THE HAROLD I. LEVINE MEMORIAL [1]

CASE LAW UPDATE

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REAL ESTATE LAW SECTION COUNCIL

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1. CONDEMNATION; LEASEHOLD AND TENANT COMPENSATION:

In The Village of Palatine v. Palatine Associates, LLC, (1st Dist., December 17, 2010), 406 Ill.App.3d 973, 942 N.E.2d 10, 347 Ill. Dec. 177, Palatine filed a condemnation proceeding against a shopping center in order to build a police station. The Village paid $6.15 million to the owners of the property as just compensation. One Hour Cleaners, a tenant in the shopping center, claimed it was entitled to compensation for its trade fixtures in the trial court, and appealed the denial of its claim based on the determination that the terms of its lease waived any interest in the condemnation award. The lease provided that One Hour Cleaners would have the right to remove its trade fixtures at the termination of the lease provided it repaired

[1] Harold I. Levine was a defender of owners and mortgagors, a prolific writer and continuing education presenter, and, to a few very fortunate lawyers, a mentor and role model who passed away in 2003. He was a long-time volunteer for the Legal Assistance Foundation, Chicago Volunteer Legal Services, the Center for Disability and Elder Law, as well as other legal service providers, and, most importantly, brought others to this important work. On more than one occasion, I had the honor of being on the opposite side of the counsel's table from Harold. He was also formidable opponent, always an advocate for his client, and always a gentleman. On a number of occasions, I had the pleasure of being on the opposite side of a dinner table from Harold. He was always a source of new ideas, a proponent of justice and equity, and…always a gentle friend. His dedication to his clients, worthy causes, and great contribution to the continuing education of attorneys are sorely missed. He would be so very proud of our Supreme Court and Bar Associations if he had known we would have finally adopted mandatory CLE. In some small measure, the work of this man must be undertaken and carried on by those of us in our profession who shared his great caring and love for the law and lawyers.

any damage caused by the removal, and that any personal property not removed within five days following termination would become the landlord's property. More specifically, the lease stated that "if the whole of the Leased Premises shall be taken by any public authority under power of eminent domain, the Lease Term shall cease as of the day possession shall be taken by such public authority…All compensation awarded for any taking under the power of eminent domain…shall be the property of Landlord…and Tenant hereby assigns to Landlord all of the Tenant's rights, title and interest in and to any and all such compensation; provided, however, that Landlord shall not be entitled to any award specifically made to Tenant for the taking of Tenant's trade fixtures or leasehold improvements. The lease terminated on January 31, 2004 by the terms of the last of several amendments, but One Hour Cleaners remained on the property and paid rent through April, 2009. In December, 2006, the Village filed its Complaint to Condemn the property, and named One Hour Cleaners as a party. Two agreed final judgment orders were entered on June 9, 2009 between the owners and another tenant, Sears, but One Hour Cleaners did not join in the agreement and there was no specific award to One Hour for its trade fixtures or leasehold improvements. On July 9, 2009, One Hour Cleaners filed an appearance and motion for determination of its portion of just compensation for its "substantial cleaning fixtures" appraised at $76,850. Palatine Associates argued that under the terms of the lease, One Hour Cleaners was not entitled to any portion of the award. The trial court ruled in favor of Palatine Associates, and One Hour Cleaners appealed.

The Second District affirmed, finding as a matter of law that the lease was terminated and One Hour Cleaners did not have an interest in the condemnation award. Although the improvements by One Hour Cleaners were trade fixtures under the standard tests, and therefore could have been removed, the fact that the lease terminated by expiration in 2004 and the express terms of the lease relating to eminent domain, overcame the presumption that if the Village took its trade fixtures, One Hour Cleaners would have been entitled to an appropriate portion of the compensation paid for the taking. Regardless of its status as a hold-over or month-to-month tenant, One Hour Cleaner's written lease continued to govern the parties. That lease assigned all of One Hour Cleaner's rights to compensation for condemnation to Palatine Associates except for "any award specifically made". No such specific award was made because One Hour Cleaners did not assert its rights, (as did Sears, for example), and "Parties can include a clause in a contract governing their rights to compensation in the event of a condemnation proceeding." In further justification, the Court notes that the lease terminated, (by the passage of time as well as the provision in the lease terminating the lease upon the day possession was taken by a public authority through eminent domain), One Hour Cleaners did not remove its trade fixtures within 5 days, and therefore those fixtures transferred to Palatine as its property affirming the payment of the entire compensation award to it.

2. CONDEMNATION; *QUASI IN REM* REQUIREMENT OF JURISDICTION, APPLYING McGAHAN:

In 2010, the Illinois Supreme Court held that a mortgage foreclosure proceeding was *quasi in rem* rather than *in rem*, and therefore required jurisdiction over the representative of a deceased mortgagor in order to obtain subject matter of the proceedings in ABN AMRO Mortgage Group Inc. v. McGahan, (2010), 237 Ill.2d 526. The decision of the Second District in The Village of Algonquin v. Lowe, (2nd Dist. May 11, 2011), 2011 Ill. App. LEXIS 458, citing McGahan, and applying the same reasoning, affirmed the vacating of a judgment in a condemnation proceeding because of a lack of subject matter jurisdiction when it did not obtain personal jurisdiction over a defendant it had never sought to identify or name.

The Village of Algonquin sought to obtain a fee-simple title to all of the areas designated as streets and all of the bordering tree-lawn/parkway areas in a certain area within the village. The property included a driveway that Terrence and Bonnie Nagel used to access their home. The Nagels were not named in the suit and were not served personally. The trial court entered a judgment that gave the village title to land that included the land that the Nagels were using for their driveway. Nagel filed a petition to vacate pursuant to Section 2-1401, arguing a lack of jurisdiction which the trial court granted. The village argued on appeal that it had obtained jurisdiction over the property owners by publication service. The appellate court disagreed and found that a plaintiff could not obtain jurisdiction over a defendant that it had not even sought to identify in its pleadings and, thus, it could not have obtained publication service over the property owners.
The driveway was in an area of streets and parkway areas that a developer had designated in his survey, but had never properly dedicated. The Village named a number of individuals and trusts in title and designated "unknown owners" and "non-record claimants" as additional parties, publishing notice against the latter. After the judgment was entered and almost six months old, the Nagles filed their 2-1401 petition alleging that they purchased their property in 1975, including the driveway condemned, that the Village knew of their use of the driveway based on two letters sent to them by the Village relating to the condition of the driveway, and they had not been served or received notice of the condemnation. The trial court ruled the judgment was void as to the Nagels, granted their petition, and vacated the judgment. The Village argued on appeal that the absence of personal jurisdiction was not apparent on the record and that the petition constituted a collateral attack, which required a jurisdictional defect appear on the face of the record.
The decision by Justice Hudson begins with a finding that a condemnation case is one which requires "personal jurisdiction over affected persons". Specifically reviewing the "confusion in Illinois courts between actions that are *in rem* and those that are *quasi in rem*, that is ones that decide property rights only as between the served parties…we conclude, following the guidelines in McGahan, that an eminent-domain action such as this one is not *in rem.* Thus, the judgment was effective only as to defendants whom the Village properly made parties to the action." Section 10-5-10(d) of the Eminent Domain Act was noted to be a basis for the Court's determination here that it is the individuals with rights and interests in the land, not the land itself, that are the defendants in an eminent-domain action. Accordingly, the prior reasoning in City of Crystal Lake v. LaSalle National Bank, (2nd Dist., 1984), 121 Ill.App.3d 346, characterizing a condemnation proceeding as *in rem* was rejected in favor of following the McGahan Court's ruling. Accordingly, "If a court lacks personal jurisdiction over a party, the judgment is void as to that party and the party can attack it any time, including collaterally."; regardless of whether the lack of jurisdiction is apparent on the face of the record.

3. FAIR DEBT COLLECTION PRACTICES; WHEN A DEBT IS "OBTAINED" BY A THIRD PARTY COLLECTOR:

Chief Judge Easterbrook, writing for the Court of Appeals for the 7th Circuit, very concisely addressed the issues of the application of the Fair Debt Collection Practices Act, (FDCPA, 15 USC Section 1692 et seq.), to collection efforts by leasing agencies. In the case of Geaniece Carter vs. AMC, LLC, (7th Cir., May 2011, #10-3184, 645 F.3d 840 2011 U.S. App. LEXIS 9753. Plaintiff was sued in state court in Forcible Entry and Detainer by AMC, LLC, the manager of an apartment building in Bolingbrook owned by Jackson Square Properties. The trial court entered an eviction order but the Appellate Court reversed, holding AMC failed to provide proper notice. Justice McDade concluded that AMC had violated the FDCPA, but the other members of the panel did not so conclude and concurred specially. Carter then sued in federal court for damages under

the FDCPA, alleging AMC told a credit bureau she owed rent without informing it she disputed the claim and misrepresented the status of the debt in litigation. AMC could have argued *res judicata* and that the FDCPA was a compulsory counterclaim in state court, but forfeited this argument by failing to raise it in the district court. Carter argued that the state court had resolved the FDCPA issue and that the federal court's only role was to supply a remedy, to which Judge Easterbrook stated "That isn't so." The theory of collateral estoppel only applies when an issue is actually and *necessarily* decided in an earlier suit, and even Justice McDade admitted in her opinion that her view on the FDCPA issue was not necessary to the state court's decision, and, accordingly AMC, LLC was not collaterally estopped.

