2015 IL App (1st) 131903-U

FIRST DIVISION
January 20, 2015

No. 1-13-1903

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HSBC BANK, N.A., as trustee for Home Equity Loan Trust Services ACE 2006-HE1,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 09 M1 708815
WILLIAM L. ADAMS,	)	
Defendant-Appellant.	)	Honorable Leonard Murray, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held*:** In this eviction case, the trial court correctly held that the defendant tenant had no unresolved counterclaim pending which would have prevented the case from being closed in its entirety.

¶ 2 The trial court granted the motion of plaintiff HSBC Bank, N.A. (HSBC) to voluntarily dismiss this eviction case. Normally, under those circumstances, someone living at the property would be overjoyed to learn that he was free from the risk of eviction, at least for awhile. Defendant William L. Adams, however, has appealed from the order terminating the case on a host of grounds. We agree with the court below that the case is over and accordingly affirm.

¶ 3 BACKGROUND

¶ 4 The dispute over the property involved in this case began on December 27, 2004, when Adams, the long-time owner, granted title to a home located at 9341 S. Jeffrey Avenue in Chicago to John Gloss by warranty deed. On the same day, Gloss mortgaged the property in his own name. A few days later, on January 1, 2005, Adams entered into a highly unusual lease transaction with Gloss. Gloss leased the already-mortgaged premises to Adams for 5½ years (until June 30, 2010) in consideration for Adams's prepayment of $50,000 in rent, representing a monthly rent of $750 per month for 66 months.[1] The lease specified that any "additional lease pre-payments will extend the terms of this Lease with Purchase Option." The lease required Adams to provide no security deposit whatsoever. The lease also allowed Adams to extend the term for an additional three years, and to exercise an option to purchase the property back at a price to be determined by a licensed appraiser.

¶ 5 Later that year, on October 24, 2005, Gloss refinanced his original loan and mortgaged the property again to secure a loan made by Fremont Investment and Loan (Fremont).[2] In this mortgage, recorded January 3, 2006, Gloss represented that he (Gloss) would reside at the property as his principal residence within 60 days of execution thereof, or before late December, 2005. It appears Gloss's representation to his lender was manifestly false; he had already leased

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[1] We cannot resolve one discrepancy regarding the prepayment amount. The sum of $50,000 divided by $750 results in a term of 66⅔ months, not 66 months.

[2] A release of the original mortgage was recorded on December 7, 2005, presumably because it had been paid off from the proceeds of the October 24, 2005 mortgage. Under the doctrine of conventional subrogation, the October 24, 2005 mortgage can advance back in the chain of lien priority to that occupied by the predecessor mortgage. Assuming that to be the case, all three of Adams's leases are inferior in priority to, and subject to, the "second" October 24, 2005 mortgage even though the first lease was signed ten months earlier. See *Home Savings Bank v. Bierstadt,* 168 Ill. 618, 624 (1897); *UnionBank v. Thrall*, 374 Ill. App. 3d 785, 793 (2007) (collecting cases all holding that conventional subrogation can apply even if the later mortgage does not recite that it is refinancing an earlier mortgage).

the property to Adams, and it is undisputed that Adams remained at the property for years. Gloss defaulted on this mortgage sometime around October 1, 2006. This second mortgage is the focus of one of the disputes at issue in this case.

¶ 6 On January 1, 2007, Adams and Gloss entered into a second lease which specifies that its term "shall start on January 1, 2007, and end on December 31, 20011 [*sic*]"[3] for a rate of $675 per month. Adams answered interrogatories regarding this lease in an evasive manner, but a fair summary of his answer is that he repudiates the validity of this particular lease and instead contends that a third lease governs his right to possession of the property.

