2013 IL App (1st) 122473-U

FIRST DIVISION
November 4, 2013

Nos. 1-12-2473 and 1-12-2653, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ATTORNEYS' TITLE GUARANTY FUND, INC., Plaintiff-Appellee, v. DANIEL BARLOW, Defendant-Appellant (The City of Chicago and The Chicago Transit Authority, Defendants).	)	Appeal from the Circuit Court of Cook County No. 09 L 014735
ATTORNEYS' TITLE GUARANTY FUND, INC., Plaintiff-Appellant, v. THE CITY OF CHICAGO and THE CHICAGO TRANSIT AUTHORITY, Defendants-Appellees (Daniel Barlow, Defendant).	)	Honorable Daniel J. Pierce, Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justice Hoffman concurred in the judgment.
Justice Mason concurred in part and dissented in part.

O R D E R

¶ 1 *Held*: The circuit court erred in granting summary judgment for the plaintiff and dismissing two defendants because questions of material fact existed as to whether the defendant was a *bona fide* purchaser of a piece of property.

¶ 2 Defendant appeals from the circuit court's determination that he breached a real estate contract and statutory warranty deed provisions when he conveyed a parcel of property that he did not own to plaintiff's insured. He also disputes the amount of damages awarded to plaintiff. On appeal, he contends that the circuit court erred in interpreting the statutes governing real estate registration. Additionally, he contends that the damages award was against the manifest weight of the evidence. For the following reasons, we affirm in part and reverse in part and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 In 2004, defendant Daniel Barlow and Christopher Cotey entered into a real estate contract whereby Barlow purportedly conveyed three parcels of real estate to Cotey: a condominium unit, a deeded parking space, and a vacant 360-square foot parcel running along the back of the lot. At issue in this case is whether Barlow had title to the parcel at the back of the lot at the time he conveyed it to Cotey. The property, known as Parcel 3, is legally described as "the east 15 feet of the west 65 feet of Lot 18." The transaction closed on July 30, 2004, and a warranty deed was recorded in Cook County on August 31, 2004.

¶ 5 Plaintiff Attorneys' Title Guarantee Fund (ATG) issued a title insurance policy to Cotey

in the course of this real estate transaction. Some time after closing, Cotey learned that Barlow may not have owned Parcel 3 at the time he conveyed it. Cotey filed a title insurance claim with ATG, which conducted its own investigation into ownership of Parcel 3 and determined that Barlow did not have title when he conveyed it to Cotey. ATG hired an appraiser to value the property and settled Cotey's claim for $162,600. Cotey then assigned his rights to ATG to seek recovery from Barlow.

¶ 6 ATG filed suit against Barlow asserting claims for a breach of the real estate contract and a breach of the statutory warranties that apply to the warranty deed. Paragraph 4 of the contract stated that Barlow "shall execute and deliver to [Cotey] *** a recordable Warranty Deed with release of homestead rights [for each of the three parcels] *** subject only to the following, if any: covenants, conditions, and restrictions of record ***." ATG alleged that the Warranty Deed that was executed by Barlow and delivered to Cotey did not convey "all right, title, and interest" in Parcel 3.

¶ 7 Rather, ATG alleged, Parcel 3 was owned by the City of Chicago (City) pursuant to a judgment order dated April 1, 1942, entered in an eminent domain lawsuit filed in Cook County. The City then enacted an ordinance on April 30, 1945, in which it granted to the Chicago Transit Authority (CTA) the right to "acquire, construct, reconstruct, maintain and operate facilities for local transportation" on Parcel 3. Accordingly, ATG sought to recover from Barlow the $162,600 it paid to Cotey, plus $1,806.25 it paid in appraisal fees.

¶ 8 ATG also filed alternative claims for trespass against the City and CTA. It alleged that the although the City obtained a judgment order to condemn Parcel 3 in 1941, it never perfected

its ownership interest by recording the judgment order with the Office of the Registrar as required by sections 49 and 85 of the Registered Titles (Torrens) Act (765 ILCS 35/49, 85) (West 1990)), a recording statute that was in effect at the time. The City was not listed on the title as it existed in the Torrens registration system.

