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No. 1-10-2784

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HARRIS N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CH 15465
)	
OLGA ZRAYITEL, VILLAGE OF)	
LA GRANGE, EURO BUILDERS AND)	
DEVELOPERS, INC., UNKNOWN OWNERS,)	
and NON-RECORD CLAIMANTS,)	
)	Honorable
Defendants-Appellants,)	David B. Atkins,
)	Judge Presiding.

VILLAGE OF LA GRANGE,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	
OLGA ZRAYITEL, HARRIS N.A., EURO)	
BUILDERS AND DEVELOPERS, INC.,)	
UNKNOWN OWNERS, and NON-RECORD)	
CLAIMANTS,)	
)	
Defendants-Appellees.)	

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PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

ORDER

Held: Where defendant Village of La Grange has failed to show that its lien for attorney's fees and costs is superior to that of plaintiff's mortgage lien against the property at issue in this foreclosure action, the circuit court's grant of summary judgment in plaintiff's favor is affirmed.

Plaintiff, Harris N.A., filed a complaint to foreclose a mortgage against defendant Olga Zrayitel, pursuant to the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2008)). Plaintiff also named defendant Village of LaGrange (Village), and other defendants not party to this appeal, as a party who claimed a right, title, interest, or lien in the subject property. The Village filed an answer and counterclaim, asserting that its lien for attorney's fees and costs associated with the underlying demolition case, brought pursuant to section 11-31-1 of the Illinois Municipal Code (Code) (65 ILCS 5/11-31-1 (West 2008)), was superior to plaintiff's mortgage lien. The circuit court granted plaintiff's motion for summary judgment as to the Village, finding that the Village's lien for attorney's fees and costs was not superior to plaintiff's lien. On appeal, the Village contends that the circuit court erred in granting summary judgment in plaintiff's favor where the Village's failure to give the requisite notice to establish its lien under section 11-31-1 of the Code was excused by the exigent circumstances involved. The Village also argues that plaintiff waived any defects in notice, by virtue of collateral estoppel, with respect to the Village perfecting its lien by failing to raise the issue in the underlying demolition case. For the following reasons, we affirm.

I. BACKGROUND

On February 29, 2008, plaintiff and defendant Zrayitel entered into a mortgage, in which plaintiff lent Zrayitel \$630,000 and Zrayitel granted plaintiff a secured interest in the subject property located at 1031 South 6th Avenue, LaGrange, Illinois. Zrayitel also executed a note whereby she promised to repay the money to plaintiff and abide by other terms. On April 7, 2009, plaintiff filed a complaint to foreclose on the mortgage based on Zrayitel's failure to pay amounts due to plaintiff on January 2, 2009 and the months thereafter. Plaintiff's complaint also named the Village as a party who claimed a right, title, interest, or lien in the subject property.

Shortly after filing its complaint to foreclose on the mortgage, plaintiff filed a motion for leave to access and to take possession of the subject property due to the fact that the Village filed an action seeking repair or demolition of the subject property (the demolition case) under section 11-31-1 of the Code. On April 30, 2009, the circuit court granted plaintiff's motion and after inspecting the property, plaintiff requested that a receiver be appointed. The circuit court appointed a receiver, who prepared a report and performed repairs to cure some of the violations at the subject property.

In response to plaintiff's complaint to foreclose on the mortgage, the Village filed an amended answer and counter complaint seeking, *inter alia*, to foreclose on its lien pursuant to section 11-31-1 of the Code. The Village's lien was filed with the office of the recorder for Cook County on December 3, 2009, and alleged that, from March 24, 2009 to October 31, 2009, the Village incurred \$6,689 in attorney's fees and costs associated with its demolition action to remediate or demolish the subject property. The Village asserted that this demolition lien was

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superior to plaintiff's mortgage lien.

On December 29, 2009, plaintiff filed an amended motion for summary judgment, asserting that there was no question of material fact that the Village's lien was not superior to that of plaintiff where the Village failed to comply with the requirements for a demolition lien under section 11-31-1 of the Code. Specifically, plaintiff argued that the Village failed to provide the owner and plaintiff, as lienholder, with the requisite 15 days' written notice to correct alleged violations before the Village filed a complaint. Plaintiff also argued that the Village failed to record its claim for lien within 180 days after incurring the fees and costs, as required under section 11-31-1. In response, the Village argued that it acted in an emergency capacity, which excused any need for the 15 days' notice period upon the property owner and lienholder. Therefore, the Village maintained that its demolition lien was superior to that of plaintiff.

