

2012 IL App (2d) 111031-U  
No. 2-11-1031  
Order filed September 17, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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HARRIS N.A.,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CH-1010
	)	
MPI-8 PLAINFIELD SOUTH	)	
ASSEMBLAGE LLC, UNKNOWN	)	
OWNERS and NON-RECORD	)	
CLAIMANTS,	)	Honorable
	)	Alan W. Cargerman,
Defendants-Appellants.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

*Held:* Trial court did not err in awarding the balance of funds held by a receiver to plaintiff-mortgagee to apply to defendant's deficiency, as opposed to the successful purchaser of the foreclosed property for the payment of real estate taxes acquired in the purchase.

¶ 1 In July 2010, plaintiff, Harris, N.A., instituted a mortgage-foreclosure action against defendant, MPI-8 Plainfield South Assemblage, LLC. The court, pursuant to section 15-1704(a) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1704(a) (West 2010)),

appointed a receiver<sup>1</sup> to manage the defaulted property during the pendency of the foreclosure proceedings. After due notice, a sheriff's sale was held on June 6, 2011, and New Grand Park South, LLC (New Grand), was the successful purchaser of defendant's property. Thereafter, New Grand objected to plaintiff's motion to apply to defendant's mortgage deficiency any remaining funds held by the receiver, arguing that those funds, which existed prior to the sale, should have been used to pay real estate taxes that were due on June 1, 2011, prior to the sale.<sup>2</sup> New Grand argued that the receiver's balance should be given to New Grand to pay a portion of the real estate tax bills it acquired in the purchase. The court rejected New Grand's argument and ordered that the receiver's balance be paid to plaintiff to be applied to defendant's mortgage deficiency. Defendant and New Grand appeal. For the following reasons, we affirm.

¶ 2

#### I. BACKGROUND

¶ 3 The real property at issue consists of approximately 1,150 acres in Plainfield that is subject to various farm leases which, in turn, produce semi-annual rent payments. Plaintiff (mortgagee) and defendant (mortgagor) entered into a loan relationship when, in 2006, plaintiff was assigned from

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<sup>1</sup>A receiver is an officer of the court, appointed to preserve and secure the subject property. *U.S. Fidelity & Guaranty Co. v. Old Orchard Plaza Ltd. Partnership*, 284 Ill. App. 3d 765, 774 (1996).

<sup>2</sup>Despite the absence of a formal intervention, New Grand's right to object to distribution of the receiver's funds to plaintiff was not challenged below. Indeed, New Grand's involvement appears to be proper under section 15-1501(e)(3) of the Foreclosure Law. 735 ILCS 5/15-1501(e)(3) (West 2010) (after the sale of the mortgaged real estate, a person who claims an interest in the real estate may appear and shall be deemed a party from the commencement of the foreclosure).

its predecessor in interest a mortgage loan for the property. Various loan documents reflect that, when plaintiff was assigned the loan, it acquired a security interest in all rents, revenues, profits, receipts, income, and other monies arising from the premises or the businesses conducted thereon.

¶ 4 In July 2010, plaintiff initiated an action against defendant to foreclose on the mortgage. On November 5, 2010, the court: (1) appointed a receiver to manage the property, collect rents, and issue disbursements during the pendency of proceedings; and (2) ordered defendant to pay plaintiff the approximately \$100,000 it had received as rental payments in September 2010.

¶ 5 During the receivership period, the receiver collected rents and made disbursements. Further, the receiver obtained and reviewed redemption figures for delinquent property taxes. On March 15, 2011, the receiver reported that he had received the first half of annual farm rents in the amount of \$112,599.95.

¶ 6 On April 18, 2011, the foreclosure action proceeded to a judgment of foreclosure in the amount of \$26,272,948.79, and an order issued for a sheriff's sale. Notice of the sale was published for three successive weeks, from May 19, through June 2, 2011. The notice stated that the foreclosure sale would take place on June 6, 2011, and that "the subject property is subject to real estate taxes, special assessments or special taxes levied against said real estate[.]"

¶ 7 During the sale's publication period, real estate tax invoices for the property were issued. New Grand alleges that those real estate tax invoices were mailed around May 15, 2011. The invoices reflected that the first installment of taxes would be due on June 1, 2011. The receiver did not, by June 1, 2011, or thereafter, pay those taxes.

