2014 IL App (1st) 132748-U

FIFTH DIVISION
August 22, 2014

No. 1-13-2748

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A., as Successor-In-Interest to the Federal Deposit Insurance Corporation, as Receiver for Midwest Bank and Trust Company, Plaintiff-Appellant, v. SUBURBAN AUTO REBUILDERS, INC, an Illinois Corporation, Defendant-Appellee, and ASSOCIATED TILE DEALERS WAREHOUSE, INC., UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Cook County, 11 CH 37264 Honorable Franklin U. Valderrama, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant's exercise of its right of first refusal to purchase property extinguished the lease agreement between defendant and the lessor, the plaintiff's

> subsequent mortgage interest in the property did not have priority over the defendant's interest.

¶ 2 Plaintiff, FirstMerit Bank (FirstMerit), appeals from an order of the circuit court denying its motion for summary judgment and granting a cross-motion for summary judgment in favor of defendant, Suburban Auto Rebuilders, Inc. (Suburban). For the reasons that follow, we affirm.

¶ 3 This appeal arises from one of two cases that were consolidated in the circuit court based on a lease agreement between Associated Tile Dealers Warehouse, Inc. (ATD), the lessor, and Suburban Auto Rebuilders, Inc. (Suburban), the lessee. In the first action (the right of first refusal litigation), initiated in April 2000, Suburban sued its landlord, ATD, alleging that it properly exercised a right of first refusal to purchase the property pursuant to a provision in the parties' lease. Suburban sought specific performance with regard to its purchase of the property. In the second action, commenced in October 2011, FirstMerit sought to foreclose a mortgage executed between ATD and Midwest Bank and Trust Company (Midwest) in November 2001, as Midwest's successor-in-interest to the mortgage. The main issue on appeal is whether, pursuant to a subordination clause contained in the lease, FirstMerit's subsequent mortgage interest takes priority over Suburban's interest in the property after Suburban exercised its right of first refusal.

¶ 4 Suburban is a family-owned Illinois corporation that operated a car restoration business from a parcel of commercial real estate located at 8444 Niles Center Road in Skokie, Illinois (the property). Suburban leased the building from ATD beginning in April 1993, pursuant to a commercial lease agreement. The lease provisions pertinent to the current appeal are as follows. Paragraph 14, the subordination clause, provided, in part:

> "Landlord may execute and deliver a mortgage *** against the Building, the Real Property or any interest thereon, and may sell and lease back the underlying land on which the Building is

> situated. This Lease and the rights of Tenant hereunder shall be and are hereby made expressly subject and subordinate [at] all times to any such Mortgage ***, now or hereafter existing[.]"

Paragraph 22(i)(2), the right of first refusal clause, provided:

> "Landlord will give Tenant First Right of Refusal if Landlord intends to sell the property. Landlord will give Tenant 30 day notice of intent and 48 hours to accept or decline any written offer Landlord may have."

¶ 5 We discuss the facts from the right of first refusal litigation only to the extent necessary to understand the current appeal. These facts are largely taken from our prior appellate opinion. See *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81 (2009). In March 1999, Suburban recorded a "Memorandum of Lease" with the Cook County Recorder of Deeds, which indicated a lease existed between ATD and Suburban for the property. The memorandum of lease further stated that the terms of the lease included a right of first refusal clause, with the clause written out in its entirety. According to the memorandum, its purpose was "to give record notice of the Lease and of the rights created thereby, all of which are hereby confirmed."

¶ 6 In February 2000, Suburban received a letter from a principal of ATD. The letter, which was dated February 11, 2000, stated: "We have accepted a contract to purchase *** [8444 Niles Center Road, Skokie, Illinois] for $600,000 without contingencies, except for a mortgage. You have 48 hours from [the] date and time of the delivery of this letter to match the offer or waive your right." The letter did not indicate a copy of the third-party purchaser contract was enclosed, and Suburban alleged that no such copy was included with the letter.

