

No. 1-10-0772

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

SECOND DIVISION
May 17, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--|---|--------------------|
| JP MORGAN CHASE BANK NATIONAL ASSOCIATION, |) | Appeal from the |
| |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 09 M1 721092 |
| |) | |
| LEWIS BOND and TRELICIA THOMAS and |) | |
| UNKNOWN OCCUPANTS, |) | Honorable |
| |) | Sheldon C. Garber, |
| Defendant-Appellants. |) | Judge Presiding. |

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

HELD: In a forcible entry action against defendants, tenants of mortgaged residential premises pursuant to a lease from the mortgagor, summary judgment for plaintiff, mortgagee and purchaser in the foreclosure sale, was inappropriate where plaintiff failed to establish clearly as a matter of law either that it commenced the forcible entry action properly or that its interest in the premises superseded defendants' interest.

Defendants Trelicia Thomas and Lewis Bond appeal pro se from an order of the circuit court granting summary judgment for plaintiff J.P. Morgan Chase Bank in its forcible entry and detainer action against defendants and awarding possession of the premises in question to plaintiff. On appeal, defendants contend that the summary judgment for plaintiff was erroneously granted because they had a valid lease for the premises binding upon plaintiff, plaintiff did not comply with the requirements of the Code of Civil Procedure (Code) (735 ILCS 5/1-101 et seq. (West 2008)) regarding the commencement of this case, and the judgment for plaintiff is contrary to federal law.

On August 26, 2009, plaintiff filed a complaint alleging that it brought a mortgage foreclosure action against Eugenia Rindner (or Rinder) on February 20, 2008, and was awarded a judgment in October 2008. On March 13, 2009, the court approved the sale of, and awarded possession of, the mortgaged premises to plaintiff under that judgment. Plaintiff alleged that defendants were unlawfully withholding possession of the premises by "residing in the premises." Attached to the complaint was the March 2009 order in the foreclosure case, naming only Rindner and National City Bank as defendants, finding that only Rindner was occupying the premises, and providing that a further court order would be required to evict anyone but Rindner.

Defendants appeared pro se in October 2009, listing the premises as their mutual address.

Also in October 2009, plaintiff filed a motion for summary judgment. Plaintiff stated that the instant case was brought pursuant to section 15-1701(d) of the Code (735 ILCS 5/15-1701(d) (West 2008)), authorizing the purchaser in a foreclosure sale to terminate under Article 9 of the Code (735 ILCS 5/9-101 et seq. (West 2008)) the possession of any occupants of the premises who were not parties to the foreclosure action. Plaintiff alleged that it purchased the premises in the foreclosure sale, that it was not a party to any lease for the premises with defendants, and that defendants have no recorded interest in the premises. In compliance with Article 9, plaintiff served a demand for possession upon defendants, after which defendants maintained occupancy of the premises in that they "are residing at the subject property without the permission of the Plaintiff." Plaintiff alleged that defendants had not provided proof of any right to possession of the premises or raised any affirmative defenses to the instant action.

Attached to the motion was a copy of a demand for possession and notice of intent to file a forcible entry and detainer action (the "demand and notice") dated May 11, 2009, and affidavits to the effect that the demand and notice was served by posting at the premises on May 22 at 7 a.m. The affidavits did not indicate

that the demand and notice was also served by another method such as personal service or mail.

In December 2009, defendants filed a motion to dismiss and an answer. Defendants noted that, under amended section 15-1701(h)(4) of the Code (Pub. Act 95-933 (eff. Aug. 26, 2008) (amending 735 ILCS 5/15-1701)), a purchaser at a foreclosure sale cannot file a forcible entry and detainer action against a tenant of the mortgaged premises until 90 days after proper service of a notice of intent to file. Defendants alleged that they were not served with such a notice. Defendants also alleged that they were in lawful possession of the premises under a pre-paid lease with Rindner that included an option to purchase the premises. Plaintiff acknowledged receiving the motion to dismiss in open court on January 7, 2010, but there is no indication on this record of any disposition of the motion.

In February 2010, defendants, now represented by counsel, responded to plaintiff's summary judgment motion. Defendants alleged that Rindner and defendant Bond entered into a lease with option to purchase on February 1, 2008. The lease was paid in full for four years, with defendants having a 30-year option to purchase the premises. Thus, they argued, their occupancy of the premises is lawful until the end of the lease in February 2012. Defendants also alleged that they were not named as parties, nor did they appear as parties, in the foreclosure action. They

argued that, under the Code, tenants are not necessary parties to a foreclosure action but, as unknown "owners" of the premises, the foreclosure plaintiff must make a diligent attempt to provide them notice of the foreclosure proceedings. *Applegate Apartments Ltd. Partnership v. Commercial Coin Laundry Systems*, 276 Ill. App. 3d 433 (1995). Thus, a tenant is not bound by a foreclosure judgment where a diligent attempt was not made to notify the tenant of the action. Defendants alleged that plaintiff did not give them proper notice of the foreclosure case but instead used service by publication upon unknown owners.

