2016 IL App (1st) 141004-U

FIFTH DIVISION
December 30, 2016

No. 1-14-1004

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ARLENE JAYNE, Plaintiff-Appellant and Counterdefendant-Appellant, v. COURTYARD OF HARWOOD HEIGHTS CONDOMINIUM ASSOCIATION and JAMES BYCHOWSKI, Defendants-Appellees and Counterplaintiffs-Appellees, (LaSalle National Trust, N.A., trustee under trust No. 26-4111-00, Counterdefendant).	)	Appeal from the the Circuit Court of Cook County. No. 05 CH 12333 The Honorable Sophia H. Hall, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The plaintiff was entitled to summary judgment on her cross-motion for summary judgment on the defendant's counter-complaint for foreclosure of a lien. The grant of summary judgment to the defendant on the plaintiff's slander of title claim was proper.

¶ 2 The plaintiff-counterdefendant, Arlene Jayne (Ms. Jayne), appeals from orders of the circuit court: (1) granting summary judgment to the defendants-counterplaintiffs, the Courtyards of Harwood Heights Condominium Association and James Bychowski, its president, (collectively the Association) and denying her cross-motion for summary on the Association's counter-complaint to foreclose a lien, and (2) granting the Association summary judgment on Ms. Jayne's slander of title claim. On appeal, Ms. Jayne contends that the circuit court's rulings were erroneous because (1) the Association violated the open meeting requirement of the Condominium Property Act (Act); (2) the doctrine of mandatory versus directory did not apply to the open meeting requirement; (3) the Association breached its duty to provide Ms. Jayne due process of law; and (4) the Association's recording of the lien against Ms. Jayne's unit was not privileged. The following facts are taken from the pleadings, motions, affidavits exhibits and other pertinent documents in the record on appeal.

¶ 3 BACKGROUND

¶ 4 I. Facts

¶ 5 Ms. Jayne is the owner of a unit and two parking spaces in the garage at the Courtyard of Harwood Heights Condominium. With respect to parking spaces in the building's garage, the Association's rules and regulations limited the sale or lease of additional parking spaces to unit

owners and required that the management office be given advance notice of any sale or lease. In addition, anyone using a garage parking space must have written permission from the owner.

¶ 6 On January 21, 2005, Jackie Baker, the Association's property manager, sent a notice to Ms. Jayne instructing her to remove an unauthorized vehicle from one of her parking spaces. Through her attorney, Ms. Jayne responded she had authorized the parking of the vehicle in that space. On January 31, 2005, Ms. Jayne received a "Condominium Summons" from the Association's attorney informing her that the parking of the vehicle in one of her spaces was a violation of the Association's rules, and a hearing on the violation would be held on February 16, 2005. On February 7, 2005, Ms. Jayne responded denying that she had violated the Association's rules and requested that the Association reconsider the matter. On February 11, 2005, Ms. Baker responded that the February 16, 2005, meeting would proceed and requested that Ms. Jayne and her attorney attend the meeting in order to present arguments and evidence for the Association to consider.

¶ 7 On February 17, 2005, the Association's attorney sent a letter to Ms. Jayne summarizing the evidence presented at the hearing and advising her that fines totaling $2,555.20 had been levied by the Association against her for the violation. In June 2005, the Association recorded a lien against Ms. Jayne's condominium unit with the Cook County Recorder of Deeds in the amount of $3,116.76. The amount included fines that were past due and remained unpaid, late charges, reasonable attorney fees and her proportionate share of common expenses.

¶ 8 II. Circuit Court Proceedings

¶ 9 A. Ms. Jayne's Complaints

¶ 10 In July 2005, Ms. Jayne filed a complaint against the Association alleging breach of a fiduciary duty and seeking a temporary injunction to bar the Association from taking any action to enforce the lien and attorney fees. The Association filed an answer, affirmative defenses and a counter-complaint to foreclose the lien for the unpaid expenses. After the circuit court granted the Association's motion for partial summary judgment on the issue of Ms. Jayne's request for attorney fees, Ms. Jayne filed an amended complaint alleging slander of title and again sought an award of attorney fees. The Association moved to dismiss the amended complaint pursuant to section 2-619 (a) (4) and (9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4)(9) (West 2006)). On June 8, 2007, the circuit court granted leave to Ms. Jayne to file a second amended complaint.