¶ 7 In a letter dated February 12, 2000, Suburban's attorney responded, saying that "[m]y clients are hereby exercising their right of first refusal under their lease, however my clients must receive a copy of the offer and allow me to review the offer ***."

¶ 8 After further correspondence between Suburban and ATD, on March 31, 2000, ATD's attorney faxed a letter to Suburban's attorney, stating that Suburban's purported right of first refusal was ineffective because it had been untimely and was not delivered according to the provisions of the lease. The letter also stated that ATD was nonetheless still willing to sell the property to Suburban at a price of $600,000 "pursuant to the terms of the contract that was signed by the potential buyers." The letter was accompanied by a copy of the original third-party purchaser's contract, executed on February 9, 2000, and accepted by ATD on February 10, 2000.

¶ 9 On April 5, 2000, Suburban's attorney sent a letter to ATD, stating that his clients were "ready, willing and able to exercise their right of first refusal to purchase the property" and that they would meet the third-party purchaser contract in "every respect."

¶ 10 In October 2000, counsel for ATD informed Suburban that ATD had rejected the written offer to purchase the premises.

¶ 11 In December 2000, Suburban filed a six-count complaint against ATD. In pertinent part, Suburban alleged in count IV that it had performed all the conditions required under the terms of the lease to purchase the property, had been ready, willing, and able to proceed with the purchase of the property, but that ATD had refused to proceed with the sale. Suburban sought specific performance, an injunction preventing ATD from leasing or conveying the property to anyone other than Suburban, and costs. ATD denied the substantive allegations, and the parties filed cross-motions for summary judgment. The circuit court entered summary judgment in favor of ATD on counts I through IV and Suburban voluntarily dismissed counts V and VI.

¶ 12 On appeal, the court reversed the entry of summary judgment in favor of ATD on count IV and remanded for further proceedings to resolve material questions of fact, specifically, when Suburban received notice of the third-party purchaser contract. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, No. 1-05-1335, slip op. at 12 (2006) (unpublished order under Supreme Court Rule 23).

¶ 13 Upon remand, the parties engaged in further discovery. Suburban filed a motion for summary judgment on count IV of its complaint, seeking specific performance and injunctive relief with regard to its purchase of the property from ATD in accordance with the third-party purchaser contract. Suburban argued that the evidence showed it had exercised its right of first refusal on April 5, 2000, and its exercise of the right was timely and otherwise in compliance with the requirements in the lease. The circuit court denied Suburban's motion for summary judgment, saying, " 'I don't agree with the [ATD] argument that there [are] genuine issue[s] of material fact, but I can't say as a matter of law that Suburban is entitled to specific performance so I'm going to deny the motion for summary judgment.' " *Suburban Auto Rebuilders*, 388 Ill. App. 3d at 88.

¶ 14 ATD then filed a motion for summary judgment, contending that there were no genuine issues of material fact that would preclude entry of judgment in its favor.

¶ 15 In November 2007, following briefing by both parties, the circuit court granted ATD's motion for summary judgment on count IV, stating " 'I [ ] find that there is no genuine issue of material fact as to the events that took place. In reviewing those facts it is clear that the Plaintiff Suburban exercised its right of first refusal beyond the 48-hour time period specified in the lease and changed the terms of the written contract from the third[-]party buyer.' " *Id*. at 89. Suburban appealed.

¶ 16 On appeal, the reviewing court held that summary judgment was improperly entered because there remained a question of fact regarding when ATD provided Suburban with a copy of the third-party purchaser contract and, therefore, whether Suburban timely exercised its right of first refusal. *Suburban Auto Rebuilders*, 388 Ill. App. 3d at 92.

¶ 17 In August 2011, after a bench trial, the circuit court issued a written order in the right of first refusal litigation[1]. In it, the court made several findings of fact, including a finding that both the lease agreement and right of first refusal clause were valid, binding, and enforceable contractual commitments of the parties. The court then found: (1) Suburban's right of first refusal became an option to purchase the property when, on February 10, 2000, Associated determined that the third-party purchaser contract was acceptable for the sale of the property; (2) Suburban "timely, seasonably, correctly, legitimately, and legally" exercised its right of first refusal for the property on April 5, 2000; and (3) Suburban was entitled to specific performance.

