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2018 IL App (3d) 170630-U

Order filed October 16, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

COUNTRYLANE CONDOMINIUM ASSOCIATION,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,)	
v.)	Appeal No. 3-17-0630
)	Circuit No. 16-LM-1621
JAMAL BARGHOUTHI and all unknown occupants,)	
Defendant-Appellee.)	Honorable Theodore Jarz, Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* A condominium association was not entitled to recover pre-foreclosure common assessments from a foreclosure purchaser because the sale notice in the foreclosure proceedings failed to give the foreclosure purchaser notice of the lien.
- ¶ 2 A condominium association appealed a judgment in which it was granted unpaid common assessments against a foreclosure purchaser, but was denied the recovery of pre-foreclosure sale amounts.

¶ 3

FACTS

¶ 4

The plaintiff, Countrylane Condominium Association, brought suit against the defendants, Jamal Barghouthi and all unknown occupants, under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2014)) to recover unpaid common expenses for the property located at 5 Elm Court in Bolingbrook, Illinois (hereinafter “unit”). Barghouthi had acquired the unit on March 6, 2013, via a sheriff’s deed issued in a judicial foreclosure proceeding. A lawsuit was previously filed against the prior owner, resulting in a judgment entered on January 28, 2011, in favor of the Association.

¶ 5

The matter proceeded to trial, and the circuit court entered judgment in favor of the Association and against Barghouthi and *in rem* against the unit in the amount of \$1640.50, which included \$70 in common expenses, \$1,174 in attorney’s fees, and costs of \$360.50, all incurred after Barghouthi purchased the unit. The circuit court did not award any pre-foreclosure amounts to the Association. Both parties filed motions to reconsider. Upon reconsideration, the circuit court affirmed in a written order. The written order specified that the circuit court found that sections 9-102(7) and 9-111.1 of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(7), 111.1 (West 2014)) did not preclude a mitigation defense. Under the specific facts of the case, where the sheriff’s notice of sale failed to give notice of the lien in compliance with section 9(g)(5) of the Condominium Property Act (765 ILCS 605/9(g)(5) (West 2014)), the lien was unenforceable against Barghouthi. The Association appealed.

¶ 6

ANALYSIS

¶ 7

The Association argues that the circuit court erred in refusing to award it all amounts owed on the unit for unpaid condominium assessments under section 9(g)(4) of the Condominium Property Act (765 ILCS 605/9(g)(4) (West 2014)). The Association contends that

it had no duty to mitigate and that any deficiencies in the notice of sale created by a third party did not bar recovery.

¶ 8 Section 9(g)(4) of the Condominium Property Act allows a condominium association to recover six months of a prior owner's unpaid assessments from a third-party purchaser. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 32. Specifically, that section provides:

“The purchaser of a condominium unit at a judicial foreclosure sale, other than a mortgagee, who takes possession of a condominium unit pursuant to a court order or a purchaser who acquires title from a mortgagee shall have the duty to pay the proportionate share, if any, of the common expenses for the unit which would have become due in the absence of any assessment acceleration during the 6 months immediately preceding institution of an action to enforce the collection of assessments, and which remain unpaid by the owner during whose possession the assessments accrued. If the outstanding assessments are paid at any time during any action to enforce the collection of assessments, the purchaser shall have no obligation to pay any assessments which accrued before he or she acquired title.” 765 ILCS 605/9(g)(4) (West 2014).

¶ 9 The Association contends that it was entitled to collect the unpaid amounts from Barghouthi under section 9(g)(4) of the Condominium Property Act and that, contrary to the circuit court's holding, it had no duty under the statute to mitigate those damages after the judgment entered against the prior owner in 2011. It contends that it complied with all of the statutory requirements necessary to allow it to seek possession under the Forcible Entry and Detainer provisions of the Code of Civil Procedure. See 735 ILCS 5/9-104, 104.1 (West 2014). Further, the Association contends that the mitigation provisions of the Forcible Entry and

Detainer Act only applied to leasehold estates, not condominium associations. See 735 ILCS 5/9-213.1 (West 2014).

