2016 IL App (1st) 151930-U

THIRD DIVISION
August 17, 2016

No. 1-15-1930

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST MIDWEST BANK, Plaintiff-Appellee, v. FIRST MIDWEST BANK AS TRUSTEE UNDER TRUST AGREEMENT DATED JUNE 22, 2006 AND KNOWN AS TRUST NUMBER 8286, LAWRENCE R. NOESEN A/K/A LAWRENCE R. NOESEN, JR., IRENE R. NOESEN A/K/A IRENE B. NOESEN A/K/A IRENE NOESEN, THE UNITED STATES OF AMERICA, SLM FINANCIAL CORP. A/K/A SMPC SALLIE MAE INC., UNKNOWN OWNERS and NONRECORD CLAIMANTS, Defendants (Sherwin Yellen and Steven Yellen, Intervenors-Appellants).	)	Appeal from the Circuit Court of Cook County No. 13 CH 16274 Honorable Robert Senechalle, Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: High bidders at foreclosure sale were not entitled to withdraw their bid on the basis that (i) clerical errors in the legal description of the subject property had not been corrected prior to the sale or (ii) confirmation of the sale was precluded by a senior lienholder's action to foreclose upon the same property. Order confirming sale affirmed.

¶ 2 Intervenors Sherwin and Steven Yellen submitted the highest bid at a judicial sale of property being foreclosed upon by plaintiff First Midwest Bank. The Yellens later learned that the property was subject to a senior lien (held by Chase Bank, who is not a party to this action). Wanting to get out of the sale, the Yellens intervened in the foreclosure action and moved to vacate the sale and withdraw their bid—while simultaneously taking possession of the property and attempting to market it to buyers. The trial court denied the Yellens' motion and entered an order confirming the sale. The Yellens now appeal the confirmation order.

¶ 3 The motion to vacate was initially based upon two typographical errors made in the legal description of the subject property: one in First Midwest's mortgage and one in the court's judgment of foreclosure and sale. The mortgage incorrectly described the property as being in the "North *East* 1/4 of Section 33" instead of in the "North*west* Quarter." (Emphasis added.) The trial court corrected this in its judgment of foreclosure and sale, but it did not explicitly reform the mortgage. Further, the judgment included a second typographical error, describing the property as being in "Block L" instead of "Block 1." On First Midwest's motion, made before the judicial sale but not heard until three weeks after the sale, the trial court entered a *nunc pro tunc* order correcting this second typographical error. The Yellens nevertheless intervened in the action and moved to vacate the sale, arguing that the errors in the property's legal description rendered the sale invalid.

¶ 4 The Yellens' efforts to vacate the sale delayed confirmation of the sale for several months, during which time the senior mortgage holder also obtained a judgment of foreclosure and sale on the property. Following entry of the order in this case confirming the sale, the

Yellens appealed and now argue that (i) the typographical errors in the property's legal description render the sale invalid, and (ii) their bid lapsed when the property was sold following foreclosure of the senior mortgage, because that sale extinguished First Midwest's lien against the property. We disagree on both grounds and further find that confirmation of the sale was not contrary to the interests of justice as set forth in section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012)). We therefore affirm.

¶ 5 The property at issue, located at 1779 East Touhy Avenue in Des Plaines, Illinois, was originally owned by Lawrence and Irene Noesen. The Noesens took out two mortgages on the property: the senior mortgage held by Chase Bank, and the junior mortgage held by First Midwest. First Midwest's mortgage recited the legal description of the property as follows: "Lot 2 in Block 1 in Oliver Salinger and Company's Glen Acres, a Subdivision in the West Half of the North East 1/4 of Section 33, Township 41 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois."

¶ 6 On July 8, 2013, First Midwest filed a two-count foreclosure complaint. In count I, the foreclosure count, First Midwest alleged that the Noesens had defaulted on a $50,000 note given by First Midwest in exchange for a security interest in the subject property. In count II, seeking reformation of mortgage, First Midwest alleged that due to a scrivener's error, the mortgage stated that the property was in the "North East 1/4 of Section 33" when it was actually in the "Northwest Quarter." First Midwest asked the court to reform the mortgage to reflect the correct legal description.

¶ 7 The Noesens filed an answer in which they admitted that the mortgage should be reformed to state the correct legal description.

¶ 8 First Midwest amended its complaint on December 6, 2013, to reference a notice of reconveyance and a UCC financing statement recorded by the Noesens. Unlike the original complaint, the amended complaint was inconsistent as to the property's legal description: the description in count II was unchanged, but count I stated that the property was in "Block L" rather than in "Block 1." First Midwest later claimed that this change was also a scrivener's error.

