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THIRD DIVISION
January 13, 2016

No. 1-14-0666

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FRANKLIN AMERICAN MORTGAGE)	
COMPANY and CLEARVUE ASSETS, L.L.C.,)	Appeal from the Circuit Court
Plaintiffs-Appellees,)	of Cook County, Illinois,
)	Municipal Department, First Judicial
)	District.
v.)	
)	No. 10 CH 32748
7306 NORTH WINCHESTER CONDOMINIUM)	
ASSOCIATION, et. al.,)	The Honorable Alfred M. Swanson,
Defendants-Appellants,)	Jr., Judge Presiding.
)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in holding that the condominium association was not entitled to any unpaid assessments because those assessments had been included in its lien, which was subordinate to the mortgagee's lien, and extinguished upon the issuance of the deed following the judicial foreclosure sale. Pursuant to our supreme court's recent decision in *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, the mortgagee failed to confirm the extinguishment of the said lien by failing to pay any postforeclosure assessment as required under the Illinois Condominium Property Act (765 ILCS 605/9(g)(3) (West 2010)).

¶ 2 In this appeal, the defendant-appellant, 7306 North Winchester Condominium Association

(hereinafter the condominium association) appeals from the order of the circuit court holding that neither the plaintiff-mortgagee, Franklin American Mortgage Company (hereinafter Franklin Mortgage), nor the subsequent assignee, the plaintiff, Clearvue Assets, L.L.C. (hereinafter Clearvue)¹ are responsible for the payment of any of the association's unpaid common expenses incurred prior to the judicial foreclosure sale. The condominium association argues that the court erred in holding: (1) that Franklin Mortgage was not responsible for the unpaid common expenses incurred prior to the judicial foreclosure sale, even though it failed to make any payments for the proportionate share of those expenses subsequent to the foreclosure sale as required under section 9(g)(3) of the Illinois Condominium Property Act (Condominium Property Act) (765 ILCS 605/9(g)(3) (West 2010)); and (2) that section 9(g)(4) of the Condominium Property Act (765 ILCS 605/9(g)(4) (West 2010)) did not apply to the instant matter because the condominium association included all preforeclosure unpaid assessments in its lien, which was subordinate to Franklin Mortgage's lien, thereby absolving Clearvue of any responsibility for those assessments. Neither Franklin Mortgage, nor Clearvue have filed appellee briefs in this appeal. For the reasons that follow, because the condominium association's brief demonstrates *prima facie* reversible error that is supported by the record, we reverse the judgment of the circuit court and remand for further proceedings.

¹ We note that we have corrected the caption in this case to include Clearvue, as an additional plaintiff-appellee. In that respect, we note that Clearvue is listed as an appellee in the notice of appeal filed with this court, and that all of the documents in the record before us reveal that Clearvue was in fact a named party-plaintiff in the cause of action below. In addition, since the attorney of record in this appeal represented both Franklin Mortgage and Clearvue in the proceedings below, proper notice has been given to all the parties.

¶ 3

I. BACKGROUND

¶ 4

The record before us reveals the following facts and procedural history. On July 29, 2010, the original mortgagee, Chase Home Finance, L.L.C., (hereinafter Chase) filed a complaint to foreclose the mortgage against, *inter alia*, the property located at 7306 North Winchester Avenue, Unit 505, Chicago 60626 (hereinafter the unit), the condominium association, and the unit owner, Eric Tripp (hereinafter Tripp). The mortgage documents attached to that complaint reveal that the note was executed on May 21, 2008, and that Franklin Mortgage was the note holder. On August 18, 2010, the condominium association filed its appearance, answer and attorney certificate for the lien claimant. In its answer, the condominium association asserted a lien on the property for unpaid assessments of \$970.14 and accruing at a monthly rate of \$264.64.

¶ 5

On April 29, 2011, the condominium association filed a separate forcible entry and detainer action (in case No. 11 M3 1611) against Tripp, alleging that he had stopped making his association payments on August 20, 2010. On July 28, 2011, the association was granted an order of possession and judgment in the amount of \$6872.44, including: (1) \$4532.44 in common expenses; (2) \$1,776 in attorneys' fees; and (3) \$564 in costs.

