2018 IL App (2d) 170112-U
No. 2-17-0112
Order filed January 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MTGLQ INVESTORS, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CH-441
	)	
ANDRZEJ POWROZNIK, ANDRZEJ POWROZNIK, as TRUSTEE UNDER A TRUST AGREEMENT DATED FEBRUARY 11, 2009, AND ANY AMENDMENTS THERETO KNOWN AS THE ANDRZEJ POWROZNIK REVOCABLE TRUST,	)	
	)	
Defendants-Appellants	)	Honorable
	)	Robert W. Rohm,
(Mahesh Patel, Intervenor-Appellee).	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: By granting mortgagee right to secure noncommercial property in the event of default, mortgagee was authorized to take possession of subject property; defendant could not establish right to use and occupancy of subject property having failed to undermine plaintiff's right to possess same; any right to defendant for restitution following reversal of initial judgment in this case terminated when plaintiff established right to possession.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Andrzej Powroznik, appeals an order of the circuit court of Du Page County granting the motion of plaintiff, MTGLQ Investors, L.P., for possession of the subject property. Defendant also contends that the trial court should have been granted his motion for use and occupancy of the subject property and that he is entitled to restitution. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 In April 2005, defendant executed a mortgage in favor of plaintiff's predecessor in interest (Mid America Bank, FSB). Defendant subsequently conveyed the mortgaged property ("the subject property") to a revocable trust, of which defendant was the trustee. A complaint to foreclose was filed on January 26, 2010, and MTGLQ was later substituted as plaintiff. Plaintiff purchased the subject property at a foreclosure sale and conveyed it to intervenor Mahesh Patel (who has also filed a brief in this appeal).

¶ 6 In December 2012, defendant, in his capacity as trustee, filed a motion to quash service on the trust (service was accomplished in Cook County by a private investigator, but without a special appointment by a court). The trial court denied defendant's motion; however, this court reversed. We held service was improper and that the defect in service was apparent on the face of the record. See *MTGLQ Investors, L.P. v. Powroznik*, 2015 IL App (2d) 140838-U, ¶ 32. As the defect was apparent on the face of the record, Patel could not claim protection as a *bona fide* purchaser. *Id.*

¶ 7 On remand, plaintiff filed a motion for possession and defendant filed a motion for use and occupancy. The trial court granted the former and denied the latter. Defendant then initiated

this interlocutory appeal. Additional facts will be discussed as they pertain to the issues presented.

¶ 8 III. ANALYSIS

¶ 9 On appeal, defendant raises three issues. First, he contends that the trial court erred in granting plaintiff's motion for possession. Second, he argues that he should have been granted use and occupancy of the premises. Third, he claims that he is entitled to restitution. We will address these issues *seriatim*.

¶ 10 A. PLAINTIFF'S MOTION FOR POSSESSION

¶ 11 With respect to nonresidential real estate, section 15 of the Illinois Mortgage Foreclosure Law (Act) (735 ILCS 5/15-1701(b)(2) (West 2016)) provides, in pertinent part, as follows:

> "[I]f (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."

Our review over a trial court's application of this provision is *de novo*. *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 867-68 (1993). Plaintiff first points out that defendant filed several pleadings that indicate he did not reside at the subject property. Hence, the subject property does not qualify as residential. See 735 ILCS 5/15-1219 (West 2016).

¶ 12 As a preliminary matter, we reject defendant's claim that the subject property was only subject to possession by the mortgagee (plaintiff) if it had been abandoned. Defendant bases this claim on a federal case that holds that "securing" property does not entail dispossessing a mortgagor from his or her home. *Boyd v. U.S. Bank, N.A.*, 787 F. Supp. 2d 747, 757 (N.D. Ill.

2011). That case involves residential property, so it provides little guidance here. *Id.* at 756. Moreover, section 15-1701(b)(2) does not make abandonment a precondition to its application. See 735 ILCS 5/15-1701(b)(2) (West 2016). We, of course, may not add any exceptions, limitations, or conditions to a statue in derogation of its plain meaning. *Holly v. Montes*, 231 Ill. 2d 153, 159 (2008).

¶ 13 Turning to the first element set forth in section 15-1701(b)(2), we must examine the terms of the mortgage and see whether it authorizes plaintiff to take possession of the subject premises. Plaintiff points to the following language from paragraph 9 of the mortgage document in support of its claim that the mortgage allows it to take possession of the subject premises in the event of a default:

> "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument * * *, then Lender may do and pay for whatever is reasonable or appropriate to protect the Lender's interest in the Property and rights under this Security Instrument, including * * * securing and/or repairing the Property."

"Securing" is defined as "includ[ing], but not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off." Resolution of this issue turns on whether "secure" entails taking possession of. Parenthetically, we note that defendant cites a section of the mortgage agreement dealing with abandonment. However, the material quoted above dealing with nonperformance is an alternative to the material pertaining to abandonment. Hence, it controls here.

