2011 IL App (1st) 103026-U

FIFTH DIVISION
December 23, 2011

No. 1-10-3026

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TIMOTHY TATUM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois.
	)	
v.	)	No. 2009 L 006519
	)	
ALLSTATE INDEMNITY COMPANY,	)	Honorable
	)	Brigid Mary McGrath,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justice McBride and Justice Howse concurred in the judgment.

ORDER

HELD: When a fire destroyed a house purportedly owned by plaintiff, the defendant insurer refused to pay, claiming that plaintiff had no insurable interest in the property because he had obtained it via a fraudulent mortgage rescue scheme. Plaintiff brought suit for breach of contract, and the insurer countersued for declaratory judgment, seeking a declaration that plaintiff lacked an insurable interest in the property. The trial court granted summary judgment for the insurer. On appeal, we affirmed in part and reversed in part, finding that the undisputed facts showed that plaintiff did not have an owner's interest in the property but, at best, a mortgagee's interest, but also finding that issues of fact existed as to whether plaintiff's conduct was fraudulent so as to invalidate his interest entirely.

¶ 1 In this breach of contract suit, plaintiff Timothy Tatum appeals from the trial court's grant of summary judgment for defendant Allstate Indemnity Company (Allstate).

¶ 2 On January 16, 2009, a fire destroyed a house located at 2004 W. 69th Place, Chicago, Illinois (the subject property). At that time, the legal title to that property was in plaintiff's name, and plaintiff had an insurance policy with Allstate. However, when plaintiff filed an insurance claim, Allstate denied coverage, contending that plaintiff lacked an insurable interest in the property because, in Allstate's words, he had obtained title through "a fraudulent mortgage rescue scheme."

¶ 3 The facts leading to plaintiff's purported ownership of the subject property are as follows. In March 2005, a woman named Donna Murray owned and resided in the subject property. Due to a delinquency of $11,581.95 that she incurred on a mortgage with Marquette Bank, a judgment of foreclosure was entered against her on March 23, 2005. As shall be more fully developed below, in order to avoid foreclosure, Murray entered into an arrangement for plaintiff and plaintiff's business partner Larry Skrobot to satisfy the delinquency. In exchange for Skrobot paying the delinquency of $11,581.95, Murray signed a "mortgage" in favor of Skrobot requiring her to repay the $11,581.95 with interest within three years, and she contemporaneously executed a separate quitclaim deed that purported to transfer title to the property to a land trust owned by plaintiff.

¶ 4 Murray continued to reside in the subject property for the next three years. However, she failed to make payments to Skrobot, and in December 2008, a notice of eviction was served upon her. As noted, on January 16, 2009, the house burned down, and plaintiff filed the insurance

claim that gave rise to the instant lawsuit.

¶ 5 When Allstate denied coverage, plaintiff brought a breach of contract suit against Allstate, seeking enforcement of the insurance policy. Allstate filed a counterclaim for declaratory judgment, seeking a declaration that the quitclaim deed was void and that plaintiff lacked an insurable interest in the subject property. The trial court granted summary judgment for Allstate. Plaintiff appeals. For the reasons that follow, we affirm in part and reverse in part.

¶ 6 I. BACKGROUND

¶ 7 Plaintiff's complaint, filed on June 3, 2009, alleges the following. Plaintiff is the beneficial owner of a land trust into which the subject property was deeded on June 23, 2005. On or about September 1, 2008, plaintiff entered into a "Landlord's Insurance Policy" with Allstate to cover the subject property. Pursuant to this policy, plaintiff paid a premium of $1,232.78 to Allstate. When a fire rendered the house uninhabitable, Allstate refused to pay for the damages caused, challenging the sufficiency of plaintiff's insurable interest.

¶ 8 Plaintiff sought relief in two counts. In count I, for breach of contract, plaintiff contended that Allstate had breached its insurance contract by its refusal to pay. In count II, plaintiff sought relief under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)) for vexatious denial of a claim.

¶ 9 Plaintiff attached to his complaint a document entitled "Quitclaim Deed in Trust," dated June 23, 2005, in which Murray purports to convey and quitclaim her entire interest in the subject property into plaintiff's land trust. Plaintiff also attached a copy of his insurance policy with Allstate. That policy provides, in relevant part: "In the event of a covered loss, **we** will not

pay for more than an **insured person's** insurable interest in the property covered, nor more than the amount of coverage afforded by this policy." (Emphasis in original.)

¶ 10 Allstate filed its answer and counterclaim for declaratory judgment on July 22, 2009. In its answer, Allstate admitted that plaintiff paid $1,232.78 in consideration of the issuance of an insurance policy on the subject property, and that Allstate accepted the premium. However, Allstate denied that the subject property had been deeded to plaintiff's land trust. By way of affirmative defense, Allstate alleged that plaintiff was not and had never been the "owner-in-fact" of the subject property and therefore lacked any insurable interest in the subject property. Therefore, Allstate contended, under the terms of the insurance policy, which limited liability to the insured's insurable interest in the subject property, Allstate was not obligated to pay plaintiff for any loss resulting from the fire.

