

No. 1-16-3221

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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1030 W. NORTH AVE. BLDG., LLC,	)	Appeal from the Circuit Court of
an Illinois limited liability company,	)	Cook County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	No. 14 L 13217
THE FIRM, LLC, d/b/a HI FI PERSONAL	)	
FITNESS, an Illinois limited liability	)	
company,	)	
	)	Honorable Raymond W. Mitchell,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1     *Held:* Court could not answer certified question due to unresolved matters; appeal dismissed.

¶ 2     Defendant, The Firm, LLC, doing business as Hi Fi Personal Fitness, filed a motion to dismiss the complaint of plaintiff, 1030 W. North Ave. Bldg., LLC, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)). After the motion was denied, the

circuit court certified a question for permissive interlocutory review to the appellate court under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016). Initially, this court denied defendant's petition for leave to appeal. Our supreme court later entered a supervisory order that directed this court to vacate that denial, allow leave to appeal, and consider the appeal on the merits. After careful review of the merits of the appeal, we find that we cannot answer the certified question and dismiss the appeal.

¶ 3 The supporting record indicates that defendant leased a portion of a building from plaintiff. This case involves the interplay between two proceedings: (1) a foreclosure proceeding involving plaintiff and (2) plaintiff's post-foreclosure attempt to recover rent, utility, and construction costs from defendant under a lease.

¶ 4 As for the foreclosure, plaintiff's lender filed a complaint for foreclosure and other relief in October 2010. The court entered an order appointing a receiver on January 26, 2011, and a foreclosure judgment was entered on March 23, 2011. An order approving the report of sale and confirming sale was entered on June 1, 2011. Turning to plaintiff's action against defendant under the lease, plaintiff filed the suit in 2010 and voluntarily dismissed it in 2013. Plaintiff re-filed the action in December 2014. Subsequently, defendant filed a motion to dismiss for lack of standing, asserting that plaintiff lost the right to pursue tenants for rent and related charges through an Assignment of Leases and Rents contained in the mortgage and the judgment of foreclosure and order confirming sale.

¶ 5 Following briefing by the parties, the circuit court denied defendant's motion to dismiss, finding that defendant did not demonstrate that plaintiff's lender would be entitled to recover the amounts due under the lease that plaintiff sought in its complaint. The court stated that the mortgagor is considered the owner of the rents and profits until the mortgagee takes steps to

perfect the assignment. The court explained that to collect rents under an assignment, a mortgagee must obtain possession through judgment in a foreclosure action or a receiver must take actual possession of the property on the mortgagee's behalf after a default. The court noted that a receiver was appointed in the foreclosure action in January 2011. Thus, plaintiff had the right to collect any rent due before January 2011, and once the court appointed a receiver, plaintiff's lender was entitled to recover amounts that became due during the pendency of the foreclosure action. The court further stated that Illinois authority suggests that plaintiff's lender was limited to recovering rent that accrued after the receiver took possession of the property.

¶ 6 Subsequently, defendant filed a motion to reconsider. In part, defendant relied on two federal decisions that applied Illinois law—*MDFC Loan Corp. v. LaSalle National Bank*, 834 F. Supp. 275 (N.D. Ill. 1993), and *In re Randall Plaza Associates, L.P.*, 326 B.R. 133 (Bankr. N.D. Ill. 2005). The court denied the motion to reconsider, stating in part that defendant did not present any evidence that either the receiver or plaintiff's lender sought to collect the rent from defendant at any point during the foreclosure proceedings or in the years that followed. Also, the court was not convinced that the lien established when plaintiff's lender perfected its assignment in the foreclosure action "continues in perpetuity."

¶ 7 Defendant moved for a Rule 308 finding and certification, which the court granted on November 14, 2016. The court stated that its orders denying the motion to dismiss and motion to reconsider involve a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from those orders may materially advance the ultimate termination of the litigation. The court certified the following question for appeal:

"Does a mortgage lender which has perfected its assignment of leases and rents lien by foreclosing on and taking possession of the pledged real estate, or its

borrower against whom the foreclosure was entered, have standing to sue under one of the assigned leases to collect rent which allegedly accrued prior to the date the mortgage lender took possession of the real estate?”

¶ 8 Defendant filed a petition for leave to appeal to the appellate court under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), which was denied on January 26, 2017. Defendant then filed a petition for leave to appeal to our supreme court. On May 24, 2017, our supreme court denied the petition for leave to appeal and entered a supervisory order that instructed this court “to allow leave to appeal and consider the appeal on the merits.” Thus, we turn to considering the certified question.