¶ 6

On April 16, 2012, Chase proceeded with its foreclosure action and filed several motions, including: (1) a motion for substitution of Franklin Mortgage as the party plaintiff; (2) a motion for default judgment against Tripp; (3) a motion for summary judgment against the condominium association; (4) a motion of appointment of a selling officer; and (5) a motion for judgment of foreclosure and order of sale.

¶ 7

On May 11, 2012, the circuit court, *inter alia*: (1) granted the motion for substitution of

Franklin Mortgage as the party plaintiff;² (2) entered a default judgment against Tripp; (3) entered summary judgment against the condominium association; and (4) entered a judgment of foreclosure and sale. In doing so, the court specifically found that Franklin Mortgage held a senior lien on the property and the condominium association had a junior lien in the amount of \$13,040.41 for unpaid assessments.

¶ 8 A judicial sale was held on August 13, 2012 at which Franklin Mortgage was the highest bidder and acquired the property for the sum of \$40,984.23. On August 30, 2012, Franklin Mortgage filed a motion for order approving report of the foreclosure sale and distribution and possession. Attached to that motion was the notice of sale, which stated in relevant part:

"If this property is a condominium unit, or a unit which is part of a common interest community, the purchaser of the unit at the foreclosure sale, other than a mortgagee, shall pay the assessments and the legal fees required by the Condominium Property Act, 765 ILCS 605/9(g)(1) and (g)4). In accordance with 735 ILCS 5/1501507(c)(1)(h-1) and (h-2), 765 ILCS 605/9(g)(5), and 765 ILCS 605/18.5(g-1), you are hereby notified that the purchaser of the property, other than a mortgagee, shall pay the assessments and legal fees required by subsections (g)(1) and (g)(4) of section 9 and the assessments required by subsection (g-1) of section 18.5 of the Illinois Condominium Property Act."

¶ 9 On September 18, 2012, the circuit court entered an order approving the report of sale and distribution. In that order the circuit court specifically held that the condominium association was entitled to collect assessments "from the first mortgagee only from the first day of the month

² We note that both Chase and Franklin Mortgage were represented by the same counsel, Freedman, Anselmo, Lindberg, L.L.C.

following a sheriff's sale pursuant to 765 ILCS 605/9(g)(3)" and that it had to modify its records accordingly. The court further held that:

"in the event of any resale of the property, any statements of any liens, including a statement of the assessments, late charges, fines, or administrative/management fees and other charges due and owing as authorized and limited by the provision of Section 9 of the Condominium Property Act or the condominium instruments, will not include any pre-foreclosure assessments and will show a \$0 balance as of the date of the first day of the month following the sheriff's/judicial sale."

¶ 10 On September 27, 2012, Franklin Mortgage assigned the property to Clearvue, and a judicial deed to that effect was issued and recorded on November 7, 2012. Subsequently, Clearvue requested that the association issue an assessment letter complying with the court's October 18, 2012, order so that it could market and sell the deeded property. In response, on December 3, 2012, by letter, the condominium association requested that it be paid the full amount of unpaid association assessments totaling, \$11,453.52 (including \$1,687.92 from Clearvue and \$9,765.60 from the purchaser). The condominium association requested payment within 48 hours of the closing date and threatened to institute a forcible entry and detainer action if the payment was not made. In response, by letter dated December 19, 2012, Clearvue proposed that the condominium association issue a letter stating that the seller be responsible for the normal condominium association dues, namely \$269.93 a month for the month of September 2012 to the date of closing, and that the buyers be responsible for the normal statutory share of six (6) months. If the association chose not to issue such a letter, Clearvue threatened the association with a contempt petition. Clearvue added that it had already contacted "the foreclosure attorneys,"

Freedman, Anselmo, Lindberg, L.L.C. (hereinafter Freedman, Anselmo, Lindberg), and that they were prepared to proceed in court.

