

No. 1-12-0630

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 under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEPHANIE CUTTER and JORDAN MUMMER,)	Appeal from the Circuit
Plaintiffs by Substitution,)	Court of Cook County,
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 10 CH 40440
)	
MICHAEL A. PLOWMAN,)	
)	
Defendant-Appellant.)	The Honorable
)	Peter Flynn
)	Judge Presiding.
)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiffs did not need to allege or prove that they were in possession of their property in order to quiet title in those premises where that claim was secondary to their action for ejectment of defendant. Further, while the legal description of that property was not consistent throughout the record, we resolve that discrepancy in favor of the appellee in the absence of a transcript of the proceedings.

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¶ 2 Defendant Michael Plowman appeals from a judgment of the circuit court of Cook County granting plaintiffs Stephanie Cutter and Jordan Mummer summary judgment in an action for ejectment and to quiet title of a portion of plaintiffs' property, which is adjacent to defendant's, and contains a porch that straddles the line dividing the two lots. He contends that while he did not have title to the portion of the property in question, neither did plaintiff, and that the circuit court improperly granted plaintiff's summary judgment motion with respect to his action to quiet title.

¶ 3 BACKGROUND

¶ 4 Initially, we note that defendant has only provided us with a common law record, and has not included a transcript of the proceedings below. Nevertheless, based on this limited record, we are able to glean what appears to be the following facts and procedural history.

¶ 5 Plaintiffs' predecessor in this lawsuit, Deutsche Bank National Trust, filed a complaint against defendant on September 17, 2010, to quiet title of a property located at 4208 North Kedvale, Chicago, Illinois ("4208 property"). According to the complaint, Deutsche Bank acquired title to that property by foreclosing on a mortgage lien secured by it, and that the property was improved with a two-story house. Deutsche Bank further alleged that defendant was the owner of an adjacent property, located at 4200 North Kedvale ("4200 property"), which was also improved with a two-story residence. It was further alleged in the complaint that the two houses were connected by a one-story adjoining structure, approximately 26 feet long, of which 22.84 feet were located within the lot line of the 4208 property and 3.01 feet were located within the lot line of the 4200 property.

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¶ 6 The complaint stated that defendant had "taken possession and control" of the entire structure, and that he blocked Deutsche Bank's entrance to it so as to prevent the bank from making any use of the structure or taking possession of it. Deutsche bank explained that defendant effectively took possession and control of the property on which the entire structure sits, and that he claims that he purchased both the structure as well as the land underneath it. According to the complaint, however, Deutsche Bank had ownership, conferred by deed, of 22.84 feet of the connecting structure and the property underneath, and that defendant's claim of ownership was a cloud to the bank's title. The complaint also contained a count for trespassing, and sought, in addition to its claim to quiet title, to order defendant to relinquish possession of the premises in question and to pay the bank appropriate damages for such trespassing.

¶ 7 Attached to the complaint was a copy of a judicial sales deed, recorded on March 27, 2008, which entitled Deutsche Bank to the 4208 property, described as:

¶ 8 "The East 100 feet of Lot 22 (except the South 10.5 feet thereof) in Block 10 in Irving Park, a Subdivision of the Southeast 1/4 of Section 15 and the North 1/2 of the Northeast 1/4 of Section 22, Township 40 North, Range 13 East of the Third Principal Meridian, in Cook County, Illinois."

¶ 9 The deed further indicates that the property had been a collateralized asset sold at a public sale and its prior title was one Gale D. Zanon. Also attached to the complaint was a special warranty deed granting defendant title to the 4200 property, which, in turn, was described as:

¶ 10 "The East 100 feet of Lot 23 and the East 100 feet of the South 0.5 feet of Lot 22 in Block 10 in Irving Park, a Subdivision of the Southeast 1/4 of Section 15 and

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the North 1/2 of the Northeast 1/4 of section 22, Township 40 North, Range 13
East of the Third Principal Meridian, in Cook County, Illinois."

