

DIRT Periodic Developments for Monday, August 18, 2014
1010 Lake Shore Association v. Deutsche Bank Nat'l Trust Co.

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1010 Lake Shore Association v. Deutsche Bank Nat'l Trust Co., 2014 IL app. (1st) 130962
(Ill. Ct. App. 2014)

Link to Opinion:

<http://www.state.il.us/court/Opinions/AppellateCourt/2014/1stDistrict/1130962.pdf>

SYNOPSIS: Illinois Court of Appeals holds that under the Illinois Condominium Property Act, because the purchaser of a condo unit at a foreclosure sale failed to pay any of the assessments that accrued after the purchase, the owners' association retained its lien not only for all post-purchase assessments, but also for the \$43,000 in assessments unpaid by the prior owner.

FACTS: Deutsche Bank Nat'l Trust Co. purchased a condo unit at a judicial foreclosure sale on June 17, 2010, but did not pay assessments on the unit for July 2010 or any month thereafter. [In this litigation, Deutsche did raise a question regarding the appropriate amount of the assessments, but there was no indication that this explained Deutsche's complete nonpayment.] On May 17, 2012, 1010 Lake Shore Association (the Association) filed a forcible entry and detainer complaint alleging that Deutsche was unlawfully withholding possession of the unit based upon nonpayment of assessments. The Association moved for summary judgment, noting that Deutsche had not made assessment payments since its purchase of the unit and that the total outstanding balance of unpaid assessments was nearly \$68,000. Deutsche responded that \$43,000 of the unpaid assessments had accrued prior to its purchase of the unit (for June 2010 and prior months), and that it was not liable for those assessments. On October 29, 2012, the trial court granted summary judgment for the Association in the amount of \$70,018.90 and granted the Association possession of the property. [Note that the Illinois Condominium Property Act gives a condominium association a possessory remedy via forcible entry and detainer, in addition to the remedy of lien foreclosure.]

Deutsche filed a motion to reconsider the summary judgment order, asserting that the court misinterpreted section 9(g)(3) of Illinois' Condominium Property Act, 765 ILCS 605/9(g)(3). The trial court denied the motion to reconsider, awarded the Association an additional \$7,000+ in attorney fees and costs. Deutsche appealed.

HOLDING/ANALYSIS: Section 9(g)(1) of the Illinois Condominium Property Act provides that "[i]f any unit owner shall fail or refuse to make any payment of the common expenses or the amount of any unpaid fine when due, the amount ... shall constitute a

lien on the interest of the unit owner in the property prior to all other liens and encumbrances, recorded or unrecorded,” excepting tax liens and liens on the unit recorded prior to the date of the assessments became unpaid. Section 9(g)(3) then provides that:

(3) The purchaser of a condominium unit at a judicial foreclosure sale, or a mortgagee who receives title to a unit by deed in lieu of foreclosure or judgment by common law strict foreclosure or otherwise takes possession pursuant to court order under the Illinois Mortgage Foreclosure Law, shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale, delivery of the deed in lieu of foreclosure, entry of a judgment in common law strict foreclosure, or taking of possession pursuant to such court order. **Such payment confirms the extinguishment of any lien created pursuant to [section 9(g)(1)] by virtue of the failure or refusal of a prior unit owner to make payment of common expenses, where the judicial foreclosure sale has been confirmed by order of the court, a deed in lieu thereof has been accepted by the lender, or a consent judgment has been entered by the court.**

Deutsche argued that Section 9(g)(3) only imposed upon it the duty to pay assessments arising from and after July 1, 2010, after it purchased the unit at the foreclosure sale. It argued that the Association's lien for the \$43,000 in unpaid assessments accrued by the prior owner was extinguished by the foreclosure sale. By contrast, the Association argued that under the second sentence of Section 9(g)(3), the Association's lien was not extinguished because Deutsche never paid the assessments arising after July 1, 2010, and that payment of those sums was required in order to extinguish the lien for the pre-July 2010 assessments.

