NOTICE
Decision filed 04/02/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120243-U

NO. 5-12-0243

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ALBERTA LOUISE LEWIS, GARY D. LEWIS, BONNIDEE H. LEWIS, BURL E. MAROHL, and PAULA KAY MAROHL,	)	Appeal from the Circuit Court of Bond County.
Plaintiffs-Appellants and Cross-Appellees,	)	
v.	)	No. 10-CH-62
TRAVIS J. HOLLENKAMP,	)	Honorable John Knight,
Defendant-Appellee and Cross-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly determined that the plaintiffs failed to meet their burden, by clear and convincing evidence, of establishing mutual mistake so as to require reformation of a warranty deed in their favor.

¶ 2 Alberta Louise Lewis, Gary D. Lewis, Bonnidee H. Lewis, Burl E. Marohl, and Paula Kay Marohl, plaintiffs, sought to reform a warranty deed and to quiet title in a certain lot transferred to the defendant, Travis J. Hollenkamp. Hollenkamp filed a counterclaim requesting that two quitclaim deeds pertaining to the same lot be rendered invalid and that the plaintiffs be declared to have no right or title to the conveyed property. The circuit court of Bond County entered judgment, after a bench trial, in favor of Hollenkamp against the plaintiffs on the complaint to reform deed and quiet title. The court further entered judgment invalidating the two quitclaim deeds and extinguishing any interest of plaintiffs Gary Lewis and Bonnidee Lewis and Burl Marohl and Paula Marohl in the ownership, title, or possession

of any portion of the lot. Hollenkamp's additional request for a finding of fraud and an award of damages was denied. The plaintiffs appeal the judgment of the circuit court arguing there was a mutual mistake of fact justifying reformation of the warranty deed in their favor. Hollenkamp cross-appeals contending that the court erred in denying his motion for leave to file an affirmative defense seeking invalidation of the quitclaim deeds on other grounds. We affirm.

¶ 3 The evidence presented at trial revealed that plaintiff Alberta Lewis, the matriarch of the Lewis family, once owned lot 4 of the Lewis Subdivision No. 2, located at Governor Bond Lake, in Bond County, Illinois. In 2009, Alberta's health deteriorated to the point she could no longer live alone in her house located on lot 4. Her children called a family meeting and determined that they needed to sell Alberta's house in order to help pay for her care. Because they wanted to keep the land in the family, they offered the property to Travis Hollenkamp, the fiancé of one of Alberta's granddaughters. Hollenkamp accepted the offer to buy the house and lot for an amount which later turned out to be approximately half of the appraised value.

¶ 4 On December 27, 2009, Burl Marohl, acting under a power of attorney for Alberta, filled out a real estate contract with Hollenkamp to sell him the house and lot 4. The line in the contract for the legal description, however, was left blank. Burl claimed that this line was intentionally left blank because lot 4 was to be divided into three parcels, and he was waiting for a new legal description for the center portion of lot 4 where the house was located. A surveyor had already been contacted on November 12, 2009, to prepare three plats–one for the center portion of lot 4 where the house was to be sold to Hollenkamp, one for the east portion of the lot that was to be transferred to Burl and Paula Marohl, and one for the west portion of the lot that was to be transferred to Gary and Bonnidee Lewis. The division of lot 4 would take 100 feet of lakefront property off of each end of the center portion of lot 4,

leaving approximately 128 feet of lakefront for the center lot. The survey plats were recorded at the Bond County recorder's office on January 29, 2010.

¶ 5 On February 4, 2010, two quitclaim deeds describing the east and west portions of lot 4 were made to Burl and Paula Marohl and to Gary and Bonnidee Lewis, respectively. The deeds were not immediately recorded because of the lateness of the day and because of the belief that the recording of the deeds could be handled by the title company simultaneously with the Hollenkamp sale. The next day, on the morning of February 5, 2010, the closing on the contract with Hollenkamp for the sale of the house and lot 4 took place. The warranty deed conveying the property to Hollenkamp set forth the legal description for the entire lot, not just the center portion. Burl Marohl testified he delivered the two quitclaim deeds to the individual representing the title company, requesting that they be recorded at the same time and that the legal description in Hollenkamp's warranty deed be corrected. According to Burl, the title company agreed to take care of everything, and he signed the papers as they were so as not to delay the closing. The individual from the title company could not confirm that she received the two quitclaim deeds at the closing and did not remember being told about the incorrect legal description in the Hollenkamp warranty deed.

¶ 6 The Hollenkamp warranty deed was filed in the Bond County recorder's office on February 8, 2010. The legal description in the warranty deed issued to Hollenkamp was not changed, thereby conveying to him the entirety of lot 4. For reasons not evident from the record, the Marohl quitclaim deed for the eastern portion of lot 4 was not recorded until July 1, 2010, and the Lewis quitclaim deed for the western portion of lot 4 was not recorded until October 9, 2010.

¶ 7 The plaintiffs argued that there was a mutual mistake as to the description of the property intended to be conveyed. They claimed there never was any intent for the transfer to Hollenkamp to include all of lot 4. While the court believed that the testimony of Burl and

Paula Marohl was sincere, there was little corroborating evidence to prove that their intent was shared by Hollenkamp. The court ultimately determined that the plaintiffs failed to meet their burden of proof by clear and convincing evidence that delivery of the contested Hollenkamp warranty deed was a mutual mistake, and, accordingly, ruled in favor of Hollenkamp.

