2016 IL App (1st) 152915-U
No. 1-15-2915
November 15, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MONTALBANO FAMILY INVESTMENT, LLC, ANTHONY P. MONTALBANO, JR. 20015 IRREVOCABLE TRUST, MICHELLE MONTALBANO 2005 IRREVOCABLE TRUST, RAY ROPPOLO 2004 IRREVOCABLE TRUST, and ROBERT ROPPOLO 20015 IRREVOCABLE TRUST, Plaintiffs-Appellants, v. VILLAGE OF LEMONT and M/I HOMES OF CHICAGO, LLC, Defendants-Appellees.	Appeal from the Circuit Court of Cook County No. 15 CH 7250 The Honorable Mary L. Mikva, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: When a contract requires one party to give notice to the other party of any assignment of its right to receive payments, an assignee must also give notice of any further assignment of the right to receive contractual payments.

¶ 2 This case involves the assignment and multiple reassignments of the right to receive payments under a contract. We address the question: When a contract requires the parties to provide notice of an assignment of contractual rights, can an assignee reassign the rights to another without giving notice of the reassignment? We hold that the assignee lacks the power to reassign without notice.

¶ 3 BACKGROUND

¶ 4 In October 2005, the Village of Lemont annexed land owned by HomeWerks-Lemont, LLC. In a document called a "Recapture Agreement," HomeWerks promised to install water mains and sewers in accordance with Lemont's code, and Lemont promised that if it annexed further land in a specified "Benefitted Area," which would use the water mains and sewers HomeWerks built, Lemont would collect from the home owners in the annexed benefitted area and pay to HomeWerks an agreed share of HomeWerks's construction costs. The recapture agreement included the following clause:

> "HomeWerks may assign its rights and obligations under this Ordinances Agreement so long as notice of such assignment is given to the Village within thirty (30) days of such assignment."

¶ 5 The agreement specified the means of notice and the addresses to which the parties needed to send the required notice.

¶ 6 In August 2007, Lemont annexed an area called Glen Oak Estates in the benefitted area described in the recapture agreement. Montalbano Builders, Inc. (MBI), which owned Glen Oak Estates subject to a mortgage, agreed that homeowners who purchased lots in Glen Oak

Estates would owe HomeWerks the recapture fees Lemont promised to collect on HomeWerks's behalf.

¶ 7 A dispute between MBI and HomeWerks led to litigation, which ended with a settlement agreement dated June 11, 2008. Under the settlement contract, MBI agreed to pay to HomeWerks $900,000, and HomeWerks agreed to assign to MBI its recapture rights pertaining to Glen Oak Estates. MBI notified Lemont of the assignment.

¶ 8 Anthony Montalbano, sole shareholder and sole officer of MBI, decided to provide for his family by creating Montalbano Family Investment, LLC (MFI), and irrevocable trusts for each of his four children. He transferred property to the Anthony P. Montalbano Jr. 2005 Irrevocable Trust, the Michelle Montalbano 2005 Irrevocable Trust, the Ray Roppolo 2005 Irrevocable Trust, and the Robert Roppolo 2005 Irrevocable Trust.

¶ 9 In December 2008, Anthony Montalbano signed a document entitled "Partial Satisfaction of Loan Agreement," in which he asserted that the four trusts, acting through MFI, had loaned $1,000,000 to MBI. In exchange for cancellation of $900,000 of that debt, MBI agreed to assign its recapture rights to MFI and the four trusts. None of the parties to the agreement informed Lemont of the assignment of the recapture rights.

¶ 10 MBI entered into another settlement agreement in March 2009, this time to end litigation with Midwest Bank, which held the mortgage on Glen Oak Estates. MBI signed a "Deed in Lieu of Foreclosure," which expressly assigned to Midwest Bank "all governmental credits, refunds and rebates of any kind resulting from the development and operation of the Mortgaged Property, including *** recapture payments." Nothing in the settlement agreement or deed notified Midwest Bank that MBI had purportedly assigned its interest in

recapture payments to the four trusts and MFI. Midwest Bank promptly assigned its interest under the settlement agreement in intangibles, including the recapture rights, to Arizona Illinois REO Trust. Arizona Illinois also received no notice of the prior purported assignment of recapture rights.

¶ 11 In March 2010, a corporation named Glen Oak Estates, LLC (GOELLC), purchased from Arizona Illinois the interest in intangible property related to the Glen Oak Estates area that Lemont had annexed. The contract specifically assigned to GOELLC the recapture rights Arizona Illinois had acquired.

¶ 12 GOELLC had purchased Glen Oak Estates. It then showed Lemont that it owned the property burdened by the recapture provision, and the documents by which it apparently acquired the recapture rights for the Glen Oak Estates area of Lemont. GOELLC asked Lemont to cancel the recapture provision. Lemont adopted a resolution dated August 11, 2014, terminating the recapture agreement insofar as it pertained to Glen Oak Estates.

¶ 13 MBI had declared bankruptcy in 2011. On May 1, 2015, the four trusts and MFI, collectively, filed the complaint that began the lawsuit now on appeal. The plaintiffs named Lemont as defendant, and they named as respondents in discovery GOELLC and M/I Homes, alleging that M/I Homes purchased Glen Oak Estates from GOELLC in August 2014.

¶ 14 The plaintiffs alleged that Lemont gave them no notice of the hearing at which Lemont's board of trustees adopted the resolution terminating the recapture rights for Glen Oak Estates. They claimed that the failure to provide them notice of the hearing made the resolution null and void. The plaintiffs sought an award of $1,300,000 from Lemont in damages caused by the resolution, alleging that the plaintiffs would have received that amount in recapture

payments under the assignment made by MBI to the plaintiffs in December 2008. The plaintiffs filed a notice of *lis pendens* against Glen Oak Estates. M/I Homes, as owner of Glen Oak Estates, filed a motion to quash the notice of *lis pendens*.

