2017 IL App (1st) 160434-U
No. 1-16-0434

Fifth Division
August 4, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ANDRZEJ JASTRZEBSKI, Plaintiff, v. ROBERT FARNIK, 1661 MILWAUKEE INC.; REAL ESTATE INVESTMENT GROUP, INC.; and FIRST SECURITY FEDERAL SAVINGS BANK, Defendants _____ WIESLAW GIZYNSKI, Counterplaintiff, v. 1661 MILWAUKEE, INC.; ROBERT FARNIK; ANGELICA JASTRZEBSKA; and ANDRZEJ JASTRZEBSKI, Counterdefendants (1661 Milwaukee, Inc.; Robert Farnik; and Angelica Jastrzebska, Appellants; Andrzej Jastrzebski and Wieslaw Gizynski, Appellees).	)	Appeal from the Circuit Court of Cook County. No. 02 CH 07645 The Honorable Kathleen M. Pantle, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting a receiver's motion for leave to sell a parcel of nonresidential real property because the trial court properly stayed the execution of its order for 21 days after appellants' counsel withdrew and appellants' arguments as to the propriety of the order are unpersuasive.

¶ 2 The instant appeal arises from the motion of a court-appointed receiver for leave to sell a parcel of nonresidential real property owned by appellant 1661 Milwaukee Inc. (1661 Milwaukee), a dissolved corporation. Appellants Angelica Jastrzebska and Robert Farnik, 1661 Milwaukee's officers, argue that the trial court erred in granting the motion to sell because their attorney had withdrawn his appearance on the same day that the motion was granted and there was a pending motion to remove the receiver that had not yet been decided. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The course of the underlying litigation and the facts surrounding the instant appeal are difficult to understand given the limited record on appeal. However, through careful review of the record and a previous appeal filed by plaintiff, we have been able to glean the most important underlying facts and relate them here.

¶ 5 The instant dispute centers around a parcel of nonresidential real property located at 1661-63 North Milwaukee Avenue in Chicago (property). Plaintiff Andrzej Jastrzebski originally owned the property and transferred it to 1661 Milwaukee by quitclaim deed on February 3, 2000. On February 4, 2000, First Security Federal Savings Bank (First Security) issued a mortgage for a loan in the amount of $393,000, which was secured by the property.[1]

[1] The mortgage listed the borrower as "1661 Milwaukee, Inc." However, the signature line indicated that the borrower was "1661 N. Milwaukee, [I]nc.," and was signed by Robert Farnik as president and Angelica Jastrzebska as secretary. Furthermore, the "corporate acknowledgement" page signed by the notary public states that Robert Farnik and Angelica Jastrzebska signed the mortgage as "President and Secretary for 1661 N. Milwaukee Avenue Inc."

¶ 6 Plaintiff is the father and father-in-law, respectively, of appellants Angelica Jastrzebska[2] and Robert Farnik. Farnik was the sole shareholder and president of appellant 1661 Milwaukee, which was involuntarily dissolved on June 1, 2001, and was also the sole shareholder and president of Real Estate Development Group, Inc.

¶ 7 On April 5, 2001, 1661 Milwaukee appointed plaintiff as a "leasing agent" for the property. Appellants claim that after his appointment, plaintiff "exercised self-help, converted and retained rents he collected" from the property and another property they owned, which they valued at approximately $413,000.[3]

¶ 8 On April 18, 2002, plaintiff filed an eight-count complaint against Farnik and 1661 Milwaukee, and Real Estate Development Group, Inc., "for specific performance, fraud, unjust enrichment and other theories, alleging, *inter alia*, that Farnik failed to fulfill the terms of an oral agreement with respect to certain real estate property." *Jastrzebski v. Farnik*, No. 1-05-0407 (2006) (unpublished order under Supreme Court Rule 23). Plaintiff later amended the complaint to add First Security as an additional defendant. A default judgment was entered on March 27, 2003, and the trial court subsequently executed two judge's deeds transferring title to certain real estate property from Farnik to plaintiff. *Jastrzebski*, No. 1-05-0407, at 4. Farnik and the two corporations later appeared and filed a motion to vacate all of the previous orders and judgments for lack of personal jurisdiction, and the trial court granted the motion to vacate. Plaintiff appealed, and we affirmed the trial court's judgment. *Jastrzebski*, No. 1-05-0407, at 9.

[2] To avoid confusion when discussing the parties, we refer to Andrzej Jastrzebski as plaintiff and Angelica Jastrzebska as Angelica.

[3] Appellants make this claim in their response to the receiver's motion for leave to sell the property that is at issue on appeal.

¶ 9 At some time subsequent to plaintiff's filing of the lawsuit, First Security filed a third-party foreclosure action on the mortgage.[4] In 2004, First Security was purchased by MB Financial Bank, N.A. (MB Financial), and MB Financial subsequently filed a petition to appoint a receiver for the property.

