

NOTICE
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2012 IL App (4th) 110921-U
NO. 4-11-0921
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 13, 2012
Carla Bender
4th District Appellate
Court, IL

STEVEN J. MAST and MARY JO MAST,)	Appeal from
Plaintiffs-Appellees and)	Circuit Court of
Cross-Appellants,)	Adams County
v.)	No. 11LM84
KENNA HAYNES,)	
Defendant-Appellant and)	
Cross-Appellee,)	
and)	
BRUCE ALFORD, as Independent)	
Administrator of the Estate of RONALD L.)	Honorable
HAYNES, Deceased; and RONALD W. HAYNES,)	Thomas J. Ortbal,
Defendants.)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in failing to dismiss the complaint for forcible entry and detainer or failing to order the sale of the property or a constructive trust. Defendant was proved to be in default on an oral contract and damages were properly assessed.

Plaintiff's cross-appeal contending the trial court erred in granting defendant the right to reinstate her oral agreement to purchase the property is moot as her motion for stay was denied and there is no indication in the record defendant cured the default within the time allotted by the court.

¶ 2 Plaintiffs, Steven J. Mast and Mary Jo Mast, brought a forcible entry and detainer action against defendants, Kenna Haynes, Bruce Alford as Independent Administrator of the Estate of Ronald L. Haynes, deceased, and Ronald W. Haynes, seeking forfeiture of an agreement

to purchase residential property. The trial court granted possession of the property in favor of plaintiffs and against defendants subject to cure of the default within 30 days of the judgment. Kenna Haynes appeals, seeking to reverse the court's opinion and impose a constructive trust on the property. Plaintiffs filed a cross-appeal seeking to reverse the court's finding Kenna has the right to reinstate the purchase agreement if she cures the default within 30 days of the entry of judgment.

¶ 3 We affirm the trial court's judgment of default and grant of possession to defendants and find the issue raised in the cross-appeal is moot.

¶ 4 I. BACKGROUND

¶ 5 In July 2005, Ronald L. Haynes worked for plaintiff, Steven J. Mast. Ronald asked Steven to help him purchase a house in Quincy and Steven agreed to do so. Steven and Mary Jo agreed they would purchase the property for \$88,000, putting \$10,000 down and financing the remaining amount with First Bankers Trust Company, Quincy. In exchange, the Hayneses agreed to make Steven's mortgage payment, pay the real estate taxes, and keep the residence insured. The \$10,000 down payment would draw interest at the rate of 4% per annum and would be payable when Steven requested it. The details of the transaction were worked out between Steven and Ronald, but it was understood Kenna would also be on the deed with Ronald.

¶ 6 Ronald and Kenna moved into the residence in 2005 and made the mortgage, taxes, and insurance payments until 2010. During the time they lived there, Ronald and Kenna made improvements to the house. In 2010, Ronald and Kenna began divorce proceedings. During those proceedings, Kenna was given the sole right to reside in the residence. During the

pendency of the divorce, Ronald approached Steven for a written contract to memorialize the earlier oral agreement. Steven provided a written contract which was signed by Ronald. Kenna refused to sign it. Steven then drew up another written contract naming just Ronald as the purchaser of the property. Ronald signed the contract on October 5, 2010, and the closing occurred October 22, 2010. Ronald died the next day.

¶ 7 Beginning in September 2010, no payments were made to Steven for the monthly mortgage payments. The property taxes were not paid and insurance was not renewed on the property by either Ronald or Kenna. Steven began paying the mortgage payments as well as the property taxes and insurance.

¶ 8 In March 2011, plaintiffs filed a complaint for forcible entry and detainer against Kenna, the administrator of Ronald's estate, and Ronald's son, Ronald W. Haynes, requesting their interests in the purchase of the property be forfeited, the court order them to vacate the premises and grant judgment for possession in favor of plaintiffs, and Ronald's estate be ordered to pay the attorney fees and expenses incurred by plaintiffs.

¶ 9 On April 11, 2011, Kenna, represented by counsel, filed a motion to dismiss the complaint. On May 23, 2011, the trial court denied the motion and set the case for status on June 6, 2011. On June 3, 2011, Kenna's counsel filed a motion for leave to withdraw as her attorney. On June 6, 2011, Kenna filed a paper stating she was terminating her relationship with counsel. On June 20, 2011, Kenna was present in court when her counsel was granted leave to withdraw and she was granted 21 days to obtain substitute counsel or file her *pro se* appearance. The case was set for trial on August 26, 2011. On July 11, 2011, the court conducted a status hearing, at which time it denied Kenna's request for a continuance. The court also entered a default

judgment against Ronald W. Haynes.

¶ 10 On July 18, 2011, Kenna filed a petition in the probate case for Ronald's estate, asking the court to declare plaintiffs hold the property in question as constructive trustees for her benefit. On August 26, 2011, trial on the forcible entry and detainer complaint was held, with Kenna appearing *pro se*.