¶ 11 Allstate alleged the following additional facts in its counterclaim for declaratory judgment. Prior to June 23, 2005, Murray was the owner of the subject property. Sometime before 2005, Murray had executed a mortgage on the subject property in favor of Marquette Bank. On or about March 23, 2005, a judgment of foreclosure was entered against Murray and in favor of Marquette Bank, and a judicial auction of the property was scheduled.

¶ 12 According to Allstate, in order to "stave off the foreclosure," plaintiff's business partner Skrobot agreed to lend to Murray the sum of $11,581.95, which would satisfy the delinquent installments on her mortgage with Marquette Bank. In exchange for that loan, Murray agreed to execute a mortgage on the subject property in favor of Skrobot in the amount of the loan and to simultaneously devise the subject property to plaintiff's (Tatum's) land trust via quitclaim deed.

(According to Allstate, plaintiff had agreed to reimburse Skrobot for the amount of his loan to Murray in exchange for Murray's execution of that quitclaim deed.) Thus, on June 23, 2005, Murray executed a mortgage on the subject property in favor of Skrobot in the amount of $11,581.95, and, in addition, she quitclaimed the subject property into plaintiff's land trust.

¶ 13 In support of the allegations in its counterclaim, Allstate attached several documents detailing the various transactions between Murray, Skrobot, and plaintiff. The first such document was the mortgage between Murray and Skrobot, dated June 23, 2005. The mortgage document stated that Murray owed Skrobot the sum of $11,591.85, to be repaid by June 23, 2008, and she was conveying the subject property to Skrobot to secure the payment of this debt.

¶ 14 Allstate additionally attached a copy of a Settlement Agreement dated August 26, 2005, between plaintiff and Marquette Bank, the bank to which Murray originally mortgaged the subject property. Pursuant to this agreement, plaintiff satisfied the entire balance of $28,622 that Murray had remaining on her mortgage with Marquette Bank. This money was part of the proceeds of a new loan in the amount of $66,200, which plaintiff procured from the bank and secured with the subject property. The agreement also stated that plaintiff paid $19,500 to his partner Skrobot to satisfy the mortgage interest that Skrobot had acquired in the subject property through his deal with Murray in June, where, as noted, Skrobot lent her the sum of $11,581.95 to bring her current at that time with her mortgage debt.

¶ 15 Allstate lastly attached a copy of a handwritten agreement between Murray and Skrobot, dated August 30, 2005. That document provided, in relevant part:

> "Larry [Skrobot] will payoff [*sic*] existing mortgage and bring current R/E taxes;

> water bill; obtain fire insurance. This amount of approx $49,000 will be pd [*sic*] back to Larry from Donna [Murray] by either selling house to another buyer or herself refinancing Larry's loan of approx $49,000 with no penalties nor extra charges added within 3 yrs. (6-28-08) Donna has deeded property into Trust 16575 and will be deeded back to Donna when she completes the terms. Donna will pay by 1st of ea [*sic*] month $490.00 to Larry with 5 day grace period till she exercises her option of a sell or refi. [*sic*] *** Larry does not want said property and expects Donna to comply with this agreement which gives her 3 yrs [*sic*] to improve her credit and get financially in order. Donna's options expire on 6-28-08"[1]

(We note that plaintiff does not make any attempt to separate himself from Skrobot with respect to any of the commitments made under the terms of this agreement.)

¶ 16 Plaintiff moved to dismiss Allstate's affirmative defenses and counterclaim under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)), arguing that Allstate lacked standing to contest the validity of the quitclaim deed by which Murray purported to give him title to the subject property, since Allstate was not a party to that transaction.

¶ 17 Allstate, meanwhile, moved for summary judgment on its counterclaim for declaratory judgment. In its motion, Allstate first addressed plaintiff's contentions regarding its standing,

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[1] This agreement between Skrobot and Murray would appear to be inconsistent with the events reflected in the Settlement Agreement as having transpired between plaintiff and Marquette Bank four days earlier, but such inconsistency is not discussed any further in the briefs or in the record.

arguing that it did have standing because the validity of the quitclaim deed would determine the extent of plaintiff's insurable interest in the property and, therefore, Allstate's legal obligation toward him. It then contended that it was entitled to summary judgment because the undisputed facts showed that plaintiff had no insurable interest in the property. Allstate argued that, even though the quitclaim deed purported to be an absolute conveyance on its face, the transaction should be construed as an equitable mortgage under Illinois law. Allstate contended that, since Illinois law does not permit a mortgagee to obtain title to property as security for a mortgage, plaintiff never had an insurable interest in the property in the first instance.

¶ 18 Allstate also alleged that on August 25, 2005, Skrobot signed a "Release Deed" quitclaiming all of his interest in the subject property in favor of Murray. (This release deed was signed approximately two months after Murray initially quitclaimed her property into plaintiff's land trust on June 23, 2005, but before plaintiff signed the Settlement Agreement on August 26, 2005, in which he paid off the remaining balance on Murray's mortgage with Marquette Bank, and before Skrobot and Murray signed the handwritten agreement on August 30, 2005, in which Murray agreed to repay Skrobot by June 28, 2008.) A copy of the release deed is attached to Allstate's motion for summary judgment. Allstate contended that, even if plaintiff did obtain an insurable interest in the property by virtue of the quitclaim deed executed by Murray on June 23, 2005, any such interest would have been extinguished by Skrobot's subsequent signing of this release deed, such that plaintiff retained no insurable interest in the property by the time of the fire.

