

No. 1-10-3341

NOTICE: This order was filed under Supreme Court Rules 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

CHICAGO TITLE LAND TRUST COMPANY, Under)	Appeal from
Trust Agreement No. 8002349240 Dated 8/13/07, and)	the Circuit Court
AXXA INC.,)	of Cook County
)	
Plaintiffs-Appellants,)	
)	No. 09 CH 47504
v.)	
)	
FIRST MIDWEST BANK, and JUAREZ AND)	
VASQUEZ, LLC,)	Honorable
)	Martin S. Agran,
Defendants-Appellees.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 **Held:** The trial court’s motion to dismiss plaintiff’s complaint was affirmed.
- ¶ 2 Plaintiffs AXXA Inc. (AXXA), and Chicago Title Land Trust Co., under trust agreement No. 8002349240 dated August 13, 2007 (Chicago Title), appeal the trial court’s dismissal based on *res judicata* of AXXA’s equitable lien and quiet title/ejectment claims against defendants

First Midwest Bank (First Midwest) and Juarez and Vasquez, LLC (J&V). Plaintiffs contend that the court erred in granting defendants' motion to dismiss because: (1) AXXA was not a party to the commercial foreclosure suit; (2) the commercial foreclosure suit and AXXA's claims do not contain identical causes of action; (3) fundamental fairness requires that AXXA have the right to assert its claims in court for the first time; and (4) Illinois foreclosure law provides AXXA the right to pursue its claims. We affirm.

¶ 3 J&V owned the property at 5215-25 West LeMoyne in Chicago, Illinois (property), consisting of a 12-unit apartment building. On February 2, 2005, First Midwest loaned J&V \$2,680,000, memorialized in five separate promissory notes. J&V provided a mortgage against the property to partially secure the notes. First Midwest recorded the mortgage against the property on February 18, 2005.

¶ 4 On August 8, 2006, Waste Management Metro (Waste Management), a refuse collection service company and third-party creditor, obtained a judgment against J&V for \$5,393.61. Waste Management recorded its judgment lien against the property on February 15, 2007, and conducted a levy sale on February 25, 2007.

¶ 5 On May 7, 2008, First Midwest filed a commercial foreclosure complaint and *lis pendens* against the property due to J&V's failure to make payments as they became due. In this suit, First Midwest named Waste Management Metro as a defendant but served Waste Management Holdings, Inc., a separate corporation, instead of Waste Management.

¶ 6 On July 18, 2008, Waste Management obtained a sheriff's deed, which it recorded on July 22, 2008.

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¶ 7 On September 8, 2008, First Midwest provided notice of its motion for default to the parties of the commercial foreclosure suit. One day later, on September 9, 2008, Waste Management assigned its rights to its judgment against J&V to Chicago Title. On that same day, Waste Management quit claimed the property to AXXA, who then took possession of it and spent over \$100,000 repairing the property. At that time, the building had numerous building violations, only four paying tenants, five complete vacancies and three units controlled by drug dealers who did not pay rent. By April 2009, the building had 12 rent-paying tenants and a number of repairs had been made, including replacement of stolen water pipes, purchase and installation of furnaces, mailboxes, lights, appliances, smoke detectors, locks, blinds, windows, doorbells, carpets, vanities, sinks, toilets, cabinets and other materials. AXXA also hired carpenters, plumbers, painters, electricians and pest-control and provided payment for electric, water, gas and garbage service.

¶ 8 On September 16, 2008, First Midwest obtained a foreclosure and sale judgment on the property.

¶ 9 On October 16, 2008, AXXA's attorney, David Koch, moved to quash service of Waste Management because First Midwest had served Waste Management Holdings, Inc. rather than Waste Management Metro.

¶ 10 On October 29, 2008, one day before First Midwest was scheduled to conduct a sheriff's sale of the property, AXXA recorded its quit claim deed. First Midwest then canceled the sheriff's sale to address the issues AXXA raised.

¶ 11 On May 4, 2009, AXXA's attorney filed a general appearance. Two days later, on May 6,

2009, the court appointed a receiver to manage the property, over AXXA's objection. The court also granted AXXA's request to file its appearance *instanter*. On May 8, 2009, AXXA filed an amended motion to vacate First Midwest's judgment of foreclosure and to quash service of Waste Management. The court denied the motion on July 9, 2009, based on AXXA's lack of standing in its attempt to quash service on behalf of Waste Management. The court later denied AXXA's motion to reconsider on September 8, 2009.

¶ 12 On October 29, 2009, First Midwest provided notice to all parties, including AXXA, of its intent to have the property sold through a sheriff's sale on December 3, 2009. On November 20, 2009, AXXA filed a complaint to quiet title and for the imposition of an equitable lien over the property.

¶ 13 On December 22, 2009, the trial court confirmed the sale of the property. The next day, a sheriff's deed was issued to First Midwest through its land trust First Midwest Bank Land Trust No. 5712 dated August 3, 1993. First Midwest recorded the sheriff's deed on January 14, 2010.

¶ 14 On March 30, 2010, First Midwest moved to dismiss AXXA's quiet title and equitable lien claims. On June 8, 2010, AXXA moved for leave to file an amended complaint for ejectment after it agreed it could not maintain a complaint to quiet title. First Midwest objected to this request, and the court set the matter for oral argument on June 18, 2010. On that date, for reasons undisclosed by the record, the court granted First Midwest's motion to dismiss based on *res judicata*. The court also granted AXXA leave to file their amended complaint for ejectment *instanter*, solely for purposes of appeal, but then *sua sponte* dismissed the amended complaint, also based on *res judicata*. On July 15, 2010, AXXA filed a motion to reconsider, which was

denied on October 8, 2010. On November 5, 2010, AXXA filed its notice of appeal.