¶ 7 On February 10, 2007, Adams and Gloss entered into a third lease with a term running from July 1, 2010 to January 31, 2015 in consideration of pre-paid rent of $40,500 at $750 per month. Receipts in the record purport to show the pre-paid rent for both the 2005 and 2010 leases were paid contemporaneously with the signing of the respective documents. The first and third leases bear the hallmarks of a textbook mortgage rescue fraud scheme with Adams being the victim. See, *e.g.*, 765 ILCS 940/1 *et seq*. (West Supp. 2007) (We will return to that issue later, as it relates to Adams's complaint that he was unaware of the foreclosure case against Gloss).

¶ 8 On March 14, 2007, Fremont's successor, HSBC, sued Gloss to foreclose Gloss's later mortgage and recorded a *lis pendens* notice.[4] *HSBC Bank, USA v. Gloss*, 07 CH 7190 (Cir. Ct.

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[3] Adams's position regarding this second lease changed over time. At some points in the proceedings below, Adams actually contended that the termination year was not the result of a typographical error but that the lease extended for 18,004 years. To the extent it may be relevant, we agree with the court below that the year was an obvious typographical error and that the signers intended that the lease run for a four-year term.

[4] Under section 15-1503 of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1503 (West 2006) (now codified as 735 ILCS 5/15-1503(a) (West 2012)), the recording of the *lis*

Cook Co.). The foreclosure complaint alleged that the mortgage had been delinquent since at least October 1, 2006. Adams had never recorded any of his leases[5] and was not named as a defendant in the foreclosure lawsuit. Neither Gloss nor Adams participated in that lawsuit in any way. Although the lender named "unknown owners" as defendants in the original complaint, the trial court entered an order on October 22, 2007 dismissing these defendants on the lender's motion. The case concluded on March 30, 2008, when the court entered an order of confirmation and sale. HSBC took title to the property by submitting the high bid at the foreclosure sale. A selling officer's deed to HSBC was recorded on May 1, 2008.

¶ 9 On August 4, 2008, HSBC filed the first of several eviction actions, apparently after discovering that there was a tenant living at the property. That case, 08 M1 720194, strangely named only "unknown owners" as defendants. The complaint asserted that HSBC acquired superior title through the selling officer's deed and claimed possession of the subject property. HSBC voluntarily dismissed that case on December 12, 2008.

¶ 10 On December 31, 2008, HSBC, now having identified Adams, served him with a post-foreclosure demand for possession under section 15-1701 of the Mortgage Foreclosure Law. 735 ILCS 5/15-1701 (West 2008). On March 16, 2009, HSBC then filed its second eviction case, 09 M1 706257. This was the first case in which Adams was actually a named defendant. That case was voluntarily dismissed on March 16, 2009 because, according to the dismissal order, HSBC

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pendens notice automatically gave Adams constructive notice that his still-unrecorded lease was in peril. See, *e.g.*, *Menard, Inc. v. 1945 Cornell, LLC*, 2013 IL App (1st) 121422, ¶ 8.

[5] The public records of the Cook County Recorder of Deeds show that Adams did not record any of his leases until February 16, 2010, several years after title had already transferred to HSBC. See *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995) ("Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case.").

had failed to serve a notice required under section 15-1701(h)(4) of the Mortgage Foreclosure Law. 735 ILCS 5/15-1701(h)(4) (West 2008).

¶ 11 HSBC filed this case, its third eviction case, on April 14, 2009. Adams was also named as a defendant in this case. After several months of litigation regarding service of summons, Adams was served by posting on September 10, 2009, with a summons requiring him to appear in court on September 23, 2009. Adams filed a *pro se* appearance and jury demand on September 21, 2009, and obtained a fee waiver order. On October 27, 2009, Adams filed a *pro se* motion to dismiss arguing that his leasehold prevented HSBC from evicting him. On November 17, 2009, Adams filed a *pro se* "emergency motion for leave to obtain legal counsel, answer summary judgment, answer complaint, present affirmative defenses and counterclaims." Attached to the emergency motion were three documents purporting to be an answer, affirmative defenses, and a counterclaim. Each of the three attached documents was separately time-stamped, but the context of their presentation demonstrates that the three documents were only exhibits to the main motion and not stand-alone filings. Three days later, on November 20, Judge Garber[6] issued an order stating that Adams's emergency motion to retain counsel was granted, and that the case was continued to December 14 for Adams's counsel to appear. The written order makes no mention that any leave was granted to file the answer, affirmative defenses, and counterclaim late, and the record contains no transcript which sheds further light on the scope of the order. On November 20, leave of court would have been necessary to file the counterclaim late, because Adams had been served with process on September 10, 2009 with a summons requiring an appearance by September 23, 2009. The counterclaim was due on the