¶ 18 While the right of first refusal litigation was pending, in October 2001, the Midwest loan committee approved a business loan to ATD. In the written approval, the "Borrower's Background" section noted:

> "[ATD's owners] had been attempting to sell the property on which we hold a mortgage at 8444 Niles Center Road, Skokie, Illinois, since April 1999. They were negotiating a sale of the property when one of their tenants, Michael Chachko, owner of Suburban Auto Rebuilders, Inc., an auto repair company at the Niles center location, invoked an obscure clause in his lease which gave him a right of the first refusal to purchase the property. In the midst of

[1] We note that, although the August 2011 order was included in the record on appeal, no transcripts or exhibits from the trial were included in the record.

> the negotiations, Mr. Chachko died. His son Larry continued to run the business and profess [*sic*] a desire to exercise the option thereby blocking attempts to sell the property. The Allens' [*sic*] hired an attorney with a litigator's background to over-come this problem, which has now lingered on for almost 2 ½ years and caused three contracts to be cancelled. They have now abandoned that tact, rented out the balance of the property, and plan to continue to hold the property as an investment."

In November 2001, ATD executed a promissory note for a loan of $475,000 from Midwest. ATD secured the loan by granting Midwest a mortgage on "the commercial building located at 8440-8444 Niles Center Road," including the property. Midwest recorded the mortgage in December 2001. The loan was renewed in December 2006, February 2007, and August 2008. The August 2008 renewal was memorialized by a promissory note from ATD to Midwest in the principal amount of $800,000. Also in August 2008, Midwest recorded a modification of the mortgage executed between ATD and Midwest, consistent with the August 2008 loan renewal.

¶ 19 In May 2010, the Federal Deposit Insurance Corporation (FDIC) seized the assets of Midwest. The same day, the FDIC sold Midwest's assets, including the August 2008 loan renewal note and mortgage, to FirstMerit pursuant to a whole bank purchase and assumption agreement.

¶ 20 In October 2011, FirstMerit filed its complaint to foreclose mortgage against ATD and Suburban. The complaint alleged that FirstMerit was the successor-in-interest to Midwest by virtue of its acquisition of certain assets of that entity from the FDIC, that ATD was the record owner of the property, and that Suburban had been awarded specific performance on a contract

for purchase of the property. FirstMerit also alleged that ATD was in default for not making the monthly payments beginning July 2011 through the time the complaint to foreclose was filed. ATD did not file an answer or other responsive pleading.

¶ 21 In February 2012, Suburban filed both a motion to consolidate the right of first refusal litigation with the foreclosure litigation and a verified answer and counterclaim to the complaint to foreclose. In its counterclaim, Suburban sought a declaratory judgment as to the priority of interests in the property.

¶ 22 In March 2012, the circuit court granted Suburban's motion to consolidate.

¶ 23 In June 2012, Suburban filed a motion for quitclaim or judicial deed, asking the circuit court to enter an order directing ATD to execute and deliver a quitclaim deed conveying ATD's right, title, and interest in the property to Suburban. Suburban argued that once the right of first refusal was properly exercised, the landlord-tenant relationship terminated and a new relationship between ATD and Suburban was established: the relationship of vendor and vendee. Suburban therefore requested that all rent payments tendered to ATD since April 5, 2000, when Suburban properly exercised its right of first refusal, be either credited toward the purchase price or returned.

¶ 24 In September 2012, the circuit court granted Suburban's motion for quitclaim or judicial deed, stating, that ATD "is ordered to convey, by quitclaim deed, all of its right, title and interest in the property *** within fourteen (14) days."

