

FILED DATE: 3/28/2019 9:23 AM 2018CH11006

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION**

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DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018CH11006

COUNTY OF COOK D/B/A)
COOK COUNTY LAND)
BANK AUTHORITY,)
)
Plaintiff)

Case No. 18 CH 11006

v.)
)
HOUSTON AVE., LLC; CONTINUUM)
CAPITAL FUNDING II LLC; SCHILLING)
BROTHERS LUMBER OF ILLINOIS,)
INC.)
)
Defendants.)

9605 S. Avenue L, Chicago, IL 60617

**PLAINTIFF’S RESPONSE TO DEFENDANT CONTINUUM CAPITAL FUNDING II
LLC’S SECTION 2-615 MOTION TO DISMISS**

Now comes Plaintiff, County of Cook d/b/a Cook County Land Bank Authority (“CCLBA”), by and through its attorneys, Denzin Soltanzadeh, LLC and in opposition to Defendant Continuum Capital Funding II LLC’s (“Continuum”) Section 2-615 Motion to Dismiss states as follows:

Background

On February 19, 2019, CCLBA filed its Amended Complaint (“AC”) alleging three Quiet Title counts – one each against Houston Ave, LLC (“Houston Ave”), Continuum, and Defendant Schilling Brothers Lumber of Illinois, along with one count for Ejectment. *See* AC at pp. 3-4. The Amended Complaint alleges that Houston Ave purchased the property located at 9605 S. Avenue L, Chicago, Illinois (“Property”) from CCLBA in October 2015 subject to a restriction in the deed that required Houston to bring the Property into compliance with all applicable federal, state, and local regulations, and to obtain any and all certificates necessary to permit

occupancy. *Id.* at pp. 1-3. As a remedy for Houston Ave’s breach of that restriction (“Deed Restriction”), CCLBA was granted a Right of Reentry, which would restore title to CCLBA and permit it to re-enter and re-possess the Property. *Id.* at 2. CCLBA exercised its Right of Reentry by giving notice to Houston Ave that it was doing so and filing this lawsuit. *Id.* at 3. CCLBA alleged it is therefore the fee simple owner of the Property, and any interests that arose after the transfer to Houston Ave that was made subject to CCLBA’s Right of Reentry – including the interest of Continuum – are a cloud on title. *Id.* at 2-5.

Continuum moved to dismiss CCLBA’s complaint under 735 ILCS 5/2–615, arguing that (1) its interest can be foreclosed only in a proceeding under the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101, *et seq.*; and (2) CCLBA’s Quiet Title claim against Continuum should be dismissed because CCLBA is not an owner of the Property. Motion to Dismiss (“MTD”) at p. 1. However, the IMFL does not protect a lender like Continuum and has no application here. CCLBA has sufficiently alleged that Continuum took subject to CCLBA’s Deed Restriction and that the restriction has restored fee simple title to CCLBA unencumbered by any subsequent interests. CCLBA’s complaint also states the elements of a quiet title claim, unambiguously alleging that CCLBA is the current owner of the property. Accordingly, this Court should deny Continuum’s motion to dismiss.

Legal Standard

A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint based on defects present on its face. *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 305 (2008). All well-pleaded facts and all reasonable inferences that may be drawn from those facts must be taken as true and allegations in the complaint must be construed in a light most favorable to the plaintiff. *Iseberg v. Gross*, 227 Ill. 2d 78 (2007). A claim should not be dismissed pursuant to section 2-615

unless no set of facts can be proved which would entitle the plaintiff to recover. *Napelton*, 229 Ill. 2d at 305.

Argument

I. The Mortgage Foreclosure Law Does Not Apply.

Continuum first argues that the Illinois Mortgage Foreclosure Law (“IMFL”), 735 ILCS 5/15-1101, *et seq.*, prohibits this lawsuit because it states that a mortgagor’s interest in a property can be foreclosed only in a foreclosure case brought under the IMFL. This argument misrepresents the IMFL, which has no application here where, accepting the allegations in the complaint as true, fee simple title, unencumbered by any subsequent interests, has been restored to CCLBA by operation of law.

Continuum’s argument misstates the nature of its interest and this proceeding. Under the IMFL, a mortgage “shall be foreclosed” in a procedure brought under the IMFL’s foreclosure provisions. 735 ILCS 5/15-1106. A foreclosure under the IMFL is a judicial proceeding brought to “terminate legal and equitable interests in real estate pursuant to a foreclosure,” 735 ILCS 5/15-1203, and a mortgage is 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.

CCLBA is not asking this Court to terminate anyone’s interests in the property. Thus, this is not a foreclosure action, and neither Continuum’s, nor Houston Ave’s, interests are being foreclosed in this lawsuit. CCLBA’s title to the property was restored by operation of law pursuant to the Deed Restriction when Houston Ave failed to rehabilitate the property within one year and CCLBA formally exercised its Right of Reentry. Continuum did not have a mortgage on the property until after the Deed Restriction was recorded and thus its mortgage was limited to a lien against Houston Ave’s interest. That interest, in turn was limited by the Deed Restriction, and

because Houston Ave failed to meet the terms of the Deed Restriction, neither Houston nor Continuum had an interest the moment CCLBA exercised the Right of Reentry granted by the Deed Restriction. No judicial proceeding was necessary; CCLBA's interest is defined by the Deed Restriction agreed to by Houston Ave, and which limited Continuum's interest to no more than what Houston could maintain under the restriction's plain language.