¶ 9 On June 17, 2014, the trial court granted summary judgment to First Midwest and entered a judgment of foreclosure and sale. It found that all material allegations of the complaint were true and proven. Although no judgment was entered on First Midwest's reformation count, the court's order correctly described the property as being in the "Northwest Quarter," but incorrectly referenced "Block L."

¶ 10 On July 31, 2014, First Midwest moved for *nunc pro tunc* amendment of the judgment of foreclosure and sale, stating that due to a scrivener's error, the legal description in the judgment and certain other pleadings erroneously said "Block L" when it should have said "Block 1."

¶ 11 Before the court ruled upon First Midwest's motion, the selling officer sent notice of the judicial sale scheduled for September 18, 2014. The notice of sale identified the property by the correct legal description (using "Northwest Quarter" and "Block 1"), property index number, and common address, and bidders were advised to verify that information:

> "The subject property is *** offered for sale without any representation as to quality or quantity of title and without recourse to Plaintiff and in 'AS IS' condition. *** The property will NOT be open for inspection and plaintiff makes no representation as to the condition of the property. Prospective bidders are admonished to check the court file to verify all information."

The sale proceeded as scheduled on September 18, 2014, and the Yellens placed the highest bid, $47,068.32. After the sale, they tendered $30,000 to the selling officer but failed to deposit the balance of their bid.

¶ 12 On October 9, 2014, the trial court granted First Midwest's motion to amend the judgment and all pleadings *nunc pro tunc* to state "Block 1" instead of "Block L." Thus amended, the legal description matched the description previously published in the notice of sale.

¶ 13 By the end of October, the Yellens still had not tendered the balance of their bid. On October 31, 2014, First Midwest filed a motion requesting the following relief: (i) an order approving the selling officer's report of sale and distribution; (ii) an order confirming the sale; (iii) an order requiring the Yellens to either deposit the balance of their bid or forfeit their deposit; and (iv) an order of possession.

¶ 14 In response, the Yellens filed a petition to intervene in the action, which the trial court granted. The Yellens then moved to vacate the sale and for leave to withdraw their bid. They argued that, because of the typographical errors in the property's description, nobody knew for sure what property was being sold or what its proper legal description was. They observed that three descriptions of the property had been used in different documents—(i) the mortgage, which used "North East" and "Block 1"; (ii) the original judgment, which used "Northwest" and "Block L"; and (iii) the amended judgment, which used "Northwest" and "Block 1"—and they argued that the court had insufficient evidence to determine which description was correct. They also argued that neither the original judgment of foreclosure nor the *nunc pro tunc* order constituted a valid reformation of the mortgage.

¶ 15 The trial court denied the Yellens' motion on February 18, 2015, and it continued First Midwest's motion to confirm the sale to March 20. The trial court also stated that First Midwest could "piggyback a motion to reform the mortgage from its amended complaint."

¶ 16 Pursuant to the court's order, First Midwest filed a motion on March 9, 2015, to reform the mortgage from "North East" to "Northwest." In support, it attached a survey showing the subject property to be in the Northwest Quarter and Block 1. It also attached a warranty deed from the property's previous owners to the Noesens, dated November 14, 1976, and a quitclaim deed in trust that the Noesens granted to First Midwest on June 22, 2006; both contained the correct legal description.

¶ 17 First Midwest additionally filed an emergency motion to advance hearing on its motions, stating that the senior lienholder had initiated its own foreclosure action on the subject property, the senior lienholder was granted a judgment of foreclosure and sale on February 5, and the property was set for judicial sale on March 17. First Midwest requested that the court rule on its motion to confirm the sale prior to that date.

¶ 18 On March 16, 2015, the Yellens filed a motion to reconsider the denial of their motion to vacate the sale and grant them leave to withdraw their bid. As before, they argued that "there has never been any evidence to support the legal description that the court used in the Amended Judgment of Foreclosure." They also asserted, without elaboration, that they were entitled to withdraw their bid because of interior damage to the property caused by frozen pipes.

¶ 19 On that same date, the trial court entered an order granting First Midwest's motion to advance "as to presentment only." It also set briefing on First Midwest's outstanding motions, including its motions for reformation and confirmation, as well as the Yellens' motion to reconsider.