On May 4, 2010, the circuit court entered an order, *inter alia*, granting plaintiff's motion for summary judgment as to the Village and finding that the Village's lien for attorney's fees and costs was not superior to that of plaintiff's mortgage lien. The circuit court denied the Village's motion to reconsider on June 3, 2010. The Village now appeals.

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when taken in the light most favorable to the nonmovant, show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008)); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Our

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review of the circuit court's grant of summary judgment is *de novo*. *Williams*, 228 Ill. 2d at 417.

We also review the circuit court's denial of the motion to reconsider the grant of summary judgment *de novo*. *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002).

B. Notice Requirement for Demolition Lien

The Village contends that the circuit court erred by granting summary judgment in favor of plaintiff where the Village's demolition lien for attorney's fees and costs, under section 11-31-1 of the Code, was superior to that of plaintiff. In response, plaintiff argues that because the Village failed to comply with the notice requirement of section 11-31-1, its lien cannot be superior to plaintiff's lien.

Section 11-31-1 of the Code provides, in pertinent part:

"The corporate authorities shall apply to the circuit court of the county in which the building is located (i) for an order authorizing action to be taken with respect to a building if the owner or owners of the building, including the lien holders of record, *after at least 15 days' written notice by mail so to do, have failed to put the building in a safe condition or to demolish it ***.*

* * *

The cost of the demolition, repair, enclosure, or removal incurred by the municipality, by an intervenor, or by a lien holder of record, including court costs, attorney's fees, and other costs related to the enforcement of this Section, is recoverable from the owner or owners of the real estate or the previous owner or both if the property was transferred during the 15 day notice period and is a lien on

the real estate; the lien is superior to all prior existing liens and encumbrances, except taxes, if, within 180 days after the repair, demolition, enclosure, or removal, the municipality, the lien holder of record, or the intervenor who incurred the cost and expense shall file a notice of lien for the cost and expense incurred in the office of the recorder in the county in which the real estate is located ***.” 65 ILCS 5/11-31-1 (West 2008).

The Village does not dispute that it failed to give 15 days’ written notice to all parties prior to filing its demolition complaint. In fact, the record shows that the Village sent a violation notice to the owner of record, which was dated March 24, 2009. The notice identified the alleged violations, but did not include a date in which the owner of record was to correct the violations in order to avoid an action being filed. Rather, the day after the violation notice was issued, on March 25, 2009, the Village filed the demolition case.

C. Waiver and Collateral Estoppel

The Village, nonetheless, contends that plaintiff waived its ability to raise the notice issue in the foreclosure case, by failing to argue that the circuit court lacked jurisdiction in the underlying demolition case based on the defective notice. The Village argues that by appearing before the court in the demolition case and entering into an agreed order on March 27, 2009 to take initial steps to alleviate some of the violations at the subject property, plaintiff waived its ability to contest jurisdiction in the underlying demolition case.

The Village correctly notes that a party appearing generally waives all objection to any defects of jurisdiction, process, or service. See *Charles v. Gore*, 248 Ill. App. 3d 441, 445-46

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(1993). However, even if plaintiff waived the issue of jurisdiction by generally appearing and failing to raise the notice issue in the demolition case, the issue of jurisdiction in the demolition case is not before this court. Rather, the issue before this court was whether the circuit court erred in entering summary judgment on the priority of liens in the foreclosure case. Thus, we cannot find that plaintiff was precluded from raising the notice issue with respect to the priority of liens in the foreclosure case due to plaintiff's alleged failure to challenge jurisdiction in the demolition case.

The Village further argues that since plaintiff did not object to any defect in notice during the underlying demolition case, the doctrine of collateral estoppel prevented plaintiff from relitigating the issue of notice in the foreclosure action.

Collateral estoppel “is an equitable doctrine of judicial origin created to prevent relitigation of previously adjudicated claims and is founded in principles of judicial economy.” *Werderman v. Liberty Ventures, LLC*, 368 Ill. App. 3d 78, 83 (2006), quoting *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113 (1986). The elements necessary to the application of collateral estoppel are:

“(1) whether the issue decided in the prior adjudication is identical with the one presented in the case in question; (2) whether there had been a final judgment on the merits; and (3) whether the party against whom estoppel is asserted is a party or in privity with a party to the prior adjudication.” *Werderman*, 368 Ill. App. 3d at 83-84, quoting *Ballweg*, 114 Ill. 2d at 113.