The opinion next discussed the identity of parties, chiding the attorneys for filing a disclosure for "AMC, LLC/Riverstone Apartments", which might be a building or a trade name, but not a person or organization, and stating: "It is no more possible to sue 'Riverstone Apartments' than it would be to sue the Mississippi River."

The opinion then reviewed the question of AMC's status as a "debt collector" under the FDCPA. Justice McDade concluded lessors are "debt collectors" but the district judge correctly found that a "debt collector" tries to collect debts "owed or due another" and an entity trying to collect a debt due itself is outside the FDCPA. Is AMC, the leasing agent for the building owner, potentially a "debt collector"? Not all agents are debt collectors, because the Act excludes any person who tries to collect a debt that "was not in default at the time it was obtained…" Analogizing to situations where mortgage servicing agents "obtain" debt even though the lender still owns the Note, the Court held that a leasing agent "obtains" a debt when the lease begins and the tenant is presumably not in default.

4. FLOOD INSURANCE ACT; CAUSE OF ACTION AGAINST FLOOD DETERMINER FOR NEGLIGENCE:

The National Flood Insurance Act of 1968, 42 U.S.C. Section 4012, is a law that transactional attorneys come across commonly at real estate closings, and equate it with the flood certification process. Upon the determination that residential property is located in a special flood hazard area, a lender is statutorily mandated under the Act to disclose and require flood insurance be obtained, or obtain it for the borrower at the borrower's cost. In Klecan v. Countrywide Home Loans, Inc., (3rd Dist., June 29, 2011), 951 N.E.2d 1212, 2011 Ill.App.LEXIS 698, the Klecans sued their lender, Countrywide and its flood certification entity, Landsafe Flood Determination, Inc., when their home in Watseka was significantly damaged by flooding and they discovered that they did not have insurance. Although their previous lender had required them to have the insurance, and pay the premium from their escrow account as a condition to their loan, at the closing of the Klecan's refinancing loan, Countrywide's subsidiary, Landsafe Flood Determination, Inc., determined that the home was not located in a flood zone, and no insurance was obtained.

In response to the Klecan's Complaint alleging negligence for not requiring the flood insurance, Countrywide and Landsafe both successfully argued in the trial court that the cause of action against them was barred by prior case decisions holding that the Flood Act did not create a duty to disclose flood hazards to borrowers, and that borrowers can not maintain a private cause of action based on a lender's failure to comply with the Act. The Klecans appealed the decision as to Landsafe and the Third District reversed the trial court.

Reasoning that the action against Landsafe was based on a breach of the common law duty of care, rather than the Flood Act, the Court drew analogy to cases in which third parties had successfully sued surveyors, termite

inspectors and appraisers hired by others for inaccurate surveys, negligent misrepresentations and erroneous appraisals in real estate transactions. Noting that while the Flood Act permits lenders to delegate flood determinations to third party providers, and immunizes the lender against liability for the determiner's mistakes, it does not bar suits by borrowers against the determiner such as Landsafe. Without a statutory bar to the action, the Court found that Landsafe's failure to correctly determine that the Klecan's property was in a flood zone, when previous flood determinations had identified the property in the hazard area, was negligent and contrary to its duty to the Klecans as "foreseeable plaintiff's". Despite the lack of privity of contract between them, applying the factors employed by the Illinois Supreme Court in the negligent surveyor case, (Rozny v. Marnul, (1969), 43 Ill.2d 54), the Court found that Landsafe knew its determination would be relied upon by Klecan, its liability was not unrestricted but limited to the Klecans, that it would be undesirable to require an innocent reliant party to suffer the burden of a professional's mistake, and that liability would promote cautionary techniques in the flood determiner industry.

5. JUDGMENTS; STRICT COMPLIANCE, JUDICIAL AND EQUITABLE ESTOPPEL, LAW OF THE CASE, AND SEVERANCE OF JOINT TENANCY BY FILING BANKRUPTCY:

The first time Maniez v. Citibank was before the First District Appellate Court was in 2008, Maniez v. Citibank, F.S.B., (1st Dist., June 10, 2008), 383 Ill. App. 3d 38; 890 N.E.2d 662; 321 Ill. Dec. 940, (See ISBA 2008 Case Law Update). The law from that case was that "a memorandum of judgment inaccurately describing a judgment as having been entered on a specific date does not create a lien under section 12-101 of the Code." Based on the fact that the memorandum of judgment erroneously stated that the judgment had been entered on February 27, 1997, when, in fact, the judgment was entered on February 28, 1997, the trial court's determination was that the judgment did not create a valid lien against the defendant's property. The First District agreed that strict compliance of the Code of Civil Procedure was required, was not met by the incorrect memorandum, and the lien was not enforceable in a foreclosure action by the judgment creditor, Maniez. On remand, the trial court granted the Defendant's motion to dismiss pursuant to Section 2-619, and this second appeal ensued to determine (1) whether the doctrine of judicial and equitable estoppel barred the defendant from asserting the invalidity of the lien, (2) whether a later recorded 2004 memorandum of the 1997 judgment created a valid lien and to what effect, and (3) whether the prior decision, as "law of the case", should be overruled. All three issues were resolved against the plaintiff once again.

The Court's decision in this second appellate decision, Maniez v. Citibank, (1st Dist., September 20, 2010), 404 Ill.App.3d 941, 937 N.E.2d 237, 344 Ill.Dec. 531, begins by giving a little more history of the case than was in the previous appeal. The Defendant on appeal, Koshiyama, was a joint tenant with Mr. Jolly relating to the condominium unit at 155 Harbor Drive, Chicago, Illinois, when the judgment for $100,348.83 was rendered on February 28, 1997, against both Jolly and Koshiyama. The memorandum of judgment was recorded on February 28, 1997, but erroneously stated the date of the judgment was February 27, 1997. (This was the fatal error around which the 2008 case revolved.) A year later, on February 6, 1998, Koshiyama filed a bankruptcy in which she listed Maniez as a "secured creditor" in the sum of $110,348.83, and did not indicate the claim was "disputed". In February, 2004, Maniez's judgment was revived against both Jolly and Koshiyama, and the order specified the correct judgment date of February 28, 1997; although the order provided the lien was "in rem" as to Koshiyama because of her then pending bankruptcy. As one might expect, the "errors" continued because the

memorandum of the 2004 revival misstated the year of the original judgment as 1998 rather than 1997. Ms. Koshiyama was discharged in bankruptcy in 2005, and Mr. Jolly died in June, 2006. The appeal ensued about whether the incorrectly stated date memorandum created a lien under Section 12-101 of the Code, with the result finding it did not because of both the "strict compliance" requirement of the statute and the incorrect date of the judgment could not give prospective purchasers notice that a judgment had been entered on the date stated; February 27, 1997. On remand, the defendants argued that since Maniez had not created a lien by the 1997 recording, Koshiyama's personal liability was discharged by the 1998 bankruptcy, the joint tenancy passed title to Koshiyama at Jolly's death in 2006, without the lien attaching to her interest, and that the complaint ought be dismissed. Maniez' counter-argument was that Koshiyama was barred by judicial and equitable estoppel from denying his lien due to the admission of his lien claim and failure to dispute it in her bankruptcy. Further arguing, Maniez asserted that when Koshiyama filed bankruptcy in 1998, the joint tenancy was severed, permitting the lien to attach to Mr. Jolly's interest at the 2004 revival and recording. These positions were rejected in both the trial and Appellate Court.

Judicial estopped and waiver did not apply at this stage of the proceedings. Even though Koshiyama admitted Maniez' lien in her bankruptcy schedules, judicial estoppel and waiver are properly "affirmative defenses" which need not be raised until the answer is due. Here the intervening appeal of the motion to dismiss and the subsequently filed motion to dismiss on remand still left defendant's without having to have filed an answer or affirmative defense because they had not yet answered the complaint and only then would the plaintiff be required to raise estoppel and waiver issues or waive them. Moreover, because the issues of the defective lien claim were not then raised, Koshiyama's bankruptcy petitions did not take a position factually inconsistent with those in the foreclosure case triggering the elements of judicial estoppel. Equitable estoppel was equally inapplicable because at the time she filed her bankruptcy, neither she nor Maniez knew that the judgment lien was invalid, and therefore Maniez could not claim that he reasonably relied on the bankruptcy filing to validate his then apparently valid lien.

