2011 IL App (5th) 110040-U

NO. 5-11-0040

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

2P HOLDINGS LLC, Plaintiff-Appellant, v. CHARLES L. SWINEY, KAREN J. SWINEY, UNKNOWN HEIRS AND LEGATEES OF KAREN J. SWINEY, UNKNOWN OWNERS-TENANTS, and NONRECORD CLAIMANTS, Defendants (Shelby County State Bank, an Illinois Banking Corporation, Intervenor-Appellee).	)	Appeal from the Circuit Court of Shelby County. No. 07-CH-20 Honorable Douglas L. Jarman, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Donovan concurred in the judgment.

O R D E R

¶ 1 *Held*: In this mortgage foreclosure action, the circuit court did not err in ordering that the foreclosed-upon real estate be sold subject to a prior and superior 50-year lease.

¶ 2 The appellant, 2P Holdings LLC, appeals from a judgment of foreclosure entered by the circuit court of Shelby County on July 19, 2010, which held that 2P Holdings held a senior mortgage lien on the real estate in question but that the real estate was subject to a superior 50-year leasehold interest and a mortgage thereon, which were granted and properly recorded prior to the grant of 2P Holdings' mortgage. The appellee, Shelby County State Bank, holds the mortgage on the leasehold estate. For reasons that follow, we affirm.

¶ 3 On January 1, 1998, Helen R. Durst granted to her grandson, Charles L. Swiney, a 50-

year leasehold estate in a certain piece of real estate consisting of 1.71 acres. On May 8, 1998, Charles Swiney and his wife, Karen,[1] granted to the Shelby County State Bank a mortgage on that leasehold estate to secure a loan in the amount of $42,500. This mortgage was properly recorded on May 14, 1998.

¶ 4 On December 18, 1998, Helen R. Durst conveyed to Charles Swiney and his wife, Karen, the fee estate in the subject real estate, and on that same date, Swiney granted a mortgage in that fee estate to the appellant's predecessor, Bank One, in return for a loan in the amount of $30,000. This mortgage was properly recorded on December 30, 1998. The mortgage was later assigned to the appellant. This mortgage explicitly acknowledges the existence of the prior mortgage on the leasehold estate: "The lien of this Mortgage securing the Indebtedness may be secondary and inferior to the lien securing payment of an existing obligation. The existing obligation has a current principal balance of approximately $42,033."

¶ 5 In 2001, Swiney filed for bankruptcy and was discharged on April 16, 2001. The liens of both mortgages survived the bankruptcy, and on March 28, 2007, the appellant began foreclosure proceedings on its mortgage on the fee estate. The appellant did not name the appellee as a party defendant.

¶ 6 On October 27, 2008, the appellee intervened as of right in the mortgage foreclosure action in order to establish the priority of its mortgage lien on the leasehold estate. See 735 ILCS 5/15-1501(d) (West 2010). The appellee did not seek to foreclose its mortgage but sought only to be made a party to the appellant's foreclosure action and to have its mortgage lien declared to be a first and paramount lien on the property.

¶ 7 On October 20, 2009, the appellant obtained a summary judgment against Swiney, unknown owners, and nonrecord claimants on its foreclosure complaint. On January 4, 2010,

[1]Karen's interest in the real estate, if any, is not pertinent to this appeal.

the appellant moved for summary judgment against the appellee. The question before the court was which lienholder had priority or the superior lien on the real estate. The appellant argued that the appellee had a mortgage only on the leasehold estate, which is personal property, and not a mortgage on the real estate. Accordingly, the appellant argued that its lien on the real estate was superior to the mortgage of the appellee on the leasehold estate.

¶ 8 On January 7, 2010, the appellee filed a response to the appellant's motion for summary judgment and a cross-motion for summary judgment. The appellee argued that Swiney's leasehold interest merged into his fee estate when the fee was conveyed to him and that the mortgage thereupon inured to the fee estate.

¶ 9 At oral argument on the cross-motions for summary judgment, the appellee abandoned its merger argument and argued that upon foreclosure, the property should be sold subject to the mortgage lien on the leasehold interest. The appellant took up the merger argument, arguing that when the leasehold estate and the fee estate merged, the lease was terminated and the appellee lost its collateral underlying the mortgage.

¶ 10 On July 19, 2010, the circuit court entered a summary judgment finding that there was no genuine issue of material fact. The court held that the appellant holds a senior lien on the described real estate subject to the 50-year lease between Durst and Swiney. The appellee holds a first and prior lien on the leasehold estate. The court held that there was no merger of the two estates because of the intervening mortgage granted to the appellee and because the parties to the lease were different than the parties to the deed: Karen Swiney was a grantee in the deed, but she was not a party to the lease. The court held that the 50-year lease remained in full force and effect, and a judgment of foreclosure was entered providing for the sale of the fee subject to the existing leasehold.

¶ 11 The appellant filed a motion asking the court to clarify and modify its judgment, arguing that the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West

2010)) does not allow the foreclosure of a mortgage subject to a lease and that foreclosure terminates the lease. The circuit court refused to modify its judgment, and the appellant brings this appeal.

