2013 IL App (1st) 121944-U

SIXTH DIVISION
November 1, 2013

No. 1-12-1944

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN BARRY and FELICITIA CONFREY, Plaintiffs-Appellees, v. DIVISION II, LLC, as Successor in Interest to Pratt II, LLC, as Assignee of Banco Popular North America, Defendant-Appellant (2534 W. Division Maplewood, LLC, an Illinois Limited Liability Company, Banco Popular North America, Unknown Others and Non-record Claimants, Defendants).	)	Appeal from the Circuit Court of Cook County.
DIVISION II, LLC, as Successor in Interest to Pratt II, LLC, as Assignee of Banco Popular North America, Plaintiff-Appellant, v. JOHN BARRY and FELICITIA CONFREY, Defendants-Appellees (2543 West Division Maplewood, LLC, a/k/a 2534 W. Division Maplewood, LLC, a Dissolved Illinois Limited Liability Company, Relu Stan, Marco Salerno, Marco Schiavoni, Unknown Others and Non-record Claimants, Defendants).	)	Nos. 08 CH 14407 09 CH 41034 (consolidated) Honorable Franklin U. Valderrama and Jean Prendergast Rooney, Judges Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held***: Judgment of foreclosure and related orders are reversed, and the matter is remanded for further proceedings, where the circuit court's determination of mortgage priority was in error.

¶ 2 This appeal arises out of two underlying mortgage foreclosure actions. In one underlying case, plaintiffs-appellees and defendants-appellees, John Barry and Felicitia Confrey (sellers), sought to foreclose on a mortgage executed at the time they sold a parcel of real estate to defendant, 2534 W. Division Maplewood, LLC, an Illinois limited liability company (Maplewood). At the time of the sale, a mortgage was also executed by Maplewood in favor of defendant-appellant and plaintiff-appellant, Division II, LLC, as successor in interest to Pratt II, LLC, as assignee of Banco Popular North America (Division),[1] which brought the other underlying foreclosure action.

¶ 3 After these two actions were consolidated below, the sellers and Division brought cross-motions for summary judgment to determine the priority of their respective mortgage liens. The circuit court granted the sellers' motion and denied the motion of Division, thus determining that the sellers' lien had priority. Thereafter, the sellers and Division litigated issues related to both the sellers' ability to include attorney fees in their mortgage lien and the reasonableness of those fees.

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[1] This mortgage was originally executed in favor of Banco Popular North America. Following two assignments and substitutions of party occurring after these two lawsuits were filed, Division is now the holder of this mortgage and is both the proper plaintiff in its own foreclosure action and a defendant in the sellers' foreclosure action. Our caption, thus, reflects the current alignment and names of the parties. For convenience, our future references to "Division" in this order will also include reference to all the prior holders of the mortgage Maplewood originally executed in favor of Banco Popular North America.

The circuit court ultimately concluded that the sellers' attorney fees could be included in their lien and that the majority of those fees were reasonable. The circuit court then entered a judgment of foreclosure–one which included attorney fees–in favor of the sellers. Division's motion to reconsider the circuit court's orders related to lien priority and attorney fees, as well as the judgment of foreclosure itself, was denied.

¶ 4 Division has appealed, and for the following reasons we: (1) reverse the circuit court's entry of summary judgment in favor of the sellers on the issue of lien priority and enter summary judgment in favor of Division; (2) reverse the circuit court's judgment of foreclosure in favor of the sellers; and (3) remand for further proceedings consistent with this order.

¶ 5 I. BACKGROUND

¶ 6 Because we reverse the circuit court's ruling on the issue of lien priority, and because our conclusion on that issue is dispositive, only those facts necessary to resolve this issue on appeal will be recited.