¶ 11 On June 29, 2007, Ms. Jayne filed her second amended complaint. Count I alleged slander of title. In count II, she sought a declaratory judgment, declaring that: the Association erroneously found that she had violated the Association's rules; the actions of the Association in levying the fine and attorney fees violated the Association's rules and the provisions of the Condominium Act; Ms. Jayne's due process rights were violated; and the Association waived or was estopped to bring its action against Ms. Jayne based on its actions in similar cases. Ms. Jayne further requested that the Association be ordered to execute a release of the lien placed on her condominium unit. The Association moved for summary judgment on count I and for involuntary dismissal of count II of the second amended complaint.

¶ 12 On November 16, 2007, the circuit court issued its memorandum opinion and order. The circuit court granted summary judgment to the Association on slander of title alleged in Ms.

Jayne's count I pleading finding that the recording of the lien was protected under the litigation privilege and that the undisputed facts failed to establish that the Association acted with malice in recording the lien against Ms. Jayne's unit. The circuit court dismissed Ms. Jayne's count II for declaratory judgment finding that it was duplicative of the Association's counter-complaint seeking foreclosure of the lien. See 735 ILCS 5/2-619(a)(3) (West 2006).

¶ 13 B. The Association's Counter-Complaint to Foreclose the Lien

¶ 14 Thereafter, the parties filed cross-motions for summary judgment on the Association's counter-complaint to foreclose the lien on Ms. Jayne's unit. On June 10, 2009, the circuit court granted the Association's motion for summary judgment and denied Ms. Jayne's motion for summary judgment. The circuit court further ordered specific paragraphs of Ms. Jayne's affidavit in support of her motion stricken for failure to comply with Supreme Court Rule 191(a) (eff. Jan. 4, 2013). The Association was ordered to file its petition for attorney fees.

¶ 15 Ms. Jayne filed a motion for reconsideration of the June 10, 2009, order. She argued that the circuit court's decision did not consider the failure of the Association's board to vote to fine Ms. Jayne in an open board meeting violated section 18(a)(9) of the Illinois Condominium Property Act (Act) (765 ILCS 605/18(a)(9) (West 2004)). On November 9, 2009, the circuit court granted Ms. Jayne's motion to reconsider its June 10, 2009, order. "[F]or the reasons stated in open court," the circuit court granted summary judgment to Ms. Jayne and denied the Association's motion for summary judgment.[1]

¶ 16 The Association filed a motion for reconsideration of the November 9, 2009, order. The

[1]A transcript of the November 9, 2009, proceeding is not contained in the record on appeal.

Association argued that its claim for attorney fees for enforcing the violation was separate from the imposing of the fine against Ms. Jayne, which did not require notice and a hearing. It further argued that the strict enforcement of the Act was not required in this case since Ms. Jayne was found to have violated the Association rules, there was no detriment to the unit owners and that the unit owners benefited from the enforcement of the Association's rules. On May 21, 2010, the circuit court granted the Association's motion for reconsideration of its November 9, 2009, order. The circuit court vacated its November 9, 2009, order, reinstated its June 10, 2009, order and ordered the Association to file a supplemental petition for attorney fees.

¶ 17 On June 21, 2010, Ms. Jayne filed a motion to reconsider the May 21, 2010, order, reinstating the June 10, 2009, order. Ms. Jayne argued that she was denied due process where the Association: failed to follow its own rules regarding providing notice of the hearing to her; permitted a witness with a conflict of interest to participate and vote on whether to levy a fine against her; and the hearing was held despite the lack of a disinterested quorum. Ms. Jayne also argued that a trial on the Association's foreclosure of lien claim was required because there was a question of fact as to whether a vote was actually taken at the February 16, 2005, board meeting and whether the Association was estopped or had waived its right to punish the violations based on its prior failure to enforce similar violations against Ms. Jayne and other unit owners.