¶ 10 On April 18, 2006, after a hearing on MB Financial's petition to appoint a receiver at which "all parties [were] present by counsel," the trial court granted the petition and appointed Eric Janssen (receiver) as receiver for the property.

¶ 11 On November 7, 2006, MB Financial assigned the loan to The Cadle Company II, Inc. (Cadle). On September 25, 2007, Cadle assigned the loan to Wieslaw Gizynski. [5] According to a separate lawsuit filed by Gizynski against plaintiff, Gizynski and plaintiff "had been friends for some time" and Gizynski agreed to purchase the note and mortgage to the property from Cadle. Under the written agreement between Gizynski and plaintiff, Gizynski was required to "take whatever appropriate legal action with regard to the Mortgage, as directed, in writing, by [plaintiff]." Gizynski and plaintiff agreed to proceed with the mortgage foreclosure action concerning the property. However, plaintiff was preventing the progression of the foreclosure action through his failure to give his approval for Gizynski's attorney to proceed with the action, which led to Gizynski's filing suit against plaintiff in 2013.

¶ 12 On August 14, 2015, the receiver filed a motion for leave to sell the property. The motion stated that a buyer offered to purchase the property from 1661 Milwaukee for $1.3 million in

[4] The date of the foreclosure action is not apparent from the record on appeal.

[5] There are no documents showing these assignments contained in the record on appeal. These dates were provided by appellants in their response to the receiver's motion for leave to sell the property. However, both assignments also appear on the title commitment obtained by the proposed buyer of the property.

March 2015, but the offer was rejected and no counteroffer was made. The motion, however, claimed that the buyer was still willing to purchase the property for that price and attached a letter of intent from the buyer supporting that assertion. According to the motion, the property was currently occupied by a tenant who had not paid rent for the months of April through August 2015, and the receiver had filed a forcible entry and detainer action against the tenant that had been consolidated with the instant case. Under the lease, the tenant's possession would end on August 31, 2015. The motion claimed that with no rental income and no tenant, the property would be operating at a loss. Accordingly, "[t]he Receiver believes the most prudent course of action to conserve the proceeds of the Property is to sell the Property pursuant to the existing offer, with funds to be escrowed until such time as the underlying litigation is resolved." The motion claimed that "[o]ther parties to the litigation have also expressed their interest in seeing the property sold pursuant to [the buyer's] offer." However, as the receiver was not expressly authorized by statute to sell or list the property for sale, the receiver requested the trial court to order the sale of the property with the proceeds to be held in escrow or, alternatively, for an order allowing the receiver to list the property for sale to determine if a better offer could be obtained.

¶ 13 On September 16, 2015, the judge who had presided over the matter since its inception was named presiding judge of the circuit court's criminal division, which unexpectedly delayed the progression of the case.[6]

¶ 14 On October 8, 2015, appellants, through counsel, filed a response to the receiver's motion for leave to sell the property. The response claimed that plaintiff was the true owner of the loan, not Gizynski, and accordingly, Gizynski could not maintain a foreclosure action against

[6] All information concerning the judges assigned to the matter comes from the receiver's emergency motion for leave to sell the property.

appellants. The response further claimed that the mortgage upon which the foreclosure action was based was unenforceable "as it was never signed by the legal owner of the Property." The response claimed that the property was owned by "1661 Milwaukee Inc.," but the mortgage was executed by "1661 N. Milwaukee Inc.," and the corporate acknowledgement page was executed by "1661 N. Milwaukee Avenue Inc." Thus, the response claimed that the mortgage was unenforceable. Furthermore, since the mortgage was unenforceable, the response argued that the receiver must be discharged because his appointment was based on the existence of a valid mortgage. The response further claimed that an order permitting the receiver to sell the property was premature because there had been no judgment entered on the underlying dispute over the property and "should [appellants] be successful in their Counterclaims, then the Mortgage and balance of the Loan would be vitiated."

¶ 15 The response also claimed that the offer to purchase the property was "grossly undervalued and under market," that re-leasing the property to another commercial tenant would be beneficial, and that there was a pending action filed by appellants concerning damage to a wall on the property, which lowered the value of the property. The response also claimed that 1661 Milwaukee had no wish to sell the property, which was "unique."

¶ 16 In November 2015, a new judge was assigned to the case and the parties came before her for the first time on December 16, 2015. On that date, appellants, through counsel, filed a motion to discharge the receiver and to vacate the order appointing the receiver. Similar to the arguments made in their response to the receiver's motion for leave to sell the property, appellants argued that the mortgage was unenforceable and, since the receiver's appointment was based on the mortgage, the receiver was improperly appointed and should therefore be discharged.

