2016 IL App (2d) 150644-U
No. 2-15-0644
Order filed June 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FISH LAKE NOTE, LLC, as Successor in Interest to Midwest Bank and Trust Company, as Successor in Interest to Village Bank and Trust, State Bank and Trust, and Mount Prospect National Bank, Plaintiff-Cross-Appellant and Counter-Defendant-Appellee, v. VOLO VENTURES, LLC; NORTH STAR TRUST COMPANY, as Successor Trustee to Bank of Northern Illinois, N.A., as T/U/T/A Dated April 12, 1995, and Known as Trust No. 3390; PRECISION LAND SURVEYORS, INC.; ROBERT L. HUMMEL; WILLIAM L. ENOCKSON; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS, Defendants (Libertyville Bank and Trust Company and Barrington Bank and Trust Company, N.A., Defendants-Cross-Appellees and Counter-Plaintiffs-Appellants).	)	Appeal from the Circuit Court of Lake County. No. 09-CH-4235 Honorable Luis A. Berrones Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Regarding Fish Lake Note's cross-appeal, the trial court erred in ruling that Fish Lake Note breached subordination agreements by not providing Barrington Bank and Trust and Libertyville Bank and Trust with the opportunity to pay off a first mortgage. Regarding Barrington Bank and Trust's and Libertyville Bank and Trust's appeal, we found no reversible error in the trial court's rulings relating to evidence and damages. Therefore, we reversed in part and affirmed in part.

¶ 2 This case involves mortgage foreclosures on an 84.6-acre parcel of undeveloped farmland in Volo, Illinois (the Volo Property). Fish Lake Note, LLC (Fish Lake Note) held priority liens on the land, and Barrington Bank and Trust Company, N.A. (Barrington Bank) and Libertyville Bank and Trust Company (Libertyville Bank) held junior liens on the property. A prior holder of the first priority mortgages filed the initial foreclosure action, and Barrington Bank and Libertyville Bank (collectively the Banks) were named as defendants. The Banks later brought counterclaims against the initial plaintiff's successor in interest, Fish Lake Note, and sought to foreclose on their own mortgages.

¶ 3 Following a bench trial, the trial court found in favor of all parties on their foreclosure claims. It further found in the Banks' favor on their counterclaims that Fish Lake Note had breached subordination agreements (Subordination Agreements) by not providing the Banks with the opportunity to cure the defaults of the first two priority mortgages. However, it also found that evidence of money damages arising from Fish Lake Note's breach was too speculative, so it awarded the Banks rescission of the Subordination Agreements as an equitable remedy.

¶ 4 In a posttrial motion, the Banks argued that partially subordinating Fish Lake Note's mortgages to the Banks' mortgages would be a more appropriate equitable remedy. The Banks argued that certain fees that Fish Lake Note sought to recover under its first mortgage should be subordinate to the Banks' liens. The trial court denied the motion to reconsider.

¶ 5 On appeal, the Banks argue that the trial court erred in its rulings with respect to their damages from the breach of the Subordination Agreements. They further argue that, contrary to the trial court's ruling, they had standing to challenge the reasonableness of fees that Fish Lake Note sought to recover under it first mortgage

¶ 6 In its cross-appeal, Fish Lake Note argues that the trial court erred in determining that the Subordination Agreements gave the Banks the right to cure any default under the first mortgage, and thus erred in determining that Fish Lake Note's failure to provide payoff figures to the Banks for that mortgage constituted a breach of the Subordination Agreements. We agree with Fish Lake Note's argument in its cross-appeal, and we therefore reverse the trial court's ruling on this issue.

¶ 7 Fish Lake Note does not dispute that the trial court correctly found that Fish Lake Note breached the Subordination Agreements by failing to provide the Banks with the payoff figure for the second mortgage, so we affirm that portion of its ruling.

¶ 8 Our determination that the Banks were not entitled to cure the first mortgage undercuts most of their arguments relating to damages, so we find no reversible error on those issues.

¶ 9 I. BACKGROUND

¶ 10 William Enockson and Robert Hummel each owned a 50% interest in the Volo Property. The men created the North Star Trust Company (North Star Trust) to hold title to the land, and they formed Volo Ventures, LLC (Volo Ventures) to develop the Volo Property.

¶ 11 Between 2004 and 2008, Volo Ventures took out a loan from predecessors to Midwest Bank and Trust Company (Midwest Bank) that eventually totaled $1,215,225.93 (First Note). The First Note was secured by a mortgage on the Volo Property (First Mortgage), and its

ultimate maturity date was September 10, 2009. The First Mortgage was recorded on November 1, 2005.

¶ 12 Volo Ventures took out a second loan from predecessors to Midwest Bank on September 20, 2008 (Second Note), for $140,891.21, to obtain funds to pay the interest on the First Note. The Second Note was also secured by a mortgage on the Volo Property (Second Mortgage). The Second Mortgage was recorded on June 27, 2007, and its ultimate maturity date was also September 10, 2009. Both notes were guaranteed by Enockson. The First and Second Mortgage had cross-collateralization provisions and some cross-default provisions.

¶ 13 On November 8, 2005, Barrington Bank made a $10 million revolving line of credit loan, evidenced by a $10 million note (Barrington Note) to Woodstock Station, LLC (Woodstock Station), whose managing member was Hummel. The same month, North Star Trust mortgaged the Volvo Property to secure $2 million of the Barrington Note. Barrington Bank recorded a junior mortgage (Junior Mortgage) on the Volo Property on November 18, 2005. Enockson consented to the Junior Mortgage.