¶ 18 On October 7, 2010, the circuit court denied Ms. Jayne's motion for reconsideration of the May 21, 2010, order. The circuit court ordered the Association to file its second supplemental fee petition.

¶ 19 C. Relevant Subsequent Proceedings

¶ 20 On July 26, 2012, Ms. Jayne filed a second motion to reconsider the May 21, 2010, order. Ms. Jayne cited this court's decision in *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620. Ms. Jayne argued that *Goldberg* held that compliance with section 18(a)(9) of the Act was mandatory. On November 16, 2012, the circuit court denied Ms. Jayne's second motion for reconsideration of the May 21, 2010, order. On December 17, 2012, the court granted leave to Ms. Jayne to file a motion for a finding pursuant to Supreme Court Rule 304(a) (eff. Mar. 8, 2016). The Association filed objections to the motion, and Ms. Jayne filed an amended reply to the Association's objections. On May 3, 2013, the circuit court denied Ms. Jayne's motion for a Rule 304(a) finding.

¶ 21 The parties continued to dispute the issue of the attorney fees owed to the Association. A decision on the attorney fees' issue was set for March 14, 2014. Instead, on that date and on its own motion, the circuit court reconsidered its May 3, 2013, order denying Ms. Jayne's motion for a Rule 304(a) finding and granted her motion. In its order, the court noted that on June 10, 2009, a final determination had been made in favor of the Association on its counter-complaint to foreclose its lien on Ms. Jayne's unit, which ultimately withstood her motions for reconsideration. The circuit court further noted that "the June 10, 2009 decision of the Court in [the Association's] favor forms the basis of its asserted rights to attorney's fees as the prevailing party." The order further provided that circuit court was adding "304(a) language to the June 10, 2009 Order that it is final and appealable."

¶ 22 This appeal followed.

¶ 23 ANALYSIS

¶ 24 I. Standard of Review

¶ 25 The court applies the *de novo* standard of review to the disposition of a motion for summary judgment. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). " 'Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 48 (*Wolinsky* III[2]) (quoting *Illinois Farmers Insurance Co v. Hall*, 363 Ill. App. 3d 989, 993 (2006)). Where the parties have filed cross-motions for summary judgment, they invite the court to determine the issues as a matter of law and enter judgment in favor of one of the parties. *Mt. Hawley Insurance Co. v. Robinette Demolition, Inc.*, 2013 IL App (1st) 112847, ¶ 14.

¶ 26 II. Discussion

¶ 27 A. *The Association's Counter-Complaint for Foreclosure of the Lien*

¶ 28 Ms. Jayne contends that she was entitled to summary judgment on the Association's foreclosure of the lien claim. She argues that by failing to comply with section 18(a)(9) of the Act (765 ILCS 605/18(a)(9) (West 2004)), the Association breached its fiduciary duty to her rendering the Association's lien claim null and void under *Wolinsky v. Kadison* (*Wolinsky* I), 114 Ill. App. 3d 527 (1983). The Association responds that compliance with section 18(a)(9) of the Act is directory rather than mandatory, and in the absence of prejudice to Ms. Jayne resulting

[2]*Wolinsky* II, No. 1-04-0169 (2004) was an unpublished order pursuant to Supreme Court Rule 23.

from the violation, its lien claim is valid.

¶ 29 The Act regulates the creation and the regulation of Illinois condominium associations. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 51. A condominium is formed by the recording of a declaration which is " 'the instrument by which the property is submitted to the provisions of [the] Act.' " *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass'n*, 2015 IL App (1st) 150169, ¶ 27 (quoting 765 ILCS 605/2(a) (West 2012)). The administration of a condominium is governed by the declaration, the condominium board's rules and regulation and the bylaws. *Alliance Property Management, Ltd.*, 2015 IL App (1st) 150169, ¶ 27. The general contents of the declaration and the bylaws are delineated by the Act. *Alliance Property Management, Ltd.*, 2015 IL App (1st) 150169, ¶ 27. Since condominiums are creatures of statute, any action taken on behalf of the condominium must be authorized by statute. *Alliance Property Management, Ltd.*, 2015 IL App (1st) 150169, ¶ 27. In determining a unit owner's rights, the Act, the declaration and the bylaws must be construed as a whole. *Goldberg*, 2012 IL App (1st) 110620, ¶ 47. The same concept is applied when determining the scope of a condominium board's authority because the same rights and obligations are implicated. *Alliance Property Management, Ltd.*, 2015 IL App (1st) 150169, ¶ 27.

