2019 IL App (1st) 18-2252-U

THIRD DIVISION
August 7, 2019

No. 1-18-2252

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BANK UNITED, FSB, Plaintiff, v. GERI A. PURSEL, RICHARD A. PURSEL, and ADVANTAGE FINANCIAL PARTNERS, L.L.C., Defendants.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 09 CH 04652 The Honorable William B. Sullivan, Judge Presiding.
ADVANTAGE FINANCIAL PARTNERS, L.L.C., Defendant-Third-Party Plaintiff-Appellant, v. PROSPER BELIZAIRE, Third-Party Defendant-Appellee.	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it dismissed the third-party plaintiff's complaint against the third-party defendant on the basis that the mortgagors of a subsidiary lien remained necessary parties to the ligation pursuant to section 15-1501(a) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1501(a) (West 2016)). Contrary to the trial court's holding, after the

third-party plaintiff settled with the mortgagors all interests that the mortgagors had in the property were fully-adjudicated, and the mortgagors no longer remained necessary parties to the litigation.

¶ 2 This appeal stems from a foreclosure action filed by the plaintiff, BankUnited, USB (the bank) against the defendants-borrowers, Geri and Richard Pursel (the Pursels), and the defendant (and third-party plaintiff) Advantage Financial Partners, L.L.C. (Advantage). Advantage was added as a defendant to the foreclosure action in order to extinguish a second mortgage lien interest that the Pursels had delivered to Advantage after executing the original mortgage with the bank.

¶ 3 After the trial court entered a default order and judgment of foreclosure and sale against both the Pursels and Advantage, the property was initially sold at a judicial sale to the bank, and then to the third-party defendant-appellee, Prosper Belizaire (Belizaire).

¶ 4 Three years later, Advantage filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)) seeking that the order of foreclosure be vacated as to it on the basis of the bank's failure to properly serve it with the foreclosure action. The trial court granted Advantage's petition and vacated its foreclosure judgment solely as to Advantage.

¶ 5 The bank then properly served Advantage and proceeded with its foreclosure action against it to address Advantage's interest in the property. Advantage answered the foreclosure complaint, but also filed a cross-claim against the Pursels and a third-party complaint against Belizaire seeking to enforce its subsidiary mortgage on the property. After Advantage settled its cross-claim against the Pursels, the trial court dismissed the cross-claim with prejudice. Belizaire then moved to dismiss Advantage's third-party claim, arguing that the Pursels were a "necessary party" to the mortgage foreclosure action pursuant to section 15-1501(a) of the

Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1501(a) (West 2016)). The trial court agreed and granted Belizaire's motion to dismiss. Advantage now appeals contending that dismissal of its third-party complaint was improper because the Pursels no longer remained a necessary party to the litigation. For the reasons that follow, we reverse and remand.

¶ 6 I. BACKGROUND

¶ 7 The record below reveals the following relevant facts and procedural history. On or about August 20, 2007, the Pursels purchased the property located at 3719 West Wabansia Avenue in Chicago, Illinois 60647 (the property) from Advantage. In order to consummate their purchase, on this same date, the Pursels executed and delivered a $234,000 promissory note (the note) to the bank. As security for the sums advanced under that note, the Pursels also executed a mortgage (the mortgage) pledging a lien interest in the property to the bank.

¶ 8 Subsequent to the delivery of this note and mortgage, on August 24, 2007, the Pursels additionally executed and delivered a $60,000 non-recourse promissory note (the second note) to Advantage. As security for this debt, the Pursels also executed and delivered a mortgage (the second mortgage) pledging to Advantage a subordinate lien interest in the property.

¶ 9 On February 4, 2009, the bank filed a complaint to foreclose the property, naming the Pursels and Advantage as defendants. On October 29, 2009, the trial court entered a default order and foreclosure judgment against the Pursels and Advantage. On February 2, 2010, the property was sold at a judicial sale to the bank, and that sale was confirmed on April 7, 2010.[1]

¶ 10 On September 22, 2010, the bank sold the property to Belizaire through a special warranty deed, which was recorded on October 13, 2010.

[1] Under that order, both the amount due under the judgment (including fees and costs), and the total proceeds of the sale equaled $285,532.80. The deficiency was $0.

¶ 11 Three years later, on September 3, 2013, Advantage filed a petition for relief from judgment (735 ILCS 5/2-1401 (West 2016)) seeking to vacate the default order and foreclosure judgment. On December 10, 2013, Advantage filed an amended petition for relief from judgment. Neither the original petition, nor the amended petition named Belizaire as a third-party defendant.