¶ 20 In its brief in support of the motion for reformation, First Midwest asserted that the Yellens had taken possession of the subject property. In support, First Midwest attached the affidavit of its vice president, Patricia Coldebella, who stated that she directed US Equities to perform monthly inspections of the subject property. The January 16, 2015 inspection report states that a "For Sale" sign with contact information for Yellen Realty was observed in the property's front yard. A photograph of the sign in the yard was attached. On February 25, 2015, Sherwin Yellen told Coldebella via email that while he was attempting to show the property to prospective buyers, he discovered that pipes in the house had burst. The March 19, 2015 inspection report states that workers hired by Yellen Realty were at the property repairing the pipes and drywall. Coldebella did not know how or when the Yellens took possession of the property; First Midwest never had possession.

¶ 21 On April 14, 2015, the trial court granted First Midwest's motion to reform the mortgage. It also entered an order approving the selling officer's report of sale and distribution, confirming the sale, and granting possession to the Yellens. The court found that the Noesens intended to mortgage the property as legally described in the mortgage as reformed, and "[t]he appearance of Block L for the first time [in the amended complaint] *** was clearly a typing mistake." On that same date, in the foreclosure action for the senior mortgage (*Bayview Loan Servicing, LLC v. Noesen*, No. 14 CH 16691), the trial court (per the same judge) confirmed the judicial sale of the property. The record does not reflect which confirmation order was entered first.

¶ 22 The Yellens withdrew their motion to reconsider but later filed new motions to reconsider the orders confirming the sale and granting reformation of the mortgage, which the trial court denied without briefing. The Yellens now appeal the denial of their motions to reconsider and the trial court's order confirming the judicial sale.

¶ 23 Once a judicial sale has occurred and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is limited by section 15-1508(b) of the Illinois Mortgage Foreclosure Law, which provides: "Unless the court finds that (i) a notice [of the sale] *** was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2012). The party objecting to confirmation has the burden of showing why the sale should not be confirmed. *NAB Bank v. LaSalle Bank*, N.A., 2013 IL App (1st) 121147, ¶ 9; *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 35. Moreover, the trial court has broad discretion in determining whether any of the above conditions have been met, and its decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 24 The Yellens do not claim that the sale was improperly noticed, unconscionable, or fraudulent; thus, their objections to confirmation necessarily fall within the fourth category, *i.e.*, that justice was not done. This category does not grant the court " 'untrammeled judicial discretion' " in deciding whether to confirm a sale; rather, it "provides a narrow window through which courts can undo sales because of serious defects in the actual sale process, and not because of alleged errors in the process leading up to the underlying judgment." *NAB Bank*, 2013 IL App (1st) 121147, ¶¶ 16, 19 (quoting *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1028 (7th Cir. 2006)). Moreover, "the doctrine of *caveat emptor* applies to judicial sales and the risk of a mistake or defect of title is to be borne by the purchaser unless there is fraud, misrepresentation, or mistake of fact." *Marino v. United Bank of Illinois, N.A.*, 137 Ill. App. 3d 523, 526 (1985).

¶ 25 The Yellens contend that two defects in the sale process should have precluded confirmation of the sale: first, they argue that the typographical errors in the property's legal description were never properly corrected by the court, and in their uncorrected state, they render the sale invalid; and second, they argue that their bid offer lapsed when the property was sold under the senior mortgage because that sale extinguished First Midwest's lien against the property.

¶ 26 The Yellens raise several arguments related to the typographical errors in the legal description of the subject property. First, they argue that there was insufficient evidence to support reformation of the mortgage to include the term "Northwest." Similarly, they argue that there was no evidence supporting the court's *nunc pro tunc* order correcting "Block L" to "Block 1." Finally, they argue that the court could not validly reform the mortgage while the judgment of foreclosure was still in place; the court was required to vacate the judgment of foreclosure before reforming the mortgage. We disagree on all points.

