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2013 IL App (3d) 130196-U

Order filed December 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

LA SALLE BANK NATIONAL ASSOCIATION,)	Appeal from the Circuit Court
a national banking corporation,)	of the 12th Judicial Circuit,
)	Will County, Illinois
Plaintiff-Appellee,)	
)	
v.)	
)	
CYPRESS CREEK I, L.P., an Illinois limited)	
partnership; <i>et al.</i> ,)	
)	
Defendants.)	
)	Appeal No. 3-13-0196
)	Circuit No. 05-CH-1281
)	(consolidated with 06-CH-2054)
EDON CONSTRUCTION CO., INC.,)	
)	
Plaintiff-Appellant,)	
)	
v.)	
)	Honorable Bobbi N. Petrunaro,
CYPRESS CREEK I, L.P., an Illinois limited)	Judge Presiding.
partnership; <i>et al.</i>)	
)	
v.)	
LA SALLE BANK NATIONAL ASSOCIATION,)	
a national banking corporation,)	
)	
Defendant-Appellee.)	

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly determined the mortgagee's reasonable attorney fees, including those attorney fees incurred after the date of the judgment of foreclosure, should receive priority payment status pursuant to section 15-1512(b) of the Foreclosure Act. The trial court properly denied lienholder's motion for allocation as moot. Finally, the law of the case doctrine prohibited the court from considering other methods to allocate sale proceeds which were not advanced prior to the first appeal.

¶ 2 Plaintiff-appellee LaSalle Bank National Association (LaSalle) loaned \$8,018,151 to Cypress Creek I, L.P., (Cypress Creek) to develop a parcel of land into senior living apartments, which was secured by a mortgage and security agreement. LaSalle initiated a foreclosure action against Cypress Creek and eventually purchased the property for \$1.3 million following a foreclosure sale. The trial court found LaSalle was entitled to receive 76% of the balance of foreclosure sale proceeds, for paid improvements, but denied LaSalle's request for attorney fees. Both parties appealed.

¶ 3 This court held the trial court erroneously determined LaSalle should receive 76% of the sale proceeds based on equal status with perfected lienholders and also improperly denied LaSalle's request for an award of reasonable attorney fees. Following this court's decision, LaSalle requested and obtained leave to appeal to the supreme court with respect to the apportionment issue alone. The supreme court upheld the trial court's allocation of 76% of the foreclosure sale proceeds to LaSalle, but indicated the attorney fee issue was not subject to their review.

¶ 4 On remand, the trial court determined the amount of LaSalle's reasonable attorney fees, as mortgagee, exceeded the balance of funds remaining from the foreclosure sale. Consequently,

the court refused to consider Edon's request, on remand, to revisit the court's proportionality analysis with respect to perfected lienholders. Edon appeals. We affirm.

¶ 5

BACKGROUND

¶ 6 In June of 2003, LaSalle loaned Cypress Creek \$8,018,151 to develop a 13.79-acre parcel of land into senior living apartments, secured by a mortgage and security agreement, which were recorded on June 13, 2003. In January of 2005, Cypress Creek hired Edon, as a subcontractor, to perform rough carpentry work related to the construction of six buildings on the property.

On July 1, 2005, LaSalle filed a complaint to foreclose on the mortgage, based on Cypress Creek's default, pursuant to the Judicial Foreclosure Procedure Laws of the Code of Civil Procedure (Foreclosure Act) (735 ILCS 5/15-1501 *et seq.* (West 2006)), asking the trial court to enter judgment in its favor for the balance of the mortgage, plus interest, costs, and attorney fees.

¶ 7 After the initiation of the foreclosure proceedings, on November 21, 2005, Edon recorded a mechanic's lien against the property for \$285,827. In April 2006, the trial court entered a judgment of foreclosure against Cypress after finding the balance due on the mortgage was \$3,043,570,¹ and ordered a foreclosure sale. LaSalle, as the only bidder, purchased the property for \$1.3 million during the foreclosure sale in May 2006. After the foreclosure sale, Edon filed an action to foreclose its mechanic's lien against multiple defendants, including Cypress Creek and LaSalle, on August 28, 2006. On April 23, 2007, the trial court consolidated Edon's action with LaSalle's mortgage foreclosure proceeding.² The trial court first allocated the expenses for

¹ The court entered an amended order of judgment to reflect payment on the judgment of \$5,577,540, leaving an amount due of \$3,043,570.