¶ 12 On July 3, 2014, the trial court entered an order granting Advantage's amended petition for relief from judgment. That order vacated the default judgment and order of foreclosure solely as to Advantage. All remaining provisions of the default order, judgment and confirmation of sale order remained intact.

¶ 13 Thereafter, the bank caused its complaint for foreclosure to be served on Advantage. In response, on June 9, 2017, Advantage filed a cross-claim against the Pursels and a third-party complaint against Belizaire, seeking to foreclose the second mortgage on the property.

¶ 14 On August 3, 2017, the trial court entered an order striking the original cross-claim without prejudice.

¶ 15 On August 3, 2017, Advantage entered into a settlement agreement with the Pursels under which it released the Pursels "from any and all claims that it now has, ever had or might but for this release ever have against the Pursels, whether known or unknown, arising from or related to" the second note and the second mortgage. This settlement agreement was based upon the fact that Advantage's second note was a "non-recourse" obligation, which could be satisfied only from the proceeds of a foreclosure of the property, which had already occurred. Presumably as a result of this settlement, on September 5, 2017, the trial court dismissed, with prejudice, Advantage's cross-claim against the Pursels.

¶ 16 On October 26, 2017, Advantage filed an amended answer and third-party complaint against

Belizaire, once again seeking to foreclose the second mortgage on the property. Having released all claims against the Pursels under the second mortgage, Advantage did not join the Pursels as party-defendants to this amended third-party complaint.

¶ 17 On November 16, 2017, Belizaire moved to dismiss the third-party complaint against him. In his motion, Belizaire argued that the Pursels were a "necessary party" to the mortgage foreclosure action pursuant to section 15-1501(a) of the IMFL (735 ILCS 5/15-1501(a) (West 2016)), and since they had been dismissed from the case, any claim against Belizaire also had to be dismissed.

¶ 18 The trial court agreed and on January 31, 2018, entered an order granting Belizaire's motion to dismiss the third party complaint with prejudice.

¶ 19 On June 4, 2018, Belizaire sought leave to file a counterclaim against Advantage to quiet title to the property. That motion was granted and Belizaire filed its counterclaim on June 6, 2018. Advantage filed a motion to dismiss Belizaire's counterclaim as moot. After the parties briefed this motion, on September 18, 2018, by agreement, the trial court entered an order certifying its January 31, 2018, order dismissing Advantage's third-party complaint, for interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)). In doing so, the court explicitly found that there was no just reason to delay appeal of that January 31, 2018, order. Advantage now appeals from the dismissal of its third-party complaint against Belizaire.

¶ 20 II. ANALYSIS

¶ 21 Our review of a dismissal of a cause of action pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)) is *de novo*. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 23 (citing *Solaia Technology, L.L.C., v. Specialty Publishing Co.,*

221 Ill. 2d 558, 579 (2006)). In determining whether dismissal was proper, we evaluate issues of statutory construction under the same *de novo* standard of review. See *Kean v. Wal-Mart Stores, Inc*., 235 Ill. 2d 351, 361 (2009).

¶ 22 In this appeal, Advantage contends that dismissal of its third-party complaint against Belizaire was improper because the Pursels no longer remained a necessary party to the litigation, after Advantage settled with them. For the reasons that follow, we agree.

¶ 23 At the outset, we recognize the unique quandary Advantage was faced with in these proceedings. As the holder of the second note, which was a non-recourse loan and could therefore be satisfied only through the foreclosure of the property, and not by any lawsuit directly against the Pursels, Advantage could recoup its losses only from the foreclosure sale. But according to the trial court's rather confounding July 3, 2014, order, that foreclosure, and subsequent judicial sale, which had already occurred without notice to Advantage, nonetheless, remained valid as to the Pursels. In addition, that same foreclosure and judicial sale produced sufficient funds only to satisfy the bank's loan. No deficiency judgment was entered against the Pursels. Accordingly, being the holder of the second and subordinate note, Advantage had no recourse against the bank. It therefore properly pursued its own foreclosure action by way of a third-party complaint against Belizaire, whose title, by virtue of the special warranty deed, became encumbered by the second loan the moment that the default order against Advantage was vacated.

¶ 24 In pursuing its own foreclosure action, Advantage also simultaneously brought a cross-claim against the Pursels, as the necessary original holders of the second mortgage note. The problem arose, however, when Advantage settled with the Pursels, on the basis of that non-recourse note, and the Pursels were dismissed out of the case. At that point, Belizaire sought and obtained

dismissal of Advantage's third-party complaint against it on the basis that under section 15-1501(a) of the IMFL (735 ILCS 5/15-1501(a) (West 2016)), the Pursels remained a necessary party to this action. Belizaire makes this same argument in asking us to affirm the trial court's decision on appeal. For the reasons that follow, we disagree and find that the trial court committed error.