¶ 25 ATD failed to convey the property by quitclaim deed, and therefore in October 2012, Suburban filed a motion requesting the issuance of a judicial deed. One week after Suburban filed the motion, the circuit court granted the motion and directed the Sheriff of Cook County to

execute and deliver a Sherriff's deed to Suburban, conveying to Suburban all of ATD's right, title and interest in the property.

¶ 26 Shortly thereafter, FirstMerit filed a motion for order of default, default judgment, and judgment of foreclosure and sale against ATD. FirstMerit specifically requested that the court enter an order of default against ATD, a judgment of foreclosure and sale against ATD, and a judgment of default in the amount of $965,363.21.

¶ 27 On the same day, FirstMerit also filed a motion for summary judgment and judgment of default against Suburban, arguing that due to the subordination clause, FirstMerit's interest in the property via the mortgage was superior to any interest Suburban had in the property.

¶ 28 In November 2012, Suburban filed a combined response to FirstMerit's motion for summary judgment and a cross-motion for summary judgment, arguing that before the mortgage was executed, Midwest had both actual and record notice of Suburban's right of first refusal, and actual notice that Suburban had exercised its right, and therefore the mortgage was subject to Suburban's right of first refusal. Suburban further argued that its exercise of the right of first refusal extinguished the lease before the mortgage was executed so FirstMerit could not rely on the subordination clause of the lease.

¶ 29 After hearing oral argument, in July 2013, the circuit court entered a written order denying FirstMerit's motion for summary judgment and granting Suburban's cross-motion for summary judgment. The court reasoned that the language of the lease was unambiguous and that the lease intended for Suburban's interest as a tenant to be subordinate to a future mortgagee. However, the court concluded that because Suburban exercised its right of first refusal before the mortgage was executed on the property, Suburban's interest in the property was first in time and

"pursuant to the general rule of lien priority," Suburban's interest in the property was superior to, and not subject to, FirstMerit's interest.

¶ 30 On appeal, FirstMerit argues that the circuit court erred in granting summary judgment in favor of Suburban and denying summary judgment in favor of FirstMerit because FirstMerit's interest in the property was superior to Suburban's interest pursuant to the subordination clause in the lease.

¶ 31 Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). In considering a motion for summary judgment, all the " 'pleadings, depositions, admissions, exhibits, and affidavits on file in the case' " must be construed in favor of the non-moving party. *Richardson v. Bond Drug Co.*, 387 Ill. App. 3d 881, 884 (2009) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). If the plaintiff cannot establish each element of his cause of action, summary judgment for the defendant is proper. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009). "Where, as here, the parties file cross-motions for summary judgment, they agree that no issues of material fact exist and invite the court to decide the issues presented as questions of law." *West Bend Mutual Insurance Co. v. Rosemont Exposition Services, Inc*., 378 Ill. App. 3d 478, 485 (2007). We review the circuit court's decision to grant summary judgment *de novo*. *Morris*, 197 Ill. 2d at 35.

¶ 32 In support of its argument, FirstMerit relies on the subordination clause contained in the lease agreement between ATD and Suburban, arguing that the clause clearly and unambiguously states that "any rights of [Suburban] under the Lease, are expressly subject and subordinate to any mortgage on the Property, then or thereafter existing." Suburban does not challenge this interpretation of the subordination clause, but instead argues that the subordination clause is

inapplicable because, when Suburban exercised its right of first refusal, pursuant to the lease provision, the lease and the subordination clause therein were extinguished, and therefore the subordination clause no longer applied to the parties. Therefore, to begin our analysis, we look to the language of the lease.

¶ 33 A lease is a contract between a landlord, or the lessor, and a tenant, or the lessee, and normal rules of contract interpretation apply. *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 24. In construing a contract, the court must determine and give effect to the parties' intentions at the time they entered into the agreement. *Id.* To determine the parties' intent, the court must look to the contract itself and the plain and ordinary meaning of the contract terms. *Id.* If the language is unambiguous, the intention of the parties must be ascertained by the language used, not by constructions urged by the parties. *Napleton v. Ray Buick, Inc.*, 302 Ill. App. 3d 191, 201 (1998). Moreover, "[c]ourts will construe a contract reasonably to avoid absurd results." *Suburban Auto Rebuilders*, 388 Ill. App. 3d at 92.

