2013 IL App (1st) 121562-U

FIRST DIVISION
March 25, 2013

No. 1-12-1562

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUMMITBRIDGE CREDIT INVESTMENT, LLC, as Assignee and Successor in Interest to Cole Taylor Bank, Plaintiff-Appellee, v. 4432-4444 W. WEST END, LLC, an Illinois Limited Liability Company, MARIAN AVRAM, and MARCEL AVRAM, Defendants-Appellants, (The City of Chicago, The City of Chicago Department of Water Management, Unknown Owners, and Nonrecord Claimants, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 08 CH 45923 Honorable Thomas R. Mulroy, Jr., Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

O R D E R

¶ 1 ***Held***: We affirm the judgment in this foreclosure action, where the mortgage clearly allowed the mortgagee to apply insurance proceeds–which were less than the total amount owed–to the debt without waiving its other remedies and rights and without

extinguishing or satisfying the entire debt.

¶ 2 Defendants-appellants, 4432-4444 W. West End, LLC, an Illinois limited liability company (West End), and Marian and Marcela Avram (the Avrams), appeal from the circuit court's orders: (1) denying their motion to dismiss; (2) entering a judgment of foreclosure and sale, after granting summary judgment in favor of plaintiff-appellee, Summitbridge Credit Investment, LLC, as assignee and successor in interest to Cole Taylor Bank (Summitbridge); and (3) confirming the sale. Defendants contend that Summitbridge's acceptance of insurance proceeds during the pendency of the foreclosure action, in an amount less than the total amount owed, acted to satisfy defendants' debt and precluded further action on the mortgage. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This mortgage foreclosure action was filed against West End, the Avrams, and certain other defendants who are not parties to this appeal. The suit was based on a loan of over $6 million made by Cole Taylor Bank (Cole Taylor) to West End to finance the costs of renovating a sixty-unit apartment building located at 4434-4444 W. West End Avenue in Chicago (the property) and converting the units to condominiums. West End executed a promissory note, construction loan agreement, and construction mortgage (mortgage) in connection with the loan. The Avrams signed a guaranty of payment and performance.

¶ 5 Paragraph 6.1(A) of the mortgage required West End, as the mortgagor, to maintain certain insurance coverages on the property, including a policy insuring against loss or damage. Paragraphs 6.1(B) and 6.1(D) stated that the insurance policies were to be for the benefit of both West End and Cole Taylor, and required those policies to either include standard mortgage clauses in favor of Cole

Taylor or to name Cole Taylor as an additional loss payee. Paragraph 7.1 of the mortgage provided that, should the property be damaged, West End would be responsible to restore the premises and could use insurance proceeds for such a purpose subject to certain restrictions as set forth in the mortgage. One such restriction was contained in paragraph 7.1(D), which provided:

> "D. If an Event of Default shall occur, or if in Mortgagee's reasonable estimation the Restoration shall not be completed prior to the maturity of the Note, then, upon thirty (30) days' notice from Mortgagee to Mortgagor, all insurance proceeds received by Mortgagee may be retained by Mortgagee and applied in payment of the mortgage indebtedness and to any excess repaid to or for the account of Mortgagor."

The mortgage defined the term "indebtedness" as "all obligations of Mortgagor or Guarantor" under the mortgage and other loan agreements and all other obligations of the mortgagor or guarantor which might arise. Paragraph 19.1(E) set forth that the proceeds of any sale of the property and "all amounts received by Mortgagee by reason of any holding, operation or management of the Mortgaged Premises *** together with any other moneys at the time held by Mortgagee, shall be applied" to the debt in a certain manner and in a specified order.

¶ 6 In the event of a default, Cole Taylor had the right under paragraph 19.1(A) of the mortgage to "[e]xercise any and all" remedies available, including the right to foreclose on the mortgage and, without the possibility of any objection by West End, seek the appointment of a receiver. Paragraph 23.1 provided that the remedies available to Cole Taylor under the law and under the loan documents were considered cumulative, and that "the exercise of any right, power or remedy shall not preclude the simultaneous or later exercise of any other right, power or remedy." The note and construction

loan agreement similarly provided that Cole Taylor's remedies were cumulative.

¶ 7 Paragraph 25.1 contained the following provision:

> "25.1 No Waiver. No delay or failure by Mortgagee to insist upon the strict performance of any term hereof or of the Note or of any of the other Loan Documents or to exercise any right, power or remedy provided for herein or therein as a consequence of an Event of Default hereunder or thereunder, and no acceptance of any payment of the principal, interest or premium if any, on the Note during the continuance of any such Event of Default, shall constitute a waiver of any such term, such Event of Default or such right, power or remedy. The exercise by the Mortgagee of any right, power or remedy conferred upon it by this or any other Loan Document or by law or equity shall not preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No waiver of any Event of Default hereunder shall affect or alter this Mortgage, which shall continue in full force and effect with respect to other then existing or subsequent Events of Default." (Underlining in the original.)

The construction loan agreement included a similar provision.

