2018 IL App (1st) 172227-U

FOURTH DIVISION
November 21, 2018

No. 1-17-2227

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITIZENS BANK N.A., f/k/a RBS Citizens N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
PHU QUOC HUYNH, MAI TUTET PHUNG,	)	No. 16 CH 1808
EQUITABLE ASCENT FINANCIAL, LLC,	)	
MIDLAND FUNDING LLC, V&T INVESTMENT	)	
CORPORATION, UNKNOWN OWNERS and	)	
NONRECORD CLAIMANTS,	)	Honorable
	)	Daniel Patrick Brennan,
Defendants,	)	Judge Presiding.
	)	
(V&T Investment Corporation, Defendant-Appellant).	)	

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

Held: We deny the motion to dismiss the appeal because this court has jurisdiction and the appeal is not moot. We affirm the circuit court's denial of defendant's motion to dismiss the complaint because plaintiff's first mortgage was not extinguished in the prior foreclosure proceeding.

¶ 1 Defendant, V&T Investment Corporation (V&T), appeals the circuit court's denial of its motion to dismiss the complaint for foreclosure filed by plaintiff Citizens Bank, N.A. (Citizens) and the circuit court's order vacating the judgment of foreclosure and voluntarily dismissing the case after V&T paid off Citizens' mortgage lien before the judicial sale of its property.

¶ 2 Citizens filed a motion to dismiss this appeal, which we have taken with the case. Citizens argues that this court lacks jurisdiction to review the order denying V&T's motion to dismiss because it was an interlocutory order. Citizens also asserts that this appeal is moot because V&T satisfied the lien before the judicial sale. For the following reasons, we deny the motion to dismiss the appeal, but affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 Citizens held three mortgages on a parcel of property located on Emerald Avenue in Chicago, Illinois. The first mortgage was executed on November 15, 2002, by Phu Quoc Huynh and Mai Tutet Phung ("mortgagors"), and recorded on December 9, 2002, which secured a note of $265,000 (recording number 0021353966). The second and third mortgages were both executed by the mortgagors on June 25, 2007, and recorded on August 8, 2007 (recording numbers 0722012010 and 0722012011, respectively). The second mortgage secured a note of $100,000, and the third secured a note of $95,000.

¶ 5 In 2014, Citizens filed a complaint to foreclose ("the 2014 foreclosure action") on its second mortgage based on a default in payment. Citizens named itself as a defendant, in addition to other defendants, because of its third-in-line mortgage interest to be terminated. The court issued a judgment of foreclosure on September 30, 2014. V&T purchased the property at the judicial foreclosure sale on January 13, 2015. The court confirmed the sale on May 13, 2015.

¶ 6 Subsequently, Citizens alleged that the mortgagors defaulted on payment obligations under the first mortgage on August 1, 2015. Based on this default, Citizens initiated the instant action to foreclose on its first mortgage on February 9, 2016. Citizens named V&T as a defendant based on its acquisition of title to the property in the 2014 foreclosure action.

¶ 7 V&T moved to dismiss Citizens' complaint under section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2014)), asserting that the action was barred by the previous foreclosure proceeding under the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1509(c) (West 2014)) as well as the terms of the judgment of foreclosure entered in the 2014 foreclosure action. Citizens maintained that the 2014 foreclosure case only terminated the second and third mortgage, not its first mortgage. Following extensive briefing by the parties, the circuit court denied V&T's motion to dismiss. V&T moved for certification under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), which the trial court also denied.

¶ 8 V&T answered the complaint, raising as an affirmative defense that the action was barred by the previous judgment. Citizens moved for summary judgment and judgment of foreclosure. V&T did not file a response. The circuit court granted Citizens' motions. V&T again moved for Rule 308 certification, which was denied. The judicial foreclosure sale was scheduled for August 3, 2017. V&T filed an emergency motion to add Rule 304(a) language to the judgment of foreclosure and made an oral motion to stay the sale, but the circuit court denied both.

¶ 9 The day before the scheduled sale, V&T tendered payment to Citizens to satisfy Citizens' first mortgage lien. V&T maintains that it paid under protest in order to prevent its property from being sold at auction. Citizens maintains the payment was not made under protest. Upon Citizens' motion, the circuit court vacated the judgment of foreclosure and voluntarily dismissed

Citizens' complaint on August 28, 2017. Citizens executed and recorded a release of its mortgage and V&T conveyed the property to a third party. V&T filed the instant appeal.

¶ 10 II. ANALYSIS

¶ 11 A. Citizens' Motion to Dismiss Appeal

¶ 12 We first address Citizens' motion to dismiss the appeal. Citizens argues that the appeal must be dismissed because this court lacks jurisdiction to review the order denying V&T's section 2-619 motion to dismiss as it is merely an interlocutory order which merged into the final judgment. Citizens argues that V&T only seeks review of the order voluntarily dismissing the case as a vehicle for attacking the denial of its motion to dismiss.

¶ 13 It is a well-established principle that an appellate court "must decline to proceed in the cause where jurisdiction is lacking." *Saddle Signs, Inc. v. Adrian,* 272 Ill. App. 3d 132, 134 (1995). "The parties cannot *** confer jurisdiction to review an order if in fact the order appealed from is not appealable." *Id.*

¶ 14 V&T first responds that this court may review the denial of its section 2-619 motion because the language in its notice of appeal specified that it was appealing both the final order that granted the voluntary dismissal of the case and vacated the judgment of foreclosure, and the order denying its section 2-619 motion to dismiss. We agree that the amended notice of appeal sufficiently identified both orders and the relief sought. Under Illinois Supreme Court Rule 303(b)(2) (eff. Jan. 1, 2015), "our court has jurisdiction only to review the judgments or parts of judgments specified in or inferred from the notice of appeal." *City of Chicago v. Concordia Evangelica Lutheran Church,* 2016 IL App (1st) 151864, ¶ 70. "The notice should be considered as a whole" and must "fairly and adequately" set out the "judgment complained of and the relief sought, advising the successful litigant of the nature of the appeal." (Internal

quotation marks omitted.) *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 13. V&T's amended notice of appeal states that V&T appeals the October 26, 2016, denial of its section 2-619 motion to dismiss "and the 8/28/2017 order dismissing the entire case which was the final order in the case." It further states that V&T "had to pay the judgment of foreclosure amount under protest prior to final judgment in order to keep its property from being sold at public auction." Concerning the relief sought, the amended notice of appeal states that V&T requests that its motion to dismiss be granted and Citizens be ordered to return the money that V&T paid under protest to stop the sale.