¶ 14 On August 31, 2006, Libertyville Bank loaned $1.8 million to Hummel, evidenced by a $1.8 million promissory note (Libertyville Note). North Star Trust mortgaged the Volo Property to secure the Libertyville Note. Libertyville Bank recorded a third mortgage (Third Mortgage) on the property on September 8, 2006.

¶ 15 As can be observed by the sequence of dates, the Junior Mortgage and the Third Mortgage were recorded after the First Mortgage but before the Second Mortgage. In June 2007, the Banks entered separate but almost identical Subordination Agreements to subordinate the Junior Mortgage and the Third Mortgage to the Second Mortgage. The Subordination

Agreements provided that the "[m]ortgagee shall have the right, but not the obligation, to cure any default of the Mortgagor named in Lender's mortgage."

¶ 16 In January 2008, Libertyville recorded a fourth mortgage (Fourth Mortgage) on the property to secure a note (School Street Note) on a different development with which Hummel was involved. As of November 2008, the Barrington Note, the Libertyville Note, and the School Street Note were in default.

¶ 17 In spring 2009, on the behalf of the Banks, Christopher Swieca contacted Midwest Bank about the possibility of purchasing the First and Second Mortgages. The purchase would have allowed the Banks to, among other things, obtain additional equity in the property by buying the mortgages at a steep discount. Midwest Bank provided estimated numbers. Swieca continued to explore the potential purchase through May 2009, but it did not occur.

¶ 18 Volo Ventures failed to pay the amounts due on the First and Second Notes when they matured on September 10, 2009. Therefore, on September 28, 2009, Midwest Bank filed a complaint to foreclose the First and Second Mortgages on the Volo Property, which initiated the action which is now on appeal.

¶ 19 In late 2009, Enockson called Thomas Hahn, executive director of the Lake County Forest Preserve (LCFP), to see if the LCFP would be interested in purchasing the Volo Property. The LCFP's land acquisition committee decided to pursue purchasing part of it. The particular parcel of the Volo Property (Volo Parcel), totaling about 50 acres, was adjacent to LCFP's Marl Flats, a 250-acre forest preserve, and it would provide a buffer between the preserve and development that would eventually occur along the northern edge of Route 120. The LCFP ordered an appraisal, which indicated a value of $65,000 to $67,000 per acre.

¶ 20 In fall 2009, Fish Lake Note's attorney, Wade Light (Light), learned from a broker that the First and Second Mortgages were for sale. Light's work primarily related to real estate transactions involving his father, Daniel Light, and Daniel Light-related entities. Light later learned that the LCFP was interested in potentially acquiring the Volo Parcel and that it had been appraised for between $60,000 to $63,000 per acre.[1]

¶ 21 In December 2009, Fish Lake Note purchased the First and Second Notes from Midwest Bank for face value, about $1.4 million, and became the successor in interest to Midwest Bank with respect to the First and Second Mortgages. Previously, in 1994, Daniel Light acquired property (Light Property) that was contiguous to the Marl Flat forest preserve and also abutted the Volo Property. Fish Lake Note purchased the First and Second Notes with the objective of foreclosing the Volo Property and having a Daniel Light-related entity bid on it at the sheriff's sale.

¶ 22 In early 2010, the LCFP made an "initial offer" of $63,000 per acre for the Volo Parcel. At the time, the LCFP believed that Enockson and Hummel were the legal owners, and it did not know the title's condition. On February 16, 2010, Enockson accepted the LCFP's initial offer. That same month, the LCFP learned that there were significant liens on the property that totaled much more than its offer. According to Hahn, if the LCFP had known of the lien issues, "it [did] not necessarily mean [it] would not have made the offer, but [it] probably would have wanted to know what is the path to clear up those issues." The LCFP had previously made offers on properties with liens. Han testified that the LCFP was "still willing to proceed with the property acquisition because it was an important property for us to acquire; however, we had significant concerns regarding how these liens and foreclosures were going to be handled." The LCFP

[1] It is unclear which appraisal Light was referring to in his testimony.

presented Enockson with an unsigned real estate sales and purchase agreement in March 2010; the LCFP would not have signed such a contract until the owner signed it and it was then approved by the LCFP's land acquisition committee, finance committee, and board of commissioners. After such approval, there would still be the contingencies that there be no environmental or encroachment issues on the property and that it have an acceptable survey. If Enockson had signed the contract without explaining how the liens would be resolved, Hahn did not think that the land acquisition committee would have begun the approval process. Donald Glyman, the court-appointed receiver for the Volo Property, testified that he had brokered 15 to 20 sales to the LCFP in the past five years, and the mortgages were paid out of the closing proceeds.

¶ 23 After Fish Lake Note purchased the First and Second Notes, Light learned from Enockson that the LCFP had offered to purchase the Volo Parcel for $63,000 per acre. That was substantially higher than the price Fish Lake Note had paid to acquire the mortgages. Light also knew that the LCFP was interested in acquiring other property in the general area and had issued bonds to fund such purchases. Thus, in February and March 2010, Light thought that it was possible that the LCFP would also be willing to pay $63,000 per acre for the Light Property. On March 11, 2010, Light sent Hahn an e-mail inquiring if the LCFP would be interested in buying the Light Property in addition to the Volo Parcel. In his reply, Hahn stated that the LCFP might be interested in acquiring the Light Property. Hahn testified that Light was valuing that property at $63,000 per acre, but because 75% to 80% of the property was "aided wetlands" that could not be developed, Hahn estimated the Light Property to be worth only $10,000 to $15,000 per acre.