¶ 11 After the condominium association rejected Clearvue's offer, on February 16, 2013, Clearvue, through counsel, Freedman, Anselmo, Lindberg, filed a petition for rule to show cause against the condominium association. On April 22, 2013, both parties appeared in court, and Clearvue made an oral motion to intervene in the case. The condominium association objected to this motion on the grounds of lack of jurisdiction. The circuit court, however, granted Clearvue's motion to intervene and ordered Clearvue to file an appearance within seven days.³

¶ 12 On May 30, 2013 the condominium association filed a motion to strike Clearvue's petition for rule to show cause. On August 20, 2013, the court requested that the parties submit supplemental briefs to detail what the association had included in its lien in its answer to the mortgage foreclosure action, and the parties complied.

¶ 13 On September 5, 2013, in a written order, the circuit court made its ruling. The circuit court first denied Clearvue's petition for rule to show cause because the petition had not been verified. The court then considered what past due assessment, if any, the association was entitled to. The court held that "[s]ection 9(g)(4) of the Condominium Property Act d[id] not apply in this case" because the condominium association had "included all unpaid assessments in its lien, which was

³ While the record before us does not contain a copy of such an appearance, it is undisputed that Clearvue continued to appear before the circuit court without any objection from the condominium association. What is more, Clearvue continued to be represented by Freedman, Anselmo and Lindberg, the same firm that had already filed a formal appearance with the court as the "mortgage foreclosure attorneys" of record for Chase and Franklin Mortgage in the same proceedings.

subordinate to plaintiff's [Franklin Mortgage's] lien, in this foreclosure action," and which was extinguished upon the issuance of the deed following the judicial foreclosure sale. Accordingly, the court held that Clearvue was not obligated to pay any assessments to the association prior to November 1, 2012, the first month following the judicial foreclosure sale. The court therefore ordered that "[w]ithin seven (7) days of the entry of this order" the condominium association "execute any documents necessary to release its lien for condominium assessment fees dating from before November 1, 2012." In addition, the court noted that its orders granting summary judgment against the condominium association, entering judgment of foreclosure and sale, and approving the report of the sale and distribution "shall stand."

¶ 14 On September 20, 2013, the condominium association filed a motion to reconsider. A month later, on October 23, 2013, Clearvue executed a warranty deed granting the property to Chicago Title Land Trust (hereinafter Chicago Title). Subsequently, on January 7, 2014, Clearvue filed a response to the condominium association's motion to reconsider. After the condominium association filed its reply asking the court to strike Clearvue's response in light of the fact that it was no longer the owner of the property, the circuit court heard arguments on the motion. On February 11, 2014, the court entered an order stating that the motion to reconsider was "granted" as to the issue of the court's proper application of the Condominium Property Act because during the hearing on the motion it had reconsidered its September 5, 2013, ruling. The court then, nevertheless, held that, even after such reconsideration, its September 5, 2013, order "stands." For purposes of finality, the court also explicitly clarified that it was not reconsidering its denial of Clearvue's petition for rule to show cause, but was only reconsidering the merits of its September 5, 2013 order with respect to the issue of the Condominium Property Act, so that any Rule 304(a) language was unnecessary to make its decision a final and appealable one. After the

court entered its order, counsel for Clearvue noted that "the subsequent buyers from Clearvue," Chicago Title were in court and "still can't (*sic*) transfer the property." The court, however, refused to entertain any motions from Chicago Title as it had no appearance on record. The condominium association now appeals.

¶ 15

II. ANALYSIS

¶ 16

On appeal, the condominium association argues that the trial court erred when it found that it was not entitled to collect any unpaid assessments because all of those assessments had already been included in its lien in the mortgage foreclosure action, which was a lien subordinate to Franklin Mortgage's lien and therefore extinguished upon the issuance of the deed following the judicial foreclosure sale. The condominium association argues that pursuant to section 9(g)(3) of the Condominium Property Act (765 ILCS 605/9(g)(3) (West 2010)), Franklin Mortgage failed to extinguish the lien on the unpaid assessments by failing to pay the assessments following the first month after the foreclosure sale. In addition, the condominium association argues that pursuant to section 9(g)(4), and 9(g)(5) of the Condominium Property Act it is entitled to collect six months of the unpaid assessments, including attorney's fees and costs from Clearvue (765 ILCS 605/9 (g)(4), (g)(5) (West 2010)). Neither Franklin Mortgage nor Clearvue have filed briefs in response. However, for the reasons articulated below we find that the condominium association's brief demonstrates *prima facie* reversible error that is supported by the record, and therefore reverse the judgment of the circuit court and remand for further proceedings. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 17