¶ 9 In this appeal, defendant contends that only the mortgage lender has standing. Defendant asserts that on perfection and enforcement of the assignment lien, plaintiff’s lender gained ownership and title to the leases and rents, which has not reverted to plaintiff. Defendant further argues that plaintiff’s lender’s perfected assignment rights survived the termination of the foreclosure proceedings.

¶ 10 In response, plaintiff asserts that it was not stripped of its right to collect rent because the mortgagee never enforced the assignment of rents. Plaintiff further states that defendant does not assert or provide any evidence that the foreclosure judge ordered prior rent to be collected or that the mortgagee sought a turnover of the collection action. According to plaintiff, any assignment is only active while the mortgagee is in possession. Plaintiff also contends that because the debt matured before the foreclosure, the debt is retained by plaintiff.

¶ 11 Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016) is an exception to the principle that generally, courts of appeal have jurisdiction to review only final judgments entered in the circuit court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Rule 308 allows for permissive

appeal of an interlocutory order certified by the circuit court as involving a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal from the order may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308 (eff. Jan. 1, 2016); *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Rule 308 should be used sparingly. *Thomas v. Page*, 361 Ill. App. 3d 484, 494 (2005). “[O]ur task is to answer the specific question and return the parties to the trial court without analyzing the propriety of the underlying order.” *Abrams v. Oak Lawn-Hometown Middle School*, 2014 IL App (1st) 132987, ¶ 5. A question certified by the circuit court must be a question of law, which we review *de novo*. *Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 57-58 (2007).

¶ 12 Per our supreme court’s supervisory order, we have considered the merits of the appeal. In addition to Illinois cases, our review included federal decisions that interpret Illinois law, which are persuasive authority. See *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 19 (lower federal court decisions are not binding, but may be considered persuasive authority); *Comerica Bank-Illinois v. Harris Bank Hinsdale*, 284 Ill. App. 3d 1030, 1033 (1996) (in analyzing assignment of rents issue, court relied on Illinois law, bankruptcy decisions, and federal case law). Having thoroughly reviewed the certified question and the parties’ arguments, we conclude that we cannot provide an answer because the question is worded incorrectly and requires resolving matters that are beyond the scope of a Rule 308 appeal.

¶ 13 The certified question confuses the perfection and enforcement of a lien. As background, Illinois recognizes the validity of an assignment of rents included in a real estate mortgage. *In re J.D. Monarch Development Co.*, 153 B.R. 829, 832 (Bankr. S.D. Ill. 1993). An assignment of rents creates a security interest in rents that is perfected as to third parties when the mortgage is

recorded in the real estate records. *Id.* The mortgagee is not entitled to the rents until the mortgagee or a receiver appointed on the mortgagee's behalf has taken possession of the real estate after default. *Id.* "Taking possession constitutes *enforcement* of the lien." (Emphasis in original.) *BMO Harris Bank N.A. v. Joe Contarino, Inc.*, 2017 IL App (2d) 160371, ¶ 45. Thus, perfection involves the relative interests of the mortgagee and third parties, while enforcement involves the relationship between the mortgagee and mortgagor, or the mortgagee and the property. See *In re KNM Roswell Ltd. Partnership*, 126 B.R. 548, 552-53 (Bankr. N.D. Ill. 1991). The certified question here states that a mortgage lender "perfected" its assignment by "foreclosing on and taking possession of the pledged real estate." Foreclosing and taking possession are part of enforcing a lien. Further, the substance of the question involves the relationship between the lender, who was the mortgagee, and the borrower, who was the mortgagor, which also relates to enforcement.

¶ 14 In some cases, our supreme court has modified or read a certified question in such a way as to "bring it within the ambit of a proper question of law." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 28; *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 556-57 (2009). We decline to do so here because even if we were to change the word "perfected" to "enforced" in the certified question, significant problems with the question would remain.

¶ 15 As noted above, a clause in a real estate mortgage pledging rents and profits creates an equitable lien on those rents and profits, which may be enforced by the mortgagee on default by taking possession of the mortgaged property. *Comerica Bank-Illinois*, 284 Ill. App. 3d at 1033. This court has recognized a modern trend that allows a mortgagee to collect rents once it has taken constructive, as opposed to actual, possession of the property. *Id.* at 1034. Mortgagees may gain possession of property to collect rent by initiating foreclosure proceedings and obtaining the