Although the validity of the lien was finally established in October, 2005, when the revival order was recorded, this occurred after the close of Ms. Koshiyama's bankruptcy case and she was personally discharged of liability. This was also before Mr. Jolly's death in 2006, and therefore created a lien on his interest in the joint tenancy property, but when Jolly died, his interest ceased to exist, as did the judgment lien, and Ms. Koshiyama took title as a surviving joint tenant free of the judgment lien. (See Harms v. Sprague, (1984), 105 Ill.2d 215.) The argument that the filing of Koshiyama's bankruptcy in 1998 severed the joint tenancy, created a tenancy in common, allowing the lien to pass as to Jolly's one-half interest was rejected. Noting that there is a split of authority among courts relating to whether a bankruptcy filing severs a joint tenancy, the First District here holds that under Illinois joint tenancy law, a "conveyance" (i.e., not a mortgage and not a levy on a joint tenant's interest), is required. There was no conveyance here, and the filing of a bankruptcy merely provides that the trustee can administer the debtor's property, not accomplish an actual transfer or conveyance of title. Since "The debtor does not transfer his title to [section] 541 property of the estate but holds his title subject to the exercise by the trustee of his rights to sell, use or lease such property by appropriation..", the 'conveyance' required to sever the joint tenancy "does not occur until the trustee sells or otherwise disposes of the property and title passes. Therefore, in Illinois, the filing of a bankruptcy petition does not sever a joint tenancy." This left the Court to complete its ruling by rejecting the argument that the first Maniez decision was either "Palpably Erroneous" or that the "Best Interest of Society and Manifest Injustice" mandated the first ruling be excepted as the law of the case. In determining that the prior finding that recording the memorandum with the wrong judgment date did not create a lien was not in error, the Court chose to ignore an 1887 decision holding otherwise, (that a judgment debtor could not defeat the execution of a judgment by showing that the judgment

date was incorrect), by applying the law that a case "decided prior to 1935 and therefore lacks precedental authority". (See Bryson v. News America Publication, Inc., (1996), 174 Ill.2d 77.)

In sum, "As the plaintiff no longer had a valid judgment lien against the Harbor Drive Unit, the circuit court's dismissal of the complaint to foreclose the judgment lien was proper." It only took two appeals, strict interpretation of the Code of Civil Procedure relating to the creation of judgment liens, rejection of judicial and equitable estoppel theories, application of the law of the case over the exceptions to that rule, and a determination that filing a bankruptcy does not sever a joint tenancy.

6. LAND OWNER LIABILITY; "OPEN AND OBVIOUS", DISTRACTION AND DELIBERATE ENCOUNTER EXCEPTIONS:

Steven Garcia lived in a rental property owned by Jack Young on a private street in Ludlow, Illinois. The street was a gravel road in need of repairs, and although Young had put down new gravel and graded the road, it was in bad condition on the day Garcia was injured. He went into the street to retrieve his stepson who was in the path of an oncoming vehicle, and fell into a two foot wide and eight inches deep pothole. Testimony at trial was that Garcia had informed Young that the street was in disrepair and a hazard, but also that the pothole was an "open and obvious" condition. In his motion for summary judgment, Young argued that Garcia's injuries were not his responsibility because the danger was "open and obvious" and neither the "deliberate encounter" or "distraction" exception were applicable to the facts before the Court. The trial court granted Young's motion for summary judgment, and the Fourth District affirmed in a Rule 23 decision which is nonetheless very instructive on the liability issues, open and obvious exception, and exceptions to the exception. Garcia v. Young, (4th Dist., March 23, 2011), 2011 Ill. App. Unpub. LEXIS 407.

The fundamental issue in landowner liability cases is whether the land owner has a duty of care to the injured party. Generally, there is no duty to protect against conditions which are "open and obvious", and therefore no liability to one who is injured by such a condition on the land. Here, it was stipulated that the pothole was open and obvious. Nonetheless, Garcia argued that in these circumstances, the exception for "deliberate encounter" and "distraction" applied, and summary judgment ought not have been granted. Under the "deliberate encounter" exception, the open and obvious nature of the condition will not insulate the landowner where "the landowner has reason to anticipate or expect the invitee will proceed to encounter an 'open and obvious' condition because the advantages of doing so outweigh the apparent risks to a reasonable person". Garcia argued that even though he knew of the potholes, (i.e., the condition of the road was open and obvious), he made the determination to enter the roadway, (a deliberate encounter despite the danger), to retrieve his stepson. The Court noted, "However, whether Mr. Garcia deliberately encountered the street itself is not relevant as the street is not the condition which allegedly caused his injury. The pothole, not the street, was the 'open and obvious' condition…the Garcias' argument fails because Steven Garcia did not deliberately encounter the pothole."! Turning to the "Distraction" exception, the Court refused its application as well, noting that Young had nothing to do with the condition which may have distracted Garcia. "Primarily, in those instances where our courts have applied the distraction exception to impose a duty on a landowner, it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition." Young did not 'create or contribute' to the factor which distracted Garcia, (i.e., his stepson being in the street in harm's way), and therefore could not be responsible for the fact that Garcia chose to ignore the open and obvious danger of the pothole in the roadway. Summary

judgment in favor of the landowner based on the "open and obvious" exception to liability, regardless of the "deliberate encounter" and "distraction" exceptions was affirmed.

7. MECHANIC'S LIENS; APPORTIONMENT BETWEEN MORTGAGEE AND LIEN CLAIMANT:

Most attorneys conversant with real estate are aware that in order to trump the "First in Time, First in Right" rule relating to lien priorities, a mechanic's lien claimant must meet the notice and recording mandates of the Illinois Mechanic's Lien Act requiring notice, four month claim recording, and suit within two years. Most are equally aware that even when a lien claimant has followed the Act's strict requirements, it is only entitled to priority to the extent of enhancement of the premises. In LaSalle Bank v. Cypress Creek I, LP, (February 25, 2011), 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281, 2011 Ill. LEXIS 428, the Court reviewed an Appellate decision which included a majority, concurring and dissenting opinion, and addressed the complexity of how the proceeds of a foreclosure sale are to be apportioned between a mortgagee and lien claimant, with controversial results.

This case was a previously published Third District opinion, 398 Ill. App. 3d 592; 925 N.E.2d 233; 2010 Ill. App. LEXIS 25; 338 Ill. Dec. 736, (March 5, 2010), in which the trial court's ruling on distribution of the proceeds of sale was reversed on appeal. The Supreme Court reversed the Appellate Court. The issue was how to distribute the proceeds of a foreclosure sale between the mortgagee and mechanic's lien claimant where the mortgagee had paid for some improvements through a construction loan and claimed entitlement to a portion of the enhanced value of the real estate in the process of apportionment of the fund. The Illinois Supreme Court gave the mechanic's lien claimant priority only with respect to the enhancement of the value of the property attributable to those improvements for which they furnished material or services, rather than with respect to all improvements made subsequent to the mortgage recording.

It is important to note the factual distinction here, that the mortgage predated the mechanic's liens and the contracts which created them. Moreover, it was significant that the mortgagee paid for several of the improvements which enhanced the property through its construction loan disbursements, and it was the value of these improvements that was to be applied toward the satisfaction of the mortgage under the trial court's ruling. The issue with which the trial court, appellate court and Supreme Court grappled was the apportionment of the foreclosure sale proceeds when the total funds available are insufficient to satisfy the mortgage and mechanic's liens as governed by Section 16 of the Mechanic's Lien Act, (770 ILCS 60/16), which modifies the "first in time, first in right" rule.

The "plan language" of the Act provides that the lien claimant's priority is limited to the extent that it's material or services increase or enhance the value of the real estate. Edon Construction and Eagle Concrete argued that they were entitled to a "full priority" over the mortgage under Section 16, so that the proceeds of sale would have satisfied their liens in total before any funds were paid to LaSalle under its mortgage. LaSalle, on the other hand, based on its payment under the construction loan to other lien claimants who had also enhanced the property, argued that it should be subrogated to those liens it paid, and also be entitled to attorney's fees in the apportionment of the sale proceeds. Holding that the purpose of the Mechanic's Lien Act is to "protect those who in good faith furnish material or labor for construction of buildings or public improvements", the Court also notes that "By giving lienholders priority only with respect to their improvements, the Act protects both the contractors and the prior encumbrancers…We find that this is accomplished by prioritizing lien claimants to the value of their improvements, instead of the value of all improvements." This limitation is then turned further to

the mortgagee's benefit by the reasoning that since the payments made to other lien claimants by LaSalle was for the benefit of and as though paid by the owner, (resulting in contractors who never filed liens because they were paid from the construction loan), "We find that neither Edon nor Eagle has made a compelling case for treating the payments made by LaSalle as anything other than payments made by the owner and applying that portion of the enhanced value of the property to the satisfaction of the mortgage held by LaSalle.