¶ 8 On June 6, 2011, the property was sold; New Grand was the successful purchaser after offering a bid of \$13,951,000.00. Plaintiff moved to approve the sale, and, on July 26, 2011, the

court confirmed the sale. At that time, the court noted that, after applying the profits from the sale to the mortgage deficiency, a deficiency still remained. Accordingly, the court entered a deficiency judgment in plaintiff's favor and against defendant in the amount of \$13,191,619.03.

¶ 9 Further, plaintiff moved for an order directing the receiver to disburse any unallocated funds in its possession to plaintiff, in partial satisfaction of the remaining deficiency. New Grand and defendant objected, seeking instead to have the funds disbursed to New Grand for the payment of the real estate taxes that had become due and owing on June 1, 2011. On October 5, 2011, after a hearing, the transcript of which is not provided in the record on appeal, the court granted plaintiff's motion and ordered the receiver to tender any surplus monies in its possession to plaintiff in partial satisfaction of plaintiff's deficiency judgment against defendant. Defendant and New Grand appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, New Grand<sup>3</sup> raises two overarching arguments: (1) that the receiver was statutorily obligated, pursuant to sections 15-1704(c) and 15-1704(b)(5) of the Foreclosure Law (735 ILCS 5/15-1704(c), (b)(5) (West 2010)), to pay the real estate taxes that were due June 1, 2011, because, at the time they were due and owing, he had the funds to do so; and (2) that the trial court could not find a balance available for distribution pursuant to section 15-1704(d)(8) of the Foreclosure Law (735 ILCS 5/15-1704(d)(8) (West 2010)) where there remained unpaid bills incurred during the receivership.

¶ 12 To the extent the issues on appeal require us to construe the Foreclosure Law, our review is *de novo*. See *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 165 (2010).

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<sup>3</sup>Although defendant and New Grand jointly filed the notice of appeal, New Grand is the party that raises the arguments and seeks relief on appeal.

However, the court's order regarding disbursement of receipts requires the exercise of discretion and, accordingly, we review that decision for an abuse of discretion. See 735 ILCS 5/15-1704(d)(8) (West 2010) (balance of receipts held by receiver shall be held or disbursed as ordered by the court); see also *Bank of America*, 401 Ill. App. 3d at 165 (application of the abuse-of-discretion standard in an appeal involving the Foreclosure Law depends on the issue to be reviewed); *Members Equity Credit Union v. Dueffel*, 295 Ill. App. 3d 336, 337 (1998) (a trial court's order distributing the surplus from a foreclosure sale reviewed for an abuse of discretion).

¶ 13                   A. Receiver Not Required to Pay Real Estate Taxes

¶ 14    We note first plaintiff's assertion that this court need not reach New Grand's first argument because New Grand did not argue before the trial court that the *receiver* should be ordered to pay the real estate taxes; rather, plaintiff contends, defendant and New Grand argued that the receiver's balance should be awarded to *New Grand* to pay the taxes. However, plaintiff is incorrect that New Grand never requested the court to order the receiver to pay the real estate taxes. While it is true that several of New Grand's subsequent written submissions on this issue requested that the court order the receiver to give the surplus only to New Grand to pay the taxes, New Grand's *initial* objections, filed July 21, 2011, requested that the court "*direct the Receiver to apply all proceeds held by said Receiver not as a surplus but in payment to [New Grand] or directly to the Kendall County Treasurer in payment of the first installment of real estate taxes[.]*" (Emphasis added.) Therefore, New Grand initially requested that the court order the receiver to pay it or, alternatively, directly pay the taxes. Accordingly, we address New Grand's argument that the receiver should have paid the real estate taxes. For the following reasons, however, we reject that argument.

