2016 IL App (2d) 160050-U
No. 2-16-0050
Order filed November 21, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LUZERN RICHTER, Plaintiff-Appellee, v. VACATION VILLAGE VENTURE, LLC; VACATION VILLAGE HOMEOWNERS ASSOCIATION; BOARD OF MANAGERS OF VACATION VILLAGE ASSOCIATION; UNKNOWN OWNERS; and NONRECORD CLAIMANTS, Defendants (Luzern Richter, Plaintiff-Counter-Defendant; Vacation Village Venture, LLC, Defendant-Counter-Defendant; Vacation Village Homeowners Association, Defendant-Appellant; Vacation Village Association, Defendant-Counter-Plaintiff; Board of Managers of Vacation Village Association, Defendant-Counter-Plaintiff; Unknown Owners, Defendants-Counter-Defendants; and Nonrecord Claimants, Defendants-Counter-Defendants).	)	Appeal from the Circuit Court of Lake County. No. 11-CH-3675 Honorable Mitchell L. Hoffman, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly foreclosed on subsequent creditor's judgment and mortgage liens and ordered sale of subject property, where prior owner had negligently released its mortgage on the property and the subsequent creditor, who was a third party, had no actual knowledge of such, thereby precluding equitable lien remedy in its favor. Affirmed.

¶ 2 Plaintiff, Luzern Richter, sought to foreclose a judgment and mortgage against certain property. Defendant and counter-plaintiff, Vacation Village Homeowners Association (HOA),[1] sought to void a release and quitclaim deed it had tendered to Vacation Village Venture, LLC (LLC) a developer, and requested an equitable lien against the property that would be superior to Luzern's liens. Following a bench trial, the trial court entered judgment in Luzern's favor on both counts in his amended complaint and against HOA on its counterclaim, ordering foreclosures and finding that Luzern's liens were superior to any others claimants' liens, where HOA had negligently released its mortgage, Luzern, a third party, had no knowledge of the release, and HOA failed to protect its rights. HOA appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Parties

¶ 5 Luzern resides in Naperville. HOA is a not-for-profit corporation consisting of 479 residential condominium units in Fox Lake (known as Vacation Village), and the Board of Managers of Vacation Village Association is its governing body.

¶ 6 LLC was a real estate developer organized to complete the Vacation Village development. Its original managers were Robert Ottenstein (who owned a 6.67% interest and who is deceased), Richard Alaimo (16.6% interest), and Jeff Nelson (16.66% interest; he

[1] Also referred to in some pleadings as Vacation Village Association.

resigned before the matters at issue here occurred). Ottenstein and Alaimo were LLC's managers.

¶ 7 B. Transactions

¶ 8 HOA owned the subject property, which consists of a four-acre parcel of vacant land that was included in the Vacation Village development (at 6800 State Park Road in Fox Lake; PIN: 01-33-103-002). In 2006, Ottenstein organized LLC to develop and complete the Vacation Village development by constructing an additional six to eight condominium buildings on the property and to market the units for sale.

¶ 9 In furtherance of this plan, LLC and the HOA entered into a real estate contract, whereby HOA sold the land to LLC for $1.7 million. The agreement provided that LLC would deposit $250,000 in earnest money with HOA, and HOA would hold a mortgage for the remaining $1.45 million.

¶ 10 In 2008, Ottenstein approached Brett Richter, Luzern's son, looking for investors in the development. Brett approached his father about the project, and they decided to invest in LLC. Luzern invested $182,000 for a 12.5% stake in LLC, and Brett invested $50,000 cash and $90,000 in architectural services for a 12.5% stake. They were members, but not managers, of the entity.

¶ 11 (1) First Mortgage

¶ 12 In April 2009, Luzern agreed to provide the $250,000 in earnest money required under the contract with HOA. LLC executed a promissory note, mortgage, and security agreement in HOA's favor for the remaining $1.45 million. Luzern was aware of the note and mortgage granted to HOA at the April 15, 2009, closing. (These documents were recorded, as was a special warranty deed, on April 18, 2009, whereby HOA conveyed the real estate to LLC.)

¶ 13 After the closing, LLC sought financing from a conventional lender to pay back Luzern's $250,000 earnest money and to commence construction. Luzern understood that he would be repaid within three months, or July 1, 2009. By late spring or early summer 2009, however, it became apparent that no conventional lender would finance the construction without having first-lien position against the real estate.

