

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 1-15-1869 & 1-15-3168 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE PETITION OF:) Appeal from the Circuit Court of Cook
IN THE MATTER OF THE APPLICATION) County
OF THE COUNTY TREASURER AND)
EX-OFFICIO COUNTY COLLECTOR OF COOK)
COUNTY, ILLINOIS, FOR ORDER OF)
JUDGMENT AND SALE OF LANDS) No. 02 COTD 4818
AND LOTS UPON WHICH ALL OR PART OF) Honorable Alfred J. Paul,
THE GENERAL TAXES FOR TWO OR MORE) Judge Presiding.
YEARS ARE DELINQUENT,)
)
REAL BUSINESS, INC., n/k/a REAL TAX)
BUSINESS, INC.,)
)
Petitioner,)
_____)
KEVIN BROOKS, SHARON PERRY,)
KATHLEEN RAY, CARL ADINOLFI, and)
RUTH SARGENT,)
)
Plaintiffs-Counter Defendants-)
Appellees)
)
v.)
)
REAL TAX BUSINESS, INC., an Illinois) No. 08 CH 44979
Corporation,) Honorable Kathleen Pantle,
) Judge Presiding
Defendant-Counter Plaintiff-)

Appellant.)	
)	
v.)	
)	
BAR HARBOUR AT WINDMILL LAKE)	
HOMEOWNERS' ASSOCIATION,)	
)	
Counter Defendant-Appellee.)	
<hr/>		
UNITED CENTRAL BANK, successor in interest)	
to Mutual Bank,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
REAL TAX BUSINESS, INC., f/k/a Real Business,)	
Inc., Tax Bix, Inc.,)	No. 08 CH 42692
)	Honorable Mary L. Mikva,
Defendant-Appellant,)	Judge Presiding.
)	
BAR HARBOUR AT WINDMILL LAKE)	
HOMEOWNERS' ASSOCIATION,)	
)	
Defendant-Appellee,)	
)	
(Robert A. Bryant, Chicago Title Land Trust Co., as)	
successor trustee to LaSalle Bank, N.A., not)	
personally but as trustee u/t/a dated May 10, 2001,)	
and known as trust number 127326, and)	
Bar Harbour Wind Lake Stone Investment, LLC,)	
an Illinois Limited Liability Company,)	
Unknown Others, and Nonrecord Claimants,)	
)	
Defendants).)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concur in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it held that recorded easements on a piece of property survived the property being sold at a tax sale. The trial court did not err when it entered a judgment of foreclosure and confirmed a foreclosure sale.

¶ 2 In these consolidated appeals, a buyer at a tax sale purchased a piece of property that was previously owned by a condominium association. The property was a common area of the development. The buyer took out a loan secured by a mortgage on the subject property and then defaulted on its obligations, so the bank foreclosed on the property. The trial court held that individual condominium owners held valid easements to use and enjoy the property and that those easements were not extinguished at the tax sale. The trial court also entered a judgment of foreclosure and confirmed the judicial sale. The tax-sale buyer appeals, and we affirm.

¶ 3 **BACKGROUND**

¶ 4 The disputes involved in this consolidated appeal have been meandering through our courts since 2002. It all began when the predecessor of Real Tax Business Inc. (RTBI), the appellant, submitted a successful \$250 bid on \$119,957.37 in delinquent taxes on a 13-acre parcel of land in the Bar Harbour at Windmill Lake condominium development in Schaumburg. The parcel that was sold was a common area of the condominium complex that was improved with, among other things, a swimming pool, a clubhouse, and a parking lot. RTBI was issued a tax deed for the property and took ownership. As will be important later on, RTBI executed a mortgage on the property in exchange for a \$3.5 million line of credit.

¶ 5 The Bar Harbour at Windmill Lake Homeowners' Association, an appellee, filed a postjudgment petition for relief from the issuance of the tax deed. The trial court granted the Association's petition and vacated the tax deed. On appeal, we reversed the postjudgment relief granted by the trial court. *Real Business, Inc. v. Bar Harbour at Windmill Lake Homeowners' Association*, Nos. 07-0362, 07-0370 (Ill. App. Ct. 1st Dist. March 19, 2008) (Rule 23 Order). Thus, RTBI retained ownership of the parcel, and the case was remanded. On remand, RTBI sought an order to restrain the Association (or the residents of the condominiums) from using the

property. RTBI also sought use and occupancy payments from the Association for the period that the residents had been using the property during RTBI's ownership.