¶ 17 On December 30, 2015, the receiver filed a reply in support of his motion for leave to sell the property. The receiver argued that the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2014)) provided that disputes over priorities in an action involving real property were not cause for removal of a court-appointed receiver and, accordingly, appellants' challenges to Gizynski's foreclosure action had no effect on the propriety of the receiver's appointment. The receiver further argued that he was appointed in 2006, so any challenges to his appointment were either barred by *laches* or had been heard and considered by the court at the time of his appointment.

¶ 18 As to appellants' arguments concerning their objection to the sale of the property, the receiver argued that their wishes were not relevant and that his duty was to manage the property as would a prudent person. The receiver also claimed that despite appellants' arguments that the offer undervalued the property, appellants had not made any counteroffer to the prospective buyer and had not had the property appraised.

¶ 19 On January 5, 2016, the receiver filed a response to appellants' motion to discharge the receiver and to vacate the order appointing the receiver. The receiver argued that the mortgage was not unenforceable, due to appellants' apparent authority to execute it and their later ratification of the mortgage. The receiver further argued that the arguments concerning the enforceability of the mortgage were barred by *laches* because it had been nearly 16 years since the mortgage was executed. Finally, the receiver argued that appellants provided no basis to discharge him.

¶ 20 The parties came before the trial court on January 19, 2016, for a hearing on the fully-briefed motion for leave to sell the property, and appellants unexpectedly served a motion to substitute judge as a matter of right. The judge granted the motion for substitution and did

not rule on the receiver's motion. On the same day, appellants, through counsel, filed a reply to their motion to discharge the receiver and to vacate the order appointing the receiver.

¶ 21 On January 21, 2016, the receiver filed an emergency motion for a ruling on his motion for leave to sell the property, claiming that the City of Chicago had filed a complaint concerning municipal code violations which subjected the property to demolition. The motion further claimed that the letter of intent from the prospective buyer of the property was set to expire on January 31, 2016. The motion also claimed that appellants' counsel would be departing at some point prior to February 2, 2016, due to an unrelated criminal matter. The motion claimed that "[t]he motion for substitution of judge was not reasonably foreseeable under the circumstances. The other parties fully expected a ruling on the Motion on the critical date of January 19, 2016, prior to the January 28, 2016[,] status in the building court case, prior to the expiration of the letter of intent, and prior to departure of counsel for the objecting party. A delay in ruling on the Receiver's motion would result in irreparable damage, as the Property is in a precarious condition and only continues to deteriorate. Deferment of ruling on the Motion would also mean additional time for the only objecting party to obtain new counsel and time to bring [counsel] up to speed. By then the letter of intent offering to purchase the Property will have expired. For all the reasons stated it is imperative that a ruling be made on the Motion."

¶ 22 On January 27, 2016, appellants' counsel filed an emergency motion to withdraw, stating that counsel was no longer licensed to practice law in the State of Illinois.

¶ 23 On January 28, 2016, the trial court entered an order granting appellants' counsel leave to withdraw. On the same day, the trial court entered a separate order concerning the receiver's

emergency motion for a ruling on his motion for leave to sell the property. The order provided, in full:

> "This matter, coming to be heard on Receiver's Emergency Motion for Ruling on his fully briefed motion for leave to sell the property, due notice being given and the parties present, the court fully advised in the premises, it is hereby ordered:
>
> 1) The court has considered all the briefs, counsel for objectioner 1661 Milwaukee Inc., Robert Farnik, and Angelica Jastrzebski [*sic*], having still been authorized to practice law at the time objectioners' brief was filed;
>
> 2) The court, ruling from the bench and no oral argument heard, hereby grants the Receiver's motion for leave to sell the property, over the objection of Andrzej Jastrzebski and Angelica Jastrzebski [*sic*];
>
> 3) Execution of this order is stayed for 21 days, through February 18, 2016, for objectioners to obtain new counsel;
>
> 4) Angelica Jastrzebski's [*sic*] request for 304(a) language is denied;
>
> 5) This case is continued for status on March 4, 2016 at 10:00 a.m.
>
> 6) Counsel for objectioners' motion for leave to withdraw as counsel is granted by separate order."

¶ 24 On February 16, 2016, 1661 Milwaukee and Farnik[7] filed an emergency motion to vacate the January 28, 2016, order or, in the alternative, to extend the stay of the order's enforcement. The motion claimed that the parties were engaged in settlement discussions "which Defendants anticipate would result in the resolution of essentially most matters before this Court," but that more time was needed to finalize a possible settlement; the

[7] Angelica was not listed as a party to the motion.

motion also claimed that appellants had received a cash offer of $1.35 million for the property, which was more than the offer received by the receiver. The motion additionally argued that the trial court should not have granted the receiver's emergency motion for leave to sell the property after granting appellants' counsel leave to withdraw, and that staying the execution of the judgment for 21 days did not cure the error because appellants were now forced to seek to vacate that order. The motion also claimed that there had been a fully-briefed motion to discharge the receiver pending at the time of the trial court's order, which should have been decided first, because if that motion was granted, it would render the receiver's motion for leave to sell the property moot. The motion claimed that Angelica raised the pending motion before the trial court during the January 28, 2016, hearing, but the trial court "disregarded the pending briefed Motion to Discharge the Receiver, and granted the Motion to Sell."

