

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
SECOND DISTRICT

WELLS FARGO BANK, N.A., as Trustee for)	Appeal from the Circuit Court
Option One Mortgage Loan Trust 1999-C,)	of Du Page County.
)	
Plaintiff,)	
)	
v.)	No. 05—MR—1686
)	
ROBERT J. ULASZEK,)	
)	
Defendant-Appellee.)	
)	
(Active Investments, Inc; Josephine Ulaszek,)	
John Schoppe, Highland Real Estate of Aurora,)	
Inc., State of Illinois, Unknown Owners, and)	
Non-record lien claimants, Defendants).)	
)	
ACTIVE INVESTMENT CORPORATION,)	
)	
Purported Appellant,)	
)	
)	Honorable
HUCK BOUMA, P.C.,)	Bonnie M. Wheaton, Neal W. Cerne, and
)	Paul M. Fullerton,
Lien Claimant-Appellant.)	Judges Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Appeal dismissed for lack of standing where Active Investment Corporation, the purported appellant, does not have a direct, immediate, and substantial interest in the subject matter of the appeal; the deed from Old Second National Bank of Aurora to “Active Investments, Inc.” was a deed to a fictitious grantee that did not pass title; Huck Bouma’s claim is dependent upon Active Investment Corporation’s claim; therefore, Huck Bouma lacks standing to appeal.

This appeal is brought by Active Investment Corporation and Huck Bouma, its attorneys, as lienholder, from an order of the circuit court of Du Page County distributing the surplus resulting from the foreclosure on defendant Robert J. Ulaszek’s mortgage to Robert. Robert moves to dismiss this appeal on the ground that Active Investment Corporation lacks standing to appeal. For the following reasons, we dismiss the appeal.

BACKGROUND

The Mortgage Foreclosure

In 1999, Robert acquired residential real estate commonly known as 1110 68th Street in Downers Grove, Illinois (the property). On September 17, 1999, Robert granted Option One Mortgage Corporation a mortgage on the property to secure a note. On November 28, 2005, plaintiff, Wells Fargo Bank (the bank) filed suit to foreclose the mortgage.¹ The complaint alleged that the mortgage was in default since September 1, 2005, and the sum due on the note and mortgage was \$144,404.62 plus interest, costs, advances, and fees.

Paragraph 3(K) of the complaint alleged that the name of the present owner of the property was Active Investments, Inc. Paragraph 3(T) of the complaint alleged that Robert and Josephine Ulaszek (Robert’s mother) were persons whose rights to possess the property were sought to be

¹Wells Fargo Bank’s relationship to Option One Mortgage Corporation is not clear, but Wells Fargo’s status as a proper plaintiff is not at issue.

terminated following confirmation of a foreclosure sale. Pertinent to this appeal, default judgments were entered against Active Investments, Inc. and Robert. On March 17, 2006, the trial court entered judgment for foreclosure and sale. The judgment order recited that the owners of the equity of redemption were the “mortgagors, property owners and any other party defendant named in the Complaint with the statutory right of redemption, with the exception of the Registrar of Titles, if named, and any party dismissed by order of Court.” On October 25, 2006, the sheriff filed his report of sale and distribution. The report disclosed that the sheriff sold the property on October 12, 2006, and that there was a surplus of \$115,148.95. On October 25, 2006, the trial court entered an order confirming the sale.

Robert and the “Active” Entities

It is undisputed that Robert became delinquent in his mortgage payments. The record contains certain documents that shed light on Robert’s attempt to rescue his mortgage.² On April 4, 2002, Robert entered into the following transactions relating to the property: (1) real estate sales contract; (2) option contract; (3) lease; and (4) quitclaim deed. We examine each. The real estate sales contract listed Robert as the seller and “Active Investments Corp.” as the buyer. The sales price was \$169,765.48. The contract provided that it was a cash transaction with closing to occur on or before April 15, 2002. The option contract listed Robert as the optionee and “Active Investments Inc., and or assigns” as the optionor. In consideration of the sum of \$1,000, the optionor granted Robert the option to purchase the property. The purchase price of the property is hand

²The parties tell the story in their briefs by citing to allegations in unverified pleadings. Pleadings are not evidence, and we do not rely on them except where we note various allegations were made.