¶ 6 In the meantime, individual resident-owners of condominiums at the Bar Harbour at Windmill Lake development filed a declaratory judgment suit seeking an order that, among other things, RTBI could not prevent it from using the property or collect for admission to the property. After unsuccessfully moving to dismiss the complaint for declaratory judgment, RTBI answered and pled affirmative defenses and a counterclaim. Among the affirmative defenses, RTBI sought a declaration that the tax deed extinguished any easements the condominium owners had under the Declaration of Covenants, Conditions and Restrictions Relating to the Bar Harbour at Windmill Lake Homeowners' Association that was recorded with the Cook County Registrar of Titles in 1973. As a counterclaim, RTBI pled a claim for unjust enrichment based on the condominium owners' use of RTBI's property without remitting payment for its use.

¶ 7 Back over in the tax deed case that was running concurrently with the declaratory judgment action, the trial court did as commanded by our order and reinstated the tax deed in favor of RTBI. The trial court also held that the easement and use-and-occupancy issues between the parties should be decided in the then-pending declaratory judgment case filed by the individual owners—deferring to the more specialized knowledge of the chancery court on such issues. RTBI appealed that order. We affirmed. *Real Tax Business, Inc. v. Bar Harbour at Windmill Lake Homeowners' Association*, No. 09-0647 (Ill. App. Ct. 1st Dist. June 30, 2010) (Rule 23 Order).

¶ 8 To add another layer to the case, RTBI defaulted on the previously-mentioned mortgage. Mutual Bank, the lender, initiated foreclosure proceedings. RTBI filed an answer and counterclaim. United Central Bank (the resulting bank after a merger with Mutual Bank) moved

for summary judgment and an order of foreclosure, also seeking a deficiency judgment of more than \$2 million.

¶ 9 RTBI disputed the calculation of damages and contested other issues, but not the fact that it had failed to make payments when due. RTBI moved to strike the affidavit that United Central submitted in support of its motion for summary judgment that was made out by Ryan Bergeron, United Central's vice president of special assets. The trial court denied the motion to strike the affidavit but did grant RTBI the right to take discovery on the content of the affidavit. RTBI deposed the affiant, Bergeron, and subsequently filed a motion to reconsider the order denying its motion to strike the affidavit. That motion to reconsider was denied.

¶ 10 RTBI then filed several other motions in the foreclosure case arguing that judgment for the bank was not proper. RTBI also requested leave to file affirmative defenses for failure to mitigate damages—that the bank was at fault for failing to collect rent from the Association for use of the property in order to reduce the debt (ultimately, the deficiency). RTBI then filed its own motion for summary judgment based on its defenses of failure to mitigate damages and unclean hands. RTBI insisted that there was a fraudulent scheme concocted to deprive it of its property rights. The trial court granted summary judgment in favor of United Central, denied RTBI's motion for leave to add claims or affirmative defenses, and denied RTBI's motion for summary judgment. RTBI filed at least three postjudgment motions that were all denied.

¶ 11 Back over in the declaratory judgment case concerning the use of the property, the parties both filed motions for summary judgment on their claims and their defenses to the other's claims. RTBI sought leave to amend to add an affirmative defense for unclean hands and add a claim for civil conspiracy—a claim that had been dismissed more than three years earlier with leave to replead, but was, until then, never replead. The trial court held that RTBI's proposed amendments

were untimely and otherwise defective.

¶ 12 RTBI then filed a motion to compel in which it sought the production of documents related to a settlement between the foreclosing bank and the Association. The trial court denied the motion to compel. RTBI also filed a motion to have the case dismissed because the case failed to comply with class action law. That motion was also denied, as the owners' counsel certified that none of the claims were being pursued as a class action.

¶ 13 Meanwhile, the foreclosure case moved forward and, since all RTBI's postjudgment objections had been overruled, the property was set to be sold. Before the sale, United Central merged with Hanmi Bank. At the foreclosure auction, Hanmi bid \$275,000 and was the winning bidder, obtaining a certificate of sale. Hanmi assigned its rights in the property to the Association. RTBI filed several objections to the sale, principally arguing that the amount of the sale was insufficient and that there was improper collusion between the bank and the Association. The trial court overruled those objections. The court confirmed the sale, directed the issuance of the deed and an order for possession, and confirmed the transfer of the property to the Association. The trial court also confirmed the nearly \$2 million deficiency judgment which Hanmi Bank formally waived.