The Illinois Court of Appeals agreed with the Association:

[T]he second sentence of section 9(g)(3) ... provides that [the payment of post-purchase assessments] “confirms the extinguishment” of a lien created under section 9(g)(1). The word “confirm” is defined as meaning “[t]o give formal approval to,” “[t]o verify or corroborate,” and “[t]o make firm or certain.” Thus, section 9(g)(3), as a whole, provides that the purchaser of a unit at a judicial foreclosure sale has a duty to pay assessments which are incurred after the sale and that the effect of making such a payment is to approve, verify, and make certain the extinguishment of a preexisting lien created under section 9(g)(1). As such, we determine that, under the plain language of section 9(g)(3), a lien created under section 9(g)(1) for unpaid assessments by a previous owner is not fully extinguished following a judicial foreclosure and sale until the purchaser makes a payment for assessments incurred after the sale.

Deutsche argued that under Section 15-1509(c) of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1509(c) (“Any vesting of title ... by deed pursuant to subsection (b) of Section 15-1509 [delivery of the deed after confirmation of sale], unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure ...”), it could not be required to pay any assessments incurred prior to the foreclosure and sale of the unit because the sale extinguished the Association’s subordinate lien claim and thus passed title to the unit to Deutsche free of any lien claim of the Association on account of the prior assessments. The court rejected this argument, holding that Section 9(g)(3)’s specific requirement for payment of the post-sale assessments to “confirm” extinguishment of the lien prevailed over the more general provision of Section 15-1509(c).

Justice Liu dissented, arguing that section 9(g)(3) and section 15-1509(c) were not in conflict. Justice Liu argued that section 15-1509(c) would apply to extinguish the association’s lien for prior assessments in a case in which the association was joined as a party. By contrast, Justice Liu argued, section 9(g)(3) “applies in the situation where a condominium association with an enforceable lien was not named as a party in the foreclosure suit or provided with notice of foreclosure as a nonrecord claimant. It provides an avenue for the purchaser to extinguish a preexisting lien that survives the foreclosure action, by paying the assessments that accrue after the date of the sale. Section 9(g)(3) does not, however, create a vehicle for liability on a lien interest that has been terminated in the foreclosure suit and therefore no longer exists.” In her view, because the Association had been joined as a party in the foreclosure sale, its lien for the pre-July 2010 assessments was extinguished by section 15-1509(c) and Section 9(g)(3) simply did not apply.

COMMENT 1: Justice Liu’s argument in dissent is an interesting one, but it is not entirely satisfactory – Illinois is a judicial foreclosure state, and so if the Association had not been joined in the foreclosure, its lien would not have been extinguished under section 15-1509(c) – and thus there would be no “extinguishment” to be confirmed by payment of post-sale assessments under Section 9(g)(3).

COMMENT 2: The majority’s conclusion is also puzzling (as is the second sentence of section 9(g)(3)). Applying Section 9(g)(3) as does the majority, all Deutsche had to do to extinguish the Association’s lien to the extent of pre-July 2010 assessments was to pay the monthly assessment due for July 2010. If Deutsche had paid for July 2010, then it could have stopped paying assessments the next month, beginning in August 2010, and the Association would only have been able to assert a lien for the assessments arising on or after August 2010. If Section 9(g)(3) is meant to provide protection for condominium associations, it isn’t much protection (except against the spectacularly clueless or incompetent unit purchaser).

Further, it isn't clear how complete the Association's victory really is in this case. At the time of the opinion, it does not appear that the Association had conducted a foreclosure of its lien. The Association had been granted possession (as it was entitled under the Illinois Condominium Property Act), but it hadn't actually foreclosed its lien, so Deutsche's ownership of the unit would not be extinguished, and presumably Deutsche could still redeem the unit. So suppose Deutsche tenders full payment for the July 2010 and post-July 2010 assessments. At that point, would Section 9(g)(3) then extinguish the Association's lien to the extent of the pre-July 2010 assessments? [It would appear so; nothing in Section 9(g)(3) suggests that the association's unlawful detainer remedy would terminate the unit purchaser's right of redemption.]

It's puzzling. If there are any Illinois DIRT members familiar with the intended purpose of Section 9(g)(3), and that can provide any insight as to its intended application in this situation, feel free to chime in.