¶ 7 The record reflects that on August 18, 2006, the sellers sold a parcel of real estate located at 2534 West Division Street in Chicago, Illinois (the property) to Maplewood. On that same date, Maplewood executed: (1) a $30,000 note promising to repay a loan from the sellers, as well as a mortgage on the property securing that note; and (2) a $386,250 note promising to repay a loan from Division, as well as a mortgage on the property securing that note. The sellers' mortgage was recorded with the Cook County recorder of deeds on August 23, 2006. Division's mortgage was not recorded until October 12, 2006, when it was filed immediately after the August 18, 2006, warranty deed transferring the property from the sellers to Maplewood was recorded. A modification of

Division's mortgage was executed by Division and Maplewood on March 1, 2007, and recorded on May 16, 2007.

¶ 8 On April 18, 2008, the sellers filed a complaint to foreclose its mortgage on the property. Division was among the named defendants in that action. On October 22, 2009, Division filed a complaint to foreclosure its mortgage on the property, and the sellers were among the named defendants whose "interest in or lien on" the property Division sought to terminate. The two foreclosure actions were consolidated by an order of the circuit court entered on March 8, 2010.

¶ 9 On June 28, 2012, the sellers filed a motion for summary judgment, in which they indicated that there was a "lien dispute" between them and Division with respect to their respective mortgages on the property. The sellers further asserted that their mortgage was recorded first, that neither lien indicated "on its face that it was a first mortgage," and that the modification of Division's mortgage was executed without the sellers' notice or consent. The sellers then requested that the circuit court find their mortgage was the first lien on the property, that Division's lien is inferior, and that summary judgment on this issue should be entered in their favor and against Division.

¶ 10 On July 26, 2010, Division filed a response and cross-motion for summary judgment on the issue of lien priority. Therein, Division asserted that its mortgage lien had priority despite the fact that it was not recorded until after the sellers' mortgage lien because: (1) Division's mortgage was a "purchase-money mortgage" used to finance Maplewood's purchase of the property, while the documents exchanged by the parties during discovery–including answers to interrogatories and documents associated with the real estate closing– reflected that the sellers' mortgage only secured a loan used to complete after-sale construction on the property; (2) the sellers' acknowledged in

interrogatory responses that they had prior notice of Division's lien, however, they had no intention that their lien would necessarily have priority; and (3) the subsequent modification of Division's mortgage and note did not increase Maplewood's indebtedness and, therefore, did not require the sellers' consent and did not cause Division to lose its lien priority.

¶ 11 The record does not contain a report of proceedings of any hearing or argument on the cross-motions for summary judgment. However, on October 26, 2010, the circuit court entered an order that granted the sellers' motion for summary judgment and denied Divisions' cross-motion for summary judgment.[2]

¶ 12 Thereafter, the sellers filed a motion seeking the entry of a judgment of foreclosure that would include an award of attorney fees. In response, Division filed an objection asserting both that; (1) the sellers were not entitled to include their claim for attorney fees in the amount of their mortgage lien under the terms of their mortgage and note; and (2) the amount of attorney fees the sellers were claiming was unreasonable. On October 6, 2011, the circuit court entered an order finding that the sellers were in fact entitled to include attorney fees in their mortgage lien on the property. On December 16, 2011, the circuit court entered a judgment of foreclosure in favor of the sellers in the amount of $77,456. This amount included: (1) $39,000 in principal and interest due; (2) $38,217.50 in attorney fees; and (3) $1,238.50 in costs.

¶ 13 On January 13, 2012, Division filed a motion which asked the circuit court to reconsider its prior orders granting the sellers summary judgment on the issue of lien priority, finding that the

[2] This order was entered by Judge Franklin U. Valderrama. All of the subsequent orders discussed below were entered by Judge Jean Prendergast Rooney.

sellers could include their attorney fees in their mortgage lien, and entering a judgment of foreclosure in favor of the sellers that included those attorney fees. In the alternative, Division asked that the circuit court make a written finding that there was no just reason to delay enforcement or appeal of those orders pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). In the briefing on Division's motion, Division argued for the first time that, because the sellers' mortgage was recorded before the warranty deed transferring the property from the sellers to Maplewood was recorded, the sellers' mortgage was recorded outside the chain of title and was, therefore, inoperative. The record also reflects that, at the hearing on the motion to reconsider, the sellers argued for the first time that their mortgage was also a purchase-money mortgage.

