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SIXTH DIVISION
March 13, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

UNIVERSITY PARK CONDOMINIUM ASSOCIATION,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	Nos. 11 M1 719167
)	11 M1 719171
MIDWEST BANK AND TRUST COMPANY, as Trustee)	
U/T Dated January 18, 1979, and Known as Trust Number)	
79-01-2857,)	
)	
Defendant-Appellant,)	
)	
(Brenda Schoenberg and Unknown Occupants,)	The Honorable
)	George F. Scully, Jr.,
Defendants).)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 **HELD:** Where judgment was entered against a land trustee in a forcible entry and detainer action brought by a condominium association for possession and unpaid assessments of two condominium units held in a land trust without a beneficiary being named in the lawsuit, we must reverse and remand to review the language of the trust agreement to determine the settlor's

intent with regard to the responsibilities of the trustee and beneficiary and ultimately whether a beneficiary was a necessary party to the litigation.

¶2 Defendant, Midwest Bank and Trust Company (Midwest Bank), as trustee u/t dated January 18, 1979, and known as trust number 79-01-2857, appeals the circuit court's order entering judgment following a trial in favor of plaintiff, University Park Condominium Association, in its action pursuant to the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.*) (West 2010)). Plaintiff was awarded possession of two condominium units, as well as damages for unpaid condominium assessments, plus fees and costs. On appeal, defendant contends the circuit court lacked subject matter jurisdiction to enter the judgments because plaintiff brought the action against a deceased individual, which was a legal nullity. Defendant additionally contends the circuit court improperly entered judgment in absence of a necessary party, namely, the beneficiary of the trust. Finally, defendant contends the circuit court erred in relying on one of plaintiff's trial exhibits which lacked proper foundation and was inadmissible hearsay. Based on the following, we reverse and remand.

¶3 **FACTS**

¶4 On August 23, 2011, plaintiff filed two forcible entry and detainer complaints seeking recovery of unpaid assessments and possession of two condominium units (229N and 230N). In both lawsuits, plaintiff named Midwest Bank, Brenda Schoenberg and unknown occupants as defendants. Plaintiff alleged that, as of August 2011, unit 229N was delinquent in the amount of \$8,155.01 and unit 230N was delinquent in the amount of \$11,898.93. Plaintiff additionally alleged that Brenda and unknown occupants were in unlawful possession of the units. The condominium units were held in a land trust. The trust deed dated September 13, 2006, provided that Vincent Schoenberg conveyed the condominium units to Midwest Bank as trustee under the

trust agreement dated January 18, 1979, known as trust number 79-01-2857. No beneficiaries were named in the September 13, 2006, trust deed. The trust deed provided, in relevant part:

"This conveyance is made upon the express understanding that neither Midwest Bank and Trust Company, individually or as Trustee, nor its successor or successors in trust shall incur any personal liability or be subjected to any claim, judgment or decree for anything it or they or its or their agents or attorneys may do or omit to do in or about the said real estate or under the provisions of this Deed or said Trust Agreement or any amendment thereto, or for injury to person or property happening in or about said real estate, and any and all such liability being hereby expressly waived and released. Any contract, obligation or indebtedness incurred or entered into by the Trustee in connection with said real estate may be entered into by it in the name of the then beneficiaries under said Trust Agreement as their attorney-in-fact, hereby irrevocable appointed for such purposes, or at the election of the Trustee, in its own name, as Trustee of an express trust and not individually (and the Trustee shall have no obligation whatsoever with respect to any such contract, obligation or indebtedness exception only so far as the trust property and funds in the actual possession of the Trustee shall be applicable for the payment and discharged thereof). All persons and corporations whomsoever and whatsoever shall be charged with notice of this condition from the date of the filing for the record of this Deed.

The interest of each and every beneficiary hereunder and under said Trust Agreement and of all persons claiming under them or any of them shall be only in the earning, avails and proceeds from the sale or any other disposition of said real

estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, or in to said real estate as such, but only an interest in the earning, avails and proceeds thereof as aforesaid the intention hereof being to vest in said Midwest Bank and Trust Company the entire legal and equitable title in fee simple, in and to all real estate above described."