¶ 34 Here, we find the subordination clause contained in the lease was clear and unambiguous. The clause provided that ATD could execute a mortgage on the property and that "[t]his Lease and the rights of [Suburban] shall be and are hereby made expressly subject and subordinate [at] all times to any such Mortgage ***, now or hereafter existing[.]" The plain and ordinary meaning of the terms shows that the parties intended for a mortgage to be superior to any rights of Suburban under the lease. The right of first refusal clause provided that ATD "will give [Suburban] First Right of Refusal if [ATD] intends to sell the property." This language is also clear and unambiguous, and shows that the parties' intent was to allow Suburban a right of first refusal to purchase the property if ATD intended to sell. Because we find that the terms of the

lease were clear and unambiguous, the question becomes what the ramifications are when the right of first refusal is exercised before a mortgage is taken out on the property.

¶ 35 In its August 2011 written order, the circuit court found that Suburban's right of first refusal became an option to purchase the property in February 2000, and that, in April 2000, Suburban "timely, seasonably, correctly, legitimately, and legally" exercised its right of first refusal for the property. " 'Where an issue has been litigated and decided, a court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit.' " *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 38 (quoting *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 624 (1997)) . FirstMerit does not now, and has not ever appealed from the circuit court's August 2011 order. Therefore, the circuit court's August 2011 order is now the law of the case. *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 544-45 (1983).

¶ 36 An option to purchase that is contained in a lease is "a contract by which the lessor-owner grants the lessee the right to purchase the premises at a fixed price within a certain time frame." *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 216 (2002). In Illinois, courts have repeatedly recognized that when a lease contains an option to purchase, that option, when accepted and exercised according to its terms, becomes a present contract for the sale of the property, extinguishing the lease agreement and changing the parties' relationship from lessor-lessee to vendor-vendee. *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 554 (1950); *Wendy & William Spatz Charitable Foundation v. 2263 North Lincoln Corp.*, 2013 IL App (1st) 122076, ¶ 28; *Wolfram*, 328 Ill. App. 3d at 216-17; *Industrial Steel Construction, Inc. v. Mooncotch*, 264 Ill. App. 3d 507, 511-12 (1994); *Artful Dodger Pub, Inc. v. Koch*, 230 Ill. App. 3d 806, 811 (1992).

¶ 37 In *Cities Service Oil*, our supreme court further explained that:

> "Where the relation of landlord and tenant exists under the terms of a written lease, containing an option to purchase which the lessee exercises, he is no longer in possession as a tenant, but his possession is that of a vendee. [Citations.] *** The exercise of the option extinguishes the lease and terminates the relation of landlord and tenant. The lease and all its incidents, express and implied, *are blotted out of existence*, and the relation of vendor and vendee created. [Citation.] Although pending the making of a contract for the sale of real estate the prospective purchasers cannot in any sense, either at law or in equity, be considered as the owner of the land, the general proposition which does not admit of controversy is that when the making of the contract is complete, thereafter the land is regarded in equity as the property of the vendee, subject to the rights of the vendor under the contract of purchase. [Citation.] It follows that, when the plaintiff in this case exercised its option to purchase by notice in writing served on the defendant, *a complete and absolute contract was created binding upon the plaintiff to buy and the defendant to sell, thereby vesting the equitable ownership of the premises in the plaintiff*. After that time the relation of landlord and tenant ceased to exist, and the rights of the parties must be determined upon the basis of a

> contract to sell and convey on one side and to purchase on the other." [Emphasis added.] *Cities Service Oil*, 404 Ill. at 554-56.

