2015 IL App (1st) 152914-U

No. 1-15-2914

Third Division
December 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NORTHBROOK BANK & TRUST COMPANY, as successor-in-interest to the Federal Deposit Insurance Corporation, as receiver for Ravenswood Bank, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
	)	No. 2010 CH 45221
v.	)	
FULLERTIN REAL ESTATE, LLC, f/k/a FULLERTON REAL ESTATE, LLC, Defendant-Appellant.	)	Honorable Michael F. Otto, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: In a mortgage foreclosure action, the circuit court did not err by granting summary judgment in favor of plaintiff, and dismissing defendant's counterclaim alleging an equitable lien on the subject property.

¶ 2 Plaintiff, Northbrook Bank and Trust Company (Northbrook), filed a mortgage foreclosure action[1] against several defendants, including Fullertin Real Estate, LLC (Fullertin), formerly known as Fullerton Real Estate, LLC (Fullerton) in the circuit court of Cook County. Fullertin filed a counterclaim. The circuit court dismissed Fullertin's counterclaim, granted summary judgment and entered a judgment of foreclosure and sale in favor of Northbrook. The court thereafter entered an order approving and confirming the sale.

¶ 3 Fullertin appeals. We affirm the judgment and orders of the circuit court.

¶ 4 BACKGROUND

¶ 5 Initially, we observe that Northbrook challenges the accuracy and fairness of Fullertin's statement of facts in its appellant's brief. Northbrook contends that "Fullertin's appellate brief avoids mention of matters which were unfavorable to it and includes other matters simply not in the record." Illinois Supreme Court Rule 341(h)(6) requires the statement of facts to be "stated accurately and fairly without argument or comment, and with appropriate reference to the pages of record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Although this court may strike the statement of facts or dismiss the appeal based on violations of Rule 341(h)(6), we will not do so in the case at bar because Fullertin's alleged violations do not hinder our review. However, we will disregard any noncompliant portions of Fullertin's statement of facts in our review. See *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 80; *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009).

¶ 6 The record contains the following pertinent facts. In November 2007 Fullerton entered into an installment agreement for warranty deed with J.A.W.S. II, LLC (JAWS II). The agreement provided that JAWS II would sell to Fullerton a two-unit mixed

[1] Northbrook filed as successor-in-interest to the Federal Deposit Insurance Corporation (FDIC), as receiver for Ravenswood Bank.

commercial/residential building commonly known as 1534 West Fullerton Avenue in Chicago (the property). Pursuant to the agreement, Fullerton would pay JAWS II a total of $100,000 by the time of an initial closing, in exchange for taking possession of the property. Fullerton would thereafter pay $815,000 divided in monthly installments. Upon payment of the final installment, JAWS II would deliver to Fullerton a warranty deed to the property. In December 2007 a memorandum of agreement was recorded.

¶ 7 In March 2008 JAWS II executed a quitclaim deed transferring the property to J.A.W.S IV, LLC (JAWS IV). Bernard Sean Alcock was a member of both JAWS II and JAWS IV.

¶ 8 On August 29, 2008, Ravenswood Bank made two loans to JAWS II, in the amounts of $2,300,000 and $300,000, respectively. The loans were reflected in two promissory notes signed by Alcock as signatory for JAWS II. Also, Alcock signed a personal guaranty for each note, in which he agreed to pay the funds that JAWS II borrowed from Ravenswood. Further, as security for the loans, JAWS IV, with Alcock as signatory, executed mortgages giving Ravenswood Bank a lien interest in the property. On October 29, 2008, JAWS II defaulted on the promissory notes.

¶ 9 On March 6, 2010, Fullerton and JAWS IV entered into an amended installment agreement. The amended agreement included the following provisions: JAWS II is now known as JAWS IV; neither party was in breach or default; as of March 6, 2010, Fullerton owed JAWS IV a total of $815,000; and Fullerton would pay JAWS IV $200,000 immediately and the remaining $615,000 over time.

¶ 10 In August 2010 Ravenswood Bank failed and was taken over by the FDIC as receiver. In turn, the FDIC sold, assigned, and transferred all of the assets of Ravenswood Bank to Northbrook.

¶ 11 In October 2010 Northbrook brought a foreclosure action against JAWS II, JAWS IV, Alcock, and unknown owners and non-record claimants. Alcock died in April 2012. In June

2013 Northbrook filed the instant third amended complaint, which joined as defendants the personal representative of Alcock's estate and Fullertin, formerly known as Fullerton.[2] Discovery ensued.