¶ 14 (2) Memorandum of Agreement, Releases, and Quitclaim Deed

¶ 15 About November 4, 2009, HOA and LLC entered into a memorandum of agreement (that was recorded in Lake County on November 6, 2009), terminating/cancelling the April 15, 2009, mortgage closing. The agreement states that LLC delivered a deed to HOA to re-convey the property to HOA and further states that the deed would be recorded. (However, the property was never re-conveyed to HOA.)

¶ 16 In December 2009, the title company, in contemplation of the closing on the construction financing, conducted a title search and determined that the memorandum of agreement was not sufficient to release the mortgage. It required a formal release of mortgage.

¶ 17 Alaimo and Ottenstein approached Michelle Kirk, HOA's property manager, requesting her to release the mortgage. She later testified that she understood that the mortgage release would *not* be recorded and would be utilized only if necessary at the construction financing closing in order to commence construction. Kirk tendered two releases (the first, signed December 22, 2009, erroneously described the property's location as Cook County, and the second, signed December 23, 2009, correctly listed it as being in Lake County) and, on January 5, 2010, she also signed a quitclaim deed to the real estate in LLC's favor (even though LLC had never re-conveyed the property to HOA). She understood that the quitclaim deed was tendered only to be recorded upon the financing being approved. Once financing was approved and

construction commenced, HOA would be granted a second mortgage that secured its interest in the real estate.

¶ 18 (3) Failure to Obtain Financing and Recording of Releases and Quitclaim Deed

¶ 19 Concrete Equities, a financing company, indicated that it would be willing to provide an $800,000 line of credit, at an above-market interest rate, to commence construction. It also required a personal guarantee by all of LLC's members. However, upon being informed of the rate and personal-guarantee requirement, Luzern refused to sign the line of credit. Thus, LLC never obtained financing.

¶ 20 On December 22 and 23, 2009, without HOA's knowledge, LLC recorded the releases and, on January 6, 2010, it recorded the quitclaim deed that Kirk had executed on HOA's behalf. Thus, LLC had title in the real estate without payment of the purchase price and free of any mortgage or encumbrance.

¶ 21 C. First Du Page Judgment

¶ 22 In January 2011, Luzern discovered that the quitclaim deed conveying title to the property to LLC was of record. LLC was dissolved at this point. Luzern sued LLC, seeking a return of his investment, and he obtained his first default judgment against it in Du Page County (case No. 11-L-0347), on May 11, 2011, for $362,595. It was recorded in Lake County on that date. This first judgment was vacated on February 13, 2014, in an agreed order for lack of jurisdiction because LLC was never served.

¶ 23 D. Initial Complaint and Responsive Pleadings

¶ 24 On August 12, 2011, Luzern filed his initial complaint in this case, seeking to foreclose the May 11, 2011, judgment lien. 735 ILCS 5/12-101 (West 2010).[2] The complaint was brought

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[2] Section 12-101 of the Code of Civil Procedure contains guidelines for creation of a

against LLC, HOA, the Board of Managers, and Unknown Owners and Nonrecord Claimants. He listed LLC as the owner of the real estate and asserted that LLC's lien was either terminated or inferior to his lien. He also recorded a *lis pendens* notice in Lake County on August 30, 2011, that recorded this complaint.

¶ 25 On April 2, 2012, HOA and the Board of Managers filed an answer, affirmative defense, and counterclaim to Luzern's complaint. As to the complaint, they denied the allegations. As an affirmative defense, HOA and the Board of Managers argued that the releases and quitclaim deed were void/voidable because LLC did not tender any consideration to HOA and Luzern was barred from foreclosing on his lien without first obtaining a release of the mortgage from HOA, which held a first-priority lien under that mortgage. HOA and the Board of Managers sought judgment in their favor and against Luzern. Finally, in their counterclaim, which echoed the affirmative-defense allegations, they sought a declaratory judgment (essentially, an equitable lien) that their mortgage and security interest in the property was superior to Luzern's judgment lien.

¶ 26 On August 3, 2012, the Board of Managers (apparently without HOA) filed its first *amended* affirmative defense and counterclaims to plaintiff's complaint, arguing that there was no consideration for the real estate that was purportedly conveyed to LLC and it requested that the releases and quitclaim deed be declared void/voidable. It also raised two affirmative defenses: (1) lien priority (arguing that it had an equitable lien against the property, securing

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judgment lien, which provides " 'a means of collecting a judgment by forcing the sale of the judgment debtor's property, real or personal, or both, to the extent necessary to satisfy the debt and costs.' " *Maniez v. Citibank, F.S.B.*, 383 Ill. App. 3d 38, 41 (2008) (quoting *Haugens v. Holmes*, 314 Ill. App. 166, 169 (1942)).

