

2017 IL App (1st) 171564-U  
No. 1-17-1564  
August 29, 2017

SECOND DIVISION

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE FOREST PRESERVE DISTRICT OF COOK	)	Appeal from the
COUNTY,	)	Court Circuit of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	09 CH 18291
v.	)	
	)	
ROYALTY PROPERTIES, LLC, CANNON SQUIRES	)	Honorable
PROPERTIES, LLC, RICHARD KIRK CANNON,	)	Daniel Patrick Brennan,
And MERYL SQUIRES-CANNON,	)	Judge Presiding.
	)	
Defendants-Appellants.	)	

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* When a defendant in a mortgage foreclosure action adequately pleads facts supporting the conclusion that the defendant signed the purported mortgage under duress or because of fraud, and never consented to the lien, unless the circuit court hears evidence on the complaint, the court lacks an adequate basis for making the plaintiff a mortgagee in possession.

¶ 2 This appeal involves enforcement of an order the appellate court entered on an earlier appeal. The circuit court granted summary judgment in favor of the Forest Preserve District of Cook County (FPD) and against Richard Cannon, Meryl Squires Cannon, and several

corporations (collectively, the Cannon parties) on a complaint for foreclosure. In the prior appeal, the appellate court held that genuine issues of material fact required reversal of the judgment. On remand, the circuit court reinstated an order that named FPD as mortgagee in possession, even though the order depended upon findings the circuit court had made in the order for summary judgment that this court reversed. We hold in this interlocutory appeal that the record does not justify the decision to name FPD as mortgagee in possession, because the record leaves unresolved genuine issues of material fact as to whether the document FPD presented qualifies as a mortgage and whether FPD counts as a mortgagee. Accordingly, we vacate the order that named FPD as mortgagee in possession.

¶ 3

#### BACKGROUND

¶ 4

On June 8, 2009, Amcore Bank filed a complaint for foreclosure against the Cannon parties. Amcore sought possession of a 400-acre property in Barrington Hills. The Cannon parties filed an answer to the complaint and several affirmative defenses.

¶ 5

In 2013, FPD acquired Amcore's interest in the property. FPD moved for summary judgment on the complaint. The circuit court dismissed the affirmative defenses, and, in an order dated August 30, 2013, granted FPD's motion for summary judgment on the complaint for foreclosure.

¶ 6

In an order dated October 10, 2013, the circuit court granted FPD's motion for placement as mortgagee in possession of the property. In the order, the circuit court relied on its August 30, 2013, order for summary judgment, and its findings that FPD had acquired a valid mortgage for the property, the Cannon parties defaulted on their obligations under the

mortgage, and the Cannon parties failed to state viable affirmative defenses to the complaint for foreclosure.

¶ 7 The Cannon parties appealed from the summary judgment order entered on August 30, 2013. In an order filed October 25, 2016, the appellate court reversed the circuit court's judgment and remanded for further proceedings in accord with the order. *BMO Harris Bank v. Royalty Properties*, 2016 IL App (1st) 151338-U. The appellate court expressly held that the Cannon parties stated several viable affirmative defenses supported by sufficient evidence to withstand the motion for summary judgment. The appellate court found that the Cannon parties stated facts which could support a finding that fraud in the factum rendered the purported mortgage documents void.

¶ 8 Following remand, the circuit court entered an order dated May 30, 2017, in which the court said, "the Plaintiff Forest Preserve District of Cook County is mortgagee in possession, pursuant to the October 10, 2013 ORDER, which is now reinstated." The Cannon parties appealed.

¶ 9 ANALYSIS

¶ 10 Supreme Court Rule 307(a)(4) (eff. July 1, 2017) gives this court jurisdiction over this interlocutory appeal. The Cannon parties argue that the circuit court needed to resolve several factual issues before it could name FPD as mortgagee in possession.

¶ 11 FPD argues that we should allow the circuit court's order to stand because the Cannon parties never filed a motion specifically requesting an evidentiary hearing on the issue of whether to appoint FPD as mortgagee in possession. Even if we find that the Cannon parties waived the issue, the waiver does not limit this court, which remains responsible for

achieving a just result. Because the case presents an issue of law, and the parties have fully briefed the issue, we choose to address the issue of whether the record before the circuit court justified the decision to name FPD as mortgagee in possession. See *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518-19 (2000).

¶ 12 The Illinois Mortgage Foreclosure Law provides:

"A request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion \*\*\*.

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\*\*\* After reasonable notice has been given to all other parties, the court shall promptly hold a hearing and promptly rule on a request that a mortgagee be placed in possession or that a receiver be appointed, except that, if no objection to the request is made prior to the time specified for the hearing, the court shall rule without a hearing." 735 ILCS 5/15-1706(a), (c) (West 2016).

¶ 13 The Foreclosure Law defines a mortgage as a "consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation." 735 ILCS 5/15-1207 (West 2016). The trial court has discretion to award a mortgagee possession, "provided that the mortgagee shows (1) that the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause." *CenterPoint Properties Trust v. Olde Prairie Block Owner*, 398 Ill. App. 3d 388, 392 (2010); see 735 ILCS 5/15-1701(b)(2) (West 2016).

¶ 14 In our prior opinion in this case, we held that the Cannon parties adequately alleged facts that could support a finding that Amcore obtained the Cannons' signatures on the purported mortgage documents through "[f]raud in the factum, also called fraud in the execution, [which] 'arises when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms.' " *BMO Harris*, 2016 IL App (1st) 151338-U ¶ 29, *quoting Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 774 (9th Cir. 1986). We noted that such fraud "would render the instrument entirely void." *BMO Harris*, 2016 IL App (1st) 151338-U ¶ 29, *quoting Langley v. FDIC*, 484 U.S. 86, 93 (1987).

¶ 15 The Cannon parties' allegations in their affirmative defenses, on which the circuit court has heard no testimony, would support a finding that no written instrument created a "consensual lien," because Amcore obtained the Cannons' signatures on the purported mortgage through fraud or duress. Because the circuit court has not yet heard sufficient evidence to determine whether the document FPD presented meets the statutory definition of "mortgage," and whether Amcore and those who derive their rights from Amcore qualify as mortgagees, the circuit court did not have an adequate basis for naming FPD as mortgagee in possession.

¶ 16 CONCLUSION

¶ 17 The allegations and evidence in the record leave unresolved genuine issues of material fact as to whether the document FPD presented qualifies as a mortgage and whether FPD has the rights of a mortgagee. Thus, the record does not yet permit the circuit court to designate

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FPD as a mortgagee in possession of the property at issue. We vacate the order naming FPD as mortgagee in possession and remand for further proceedings in accord with this order.

¶ 18 Vacated and remanded.