¶ 19 In support of its motion for summary judgment, Allstate attached a transcript of a sworn

statement made by plaintiff on February 24, 2009, to counsel for Allstate in connection with Allstate's investigation of plaintiff's claim. (Plaintiff has not challenged either the veracity or the admissibility of this statement, either before the trial court or in this appeal.)

¶ 20 In that statement, plaintiff testified that he was an owner and investor in real estate, and Skrobot helped him with that business, performing tasks such as collecting rent and finding properties for him to invest in. When asked how he first became aware of the subject property, plaintiff replied, "Well, I believe at the time [Skrobot and I] were looking for properties where people – where they were maybe a week away or a few days away from going to the auction." He clarified that "auction" meant a judicial sale on a property subject to foreclosure. "So we went in and would typically agree to pay everything off," he said, "give them some time to refinance and pay us back, or we would just take the property." He explained that in exchange for lending such homeowners the amount that they needed to keep their property from being foreclosed upon, he would have them deed the property to his trust "so we could take it if they didn't pay us back."

¶ 21 Plaintiff further included in his statement to Allstate that such was the case with Murray, the original owner of the subject property. He stated that Skrobot contacted Murray when she was only a few days away from losing her house to foreclosure, offering to loan her money in order to enable her to keep her house. On June 23, 2005, plaintiff said, Murray and Skrobot signed a mortgage agreement in the amount of $11,581.95, representing the amount of money loaned to Murray to pay the delinquency on her mortgage with Marquette Bank. As part of this arrangement, Murray was induced to deed the subject property to plaintiff's trust. Plaintiff

stated, "The idea is we basically took it from her with the idea that she had three years to refinance and pay us back."

¶ 22 Counsel for Allstate asked plaintiff, "Did [Murray] understand, as far as you know, that she was transferring title to the property in exchange for a mortgage?" Plaintiff replied, "Absolutely." He stated that there was a clear understanding between himself, Skrobot, and Murray that plaintiff and Skrobot "owned" and "controlled" the property, but Murray would continue living there and would pay them rent. She had three years to refinance the home; if she did not refinance the home within that time, plaintiff would keep it, but if she did refinance, then she would "get her house back from us." Counsel for Allstate asked whether it was "normal" to change title in exchange for a mortgage. Plaintiff said, "It ended up being common for us because we ended up being on the wrong end of several deals." He explained that in the past, he and Skrobot had made similar mortgage deals with homeowners without obtaining title to the properties in question and had ended up not being paid back.

¶ 23 Counsel for Allstate then asked plaintiff whether Murray was still responsible for making payments on her original mortgage to Marquette Bank after she executed the deed in favor of plaintiff. Plaintiff said that he could not remember. However, he said, he ended up being the one to pay that mortgage. He stated that he took out a new mortgage on the property with Marquette Bank in order to pay off Murray's old mortgage to prevent the house from being foreclosed on. (As noted, this new mortgage was part of the Settlement Agreement executed on August 26, 2005.) The amount of the loan that plaintiff received from the new mortgage was approximately $65,000. Of that money, he said, $28,622 went to pay off the old mortgage on the

house, and $19,500 went to Skrobot to compensate him for paying off the $11,581.95 delinquency on Murray's mortgage and for other expenses, such as taxes and insurance. The remaining $16,400 went to plaintiff. Plaintiff further stated that he believed that Marquette Bank would have appraised the property when it granted him the new mortgage, and he guessed that the appraisal value would have been somewhere between $90,000 and $110,000, but he did not have a copy of the appraisal.

¶ 24 Plaintiff acknowledged that Skrobot signed a release deed that purported to be a release of the mortgage. (As noted above, Skrobot signed this deed on August 25, 2005.) Plaintiff stated that Skrobot did this at plaintiff's behest: "I'm sure I made him release everything to have clear title," he said. "It was very clear whatever I did after a while I wanted clear title, so..."

¶ 25 In his statement to counsel for Allstate, plaintiff also discussed the handwritten agreement that Skrobot and Murray entered into on August 30, 2005, approximately two months after Skrobot and Murray initially entered into the mortgage agreement on June 23, 2005. That handwritten agreement gave Murray three years to repay the sum of $49,000, which, according to plaintiff, represented the $28,622 that plaintiff paid to satisfy her original mortgage plus the $19,500 that he paid to Skrobot to compensate him for paying the delinquency on Murray's mortgage as well as miscellaneous expenses.

¶ 26 Plaintiff stated that Murray made payments on the agreement for approximately five months but then stopped paying, except for intermittent payments when he or Skrobot would make phone calls requesting payment. The last phone call that plaintiff made to Murray was in fall 2008, after the expiration of the three-year period provided for in the August 30, 2005,

agreement. "We knew that we were gonna probably have to evict her," plaintiff said, and he said that Murray was aware of that fact as well. After that call, according to plaintiff, Murray paid a couple hundred dollars, but then stopped paying again. He estimated that she paid a total of less than $4000 to them. She was served with a landlord five-day notice on December 19, 2008, and Skrobot filed an eviction action against her on January 9, 2009. As noted, the fire occurred on January 16, 2009.