LLC's payment of the purchase price to HOA, which was superior to Luzern's judgment lien); and (2) Luzern's actual or constructive notice of HOA's superior claim and interest. The Board of Managers also raised two amended counterclaims against Luzern, LLC, and unknown owners and nonrecord claimants: (1) injunctive relief (seeking an equitable lien for the $1.45 million purchase price); and (2) declaratory judgment (seeking a declaration that the releases and quitclaim deed are void/voidable for lack of consideration and that HOA has an enforceable first-priority mortgage and equitable lien against the real estate pursuant to the first mortgage that is superior to Luzern's judgment lien).

¶ 27 E. Second Mortgage and Second Du Page Judgment

¶ 28 In 2014, Luzern and Brett re-instated LLC. On March 7, 2014, Brett executed a mortgage on LLC's behalf that was recorded on March 11, 2014, listing Luzern as the lender of $454,240.82 to LLC.

¶ 29 On April 16, 2014, Luzern obtained a second Du Page County judgment against LLC for $569,250 (case No. 11-L-347) in an agreed judgment order. He recorded the judgment in Lake County on June 13, 2014.

¶ 30 F. Amended Complaint

¶ 31 On June 13, 2014, the trial court dismissed Luzern's initial complaint and granted him time to file an amended complaint. On June 26, 2014, Luzern filed an amended complaint, seeking to foreclose on the second (*i.e.*, April 16, 2014) Du Page County judgment lien (count I) in the amount of $569,250 and, alternatively, the March 7, 2014, (second) mortgage lien (count II). In each count, Luzern referenced HOA's first mortgage, its cancellation, and the mortgage releases that were recorded, arguing that these liens were either terminated or inferior to his lien, as were any liens held by the other defendants.

¶ 32 On August 27, 2014, HOA and Board of Managers filed an answer, denying Luzern's allegations and requesting that his amended complaint be dismissed. They also raised an (untitled) affirmative defense, requesting judgment in their favor on the basis that the releases and quitclaim deed were void/voidable for lack of consideration and that they had a first-priority lien and security interest in the property that was superior to Luzern's judgment liens and mortgage. They argued that Luzern was barred from foreclosing on his judgment or mortgage without satisfying or obtaining a release of the mortgage from HOA. They requested judgment in their favor and against Luzern.

¶ 33 G. Luzern's Affirmative Defenses to the Counterclaim

¶ 34 On May 28, 2015, Luzern filed several affirmative defenses to HOA's counterclaim: (1) waiver; (2) unclean hands; (3) the Conveyances Act (765 ILCS 5/0.01 *et seq.* (West 2014)); (4) *laches*; and (5) an argument that equitable liens do not extend to third parties.

¶ 35 H. Bench Trial

¶ 36 (1) Luzern Richter

¶ 37 The bench trial commenced on August 24, 2015. Luzern, age 76, testified that he loaned LLC $412,000 for the condominium development project, and he has received none of it back. He sued LCC to try to obtain his money back and, on April 16, 2014, obtained an agreed judgment order against LLC in Du Page County (the second Du Page judgment) for $569,250. He recorded the judgment in Lake County. Luzern also lent LLC money and executed a promissory note to that effect, along with a mortgage, dated March 7, 2014, for $454,240.82 (signed by Bret as a manager of LLC). In total, Luzern testified, he is owed $638,728.20 for the second judgment and $554,621.06 for the mortgage (which was issued prior to the second judgment being recorded).

¶ 38 Luzern further testified that, in 2009 and 2010, he was not aware of the releases and quitclaim deed that HOA executed. The 2011 title search revealed that the quitclaim deed recorded in January 2010 transferred ownership of the parcel from HOA to LLC. According to Luzern, the memorandum of agreement did not appear on the title search, even though it was recorded on November 6, 2009; he first learned about the agreement in August 2015. Luzern consulted with his attorney about how he might proceed to get his money back. He decided that, since LLC had the property as its single asset, he would foreclose on the property.

¶ 39 Luzern and Bret re-instated LLC in 2014. LLC owned title to the real estate and has held it since January 2010. HOA has paid some of the real estate tax bills on the property, and LLC has paid none since acquiring title. Luzern testified that he believed that LLC acquired title to the property via the special warranty deed recorded on April 18, 2009.