Attached to the motion response was a copy of the lease between Rindner and defendant Bond, providing that \$120,000 had already been paid as four years' rent with \$2,500 monthly rent after February 2012 and a provision that the rent would serve as a down payment if the 30-year option to purchase was exercised.

Plaintiff replied in support of its summary judgment motion, arguing that it was not bound by the lease as it was not recorded. Against defendants' assertion that tenants are unknown owners and as such not bound by a foreclosure judgment where diligent efforts were not made to notify them of the foreclosure proceedings, plaintiff argued that Applegate Apartments involved a consent foreclosure while the instant case involves a judicial foreclosure. 735 ILCS 5/15-1402, -1404 (West 2008). Plaintiff conceded that defendants lawfully possessed the premises while

the foreclosure action was pending since they were not named parties, but noted that section 15-1701(d) of the Code (735 ILCS 5/15-1701(d) (West 2008)) authorizes a forcible entry action against occupants of mortgaged premises who were not parties to the foreclosure action. Plaintiff also acknowledged amended section 15-1701(h)(4) (Pub. Act 95-933 (eff. Aug. 26, 2008) (amending 735 ILCS 5/15-1701)), requiring service of a notice of intent to file a forcible entry action 90 days before commencing an action, and alleged that it had complied with the requirement.

On March 8, 2010, the court granted summary judgment for plaintiff and issued an order for possession of the premises against defendants. This appeal timely followed.

On appeal, defendants contend that the summary judgment for plaintiff was erroneously granted because they had a valid lease for the premises binding upon plaintiff, plaintiff did not comply with the Code requirements on commencing a forcible entry action, and the judgment for plaintiff is contrary to federal law.

Before proceeding to the merits of this appeal, we briefly address defendants' request that we disregard plaintiff's brief as untimely by noting that we granted plaintiff leave to file its brief *instanter* in December 2010. Also before proceeding, we must consider plaintiff's argument that defendants forfeited two of their contentions by not raising them in the circuit court.

The first allegedly forfeited contention is that plaintiff did not comply with Code section 15-1701(h)(4), requiring service of a notice of intent 90 days before commencement of a forcible entry action. Defendants' motion to dismiss raised the issue but was apparently not disposed of by the court, either by striking it or by ruling upon it. However, plaintiff itself raised this issue when it asserted in its reply in support of its motion that it had complied with the Code provision in question. Though defendants did not properly raise the issue of whether the notice was properly served, plaintiff asserted that it complied with the statute, which in turn expressly requires proper service of the notice. Plaintiff also provided the court a copy of the demand and notice herein and of the affidavits of service for the same. The issue was presented to the trial court, which had what it needed to decide the issue.

We agree with plaintiff, however, that defendants have forfeited their contention that the judgment for plaintiff violates federal law. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, §§ 701-702, 123 Stat. 1632 (eff. May 20, 2009)("Federal Act"). Though defendants' response to the summary judgment motion was prepared by counsel and filed in February 2010, they did not cite the Federal Act. While defendants argue that they cited the Federal Act in arguments, the record on appeal does not include a transcript or appropriate

substitute (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for any of the proceedings. Defendants are obligated to provide us a sufficiently complete record of the trial court proceedings to support their claims of error. In re Marriage of Gulla and Kanaval, 234 Ill. 2d 414, 422 (2009). We must also disregard defendants' attempt to provide documentation in the appendix to their reply brief, because documents not included in the record may not be included in the briefs (Harshman v. DePhillips, 218 Ill. 2d 482, 488-89 (2006); Lake v. State, 401 Ill. App. 3d 350, 352 (2010)) and because Supreme Court Rules 321 (eff. Feb. 1, 1994) and 329 (eff. Jan. 1, 2006) provide an appropriate method of introducing such documents. We conclude on this record that defendants forfeited this particular issue and deprived the circuit court of the ability to remedy the error they now allege. Colella v. JMS Trucking Co., 403 Ill. App. 3d 82, 95 (2010); Stahelin v. Forest Preserve District of Du Page County, 401 Ill. App. 3d 1030, 1041 (2010).

We therefore turn to the merits of the two issues upon which the parties properly joined issue in the circuit court: whether plaintiff complied with the Code provisions regarding the commencement of the forcible entry case, and whether plaintiff is bound by the lease interposed by defendants.

Summary judgment is appropriate only when the record, including any documents attached to the summary judgment motion,

"show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). We review de novo the circuit court's grant of summary judgment. J.P. Morgan Chase Bank v. Earth Foods, Inc., 238 Ill. 2d 455, 461 (2010).

Section 15-1701 of the Code, governing the right to possession pursuant to a foreclosure judgment and sale, provides that a purchaser of foreclosed premises may seek possession from an occupant of the premises who was not a party to the foreclosure case by commencing a proceeding under Article 9 of the Code, the Forcible Entry and Detainer Act (735 ILCS 5/9-101 et seq. (West 2008)), but may not do so "until after 30 days after the order confirming the sale is entered." 735 ILCS 5/15-1701(d) (West 2008). Also:

"No mortgagee-in-possession, receiver or holder of a certificate of sale or deed, or purchaser who fails to file a supplemental petition under this subsection during the pendency of a mortgage foreclosure shall file a forcible entry and detainer action against a tenant of the mortgaged real estate until 90 days after a notice of intent to file such action has been

properly served upon the tenant." 735

ILCS 5/15-1701(h)(4) (West 2008).