¶ 24 After Enockson received a draft of the forest preserve contract, he asked Fish Lake Note for a payoff letter for the First and Second Notes. On March 22, 2010, Fish Lake Note refused to

issue Enockson a payoff letter or issue a letter directing the North Star Trust to sell the Volo Parcel to the LCFP. Enockson testified that if Fish Lake Note had provided him with a payoff amount at that time, he would have been ready, willing, and able to pay the First and Second Notes and the mechanic's lien on the property. Enockson also testified that he met with the Banks around March 2010 to discuss a proposal to pay off all of the notes, but he could not come up with all of the necessary funds at the time, and he could not sell to the LCFP unless the title was "cleaned up" first. By April 2010, Enockson decided that he was no longer going to try to negotiate a settlement with the LCFP. Hahn testified that Enockson never signed the draft contract, and Hahn believed that was because Enockson could "not come up with a path to resolve all the title issues on the property."

¶ 25 On May 13, 2010, Light sent an e-mail to Hahn stating that he was attempting to settle the foreclosure suit, and he asked to be informed if the LCFP lost interest in purchasing the Volo Parcel. On May 14, 2010, Light sent an e-mail to the Banks' attorney proposing a settlement in which the Banks would receive $325,000 from the sale of any portion of the Volo Property within 18 months. In the e-mail, Light described the LCFP's potential purchase as "tenuous" but also stated that the LCFP would be willing to pay more now than any other purchaser would pay in the foreseeable future. The Banks rejected the proposal because, according to Swieca, it would receive only $325,000 whereas the sale of the land to the LCFP would generate a lot more money. Instead, a few days later, on May 17, 2010, the Banks sent a letter to Fish Lake Note requesting payoff amounts for the First and Second Mortgages. Two days later, Fish Lake Note refused to provide payoff figures.

¶ 26 At trial, Swieca agreed that he asked for the payoff figures so that he could know how much money Fish Lake Note was allegedly owed under its first position, thus indicating whether

the Banks would be "in the money" if the contract with the LCFP closed. However, he also testified that he wanted to payoff Fish Lake Note so that Fish Lake Note could be removed from the transaction, and Enockson could then have North Star Trust execute the contract with the LCFP. Swieca testified that Fish Lake Note could have been paid at the closing, or if it objected to that, Swieca was prepared to recommend that the Banks pay it off in full as a protective advancement; Swieca's recommendations for a protective advancement had never been denied. Swieca could not make a written request for the protective advancement because he did not have the payoff amount. He agreed that the Banks typically did not pay the face value of loans, and he did not know whether they would have paid the interest and attorney fees on the First and Second Notes.

¶ 27 After Fish Lake Note refused to provide the payoff figures, Swieca met with the LCFP to assure it that the Banks were prepared to release their liens and that nothing should prevent the sale from closing. In September 2010, the Banks sought to appoint a receiver for the Volo Property who would have the power to sell the property. Fish Lake objected, and the trial court denied the motion without prejudice. However, on February 8, 2012, the trial court entered an agreed order appointing a receiver for the property.

¶ 28 Light testified that he met with the Banks about two times after May 17, 2010, when the Banks had requested the payoff letter. During the meetings, Light made the Banks generally aware of the amounts owed to Fish Lake Note under the First and Second Mortgages. The Banks never stated that they were exercising a right to cure or talked about buying the First and Second Notes and Mortgages outright from Fish Lake Note so that they could negotiate with the LCFP themselves.

¶ 29 On August 11, 2010, Light sent Hahn an e-mail asking for confirmation that the LCFP was still interested in purchasing the Volo Parcel. Hahn replied on August 20, 2010, stating that the land acquisition committee was becoming more selective because it had spent over half of its acquisition funds. He suggested donating the Light Property as part of the deal. Hahn testified that he was trying to communicate that the LCFP was losing some interest in the deal, but Light could potentially save the transaction by donating the Light Property. Light responded by saying that he would be willing to sell the Light Property at the same per acre price as the Volo Parcel. In fall 2010, the LCFP land acquisition committee authorized Hahn to propose buying the combined 86 acres for $3.15 million, but Light never accepted the proposal.

¶ 30 On May 25, 2012, the Banks filed second amended answers, affirmative defenses, and counterclaims, in which they sought, for the first time, to foreclose on the Junior Mortgage and the Third Mortgage. The Banks also alleged that Fish Lake Note breached the Subordination Agreements by refusing to provide them payoff information for the First and Second Notes.

¶ 31 On November 21, 2012, Fish Lake Note filed a motion for partial summary judgment as to the Banks' claims that its refusal to provide them with payoff figures for the First and Second Mortgages and its refusal to consent to a potential sale of the Volo Parcel to the LCFP were breaches of both the express terms and covenants of good faith and fair dealing of the Subordination Agreements, and constituted unclean hands. Fish Lake Note argued that the Subordination Agreements had no impact on or relation to the First Mortgage and that Fish Lake Note had no obligation under the agreements to provide the Banks with a payoff or consent to a potential sale of part of the property.

¶ 32 On February 5, 2013, the trial court ruled on the motion as follows:

> "Libertyville Bank and Barrington Bank and Trust entered into a subordination agreement whereby they contracted to have the right to cure any default by the mortgagor. The mortgage to which they were subordinating was the second mortgage held by plaintiff who is the successor in interest to the original mortgagee.
>
> *** [T]he second mortgage had cross-collateralization provisions whereby a default on any other documents or obligations owed by the mortgagor to the plaintiff that were not within the second mortgage would be considered a default under the second mortgage. The Court finds that based on the language of the subordination agreement, which is very broad, that, in fact, Barrington Bank and Libertyville Bank had the right to cure any default under the first or second mortgage."