¶ 15 Lemont filed a motion to dismiss the complaint under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)), claiming that the purported assignment of recapture rights from MBI to the plaintiffs never took effect, because neither party notified Lemont of the assignment. Lemont supported the motion with an affidavit from the Village official who would have received notice of the assignment if MBI or the plaintiffs had sent such notice. In their response, the plaintiffs did not contest Lemont's contention that they never sent notice of the assignment. Instead, they argued that the recapture agreement did not require MBI to provide notice of any assignment it chose to make of the recapture rights, and that the assignment took effect despite the absence of notice.

¶ 16 The circuit court granted the motion to dismiss the complaint and the motion to quash the notice of *lis pendens*. The plaintiffs now appeal.

¶ 17 ANALYSIS

¶ 18 We review *de novo* an order dismissing the complaint under section 2-619.1 of the Code. *Carr v. Koch*, 2012 IL 113414, ¶ 27. The circuit court held, in effect, that the plaintiffs lacked standing to sue because they never acquired an interest in the recapture rights. The case turns on the interpretation of the recapture agreement.

¶ 19 The recapture agreement required notice to Lemont when HomeWerks assigned its recapture rights. The plaintiffs claim that when MBI obtained the recapture rights from

Home Werks, it had the power to assign the rights to other parties without providing notice to Lemont.

¶ 20 An "assignment operates to transfer to the assignee all of the assignor's right, title, or interest in the thing assigned. [Citations.] The assignee, by acquiring the same rights as the assignor, stands in the shoes of the assignor." *In re Estate of Martinek,* 140 Ill. App. 3d 621, 629-30 (1986). Thus, "the assignee can obtain no greater right or interest than that possessed by the assignor." *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 350 (2000). Because HomeWerks had no right to assign the recapture payments without notice to Lemont, it could not give its assignee the right to further assign the recapture payments without notice to Lemont.

¶ 21 The plaintiffs attempt to distinguish *Owens* on its facts, but they do not explain why the principles stated in *Owens* would not apply. The plaintiffs point out that the recapture agreement does not say "HomeWerks and any subsequent assignees of the recapture rights may assign their rights and obligations under this Ordinances Agreement so long as notice of such assignment is given to Lemont." However, because HomeWerks's assignee could not acquire from HomeWerks a right HomeWerks did not have (see *Litwin v. Timbercrest Estates, Inc.* 37 Ill. App. 3d 956, 958 (1976) (an assignor cannot convey that which he does not have)), the language of the contract sufficiently protects Lemont's right to notice of subsequent assignments.

¶ 22 Moreover, the plaintiffs' interpretation of the recapture agreement would lead to results which would not conform to the contracting parties' reasonable expectations. Under the plaintiffs' interpretation of the agreement, HomeWerks could assign its recapture rights to a

subsidiary, a parent corporation, or any other closely related party, and as long as HomeWerks provided notice of the initial assignment, the closely related party would have no duty to inform Lemont of subsequent assignments. If a situation arose in which Lemont needed to know who held the recapture rights – for instance, if someone who claimed to own both the burdened property and the recapture right proposed cancellation of the recapture rights – and any right holder in the chain of assignments had dissolved or died, Lemont might have no means for conclusively determining who needed notice of the proposal. Lemont could not rely on documents like those involved here, in which MBI assigned all of its intangible rights, including recapture rights, to a bank, because the right holder might have assigned the recapture rights to some other party before the global assignment of intangible rights. And notice to the first assignee would not provide notice to the current right holder, if any person or corporation in the chain of assignments had died or dissolved.

¶ 23 "[T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it." *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 544 (1960). The recapture agreement avoids absurd consequences by its incorporation of the general principle that the assignee stands in the shoes of the assignor and acquires no right greater than the assignor possessed. See *Martinek*, 140 Ill. App. 3d at 629. The incorporation of that principle ensures that all subsequent assignees must notify Lemont of the assignment of recapture rights.

¶ 24 Finally, the plaintiffs argue that if they did not acquire the recapture rights, then neither Midwest Bank nor GOELLC acquired the recapture rights, because Midwest Bank and GOELLC have not presented evidence in this proceeding that they provided timely notice to

Lemont of their acquisition of the recapture rights by assignment. Because the plaintiffs never notified Lemont of the assignment of recapture rights from MBI to the plaintiffs, the assignment of recapture rights to the plaintiffs never took effect, and therefore the plaintiffs lack standing to bring this lawsuit. Another party with a valid claim of ownership of the recapture rights might challenge the claims of Midwest Bank and GOELLC that they own the recapture rights, and then Midwest Bank or GOELLC might need to raise issues of whether they provided adequate notice to Lemont or whether Lemont ratified the assignment despite the lack of contractually required notice. We decide no issue concerning the validity of any such assignment. We hold only that the assignment of recapture rights from MBI to the plaintiffs never took effect because MBI and the plaintiffs did not notify Lemont of the assignment, as required by the recapture agreement.

¶ 25 CONCLUSION

¶ 26 When HomeWerks assigned its recapture rights to MBI, MBI acquired only the rights HomeWerks owned, and therefore MBI could further assign the recapture rights only if MBI notified Lemont of the assignment. MBI never notified Lemont of its purported assignment of its recapture rights to the plaintiffs, so the plaintiffs never acquired the recapture rights. Thus, the plaintiffs lack standing to sue Lemont for cancellation of the recapture rights. Accordingly, we affirm the circuit court's judgment dismissing the plaintiffs' complaint.

¶ 27 Affirmed.