Justice Freeman dissented. Recounting that Illinois uses two different methods ("market value" of the improvements versus "contract price" less payments) to determine the value of improvements, but the "contract price method was accepted here, Justice Freeman observes that treating LaSalle Bank as the "equivalent of a mechanic's lien claimant" to the extent it paid other contractors "put it on equal footing with …Edon and Eagle. The effect of this is to improperly increase LaSalle's pro rata percentage to more than it is entitled to under the Act…LaSalle is simply not a material provider as so defined [by the Mechanic's Lien Act] and the court should not, by judicial fiat, confer that status on LaSalle." Justice Freeman's emphasis on the distinction between and "owner" and "incumbrancer" lead him to believe that the majority blurred an important demarcation by allowing LaSalle to claim the loan proceeds paid "on behalf of the owner", and concluded that it was not entitled to the deference granted because "LaSalle's loan of its funds did not 'enhance' the value of the property, under Section 16, it is the work done by the mechanic's lien claimants that 'enhances' the value." This, he declares "reflects the intent of the legislature in enacting the Act, which was to extend statutory protection for unpaid work done, not for money lent."

8. MECHANIC'S LIEN; SUBCONTRACTOR'S NOTICE OF LIEN TO A MORTGAGEE AND PROCEDURAL FAUX PAUX:

Parkway Bank and Trust v. Meseljevic, (1st Dist., December 7, 2010), 406 Ill. App. 3d 435, 940 N.E.2d 215, 346 Ill.Dec. 215, was a suit for foreclosure of a construction mortgage and sale of the underlying real property brought by Parkway Bank. The Appellant corporation, Beta Electric, Inc., filed a counterclaim asserting the priority of its mechanic's lien on the property over the bank's mortgage. In what can only be characterized as a 'procedural nightmare', Beta was initially defaulted for failure to plead, vacated the default judgment, then filed its counterclaim against Parkway asserting a priority as a mechanic's lien claimant. The Bank filed a motion for judgment on the pleadings arguing that the mechanic's lien claim was not properly perfected under the Act and therefore was subordinate to its mortgage. The trial court granted Beta until June 4, 2009, to respond to the motion for judgment on the pleadings in an order which contained a provision that "failure to file a timely written Response or Reply will be deemed a waiver of oral argument…". Beta filed its response on June 5, 2009, one day late. Parkway filed a Reply within the briefing schedule and objected to oral argument of the motion by Beta based on the order and late filing. Thereafter, Beta filed a motion for leave to file its response late. The motion did not contain an explanation for the late filing and was not supported by an affidavit. The trial court denied the motion for leave to file late, struck Beta's late Response, and barred its attorneys from oral argument. Finding that the Beta lien identified it as a subcontractor, the trial court ruled it failed to perfect its lien by giving the 90 day notice to lenders required of a subcontractor, and ruled in Parkway's favor on the motion for judgment on the pleadings and reinstated the default judgment previously entered against Beta.

The Appellate Court affirmed both the trial court's action relating to the untimely response and entry of judgment on the pleadings. "The circuit court has the inherent authority to enforce its own orders", and although there is case law holding that the failure to obtain leave of court prior to an untimely response does

not make the response a nullity, here it was within the trial court's discretion to allow or disallow the late pleading. Noting that Supreme Court Rule 183 allows the trial court discretion to approve late filing "for good cause shown on motion after notice to the opposite party…either before or after the expiration of the time", the Rule "does not come into play…unless the responding party can first show good cause for the extension." Here Beta's attorneys did not make any effort to allege any cause for the late filing, let alone 'a good cause', or a "clear, objective reason why it was unable to meet the deadline and why an extension of time should be granted." For the same reason, the trial court's decision to bar Beta from participating in oral argument was not an abuse of its discretion; "Oral argument in a civil proceeding tried, as here, by the court without a jury is a privilege, not a right, and is according to the parties by the court in its discretion." The briefing schedule order contained clear warnings and admonished the parties of the penalty of being barred from participation in the hearing on the motion scheduled.

The substantive ruling on the motion for judgment on the pleadings was also affirmed based on the Court's holding that the absence of a response was not a waiver of the issues on appeal. Beta did not fail to object. Its response objecting was simply stricken as untimely, but that did not constitute a waiver or failure to preserve the argument or right to contest the motion on appeal. Moreover, inasmuch as judgment on the pleadings pursuant to 2-615(e) is a motion directed to the face of the pleadings, a response to the motion is not necessary for a court's ruling. Here, the motion attacked the sufficiency of Beta's lien claim because it was a subcontractor required to, but which did not, provide a 90 day notice to Parkway under the Mechanic's Lien Act, together with other technical deficiencies in the notice. "If the subcontractor does not provide a known lender with the mandated section 24 notice, the lien is unenforceable against the lender." Beta fit the Act's definition of a subcontractor, (770 ILCS 60/1 and 60/21(a)), because he contracted with Haso Meseljevic, "a contractor, and not directly for the owner of the property. This means Beta is a subcontractor under the definitions in sections 1 and 21 of the Act and should have provided notice of its lien to Parkway under section 24 and its lien is invalid."

9. MORTGAGE FORECLOSURE; JURISDICTION AND STANDING OF FOREIGN CORPORATIONS:

In a case which may be destined to add fuel to the fire tended by attorneys defending mortgage foreclosure cases, the First District issued an opinion in Bank of America v. Ebro Foods, Inc., (1st Dist., April 26, 2011), 409 Ill.App.3d 704, 948 N.E.2d 685, 350 Ill.Dec. 405, which reversed the trial court's dismissal of a foreclosure complaint pursuant to Sections 2-619 and 2-615 based on the allegation that the Bank of America did not have authority from the Illinois Secretary of State in order to maintain a civil action in its jurisdiction. The Illinois Business Corporation Act of 1983 requires foreign corporations obtain a certificate of authority from the Secretary of State pursuant to 805 ILCS 5/13.70. The successor to the original lender, LaSalle Bank was listed on the Secretary of State's website as "BANA Holding Corporation"; an entity that was not in good standing at the time of the filing of the complaint to foreclose, and then had its certificate "revoked". One of the Defendants argued that in the absence of a certificate of authority, Bank of America's complaint was subject to dismissal on standing grounds, and the trial court agreed. The Bank of America argued in its motion to reconsider that the National Banking Act (12 U.S.C. Section 1, et seq.) provides its authority to do business in all 50 states and pre-empts the application of the state registration. The trial court found that the argument based on the National Banking Act had not been raised until the motion to reconsider, and was thus waived.

Holding that the issue was one of the application of law rather than fact, the First District declared its standard of review was de novo. "Waiver, however, is an admonition on the parties and not a limitation on the jurisdiction of this court" dispatched the waiver in order that the "interest of preserving a sound and uniform body of precedent…To ensure a consistent body of law on which national banks doing business in Illinois can rely, we will address Bank of America's argument." Then, noting there are exceptions to the requirement of a state certificate of authority in order to maintain a civil action, (for example if a foreign corporation is engaged in only occasional transactions in the state…if a foreign corporation is conducting interstate commerce…[or] in such a way as to impede the Federal authority and responsibility to insure the free flow of interstate commerce."), the Court reversed and remanded. The Defendant has the burden of proving that the Bank of America was transacting business in the state without a certificate in violation of the Act by alleging facts showing that the Bank of America was not engaged in conducting interstate commerce, the case was remanded.

10. MORTGAGES; CLAIMS BASED ON LENDER'S DECEPTIVE CONDUCT IN MAKING LOAN:

In Haymer v. Contrywide Bank, (N.D.Il., July 15, 2011), 10 C 5910, 2011 U.S. Dist. LEXIS 76910, Helen Haymer brought an action against her lender and mortgage broker for making a mortgage to her that was "destined" for foreclosure, alleging violations of various lending laws, consumer fraud and common law fraud.

