2015 IL App (1st) 132945-U

SECOND DIVISION
Order filed September 29, 2015
Modified Upon Denial of Rehearing October 20, 2015

No. 1-13-2945

FIRSTMERIT BANK, f/k/a MIDWEST BANK and TRUST COMPANY, Plaintiff-Appellee, v. SAVOY CLUB, LLC, DANIEL P. CALLAGHAN, DANIEL P. CALLAGHAN, as Trustee of the Daniel P. Callaghan Revocable Trust, CALLAGHAN ASSOCIATES, INC., JAMES W. PAUL and GINGER J. PAUL, Unknown Owners and Non-Record Claimants, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 10 CH 7526 Honorable Lisa A. Marino, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER MODIFIED ON DENIAL OF REHEARING

¶ 1 *Held*: Defendants' claim that the trial court erred in granting FirstMerit's motion to dismiss their first affirmative defense and count I of their counterclaim is dismissed as moot, as is their claim for a constructive trust. We affirm the order of the trial court granting summary judgment for FirstMerit on the Pauls' counterclaim for unjust enrichment.

¶ 2 Defendants James W. Paul and Ginger J. Paul ("the Pauls") appeal from orders of the

circuit court granting plaintiff FirstMerit Bank's ("FirstMerit") motion to dismiss their first affirmative defense and count I of their counterclaim, motion for judgment of foreclosure, FirstMerit's motion for summary judgment on count II of the Pauls' counterclaim, and an order approving report of sale and distribution, confirming sale and order of possession. Here, the Pauls argue: (1) the trial court erred in dismissing their first affirmative defense and counterclaim that their contract for the purchase of Lot 51 gave them a vendee's lien and equitable title; (2) separately, the trial court erred in granting FirstMerit's motion for summary judgment on their unjust enrichment claim; and (3) they have no adequate remedy at law. While this appeal was pending, FirstMerit filed a motion with this court seeking to dismiss portions of the Pauls' appeal as moot, which was taken with the case. For the following reasons, we dismiss: 1) the first issue raised by the Pauls as it is moot and, 2) affirm the order of the trial court granting summary judgment in favor of FirstMerit on the Pauls' unjust enrichment claim.

¶ 3 BACKGROUND

¶ 4 On October 24, 2005, FirstMerit's predecessor in interest, Midwest Bank and Trust Company[1] ("Midwest"), gave Savoy Club, LLC ("Savoy Club") a series of loans to build and develop 52 residential units on property located at 11500 79th Street in Burr Ridge, Illinois ("the subdivision"). The first loan of $16,000,000 was the "Construction Loan" and was used by Savoy to acquire the property and finance the development of the subdivision. The second loan of $3,500,000 was the "Term Loan" in the form of a letter of credit issued for the benefit of the Village of Burr Ridge to ensure sufficient funds for the necessary site development of the

[1] Federal Deposit Insurance Corporation (FDIC) closed Midwest on May 14, 2010, and FirstMerit bought Midwest's assets. Those assets included the loans and mortgages at issue here.

subdivision. Both loans to Savoy were secured by a construction mortgage, security agreement and fixture financing statement. Savoy Club signed promissory notes for both of these loans. Additionally, Savoy Club signed the "Construction Loan Agreement" and gave Midwest a "Construction Mortgage" secured by the subdivision. Daniel P. Callaghan signed all of the above documents as Savoy Club's manager.

¶ 5 Savoy Club, Callaghan individually, and Callaghan as trustee of the Daniel P. Callaghan Revocable Trust dated May 31, 2000, also gave Midwest separate signed guarantees of payment and performance. On November 7, 2005, Midwest recorded its Construction Mortgage from Savoy Club against the subdivision.

¶ 6 From January 12, 2007 to March 24, 2009, these loan and mortgage documents underwent a series of amendments which, among other things, extended the term of the loans. The first Construction Loan amendment occurred on January 12, 2007, and was recorded in Cook County on February 26, 2007. The fifth amendment to the Construction Loan and related documents was entered into on March 24, 2009. The Construction Mortgage was also amended on that same date. In addition, Callaghan and Associates, Inc. ("Callaghan Associates") and Callaghan individually entered into a loan modification agreement wherein the maturity date of the Callaghan Associates Loan was extended to July 7, 2009.