¶ 25 On February 17, 2016, the trial court denied the motion to vacate or to extend the stay of enforcement, but ordered the receiver to consider the cash offer to purchase the property that appellants had received. On February 19, 2016, the receiver filed a receiver's report, in which he stated, *inter alia*, that he had considered the offer and believed that it would be prudent to complete the first sale, which required only a closing, rather than pursuing the new offer, which would require negotiation, completion of due diligence, and the potential of losing the offer.

¶ 26 On February 24, 2016, appellants filed a notice of appeal, and this appeal follows. We take the matter for consideration on the appellants' brief and the record alone because the appellees failed to file any responsive briefs, according to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 27 ANALYSIS

¶ 28 On appeal, appellants claim that the trial court erred in granting the receiver's motion for leave to sell the property on the same date as it granted appellants' counsel leave to withdraw. Appellants further argue that the trial court erred in granting the receiver's motion because they objected to the sale and there were pending matters that should have been resolved prior to a decision on the motion. We discuss the procedural issue of the timing of the trial court's order first, then consider the substantive arguments concerning the merits of the court's granting of the motion for leave to sell the property.

¶ 29 We note that we have jurisdiction over the instant appeal under Illinois Supreme Court Rule 307(a)(3) (eff. Jan. 1, 2016), which permits a party to file an interlocutory appeal from an order "giving or refusing to give other or further powers or property to a receiver or sequestrator already appointed." In the case at bar, the order granting the receiver leave to sell the property gave "further powers" to the receiver. Accordingly, we have jurisdiction to consider appellants' claims on appeal and proceed to the merits of appellants' arguments.

¶ 30 I. Timing of Order

¶ 31 We first consider appellants' claim that the trial court erred by granting the receiver's motion for leave to sell the property on the same day that appellants' counsel withdrew from their representation. As noted, on August 15, 2015, the receiver filed a motion for leave to sell the property to which appellants filed a response. On January 19, 2016, the parties appeared before the trial court for a hearing on the fully-briefed motion for leave to sell the property, and appellants unexpectedly served a motion to substitute judge as a matter of right. The judge granted the motion for substitution and did not rule on the motion for leave to sell the property. On January 21, 2016, the receiver filed an emergency motion for a ruling on his

motion for leave to sell the property. Appellants' counsel filed an emergency motion to withdraw on January 27, 2016, stating that counsel was no longer licensed to practice law. On January 28, 2016, the trial court granted appellants' counsel's withdrawal motion. At the same hearing, the trial court also granted the motion to sell and stayed it for 21 days.

¶ 32 On appeal, appellants argue that the trial court violated Illinois Supreme Court Rule 13(c) (eff. July 1, 2013) when it granted the receiver's motion on the same day that it granted appellant's counsel's withdrawal motion because it deprived appellants of their statutory 21-day period to arrange for substitute counsel. Although our supreme court rules are not statutes, "they are neither aspirational nor are they mere suggestions; 'they have the force of the law, and the presumption must be that they will be obeyed and enforced as written.' " *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002) (quoting *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995)). To the extent that our decision turns on the interpretation of a supreme court rule, we apply a *de novo* review. *Reyes v. Menard Inc*., 2012 IL App (1st) 112555, ¶ 14; *People v. Thompson*, 238 Ill. 2d 598, 606 (2010) ("the proper interpretation of our supreme court rules is reviewed *de novo*"). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 33 Illinois Supreme Court Rule 13(c)(2) (eff. July 1, 2013) provides:

> "An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, unless another attorney is substituted, he must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw by personal service, certified mail, or a third-party carrier, directed to the party represented by him at his last known business or residence address. Such

> notice shall advise said party that to insure notice of any action in said cause, he should retain other counsel therein or file with the clerk of the court, within 21 days after entry of the order of withdrawal, his supplementary appearance stating therein an address at which service of notices or other documents may be had upon him."

¶ 34 Rule 13 allows an attorney to end the attorney-client relationship with or without cause so long as the client is not left in a position where he is prejudiced. *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 41 (citing *In re Rose Lee Ann L.*, 307 Ill. App. 3d 907, 912 (1999)). "Rule 13 requires a continuance of at least 21 days after the order granting withdrawal so that the party can retain counsel or enter her own supplementary appearance." *In re Marriage of Miller*, 273 Ill. App. 3d 64, 69 (1995).

