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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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FIRST NATIONAL BANK & TRUST CO.,	)	Appeal from the Circuit Court
	)	of Stephenson County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CH-7
	)	
CCFP, INC., KENNETH LONG, and	)	
DAVID TUELL,	)	
	)	
Defendants-Appellants	)	
	)	Honorable
(State Bank, Nonrecord Claimants, and	)	Theresa L. Ursin,
Unknown Owners, Defendants).	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in granting plaintiff a foreclosure judgment as to property different from that described in plaintiff's motion for summary judgment; we vacate the judgment and the ensuing sale and remanded for the entry of a judgment corresponding to the motion and for further proceedings thereon.

¶ 2 The property-owner defendants in a foreclosure action, CCFP Inc., Kenneth Long, and David Tuell (defendants), appeal, challenging the portion of the foreclosure judgment that describes the foreclosed property. They assert that the description in the judgment is inconsistent

with what plaintiff, First National Bank & Trust Co., sought in its amended complaint and motion for summary judgment. We hold that the foreclosure judgment describes the wrong property. We vacate the order and the ensuing sale and remand for entry of an order of foreclosure consistent with the property that plaintiff showed was uncontestedly subject to foreclosure.

¶ 3

### I. BACKGROUND

¶ 4 This appeal centers on confusion over the legal descriptions of the properties subject to a commercial mortgage. That confusion largely stems from the complexity of the descriptions, which varied as the proceedings progressed. In this decision, we attempt to avoid extending the confusion by starting with an outline of the critical facts.

¶ 5 Plaintiff's complaint, as amended, sought foreclosure of several pieces of real estate in Freeport. That complaint referred to an Exhibit E as being the description of the property sought to be foreclosed; the description was two brief paragraphs. By contrast, the mortgage document, also an exhibit, had a section that described the property as "Tract I," with a description just over two *pages* long, and "Tract II," with a description running a brief paragraph. Tract II included certain numbered lots in the Tuell Park subdivision of Freeport.

¶ 6 Plaintiff filed a motion for summary judgment in which it asserted that defendants had not disputed that the mortgaged property included property that it described in two paragraphs—those two paragraphs appear to be identical to the two paragraphs in the amended complaint. Those two paragraphs include numbered lots in the Tuell Park subdivision that partially overlap with the numbered lots in Tract II. Defendants did not respond to the motion.

¶ 7 The court granted the motion for summary judgment and entered a judgment of foreclosure. The property description appended to the order appears to be that of Tract I. (The mortgage document, with its attendant descriptions, was also attached.)

¶ 8 Defendants moved for reconsideration. They pointed out the discrepancy in the descriptions, but the court accepted plaintiff's representation that any problem would not invalidate the sale. Discussion at this hearing suggested that the notice of sale contained yet another description, one that might have incorporated the land on which the Stephenson County jail sits. On appeal, plaintiff states that it is entitled to property with a description different from that in the mortgage, the summary judgment motion, or the foreclosure judgment, although it does not seem to recognize the inconsistency.

¶ 9 With that brief summary as scaffolding, we now describe the proceedings in more detail.

¶ 10 Plaintiff filed a two-count complaint against defendants, the State Bank of Freeport, a possible lienor, nonrecord claimants, and unknown owners. The first count sought judgment on a note. The second sought the foreclosure of a mortgage signed by Tuell on October 1, 2008. Context provided by other documents filed in this case makes clear that this mortgage was one that, under a "substitution agreement," replaced an earlier mortgage.

¶ 11 Defendants appeared and answered count I (for judgment on the note). They moved to dismiss count II, the foreclosure count, on the basis that the land that plaintiff sought was not consistent with the land in the substitution agreement; they claimed that the substitution agreement was the true expression of the parties' intentions. Defendants asserted that the parties had intended that, upon the execution of the agreement, the mortgage would apply only to the land described by a two-paragraph property description.

¶ 12 Plaintiff then received leave to file an amended complaint. The copy of the mortgage remained unchanged. However, the exhibit that included the description of the land that the body of the complaint stated was the property to be foreclosed had changed. Now, it was recognizably the two-paragraph description supplied by defendants.

¶ 13 Defendants did not answer this complaint.

¶ 14 Plaintiff then filed a motion for summary judgment. (It appears that plaintiff assumed that defendants' answer and motion to dismiss remained extant.) Plaintiff asserted that defendants' motion to dismiss was an admission that, "at a minimum," the mortgaged property was all property that the motion to dismiss admitted was covered by the mortgage, namely, the land in the two-paragraph description.