¶ 14 Back over in the declaratory judgment case, the trial court reached the merits of the pending summary judgment motions. The court found in favor of the condominium owners and granted summary judgment in their favor. The court held that the recorded easements survived the issuance of the tax deed. The court explained that RTBI did not acquire greater title than the Association had before it was sold at the tax sale—both were subject to the easements. The court in the tax deed case held that RTBI was entitled to nothing on its claim for unjust enrichment for use and occupancy payments. In ruling as it did, the trial court rejected all of RTBI's other, more

specific arguments (such as *res judicata*, laches, and others), many of which are raised again here. The facts that pertain to those specific arguments are set forth in more detail below as needed to address the issues raised on appeal.

¶ 15 In October 2015, nearly 14 years after this all began, the trial court clarified that the owners' summary judgment motion was granted and RTBI's motion for summary judgment was denied. At that point, all the parties' claims had been disposed of, and a final judgment on the merits existed in all three cases once and for all. RTBI now appeals. There are two separate appeals. One appeal deals with the foreclosure of the property, *i.e.* principally the relationship between RTBI and the bank. The other appeal deals with the right of ownership and then the right to use and occupy the property, *i.e.* principally the relationships between RTBI and the Association and then RTBI and the individual owners.

¶ 16 ANALYSIS

¶ 17 At the beginning of RTBI's chaotic briefs, it lists a total of 26 "issues presented for review." There are not 26 legitimate issues. More importantly, RTBI seriously violated a number of formatting rules, misstates the proper standard of review on multiple issues, and fails to properly provide authority in about a dozen situations where it is required.

¶ 18 Although just scratching the surface, by way of example, in both briefs RTBI sets forth a blanket declaration that "[t]he standard of review for each issue is *de novo*." It then cites two irrelevant cases to support that proposition. However, even of the approximately 14 meaningful issues (and we are stretching the word meaningful), no less than six are reviewed under other, more deferential standards. RTBI also misrepresents our holdings in the prior appeals in this case, attempting to pass off a concurrence and a dissent as the majority holding. The myriad shortcomings in RTBI's submissions are a burden on the court and demonstrate, at best,

indifference to the rules—actually begging the question of whether there was an attempt to deceive the court or if there is some other, less-sinister explanation.

¶ 19 There are three separate cases at issue in this consolidated appeal: the tax deed case, the declaratory judgment case, and the foreclosure case. For ease of understanding, we will begin with the disputes between RTBI and the Association and owners respectively. Then, once we have explained the propriety of the disposition of those issues, we will move to the dispute between RTBI and the bank—the propriety of the foreclosure proceedings.

¶ 20 I. Property Ownership and Use Disputes

¶ 21 RTBI argues that the trial court lacked jurisdiction over the declaratory judgment case filed by the individual owners. To support that argument, RTBI claims that this court held that the declaratory judgment action was improper, in that, all matters related to the tax deed must remain before the same court (quoting *Real Tax Business, Inc. v. Bar Harbour at Windmill Lake Homeowners' Association*, No. 09-0647, at p. 23 (Ill. App. Ct. 1st Dist. June 30, 2010) (Rule 23 Order) (Murphy, J. specially concurring)). Even though RTBI expressly claims that the statement above was the majority holding, it quotes a special concurrence and the dissent to support its arguments, not the holding of the court. Contrary to RTBI's representations, the majority took the opposite position.

¶ 22 RTBI appealed after the court presiding over the tax deed case declined to exercise jurisdiction over the easement issue. Instead, the tax deed court deferred to the court presiding over the declaratory judgment case to adjudicate the unresolved issues concerning the easements. We affirmed the tax deed court's decision to do so and held that it was not error for the tax deed court to defer to the declaratory judgment court on an issue on which the courts had equal and concurrent jurisdiction. *Id.* at p. 15. That analysis is correct and we reaffirm it here. We give

RTBI the benefit of the doubt in hopes that it merely fails to understand the court's holding rather than that it is making affirmative misrepresentations.

¶ 23 RTBI's argument that the declaratory judgment action was precluded by *res judicata* or collateral estoppel is similarly flawed. Quoting the concurring opinion, but calling it the majority, RTBI argues that we held that the declaratory judgment action was an improper collateral attack on the tax deed action. *Id.* at p. 25-26 (Murphy J., specially concurring). It was not. And we never held that it was. RTBI argues that our "holding" that the declaratory judgment case was an improper collateral attack on the tax deed judgment "was not *dicta*," insinuating that the trial court in the declaratory judgment case was required to dismiss the case. RTBI is correct that the relevant portion of our order was not *dicta*, it was less than *dicta*. It was not even part of the judgment. In reality, our holding was that the issue of *res judicata* was not properly before the court. *Id.* at p. 16. The owners—nonparties to the tax deed case— filed a separate action asking the court to declare their rights on the separate easement issue and did not collaterally attack the adjudication of the ownership issue. One case calls for a determination of the ownership of the property—a fight between the Association and RTBI. The other case calls for a determination about the conditions for use of the property—a fight between the individual residents and RTBI. The trial court properly rejected RTBI's arguments that the declaratory judgment action was barred by collateral estoppel or *res judicata*.