¶ 15 Although we find no error in the notice of appeal, the crux of the jurisdictional dispute is Citizens' assertion that the order denying V&T's motion to dismiss was merely an interlocutory order which merged into the final judgment, that is, the voluntary dismissal of the complaint. In response, V&T contends that the order denying its motion to dismiss is reviewable because it was a step in the procedural progression of the case leading to the final judgment, it was also raised as an affirmative defense, and it involved a question of law that does not merge into the final judgment.

¶ 16 "Supreme Court Rule 301 provides for appeal as a matter of right from 'final judgments.'" *In re M.M.*, 337 Ill. App. 3d 764, 771 (2003). "A judgment is final for appeal purposes if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining to be done by the trial court is to proceed with execution on the judgment." *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 538 (1999).

¶ 17 Here, the order granting voluntary dismissal terminated the litigation and operated as a final order in the case. There was nothing left to adjudicate; the only thing remaining was

execution of the judgment, which in this case, was the voluntary dismissal of the cause and the order vacating the judgment of foreclosure. A voluntary dismissal has been deemed a final order from which an appeal may be taken under Rule 301. *Kahle v. John Deere Company*, 104 Ill. 2d 302, 305-07 (1984); *Swisher v. Duffy*, 117 Ill. 2d 376, 379-80 (1987); *Lewis ex rel. Lewis v. Collinsville Unit No. 10 School District*, 311 Ill. App. 3d 1021, 1023-24 (2000); *Valdovinos*, 307 Ill. App. 3d at 538. "Our Illinois Supreme Court has determined that it is important that a defendant have the ability to appeal from an order of voluntary dismissal since, otherwise, such an order would never be subject to review." *DePluzer v. Village of Winnetka*, 265 Ill. App. 3d 1061, 1065 (1994) (court had jurisdiction to review the denial of summary judgment on count II of the complaint because the order granting the plaintiff a voluntary dismissal on count II of his complaint was a final and appealable order). See *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 40 (sanction orders under Rule 219 were reviewable on appeal from the final order voluntarily dismissing the remaining count of the complaint).

¶ 18 Citizens argues that although V&T listed the voluntary dismissal order in its notice of appeal, its appeal solely focuses on the trial court's denial of its section 2-619 motion, which is not reviewable because it was merely an interlocutory order which merged into the final judgment.

¶ 19 "The supreme court has held that any error in the denial of a motion for summary judgment ordinarily merges into the final judgment [citations], and the same is true of any error in the denial of a section 2-619 motion." *Ovnik v. Podolskey*, 2017 IL App (1st) 162987, ¶ 20. "[T]he power of this court to address a defendant's appeal from an order granting a plaintiff's motion for a voluntary dismissal *** does not form the jurisdictional basis from which we may

also address the substantive merits of other non-final orders entered by a trial court prior to the granting of a voluntary dismissal." *Valdovinos,* 307 Ill. App. 3d at 537.

¶ 20 However, "[t]here is little question that an appeal from a final judgment draws into issue all prior interlocutory orders which produced the final judgment." *Valdovinos*, 307 Ill. App. 3d at 538. Accordingly, this court has "jurisdiction to review interlocutory orders of a trial court if those orders constitute a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Id*. "When the interlocutory orders of a trial court do not constitute such a procedural step, we have no jurisdiction to review them absent some specific statute or rule granting us the power." *Id.* (no jurisdiction to review the trial court's orders denying motions for summary judgment and orders regarding motions to strike, quash, and continue the trial date, and motions *in limine*, despite their inclusion in the notice of appeal, because these interlocutory orders did not constitute procedural steps in granting the motion for voluntary dismissal).

¶ 21 Citizens relies on *Saddle Signs* in arguing that the denial of V&T's motion to dismiss is not reviewable. In *Saddle Signs*, the trial court denied the defendant's section 2-619 motion to dismiss; the plaintiff subsequently voluntarily dismissed the case under section 2-1009 of the Code for the purpose of refiling his claim with a jury demand. *Saddle Signs*, 272 Ill. App. 3d at 134 (citing 735 ILCS 5/2-1009(a) (West 1992)).[1] On appeal, the court found it had no jurisdiction to review the order denying the defendant's section 2-619 motion to dismiss under Supreme Court Rule 301 because it was not a final and appealable judgment and no other rule provided for appeal. *Id.* at 134-35, 139-40. The court held that appealing the voluntary dismissal

[1] Under section 2-1009, a trial court must grant a plaintiff's motion to voluntarily dismiss before trial or a hearing begins, as long as the requirements under the provision are met. *Lewis ex rel. Lewis v. Collinsville Unit No. 10 School District*, 311 Ill. App. 3d 1021, 1024 (2000) (citing 735 ILCS 5/2-1009(a) (West 1996)). However, "[a]fter trial or hearing has begun, a plaintiff can only voluntarily dismiss if the trial court so allows." *Id.* (citing 735 ILCS 5/2-1009(b) (West 1996)).

order did not render appealable the otherwise nonappealable order regarding the section 2-619 motion to dismiss. *Id.* The court observed that a plaintiff is generally entitled to a voluntary dismissal under section 2-1009 of the Code before a trial or hearing occurs. *Id.* While this has in some circumstances raised concerns of prejudice to defendants or abuse by plaintiffs, the court "refuse[d] to extend jurisdiction to hear the substantive merits of the trial court's denial of defendant's 2-619 motion." *Id.* at 137. The court stated that the plaintiff had properly used the voluntary dismissal mechanism and the defendant was not prejudiced by the voluntary dismissal or denial of the section 2-619 motion. *Id.* at 139.