¶15 The January 18, 1979, trust agreement does not appear in the record. According to the parties, Brenda, at some point, became the beneficiary of the land trust. The record contains a "notice and final demand for payment" dated June 17, 2011, addressed to Midwest Bank and Brenda related to unpaid assessments for condo unit 230N.¹

¶16 Following unsuccessful attempts at service of process, plaintiff learned that Brenda had died in June of 2011 and both condo units were vacant. According to the circuit court's half sheet, on July 11, 2012, plaintiff's motions to non-suit Brenda and unknown occupants from both cases were granted. On September 28, 2011, plaintiff filed separate motions to set the matters for trial, acknowledging Brenda's death, that the condo units were vacant, and that it intended to proceed solely against Midwest Bank. The lawsuits, case number 11 M1 719167 (for unit 230N) and case number 11 M1 719171 (for unit 229N), were handled simultaneously; however, no consolidation order was entered. The motions were continued a number of times until the circuit court entered orders, one for each case, on April 25, 2012, ordering defendant to file an appearance on or before April 27, 2012, and to answer or otherwise plead on or before May 9, 2012. On May 23, 2012, plaintiff's motions for trial were granted and agreed orders granting continuances were entered. However, on July 11, 2012, the circuit court entered two *ex parte*

¹ Attempts to locate in the record a similar "notice and final demand for payment" for unit 229N were unsuccessful.

orders for possession of the condos and for \$19,215.06 in unpaid assessments plus attorney fees and costs in relation to case number 11 M1 719167 for unit 230N and \$15,581.14 in unpaid assessments plus attorney fees and costs in relation to case number 11 M1 719171 for unit 229N. On August 10, 2012, Midwest Bank filed motions to vacate the *ex parte* orders. The circuit court granted the motions to vacate the *ex parte* orders.

¶7 On October 2, 2012, Midwest Bank filed motions to dismiss the lawsuits, arguing that, as trustee, it was not under control or possession of the condo units; rather, the beneficiaries of the land trust had the rights to possession, management, control, and operation of the properties. According to Midwest Bank, Brenda and Vincent Schoenberg, her husband that predeceased her, were the beneficiaries of the land trust and no estate was filed for either individual. Midwest Bank argued that the deceased beneficiaries were dismissed from the cases without any other beneficiaries being named as necessary parties. Midwest Bank maintained that, without necessary parties named as defendants, the lawsuits had to be dismissed and any orders entered by the circuit court would be void. On October 29, 2012, the circuit court denied Midwest Bank's motions to dismiss the lawsuits, stating that "[t]he caselaw cited by the Defendant stands for the premise that, generally, the beneficiary of a land trust is a necessary party; in the case at hand, the Defendant is stating that there is no beneficiary. Therefore, there is no beneficiary who must be joined as a necessary party." On November 5, 2012, Midwest Bank filed its answers and affirmative defenses.

¶8 According to the parties, a trial was held on February 6, 2013. A court reporter was not present for the trial, so no transcript of the proceeding appears in the appellate record. On the same date, February 6, 2013, the circuit court entered orders of possession in favor of plaintiff in both lawsuits. As to case number 11 M1 719167, the circuit court found plaintiff was entitled to

possession of condo unit 230N and that plaintiff was to recover \$26,033.07 from Midwest Bank. As to case number 11 M1 719171, the circuit court found plaintiff was entitled to possession of condo unit 229N and that plaintiff was to recover \$22,232.85 from Midwest Bank. Plaintiff subsequently filed motions for rulings on its requests for attorney fees. Then, on March 8, 2013, Midwest Bank filed motions to vacate the circuit court's February 6, 2013, orders. Midwest Bank's motions to vacate were denied. On April 10, 2013, the circuit court awarded plaintiff attorney fees of \$5,369 plus \$766.50 in costs in case number 11 M1 719167 and \$5,426 plus \$766.50 in costs in case number 11 M1 719171. Both of the court's April 10, 2013, orders provided that "this is a final and appealable order."

¶9 On May 8, 2013, Midwest Bank filed one notice of appeal listing both case numbers. In the notice of appeal, Midwest Bank provided that it is appealing the circuit court's October 29, 2012, order denying Midwest Bank's motions to dismiss the complaints, the February 6, 2013, order granting possession and awarding damages in favor of plaintiff, and the April 10, 2013, order granting attorney fees. Midwest Bank's notice of appeal does not acknowledge that the circuit court entered two orders on each of the dates listed, one for each case number.