The trial court did not resolve at that time whether Fish Lake Note breached the Subordination Agreements, because it found that there was a genuine issue of material fact as to whether the Banks had an opportunity to cure and whether Fish Lake Note interfered with that opportunity.

¶ 33 Following a pre-trial conference, on January 24, 2013, the trial court entered an order severing the issues of liability and damages for the Banks. The order stated: "Plaintiff will prove up damages prior to the entry of judgment of foreclosure and sale and Defendant Banks will prove up damages after foreclosure sale." The trial took place on dates in February and March 2013.

¶ 34 Over one year later, on October 30, 2014, the trial court issued its memorandum order, which we summarize. Fish Lake Note and the Banks had proven their rights to foreclose on the Volo Property. Under the Subordination Agreements, the Banks had the right to cure any default by the mortgagor, North Star Trust, under the First and Second Mortgages. On May 17, 2010, the Banks made a payoff demand to Fish Lake Note to cure the defaults under the First and

Second Mortgages and Notes, but Fish Lake Note refused to provide the payoff amounts because it did not believe that the Banks had a right to cure under the loan documents. Fish Lake Note argued that the Banks never intended to pay the amounts owed under the mortgages but were instead seeking to sell the Volo Parcel to the LCFP to pay off Fish Lake Note. Fish Lake Note also argued that it had no obligation under the Subordination Agreements to wait for payment of the amounts it was owed or to cooperate in the property's sale. The Subordination Agreements were silent on the timing of when and how the Banks could cure any default by the Mortgagor, but it was clear that before the Banks' payment obligations were triggered, Fish Lake Note first had the duty to provide the Banks with the exact amounts to cure the defaults. Its failure to provide a cure figure was a breach of the Subordination Agreements.

¶ 35 The trial court continued as follows. The Banks argued that due to the breach, Fish Lake Note should lose is lien priority for both of its mortgages on the property. The First Mortgage was recorded before the Banks' mortgages, so the Subordination Agreements did not impact it. The question was the appropriate remedy to compensate the Banks for Fish Lake Note's breach of the Subordination Agreements. Specific performance of requiring Fish Lake Note to provide the payoff amount was not practical because five years had passed since the demand, and the Banks had not requested such a remedy. The Banks requested damages, but they provided insufficient evidence to support their request. The sale price that potentially could have been realized from the property's sale to the LCFP was too speculative to base an award on because: Enockson never signed the proposed real estate agreement before its deadline, which occurred prior to the Banks' payoff demand; even if he had signed the agreement, there were still several contingencies that had to be satisfied before the sale could be completed; and shortly after the Bank's payoff demand, Hahn was requiring Fish Lake Note to donate some of the contiguous

Light Property to make the transaction more attractive to the LCFP, but Fish Lake Note did not have the duty to do so. The Banks contended that it was Fish Lake Note's burden to prove that the sale to the LCFP would not have closed even if Fish Lake Note had provided the payoff amounts, but the case that the Banks cited did not support this result. As a remedy, the trial court relieved the Banks from the obligation to subordinate their mortgage liens to Fish Lake Note's Second Mortgage, or, alternatively, the trial court rescinded the Subordination Agreements. Under either theory, the mortgage liens were prioritized as follows: (1) Fish Lake Note's First Mortgage; (2) Barrington Bank's Junior Mortgage; (3) Libertyville Bank's Third Mortgage; (4) Fish Lake Note's Second Mortgage; and (5) Libertyville Bank's Fourth Mortgage.

¶ 36 The trial court further stated the following. The Banks alleged three affirmative defenses, but only the defense of unclean hands was a proper affirmative defense. The Banks failed to prove that this defense applied to defeat Fish Lake Note's foreclosure action on its First Mortgage lien priority claim. The First Note and Mortgage were not connected to the execution of the Subordination Agreements, which involved the Second Mortgage. The Banks failed to present evidence of any misconduct, fraud, or bad faith on Fish Lake Note's part regarding the execution or implementation of the Subordination Agreements. The evidence instead showed that the parties disagreed about the meaning of the Subordination Agreements' cure provisions and the extent of the Banks' rights to cure any default under the First or Second Mortgages. The trial court ordered each mortgagee to submit a judgment of foreclosure that itemized its damages, namely the principal amount and any interest, real estate taxes, advances, attorney fees, and costs.

¶ 37 Last, the trial court ruled that North Star Trust forfeited its right to raise the affirmative defense of Fish Lake Note's standing. North Star Trust, Enockson, and Volo Ventures also

sought damages for Fish Lake Note's failure to provide a payoff amount following Enockson's demand. The trial court ruled that only North Star Trust had the right to make a payoff demand, and that there was no evidence that Enockson was acting as its authorized agent when he did so.

¶ 38 On November 12, 2014, Fish Lake Note submitted an affidavit of attorney fees, and on November 20, 2014, it submitted an affidavit by Light asserting the total amounts that Fish Lake Note was entitled to recover under the First and Second Mortgages (totaling $2,207,546.28 and $225,324.18, respectively).

¶ 39 On November 18, 2014, the Banks filed a posttrial motion requesting: (1) that the trial court clarify its ruling as to the amounts secured by the First and Second Mortgages; (2) that the trial court conduct a hearing at which Fish Lake Note had to prove the amounts owed under the First and Second Mortgages; and (3) that in the event that the trial court determined that the First Mortgage was not capped, it reconsider the recession remedy it granted the Banks and order alternative equitable relief, such as the equitable subordination of the interest and fees accrued under the First and Second Mortgages after Fish Lake Note breached the Subordination Agreements. The Banks argued that in the 4½ years since the breach, Fish Lake Note purported to accrue nearly $1 million in interest and attorney fees, leaving the Banks with little or no security for their debt. The Banks further argued that Fish Lake Note attributed all of its attorney fees to the First Mortgage in an attempt to unfairly prioritize the fees, and that the fees also improperly included amounts to defend against the Banks' counterclaims.