¶ 25 There is no doubt that under Illinois law, as the mortgagors under the second note to Advantage, the Pursels were initially a necessary party to any foreclosure proceedings pertaining to that note. Section 15-1501(a) of the IMFL (735 ILCS 5/15-1501(a) (West 2016)) clearly provides in pertinent part:

> "(a) Necessary Parties. For the purposes of Section 2-405 of the Code of Civil Procedure, only (i) the *mortgagor* and (ii) other persons (but not guarantors) who owe payment of indebtedness or the performance of other obligations secured by the mortgage and against whom personal liability is asserted *shall be necessary parties* defendant in a foreclosure. The court may proceed to adjudicate their respective interests, but any disposition of the mortgaged real estate shall be subject to (i) the interests of all other persons not made a party or (ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure." (Emphasis added.)

¶ 26 However, contrary to Belizaire's position, nothing in section 15-1501(a) suggests, let alone requires, that the Pursels remain in the case indefinitely, particularly not after their interests in the property are fully adjudicated. Any such requirement is contrary to the plain language of the IMLF.

¶ 27 It is a fundamental rule of statutory interpretation that in reviewing a statute, we must

ascertain and give effect to the intent of the legislature. *Rogers v. Imeri*, 2013 IL 115860, ¶ 13; see also *Commonwealth Edison Co. v. Illinois Commerce Com'n*, 2014 IL App (1st) 132011, ¶ 19. The most reliable indicator of that intent is the language of the statute itself. *Id*. If the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory interpretation. *Id*. In doing so, we must construe the statue as a whole and may not depart from the plain language to read into the statute exceptions, limitations, or conditions that are not consistent with the express legislative intent. *Id*.

¶ 28 In the present case, we think that the plain language of the statue clearly does not mandate that the Pursels, as mortgagors of the second subsidiary loan, remain in the litigation indefinitely. While there is no doubt that section 15-1501(a) expressly provides that a mortgagor must be included in the initial filing of a foreclosure action as a necessary party, subsections (i) and (ii) further state that after the court adjudicates the mortgagor's interests, any disposition of the property is subject to other unresolved interests in the property. Nowhere does section 15-1501(a) oblige the mortgagor, once brought into the litigation, to remain in the case after its interests are fully-adjudicated. Rather, the plain language of subsections (i) and (ii) expressly anticipates situations, such as this one, where litigation regarding the property will continue long after the interests in the original mortgagor and mortgagee are resolved. We are not permitted to read exceptions into the plain language of the statute that would make these two subsections meaningless. See *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 440-41 (2010) ("[A] court should not depart from a statute's plain language by reading into it exceptions, limitations, or conditions that the legislature did not express or that render any part of the statute meaningless or superfluous."); see also *Terra Foundation for American Art v. DLA Piper L.L.P.*, 2016 IL App (1st) 153285, ¶ 38.

¶ 29 In coming to this conclusion, we have considered the decision in *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010), cited to by Belizaire and find it inapplicable. In that case, our supreme court was asked to determine whether a personal representative of a deceased mortgagor has to be named as a defendant in a foreclosure proceeding at inception. *Id*. at 535-36. The court found that it did because a mortgagor is a necessary party to the initial foreclosure proceeding. *Id*. In doing so, the court explained that a foreclosure is a *quasi in rem* proceeding, in which the property is neither the defendant, nor the instrumentality of the wrong. *Id*. Rather, the mortgagor, who is both the person whose interest in the real estate is subject to the mortgage and the party responsible for defaulting on the note secured by that mortgage, is the necessary party-defendant to the proceedings. *Id*. The court therefore held that where a bank discovers that a mortgagor is deceased after filing a foreclosure, the mortgagee must name a personal representative as a necessary party to the proceedings so as to vest the court with subject matter jurisdiction. *Id*.

¶ 30 Contrary to Belizaire's position, however, *McGahan* solely dealt with the distinct question of whether such a personal representative must be named as a defendant at the initial stage of the foreclosure proceedings. The case nowhere dealt with, or addressed, whether such a defendant, or anyone else for that matter, is required to remain in the litigation until its very end.