¶ 22 V&T argues that *Saddle Signs* is inapplicable because the present case did not involve a voluntary dismissal before a trial or any hearings occurred under section 2-1009, and asserts that this case is more similar to *CitiMortgage, Inc. v. Hoeft*, 2015 IL App (1st) 150459. In *Hoeft*, the mortgagors moved to dismiss the foreclosure suit under section 2-619, arguing that the acceleration letter failed to conform to the mortgage's requirements. *Id.* ¶ 4. The trial court denied the motion to dismiss; the mortgagors then filed an answer in which they reasserted this argument as an affirmative defense. *Id.* The trial court subsequently granted the mortgagee's motion to strike this defense. *Id.* The mortgagee moved for summary judgment and the mortgagors did not reassert the acceleration clause defense. *Id.* ¶ 5. The trial court granted summary judgment in favor of the mortgagee and confirmed the sale of the property. *Id.* The mortgagors filed a notice of appeal indicating that they were appealing the order of foreclosure and sale and the order confirming sale. *Id.* In their appeal, however, the mortgagors only challenged the denial of their section 2-619 motion to dismiss regarding the acceleration letter issue. *Id.* ¶ 6. The mortgagee asserted that this argument was procedurally barred because the mortgagors failed to list this order in the notice of appeal and it was not a procedural step leading

to the final judgment. *Id.* ¶ 7. This court found it had jurisdiction to review the order denying the section 2-619 motion because it constituted a procedural step "toward both the foreclosure order and the final judgment confirming the sale after foreclosure, because had the court granted the motion, the court would have dismissed the case and never entered the later two orders. All three orders are integrally related." *Id.* ¶ 8. This court went on to address the merits of the acceleration letter issue and ultimately concluded that the mortgagee had complied with the acceleration requirements and that the trial court had correctly denied motion to dismiss. *Id.* ¶ 11.

¶ 23 In addition to *Hoeft*, V&T also relies on *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780. There, the trial court granted the plaintiff mortgagee's motion to dismiss the defendants' two affirmative defenses. *Id.* ¶¶ 6-7. The trial court then granted summary judgment to the mortgagees and entered a judgment of foreclosure and confirmed the sale. *Id.* ¶ 8. The defendants' notice of appeal indicated they appealed from the order confirming sale, but their appeal challenged the trial court's orders dismissing their defenses and granting summary judgment to the mortgagee. *Id.* ¶ 9. The mortgagee asserted that the appeal should be dismissed because the only order specified in the notice of appeal was the order confirming sale, to which defendants had not objected. *Id.* ¶ 12. This court reasoned that the only contested issues below were the defendants' affirmative defenses and the mortgagee was "undoubtedly aware that the only basis for challenging the final judgment" was the dismissal of the defenses. *Id.* ¶ 13. Accordingly, the court held that the dismissal of the defenses constituted "a 'step in the procedural progression' of the foreclosure action that ultimately led to confirmation of the sale." *Id.* Thus, the court had jurisdiction to decide the issues raised by the defendants, as their appeal from the final order confirming sale "encompasse[d] review of the trial court's orders dismissing the affirmative defenses and entering summary judgment for CitiMortgage." *Id.*

¶ 24 We agree with V&T that the present case is distinguishable from *Saddle Signs* and is, instead, on similar procedural footing as *Hoeft* and *Bukowski*. Unlike in *Saddle Signs*, the case was not voluntarily dismissed pursuant to 2-1009, early in the litigation before any hearings, a trial, or significant rulings had occurred. As the *Saddle Signs* court observed, the defendant was not prejudiced by the denial of his motion or the voluntary dismissal of the case. In contrast, V&T would suffer prejudice here. At the time the circuit court granted the voluntary dismissal here, it had already ruled on several dispositive motions which addressed and rejected V&T's defense that the first mortgage lien was invalid based on the 2014 foreclosure action. Unlike in *Saddle Signs*, where the plaintiff had not yet obtained any relief sought, Citizens had obtained the relief it sought in its complaint before the case was dismissed; the circuit court had already entered a judgment of foreclosure in favor of Citizens. Further, V&T paid the lien amount in order to avoid the judicial sale of its property.

¶ 25 Similar to *Hoeft* and *Bukowski*, V&T raised a potentially dispositive issue in a section 2-619 motion to dismiss and as an affirmative defense in asserting that the foreclosure action was barred by the 2014 foreclosure judgment. The circuit court ruled against this defense in denying the motion to dismiss and later granting Citizens' motion for summary judgment and entering a judgment of foreclosure. The circuit court also denied V&T's motion for Rule 308 certification with respect to its section 2-619 motion and Citizens' summary judgment motion, denied V&T's request for the addition of Rule 304(a) language to the judgment of foreclosure, and denied its motion to stay the sale. Just as the court in *Hoeft* concluded, the order denying the section 2-619 motion, which challenged the validity of Citizens' first mortgage lien, constituted a procedural step "toward both the foreclosure order and the final judgment confirming the sale after foreclosure, because had the court granted the motion, the court would have dismissed the case

and never entered the later two orders. All three orders are integrally related." *Hoeft*, 2015 IL App (1st) 150459, ¶ 8.