[6] Because the main issue in this case involves a successor judge (Judge Murray) interpreting an ambiguous order entered by his deceased predecessor (Judge Garber), we specifically name each judge for clarity.

appearance date. IL. S. Ct. R. 181(b)(2) (eff. Feb. 10, 2006); *Sawyier v. Young*, 198 Ill. App.3d 1047, 1050-51 (1990).

¶ 12 A long period then ensued during which the parties were embroiled in various discovery disputes. HSBC had considerable doubts about the *bona fides* of the leases, questioning whether any money actually changed hands. In essence, HSBC intimated that the leases may have been concocted as subterfuges to allow Adams to establish a long-term tenancy that would be superior to any title acquired by a Gloss's mortgagee, and for Gloss to draw out money from the property by sequentially mortgaging it. About this time, Adams also filed motions arguing for various forms of relief because the plaintiff had failed to name Adams as a defendant in the foreclosure case, and sought the relief prayed for in his "counterclaim."

¶ 13 On August 23, 2011, Judge Garber heard testimony regarding the lease at an evidentiary hearing. He noted that he doubted Adams's lease defense early on, but had changed his mind after hearing the testimony. In sum, Judge Garber granted Adams's motion to dismiss on the basis that he had prepaid rent for a period expiring December 31, 2011.

¶ 14 HSBC moved to reconsider that ruling, arguing that the hearing was improperly convened because Adams had a jury demand on file and Judge Garber, rather than a jury, resolved contested issues of fact which went to the merits of Adams's lease-based defense. Judge Garber realized this error and vacated his order dismissing the case. Around the same time, Adams filed motions to reconsider of his own, arguing: (1) that his leasehold actually ran until 2019 or 2028; (2) that because Adams filed the jury demand, only issues that he wanted to send to a jury should be decided by a jury, not all factual disputes in the case; and (3) that he had recorded a document exercising his option to purchase the property.

¶ 15 On December 27, 2011, Adams recorded a notice of his intent to exercise his option to purchase the property. The notice, however, did not contain a purchase price established by an appraiser as required by the terms of the underlying agreement. Additionally, it was recorded long after the *lis pendens* notice and selling officer's deed were themselves recorded, rendering it inferior to those documents. See ¶ 41 *infra*.

¶ 16 On March 14, 2012, the City of Chicago filed a housing court case (12 M1 400801) against HSBC and Adams, citing numerous building code violations at the property. Back in eviction court, on March 27, 2012, Judge Garber denied Adams's motion to reconsider.

¶ 17 On July 11, 2012, Adams submitted an affidavit signed by Gloss, in which Gloss asserted that Adams was "entitled" to a down payment of $79,800 toward the purchase price and that Adams had prepaid $90,000 to date. On September 3, 2012, Judge Garber died, shortly after he had continued the trial date several times. Further proceedings in the eviction case were held before Judge Murray.

¶ 18 The housing court ordered Adams to vacate the premises because they were dangerous and hazardous. On September 18, 2012, the housing court judge entered an order granting Adams's motion for extra time to vacate the premises, but ordered him to vacate by September 26, 2012, "with police assistance if necessary." The deadline was later extended to October 3, 2012. Adams was eventually dismissed as a defendant in the housing court case (most likely because he was merely a tenant), but Adams moved to vacate that dismissal, based on his oft-repeated complaint regarding HSBC's failure to name him as a defendant in the foreclosure case. The housing court judge denied Adams's request.

