2013 IL App (1st) 113047-U

FIRST DIVISION
SEPTEMBER 30, 2013

No. 1-11-3047

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STABFUND (USA) INC., as assignee of UBS Real Estate Securities, Inc.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	
WALTON OF CHICAGO, LLC; BATTAGLIA BOUTIQUE, INC.; KISON, INC.; CALDWELL PLUMBING CO.; CITY OF CHICAGO, DEPARTMENT OF WATER MANAGEMENT; 70 E. WALTON CONDOMINIUM; 70 EAST WALTON PROPERTY, LLC; BAC.CC CORP.; BEAUX ARTS CREATIONS; CHICAGO IRONWORKS CORPORATION; JUAN DELGADO d/b/a DELGADO CONSTRUCTION; IMAGGEE INC.; R.M.B. HEATING & COOLING, INC.; SILVIO ELECTRIC CO. a/k/a COSTEA ELECTRIC CO.; AND UNKNOWN OWNERS AND NONRECORD CLAIMANTS,	)	No. 10 CH 2545
Defendants,	)	
72 EAST WALTON BAKERY, INC; 68 FOOD SERVICES, LLC.; JERRY CEDICCI; and PANE CALDO, INC.	)	Honorable Mathias W. Delort, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

O R D E R

¶ 1 *Held:* The judgment of the circuit court is affirmed because the trial court did not err in denying the defendants' motion to dismiss; and did not err in granting the plaintiff's motion for summary judgment.

¶ 2 This appeal arises from a May 11, 2011 order entered by the circuit court of Cook County, which denied the motion to dismiss filed by the defendants-appellants 72 East Walton Bakery, Inc. (72 East) and 68 Food Services, LLC (68 Food); a September 8, 2011, which granted plaintiff-appellee Stabfund (USA) Inc.'s (Stabfund) motion for summary judgment; and a September 16, 2011 judgment of foreclosure. On appeal, defendants-appellants 72 East, 68 Food, Jerry Cedicci (Jerry), and Pane Caldo, Inc. (Pane Caldo) (collectively, the Walton tenants) argue that: (1) the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food; and (2) the trial court erred in granting Stabfund's motion for summary judgment. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In June 2007, Walton of Chicago, LLC (Walton of Chicago) executed a promissory note and loan agreement in which it agreed to borrow $20 million from UBS Real Estate Investments (UBS)[1] for the acquisition of real estate commonly known as 70 East Walton Street, Chicago, IL (the property). Jerry was the President of Walton of Chicago and signed the promissory note. The loan was secured by a mortgage encumbering the property. On January 1, 2008, Jerry, on behalf of Walton of Chicago, executed a lease agreement with Anthony Cedicci (Anthony), on behalf of 72

[1]In April 2009, UBS assigned to Stabfund all of its rights and interests in the loan agreement with Walton of Chicago.

East d/b/a Pane Caldo, for 72 East to rent space in the first floor of the property. Anthony and Jerry are brothers, and Anthony was the President of 72 East. According to Stabfund, it was unaware of the lease agreement with 72 East because the lease agreement was not submitted to Stabfund for review and was not yet recorded.

¶ 5 On January 20, 2010, Stabund filed a complaint for foreclosure of mortgage in the circuit court of Cook County against Walton of Chicago, Jerry, and other defendants who are not parties to this appeal. The complaint, in pertinent part, alleged that Walton of Chicago defaulted on the loan. Stabfund alleged that Walton of Chicago owed Stabfund $21,572,527.54 which included the principal balance, accrued and unpaid interest, default interest, late payment charges, deferred interest and an exit fee. In the Spring of 2010, Stabfund became aware of the lease agreement between Walton of Chicago and 72 East. According to an affidavit executed by Stabfund's Executive Director, Stabfund reviewed the lease and informed Walton of Chicago and Anthony that its terms were unacceptable. Stabfund and 72 East attempted to negotiate a lease to be executed, but the negotiations were unsuccessful. Shortly thereafter, on April 28, 2010, Stabfund, Walton of Chicago, and Jerry executed a deed in lieu of foreclosure agreement (DIL agreement). Pursuant to the DIL agreement, Walton of Chicago conveyed the property to Stabfund's nominee, 70 East Walton Property LLC (70 East). After the DIL agreement was executed, Stabfund and 72 East continued to negotiate in order to execute a lease acceptable to both parties. However, the parties were unable to reach an agreement.