¶ 14 After a hearing, the circuit court denied Division's motion to reconsider on April 23, 2012. However, the circuit court did make a written finding that the denial of Division's motion to reconsider was a final order, and that there was no just reason to delay enforcement or appeal of that order or the three prior orders challenged by Division in its motion. Division filed a notice of appeal seeking review of all four of those orders, pursuant to Rule 304(a), on May 22, 2012.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Division challenges all four of the circuit court orders discussed above: *i.e.*, (1) the order entering summary judgment in favor of the sellers on the issue of lien priority; (2) the order finding that attorney fees could be included in the sellers' mortgage lien; (3) the judgment of foreclosure, which included the sellers' attorney fees in the judgment amount; and (4) the denial of Division's motion to reconsider. Division and the sellers exchange a host of arguments on these issues in their briefs on appeal. However, we find that this appeal can be resolved solely on the basis

of our conclusion that summary judgment was improperly granted in favor of the sellers and denied to Division on the issue of lien priority.

¶ 17 A. Preliminary Issues

¶ 18 Before considering what we deem to be the dispositive issue of lien priority, we find it necessary to address a number of preliminary issues related to forfeiture and the record on appeal.

¶ 19 First, we agree with the sellers' argument that Division has forfeited the chain of title issue because it was not raised until Division filed its motion to reconsider in the circuit court. There are any number of decisions holding that arguments first raised in a motion to reconsider are deemed forfeited. See, *e.g.*, *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 13 (2013) ("Issues cannot be raised for the first time in the trial court in a motion to reconsider and issues raised for the first time in a motion to reconsider cannot be raised on appeal."); *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 36 (same). Still, there is also authority for the proposition that a circuit court has discretion to consider a new issue raised for the first time in a motion to reconsider, but only when a party has a reasonable explanation for why it did not raise the issue earlier in the proceedings. *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41; *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989) (same).

¶ 20 Here, Division has never provided any explanation for why it did not raise the chain of title issue at the time the parties' cross-motions for summary judgment were originally considered. Under either of the above cited standards, that issue has, therefore, not been properly preserved for appeal. Moreover, because we ultimately resolve this appeal in Division's favor on other grounds, we need not overlook Division's forfeiture of the chain of title issue in the interests of justice. See

Mid-Century Ins. Co. v. Founders Ins. Co., 404 Ill. App. 3d 961, 966 (2010) (appellate court has the authority to overlook any possible forfeiture in order to ensure a just result).

¶ 21 Second, it is apparent from the record that Division has consistently maintained that it held a purchase-money mortgage on the property from the time the parties filed their cross-motions for summary judgment. However, Division asserts that the sellers have forfeited any argument that their mortgage is also a purchase-money mortgage, contending that this claim was first raised by the sellers on appeal. However, as noted above, the sellers did actually make this argument, albeit briefly, at the hearing on Division's motion to reconsider. Moreover, even if the sellers had not raised this issue below, it is well settled that appellees such as the sellers "may raise an issue on review that was not presented to the trial court in order to sustain the judgment, as long as the factual basis for the issue was before the trial court." *DOD Technologies v. Mesirow Ins. Services, Inc.*, 381 Ill. App. 3d 1042, 1050 (2008). The factual basis for the sellers' argument that they also hold a purchase-money mortgage was, in fact, before the circuit court, and we may therefore consider the sellers' argument on appeal along with Division's argument that it holds the only such mortgage.

¶ 22 Third, we note that while the parties debated the possible significance of the subsequent modification of Division's mortgage on the issue of lien priority in the circuit court, no arguments have been raised with respect to that issue on appeal. We, therefore, need not further consider this issue. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (points not argued on appeal are waived).