¶10 On September 18, 2013, Midwest Bank filed a motion for leave to file a late report of proceedings before this court. In the motion, Midwest Bank acknowledged that there was no agreed statement of facts by the parties and requested leave to file a late proposed report of proceedings together with the record on appeal. Midwest Bank attached its proposed report of proceedings to the motion. On September 23, 2013, this court granted Midwest Bank's motion for leave to file its late proposed report of proceedings. The proposed report of proceedings provided, in relevant part:

"Appellee brought this case as a forcible and detainer case in the Municipal Department, First District, in the Circuit Court of Cook County. The suit was brought against Vincent G. Schoenberg. Vincent G. Schoenberg died on December 17, 2008. The Appellee dismissed Vincent G. Schoenberg, who had possession of the condominium unit before his death. There was a stipulation at trial that Vincent G. Schoenberg was deceased, the trial court recognizing that a beneficiary in a land trust is a necessary party and since there was no named beneficiary there was no necessary party to be joined. Defendant-Appellant's motion as to a necessary party was denied. Motions were made before the trial court that it had no jurisdiction because Vincent G. Schoenberg was dead as was Brenda Schoenberg, his wife, and Appellee did not do anything more other than filing its forcible and detainer suit to obtain possession of the condominium. The trial court denied Defendant-Appellant's Motion as to lack of jurisdiction. The trial court also denied Appellant's motion to transfer the case to the Chancery Division of the Circuit Court of Cook County, where a previously filed foreclosure suit *Deutsche National Bank v. Vincent G. Schoenberg*, 09 CH 7591[,] involving the same unit was pending and is still pending.² The evidence presented at trial was the stipulation that Vincent G. Schoenberg was dead.

[] The only person testifying for Appellee was Richard Krelich who testified that he was a property manager for an entity employed by plaintiff and only handled property accounts for seven months before trial. He did not testify that Exhibit '3' in evidence addressed to Vincent G. Schoenberg was made or kept in the regular course of business to make such a record nor that it was made at or

² Inquiries by this court into the status of the foreclosure case reveal that the case remains pending.

shortly after the transaction it reflects, nor were the entries made by him or someone under his supervision, and were kept to produce accuracy, that the person or persons making the entries were dead or unavailable, nor could he as he was only there seven months and worked for another entity. On cross-examination, this witness as to Exhibit '3' in evidence admitted that the Exhibit '3' is addressed to Vincent Schoenberg, 1451 East 51st Street, Units 2329 [sic] and 230 and not The Midwest Bank and Trust [C]ompany as Trustee Under Trust Number 79-01-2857 and dated 1-18-79."

¶11 ANALYSIS

¶12 I. Jurisdiction

¶13 We first address plaintiff's cursory mention that defendant failed to file separate notices of appeal despite the fact that the underlying cases remained separate throughout their simultaneous consideration by the circuit court. A notice of appeal is to be liberally construed, and defects in its form will not deprive a reviewing court of jurisdiction to consider the merits of the appeal. *McMahon v. McMahon*, 97 Ill. App. 3d 448, 450 (1981). "The purpose of a notice of appeal is to inform the party prevailing in the trial court that the other party seeks a review of the judgment." *Id.* at 449. Here, although case number 11 M1 719167 and case number 11 M1 719171 were not consolidated, Midwest Bank's May 8, 2013, notice of appeal listed both cases and clearly informed plaintiff that it sought review of the circuit court's October 29, 2012, February 6, 2013, and April 10, 2013, orders as they related to the listed cases. We, therefore, find this court has jurisdiction to consider the appeal.

¶14 Turning to the merits of defendant's appeal, Midwest Bank contends that the circuit court lacked subject matter jurisdiction where plaintiff named a deceased person as a defendant, which

was a legal nullity. Midwest Bank further contends that a named beneficiary was a necessary party to the lawsuits; therefore, the circuit court erred in proceeding in absence of a named beneficiary.