² Additionally, four other mechanic's lien claimants filed mechanic's liens and later argued for priority of their liens over the mortgage.

the foreclosure sale (\$1,542) together with the receiver's fees and expenses (\$746,244) against the sale proceeds of \$1.3 million leaving a balance of \$552,214. The trial court denied LaSalle's request for an award of its attorney fees from the sale proceeds.

¶ 8 Thereafter, the court determined \$215,100 (40% of the remaining proceeds from the foreclosure sale) should go to LaSalle toward the satisfaction of the mortgage for the value of unimproved land. The trial court determined \$331,328.40 (60% of the remaining proceeds for the value of the improved property) should be divided among those who had improved the property, regardless of whether the value of improvements were the subject of perfected mechanics liens.

¶ 9 The court concluded LaSalle's prior payments of \$1,587,765 from the loan accounted for 76% of the value of the total improvements to the property. The court found that Edon's unpaid mechanic's lien for \$285,827 accounted for approximately 15% of the total value of improvements to the property. Accordingly, the court awarded a proportioned share of the remaining sale proceeds for improvements to Edon in the amount of \$50,000 and to LaSalle in the amount of \$256,514. The court also allocated the remaining 9% of improvements to other lienholders proportionately with the value of their liens.

¶ 10 I. The First Appeal

¶ 11 Edon and Eagle Concrete, another perfected mechanic's lienholder, both appealed the trial court's proportionate allocation of the sale proceeds. Subsequently, LaSalle cross-appealed challenging the trial court's denial of its request for attorney fees. In the first appeal, this court affirmed the trial court's finding that LaSalle had priority, as mortgagee, to 40% of the foreclosure sale proceeds based on the value of the unimproved property, totaling \$215,100.

This court also allowed LaSalle to be subrogated in the amount of \$30,202 for its payment of the perfected lien to Basic Development. However, this court reversed the trial court’s determination that section 16 of the Mechanics Lien Act allowed LaSalle to be subrogated for every subcontractor that LaSalle paid from loan proceeds, before the foreclosure sale, regardless of whether a compensated subcontractor had a pre-existing, perfected, mechanic’s lien. *LaSalle Bank National Ass'n v. Cypress Creek 1, LP*, 398 Ill. App. 3d 592, 599-600 (2010) (hereinafter *LaSalle Bank I*). This court also reversed the trial’s court denial of LaSalle’s request for attorney fees by holding section “1512(b) [of the Foreclosure Act] gives priority to the payment of attorney fees as provided for in the mortgage over payment of mechanic’s liens.” *Id.* at 601. This court remanded the case to the trial court with the following specific instructions:

“[T]he trial court should determine LaSalle’s attorney fees and any amount found reasonable should be subtracted from the sale proceeds pursuant to section 15-1512(b) and the remaining proceeds reallocated proportionally consistent with this opinion.” *Id.* at 601.

¶ 12 II. Leave to Appeal to Supreme Court

¶ 13 Subsequently, our supreme court granted LaSalle’s petition for leave to appeal.³ The only issue raised before our supreme court concerned the trial court’s apportionment of the foreclosure sale proceeds between the mortgagee (LaSalle) and Edon,⁴ a mechanic’s lien claimant, pursuant to the Mechanics Lien Act (770 ILCS 60/16 (West 2006)). *LaSalle Bank National Ass'n v.*

³ The mechanic’s lien claimants did not file a cross-appeal with the supreme court.

⁴ Eagle Concrete, another lienholder, remained a party to the appeal before our supreme court.