¶ 35 In considering whether Rule 13 was violated in the instant case, we find instructive the recent case of *Olive Portfolio Alpha, LLC, v. 116 West Hubbard Street, LLC,* 2017 IL App (1st) 160357, which has very similar facts to the present case. In that case, the trial court entered a judgment of foreclosure and sale in the plaintiff's favor and later granted the plaintiff's motion to confirm the sale on the same day it granted the defendant's counsel's motion to withdraw. *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶¶ 1, 16, 17. On appeal, the defendant argued that "the trial court erred in simultaneously confirming the judicial sale and granting its counsel's motion to withdraw" because it failed to grant 21 days to obtain new counsel and file a response to the motion to confirm the judicial sale. *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶ 49. Specifically, the defendants argued that the trial court "artificially stag[ed] the sequence of the orders by *a single moment* so that the Sale Confirmation Motion was *technically granted first*, which allowed the court to avoid the requirements of [Rule 13] and prejudiced defendant." (Emphases added.) *Olive Portfolio*

Alpha, LLC, 2017 IL App (1st) 160357, ¶ 49. However, the appellate court found the trial court to be in compliance with Rule 13(c) and affirmed its decision for three reasons. First, it found that the trial court does not have to rule on motions in a specified order and the plaintiff's motion to confirm the sale was filed prior to counsel's motion to withdraw. Therefore, simultaneously confirming the judicial sale and granting the defendant's motion to withdraw was not prejudicial. *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶ 54. Second, it found that the trial court complied with Rule 13(c) because "no action occurred on the case during the 21-day period after the motion to withdraw was granted." *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶ 54. And third, it found that "even if the trial court erred in granting the motion to confirm the sale without allowing a 21-day continuance, defendant has not set forth any claim of how it was prejudiced." *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶ 55.

¶ 36 In the case at bar, as in *Olive Portfolio Alpha, LLC*, we do not place any significance on the order in which the trial court ruled on the motions when deciding this case because both were essentially granted simultaneously since the trial court heard both at the same hearing. "Simultaneous" is defined as "a term that is applied to the happening at the same time or the same instant." Black's Law Dictionary 712 (9th ed. 2009). In other words, the trial court granted the two motions at essentially the same time.

¶ 37 The trial court was able to simultaneously rule on the motions in the same hearing here because appellants admit in their brief that the receiver filed the motion for leave to sell "several months" before the withdrawal motion, during which time appellants' counsel had "been authorized to practice law." This is analogous to *Olive Portfolio, LLC*, where the trial court did not prejudice the defendant because his counsel filed his motion to withdraw after

the motion to confirm the sale was filed. As earlier noted, the purpose of Rule 13 is to ensure that the client of withdrawing counsel is not left in a position where he is prejudiced. *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 41 (citing *In re Rose Lee Ann L.*, 307 Ill. App. 3d 907, 912 (1999)). Here, even after the case was reassigned, there was a period of time during which the receiver's motion could have been granted and appellants' counsel remained licensed to practice law. Furthermore, the trial court expressly stated in the order that "[t]he court has considered all the briefs, counsel for objectioners 1661 Milwaukee Inc., Robert Farnik, and Angelica Jastrzebski, having still been authorized to practice law at the time the objectioners' brief was filed *** and no oral argument heard." Since appellants fully argued this issue in written briefs and the motion for leave to sell could have been granted without prejudicial effect before appellants' counsel withdrew, we find no issue with the trial court ruling on both motions at the same hearing.

¶ 38 Next, the trial court did not prejudice the appellants here because it did not take any action on the case during the 21-day period following counsel's withdrawal. Appellants' brief argues that "while the trial court acknowledged the existence of a 21-day stay, it *did not* continue the hearing on the Receiver Motion and instead, included language that the execution of the January 28, 2016, order allowing the sale of the Property was stayed for 21-days." (Emphasis added). Appellants do not explain how granting a stay, rather than a continuance of the hearing, deprived them of any rights. We observe that the trial court did not subject appellants to proceedings without representation; rather, it concluded the hearing and stayed the order until defendants were able to obtain new representation. Since the trial court stayed the order granting the motion for leave to sell, it did not immediately impact the parties' legal rights. "A stay order seeks to preserve the status quo existing on the date of its

entry and does not address in any way the merits of the underlying dispute." *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 68 (2007); *City of Chicago v. Hunter*, 14 Ill. App. 3d 911 (1973) ("The purpose of a stay order is to stay all future proceedings and to restrain the appellee from taking affirmative action to enforce the judgment"). "[A court] may consider factors such as the orderly administration of justice and judicial economy in determining whether to stay proceedings." *Estate of Bass ex rel. Bass*, 375 Ill. App. 3d at 68. In the case at bar, the trial court prevented the receiver from proceeding with the sale until appellants were given sufficient time to substitute counsel by ordering the execution of the order to be stayed for 21 days. See *Northern Trust Co.*, 265 Ill. App. 3d at 411 ("the 21-day continuance granted to defendant after allowing his counsel to withdraw was sufficient time to retain counsel"). Therefore, we agree with the *Olive Portfolio Alpha, LLC,* court that such an action did not prejudice appellants.