¶ 30 At the time of the violation proceedings, section 18(a) of the Act provided in pertinent part as follows:

> "The bylaws shall provide for at least the following:
>
> ***

> (9) that meetings of the board of managers shall be open to any unit owner, except for the portion of any meeting held***(iii) to discuss violations of the rules and regulations of the association or a unit owner's unpaid share of common expenses; that any vote on these matters shall be taken at a meeting or portion thereof open to any unit owner." 765 ILCS 605/18(a)(9) (West 2004).

¶ 31 Also relevant to our discussion are the provisions in the rules governing violations. The provisions required that the alleged violator be notified in writing of the violation complaint, that within 10 days of the notice, the alleged violator must request a hearing, and the failure to request a hearing is "deemed an admission that the charges in the violation are true. The Board will then take appropriate action consistent with these Rules." The rules further provided in pertinent part as follows:

> "(3) Following the hearing, the Board will determine whether a violation has occurred, and if so, the appropriate penalty including fines. The decision shall be made by the majority vote of the Board and shall be final and binding on the unit owner and the Association."

¶ 32 Under section 18(a)(9)(iii) of the Act, the board was permitted to discuss Ms. Jayne's alleged violation of the Association's rules in a closed meeting, but any vote to impose a fine or other penalty was required to take place in a meeting open to the unit owners. 765 ILCS 605/18(a)(9) (West 2004). It is undisputed that the Association imposed the fine without voting on the matter in a meeting open to all of the unit owners. It was not until November 18, 2009, that a meeting of the board open to all the unit owners was held, at which time a vote was taken

to ratify the imposition of a $1,000 fine on Ms. Jayne for the violation. At that time, the imposition of the fine was ratified by a majority vote of three to one in favor of imposing the monetary fine.

¶ 33 In *Wolinsky* I, this court recognized that condominium association officers and board members become fiduciaries to some degree when they take office and must act in a manner reasonably related to the exercise of that duty. *Wolinsky* I, 114 Ill. App. 3d at 533-34. A board's proper exercise of its fiduciary or quasi-fiduciary duty requires strict compliance with the condominium declaration and bylaws. *Wolinsky* I, 114 Ill. App. 3d at 534. In *Wolinsky* I, this court found that the plaintiff stated a cause of action for breach of fiduciary duty against the condominium board where the board exercised a right of first refusal to purchase a unit without first obtaining the requisite affirmative vote of the unit owners as required by the declaration and the bylaws. *Wolinsky* I, 114 Ill. App. 3d at 534.

¶ 34 In *Palm*, this court held that the trial court did not err by granting summary judgment to the unit owner on his assertion that the association could not pursue litigation without a vote by the board and that the board's failure to conduct such a vote to defend the instant litigation violated the declaration and the Act. *Palm*, 2014 IL App (1st) 111290, ¶ 89. This court noted that while section 18(a)(9) of the Act permitted the board to discuss litigation matters in closed sessions, "it specifically provides that the board must vote on any litigation matter at [a] meeting open to all unit owners." *Palm*, 2014 IL App (1st) 111290, ¶ 87.

¶ 35 In this case, the record reflects that on November 18, 2009, a meeting of the board open to all the unit owners was held wherein the board voted to ratify its prior action in imposing a

fine on Ms. Jayne. However, the association had no authority to impose the fine on Ms. Jayne absent a vote in a meeting open to all of the unit members. Without such authority, the imposition of the fine was void *ab initio* and cannot be ratified. See *Alliance Property Management, Ltd.*, 2015 IL App (1st) 150169, ¶ 29 (where the condominium board had no authority to enter into a contract for a term longer than 24 months, the 36-month contract was void *ab initio*); see also *Granzow v. Village of Lyons, Ill.*, 89 F.2d 83, 85 (7th Cir. 1937) ("[r]atification is impossible if there is no power to contract").