Cypress Creek I, L.P., 242 Ill. 2d 231, 237-8 (2011) (hereinafter *LaSalle Bank II*). The supreme court upheld the trial court's allocation of 76% of the foreclosure sale proceeds to LaSalle, for the apportioned value of improvements by other subcontractors LaSalle previously paid, thereby reversing this court's decision on the issue of apportionment. *LaSalle Bank II*, 242 Ill. 2d at 248-49. Accordingly, the supreme court held:

“Because the trial court used the contract method of determining the value of the mechanics lien claimants' improvements to the property, it was correct to apply the same method to value all other lienable improvements – those paid for by the eight draws made on LaSalle's loan to Cypress. The value of these improvements, paid for with mortgage proceeds, should thus go toward the satisfaction of the mortgage without a question of subrogation arising.” *Id.* at 248.⁵

¶ 14 The supreme court recognized the trial court's methodology, based on subrogation, was not technically correct, but held the end result of the trial court's approach effectively produced the same result as if “the trial court conducted the same type of analysis as would be required if it had valued those improvements that formed the basis for the mechanic’s liens and then valued the rest of the land and given LaSalle credit in a proportionality determination for the latter.” *Id.* at 248. Therefore, our supreme court ruled in favor of LaSalle and held that the trial court correctly calculated, and then apportioned, the balance of the foreclosure sale proceeds to LaSalle at the rate of 76% of the balance of \$552,214. Since Edon did not seek further review of this court's award of LaSalle's attorney fees in *LaSalle Bank I*, the supreme court affirmed this court

⁵ In this decision, our supreme court expressly overruled the earlier case, *Mitchell v. Robinovitz*, 272 Ill.App. 414 (1933), to the extent that it was inconsistent with this opinion.

on that point. *Id.* at 249. Our supreme court remanded the case to the trial court.

¶ 15 III. Remand to Trial Court

¶ 16 Once the matter returned to the trial court from the supreme court, Edon filed a “Motion for Allocation of Improvements on Remand from the Illinois Supreme Court” on June 29, 2012.⁶ On July 5, 2012, LaSalle filed a “Motion for Award of LaSalle’s Attorney’s Fees and for an Order Concluding this Matter.”⁷ The trial court, in a written order, set a briefing schedule, and, thereafter, Edon and LaSalle filed extensive briefs in support of their respective arguments.

¶ 17 The court held a hearing on the pending motions on September 13, 2012. During the hearing, Edon argued the supreme court held subrogation was not necessary in this case, therefore, Edon claimed the trial court must now apply a “completely different legal theory” based on section 16 of the Mechanics Lien Act. Edon contended that LaSalle’s mortgage did not apply to Edon’s mechanic’s lien for completed work on “buildings three, four, five, and seven,” because LaSalle did not pay Edon these amounts, in spite of Edon’s perfected lien, before LaSalle obtained the deed following the foreclosure sale.

¶ 18 Edon asked the trial court to declare Edon should be considered the owner of those buildings. Edon argued the court should order LaSalle to pay a portion of any rental income or

⁶ Another lienholder, Eagle Concrete, also filed a “Motion for Allocation” after remand from the supreme court, but did not file a notice of appeal in the instant appeal.

⁷ A copy of this motion is not included in the record on appeal. However, an order entered by the trial court on July 5, 2012, refers to setting a hearing on the “Motion for Award of LaSalle’s Attorney Fees.” Also on July 5, 2012, LaSalle filed a “Notice of Entry of Order and Setting for Hearing” regarding “Motion for Award of LaSalle’s Attorney’s Fees and for an Order Concluding this Matter” and the “Certificate of Service” states that it served Edon’s attorney with this motion in open court on July 5, 2012. The parties have never raised an issue that this document is not included in the record.

other income derived from buildings three, four, five and seven to satisfy the total amount of Edon's lien, \$285,827.

¶ 19 LaSalle argued the allocation issue became moot after the trial court awarded LaSalle its attorney fees as a first priority, which exhausted the balance of the sale proceeds. In addition, LaSalle claims Edon's arguments could not be considered by the trial court due to the "law of the case" doctrine. On November 20, 2012, the trial court filed a written order finding, as follows:

"The Supreme Court determined that in a proportionality determination under section 16 of the Mechanic's Lien Act, the value of the property attributable to improvements paid for with proceeds of a mortgage and construction loan should be attributed toward the satisfaction of the mortgage. Further, the Supreme Court consistently noticed that because Edon and Eagle [Concrete] did not appeal the appellate court's award of LaSalle's attorney's fees, the appellate court was affirmed. Thus, consistent with those opinions, it is ORDERED.