¶ 40 (2) Michele Kirk

¶ 41 Michele Kirk, HOA's property manager, testified that HOA was never paid $1.45 million pursuant to the 2009 mortgage, and the subject real estate was never re-conveyed to HOA by LLC. Kirk stated that Alaimo (one of LLC's managers) did not tell her that the releases she signed were going to be recorded. She signed the documents so that LLC could secure financing. She also understood that the quitclaim deed she signed was not going to be recorded. Kirk first learned that the documents she signed were recorded when Luzern filed his suit (the June 26, 2014, amended complaint). She was aware of HOA's attorneys' efforts to have the Du Page judgment vacated.

¶ 42 Subsequent to the quitclaim deed in January 5, 2010, HOA has not paid any real estate taxes on the property, but it has redeemed taxes (*i.e.*, the taxes were sold to a tax buyer and they were redeemed with HOA's funds).

¶ 43 After the memorandum of agreement was executed, the deed was never re-conveyed to HOA and HOA never returned to LLC the $221,000 it had received (and LLC never asked for it). HOA never received any consideration pursuant to the quitclaim deed.

¶ 44 When Kirk learned that the releases and quitclaim deed were recorded, she sent documents to HOA's legal counsel. Kirk never discussed the releases with Luzern.

¶ 45 I. Trial Court's Ruling

¶ 46 On October 29, 2015, the trial court entered judgment in Luzern's favor on both counts in his amended complaint and against HOA on counts I (injunction) and II (declaratory judgment) of its counterclaim. The court found that: (1) HOA waived its right to an equitable lien, where it had a legally-recorded mortgage that it negligently released; (2) *laches* barred an equitable lien remedy because HOA failed to protect its rights in the Du Page County litigation even after Luzern's initial judgment lien was vacated in that action; (3) there was no evidence that Luzern had timely knowledge of the release of the mortgage between HOA and LLC, and "he can in no legal or equitable sense be said to be guilty of fraud"; and (4) Luzern proved the allegations in his amended complaint. The trial court ordered that, in light of the second Du Page judgment, Luzern was owed $638,728.20 as of August 24, 2015. Further, under the mortgage and its underlying note, Luzern was owed $554,621.06. These sums, the court found, were valid and existing liens on the property and superior to the rights and interests of all other parties and nonrecord claimants. The court foreclosed on the judgment lien and ordered sale of the property.

¶ 47 The court noted that, while HOA "may have been the victim of a misrepresentation" by LLC, it could not find that HOA reasonably relied on LLC's representations. Rather, the court found that HOA was "negligent if not outright reckless." The court also found that, regardless of the misrepresentations, they were *not* made by *Luzern*, who did not have knowledge of the

transaction. The trial court noted that the question before it was whether an equitable vendor's lien should be declared to defeat Luzern's, a third party's, rights. The court noted that the court in *Stump v. Swanson Development Co.*, LLC, 2014 IL App (3d) 110784, refused to extend the reach of an equitable lien to a third party based on *constructive* notice. The trial court described this as a "high bar" for HOA to clear if it was "to assert that its own equitable rights, if any, should be held superior to" Luzern's rights. Regardless, the court found that HOA waived any right to an equitable lien "in circumstances where it had a legally recorded mortgage which it neglig[ently] released."

¶ 48 On January 8, 2016, the trial court confirmed the sale of the property to Luzern for $653,606.36. HOA appeals.

¶ 49 II. ANALYSIS

¶ 50 HOA argues that the trial court erred in: (1) refusing to grant it an equitable vendor's lien that would be superior to Luzern's mortgage and judgment liens; (2) finding that HOA waived its right to seek an equitable lien; and (3) finding that *laches* barred an equitable lien. For the following reasons, we reject these arguments.

¶ 51 We review the trial court's factual findings following a bench trial under the manifest-weight-of-the-evidence standard. *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 433 (1991). A finding is against the manifest weight when "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in the evidence." *Samour, Inc. v. Board of Election Commissioners*, 224 Ill. 2d 530, 544 (2007). We review *de novo* a trial court's legal conclusions. *Id.* at 541-42.