¶15 "Under the common law of Illinois, a dead person is a nonexistent entity and cannot be a party to a suit. [Citation.] If a person is already dead when an action is asserted against him or her, the proceedings will not invoke the trial court's jurisdiction, and any judgment entered in the case will be a nullity. [Citation.]" *Relf v. Shatayeva*, 2013 IL 114925, ¶ 22.

¶16 The record reveals that Brenda and unknown occupants were dismissed from the case on July 11, 2012, in response to plaintiff's request to non-suit them after learning of Brenda's death and the vacancy of the condominium units. Midwest Bank remained as a named defendant. *Cf. Keller v. Walker*, 319 Ill. App. 3d 67, 70 (2001) (where the circuit court lacked subject matter jurisdiction in the personal injury action because the only named defendant was deceased when the action was filed). Accordingly, the underlying cases did not proceed against a deceased person. That said, whether the circuit court erred in proceeding without a named beneficiary necessarily leads us to defendant's next contention and requires us to determine whether a beneficiary is a necessary party in litigation involving trust property.

¶17 The general principles of land trusts are well established. In a land trust, the legal and equitable title is held by the trustee, while the beneficiary retains a personal property interest. 765 ILCS 430/1 (West 2010). The beneficiary "or any person designated in writing by the beneficiary" has the "exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property is in the

beneficiary of the trust." 765 ILCS 430/1 (West 2010). With regard to whether a beneficiary is a necessary party in litigation involving trust property, the supreme court long ago advised:

"The general rule is that in all suits respecting trust property, whether brought by or against a trustee, the beneficiaries are necessary parties and the objection on account of their not being made necessary parties may be taken on appeal. The trustee is a necessary party because he holds legal title. The beneficiary is a necessary party because he has the equitable and ultimate interest to be affected by the decree." *Peoples Bank & Trust Co. of Rockford v. Gregory*, 347 Ill. 397, 399 (1932).

Two exceptions have been recognized, such that beneficiaries are not necessary parties where others represent the beneficiaries' interests so completely that they receive actual and efficient protection or where the beneficiaries are so numerous that the delay and expense of joining them becomes oppressive and burdensome. *Just Pants v. Bank of Ravenswood*, 136 Ill. App. 3d 543, 546 (1985).

¶18 In *Just Pants*, lessees of a property sued the trustee for conversion and breach of contract, but did not name the beneficiaries to the trust. *Id.* at 544. A trial was held and the circuit court entered judgment against the trustee. Thereafter, the plaintiffs discovered that the property had been transferred to a different land trust after the lawsuit had been filed but prior to trial. *Id.* at 545. The circuit court subsequently entered an order amending the complaint and judgment and entering judgment against only the beneficiaries. The beneficiaries appealed, arguing that, because they were not added as parties despite being necessary and indispensable, the original judgment against the trustee was void and could not be amended by adding them. In framing the issue on appeal, this court instructed that "failure to join *** an indispensable party does not

deprive a court of jurisdiction over the parties properly before it. Hence, where a failure to join an indispensable party is brought to the attention of a reviewing court, the appropriate course is to vacate the judgment, not because the trial court lacked jurisdiction over the joined parties, but because fairness to the non-joined party dictates such a result." *Id.* at 546.

¶19 Here, the circumstances are unique because the named beneficiary is not requesting to be joined as a party. In fact, we do not know the identity of the named beneficiary. Instead, the issue is whether it was necessary to add a beneficiary as a party in order for plaintiff to proceed in its forcible entry and detainer action. Essentially, Midwest Bank argues that a beneficiary was a necessary party to plaintiff's action for possession of the condominium units and unpaid assessments, and, as such, the circuit court's orders against Midwest Bank were entered in error.

¶20 This court has provided that:

"In an action involving a land trust, the question of whether the beneficiary or the trustee is the proper party depends on the nature of the action in light of the rights and duties established by the trust agreement. [Citations.] The beneficiary in a land trust is the proper party to litigation involving his rights and liabilities of management, control, use and possession of the property. [Citation.] Beneficiaries in land trusts oftentimes retain managerial rights in property and, in exercising these rights, enter into a variety of contractual arrangements resulting in the accrual of causes of action against them that do not involve the trustee. [Citation.]