¶ 26 Although the final order in this case was not a confirmation of the sale, but, rather, the order granting Citizens' request to voluntarily dismiss the case, this was only so because of the prior procedural steps, *i.e.*, the denial of the section 2-619 motion and entry of summary judgment and judgment of foreclosure in favor of Citizens, and because V&T satisfied the lien the day before the sale in order to save its property. The denial of the section 2-619 motion constituted a procedural step in coming to the final judgment of the case as it involved the only contested issues in the case. Had the section 2-619 motion been granted, Citizens' motion for summary judgment and judgment of foreclosure would not have been entered, and the judicial sale would not have been scheduled, and thus V&T would not have been prompted to pay the amount due in order to avoid the sale of its property. *Bukowski*, 2015 IL App (1st) 140780, ¶ 13.

¶ 27 Citizens also contends that the order denying the motion to dismiss is not reviewable because it merged into the final judgment, that is, the order granting voluntary dismissal of the case, citing *Ovnik*, 2017 IL App (1st) 162987. In *Ovnik*, the defendants appealed following entry of summary judgment in favor of the plaintiff regarding her claim that defendants failed to return her security deposits in connection with a lease. The defendants argued on appeal that the circuit court erred in denying their three section 2-619 motions to dismiss. *Id.* ¶ 19. This court declined to address the section 2-619 motions, finding that any error in their denial merged into the final judgment. *Id.* ¶¶ 19-20. The court cited three reasons for declining to follow *Hoeft*. *Id.* ¶ 21. First, the *Ovnik* court found that the issue in *Hoeft* was not jurisdictional, but, rather, "was one of merger" in that the order denying a section 2-619 motion "merges into the final judgment from which the appeal was taken." *Id.* Second, the court held that the denial of the section 2-619

motion to dismiss in *Hoeft* "was not a procedural step in the progression leading to the order confirming the foreclosure sale." *Id*. And third, the court held that the *Hoeft* court's decision was "contrary to the weight of authority on the issue." *Id.*

¶ 28 In light of *Bukowski* and *Hoeft*, we are persuaded that this case is distinguishable from *Ovnik*. The trial court ruled against V&T's affirmative defense (regarding the 2014 foreclosure case) in granting summary judgment to Citizens. Indeed, the procedural posture of the present case is distinguishable as there was no trial; the trial court granted Citizens' motion for summary judgment, entered the judgment of foreclosure, which was later vacated and entered an order voluntarily dismissing the case. The final order here did not result after a jury trial on the merits.

¶ 29 In sum, the order granting the plaintiff's motion for voluntary dismissal was a final and appealable order. Thus, on appeal, V&T may challenge not only the substantive merits of the voluntary dismissal, but also the order denying the section 2-619 motion because it was a procedural step in the progression leading to the entry of the final voluntary dismissal.

¶ 30 We next address Citizens' contention that the appeal is moot because V&T paid off Citizens' lien, Citizens recorded a release of the mortgage, and V&T subsequently conveyed the property free and clear of the mortgage. Citizens argues that V&T's payment was voluntary.

¶ 31 In response, V&T contends it paid under protest or under duress and compulsion as the judgment of foreclosure had been entered and the property was scheduled to be sold at public auction. V&T thus contends it is entitled to recover its money.

¶ 32 " 'This court will not review cases merely to establish a precedent or guide future litigation.' " *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 24 (quoting *Madison Park Bank v. Zagel*, 91 Ill. 2d 231, 235 (1982)). "An issue is moot if no actual

controversy exists or where events transpire which make it impossible for the court to grant effectual relief." *Id.*

¶ 33 "In Illinois, 'it is well established that the payment or satisfaction of a money judgment by a judgment debtor does not bar the prosecution of *** an appeal by such judgment debtor.' " *Abbas*, 2018 IL App (1st) 162972, ¶ 25 (quoting *Pinkstaff v. Pennsylvania R.R. Co.*, 31 Ill. 2d 518, 523 (1964)). However, "[w]hen a judgment has been voluntarily paid or its benefits accepted, the basis for the appeal is waived." *Id.*

¶ 34 V&T asserts that as in *Abbas*, its payment was involuntary here. Citizens argues that unlike *Abbas*, there was never a money judgment in this case because the foreclosure sale never occurred and a confirmation of sale with any deficiency was never entered. Citizens further argues that V&T's claim is rendered moot under the voluntary payment doctrine, as in *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843 (1995). V&T distinguishes *Smith* and argues that the present case involved more than a mere threat of litigation as the cause had actually proceeded to judgment.

¶ 35 The voluntary payment doctrine provides that "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal. [Citations.] Absent fraud, coercion or mistake of fact, monies paid under a claim of right to payment but under a mistake of law are not recoverable." *Smith*, 276 Ill. App. 3d at 847-48. To avoid application of the doctrine, a party must show that the claim was unlawful and that the payment was not voluntary, that is, "there was some necessity which amounted to compulsion." *Id.* at 848. Duress may be shown where a party made a payment to "prevent injury to himself, his business or property" where the demanding party had no right to the payment and the payor had "no adequate opportunity *** to

effectively resist such demand." (Internal quotation marks omitted.) *Id.* A payment is compulsory where the pressure on the payor interferes with his "free enjoyment of his rights of person or property" and there is "actual or threatened power wielded over the payor from which he has no immediate relief and from which no adequate opportunity is afforded" to resist. *Id.* at 849. While paying under protest is evidence of compulsion, "compulsion may appear from the circumstances without a protest against payment." *Id.* "[T]o render a payment involuntary or compulsory, pressure must be brought to bear on the payor and that pressure must be the product of some actual or threatened power wielded over the payor from which he has no immediate relief." *Id.* at 851.