written and is unclear on the copy of the document in the record, but it exceeds \$193,000. The option was to be exercised on or before April 31, 2003.³ Robert could exercise the option by providing written notice to the optionor no later than 60 days prior to April 31, 2003, and by paying the purchase price in full on or before April 31, 2003. In the event Robert exercised the option, the \$1,000 option fee would be credited toward the purchase price. The option contract provided that the optionor would provide Robert a title commitment showing the optionor in good title and that the optionor would convey “good title to [the property] by a good and sufficient Quit Claim deed.” The lease listed Robert as the lessee and “Active Investments, Corp.” as the lessor. The amount of rent is not stated in the lease. The duration of the lease is not stated. The copy in the record contains Robert’s signature as lessee, but does not contain a lessor’s signature. However, typewritten beneath the signature line for the lessor is “Active Investments, Inc.” The quitclaim deed recited that Robert was the grantor and “Active Investments, Corp.” was the grantee. Robert signed the deed, and “Frank Custable President of Active Investments Corp.” signed, indicating that the deed was exempt pursuant to Paragraph E of the Plat Act. The second page of the deed stated that it was prepared by “Active Investments Corp.,” grantee, and that subsequent tax bills should be sent to “Active Investments Corp.” The deed was recorded on April 29, 2002.

In addition to the above documents, the record contains a handwritten, undated memorandum that purports to summarize the transaction between Robert and the “Active” entities. There is a stamp in the margin of the document: “Active Investments.” Below “Active Investments”

³The date “April 31, 2003,” appears typewritten in the document four times. This court takes judicial notice that April has only 30 days.

is the name “Dan Davis,” also stamped. Robert’s name, the property’s common address and legal description, the property’s tax ID number, and various figures are handwritten on the document.

What happened after Robert quitclaimed the property to “Active Investments, Corp.” and entered into the option agreement with “Active Investments Inc.” on April 4, 2002, is also documented in the record. On September 30, 2002, while Robert’s option to purchase the property was still pending, “Active Investments Corp” deeded the property by warranty deed to Old Second National Bank of Aurora, as trustee under trust No. 8842. On September 17, 2004, Old Second National Bank of Aurora as trustee under trust No. 8842 conveyed the property to “Active Investments, Inc., a Delaware corporation.”

The record shows that “Active Investments, Corp.”; “Active Investments Corp.”; and “Active Investments, Inc.” never existed.

The Motions for Turnover of the Surplus from the Foreclosure Sale

On October 25, 2006, Robert filed a motion for turnover of the surplus. He alleged that he was the sole debtor under the mortgage. On November 9, 2006, the law firm of Huck Bouma filed an appearance on behalf of “Frank J. Custable and Active Investment Corp.” “Active Investment Corporation” filed motions to vacate the default judgment entered against “Active Investments, Inc.” in the foreclosure suit and to vacate the order confirming the sale. “Active Investment Corporation” also filed a motion for turnover of the surplus. In its unverified motion, “Active Investment Corporation” alleged that it was the “record owner” of the property at the time the foreclosure proceedings commenced. Robert objected to Active Investment Corporation’s standing on the ground that Old Second National Bank of Aurora, as trustee, deeded the property to “Active Investments, Inc., a Delaware corporation.” Robert maintained that “Active Investments, Inc.” was

never incorporated in Delaware and was never licensed to do business in Illinois. Robert also asserted that Active Investment Corporation, while it had been incorporated in Delaware and licensed to do business in Illinois, was revoked in both states, Delaware having revoked its corporate status prior to the filing of the instant foreclosure against the property, and Illinois having revoked its license to do business prior to its motion for turnover of the surplus. In response to the standing argument, Active Investment Corporation, in an unverified pleading, alleged the “possibilities” that “Active Investments, Inc.” or “Active Investment Corp.” were trade names of Active Investment Corporation, or that misnomer on the deeds had occurred. Active Investment Corporation produced no evidence of either possibility.

Documents from the Delaware Division of Corporations and the Illinois Secretary of State’s office verified that Active Investment Corporation was incorporated in Delaware on March 13, 2001, and was revoked on March 1, 2004; it was licensed to do business in Illinois on November 2, 2001, and its license was revoked on April 1, 2006. The Illinois Secretary of State’s office listed Frank J. Custable as the president of Active Investment Corporation. Custable, who entered his appearance, received notice of the proceedings at his current residence, the Metropolitan Correctional Center in Chicago, a facility that houses federal prisoners. This fact is relevant because Robert alleged that Custable was behind all of the “Active” entities that perpetrated a fraud when he was never paid the purchase price for the property and his payments on the lease were never remitted to bring the mortgage current. Further, Robert alleged that the deed from Old Second National Bank of Aurora as trustee to “Active Investments, Inc.” did not include the property until Custable’s attorney, who came into the deed’s possession, forged it and recorded the forged document.