The doctrine of equitable conversion holds that the buyer becomes equitable owner of the property upon entering an enforceable contract for sale. *Daniels v. Anderson*, 252 Ill. App. 3d 289, 299 (1993) (citing *Shay v. Penrose*, 25 Ill. 2d 447 (1962)), *aff'd as modified*, 162 Ill. 2d 47 (1994)).

¶ 38 In the present case, the option to purchase was created by ATD's acceptance of a third-party purchaser offer in February 2000. Suburban properly exercised its right of first refusal by accepting the option to purchase in writing in April 2000. Following the law in Illinois, we hold that once Suburban exercised its option to purchase in April 2000, the lease between ATD and Suburban was extinguished and a complete and absolute contract was created binding upon ATD to sell and convey, and on Suburban to buy. In April 2000, all the provisions of the lease, including the subrogation clause, were blotted out of existence. ATD did not execute the mortgage and note on the property until November 2001, more than 18 months after the lease was extinguished. Therefore, the subrogation clause was not in existence at the time the mortgage was executed and is not in any way binding on Suburban's interest in the property.

¶ 39 "The general rule with recorded liens, including mortgages, is that '[a] lien that is recorded first in time has priority and is entitled to prior satisfaction of the property it binds.' " *Union Planters Bank, N.A. v. FT Mortgage Cos.*, 341 Ill. App. 3d 921, 924-25 (2003) (quoting *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 703 (2000)).

¶ 40 The record here shows that Suburban recorded a memorandum of lease in March 1999, which provided the right of first refusal clause in its entirety. In April 2000, Suburban properly exercised its right of first refusal, extinguishing the lease agreement. Midwest did not create the

mortgage until November 2001, and did not record the mortgage until December 2001. Midwest's interest in the property was created more than 18 months after Suburban exercised its right of first refusal, thereby extinguishing the lease and creating a contract for sale. Moreover, FirstMerit concedes, and the record shows, that Midwest had knowledge of the right of first refusal litigation when it recorded the mortgage. Therefore, Suburban's interest in the property was first in time and takes superiority over FirstMerit's interest.

¶ 41 To the extent FirstMerit suggests that the phrase "[at] all times" and the reference to mortgages "now and hereafter existing" in the subordination clause shows that the parties intended the subordination clause to survive the proper exercise of the right of first refusal, and thereby the lease's existence, we disagree. Binding parties to a clause in a lease even after the lease was extinguished would be an absurd result.

¶ 42 FirstMerit does not cite any authority that supports its argument that a subsequent mortgagee with actual notice of a prior interest may create a lien superior to that prior interest. The cases that FirstMerit does cite are distinguishable from the present case. FirstMerit cites *Napleton* for the proposition that the exercise of a lease option does not, as a matter of law, automatically extinguish a lease. *Napleton*, 302 Ill. App. 3d at 201. However, in *Napleton*, the lease specifically provided that, upon exercise of the option to purchase, the lease "shall continue in full force and effect" until the transfer of title was recorded. *Id*. at 198. Based on this provision, the court concluded that the lease itself specifically precluded the lease from being extinguished upon the lessee's exercise of its option to purchase. *Id*. at 201. The lease in the present case did not contain any provision indicating that the parties intended for the lease to continue even after Suburban exercised its right of first refusal. Absent such a provision, Illinois law dictates that once an option to purchase in a lease has been properly exercised, the lease and

all the provision therein are extinguished. *Cities Service Oil*, 404 Ill. at 554; *Wendy and William Spatz*, 2013 IL App (1st) 122076, ¶ 28; *Wolfram*, 328 Ill. App. 3d at 216-17; *Industrial Steel Construction*, 264 Ill. App. 3d at 511-12; *Artful Dodger*, 230 Ill. App. 3d at 811.