¶ 7 On September 12, 2007, the Pauls entered into a contract with Callaghan Associates, where Callaghan Associates would build a house and the Pauls would buy a unit on Lot 51 of the subdivision. The contract was subject to the first mortgage lien of Midwest. The purchase contract did not provide that Lot 51 would serve as security for the Paul's payment towards the purchase of Lot 51. The terms of the contract stated that Callaghan Associates or the land owner

(Savoy Club) would convey title to the Pauls at an agreed upon closing date. The Pauls recorded a Memorandum of this contract in Cook County on July 8, 2009. The Pauls paid Callaghan Associates $412,600. Callaghan Associates only built the shell of the house by the time they stopped work on Lot 51.

¶ 8 On January 28, 2008, Callaghan Associates took out an additional $1,200,000 loan and mortgage secured by the subdivision from Midwest.

¶ 9 The Construction Loan, as amended, matured on July 7, 2009, as did the Callaghan Associates Loan. Savoy Club did not pay the amounts due under the Construction Loan, nor did Callaghan Associates. Thereafter, the Village of Burr Ridge drew on the amended Term Loan according to its letter of credit from Midwest. This event triggered a default and made the entire principal balance and accrued interest immediately due.

¶ 10 On February 22, 2010, Midwest filed its foreclosure complaint to foreclose its mortgage lien granted by the owner Savoy Club, LLC against the subdivision. FirstMerit filed an amended complaint on April 13, 2010. On May 17, 2010, the Pauls filed their answer, affirmative defenses and counterclaim to FirstMerit's amended complaint. In their first affirmative defense, the Pauls alleged that because Midwest Bank had entered into "amended notes and mortgages with Savoy Club" in December 2008 and March 2009, after the Pauls executed their contract with Callaghan Associates on September 12, 2007 and became "the equitable owners" of Lot 51, "Midwest's interests in the Paul property are subordinate to the interests of the Pauls." The Pauls requested a judgment that they had a superior interest over FirstMerit in Lot 51. Their second affirmative defense, almost identical to the first, alleged that their September 12, 2007 contract gave them a vendee's lien superior to the interests of Midwest and requested a finding in their

favor. Count I of the Paul's counterclaim alleged Midwest had "actual or constructive knowledge of the Paul's interest in the lot after the execution of the contract on September 12, 2007" and that as a result of the contract they had both equitable title and a vendee's lien in Lot 51. The Pauls requested that the amended FirstMerit mortgage "cloud on the title" be declared "illegal and void and ordered to be canceled of record as to the parcel owned by the Pauls" and that title be "quieted, established and confirmed in plaintiffs." Count II of the counterclaim alleged that Midwest would be unjustly enriched "as Midwest will obtain title to real estate in which the Pauls have a superior right and interest." In addition to requesting title to Lot 51, the Pauls requested a judgment in the amount of $412,600.

¶ 11 FirstMerit subsequently filed a motion to dismiss the Paul's affirmative defenses and counterclaims. In the motion, as to count I, FirstMerit argued that the Pauls did not have a superior equitable title or vendee's lien against Lot 51, nor were they entitled to any money damages against FirstMerit under count II. On January 11, 2011, the circuit court issued an order granting in part and denying in part FirstMerit's motion. The court dismissed the Pauls' first affirmative defense that alleged they were the equitable owners of Lot 51 and dismissed Count I of the counterclaim that alleged the Pauls have equitable title and a vendee's lien on Lot 51. The trial court found that FirstMerit's mortgage lien is superior to any lien claim of the Pauls. The trial court allowed the second affirmative defense, that the Pauls have a vendee's lien on Lot 51, and count II of the counterclaim that alleged unjust enrichment, to stand.

¶ 12 On January 12, 2011, the trial court entered an order that granted FirstMerit's motion for summary judgment as to counts I (mortgage foreclosure on Savoy's construction and term loans) and IV (the Callaghan Associates loan) of its amended complaint against the Pauls and found

that FirstMerit's lien interest was superior to the Pauls'. On November 2, 2011, FirstMerit moved for summary judgment against the Pauls regarding Count II of the Pauls' counterclaim which alleged unjust enrichment. On March 1, 2013, the trial court granted FirstMerit's motion for summary judgment on Count II of the Pauls' counterclaim for unjust enrichment.