We begin by noting that in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976), our supreme court held that when, as here, faced with the absence of an appellee's brief, a reviewing court has the discretion, *inter alia*, to reverse the trial court's order

if the appellant's brief demonstrates a *prima facie* reversible error that is supported by the record. See *e.g.*, *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). In this context, *prima facie* has been defined as " '[a]t first sight; on first appearance but subject to further evidence or information' and '[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.' " *Thomas*, 395 Ill. App. 3d at 577 (quoting Black's Law Dictionary 1228 (8th ed. 2004)); see also *Talandis*, 63 Ill. 2d at 132 (defining *prima facie* as "at first sight, on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary").

¶ 18 In the present case, the condominium association has met its burden in establishing a *prima facie* case that the trial court's order determining that the condominium association was not entitled to recoup any unpaid assessments incurred prior to November 1, 2012, one month after the judicial foreclosure sale, was reversible error. Very recently in *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, our supreme court addressed the very same arguments raised here by the condominium association, namely under what circumstances a mortgagee and/or a purchaser of a condominium unit at a foreclosure sale remain liable on liens created on the property by way of the prior unit owner's failure to pay the common assessments.

¶ 19 In that case, the court held the plain language of sections 9(g)(1) and 9(g)(3) of the Condominium Property Act (765 ILCS 605/9(g)(1), (g)(3) (West 2010)) provides a two-step procedure which is necessary to extinguish a lien on any unpaid condominium assessments incurred by a prior unit owner. See *Deutsche Bank*, 2015 IL 118372, ¶¶ 26-27. First, pursuant to section 9(g)(1) of the Condominium Property Act (765 ILCS 605/9(g)(1) (West 2010)), the condominium association must be included as a party to the mortgage foreclosure action so that any lien can be extinguished upon the foreclosure sale. *Deutsche Bank*, 2015 IL 118372, ¶ 26.

Second, according to *Deutsche Bank*, pursuant to section 9(g)(3) (765 ILCS 605/9(g)(3) (West 2010)), "an additional step" must be taken "to confirm or formally approve the extinguishment by paying the postforeclosure sale assessments." *Deutsche Bank*, 2015 IL 1183782, ¶ 27.

Without such confirmation, the foreclosure purchaser remains liable on the unpaid assessments. *Deutsche Bank*, 2015 IL 1183782, ¶ 42.

¶ 20 In addition, in *Deutsche Bank*, our supreme court addressed the relationship between sections 9(g)(3), 9(g)(4), and 9(g)(5) of the Condominium Property Act (765 ILCS 605/9(g)(3), 9(g)(4), 9(g)(5), and the obligations for the unpaid assessments they impose on different types of mortgage foreclosure purchasers. *Deutsche Bank*, 2015 IL 1183782, ¶ 31. As the court explained:

"[S]ections 9(g)(4) and 9(g)(5) apply to foreclosure sale purchasers other than mortgagees and to purchasers acquiring title from a mortgagee. Those third-party purchasers are required to pay a prior owner's unpaid assessments that accrued during the six months preceding an action to collect assessments. Section 9(g)(5) requires the notice of the foreclosure sale to state that a purchaser other than a mortgagee must pay those prior unpaid assessments. Sections 9(g)(4) and 9(g)(5), therefore allow condominium associations to recover a portion of the prior owner's unpaid assessments from the new owner.

Section 9(g)(3), in contrast, applies to all foreclosure sale purchasers, including mortgagees, and it simply requires the purchaser to pay assessments beginning the month following the foreclosure sale to confirm the extinguishment of the lien created by the prior owner's failure to pay assessments. Section 9(g)(3) does not require a foreclosure sale purchaser to pay any of the prior owner's unpaid assessments if the purchaser pays the assessments coming due following the sale. Thus, section 9(g)(3) ensures payment of

assessments accruing after the foreclosure sale. Under section 9, mortgagees may be exempted from liability for the prior owner's unpaid assessments, but only if the mortgagee pays the assessments coming due following its purchase of the unit at the foreclosure sale."