¶ 52 Preliminarily, we address Luzern's argument that HOA's failure to file an answer to Luzern's affirmative defenses to HOA's counterclaim results in the defenses being admitted. We

reject this argument. Pursuant to section 2-610(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-610(b) (West 2014)), the failure to deny any allegation contained in a pleading constitutes an admission of that allegation. This principle extends to affirmative defenses pleaded by defendants: a plaintiff who fails to file an answer to such defenses admits the allegations of those defenses. *State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill. App. 3d 242, 246 (1991). However, when an affirmative defense is admitted, only the facts alleged in the defense are admitted, not the legal conclusions. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769-70 (1993). "[S]uch a failure to reply merely amounts to an admission of [the] truth of [the] new factual matter [alleged in the affirmative defense] and does not amount to an admission that such new matter constitutes a valid legal defense." *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574, 586 (1985). Illinois law also provides that, if the complaint itself negates the affirmative defense, a reply is not necessary; further, courts should liberally construe the rule excusing the filing of a reply to an affirmative defense. *Haskins*, 215 Ill. App. 3d at 246. Here, Luzern claims that the affirmative defenses of waiver and *laches* were admitted by HOA and it cannot now argue that they should not apply. Given the foregoing authority and the fact that the facts here are essentially undisputed, we decline to find the defenses admitted.

¶ 53 A. Validity of Release

¶ 54 Turning to the merits, HOA argues first that the trial court erred in denying its request to declare an equitable lien to secure payment of the purchase price for the real estate. It asserts that the release and mortgage were recorded without authority or payment and are, therefore, void.

¶ 55 Under Illinois law, the proceeds resulting from the sale of real estate under foreclosure are applied as follows: (1) the reasonable expenses of the sale; (2) the reasonable expenses of securing possession before the sale; (3) satisfaction of claims in the order of priority adjudicated in the judgment of foreclosure or order confirming the sale; and (4) remittance of any surplus to the appropriate parties, as ordered by the court. 735 ILCS 5/15-1512 (West 2014). Generally, satisfaction of claims in the order of priority is determined by debts, or liens, that have been properly recorded. See *Heritage Federal Credit Union v. Giampa*, 251 Ill. App. 3d 237, 238-39 (1993). A judgment lien is created when a certified copy of a judgment is filed in the office of the county recorder on the real estate of the person against whom it is entered. 735 ILCS 5/12-101 (West 2014) (a judgment is a lien only from the time a transcript, certified copy or memorandum of judgment is filed in the office of the recorder in the county in which the real estate is located).

¶ 56 Equitable liens may be imposed on real property out of considerations of fairness. *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260, 270-71 (1985). An equitable lien is "neither a debt nor a property right; rather, it is a remedy for a debt." *Paine/Wetzel Associates, Inc. v. Gitles*, 174 Ill. App. 3d 389, 393 (1988). The elements of an equitable lien are: (1) a debt, duty, or obligation owing by one person to another; and (2) a *res* to which that obligation attaches. *Id.* Such liens have been imposed where contracts manifest the intent that a particular property or funds be security for a debt whenever there has been a promise to convey or assign the property as security. *Uptown National Bank of Chicago v. Stramer*, 218 Ill. App. 3d 905, 907-08 (1991). Although express words are not required to create an equitable lien, "it must clearly appear from the instrument or the surrounding circumstances *** that the maker of the instrument intended that the property therein described is to be held, given, or

transferred as security for the obligation." *Hibernian Banking Ass'n v. Davis*, 295 Ill. 537, 544 (1920).

¶ 57 Here, HOA argues that it tendered the release of mortgage and quitclaim deed in the hope that construction financing would be secured by LLC. The documents were to be recorded only if necessary at the construction financing closing. If this occurred, a second mortgage would be tendered back to HOA so that it could retain its security interest in the property. HOA contends that the mortgage was "mistakenly" released without the closing of the financing. Luzern, it asserts, knew at all times of HOA's mortgage against the property and is *not* a *bona fide* third-party purchaser.[3] HOA further argues that Luzern should not be allowed to take advantage of the mistake and, in effect, take title to the real estate without HOA receiving the agreed-upon consideration from LLC. HOA urges that equity requires that this court rescind the wrongfully recorded quitclaim deed and honor the parties' November 4, 2009, agreement. Alternatively, it requests that we declare an equitable vendor's lien in its favor that "primes" Luzern's judgment lien and mortgage.

¶ 58 HOA further argues that Luzern was not a stranger to the transactions in this case and urges that he had constructive and actual notice of the mortgage between HOA and LLC when he secured the judgment and mortgage he was seeking to foreclose on in his amended complaint. HOA notes that, in 2009, Luzern knew of the real estate contract that provided for the transfer of title from HOA to LLC and knew that LLC had executed a note and mortgage for $1.45 million. HOA maintains that, in January 2011, Luzern knew that LLC held title to the real estate through

[3] A *bona fide* purchaser is a person who takes title to real property in good faith for value without notice of outstanding rights or interests of others. See *Guel v. Bullock*, 127 Ill. App. 3d 36, 42 (1984).

the mistaken and unauthorized recording of the releases and quitclaim deed without any consideration passing from LLC to HOA.