¶ 11 Based on those descriptions, combined with the surveys, also attached to the complaint, it appears that the dividing line between the 4200 and the 4208 properties sits at 0.5 feet into the South portion of Lot 22. However, the additional 10 feet of lot 22, while apparently part of the 4208 property, does not appear to be included in the deed granting title of that property to Deutsche Bank.

¶ 12 Defendant filed an answer, *pro se*, to Deutsche Bank's complaint on November 5, 2010, in which he asserted that, contrary to Deutsche Bank's allegations, 23 of its 26 feet sit on defendant's property and only the remaining 3 feet are on the 4208 property. Defendant further explains that all of the outlets on the connecting structure connect to a supply box at defendant's 4200 property, and that the radiators in the structure connect to a boiler in that same property. Defendant admits to blocking the entrance of the structure from those on the 4208 property, but claims that it was necessary for the safety of his family. He further alleges that the description of the 4208 property on the deed to Deutsche Bank is incorrect, but argues that even if it were a true description of the property, it would show that only 12.5 feet of the connecting structure were on the 4208 property, instead of 22.84 feet as claimed by defendant, since the description excludes the south 10.5 of the lot from the property that was deeded to the bank.

¶ 13 On June 7, 2011, the circuit court allowed plaintiffs Cutter and Mummer to substitute in as plaintiffs in this case upon representation that Deutsche Bank had conveyed the 4208 property to them. While the record on review does not appear to contain documents on which the circuit

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court may have relied, the propriety of their substitution as plaintiffs is not at dispute.

¶ 14 One month later, on July 7, 2011, plaintiffs filed their first amended complaint, for the ejectment of defendant from the connecting structure (count I), and as before, to quiet title of the entire 4208 property, including any portion of that structure which is part of the property (count II). In that complaint, plaintiffs alleged that they became owners in fee simple of the 4208 property on May 12, 2011, through the delivery of a special warranty deed from Deutsche Bank as indenture trustee. They further explained that Deutsche Bank had gained title to that property as a result of a judgment of foreclosure and sale entered by the circuit court of Cook County in a case captioned *Deutsche Bank National Trust Company, as Indenture Trustee under the Indenture Relating to the IMH Assets Corp., Collateralized Asset Backed Bonds, Series 2005 v. Gale D. Zanon et al.*

¶ 15 In count I of this complaint, plaintiffs allege that the adjoining structure that connected the house on the 4208 property to that on the 4200 property is about 25 by 18 feet, of which a portion of 3 by 20 feet sits on the defendant's 4200 property and 23 by 20 feet sits on plaintiffs' 4208 property. Plaintiffs state that doors in the houses of both the 4208 and 4200 properties provide access to the adjoining structure. In support of their assertions, plaintiffs alleged that the legal description of the 4208 property, as pledged to Deutsche Bank and later deeded to them, is the same as described in Deutsche Bank's complaint, except for the amount of land excluded from the property, which, according to plaintiffs, is only 0.5 feet, rather than 10.5 feet. They claimed that the first line of that legal description reads "[t]he East 100 feet of Lot 22 (Except the South 0.50 feet thereof)." (Emphasis added). According to plaintiffs, the legal description of

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defendant's property is the same as described in Deutsche Bank's complaint.

¶ 16 Plaintiffs further alleged in that count that at some point after March, 2009, when the 4208 property was taken by Deutsche Bank, defendants unlawfully took exclusive possession of the entire adjoining structure by boarding up the entryways from the house on the 4208 property into the structure, thereby blocking all access from plaintiffs' property. Since that time, plaintiffs explain that defendants have refused to vacate the portion of the adjoining structure that sits on the 4208 property, or allow plaintiffs to utilize the portion of the structure that sits on their property. Accordingly, plaintiffs sought exclusive possession of the portion of the adjoining structure that sits on the 4208 property and that defendant be ordered to vacate that portion of the structure located on plaintiffs' property.

¶ 17 In count II, to quiet title, plaintiffs alleged, as Deutsche Bank had previously done, that defendant's claim of ownership of the entire adjoining structure, including the portion of the 4208 property on which part of the structure is located, constitutes a cloud on the title of plaintiff in and to the 4208 property. Plaintiffs further claimed that they have no adequate remedy at law to remove that cloud from their title, and sought a decree that any claims by defendant to any portion of the 4208 property has no legal effect.