¶ 19 In the end, the housing court judge determined that the property was dangerous, hazardous, and unfit for habitation and entered an order commanding all persons to leave the

property.[7] Upon entry of that order, HSBC decided to abandon its eviction case against Adams, because it had obtained the relief it wanted from the housing court case. It filed a motion to voluntarily dismiss this eviction case.

¶ 20 The eviction case was eventually set for trial for December 7, 2012. The record only reveals a bit of what happened that day. It appears that HSBC's attorney appeared early (whether it was before the set time for the case or not is disputed) and obtained an order voluntarily dismissing the eviction case "without prejudice." Adams's attorney appeared later, vehemently protesting the voluntary dismissal. He memorialized his protest in a motion to reconsider arguing, among other things, that the case could not be voluntarily dismissed because Adams still had a counterclaim pending.

¶ 21 On January 28, 2013, Judge Murray denied Adams's motion to reconsider the voluntary dismissal order, finding that HSBC had an absolute right to dismiss its own case. Nonetheless, he set the case for March 29 for a "hearing on defendant's counterclaim." HSBC then filed a motion to reconsider the portion of the order relating to the counterclaim, saying that no such counterclaim existed because the court never granted leave to file it late. The parties briefed that motion. While Adams did not dispute that there was no written order specifically granting leave to file the late counterclaim, he relied strongly on the action of Judge Garber in "accepting" the counterclaim when it was tendered to him over the bench at some previous court appearance.

¶ 22 On May 10, 2013, Judge Murray heard very extensive arguments regarding the validity of the counterclaim. Pressed repeatedly to demonstrate that Judge Garber had granted leave to file a late counterclaim, Adams's attorney persistently responded that Judge Garber's

[7] On February 21, 2013, we dismissed Adams's appeal of one of the housing court orders for want of prosecution. *City of Chicago v. HSBC Bank, N.A.*, No. 1-12-2689.

"acceptance" was all that was required. After an exhaustive hearing, Judge Murray granted plaintiff's motion to reconsider, finding that no valid counterclaim was on file because Judge Garber had never granted leave to file it late. This appeal followed.

¶ 23 ANALYSIS

¶ 24 Before we address the merits, we consider several issues relating to Adams's brief. In its own brief, HSBC asked to strike the appendix to Adams's brief. Adams's brief and a 347-page appendix are bound together as a single document. HSBC claims that the appendix contains documents which are outside the record. Indeed, most if not all of the documents in the appendix relate to preceding litigation, such as the housing court case, the foreclosure case, and prior eviction cases involving the same property. While we can take judicial notice of pleadings and orders entered in other cases (and have done so to fully set out the background in this order), we agree with HSBC that the appendix is improper and therefore strike pages A61-A319 from it.

¶ 25 Additionally, we note that Adams's brief contains no index to the record as required by Illinois Supreme Court Rule 342(a) (IL Sup. Ct. R. 342(a) (eff. Jan. 1, 1995)). Adams's brief contains a "Standard of Review" section (see IL Sup. Ct. R. 341(h)(3) (eff. July 1, 2008)), but it contains absolutely nothing relating to the standard of review. Instead, it is a rambling argumentative recitation of various issues in the case. This court is entitled to be presented with clearly defined issues, citations to pertinent authority and cohesive arguments. *U.S. Bank v. Lindsey*, 397 Ill.App. 3d 437, 459 (2009). The court "is not merely a repository into which an appellant may 'dump the burden of argument and research.' " *Id.* (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). The rules of procedure concerning appellate briefs are rules, not mere suggestions, and it is within our discretion to strike a brief and dismiss the appeal for failure to comply with those rules. See *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999).

However, despite this disregard for the appellate rules and the confusing presentation in the brief's argument section, we decline to dismiss the appeal and find that lack of compliance does not preclude our review. We have a cogent brief from HSBC which aids our ability to review this case on the merits. See *In re Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004) (reviewing court has choice to review merits, even in light of multiple Rule 341 mistakes).