¶ 27 Reformation of a contract will be granted where the written instrument does not reflect the parties' bargain because of the parties' mutual mistake, *i.e.*, " 'the parties intended to say one thing but by the written instrument expressed another.' " *Marengo Federal Savings & Loan Ass'n v. First National Bank of Woodstock*, 172 Ill. App. 3d 859, 863 (1988) (quoting *Benyon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill. App. 3d 754, 760 (1983)); see also *Berry v. Lewis*, 23 Ill. 2d 380, 385 (1961) (reformation of a deed or other instrument affecting land will be granted when the party seeking reformation presents satisfactory evidence "leaving no reasonable doubt as to the mutual intention of the parties"). Thus, if an instrument fails to express the parties' intent because of a scrivener's error, reformation is appropriate. *Roots v. Uppole*, 81 Ill. App. 3d 68, 72-73 (1980). The record readily shows that the inclusion of

"North East" rather than "Northwest" in the mortgage was a scrivener's error. The property is identified as being in the Northwest Quarter (and, incidentally, in Block 1) in the deed by which the Noesens obtained the property, as well as the 2006 quitclaim deed the Noesens gave to First Midwest. A survey of the property confirms this legal description. Moreover, the Noesens admitted in their answer to the original complaint that the mortgage should be reformed. Thus, it was proper to reform the mortgage to reflect the correct legal description of the subject property.

¶ 28 The court's *nunc pro tunc* order was likewise supported by evidence. It is well established that a court may enter a *nunc pro tunc* order at any time in order to amend a written record of judgment to conform to the actual judgment entered by the court. *First Bank of Oak Park v. Rezek*, 179 Ill. App. 3d 956, 959 (1989) (in foreclosure action, court properly entered *nunc pro tunc* order to amend the judgment of foreclosure to correct typographical errors in the legal descriptions of the subject properties). In this case, the court's actual judgment concerned the property at 1779 East Touhy Avenue, which the Noesens mortgaged to First Midwest. The legal description in the mortgage and the original complaint both describe the property as being located in Block 1, and as noted above, there is ample evidence showing this description to be correct. Therefore, it is apparent that this was not a substantive change in the court's judgment but merely correction of a clerical error. See *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 662 (2003) (*nunc pro tunc* modification of judgment was proper where court was correcting a clerical error rather than effecting substantive change).

¶ 29 Moreover, we observe that, despite minor technical errors in the property's legal description, there was never any genuine confusion about what property was being foreclosed upon and sold. All relevant documents consistently and correctly listed the property's street address. The notice of judicial sale, which the Yellens would have relied upon in identifying the

property, contained the correct legal description. Prospective buyers were advised that the property was being sold as-is and that they should verify all information. Additionally, we note that the Yellens apparently took possession of the property sometime in winter 2015, before judicial confirmation of the sale, indicating that they understood perfectly what property they had bid upon. Indeed, the Yellens do not claim in their briefs that they were prejudiced in any way by the typographical errors of which they so strenuously complain. Under these circumstances, it is not inequitable to give effect to the trial court's clerical corrections to the mortgage and the judgment of foreclosure.

¶ 30 Finally, the Yellens claim that the mortgage could not be reformed after the judgment of foreclosure was entered, because it merged into the foreclosure judgment and no longer existed as a separate instrument. This contention is not supported by Illinois law. On the contrary, even after a judgment of foreclosure has been entered, the trial court retains power to amend the judgment to correct clerical errors in the names of the parties or in the description of the land to be sold. *Harris v. Schilling*, 108 Ill. App. 116, 119 (1903).

¶ 31 The Yellens do not cite any authority that bars postjudgment reformation of a mortgage, and the cases they cite are inapposite. See *Aldrich v. Sharp*, 4 Ill. 261, 263 (1841) (after a judgment of foreclosure had been entered, but before the court confirmed sale of the property, plaintiff was entitled to recover interest at the statutory rate rather than the rate provided for in the mortgage); *BAC Home Loans Servicing, LP v. Popa*, 2015 IL App (1st) 142053, ¶ 36 (same); *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414 (2006) (after plaintiff has obtained a judgment in a breach of contract suit, he cannot initiate a new action based on the same contract). None of these cases purport to restrict the court's power to correct a clerical error in the description of the subject property after a judgment of foreclosure has been entered.

¶ 32 The Yellens' stance on this issue is contrary to notions of judicial economy, as well as the policy favoring stability and permanency in judicial sales (*World Savings and Loan Ass'n v. Amerus Bank*, 317 Ill. App. 3d 772, 780 (2000)). According to the Yellens, in order to make a minor clerical correction to the property's description—a correction that is overwhelmingly supported by the record—the court would have to first vacate the judgment of foreclosure (thus conveniently relieving the Yellens of any obligation caused by their bid), enter an order reforming the mortgage, enter a new judgment of foreclosure, and then hold a new judicial sale, of which the Yellens would presumably steer clear. Such is not the law in Illinois. Nor do the Yellens articulate any reasons as to why such an exercise would be desirable (except that, in the present case, it would allow them to escape a bid which they now regret). As discussed, lack of a separate reformation order was an oversight that the trial court could correct at any time before final judgment. Accordingly, the scrivener's errors in the legal description of the property do not require that the sale be vacated.