The Court finds that the fees of LaSalle's attorneys are fair and reasonable and the rates are usual and customary in cases of this nature. Fees are thus awarded to LaSalle in the amount of \$659,260.60 and are to be paid out first prior to satisfaction of any other claims."

The court further found:

"Motion for Allocation of Improvements on the Remand from the Illinois Supreme Court filed by [Edon] are also moot as there are no remaining sale proceeds after payment of LaSalle's attorneys' fees. This matter is terminated. Clerk to notify."

After the court denied Edon’s “Post-Trial Motion for Modification of Judgment,” Edon filed this appeal.

¶ 20

ANALYSIS

¶ 21 Edon raises the following issues on appeal. First, Edon asks this court to determine that the trial court erred by refusing to apply an alternate interpretation of section 16 of the Mechanics Lien Act or to address the merits of Edon’s new motion for allocation. Additionally, Edon contends the trial court erred by granting LaSalle’s motion for award of additional attorney fees and prioritizing those fees for payment over Edon’s perfected lien.

¶ 22 LaSalle contends the trial court properly awarded all of its attorney fees, as required by the terms of the mortgage and section 15-1512 of the Foreclosure Act (735 ILCS 5/15-1512 (West 2006)). Further, LaSalle argues that any other theories regarding apportionment of the sales proceeds to lienholders are moot, since there are no remaining funds to distribute. Alternatively, LaSalle argues the trial court correctly rejected Edon’s argument, on remand, regarding the construction of section 16 of the Mechanics Lien Act (770 ILCS 60/16 (West 2006)) based on the “law of the case” doctrine.

¶ 23

I. Attorney Fees

¶ 24 By way of review, we note the trial court originally denied LaSalle’s request for priority payment of any of LaSalle’s attorney fees. This court reversed that ruling under section 15-1512(b) of the Foreclosure Act. 735 ILCS 5/15-1512(b) (West 2006). Since the trial court did not determine the actual amount of attorney fees incurred by LaSalle, this court ordered the trial court to determine the amount of reasonable attorney’s fees to be awarded to LaSalle, under section 15-1512(b), as a matter of first priority.

¶ 25 Significantly, Edon does not contest the trial court’s findings regarding the reasonableness of LaSalle’s attorney fees. Relying exclusively on the language of the statute, Edon claims that any attorney fees incurred *after* the date of the judgment of foreclosure and the date of discharge of the receiver should not receive priority payment status from the balance of sale proceeds pursuant to section 15-1512(b). 735 ILCS 5/15-1512(b) (West 2006). LaSalle argues the language section 15-1512(b) of the Foreclosure Act does not have automatic time restrictions for fees but allows reasonable fees as provided by the language of mortgage.

¶ 26 When construing a statute, in this case section 15-1512(b), our primary objective is to ascertain and give effect to the intent of the legislature by looking at the plain language of the statute. *Sandholm v. Kuecker*, 2012 IL 111443 at ¶ 41. All provisions of the statute should be viewed as a whole and words and phrases should be interpreted in light of other relevant provisions of the statute and should not be construed in isolation. *Id.* We review of an issue of statutory interpretation *de novo*. *Id.*

¶ 27 When looking at the plain language of this statute, in its entirety, the payment of attorney fees and other legal expenses are controlled by the language used in the mortgage at issue. 735 ILCS 5/15-1512(b) (West 2006). Edon relies on the language of the statute in support of the contention that section 15-1512(b) only gives priority to reasonable attorney fees and expenses incurred for securing possession *before* sale, and those fees associated with holding, maintaining and preparing the real estate for sale. Significantly, Edon fails to cite to the remainder of section 15-1512(b) which further gives priority “to the extent provided for in the mortgage or other recorded agreement and not prohibited by law, reasonable attorneys' fees, payments made pursuant to Section 15-1505 and other legal expenses incurred by the mortgagee.”

¶ 28 In this case, Section 4.3 of the mortgage provides:

“All expenditures and expenses of the nature in the Section mentioned, and such expenses and fees as may be incurred in the protection of the Premises and the maintenance of the lien of this Mortgage, *including the reasonable fees of any attorney employed by the Mortgagee in any litigation or proceeding affecting this Mortgage **** or in preparations for the commencement or defense of any proceeding or threatened suit or proceeding, shall be so much additional indebtedness secured by this Mortgage.” (Emphasis added).