¶ 6 On August 9, 2010, Stabfund filed an amended complaint for mortgage foreclosure which joined 70 East, Pane Caldo, 72 East, and 68 Food as defendants. On November 19, 2010, 72 East

and 68 Food filed a motion to dismiss Stabfund's amended complaint for foreclosure pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)). On May 11, 2011, the trial court denied 72 East and 68 Food's motion to dismiss. On January 14, 2011, Stabfund filed a motion in opposition to 72 East and 68 Food's motion to dismiss. On June 10, 2011, Stabfund filed a motion for summary judgment of foreclosure pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). On September 8, 2011, the trial court entered an order which granted Stabfund's motion for summary judgment and denied 72 East's cross-motion for summary judgment.[2] On September 16, 2011, the trial court entered a judgment of foreclosure. The trial court found that Stabfund's mortgage constituted a valid, prior, and paramount lien upon the property; and ordered that the lease interests of 72 East and the other named defendants be terminated.

¶ 7 On October 14, 2011, the Walton tenants filed a notice of appeal. On December 16, 2011, the trial court entered an order approving the report of sale. On February 3, 2012, in this court, Stabfund filed a motion to dismiss the appeal. Stabfund's motion alleged that the Walton tenants' notice of appeal was premature because it was filed before the trial court entered the order which approved the report of sale. This court denied Stabfund's motion.[3] According to the parties, the

[2]Despite careful review of the record, we are not able to determine the date on which 72 East's cross-motion for summary judgment was filed.

[3]We note that the supreme court rules state that when a postjudgment motion is filed, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered. Ill. S. Ct. R. 303(a)(2) (eff. May 30, 2008). This court has recognized that Rule 303(a)(2) was amended in 2007 to protect the rights of appellants

Walton tenants vacated the property pursuant to an agreed order in June 2012.[4] This court has jurisdiction to consider the Walton tenants' arguments on appeal pursuant to Rule 303.

¶ 8 ANALYSIS

¶ 9 We determine the following issues on appeal: (1) whether the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food; and (2) whether the trial court erred in granting Stabfund's motion for summary judgment.

¶ 10 As a preliminary matter, we note that Stabfund argues that the Walton tenants' appeal should be dismissed due to violations of Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994), Rule 342 (eff. Jan. 1, 2005), and Rule 303(b)(2). If an appellant's brief does not comply with the supreme court rules, this court has the authority to dismiss the appeal. *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). However, the supreme court rules "are not limitations upon the court of review, but rather are admonishments to the parties." *Roberts v. Dow Chemical Co.*, 244 Ill. App. 3d 253, 256 (1993). This court may consider improperly raised arguments where such consideration is necessary to produce a just result. *Brown v. Brown*, 62 Ill. App. 3d 328, 332-33 (1978). We acknowledge that the Walton tenants have failed to strictly comply with the supreme court rules. However, the arguments that the Walton tenants present warrant consideration in the interest of finding a just result. Therefore, although we admonish the Walton tenants for their multiple violations of the supreme court rules, we will address the merits of the appeal.

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that file premature notices of appeal. *Yunkers v. Farmers Automobile Management Corp.*, 404 Ill. App. 3d 816, 821 (2010).

[4]Neither Stabfund, nor the Walton tenants provide a record citation to support this claim.

¶ 11 We first determine whether the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food.

¶ 12 First, the Walton tenants argue that the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food because the DIL agreement cured all defaults alleged in Stabfund's amended complaint. The Walton tenants argue that the DIL agreement acknowledges that there have been events of default, but the agreement itself states that the events of default were resolved. The Walton tenants contend that Stabfund contradicted itself by filing the amended complaint and alleging that the default remained. The Walton tenants assert that because the loan had matured before the DIL agreement, and the DIL agreement stated that the events of default were resolved, there could be no default for Stabfund to allege in the amended complaint. The Walton tenants contend that section 15-1504(3)(J) of the Code (735 ILCS 5/15-1504(3)(J) (West 2010)) requires that in a foreclosure complaint, statements of default must be alleged. The Walton tenants argue that Stabfund was unable to meet that requirement in its amended complaint because the events of default had been resolved by the DIL Agreement.