¶ 24 RTBI's argument that the declaratory judgment action is "doubly *res judicata*" fails for the same reasons.

¶ 25 Moving on from preclusion, RTBI argues that the individual owners' lack of diligence "amounts to laches." Laches is an equitable principle that bars recovery by a litigant whose unreasonable delay in bringing an action for relief prejudices the rights of the other party. *Richter*

v. Prairie Farms Dairy, Inc., 2016 IL 119518, ¶ 51. RTBI does not provide any tailored authority or any basis for a laches finding. RTBI fails to explain how the court committed any error relating to laches. The actual fact is that the declaratory judgment action was filed by the owners just two months after this court overturned the trial court's decision to invalidate the tax deed. The owners had no reason to assert their easement rights prior to that time because there was no indication there was about to be an attempt to usurp their easement rights. RTBI has also made no cognizable or persuasive claim of resulting prejudice to support a finding of laches.

¶ 26 Also unavailing is RTBI's claim that the declaratory judgment case should have been dismissed pursuant to the Illinois Code of Civil Procedure's provision allowing for the dismissal of pending cases on the basis that there is another action between the same parties for the same cause (735 ILCS 5/2-619(a)(3)). When moving to dismiss an action on the basis that there is another action pending between the same parties for the same cause, it is the movant's burden to demonstrate through clear and convincing evidence that the two actions involve both the same parties and the same cause. *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1091 (2000). The adjudication of a motion to dismiss under section 2-619(a)(3) requires the trial court to consider various factors and exercise its discretion to determine if dismissal is proper. *Id.* at 1091, 1096. RTBI failed, both here and in the trial court, to demonstrate, with argument and authority, that the criteria for dismissal under section 2-619(a)(3) is met. To the contrary, as explained above (*supra* ¶ 23), all indications are that neither the parties nor the causes are the same, and RTBI did not meet its burden to prove otherwise.

¶ 27 The trial court also dismissed RTBI's counterclaim for "civil conspiracy to defraud." RTBI claims that the dismissal was improper because it pled facts to support that cause of action. RTBI contends that the individual owners and the Association worked together to unlawfully

collaterally attack the tax deed judgment "so as to be able to deny RTBI the use of and compensation for the use of its property." RTBI maintains that one of the acts (the only act referred to in its brief on appeal) conducted in furtherance of the conspiracy was that the owners filed perjured answers to the complaint and an interrogatory.

¶ 28 Also on the conspiracy to defraud issue, RTBI argues that the trial court erred when it did not allow it to replead its claim as well as to add a defense for unclean hands. The unclean hands defense is tied to the same supposed acts as the conspiracy claim. RTBI contends that the trial court's refusal to allow these filings was error because: (1) the requests were timely made; (2) the relief it sought was for wrongs it had suffered; (3) there was no defect in the fact-pleading; and (4) it suffered prejudice. Adding to its prior, dismissed iteration of the claim, RTBI sought to add that the law firms working on the case and the bank that held the mortgage were involved in the conspiracy.

¶ 29 RTBI's initially-filed claim for civil conspiracy was dismissed with leave to replead. However, RTBI did not attempt to replead the claim for over three years—until after the owners' motion for summary judgment was filed. RTBI's explanation for its delay did not satisfy the trial court. It had been in possession of the documents it relies upon to give rise to its claim for 14 months before seeking leave to amend. RTBI sought to add claims against new parties to address newfangled allegations, just as the parties both filed for summary judgment. RTBI fails to make a persuasive case that the trial court abused its discretion by disallowing the untimely amendment. See *FHP Tectonics Corp. v. American Home Assurance Co.*, 2016 IL App (1st) 130291, ¶ 34 (a trial court's decision on whether to allow an amended pleading is reviewed for an abuse of discretion).

¶ 30 The only act that RTBI points to on appeal to support its assertion that there was a civil

conspiracy between the owners and the Association was that the owners denied an allegation in the complaint and in an interrogatory that the owners and the Association were working together to deprive RTBI of its property rights. The court was right to say that the "allegation" was insufficient to go forward on a claim for conspiracy to defraud. It was a conclusory allegation that did not demand any factual admission or denial from the owners. The facts pled fail to meet the pleading standards.