The facts alleged in her complaint were that she was a 73 year old African-American with disabilities, whose sole source of income was $1,125 per month in social security benefits, at the time Marilyn Cieslak, the sole owner of Valor Finacial Services, came to her house to fill out a loan application to refinance. The application did not state her income and the home appraised at $175,000 on January 22, 2009. The mortgage payment on the loan was $1,049.19; a sum equal to 90% of her gross monthly income. When she was, in fact unable to make the payments, a foreclosure case was filed in Cook County and pending when Ms. Haymer filed the instant, nine count complaint in federal court with claims of violation of the Illinois Fairness in Lending Act, the Illinois Consumer Fraud Act, fraud and negligent misrepresentation, Truth in Lending, the Civil Rights Act, Equal Credit Opportunity Act, and the Fair Housing Act. The Defendants, Countrywide, BAC Home Loans Servicing, Valor Financial Services and Marilyn Cieslak moved to dismiss the complaint under Federal Rule 12(b)(6) for failure to state a cause of action. Although the Federal standard to overcome the motion to dismiss is slightly more lenient, ("two easy-to-clear hurdles"; (1) the complaint must describe the claim in sufficient detail to give defendant fair notice of what the claim is and the grounds on which it rests and (2) its allegations must plausibly suggest that the plaintiff has the right to relief"), the Courts apply the same measure to "take the complaint's well-pleaded factual allegations as true and draw all reasonable inferences in [plaintiff's] favor."

Haymer's common law fraud count, alleged that Countrywide and Valor engaged in fraud when Valor failed to disclose her income on the loan application and Countrywide "turned a blind eye" to her inability to repay. Noting that there was no allegation that either Countrywide or Valor had a *duty* to disclose their position on Haymer's inability to repay the loan, the Court rejected the claim of fraudulent misrepresentation, and also found that there was no stated claim for fraudulent concealment relating to her inability to pay because there was no fiduciary relationship between Haymer and the broker or lender to support a duty to reveal and concealment. The cause of action for violation of the Illinois Consumer Fraud Act was dissected point by point by the Court and found valid. An omission or concealment of a material fact in trade or commerce constitutes consumer

fraud. A material fact is one which, if known to a consumer, her or she would have relied upon and would have lead him or her to act differently. Omission of a material fact is deceptive conduct under the Act. Here, Valor and Countrywide concealed the fact that Haymer could not afford the loan by excluding her income from the application and approved a loan they knew she could not afford. In response to the bold argument by the lenders that Haymer did not suffer any damages required under the Act, (i.e., the lenders posited that she actually "benefited" from the loan because it reduced her then existing interest rate and monthly payment!), the Court noted that the end result of the loan was to decrease her equity in her home by increasing the loan outstanding, damage to her credit, and the new higher interest, closing costs, and expenses of refinancing. Likewise the arguments relating to purely economic loss and the Moorman Doctrine were dispatched based on preceded that holds "a bank's failure to observe ordinary care in handling its customer's transactions may support a tort claim notwithstanding *Moorman's* commercial loss doctrine". The lenders did prevail on the Truth in Lending issues, the Court finding that the one year statute of limitations barred the action and Ms. Haymer's contention that her complaint was a "defensive measure" or "recoupment" exempted from the limitation was rejected because the foreclosure case was pending in state court and this assertive action was filed in federal court.

While many of Haymer's nine counts were dismissed as requested by the lenders, she was found to have valid claims for deceptive conduct, violation of the Illinois Consumer Fraud Act, and negligent misrepresentation. The factual pattern in this case is actually not rare in today's real estate recession following period of "no doc loans", and counsel seeking to plead a case against a lender which made a loan that clearly should not have been made would do well to read and take note of the reasoning in this decision by Judge Charles P. Korcoras.

11. MORTGAGES; RESPA, QUALIFIED WRITTEN REQUEST AND NEGLIGENCE:

Catalan v. GMAC Mortgage Corp., (7th Cir., January 10, 2011), 629 F.3d 676, 2011 U.S. App. LEXIS 579, is a case which should be read by every attorney who has had a client complain about their lender's mortgage loan – and who hasn't heard that? Catalan and Morris, the mortgagors, sued GMAC under RESPA and Illinois law for negligence, breach of contact, willful and wanton conduct. The problems with the mortgage servicing began when the original servicer, RBC Mortgage, mistakenly entered a first payment date of July 1, 2003, in their computer, even though the Catalan mortgage first due date was actually August 1, 2003. From that point forward, the mortgage appeared to be one month behind in payments and things escalated. The loan servicing then transferred from RBC to GMAC, which carried the initial error forward and increased the Catalan's mortgage payments in default. There was no notice of the servicing transfer, and payment checks were lost or misapplied between the servicers. As a result, Catalan's payments were returned as insufficient to reinstate and foreclosure was filed. Catalan did not sit by idle as the months went by, and wrote "Qualified Written Requests" to GMAC for an explanation, wrote to HUD setting forth the details of their "mortgage nightmare" with the servicers, and continually tendered monthly and lump sum payments.

The Seventh Circuit decision begins acknowledging RESPA as a consumer protection statute that regulates the servicing of loans as well as the real estate closing transaction, and imposes duties on lenders and servicers relating to the transfer and servicing of a loan (12 USC 2605(b)). Those servicing duties are triggered by a "Qualified Written Request" A QWR must be in writing, include the name and account number of the borrower or information sufficient to allow the servicer to identify them, and must request information or state reasons the borrower believes that there is an error with their account. The servicer then had 60 days from receipt to (1)

make appropriate corrections, (2) investigate and provide written clarification of the issue if the account is correct, or (3) investigate and provide the requested information or an explanation. The name and telephone number of a servicer representative who can be contacted must be provided, and during the 60 day period, the servicer can not provide prejudicial information to credit reporting agencies. There is a private cause of action for violations, and the servicer has a statutory "safe harbor" if the servicer notifies the borrower and makes corrections to the account within 60 days of discovery of an error.

The various QWR letters written by the borrower are analyzed to determine if they were within the parameters of the regulations and the actions of GMAC to determine if they fell within the safe harbor. A number of the letters written by Catalan were not proper "QWR" and did not trigger response obligations. Noting that "RESPA does not require any magic language before a servicer must construe a written communication from a borrower as a qualified written request and respond accordingly…Any reasonably stated written request for account information can be a qualified written request", a number of the letters stated "reasons for the belief of the borrower, to the extent applicable, that the account is in error", and met the criteria, but other letters simply stated Catalan's frustration and expectations without requests for information. The critical issue is whether the letter requests information and/or states a basis for a belief that an account is in error. Including that language "I am disputing your attempt to collect", together with a specific request for information regarding the account was viewed as the best form for the QWR. Based on the letters written, the Seventh Circuit reversed the Summary Judgment in favor of GMAC and remanded to the District Court to determine if the servicer had satisfied its duties to investigate and respond, refrain from negative credit reporting, sent the servicing transfer notices, and refrained from assessing late charges during the 60 day transfer period.

GMAC also refused Catalan's tender of payments based on the initial accounting error, and Catalan alleged this was a breach of contract. Responding to the servicers arguments that this cause of action was a "gripe that the payments were not applied as plaintiff's would have liked", the decision notes "To swallow GMAC Mortgage's argument, we would have to accept, as a matter of law, that a lender is free to refuse a tendered payment and then hold the borrower responsible for having failed to make the payment…We do not accept that argument.", and this also precluded summary judgment in favor of GMAC. Rejecting the negligence theory posed by Catalan, the Court applied the Moorman doctrine barring tort recovery for purely economic loss based on the failure to perform a contract, and further noted that under RESPA damages here were limited to actual damages inasmuch as there was no allegation that GMAC engaged in a "pattern or practice" such as occurred here, but discussed, in general terms, damages relating to the denial of credit and emotional distress resulting from the servicer's conduct.

12. MORTGAGE FORECLOSURE; CONFIRMATION OF SALE, NOTICE ERROR, CROSS COLLATERLIZED PROPERTY ACCOUNTING AND DEFICIENCY JUDGMENTS:

There were two separate foreclosures consolidated for appeal in Banco Popular v. Sonuga, (1st Dist., April 27, 2011), 2011 Ill.App.Unpub.LEXIS 659, and although the decision was filed under Rue 23 and unpublished, it is nonetheless instructional, if not precedental. More foreclosures of cross-collateralized property occur as the sheer volume of cases increases during the recession, and the issues presented are not unique.