¶ 36 The Association maintains that Ms. Jayne's reliance on *Goldberg* and *Wolinsky* I is misplaced. It argues that the requirement contained in section 18(a)(9) of the Act that the vote to impose the fine be held in a meeting of the board open to the unit owners was a procedural directive rather than a mandatory one.

¶ 37 In *Goldberg*, the trial court found that condominium association had failed to comply with its statutory obligations under the Act but denied the plaintiff's request for attorney fees. The statute provided that in the event a party prevailed in an enforcement action, the party "shall be entitled" to recover reasonable attorney fees and costs from the association. 765 ILCS 605/19(b) (West 2006). On appeal, this court determined the issue to be whether or not the statute was mandatory. While noting that the use of "shall" did not always indicate a mandatory statute, in the instant case, the use of the word "shall" was a strong indication that legislature intended the statute to be mandatory and that there was no other language in the statute indicating that the legislature did not intend for the fee-shifting provision to be mandatory. *Goldberg*, 2012 IL App (1st) 110620, ¶ 40. Moreover, this court found that "[t]he purpose of

section 19 is to ensure that condominium boards remain accountable to their residents; therefore, the desire by the legislature to encourage litigation against improper conduct through mandatory fee-shifting is quite apparent." *Goldberg*, 2012 IL App (1st) 110620, ¶ 40.

¶ 38 Since nothing in section 18(a)(9) gives the board the discretion to vote in a meeting closed to the unit owners, we find the statutory requirement that a vote by the board be held in a meeting open to all unit owners to be mandatory rather than permissive. See *People v. Delvillar*, 235 Ill. 2d 507, 516 (2009) (under the statute circuit court did not have discretion whether to admonish a defendant of the potential immigration consequences of his guilty plea).

¶ 39 The Association points out that the court in *Goldberg* did not address what the Association maintains is the dispositive issue in this case, namely, whether a statutory provision is mandatory or directory. *Delvillar*, 235 Ill. 2d at 514. In *Delvillar*, our supreme court explained that a statute is mandatory "if the intent of the legislature dictates a particular consequence for failure to comply with the provision." *Delvillar*, 235 Ill. 2d at 514. "In the absence of such intent the statute is directory and no particular consequence follows noncompliance." *Delvillar*, 235 Ill. 2d at 515. "[T]he mandatory/directory dichotomy ' "simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." ' " *Delvillar*, 235 Ill. 2d at 516 (quoting *People v. Robinson*, 217 Ill. 2d 43, 51-52 (2005), quoting *Morris v. County of Marin*, Cal. 3d 901, 908, 559 P.2d 606, 610-11, 136 Cal. Rptr. 251, 255-56 (1977)). Whether a statute is mandatory or directory is a question of statutory construction and therefore our review is *de novo*. *Delvillar*, 235 Ill. 2d at 517.

¶ 40 As we previously observed, the board's proper exercise of its fiduciary duty required strict compliance with the condominium declaration and bylaws. *Wolinsky* I, 114 Ill. App. 3d at 534. While the Act exempted the board's discussion of violations of the rules by unit owners, the Act provides that "any vote on these matters shall be taken at a meeting of the board of managers or portion thereof open to any unit owner." 765 ILCS 605/18(a)(9)(A) (West 2004). The language of other provisions of section 18(a) strongly indicates that the presence of the unit owners at any such vote is highly desired. For example, section 18(a)(9) further provides that "any unit owner may record the proceedings at meetings or portions thereof required to be open by this Act by tape, film or other means, and that the board may prescribe reasonable rules and regulations to govern the right to make such recording." 765 ILCS 605/18(a)(9) (West 2004). Section 18(a)(9) further provided that notice of the meeting "shall be mailed or delivered at least 48 hours prior to" the meeting unless waived and the notices of the meetings of the board of managers "shall be posted" in conspicuous places in the condominium "at least 48 hours prior to" a meeting of the board. 765 ILCS 605/18(a)(9) (West 2004**)**.