¶ 8 The mortgage defined the mortgagee as Cole Taylor and "its successors and assignees." The note stated that it "inure[d] to the benefit of the Lender and its successors and assigns" and defined "Lender" to include Cole Taylor and any subsequent holders of the note.

¶ 9 Cole Taylor filed suit after West End defaulted on its payments. The complaint alleged that the amount due as of December 8, 2008, was $4,718,015.98. By an order entered on November 17, 2009, Summitbridge was substituted as the plaintiff based on an assignment of the note and

mortgage made by Cole Taylor on September 30, 2009.

¶ 10 Thereafter, the circuit court appointed as receiver, Eric J. Janssen, of Chicago Real Estate Resources, Inc.(the receiver), pursuant to sections 15-1702 (735 ILCS 5/15-1702 (West (2008)) and 15-1705 (735 ILCS 5/15-1705 (West 2008)) of the Illinois Mortgage Foreclosure Law (Foreclosure Law). The order set out in detail the powers and authority of the receiver over the property and included a provision which stated that the receiver shall receive any proceeds paid under "the insurance policies affecting the [p]roperty."

¶ 11 In his fifth report to the court, the receiver stated the building on the property had been damaged during break-ins which had occurred in August and October of 2009. The company that insured the property made payments of $267,295.07 and $48,931.06 on March 4, 2010. In that same report, the receiver asked permission of the circuit court to release $225,000 in excess insurance proceeds to Summitbridge. Additionally, Summitbridge filed a motion asking that the insurance proceeds be disbursed to it and that those proceeds be applied to the outstanding mortgage debt pursuant to section 5/15-1704(d)(8) of the Foreclosure Law. 735 ILCS 5/15-1704(d)(8) (West 2010). In response to that motion, West End and the Avrams argued that the insurance proceeds should, instead, be used to repair the property. In reply to this argument, Summitbridge contended paragraph 7.1(D) of the mortgage allowed the proceeds to be applied to the balance owed under the loan.

¶ 12 In a surreply, West End and the Avrams argued that Summitbridge, by seeking to apply the insurance proceeds to the outstanding debt under paragraph 7.1(D), must do so in full satisfaction of their obligations. West End and the Avrams then filed a motion to dismiss the suit based on their

argument that Summitbridge's acceptance of the insurance proceeds would satisfy the outstanding debt.

¶ 13 In a written order entered on January 4, 2011, the circuit court granted the request to disburse the excess insurance proceeds to Summitbridge and denied the motion to dismiss. The court found that the reading of paragraph 7.1(D) advanced by West End and the Avrams was contrary to its plain terms, and that Summitbridge's acceptance of the insurance proceeds would not serve to satisfy the loan in full when those funds were less than the outstanding loan balance.

¶ 14 The court entered summary judgment against West End and the Avrams on July 19, 2010. A judgment of foreclosure and sale was entered on February 24, 2011. In that order, the court found the outstanding loan amount was $5,271,705.05, plus interest. The court also directed that the property be sold. At the May 11, 2011, public sale, Summitbridge was the highest bidder, and it purchased the property for $700,000. The court entered an order approving the report of sale and distribution on June 27, 2011. The order stated that defendant had objected to the confirmation "based on arguments previously submitted to the court related to plaintiff's acceptance of insurance proceeds for the underlying property." An *in personam* deficiency judgment of $4,671,143.62, plus interest, was entered against West End and the Avrams.

¶ 15 West End and the Avrams appealed, seeking reversal of the circuit court's orders: (1) granting plaintiff's motion for an order disbursing the insurance proceeds and denying their motion to dismiss; (2) granting plaintiff summary judgment and a judgment for foreclosure and sale; and (3) approving the sale.

¶ 16 II. ANALYSIS

¶ 17 West End and the Avrams argue that their debt was satisfied when Summitbridge elected to retain the excess insurance proceeds under paragraph 7.1(D) of the mortgage and, therefore, the circuit court erred in denying their motion to dismiss, entering judgment in favor of Summitbridge, and confirming the sale of the property. We disagree.

¶ 18 Initially, we consider that the primary point of error raised by West End and the Avrams is the circuit court's denial of their motion to dismiss. Specifically, they argue that the motion to dismiss should have been granted and the property returned to them free of any lien or interest in favor of Summitbridge.

¶ 19 Generally, the denial of a motion to dismiss is not a final and appealable order. *Cabinet Service Tile, Inc. v. Schroeder*, 255 Ill. App. 3d 865, 868 (1993). However, "[a]n appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009). "Consequently, a court of review has jurisdiction to review an interlocutory order that constitutes a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Id*. Under the doctrine of merger, however, the denial of a motion to dismiss may, at times, not be reviewable after a decision on the merits. See generally *Paulson v. Suson*, 97 Ill. App. 3d 326, 328 (1981) (where the court held that the denial of a motion to dismiss is not reviewable after a trial because it merges with judgment).