¶ 27 Plaintiff additionally stated that, before the fire occurred, he had intended to either sell or rent the house after evicting Murray. He mentioned that in the summer of 2007, a potential buyer offered $89,000 for the house. Plaintiff and Skrobot made a counteroffer seeking $115,000, and the deal was never finalized.

¶ 28 After hearing oral argument on both plaintiff's section 2-619 motion to dismiss and on Allstate's motion for summary judgment, the trial court issued an order on April 9, 2010, where it denied plaintiff's motion to dismiss, stating that Allstate had standing "for the reasons stated by the Court." (No transcript of the oral argument is contained in the record on appeal.) The trial court additionally took Allstate's summary judgment motion under advisement.

¶ 29 On September 10, 2010, the trial court issued an order granting Allstate's motion for summary judgment, stating:

> "The Court finds Plaintiff had no insurable interest in the subject property as a matter of law. At all relevant times, Illinois law and public policy did not allow a mortgagee to take title as security for a mortgage. Accordingly, the quit claim deed that purported to transfer title to Plaintiff was void because it was intended as security for a mortgage."

The trial court further ordered Allstate to return the premiums paid for the subject policy to the plaintiff.

¶ 30 Plaintiff now appeals.

¶ 31 II. ANALYSIS

¶ 32 On appeal, plaintiff contends that Allstate lacks standing to challenge the validity of the quitclaim deed that Murray signed purporting to transfer title to plaintiff. Plaintiff also contends that the quitclaim deed makes him an owner of the subject property, or, at the very least, a mortgagee, such that he would have an insurable interest in the property.[2] Allstate contests both of these contentions, arguing that the quitclaim deed was "void" by reason of the fact that it illegally attempted to obtain a mortgage interest in the property through the transfer of legal title, and thus it conferred no interest at all upon plaintiff. Allstate additionally makes two more arguments against plaintiff's entitlement to recovery in this case. First, it argues that the deed was invalid because there was no consideration given for the deed. Second, it argues that, even

[2] Plaintiff additionally argues that Allstate was not entitled to rescission of the insurance contract. In support, he cites section 154 of the Illinois Insurance Code, which sets forth the conditions under which an insurer may rescind an insurance policy on grounds of misrepresentation by the insured. However, Allstate effectively relinquishes any claim that it is entitled to rescission on grounds of misrepresentation in its brief by stating that "Defendant did not attempt to rescind Plaintiff's policy based on any misrepresentation" but, rather, denied plaintiff's claim because it determined that plaintiff did not have any insurable interest at the time of the loss. Accordingly, we do not address this issue on appeal.

if plaintiff's status as mortgagee would have granted him an insurable interest in the property, plaintiff was no longer a mortgagee at the time of the fire, pursuant to the release deed signed by Skrobot on August 25, 2005, in which Skrobot quitclaimed his entire interest in the subject property in favor of Murray.

¶ 33 A. Allstate's Standing to Challenge the Validity of the Deed

¶ 34 At the outset, plaintiff contends that Allstate lacks standing to challenge the validity of the deed, since it was not a party to the contract between him and Murray. Allstate contends that we lack jurisdiction to consider this contention, since plaintiff did not purport to appeal from the trial court's denial of his motion to dismiss, in which he raised the standing issue, but only appealed from the trial court's grant of summary judgment. In the alternative, Allstate argues that it does indeed have standing because the validity of the deed bears directly upon the question of whether plaintiff has an insurable interest in the property, which in turn determines Allstate's legal liability.

¶ 35 We find Allstate's jurisdictional argument to be without merit. The appeal from a final judgment "draws in question all non-final prior orders and rulings which produced the judgment." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979). Thus, an appellate court may consider an earlier judgment of the trial court even though not specifically mentioned in the notice of appeal where that earlier judgment is merely a step in the procedural progression leading to the final judgment being appealed from. *Burtell*, 76 Ill. 2d at 436 (prior decree of trial court was reviewable on appeal, even though not directly referenced in the notice of appeal, where it "was but a preliminary determination necessary to the ultimate relief sought by the

plaintiff"). Such is true in the instant case. As noted, plaintiff contended that Allstate lacked standing to challenge the validity of the deed in his motion to dismiss. The trial court's denial of that motion was foundational to its later grant of summary judgment in favor of Allstate, which necessarily relied upon its ruling that Allstate did have standing to challenge the validity of the deed. Thus, we may consider the trial court's ruling upon the standing issue on appeal.