¶ 13 Next, the Walton tenants argue that attornment resulted from Stabfund's tacit acceptance of the lease agreement.[5] As a result, they assert that Stabfund and 70 East are bound by the terms of

[5]"An attornment is a continuation of the existing lease under the same conditions and continues the landlord-tenant relationship 'under the term of the original tenancy.' " *Coleman v. Madison Two Associates*, 307 Ill. App. 3d 570, 581 (1999) (quoting *Arendt v. Lake View Courts Associates*, 51 Ill. App. 3d 564, 566-67 (1977)). Attornment occurs when a mortgagee elects to recognize a lessee as a tenant, and upon notification of the mortgagee's desire to act as a landlord, the tenant recognizes him as a landlord expressly or by implication. *West Side Trust & Savings Bank v. Lopoten*, 358 Ill. 631, 641 (1934).

the lease agreement that 72 East executed with Walton of Chicago. The Walton tenants point out that 72 East submitted to Stabfund all rent and real estate tax payments required under the lease agreement from May 2010 through November 2010. The Walton tenants claim that Stabfund accepted these payments without objection. Therefore, the Walton Tenants take the position that because Stabfund and its nominee 70 East accepted rent payments from 72 East, this shows that Stabfund elected to recognize 72 East as a tenant, thereby creating a landlord/tenant relationship. The Walton tenants assert that the landlord/tenant relationship bound Stabfund to the terms of the lease agreement in question. Also, the Walton tenants claim that by accepting the assignment of interest from Walton of Chicago, Stabfund stood in the shoes of Walton of Chicago and was bound by the terms of the lease agreement. The Walton tenants assert that Stabfund acknowledged the lease agreement through its negotiations with 72 East, and the lease agreement is valid because Stabfund was aware of its existence when the DIL agreement was executed. Additionally, the Walton tenants argue that Stabfund acted as a landlord when it made efforts to resolve an issue regarding garbage collection.

¶ 14 Further, the Walton tenants argue that Stabfund's interest in the property was extinguished, and 70 East's interest in the property is subordinate, because the DIL agreement was structured as a "short sale." The Walton tenants claim that the DIL agreement was structured as a short sale because: instead of the mortgagee or its nominee accepting the deed in lieu of foreclosure outright, the DIL agreement called for the deed to be transferred to an entity identified as "Buyer" (70 East); 70 East agreed to procure title insurance naming itself as the insured and showing that title vested in 70 East; and the DIL agreement required a formal closing whereby title would be vested in 70

East. The Walton tenants argue that the short sale structure of the agreement negates the "anti-merger" language of section 15-1401 of the Code (735 ILCS 5/15-1401 (West 2010)). The "anti-merger" language of section 15-1401 of the Code states that a deed in lieu of foreclosure to the mortgagee or mortgagee's nominee shall not cause a merger of the mortgagee's interest as mortgagee, and the mortgagee's interest derived from the deed in lieu of foreclosure. The Walton tenants contend that 70 East was not Stabfund's nominee, but instead a third-party acquiring title to the property after a formal closing. The Walton tenants claim that after closing, any interest Stabfund might have had in the property was transferred to 70 East. The Walton tenants argue that because Stabfund's interest was extinguished, it lost any interest on which it might foreclose. Thus, they argue that the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food.

¶ 15 In response, Stabfund argues that the trial court properly denied the motion to dismiss filed by 72 East and 68 Food because the DIL agreement did not terminate Stabfund's right to continue the foreclosure case and terminate subordinate claims of interest in the property. Stabfund contends that the language of the DIL agreement specifically allowed the foreclosure to continue after Walton of Chicago relinquished its interest in the property. Stabfund asserts that the DIL agreement does not state that the events of default have been resolved. Rather, Stabfund argues that the DIL agreement states that Walton of Chicago *has requested* the events of default be resolved. Stabfund points out that the DIL agreement states "the indebtedness evidenced by the Note shall not be cancelled, shall survive the Closing,***and all of the Loan Documents shall remain in full force and effect after [this transaction has been consummated]." Thus, Stabfund argues that after the DIL agreement was executed, the indebtedness continued to exist unsatisfied, and the default remained.

