter egos of Mega Homes. While the beneficiary interest of the land trust by Mega Homes would be subject to collection under article 9 of the Uniform Commercial Code (810 ILCS 5/9-101 *et seq.* (West 2012)), a procedure appropriate regarding an interest in personal property, the method used by Clover Leaf was found to be without support as noted in the companion case.

¶ 7 The basis of the award of attorney fees as noted above was by means of the 2003 mortgage which the court characterized as an equitable mortgage subject to imposition of a constructive trust on an alleged interest in the real property held by the Gardners. We found to the contrary in the companion order. "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 Garners may have and any judgments against the Gardners is enforcement against personal property interests." *First Clover Leaf Bank v. Bank of Edwardsville*, 2014 IL App (5th) 120440-4, ¶ 24. Clover Leaf argues that the 2003 mortgage was an appropriate basis for an award of attorney fees. As noted above, however, the court characterized the mortgage as an equitable mortgage subject to constructive trust. The circuit court in this case, however, applied the provisions of the 2003 mortgage after finding it was a legally binding equitable mortgage. As noted in the companion case, the

finding was in error and accordingly does not constitute a sufficient basis for an award of attorney fees and costs. Given this court's reversal of the circuit court's findings constituting a basis for its characterization of the 2003 mortgage, we hereby vacate and reverse the award of attorney fees and costs based upon that mortgage as characterized by the circuit court's findings.

¶ 8 Edwardsville further claims as to attorney fees that there was an inadequate presentation by Clover Leaf to the circuit court, specifically that its presentation did not delineate to which of these companion cases a specific attorney fee or cost was to be attributed. Given our conclusion stated above, we need not reach that question.

¶ 9 Based upon our findings stated above and the position of this court in the companion case incorporated by reference in this order, we reverse and remand the order distributing the surplus of the foreclosure to Clover Leaf as opposed to the beneficiary of the land trust, Mega Homes. We further reverse the award of attorney fees and costs by the circuit court based on its mischaracterization of the 2003 mortgage. We remand for further proceedings not inconsistent with this order.

¶ 10 Reversed and remanded.