

NOTICE
Decision filed 02/05/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 170100-U

NO. 5-17-0100

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

NEW PENN FINANCIAL, LLC,)	Appeal from the
d/b/a Shellpoint Mortgage Servicing,)	Circuit Court of
)	St. Clair County.
Plaintiff-Appellee,)	
)	
v.)	No. 15-CH-582
)	
CHARLES E. EICHHOLZ, JR., <i>et al.</i> ,)	
)	
Defendants-Appellees)	
)	
(Blue Horizon Capital, Inc., an Illinois Corporation,)	
Proposed Intervenor-Appellant; JCS Acquisition,)	Honorable
LLC, and Homefront Properties, LLC,)	Heinz M. Rudolf,
Intervenors-Appellees).)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* In a foreclosure proceeding, the circuit court did not abuse its discretion in denying a motion made by a bidder at the foreclosure sale requesting permission to intervene in the foreclosure proceeding in order to object to the confirmation of the foreclosure sale to another bidder.

¶ 2 This case is a foreclosure proceeding in which the appellant, Blue Horizon Capital, Inc. (Blue Horizon), claimed to be the high bidder at the foreclosure sale. The officer conducting the foreclosure sale, however, declared appellees, JCS Acquisition, LLC, and

Homefront Properties, LLC (collectively referred to as JCS), as the high bidders and issued them a certificate of sale. Blue Horizon filed motions requesting permission to intervene in the foreclosure proceeding in order to object to the confirmation of the sale. The circuit court denied the motions to intervene, and Blue Horizon now appeals the circuit court's denial of its request to intervene and the circuit court's subsequent confirmation of the sale. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On February 23, 2007, Charles and Julie Eichholz obtained a \$95,843 loan from First Horizon Home Loan Corporation (First Horizon) for the purchase of a home located in Belleville, Illinois. A mortgage recorded against the property secured the loan. The Eichholzes also took out a second mortgage on the home with RBS Citizens N.A. (RBS) for \$29,000. On July 8, 2015, First Horizon assigned its interest in the mortgage to New Penn Financial, LLC, doing business as Shellpoint Mortgage (New Penn). The Eichholzes defaulted on the New Penn loan, and on August 24, 2015, New Penn filed a complaint to foreclose on the mortgage. New Penn named the Eichholzes and RBS as defendants. New Penn alleged that the Eichholzes had not made a payment on the loan after December 2013 and that the principal balance due was \$87,061.70. On February 18, 2016, the circuit court entered a default order and judgment for foreclosure and sale. The judgment for foreclosure and sale provided that the property "shall be sold for cash or certified funds to the highest bidder with all sums due at the time of the sale unless other terms are agreed to by [New Penn]." The judgment also required the notice of the sale to include, among other things, the time and place of the sale and the terms of the sale.

¶ 5 On August 22, 2016, New Penn filed notice of a judicial sale of the property that was to take place on September 22, 2016, at 9 a.m. at the main lobby of the St. Clair County courthouse. The Judicial Sales Corporation served as the selling officer. The sales terms set forth in the notice of the sale required “25% down of the highest bid by certified funds at the close of the sale payable to The Judicial Sales Corporation” and the remaining balance to be paid within 24 hours.

¶ 6 Three bidders attended the sale: New Penn, JCS, and Blue Horizon. Blue Horizon’s president, Stephen Medford, represented Blue Horizon at the auction. Blue Horizon initially won the auction with the highest bid of \$30,001 at the close of the sale. The Judicial Sales Corporation’s representative asked Medford to finalize the paperwork for the auction at a nearby law office. JCS’s auction representative also went to the law office for the completion of the paperwork. At the law office, Medford did not have the certified funds for the down payment with him. The Judicial Sales Corporation then accepted JCS’s bid of \$27,845 for the sale of the property, which was the second highest bid at the courthouse auction.

¶ 7 On the day of the auction, September 22, 2016, Blue Horizon filed a motion to intervene in the present foreclosure proceeding, alleging that any orders entered in the foreclosure proceeding would affect its rights to the property. Blue Horizon also alleged that it “seeks to file a Counterclaim,” but it did not attach a proposed counterclaim.

¶ 8 On October 31, 2016, New Penn filed a duplicate certificate of sale and report that stated JCS was the successful bidder at the auction with a bid of \$27,845. The notice stated that the auction took place in the main lobby of the St. Clair County courthouse.

New Penn filed a motion requesting the circuit court to approve the report of sale, confirm the sale, and enter an order of possession.

¶ 9 On November 10, 2016, counsel for JCS filed an entry of appearance in the present case. On November 17, 2016, the parties appeared in court on Blue Horizon's motion to intervene, and New Penn requested more time to respond to the motion. The circuit court entered an agreed order continuing the hearing to December 7, 2016. The order was signed by counsel for New Penn, JCS, and Blue Horizon.