The appeal arose out of three loans Banco Popular made to Sonuga, collateralized by two properties. The first loan was for $157,500, and secured by a mortgage on the defendant's Foster Avenue property. The second was a loan for $560,000, and secured by a mortgage on 24th Street property, together with a second mortgage on the

Foster Avenue property. The third loan was for $500,000, secured by a second mortgage on 24th Street. When a default in payments occurred, Banco Popular filed two separate suits to foreclose its loans totaling $1,217,500. Despite the fact that Sonuga had an offer to purchase the 24th Street property for $1.180 millions, the first case proceeded to a judgment of foreclosure in the sum of $1.271 against the 24th Street property, and a sale was held at which Banco Popular was the successful bidder for $423,000. A deficiency in the amount of $878,646.72 resulted, and a judgment for $639,496.18 was entered on the second mortgage at the confirmation of sale. The Order noted that $639,496.18 of the debt was cross-collateralized by the Foster Avenue property, and the subject of a related foreclosure case proceeding to sale thereafter. In the process of confirming the sale, Banco Popular filed appraisals indicating values of $690,000 approximately a year before the sale, and a current, second appraisal valuing the 24th Street property at only $465,000. The defendant filed an affidavit relating to the $1,180,000 contract, and alleged that Banco Popular "interfered with that sale" by telling the potential buyers that it might sell the property to them for much less at the end of the foreclosure. The trial court confirmed the sale and granted a deficiency judgment in the sum of $631,496.18, nonetheless and denied the defendant's motion to reconsider, leading to the notice of appeal.

The foreclosure against the Foster Avenue property was also contested and proceeded by summary judgment. The judgment listed $161,858.74 due on the first mortgage, ($157,500), and $610,725.18 on the second mortgage, noted the interrelatedness with the 24th Street proceeding, and ordered Banco Popular to "make a full accounting to the Court as to application of the sales proceeds in both matters as part of any motion for entry of a deficiency judgment." At the sale of the Foster Avenue property, Banco Popular bid and purchased the property for $205,000, filing an appraisal that valued the parcel at $300,000 just prior to the sale. The sale was confirmed with a deficiency judgment of $173,463.06, leading to the second, consolidated appeal.

On appeal, the defendants argued that the 24th Street sale confirmation ought be reversed or vacated because the notice of sale stated the wrong date of judgment, (i.e., the published notice stated May 28, 2008 as the judgment date, rather than the actual, May 14, 2008, date of judgment), and that the amount of Banco Popular's bid at sale was unconscionably low. The first argument relating to the erroneous judgment date in the notice of sale, took the position that the sale should not have been confirmed because a third party bidder would not be able to find a judgment entered on May 28, 2008 in the court's file, and therefore would not bid at sale. (Sound like a familiar path of reasoning? See Maniez v. Citibank, above, relating to errors in dates in a memorandum of judgment.) The Court reviewing the section of the Illinois Mortgage Foreclosure Law outlining the notice of sale found that the date of the judgment is not required to be stated in the notice, and that the law provides "an immaterial error in the information shall not invalidate the legal effect of the notice." in any event. (735 ILCS 5/15-1507).

Although Sonuga argued that the variance between the two Banco Popular appraisals, ($690,000 and $465,000), together with the offer to purchase for $1.180, was an unconscionable attempt to commit fraud in the conduct of the first sale, by diminishing the sales price in order to maximize the deficiency and carry that deficiency over to the Foster Avenue foreclosure, the Appellate Court rejected the argument. Holding that the price was not unconscionable and there was no evidence of a fraud, the Court noted that the $423,000 bid was within 10% of the latest appraisal of $465,000 obtained by the bank, and that the reduction in appraised value from $690,000 could "reasonably reflect a decrease in value over time". The Court turned to the often cited language in Illini v. Doering, (1987), 162 Ill.App.768, that while a court of equity has wide discretion in confirming sales that will not be reversed absent an abuse, the policy in these cases is to give stability and permanency to judicial sales. Mere inadequacy of price is not sufficient, and defendants failed to present evidence of any other current value to refute the bank's recent appraisal, and there was no actual evidence of the alleged fraudulent interference with the offer to purchase for $1.18 million, which was never closed.

The arguments relating to the confirmation of the Foster Avenue property and resulting deficiency were more technical. Sonuga argued that the note foreclosed in the first foreclosure was "merged into the judgment" in that case, and therefore could not be the basis for the deficiency in the second foreclosure. Noting that "whether and to what extent merger occurs is a matter of the parties' intent as evidenced by the language of the instruments and surrounding circumstances", the Court adopted Banco Popular's position on this issue as well. The language contained in the first confirmation of sale noted that the debt was cross-collateralized by the Foster Avenue property, and ordered Banco Popular to "make a full accounting to the Court as to application of the sales proceeds in both matters as part of any motion for entry of a deficiency judgment.", indicating that the parties did not intend a merger, but intended to factor in any "shortfall" on the sale of the first property into the confirmation of the second. Likewise, the arguments that collateral estoppel and res judicata applied were rejected. Although related and between the same parties, the two foreclosures were of different properties and debts. The loans being foreclosed were cross-collateralized but not identical and neither were the causes of action as is necessary to support either the theory of res judicata or collateral estoppel.

13. MORTGAGE FORECLOSURE SALES; INADEQUATE PRICE AND APPRAISALS:

In United States of America v. Buchman, (7th Cir. May 16, 2011), 646 F.3d 409, 2011 U.S. App. LEXIS 9909, the Court reviewed whether a foreclosure sale to a third party bidder should be overturned based on argument that the sale price was inadequate. Upholding the sale, the Court provides some very cogent language in support of sale, criticism of a mortgagor who took no action until confirmation of the sale over a two year period, and language that is especially applicable to the current real estate market decline in this context.

Buchman attempted to negotiate a settlement with lawyers representing the Department of Agriculture's Farm Service Agency, but then failed to file an answer to the Complaint, and later filed a petition in bankruptcy in order to stay the foreclosure sale following judgment. At the confirmation of a sale of three parcels for $322,000 to third party bidders, Buchman produced appraisals stating a value of $513,000. The Court concurred with the District Judge that "competition [is] superior to appraisals as a means of establishing market value: an auction yields a real price, while appraisals are just forecasts…Appraisers often produce estimates that favor their employer's interests…And appraisers usually generate estimates by examining sales of comparable properties. When the market is down, as the real estate market has been for several years, appraisals based on pre-decline transactions do not produce reliable estimates of current market value".

Although this case applies Wisconsin law to foreclosure facts, the statutory schemes are very similar, and the language employed "following established doctrine, that a completed sale will not be upset" will certainly entice some Illinois lawyers to cite this case.

14. MORTGAGE FORECLOSURE; INTEREST ACT, 365/360 INTEREST CALCULATION, GOOD FAITH AND FAIR DEALING AFFIRMATIVE DEFENSES:

In RBS Citizen's National Association v. RTG-Oak Lawn, Inc., (1st Dist., February 3, 2011), 407 Ill.App.3d 183, 943 N.E.2d 198; 2011 Ill. App. LEXIS 66; 347 Ill. Dec. 908, (Petn for Leave to Appeal Denied, May 25, 2011, 2011 Ill. LEXIS 1037), the borrower, raised affirmative defenses and counterclaims to a foreclosure

action based upon alleged violations of the Illinois Interest Act, the duty of good faith and fair dealing, common law and Consumer Fraud. The affirmative defenses all revolved around the allegations that RBS improperly calculated interest on a 360/365 computation method, failed to disclose the method of calculating interest, and unlawfully increased the amount of interest charged. The trial court dismissed the affirmative defenses and counterclaims with prejudice. The First District affirmed.

The "365/360" method of calculation is based on the "banking assumption" that each month consists of 30 days, and calculates a per diem interest factor by dividing the annual interest by 360, but then multiplies that rate by the actual number of days in the year, 365, resulting approximately 5 more days of annual interest than the alternative methods, (360/360 and 365/365). Based on the stated "per annum" interest in the note, the Defendants argued that the Illinois Interest Act specifically "prohibits the receipt of interest on a per annum note in any amount greater than expressly authorized under the statutory definitions of per annum and obvious meaning of a 'year', and therefore the 365/360 computation was improper. Turning to the "plain language" of the note that "Interest shall be computed on the principal balance outstanding from time to time, on the basis of a three hundred sixty (360) day year, but shall be charged for the actual number of days within the period for which interest is being charged", the Court found that the Note was not "ambiguous", but clearly provided for the 365/360 method of calculation. "Simply because the defendants claim they were unaware of how interest would be ultimately calculated and charged is not an appropriate factor to consider in determining ambiguity, or lack thereof, in a contract…'a party who has had an opportunity to read a contract before signing, but signs before reading, cannot later plead a lack of understanding'…we find no ambiguity in the interest provision of the Note and we conclude that no Interest Act violation occurred here." Accordingly, there was no breach of the duty of good faith and fair dealing, implied in every contract, but "does not arise out of precontractual actions and is only applicable to the conduct of parties to an existing contract." The defendant's expectations were limited to the plain meaning of the language of the note relating to calculation of interest, and the lender did not exercise any discretion required for a claim of breach of good faith and fair dealing. Likewise, there could be no finding of either common law or consumer fraud where the interest calculation provision was clear and unambiguous and the lender did not deviate from the terms of the Note. "[a] person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another."

