

Decision filed 10/10/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

FIFTH DISTRICT

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).

Honorable
Clarence W. Harrison II,
Judge, presiding.

1

of reentry which was exercised, and where merger of the greater and lesser estates did not occur because it was not intended by the parties to the conveyance.

¶ 2 This is an appeal from a judgment entered by the circuit court of Madison County on cross-motions for summary judgment. John and Jayne Simmons, as Trustees of The River House Trust Dated August 21, 2003, and of The Qualified Annuity Share of Grantor Income Trust Under Irrevocable River House Trust of John Doyle Simmons (Simmons), had filed a complaint against Shamrock Bank of Florida (Shamrock), seeking to quiet title to certain property by having a mortgage held by Shamrock against said property declared invalid. Shamrock answered the complaint and filed a counterclaim asserting the validity of, and seeking to foreclose, the mortgage.

¶ 3 Both parties filed motions for summary judgment. On October 25, 2011, the circuit court of Madison County entered an order denying Shamrock's motion for summary judgment and dismissing its counterclaim to foreclose the mortgage, and granting Simmons' motion for summary judgment. Simmons was declared to own the property in fee simple, free of any claims of Shamrock on the mortgage. Shamrock appeals. The facts are not in dispute and are set forth herein only to the extent necessary for an understanding of our disposition.

¶ 4 Prior to 2007, Simmons held title to the subject property in fee simple absolute. On January 22, 2007, Simmons entered into an agreement (the Sale Agreement) to transfer the property to Great River Enterprises Limited Partnership No. 1 (Great River) in return for one million shares of stock of YTB International, Inc. (YTB), a company founded by the general partner of Great River, James L. Tomer. The Sale Agreement provides in pertinent part as follows:

"The Deed shall contain, among other things, provisions consistent with the following:

3.1 Possibility of Reverter. Subject to the remaining provisions of this Section 3.1, the Property shall revert to Seller, its permitted successors, assigns or designees, on December 31, 2011 (the '*Reversion Date*') unless at any time prior to the Reversion Date, the common stock of the Issuer has attained a Trading Price (as hereinafter defined) equal to or greater than Six and 00/100 Dollars (\$6.00) per share (the '*Benchmark Price*') for a period of ninety (90) consecutive trading days, as long as such ninety (90) consecutive trading day period during which the Benchmark Price is attained ends no earlier than the one (1) year anniversary of the Closing Date (as defined in Section 7) (the '*Possibility of Reverter*'). *** If prior to the Reversion Date the common stock of the Issuer has attained a Trading Price equal to or greater than the Benchmark Price for a period of ninety (90) consecutive trading days (as long as such ninety (90) consecutive trading day period during which the Benchmark Price is attained ends no earlier than the one (1) year anniversary of the Closing Date (as defined in Section 7)), then the Possibility of Reverter shall automatically and irrevocably terminate and be of no further force or effect, and title to the Property shall be held by Purchaser, free and clear of the Possibility of Reverter. If the Property reverts to Seller, its successors, assigns or designees pursuant to the first sentence of this Section 3.1, then Seller, its successors or assigns shall convey and deliver back to Purchaser one million (1,000,000) shares of the common stock of the Issuer, which shares may but are not required to include all or some of the Shares. Notwithstanding the foregoing, in the event that prior to the Reversion Date the common stock of the Issuer has not attained a Trading Price equal to or greater than the Benchmark Price for a period of ninety (90) consecutive trading days (as long as such ninety (90) consecutive trading day period during which the Benchmark Price is attained ends no earlier than the one (1) year anniversary of the Closing Date (as

defined in Section 7)), Seller shall have the option, exercisable in Seller's sole and absolute discretion, to waive in writing its right to have the Property revert to Seller pursuant to this Section 3.1, in which case title to the Property shall be held by Purchaser, free and clear of the Possibility of Reverter, and Seller shall be entitled to retain the Shares (or if and to the extent applicable, the proceeds from the sale of any Shares by Seller prior to the Reversion Date). *** The Reversion Date will be accelerated automatically upon the occurrence of an Event of Bankruptcy (as defined in Section 3.5), Purchaser's conveyance or attempted conveyance of title to the Property, or Purchaser's waste of the Property, including without limitation, abuse, destructive use, neglect or any act or omission causing material or unreasonable injury, damage or loss to the property."