¶ 31 The interests of justice would not have been served, as RTBI claims, by allowing the amendment. RTBI argues that the reason it is entitled to relief on that claim is because the collusion allowed the conspirators to deny it "both the use of and the value to be obtained from [the property's] ownership." As will be explained in more detail below (*infra* ¶¶ 39-41), the owners' pursuit of their easement rights was not improper or illegal. The owners' easements ran with the land and RTBI was never entitled to unencumbered ownership as it asserts, so RTBI could have never prevailed on its claim because it suffered no cognizable harm. It never had the rights to the land that it claimed to have. Since RTBI never had those rights, the owners and the Association could not have wrongfully worked together to deprive it of those rights. The trial court did not abuse its discretion in denying leave to file the untimely, insufficiently-pled amendment that would have been futile anyhow.

¶ 32 RTBI argues that the trial court erred in denying its motion to compel production of documents between United Central and the owners' attorneys. When the discovery was sought, United Central provided a privilege log indicating that it would not turn over some of the documentation because it was covered by attorney-client privilege. The information RTBI sought related to its conspiracy to defraud claim and unclean hands defense that the trial court did not allow it to replead. A trial court's decision on a motion to compel discovery is also reviewed for

an abuse of discretion. *Powers v. Rosine*, 2011 IL App (3d) 100070, ¶ 12. RTBI does not even indicate, with argument or authority, why the documents would not be subject to withholding on the basis of privilege. RTBI has failed to demonstrate how the trial court abused its discretion in denying the motion to compel.

¶ 33 RTBI contends that the trial court "improperly refused to dismiss [the declaratory judgment case] for violations of fundamental class action law." In the complaint and many other documents filed in the case, the owners indicated something to the effect of that the relief sought was for the named owner-plaintiffs "individually, and on behalf of all others similarly situated." In response to the motion to dismiss the case on the basis that the owners failed to certify the class and comply with other aspects of class action law, the owners' attorney offered to stipulate that the case was not a class action, and the court accepted the stipulation or, as the court referred to it, a judicial admission. RTBI gives no persuasive reason, or precedential basis, for dismissing a case on the basis that the pleadings were framed in a manner consistent with class-action phrasing even though the case was not actually a class action. There is nothing in the substance of the case or the actual relief sought or obtained that would require the owners to have complied with class action law.

¶ 34 Moreover, RTBI simply fails to demonstrate its entitlement to relief on the class action issue. It does not address, with any authority, what the remedy would be or how we are to review its claim at all. It does not provide any analogous case law or even any authority related to its apparent contentions. From all we can tell, the individual owners sued in their capacity as affected owners to obtain a declaration that their easement rights remained valid. There is nothing about those circumstances that would demand class certification. Other remedies might have been available to RTBI in regard to any attempt by the owners to obtain a declaration of

rights for non-parties, but we see no error from the record, especially where the issue was raised for the first time 6 years into litigation.

¶ 35 So now that we have explained why none of the arguments raised by RTBI entitles it to relief from the declaratory judgment on appeal, we will explain why the trial court's order was, in fact, correct.

¶ 36 We review an order granting summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8. Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012). If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12.

¶ 37 On August 27, 1973, the Declaration of Covenants, Conditions and Restrictions Relating to the Bar Harbour at Windmill Lake Homeowners' Association (the Declaration) was recorded with the Cook County Registrar of Titles. The Declaration provides that if the property is "transferred, sold, conveyed" it is done "subject to the covenants, conditions, restrictions, easements, charges and liens hereinafter set forth which shall run with the property and be binding on all parties having or acquiring any right, title or interest therein." The easements are "binding upon any person having at any time any interest or estate in said land." Similar statements are made elsewhere in the Declaration, *i.e.* that the easements run with the land and that those who take title to property covered by the Declaration do so subject to the easements and other conditions of ownership. One of the easements is for quiet enjoyment in and to the

property and another is for ingress and egress to the property. The common property, the property purchased by RTBI, is covered by the Declaration.

¶ 38 Section 22-70 of the Illinois Property Tax Code (35 ILCS 200/1-1 *et seq.*) says that the issuance of a tax deed does not extinguish recorded easements and the deed is to be treated the same as if the property had been ordinarily conveyed.