¶ 26 On appeal, Adams raises four contentions of error: (1) the trial court erred in finding there was no valid counterclaim pending; (2) because of the "one refiling" rule, HSBC could not voluntarily dismiss this third eviction case because it had already voluntarily dismissed two prior cases; (3) the court "lacked jurisdiction" over Adams because he had an unexpired leasehold which was not extinguished at the foreclosure sale and was superior to whatever rights HSBC gained through the foreclosure sale; (4) the court erred when it reconsidered its ruling following the evidentiary hearing on the basis that contested facts should be presented to a jury, because only Adams, not HSBC, was entitled to have facts determined by a jury.

¶ 27 The main issue before us is whether the case was properly terminated. Inherent in that issue are whether there was a valid counterclaim pending. If the counterclaim had been properly filed, then a voluntary dismissal would not have been appropriate without Adams's consent. *Sawyier*, 198 Ill. App. 3d at 1050. However, a party who fails to obtain leave of court to file a late counterclaim risks having the counterclaim "disregarded or treated as a nullity" "at the discretion of the court." *Id*. at 1052. A voluntary dismissal does not necessarily dismiss a pending counterclaim or third party complaint. 735 ILCS 5/2-1009(d) (West 2008).

¶ 28 There is a photocopy of the counterclaim in the record. The very brief document, filed *pro se*, bears the title "III. DEFENTANT'S [sic] COUNTERCLAIMS." The document itself bears little resemblance to a valid counterclaim. First, it purports to "adopt[ ]" all the allegations

in Adams's answer and affirmative defenses, which is nonsensical since an answer and affirmative defenses have specialized roles in the pleading sequence and cannot constitute counterclaims of their own. In Part A, entitled "PLAINTIFF BREACHED DEFENDANT'S LEASE," Adams simply alleges that he had prepaid rent, lived at the property for thirty years, and that HSBC has "done everything they could do to evict him." Part B is captioned "PLAINTIFF ILLEGALLY COMMITTED FRAUD AGAINST DEFENDANT," and says that HSBC should have informed Adams about the foreclosure case and that the "Federal, State, and City laws are very clear in this regard when Tenant has a Lease."

¶ 29 The counterclaim concludes with a single prayer for relief asking that the trial court deny plaintiff the relief it requested in the main complaint, and grant Adams "the reliefs" [*sic*] contained in the counterclaim. However, no other prayers for relief, particularly for affirmative, rather than defensive relief, appear anywhere in the counterclaim.

¶ 30 Judge Murray could find no order allowing leave to grant this counterclaim. We can find none in the record, and Adams cites to none. The fact that it may have been handed up to Judge Garber, who justifiably presumed that it had been validly and timely filed, does not constitute a finding to that effect in light of the contrary finding which Judge Murray made after patiently conducting an extensive hearing.

¶ 31 There is another reason why the result below is correct. Simply calling something a "counterclaim" does not make it so. Section 2-608 of the Illinois Code of Civil Procedure (735 ILCS 5/2-608 (West 2008)) defines a counterclaim as "[a]ny claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief ***." The key concept is that a counterclaim is a

lawsuit of its own. It is a mechanism through which a defendant asks for damages or injunctive relief against a plaintiff. It is not, as here, merely a defense to the plaintiff's main claim. Despite its title, the document in question is not a counterclaim, because it requests no affirmative relief whatsoever. Our supreme court has determined that "the character of [a] pleading is determined from its content, not its label." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) (citing *Barnes v. Southern Ry. Co.*, 116 Ill. 2d 236 (1987)). Accordingly, the trial court did not err in finding that no counterclaim was filed.

