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Lessee's rights after foreclosure in Illinois

Introduction

There was an existing lease agreement between a marketing firm ("Lessee") and the prior owners of the property. The lease was for a sign on the property. The bank foreclosed against the prior owner of the land. However, the bank never notified the Lessee about the foreclosure. The client ("Purchaser") purchased the property from the bank. The Lessee is trying to exercise its rights under the lease agreement against the Purchaser.

Short Questions

- Can the Lessee enforce the entire lease agreement? Did the Purchaser assume the lease with the Lessee?

Short Answer

- Yes. When a tenant has not been notified of the foreclosure, the purchaser of the property acquires the property subject to the lease.

A. When the Lessee has not been notified of the foreclosure, the purchaser of the property acquires the property subject to the lease.

When a tenant in possession has not been properly notified of the foreclosure, the purchaser of the property acquires the property subject to the tenant's lease. See *Applegate Apartments Ltd. Ptnr. v. Commercial Coin Laundry Sys.*, 276 Ill. App. 3d 433, 444-445 (Ill. App.

Ct. 1995); See also *Bellows v. Ziv*, 38 Ill. App. 2d 342 (Ill. App. Ct. 1962) (when real estate is sold the purchaser takes it subject to existing valid leases). In *Applegate*, the mortgagor executed a mortgage and an assignment of rents to the mortgagee and later entered into a lease with the defendant-lessee. *Id.* at 436. The defendant-lessee did not record its lease with the Registrar of Titles. *Id.* Subsequently, the mortgagor filed a complaint for foreclosure against the mortgagor and a judgment of consent foreclosure was entered which vested absolute title to the property in the mortgagee. *Id.* The lessee was not identified in the mortgagor's complaint or the judgment of foreclosure. *Id.* at 437. The mortgagee then sold its interest to the plaintiff who filed a complaint for possession against the lessee. *Id.* The tenant argued that the mortgagee failed to make it a party to the foreclosure, it had no actual notice of the proceedings and that its lease was valid and enforceable against the new owner. *Id.* at 438.

The court held that tenants in possession are parties with an interest in the property. *Applegate*, 276 Ill. App. 3d at 439-440. The court further held that under Section 15-1501(c) a tenant in possession should be classified as an "unknown owner" and made a party to the foreclosure proceedings in accordance with section 2-413 of the Code of Civil Procedure. *Id.* at 439-440. Under Section 2-413, persons interested "whose names are unknown" may be made parties to an action "by the name and description of unknown owners . . . but an affidavit shall be filed by the party desiring to make those persons parties stating that their names are unknown." *Id.* According to the court, persons seeking a judgment against unknown owners must make an honest attempt to ensure that interested parties have notice of proceedings involving their property rights. *Id.* The court found that the plaintiff did not exercise due diligence in attempting to ascertain the identity of the defendant lessee in possession; and that the plaintiff failed to establish that the plaintiff did not know of the interest of the defendant tenant in

possession. *Id.* at 440-442. In this regard, the record established that both the mortgagor and plaintiff knew of the defendant's lease, and the *lis pendens* doctrine did not constitute proper notice to the lessee. *Id.* at 440-444. Therefore, because the lessee did not have notice of the foreclosure proceedings, the court held that the plaintiff acquired the property subject to the defendant's lease. *Id.* at 444.

Once the court established that the plaintiff took the property subject to the defendant lease, the court interpreted the lease as binding on both the parties. *Applegate*, 276 Ill. App. 3d at 445. Although, the plaintiff contended that some of the terms were unconscionable, the court held that “[t]he parties have entered into an unambiguous lease, which is governed by the law applicable to all contracts. . . . Where the parties have entered into an unambiguous contract, the court cannot remake a contract to give a litigant a better bargain than he himself was satisfied to make.” *Id.* at 445. As a result, the court upheld the lease agreement as binding on both parties. *Id.*

In reaching this conclusion, the *Applegate* court cited to § 735 ILCS 5/9-215 (Remedies available to grantee), which reads as follows:

The grantees of any leased lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any lease, and the heirs, legatees and personal representatives of the lessor, grantee or assignee, shall have the same remedies by action or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor.

In the present case, the bank never notified the lessee of the foreclosure. When the lessee has not been notified of the foreclosure, the purchaser of the property acquires the property subject to the lease. Therefore, it would appear that the lessee can enforce the entire lease

agreement and that the purchaser assumed all the provisions of the lease agreement when he purchased the property.

B. Remedies available to a purchaser

Under 735 ILCS 5/15-1701(d), the purchaser can bring proceedings under 735 ILCS 5/15-1701(h) or under Forcible Entry And Detainer Statute (735 ILCS 5/9-101 et seq.), to terminate the rights of possession of any occupants who have not been made parties to the foreclosure. 735 ILCS 5/15-1701(d) reads as follows:

(d) After 30 Days After Sale Confirmation. The holder of the certificate of sale or deed issued pursuant to that certificate or, if no certificate or deed was issued, the purchaser, except to the extent the holder or purchaser may consent otherwise, 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, without further notice to any party, further order of the court, or resort to proceedings under any other statute other than this Article. This right to possession shall be limited by the provisions governing entering and enforcing orders of possession under subsection (g) of Section 15-1508 [730 ILCS 5/15-1508]. If the holder or purchaser determines that there are occupants of the mortgaged real estate who have not been made parties to the foreclosure and had their interests terminated therein, the holder or purchaser may bring a proceeding under subsection (h) of this Section or under Article 9 of this Code [735 ILCS 5/9-101 et seq.] to terminate the rights of possession of any such occupants. The holder or purchaser shall not be entitled to proceed against any such occupant under Article 9 of this Code [735 ILCS 5/9-101 et seq.] until after 30 days after the order confirming the sale is entered.

Further, under 735 ILCS 5/15-1701(e), a lease will not automatically terminate “solely by virtue of the entry into possession by (i) a mortgagee or receiver prior to the entry of an order confirming the sale, (ii) the holder of the certificate of sale, (iii) the holder of the deed issued pursuant to that certificate, or (iv) if no certificate or deed was issued, the purchaser at the sale.”

Therefore, in order to terminate the rights of possession of any occupants who have not been made parties to the foreclosure, the purchaser can file a supplemental petition for possession within 90 days after the judge has entered an order confirming the sale of the

building. See § 735 ILCS 5/15-1701(h)(3). The hearing will be held no less than 21 days from the date of service of notice. See § 735 ILCS 5/15-1701(h)(2). Even if the rent is paid, the maximum period that a lessee will be allowed to stay is 120 days. See § 735 ILCS 5/15-1701(h)(4).

The mortgagor or purchaser of property can also file a petition for Forcible Entry and Detainer. See § 735 ILCS 5/9-101. Further, the mortgagor or the purchaser of the property can file an eviction case against the lessee 30 days after the judge enters an order confirming the sale of the building. See § 735 ILCS 5/15-1701(c). These are the general remedies available to a purchaser to evict a lessee in possession.