Active Investment Corporation withdrew the motions to vacate the judgment and order confirming the sale and proceeded solely on the motion for turnover of the surplus. On March 31, 2008, Huck Bouma filed a notice of attorney's lien claiming a lien on the surplus. On July 21, 2009, the trial court ordered Robert and Active Investment Corporation to file "evidence of corporate existence and/or qualification of Active Investment Corporation, Active Investment Corp. and Active Investments, Inc." For his response, Robert filed the certificate of incorporation for Active Investment Corporation; the results of the state of Delaware's corporate search for Active Investment and Active Investments, Inc. (not found); the state of Illinois' corporate search for Active Investment Corporation; Active Investment Corporation's application for certificate of authority to transact business in Illinois, dated November 2, 2001; results of Illinois' corporate search for Active Investments, Inc. (did not match any records in Secretary of State's database); Illinois certificate of revocation of Active Investment Corporation, dated April 1, 2003; quitclaim deed from Robert to "Active Investments, Corp."; and an affidavit of John Schoppe. Schoppe was a principal with the sole beneficial owner of the land trust into which "Active Investments Corp" deeded the property. According to Schoppe, legal title to the property, as well as other properties, was being held by the land trust as collateral for a loan to Custable. Schoppe averred that the land trust did not deed the property to "Active Investments, Inc." According to Schoppe, the deed purporting to convey the property to "Active Investments, Inc." was not the same deed that Old Second National Bank of Aurora, as trustee, delivered to Schoppe.

For its response to the court's order to file proof of corporate existence, Active Investment Corporation filed a document from the Delaware Department of State: Division of Corporations that showed that Active Investment Corporation was incorporated on March 13, 2001, and was void as

of March 1, 2004. A second document showed that Illinois revoked Active Investment Corporation's license to do business on April 1, 2006. In its supplemental brief before the trial court, Active Investment Corporation asserted that it could revive its charter under Delaware law; even without reviving its charter, it could pursue the surplus as part of winding up its affairs; assuming that the records of the Du Page County recorder of deeds established that Active Investment Corporation was the owner of the property, it was entitled to the proceeds from the sale.

The only deeds in the record are those already enumerated. The last deed in the chain of title that Robert provided, and which is not disputed by either Active Investment Corporation or Huck Bouma, was the deed from Old Second National Bank of Aurora as trustee to "Active Investments, Inc."⁴ There is nothing in the record showing that Active Investment Corporation was ever in title.⁵

On August 28, 2009, the trial court ruled that Robert was entitled to the surplus. In its ruling, the trial court assumed *arguendo*, without deciding, that Active Investment Corporation was the owner of the property and was an owner of the equity of redemption, but the equities were in Robert's favor. The court declined to resolve Active Investment Corporation's legal status, and held that it came into court with unclean hands, having breached the contract with Robert "in several ways." The trial court denied a motion to reconsider, and this appeal followed.

DISCUSSION

The Motion to Dismiss the Appeal

⁴For our discussion, we set aside the question of whether this deed was a forgery.

⁵Nevertheless, Active Investment Corporation at page 8 of its opening brief states that the bank alleged in the foreclosure complaint that it was the owner of the property. This is false; the bank

alleged that "Active Investments, Inc." was the owner.

This court ordered two motions taken with the case: (1) Robert’s motion to dismiss the appeal and (2) Active Investment Corporation’s and Huck Bouma’s motion to take judicial notice of documents filed with the state of Delaware while this appeal was pending to reinstate Active Investment Corporation’s charter. Before we discuss the merits of either motion, we must comment on the form of the motion to take judicial notice. In the caption, Huck Bouma, which prepared and filed the motion, styled the lawsuit in pertinent part as follows: Wells Fargo Bank, plaintiff; Robert J. Ulaszek, defendant-appellee; and “Active Investment Corp. *misidentified* as Active Investment, Inc., defendant-appellant.” (Emphasis added). The word “misidentified” is false, and it was meant to be misleading, because there is no evidence that the bank intended to sue any entity other than “Active Investments, Inc.” (which appeared in the chain of title).⁶ This court is not persuaded by such tactics. Although we choose not to impose a sanction, counsel is admonished that similar conduct before this court in the future may result in sanctions.

We turn to the merits of Robert’s motion to dismiss the appeal. Robert contends that Active Investment Corporation lacks standing for three reasons: (1) any interest of any of the “Active” entities is the product of the fraudulent actions and forgery perpetrated by Custable and his attorney William Hale, which have not been denied by Huck Bouma; (2) “Active Investments, Inc.” was a fictitious grantee, voiding the deed; and (3) even if Active Investment Corporation were the alter ego of “Active Investments, Inc.,” Active Investment Corporation does not exist. In their objection to the motion to dismiss, Active Investment Corporation and Huck Bouma profess not to understand the bases upon which Robert seeks dismissal and respond only to the argument that Active

⁶Curiously, none of the parties provided the results of a tract search on the property or minutes of foreclosure.

Investment Corporation does not exist by alleging that Active Investment Corporation is now reinstated in Delaware. Active Investment Corporation and Huck Bouma urge, without citing authority, that Robert waived this argument by not obtaining a ruling on it in the trial court. However, we do not resolve the motion to dismiss on this ground. Moreover, as we shall see, appellate standing in this case does not depend on the rulings of the trial court.