¶ 32 We pause at this point to analyze a related issue. Adams has complained about lack of notice of the foreclosure case in virtually every forum in which this property has been disputed. We wish to put this issue to rest once and for all. As noted above, his "counterclaim" argues that the laws "are very clear in this regard." He is right with respect to the laws' clarity but mistaken on the merits. Until the property is sold at a foreclosure sale and the sale is confirmed, a foreclosing lender has no obligation whatsoever to name tenants of mortgaged properties as defendants in foreclosure cases against their landlords, or even to notify them of the pendency of the foreclosure case. Under section 15-1501(a) of the Mortgage Foreclosure Law (735 ILCS 5/15-1501(a) (West 2008)) there are only two necessary parties to a foreclosure case: the mortgagor, and 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. Failure to notify a tenant of a pending foreclosure is not error but merely means that the foreclosure judgment itself does not bind the tenant. *Menard, Inc.*, 2013 IL App (1st) 121422, ¶ 8. Instead, the successful purchaser at the foreclosure sale must pursue its claim for possession through separate litigation against the tenant, either by pursuing supplemental

proceedings in the foreclosure case or, as here, through a fresh forcible entry and detainer lawsuit.

¶ 33 We recognize that, after the court confirms the sale of the foreclosed property, the new owner (usually, the lender) must undertake various steps to notify tenants living at the foreclosed property. See, *e.g.*, 12 U.S.C. § 5220 Note; 735 ILCS 5/9-207.5 (West 2012); 735 ILCS 5/15/1224 (West 2012); Chicago Municipal Code § 5-14-010, *et seq.* (added June 5, 2013). Doubtless, these laws are the ones on which defendant here relies. However, they all concern the relationship between the owner and tenant *after* the judicial foreclosure process has been completed and title to the property has been transferred to the successful bidder at the foreclosure sale. None require that a lender name a tenant as a party defendant during the pendency of the foreclosure case against the landlord.

¶ 34 Adams strenuously complains that he was unaware of the foreclosure, but he facilitated his own ignorance by deeding the property to Gloss and thus taking himself out of the chain of record title. In mortgage rescue fraud schemes, long-time residents deed their property away and are unaware that the buyer has become delinquent on their mortgage. We recognize there is case law holding that a lender has some due diligence obligations to investigate whether there is a resident *claiming an ownership interest* when lending in the first instance. (Emphasis added.) See, *e.g.*, *U.S. Bank National Ass'n v. Villasenor*, 2012 IL App (1st) 120061, ¶ 71. If they fail to do so, equitable remedies used in mortgage rescue fraud cases, such as rescission, might be able to undo the rescue fraud transaction and so be used to preserve the original owner's interest at the expense of the mortgagee (because the mortgagee had constructive notice of the scheme all along). *Id.* However, that doctrine is inapplicable to the facts of this case because Adams admits he is a tenant and not an owner.

¶ 35 Adams also contends that the voluntary dismissal was improper because HSBC filed two previous forcible entry and detainer cases seeking possession of the same property based on the same deed (cases 08 M1 720191, 09 M1 706257).

¶ 36 The question of when a plaintiff can refile an action after taking a voluntary dismissal is controlled by section 13–217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2008)). That statute is a saving provision which allows plaintiffs to refile a cause of action if its prior disposition was based on reasons outlined in the statute. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 162-63 (1997). The law contains no language prohibiting multiple refilings, but our supreme court has interpreted it as "permitting only one refiling even in a case where the applicable statute of limitations has not yet expired." *Id*. at 163.

¶ 37 In the first case in sequence here, 08 M1 720191, HSBC only sued "Unknown Owners." Adams voluntarily participated in that case by arguing he wasn't served, an omission which was hardly surprising since he was not a defendant in the first place, and by claiming he did not receive a pre-eviction notice. It does not appear that the trial court granted Adams leave to intervene as a party in that case, which HSBC voluntarily dismissed. The only other prior eviction case between HSBC and Adams was 09 M1 706257, which HSBC voluntarily dismissed on April 13, 2009. The dismissal order recites that HSBC "failed to comply with notice requirements under 735 ILCS 5/5-1701(h)(4)."[8]

¶ 38 These facts invoke an exception to the "one refiling" rule. Under that exception, where not every case in the sequence names the same defendants, multiple refilings are allowed. In *Flynn v. Allis Chalmers Corp.*, 262 Ill. App. 3d 136, 140 (1994), the court noted that the identity