¶ 13 On May 30, 2013, FirstMerit held a foreclosure sale for Lot 51, where FirstMerit was the successful bidder. On July 9, 2013, FirstMerit sought to confirm the foreclosure sale of Lot 51 and the Pauls moved to stay enforcement of the judgment entered and waive an appeal bond. On August 7, 2013, the trial court confirmed the foreclosure sale of Lot 51, which was not contested by the Pauls. Thereafter, on August 21, 2013, FirstMerit responded to the Pauls request to stay judgment and waive appeal bond. On September 4, 2013, the trial court denied the Pauls' request to waive appeal bond and ordered the Pauls to post an appeal bond in the amount of $150,000 by October 4, 2013, in order to stay enforcement of the judgment entered against them. No appeal bond was posted.

¶ 14 On November 8, 2013, FirstMerit conveyed Lot 51 to Cascade Holdings, LLC ("Cascade"), a FirstMerit entity used to hold title in real estate. On November 12, 2013, Cascade sold Lot 51 to MACnificent 5, LLC – Series 1 ("MACnificent"), an entity unrelated to any party here, for $421,560.

¶ 15 This appeal followed. On May 5, 2014, FirstMerit filed a motion to dismiss portions of the Pauls' appeal as moot. That motion was taken with the case.

¶ 16 ANALYSIS

¶ 17 While this appeal was pending, FirstMerit filed a motion to dismiss this appeal alleging that because the Pauls failed to file an appeal bond, this court lacks the necessary jurisdiction to

enter the relief requested, vest title to Lot 51 to the Pauls, where FirstMerit sold the real estate to a third party that was not a party to this case. We will first address FirstMerit's mootness argument before considering the merits of this appeal.

¶ 18 I. Mootness

¶ 19 FirstMerit argues the Paul's claim that the trial court erred in dismissing their first affirmative defense, that alleged they were the equitable owners of Lot 51, and count I of the counterclaim, that the Pauls have equitable title and a vendee's lien on Lot 51, is moot because the relief requested, to declare that the Paul's have superior title to Lot 51, cannot be granted because the Pauls did not file an appeal bond to stay the enforcement of the order approving the sale pursuant to Illinois Supreme Court Rule 305(k) (eff. July 1, 2004) and Lot 51 has been subsequently conveyed to a third party. The Paul's response asserted that they did not wish to set aside the foreclosure proceedings, but merely sought an "adjudication of their priority lien interest so that, once the subject property was sold, they would have been made whole" and once their lien is declared superior to the bank's lien "those proceeds can be applied to satisfy the Pauls' superior lien."

¶ 20 An appeal is moot if no controversy exists or if “events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief.” *In re Marriage of Peters–Farrell*, 216 Ill. 2d 287, 291 (2005). "Since the existence of a real controversy is an essential requisite to appellate jurisdiction, the general rule is that where a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, it will dismiss the appeal *** even though such facts do not appear in the record. [Citations omitted.] *La Salle National Bank v. Chicago*, 3 Ill. 2d 375, 378-379 (1954)

¶ 21 It is well established that in the absence of a stay, an appeal is moot if the relief sought involves possession or ownership of property that has already been conveyed to a third party who is not a party to the litigation, which is exactly what occurred here. *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (1989). Illinois Supreme Court Rule 305(k) (eff.Jan.1, 2004) provides that:

> "[i]f a stay is not perfected within the time for filing the notice of appeal, * * * the reversal or modification of the judgment does not affect the right, title or interest of any person who is not a party to the action or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed." Ill. S.Ct. R. 305(k) (eff. Jan.1, 2004).

¶ 22 Rule 305(k) serves to protect third-party buyers of property from the reversal or modification of judgment regarding that property, absent a stay of judgment pending the appeal if: (1) the property passed pursuant to final judgment; (2) the right, title and interest of the property passed to a party who is not a party to the action; and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. *Steinbrecher*, 197 Ill. 2d at 523-34. We find that the record and facts of the instant case allow us to conclude that the requirements necessary to invoke the application of Rule 305(k) exist here, rendering a portion of this appeal moot.