¶ 36 However, in the exercise of our jurisdiction, we do substantively concur in the finding of the trial court that Allstate has standing to challenge the validity of the deed. In order to have standing, a party must suffer some injury in fact to a legally cognizable interest and must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the complained-of conduct. *Illinois American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098 (2002); *Brockett ex rel. Brockett v. Davis,* 325 Ill. App. 3d 727 (2001). As has been discussed, the insurance policy at issue contains a clause explicitly stating, "In the event of a covered loss, **we** will not pay for more than an **insured person's** insurable interest in the property covered, nor more than the amount of coverage afforded by this policy." (Emphasis in original.) Thus, Allstate's potential liability in this action is bounded by the extent of plaintiff's insurable interest in the property, which in turn depends upon the nature and characterization of the quitclaim deed upon which plaintiff made his claim. That characterization would determine whether plaintiff had an owner's interest in the property, or a mortgagee's interest, or no interest at all. Allstate has argued that plaintiff had no interest at all due to the invalidity of the quitclaim deed that purported to convey an interest in the property to plaintiff. Thus, the extent of plaintiff's insurable interest necessarily hinges upon the status of that quitclaim deed and whether it confers

upon plaintiff an owner's interest in the property, or whether it creates an equitable mortgage in favor of plaintiff, or whether it is void and confers no interest upon plaintiff at all.

¶ 37 Plaintiff nevertheless argues that Allstate, as a stranger to the quitclaim deed, may not raise the validity of that quitclaim deed to determine the extent of its contractual obligations to plaintiff. In support, plaintiff cites *Brockett v. Davis*, 325 Ill. App. 3d 727 (2001), and *International Insurance Co. v. Melrose Park National Bank*, 145 Ill. App. 3d 286 (1986). These cases are inapposite. In *Brockett*, plaintiffs were injured in an automobile accident with defendant and filed a personal injury lawsuit against him. *Id.* at 728. During the litigation, defendant moved for partial summary judgment, claiming that certain bills for chiropractic services received by defendants were void as a matter of law because the doctors who treated them failed to obtain a certificate of registration for their medical corporation as required under Illinois law. *Id.* The *Brockett* court held that plaintiff was not entitled to partial summary judgment on this basis, stating that plaintiff was not a party to the contract between defendants and their medical providers and therefore lacked standing to raise any alleged illegalities in that contract. *Id.* at 731. It explained that there was no evidence that plaintiff suffered any direct injury from the doctors' failure to obtain a certificate of registration. *Id.* at 731.

¶ 38 However, the instant case is distinguishable from *Brockett* because, in the instant case, the insurance contract between plaintiff and Allstate explicitly made Allstate's liability contingent upon the extent of plaintiff's insurable interest in the property. Thus, it is impossible to determine the extent of Allstate's liability without first determining the validity of the transaction upon which plaintiff's insurable interest, if any, is premised.

¶ 39 Likewise, the case of *Melrose Park*, 145 Ill. App. 3d 286, is similarly distinguishable. The *Melrose Park* plaintiff insured a building owned by defendants. *Id.* at 287. Defendants entered into an agreement to sell the building to a third party for $65,000. *Id.* at 287. However, before the sale was closed, a fire damaged the building, and the defendants and the buyer abandoned their contract. *Id.* at 287. Upon these facts, the *Melrose Park* court held that the contract sale price of $65,000 was not a limit upon defendants' recovery under the insurance policy. *Id.* at 292. The court reasoned that, because defendants had not transferred title or possession to their buyer at the time of the fire, the parties to that transaction were entitled to abandon their contract under Illinois law. *Id.* at 291. Since they legally abandoned their contract, the insurer was not entitled to raise it as a limit to recovery. *Id.* at 292. Thus, the *Melrose Park* decision was based upon the peculiar factual situation where the contract at issue was never consummated, never became binding, and, in fact, was abandoned by the parties before any transfer of the property was ever effected. By contrast, the quitclaim deed at issue in this case was fully executed and would provide the basis for any insurable interest that plaintiff might hold, whether it would be that of an owner or that of a mortgagee. Accordingly, *Melrose Park* is not controlling in the instant action.

¶ 40 B. Status of the Quitclaim Deed

¶ 41 Thus, we proceed to consider what ownership interest, if any, is conferred upon plaintiff by the quitclaim deed executed by Murray on June 23, 2005. Plaintiff contends that the quitclaim deed gave him an absolute ownership interest in the property. In the alternative, plaintiff contends that, even if we construe the quitclaim deed as creating an equitable mortgage,

then he would be a mortgagee of the property. In either event, he argues, he would have an insurable interest in the property, either as an owner or as a mortgagee, so the trial court erred in granting summary judgment in favor of Allstate. Allstate, on the other hand, contends that the deed conferred neither an owner's interest nor a mortgagee's interest upon plaintiff but, rather, is a "nullity" and "void as a matter of law" because it was the result of a "fraudulent mortgage rescue scheme" and therefore against Illinois public policy.

¶ 42 For the reasons that follow, we find that the undisputed evidence shows that the deed is not an absolute conveyance but, at best for plaintiff, would be an equitable mortgage. However, there remain issues of fact as to whether an equitable mortgage under the circumstances of this case would be sufficiently valid to withstand the challenge of public policy, or whether, as Allstate contends, it is a nullity with no effect.

¶ 43 Under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.*), even a conveyance that is absolute on its face may be construed by the courts as an equitable mortgage, which term is defined as follows:

> " 'Mortgage' means any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation. The term "mortgage" includes, without limitation:
>
> ***
>
> (c) every deed conveying real estate, although an absolute conveyance in its terms, which shall have been intended only as a security in the nature of a mortgage." 735 ILCS 5/15-1207 (West 2008).