Stabfund contends that because the debt continued to exist, its right to foreclose was preserved. Stabfund claims that under the DIL agreement, 70 East took title subject to the debt and Stabfund then foreclosed 70 East's interest in the property in order to obtain clean title.

¶ 16 Additionally, Stabfund argues that the Walton tenants' claim of attornment provided no basis on which to dismiss the foreclosure complaint. Stabfund claims that the cases cited by the Walton tenants do not provide any support for their argument. Stabfund asserts that there was no attornment in this case because acceptance of a relationship by the tenant does not bind a new landlord unless the new landlord consents to be bound. Stabfund contends that for it to be bound to 72 East's lease agreement with Walton of Chicago, Stabfund must have accepted the lease agreement and manifested a relinquishment of the right to foreclose. Stabfund claims that 72 East presented no evidence of Stabfund's acceptance of the lease agreement. Stabfund asserts that accepting rent payments had no effect on its relationship with 72 East because Stabfund was not required to allow 72 East to occupy the property free of charge while the foreclosure case was pending.

¶ 17 Also, Stabfund argues that the language of the DIL agreement and its actions throughout the foreclosure case show that it clearly did not accept the terms of the lease agreement. Stabfund argues that the language of the DIL agreement states that it does not create any obligations on the part of Stabfund to third parties, such as 72 East, who may have claims against Walton of Chicago. Stabfund asserts that 72 East is not a party to the DIL agreement, nor a third-party beneficiary, so it cannot assert claims based on the DIL agreement. Stabfund contends that the DIL agreement also states that Stabfund does not assume any liabilities pertaining to the property, except as expressly stated in the agreement. Stabfund acknowledges that there is a section of the DIL agreement which

allows "Permitted Exceptions." However, Stabfund argues that the terms of 72 East's lease violate the conditions of the Permitted Exceptions section. Additionally, Stabfund highlights an email correspondence between its representative and 72 East in which Stabfund's representative stated that the terms of the lease agreement were unacceptable, and that Stabfund would name Pane Caldo in the foreclosure action if the parties could not agree on acceptable lease terms. Thus, Stabfund argues that there could not have been attornment in this case.

¶ 18 Further, Stabfund argues that the DIL agreement was not a "short sale." Stabfund argues that under the DIL agreement, the parties agreed that the property would be transferred to Stabfund's nominee, 70 East. Stabfund claims that this is the precise situation contemplated by section 15-1401 of the Code. Stabfund points out that the parties executed a special warranty deed which states:

> "This Special Warranty Deed is given by Grantor as a deed in lieu of foreclosure. It is the purpose and intent of Grantor and Grantee that the interests of Grantee shall not merge with the interests of Stabfund *** under that certain Mortgage ***. "

Moreover, Stabfund argues that the deed contains a declaration that it is tax exempt, which would not be permitted if the transaction were a short sale. Stabfund asserts that the DIL agreement also contains non-merger language. Additionally, Stabfund argues that there is no merit to the Walton tenants' argument that the transaction was a short sale because the party who received title was identified as the "Buyer." Stabfund points out that in the DIL agreement, the "Buyer" is defined as the "person or other entity designated by [Stabfund]." Thus, Stabfund contends that 70 East was simply its nominee, not a third-party purchaser pursuant to a short sale. Therefore, Stabfund argues

that the trial court did not err in denying the motion to dismiss filed by 72 East and 68 Food.

¶ 19 A motion to dismiss pursuant to section 2-619 of the Code allows for involuntary dismissal of a claim based on certain defects or defenses. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). When ruling on a section 2-619 motion to dismiss, the trial court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Sandholm v. Kuecker*, 2012 IL 111443, ¶55. The reviewing court applies the *de novo* standard of review to the trial court's ruling on a motion to dismiss. *Id*.