"A tax deed issued with respect to any property sold under this Code shall not extinguish or affect any conservation right, easement, covenant running with the land or right-of-way for water, sewer, electricity, gas, telephone or other public service use which was created, on or over that real property before the time that property was sold under this Code and which is evidenced either by a recorded instrument or by wires, poles, pipes, equipment or other public service facilities. When the property described in a tax deed issued under this Code is a dominant or a servient tenement with respect to any private easement or easements, created in good faith expressly or by operation of law for the benefit of a dominant tenement or tenements, with respect to the easement or easements the tax deed shall have the same effect as a deed of conveyance made by the owner of the property to the tax deed grantee, just prior to the issuance of the deed." 35 ILCS 200/22-70 (West 2012).

¶ 39 When the Declaration and recorded easements are considered in light of this section of the Property Tax Code, it is clear that when RTBI purchased the property at the tax sale, it did so subject to the easements. RTBI is seeking title greater than what was held by the Association. But it is obvious that the tax deed could not offer its holder more rights than the deed evidenced prior to the sale. *SI Sec. v. Bank of Edwardsville*, 362 Ill. App. 3d 925, 931 (2005). All that could

be sold at the tax sale was what existed prior to the tax sale—a piece of property subject to easements and other conditions. A tax purchaser obtains no greater title than a prior owner. *Id.*

¶ 40 The Declaration was recorded. Any purchaser of property encumbered by recorded easements (and the Property Tax Code says a tax-sale buyer is to be treated the same as one who buys for value from the owner) takes title to property subject to those easements. As the trial court pointed out, it was incumbent on RTBI as a bidder on the property to research and discover what it was purchasing. The trial court was right to reject RTBI's long-held, erroneous argument that the easements held by the owners were extinguished when it purchased the property at the tax sale.

¶ 41 Because the condominium owners always had valid easements on the property, RTBI was never entitled to any compensation for the owners' use of the property consistent with the easements. The right to use the property was vested in their ownership of their condominiums—the easement rights are part of the owners' title to their property. The owners were not required to pay compensation for exercising their easement rights. The trial court correctly granted summary judgment against RTBI on its claim for unjust enrichment and in favor of the individual owners for the declaration they sought.

¶ 42 II. The Foreclosure

¶ 43 In the foreclosure suit, RTBI offered no evidence to rebut the evidence offered by the bank that RTBI defaulted on its obligations as a result of non-payment. Instead, RTBI's principal objections are to the procedures employed. Specifically, RTBI argues that the affidavit submitted in support of its motion for summary judgment is deficient so that summary judgment was not proper. Then, RTBI turns to the court's rulings on its defenses. To conclude its arguments, RTBI contests the foreclosure sale on the basis that United Central Bank merged with Hanmi Bank

before the sale and Hanmi Bank was never made a party to the case. RTBI also contests the propriety and reasonableness of the amount of the accepted bid at the foreclosure sale and alleges that more fraud was afoot.

¶ 44 In support of its motion for summary judgment seeking a judgment of foreclosure, United Central submitted an affidavit from Ryan Bergeron, its vice president of special assets. RTBI's arguments, though not fully cogent, are apparently that Bergeron did not have personal knowledge, that his attestations are hearsay, and that he fails to lay a business-record foundation for the records he relied upon to make out his affidavit.

¶ 45 It is important to note that, after the affidavit was submitted in support of the summary judgment motion, RTBI was given leave to take Bergeron's deposition. So, the purported deficiencies in the affidavit must also be considered in light of the fact that RTBI had the opportunity to probe these issues in a deposition. Moreover, the trial court had the benefit of Bergeron's deposition testimony to consider when it was deciding whether Bergeron was competent to make the averments made in the affidavit. See *Illinois Tool Works Inc.*, 2015 IL App (1st) 132350, ¶ 8 (at the summary judgment stage, the trial court is to consider the pleadings, depositions, admissions and affidavits on file).

¶ 46 Contrary to RTBI's position, business records are admissible into evidence under a different standard than other evidence.

"Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such

an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind." Ill S. Ct. R. 236(a).

¶ 47 In this case, Bergeron averred that his testimony, offered in the form of an affidavit, was based on his review of United Central's loan files that were kept in the ordinary course of business. It is true that Bergeron himself did not make and maintain the records at issue, but that is not required. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 41. Business records are presumed to be accurate because they are made in furtherance of the business and businesses are motivated to keep accurate records because the record would otherwise be useless to the business. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13. The admission of business records is reviewed for an abuse of discretion. *Id.* The loan payment history ledgers attached to the affidavit reflect the means by which the bank tracks payments and charges and processes accounts contemporaneously with account activity.