¶ 15 The Foreclosure Law does not mandate that a receiver pay real estate taxes. Again, a receiver is an officer of the court, appointed to preserve and secure the subject property. *U.S. Fidelity & Guaranty*, 284 Ill. App. 3d at 774. In that role, the Foreclosure Law mandates that, to the extent the receiver receives sufficient receipts from the mortgaged real estate, it “shall” perform certain functions (735 ILCS 5/15-1704(c)(1)-(4) (West 2010)), and “may” perform other functions with those receipts (735 ILCS 5/15-1704(c)(5)-(9) (West 2010)). However, paying real estate taxes is not included in those lists of mandated and permitted functions. Further, section 15-1704(b)(5) of the Foreclosure Law states only that “a receiver shall have the power and authority” to pay taxes levied against the mortgaged real estate, not that it must do so. 735 ILCS 5/15-1704(b)(5) (West 2010); see also *Midwest Bank and Trust Co. v. US Bank*, 368 Ill. App. 3d 721, 725-26 (2006) (rejecting third-party purchaser’s argument that the Foreclosure Law *mandates* that a receiver pay real estate taxes). Finally, section 15-1704(d) provides a list of the priority in which receipts received from the operation of real estate should be allocated; the first seven provisions do not reference the payment of real estate taxes, and the eighth and final provision states that the balance of receipts shall be held or disbursed as ordered by the court. 735 ILCS 5/15-1704(d)(8) (West 2010).

¶ 16 Accordingly, as the Foreclosure Law does not *mandate* the receiver to pay real estate taxes, New Grand’s argument that the receiver *should* have paid the real estate taxes rests on the Foreclosure Law’s provision that a receiver must manage the real estate as would a prudent person. Specifically, section 15-1704(c) provides that a receiver “must manage the mortgaged real estate as would a prudent person, taking into account the effect of the receiver’s management on the interest of the mortgagor.” 735 ILCS 5/15-1704(c) (West 2010). New Grand argues that it is “common sense” that a prudent person in the role of court-appointed receiver would, when he or she has the

funds to do so, pay real estate taxes that are due and owing. However, as noted above, section 1704(c) contemplates that, when acting as a prudent person, the receiver must consider the effects of his or her actions on the mortgagor's (*i.e.*, here, defendant's) interest. In other words, the receiver must not only act prudently, it must do so by considering what is prudent *in light of* the mortgagor's interest. See also *Davis v. Dale*, 150 Ill. 239, 243 (1894) (noting that the "only purpose" of appointing a receiver is to preserve the security of the mortgage and apply the rents and profits in discharge of the (presumably mortgagor's) indebtedness).

¶ 17 Here, it was not imprudent for the receiver to determine that, where he was not compelled by the Foreclosure Law to do so, paying the real estate taxes due June 1, 2011, was not in defendant's interest. Specifically, the real estate taxes were allegedly mailed out around May 15, 2011, and were due June 1, 2011. Although the receiver had the authority under the Foreclosure Law to pay those bills at that time, notice had been published beginning May 19, 2011, and continuing for several weeks thereafter, that the property was subject to a judicial sale that would occur on June 6, 2011, five days after the taxes were due. Not only did the notice of sale to prospective purchasers here specifically provide that the property was subject to real estate taxes, but also, generally, any successful purchaser at a foreclosure sale acquires the property subject to pending encumbrances, including taxes. See *Members Equity*, 295 Ill. App. 3d at 339 ("Illinois law mandates that a buyer at a judicial foreclosure sale takes the property subject to any outstanding debts which may encumber the property subsequent to the sale"). We further note that the Foreclosure Law provides that foreclosure of a mortgage does not affect the mortgagee's existing rights to obtain a personal judgment against the mortgagor for a deficiency. 735 ILCS 5/15-5111 (West 2010). Accordingly, taking into account defendant's interest (which was to minimize any deficiency), the receiver did not

act contrary to the prudent-person standard where he held the receipts, instead of paying the taxes, and left the taxes to be acquired by a purchaser. By allowing the real estate taxes to be acquired by the purchaser, the receiver acted in a manner consistent with defendant's interest because additional funds existed in the receiver's accounts that could be applied to the mortgage deficiency. Accordingly, where the Foreclosure Law does not mandate that the receiver pay the real estate taxes, and where, under the circumstances here, the receiver's decision to not pay the real estate taxes did not run contrary to the prudent-person provision, we reject New Grand's argument that the receiver violated the Foreclosure Law when he did not pay the real estate taxes.

¶ 18 B. Trial Court Did not Abuse its Discretion

¶ 19 New Grand next argues that the court erred in finding a surplus because no surplus could exist when there remained unpaid bills incurred during the receivership period. New Grand's argument again presupposes that any remaining funds should have been used to pay the real estate taxes, and we, for the foregoing reasons, reject that premise.