In determining whether an equitable mortgage exists, the primary consideration is the intent of the parties. *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 877 (2010). Any evidence tending to show that the purpose and intention of the parties was that the property was intended as security for a loan is admissible. *Burroughs v. Burroughs*, 1 Ill. App. 3d 697, 703 (1971). In this regard, courts have considered the following factors to be pertinent:

> " 'the existence of an indebtedness, the close relationship of the parties, prior unsuccessful attempts for loans, the circumstances surrounding the transaction, the disparity of the situations of the parties, the lack of legal assistance, the unusual type of sale, the inadequacy of consideration, the way the consideration was paid, the retention of written evidence of the debt, the belief that the debt remains unpaid, an agreement to repurchase, and the continued exercise of ownership privileges and responsibilities by the seller.' " *Gandy*, 406 Ill. App. 3d at 876-77, quoting *Robinson v. Builders Supply & Lumber Co.*, 223 Ill. App. 3d 1007, 1014 (1991).

In considering these factors, courts are mindful that "[e]quitable principles *** recognize unfair advantage may be the result of coercion caused by necessitous circumstances and that devices designed to circumvent the rights of a borrower ought not to be permitted." *Burroughs*, 1 Ill. App. 3d at 702.

¶ 44 With regard to the present case, the circumstances surrounding the transaction strongly evidence an intent by the parties to create a mortgage rather than an absolute conveyance of the subject property. It is undisputed that, in June 2005, Murray was only a few days away from foreclosure and, indeed, a judgment of foreclosure had already been entered against her. See

Robinson, 223 Ill. App. 3d at 1016 (homeowner's "desperate circumstances" weighed in favor of a finding of an equitable mortgage). Into this picture stepped plaintiff and Skrobot, with an offer to satisfy the delinquency if she would agree to repay that amount. It is further apparent that Murray was thereafter indebted to plaintiff and Skrobot for the amount that they paid in order to settle her mortgage. According to plaintiff in his sworn statement to Allstate, Murray "[a]bsolutely" understood that she was transferring title in exchange for a mortgage. Indeed, Murray signed an actual mortgage agreement with Skrobot on the same date as she signed the quitclaim deed purporting to transfer her interest in the subject property to plaintiff. Plaintiff virtually admitted in his sworn statement that the reason that he and Skrobot obtained a quitclaim deed from her was to secure her debt, in the nature of a mortgage:

> "We run across these people [like Murray] quite often. Or situations where people want to rehab a house, is more common, and they own title to the house, and *** *we have a mortgage with them, but we take clear title*, put it in the trust, and then if they performed, you know, it's easy to deed back out of it." (Emphasis added.)

Plaintiff further explained that he and Skrobot developed this procedure for ensuring repayment of loans from homeowners because he and Skrobot had "ended up being on the wrong end of several deals" in the past.

¶ 45 The parties' intent to use title as security for Murray's debt is further reflected in the handwritten agreement signed by Murray and Skrobot on August 30, 2005, which states that Murray had three years in which to repay her debt to Skrobot, and, if and when she did, title to the house would return to her. Moreover, Murray remained in possession of the house up until

the date of the fire. See *Robinson*, 223 Ill. App. 3d at 1016 (significant that original homeowner remained in possession of house throughout proceedings).

¶ 46 When viewed as a whole, all of these circumstances, undisputed in the record, demonstrate that, although the quitclaim deed was "an absolute conveyance in its terms," it was "intended only as security in the nature of a mortgage" (735 ILCS 5/15-1207 (West 2008)) and therefore qualifies as an equitable mortgage under Illinois law. See *Gandy*, 406 Ill. App. 3d at 876-77; *Robinson*, 223 Ill. App. 3d at 1017 ("Although the documents do not appear to create indebtedness between the parties, the record suggests that the parties' primary intent was to effect a security agreement, rather than an outright sale of the properties.").

¶ 47 Furthermore, contrary to plaintiff's contention in this regard, the inadequacy of consideration, that is, the disparity between the amount paid by plaintiff and the actual value of the property, is additional corroboration that the transaction was not intended as an absolute conveyance and should therefore be treated as an equitable mortgage. See *Burroughs*, 1 Ill. App. 3d at 705 (inadequacy of consideration is a "potent circumstance *** tending to show that a deed was intended to operate as a mortgage and not as an absolute conveyance); *Gandy*, 406 Ill. App. 3d at 878 (where purported buyer paid a purchase price of $90,000 for the property at issue, then sold the property to a third party for $170,000, this "vast disparity" suggested strongly that the original transaction was intended as a mortgage). During his sworn statement, plaintiff opined that the fair market value of the property was between $90,000 and $110,000, and, in fact, plaintiff turned down a purchase offer of $89,000 in the summer of 2007 because he was hoping to get a higher price for the property. By contrast, the consideration that plaintiff paid for the

property was approximately half of that value. The amount that Murray owed as a result of the transaction was $49,000, as evidenced by the August 30, 2005, handwritten agreement with Skrobot. Plaintiff explained that this amount reflected the original delinquency ($11,581.85), the remaining amount on the mortgage which plaintiff subsequently paid off ($28,622.46), and miscellaneous expenses paid by Skrobot, including taxes and insurance. As noted, a similarly high disparity in *Gandy* was found to be strong evidence that the transaction at issue was an equitable mortgage rather than an absolute conveyance. *Gandy*, 406 Ill. App. 3d at 878.