¶ 10 On December 5, 2016, JCS filed its own motion to intervene in the present case. JCS alleged in its motion that, upon information and belief, Blue Horizon "will argue that it is the owner of, or has some ownership interest in, the property in question by virtue of an unrecorded quit claim deed." JCS argued that it was the successful bidder in the foreclosure auction and that the court's orders in the foreclosure case will affect its "rights related to the property and will, or may be, bound by the [o]rders entered" by the circuit court. On December 7, 2016, the court conducted a hearing and entered an order that stated, "Motion to Intervene is denied after argument of counsel." The order does not state which motion to intervene the court denied, but only Blue Horizon's motion to intervene had been set for hearing on that date.

¶ 11 On January 6, 2017, Blue Horizon filed another motion to intervene and included Medford's affidavit in support of the motion. In his affidavit, Medford stated that at the end of the auction, Blue Horizon was "ready, willing and able to deliver the 25% deposit of the bid to The Judicial Sales Corporation" and that a certified check was "being delivered to the office." On February 2, 2017, the circuit court conducted a hearing on

JCS's motion to intervene and Blue Horizon's second motion to intervene. The court denied Blue Horizon's motion to intervene, but granted JCS's motion. The court also entered an order approving the report of the sale, confirming the sale, and ordering possession of the home. Blue Horizon now appeals the circuit court's denial of its motion to intervene and the court's order confirming the sale.

¶ 12

ANALYSIS

¶ 13 Section 2-408 of the Illinois Code of Civil Procedure (Code) sets out the general rule for intervention and recognizes two types of intervention: intervention as of right and permissive. 735 ILCS 5/2-408 (West 2016). Intervention as of right is set forth in subsection (a) as follows: "Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer." 735 ILCS 5/2-408(a) (West 2016). Permissive intervention is set out in subsection (b), which provides: "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016).

¶ 14 The purpose of intervention "is to expedite litigation by disposing of the entire controversy among the persons involved in one action and to prevent a multiplicity of

actions.” *Wheeling Trust & Savings Bank v. Village of Mount Prospect*, 29 Ill. App. 3d 539, 541 (1975). “Although a party need not have a direct interest in the pending suit, it must have an interest greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit.” *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 57-58 (2002).

¶ 15 The supreme court has held that a circuit court’s decision concerning an individual’s right to intervene under the Code, whether as of right or permissively, is a matter of judicial discretion. *In re Application of the County Collector of Du Page for Judgment for Delinquent Taxes for the Year 1992*, 181 Ill. 2d 237, 247-48 (1998). An abuse of discretion occurs when a court’s ruling is arbitrary, fanciful, or unreasonable, or where its ruling rests on an error of law. *Urban Partnership Bank v. Chicago Title Land Trust Co.*, 2017 IL App (1st) 162086, ¶ 15.

¶ 16 Blue Horizon’s motions to intervene cited section 2-408 of the Code but did not specify whether Blue Horizon was asserting a right to intervene as set forth in subsection (a) of the general rule or requesting permissive intervention as set forth in subsection (b). In both of the motions, it alleged that the circuit court’s orders in the present case would affect its right to the property at issue and that it will, or may be, bound by the orders entered by the court in the case. These allegations appear to be an assertion of intervention as of right as set forth in subsections (a)(2) and (a)(3), rather than permissive intervention under subsection (b). On appeal, however, Blue Horizon argues that it “could only be granted permissive intervention” and argues only that the circuit court abused its discretion in denying permissive intervention. Therefore, we will analyze Blue

Horizon's request to intervene under permissive intervention principles set forth in section 2-408(b) of the Code rather than intervention as of right under section 2-408(a) of the Code.

¶ 17 Under section 2-408(b) of the Code, the circuit court can, in its discretion, allow a nonparty to intervene in a proceeding if a statute confers the nonparty a conditional right to intervene or if the nonparty's claim and the proceeding have "a question of law or fact in common." 735 ILCS 5/2-408(b) (West 2016). Here, Blue Horizon argues that section 15-1501 of the Mortgage Foreclosure Law (Foreclosure Law) conferred upon it a conditional right to intervene. 735 ILCS 5/15-1501 (West 2016).

¶ 18 Under section 15-1501 of the Foreclosure Law, "[a]ny person who has or claims an interest in real estate which is the subject of a foreclosure *** shall have an unconditional right to appear and become a party in such foreclosure." 735 ILCS 5/15-1501(d) (West 2016). A person seeking to intervene as of right may appear and become a party at any time prior to the entry of judgment of foreclosure. 735 ILCS 5/15-1501(e)(1) (West 2016). In the present case, Blue Horizon filed its motion to intervene after the entry of the judgment of foreclosure. Therefore, it does not have a *right* to intervene under section 15-1501(d) of the Foreclosure Law because the time for intervention as of right under that statute had expired when it filed its motion.