¶ 20 Because the circuit court's denial of the motion to dismiss was a procedural step toward the final judgment confirming the sale after foreclosure, we find that review of that order is proper. Moreover, because the issue before us is one of contractual interpretation and, thus, presents any

questions of law reviewed *de novo* (*Hartz Construction Co., Inc. v. Village of Western Springs*, 2012 IL App (1st) 103108, ¶ 27), and because West End and the Avrams again argued in their objection to the confirmation of the sale that their obligations were satisfied under paragraph 7.1(D), we find the merger doctrine to be inapplicable (see generally *Walters v. Yellow Cab Co.*, 273 Ill. App. 3d 729, 736 (1995)).

¶ 21 In this appeal, we are called upon to determine the meaning of paragraph 7.1(D) of the mortgage. "A mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 111 (1993). Therefore, the well established rules of contract construction are applicable. When interpreting a contract, we must give the words at issue their plain, ordinary meaning, while ascertaining and giving affect to the intent of the contracting parties. *Fan v. Auster Co., Inc.*, 389 Ill. App. 3d 633, 648 (2009). "A contract is 'construed as a whole giving effect to every provision.' " *Id*. at 649 (quoting *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007). "[W]hen the contract terms are clear and unambiguous, the intent of the parties must be discerned only from the language used in the contract itself." *Continental Mobile Telephone Co., Inc. v. Chicago SMSA Ltd. Partnership*, 225 Ill. App. 3d 317, 323 (1992). The language of the contract will not be considered ambiguous simply because the parties disagree as to its construction. *Id.*

¶ 22 Paragraph 7.1(D), stated that "all insurance proceeds received by the Mortgagee may be retained by the Mortgagee and applied in payment of the mortgage indebtedness and to any excess repaid to or for the account of Mortgagor." It is not disputed that Summitbridge had a right to apply

the insurance proceeds to the debt. Further, there is no dispute that the total of the excess insurance proceeds ($225,000) was far below the amount of indebtedness, both at the time the suit was filed (over $4,000,000), and at the time of judgment (over $5,000,000). Both sides maintain that the language of paragraph 7.1(D) is clear and unambiguous, but they debate its meaning. West End and the Avrams read the words "applied in payment of the mortgage indebtedness" to mean that Summitbridge's acceptance of the insurance proceeds satisfies the whole debt. Summitbridge, on the other hand, maintains that the language of paragraph 7.1(D) plainly states that any insurance proceeds which are less than the total amount owed are to be applied to reduce the balance due, and not in satisfaction of the debt as a whole.

¶ 23 As the word "applied" is undefined in the mortgage, we give the term its ordinary and plain meaning. *Continental Cas. Co. v. Howard Hoffman and Assoc.*, 2011 IL App (1st) 100957, ¶ 60. Black's Law Dictionary defines "apply" as "[to] employ for a limited purpose," and provides as an example: "apply payments to a reduction in interest." *Black's Law Dictionary*, 116 (9th ed. 2009). "Applied" has been defined as "put to practical use." *Webster's Third New International Dictionary*, 105 (1993). In contrast, "satisfaction" is defined as "[t]he fulfillment of an obligation; esp., the payment in full of a debt" (*Black's Law Dictionary*, 1460 (9th ed. 2009)), and the phrase "satisfaction of mortgage" is defined as "[t]he complete payment of a mortgage." *Id*.

¶ 24 Giving the language of paragraph 7.1(D) its plain meaning, we find that the insurance proceeds, which were less than the total amount owed, were to be "employed for the limited purpose" of reducing the indebtedness, and not in satisfaction, complete payment or fulfillment of the obligations or the whole debt under the mortgage. To construe paragraph 7.1(D) in the manner

suggested by West End and the Avrams would require us to ignore the plain language of that paragraph and to rewrite the "contract to provide a better bargain to suit [them]." *Resolution Trust*, 248 Ill. App. 3d at 112.

¶ 25 Moreover, our reading of paragraph 7.1(D) is consistent with the mortgage as a whole. The mortgage set forth the mechanics of how any proceeds received by Summitbridge should be applied to the debt. That section did not provide that any monies received by Summitbridge, which are less than the entire amount due, should be applied to satisfy the debt as a whole. Additionally, the mortgage clearly provided that all remedies available to Summitbridge were cumulative, and that Summitbridge's choice to exercise one remedy did not preclude it from the exercise of any other right or remedy. Finally, the mortgage specifically stated that, should Summitbridge chose to exercise any of its rights, it would not waive any of the remedies, rights, or powers conferred upon it by the mortgage, loan documents, or the law. Considering the mortgage in its entirety–as is required–we find that, by exercising its contractual right to apply the insurance proceeds to the outstanding debt, Summitbridge was not prevented from also exercising its power to enforce its right to full collection of the remaining debt, and to seek foreclosure upon and the sale of the property. Therefore, the circuit court committed no error in rejecting the interpretation of paragraph 7.1(D) urged by West End and the Avrams and denying their motion to dismiss.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm the denial of the motion to dismiss, the granting of summary judgment, the entry of a judgment of foreclosure, and the confirmation of the sale and distribution.

¶ 28 Affirmed.