¶ 12 On appeal, both parties agree with the circuit court's holding that no merger of the leasehold estate into the fee estate occurred upon Durst's conveyance of the fee to Swiney and his wife, Karen. The only issue raised by the appellant on appeal is whether the Illinois Mortgage Foreclosure Law provides that all leaseholds are terminated upon foreclosure and whether the circuit court therefore erred as a matter of law in holding that the foreclosed property in the case at bar remained subject to the lease. The appellant argues that under Illinois foreclosure law, the leasehold interests of all persons joined in the action terminate when the order confirming the judicial sale is entered. Once the leasehold interest is terminated, any encumbrance on that interest will terminate as well. Because this issue does not involve any disputed facts and is resolved as a matter of law, our review is *de novo*. *Cozza v. Culinary Foods, Inc*., 311 Ill. App. 3d 615, 619-20 (2000).

¶ 13 We turn to the provisions of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2010)), which we believe govern this appeal. We are reminded that the appellee's mortgage on the leasehold estate was granted and recorded prior to the appellant's mortgage on the fee estate. Our reading of the Illinois Mortgage Foreclosure Law leads us to the conclusion that not all leases are terminated by the foreclosure action, but only those specifically ordered to be terminated by the circuit court.

¶ 14 Section 15-1501(d) (735 ILCS 5/15-1501(d) (West 2010)) specifically provides that neither the voluntary appearance by a lessee whose interest in the real estate is subordinate to the interest being foreclosed, nor the act of making such lessee a party, shall result in the termination of the lessee's lease unless the termination of the lease or lessee's interest in the mortgaged real estate is specifically ordered by the court in the judgment of foreclosure. It

seems clear from this language that leases are not automatically terminated by the foreclosure action, but only upon specific order of the court.

¶ 15 Section 15-1501(e)(4) (735 ILCS 5/15-1501(e)(4) (West 2010)) provides that, *except as provided for lessees in section 15-1501(d),* the interest of any person who is allowed to appear and become a party shall be terminated, and the interest of such party in the real estate shall attach to the proceeds of sale. Thus, while the interests of other parties to the mortgage foreclosure are automatically terminated by the foreclosure action, the interests of lessees are not terminated unless specifically ordered by the court in the judgment of foreclosure. This is consistent with section 15-1404 (735 ILCS 5/15-1404 (West 2010)), which also provides that, *except as provided in section 15-1501(d),* the interest in the mortgaged real estate of all persons made a party and all nonrecord claimants given notice shall be terminated by the judicial sale of the real estate pursuant to a judgment of foreclosure.

¶ 16 Section 15-1506(i)(2) (735 ILCS 5/15-1506(i)(2) (West 2010)) provides that upon the entry of the judgment of foreclosure, the rights in the real estate subject to the judgment of foreclosure of all persons made a party and all nonrecord claimants given notice shall be solely as provided for in the judgment of foreclosure and in the Illinois Mortgage Foreclosure Law.

¶ 17 Section 15-1507(b) (735 ILCS 5/15-1507(b) (West 2010)) provides that the real estate shall be sold at a sale on such terms and conditions as shall be specified by the court in the judgment of foreclosure. Section 15-1508(g) (735 ILCS 5/15-1508(g) (West 2010)) provides that the order confirming the sale shall include an award to the purchaser of possession of the mortgaged real estate, as of the date 30 days after the entry of the order, *against the parties to the foreclosure whose interests have been terminated*. Section 15-1701(d) (735 ILCS 5/15-1701(d) (West 2010)) also provides that the purchaser of the foreclosed property shall be entitled to possession of the mortgaged real estate as of the date 30 days after the order

confirming the sale is entered, *against those parties to the foreclosure whose interests the court has ordered terminated*. Thus, if the court has not ordered the lease terminated, the right to possession remains subject to that lease.

¶ 18 Section 15-1701(e) (735 ILCS 5/15-1701(e) (West 2010)) provides that a lease of all or any part of the mortgaged real estate shall not be terminated automatically solely by virtue of the entry into possession of any party otherwise entitled thereto.

¶ 19 We find that the terms of the Illinois Mortgage Foreclosure Law, as they apply to this case involving a superior leasehold where the lessee is a party to the action, are quite clear. A leasehold is not terminated automatically, but only if the circuit court so orders in the foreclosure decree. The circuit court did not so order in the case at bar.

¶ 20 The cases relied upon by the appellant (*Agribank, F C B v. Rodel Farms, Inc.*, 251 Ill. App. 3d 1050 (1993); *Applegate Apartments Ltd. Partnership v. Commercial Coin Laundry Systems*, 276 Ill. App. 3d 433 (1995); *Anna National Bank v. Prater*, 154 Ill. App. 3d 6 (1987)) are inapposite. In each of those cases, the lease was subordinate to the mortgage and/or the lessee was not a party to the foreclosure proceeding. In the case at bar, the lessee was a party to the foreclosure proceeding, and the lease and mortgage thereon were superior to the mortgage being foreclosed. The circuit court's judgment of foreclosure specifically held that the lease would not be terminated and the foreclosure sale would be subject to the lease.

¶ 21 Finally, we note that the appellee, arguing that the appellant raised a new issue in its reply brief, has filed a motion for leave to file a brief in reply to the appellant's reply brief or, alternatively, leave to supplement its initial brief. We have ordered this motion to be taken with the case. We have examined the appellant's reply brief and find that it does not raise a new issue for review, but responds to the appellee's argument in its brief regarding the doctrine of merger. Accordingly, we deny the appellee's motion to file an additional brief

or to supplement its initial brief.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Shelby County is hereby affirmed.

¶ 23 Affirmed.