¶ 9 Consequently, ATG alleged that when Barlow acquired Parcel 3 in 2002, he did so as a *bona fide* purchaser with no actual or constructive notice of the City's claim to the property. Similarly, ATG alleged that when Cotey acquired the property from Barlow, he was also a *bona fide* purchaser.

¶ 10 Therefore, ATG alleged, the City did not have title to the property and it lacked the authority to grant the CTA the right to use the property for transportation purposes. As a result, the CTA's use of Parcel 3 was a "continuous and unlawful entry" that "constitutes an actual interference with Cotey's right to exclusive possession of Parcel 3" and the City and the CTA are liable for trespass. ATG sought $164,406.25 in damages, representing the amount of the claim paid to Cotey plus appraisal expenses.

¶ 11 Finally, ATG asserted another alternative claim for a declaration of ownership of Parcel 3. It asserted that Cotey, Barlow, the City, and the CTA all claimed an ownership interest in the property at some point and their interests should be determined as a matter of law.

¶ 12 Barlow then filed a motion for summary judgment.[1] He argued that he was a *bona fide*

[1] Barlow filed his motion for summary judgment pursuant to ATG's first amended complaint, which only named the CTA as a defendant under the mistaken belief that the CTA obtained the judgment order for condemnation of Parcel 3. ATG filed a second amended complaint while Barlow's motion was pending, which added the City as a defendant and alleged that the City obtained the judgment order and granted the CTA rights to use Parcel 3 pursuant to

purchaser of Parcel 3 and that the City has no claim to the property. He argued that because the City never recorded the judgment order for condemnation of Parcel 3 in the Torrens system, it did not appear as the title owner in the Torrens system. He argued that as a result, the City's purported interest in the property also was not recorded under a new system of title registration that was implemented in 1997.

¶ 13 Barlow explained that in 1997, the Torrens Act was repealed by the Torrens Repeal Law. 765 ILCS 40/1 *et seq*. (West 1997). The Torrens Repeal Law (Repeal Law) required that a Certificate of Title from the Torrens office must be filed with the Cook County Recorder of Deeds (Recorder) to register property under the new recording system and would reflect the title owner as it was listed in the Torrens system. 765 ILCS 40/7 (West 1997). Additionally, he asserted that section 7 of the Repeal Law stated that the newly-filed Certificate of Title "constituted a new chain of record title in the registered owner of any estate or interest as shown on the Certificate [of Title]."

¶ 14 Barlow argued that the Certificate of Title that issued to the Recorder in 1998 reflected that the title owner of Parcel 3 was George Sweet and contained no reference to the City's judgment order. Thus, he argued that whatever interest the City may have had in 1942 was extinguished in 1998 when the Certificate of Title was filed with the Recorder. He argued that he purchased Parcel 3 from Sweet in 2002 as a *bona fide* purchaser, as the chain of title did not reflect any ownership interest in the City or the CTA. Accordingly, as the *bona fide* purchaser,

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an ordinance. The circuit court and the parties appear to treat Barlow's arguments on summary judgment directed at the CTA as applying to the City where applicable, as will this court.

he owned Parcel 3 and transferred it to Cotey in 2004. Therefore, he did not breach the real estate contract or the warranty deed.

¶ 15 While Barlow's motion was pending, the City and the CTA filed motions to dismiss ATG's complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) (Code). It asserted that ATG's claim was barred by the statute of limitations under sections 13-109 and 13-118 of the Code. Specifically, it argued that under section 13-109, "the City and CTA exclusively possessed [Parcel 3] for at least seven consecutive years" and that having obtained tax-exempt status on the property, the City "paid all taxes legally assessed" on the property. Therefore, the City should be considered the legal owner of the property and not subject to this lawsuit. It also argued that under section 13-118, the 1942 judgment order cannot be challenged because "the Torrens Certificates obviously could not be trusted, [meaning] that [ATG], Barlow, and Cotey must be aware of the possibility that the 1942 Order had in fact been registered, but never memorialized."