¶ 12 In September 2013 Fullertin filed a ten-count counterclaim against Northbrook, JAWS II, JAWS IV, and Alcock's estate. The entire counterclaim was premised on the installment agreement. In count IX, Fullertin alleged that the original installment agreement between it and JAWS II transferred equitable title to Fullertin, while JAWS II held legal title in trust for the benefit of Fullertin. Also, Fullertin alleged that it made payments totaling approximately $324,223 pursuant to the original installment agreement, but JAWS II "breached the agreement." Fullertin sought imposition of an equitable lien against the property for no less than that amount. Count X presented a complaint to foreclose on the claimed lien. On October 7, 2014, the circuit court dismissed Fullertin's counterclaims, five counts with prejudice and five with leave to replead. Fullertin subsequently filed its amended counterclaim. Amended count IX added a reference to the amended installment agreement, and increased the amount that Fullertin allegedly paid under the original and amended installment agreements.

¶ 13 In November 2014 Northbrook filed a motion for summary judgment. On April 7, 2015, the circuit court granted summary judgment in favor of Northbrook, and entered a judgment of foreclosure and sale, which included a judgment against defendants in the amount of $779,042. On May 13, a judicial sale of the property occurred and Northbrook was the highest bidder. The circuit court dismissed Fullertin's amended counterclaim on July 15, 2015, and, on September 8, 2015, entered an order approving and confirming the sale.

[2] In its briefs, Fullertin does not cite to anything in the record explaining its transition from "Fullerton." Accordingly, we do not discuss it.

¶ 14 On October 8, 2015, Fullertin filed its notice of appeal and, on May 6, 2016, filed an amended notice of appeal. Additional pertinent background will be discussed in the context of our analysis of the issues.

¶ 15 ANALYSIS

¶ 16 Before this court, Fullertin's contentions center on its alleged equitable lien on the property. Fullertin contends that the trial court erred by: (1) allowing Northbrook to assert the contract rights of JAWS II and JAWS IV with respect to the installment agreement; (2) granting Northbrook's motion to dismiss Fullertin's counterclaims; (3) granting summary judgment in favor of Northbrook; (4) approving and confirming the sale and distribution; and (5) denying Fullertin leave to file crossclaims against Alcock's estate.

¶ 17 I. Northbrook's Reliance on Installment Agreement

¶ 18 Northbrook initially filed an answer to Fullertin's original counterclaim. However, Northbrook subsequently sought leave to withdraw its answer and file a motion to dismiss. The circuit court granted the motion. Northbrook moved to dismiss counts IX and X because Fullertin breached the installment agreement, or alternatively, the failure of JAWS II and Fullertin to take certain contractual actions rendered the agreement "null and void."

¶ 19 Before this court, Fullertin presents several arguments relating to Northbrook's reliance on the installment agreement. Citing principles of contractual privity, Fullertin argues that only it and JAWS II can argue the validity of the installment agreement.

¶ 20 Fullertin misapprehends the nature of the instant proceeding. This dispute is not a breach of contract action between Northbrook and Fullertin, but rather a lien priority dispute in a mortgage foreclosure action. Northbrook, the junior lienholder[3], named Fullertin as a defendant

[3] Northbrook's observation that "Fullertin was named as a junior lienholder in Northbrook's mortgage foreclosure action" mischaracterizes the relative position of the parties. Northbrook's naming Fullertin as a defendant did not

having a lien or other interest in the property. See 735 ILCS 5/15-1504(a)(3)(L) (West 2010) (requiring foreclosure complaint to include "[n]ames of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated"); 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law §7.14, at 820 (5th ed. 2007) (senior lienholders can join or be joined in junior lienholder's foreclosure action). Through its counterclaim, Fullertin chose to plead and prove its lien interest during the foreclosure action.[4] In its counterclaim, Fullertin asserted that its lien was grounded in the installment agreement. As the junior lienholder, Northbrook had the right "to challenge [Fullertin's] priority on the facts alleged." 59 C.J.S., *Mortgages* §330 (2009); see 1 Garrard Glenn, Mortgages §39.2, at 251, 253 (1943) (junior lienholder may assert every defense that may have been available to mortgagor). Since Fullertin's claimed equitable lien is based on the installment agreement, the circuit court properly allowed Northbrook to challenge the agreement's validity.

¶ 21 This view of the instant mortgage foreclosure proceeding disposes of several of Fullertin's arguments. Fullertin argues that the circuit court erred in allowing discovery regarding Fullertin's payments under the installment agreement. Discovery rulings are within the trial court's discretion and will not be overturned absent an abuse of discretion. A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 81. Since Fullertin based its

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render Fullertin a junior lienholder. Rather, Fullertin was the senior lienholder and Northbrook its junior based on the recordation presumption of first in time, first in right. See *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 703-04 (2000); *Firstmark Standard Life Insurance Co. v. Superior Bank FSB*, 271 Ill. App. 3d 435, 439 (1995); *Cole Taylor Bank v. Cole Taylor Bank*, 224 Ill. App. 3d 696, 704 (1992).