The Trustee's Deed which conveyed the property states in pertinent part:

"The Property is subject to a possibility of reverter, the specific terms and conditions of which are set forth in Section 3.1 of that certain Real Estate Sale Agreement dated January 22, 2007 between Grantor and Grantee (the '*Sale Agreement*'; such possibility of reverter to be hereinafter referred to in this Deed as the '*Possibility of Reverter*'). Reference is hereby made to the Sale Agreement for the terms and conditions of the Possibility of Reverter, which such terms and conditions are hereby incorporated into and made a part of this Deed by this reference."

¶ 5 The Trustee's Deed was duly recorded in the Madison County recorder's office on February 12, 2007.

¶ 6 Subsequently, and without Simmons' knowledge, Great River secured a \$1.3 million commercial revolving line of credit by granting a mortgage on the subject property to Shamrock's predecessor in title. Shamrock subsequently acquired the mortgage. At all times, Shamrock had constructive notice of the duly recorded Trustee's Deed which referenced the

Possibility of Reverter.

¶ 7 Shamrock had acquired actual knowledge of Simmons' rights in the property by August 2009, when it submitted a notice of claim letter to the title insurance company which had issued insurance for the mortgage. Shamrock represented that it would not have made the loan had it known of Simmons' rights in the property. On September 15, 2009, Shamrock declared the mortgage in default.

¶ 8 By December 2009, Simmons had learned that Great River had committed "waste" to the property as defined in the Sale Agreement by failing to pay 2008 real estate taxes, resulting in a lien against the property, failing to pay 2008 dues to the neighborhood committee, resulting in a lien against the property, and failing to maintain boilers on the property, causing damage and putting the property at risk for cold weather damage. Simmons paid the back taxes and dues and replaced the boilers at their own expense. Accordingly, Simmons directed their counsel to prepare a complaint seeking declaratory judgment that Great River had allowed waste to occur, triggering the automatic acceleration of the Reversion Date, and that ownership of the property had reverted to Simmons.

¶ 9 On January 7, 2010, Simmons' counsel sent the draft complaint to Great River's counsel, stating that Simmons intended to file the complaint and requesting an expedited hearing. Great River agreed to settle the dispute to avoid the legal action. On January 15, 2010, Simmons and Great River entered into an "Agreement Regarding Reversion" (the Reversion Agreement), in which Great River acknowledged the occurrence of events which automatically accelerated the Reversion Date and that the Reversion Date had been automatically accelerated pursuant to Section 3.1 of the Sale Agreement. The Reversion Agreement recited that it was being entered into in order "to effect an orderly transfer of the Property." The parties agreed that the Reversion Date had been automatically accelerated "and shall be the date of the Reversion Closing." At the Reversion Closing, Great River was

to deliver a warranty deed conveying the property to Simmons, and Simmons was to deliver to Great River the stock shares. The Reversion Agreement also included Great River's warranty that it would convey the property to Simmons "free and clear of any liens, charges or encumbrances" and that Great River would "defend, indemnify, and hold harmless" the Simmonses "from and against all claims, demands, liabilities, causes of action, suits, judgments, damages, and expenses (including reasonable attorneys' fees), relating to (i) the Property and accruing prior to the Reversion Date, (ii) any liens or financial obligations of [Great River], including, without limitation, in connection with [Shamrock's mortgage]." The Reversion Closing did occur, and on January 22, 2010, a deed was recorded in the Madison County recorder's office evidencing the conveyance.

¶ 10 On February 25, 2010, Simmons brought this action against Shamrock to quiet title to the property. The complaint alleged that Simmons had conveyed to Great River only a determinable fee, reserving unto themselves a possibility of reverter, which possibility of reverter had been triggered by Great River's waste of the property, thereby terminating Great River's determinable fee and causing ownership of the property to automatically revert to the Simmonses. As a consequence, Shamrock's intervening interest in the property had been extinguished.

¶ 11 In its answer to the complaint, Shamrock asserted that Simmons' claim is barred by the doctrine of merger in that the possibility of reverter was extinguished by the conveyance of the fee from Great River to Simmons by the deed recorded on January 22, 2010. Shamrock also filed its counterclaim asserting the validity and priority of, and seeking to foreclose, its mortgage.

¶ 12 On March 8, 2011, Shamrock filed its motion for summary judgment asserting that no genuine issues of material fact were in dispute and that it was entitled to judgment as a matter of law because any interest reserved to Simmons pursuant to the Sale Agreement had

merged into the fee simple title conveyed to Simmons by the Reversion Deed and was extinguished when Simmons knowingly accepted the Reversion Deed. Shamrock argued that Simmons knowingly took title to the property subject to the mortgage when they accepted the Reversion Deed. Because Great River had defaulted in payment of the loan secured by the mortgage, and the mortgage was superior to Simmons' interest, Shamrock was entitled to foreclose the mortgage.