¶ 40 The trial court denied the Banks' motion to reconsider on May 8, 2015. The trial court stated that the additional $1 million that Fish Lake Note incurred was not damages but rather "collection issues." It stated that the Banks were receiving full recovery from their mortgages

and were being put in the position that they were in before entering into the Subordination Agreements.

¶ 41 On May 29, 2015, the trial court entered an order and judgment of foreclosure and sale. For the First Note, it found that the total amount due for principal, interest, fees, and costs was $2,281,201.58. The trial court appointed the sheriff to sell the Volo Property at public auction to the highest cash bidder.

¶ 42 The Banks timely appealed, and Fish Lake Note timely cross-appealed. On August 7, 2015, the trial court entered an order staying the foreclosure sale pending appeal.

¶ 43 On appeal, the Banks argue that: (1) the trial court erred by refusing to hold a hearing on damages, even though it ruled that they had proven all of the liability elements of their breach of contract counterclaims; (2) even if the trial court correctly decided the damages issues based on evidence presented at trial on liability, the trial court erred by requiring the Banks to prove what might have happened if Fish Lake Note had not breached the Subordination Agreements; (3) even if the trial court did not err in imposing such a burden on the Banks, the Banks presented sufficient evidence to prove that Fish Lake Note's breach of contract resulted in money damages; (4) the trial court, as a court of equity, had the power to reprioritize the parties' mortgages as a remedy for Fish Lake Note's breach of contract; (5) and the Banks, as junior lienholders, had standing to challenge the reasonableness of fees, costs, and interest that Fish Lake Note sought to recover under it First Mortgage.

¶ 44 In its cross-appeal, Fish Lake Note argues that, in denying its motion for partial summary judgment and entering its memorandum order, the trial court erred as a matter of law in determining that the Subordination Agreements gave the Banks the right to cure any default under the First Mortgage, and thus erred as a matter of law in determining that Fish Lake Note's

failure to provide payoff figures to the Banks for the First Mortgage constituted a breach of the Subordination Agreements.

¶ 45 II. ANALYSIS

¶ 46 A. Fish Lake Note's Cross Appeal

¶ 47 We first address the argument that Fish Lake Note raises in its cross-appeal, as it potentially impacts most of the issues in the Banks' appeal. Fish Lake Note's argument requires us to construe language in the Subordination Agreements. In construing a contract, the primary objective is to give effect to the parties' intent, and we will look first to the contract's language to determine that intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We construe a contract as a whole, viewing each provision in light of other provisions. *Id.* If the contract's words are clear and unambiguous, they will be given their plain, ordinary, and popular meaning. *Id.* We review a contract's interpretation *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 48 The Banks each entered a two-page Subordination Agreement with North Star Trust, and the agreements had very similar terms. They provided that each bank was agreeing to subordinate its mortgage to the Second Mortgage "in consideration of One Dollar ($1.00) and other good and valuable consideration." The critical language was the following: "Mortgagee shall have the right, but not the obligation, *to cure any default of the Mortgagor named in Lender's mortgage*." (Emphasis added.)

¶ 49 Fish Lake Note argues that the Subordination Agreements' plain language unambiguously related only to the Second Mortgage, as the contracts were created for the specific purpose of consensually promoting the Second Mortgage's priority over the Banks' mortgages. Therefore, Fish Lake Note argues that, as a matter of law, the agreements did not

provide the Banks with any rights with respect to: the First Mortgage or First Note; any other loan documents between North Star Trust and Fish Lake's Note's predecessor or any other lender; or any other mortgage pledged by North Star Trust as collateral for a loan to any third party. Fish Lake Note argues that it is logical that the First Mortgage was not mentioned in the Subordination Agreements, as that mortgage already had priority over the Banks' mortgages based on its earlier recording date.

¶ 50 Fish Lake Note argues that the trial court interpreted the sentence that the Banks had the right "to cure any default in the Mortgagor named in Lender's mortgage" to include any default by North Star Trust under the First Mortgage, but if that were true, there would have been an express reference to the First Mortgage, which was nearly 10 times the size of the Second Mortgage. Moreover, argues Fish Lake Note, the First Mortgage was not expressly incorporated into the Subordination Agreements, as would be required under case law for its terms to be incorporated, nor was it even referenced. Fish Lake Note argues that to rule that the Banks could cure "any default" of North Star Trust would create an absurd result, in that it would give the Banks the right to cure any default for loans or mortgages that North Star Trust had with any lender for any property.

¶ 51 Fish Lake Note further argues that the trial court improperly examined extrinsic evidence in making its ruling, specifically, the Second Mortgage's cross-collateralization language. Fish Lake Note argues that because the parties never argued that the Subordination Agreements were ambiguous, nor did the trial court find them to be, the trial court should have looked only to the Subordination Agreements' plain language to determine if the Banks had the right to cure a default under the First Mortgage. Fish Lake Note contends that even if the Subordination Agreements were ambiguous, the trial court's reliance on Fish Lake Note's cross-collateral

default rights under the Second Mortgage was misplaced. Fish Lake Note argues that there was no allegation or evidence that it ever acted upon its cross-default rights, and, in fact, there was no reason for it to exercise the right because both the First Mortgage and the Second Mortgage fully matured on the same day. Fish Lake Note argues that, moreover, only it had the right to declare other loans held by the same borrower in default through the cross-default provisions. Fish Lake Note argues that in relying on the Second Mortgage's cross-collateralization provisions to hold that the Banks had the right to cure any defaults under the First Mortgage, the trial court seemed to be implicitly determining that the Banks were third-party beneficiaries of the Second Mortgage. Fish Lake Note argues that, however, as part of it ruling on the motion for partial summary judgment, the trial court held that the Banks were not third-party beneficiaries of either the First or Second Mortgages and could assert only the rights they possessed under the Subordination Agreements' express terms.