¶ 20 Further, when plaintiff moved the court to approve the sale and disburse the receiver's surplus, funds existed in the receiver's accounts. Therefore, whether that money was termed a surplus or a balance, and whether it should have existed or not, it did, in fact, exist and the court was charged with determining where that money should be disbursed. As noted above, the Foreclosure Law does not require the payment of real estate taxes; instead, it details and prioritizes how receipts should be disbursed, leaving any remaining balance to be held or disbursed as ordered by the court. 735 ILCS 5/15-1704(d)(8) (West 2010). Thus, New Grand's argument simply pertains to whether the court abused its discretion in determining that the receiver's remaining funds should be given to plaintiff, the holder of a deficiency judgment and an entity that held a security interest in all rents

received from the property. We cannot conclude that the court abused its discretion in that determination.

¶ 21 We note first that, in considering whether the court abused its discretion in deciding how to disburse the receiver's remaining proceeds, the record on appeal does not contain a transcript from the hearing held on this issue. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (appellant bears the burden to present a sufficiently complete record to support his or her claims of error, whether by a hearing transcript, bystander's report, or agreed statement of facts). Accordingly, without a transcript to review the court's reasoning, we presume the court's decision was correct. *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009) ("Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law").

¶ 22 Further, as noted above, the purchaser at a foreclosure sale acquires the property subject to any liens, including taxes, and the notice of sale here specifically provide that the property was subject to real estate taxes. See *Midwest Bank*, 368 Ill. App. 3d at 726; see also *Davis*, 150 Ill. at 244 (purchaser at foreclosure sale is required to know that mortgagor would be entitled to the rents and profits of the premises, that taxes would accrue and be a lien on the property, and that it will be voluntarily purchasing the property subject to that lien); *Evanston Bank v. First National Bank of Wheaton*, 132 Ill. App. 3d 910, 913 (1985) (rejecting argument that a receiver should have been appointed after a judicial sale and noting that rents accruing from operation of property during redemption period may not be used by a receiver to pay real estate taxes because the purchaser at a judicial sale takes the property subject to all outstanding liens). Moreover, a foreclosure sale assumes a competitive bidding process that will maximize selling price so as to decrease the

*mortgagor's* potential deficiency judgment; allowing the purchaser to use receiver funds to pay the real estate taxes acquired during the sale works contrary to that purpose. *Midwest Bank*, 368 Ill. App. 3d at 727; see also *Member Equity*, 295 Ill. App. 3d at 339; and *Community Savings and Loan Assoc. v. Cosmopolitan National Bank of Chicago*, 72 Ill. App. 2d 202, 209 (1966) (proceedings at a foreclosure sale must be on the assumption that bidding will be competitive, and the purchaser cannot, therefore, expect the property to be free of tax liens because, if the court orders taxes “to be paid out of funds in the hands of the receiver, it is by no means implausible that other bidders would have been attracted to bid at a price higher than that paid by” the successful purchaser).

¶ 23 New Grand argues that the foregoing cases are inapplicable because they either pre-dated the current version of the Foreclosure Act or involved a sale surplus (as opposed to the funds held by the receiver prior to sale). Those distinctions do not, however, render inapplicable the principles for which this court references those opinions. For example, the principles cited *Community Savings* (a case from 1966) were cited by this court fairly recently (in 2006) in *Midwest Bank*. There, the court noted that, if a court could award a third-party purchaser surplus funds from the sale of property for payment of real estate taxes, the competitive bidding process would effectively be hampered because, whereas other bidders may have taken into account the unpaid taxes when submitting their bids, the successful bidder is unjustly enriched, at the mortgagor's expense, because the bidder has every incentive to bid an excessive amount of the sale and then, as highest bidder, petition the court to recoup the surplus. *Midwest Bank*, 368 Ill. App. 3d at 727; see also *Member Equity*, 295 Ill. App. 3d at 339. The fact that *Midwest Bank* involved a post-sale context and/or no receiver in no way affects this general principle regarding competitive bidding.

¶ 24 Accordingly, the court did not abuse its discretion in determining that the receiver's remaining funds should be disbursed to plaintiff to reduce defendant's deficiency, as opposed to New Grand, a third-party purchaser that purchased the property subject to encumbrances.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 27 Affirmed.