[4] Fullertin was required to do so at some point during the proceeding. See 735 ILCS 5/15-1506(h) (West 2010) (allowing party claiming interest in mortgaged property, with court approval, to postpone proving priority of such interest until hearing to approve sale).

alleged equitable lien on the installment agreement, the circuit court did not abuse its discretion in allowing discovery pertaining thereto.

¶ 22 Fullertin argues that the circuit court abused its discretion by allowing Northbrook to withdraw its answer to Fullertin's original counterclaim and to file a motion to dismiss based on the installment agreement. A trial court has discretion to permit the defendant to withdraw an answer and file a motion to dismiss as long as there will be no prejudice to the plaintiff. *The Retreat v. Bell*, 296 Ill. App. 3d 450, 452 (1998); *Premo v. Falcone*, 197 Ill. App. 3d 625, 629 (1990). Fullertin identifies only one aspect of prejudice: "Because the Circuit Court allowed Northbrook to proceed with these arguments, Fullertin was unable to enforce its Agreement and seek the imposition and foreclosure of an equitable lien that it rightfully deserves."

¶ 23 We reject this argument. Not only was Fullertin able to seek both enforcement of the installment agreement and imposition of an equitable lien, Fullertin actually did so by way of counts IX and X of its counterclaim. Northbrook's motion to dismiss based on the installment agreement tested the legal sufficiency of Fullertin's counterclaim based on defects apparent on its face. See *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 8; *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶ 15. Since the installment agreement was central to Fullertin's claimed equitable lien, the circuit court did not abuse its discretion in allowing Northbrook to file a motion to dismiss.

¶ 24 II. Dismissal of Equitable Lien Counterclaim

¶ 25 Turning to the merits, Fullertin assigns error to the circuit court's dismissal of its counterclaim for an equitable lien. A section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2016)) attacks the legal sufficiency of a complaint by alleging defects on the face of the complaint. The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, taken as true and viewed in the light most favorable to the plaintiff,

are sufficient to state a cause of action upon which relief can be granted. Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring the claim within the scope of the cause of action asserted. A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. Our review is *de novo*. *Wells Fargo Bank, supra* ¶ 8.

¶ 26 An equitable lien is the right to have property subjected to the payment of a claim. It is neither a debt nor a property right, but a remedy for a debt. This special remedy constitutes an encumbrance on the property, so that the very property itself may be proceeded against and sold under a judicial decree, and its proceeds applied upon the demand of the lienholder. *Watson v. Hobson*, 401 Ill. 191, 201 (1948). Further:

> "The imposition of an equitable lien arises in two situations: first, where the parties express in writing their intention to make a particular property, real or personal, or some fund the security for a debt, or where there has been a promise to convey or assign the property as security [citations]; and, second, equity has also recognized similar liens without an express agreement between the parties which arise wholly from general considerations of fairness and justice, such as where a party has made improvements on the property of another." *Cole Taylor Bank*, 224 Ill. App. 3d at 703-04 (quoting *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260, 269-70 (1985)).

¶ 27 The essential elements of an equitable lien are: (1) a debt, duty, or obligation owing by one person to another; and (2) a *res* to which that obligation fastens. *Cole Taylor Bank*, 224 Ill. App. 3d at 704 (quoting *W.E. Erickson*, 132 Ill. App. 3d at 270).

¶ 28 Fullertin argues that its claim for an equitable lien arises in both of the above-recognized situations: an express writing and general considerations of fairness. Count IX of Fullertin's counterclaim alleged that the installment agreement transferred equitable title to the property to Fullertin, while JAWS II held legal title in trust for the benefit of Fullertin. Pursuant to the installment agreement, Fullertin made over $300,000 in payments towards acquiring legal title to the property. Therefore, as alleged in count IX, Fullertin is "entitled" to an equitable lien against

the legal title of the property in an amount no less than the amount of its alleged payments. Except, however, amended count IX did not, and could not, allege that the property was pledged to Fullertin as security for a debt, a necessary element for imposition of the lien.