A party has standing to appeal where he or she has some real interest in the cause of action or a legal or equitable interest in the subject matter of the controversy. *In re Nitz*, 317 Ill. App. 3d 119, 122 (2000). One of the problems here is that Active Investment Corporation has never demonstrated any relationship to “Active Investments, Inc.,” much less that they are one and the same entity. Even though Custable was in federal custody, his lawyers had access to him. Tellingly, Custable provided no affidavit or other sworn testimony regarding any relationship between Active Investment Corporation and “Active Investments, Inc.” William Hale, Custable’s attorney in the transactions that resulted in the deed of the property to “Active Investments, Inc.” was for a time counsel for Active Investment Corporation in this case, yet Hale provided no evidence of any relationship. It is clear that Active Investment Corporation was the only one of the “Active” entities that ever existed, so in order to claim the surplus, it stepped forward and claimed to be “Active Investments, Inc.” Assuming for the moment that “Active Investments, Inc.” was a corporation, under Illinois law, a corporation is deemed a distinct legal entity, separate from other corporations with which it may be affiliated. *Forsythe v. Clark USA, Inc.*, 361 Ill. App. 3d 642, 646 (2005). Hence, Active Investment Corporation was not a party to this litigation.

However, even a nonparty has standing to appeal if he or she has a direct, immediate, and substantial interest in the subject matter that would be prejudiced by the judgment or benefitted by

its reversal. *Nitz*, 317 Ill. App. 3d at 122. Setting aside the question of Active Investment Corporation's legal status and its lack of any relationship to "Active Investments, Inc.," and setting aside the allegations of fraud and forgery, the overarching problem in this case is that "Active Investments, Inc." never existed. The deed from Old Second National Bank of Aurora, as trustee, to "Active Investments, Inc." was a deed to a fictitious grantee. Furthermore, "Active Investments Corp." never existed either, so Robert's quitclaim deed to "Active Investments Corp." was a deed to a fictitious grantee. Because it appears that Custable, or someone else, deliberately confused the paperwork with so many different versions of the "Active" entities, not to mention placing a nonexistent date for Robert's exercise of the option in the option contract, we do not assume that "Active Investments Corp." was really Active Investment Corporation. As an example of deliberate confusion, or outright mendacity, something claiming to be "Active Investments, Inc., an Illinois corporation" alleged it was the owner of the property in a complaint it filed in forcible entry and detainer to evict Robert from the property.

Because Active Investment Corporation and Huck Bouma claim their interests in the surplus as a result of the deed to "Active Investments, Inc.," we focus on that deed. It is well settled that where an interest is conveyed to a fictitious grantee, no estate or interest is conveyed under Illinois law. *In re Pak Builders*, 284 B.R. 663, 673 (C.D. Ill. 2002). Here, looking at the deed, there is nothing to alert anyone that the grantee should be anything other than "Active Investments, Inc." See *Beaver v. Slanker*, 94 Ill. 175, 185 (1879) (where a mistake in transposition of names on a mortgage was apparent on the face of the document, the court could reform the instrument.) Nor did Active Investment Corporation or Huck Bouma offer any evidence that the deed from Old Second National Bank of Aurora, as trustee, to "Active Investments, Inc." resulted from mutual

mistake or a clerical error. Where parties intend to pass a present estate to an existent grantee but under a name other than the correct one, such a conveyance passes title to the intended grantee. *Chance v. Kimbrell*, 376 Ill. 615, 621 (1941). “The intention of the parties as to who shall receive the title is a controlling element.” *Chance*, 376 Ill. at 622. Here, there is no evidence in the record that the parties intended any entity other than “Active Investments, Inc.” to receive title to the property. According to the Schoppe affidavit, Schoppe delivered the deed to attorney Hale, who presumably would have noticed that the grantee was not the intended grantee. Further, the only evidence in the record as to the parties’ intent is the Schoppe affidavit from which it appears that the grantor never intended to convey the property via this deed at all. Consequently, the deed from Old Second National Bank of Aurora, as trustee, to “Active Investments, Inc.” did not convey title to the property.

Active Investment Corporation and Huck Bouma base their claims to the surplus solely on their contention that Active Investment Corporation was the owner of the property. Even if we assume that Active Investment Corporation was “Active Investments, Inc.,” Active Investment Corporation was not the owner of the property because the deed did not convey title. Accordingly, Active Investment Corporation does not have a direct, immediate, and substantial interest in the subject matter of this appeal, and it lacks standing to appeal. Huck Bouma’s standing depends on Active Investment Corporation’s standing, so Huck Bouma likewise lacks standing.

Because we dismiss this appeal, we deny the motion to take judicial notice as moot.

Appeal dismissed.