¶ 36 We find this case is similar to the circumstances in *Abbas* and distinguishable from *Smith*. In *Abbas*, the circuit court entered a judgment following a trial finding the loan agreement was valid and that the defendant was in default. *Abbas*, 2018 IL App (1st) 162972, ¶ 20. The defendant satisfied the judgment while the appeal was pending, and the plaintiff asserted that this mooted the appeal. *Id.* ¶ 28. The plaintiff argued that the payment was voluntary because the defendant did not post an appeal bond, the foreclosure cases were dismissed with prejudice and the mortgages were released, and the recorded judgment was released. *Id.* ¶ 26. The defendant argued that the satisfaction of the judgment was compulsory because he was faced with a judgment order, collection proceedings, wage garnishment, and the accrual of statutory interest. *Id.* ¶ 27. This court held that "the satisfaction of the judgment in this case was compulsory" under the circumstances and the appeal was not moot because the plaintiff commenced collection proceedings, which were dismissed after the defendant paid the judgment. *Id.* ¶ 28.

¶ 37 In *Smith*, the plaintiffs claimed they paid cable fees under compulsion because the cable company defendant threatened to terminate service or sue the plaintiffs if they did not pay, and

plaintiffs filed their complaint a few days before making payment. *Id.* at 850. The court found that "payment made pursuant to threat of litigation or to prevent the bringing of a legal action" was not involuntary as the plaintiffs could have defended against any lawsuit and "no loss could occur until the lawsuit was instituted and proceeded to judgment." *Id.* at 851-52. The plaintiffs' allegations of loss were wholly speculative and they had not exhausted other options available before tendering payment, such as contacting the cable company to object to the charges. *Id.* at 853-54.

¶ 38 Here, similar to *Abbas* and in distinction from *Smith*, V&T faced more than the mere threat of litigation. Although this case did not proceed to judicial sale or confirmation of sale, foreclosure proceedings had obviously been commenced. A judgment of $164,033.46 had been entered and the judicial sale was immediately pending. V&T was not obliged to lose its property before being able to appeal. The circuit court had denied V&T's several efforts to stop the foreclosure and sale or pursue an appeal, *i.e.*, the motion to dismiss, the motions for Rule 308 and 304 language, and the motion to stay. The circuit court had denied its motion to dismiss and granted summary judgment to Citizens, effectively rejecting V&T's defenses. Consequently, payment of the judgment amount was not made under the mere threat of litigation. Because the litigation had "proceeded to judgment," V&T's allegations of loss were not merely speculative, and we conclude that V&T's payment of the lien to stop the foreclosure sale did not render the controversy moot.

¶ 39 In addition, we find another case relied on by Citizens, *Blumenthal v. Brewer*, 2016 IL 118781, to be inapposite. Citizens cites *Blumenthal* for the proposition that "if a party proceeds to trial and voluntarily accepts the benefit of a judgment in his or her favor with respect to the disposition of property, that party is precluded from later challenging that judgment ***." *Id.* ¶

43. In *Blumenthal*, the court ordered a partition of the property per the plaintiff's request, or in the alternative, allowed the defendant to buy out the plaintiff's interest while the appeal was pending; the defendant bought out the interest. *Id.* ¶ 34. Our supreme court found that the dismissal of the defendant's counterclaims, which related to the partition action, were mooted by the partition judgment and the defendant's purchase. *Id.* ¶¶ 26, 30. The court found that the defendant accepted the ruling, purchased the plaintiff's share, and there was no longer an actual controversy or ability to grant effectual relief. *Id.* ¶ 36.

¶ 40 In contrast to *Blumenthal*, V&T did not "accept" the circuit court's ruling or receive the "benefit" of a judgment entered in its favor. Judgment was entered in favor of Citizens and V&T paid the lien in order to avoid having its property sold at auction. As V&T's contentions go, Citizens never had a valid lien in the first place, so releasing an invalid lien would be of no benefit to V&T.

¶ 41 Accordingly, we deny Citizens' motion to dismiss the appeal. We now turn to the merits of V&T's appeal.

¶ 42 B. V&T's Section 2-619 Motion to Dismiss

¶ 43 "[S]ection 2-619(a)(4) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2014)), provides that an action may be dismissed if the cause of action is barred by a prior judgment." *Deutsche Bank National Trust Co. v. Bodzianowski*, 2016 IL App (3d) 150632, ¶ 16. We review *de novo* the trial court's decision to grant or deny a motion under section 2-619. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). When reviewing a section 2-619 motion to dismiss, we "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party" and take as true all well-pleaded facts and reasonable inferences derived therefrom. *Id.*

¶ 44 Interpretation of provisions of the Foreclosure Law presents purely legal issues subject to *de novo* review. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). In that regard, "our primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature. [Citation.] The most reliable indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning." *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 440-41 (2010). In construing a statute, we avoid an interpretation which would render any part meaningless or conflict with the expressed intent, and we presume the legislature did not intend an absurd, inconvenient, or unjust result. *Id.*

¶ 45 V&T asserts that Citizens' complaint to foreclose on its 2002 mortgage was barred by the prior judgment of foreclosure in the 2014 foreclosure case. V&T asserts that under the specific terms of the judgment of foreclosure and pursuant to sections 15-1404, 15-1506(i)(2), and 15-1509(c) of the Foreclosure Law, any claims or interests in the property were extinguished. V&T argues that, as commonly happens, Citizens likely refinanced its 2002 mortgage into two new loans in 2007, but failed to record a release of the first mortgage in order to save the recording fee; Citizens' two 2007 mortgages add up to slightly less than the amount of the 2002 mortgage.

¶ 46 Section 15-1404 of the Foreclosure Law provides:

> "Except as provided in subsection (d) of Section 15-1501, the interest in the mortgaged real estate of (i) all persons made a party in such foreclosure and (ii) all nonrecord claimants given notice *** shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure, provided the sale is confirmed in accordance with this Article." 735 ILCS 5/15-1404 (West 2014).

¶ 47 Under section 15-1506(i)(2), upon entry of the judgment of foreclosure,

> "the rights in the real estate subject to the judgment of foreclosure of (i) all persons made a party in the foreclosure and (ii) all nonrecord claimants given notice *** shall be solely as provided for in the judgment of foreclosure and in this Article." 735 ILCS 5/15-1506(i)(2) (West 2014).