Actions sounding in tort involving land trust property usually arise from the operation and maintenance of the property. Such causes are based on negligence and accrue against only the beneficiary and not the trustee. The

trustee is insulated from these responsibilities if he has no rights of possession, operation, control or maintenance [Citation.] For example, trustees who hold legal title to realty through a trust agreement are not liable for damages resulting from defects in the trust premises when the agreement gives the beneficiaries and not the trustees the power to make the needed repairs. [Citation.] Beneficiaries can also be held responsible for the torts or frauds of the trustee where they participate in or authorize the commission of the wrongs. [Citation.]" *Just Pants*, 136 Ill. App. 3d at 547.

¶21 In *Just Pants*, the court observed that it did not know, and had no way of knowing, the responsibilities of the defendant bank as trustee and the responsibilities of the beneficiaries regarding the trust property because the trust agreement was not found in the record on appeal. *Id.* at 548. The court, therefore, was unable to apply the above stated principles to the case before it. *Id.* Similarly, we are unable to apply the above stated principles to the case before us. Because we do not have the trust agreement in the appellate record, we do not know, and have no way of knowing, the responsibilities of Midwest Bank as trustee and the responsibilities of the beneficiary, even assuming a beneficiary exists. *Id.* at 548. The primary purpose of trust construction is to ascertain the settlor's intent from the trust as a whole and to effectuate that intent so long as it is not contrary to public policy. *In re Estate of Mendelson*, 298 Ill. App. 3d 1, 3 (1998). As with contract construction, the settlor's intent should be determined by the plain language of the trust agreement. *Id.* We are unable to review the trust agreement dated January 18, 1979, known as trust number 79-01-2857, to determine Vincent's intent when he created the trust. We recognize that the language of the trust deed follows the general principles of land trust law, in that, as trustee, Midwest Bank was the legal and equitable holder of title to the

properties and the beneficiary held a personal property interest in the condominium units. The trust deed seemingly limited Midwest Bank's personal liability; however, the trust deed did not, and could not, provide the responsibilities and liabilities devised by the trust agreement. We, therefore, conclude that we must remand this cause to the circuit court to ascertain the responsibilities of Midwest Bank as trustee and the responsibilities of the beneficiary under language of the trust agreement.

¶22 We note that our research has revealed forcible entry and detainer cases that have proceeded solely against a beneficiary (*Streams Condominium No. 3 Association v. Bosgraf*, 219 Ill. App. 3d 1010 (1991) (where, shortly after the complaint was filed, the beneficiary of the trust was substituted as the defendant for the trustee)), as well as against the trustee and the beneficiary (*Graue Mill Country Condominium Association No. 1 v. Gary-Wheaton Bank*, 213 Ill. App. 3d 698 (1991) (where the plaintiff's failure to adequately serve the land trustee and the beneficiaries with a 30-day notice required in forcible entry and detainer actions did not require the dismissal of the claim for unpaid assessments against the trustee and the beneficiaries though it barred the claim for possession). This court has also found that a beneficiary may institute a forcible entry and detainer case. See, e.g., *Azar v. Old Willow Falls Condominium Association*, 228 Ill. App. 3d 753, 756-57 (1992) (finding the beneficiary of the land trust had standing to bring a claim against the condominium association to challenge the imposition of special assessments where the trust agreement expressly provided that the beneficiary had the right to the management and control of the property and the land trustee had no such right); *American National Bank & Trust Co. of Chicago v. Ryan*, 106 Ill. App. 3d 434, 437 (1982) (because the Forcible Entry and Detainer Act relates solely to the right of possession, legal title is not a prerequisite to instituting a cause of action under the statute and a beneficiary may maintain such

an action). Our research has not revealed, and the parties have not cited, any cases wherein a forcible entry and detainer action has proceeded solely against a trustee.

¶23

II. Evidentiary Error

¶24 Because we are remanding this cause to determine whether it was necessary to add a beneficiary to the underlying case, we need not address Midwest Bank's contention related to the improper entry of plaintiff's exhibit into evidence.

¶25

CONCLUSION

¶26 We reverse the circuit court's judgment and remand this cause for proceedings consistent with this order.

¶27 Reversed and remanded.