¶ 52 The Banks respond that the trial court did not interpret the Subordination Agreements to include the right to cure with respect to the First Mortgage, but rather ruled that because the Second Mortgage was cross-collateralized and cross-defaulted with the First Mortgage, the Banks' right to cure under the Second Mortgage included the right to cure defaults under the First Mortgage. The Banks maintain that Fish Lake Note never even considers the Banks' right to cure defaults under the Second Mortgage.

¶ 53 The Banks point out that the "EVENTS OF DEFAULT" in the Second Mortgage include, under the heading, "Other Defaults," the borrower's failure to comply with requirements in the mortgage, in any "Related Documents," or "in any other agreement" between the lender and the borrower. The Second Mortgage's definition of "Related Documents" includes "all promissory notes, *** loan agreements, *** mortgages, *** collateral mortgages, and all other ***

documents *** executed in connection with the Indebtedness." "Indebtedness" is defined to include "all amounts that may be indirectly secured by the Cross-Collateralization provision of this Mortgage." The cross-collateralization provision cross-collateralizes the Second Mortgage with all obligations from the borrower to the lender, which the Banks maintain would include the First Note and Mortgage. The Banks argue that the First Note and Mortgage also fall within the default event of failure to comply with "any other agreement" between the lender and the borrower.

¶ 54 The Banks argue that their interpretation does not create an absurd result, because it relies on the aforementioned plain language of the Subordination Agreements and the Second Mortgage. The Banks argue that Fish Lake Note's interpretation actually leads to absurd results, because it guts the mortgages' cross-collateralization provisions, and if the Banks could not stop a foreclosure on the property under the First Mortgage, their right to cure a default under the Second Mortgage would be hollow. The Banks argue that Fish Lake Note's predecessor would have every reason to give the Banks broad cure rights, as such rights actually benefited the lender by allowing it to get paid in the event of a default. The Banks argue that while Fish Lake Note had a different goal of foreclosing and buying the Volo Property, it did not render the prior lender's goals and the trial court's ruling absurd.

¶ 55 The Banks maintain that while Fish Lake Note argues that only it could exercise its cross-default rights and chose not to do so, the Subordination Agreements link the Banks' cure rights to the default itself rather than the default declared by the lender. The Banks argue that default is triggered by the borrower's action rather than by notice delivered by the lender. The Banks contend that under Fish Lake Note's theory, Fish Lake Note could unilaterally limit the Banks' right to cure based on the way it described the default in its notice to the borrower, which would

be an absurd result. The Banks argue that while Fish Lake Note also argues that the cross-default provision existed to benefit the lender, that is true with every default provision in every mortgage. The Banks argue that this fact does not nullify the borrower's or subordinating party's cure rights. The Banks argue that the trial court's ruling also did not require it to conclude that they were third-party beneficiaries of the cross-collateralization and cross-default provisions.

¶ 56 Fish Lake Note replies that the Banks' argument is completely defeated by language in the Second Mortgage stating: "Upon the occurrence of an Event of Default and at any time thereafter, Lender, *at Lender's option*, may exercise any one or more of the following rights and remedies." (Emphasis added.) Fish Lake Note argues that, therefore, it alone held the right, at its option, to declare any default, including a cross-default, under the Second Mortgage. Fish Lake Note argues that this result is consistent with Illinois law, which holds that "a promisor is not regarded as being guilty of a breach prior to demand." *Schreiber v. Hackett*, 173 Ill. App. 3d 129, 131 (1988). Fish Lake Note argues that although *Schreiber* involved a demand note, the same reasoning applies here. Fish Lake Note argues that it never declared North Star Trust to be in default under the Second Mortgage based on a breach of the First Mortgage, but rather that North Star Trust was in default for failing to pay the Second Mortgage at maturity. Fish Lake Note argues that because it did not exercise its option to declare a cross-default, a cross-default never existed, meaning that cross-cure rights were never triggered. Fish Lake argues that if the Banks, which are large and experienced institutions, had wanted the right to cure defaults under the First Mortgage, they could have expressly included such a right in the Subordination Agreements.

¶ 57 We ultimately agree with Fish Lake Note. The fact that the Subordination Agreements refer only to the Second Mortgage and state, "Mortgagee shall have the right, but not the

obligation, to cure any default of the Mortgagor named in Lender's *mortgage*" (emphasis added), with the term "mortgage" being in the singular, clearly shows that the Subordination Agreements, on their face, covered defaults under only the Second Mortgage. It is not immediately obvious from the trial court's statements in its ruling on the motion for summary judgment and in its memorandum order whether it believed that the Subordination Agreements themselves incorporated both the First and Second Mortgages, but as our review is *de novo*, we need not parse the trial court's language.