¶ 18 Attached to the first amended complaint were, *inter alia*: (1) the special warranty deed from Deutsche Bank to plaintiffs; (2) the judicial sales deed to Deutsche Bank; (3) the judgment of foreclosure that resulted in Deutsche Bank's previous title; (3) the order approving report of sale and distribution, confirming sale and order of possession; and (4) the foreclosed mortgage. As with Deutsche Bank's complaint, the judicial sales deed contained a legal description of the

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4208 property that excluded the south 10.5 feet of lot 22. In fact, the legal descriptions of that property in judgment of foreclosure, and in the order approving report of sale and distribution were consistent in excluding the south 10.5 feet of the lot. However, the legal descriptions in both the special warranty deed from Deutsche Bank to plaintiffs, as well as the mortgage agreement collateralized by the 4208 property provide that only the south 0.5 feet of lot 22 are excluded.

¶ 19 Also attached to plaintiffs' first amended complaint were the special warranty deed granting title of the 4200 to defendant, as well as various other documents related to that transaction. Each of those documents contained legal descriptions of the 4200 property consistent with the deed attached to the prior complaint, which described that property as the east 100 feet of lot 23, plus 0.5 feet into lot 22.

¶ 20 In his answer to plaintiffs' first amended complaint, defendant, again, admitted that he had taken possession of the adjoining structure, but claimed that the south 10.5 feet of the east 100 feet of lot 22 were not part of the 4208 property that was conveyed to Deutsche Bank and then to plaintiffs. He further stated that his actions did not place a cloud on plaintiffs' title because they never had such title to the south 10.5 feet of the lot in question.

¶ 21 In addition, defendant raised an affirmative defense, asserting equitable ownership of the adjoining structure and the property on which it set. Defendant explained that in 2004, the owners of the lots that would eventually become properties 4200 and 4208 entered into an agreement to divide the land, pursuant to which the south 20 feet of the east 100 feet of lot 22 would be added to lot 23. Thus, the majority of the adjoining structure would be located on

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defendant's property. According to defendant, the division described in that agreement has been recognized for tax purposes since 2005, such that the possessor of the 4200 property has since been responsible for property taxes on that property as so described. He further explains that when he was shown the 4200 property, he was told that the adjoining structure was part of the property, and that the block construction materials used in the adjoining structure are the same as those used on the house on the 4200 property, rather than the frame construction used on the house on the 4208 property. Defendant admits, however, that the property line between the 4200 and 4208 properties, as described in various documents, such as deeds, mortgages, judicial orders, and petitions for division, is inconsistent.

¶ 22 Attached to defendant's answer was a petition for division and/or consolidation of property for the tax year 2005, by Gale Zanon, who apparently authorized the Assessor to list the 4200 property as two tracts of land, and a similar petition for the tax year 2006, in which Zanon authorized the Assessor to list the 4200 and 4208 properties as two tracts. Also attached were handwritten plots that appear to indicate that the tract corresponding to the 4200 property included the south 20 feet of the east 100 of lot 22, and that the 4208 property excluded such south 20 feet from that lot.

¶ 23 On November 10, 2011, plaintiffs filed a motion for summary judgment, in which they argued that although the adjoining structure may be taxed under the same property index number as the 4200 property, a division for tax purposes has no effect on the title or ownership of property as a matter of law. Plaintiffs further explain that ejectment is an appropriate remedy because defendant was never conveyed more than the east 100 feet of lot 23 and only 0.5 feet of

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the east 100 feet of lot 22. Furthermore, plaintiffs note that the 4208 property, which was originally mortgaged by Gale Zanon, was described as excluding only the south 0.5 of lot 22, and that was the property ultimately conveyed to plaintiffs by Deutsche Bank. They further assert that an improvement on real estate becomes part of the land where it stands, and that the location of the mechanical system does not create ownership. Plaintiffs, again, attached the special warranty deed from Deutsche Bank which conveyed the 4208 property to them, Zanon's mortgage on that property, the judgment of foreclosure, as well as the documents in connection with defendant's acquisition the 4200 property.