¶ 15 We review *de novo* the circuit court's grant of Waste Management's motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) (Code) based on *res judicata*. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565, 739 N.E.2d 1263 (2000). We may affirm the judgment of the trial court on any basis provided by the record. *Alpha School Bus Co., v. Wagner*, 391 Ill. App. 3d 722, 734, 910 N.E.2d 1134 (2009). For the reasons that follow, we affirm the trial court's dismissal of AXXA's complaint because AXXA's claims are barred by sections 15-1503 and 2-1901 of the Code.

¶ 16 A notice of foreclosure is constructive notice of the pendency of the foreclosure to every person claiming an interest in or lien on the mortgaged real estate, whose interest or lien has not been recorded before the recording of the notice of foreclosure. 735 ILCS 5/15-1503 (West 2008); *Agribank, FCB v. Rodel Farms, Inc.*, 251 Ill. App. 3d 1050, 1053, 623 N.E.2d 1016 (1993) ("section 15-1503 of the Foreclosure Law provides that the constructive notice is effective regardless of possession if the party claiming an interest fails to record that interest before the foreclosing party files its *lis pendens* notice"). Section 2-1901 of the Code provides that parties acquiring an interest in the property *after* a *lis pendens* is filed are bound by the proceedings to the same extent as if they were parties:

“[E]very condemnation proceeding *** affecting or involving real property shall, from the time of the filing in the office of the recorder in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action,

the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and *every such person and every person* acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and *shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto.*" (Emphasis added.) 735 ILCS 5/2-1901(West 2008).

¶ 17 The doctrine of *lis pendens* serves to: (1) avoid endless litigation of property rights triggered by transfers of interests; (2) protect parties to the litigation from persons who acquire an interest in the subject matter of the litigation during the pendency of litigation; and (3) protect purchasers by giving them notice that the land they are buying might be affected by a judgment entered in a pending suit by which they could be bound. *Admiral Builders Corp. v. Robert Hall Village*, 101 Ill. App. 3d 132, 136-37, 427 N.E.2d 1032 (1981).

¶ 18 Here, we believe that First Midwest's *lis pendens* bars AXXA's claims. First Midwest filed its *lis pendens* five months before AXXA acquired its interest in the property. At the time First Midwest filed the *lis pendens*, AXXA had no recorded interest in the property. We find that AXXA had constructive notice of First Midwest's foreclosure claim and is bound by the foreclosure judgment. *Agribank*, 251 Ill. App. 3d at 1054-55 (party had no interest in property because it recorded its interest in the property after the *lis pendens* notice and was deemed to

have constructive notice of the foreclosure).

¶ 19 Also, a judgment is conclusive and binding, not only on the parties to the action in which it was rendered but also on persons who are in privity with them with respect to the subject matter of the litigation. *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill. 2d 235, 246, 670 N.E.2d 664 (1996). Privity exists between parties who share a mutual or successive relationship in property rights that were the subject of an earlier action. *Board of Education of Sunset Ridge School District No. 29 v. Village of Northbrook*, 295 Ill. App. 3d 909, 919, 692 N.E.2d 1278 (1998). Where an assignment occurs after the commencement of a suit against an assignor, the assignee is considered to be in privity with the assignor and is bound by a judgment against the assignor. *IFC Credit Corp. v. Magnetic Technologies, Ltd.*, 368 Ill. App. 3d 898, 901, 859 N.E.2d 76 (2006).

¶ 20 Here, Waste Management assigned its interest to AXXA *after* First Midwest commenced the foreclosure suit. Also, AXXA and Waste Management shared a mutual and successive relationship in property rights to the property because Waste Management quit claimed its interest to AXXA. Because AXXA and Waste Management were in privity, AXXA is bound by the foreclosure judgment against Waste Management.

¶ 21 AXXA argues that fundamental fairness demands that it have its day in court to assert its claims. But, while our result may appear harsh given the numerous improvements made by AXXA, it was incumbent on it to examine the records of the property it was acquiring. A contrary result could encourage purchasers of land to ignore the rights of parties with recorded interests. One of the primary purposes of the *lis pendens* doctrine is to protect parties like

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AXXA by giving them notice that the land they are acquiring may be affected by an earlier or pending judgment. See *Applegate Apartments Limited Partnership v. Commercial Coin Laundry Systems*, 276 Ill. App. 3d 433, 444, 657 N.E.2d 1172 (1995) ("[c]ases considering the purpose of *lis pendens* statutes hold that one of the purposes is to alert persons who have not yet acquired an interest or lien in the property of the existence of pending litigation"). Further, there is "no principle of law permitting *** a subsequent purchaser with notice of prior equities of first purchaser, to make improvements on the premises and have a prior lien therefor, but such improvements will pass upon sale of the premises.'" *Schiavone v. Ashton*, 269 Ill. App. 386, 393 (1933) (quoting *Cable v. Ellis*, 120 Ill. 136, 152-53, 11 N.E. 188 (1887)).

¶ 22 Because we affirm the trial court on the above grounds, we need not address plaintiff's arguments on the applicability of *res judicata* to these claims. See *Alpha School Bus*, 391 Ill. App. 3d at 734.

¶ 23 We affirm.