¶ 16 The City explained that it filed a *lis pendens* against Parcel 3 in 1941, which was registered on the title certificate in the Torrens system. Some time thereafter, the title certificate was separated into two certificates, one of which reflected the *lis pendens* and one that did not. However, it is undisputed that the 1942 judgment order was never registered in the Torrens system. The City explained that the chain of title relied on by Barlow and Cotey and ATG (the George Sweet certificate) originates from the certificate that did not list the *lis pendens*. The other chain of title shows that title was transferred to Louise, Geraldine, and Brenda Fields and only reflected the *lis pendens* until 1962. According to the City, there was "no indication" as to

why the title certificate for Parcel 3 was treated this way. Nevertheless, the City further contended that it obtained tax exempt status for Parcel 3 "for at least the nine-year period from 1997 through 2006."

¶ 17 The City argued that regardless of whether the actual judgment order for condemnation was registered in the Torrens system, it obtained equitable title to Parcel 3 when it paid the condemnation judgment in 1942. The City further argued that because it held equitable title since 1942, it could only be divested of title if there was a conveyance to a *bona fide* purchaser. However, it argued, neither Barlow nor Cotey were *bona fide* purchasers because they had notice of the City's ownership of Parcel 3 through the presence of the CTA station and tracks on the property. It argued that once on notice, Barlow "had a duty to investigate the status of title" to discover why the train operated on the property that he believed to be transferrable. The City contended that he also would have been on notice of its ownership after reviewing the property tax bills that showed Parcel 3 as exempt from taxation. Accordingly, the City claimed that it owned the property and had not been divested of it and, therefore, it was not liable for trespass. In its motion, the CTA argued that it was authorized to use the property by the City pursuant to the 1945 ordinance.

¶ 18 On January 13, 2011, the court held a hearing on the City's and CTA's motions to dismiss. At the outset, the court attempted to understand in "layman's terms" what Parcel 3 looked like. Counsel for the City represented that Parcel 3 was the area between the residential buildings and a CTA pillar, which "looks like an alley." Counsel for the CTA disagreed and presented a photograph to the court "for demonstrative purposes" that purported to show that

Parcel 3 was the area underneath the elevated train tracks between a support beam and a pillar. She also represented that she submitted an affidavit *instanter* from the "vice president of infrastructure" indicating that "the beams have been there for the past at least 48 years."[2] Counsel for Barlow contended that he "[did not] know whether to agree or disagree" with those representations because there was no evidence indicting where the lot lines were. ATG's counsel agreed that between the four parties' attorneys, "we did not have one voice when pointing out to the Court which 15 feet [constituting Parcel 3] we are talking about."

¶ 19 ATG argued that the circuit court must decide which of two scenarios was more likely: either Parcel 3 belonged to the City and the CTA, which meant that Barlow breached the contract and warranties in his attempt to convey property that he did not own; or Parcel 3 belonged to Barlow, which meant that the City and the CTA were trespassers. In either event, it is entitled to recoup the money it paid to Cotey to settle his title insurance claim.

¶ 20 In response to the City's argument, Barlow argued that he received clean title to Parcel 3 in 2002. He further argued that even if property tax exemption was sufficient to constitute property tax payment as required by section 13-109, as the City argued, he had already conveyed the property to Cotey by the time the statute's 7-year limitations period expired. Therefore, the dispute over the City's ownership under section 13-109 was a matter between the City and Cotey. The court took the City's and the CTA's motions to dismiss under advisement at that time.

¶ 21 On March 23, 2011, the court issued a written order disposing of the motions to dismiss

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[2] None of the parties have directed us to the referenced affidavit or the demonstrative photograph in the record on appeal. Nor have they indicated whether these materials have been made part of the record on appeal.

together with Barlow's motion for summary judgment, based on the parties' written submissions and the January 13, 2011, hearing. It found that the following facts were undisputed. In 1941, the City filed condemnation proceedings to acquire Parcel 3, which resulted in a *lis pendens* notice being filed. The City paid the just compensation award in 1942. From 1941 through 1962, the *lis pendens* was shown on the Torrens certificate, but not thereafter. However, the judgment order for condemnation was never registered in the Torrens system. In 1945, the City leased the property to the CTA, which has used the property since 1945 for elevated train tracks and pillars.