¶ 24 In his response, defendant argued that the portion of the east 100 feet of lot 22, between 0.5 and 10.5 feet north of lot 23, was never foreclosed upon or transferred to plaintiffs' predecessor in interest Deutsche Bank. Thus, Deutsche Bank could not have transferred the title to that portion of lot 22 to plaintiffs, and since that portion was never foreclosed upon, Zanon must have some interest in that property, the court should dismiss plaintiffs' motion for failure to join her as a party. Defendant further asserts that summary judgment in plaintiffs' favor would be inequitable in light of the taxes that defendant had paid on the portion of lot 22 on which the adjoining structure stands.

¶ 25 Plaintiffs replied that the judicial sales deed that appears to convey to Deutsche Bank the east 100 feet of lot 22 to the exclusion of the south 10.5 feet was the result of a scrivener's error. They note that a corrected judicial sales deed was entered on March 11, 2011, containing the correct legal description of the 4208 property, namely, the one excluding only the south 0.5 feet, which deed is attached to the reply. They further explain that since defendant has no title to the

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described portion of lot 22, he cannot sue its owner for taxes that he paid voluntarily.

¶ 26 Following a hearing on February 16, 2012, the circuit court granted plaintiffs' motion for summary judgment in its entirety. In doing so, the court found, in its written order, that plaintiffs hold title to the entirety of the east 100 feet of lot 22, except for only the south 0.5 of thereof.

Accordingly, the court further stated in that order that defendant was to vacate and surrender that portion of lot 22 described in the complaint. This appeal follows.

¶ 27 ANALYSIS

¶ 28 On appeal from that order, defendant does not appear to claim any right to possess the disputed portion of the 4208 property, nor does he challenge the portion of the summary judgment in plaintiff's favor with respect to their action for ejectment. Instead, he contends only that the circuit court improperly granted plaintiffs' motion for summary judgment with regard to plaintiffs' claim to quiet title because plaintiff was not in possession of the adjoining structure and Zanon may have an interest in the property in question. Defendant maintains that an action to quiet title was not appropriate because plaintiffs were not in possession of the portion of land in dispute as generally required in a claim to quiet title of non-vacant land.

¶ 29 As a preliminary matter, before turning to the merits of defendant's appeal, we observe that the record on appeal is incomplete. Specifically, transcripts of the hearing on plaintiffs' motion for summary judgment do not appear in the record, and only the common law record containing the parties' pleadings and the circuit court's written order are present. We note that it is the burden of the appealing party to provide a sufficiently complete record of the proceedings in the trial court to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389,

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392 (1984); *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902 (2010). Thus, in the absence of a sufficiently complete record on appeal, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the order entered by the trial court was in conformity with the law and had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 392; see also *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 3d 408, 419 (1987), citing *Mileke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 48-49 (1984), *In re marriage of Hofstetter*, 102 Ill. App. 3d 392, 396 (1981) (“[i]t is not the obligation of the appellate court to search the record for evidence supporting reversal of the circuit court. *** When portions of the record are lacking, it will be presumed that the trial court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court”); but see *Gonella Baking Co. v. Clara’s Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003) (transcripts of the proceedings below may be unnecessary when this court confronts only a question of law and the circuit court's decision was based solely on the record before it).

¶ 30 The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact actually exists. *Northern Illinois Emergency Physicians et al. v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). Summary judgment is appropriate when “the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2011). A circuit court's ruling on a motion for summary judgment is reviewed *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