¶ 48 Following confirmation of the sale and delivery of the deed, title is passed to the purchaser, and under section 15-1509(c),

> "[a]ny vesting of title by a consent foreclosure pursuant to Section 15-1402 or by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure ***." 735 ILCS 5/15-1509(c) (West 2014).

¶ 49 According to this statutory framework, upon entry of the judgment of foreclosure and delivery of the deed from the foreclosure sale, title to the property vests in the purchaser at the judicial sale and the parties in the foreclosure have only those rights in the property as provided for specifically in the judgment of foreclosure, as the judicial foreclosure extinguishes all interests in the property of all parties to the foreclosure action unless otherwise stated.

¶ 50 V&T asserts that Citizens was a party to the 2014 foreclosure, as both plaintiff and defendant, and a mortgage itself cannot be a "party" to a foreclosure. Therefore, pursuant to the above provisions of the Foreclosure Law, all of Citizens' interests in the property, including the first mortgage, were necessarily subject to adjudication and were extinguished.

¶ 51 Citizens believes V&T's interpretation of these statutory provisions is too broad. Citizens points to other sections of the Foreclosure Law which require the complaint to set forth not only the name of the party, but identify its particular interest or lien as well. Citizens notes that its

2014 complaint to foreclose specifically identified the second mortgage as the mortgage being foreclosed and its third mortgage as an interest to be extinguished; the first mortgage was not identified as any lien or interest in the complaint. Citizens argues that the mortgagors had not defaulted on the first mortgage at that time, and Citizens held a wholly separate and superior bundle of rights in its first mortgage which was not subject to adjudication in the 2014 foreclosure. Citizens argues that a foreclosure of a junior mortgage can only cut off more junior rights and the Foreclosure Law must be interpreted consistently with this longstanding principle, otherwise the purchaser at a judicial sale receives a windfall.

¶ 52 Citizens cites sections 15-1501 and 15-1504. Section 15-1504 provides, in relevant part:

> "(a) Form of Complaint. A foreclosure complaint may be in substantially the following form: ***
>
> (3) Information concerning mortgage:
>
> * * *
>
> (L) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated[.]" 735 ILCS 5/15-1504(a)(3)(L) (West 2014).

¶ 53 Section 15-1501(a) provides, in pertinent part:

> "(a) Necessary Parties. For the purposes of Section 2-405 of the Code of Civil Procedure,[1] only (i) the mortgagor and (ii) other persons (but not guarantors) who owe payment of indebtedness or the performance of other obligations secured by the mortgage and against whom personal liability is asserted shall be necessary parties defendant in a foreclosure. The court may proceed to adjudicate their respective interests, but any disposition of the

> mortgaged real estate shall be subject to (i) the interests of all other persons not made a party or (ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure." 735 ILCS 5/15-1501(a) (West 2014).

¶ 54 Although we agree with V&T that Citizens was a party to the 2014 foreclosure as it named itself as both a plaintiff and defendant, its senior mortgage from 2002 was not subject to adjudication. Consistent with sections 15-1501 and 15-1504, Citizens identified in the 2014 foreclosure complaint the mortgage being foreclosed as its second mortgage—the 2007 mortgage, record number 0722012010, in the amount of $100,000. The complaint also specifically identified its third mortgage as an interest it sought to terminate:

> "L. Names of other persons who are joined as Defendants and whose interest in or lien on the mortgage real estate is sought to be terminated:
>
> * * *
>
> 3) Mortgage dated June 25, 2007 to RBS Citizens, National Association successor by merger to Charter One Bank, N.A. , and recorded August 8, 2007, as Document No. 0722012011, in the amount of $95,000.00."

¶ 55 Nowhere in the complaint did Citizens list or refer to its first mortgage from 2002, as either an interest being foreclosed or terminated in the course of the 2014 foreclosure proceedings. Citizens properly set forth in its complaint the "[n]ames of other persons who are joined as defendants *and whose interest in or lien on the mortgaged real estate is sought to be terminated*." (Emphasis added). 735 ILCS 5/15-1504(a)(3)(L) (West 2014). The disposition of the mortgaged property remained subject to "(ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure." 735 ILCS 5/15-1501(a) (West 2014); *React Financial v. Long*, 366 Ill. App. 3d 231, 236 (2006). Thus, Citizens' first mortgage from 2002

was not involved or subject to adjudication in the 2014 proceedings to foreclose on its second and third mortgages.

¶ 56 V&T also contends that the specific language in the judgment of foreclosure from the 2014 case terminated Citizens' first mortgage interest. The judgment of foreclosure essentially tracks the statutory language from the Foreclosure Law:

> "B. Information Concerning Mortgage:
>
> 13. (a) The rights and interests of all Defendants in this cause in and to the property herein described are inferior to the lien of Plaintiff herein mentioned.
>
> (b) The court further finds that the following defendants have good and subsisting liens against the property, in the order of priority noted below, all of which are inferior to the lien of plaintiff: None
>
> * * *
>
> B. All lien or mortgage claimants defaulted are found and declared to have no interest in the real estate foreclosed, as they have offered no evidence of said interest.
>
> C. Plaintiff's mortgage is prior and superior to all other mortgages, claims of interests and liens upon said real estate except for real estate taxes and special assessments, if any, and except for any mortgages or liens found herein to be prior and superior to Plaintiff's mortgage or prior liens of non-parties.
>
> D. In the event of such sale and the failure of the person entitled thereto to redeem prior to such sale pursuant to statutory provisions, the Defendants made parties to the foreclosure *** shall be forever barred and foreclosed of

> any right, title, interest, claim, lien or right to redeem in and to the mortgaged real estate.
>
> * * *
>
> D. Exceptions to which title in the real estate shall be subject at the sale shall include all general real estate taxes for the current year and for any preceding year(s) and any special assessments upon the real estate which are due and payable or which may become due and payable; covenants, conditions easements and restrictions of record; the rights of any non-parties and any lienholders adjudicated herein to have a prior lien to that of Plaintiff.
>
> * * *
>
> B. Delivery of the deed executed on the sale of the real estate, even if the purchaser or holder of the certificate of sale is a party to the foreclosure, shall be sufficient to pass the title thereto. Such conveyance shall be an entire bar of all claims of parties to the foreclosure and all claims of any non-record claimant who is given notice of the foreclosure as provided by statute."