¶ 59 HOA relies on *Stump*, 2014 IL App (3d) 110784, which we address at length. In *Stump*, the plaintiff provided property for three real estate projects to be developed by defendants. The plaintiff conveyed the properties so they could be used as collateral for bank loans that were necessary to undertake the developments. Ultimately, none of the three developments were completed (and two were not even created), even though the defendants secured a $4.1 million bank loan, all of which they spent. The plaintiff received only $500,000 of $4.5 million owed him for one of the developments (in Mokena), and nothing on a second (in Frankfort) development. (It is unclear whether he received any payment for the third (in Peotone) development.) The plaintiff and others sued the defendants, alleging breach of contract and fraud and seeking, *inter alia*, an accounting, rescission of agreements, and declaration of an equitable lien on the Frankfort development. The defendants counterclaimed, seeking a setoff and alleging breach of contract and fraud. (An additional defendant bank counterclaim against the plaintiff and the other defendants, seeking to foreclose mortgages on the properties.)

¶ 60 At the bench trial, evidence was elicited that the plaintiff had been assured during negotiations that an agreement would be completed after the loan closing, documenting the sale/purchase of one of the properties; however, this never occurred. He was also assured that an LLC operating agreement would be finalized after closing and reflect that he had a 50% interest in the entity. However, the LLC, which would receive the Mokena loan proceeds, was formed prior to closing and several defendants were the only members; the plaintiff had no interest. The plaintiff conveyed title to the property on the condition that he would be paid. He testified that

he was told that the loan proceeds would be used only for the property that secured them. No mortgages were drafted against the Frankfort or Mokena properties.

¶ 61 The trial court declared that the plaintiff held an equitable lien against the defendants on the Frankfort property, but that the bank's mortgage lien was superior. The court also granted the plaintiff's claim for rescission of his oral contract and deed, but determined that the bank's lien was superior to the plaintiff's restored title.

¶ 62 On appeal, the *Stump* court affirmed, holding that the bank could foreclose on its mortgage because, although an equitable lien was created after the plaintiff was not paid for the conveyed property, the bank, a *third party*, did not have *actual* notice of this fact and, therefore, the lien could not apply to the bank. *Id.* at ¶¶ 110-115.

¶ 63 As to the equitable lien, the plaintiff had argued that, because the bank was on inquiry notice of his interest in the property prior to making the Frankfort and Mokena loans, the bank was not a *bona fide* purchaser whose mortgage lien was superior to the plaintiff's vendor's liens or to his title to the Mokena property that the trial court restored to him when it granted his prayer for rescission. The *Stump* court first reviewed the general law addressing equitable vendor's liens and held that the trial court did not err in declaring such a lien with respect to the Frankfort property. The court noted that such liens are, as we noted above, recognized in equity and arise when a landowner conveys land by deed, but where some, or all, of the purchase price remains unpaid. *Id.* at ¶ 77. The *Stump* court held that, although the plaintiff did not protect his right to be paid by recording a legal lien to give notice of his preserved property interest to persons reviewing the chain of title, the evidence was sufficient and undisputed to show that the parties agreed upon a purchase price and the plaintiff intended to be paid, but was not, by the defendants for the property. *Id.* at ¶¶ 81-82.

¶ 64 Next, the *Stump* court addressed the issue most relevant to this appeal: the application of equitable liens to third parties, such as the bank in that case. It noted generally that courts "have urged restriction of the reach of vendors liens, stating that these secret liens on real estate often produce injustice and should not be encouraged, and that [with] respect *to third parties*, the doctrine of implied liens should not be extended or enlarged." (Emphasis added.) *Id.* at ¶ 95. The plaintiff argued that the concept of inquiry notice defeated the *bona fide* nature of the bank's actions in making the loans and securing its mortgage liens. He asserted that the bank had constructive knowledge of his equitable lien and could not, therefore, be a *bona fide* purchaser.