¶ 29 The language of the installment agreement precludes any finding that an equitable lien should be imposed here. Fullertin attached the original and amended installment agreements to the amended counterclaim. The original installment agreement expressly provided various remedies in the event of the seller's breach, which did not include pledging the property as collateral in the event of a breach. The amended installment agreement likewise did not provide for any pledge of the property. Where a contract expressly covered the entire subject matter and did not provide for a lien, then a lien will not be inferred. *LaSalle Bank, N.I. v. First American Bank*, 316 Ill. App. 3d 515, 525 (2000).

¶ 30 Fullertin alternatively argues that it is entitled to an equitable lien based on considerations of fairness and justice. However, this situation arises "without an express agreement between the parties." *Cole Taylor Bank*, 224 Ill. App. 3d at 704. "[A]n equitable lien imposed upon general equitable considerations, rather than from a contract, is inapplicable where the parties have entered a contract covering the subject matter, yet have neglected to create a security interest therein." *Bankers Trust Co. v. Chicago Title & Trust Co.*, 89 Ill. App. 3d 1014, 1018-19 (1980). Accordingly, we uphold the trial court's dismissal of Fullertin's counterclaim seeking an equitable lien.

¶ 31 III. Summary Judgment

¶ 32 Fullertin assigns error to the circuit court's grant of summary judgment in favor of Northbrook. Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735

ILCS 5/2-1005(c) (West 2016). The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists. In making this determination, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper. Our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007) (and cases cited therein).

¶ 33 In the case at bar, Northbrook based its motion for summary judgment on the installment agreement. Northbrook argued that the installment agreement did not grant Fullertin an equitable interest in the property and, alternatively, that the installment agreement is void. Before this court, Fullertin repeats its argument that principles of contractual privity preclude Northbrook from relying on the installment agreement. We again reject this argument. *Infra* ¶¶ 17-23.

¶ 34 Fullertin also argues that summary judgment is inappropriate because a genuine issue of fact exists as to Fullertin's equitable interest in the property. In response, Northbrook devotes several pages in its brief, with citation to evidence of record, arguing that the installment agreement did not grant Fullertin any equitable interest in the property. Summary judgment usually " 'assumes that a cause of action has been stated and proceeds to determine whether there are any material issues of fact to be tried.'" *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 190 (1989) (quoting *Janes v. First Federal Savings & Loan Ass'n*, 57 Ill. 2d 398, 406 (1989)). Here, we have already concluded that Fullertin's counterclaim for an equitable lien fails because there are *no* set of facts that can be proved that would entitle Fullertin to recover. Accordingly, we reject Fullertin's argument that a genuine issue of material fact exists as to its claimed

equitable interest in the property. See *Betts v. Crawshaw*, 248 Ill. App. 3d 735, 740 (1993) (concluding that "our resolution of the arguments with respect to the motion to dismiss is dispositive, and we need not address the propriety of summary judgment").

¶ 35 IV. Approval and Confirmation of Sale

¶ 36 Fullertin next assigns error to the circuit court's entry of the order approving and confirming the sale of the property and distribution of the proceeds. Absent exceptions not present here, entry of the order is mandatory (735 ILCS 5/15-1508(b) (West 2010)) and constitutes the final and appealable order in the proceeding. *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 21. Fullertin argues that the circuit court should not have entered this final order based on its previously-discussed arguments. Since we have rejected these arguments, we uphold the circuit court's entry of the final judgment order.

¶ 37 V. Fullertin's Crossclaims Against Alcock's Estate

¶ 38 As a final matter, Fullertin assigns error to the circuit court's denial of leave to file a cross-claim against the personal representative of Alcock's estate. On July 15, 2015, Fullertin filed a motion for leave to file a cross-claim against Alcock's estate. Later that day, the circuit court dismissed Fullertin's amended counterclaim. On September 8, 2015, the court entered its final order confirming and approving the sale of the property. Fullertin presented its motion on October 30, 2015. On January 12, 2016, the circuit court denied the motion. However, we are unable to review the circuit court's ruling because there is no record to review the basis of that ruling.

¶ 39 "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). An issue relating to the basis for the circuit court's conclusions obviously cannot be reviewed absent a report or record of the

proceedings. To support a claim of error, the appellant has the burden to present a sufficiently complete record. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001).

¶ 40 In the case at bar, Fullertin admits that the record does not include any transcript or report of the January 12, 2016, hearing on the motion. Thus, we do not know the basis of the circuit court's denial. Under these circumstances, we must presume that the circuit court's denial of leave to file the motion conformed to the law. See *Corral*, 217 Ill. 2d at 157; *Webster*, 195 Ill. 2d at 433-34; *Foutch*, 99 Ill. 2d at 393-94.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the judgment and orders of the circuit court of Cook County are affirmed.

¶ 43 Affirmed.