¶ 23 Fourth, we reiterate that no report of proceedings for the original hearing on the cross-motions for summary judgment has been included in the record. It is generally understood that Division, as the appellant, has the burden to present a sufficiently complete record to support its

claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). However, an incomplete record does not preclude a reviewing court from determining whether a circuit court's findings or rulings are correct where that determination can be made from the record that is actually presented. *In re Dominique W.*, 347 Ill. App. 3d 557, 564 (2004). Here, there is no indication that any additional evidence was presented at the original hearing on the cross-motions for summary judgment, and a report of the proceedings from the hearing on Division's motion to reconsider is included in the record. We, therefore, conclude that the record before us is sufficient to allow us to determine the issues presented.

¶ 24 B. Legal Standards

¶ 25 Our resolution of this appeal involves solely a consideration of the circuit court's rulings on the parties' cross-motions for summary judgment and its denial of Division's motion to reconsider those rulings.

¶ 26 Summary judgment is appropriate only where the pleadings, depositions, admissions and affidavits, viewed in the light most favorable to the nonmovant, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). "By filing cross-motions for summary judgment, the parties agree that no factual issues exist and this case turns solely on legal issues subject to *de novo* review." *Gaffney v. Board of Trustees of Orland Fire Protection Dist.*, 2012 IL 110012, ¶ 73.

¶ 27 Furthermore, the "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northeast Illinois Regional Commuter*

R.R. Corp., 398 Ill. App. 3d 13, 16 (2010). "A ruling on a motion to reconsider is typically reviewed for an abuse of discretion, but a motion to reconsider a grant of summary judgment typically questions the trial court's application of existing law, and the denial of such a motion is reviewed *de novo*." *Wilfong v. L.J. Dodd Const.*, 401 Ill. App. 3d 1044, 1063 (2010); *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 97 (2004) (same); *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 577 (2000) (same). That is the very situation we face here where, with the exception of the chain of title issue, all of the arguments that Division raised in its motion to reconsider with respect to the issue of lien priority had been previously presented to the circuit court at the time it originally ruled on the cross-motions for summary judgment.[3] We will, therefore, apply a *de novo* standard to our review of both the circuit court's rulings on the parties' cross-motions for summary judgment and its denial of the motion to reconsider those rulings.

¶ 28 C. Discussion

¶ 29 Our determination that the circuit court erred in concluding that the sellers' mortgage had priority over the mortgage given to Division is based upon our consideration of the parties' arguments with respect to: (1) whether or not the parties' liens arise out of purchase-money mortgages; and (2) the significance of the fact that the sellers recorded their mortgage first. We

[3] Because we do not consider the propriety of the circuit court's denial of Division's motion to reconsider on the basis of the chain of title issue, we do not apply the abuse of discretion standard applicable where a motion to reconsider presents a new legal theory. See *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 433 (2005) ("when a motion to reconsider sets new matters before the court, such as new facts or legal theories, the submitting party essentially seeks a 'second bite at the apple,' and the circuit court therefore has discretion over whether to consider the new matter as well as its decision on the motion") (quoting *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002)).

address each issue in turn, as our resolution of the former will inform our discussion of the latter.

¶ 30 1. Purchase-Money Mortgage

¶ 31 It is well understood that a "purchase-money mortgage is given concurrently with a conveyance of land to secure the unpaid balance of the purchase price." *In re Application of Busse*, 124 Ill. App. 3d 433, 440 (1984). Such a mortgage need not be granted to the seller of the property, as "the true test as to when a mortgage is a purchase-money mortgage, is not whether it is executed to the vendor, but whether the proceeds are to be used to apply on the purchase price." *Wermes v. McCowan*, 286 Ill. App. 381, 386 (1936). Furthermore, in determining if an instrument is actually a purchase-money mortgage, the"real test is not whether the deed and mortgage were in fact executed at the same instant, but whether they were parts of one continuous transaction, and so intended to be by the parties, so that the two instruments should be given contemporaneous operation in order to promote and carry out the intention of the parties." *Id.* A "purchase-money mortgage usually takes precedence over all other and subsequent claims and liens of every kind against the mortgagor to the extent of the land purchased." *Busse*, 124 Ill. App. 3d at 440.