Deutsche Bank, 2015 IL 1183782, ¶¶ 32-33.

¶ 21 Based on the principles articulated above, in *Deutsche Bank*, the court held that the purchaser of a condominium unit at the mortgage foreclosure sale had failed to confirm the extinguishment of the lien created by the unpaid assessments of the prior unit owner, by failing to pay any assessment payments after purchasing the property at the foreclosure sale. *Deutsche Bank*, 2015 IL 1183782, ¶ 41. Accordingly, the court held that the purchaser was liable for the full amount of the unpaid assessments. *Deutsche Bank*, 2015 IL 1183782, ¶ 42.

¶ 22 Applying *Deutsch Bank* to the facts of this case, it is apparent that in the instant matter, the trial court's order finding that the condominium association was not entitled to collect any unpaid assessments constitutes reversible error. While the trial court correctly found that the lien created by the prior unit's owner failure to pay the common assessments was extinguished by the foreclosure sale, with the condominium association named a party in the foreclosure action, in order to avoid liability on those assessments, Franklin Mortgage nevertheless needed to confirm the extinguishment of the lien by paying the postforeclosure assessments. Since the record reveals that neither Franklin Mortgage nor Clearvue ever made any such payments, the extinguishment of the lien was not confirmed and the lien is still alive. *Deutsche Bank*, 2015 IL 1183782, ¶ 41. Accordingly, the condominium association is entitled to all unpaid assessments pursuant to 9(g)(1) and 9(g)(4) of the Condominium Property Act (see 765 ILCS 605/9(g)(1), (g)(4) (West 2010)), as well as any costs and reasonable attorney fees incurred in attempting to recoup them (see 765 ILCS 605/9(g)(1) (West 2010) ("If any unit owner shall fail or refuse to

make any payment of the common expenses***, the amount thereof together with any interest, late charges, *reasonable attorney fees* incurred enforcing the covenants of the condominium instruments, rules and regulations of the board of managers, or any applicable statute or ordinance, and *costs of collections* shall constitute a lien on the interest of the unit owner in the property ***." (Emphasis added.)); see also 765 ILCS 605/9.2(b) (West 2010) ("Any attorneys' fees incurred by the Association arising out of a default by any unit owner, *** in the performance of any of the provisions of the condominium instruments, rules and regulations or any applicable statute or ordinance shall be added to, and deemed a part of, his respective share of the common expense.").

¶ 23 Since we find that the condominium association has presented a *prima facie* case of reversible error, we reverse and remand to the trial court for further proceedings. In doing so, we note that we are aware that while the motion to reconsider was pending before the circuit court, Clearvue issued a warranty deed for the property to Chicago Title. As such, the unpaid assessment lien necessarily ran with that property to Chicago Title. See *e.g.*, *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2014 IL App (1st) 130962, ¶17, *affirmed*, 2015 IL 118372 (section 9(g)(1) of the Condominium Property Act "creates a lien on the property, [and] not a personal judgment against the foreclosure purchaser, when assessment payments are not made for the first full month following the judicial foreclosure sale"); see also *Pembroke Condominium Ass'n-One v. North Shore Trust & Savings*, 2013 IL App (2d) 130288, ¶ 13; see also *Newport Condominium Ass'n v. Talman Home Federal Savings & Loan Ass'n of Chicago*, 188 Ill. App. 3d 1054, 1059 (1988) ("[T]he obligation to pay condominium assessments is a covenant that runs with the land and is binding only upon title holders."). For reasons unexplained by the record before us, however, Chicago Title was not made a party to the

proceedings below, or a party to this appeal. What is more, with the passage of time between the circuit court's order and the resolution of this appeal, we have no way of knowing who the current title holder of the property is. Accordingly, for purposes of judicial economy, on remand, the condominium association should be permitted to bring into this action any appropriate party.

¶ 24

III. CONCLUSION

¶ 25

For the reasons that follow, we reverse and remand.

¶ 26

Reversed and remanded.