Upon our review of the language used in the mortgage, it is clear that section 4.3 of the mortgage authorizes the payment of any attorney fees resulting from any litigation or proceeding with respect to this mortgage, thereby including appeals, to be added as additional indebtedness secured by the mortgage.

¶ 29 Based on the language incorporated into the terms of the mortgage, the court entered the following order:

“The Court finds that the fees of LaSalle’s attorneys are fair and reasonable and the rates are usual and customary in cases of this nature. Fees are thus awarded to LaSalle in the amount of \$659,260.60 and are to be paid out first prior to satisfaction of any other claims.”

We conclude trial court properly awarded LaSalle's attorney fees in this amount since LaSalle incurred the fees when prosecuting and/or defending the foreclosure action in the trial court and the subsequent appeals concerning the foreclosure issues as provided for by the language of the mortgage.

¶ 30 It is well-established that an issue is moot if events have occurred making it impossible for the court to grant the relief requested. *In re Marriage of Peters–Farrell*, 216 Ill. 2d 287, 291 (2005). Since the trial court’s award of LaSalle’s attorney fees, in the amount of \$659,260, exceeded the amount of the remaining proceeds from the foreclosure sale, in the amount of \$552,214, Edon’s new motion for allocation for the value of its improvements became moot. Here, with no proceeds remaining after the payment of LaSalle's attorney fees as a first priority, there is no need to attempt to reallocate the value of the improvements for purposes of paying lienholders their share from the proceeds.

¶ 31 II. Law of the Case

¶ 32 In the interest of being thorough, in spite of the mootness issue, we elect to address whether the trial court should have considered Edon's request for reallocation before considering the issue moot due to lack of sufficient sale proceeds. In the case at bar, Edon argues that the supreme court decision, *LaSalle Bank II*, 242 Ill. 2d 231 (2011), “changed well-settled law by holding that a mechanic’s lien claimant is entitled to priority only as to ‘his own improvements.’ ” Edon argues the supreme court decision required the trial court to re-examine its analysis of section 16 of the Mechanic’s Lien Act (770 ILCS 60/16 (West 2006)). We disagree.

¶ 33 The supreme court held:

“[I]n a proportionality determination under section 16 of the Mechanics Lien Act, the value of the property attributable to improvements paid for with proceeds of a mortgage and construction loan should be attributed toward the satisfaction of the mortgage. We therefore find that the appellate court erred when it reversed the trial court's distribution of proceeds. Accordingly, we reverse the judgment of the

appellate court on this point and remand to the trial court for further proceedings consistent with this opinion. Because Edon and Eagle have not appealed the appellate court's award of LaSalle's attorney fees (398 Ill. App. 3d at 601, 338 Ill. Dec. 736, 925 N.E. 2d 233), we affirm the appellate court on that point.” *LaSalle Bank II*, 242 Ill. 2d at 249-50.

The supreme court held that the trial court correctly distributed 76% the proceeds to the LaSalle under the Mechanic’s Lien Act even though the trial judge inartfully used subrogation language. While the supreme court held subrogation was not necessary in this case, the court concluded the outcome would have been the same and upheld the trial court’s original apportionment and distribution of the sale proceeds.

¶ 34 The law of the case doctrine prohibits the reconsideration of issues that have been decided by a reviewing court in a prior appeal. *In re Christopher K.*, 217 Ill. 2d 348, 363 (2005). “The rule is that no question which was raised or could have been raised in a prior appeal on the merits can be urged on subsequent appeal and those not raised are considered waived.” *Preferred Personnel Services, Inc. v. Meltzer, Purtill and Stelle, LLC*, 387 Ill. App. 3d 933, 947 (2009) (quoting *Kazubowski v. Kazubowski*, 45 Ill.2d 405, 413 (1970)).

¶ 35 Here, Edon could have advanced the current theory, that the mortgage did not attach to buildings three, four, five, and seven, originally in the trial court, prior to the first appeal, but did not do so. Accordingly, based on the law of the case doctrine, we conclude the trial court did not err by denying Edon’s motion for allocation after remand.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 38 Affirmed.