appointment of a receiver. *In re Randall Plaza Associates, L.P.*, 326 B.R. at 141. There are federal cases applying Illinois law and out-of-state authority that awarded unpaid rents to the mortgagee or receiver. See *id.* at 140-41 (mortgagee could collect any unpaid rent that was due on the date the debtor received a notice of default or any time thereafter); *MDFC Loan Corp.*, 834 F. Supp. at 277 (awarding mortgagee overdue rents actually collected by the receiver, but stating that a broad rule that awards mortgagee rents due but not paid when the receiver is appointed seemed flawed); *Chase Manhattan Bank v. Brown & East Ridge Partners*, 672 N.Y.S.2d 206, 208-09 (N.Y. App. Div. 1998) (receiver entitled to judgment for unpaid rent based on the terms of the order appointing the receiver and because the rent owed never came “ ‘to the hands’ ” of the debtor); *S & H Building Materials Corp. v. European-American Bank & Trust Co.*, 428 N.Y.S.2d 140, 143-44 (N.Y. Sup. Ct. 1980) (upon appointment, receiver became entitled to collect rents due and unpaid and future rents); *New York Life Insurance Co. v. Fulton Development Corp.*, 193 N.E. 169 (N.Y. 1934) (a property owner is entitled to the rents until there is a default under the mortgage; then the mortgagee has an equitable claim to the rents that are unpaid).

¶ 16 Whether the mortgagee is entitled to unpaid rent depends in part on the language of the assignment. See *In re Randall Plaza Center Associates, L.P.*, 326 B.R. at 141 (in finding that mortgagee could collect unpaid rent, noting that the assigned rents included all rents that were unpaid at the time of the notice of default and quoting the applicable provision in the mortgage). Yet, we are only supposed to answer the specific question certified by the circuit court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. To do that here, we would have to examine the language of the assignment and apply the law to it, which is beyond the scope of what we are permitted to do in an appeal under Rule 308 (eff. Jan. 1, 2016). See *AT & T v. Lyons & Pinner*

*Electric Co.*, 2014 IL App (2d) 130577, ¶ 31 (“Rule 308 is not intended to be a mechanism for expedited review of an order that merely applies the law to the facts of a particular case”).

¶ 17 Further, our review of the case law suggests that the assignment here may violate public policy. Again, to enforce the lien and obtain the rents, a mortgagee must take possession of the property and accept the corresponding burdens—“the responsibilities and potential liability that follow whenever a mortgage goes into default.” *In re J.D. Monarch Development Co.*, 153 B.R. at 833. The possession requirement “reflects the public policy in Illinois which seeks to prevent mortgagees from stripping the rents from the property and leaving the mortgagor and the tenants without resources for maintenance and repair.” *Comerica Bank-Illinois*, 284 Ill. App. 3d at 1033. An assignment provision that allows the mortgagee to collect rents without taking actual or constructive possession violates Illinois public policy. *Id.* at 1034. Courts refuse to recognize such provisions. *Id.* Here, the assignment provision in the mortgage contract entitles the lender to “possession of all rents and revenues,” including those “due and unpaid,” “without the necessity of Lender entering upon and taking and maintaining full control of the Property \*\*\*.” Further, the Assignment of Leases and Rents provides that the assignee “shall have the complete right, power and authority \*\*\* without taking possession, to demand, collect and receive and sue for the rents and other sums payable under the Leases \*\*\*.” We hesitate to declare the assignment invalid because the matter has not been briefed by the parties, but whether the assignment is indeed invalid and the effect of any invalidity seem to be important questions to resolve.

¶ 18 In reviewing a certified question, we are not supposed to answer other, unasked questions. *Giangiulio v. Ingalls Memorial Hospital*, 365 Ill. App. 3d 823, 829 (2006). Here, answering the certified question requires construing the assignment, whose validity is questionable. Any opinion we would offer now about the lender’s entitlement to rents would thus

be provisional. As a result, we cannot answer the certified question. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 470 (1998) (answering the certified question would be meaningless based on the number of unresolved variables at work, including the provisional nature of the inquiry).

¶ 19 Moreover, although the certified question is framed as a question of law, answering it depends on several unresolved facts. The certified question does not indicate when the notice of default was given, whether anyone collected the unpaid rent during the foreclosure proceedings, or whether any portion of the unpaid rent was paid to the mortgagor before the receiver was appointed. These unresolved factual matters are another reason why an answer to the certified question would be advisory and provisional. See *id.* at 469 (answer to certified question would be advisory and provisional where ultimate disposition depended on resolving “a host of factual predicates”).

¶ 20 Under Rule 308, “the appellate court serves as gatekeeper and must carefully question whether the case before it warrants consideration outside the usual process of appeal.” *Rozsavolgyi*, 2017 IL 121048, ¶ 23. We have carefully considered the merits of this Rule 308 appeal and conclude that we cannot answer the certified question. As a result, we dismiss the appeal and remand to the circuit court for further proceedings.

¶ 21 Appeal dismissed.

¶ 22 Cause remanded.