¶ 22 The court also noted that after the Repeal Law was enacted, existing Torrens certificates were updated and filed with the Recorder thereby creating a new chain of title outside the protections of the Torrens Act. At the time of this transition to the new system of recording, Sweet was the registered owner of Parcel 3. Sweet sold it to Barlow in 2002 and Barlow sold it to Cotey in 2004.

¶ 23 The court also found that the City obtained tax exempt status on the property. The Torrens certificate and the subsequent registration with the Recorder in 1998 reflected the property's tax exempt status for the years from 1962 to 1965 and from 1972 to 1983. Additionally, since 1997, the property has been marked "exempt" and no real estate taxes have been levied or paid on it.

¶ 24 The court identified the dispute as involving two questions of law. First, whether Barlow was a *bona fide* purchaser of Parcel 3 free of any interest of the City, thus transferring good title to Cotey. Second, whether the City's failure to register the judgment order divests the City of

ownership of the property. It concluded:

> "equitable title to [Parcel 3] rests with the City since 1941, legal title vested with the City upon payment of the just compensation award in 1942, and the City's failure to register the 1942 Judgment during the applicable time of the Torrens Act did not divest the City of its ownership. Any subsequent conveyance of [Parcel 3] by non-City entities was of no effect."

It further found that the subsequent purchases by Sweet, Barlow, and Cotey did not divest the City of its interest and that Barlow "could not convey any interest in [Parcel 3] to Cotey, regardless of his good intentions." Accordingly, the court granted the City's and the CTA's motions to dismiss and denied Barlow's motion for summary judgment.

¶ 25 As such, the court declined to address the City's alternative arguments. However, the court noted that it "flatly rejected" the City's argument that obtaining tax exempt status on a property qualifies as payment of taxes for the purposes of satisfying section 13-109 and distinguished the cases on which the City relied.

¶ 26 In light of the court's order, ATG filed a motion for partial summary judgment for liability against Barlow on the breach of contract and warranty deed claims. The court granted the motion and later held a trial on damages.

¶ 27 At trial, ATG called Vance du Rivage to testify in his capacity as a licensed associate real estate appraiser trainee. He was retained by ATG to perform an appraisal of Parcel 3. However, he testified that he did not perform a full appraisal of the property; rather, he completed a "consulting assignment," which was less rigorous than a full appraisal. He was asked to

determine the diminution in value of the property Cotey contracted to purchase, which measured 24 feet by 75 feet, as compared to the value of the property without Parcel 3, which measured 24 feet by 60 feet.

¶ 28 Du Rivage testified that his evaluation of the property was based on the sales approach in which he used the sales prices of comparable properties to determine the value of the subject property in relationship to the whole property. Based on his comparisons and adjustments, du Rivage concluded that Parcel 3 accounted for 28% of the value of the whole property. He did not arrive at a conclusion as to the price of Parcel 3. His report also cautioned that he was not rendering an opinion of value on Parcel 3. However, he testified that the value could be calculated by multiplying Cotey's purchase price of $674,000 by 28%, which amounts to $188,720.

¶ 29 In his case, Barlow called his expert, Eric Enloe, to testify in his capacity as a certified general real estate appraiser. Enloe testified that he was asked to determine the amount of damages associated with the taking of 360 square feet of land at the property. He stated that he determined the value of the whole property, both with and without Parcel 3 included. He conducted his analysis using May 18, 2008, as the relevant date for determining value because that was the date on which Cotey made his claim with ATG.

¶ 30 Enloe testified that he used vacant land or properties being sold as redevelopment sites as comparable properties in his analysis because Parcel 3 itself is a tract of vacant land. He then made certain adjustments to reflect the difference in the size of the properties examined. Enloe determined that the land value of the property was $360,000, including Parcel 3. He then

determined that the land value of the property was $310,000, not including Parcel 3. Therefore, he concluded that the value of Parcel 3 was $50,000.