¶ 41 The legislature consistently used the term "shall" in connection with provisions governing the unit owners' right to receive notice of the board meetings, their right to preserve the actions of the board by recording devices and their right to be present when the board voted on matters which were discussed in sessions not open to the unit owners. Since the Act mandated that these provisions be in the bylaws of the association and the board was required to strictly comply with the bylaws of the association, we determine that compliance with the voting requirement of section 18(a)(9) was mandatory, not directory. Similar to *Goldberg*, we find that

the purpose of section 18(a)(9) was a salient one. In this case, the purpose of the section was to protect the unit owners by ensuring that the board's imposition of penalties for violations was in accordance with the Association's rules

¶ 42 We hold that the provision in section 18(a)(9) of the Act that the vote take place in a meeting open to all unit owners is mandatory. The failure to comply with that provision rendered the board's action imposing a fine on Ms. Jayne was void *ab initio*. Accordingly, the circuit court erred when it granted the Association's motion for summary judgment and denied Ms. Jayne's motion for summary judgment on the Association's counter-complaint to foreclose its lien claim on her unit.

¶ 43 Even if the vote to impose the fine required a board meeting open to all the unit owners, the Association maintains that the requirement does not apply to attorney fees because Illinois law does not require a hearing in order for the assessment and recovery of attorney fees. *Board of Managers of Village Square 1 Condominium Ass'n v. Amalgamated Trust & Savings Bank*, 144 Ill. App. 3d 522, 528-29 (1986) (a hearing and an opportunity to be heard on the issue of attorney fees and related costs was not required because the assessment of attorney fees was not in the nature of a fine). The Association points out that in the June 10, 2009, proceeding the circuit court found that Ms. Jayne violated the Association's rules. It further points out that both the Act and its declaration of condominium provide for the recovery of attorney fees incurred in the enforcement of the rules and regulations of the Association.

¶ 44 Section 9(g)(1) of the Act provides in pertinent part that the failure or refusal of any owner to make payment for "the amount of any unpaid fine when due, the amount thereof

together with any interest, late charges, reasonable attorney fees incurred in enforcing the covenants of the condominium instruments, rules and regulations of the board of managers***and the costs of collections shall constitute a lien on the interest of the unit owner in the property." 765 ILCS 605/9(g)(1) (West 2004). Section 9.2(b) of the Act provides in pertinent part that "[a]ny attorney fees incurred by the Association arising out of a default by any unit owner***in the performance of any of the condominium instruments, rules and regulations***shall be added to and deemed a part of his respective share of the common expense." 765 ILCS 605/9.2(b) (West 2004). Article XII of the declaration of condominium provides that where a unit owner has defaulted under the Act, the declaration, the bylaws or the rules and regulations of the Association, the Association has a lien against the unit and that the amount of the lien includes all expenses, including attorney fees, incurred in enforcing the lien.

¶ 45 An exception to the rule that a losing party may not be required to pay the attorney fees of the winning party are contractual fee-shifting provisions. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC***,** 403 Ill. App. 3d 234, 254 (2010**)**. In *Mission Hills Condominium M-4 Ass'n v. Penachio*, 97 Ill. App. 3d 305 (1981), this court reversed an award of attorney fees to the plaintiff-association. We held that the provision in the declaration assessing fees where the plaintiff pursued legal remedies to enjoin a breach of a declaration provision "implicitly assumes success upon such action." *Penachio*, 97 Ill. App. 3d at 310. Since the award of summary judgment was no longer mandated for the plaintiff, the basis for the award of attorney fees no longer existed. *Penachio*, 97 Ill. App. 3d at 310.

¶ 46 *Board of Managers of Village Square 1 Condominium Ass'n* is distinguishable. In that

case, the trial court dismissed the case after it found that the plaintiff's request for attorney fees was in the nature of a fine, which could not be imposed without notice and an opportunity to be heard. The reviewing court reversed finding that an award of attorney fees was not in the nature of a fine and therefore, the Act's notice and hearing requirement did not apply. *Board of Managers of Village Square 1 Condominium Ass'n*, 144 Ill. App. 3d at 528-29. In contrast, in the present case, the Association is not entitled to attorney fees and expenses, not because a hearing on the fees was not conducted but because there is no longer any basis for the award of attorney fees.