¶ 20 The Walton tenants' first argument is that the trial court erred in denying the motion to dismiss filed by 72 East and 68 Food because the DIL agreement cured all defaults alleged in Stabfund's amended complaint. Stabfund argues that the language of the DIL agreement specifically allowed the foreclosure to continue after Walton of Chicago relinquished its interest in the property. We agree with Stabfund's argument. When a court interprets a contract, the court's main objective is to give effect to the intent of the parties. *C.A.M. Affiliates, Inc. v. First American Title Insurance Co.*, 306 Ill. App. 3d 1015, 1020 (1999). "If a contract is clear and unambiguous, the court must determine the intent of the parties solely from the plain language of the contract." *Id*. In this case, the parties disagree about whether the DIL agreement resolved the events of default. The DIL agreement states, in pertinent part, as follows:

> "E. Certain Events of Default have occurred under the Loan Documents and in order to avoid the financial hardship and damage to reputation that would result therefrom, Borrower and Guarantor *have requested* that the parties resolve such Events of Default by

> Borrower's conveyance of the Property *** to a person or other entity designated by Lender ("Buyer") in lieu of foreclosure in consideration of Lender's covenant not to sue Borrower, Lender's release of Guarantor, an agreement by Lender not to currently exercise foreclosure remedies otherwise available to Lender and other consideration.
>
> ***
>
> G. Lender wishes to have the Property conveyed to Buyer pursuant to this Agreement to avoid the necessity of litigation [and] foreclosure ***.
>
> * * *
>
> 9.01 Merger. Notwithstanding Buyer's acquisition of the Property, subject to the provisions of the Covenant Not to Sue and the Release of Guarantor, *the indebtedness evidenced by the Note shall not be cancelled, shall survive the Closing and delivery of any deeds and/or releases, and all of the Loan Documents shall remain in full force and effect after the transaction contemplated by the Agreement has been consummated.*" (Emphasis added..)

¶ 21 As Stabfund argues, section E of the DIL agreement does not state that the events of default have been resolved. Rather, section E of the DIL agreement states that Walton of Chicago and Jerry *have requested* that the events of default be resolved by the agreement. Moreover, section 9.01 of

the DIL agreement states that the debt evidenced by the promissory note shall not be cancelled and shall survive the closing, and all loan documents shall remain in full force and effect after the transaction is consummated. The plain language of section 9.01 shows that the parties explicitly agreed that the DIL agreement would not extinguish or resolve Walton of Chicago's default. The Walton tenants do not point to any part of the DIL agreement which states that the debt is resolved. Thus, we find that, pursuant to the plain language of the DIL agreement, the events of default were not resolved by the DIL agreement.

¶ 22 The Walton tenants next argue that 72 East attorned to Stabfund, and Stabfund is bound by 72 East's lease agreement. As noted earlier, attornment is an act by a tenant acknowledging an obligation to a new landlord. *Arendt*, 307 Ill. App. 3d at 566. We are not persuaded by the Walton tenants' argument. As Stabfund points out, most of the cases cited by the Walton tenants identify general rules regarding attornment, and apply those rules to situations involving a mortgagee's attempt to *bind a tenant* to a lease. See *West Side Trust*, 358 Ill. 631; *Oswald v. Mollet*, 29 Ill. App. 449 (1888). Those cases do not discuss the effect of attornment on a mortgagee's rights. In support of their argument that accepting rent payments binds a new landlord to a previously executed lease, the Walton tenants cite *Jung v. Zemel*, 189 Ill. App. 3d 191 (1989). However, the *Jung* court was not presented with the issues of foreclosure or attornment. Rather, *Jung* involved a landlord's waiver of strict compliance with a lease provision. See *id*. Therefore, the cases cited by the Walton tenants do not support their argument.

¶ 23 In this case, attornment occurred where 72 East submitted rent payments to Stabfund, and Stabfund accepted those payments. However, we note that this court has previously held that in