¶ 8 In order to be entitled to the equitable relief of reformation of a deed, a plaintiff must prove both a mutual mistake and the existence of an alternate agreement. *Texas Eastern Transmission Corp. v. McCrate*, 76 Ill. App. 3d 828, 831, 395 N.E.2d 624, 627 (1979). It is a question of fact whether the evidence offered to support the claim of mutual mistake is sufficient to overcome the presumption that the written instrument expresses the true intent of the parties. Consequently, unless the court's decision is manifestly against the weight of the evidence, it will not be disturbed on appeal. *Upper Level, Inc. v. Provident Venture Corp.*, 209 Ill. App. 3d 964, 966, 568 N.E.2d 531, 532 (1991). Given the record before us, we cannot say the court's decision, in this instance, is against the manifest weight of the evidence.

¶ 9 In general, purchasers of real estate are chargeable with notice of anything appearing in the record of the chain of title of the property they are purchasing. *Smith v. Grubb*, 402 Ill. 451, 464, 84 N.E.2d 421, 428 (1949). Under section 30 of the Conveyances Act (765 ILCS 5/30 (West 2010)), if a subsequent purchaser for value records his deed before a prior conveyance is recorded, that subsequent purchaser's recorded deed takes precedent over earlier nonrecorded deeds if the subsequent purchaser did not have actual or constructive notice of the earlier claim or interest. *King v. De Kalb County Planning Department*, 394 Ill. App. 3d 699, 705, 917 N.E.2d 36, 42 (2009). Constructive notice exists when there is an instrument, such as a deed, in the recorded chain of title that puts the purchaser on notice of another's interest or claim. *Glen Ellyn Savings & Loan Ass'n v. State Bank of Geneva*, 65 Ill.

App. 3d 916, 923, 382 N.E.2d 1267, 1273 (1978). As the Marohl and Lewis quitclaim deeds at issue here were not recorded until after Hollenkamp's warranty deed was recorded, Hollenkamp clearly had no constructive or actual notice of the quitclaim deeds in his chain of title.

¶ 10 The plaintiffs point to the fact that the survey dividing the lot had been recorded before Hollenkamp's closing and should have, at least, put him on inquiry notice. Recorded surveys, however, have no effect on the title of property, without more, to actually alter a plat or the boundaries of a lot. Here there was nothing more. While the testimony of the surveyor provides some corroboration of Burl Marohl's intent to divide lot 4, it does not provide any proof of a joint agreement between the plaintiffs and Hollenkamp. Hollenkamp denied even meeting the surveyor before the closing, a fact which the surveyor appeared to have confirmed. The plaintiffs argue the survey stakes on the lot itself should have put Hollenkamp on notice. The survey stakes, for the most part, were located along the original boundary lines of lot 4, thereby doing very little to make Hollenkamp aware that the plaintiffs intended to carve off portions of the lot. The plaintiffs also had requested that the access road to all of the property in the subdivision be turned over to the county for maintenance, thereby triggering surveys for the road as well. We agree with the trial court that the plaintiffs' intent to divide lot 4 simply was not carried out to completion prior to the closing with Hollenkamp.

¶ 11 We find it interesting that while there was a family meeting to discuss the selling of Alberta's house and property, the intention to partition the lot was never discussed or revealed to any other members of the family. Clearly such a partition of the lot, removing two thirds of the lakefront footage, would affect the value of the property as a whole and would appear to be a factor to be considered in any disposition of the property. Additionally, there was no written documentation to show that the title company or the bank were ever notified of the

intent to convey only a portion of lot 4 to Hollenkamp. More importantly, however, Burl Marohl executed and delivered the Hollenkamp warranty deed at closing in spite of noticing the alleged discrepancy in the description of the lot, and in spite of having full knowledge of the existence of the two quitclaim deeds in favor of himself and plaintiffs, Gary and Bonnidee Lewis. Any error in the documents should have been raised, and corrected, at the time of closing, even if that meant completion of the closing and delivery of the warranty deed were delayed at that time. For this court to change the recorded warranty deed in this instance requires evidentiary proof substantially beyond what the plaintiffs presented here. In other words, the plaintiffs failed to meet their burden of proof that delivery of the contested warranty deed was a mutual mistake. The subsequently recorded quitclaim deeds, therefore, were legally insufficient to defeat Hollenkamp's right to title, ownership, and possession of all of lot 4 as described in the plat of Lewis Subdivision No. 2.

¶ 12 Hollenkamp argues, on cross-appeal, that if we find judgment in favor of him to be in error then we should overturn the denial of his motion for leave to file an affirmative defense regarding the invalidity of Burl Marohl's execution of a deed to himself while acting as Alberta's power of attorney. Given that we are finding in favor of Hollenkamp we need not address this issue. We do note, however, that the decision whether to grant leave to file an amended affirmative defense rests within the sound discretion of the trial court, and such a decision will not be disturbed on appeal absent an abuse of that discretion. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App 3d 781, 796, 914 N.E.2d 1195, 1210 (2009).

¶ 13 For the reasons stated above, we affirm the judgment of the circuit court of Bond County.

¶ 14 Affirmed.