¶ 58 That being said, because the Subordination Agreements themselves refer to the Second Mortgage, we must examine the Second Mortgage's language in order to determine whether there was a default that would trigger the Subordination Agreements' cure provisions. In this manner, we reject Fish Lake Note's position that the trial court was limited to examining the Subordination Agreements. See *Fisher v. Parks*, 248 Ill. App. 3d 666, 677 (1993) ("[A] contract may incorporate all or part of another document by reference."). After the phrase, "EVENTS OF DEFAULT," the Second Mortgage states: "Each of the following, *at Lender's option*, shall constitute an Event of Default under this Mortgage." (Emphasis added.) It then lists a series of events, including the borrower's failing "to make any payment when due under the Indebtedness" and, as the Banks point out, the failure to comply with any other mortgages or other agreements between the lender and the borrower, which would encompass the First Mortgage. However, by including the phrase "at Lender's option," the Second Mortgage expressly gives the lender the choice whether to declare one of the events an "Event of Default." This means that if, for example, the borrower did not make a payment when due, the lender was not required to declare the borrower in default immediately or even at all. In such a scenario, the Banks' right to cure would not be triggered. Likewise, there is no evidence that Fish Lake Note

or its predecessor declared North Star Trust to be in default under the Second Mortgage for failure to timely pay the First Mortgage, so the Banks never had the right to cure the Second Mortgage through a payoff of the First Mortgage. The cross-collateralization provisions of the First and Second Mortgages do not affect our interpretation of the Second Mortgage's plain language, especially considering that the provisions were of limited effect in that both mortgages were already against the same property.

¶ 59 The case cited by the Banks does not lead us to a different result. In *People's National Bank, N.A. v. Banterra Bank*, 719 F.3d 608, 609-10 (7th Cir. 2013), a lender recorded two mortgages that were initially secured by different pieces of real estate but contained cross-collateralization provisions. Another lender recorded a second mortgage on one of the properties, after the initial lender's first mortgage but before its subsequent mortgage. *Id.* The court held that because the second lender was aware of the cross-collateralization clause in the first mortgage, the initial lender had priority in recovering payment on its first mortgage and part of its subsequent mortgage, up to the face value of the first loan amount. *Id.* at 610, 615. Here, the issue centers on whether North Star Trust cross-defaulted on the First and Second Mortgages, such that the Banks were allowed to cure both mortgages under the Subordination Agreements, rather than on the cross-collateralization provisions.

¶ 60 We further reject the Banks' argument that interpreting the Subordination Agreements as not allowing them to cure under the First Mortgage in the present scenario guts the mortgages' cross-collateralization provisions and renders their right to cure a default under the Second Mortgage hollow. As the Banks themselves point out, Fish Lake Note's predecessor had the incentive to give the Banks broad cure rights because the lender would benefit by obtaining another avenue to be paid in the event of a default. Therefore, the prior lender could have

exercised its "option" to declare an "Event of Default" on the Second Mortgage for failure to pay the First Mortgage, and vice versa. In that situation, the Banks could have then chosen "to cure any default of the Mortgagor named in the Lender's Mortgage" by paying off the First and Second Mortgages. Still, the Banks cite no evidence that Midwest Bank declared North Star Trust in default under the cross-default provisions. Moreover, as the Banks recognize, Fish Lake Note had the unique goal of foreclosing on the Volo Property so that a Daniel Light-related entity could buy it, and thus Fish Lake Note did not have the incentive to declare North Star Trust in default under the cross-default provisions. However, Fish Lake Note's unique motivation did not alter the Second Mortgage's plain language giving the lender the "option" to declare a default under various provisions.

¶ 61 Thus, the trial court erred in ruling: (1) that the language in the Subordination Agreements and Second Mortgage gave the Banks the right to cure under the First Mortgage under the circumstances here, and (2) relatedly, that Fish Lake Note breached the Subordination Agreements by not supplying the Banks with the payoff figure for the First Mortgage. Fish Lake Note does not dispute the trial court's finding that the Banks had a right to cure the Second Mortgage and that Fish Lake Note breached the Subordination Agreements by failing to provide the Banks with the payoff figure for the Second Mortgage. Therefore, we affirm that portion of its ruling.

¶ 62 B. The Banks' Appeal

¶ 63 We now turn to the issues that the Banks raise in their appeal, recognizing that most of their arguments are undermined by our holding that Fish Lake Note was not required to allow them to cure North Star Trust's default of the First Mortgage.

¶ 64 The Banks first argue that the trial court erred in failing to conduct a damages phase of the trial on the Banks' counterclaims. "We review a circuit court's ruling regarding the admissibility of evidence for abuse of discretion." *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 106. The Banks argue as follows. The trial court found that the Banks proved every element of their breach of contract claims, including that the Banks were injured because they could not take advantage of their contractual right to cure defaults under the First and Second Mortgages. Having found that the Banks proved liability, the trial court should have scheduled a hearing on damages following the judicial sale of the Volo Property, as provided for in the pre-trial order. The Banks argue that the trial court found that because specific performance was an inadequate remedy, the Banks had no adequate remedy at law. The Banks argue that, to the contrary, they sought the traditional breach of contract remedy, namely monetary damages. The Banks point out that the trial court then concluded that they provided insufficient evidence to support their request at damages. The Banks argue that they actually presented no evidence of the amount of their damages because the trial court had ordered that the damage phase of the trial take place after the liability phase.

¶ 65 Our review is hampered by the fact that the Banks never submitted an offer of proof regarding what evidence they would have submitted during the damages phase of the trial. An offer of proof serves to disclose to the trial court and opposing counsel the nature of the offered evidence, allowing them to take appropriate action, and to provide the reviewing court with a record to determine whether the exclusion of evidence was erroneous and harmful. *Id.* ¶ 108. It appears from the record and the briefs that damages would all relate to the Banks' curing of North Star Trust's defaults under the First and Second Mortgages, which allegedly would have allowed the Banks to proceed with a sale of the property to the LCFP. However, as we have

determined that the Banks were not entitled to cure the default under the First Mortgage, the Bank could not have proceeded with the sale. Thus, we cannot find any reversible error in the trial court's failure to conduct another phase of the trial at which the Bank could prove its damages.