¶ 31 ATG then called Howard Richter in rebuttal. Richter testified that Enloe's analysis should have been based on a 2004 date of valuation, when the damages occurred. He also testified that the report was flawed in that it was based on the value of vacant land, which ignored the fact that the property as a whole was improved with the condominium building. Richter testified that although he disagreed with these two major premises of Enloe's analysis, the comparable properties he relied upon were appropriate. However, he disagreed with the adjustments that Enloe made or failed to make in comparing the comparable properties to the subject property.

¶ 32 Following closing arguments, the court rendered the award on damages. In determining the value of Parcel 3, the court first stated that it "did not accept" that Parcel 3 was worth $162,600 just because that was the price ATG paid to settle its claim with Cotey. The court also explained that "having been chief deputy assessor in Cook County for five years, *** I'm probably more exposed to appraisers and their methodologies and techniques than most." The court concluded that the analysis of the property's value should focus on a comparison of vacant land sales and adjustments should be made accordingly. Furthermore, it stated that damages should be determined as of the date of the sale between Cotey and Barlow because that was when the damages were incurred. That was an important distinction in this case because the "real estate market crashed in mid[-]2007 and was plummeting in 2008," but "2004 was probably one of the stronger real estate markets." Thus, the court stated that Enloe was "in the right pew, [but]

he was in the wrong church." On the other hand, the court found Du Rivage's analysis "not very helpful" because he did not account for the value of the structures on the property in determining value.

¶ 33 The court remarked that Enloe's value of $50,000 was insufficient, but that Du Rivage's conclusion was higher than what ATG paid. It concluded that a "fair award to the plaintiff [based on] evidence adduced in the bits and pieces of the testimony from the various witnesses" was $100,000, which included ATG's appraisal fees paid to Du Rivage. Thus, the court determined that the value of Parcel 3 was $98,193.75, after deducting the $1,806.25 cost of ATG's appraisal. The order was entered on July 26, 2012. Barlow appealed from that order and the denial of his summary judgment motion. ATG also appealed, seeking reversal of the court's order dismissing the City and the CTA. Neither the City nor the CTA filed briefs on appeal.

¶ 34 ANALYSIS

¶ 35 On appeal, Barlow argues that he is not liable for breach of contract and breach of warranty because he held legal title to Parcel 3 at the time he conveyed it to Cotey. From a procedural perspective, the court entered summary judgment on liability in favor of ATG on the breach claims based on its earlier finding that Parcel 3 was owned by the City, not Barlow. The court made the latter determination in its order denying Barlow's motion for summary judgment and granting the City's and the CTA's motions to dismiss. Thus, we will first address the court's ruling on those motions.

¶ 36 Summary judgment is appropriate only where " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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.' " *Standard Mutual Ins. Co. v. Lay*, 2013 IL 114617, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2010)). We construe these materials strictly against the movant and liberally in favor of the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Summary judgment is a drastic means of disposing of litigation and should only be granted when the movant's right to judgment is clear and free from doubt. *Id*. The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact actually exists. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from those facts. *Mashal*, 2012 IL 112341, ¶ 49.

¶ 37 Similarly, a motion to dismiss under section 2-619(a)(9) of the Code provides for a means of obtaining a summary disposition as a matter of law. *Zurich Insurance Co. v. Amcast Industries Corp.*, 318 Ill. App. 3d 330, 333 (2000). The questions on appeal from a section 2-619 motion are: (1) whether a genuine issue of material fact exists and (2) whether the movant is entitled to judgment as a matter of law. *Zurich Insurance Co.*, 318 Ill. App. 3d at 333.

¶ 38 In both cases, we review the circuit court's judgment *de novo*. *Lay*, 2013 IL 114617, ¶ 15; *Zurich Insurance Co.*, 318 Ill. App. 3d at 333. Additionally, we may affirm the circuit court on any basis that is supported by the record, even if our reasoning differs from that of the circuit court. *Wells v. St. Bernard Hospital*, 2013 IL App (1st) 113512, ¶ 49.