¶ 65 The *Stump* court rejected this argument. First, it determined that the Conveyances Act was not, as the plaintiff had suggested, implicated in any analysis of equitable liens because such liens are not interests in property and cannot be discovered in a title search. *Id.* at ¶ 100. Second, having found no *legal* justification for applying inquiry notice to vendor's liens, the Stump court considered whether *equity* would approve such applications. *Id.* at ¶¶ 102-03. The plaintiff acknowledged that the bank owed him no duty and that he did not have a contractual or fiduciary relationship with the bank that gave rise to any obligations. He raised only the inquiry-notice concept. The *Stump* court reject the argument, stating that:

> "the concept of inquiry notice is not applicable to equitable vendor's liens and that the only time—*if at all*—a purchaser of a property interest who is a stranger to the original transaction can be burdened with the original vendee's equitable—essentially moral—obligation for the unpaid purchase price is when the subsequent purchaser or mortgagee for value has *actual* knowledge about the prior purchase that would render his [or her] own purchase or mortgage tantamount to complicity in fraud. [The plaintiff] does not claim the bank had actual notice." (Emphases in original.) *Id.* at ¶ 110.

¶ 66 The court held that there was nothing in the bank's handling of the loans that constituted actual notice that: the plaintiff's purchase price had not been paid; he had been victimized by the defendants; equitable liens had arisen on his behalf; there was any interest in the land prior to its own; or that, by completing the loans, the bank was complicit in the defendants' fraudulent conduct. *Id.* at ¶ 115. The *Stump* court determined that the plaintiff's position was largely one of his own making because he enabled the fraud perpetrated against him and prevented the bank from discovering his connection to the property by conveying unrestricted title, "ostensibly representing that the consideration had been paid, for the purpose of allowing [the defendants] to do precisely what they did—use the property as collateral for loans." *Id.* at ¶ 112. He deliberately obscured his relationship to the property, did not ensure that his financial interests were secured by membership in the LLCs formed to receive the loan proceeds or by execution of development agreements documenting the sale. *Id.* The bank had clean hands with regard to the plaintiff, the court noted, and there was nothing in its underwriting of the loans that constituted actual notice. *Id.* at ¶ 115.

¶ 67 Here, we conclude that the trial court did not err in refusing to declare an equitable lien in HOA's favor. As *Stump* instructs, an equitable lien will not be declared in a vendor's favor over the rights of a third party purchaser, unless the third party had actual knowledge about the prior purchase. *Id.* at ¶ 110. Luzern testified that, in 2009 and 2010 (when the releases and deed were executed and recorded) he was unaware of their existence. Further, he stated that the 2011 title search revealed that the quitclaim deed had transferred ownership from HOA to LLC. The memorandum of agreement did not appear in the chain of title, and he first learned about it in August 2015. The (first) mortgage that he knew about, he notes, had been released of record, and the recorded release stated on its face that the mortgage had been paid in full. This was the

extent of his knowledge, and Kirk testified that she never discussed the releases with Luzern. HOA points to no evidence that Luzern knew otherwise. It merely assumes as much. We further note that Luzern was a member of LLC, but not a manager, and his son Brett did not become a manager of LLC until after he and Luzern re-instated the entity in 2014. Therefore, we cannot assume that Luzern had knowledge, in 2009 and 2010, of the recording of the releases and quitclaim deed by virtue of any managerial responsibilities with respect to LLC. We also disagree with HOA's characterization that an affirmance of the trial court's order would result in Luzern taking advantage of HOA's mistake. In the absence of actual notice on his part, Luzern, a third party, cannot be characterized as taking advantage of the situation. *Id.* As the trial court reasonably found, Luzern did not participate in any misrepresentations by LLC.

¶ 68 Although we need not reach the additional two bases upon which the trial court relied, waiver and *laches*, we briefly address them.

¶ 69 B. Waiver of Equitable Lien

¶ 70 HOA contends that the trial court erred in finding that HOA waived its right to an equitable lien. It again relies on its argument that, at the time Luzern acquired both his judgment and mortgage, he had, according to HOA, actual notice that HOA was actively seeking declaration of an equitable vendor's lien on the real estate for approximately two years. HOA reasons that, under these circumstances, it did not waive its right to an equitable lien. We disagree.

¶ 71 The *Stump* court addressed whether the plaintiff's liens were waived in that case (as the bank had argued and the trial court had found) and it held that the liens were not waived by the plaintiff. *Id.* at ¶¶ 84-92. In addressing this issue, the *Stump* court recited several principles that are helpful here. First, the court noted that vendor's liens are disfavored and are not enforced

unless they are clearly established. *Id.* at ¶ 88. Next, it elaborated that, because they are disfavored, "whenever, under any circumstances, a court can infer that a vendor did not rely on his lien for security, the court should treat it as waived." *Id.* at ¶ 88. Where it appears that a vendor did not rely on the lien, the implied agreement between the vendor and the vendee that the vendor holds a lien for payment of the purchase price is done away with and "courts hold the lien waived." *Id.* The *Stump* court next recited the rule that a vendor's lien is waived where the vendor: (1) "takes other security for the purchase money"; or (2) "performs an act manifestly declaring an intention not to rely on the lien." *Id.* at ¶ 89. The giving of a warranty deed or the conveyance of property via quitclaim deed, the court determined, does not defeat an equitable vendor's lien because the equitable lien "does not come into being until after the property is sold and some, or all, of the purchase price remains unpaid." *Id.* at ¶¶ 90-91 (holding the plaintiff did not waive the lien, where he had no dealings with the bank and did not induce it to deal with the property as unencumbered).