¶ 31 Moreover, *McGahan* is factually distinguishable because it involved a straightforward foreclosure, and not a non-recourse loan such as the one Advantage made with the Pursels. Unlike *McGahan*, in the present case, Advantage was *not* attempting to "enforce the obligation created by that [non-recourse note] ***through the property, but against a specific person." *McGahan*, 237 Ill. 2d at 535. On the contrary, Advantage was attempting to assert the Pursels's obligations against the property itself. Indeed the Pursels were not even in default on

Advantage's note at the time the bank initially filed its foreclosure. Advantage's claim only became ripe because the bank wrongfully attempted to wipe out Advantage's second mortgage by foreclosing on the Pursels without serving Advantage. Accordingly, the holding of *McGahan* has no bearing on the outcome of this case.

¶ 32 Moreover, even if we were to consider the statutory language of section 15-1501(a) ambiguous, we would nonetheless reject Belizaire's interpretation, since it attempts to read into the statute a requirement that would never permit the original mortgagor to settle out of a case. This is the kind of absurd outcome that the legislature surely did not intend. See *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 21 ("[S]tatutes should be construed in such a way as to avoid 'impractical or absurd results.' [Citation.]").

¶ 33 In this regard, Belizaire contends that under section 15-1402(a) of the IMFL, Advantage had an alternative, *i.e.*, to obtain a consent foreclosure from the Pursels, and that therefore we must read section 15-1501(a), as requiring the Pursels to remain necessary parties to the litigation indefinitely.

¶ 34 Consent foreclosure under section 15-1402(a) permits a mortgagee, such as Advantage, to waive any and all rights to a personal judgment for deficiency against the mortgagor and all other persons liable for indebtedness by vesting in the mortgagee "absolute title *** free and clear of all claims, liens, *** and of all rights of all other persons made parties to the foreclosure whose interests are subordinate to that of the mortgagee." 735 ILCS 5/15-1402(a) (West 2016). Initially, we are not persuaded that as the holder of a non-recourse note, Advantage could have pursued consent foreclosure against the Pursels. Moreover, even if this was a possibility, the consent foreclosure would have wiped out Belizaire's interest in the property altogether, and would undoubtedly have caused him to object to the consent foreclosure under section 15-

1402(b) in an attempt to prevent it (735 ILCS 5/14-1402(b) (West 2016)). As such, we do not believe that section 15-1402 provides any insight into the length of time section 15-1501(a) anticipates the mortgagor to remain a "necessary party" to the foreclosure proceedings in any type of scenario, let alone this one.

¶ 35 Aside from the plain language of the IMLF, we also find that there is no non-statutory reason to require the Pursels to remain in the litigation so as to adjudicate the remaining disputes between Belizaire and Advantage. "A necessary party is one whose presence in a lawsuit is required for any of three reasons: (1) to protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) to reach a decision to protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy." *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 940 (2008); see also *Victor Township Drainage Dist. 1 v. Lundeen Family Farm partnership*, 2014 IL App (2d) 140009, ¶ 39.

¶ 36 In the present case, none of these three reasons apply. The Pursels have been explicitly released by Advantage from any further liability or lawsuit. Similarly, the bank has no further interest in the cause of action against the Pursels, since the original foreclosure judgment against them remains valid, and that judgment contains no personal deficiency. In addition, we cannot conceive of any liability the Pursels would have to Belizaire. The trial court did not identify any remaining interest the Pursels have in this case, and we similarly find none. As such, their presence is not required and we see no non-statutory basis for the trial court's ruling requiring their continued presence in the case. See *Caparos v. Morton*, 364 Ill. App. 3d 159, 176 (2006) (a party need not be joined if his interests are fully and adequately represented).

¶ 37 Finally, we note that our holding today fully comports with our state's strong public policy of

encouraging voluntary settlement. See *Rakowski v. Lucente*, 2014 Ill. 2d 317, 325 (1984) ("As a matter of public policy the settlement of claims should be encouraged); *Johnson v. Hermanson*, 221 Ill.App.3d 582, (1991) (noting that "[p]ublic policy in Illinois favors settlements"). If we were to hold otherwise, countless matters involving foreclosure actions would require courts to keep the original mortgagor in the case for its entire lifespan, regardless of that party's eventual role or interests. Such an outcome would prevent lenders from ever settling with borrowers in foreclosure cases and would burden both litigants and courts with pointless process even, where, as here, it is certain that the mortgagor has no further liability to any party remaining in the case. The legislature cannot have intended this result.

¶ 38 III. CONCLUSION

¶ 39 For all of the aforementioned reasons, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 40 Reversed and remanded.