¶ 11 Before testimony was presented, the trial court noted Kenna had filed a petition requesting a constructive trust in the probate case, and the court asked Kenna if she wanted to present evidence in support of her petition in connection with the hearing on the forcible entry and detainer complaint. Kenna replied she did, and the court noted the pleading appeared to be in the nature of an affirmative defense and would allow her to present evidence in support of her request for a constructive trust.

¶ 12 Steven called two witnesses, himself and Robert K. Adrian, now a circuit court judge but previously Ronald's attorney during the divorce proceedings with Kenna. Adrian testified because of the divorce, Ronald had wanted to sell the property being purchased from plaintiffs, and Adrian advised him he and plaintiffs needed to sign a written contract for sale so there would be a binding agreement in place to purchase the property. Ronald wanted to sell the property to realize the equity and Kenna could live in another residence the parties owned in Quincy.

¶ 13 In April 2010, Steven contacted an attorney to prepare a contract for the purchase on the same terms as the original oral agreement. Steven stated Ronald's plan was to sell the residence, pay off plaintiffs, and divide the equity with Kenna. At Steven's request, the written installment contract was prepared with signature lines for both Ronald and Kenna obligating

them to purchase the residence from plaintiffs. The contract was sent to Adrian who had Ronald sign it and then forwarded it to Kenna's divorce attorney. Adrian never received the contract back, nor did Steven. Steven contacted Kenna's attorney, who advised him Kenna would not sign. In August 2010, Steven went to Kenna's house to find out about the status of the contract, and she told him there was no way she was going to sign it. Steven reported this to Ronald.

¶ 14 Adrian then recommended Ronald sign a second written contract between himself and plaintiffs so there would be a binding agreement with plaintiffs. A second contract was prepared on the same terms as the first, except Kenna's name was omitted. The written contract memorialized all of the terms of the agreement plaintiff originally had with Ronald and stated it was memorializing the agreement of July 2005. By this time, Ronald had moved out of state and Adrian sent him the second contract to be signed. Ronald signed it on October 5, 2010, and returned it to Adrian with an e-mail stating he was returning the signed contract. Adrian testified he had seen Ronald's signature before this and he was certain this was Ronald's signature.

¶ 15 The closing was held on October 22, 2010, for the purchase by Ronald of the property at issue in which Adrian appeared for Ronald. Steven learned shortly thereafter Ronald died on October 23, 2010.

¶ 16 When sole possession of the property was given to Kenna in the divorce proceedings, Ronald stopped making any payments on it. Kenna sent one mortgage payment in November of 2010 but Steven did not cash it until February 2011. By that time, Kenna had stopped payment on the check. Steven began making the mortgage payments and paid them from September 2010 through August of 2011 and also paid the property taxes and insurance on the property, including the property taxes due in 2011. Due to the Haynes' failure to make

payments as agreed, in December 2010 plaintiffs filed a petition to appoint an administrator of Ronald's estate so they could enforce their rights as sellers. Kenna appeared in the probate action and asked the motion to appoint administrator be dismissed as she was Ronald's sole heir. On January 18, 2011, an administrator was appointed to represent Ronald's estate.

¶ 17 On January 24, 2011, Kenna was served with a notice of declaration of termination of installment contract for the sale of residential real estate, demand for possession, and notice of intention to file forcible detainer. The notice stated if she did not cure the defaults within 30 days, her interest in the purchase agreement was automatically terminated and forfeited. Steven testified Ronald and Kenna were in default of the agreement to purchase the residence and there was due and owing him as of August 23, 2011, the following:

A. Monthly house/mortgage payments due	\$ 4,485.33
B. Interest	114.59
C. Real estate taxes, insurance, and interest	4,024.31
D. Attorney fees and expenses of litigation	10,188.26
E. Expenses of closing of written contract	1,056.00
F. Down payment and interest	<u>11,943.94</u>
Total	31,812.43

¶ 18 Plaintiffs rested and the trial court inquired whether Kenna wanted to testify or had other witnesses. She replied she did not wish to testify and she had other witnesses and other evidence at home but did not realize she would need it that day. She asked the court to impose the constructive trust. Kenna protested throughout the trial plaintiffs and their attorneys were defrauding her and she was pursuing other actions against them for their fraud. After oral

arguments, the court took the matter under advisement.

¶ 19 On September 6, 2011, the trial court entered its findings and judgment order. The court found Ronald in default of the second written contract, and the default amount due and owing was \$17,261.08, including attorney fees, interest, and costs of closing as provided by the written contract. Because there was no prior demand by Steven for payment of the \$10,000 down payment, it was not in default. The court found Kenna did not sign a written contract and did not obligate herself for attorney fees or additional interest. Instead, the court found Kenna in default under the oral agreement to purchase the residence and found there was due from her as of the date of the trial the following:

A. Monthly house/mortgage payments due	\$4,485.33
B. Insurance	659.04
C. Real estate taxes 2010	2,091.32
D. Real estate taxes 2011	<u>1,078.97</u>
Total	8,314.66