¶ 48 Thus, we find that the undisputed facts in the record are sufficient to conclude at the summary judgment stage that the transaction between plaintiff and Murray did not constitute an absolute conveyance but, at best for plaintiff, an equitable mortgage under the definition set forth in the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1207 (West 2008)). See *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill. 2d 580, 587 (1971) (summary judgment should be granted where the court would be required to direct a verdict for one party if the evidence contained in the pleadings and affidavits would have constituted all of the evidence before the court); *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989) (citing Fooden standard with approval)[3] Accordingly, we affirm the trial court's grant of summary judgment to the extent that

[3] We note at this juncture that Allstate does not contest the general principle that a mortgagee has an insurable interest in property, nor would any such contention be availing. It is well-settled that a person has an insurable interest in property whenever he would gain an advantage from its continued existence or suffer a disadvantage from its destruction, regardless of whether he has title to the property. *Hawkeye-Security Ins. Co. v. Reeg*, 128 Ill. App. 3d 352,

it found that plaintiff did not have an owner's interest in the property.

¶ 49 Allstate urges us to go further and affirm the trial court's grant of summary judgment in its entirety, arguing that the quitclaim deed did not confer a mortgagee's interest upon plaintiff but, rather, no interest at all, since his convoluted dealings with Murray constituted a "fraudulent mortgage rescue scheme." Allstate asserts that it would be against Illinois public policy to allow plaintiff to recover insurance proceeds where he obtained title to the property in such a manner.

¶ 50 In support of its contention that plaintiff's conduct constituted fraud under Illinois law, Allstate cites the Mortgage Rescue Fraud Act, 765 ILCS 940/1 *et seq.* (West 2008) (MRFA). The MRFA attempts to protect owners of "distressed property," which it defines as "residential real property consisting of one to 6 family dwelling units that is in foreclosure or at risk of loss due to nonpayment of taxes, or whose owner is more than 30 days delinquent on any loan that is secured by the property." 765 ILCS 940/5 (West 2008). It does so by, among other provisions, prohibiting a distressed property consultant from inducing the owner of the distressed property to execute a quitclaim deed when entering into a conveyance of the distressed property (765 ILCS 940/50(b)(8)) and requiring the purchaser of a distressed property to pay at least 82% of the fair market value of the property (765 ILCS 940/50(b)(2) (West 2008)). Allstate argues that, at the time that Murray entered into her deal with plaintiff, she was an owner of distressed property as it is defined under the MRFA, since it is undisputed that her home was only a few days from foreclosure, and plaintiff's conduct in inducing her to sign the quitclaim deed would

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355 (1984). Thus, a mortgagee's interest in property is an insurable one to the extent of the debt. *Kerrigan v. Unity Sav. Ass'n*, 58 Ill. 2d 20, 25 (1974).

therefore be in violation of the MRFA.

¶ 51 Plaintiff argues, and we agree, that the MRFA is inapplicable to the instant case because it was not enacted into law until January 1, 2007, well after plaintiff made his deal with Murray in 2005. Allstate does not attempt to argue that the MRFA, as such, would apply retroactively to plaintiff's case. Instead, Allstate claims that the MRFA was merely the codification of preexisting public policy, such that plaintiff's actions would have been considered fraudulent under common law even prior to the enactment of the MRFA. It asserts that this conclusion is "evident from even a cursory review of statutes and case law." However, it does not proceed to cite any statutes or cases in support of the proposition that, prior to the enactment of the MRFA, it was considered fraud under Illinois law to purchase a distressed property for less than a certain percentage of its fair market value.

¶ 52 The elements of common law fraud in Illinois are as follows: " '(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury.' " *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 75 (1994), quoting *Siegel v. Levy Organization Development Co.*, 153 Ill.2d 534, 542-43 (1992). In this case, the record is insufficient to demonstrate that these elements have been met. In particular, there is no evidence sufficient to establish that plaintiff made any false statement of material fact to Murray when obtaining the quitclaim deed from her, or, for that matter, during

the course of their dealings, the record being devoid of any testimony by Murray with regard to her interactions with the plaintiff. Correspondingly, there is no evidence of any reliance by Murray upon any such misrepresentations.

¶ 53 Consequently, there is insufficient evidence at this summary judgment stage to establish that plaintiff's conduct was fraudulent under Illinois common law as a matter of law. The trial court therefore erred in finding at the summary judgment stage that plaintiff had no insurable interest whatsoever in the subject property. Although, as noted, the evidence is overwhelming that plaintiff did not enjoy an owner's interest in the property, there remains an issue of fact as to whether he would be left with a mortgagee's interest or, as Allstate contends, no interest at all.

¶ 54 C. Whether Consideration Was Given For the Deed

¶ 55 Notwithstanding the foregoing, Allstate contends that the quitclaim deed was invalid because plaintiff gave no consideration for the deed. This contention is without merit.