¶ 48 One supposed pitfall that RTBI points out is that some of the attestations made by Bergeron concern the period in which the loan was the possession of Mutual Bank. According to RTBI, Bergeron, as an employee of United Central, cannot competently testify to the account activity prior to the banks' merger. Upon merger, however, United Central acquired all of Mutual Bank's assets. Mutual Bank's records were incorporated into United Central's record-keeping system. Bergeron testified that records were made by Mutual Bank in the ordinary course of its business and then, after the merger, incorporated into United Central's records and continued to

be tracked in the ordinary course of United Central's business. When a business record is created by a third party, it may be admitted by a party that receives it where the business receiving the information, acting in the regular course of business, integrates the information received and relies on it in its day-to-day operations. *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 86; see also *Northbrook Bank & Trust Co. v. 2120 Div. LLC*, 2015 IL App (1st) 133426, ¶ 49. In addition, RTBI had the opportunity to depose Bergeron about the content of his affidavit. He was not impeached and his testimony was not called into question on any material facts.

¶ 49 RTBI argues that even if the affidavit complied with the rules for admissibility, summary judgment still should not have been granted because there were questions of material fact remaining. Aside from the fact that both parties filed motions for summary judgment, RTBI's scattershot argument in this regard is directed at some wayward statements made by Bergeron and some indicia that he lacked familiarity with the computer system and the calculation of interest. But RTBI provides no specific authority to demonstrate why any of these supposed insufficiencies would mandate the denial of the summary judgment motion. There was no counter-evidence presented—no counter affidavit. When all of the evidence that was on file at the summary judgment stage is considered, along with the lack of any affirmative evidence from RTBI to create a question of fact, we find RTBI's arguments on appeal to be misplaced.

¶ 50 The trial court found that summary judgment was appropriate despite RTBI's assertion of defenses for United Central's purported failure to mitigate damages, unclean hands, and waste. RTBI sought leave to plead these defenses after United Central filed its motion for summary judgment—more than four years after RTBI answered the complaint. RTBI also filed its own motion for summary judgment claiming that the failure to mitigate damages and unclean hands attributable to United Central were a valid basis on which to grant summary judgment in its

favor.

¶ 51 The failure to mitigate damages and unclean hands proposed defenses related to RTBI's claim that it was entitled to rent for the owners' use of the property and that United Central was at fault for exacerbating the deficiency by not collecting rent and colluding with the Association. The claims are unsupported by authority on appeal or by any evidence. RTBI had no right to rents from the owners because the owners had valid easements on the property. In addition, RTBI did not submit any justification for failing to assert the defenses until so late, except to say that declaring them to be untimely is not in the interests of justice. The same defenses, as discussed in part I (*supra* ¶ 31, 41), had already been rejected in the other lawsuit, so claim and issue preclusion would not permit their re-litigation. Nonetheless, due to the late nature of asserting the defenses (without any justification for the untimeliness) and the fact that the amendments would have been futile, we hold that the trial court did not abuse its discretion in rejecting RTBI's bid to plead the defenses. The trial court likewise did not err in denying RTBI's motion for summary judgment and instead granting summary judgment for United Central.

¶ 52 RTBI argues that the trial court erred when it denied its motion to stay the proceedings in order to take further discovery on the collusion issue. A reviewing court will not overturn the trial court's determination to grant or deny a motion for a stay absent an abuse of discretion. *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 372 (2009). RTBI sought this discovery six years into the litigation and it offers no persuasive reason why any of the discovery would have mattered. RTBI could have prevented any issue pertaining to its ownership by not defaulting on its credit obligations. Nothing done by the Association or owners or United Central for that matter had any effect on RTBI defaulting. The motion for a stay was brought after the litigation had already been going on for six years. The trial court did not abuse its discretion when it

denied RTBI's attempt to stay the proceedings.

¶ 53 Finally, we get to RTBI's claim that the court's decision to confirm the sale constituted reversible error. The standard of review for a motion to confirm the sale of foreclosed property is an abuse of discretion. *CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 31. A trial court is to confirm a judicial sale unless it finds that "(i) a notice required in accordance with subsection (c) of Section 15-1507 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). RTBI contends that all four of these bases are in play here, so the trial court should not have confirmed the sale.

¶ 54 After the foreclosure case was filed, Mutual Bank merged with United Central and then, before the property was sold at auction, United Central merged with Hanmi Bank. RTBI maintains that the notice of sale was deficient because United Central was no longer the mortgagee and the Foreclosure Law requires that the mortgagee be the one to give notice of the sale (citing 735 ILCS 5/15-1507(c)). However, there is nothing in the Foreclosure Law that supports the strict interpretation offered by RTBI, and RTBI does not cite any authority in this section of its brief. In fact, the Foreclosure Law states a preference that immaterial errors not be construed to invalidate the legal effect of the notice. 735 ILCS 5/15-1507(c)(1).