¶ 39 Finally, we share the position taken by the court in *Olive Portfolio Alpha, LLC,* that a deprivation of the 21-day continuance is not necessarily reversible error in and of itself but there also needs to be a prejudicial effect. *Olive Portfolio Alpha, LLC*, 2017 IL App (1st) 160357, ¶ 55 ("even if the trial court erred in granting the motion to confirm the sale without allowing 21-day continuance, defendant has not set forth any claim of how it was prejudiced"). Here, the trial court specifically noted in the order granting the motion for leave to sell that "[e]xecution of this order is stayed for 21 days, through February 18, 2016, for [appellants] to obtain new counsel." The trial court thus was cognizant of appellants' right to substitute counsel and explicitly endorsed the exercise of it in the order. We again note the execution of the order at issue here was stayed for the exact amount of time appellants were

entitled to under Rule 13 and thus, the trial court did not deprive appellants their right to substitute counsel.

¶ 40 We are unpersuaded by appellants' arguments to the contrary because each of the cases cited in their brief is distinguishable from the present matter. Defendants first cite *In re Marriage of Miller*, 273 Ill. App. 3d 64 (1995), to argue that the trial court was required to grant a 21-day continuance after the order granting withdrawal so that defendants could substitute counsel. In that case, "the trial court granted the motion to withdraw on the very eve of trial, but denied respondent's motion to continue to seek new representation." *In re Marriage of Miller*, 273 Ill. App. 3d at 68. As a result, the respondent "was placed in a position of going forward on her case without the benefit of representation as a result of the trial court granting her attorney's motion to withdraw." *In re Marriage of Miller*, 273 Ill. App. 3d at 68. In the instant case, however, appellants were not denied a 21-day continuance, nor were they placed in a position of going forward on their case without the benefit of representation. The trial court granted the motion and stayed the execution of it for 21 days to allow appellants the opportunity to substitute counsel. Moreover, the motion for leave to sell the property had been fully briefed while appellants were still represented by counsel and the trial court's order was expressly based on the briefs, with no additional oral argument. Thus, the prejudicial effect found in *Miller* is absent from the present case. *Ali v. Jones*, 239 Ill. App. 3d 844 (1993), is distinguishable from the instant case for the same reasons. In that case, the trial court gave the plaintiff's attorney leave to withdraw but ordered that the trial by jury would begin in less than 21 days after the withdrawal, denied the plaintiff's motion for a continuance to obtain new counsel, and dismissed his case with prejudice 10 days after it granted the withdrawal motion. *Ali*, 239 Ill. App. 3d at 846-47. Once again, the trial court

in the instant case did not proceed with the case and instead stayed the matter for 21 days so that appellants could substitute counsel.

¶ 41 Finally, we find appellants' reliance on *Freeborn & Peters v. Professional Seminary Associates, Inc.*, 176 Ill. App. 3d 714 (1988), to be unpersuasive. In that case, the defendants filed a motion to dismiss in lieu of answer. *Freeborn & Peters*, 176 Ill. App. 3d at 717. The trial court granted the defendant's motion to dismiss counts III and IV and did not direct defendants to answer the original counts I and II, but only to answer the amended complaint. *Freeborn & Peters*, 176 Ill. App. 3d at 719. The plaintiffs chose not to amend their complaint. *Freeborn & Peters*, 176 Ill. App. 3d at 719. Since the defendants did not answer the original counts I and II, the trial court entered a default judgment against the defendant for failure to answer the plaintiff's complaint on the same day that the defendant's attorney withdrew. *Freeborn & Peters*, 176 Ill. App. 3d at 716-717. The appellate court reversed, reasoning that "substantial injustice was done to [the defendant] by the entry of default on the same date that [the defendant's] attorney was granted leave to withdraw, and also by the subsequent scheduling of the case for prove up 22 days later." *Freeborn & Peters*, 176 Ill. App. 3d at 719. Upon review of the trial court's conduct, the appellate court noted that "it was manifestly unfair for the trial court to enter the default order on the same day that [the defendant's] attorney withdrew" because it defaulted the defendant "for failure to answer counts I and II, when the trial court's order of October 8, 1986, did not specifically direct [the defendant] to answer counts I and II." *Freeborn & Peters*, 176 Ill. App. 3d at 719. The substantial injustice found in that case is absent from the instant case. Unlike the defendant in *Freeborn & Peters*, appellants here had the opportunity to respond to the receiver's motion for leave to sell and they did so in briefs submitted by their counsel before counsel withdrew.

Nor did appellants experience substantial injustice from the trial court's procedural instructions or other improper conduct.

¶ 42 For the foregoing reasons, we do not find that the trial court violated Rule 13(c) in granting the withdrawal motion and the motion for leave to sell the property at the same hearing.