A demand or notice is served by delivering a copy to the tenant, or an occupant of the premises 13 years' old or older, or by registered or certified mail for persons with a contract to purchase the premises, "or in case no one is in the actual possession of the premises, then by posting the same on the premises." 735 ILCS 5/9-104, 9-104.1(c) (West 2008). Because the Code expressly limits service by posting to cases where nobody is in possession, service is defective and a forcible entry case cannot proceed where actual occupants are served by posting alone. *Figueroa v. Deacon*, 404 Ill. App. 3d 48 (2010).

Here, both plaintiff and defendants admitted or alleged that defendants were residing on the premises, so that it is not in dispute for purposes of the summary judgment motion. However, the evidence presented by plaintiff in support of its motion showed service of the requisite notice of intent to file and demand for possession by posting alone, a method inappropriate for possessed property. While we need not consider whether defendants were also served with the notice and demand by a proper method, we find that plaintiff did not establish on this record a clear right to summary judgment as a matter of law.

Similarly, plaintiff failed to establish as a matter of law for purposes of summary judgment that its rights under the

foreclosure judgment sale superseded those of defendants under their lease.

Section 15-1501 of the Code provides that "persons having a possessory interest in the mortgaged real estate" are not necessary parties to a foreclosure but may be named as parties. 735 ILCS 5/15-1501(a), (b)(1) (West 2008). "[A]ny disposition of the mortgaged real estate [in a foreclosure judgment] shall be subject to (I) the interest 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 2008).

Section 15-1502 of the Code concerns the rights and interests of nonrecord claimants of mortgaged premises in a foreclosure action. 735 ILCS 5/15-1502 (West 2008). A nonrecord claimant is a person with an interest in mortgaged real estate that includes a right of homestead if his interest is not disclosed at the time a notice of foreclosure is filed, such disclosure being accomplished either by being recorded with the recorder of deeds or by being specifically referenced in a legal proceeding. 735 ILCS 5/15-1210, -1218 (West 2008). The interests of a nonrecord claimant in the mortgaged premises are barred or terminated by a judgment of foreclosure if the claimant received proper notice of the proceedings as provided in section 15-1502. 735 ILCS 5/15-1502(b) (West 2008).

A party seeking to bar or terminate the interests of nonrecord claimants must file an affidavit listing all known nonrecord claimants by name and address; the affidavit may be made on information and belief, and the affiant need not inquire into the identities of nonrecord claimants. 735 ILCS 5/15-1502(c)(1) (West 2008). Notice is served by mail and newspaper publication, addressed by name to known nonrecord claimants and to unknown nonrecord claimants as "nonrecord claimants." 735 ILCS 5/15-1502(c)(1), (2) (West 2008). While the failure to file an affidavit or give notice under section 15-1502, or inaccuracies in the affidavit, "shall not invalidate any sale made" in the foreclosure action, a nonrecord claimant whose interest was barred or terminated due to an inaccurate affidavit or lack of notice may bring suit against the party who filed the affidavit. 735 ILCS 5/15-1502(c)(3), (4) (West 2008).

Here, defendants are nonrecord claimants, since their undisputed residency of the premises gave them a right of homestead. 735 ILCS 5/12-901 (West 2008)(possession by lease is a homestead interest). This case is thus distinguishable from Applegate Apartments, relied upon by defendants, where the tenant in possession was not a nonrecord claimant because it was a commercial tenant and thus did not have a homestead right or one of the other nonrecord claimant interests. Applegate Apartments, 276 Ill. App. 3d at 436, 439.

Conversely, plaintiff's contention that its purchase in foreclosure terminates defendants' lease because the latter was not recorded is not by itself dispositive, since non-recording is inherent in the concept of nonrecord claimants. Similarly, we do not accept plaintiff's contention that because a Code provision governing foreclosure contemplates terminating a tenant's possession before the lease has expired (735 ILCS 5/15-1701(h)(4) (West 2008)), therefore "[i]f a tenant's lease survived the foreclosure, there would be no need for [that provision] because the tenant would always be able to stay in the property for the duration of the lease." While Applegate Apartments is not directly applicable here, as stated above, it does clearly establish that some leases can survive foreclosure. We must therefore conclude that the Code provision cited by plaintiff does not establish that all leases are superseded or terminated by foreclosure but merely concerns a tenant's rights if his lease does not survive foreclosure.

Plaintiff's summary judgment motion and reply in support thereof established that plaintiff did not name defendants as a party in the foreclosure action but failed to establish whether they were named as nonrecord claimants in an affidavit, or served with notice, pursuant to section 15-1502. Thus, plaintiff failed to establish as a clear matter of law that defendants' interest in the premises were barred or terminated by the foreclosure

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judgment, and summary judgment for plaintiff on that point was inappropriate.

Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further proceedings.

Vacated and remanded.