¶ 39 Here, the circuit court determined that the City was the rightful owner of Parcel 3 and that

it duly authorized the CTA to use the property. It found that the City obtained *equitable title* in 1941 and that "*legal title* vested with the City upon payment of the just compensation award in 1942," citing *Application of County Collector (Burdash v. Olsen)*, 48 Ill. App. 3d 572, 578-79 (1977) (*Burdash*) in support. (Emphasis added.)

¶ 40 However, the circuit court misstated the holding of *Burdash*. In *Burdash*, the court held that "*equitable title* passed [to a government agency following a condemnation proceeding] upon the deposit of the [condemnation] award despite the failure to register [the condemnation order in the Torrens system]." (Emphasis added.) *Burdash*, 48 Ill. App. 3d at 579. *Burdash* made the distinction that the "full transfer of title as contemplated by the Torrens Act" would only occur after the condemnation order was registered with the registrar under the Torrens system. *Id.* at 578. However, the "taking by condemnation *** transferred *equitable title* to the [government entity]." (Emphasis added.) *Id*. This is consistent with the supreme court's longstanding recognition that " 'under the Torrens Act it is the registration itself which completes the conveyance of legal title.' " *Echols v. Olsen*, 63 Ill. 2d 270, 277 (1976) (quoting *Kostelny v. Peterson*, 19 Ill. 2d 480, 484 (1960)). As a result, the City obtained equitable, but not legal, title to Parcel 3 at the time it paid the judgment in 1942. The question then becomes what interest, if any, it held from that point on.

¶ 41 Barlow contends that such equitable interests may be destroyed as, for example, when the property is transferred to a *bona fide* purchaser without notice of the unrecorded interest, which he claims to be. He relies on the following language from Restatement (First) of Property § 6 in support of this argument:

> "As a result of recording statutes passed in various States, unrecorded legal interests as well as equitable interests may be destroyed by a transfer to a purchaser for value and without notice of the recorded interest." Restatement (First) of Property § 6 cmt. b.

Although the Illinois Supreme Court has not adopted this restatement and it is not binding on this court, we may consider it as persuasive authority. *Tilschner v. Spangler*, 409 Ill. App. 3d 988, 990 (2011). More importantly, decisions of other our appellate districts have held the same. See *Pool v. Rutherford*, 336 Ill. App. 516, 523 (1949) ("equitable interests are cut off by transfers to *bona fide* purchasers for value without notice"); *United Community Bank v. Prairie State Bank & Trust*, 2012 IL App (4th) 110973, ¶¶ 35-39 (holding that a purchaser of real estate is not charged with notice of another's equitable interest in land under the terms of a purchase contract if the contract was not recorded). ATG has not offered any authority to the contrary and we have found none. Accordingly, we conclude that the legal rule is applicable here and that the City's equitable interest is capable of being destroyed by a transfer to a *bona fide* purchaser.

¶ 42 Contrary to the circuit court's view, whether or not Barlow was a *bona fide* purchaser of Parcel 3 so as to "cut off" the City's equitable interest is a disputed question of fact that precludes summary judgment or a motion to dismiss. *Schaffner v. 514 West Grant Place Condominium Association, Inc.*, 324 Ill. App. 3d 1033, 1046 (2001). A *bona fide* purchaser of an interest in property takes that interest free and clear from all claims except those of which he has notice. *Schaffner*, 324 Ill. App. 3d at 1045-46. Such notice may be actual or constructive and contemplates the existence of circumstances or facts either known to a prospective purchaser or

of which he is chargeable with knowledge which imposes upon such purchaser the duty of inquiry. *Schaffner*, 324 Ill. App. 3d at 1046. Evidence of possession of a premises by another may constitute inquiry notice, but that, too, is a question of fact that cannot be resolved on summary disposition. *U.S. Bank National Association v. Villasensor*, 2012 IL App (1st) 120061, ¶¶ 69-70; *Banco Popular v. Beneficial Systems, Inc.*, 335 Ill. App. 3d 196, 210-11 (2002). The party charging actual or constructive notice has the burden of proof on this issue. *Pedersen and Houpt*, 2012 IL App (1st) 112971, ¶ 31.