¶ 66 The Banks next argue that even if the trial court properly ruled on damage issues after the trial on liability, the trial court erred by failing to shift the burden of proving causation to Fish Lake Note, and by improperly weighing the evidence of the Banks' damages. The Banks argue that the trial court erred in finding that the Banks had the burden of proving that the LCFP would have purchased the Volo Parcel absent Fish Lake Note's breach of contract, and, even otherwise, the Banks presented more than sufficient evidence on this subject. Again, as we have held that the Banks did not have the right to cure the First Mortgage here, it follows that the Banks would not have been in a position to effectuate the sale of the Volo Parcel to the LCFP, and thus proving those damages would have been irrelevant.

¶ 67 The Banks' third argument on appeal is that the trial court erred in ruling that it lacked the power to grant equitable subordination of Fish Lake Note's mortgages to the Banks' mortgages as a remedy for Fish Lake Note's breach of the Subordination Agreements. The Banks note that the trial court ruled that although Fish Lake Note breached the Subordination Agreements, the Banks failed to prove money damages and had no adequate remedy of law, so the trial court awarded the equitable remedy of rescinding the Subordination Agreements. The Banks note that the trial court's remedy returned Fish Lake Note's Second Mortgage to a position subordinate to the Banks' Junior Mortgage and Third Mortgage. The Banks argue that they never asked for the Subordination Agreements to be rescinded because that would not be an effective remedy, in that it would merely put their mortgages ahead of the Second Mortgage,

which secured $282,000 of the borrower's indebtedness. The Banks argue that rescission still left them without the money they would have recovered but for Fish Lake Note's breach, as the amount Fish Lake Note claimed to be owed under the First Mortgage, including about $1 million in fees, costs, and interest, far exceeded the Volo Property's value.

¶ 68 The Banks point out that in their motion to reconsider, they asked the trial court to substitute for rescission the equitable remedy of partial subordination. The Banks argues that if Fish Lake Note had provided payoff information in May 2010, the Banks would have cured defaults under the First and Second Mortgages and would therefore have recovered the proceeds from the sale of the Volo Property, less the value of Fish Lake Note's liens. The Banks argue that, therefore, equitable subordination of Fish Lake Note's post-breach fees, costs, and interest, would put the Banks in the position they would have occupied if Fish Lake Note had complied with the Subordination Agreements.

¶ 69 We again circle back to our determination that the Banks were not entitled to cure the default under the First Mortgage, and therefore would not have been in the position to sell the Volo Parcel to the LCFP. Accordingly, even if it were permissible, the trial court did not err by denying the Banks' request to equitably subordinate the interest and fees under Fish Lake Note's mortgages. Indeed, the remedy that the trial court ordered, rescission of the Subordination Agreements, is particularly appropriate at this point because it allowed the Banks' mortgages to have priority over the only defaulted mortgage that they should have been permitted to cure, *i.e.*, the Second Mortgage.

¶ 70 Last, the Banks argue that the trial court erred in ruling that they lacked standing to challenge the reasonableness of the post-May 2010 fees, costs, and interest that Fish Lake Note

sought to collect under its First Mortgage, including the total amount spent foreclosing on the Second Mortgage and the total amount spent unsuccessfully defending the Banks' counterclaims.

¶ 71 Fish Lake Note argues that the trial court never ruled that the Banks lacked standing to contest the reasonableness of Fish Lake Note's attorney fees, and that the Banks conceded in both pleadings and in open court that they were not attacking the reasonableness of the fee amounts. Fish Lake Note argues that, therefore, the Banks have forfeited any challenge to the reasonableness of Fish Lake Note's fees.

¶ 72 Even if, *arguendo*, the Banks preserved the issue and had standing to contest the reasonableness of the attorney fees, we conclude that the trial court's award of attorney fees was not an abuse of discretion. See *Chicago Title & Trust Co. v. Chicago Title & Trust Co.*, 248 Ill. App. 3d 1065, 1073 (1993) (reviewing attorney fees awarded in a foreclosure case for an abuse of discretion). As the Banks were not entitled to cure the First Mortgage, Fish Lake Note was entitled to fees, costs, and interest for that mortgage that accrued both before and after May 2010. The Banks also contest the attorney fees Fish Lake Note incurred defending against the Banks' counterclaims, which alleged that Fish Lake Note had breached the Subordination Agreements. However, as we have concluded that Fish Lake Note was correct in arguing that the Banks were not entitled to cure the First Mortgage, it is clear that Fish Lake Note is entitled to attorney fees for defending against the counterclaims. The Banks also argue that Fish Lake Note should have attributed some of the attorney fees to the Second Mortgage, such that the Banks would be entitled to recover from the proceeds of the sheriff's sale of the Volo Property before the attorney fees for the Second Mortgage were paid out. However, Fish Lake Note was foreclosing on both the First and Second Mortgages at the same time, and the Banks do not cite, nor does our research reveal, any case requiring a mortgagee to apportion attorney fees between

mortgages. Accordingly, the trial court acted within its discretion in its award of attorney fees for Fish Lake Note.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the trial court's ruling that Fish Lake Note breached the Subordination Agreements by not providing the Banks with the opportunity to cure the Second Mortgage, but we reverse the trial court's ruling that Fish Lake Note breached the Subordination Agreements by not providing the Banks with the opportunity to cure the First Mortgage. We affirm the trial court's evidentiary rulings and its award of damages, including its rescission of the Subordination Agreements and its approval of the attorney fees for Fish Lake Note.

¶ 75 Affirmed in part and reversed in part.