¶ 55 RTBI does not deny that it had actual knowledge of the sale nor does it assert that it was confused or misled by the notice. RTBI actually does not give any substantive basis for setting aside the sale based on the purported deficiency and its contentions appear to be aimed at taking advantage of a technical mistake. For a deficiency in a notice of foreclosure to justify setting aside a judicial sale, the movant must demonstrate that the claimed deficiency materially affected its rights or the outcome of the sale and there must be good cause for setting aside the sale.

World Savings & Loan Ass'n v. Amerus Bank, 317 Ill. App. 3d 772, 780 (2000). RTBI has not demonstrated any of those things here.

¶ 56 RTBI argues that because Hanmi Bank was never substituted as the plaintiff in the case and United Central, after the merger, had no standing or capacity to sue, the court should not have confirmed the sale. RTBI point to section 2-1008 of the Illinois Code of Civil Procedure which provides a vehicle for substituting parties when an interest that is subject to litigation is transmitted to a party coming into existence after the commencement of the action. See 735 ILCS 5/2-1008(a). RTBI argues that Hanmi Bank was required to file a motion and be substituted as a party in order for the foreclosure proceedings to be valid.

¶ 57 RTBI provides no authority to support the proposition that a motion for substitution was definitively required or that the proper remedy for not filing such a motion would be to vacate the judgment and vest title in RTBI as it demands as requested relief. Moreover, under the Illinois Banking Act, when two banks merge, the successor in interest to original mortgagee becomes the legal holder of mortgage. *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 9. The successor has standing to bring foreclosure action. *Id.* Thus, by operation of law (*Harris Trust & Savings Bank v. Stephans*, 97 Ill. App. 3d 683, 687 (1981)), Hanmi had standing to pursue the foreclosure action. The only potential issue is that it never moved to put its own name on the case.

¶ 58 There is no reason to reverse the case on this basis. Hanmi, as successor in interest to the mortgage at issue, is properly before the court. Perhaps we could affirm in all other respects and remand the case for Hanmi to be substituted as plaintiff, but we need not take that additional, inefficient step. The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit, and assures that issues are raised only by those parties with a

real interest in the outcome of the controversy. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010). Even if best practices would have been for Hanmi Bank to file a motion to substitute as the plaintiff after the merger, its failure to do so does not demand vacating the foreclosure judgment, let alone restoring ownership to RTBI after its conceded default. RTBI has not shown any prejudice or harm and the trial court did not err by confirming the sale over RTBI's objection to standing.

¶ 59 RTBI also argues that the terms of the sale were unconscionable and that the attendant fraud in the proceedings required that the trial court deny confirmation of the sale. To support its position, RTBI points to the amount of the credit bid compared to its valuation of the property along with other circumstances in the procedure of the sale that it claims amount to fraud. The thrust of RTBI's position is that the failure to disclose Hanmi as the mortgagee while acting in the name of United Central constitutes fraud. RTBI has put forth no actual evidence of fraud nor has it pointed to any authority for the proposition that the circumstances constitute fraud. RTBI points to a couple of errant statements made by United Central in its motion to confirm the sale, but it falls far short of establishing the elements of fraud.

¶ 60 Though only cursorily alluded to in its argument concerning the propriety of the trial court confirming the sale, RTBI did submit an affidavit from Norman Hassinger who stated that he believed the property to be worth between \$1.2 million and \$2 million, certainly more than the \$275,000 successful bid. However, and significantly, Hassinger's estimate was conditioned on obtaining approval to build 60 to 100 units on the land. As we now know, RTBI would never have been able to do so because the property is encumbered. Hassinger offered no opinion about what the value of the land might be subject to the easements held by the individual owners. It is fair to say that, other than to the Association, the encumbered property is not of great utility.

No. 1-15-1869 & 1-15-3168 (cons.)

Moreover, the price that a property commands during a foreclosure sale, even if significantly lower than an appraisal, is not alone sufficient to set aside the sale, let alone to establish fraud.

There are many factors that must be considered to determine if a sales price at a foreclosure sale is unconscionable. RTBI offers no evidence other than the raw numbers and some irrelevant statements about the property. The trial court did not err when it confirmed the judicial sale.

¶ 61

CONCLUSION

¶ 62 Accordingly, we affirm.

¶ 63 Affirmed.