situations similar to the instant case, attornment does not necessarily bind an original lessor to the terms of a sublease. See *Arendt*, 51 Ill. App. 3d 564. In *Arendt*, the original lessor leased an apartment to a tenant, and the tenant sublet the apartment to a subtenant. *Id*. at 565. Pursuant to the terms of the sublease, the subtenant paid the tenant a $100 security deposit. *Id*. After not receiving monthly rent payments, the original lessor served a notice of default on the tenant and notified the tenant that the lease was terminated. *Id*. The subtenant remained in the apartment and paid rent to the original lessor. *Id*. When the subtenant vacated the premises, the subtenant demanded that the original lessor return the $100 security deposit that was paid to the tenant. The original lessor refused to comply with the subtenant's demand, and the subtenant filed a complaint against the original lessor. *Id*. The trial court entered a judgment in favor of the subtenant. *Id*. This court reversed the judgment of the trial court. *Id*. at 566-67. This court reasoned that there was no privity of estate or contract between the subtenant and the original lessor; and there was no indication that the original lessor acquiesced in, or benefitted from, the provisions of the sublease regarding the security deposit. *Id*. at 566. This court held that although attornment occurred where the original lessor accepted rent payments from the subtenant, "attornment cannot serve to bind [the original lessor] to the terms of the [sublease] to which it was neither initially a party nor by its conduct subsequently bound." *Id*. at 567. We agree with this court's holding and reasoning in *Arendt*. In this case, there is clearly no privity of contract between Stabfund and 72 East, and Stabfund was not a party to the lease agreement between Walton of Chicago and 72 East. Therefore, Stabfund could not be bound by the terms of 72 East's lease agreement.

¶ 24 Further, the terms of the DIL agreement show that Stabfund did not intend to adopt 72 East's

lease agreement. Section 7.01 of the DIL agreement states that the agreement does not create any obligations on the part of Stabfund to third parties that have claims against Walton of Chicago. Section 7.01 also states that Stabfund does not assume or agree to discharge any liabilities pertaining to the property, except as expressly stated in the agreement. Section 11.08 of the DIL agreement states "Except to the extent expressly provided in the Borrower Documents, neither [70 East] nor [Stabfund] is assuming any obligations or liabilities of Borrower or Guarantor." Section 11.10 of the DIL agreement states that except as otherwise provided in the agreement, no agreements or other obligations of Walton of Chicago shall survive the closing. Additionally, the DIL agreement stated that the assignment of Walton of Chicago's interest to 70 East was subject to a list of "Permitted Exceptions." The right of a tenant was a permitted exception only if the tenant has "no rights or options to purchase the Property or rights of first refusal affecting the Property." As Stabfund points out, 72 East's lease agreement with Walton of Chicago contained an option to purchase the property, which is a violation of the terms of the permitted exceptions. It is clear through the terms of the DIL agreement that Stabfund did not intend to adopt any additional contracts or agreements executed by Walton of Chicago, such as the lease agreement with 72 East.

¶ 25 Moreover, Stabfund's conduct once it became aware of 72 East's lease agreement showed that it did not acquiesce nor accept the lease agreement. On July 1, 2010, Stabfund's representative sent an email to 72 East which stated, in pertinent part, as follows:

> "[W]e are going to need to proceed with naming the Pane Caldo tenant in the foreclosure action in order to foreclose out the improperly recorded lease which was not approved by the lender at

> the time of the recording. This will result in the termination of any rights of Pane Caldo to occupy the premises absent a new lease being signed. *** [W]e could agree to enter into a lease that is substantially similar to what you previously signed *** with a term coterminous with any agreed upon 2nd floor lease, however, the exclusivity provision would need to be removed and the option to purchase revised to more specifically apply to the applicable condo unit, rather than the entire building."

¶ 26 It is undisputed that the parties were not able to agree on the terms of a new lease agreement. Although Stabfund accepted rent payments from 72 East and took on some management responsibilities for the property, Stabfund expressly stated that 72 East's lease agreement was unacceptable. We are not persuaded by the Walton tenants' argument that Stabfund waived its right to foreclose on the property, and was bound to honor the sublease for its entire duration, simply because Stabfund accepted rent payments from 72 East. The Walton tenants do not cite any statute or case that supports this proposition. Likewise, we are unpersuaded by the Walton tenants' argument that Stabfund elected to comply with 72 East's lease agreement because Stabfund's assignee, 70 East, accepted an assignment of the interests of Walton of Chicago. The Walton tenants cite only *Stavros v. Karkomi*, 39 Ill. App. 3d 113 (1976), in support of their argument. *Stavros* addressed the issue of an assignee having no interest in a property because the assignor did not have any interest to assign. See *id*. at 123-24. *Stavros* is not analogous to the case at bar. Therefore, we find that the attornment that occurred in this case did not bind Stabfund to the terms of 72 East's

lease agreement.