¶ 10 Section 9-111.1 of the Forcible Entry and Detainer Act provides that “the board of managers shall have the right and authority, incidental to the right of possession of a unit under the judgment, but not the obligation, to lease the unit to a bona fide tenant.” 735 ILCS 5/9-111.1 (West 2014). The First District, in *dicta*, found that this provision specifically provided that a condominium association had no duty to mitigate. *100 Roberts Road Business Condominium Ass'n v. Khalaf*, 2013 IL App (1st) 120461, ¶ 46. However, the First District has also held that, if a condominium association elects to rent a unit to a third party after obtaining judgment of possession, section 9-111.1 of the Forcible Entry and Detainer Act requires that those rents be applied to the delinquent assessment. *V & T Investment Corp. v. West Columbia Place Condominium Ass'n*, 2018 IL App (1st) 170436, ¶ 36 (citing *Board of Managers of the Inverrary Condominium Ass'n v. Karaganis*, 2017 IL App (2d) 160271, ¶ 29).

¶ 11 In the instant case, the circuit court disagreed with the court in *100 Roberts Road*, finding that the language in section 9-111.1 of the Forcible Entry and Detainer Act did not preclude a mitigation defense but simply clarified that a *bona fide* tenant lease could be made by the Association board either with a tenant of their own choosing or an existing tenancy created by the unit owner, or for that matter take advantage of any other negotiations or transactions with other parties that achieves satisfaction of the owners unpaid assessments or other obligations. We agree that, had the Association rented out the subject unit, rents collected would have applied to the outstanding assessments owed. We do not, however, need to reach the issue of whether the language of section 9-111.1 of the Forcible Entry and Detainer Act precludes a mitigation defense. The circuit court ruled that the lien was unenforceable against Barghouthi because the

sheriff's notice of sale failed to give notice of the lien in compliance with section 9(g)(5) of the Condominium Property Act.

¶ 12 The plain language of section 9(g)(1) of the Condominium Property Act creates a lien in favor of a condominium association upon the failure or refusal of a unit owner to pay common expense assessments. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 23; 765 ILCS 605/9(g)(1) (West 2014). Sections 9(g)(4) and 9(g)(5) of the Condominium Property Act apply to foreclosure sale purchasers other than mortgagees and to purchasers acquiring title from a mortgagee. Those third-party purchasers are required to pay a prior owner's unpaid assessments that accrued during the six months preceding an action to collect assessments.

¶ 13 Section 9(g)(5) of the Condominium Property Act requires the notice of the foreclosure sale to state that a purchaser other than a mortgagee must pay those prior unpaid assessments. 765 ILCS 605/9(g)(5) (West 2014); *1010 Lake Shore Ass'n*, 2015 IL 118372, ¶¶ 31-32. The Notice of Sale in this case did not contain such language. Thus, the circuit court found that the lien was unenforceable against Barghouthi and his interest in the property. The Association argues that the deficient notice should not bar its recovery because the Notice of Sale was prepared by the attorney for the mortgagee. The Association contends that any issue with the Notice of Sale should be addressed with a motion to vacate the sale.

¶ 14 As noted by the First District, section 9(g) of the Condominium Property Act reflects a policy decision by the legislature that a foreclosure buyer, who may be getting a bargain, rather than the condominium association, should bear the burden of paying unpaid assessments. *Sylva, LLC v. Baldwin Court Condominium Ass'n, Inc.*, 2018 IL App (1st) 170520, ¶ 14. However, “[o]ne of the reasons that the statute works as a matter of policy is because a foreclosure buyer is

given notice of the unpaid assessments and that it will have the duty to pay them before making the decision to buy the condominium.” *Id.* In this case, the Association was served with summons in the prior foreclosure action. It is undisputed that the Sheriff’s Sale Notice did not contain the language required by section 9(g)(5) of the Condominium Property Act. Thus, we agree with the circuit court that the lien cannot be enforced against Barghouthi.

¶ 15

CONCLUSION

¶ 16

The judgment of the circuit court of Will County is affirmed.

¶ 17

Affirmed.