¶ 15 Defendants did not respond to the motion for summary judgment.

¶ 16 On October 4, 2013, the court entered a judgment of foreclosure. The description of the property foreclosed was—consistent with the mortgage documents—given as "1583 Adams St., Freeport," with the direction to "[s]ee attached." The "Ultimate Findings" section stated that plaintiff was entitled to "foreclosure of said mortgage upon the real property described therein." Immediately following the judgment proper is a legal description that appears to be that of Tract I as described in the original mortgage. The mortgage was also attached.

¶ 17 Defendants filed a motion to reconsider on October 9, 2013. They argued that summary judgment had been improper because their motion to dismiss had raised an issue of material fact about the correct description of the mortgaged property.

¶ 18 At the hearing, defendants represented that the legal description included in the notice of judicial sale encompassed Tuell Park lot 1, which was the site of the Stephenson County jail.

They asked the court to amend the judgment to reflect the property upon which plaintiff sought to foreclose in the complaint.

¶ 19 Plaintiff argued that defendants should have raised their objection to the description in a response to plaintiff's motion for summary judgment. It further argued that the evidence it had filed in support of its motion for summary judgment supported the description in the judgment. It suggested that, if the problem was with the description in the notice of sale, defendants should raise this as an objection to the confirmation of the sale. It further suggested that defendants were simply trying to buy time.

¶ 20 In response to plaintiff's argument, the court asked plaintiff, "[Y]ou're confident that you can go forward with the sale on this legal description, and then if you can't, it's essentially your problem and not defendant[s']?" Plaintiff agreed.

¶ 21 Defendants replied that the focus on the practical problems of the sale was a distraction, as the core problem was that the court had granted relief other than that requested.

¶ 22 The court denied the motion, stating that it agreed with plaintiff that it appeared that defendants were simply trying to delay the sale at the last minute.

¶ 23 Defendants filed a notice of appeal on January 10, 2014. This also was the day that plaintiff filed a motion for confirmation of the judicial sale. According to the motion, the sale took place on December 19, 2013. The court confirmed the sale on February 11, 2014. It is not clear from the record what description of the property was given for the sale.

¶ 24

## II. ANALYSIS

¶ 25 On appeal, defendants initially note that their notice of appeal was premature as filed, but assert that it became effective upon confirmation of the sheriff's sale. Plaintiff does not challenge our jurisdiction. The facts make this appeal timely under Illinois Supreme Court Rule

303(a)(2) (eff. May 30, 2008), which makes an appeal filed before the disposition of the last pending claim effective upon the disposition of that last claim.

¶ 26 Substantively, they argue that the relief available to plaintiff should be set by what plaintiff sought in the amended complaint. They argue that it was error for the court to grant unrelated relief. Further, they argue that we should follow *Bonhomme v. St. James*, 2012 IL 112393, ¶¶ 17-30, to hold that plaintiff, by seeking only the property in the two-paragraph description, abandoned its claims to further property that it sought in its original complaint. It asks that we direct the trial court to correct the judgment to grant foreclosure on only the property that plaintiff sought in the amended complaint.

¶ 27 Plaintiff responds that the documents it presented in support of its motion for summary judgment supported its entitlement to the property that it said that it was seeking in the *original* complaint. It asserts that, by failing to answer the amended complaint or respond to the motion for summary judgment, defendants accepted plaintiff's evidence. It further asserts that, because defendants never submitted any evidence that plaintiff's property description was incorrect, they cannot complain of the description in the judgment. Plaintiff does not address the discrepancies between the various property descriptions. Indeed, the impression it gives is that it believes that all the property descriptions that it has given other than the two-paragraph one it used in the amended complaint are identical.

¶ 28 Plaintiff also argues that defendants forfeited any claim of error by not raising it in response to the motion for summary judgment. Finally, it asserts that "[t]he fact that the property already has been sold at Sherriff's [*sic*]Sale and that Sherriff's [*sic*] Sale has been confirmed by the court with the Defendants participating would seem to make this issue moot."

¶ 29 We first note a technical flaw in defendants' argument. They argue that plaintiff should not have received relief other than what they sought in their amended complaint, specifically, the real estate described in the two-paragraph description. However, the complaint included the mortgage documents as a matter of law (see 735 ILCS 5/2-606 (West 2012)). Because of the incorporation of the mortgage, the complaint contains two possible property descriptions, one of which, the Tract I-Tract II description in the mortgage, would support the judgment foreclosing on Tract II.