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¶ 31 An action to quiet title of certain property is an equitable proceeding in which a party seeks to remove a cloud upon their title to property. *Gambino v. Boulevard Mortg. Corp.*, 398 Ill. App. 3d 21, 52 (2009). It is well established that a plaintiff seeking to remove a cloud from the tile of his property must be in possession of that property, unless the property in question is vacant and undeveloped or other grounds for equitable relief are established, such as mistake or fraud. *Lakeview Trust & Sav. Bank v. Estrada*, 134 Ill. App 3d 792, 812 (1985) (internal citations omitted). Thus, where the property is not vacant and is not in the possession of the party seeking to remove a cloud from his title, the proper remedy is an action for ejectment, rather than an action solely to quiet title. *Id.* However, it is equally well established that if the main purpose of the action is to obtain relief other than settling the title in the plaintiff, such that the quieting of the title is merely secondary, then is it not necessary to allege and show that plaintiff is in possession of the property or that the premises are vacant and undeveloped. *McGookey v. Winter*, 381 Ill. App. 516, 526 (1943), citing *Chicago Medical School v. Wilson*, 341 Ill. 170 (1930) and *Ward v. Clendering*, 245 Ill. 206 (1910).

¶ 32 Here, plaintiffs correctly note that the main purpose of their action was to eject defendant from the portion of the adjoining structure that sits on the 4208 property, which as noted above, is the proper remedy under these circumstances. Count II, in which plaintiffs sought to quiet title in the entire 4208 property as it is described in their special warranty deed, appears to be secondary, and to merely provide finality with regard to any claim of title that defendant may have had in the disputed portion of the 4208 property. While defendant argues that plaintiffs' claim to quiet title is not "incident" to their action for ejectment, he admits that it may not be

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possible for this court to determine plaintiffs' "primary purpose" in seeking to quiet title.

However, the circuit court's order does not state its reasoning for granting the motion with respect to plaintiffs' action to quiet title, nor does it state whether the parties provided any additional evidence at the hearing with respect to plaintiffs' purpose in seeking to quiet title.

However, as noted above, defendant has not provided us with any report of the proceedings below. Since we must resolve all doubts against the appellant and presume that the court had a sufficient factual basis for its decision, we conclude that plaintiffs' action to quiet title was secondary with their primary action for ejectment, and therefore, the circuit court acted properly in granting plaintiffs' motion. See *Foutch*, 99 Ill. 2d at 392; *Coleman*, 160 Ill. App. 3d at 419.

¶ 33 Defendant next contends that as he did at the court below, that plaintiffs could not have acquired title to the south 10.5 feet of lot 22 because the judgment of foreclosure and sale, as well as the order approving report of sale and distribution, exclude that portion from the property conveyed to Deutsche Bank, their predecessor in interest. According to defendant, Deutsche Bank never had title to those additional 10 feet of property and could not, therefore, convey that portion of the property to plaintiffs, even if the special warranty deed conveying the property to them excluded only the south 0.5 feet of the lot, rather than the south 10.5 feet. Thus, defendant again argues that the summary judgment order is void as a matter of law because plaintiffs failed to join Zanon, who as a necessary party because she had retained title to the described portion of the east 100 feet of lot 22. Those claims are similarly unpersuasive.

¶ 34 Both claims hinge upon the legal description of the 4208 property contained in the judgment of foreclosure and sale of that property when it was acquired by Deutsche Bank, and in

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the order approving report of that sale and distribution. However, plaintiffs have submitted Zanon's mortgage of the 4208 property which gave rise to the foreclosure, and the legal description contained in that mortgage excludes only the south 0.5 feet of lot 22, just like the special warranty deed from Deutsche Bank to plaintiffs. Plaintiffs also submitted a corrected deed to Deutsche Bank, with that same legal description of the property, namely, excluding only 0.5 of the lot. As noted above, plaintiffs explained in their pleadings that the documents in which the description excluded the south 10.5 feet of lot 22 were the result of a scrivener's error. As previously discussed, since the circuit court's written order granting plaintiffs' motion for summary judgment did not specify the reasoning for its ruling or state whether the parties presented any additional evidence to explain the discrepancy in the legal descriptions, and defendant did not provide a transcript of the proceedings, we must resolve any inconsistencies in the record against defendant. *Foutch*, 99 Ill. 2d at 392. If the documents that exclude the south 10.5 feet of lot 22 from the 4208 property were merely the result of a scrivener's error, Zanon did not retain any interest in the property and was not a necessary party to the proceedings below. Thus, we again presume that the trial court acted properly in granting summary judgment in favor of plaintiffs' with regard to their action to quiet title, and that such decision was in conformity with the law. *Id.*

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.