¶ 43 FirstMerit next argues that the exercise of the option to purchase "has no effect whatsoever on the rights and interests of those who were neither party to the lease nor the now-existing sales contract," citing *Argonne Construction Co. v. Norton*, 29 B.R. 731 (1983) and *First National Bank of Highland Park v. Boston Insurance Co.*, 17 Ill. 2d 147 (1959). However, neither *First National* nor *Argonne* is factually similar to the instant case. In *Argonne*, a contractor contracted to perform work on two units located in a building, which were ultimately sold as condominiums. *Argonne*, 29 B.R. at 733. On appeal to the district court, the main issue turned on whether the owners of one of the units were the equitable owners of their unit at the time the contractor filed its mechanic's lien. *Id.* at 736. Ultimately, the court concluded that the condominium owners did not have equitable ownership in the unit at the time the lien arose and, even if they did, that equitable conversion has no effect on the rights of third parties. *Id*.

¶ 44 In *First National*, a bank insured a property to which it held title with fire insurance policies totaling $46,750. *First National*, 17 Ill. 2d at 148. The bank then contracted to sell the property for $19,000, but the building burned down before the sale closed. *Id*. at 148-49. Eventually, the Bank brought an action to recover the face amount of the insurance policies. *Id*. On appeal to the supreme court, the insurance companies relied on the doctrine of equitable conversion to argue that the Bank's recovery on the insurance policies was limited to the price of the building set forth in the contract of sale. *Id*. The supreme court noted that the insurance companies conceded that the actual value of the building exceeded the aggregate amount of the insurance policies, and then held:

> "While it is clear that a vendee can hold a vendor to the terms of his contract, it is by no means clear that a stranger to the contract should be allowed to fix upon the contract price as an absolute measure of the value of property" *Id*. at 151.

The court concluded that the contract price did not determine the value of the building for the purpose of determining the amount due upon the insurance policies. *Id*. at 152.

¶ 45 FirstMerit cites to *Argonne* and *First National* for the principle that "equitable conversion has no application to the relationship between [FirstMerit] and [ATD], and it may not be asserted by [Suburban] to extinguish the mortgage." We first note that we are not bound by the Argonne decision because we are not bound by the decisions of federal courts. *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381, 395 (2005). Moreover, the present case does not involve a third party seeking to benefit under the doctrine of equitable conversion. Rather, FirstMerit, a mortgagee whose interest was created subsequent to that of Suburban, is asking this court to find its interest in the property to be superior to Suburban's interest, despite having actual notice of Suburban's interest before creating the mortgage. Neither *Argonne* nor *First National* hold that a subsequent mortgagee may create a lien superior to a prior interest of which it had actual notice, and therefore both cases are inapposite.

¶ 46 FirstMerit also relies on *Life Savings & Loan Assoc. of America v. Bryant*, 125 Ill. App. 3d 1012 (1984). *Life Savings* involved a sales contract with a subordination clause for the sale of property from Katrina Inc. to Adam and Ruth Bryant. *Life Savings*, 125 Ill. App. 3d at 1014. Subsequent to the contract being signed, Katrina executed a mortgage with Life Savings and Loan Association of America (Life Savings). *Id*. at 1014-15. Ultimately, Katrina dissolved, the Bryants ceased making payments on the mortgage once they reached their contract price, and

Life Savings brought an action to foreclose against the Bryants. *Id*. The Bryants then filed a counter-claim for quiet title to the property. *Id*. The trial court found that the Bryants had subordinated their interest in the property to the mortgage in the sales contract, and dismissed their counter-claim. *Id*.

¶ 47 On appeal, the court concluded that the Bryants became equitable owners on the day they executed the purchase contract with Katrina. *Id*. at 1016-17. The court then held that the subordination provision at issue constituted a contract to subordinate in the future if certain conditions were met but, because the conditions went unfulfilled, the Bryants' interest had priority over Life Savings, the subsequent mortgagee. *Id*. at 1018.