¶ 57 As V&T correctly notes, the judgment of foreclosure did not contain any specific reference to reserving or preserving Citizens' 2002 mortgage interest. However, the judgment of foreclosure must be read in light of section 15-1501(a), that is, the disposition remained subject to "interests in the mortgaged real estate not otherwise barred or terminated." 735 ILCS 5/15-1501(a) (West 2014). The judgment of foreclosure must also be considered in context of the 2014 foreclosure complaint, in which Citizens never listed its first mortgage as an interest to be terminated or otherwise subject to adjudication. 735 ILCS 5/15-1504(a)(3)(L) (West 2014).

¶ 58 V&T's argument goes against the long-standing principle that "[a] suit to foreclose a junior mortgage can cut off only rights or claims of interest *subsequent* to the interest asserted. *** The purchaser takes title to the property subject to all prior liens and encumbrances." *Heritage Federal Credit Union v. Giampa*, 251 Ill. App. 3d 237, 238-39 (1993). The judgment of foreclosure from the 2014 foreclosure case must be interpreted consistently with this principle and the provisions of the Foreclosure Law as we have outlined above.

¶ 59 Our decision is reinforced by *Giampa*. There, the second mortgage on a property was foreclosed (by a different bank) and the defendant purchased the property at a sheriff's sale. *Id.* at 237. The first mortgagee bank, which was not named as a party, filed an appearance in the case but took no other action. *Id.* at 238. When the first mortgagee bank later initiated a foreclosure action on its mortgage, the defendant moved to dismiss, arguing that it had waived its priority by taking no action after becoming a party in the foreclosure suit involving the second mortgage. *Id.* at 237-38. On appeal, the court held that foreclosure of the second mortgage "could not cut off plaintiff's prior interest in the property. Defendant purchased the property subject to plaintiff's first mortgage. Whether plaintiff intervened in the [suit to foreclose the second mortgage] or took any action thereupon is simply irrelevant. The [suit to foreclose the second mortgage] could not have affected plaintiff's interest in the property, and plaintiff's failure to take action in the suit thus cannot reasonably be construed as a waiver of its superior right. To hold otherwise would grant defendant a windfall contrary to established case law." *Id.* at 239.[2]

¶ 60 Here, the judgment of foreclosure in the 2014 foreclosure case did not extinguish Citizens' first mortgage, despite the fact that this interest was not listed as an exception or

[2] We note that while a junior mortgagee is not a necessary party to a foreclosure action by a senior mortgagee, a junior mortgagee may intervene, but its interests will be terminated by the proceedings if it becomes a party, while a non-party's interests will not be affected. *React Financial*, 366 Ill. App. 3d at 236 (citing 735 ILCS 5/15-1501(b)(10), (d), (e)(4) (West 2004)).

reservation of rights in the judgment, because Citizens' 2002 mortgage was not before the court for adjudication. As stated, Citizens' 2014 foreclosure complaint specifically indicated that the second mortgage was being foreclosed and the third mortgage was being terminated. There was no reason for Citizens to insert reference to its first mortgage as it was not before the court. As Citizens notes, the first mortgage was not ripe for foreclosure at that time as the borrowers were current on payments.

¶ 61 Despite V&T's argument that a bidder at the judicial sale could be led to believe that the issuance of the two loans in 2007 resulted in payoff of the 2002 mortgage, it is undisputed that the 2002 mortgage was duly recorded and appeared in public records and no release had been recorded. *Members Equity Credit Union v. Duefel*, 295 Ill. App. 3d 336, 339 (1998) (purchaser at judicial sale following foreclosure of junior mortgage argued it could apply surplus to first mortgage because first mortgage was not identified in the complaint, judgment, or notice of sale, but the court held that the surplus belonged to mortgagors because the first mortgage was duly recorded and subsequent purchasers were thus deemed to have notice of its existence.) As Citizens observes, V&T apparently did not seek to research the status of the first mortgage until after it already purchased the property.

¶ 62 We find *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254 (2008), cited by V&T, unpersuasive. That case involved whether a section 2-1401 petition for relief from judgment should have been granted to a defaulted defendant who also had a mortgage on the subject property. The court found that, under the section 2-1401 analysis, the defaulted defendant's argument that it was not legally required to defend the foreclosure action because it was a senior lienholder was irrelevant, although the defendant may have other legal remedies regarding its mortgage. *Id.* at 263.

¶ 63 V&T also relies on another distinguishable case, *BMO Harris Bank v. Wolverine Properties*, 2015 IL App (2d) 140921. There, the issue was whether the mortgagee, who purchased the property at a judicial sale, could recoup real estate tax payments it made after the foreclosure case was filed but before the judgment of foreclosure was entered. *Id.* ¶¶ 1-3. The mortgagee failed to seek to amend the judgment of foreclosure to include the tax payment. *Id.* ¶ 27. After the sale, the mortgagee tried to include the tax payment in the order confirming the sale, but the court held that the mortgagee could not collect the payment as a deficiency against the sale proceeds because it arose before the judgment of foreclosure was entered, and a party to the foreclosure only has those rights specified in the judgment of foreclosure. *Id.* ¶¶ 24-26. We acknowledge that under the Foreclosure Law, a judgment of foreclosure specifies a party's rights and interests in the foreclosed property. However, as previously explained, Citizens first mortgage was not named in its 2014 foreclosure complaint or otherwise subject to adjudication by the court at the time of those proceedings.