¶ 13 Specifically, Shamrock argued that the estate which Simmons originally conveyed to Great River was not a fee simple determinable subject to a possibility of reverter, as Simmons maintained, but a fee simple subject to condition subsequent. Shamrock acknowledged that a fee simple determinable fails automatically upon the occurrence of a specified event, and in such a case, Shamrock's mortgage would fail with it. However, because Great River held a fee simple subject to a condition subsequent, which required action on the part of Simmons to terminate it, and Simmons took no such action, the Shamrock mortgage was not extinguished and remains in full force and effect.

¶ 14 In their cross-motion for summary judgment, Simmons insisted that the estate they conveyed to Great River was a fee simple determinable which terminated automatically, divesting Shamrock of any rights in the property. Alternatively, in response to Shamrock's argument that the estate conveyed to Great River was a fee simple subject to condition subsequent, Simmons argued that even if so, their act of reentry terminated Great River's estate, divesting Shamrock of any rights in the property. In either case, no merger occurs. Simmons pointed out that it did exercise its right of reentry when it threatened to sue Great River to regain possession of the property and that the conveyance from Great River to Simmons by virtue of the Reversion Deed was not voluntary as Shamrock maintains. In any case, Simmons argued, no merger occurred because the evidence demonstrates that no merger was intended.

¶ 15 In its summary judgment, the court ruled as follows. First, the court found no ambiguity in the terms of the Sale Agreement or Trustee's Deed which would allow it to consider extrinsic evidence when determining the parties' intent. The court concluded that the plain language of the documents demonstrates that Simmons conveyed a fee simple determinable subject to a possibility of reverter. The court held that the contractual requirement that upon reversion Simmons return to Great River the YTB stock, did not indicate an intention to convey a fee simple subject to a condition subsequent because by the plain language of the Sales Agreement the obligation to return the stock arises only *after* a reversion has occurred. Nothing in the contractual language can be read to suggest that the return of the stock is a precondition to the reversion. The court also found unavailing Shamrock's argument that the provision in the Sale Agreement which allowed Simmons to "waive in writing [the] right to have the Property revert" destroyed the automatic nature of the possibility of reverter or created an ambiguity. The court found no authority to support the proposition that such waiver language turns a possibility of reverter into a right of reentry. The court concluded as a matter of law that the Trustee's Deed conveyed to Great River a fee simple determinable subject to possibility of reverter. As Shamrock conceded, when the determinable estate failed, Shamrock's mortgage failed with it.

¶ 16 The court further found that even if the Trustee's Deed conveyed a fee simple subject to a condition subsequent, Simmons exercised their right of reentry, thereby terminating Great River's estate and with it, the mortgage. In January 2010, Simmons presented Great River with a complaint for declaratory judgment which they intended to file unless Great River agreed that a reversion had occurred. Such action by Simmons was alone sufficient to effectuate a right of reentry and terminate Great River's estate.

¶ 17 The court also rejected Shamrock's argument that when Simmons accepted the warranty deed from Great River in January 2010, it effected a merger of Simmons' right of

reentry with the fee simple, extinguishing Simmons' right of reentry. The court held that the conveyance from Great River to Simmons was not voluntary, but was made simply to evidence or document the involuntary transfer upon reversion or upon exercise of Simmons' right of reentry.

¶ 18 Finally, the court held that, even if the Trustee's Deed from Simmons to Great River conveyed a fee simple subject to condition subsequent, and even if Simmons failed to exercise their right of reentry, the merger doctrine would not apply because the evidence demonstrates a clear intent that merger shall not take place. In the absence of evidence of intent *not* to merge, merger is presumed. However, in this case the evidence demonstrated that merger was not intended. The Reversion Agreement expressly states the parties' intention that Simmons take the fee free of the mortgage.

¶ 19 Accordingly, the court denied Shamrock's motion for summary judgment and dismissed its counterclaim to foreclose the mortgage. The court granted Simmons' motion for summary judgment and declared that Simmons owned the property in fee simple free and clear of the mortgage of Shamrock. Shamrock appeals.

¶ 20 Summary judgment is properly granted when the pleadings, depositions, admissions, and affidavits on file demonstrate no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). Where, as here, parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite resolution of the matter by the court as a matter of law. *Gandy*, 406 Ill. App. 3d at 875. We review an order granting summary judgment *de novo*. *Gandy*, 406 Ill. App. 3d at 875.