The issues raised in this foreclosure case are not identical to those presented in the underlying

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demolition case. In the demolition case, the issues raised concerned the repair or demolition of the subject property. In the foreclosure case, the court addressed the priority of liens, which required the court to consider whether the Village complied with section 11-31-1, including providing proper notice, such that the costs incurred by the Village become a lien on the property “which *** is superior to all prior existing liens and encumbrances, except taxes ***.” 65 ILCS 5/11-31-1 (West 2008). The circuit court’s judgment in the foreclosure case, therefore, is not a relitigation of the issues raised in the underlying demolition case. As a result, the doctrine of collateral estoppel is inapplicable to the case at hand.

D. Notice and Emergency Situations

The Village next contends that any failure to comply with the notice requirement of section 11-31-11 was excused because the Village acted in an emergency capacity to remedy the danger to the public presented by the unsafe property at issue.

In *Village of Ringwood v. Foster*, 405 Ill. App. 3d 61, 85 (2010), this court recently held that a village is required under section 11-31-1 of the Code to provide notice to any lienholders prior to any demolition order. In so holding, this court noted that statute required notice of the right to repair, which is an important reason that the statute was found constitutional by our supreme court. *Foster*, 405 Ill. App. 3d at 82, citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 130 (2004). This court reasoned, “The purpose of the notice requirement - to allow time to repair or demolish a building prior to the municipality’s obtaining a court order requiring repair or demolition [Citation] - is served by requiring notice to lienholders who the statute contemplates might facilitate the repair or demolition.” *Foster*, 405 Ill. App. 3d at 84. This court explained

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that such a lienholder has an interest in the outcome of demolition proceedings, “both because of its interest, as a lienholder, in the building’s continued existence (so that the building may continue to secure the obligation), and because section 11-31-1 contemplates the subordination of all prior liens to a new lien in favor of the municipality for the cost of any demolition or repair conducted by the municipality.” *Foster*, 405 Ill. App. 3d at 85.

In this case, the Village sent a violation notice to the owner of record, which was dated March 24, 2009, but did not include a date in which the owner was to correct the violations in order to avoid an action being filed. The day after the violation notice was issued, on March 25, 2009, the Village filed the demolition case. The Village subsequently recorded a lien for attorney’s fees and costs, in the amount of \$6,689, incurred by virtue of filing its complaint to correct the safety hazards at the property. Therefore, the record shows that the Village failed to provide notice to plaintiff and the statutory 15 days to repair the building prior to filing suit. Since the Village failed to comply with section 11-31-1, we find no error in the circuit court’s finding that the Village’s lien for attorney’s fees and costs was not superior to that of plaintiff.

We find the Village’s argument that its failure to comply with the 15 days’ notice requirement was excused where it acted in response to an emergency situation unconvincing.

This court has explained that section 11-31-1 “does not limit [a] municipality’s common law authority to abate a nuisance (*City of Chicago v. Nielsen*, 38 Ill. App. 3d 941 (1976), nor [a] municipality’s authority to take appropriate emergency measures when a dilapidated building poses an imminent danger to public health, safety and welfare. (*City of Chicago v. Garrett*, 136 Ill. App. 529 (1985).” *Turpen v. City of St. Francisville*, 145 Ill. App. 3d 891, 895 (1986).

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When a “true emergency” does arise, a municipality is authorized to act without notice; however, in “the normal situation,” a municipality must comply with notice requirements. *Garrett*, 136 Ill. App. 3d at 536.

Here, the Village did not show that a true emergency existed in this situation, such that it was required to take immediate action to repair or demolish a building that posed an imminent danger to the public health, safety or welfare. Instead, the Village sent out a notice to the owner of record, then filed a lawsuit without providing the owner and lienholder 15 days’ notice to repair or demolish the building. In addition, we note that the Village’s lien was for attorney’s fees and costs, rather than actual costs to immediately repair or demolish the building. Accordingly, we find that the Village has not shown that it acted in an emergency situation, such that its failure to comply with the notice requirement of section 11-31-1 can be excused.

Since we find no error in the circuit court’s determination that the Village’s lien is not superior to that of plaintiff, where the Village failed to comply with the notice requirement of section 11-31-1, we need not consider plaintiff’s further argument that the Village failed to timely file its lien.

For the above reasons, we affirm the circuit court’s judgment.

Affirmed.

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