[8] The cited statute deals with supplemental proceedings to evict tenants living at foreclosed properties, but we cannot discern the reason for the particular citation as that subsection does not address the giving of notices to those tenants.

of the defendants was "an essential element of an 'action.' " The *Flynn* court held that the third filing of the same claim could proceed despite the "one refiling" rule because the defendant asserting the bar had not been named as a defendant in the first case in chronological sequence. Accord, *Hendricks v. Victory Memorial Hospital*, 324 Ill. App. 3d 564, 566 (2001); *Don Saffold Enterprises v. Concept I, Inc.*, 316 Ill. App. 3d 993, 996 (2000).

¶ 39 Also, the limitation on filing serial cases after voluntarily dismissing is of little applicability in eviction cases because wrongful possession of someone else's property is a continuing wrong which may evolve depending on the passage of time and changes in the respective rights of the parties due to lease terminations and the like. A tenant might, for instance, lawfully hold possession on April 1, but not hold it lawfully on October 1. Therefore, the "one refiling" rule did not prohibit HSBC from voluntarily dismissing this case.

¶ 40 Adams takes issue with the underlying premise of the forcible case because, he claims, his unexpired leasehold was not extinguished at the foreclosure sale and was superior to whatever rights HSBC gained through the foreclosure sale. In essence, Adams asks for a declaratory judgment regarding the superiority of various parties' interests in the property. However, as we have noted above: (1) Adams had no counterclaim pending through which the trial court could have made such a determination; and (2) HSBC was not required to name Adams as a defendant in the foreclosure case.

¶ 41 We do agree that if Adams had some interest *superior* to the mortgage, it would not have been extinguished by the foreclosure judgment. Section 15-1501(a) of the Illinois Code of Civil Procedure provides that "[A]ny disposition of the mortgaged real estate [in a foreclosure judgment] shall be subject to (i) the interest of all other persons not made a party or (ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure." 735 ILCS

5/15-1501(a) (West 2008). Additionally, section 15-1701(e) of the Mortgage Foreclosure Law states: "[a] lease of all or any part of the mortgaged real estate shall not be terminated automatically solely by virtue of the entry into possession by * * * (iii) the holder of the deed issued pursuant to [the certificate of sale]." 735 ILCS 5/15-1710(e) (West 2008).

¶ 42 As noted above, however, Adams's claim of superior title is faulty because he leased the property when it had already been encumbered by a recorded mortgage. Under section 30 of the Illinois Conveyances Act, the first person to record a lien is entitled to priority. 765 ILCS 5/30 (West 2008). Applying this "first-in-time" rule to facts similar to those presented here, this court determined in *Kelley/Lehr & Associates, Inc. v. O'Brien*, 194 Ill. App. 3d 380, 385 (1990): "In Illinois, however, the defense that a tenant had paid rent in advance to a landlord mortgagor has never prevailed against the mortgagee where the mortgage was filed and of public record prior to the execution of a lease."

¶ 43 Adams also argues that the trial court should not have reconsidered its granting of Adams's section 2-619 motion following the evidentiary hearing regarding pre-paid rent. Judge Garber reversed himself after HSBC filed a motion to reconsider, noting therein that Adams had filed a jury demand. Judge Garber agreed with HSBC and determined that the testimony presented at the evidentiary hearing stemmed from an affirmative defense and so should have been heard by the jury. On appeal, Adams argues, without citation to any relevant authority, that since only Adams filed a jury demand, that only issues that he wanted to go to a jury should have been heard by a jury. He claims that HSBC had no right to a jury trial on any issue. This claim ignores a basic principle of trial practice in American courts that is so well-established that citation to authority is unnecessary. When any party files a timely and valid jury demand, the

jury determines disputed facts regardless of which party proffers the evidence supporting or opposing them. Accordingly, Adams's last contention of error is without merit.

¶ 44 CONCLUSION

¶ 45 For these reasons, we affirm the order of the trial court.

¶ 46 Affirmed.