The opinion also includes a discussion of the dismissal with prejudice and denial of motion for reconsideration by the trial court, and the request of the lender for sanctions for a frivolous appeal. Agreeing that no amendment of the pleadings could overcome the unambiguous language of the note, the dismissal with prejudice was affirmed. The basis for the motion to reconsider was two affidavits relating to the alternative methods of interest calculation, but "two individual's opinions as to the interpretation of the relevant interest provision can hardly be considered authoritative or even persuasive, when compared to the plain language of the Note itself." and was therefore also proper. The request for sanctions for the appeal, however, was denied. "We have held on numerous occasions, however, that an unsuccessful appeal does not necessarily indicate that the appeal was frivolous, was taken in bad faith, or requires the imposition of sanctions."

15. MORTGAGE FORECLOSURE; MERS STANDING TO SUE AND WAIVER OF AFFIRMATIVE DEFENSE BY DEFAULT:

The often referenced Internet "standing argument" in foreclosure cases was presented in Mortgage Electronic Registration System, Inc. v. Jessie Barnes, (1st Dist., December 3, 2010), 406 Ill. App. 3d 1; 940 N.E.2d 118; 2010 Ill. App. LEXIS 1288; 346 Ill. Dec. 118, (Appeal denied, 2011 Ill. LEXIS 670 (Ill., Mar. 30, 2011). The argument made in defense of this foreclosure of a mortgage, in which First NLC Financial Services, LLC was defined as the "lender" and MERS as the nominee of the lender, and "MERS is the mortgagee under this

Security Instrument.", was that MERS actually had no interest in the debt secured by the mortgage, was not the true owner, and therefore had no standing to sue. The "problem" was the Barnes did not raise the defense until filing a Section 2-1401 petition to vacate the judgment of foreclosure and deny confirmation of sale long after she had been defaulted in the case.

Noting that the foreclosure judgment was not a final order, and that without Rule 304 language in the judgment, it is the confirmation of sale that is final and appealable, the Court determined that Section 15-1508 limits the trial court's discretion to refuse confirmation to situations of issues relating to notice, fraud, the terms of the sale were unconscionable and/or an unjust result. In balancing the provisions of Section 2-1301 to vacate a non-final order, and 15-1508 relating to confirmation of sale, the decision notes that "defendant could not utilize section 2-1301(e) of the Code to circumvent section 15-1508(b) of the Foreclosure Law after MERS filed its motion to approve the sale" because "Such a practice would undermine the sale process because bidders would have no confidence that sales would be confirmed." Barnes, of course, argued that the judgment was void because MERS "was not the real party in interest because it was not the true owner or holder of the promissory note and mortgage." Although the Court acknowledged that "The doctrine of standing is designed to preclude persons who have no interest in a controversy from brining suit…Our supreme court has stated that 'lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court…[and by not doing so here] Defendant forfeited the standing issue through her default" Since all well-pleaded allegations are admitted by a defendant in default for failure to plead, the allegation that MERS held an interest in the loan was admitted, and "Furthermore, Illinois does not require that a foreclosure be filed by the owner of the note and mortgage. [citations]… MERS, as nominee for the lender, had authority to act to enforce the mortgage…" and had "standing". Noting that courts in other jurisdictions have both found MERS has standing to bring a foreclosure suit in its own name, and that there may be a material issue of fact as to the ownership of the mortgage that precludes that standing, the Court decided here that Jessie Barnes "forfeited that argument by her default. Such default notwithstanding, MERS satisfies the definition of mortgagee in section 15-1208 of the Foreclosure Law, and the trial court could have exercised its discretion to allow MERS to amend paragraph 3(N) of its complaint to reflect that it was designated or authorized to act on behalf of the holder of the indebtedness."

16. PARTITION; APPORTIONMENT OF ATTORNEY FEES:

On appeal in Bargman v. Wilson, (5th Dist., February 14, 2011*),*407 Ill.App.3d 656, 943 N.E.2d 1236, 2011 Ill. App. LEXIS 87,348 Ill. Dec. 326, the issue before the Fifth District was not a dispute relating to the partition of the subject real estate, but related only to the award of attorneys fees pursuant to the Partition Act, 735 ILCS 5/17-125. The initial complaint for partition was filed on behalf of the Plaintiffs, John Bargman, Charles Bargman, Norma Baughman, Ella Mae Wilson and Willard Wilson by their attorneys, Arbeiter & Walker, against Marlin Ray Wilson and Teresa Wilson to partition farm land owned as tenants in common. Approximately five months after filing, Arbeiter filed a motion to withdraw as John Bargman's attorney. Attorney Otto Faulbaum then appeared for John, and thereafter a judgment for partition was entered on the Plaintiff's motion for summary judgment. A sale was had, and attorney Arbeiter filed his petition for attorneys fees on behalf of Charles, Norma, Ella Mae and Willard, the remaining Plaintiffs represented by his office. attorney Faulbaum then filed a separate petition for attorneys fees on behalf of Plaintiff John Bargman for an amount of time expended similar to attorney Arbeiter. Not to be outdone, the defendant's attorneys, Neubauer and AuBuchon filed their own petition for apportionment of fees. The trial court, noting that neither John Bargman, Marlin Ray Wilson or Teresa Wilson "interposed any good and substantial defense to

the allegations and request for relief in the partition action; therefore, only the attorneys fees of [attorney] Arbeiter…shall be allowed." On John Bargman's motion to reconsider, attorney Arbeiter filed an affidavit stating that Faulbaum "had worked closely with him in addressing many legal issues…on many occasions, attorney Faulbaum took the lead in preparing pleadings and other documents necessary to advance the partition action…determined that their clients' objectives were fully aligned and that their respective legal work would mutually benefit the clients." The motion to reconsider was denied, and this appeal followed.

Based on the premise that the plaintiff's attorney acts for all parties having an interest in the property in seeking partition, the Code of Civil Procedure provides in Section 17-125 that "In all proceedings for the partition of real estate, when the rights and interests of all parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties…including…a reasonable fee for plaintiff's attorney…unless the defendants, or some of them, interpose a good and substantial defense to the complaint." The basis for this statutory provision is the fact that "plaintiff owes defendant a duty to establish the right to partition, to join all necessary parties as defendants, and to set forth the interests of all parties properly." When this is done, there is no need for the defendants to retain counsel to protect their interest. Noting realistically that there are often difficulties between co-owners that lead to partition, the courts nonetheless hold that "The existence of personal animosity or other differences between the parties…does not translate to an adversary proceeding", and while a defendant may hire his or her own attorney to represent them, they do so at their own expense. Where there is more than mere 'personal animosity or other differences', so that there is a good and substantial defense or the complaint does not properly set forth all parties' interests, the award of attorney's fees to the plaintiff is not appropriate. "The allowance of attorneys fees as apportioned costs is largely a matter resting in the discretion of the trial court."

Here the withdrawal of Arbeiter from John Bargman's representing placed John is a position similar to that of a defendant, and Faulbaum's representation was not "necessary" because there were no defenses interposed and the allegations of the partition complaint were admitted. "In sum, where the plaintiff's attorney files a petition for a partition properly setting forth the rights and interests of the parties and fairly and honestly represents the interests of all the parties, there is no necessity for the defendants or for one of the plaintiffs to subsequently employ separate counsel.

17. REAL ESTATE CONTRACTS; "AS IS" CONTRACT PROVISION IS NOT A DEFENSE TO FRAUD OR MISREPRESENTATION IN NON-RESIDENTIAL CONTRACTS AND NOT ADMISSIBLE IN EVIDENCE:

In an action for fraudulent misrepresentation of the condition of an industrial building in a purchase transaction, the Second District affirmed the trial court's exclusion of evidence that the buyer had agreed to purchase the property "as is" in Napcor Corporation v. JP Morgan Chase Bank, (2nd Dist., November 19, 2010.), 406 Ill. App. 3d 146, 938 N.E.2d 1181, 345 Ill.Dec.260. Prior to the contract for sale to the Plaintiff, Howard Preis was the employee at JP Morgan's trust department responsible for managing and maintenance of the building. The Realtor hired to market the property obtained a report indicating that the existing roof was leaking and that the proper method of repair was to tear-off and replace rather than recover and repair. Preis was advised that the roof needed to be torn off and replaced, but Preis took the position that a tear off was too expensive and directed contractors to install a new roof without a tear off of the existing roof. The job was completed and there was nothing that would alert anyone else that the roof had been covered versus torn off. The listing sheet prepared by Realtors for the sale was approved by Pries with the

statement "New roof in 1994 (tear off)". The purchase contract contained specific language that Napcor had "fully examined the real estate described herein and the building improvements thereon and…is accepting the real estate in its 'AS IS' condition." Preis also stated that the "new roof" on the building came with a ten year warranty. Napcor began experiencing minor roof leaks soon after taking possession and lost sections of the roof during three separate storms. It spent $25,158.05 in repairs and obtained estimates for replacing the roof in excess of $2,000,000. In the trial of the complaint filed by Napcor against the trust, the court granted a motion by Napcor's attorneys in limine of the 'As Is' provisions of the contract. The jury found that Preis intentionally, knowingly, or with reckless disregard for the truth, falsely misrepresented that there was a "new roof in 1994 (tear off)" on the building, and entered a resulting award of $1,201,158.05 in favor of Napcor. Defendant objected that the 'As Is' provision precluded Napcor from claiming that it reasonably relied on the statement, and that the trial court erred in excluding that from the evidence and argument submitted to the jury.