¶ 32 We first note that Division's loan to Maplewood, which is secured by Division's mortgage, is reflected on the closing officer's settlement statement as representing the bulk of the funds necessary for the purchase of the property from the sellers. Division's loan is also referenced on the title insurance policy commitment and title insurance policy prepared for the closing. Division's mortgage and the deed transferring the property were thereafter recorded simultaneously. Thus, it is evident (and undisputed) that Division's mortgage is a purchase-money mortgage, as it secured a loan that was applied to the purchase price of the property, and the execution of the deed and

Division's mortgage were "parts of one continuous transaction, and so intended to be by the parties." *Wermes*, 286 Ill. App. at 387.

¶ 33 The same cannot be said of the sellers' mortgage. Certainly, that mortgage was executed on the same day as the deed transferring the property to Maplewood. However, that fact is not sufficient to establish the sellers' mortgage as a purchase-money mortgage. Nor is there any other evidence in the record to support the sellers' contention that it holds a purchase-money mortgage.

¶ 34 There is absolutely no reference to the sellers' loan or mortgage on any of the closing documents contained in the record, including the title insurance policy commitment and title insurance policy. Moreover, there is no indication in those documents that the sellers' loan was to be applied to the purchase price of the property. The settlement statement, escrow disbursement statement, and transfer tax stamps contained in the record all reflect a purchase price of $385,000. According to the settlement statement and escrow statement, that purchase price was paid entirely from sources other than the sellers' loan–primarily from the loan secured by Division's mortgage. The sellers themselves signed both the settlement statement and escrow statement and, with respect to the settlement statement, they signed underneath an attestation that it was "a true and accurate statement of all receipt and disbursements made on my account or by me in this transaction." Furthermore, in their answers to interrogatories, the sellers acknowledged that their loan would be used so that Maplewood could "build out the property to conduct their business." While the sellers also characterized their loan as being necessary in order for Maplewood to close, nowhere in their answers to interrogatories did they indicate that the loan was actually applied to the purchase price.

¶ 35 We note that the sellers' argument that their loan was secured by a purchase-money mortgage

relies, in part, upon the fact that the original sales contract called for a $450,000 purchase price, reduced by a $50,000 credit for construction. The sellers appear to contend that their $30,000 loan was intended to partially fund the construction contemplated by this credit, and was, therefore, part of the purchase price. First, we fail to see how a loan for a portion of necessary construction costs, costs that were already accounted for by a *reduction* in the purchase price, could possibly be considered a loan secured by a purchase-money mortgage, as the proceeds of such a loan would not be "used to apply on the purchase price." *Id*. at 386. Second, whatever the intentions of the parties at the time of the original contract as to the price of the property, the closing documents all clearly reflect that the final purchase price was $385,000. All of this amount was paid from sources other than the sellers' loan to Maplewood, with most of this amount paid from the proceeds of Division's loan to Maplewood.

¶ 36 Thus, after a *de novo* review of the undisputed facts contained in the record, we find that there is no evidence to support the sellers' contention that any of its loan was applied to the purchase price of the property.