¶ 47 In any event, in its March 14, 2014, order, the circuit court stated "the June 10, 2009 decision of the Court in [the Association's] favor forms the basis of its asserted rights to attorney's fees as the prevailing party." Since Ms. Jayne is entitled to summary judgment on the Association's lien claim, the Association is no longer the prevailing party and therefore, it is not entitled to attorney fees.

¶ 48 B. *Dismissal of Ms. Jayne's Second Amended Complaint*

¶ 49 1. Jurisdiction

¶ 50 On November 16, 2007, the circuit court granted summary judgment to the Association on count I of Ms. Jayne's second amended complaint alleging slander of title. The court further granted the Association's motion for an involuntary dismissal of count II for declaratory judgment, finding it duplicative of the Association's lien claim. 735 ILCS 5/2-619(a)(3) (West 2006).

¶ 51 In her second amended notice of appeal, Ms. Jayne listed the November 16, 2007, order

as one of the circuit court orders from which she was appealing. During the pendency of this appeal, the Association filed a motion to dismiss the appeal pursuant to Illinois Supreme Court Rule 361(h) (eff. Jan. 1, 2015), arguing, *inter alia*, that the November 16, 2007, order was not appealable because the Rule 304(a) finding applied to the June 10, 2009, order and that no Rule 304(a) finding had been made with respect to the November 16, 2007, ruling. On June 22, 2015, this court denied the motion to dismiss. In its appellee's brief, the Association has not requested that this court revisit the issue of our jurisdiction of Ms. Jayne's appeal of the circuit court's November 16, 2017, order.

¶ 52 2. Discussion

¶ 53 On appeal, Ms. Jayne contends that the grant of summary judgment to the Association on the slander of title claim in the second amended complaint was error. The circuit court granted summary judgment on the ground that the Association's act in filing the lien against Ms. Jayne's unit was absolutely privileged. Our review of the court's summary judgment ruling is *de novo*. *Millennium Park Joint Venture, LLC*, 241 Ill. 2d at 309.

¶ 54 In *Kurtz v. Hubbard*, 2012 IL App (1st) 111360, this court held that the defendant-association did not have an absolute privilege with respect to the statements in its lien claim. In *Kurtz*, the defendant filed suit for possession of the plaintiff's condominium unit, and several weeks later, it recorded a lien against the unit. This court pointed out that the recording of a lien claim is not always followed by a suit to foreclose the lien. "As a result, a fraudulent assessment lien may encumber the property indefinitely, with the onus on the liened party to take affirmative judicial action to remove it." *Kurtz*, 2012 IL App (1st) 111360, ¶ 21 We held that statements in

the lien claim should be afforded a conditional privilege which would protect the defendant if it was determined that the statements were not made with knowledge as to their falsity or with reckless disregard as to their truth or falsity. *Kurtz,* 2012 IL App (1st) 111360, ¶ 22.

¶ 55 We find *Kurtz* distinguishable. In the present case, the Association recorded its lien against Ms. Jayne's unit prior to filing suit to foreclose the lien. Ms. Jayne's original complaint sought to enjoin the Association from foreclosing the lien. She did not allege a slander of title claim until after the Association filed its counter-complaint to foreclose the lien. Therefore, we conclude that where the lien is recorded prior to the filing of the complaint to foreclose the lien, the lien claim and the foreclosure complaint are sufficiently related so that the statements made in the lien claim are absolutely privileged. Therefore, the circuit court correctly determined that the defense of absolute privilege defeated Ms. Jayne's slander of title claim.

¶ 56 We conclude that the grant of summary judgment to the Association on Ms. Jayne's slander of title claim was proper.

¶ 57 CONCLUSION

¶ 58 We reverse the order of the circuit court granting summary judgment to the Association and denying summary judgment to Ms. Jayne on its counter-complaint to foreclose the lien on her unit. Pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we grant Ms. Jayne's cross-motion for summary judgment and deny the Association's motion for summary judgment on its counter-complaint to foreclose its lien. We affirm the grant of summary judgment to the Association on Ms. Jayne's slander of title claim in her second amended complaint.

¶59 Reversed in part and affirmed in part.