¶ 48 Unlike the present case, *Life Savings* involved a subordination agreement which was contained in the actual sales contract. Here, the subordination agreement was contained in the lease. FirstMerit's reliance on *Life Savings* is based on the incorrect premise that the lease and the subordination agreement survived Suburban's exercise of the right of first refusal. The law in Illinois clearly holds, however, that when an option to purchase in a lease is exercised, it functions to extinguish that lease and all provisions within. *Cities Service Oil*, 404 Ill. at 554; *Wendy and William Spatz*, 2013 IL App (1st) 122076, ¶ 28; *Wolfram*, 328 Ill. App. 3d at 216-17; *Industrial Steel Construction*, 264 Ill. App. 3d at 511-12; *Artful Dodger*, 230 Ill. App. 3d at 811. Therefore, we find *Life Savings* to be distinguishable and inapplicable to the instant case.

¶ 49 Finally, FirstMerit argues that Suburban did not have an ownership interest in the property because it still had to tender its performance under the contract for sale and points out that "nothing in the record [shows] that [Suburban] was ready, willing, and able to tender the purchase price at that time." FirstMerit also notes that Suburban continued to pay rent during the pendency of the right of first refusal litigation. FirstMerit concludes that "[t]here is no law or

statutory authority to support a finding that, absent an attempt to tender the contract price, legal title immediately vested in [Suburban] simply because it exercised the Right of First Refusal thereafter." However, as we have discussed above, Suburban had an equitable interest in the property when it exercised the option to purchase in April 2000, more than 18 months before FirstMerit recorded the mortgage. See *Union Planters Bank*, 341 Ill. App. 3d at 924-25 (quoting *Aames*, 315 Ill. App. 3d at 703) (" 'A lien that is recorded first in time has priority and is entitled to prior satisfaction of the property it binds' "). The record also shows that, in April 2000, when Suburban exercised the option to purchase, the letter affirmatively stated that it was "ready, willing, and able to exercise their right of first refusal to purchase the property" and that they would meet the third-party purchaser contract in "every respect." Furthermore, FirstMerit never challenged the August 2011 circuit court's finding that Suburban "timely, seasonably, correctly, legitimately, and legally exercised its right of first refusal" for the purchase of the property in April 2000, or that Suburban was entitled to specific performance. These findings are the law of the case and cannot now be challenged on appeal. *Stocker Hinge Manufacturing*, 94 Ill. 2d at 544-45; see also *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 874 (2003) (quoting *Softa Group, Inc. v. Scarsdale Development*, 260 Ill. App. 3d 450, 452 (1993) (" 'An argument not raised in the trial court and presented for the first time on appeal is waived, even in an appeal from a summary judgment' "). Moreover, FirstMerit has cited no authority to suggest that Suburban's payment of rent during the pendency of the right of first refusal litigation somehow negated their equitable interest in the property. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant *** with citation of the authorities *** relied on"). In addition, Illinois law allows a party that has exercised an option to purchase in a lease to continue to pay

rent in order to mitigate any potential damages, and to recover that rent following specific performance of the sales contract. See *Artful Dodger*, 230 Ill. App 3d at 811 (noting that the plaintiff-purchaser continued to pay rent to mitigate possible damages and finding that the plaintiff was entitled to "an accounting and replevin of any monies owed it resulting from the parties' failure to execute their contract"); see also *Industrial Steel Construction*, 264 Ill. App. 3d at 512 -13 (finding that the court's abatement of rent was proper and not meant to punish defendants but was rather an equitable adjustment made by the court in light of the plaintiff's equitable ownership in the land when the option to purchase was exercised).

¶ 50 Nevertheless, in order to properly exercise its right to acquire the property, Suburban was required only to comply with the terms of the right of first refusal clause in the lease, which it did in its April 2000 letter. See *Artful Dodger*, 230 Ill. App. 3d at 810 (holding that the purchaser was not required to show he was ready, willing, and able to perform the contract by proving he had sufficient assets to purchase the property; instead "the acceptance of an option contract is valid when the parties meet all of the terms of the option"). Based upon all of the above, we find that the circuit court properly granted summary judgment in favor of Suburban and denied summary judgment to FirstMerit.

¶ 51 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 52 Affirmed.