¶ 37 We also conclude that the undisputed facts do not demonstrate that the execution of the deed and the sellers' mortgage were "parts of one continuous transaction, and so intended to be by the parties." *Id*. Again, the closing documents signed by the sellers do not reference the sellers' loan or mortgage at all. Pursuant to the sellers' attestation on the settlement statement, the items that were referenced therein represented all of the receipts and disbursements made on the sellers' behalf in the transaction. In addition, we note that one of Division's interrogatories to the sellers asked about any title searches completed by the sellers prior to its loan to Maplewood. The sellers responded: "None

other than the title search performed for the *underlying* transaction between [the sellers] and [Maplewood]." (Emphasis added.) Thus, the sellers themselves did not view their loan as part of the "underlying transaction" transferring the property to Maplewood. Finally, we note that the sellers recorded their mortgage separately, while the deed was recorded simultaneously with Division's mortgage.

¶ 38 It is, therefore, clear from the undisputed facts that, as a matter of law, the sellers were not entitled to summary judgment on the issue of lien priority on the theory that their mortgage is a purchase-money mortgage. The seller's mortgage did not secure a loan applied to the purchase price and was not intended to be a part of a continuous transaction transferring the property to Maplewood. Indeed, the undisputed facts establish that, as a matter of law, the only mortgage entitled to the priority generally afforded to purchase-money mortgages was Division's.

¶ 39 2. First in Time, First in Right

¶ 40 While Division's mortgage is, therefore, entitled to priority over the sellers' mortgage because it is the only purchase-money mortgage on the property, it is not entirely clear that this priority necessarily overrides the operation of this state's recording laws and the traditional doctrine of first in time, first in right. This court is not aware of any Illinois authority on the issue, but the Restatement of Property notes that "recording is necessary in order to protect the purchase money mortgagee against liens or other interests that arise against the purchaser-mortgagor *subsequently* to the latter's acquisition of title. " (Emphasis in original.) Restatement (Third) of Property (Mortgages) § 7.2 cmt. b (1997). Thus, we must still consider the possible significance of the fact that it was the sellers who first recorded their mortgage on the property.

¶ 41 A mortgage is defined by the Illinois Mortgage Foreclosure Law (Foreclosure Law) as "any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation." 735 5/15-1207 (West 2010). Under the Foreclosure Law, "from the time a mortgage is recorded it shall be a lien upon the real estate that is the subject of the mortgage for all monies advanced or applied or other obligations secured in accordance with the terms of the mortgage or as authorized by law ***." 735 ILCS 5/15-1301 (West 2010). The Conveyances Act provides:

> "Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated." 765 ILCS 5/28 (West 2010).

The Conveyances Act further provides:

> "All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." 765 ILCS 5/30 (West 2010).

¶ 42 It has, therefore, been recognized that at least with respect to third parties, a mortgage "becomes effective when it is recorded. This is a long-standing rule that has been codified in our statutes ***." *Firstmark Standard Life Insurance Co. v. Superior Bank FSB*, 271 Ill. App. 3d 435, 439 (1995). Furthermore, it is "likewise long-established that this rule gives rise to a presumption

that the first mortgage recorded has priority." *Id*. However, "[t]he doctrine of first in time, first in right is not always as clear and obvious as it may seem." *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 704 (2000). In fact, this presumption of priority is affected by important caveats that prove dispositive of this appeal.

¶ 43 It must be recognized that the very purpose of recording a mortgage is to give constructive notice to third parties and to protect them from unrecorded prior encumbrances. *Id*. at 703-04; *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 634-35 (2000). This is important because "[t]he underlying principle regarding priority of mortgage liens is that the first party to give notice of its lien on real property has the senior lien. Thus, where any party has actual or constructive notice of a prior lien, it will ordinarily take subject to that lien." *Skidmore, Owings & Merrill v. Pathway Financial*, 173 Ill. App. 3d 512, 514 (1988); see also *In re Bruder*, 207 B.R. 151, 156 (N.D. Ill. 1997) ("Illinois is a race-notice jurisdiction, which means that the first to record, *without notice*, has superior rights to those who record later. *** The reason for this is that the first to give notice of its lien on real property has the senior lien, and, by recording the mortgage with the recorder of deeds, the individual filing that mortgage is said to give 'constructive notice' of its lien to all others." (Emphasis added.)).