The court found plaintiffs elected to rescind and terminate the agreements with Ronald and Kenna as a result of the defaults, and Kenna and Ronald's estates were equitable owners, respectively, of an undivided one-half interest in the title to the property. The court found plaintiffs were entitled to possession of the residence because defendants failed to comply with their purchase agreements and have continued to withhold possession after demand in writing by plaintiffs. The court entered judgment for possession in favor of plaintiffs and against Kenna and Ronald's estates and stayed the judgment for possession for 30 days from the date of the order, stating if Kenna paid the sum of \$8,314.66, less any sum paid by Ronald's estate, together with

court costs, and any installment or other payment coming due during the period of the stay, the oral agreement to sell would remain in force as if the default had not occurred. In the event Kenna failed to cure the default, execution may issue upon the judgment for possession as to Kenna's undivided one-half equitable interest in the premises. A similar finding was made in regard to Ronald's estate.

¶ 20 On October 4, 2011, Kenna filed a notice of appeal. On October 6, 2011, plaintiffs filed a notice of cross-appeal, appealing portions of the findings, order, and judgment in relation to the existence of an oral agreement between them and Kenna and a finding she had a right to cure her default. Also on October 6, Kenna filed a motion for stay for approval of a form of security and to stay enforcement. She alleged she could obtain security totaling \$8,314.66 and asked the court to enter an order staying enforcement of the judgment. On October 19, 2011, the trial court set her motion for hearing on October 31. Kenna failed to appear on her motion for stay and it was denied.

¶ 21 II. ANALYSIS

¶ 22 On appeal, Kenna argues the trial court improperly imposed a penalty on her in the amount of \$8,314.66. She misunderstands the actions of the court. The evidence supported the trial court's finding of the existence of an oral contract between Kenna and plaintiffs. It was clear Kenna defaulted on her contract obligations. The court's assessment of damages in the amount of \$8,314.66, including missed mortgage payments, insurance payments, and real estate taxes, was the correct amount of damages and supported by the evidence. It was not a penalty plucked out of thin air by the court as Kenna argues.

¶ 23 Kenna argues the trial court should have imposed a constructive trust upon

plaintiffs for her benefit. She filed a pleading in regard to her request for a constructive trust, but she introduced no evidence in support of this theory.

¶ 24 A constructive trust is imposed when a court declares a party in possession of wrongfully acquired property as a constructive trustee of that property and when it would be inequitable for that party to retain possession of the property. *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 293, 499 N.E.2d 1319, 1326 (1986). A constructive trust is generally imposed in two situations: first, where actual or constructive fraud is considered as equitable grounds for creating the trust and, second, where there is a fiduciary duty between the parties and a breach of that duty. See *Charles Hester*, 114 Ill. 2d at 293, 499 N.E.2d at 1326. The grounds for imposing a constructive trust must be so clear, convincing, strong, and unequivocal, only one conclusion may be drawn. *Perry v. Wyeth*, 25 Ill. 2d 250, 253, 184 N.E.2d 861, 863 (1962).

¶ 25 There was no evidence at trial plaintiffs wrongfully acquired the property. Plaintiffs assisted Ronald and Kenna in acquiring the property at Ronald's request and with Kenna's knowledge. After Ronald and Kenna stopped making payments under the contract to purchase the property from plaintiffs, plaintiffs took the necessary steps to forfeit the Haynes' interests in the property and to obtain possession. Kenna tried to argue Ronald's signature on the written contract to purchase the property was not his true signature but presented no evidence to that effect in the trial court. Adrian, Ronald's attorney, stated he recognized the signature on the contract as that of Ronald. He also stated he received confirmation from Ronald he signed the contract.

¶ 26 There was no evidence supporting the second ground for a constructive trust,

breach of a fiduciary duty. Whether a fiduciary relationship exists depends on factors such as the degree of kinship between the parties, the disparity in their age, health and mental condition, education and business experience between the parties, and the extent to which one party entrusts the handling of her business affairs to the other party. *Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 272 Ill. App. 3d 370, 380, 649 N.E.2d 511, 518 (1995). The party asserting a fiduciary relationship must show she placed her trust and confidence in another who then gained dominance over her. *Id.*

¶ 27 No fiduciary relationship existed between plaintiffs and Kenna. Plaintiffs did not handle any business affairs for Kenna, there is no evidence they are related, and the purchase of the property from plaintiffs by Kenna and Ronald was an arm's length transaction.

¶ 28 We find plaintiffs' cross appeal moot. The trial court allowed Kenna 30 days from the entry of the judgment on September 6, 2011, to cure her default and her oral contract to purchase the property would remain in force. If she did not cure the default within that time period, plaintiffs had the right to possess the property and remove Kenna. Her request for a stay of the judgment was denied on October 31, 2011. There is nothing in the record indicating she cured her default. Any rights Kenna had to purchase the property and live there ended on October 6, 2011. Plaintiffs have the right to possess the property, and Kenna no longer has any rights to the property.

¶ 29 III. CONCLUSION

¶ 30 We affirm the trial court's judgment.

¶ 31 Affirmed.