¶ 56 "Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them." *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 112 (1999). In this case, plaintiff's sworn statement to Allstate establishes that Skrobot paid the $11,581.95 delinquency on Murray's mortgage, and, in exchange, Murray executed a mortgage agreement in which she agreed to repay the sum of $11,581.95 to Skrobot as well as the quitclaim deed purporting to convey title to plaintiff. It is therefore apparent from the undisputed facts that these two documents, both signed by Murray on June 23, 2005, were in consideration of Skrobot's payment of $11,581.95 on the mortgage, notwithstanding the fact that one went to Skrobot and the other went to plaintiff. See Restatement (Second) of Contracts §71,

Comment *e* (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.").

¶ 57 Allstate nevertheless argues that, since Murray's execution of the mortgage agreement in favor of Skrobot was given in exchange for Skrobot's payment of $11,581.95, Murray's signing of the quitclaim deed could not also be given in exchange for Skrobot's payment of $11,581.95. In support, Allstate cites as its sole authority the case of *Doyle*, 186 Ill. 2d 104. *Doyle* stands for the proposition that, once a contract has been formed, any modification to that contract requires consideration to be valid and enforceable. *Doyle*, 186 Ill. 2d at 112. Thus, where the plaintiff employees entered into an employment contract with the defendant employer under the terms stated in the employee handbook, and the employer subsequently changed the terms of that handbook without there being any consideration for such change, such subsequent change was not binding. *Doyle*, 186 Ill. 2d at 112-13.

¶ 58 Allstate appears to argue that Murray's mortgage agreement with Skrobot is analogous to the employment contract in *Doyle*, while the quitclaim deed is analogous to the *Doyle* employer's subsequent modification of the handbook. However, that analogy does not withstand scrutiny, because the mortgage agreement with Skrobot and the quitclaim deed were both bargained for as part of the same transaction by which Skrobot paid the delinquency on Murray's mortgage. Therefore, it would appear that the quitclaim deed was not a subsequent modification of an existing contract but, rather, part and parcel of the original agreement by which Skrobot paid the delinquency on Murray's mortgage. This is corroborated by plaintiff's testimony that it was as part of the mortgage deal that Skrobot induced Murray to deed her property to plaintiff's

trust. We further note that the movant has not presented any evidence to the contrary. Therefore, *Doyle*, which deals solely with an attempt to modify a contract after it has already been formed, is inapposite. See *Doyle*, 186 Ill. 2d at 112.

¶ 59 D. Whether the Mortgage Was Satisfied Prior to the Time of the Fire

¶ 60 Allstate's final contention is that, even if the quitclaim deed that Murray signed on June 23, 2005, created an equitable mortgage in favor of plaintiff, any mortgagee's interest gained by plaintiff would have been extinguished on August 25, 2005, when Skrobot signed the release deed quitclaiming all interest in the property in favor of Murray.

¶ 61 In making this argument, Allstate conflates the mortgage that Murray executed in favor of Skrobot with the quitclaim deed that Murray signed on the same date, assuming that, if the interest conferred by the former is extinguished, the interest conferred by the latter must necessarily be extinguished as well. However, such an assumption is contradicted by the text of the release deed itself, in which Skrobot releases

> "all right, title, interest, claim or demand whatsoever he may have acquired in, through, or by a certain mort. bearing date the 23 day of June A.D., 05, and recorded in the Recorder's Office of Cook County, in the State of Illinois, as Document No. 0518647101 to the premises therein described ***."

Document No. 0518647101 is the June 23, 2005, mortgage that Murray executed in favor of Skrobot. Thus, by its very terms, the release deed limits itself to releasing the interest created by that specific document, and not any interest created by any other document, such as any mortgage interest that plaintiff might have received by virtue of of the quitclaim deed. See 29

Williston on Contracts § 73:7 (4th ed. 2011) ("If the court determines the language of a release to be clear and unambiguous, it will ascertain the intent of the parties in accordance with the plain and ordinary meaning of the language chosen by them to express their intent. Thus, an unambiguous release is to be construed and then enforced according to its terms.") Moreover, even if the language of the release would have been ambiguous, such that we would look to parol evidence of the parties' intent, plaintiff's undisputed statement and his undeniable purpose was to have Skrobot sign the release deed not as a means of relinquishing plaintiff's interest in the property, but, in fact, as a means of protecting plaintiff's interest in the property, because, in plaintiff's words, "It was very clear whatever I did after a while I wanted clear title." See 29 Williston on Contracts § 73:7 (4th ed. 2011) ("a release is to be construed in accordance with, and will be limited and controlled in its operation by, the intent of the parties given its nature, object and purpose"). Thus, we cannot conclude at the summary judgment stage that the release deed signed by Skrobot purporting to release Skrobot's mortgage interest in the property would have also released any mortgagee's interest in the property that might have been held by plaintiff.

¶ 62 We therefore affirm the trial court's grant of summary judgment to the extent that it held that plaintiff did not have an owner's interest in the property, insofar as the undisputed facts demonstrate that plaintiff would, at best, have a mortgagee's interest in the property, but we reverse its finding that plaintiff had no ownership interest at all, since genuine issues of fact remain with respect to that determination.

¶ 63 Affirmed in part, reversed in part, and remanded.