¶ 43 II. Propriety of Order

¶ 44 Since we have determined that the trial court did not err in granting the motion for leave to sell at the same hearing as appellants' counsel's leave to withdraw, we now turn to considering whether the trial court properly granted the motion for leave to sell on its merits. As an initial matter, we note that the standard of review on this issue is not entirely clear and is not discussed by appellants in their brief. Our supreme court has previously found that "[t]he appointing of a receiver is an exercise of equity jurisdiction and rests largely in the discretion of the appointing court, the object being to secure and preserve the property for the benefit of all concerned so that it might be subjected to such order as a court might render." *People ex rel. Scott v. Pintozzi*, 50 Ill. 2d 115, 123 (1971). However, through the 1987 enactment of the Foreclosure Law, the legislature "employ[ed] mandatory language and drastically curtail[ed] a trial court's discretion in deciding motions to appoint a receiver." *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 164 (2010). Under section 15-1702(a) of the Foreclosure Law, "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." 735 ILCS 5/15-1702(a) (West 2014). "Shall" is expressly defined in the Foreclosure Law to mean "mandatory and not permissive." 735 ILCS 5/15-1105(b) (West 2014). The use of the term "shall" has been considered "persuasive evidence that trial court[s] were not intended to possess discretion regarding the award of

possession once the [Foreclosure Law's] requirement[s] are met." *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 867 (1993). Thus, courts have recently applied a *de novo* standard of review to questions of whether a trial court properly appointed a receiver, at least in situations in which no evidentiary hearing was held. See, *e.g.*, *108 N. State Retail*, 401 Ill. App. 3d at 165; *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010); *Mellon Bank*, 265 Ill. App. 3d at 868.

¶ 45 However, in the case, at bar, it is not the appointment of the receiver itself that is at issue—it is the trial court's granting the receiver the power to sell the property that is at issue on appeal. The scope of a receiver's powers are set forth in section 15-1704(b) of the Foreclosure Law, which provides that the receiver "shall have full power and authority to operate, manage and conserve [the mortgaged real estate], and shall have all the usual powers of receivers in like cases." 735 ILCS 5/15-1704(b) (West 2014). Additionally, a receiver appointed under the Foreclosure Law "must manage the mortgaged real estate as would a prudent person, taking into account the effect of the receiver's management on the interest of the mortgagor." 735 ILCS 5/15-1704(c) (West 2014). The Foreclosure Law sets forth a number of specific duties that the receiver must undertake, as well as providing that the receiver "may take such other actions as may be reasonably necessary to conserve the mortgaged real estate and other property subject to the mortgage, or as otherwise authorized by the court." 735 ILCS 5/15-1704(c)(9) (West 2014). Accordingly, the Foreclosure Law gives back to the trial court a certain amount of discretion in authorizing a receiver's actions when otherwise not prescribed by the statute. Given that the trial court is provided with discretion in authorizing a receiver's actions, the general rule providing that receivership issues are subject to an abuse of discretion standard of review applies to the situation present

in the case at bar. We note, however, that our decision would be the same under even a *de novo* standard of review.

¶ 46 In the case at bar, appellants do not argue that a trial court may not permit a receiver to sell the mortgaged property as part of its powers under the Foreclosure Law. Instead, they make three arguments concerning the trial court's grant of the receiver's motion under the factual circumstances present in the instant case. First, they argue that the property is unique and should not be sold. Second, they argue that the relief granted to the receiver is premature because there was no underlying judgment granted in the underlying case. Finally, they argue that there was a motion to discharge the receiver pending at the time that the trial court granted the motion for leave to sell, which should have been decided first. We find all three of these arguments unpersuasive.

¶ 47 First, appellants claim that the property should not be sold because it is "unique." However, as appellants correctly note, all real property is considered "unique," especially in the context of determining whether specific performance is appropriate for a breach of contract action. See, *e.g.*, *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 476 (2004); *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971; 981 (1985); *Ashline v. Verble*, 55 Ill. App. 3d 282, 283-84 (1977). Appellants' argument, then, would prevent the owner of real property from ever being involuntarily deprived of its ownership, which is certainly not the state of the law. Indeed, courts every day enter orders disposing of real property, whether through foreclosure, marital dissolution proceedings, or eminent domain, to name a few possibilities. We cannot find that the mere fact that a parcel of real property was involved deprives the trial court of any authority to permit the receiver to sell it.

¶ 48 We are similarly unpersuaded by appellants' arguments that the relief granted to the receiver is premature. Appellants argue that there was no judgment entered against them in the lawsuit filed by plaintiff, nor was there a judgment of foreclosure entered against them. Appellants also argue that they have affirmative defenses in those cases that could result in their prevailing when the cases are considered on their merits. However, appellants' arguments fail to recognize the nature of the receiver's appointment, which by definition occurs during the pendency of foreclosure proceedings.