¶ 27 The Walton tenants next argue that because the DIL agreement was structured as a "short sale," Stabfund's interest in the property was extinguished and it had no right to foreclose on the property. The Walton tenants claim that the DIL agreement was structured as a short sale because: instead of the mortgagee or its nominee accepting the deed in lieu of foreclosure outright, the DIL agreement called for the deed to be transferred to an entity identified as "Buyer" (70 East); 70 East agreed to procure title insurance naming itself as the insured and showing that title vested in 70 East; and the DIL agreement required a formal closing whereby title would be vested in 70 East. Stabfund argues that the DIL agreement was not structured as a short sale, and that the agreement complied with section 15-1401 of the Code. We agree with Stabfund's argument. Section 15-1401 of the Code states:

> "Any mortgagee or mortgagee's nominee may accept a deed from the mortgagor in lieu of foreclosure subject to any other claims or liens affecting the real estate. *** A deed in lieu of foreclosure, whether to the mortgagee or mortgagee's nominee, shall not effect a merger of the mortgagee's interest as mortgagee and the mortgagee's interest derived from the deed in lieu of foreclosure." 735 ILCS 5/15-1401 (West 2010).

¶ 28 Under section 1.02 of the DIL agreement, Walton of Chicago agreed to assign its interest to a "Buyer," namely 70 East. Although 70 East was identified as a "Buyer" in the DIL agreement, the agreement defined the term "Buyer" as "a person or other entity designated by [Stabfund]." Thus,

under the DIL agreement, 70 East was nothing more than Stabfund's nominee. Also, the special warranty deed executed by the parties states:

> "This Special Warranty Deed is given by Grantor as a deed in lieu of foreclosure. It is the purpose and intent of Grantor and Grantee that the interests of Grantee shall not merge with the interests of Stabfund *** under that certain Mortgage ***. "

The language of the DIL agreement and the special warranty deed show that the DIL agreement was executed in conformance with section 15-1401 of the Code, and the parties agreed that the interests of 70 East would not merge with the interests of Stabfund. Contrary to the Walton tenants' argument, the DIL agreement was not structured as a short sale, and the "anti-merger" language of section 15-1401 was not negated. Therefore, we hold that the trial court did not err in denying the Walton tenants' motion to dismiss.

¶ 29 We next determine whether the trial court erred in granting Stabfund's motion for summary judgment.

¶ 30 The Walton tenants argue that the trial court erred in granting Stabfund's motion for summary judgment because 72 East attorned to Stabfund. The Walton tenants claim that through its conduct, Stabfund accepted 72 East's lease agreement and created a landlord-tenant relationship. Thus, the Walton tenants assert that there was a genuine issue of material fact regarding attornment. Additionally, the Walton tenants argue that the trial court erred in granting Stabfund's motion for summary judgment because the DIL agreement resolved all events of default. The Walton tenants claim that because the events of default were satisfied by the DIL agreement, the trial court should

have found that Stabfund could not plead a default under the loan documents.

¶ 31 In response, Stabfund argues that the trial court did not err in granting its motion for summary judgment. Stabfund argues that the Walton tenants' argument that the DIL agreement resolved all events of default, is simply a restatement of its argument regarding the trial court's ruling on the motion to dismiss. Stabfund contends that the Walton tenants' attornment argument is also largely a restatement of their earlier argument; and that Stabfund's conduct clearly shows that Stabfund never accepted 72 East's lease agreement. Thus, Stabfund argues that the trial court did not err in granting its motion for summary judgment.

¶ 32 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). This court applies *de novo* review to a trial court's order granting summary judgment. *Id*.

¶ 33 As Stabfund points out, the Walton tenants' arguments regarding the trial court's ruling on the motion for summary judgment are a restatement of the arguments they made regarding the trial court's ruling on the motion to dismiss. In their arguments regarding the motion for summary judgment, the Walton tenants provide no additional facts, evidence, or legal support that alter any of our analysis as to the issues of attornment, or the DIL agreement resolving the events of default. The same analysis that we utilized in discussing the Walton tenants' arguments on the motion to dismiss, can be applied to the Walton tenants' arguments on the motion for summary judgment. Thus, we decline to discuss those same issues again. Accordingly, we hold that the trial court did

not err in granting Stabfund's motion for summary judgment.

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.