¶ 64 C. Estoppel

¶ 65 V&T asserts that Citizens is estopped from making any claim to the property in the instant foreclosure suit based on the 2014 judgment of foreclosure. V&T argues estoppel also applies because, following the sale of the property in the 2014 foreclosure proceeding, Citizens filed a motion for the surplus from the sale and V&T agreed not to contest the motion so long as Citizens agreed not to make any future claims to the property. V&T asserts that although the trial court denied the request for surplus, it included in its order the parties' agreement that Citizens would not make any claim to the property. V&T asserts that it believed Citizens was extinguishing all of its interests in the property based on the fact that the court file did not contain any information about the first mortgage.

¶ 66 Citizens argues that V&T failed to raise this argument below and has thus forfeited the issue. We disagree. V&T argued in the trial court that Citizens' foreclosure action was barred by the 2014 foreclosure proceeding and Citizens represented it was selling all of its interests in the property at the judicial sale based on the court file and language in the judgment of foreclosure. See *K & K Iron Works, Inc. v. Marc Realty, LLC,* 2014 IL App (1st) 133688, ¶ 25 (arguments not raised in the circuit court cannot be raised for the first time on appeal).

¶ 67 Even so, we do not find that equitable estoppel applies here. "Under equitable estoppel, where a person, by his or her statements or conduct, leads a party to do something that said party would not have done but for such statements or conduct, that person will not be allowed to deny his or her words or actions to the detriment of the other party." *Bank of New York v. Langman*, 2013 IL App (2d) 120609, ¶ 26 (citing *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001)).

¶ 68 V&T concedes that it knew of the 2002 mortgage and it did not take steps to determine definitively the status of that mortgage until after the judicial sale. Apparently, it believed that it was "unlikely" that a bank would issue a second mortgage, and thus assumed that the two mortgages from 2007 were meant to refinance the 2002 mortgage and the bank never recorded a release of the 2002 mortgage in order to save on recording fees. However, it is undisputed that the first mortgage was properly recorded and remained of record and no release had been recorded when V&T purchased the property. "The party claiming the benefit of estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others." *Bank of New York*, 2013 IL App (2d) 120609, ¶ 26 (citing *Trossman v. Philipsborn,* 373 Ill. App. 3d 1020, 1042 (2007)). "[E]quitable estoppel is not available to a party that has notice of any adverse title or error in the record." *Id.* ¶ 29. According

to an affidavit of V&T's attorney, V&T contacted the attorney to have him investigate the status of the 2002 mortgage, but not until after purchasing the property. Moreover, his investigation did not establish that the first mortgage had been extinguished.

¶ 69 Further, V&T has not shown that it relied on any statements or conduct by Citizens to its detriment or which led V&T to believe the first mortgage had been satisfied. Its argument concerning Citizens' motion for the surplus relates to after the judicial sale had occurred and therefore cannot show any reliance by V&T. In addition, the motion for surplus, which included the language that Citizens would agree not to make any future claims to the property, was denied by the trial court.

¶ 70 D. *Caveat Emptor*

¶ 71 On appeal, Citizens argues that the doctrine of *caveat emptor* applies to the purchase of property at a judicial foreclosure sale.

¶ 72 In response, V&T argues that all of Citizens' interests or claims to the property were extinguished in the 2014 foreclosure proceedings based on the judgment of foreclosure and sections 15-1506(i)(2) and 15-1509(c). We have previously rejected this argument, *supra*.

¶ 73 Moreover, in Illinois, there is a long history of "the application of the doctrine of *caveat emptor* to all judicial sales, a history that the Illinois Mortgage Foreclosure Act [citation] does nothing to negate." *First National Bank of Blue Island v. Board of Managers of Faulkner House Condominium Ass'n*, 252 Ill. App. 3d 139, 145 (1993). "[T]he doctrine of *caveat emptor* applies to judicial sales except in cases of fraud, misrepresentation, or mistake." *Id.* at 144. Under Illinois law, V&T, as the purchaser at the judicial sale, took the property "subject to any outstanding debts which may encumber the property subsequent to the sale." *Members Equity Credit Union v. Duefel*, 295 Ill. App. 3d 336, 339 (1998). In similar fashion, in *Duefel*, the first

mortgage "was not identified in the complaint, judgment, or notice of sale" in the foreclosure proceeding of the junior mortgage, but the purchaser at the judicial sale was deemed to have notice as it was undisputed that the first mortgage was of record at the time of sale. *Id.* As a result, the trial court abused its discretion when it awarded the surplus from the sale to the purchaser and ordered the purchaser to apply the surplus to the first mortgage, instead of awarding the surplus to the foreclosed mortgagors. *Id.*

¶ 74 E. Section 2-604

¶ 75 V&T addresses on appeal an argument raised by Citizens in the circuit court against V&T's section 2-619 motion to dismiss, namely, that section 2-604 of the Code (735 ILCS 5/2-604 (West 2014))[3] limits the relief available to what is stated in the prayer for relief, and therefore because Citizens was also a defaulted defendant, the judgment of foreclosure from the 2014 case should be deemed void if it inadvertently extinguished Citizens' first mortgage. We need not address this argument as we have already determined that V&T's section 2-619 motion to dismiss was properly denied.

¶ 76 III. CONCLUSION

¶ 77 For these reasons, the motion to dismiss the appeal is denied. V&T's section 2-619 motion to dismiss in the circuit court was properly denied, and the order to voluntarily dismiss the cause is affirmed in all other respects.

¶ 78 Motion denied. Judgment affirmed.

[3] Section 2-604 provides, in part:

> "Except in case of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise. In case of default, if relief is sought, whether by amendment, counterclaim, or otherwise, beyond that prayed in the pleading to which the party is in default, notice shall be given the defaulted party as provided by rule." 735 ILCS 5/2-604 (West 2014).