¶ 33 As noted, the subject property was sold to the Yellens at a judicial sale on September 18, 2014. But before the sale was confirmed, the senior mortgage holder also obtained a judgment of foreclosure and sale on the property, and a second judicial sale was held. Both the senior and junior sales were confirmed on April 15, 2015. The Yellens argue that confirmation of the senior sale extinguished First Midwest's lien against the property, thus nullifying the Yellens' bid.

¶ 34 We initially note that the record does not disclose whether the senior sale or the junior sale was confirmed first, only that they were confirmed on the same day. The Yellens assert in their brief that the senior sale was confirmed in the morning, while the junior sale was not confirmed until that afternoon, but they cite no record support for this claim, in violation of Rule 341(h)(6) (Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016)). Accordingly, we need not consider this

point. See *Lake v. State*, 401 Ill. App. 3d 350, 352 (2010) ("Reviewing courts must determine the issues before them on appeal solely on the basis of the record made in the trial court").

¶ 35 But even if we assume, for the sake of argument, that (i) the senior sale was confirmed a few hours before the junior sale, and (ii) confirmation of the senior sale had the effect of extinguishing First Midwest's lien (see *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶ 36 ("After a judgment of foreclosure, only a judicial sale of the property followed by judicial confirmation of the sale will terminate 'with finality' the rights of third parties.") (citing 735 ILCS 5/15-1404 (West 2012))), this would not preclude confirmation of the junior sale. As previously discussed, the "justice clause" of section 15-1508(b) "provides a narrow window through which courts can undo sales because of serious defects *in the actual sale process*, and not because of alleged errors in the process leading up to the underlying judgment." (Emphasis added.) *NAB Bank*, 2013 IL App (1st) 121147, ¶ 19. Termination of the junior lien after a sale has occurred is not a defect in the actual sale process, and therefore it is not the kind of error for which relief can be granted under the justice clause. Certainly, if the junior lien had been terminated prior to the court entering a judgment of foreclosure and sale, that would have been a valid defense to the foreclosure action. But once a judgment of foreclosure and sale has been entered and a sale has been held, the court loses power to consider errors that do not pertain to the actual process of sale. *Id.* (justice clause was "inapplicable" where party challenging confirmation of sale did not raise any defects in the actual sale process).

¶ 36 This is particularly true in light of the fact that the junior lien was valid when the Yellens made their bid, and they were responsible for delaying confirmation of the sale until after the senior sale. The Yellens placed their winning bid on September 18, 2014, but refused to deposit the balance of their bid. When First Midwest filed a timely motion to confirm the sale on

September 31, 2014, the Yellens intervened in the case and moved to vacate the sale, thus extending the litigation for months until the sale was finally confirmed on April 14, 2015. Under these circumstances, rewarding the Yellens' dilatory tactics by allowing them to withdraw their bid would be inequitable, and it would also be contrary to the policy favoring stability and permanency in judicial sales (*World Savings and Loan Ass'n*, 317 Ill. App. 3d at 780).

¶ 37 Finally, the Yellens argue that under section 2-205 of the Uniform Commercial Code (810 ILCS 5/2-205 (West 2012)), which governs firm offers, their bid lapsed when the sale was not confirmed within three months. But by its own terms, section 2-205 only applies to "[a]n offer by a *merchant* to buy or sell *goods* in a signed writing," not the highest bidder at a judicial sale of real estate. (Emphasis added.) *Id.*

¶ 38 Rather, as noted, the court's discretion to refuse to approve a foreclosure sale is strictly limited by section 15-1508(b) of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1508(b) (West 2012). The Yellens have not raised any defects in the sale process aside from typographical errors that were corrected in a timely fashion by the trial court. Nor would confirmation of the sale cause unfair prejudice to any party in light of the fact that the Yellens knew they were bidding on the property as-is, without any representation as to quality of title, and were advised to check the court file to verify all information. See *Marino*, 137 Ill. App. 3d at 526 (purchaser at judicial sale bears the risk of a mistake or defect of title unless there is fraud, misrepresentation, or mistake of fact).

¶ 39 Because confirming the sale of the Noesens' property was not contrary to the interests of justice under section 15-1508(b) of the Illinois Mortgage Foreclosure Law, we affirm the trial court's order confirming the sale of the subject property to the Yellens.

¶ 40 Affirmed.