¶ 72 We conclude that the trial court did not err in finding that HOA waived its right to an equitable lien. After it executed the releases and quitclaim deed (in 2009 and 2010), HOA took no action to assert any claim to the property until, arguably, April 2012, when it filed its first responsive pleading in this case; specifically, it filed its answer, affirmative defense, and counterclaim, seeking an equitable lien. It never recorded any interest in the property after the 2009 conveyance and its cancellation in the memorandum of agreement. HOA's claim that Luzern had notice for two years (after he obtained his second judgment and the mortgage) that HOA was seeking an equitable lien ignores that Luzern had initiated his efforts at seeking repayment in 2011 when he obtained his first judgment. We agree with Luzern that, by requiring that a mortgage be recorded at the time of purchase in April 2009, HOA both took other security

for the purchase money and performed an act demonstrating its intention *not* to rely on an equitable lien. *Id.* at ¶ 89. Further, HOA took no action as to the releases and quitclaim deed Kirk executed on its behalf in late 2009 and early 2010 to ensure that the legal documents it executed were not subsequently negligently or intentionally recorded so as to jeopardize it claim to the real estate. Under these circumstances, any right to an equitable lien is waived.

¶ 73 C. *Laches*

¶ 74 HOA's final argument is that the trial court erred in finding that *laches* precluded its claim. HOA argues that Luzern cannot have relied on any inactivity by HOA to his detriment. *Laches* cannot apply here, it urges, because its counterclaim was filed in 2012 and the judgment and mortgage on which Luzern seeks to foreclose are dated 2014.

¶ 75 Luzern responds that it is unquestionable that HOA knew that Luzern's original judgment against LLC was vacated. He points to Kirk's testimony that she knew this to be the case. He also notes that HOA's attorney in these proceeding was also LLC's attorney in the Du Page litigation and secured an order vacating that judgment. Luzern contends that, in between the date that his first Du Page judgment was vacated (on February 13, 2014) until he recorded his new judgment lien (*i.e.*, the second Du Page judgment) against the property (on June 13, 2014), HOA was free to record documents against the property to protect its interests. They would have placed HOA in a priority position to any subsequent judgment lien recorded by Luzern. However, he notes, for four months, HOA and its attorney did nothing.

¶ 76 One court has explained the *laches* doctrine as follows:

> "*Laches* is an equitable doctrine to be invoked in the discretion of the court, and a finding by the trial court that a party is guilty of *laches* will not be disturbed on review unless this determination is so clearly wrong as to constitute an abuse of discretion.

> [Citation.] There is no absolute rule by which *laches* can be determined, and what facts will combine to constitute *laches* depends upon the circumstances of each case. [Citation.] However, *laches* is not available as a defense unless [the] defendant was prejudiced by [the] plaintiff's delay in bringing his [or her] claim [citation] and that plaintiff have knowledge of the facts on which his [or her] claim is based. [Citation.] However, it is not necessary that [the] plaintiff have actual knowledge of the specific facts upon which his [or her] claim is based. If the circumstances are such that a reasonable person would make inquiry concerning these facts, a party will be charged with *laches* if he [or she] fails to ascertain the truth through readily available channels. [Citation.]" *Bobin v. Tauber*, 45 Ill. App. 3d 831, 837 (1977).

¶ 77 We conclude that the trial court did not err in finding that *laches* precluded an equitable lien over the property. Although HOA's counterclaim pre-dates the lien upon which Luzern eventually foreclosed (*i.e.*, the second Du Page judgment), HOA did not record any documents during this period evidencing its equitable lien claim or assertion of ownership. Further, as Luzern points out, HOA knew, as evidenced by Kirk's testimony, that efforts were being made to vacate the first Du Page judgment (which was ultimately vacated on February 13, 2014), but HOA did nothing to record a priority lien in its favor between this time and the date when Luzern recorded his second Du Page judgment on June 13, 2014. Under these circumstances, the trial court's finding was not unreasonable.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 80 Affirmed.