¶ 30 Nevertheless, the parties' briefs, particularly *plaintiff's* brief, support two bases for vacatur. One, the record shows that the property description attached to the foreclosure judgment was simply a mistake. The court should have corrected that mistake. Two, summary judgment was improper as to the property described in the foreclosure judgment—as to this basis, we follow plaintiff's analysis, but to a different conclusion.

¶ 31 Based on this history, we can state that the property description in the foreclosure judgment is simply the result of a mistake. The description appended to the foreclosure judgment was the description in the mortgage with the *uncontested* area removed. That was surely a clerical error. Courts routinely correct such error, often *nunc pro tunc*. See, e.g., *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 29 (the court can correct an error that is the result of inadvertence at any time).

¶ 32 We can also follow plaintiff's reasoning to conclude that summary judgment was improper as to the property described in the foreclosure judgment. On appeal, plaintiff asserts that it showed its entitlement to all the property it sought in its original complaint. (It apparently does not recognize that it is arguing for property different from that in the foreclosure judgment.)

¶ 33 Following the rules for the grant of summary judgment, as cited by plaintiff, we can conclude that plaintiff was entitled to, at most, the real estate described in the two-paragraph description. In other words, the motion for summary judgment correctly stated what real estate was undisputedly subject to the mortgage. However, this was not the property that the foreclosure judgment included.

¶ 34 “[T]he purpose of summary judgment is not to try questions of fact but simply to determine if triable questions of fact exist. Summary judgment should not be granted unless the moving party’s right to judgment is clear and free from doubt. \*\*\* [W]here there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact.” *Pielet v. Pielet*, 2012 IL 112064, ¶ 53; see also 735 ILCS 5/2-1005(c) (West 2012).

¶ 35 “The standard for summary judgment is a formidable one.” *Pielet*, 2012 IL 112064 ¶ 54. Grants of summary judgment receive *de novo* review. *E.g.*, *Home Star Bank & Financial Services v. Emergency Care & Health Organization, Ltd.*, 2014 IL 115526, ¶ 22.

¶ 36 Here, excepting a few numbered lots in Tuell Park that appeared both in the mortgage’s Tract II and in the two-paragraph description, the property on which plaintiff was entitled to foreclose was anything but clear and free from doubt. The amended complaint explicitly sought those plus the remainder of the real estate in the two-paragraph description. However, it also put forward the mortgage instrument as correct, which stated that the mortgaged property was Tract I and Tract II. The evidence plaintiff included with its motion for summary judgment only increases the ambiguity. In the end, the only thing that all of plaintiff’s various descriptions had in common was the few numbered lots in Tuell Park. Based on the conflicting documents put forward by plaintiff, the only real estate to which the right to foreclose was clear and free from doubt were those lots in Tuell Park.



¶ 37 In any event, in the body of plaintiff's motion for summary judgment, plaintiff sought to foreclose on the property with the two-paragraph description. It further asserted that defendants made a binding concession in their motion to dismiss by admitting that the mortgage applied to the real estate with the two-paragraph description. Defendants did not challenge that assertion in the trial court (and they do not challenge it now). Therefore, the parties then agreed that the judgment of foreclosure should cover the real estate with the two-paragraph description. Anything beyond that is unsupportable.

¶ 38 Plaintiff argues that defendants forfeited any objection to the foreclosure judgment by choosing not to respond to its motion for summary judgment. That motion did not ask for, or support the grant of, any property that defendants did not agree was subject to foreclosure. Therefore, as defendants note, they had no reason to oppose the motion.

¶ 39 Finally, plaintiff asserts that defendants should have raised the matter as an objection to confirmation. That assertion is contrary to the principle, expressed in *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶¶ 12-27, that the law favors challenges to a foreclosure judgment brought early in the process. In particular, the standard for vacatur becomes higher after the filing of a motion to confirm the judicial sale. Leaving the issue until after the sale would, for no good reason, require defendants to relitigate the matter under the higher standards of section 15-1508(b) of the Code (735 ILCS 5/15-1508(b) (West 2012) (bases for denying confirmation of a judicial sale)).

¶ 40

### III. CONCLUSION

¶ 41 For the reasons stated, we vacate the foreclosure judgment and the ensuing sale and remand the cause for the entry of a foreclosure judgment consistent with that sought in the body of plaintiff's motion for summary judgment.

¶ 42 Vacated and remanded.