¶ 21 On appeal, Shamrock repeats the arguments it made before the circuit court. It argues that Great River's title did not automatically revert to Simmons because Great River did not hold a determinable fee subject to possibility of reverter, but a fee simple subject to condition

subsequent. Great River's title did not terminate for failure of the condition subsequent because Simmons never exercised their right of reentry. Instead, title remained vested in Great River until Great River voluntarily delivered and Simmons willingly accepted a deed of reconveyance. When Simmons accepted the deed with full knowledge of Shamrock's mortgage, Simmons' reversionary interest merged into their fee simple title. Since merger extinguished Simmons' reversionary interest, they acquired title subject to Shamrock's mortgage. Since the loan is in default and Simmons' interest is subordinate, Shamrock is entitled to foreclose.

¶ 22 The distinction between a fee subject to a condition subsequent and a determinable fee is not easily ascertained. It is clear that a fee subject to a condition subsequent is a voidable estate, while a determinable fee contains some words of limitation which cause the estate to cease automatically. *Storke v. Pennsylvania Mutual Life Insurance Co.*, 390 Ill. 619, 624-25 (1945). It is also clear that the law favors the fee subject to condition subsequent over the determinable fee and in doubtful cases will so construe a deed. *Storke*, 390 Ill. at 625.

¶ 23 *Storke*, 390 Ill. at 626, explains the distinction between the two estates as follows:

"If the deed contains language which purports to pass immediate title, but limits its duration by some event which may or may not happen, a [determinable fee] is created, because there is always a possibility of reverter to the grantor. The estate fails upon the happening of the event by its own terms, because it comes within the condition which limits it, and it is self-operative.

On the other hand, a breach of a condition subsequent does not revest title in the original grantor or his heirs."

¶ 24 Similarly, *Lake View Memorial Hospital v. County of Vermilion*, 23 Ill. App. 3d 413, 417 (1974), explained the distinction between the two estates as follows:

"[I]t is characteristic of the fee [determinable] subject to a possibility of reverter that the reversion to the grantor is effective automatically upon the occurrence of the stated event without an act of the grantor or his heirs. It is said that such estate expires by its own terms. [Citations.] A fee upon a condition subsequent, on the other hand, may be terminated only by entry for breach of such condition."

¶ 25 The distinction between the two estates was again explained in *Pfeffer v. Lebanon Land Development Corp.*, 46 Ill. App. 3d 186, 192-93 (1977):

"The Supreme Court of Illinois has decided that certain words, namely, 'upon condition,' 'so that,' and 'provided' or their respective Latin equivalents are recognized as apt and customary to express the clear intention of creating a condition in a deed. [Citation.] Where language of condition follows the words of grant of a fee simple interest in a deed, they express an intention to convey a fee upon a condition subsequent also referred to as a 'conditional fee' [citation]. This species of defeasible fee is to be distinguished from a determinable fee. An intention to convey a determinable fee *** is evidenced whereby following the language of grant of the fee, words of special limitation are employed. Examples of language of special limitation are 'until,' 'during,' 'for so long as,' 'as long as,' 'during that time,' and 'no longer.' [Citation.] The difference between estates on special limitation and estates depending upon conditions subsequent is that in the former the estate determines in favor of the grantor, his heirs or successors as soon as the contingency happens [citation], but in the latter, it endures until the grantor, his heirs or successors take advantage of the breach of condition. [Citations.] In the former case the interest remaining in the grantor is a possibility of reverter, while in the latter the interest retained is a power of termination or right of re-entry."

¶ 26 The parties agree that the estate conveyed by Simmons to Great River is one or the

other of these two estates. Neither party argues that the estate conveyed was not either of these two estates. Simmons argues that the estate was a fee determinable subject to a possibility of reverter; Shamrock argues that the estate was a fee simple subject to a condition subsequent. We conclude that we need not determine which form of estate was actually conveyed because in either case, we would affirm the decision of the circuit court.

¶ 27 Shamrock does not dispute that if the estate conveyed by Simmons to Great River was a fee simple determinable subject to a possibility of reverter, title automatically vested in Simmons upon the occurrence of waste and Shamrock's mortgage was thereby extinguished. Accordingly were we to find, as did the circuit court, that the estate conveyed by Simmons to Great River was a fee simple determinable, we would affirm the judgment of the circuit court. We need not make this determination, however, because we conclude that even if the estate conveyed to Great River was not a fee simple determinable but a fee simple subject to a condition subsequent, as the circuit court also, alternatively, held, we would still affirm the judgment of the circuit court.