¶ 19 Sections 15-1501(e)(2) and 15-1501(e)(3) of the Foreclosure Law set forth the requirements and time limits for permissive intervention after the right to intervene has expired. 735 ILCS 5/15-1501(e)(2), (e)(3) (West 2016). Section 15-1501(e)(2) provides: "After the right to intervene expires and prior to the sale in accordance with the

judgment, the court may permit a person who has or claims an interest in the mortgaged real estate to appear and become a party on such terms as the court may deem just.” 735 ILCS 5/15-1501(e)(2) (West 2016). Section 15-1501(e)(3) provides: “After the sale of the mortgaged real estate in accordance with a judgment of foreclosure and prior to the entry of an order confirming the sale, a person who has or claims an interest in the mortgaged real estate, may appear and become a party, on such terms as the court may deem just, for the sole purpose of claiming an interest in the proceeds of sale.” 735 ILCS 5/15-1501(e)(3) (West 2016).

¶ 20 We review a denial of a motion to intervene under the Foreclosure Law under the same abuse-of-discretion standard that we apply to a denial of a motion to intervene under the Code. *Urban Partnership Bank*, 2017 IL App (1st) 162086, ¶ 17.

¶ 21 Here, Blue Horizon filed its motions to intervene after the completion of the foreclosure sale at the St. Clair County courthouse, but prior to the entry of an order confirming the sale. Therefore, section 15-1501(e)(3) is the provision in the Foreclosure Law that establishes the circuit court’s discretion to allow Blue Horizon to intervene in this case, but that provision allows intervention only for the purpose of claiming an interest in the proceeds of the sale. 735 ILCS 5/15-1501(e)(3) (West 2016). Blue Horizon’s motions to intervene did not set out any claim to any of the proceeds of the sale. Therefore, its motions to intervene did not meet the requirements of section 15-1501(e)(3). Under the specific language of the statute, we cannot say that the circuit court abused its discretion in denying Blue Horizon’s request for permissive intervention under section 15-1501(e)(3) of the Foreclosure Law.

¶ 22 We recognize that “[t]he right to intervene is a remedial right and is to be liberally construed.” *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 298 (1995). Nonetheless, the Foreclosure Law governs the mode of procedure for mortgage foreclosures, and inconsistent statutory provisions are not applicable. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 4 (2010). Blue Horizon has not established that the Foreclosure Law provides for permissive intervention under the specific facts of this case.

¶ 23 Under the Foreclosure Law, the high bid at a foreclosure auction is “merely an irrevocable offer to purchase the property and acceptance of the offer takes place when the court confirms the sale.” *Citicorp Savings of Illinois*, 269 Ill. App. 3d at 300. “Until the court confirms the [sale], there is not a true sale in the legal sense.” *Id.* At the hearing on the confirmation of the sale, the circuit court must confirm the sale unless (i) a required notice of the sale was not given, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2016). The circuit court has broad discretion in approving or disapproving sales made at its direction. *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915, 927 (1997). However, section 15-1508(b) of the Foreclosure Law limits the court’s discretion to refuse confirmation of the sale to only the four specified grounds. *Barnes*, 406 Ill. App. 3d at 4.

¶ 24 In support of its second petition to intervene, Blue Horizon filed an affidavit in which its president, Medford, set out the basis for its objection to the confirmation of the sale to JCS. Medford stated in his affidavit that Blue Horizon was the high bidder; that it

was “ready, willing and able to deliver the 25% deposit of the bid to The Judicial Sales Corporation”; and that a certified check was “being delivered to the office.” This affidavit does not set forth grounds for denying the confirmation of the sale under section 15-1508(b) of the Foreclosure Law and, therefore, does not support Blue Horizon’s request for permissive intervention.

¶ 25 Specifically, the notice of the sale included sale terms that required “25% down of the highest bid by certified funds *at the close of the sale* payable to The Judicial Sales Corporation.” (Emphasis added.) In his affidavit, Medford admitted that Blue Horizon was unable to fulfill this requirement at the close of the sale. Instead, he alleged, Blue Horizon wanted to make the required payment, not at the close of the sale, but at some unspecified time *after* the close of the sale. Medford’s affidavit, therefore, established that Blue Horizon could not comply with the terms of the sale and, as a result, was not entitled to a certificate of sale. Blue Horizon’s affidavit did not establish any basis for objecting to the confirmation of the sale to JCS, who was the second highest bidder and had the required certified funds *at the closing*. Medford’s affidavit did not establish unconscionability or fraud during the sale or set forth facts supporting a claim that “justice was otherwise not done.” See 735 ILCS 5/15-1508(b) (West 2016). The affidavit, therefore, does not support Blue Horizon’s argument on appeal that the circuit court abused its discretion in denying its request for permissive intervention.

¶ 26 Also, we note that section 2-408(e) of the Code provides that “[a] person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file.” 735

ILCS 5/2-408(e) (West 2016). Blue Horizon's motions to intervene did not include a proposed initial pleading.

¶ 27 Under the facts of this case, we cannot conclude that the circuit court abused its discretion in denying Blue Horizon's request for permission to intervene. Because the circuit court did not abuse its discretion in denying Blue Horizon's motions to intervene, we need not consider Blue Horizon's argument that the circuit court improperly allowed JCS to intervene in the proceeding. As a nonparty, Blue Horizon cannot establish that it has a direct, immediate, and substantial interest in the circuit court's decision allowing JCS to intervene.

¶ 28 **CONCLUSION**

¶ 29 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 30 Affirmed.