¶ 44 Here, it is undisputed that the mortgage Maplewood granted to the sellers was recorded with the Cook County recorder of deeds on August 23, 2006, while the mortgage Maplewood granted to Division was not recorded until October 12, 2006. However, it is also undisputed that the sellers had actual notice of Division's unrecorded loan and purchase-money mortgage at the time they recorded their own mortgage. In fact, the record reflects that the sellers had been aware of Division's

mortgage since at least the time of the closing, when they signed the settlement statements detailing Division's loan, accepted the proceeds of that loan as payment for the property, and were present when Maplewood executed its mortgage in favor of Division.[4]

¶ 45 Moreover, while the sellers' mortgage and Division's mortgage were both executed on the same day, it is only logical to view Division's mortgage as the prior lien. It is the only purchase-money mortgage and was, therefore, the only mortgage involved in the actual transaction transferring the property to Maplewood. See *Wermes*,, 286 Ill. App. at 386 (deed transferring property and purchase-money mortgage "given contemporaneous operation"). Thus, only after Maplewood obtained title to the property, title immediately encumbered by its purchase-money mortgage to Division, did Maplewood grant another mortgage on the property to the sellers.

¶ 46 Because the sellers, therefore, had actual knowledge of Division's mortgage at the time it recorded their own mortgage, and because Division's mortgage was necessarily a prior lien *vis-a-vis* the sellers' mortgage, the sellers could not obtain priority for their lien by recording first under the doctrine of first in time, first in right. *Skidmore*, 173 Ill. App. 3d at 514. Indeed, as a matter of law, because the sellers knew about Division's loan before their loan could have been executed, they took their mortgage subject to Division's prior mortgage on the property. *Id*. Division was, therefore, not entitled to summary judgment on the issue of lien priority simply because it recorded its lien first. Rather, the seller's actual knowledge of Division's prior purchase-money mortgage requires us to

[4] In fact, the sellers had notice that Division would have a purchase-money mortgage on the property prior to the closing. The purchase contract called for Maplewood to secure a mortgage by a certain date, and the title insurance commitment–ordered by the sellers' attorney–indicated that Division would be providing a loan for the purchase of the property.

conclude that, as a matter of law, the seller's mortgage was subject to and inferior to Division's mortgage.

¶ 47 3. Resolution

¶ 48 For all the foregoing reasons, we find that the circuit court improperly granted the sellers' motion for summary judgment and denied the summary judgment motion of Division on the issue of lien priority. Therefore, the circuit court also improperly denied Division's motion to reconsider the rulings on the cross-motions for summary judgment. We, therefore, reverse both the circuit court's summary judgment in favor of the sellers and its denial of Division's cross-motion for summary judgment. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994)), we grant summary judgment in favor of Division on the issue of lien priority.

¶ 49 Furthermore, in light of our conclusion that Division's mortgage had priority over the sellers' mortgage, it necessarily follows that the circuit court's judgment of foreclosure in favor of the sellers–one which explicitly found Division's mortgage to be inferior– was improper. We, therefore, reverse that judgment as well. Finally, the order finding that the sellers would be entitled to include its attorney fees in any judgment of foreclosure in its favor has been rendered moot and need not be further considered on appeal. *In re Jonathan P.*, 399 Ill. App. 3d 396, 400 (2010). (" 'An appeal is considered moot where it presents no actual controversy or where the issues involved in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party.' [Citation.] Generally, courts of review do not decide moot questions, render advisory opinions, or consider issues where the result will not be

affected regardless of how those issues are decided. [Citation.]").

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, we reverse the orders of the circuit court granting summary judgment in favor of the sellers, denying Division's cross-motion for summary judgment, and entering a judgment of foreclosure in favor of the sellers. We also enter summary judgment in favor of Division on the issue of lien priority, and remand for further proceedings consistent with this order.

¶ 52 Reversed; judgment entered; cause remanded.