¶ 14 One meaning of "secure" is "to come into secure possession of." Webster's Third New International Dictionary 2053 (2002). Moreover, the mortgage document itself includes

changing the locks in the definition of secure. Changing the locks would surely dispossess the mortgagor from the subject property. Thus, we conclude that "secure" entails taking possession of the subject property. *C.f.*, *Moore v. State*, 182 Ind. App. 552, 554 (1979) (defining "exert control over property" to include "secure"). Hence, we conclude that the mortgage authorizes plaintiff to take possession of the subject property.

¶ 15 Arguing for a contrary result, defendant contends that a mortgagee's right to possess must be explicitly stated in a mortgage document. In support, defendant cites *Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010). However, while this case does involve a mortgage agreement explicitly stating that the mortgagee may seek appointment of a receiver in the event of default, it does not state that such express language is necessary. Thus, it provides no support for defendant's premise (in fact, the issue was not in dispute (*Centerpoint Properties Trust*, 398 Ill. App. 3d at 392 ("[T]he parties agree that [the plaintiff] has satisfied the two requirements entitling it to possession."))). Defendant also cites *Bank of America, N.A. v. 108 North State Retail LLC*, 401 Ill. App. 3d 158, 166 (2010). In that case, whether the loan document authorized the mortgagee to take possession of the property was not at issue. *Id.* ("Defendants do not contest that the loan documents authorize the plaintiff to take possession of the property"). As such, this case is of no assistance to defendant either. Defendant also cites *In re Wheaton Oaks Office Partners Limited Partnership*, 27 F.3d 1234, 1241 (7th Cir. 1994). That case merely restates the general rule that absent a provision in a mortgage authorizing a mortgagee to take possession of a property, the mortgagee must wait until after the conclusion of foreclosure proceedings to do so. Accordingly, defendant's claim that a mortgagee's right to possess must be explicitly stated in a mortgage document finds no support in the case law.

¶ 16 Defendant complains that nothing in the mortgage allowed plaintiff to put Patel in possession of the property. While true, we see no limitation on what plaintiff can do once it properly took possession in accordance with the mortgage document. Further, defendant cites no authority in support of this contention, thereby forfeiting it. *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. Indeed, the only authority defendant cites here concerns the fact that Patel cannot claim protection as a *bona fide* purchaser. See *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 30. However, Patel is not claiming protection as a *bona fide* purchaser—plaintiff is claiming its statutory right to possession. As such, defendant's citation is inapposite.

¶ 17 In sum, we find defendant's argument that the trial court erred in awarding possession to plaintiff unpersuasive.

¶ 18 B. DEFENDANT'S MOTION FOR USE AND OCCUPANCY

¶ 19 Defendant next argues that the trial court erred in denying his motion for use and occupancy of the subject property. Defendant's entire argument is premised on Patel being unable to demonstrate that he is a *bona fide* purchaser. See *U.S. Bank National Ass'n v. Johnston*, 2016 IL App (2d) 150128, ¶ 45. He does not address plaintiff's interest in the subject property pursuant to section 15 of the Act (735 ILCS 5/15-1701(b)(2) (West 2016)). If plaintiff has a valid statutory right to possession and plaintiff has transferred that right to Patel, Patel's status as a *bona fide* purchaser is beside the point. Patel's possession is a consequence of plaintiff's right to possess. As such, a prerequisite to defendant succeeding on this argument was defendant prevailing on his first one, thereby eliminating plaintiff's statutory interest. As explained above, we have rejected defendant's first argument. He cannot, therefore prevail here. Quite simply, defendant makes no attempt to explain how he could be entitled to use and occupancy of the subject premises while plaintiff is entitled to possession of the same.

¶ 20 C. RESTITUTION

¶ 21 Defendant's final argument is that he is entitled to restitution following this court's reversal of the initial judgment in this case for lack of personal jurisdiction. See *MTGLQ Investors, L.P. v. Powroznik*, 2015 IL App (2d) 140838-U, ¶ 2. It is true that " '[o]n reversal of a judgment under which one of the parties has received benefits, he is under an obligation to make restitution.' " *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 381-82 (1985) (quoting 3 Ill. L. & Prac. *Appeal & Error* 1004 (1953)). To state a cause of action for unjust enrichment, a plaintiff must set forth that a defendant has retained a benefit to the plaintiff's detriment and that the retention of the benefit violates the fundamental principles of equity, justice, and good conscience. *HPI Healthcare Services, Inc. v. Mount Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989).

¶ 22 Defendant contends that plaintiff "is not entitled to be placed in possession of the property until it makes full restitution to [d]efendant." This is a proposition of law, and defendant provides no legal authority to support it. Indeed, it is not apparent to us how plaintiff's alleged failure to make restitution limited the trial court's authority to grant plaintiff's motion made in accordance with section 15 of the Act (735 ILCS 5/15-1701(b)(2) (West 2016)). The statute mentions no such condition. See 735 ILCS 5/15-1701(b)(2) (West 2016). It would seem to us that any right defendant had to possession following remand from this court after the first appeal would expire when plaintiff made an appropriate showing under the Act. See 735 ILCS 5/15-1701(b)(2) (West 2016). In any event, defendant's failure to cite authority supporting the existence of such a limitation forfeits the issue. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19.

¶ 23 IV. CONCLUSION

¶ 24 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 25 Affirmed.