¶ 43 On appeal, Barlow and ATG disagree as to whether Barlow was a *bona fide* purchaser at the time he acquired the property. However, little or no evidence was presented on that issue in the court below and it was not fully developed in the record. Although Barlow argues that ATG admitted he was a *bona fide* purchaser when it made that allegation in its complaint for trespass against the City and the CTA, that is not a binding admission by ATG. Although allegations of a complaint are judicial admissions and are conclusive against the pleader, the pleader must have actual knowledge of the facts alleged. *Roti v. Roti*, 364 Ill. App. 3d 191, 200 (2006) (quoting *In re Estate of Rennick*, 181 Ill. 2d 395, 406-07 (1998)). ATG could not have actual knowledge of the information that Barlow had regarding ownership of the property at the time he purchased it from Sweet.

¶ 44 Despite the parties' efforts to argue the issue of notice as a matter of law, it is a question of fact that is not suitable for summary disposition. *Schaffer*, 324 Ill. App. 3d at 1046. More to the point, if it is determined on remand that Barlow did have knowledge of the City's or the CTA's claim on the property, it must also be determined whether Cotey had knowledge of the

City's or the CTA's claim at the time he attempted to acquire the property from Barlow and what effect that finding has on ATG's claims. See *LaSalle National Bank v. 850 De Witt Condominium Association*, 211 Ill. App. 3d 712, 718-19 (1991).

¶ 45 Accordingly, because there is a genuine issue of material fact, the circuit court's summary dismissal of the City and the CTA was erroneous and we reverse and remand the matter to the circuit court for further proceedings. For the same reason, we affirm denial of Barlow's motion for summary judgment. Although we may affirm the circuit court's order on any basis (*Wells*, 2013 IL App (1st) 113512, ¶ 49), including the alternative arguments made by the City, the City did not submit a brief on appeal and did not advance any arguments in its favor. Therefore, we decline to undertake an analysis of those claims.

¶ 46 We also reverse the circuit court's order granting partial summary judgment on ATG's breach of contract and breach of warranty claims. The court concluded that because the City was deemed the owner of Parcel 3, Barlow could not have conveyed all "right, title, and interest" in the property to Cotey and, therefore, Barlow breached the real estate contract and the warranties contained in the deed. In light of our reversal of the court's order as to ownership of Parcel 3, the court's order granting partial summary judgment in favor of ATG must also be reversed. We need not address Barlow's final contention on appeal regarding the propriety of the damages award.

¶ 47 For the foregoing reasons, the court's dismissal of the City and the CTA is reversed, as is the court's grant of partial summary judgment on the breach of contract and breach of warranty

claims. The court's order denying Barlow's motion for summary judgment is affirmed.

¶ 48 Affirmed in part and reversed in part.

¶ 49 Cause remanded.

¶ 50 JUSTICE MASON, concurring in part and dissenting in part.

¶ 51 I agree that the judgment in favor of ATG and against Barlow for $100,000 must be reversed. I cannot agree, however, that the order granting the City and the CTA's motion to dismiss should be reversed. I would remand only for the purpose of further proceedings against Barlow.

¶ 52 1850 N. Bissell is one of many properties in the City of Chicago that abuts elevated train tracks. In 1941, the City commenced condemnation proceedings against one of the parcels comprising 1850 N. Bissell, Parcel 3 (among many others), to obtain land upon which to construct a public system of transportation. In 1942, a judgment of condemnation was entered with respect to Parcel 3 and satisfied by the City. As the majority correctly concludes, the City thus became the equitable owner of Parcel 3.

¶ 53 In 1945, the City passed an ordinance leasing the property acquired to the Chicago Transit Authority for use in constructing and maintaining a public transit system. The grant of authority under the terms of the ordinance was for a period of "50 years and thereafter until terminated." For decades prior to Daniel Barlow's acquisition of 1850 N. Bissell in 2002, and pursuant to its lease with the City, the CTA occupied Parcel 3 (as well as adjacent parcels for several miles north and south of Parcel 3) by erecting elevated tracks and supporting structures and operating trains continuously over the tracks. By 1998, when the Torrens Repeal Law was passed, the CTA had been operating trains over the tracks for more than five decades.