¶ 28 Shamrock argues, however, that if the estate conveyed by Simmons to Great River was a fee simple subject to a condition subsequent, title would only revert to Simmons upon exercise of his right of reentry, and that Simmons never exercised that right. Instead, Shamrock argues, Simmons took title to the fee pursuant to a voluntary transfer of the fee from Great River, into which his right of reversion merged and was extinguished. Accordingly, Simmons took title to the fee subject to Shamrock's mortgage.

¶ 29 Shamrock is correct that upon the happening of the condition subsequent, title does not revert in the grantor automatically, but does so only upon the grantor's exercise of his right of reentry. Simmons argue that they exercised their right of reentry when they presented to Great River, and threatened to file, a complaint for declaratory judgment. Relying on *Powell v. Powell*, 335 Ill. 533 (1929), Shamrock counters that the only

appropriate way to exercise a right of reentry is through a suit for possession through ejectment. Shamrock misreads the holding of *Powell*.

¶ 30 The deed in *Powell* conveyed a fee simple subject to a condition subsequent. The condition failed, and the grantor sought relief in a court of equity by filing a complaint to have the deed "canceled," to be declared the owner of the land, and to regain possession of the land. The equity court dismissed the action for want of jurisdiction because such an action did not lie in equity, but at law. "An action of ejectment is the appropriate remedy to enforce a forfeiture upon the breach of a *** condition [subsequent]." *Powell*, 335 Ill. at 538. *Powell* did not hold that an ejectment action was the only appropriate remedy upon the breach of a condition subsequent. Indeed, the court explained,

"[t]he consequence of the nonfulfillment of a condition subsequent is a forfeiture of the estate conveyed, and in such a case the grantor may re-enter and possess himself of his former estate. Noncompliance with a condition subsequent does not, of itself, determine the estate, since the right to enforce a forfeiture may be waived. Notwithstanding the breach the estate abides in the grantee until it is defeated and determined at the election of the grantor or his heirs. *This election may be signified by a re-entry or by some act equivalent thereto. Such re-entry or equivalent act is necessary to revest the estate in the grantor.*" (Emphasis added.) *Powell*, 335 Ill. at 538.

¶ 31 We find that Simmons did exercise their right of reentry upon learning of Great River's waste of the property by preparing a complaint for declaratory judgment and notifying Great River of their intent to file the complaint if Great River was unwilling to recognize their right to reenter and reclaim the property. Nothing further is required where the grantee acknowledges the breach and the grantor's right to reenter and repossess the property. This was sufficient to cause title to the property to revest in Simmons pursuant to their right of

reentry, and the Simmonses took title to the fee free and clear of Shamrock's mortgage.

¶ 32 Finally, Shamrock argues that the merger doctrine extinguished Simmons' reversionary right or right of reentry because the property was not transferred involuntarily pursuant to one of those rights, but was transferred voluntarily by warranty deed from Great River to the Simmonses. This voluntary transfer was subject to Shamrock's mortgage. Even were we to agree that title to the property was not transferred involuntarily pursuant to Simmons' right of reentry, but was transferred voluntarily by warranty deed, we would still affirm the circuit court's summary judgment that merger did not apply here.

¶ 33 As a general rule, whenever a greater and a lesser estate are joined in the same person with no estate intervening, the lesser estate is merged into the greater estate *unless there is a clear intent that merger shall not take place*. *Metropolitan Life Insurance Co. v. W. T. Grant Co.*, 321 Ill. App. 487, 499-500 (1944). Whether a merger results from greater and lesser estates uniting in the same person depends upon what will best serve the purpose of justice and the intention of the parties. *In re Estate of Ozier*, 225 Ill. App. 3d 33, 36 (1992).

¶ 34 In the case at bar, the evidence is clear that no merger was intended by Simmons and Great River. The Reversion Agreement stated that Great River warranted that it would convey the property to Simmons free and clear of any liens or encumbrances, and would hold Simmons harmless from any liens or financial obligations in connection with Shamrock's mortgage. This clearly evidences the intent of Simmons and Great River that no merger would occur and Simmons would take the property free and clear of Shamrock's mortgage.

¶ 35 Furthermore, the equities do not support application of the merger doctrine. Shamrock had constructive notice of Simmons' reversionary interest in the property when they acquired the mortgage. Furthermore, Shamrock is not without remedy. It may pursue collection of monies due from the mortgagee and can take legal action against its title insurance company which failed to discover Simmons' prior interest in the property. Neither

the parties' intention nor the equities support a finding of merger in this case.

¶ 36 For the foregoing reasons, we affirm the summary judgment of the circuit court of Madison County.

¶ 37 Affirmed.