¶ 49 As noted, the receiver was appointed under the Foreclosure Law. Under section 15-1701(b)(2) of the Foreclosure Law, in the case of nonresidential real property, "if (i) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (ii) the court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause, the mortgagee shall upon request be placed in possession of the real estate, except that if the mortgagor shall object and show good cause, the court shall allow the mortgagor to remain in possession." 735 ILCS 5/15-1701(b)(2) (West 2014). Thus, "the Foreclosure Law creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding." *108 N. State Retail*, 401 Ill. App. 3d at 164; *Mellon Bank*, 265 Ill. App. 3d at 867; *Travelers Insurance Co. v. La Salle National Bank*, 200 Ill. App. 3d 139, 143 (1990). Once the mortgagee is awarded possession of the property, "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." 735 ILCS 5/15-1702(a) (West 2014). Thus, under the terms of the Foreclosure Law, the mortgagee—and, by extension, the receiver—has the right to possession of the contested property while the foreclosure proceedings are ongoing. Once the receiver is appointed, the receiver is charged with

"manag[ing] the mortgaged real estate as would a prudent person" (735 ILCS 5/15-1704(c) (West 2014)), which may include "tak[ing] such other actions as may be reasonably necessary to conserve the mortgaged real estate and other property subject to the mortgage, or as otherwise authorized by the court" (735 ILCS 5/15-1704(c)(9) (West 2014)). Appellants do not argue that these actions may not include selling the real property itself, but simply argue that the trial court should not have permitted it under these factual circumstances. Thus, any actions taken by the receiver necessarily occur prior to the entry of a judgment of foreclosure, and we do not find it improper for the trial court to grant the receiver leave to sell the property despite the pendency of unresolved proceedings.

¶ 50 We additionally note that plaintiff's complaint was first filed in April 2002, and the receiver was appointed in April 2006 in connection with the previously-filed foreclosure complaint.[8] It was not until August 2015 that the receiver filed a motion for leave to sell the property, which was granted in January 2016. We see no way that an order that was entered nearly a decade after the receiver was first appointed and almost 14 years after the commencement of the lawsuit can in any way be considered "premature," despite the fact that these matters have not yet proceeded to judgment.

¶ 51 Finally, we find unpersuasive appellants' arguments that the motion to discharge the receiver should have been decided prior to the grant of the receiver's motion because if the receiver was discharged, his motion would be rendered moot. First, the motion to discharge the receiver had no basis in the Foreclosure Law, which provides that "[t]he court may remove a receiver upon a showing of good cause ***." 735 ILCS 5/15-1704(h) (West 2014). In the case at bar, the sole basis for the motion to discharge the receiver was appellants'

[8] The date of the foreclosure complaint is not contained in the record on appeal. However, the foreclosure complaint was certainly filed prior to the appointment of the receiver.

attack on the validity of the mortgage itself, which provided the basis for appointment of the receiver. However, the Foreclosure Law specifically provides that "[a] receiver shall not be removed solely on account of being designated by a mortgagee later determined not to have priority." 735 ILCS 5/15-1702(d) (West 2014). Thus, appellants' attacks on the underlying mortgage have no effect on the receiver's status as such and cannot constitute "good cause" to remove the receiver as a matter of law. Moreover, as appellants acknowledge in their brief, they made the same arguments concerning the validity of the mortgage in their response to the motion for leave to sell the property. Consequently, the trial court was well aware of appellants' arguments at the time that it granted the receiver's motion. Therefore, we cannot find that the trial court erred in granting the receiver's motion without first disposing of appellants' motion to discharge the receiver.

¶ 52 As a final matter, appellants argue that plaintiff and appellants objected to the sale of the property, as did Gizynski, the mortgagee, since he was required to act at the direction of plaintiff. Thus, according to appellants, "since all parties to the action *** objected to the Receiver's Motion to Sell the Property," the motion should have been denied for that reason alone. However, as noted, the receiver is required to "manage the mortgaged real estate as would a prudent person" (735 ILCS 5/15-1704(c) (West 2014)), not according to the wishes of the parties. Accordingly, appellants' and plaintiff's wishes are irrelevant here so long as in discharging his duties, the receiver has "tak[en] into account the effect of the receiver's management on the interest of the mortgagor" (735 ILCS 5/15-1704(c) (West 2014)), which there is no claim the receiver failed to do. We also note that appellants' claims as to Gizynski's wishes—that he indirectly objected to the sale—appear to be at odds with his actual wishes, as the record shows that he is currently engaged in litigation with plaintiff in

order to proceed with the foreclosure. We thus cannot find that the trial court erred in granting the receiver's motion for leave to sell the property.

¶ 53 CONCLUSION

¶ 54 For the reasons set forth above, we find that the trial court properly granted the receiver's motion for leave to sell the property.

¶ 55 Affirmed.