Neither Houston Ave, nor Continuum, had any interest in the Property upon CCLBA exercising its Right of Reentry. Thus, Plaintiff is not asking this Court to transfer title back to CCLBA or otherwise terminate any interest in the Property. CCLBA seeks only an order removing the cloud on CCLBA's title cause by the existence of Continuums' mortgage and the deed to Houston Ave. The IMFL does not apply, and nothing cited by Continuum suggests otherwise.

Even if the IMFL applied here, it would be of no benefit to Continuum in this context. As Continuum concedes in its motion, IMFL identifies the exclusive means of "terminating a mortgagor's interest in real estate." Continuum Mot. to Dismiss at p. 3 (citing 735 ILCS 5/15-1401, *et seq.*). But Continuum is the mortgagee, not a mortgagor. *See* 735 ILCS 5/15-1208, 735 ILCS 5/15-1209. CCLBA did not have a mortgage or any other lien against the Property, and its exercise of its Right of Reentry does not implicate a mortgage interest Continuum developed after, and subject to, the recording of the Deed Restriction.

II. CCLBA Has Sufficiently Alleged That It Owns The Property.

Continuum's second argument – that CCLBA has not stated a claim for Quiet Title because it is not the owner of the Property, MTD at p. 4 – likewise fails. As demonstrated below, the Complaint plainly alleges that CCLBA is the owner of the Property, and for this reason alone Continuum's argument is meritless under Section 2-615. Furthermore, CCLBA's exercise of its

Right of Reentry restored its fee simple title to the Property, free of all encumbrances, and for this reason too, Continuum is not entitled to any relief.

The Amended Complaint alleges that “CCLBA is the owner of the property and is entitled to have the cloud [on title] removed.” AC, p. 4, ¶ 16; p. 5, ¶ 23. In addition, the Complaint’s allegations explain this ownership, alleging that under the Deed Restriction, CCLBA had the right to re-enter, take title, and possess the Property. The Amended Complaint further alleges that Houston Ave did not complete the rehabilitation of the Property within twelve months, and that CCLBA formally exercised its Right of Re-Entry. AC, p. 2, ¶ 4; p. 3, ¶¶ 8-13. Accordingly, the Amended Complaint plainly alleges that CCLBA is the owner of the Property, defeating Continuum’s motion.

Furthermore, Illinois law provides that upon a property owner’s exercise of a valid right of re-entry, title is restored to the owner free of any mortgages, liens, or other encumbrances placed on the property subsequent to the transfer made subject to the right of re-entry. *See Mahrenholz v. Cty. Bd. of Sch. Trustees of Lawrence Cty.*, 93 Ill. App. 3d 366, 370 (5th Dist. 1981) (where party holds a right of re-entry for a breach of a condition, the party or its heirs become owner after exercising the right); *see also Powell v. Powell*, 335 Ill. 533, 537-38 (1929) (where title conveyed with a condition subsequent, the remedy for a breach of the condition is that the estate is restored to the grantor upon re-entry or some other affirmative act of the grantor exercising the right); *Lake View Mem’l Hosp. v. Vermilion Cty.*, 23 Ill. App. 3d 413, 417 (1974).¹ The General Assembly has

¹ In support of its Quiet Title argument, Continuum has cited an unpublished case, *McElmeel v. Shedelbower*, 2013 IL App (5th) 130042-U. Illinois Supreme Court Rule 23 prohibits citing unpublished decisions as precedent. To the extent this Court considers *McElmeel*, it should additionally consider that unpublished decisions in Illinois reject Continuum’s theory and demonstrate that the deed restriction in this case restored CCLBA’s interest to fee simple ownership unencumbered by any subsequent liens. *See generally Simmons v. Shamrock Bank of Fla.*, 2012 IL App (5th) 110521-U, ¶¶ 27-31 for a non-precedential discussion on the interplay

affirmed the use of rights of re-entry, setting forth the parameters for such restrictions in the Rights of Entry or Re-entry Act, none of which limit CCLBA's right here. *See* 765 ILCS 330/0.01, *et seq.* Thus, for this reason as well, this Court should reject Continuum's argument that CCLBA is not the current owner and deny Continuum's motion to dismiss.

Conclusion

WHEREFORE, for the foregoing reasons, Plaintiff, County of Cook d/b/a Cook County Land Bank Authority requests that this Court deny Continuum's section 2-615 motion to dismiss.

Respectfully submitted,

County of Cook d/b/a Cook County Land
Bank Authority

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between a right of re-entry, the exercise of the right, and a mortgage that attaches subsequent to the conditional conveyance. Again, because *Simmons* is an unpublished Rule 23 order, it is not, and cannot be, cited as precedent in this case, but is listed here merely to refute Continuum's reliance on a Rule 23 order and for its explanation of these concepts that few recent Illinois decisions have addressed.