¶ 54 Given the foregoing undisputed facts, as a matter of law, neither Barlow, nor Cotey, or

any of their predecessors in interest could obtain bona fide purchaser for value status so as to divest the City of the interest in the property it acquired in 1942. See *U.S. Bank Nat. Ass'n v. Villasenor***,** 2012 IL App (1st) 120061, ¶ 61, quoting *Whitaker v. Miller*, 83 Ill. 381,386 (1876) ("'Without inquiry, no one can claim to be an innocent purchaser of lands in actual possession of another'"). Therefore, notwithstanding the City's failure to record the judgment it obtained, the City's open and obvious use of the property continuously since its acquisition defeats any claim that a purchaser of Parcel 3 could reasonably believe that title to that parcel was "free and clear" of any adverse interest.

¶ 55 At a minimum, even assuming the Torrens Repeal Law could divest the City of legal title to Parcel 3 because the City's interest did not appear in the chain of title, the City nevertheless retained title by virtue of the doctrine of adverse possession. Municipalities can acquire property through adverse possession. *Drainage Dist. #1 v. Vil. of Green Valley*, 69 Ill. App. 3d 330, 335 (1979). "The essence of the doctrine of adverse possession is the holding of the land adversely to the true titleholder. 'A party, claiming title by adverse possession, always claims in derogation of the right of the real owner. He admits that the legal title is in another. He rests his claim not upon a title in himself, as the true owner, but upon holding adversely to the true owner for the period prescribed by the Statute of Limitations.'" *Joiner v. Janssen,* 85 Ill. 2d 74, 81 (1981) (internal citations omitted). Adverse possession requires the concurrent existence over a minimum of 20 years of the following: 1) (a) continuous, (b) adverse, (c) actual, and (d) open, notorious and exclusive possession of land and 2) a claim of title inconsistent with that of the true owner. *Id.*; *Miller v. Water Reclamation Dist., 374 Ill. App. 3d 188, 189-90 (2007)*. Based on the undisputed

facts in this case, the City satisfies the foregoing requirements. Once the 20-year period for adverse possession has run, the record owner is divested of title. *Knauf v. Ryan*, 338 Ill. App. 3d 265, 271 (2003). Therefore, because the City's adverse possession of Parcel 3 ripened into title prior to the passage of the Torrens Repeal Law, there are no circumstances under which Cotey, Barlow, or any of their predecessors in interest could claim title to Parcel 3.

¶ 56 It is unfortunate that the City and the CTA elected not to file briefs on appeal. Certainly, the court could have benefitted from a discussion of their position on these issues. However, based on the foregoing undisputed facts, I cannot agree that the order granting the CTA's and City's motion to dismiss should be reversed.

¶ 57 I also do not believe that Barlow breached the terms of the warranty deed, but for reasons other than those advanced by him. Pursuant to the terms of the deed, the property, including Parcel 3, was conveyed "subject to existing leases and tenancies." The City's lease of Parcel 3 to the CTA is a matter of public record as embodied in a municipal ordinance included in the record on appeal. That lease was in force at the time Cotey purchased the property and for many decades before that. Thus, no purchaser of 1850 N. Bissell can claim ignorance of the existing lease, again notwithstanding the failure of the City to record its judgment or the failure of the City's interest to appear in the chain of title. See *Ropiy v. Hernandez*, 363 Ill. App. 3d 47, 55 (2006) (motion to dismiss properly granted where ordinance affecting property was a matter of public record prior to time purchaser submitted application for building permit; expenditures made by purchaser "were made with constructive notice of the proposed amendatory zoning ordinance."); *Randels v. Best Real Estate, Inc.,* 243 Ill. App. 3d 801, 807 (1993) (village

ordinance requiring sewer hookup was matter of public knowledge).

¶ 58 Nevertheless, Barlow persists on appeal in his argument that he did, in fact, have title to Parcel 3 and the ability to convey it to Cotey free and clear of the interests of any third parties and, for that reason, is not guilty of any breach. Given the position taken by Barlow, I agree that the matter should be remanded for further proceedings with respect to ATG's claim against Barlow.