¶ 23 As to the first requirement, title to Lot 51 passed pursuant to a final judgment. On November 13, 2013, FirstMerit, through its holding company Cascade, sold Lot 51 to

MACnificient, for $421,565. Concerning the second requirement, FirstMerit states that MACnificient "is in no way affiliated with FirstMerit or Cascade" and "[n]either FirstMerit, nor Cascade, retained an interest in Lot 51 after the sale to MACnificient." There is no evidence in the record to the contrary. Lastly, as to the third requirement, the Pauls did not file an appeal bond or otherwise obtain a stay of the trial court's judgment. The mere fact that they filed a timely appeal does not automatically stay the foreclosure judgment or order approving report of sale and distribution, confirming sale and order of possession. *See* Ill. Sup. Ct., R 305(b) (mandating "[a] bond or other form of security *** to protect an appellee's interest in property."). Therefore, we find that all three requirements for the application of Illinois Supreme Court Rule 305(k) (eff. Jan.1, 2004) were met as to Lot 51. See *Steinbrecher*, 197 Ill. 2d at 523–524. Accordingly, we dismiss that portion of the Pauls' appeal dealing with the trial court's dismissal of their first affirmative defense and count I of their counterclaim for mootness.

¶ 24 Even if we were to conclude that this issue was not moot we would deny the relief requested by the Pauls because of the lack of any argument supported by facts and citation to the record in support of their position. Ill. S. Ct. R. 341 (h)(6), (7) (eff. Feb. 6, 2013). The Pauls' basic contention is that when they agreed to purchase Lot 51 they acquired a vendee lien that is superior to the lien foreclosed by FirstMerit. The Pauls argue broadly that because the bank knew of their agreement with Callaghan and because loan modifications were made subsequent to their September 12, 2007 purchase contract, a vendee lien was created and it is superior to a prior recorded lien filed by the bank against the property. However, the Pauls fail to demonstrate by citation to the record that the foreclosed lien was not recorded prior to their agreement with the developer because there is no dispute here that it was recorded in February 2007. They

likewise fail to demonstrate by citation to applicable case law that this recorded lien somehow loses its superior position and becomes junior to a vendee's lien under facts similar to those presented here. The Pauls have not presented this court with any precedent where vendees, similar to defendants, enter into an agreement to construct a home on property subject to a recorded mortgage, acquire a superior lien by virtue of the mortgagee amending an earlier recorded mortgage or extending an earlier construction loan. Instead, defendants cite to *Hinsdale Federal Savings & Loan Association v. Gary-Wheaton Bank*, 100 Ill. App. 3d 746 (1981), a case where the aggrieved party entered into a contract with a vendor *before* there was a recorded mortgage lien, which is completely opposite of what occurred in this case.

¶ 25 FirstMerit also seeks to dismiss as moot the constructive trust portion of the Pauls' count II counterclaim. However, FirstMerit does not seek to dismiss the unjust enrichment claim.

¶ 26 In third party sale situations where there are issues on appeal which are separate from the subject property, courts may dismiss only the part of the appeal that is moot. See *Estate of DeBow v. City of E. St. Louis*, 228 Ill. App. 3d 437, 448-49 (5th Dist. 1992) (granting plaintiff estate's motion to dismiss on mootness grounds city defendant's appeal as to city's vacant land, but denying the motion as to the city hall building on public policy grounds).

¶ 27 We note that "a constructive trust is a remedy, not a cause of action." (Citation omitted.) *National Union Fire Insurance Co. v. DiMucci*, 2015 IL App (1st) 122725, ¶75. Creation of a constructive trust in this case would affect the title to Lot 51, which has already been conveyed to a third party. Therefore, the request for imposition of a constructive trust in Count II of the counterclaim is dismissed as moot. *Jones v. Matthis*, 89 Ill. App. 3d 929, 931 (1980).

¶ 28 II. Unjust Enrichment Claim

¶ 29 We now turn to the Pauls' argument that the trial court erred in granting FirstMerit's motion for summary judgment as to count II of the Pauls' counterclaim for unjust enrichment. The Pauls argue that they paid $412,600 toward the construction of a home on Lot 51, which has been partially built, and FirstMerit has been unjustly enriched because the shell of the house was turned over to them. The Pauls argue that to allow FirstMerit to obtain the partially-built house that the Pauls paid for without compensating them or recognizing their liens constitutes unjust enrichment.

¶ 30 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Irwin Industrial Tool Co. v. Illinois Department of Revenue,* 238 Ill. 2d 332, 339-40 (2010) (quoting 735 ILCS 5/2–1005(c) (West 2010)). Because this appeal is from the circuit court's entry of summary judgment, our review is *de novo*. *Evans v. Brown*, 399 Ill. App. 3d 268, 244 (2010).

¶ 31 To prevail on a claim for unjust enrichment, a plaintiff must prove that the defendant "retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates fundamental principles of justice, equity, and good conscience." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill.2d 145, 160 (1989). Where the benefit was transferred to the defendant by a third party, as in this case, a claim for unjust enrichment is recognized in the following situations: (1) where the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead; (2) where the defendant procured the benefit from the third party through some type of wrongful conduct; or (3) where the plaintiff for some other reason had a better claim to the benefit than the defendant. *Id*. at

161-62.

¶ 32 Here, the Pauls have failed to show a genuine issue of material fact exists as to whether FirstMerit was unjustly enriched. First, FirstMerit did not mistakenly receive a benefit here. The Pauls had constructive notice when they made their contract with Callaghan Associates that Midwest, now FirstMerit, had a prior recorded mortgage on Lot 51 and superior lien status. The Paul's contract with Callaghan Associates was subject to the construction mortgage recorded in 2005. The Pauls contracted for Lot 51 in September 2007 and did not record a memorandum of their agreement until July 8, 2009. Thus, FirstMerit's recorded mortgage was a prior superior lien against Lot 51.

¶ 33 Second, FirstMerit did not engage in any wrongful conduct in obtaining Lot 51 and its improvements. There were no allegations that FirstMerit engaged in wrongful conduct. FirstMerit merely filed to foreclose on its mortgages recorded in 2005. Third, the Pauls do not have a better claim to the improved Lot 51 than FirstMerit. The Pauls had notice of FirstMerit's prior recorded 2005 mortgage when they entered into the contract with Callaghan Associates on September 12, 2007. "The general rule with recorded liens, including mortgages, is that '[a] lien that is recorded first in time has priority and is entitled to prior satisfaction of the property it binds.' " *Union Planters Bank, N.A. v. FT Mortgage Cos.*, 341 Ill. App. 3d 921, 924-25 (2003) (quoting *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 703 (2000)).

¶ 34 "Quasi-contract action is not a means for shifting a risk one has assumed under contract." *Industrial Lift Truck Service Corp. v. Mitsubishi International Corp.*, 104 Ill. App. 3d 357, 361 (1982). Under the Pauls' contract, they assumed the risk of standing in line behind FirstMerit's

superior mortgage lien. The Pauls also assumed the risk of not acquiring a lien in the first place because they contracted with the trust beneficiary and not the trustee, Savoy Club. A viable unjust enrichment claim requires there to be no "adequate remedy at law." *Season Comfort Corp. v. Ben A. Borenstein Co.*, 281 Ill. App. 3d 648, 656 (1st Dist. 1995). Mere uncollectible bankruptcy debt does not satisfy this standard. *Id*. Here, the Pauls had an adequate remedy under their contract because it allowed them to sue Callaghan Associates. The mere fact that Callaghan Associates may be insolvent does not allow the Pauls to recover from FirstMerit under unjust enrichment. FirstMerit has not been unjustly enriched simply because Callaghan Associates improved Lot 51 at the Pauls' request. *See Id*. at 657. Because there are no questions of material fact as to the Pauls' unjust enrichment claim, FirstMerit is entitled to summary judgment as a matter of law. Therefore, we affirm the order of the trial court granting summary judgment to FirstMerit.

¶ 35 CONCLUSION

¶ 36 We dismiss the Pauls' claim that the trial court improperly granted FirstMerit's motion to dismiss their first affirmative defense, that they were the equitable owners of Lot 51, and count I of the counterclaim that sought to vest title to lot 51 with the Pauls. We affirm the judgment of the circuit court granting summary judgment to FirstMerit as to Count II of the Pauls' counterclaim for unjust enrichment.

¶ 37 Appeal dismissed in part; trial court affirmed in part.