Justice Hutchinson's opinion affirming the trial court harkened to the 2005 decision in Bauer v. Giannis, (2nd Dist., 2005), 359 Ill.App.3d 897, holding that an "As Is" clause is not a defense available to a seller in a real estate transaction where a fraudulent misrepresentation and concealment of the condition of the property is alleged. Although that case specifically involved residential real estate and brought under the Residential Real Property Disclosure Act, the ultimate finding that "As Is" language in a real estate sale contract does not shield a seller from liability for fraud" served to provide the trial court with a proper basis upon which to rule that the language was not admissible relating to the issue of the buyer's reliance. "[B]ecause the "as is" clause was not a defense to fraud, the clause should not be admissible in evidence because it was not relevant to any element of or defense to the fraud claims". The Court further noted that this position has been adopted in a number of other states, and is not premised solely on the policy of the Residential Real Property Disclosure Act…therefore "we see no basis for limiting that holding to residential real estate transactions." Because the trial court properly relied upon the decision in Bauer, and properly applied the rule of that case in its decision on the motion in limine there was no error in its exclusion of the "As Is" provision of the contract and evidence Defendant sought to employ as a defense to its fraud.

While it is not clear from the state court record whether Carter ever got behind on her rent, AMC "obtained" an interest in Carter's debt to Jackson Square when AMC became Jackson's agent, and Carter's first rental payment was not yet due, and therefore AMC was not a "debt collector" and owed no duties to Carter under FDCPA. Carter's brief raised the question of whether the lawyers violated the Act even if AMC is not liable, but none of the lawyers was sued, so the issue was moot.

18. REAL ESTATE CONTRACTS; HOME INSPECTION LIABILITY LIMITATIONS:

In Zerjal v. Daech & Bauer Construction, Inc., (5th Dist., December 1, 2010), 405 Ill. App. 3d 907; 939 N.E.2d 1067; 2010 Ill. App. LEXIS 1269; 345 Ill. Dec. 887, Doug and Jackie Zerjal sued the builder, Daech & Bauer, and home inspector, Bill Theisman d/b/a Sure Home Appraisal and Inspection Services, when a number of defects became apparent after they purchased their home. Zerjal alleged that Sure Home failed to determine and then advise them that the foundation was insufficient to support the home's load, the underlayment was decayed and structurally unstable, as were the walls, that water intruded at the footing and

foundation, and the HVAC and electrical system were installed and maintained improperly. The home inspection contract specifically limited Sure Home's liability to the amount paid for the inspection, ($175), and required that any suit on the contract be filed within two years of the date of the inspection. The contract was for a "visual inspection" of the "readily accessible installed systems and components of the property" and excluded latent and concealed defects. When the Zerjals filed suit, Sure Home moved to dismiss pursuant to Section 2-619 based upon the contractual limitations of liability, and that it had tendered the cost of the inspection in settlement. The Court entered a judgment for $94,000 of damages against the builder, but dismissed that action against Sure Home with prejudice based on its motion.

On Appeal of the decision in favor of Sure Home, Zerjal argued that Sure Home failed to provide the contractually agreed upon services, that the limitations of liability were contrary to public policy and unenforceable, and that Jackie Zerjal had a justiciable interest in the inspection regardless of whether she was a party to the contract or not. Theisman argued that the limitations were not a violation of public policy and were valid contractually, absent a fiduciary relationship between the parties. Ruling in favor of Sure Home, the Court reasoned that Illinois courts have applied a strict test in determining when public policy interests invalidate a contract's terms, and do so only when it is "injurious to the interests of the public, contravenes some established interests of society, violates some public statute, in against good morals, tends to interfere with public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time." While the Illinois legislature has sought to regulate home inspections and inspectors by the Home Inspector License Act, (225 ILCS 441/1-1 et seq.), for the 'protection of the public', the mere regulation of an industry does not establish a public policy. This legislation deals primarily with education, licensing and regulation, not a specifically criticized pattern of exculpation or limitations of liability prohibition such as exist for innkeepers, professional bailees, landlords, and building contractors. The legislature could have easily included these prohibitions in the Act, but did not. In a like vein, the Zerjals were not in a position similar to patrons of common carriers or employees so that their bargaining position needed support because of a special relationship or vulnerability. There was no "absence of meaningful choice" to support a finding of "unconscionable" contract limitations imposed upon the Zerjals, and while such limitation clauses in homes inspection contracts may have been rejected in other states, (such as New Jersey), Illinois does not yet have such an established public policy. The decision ends with the statement by the Court that: "We decline to act in place of the legislature in declaring limitation of liability clauses in home inspection contracts against public policy."

19. REAL ESTATE CONTRACTS; BREACH, DAMAGES AND APPEALS:

Mary and Marc Simon entered into a contract to purchase a condominium unit under construction in the facts set forth in Palmolive Tower Condominiums v. Simon, (1st Dist., May 16, 2011), 409 Ill.App.3d 539, 949 N.E.2d 723. The terms of the contract provided specific dates for substantial completion of construction, (December 31, 2005), but limited the Simon's remedy to the refund of their Earnest Money and interest on it. The contract also contained a provision for payment of $7,500 per month to the Simons, at their election, if the closing did not occur by August 31, 2005. Construction lagged, but the parties entered into a "closing agreement" on January 17, 2006, by which the Simons took possession even though the construction was not complete, and deposited the balance of the purchase price into an escrow, based on the Seller's representations relating to the progress of completion of construction and a credit of $25,000. The Seller later completed construction, but the Simons refused to release the purchase price from the escrow. Plaintiff filed suit for

declaratory judgment claiming that it was entitled to payment of the purchase money, for breach of the agreement, and specific performance. The Simons filed a counter-complaint alleging the Seller's representations of the progress of completion of construction at the time of the closing agreement were false, and that it thereby breached the contract and committed fraud in those representations. The trial court granted the Seller's motion to dismiss the Simon's counter-complaint, finding that the Counter-complaint failed to properly plead damages. The First District affirmed.

Both the breach of contract and fraud actions required an allegation of actual damages. The measure of damages in fraud is that which will "enable [a party] to be placed in the same financial position as it would have been had the misrepresentation in fact been true", and a like measure applies to breach of contract. The Simon's measure of damages here would have been the difference in their position before and after the misrepresentation of the status of construction and any diminution of value attributable to the breach. The parties agreed that the closing took place pursuant to the terms of the closing agreement executed in January, 2006, after the Seller failed to close in August and complete construction in December, and that the construction was eventually complete. There was no allegation that the value of the property was diminished by the late closing or that the construction not being completed as represented actually impacted the Simons financially. (The Court noted that the contract provision to giving the Simons the option of receiving $7,500 a month from August to December was waived by the Closing Agreement, together with other potential "damages" relating to terminating the contract and interest on their earnest money.) "The defendants make no allegations that the plaintiff did not eventually complete the requisite construction and sales so that those problems no longer affect the defendants, nor do they allege that they were in any way harmed by any temporary diminution in value, for example by failed efforts to sell their condominium or obtain loans based on its value."

The Plaintiff also obtained a judgment on the pleadings on its complaint for breach of contract, specific performance and damages due to the Simons' refusal to release the purchase money held in escrow. This followed the earlier order granting their motion to dismiss the Defendant's Counter-Complaint, and set up another important aspect of this decision: Whether the Appellate Court properly had jurisdiction to hear the Simons' appeal of the first order dismissing the Counter-Complaint as well as their appeal of the judgment on the pleadings. The crux of this issue deals with what is a "final and appealable order" under Supreme Court Rule 304(a) . The first order dismissing the Counter-complaint contained the language "This is a final and appealable order, there being no just reason to delay enforcement or appeal." The second order granting Plaintiff judgment on the pleadings as to the first count of its three count complaint but merely stated "This order is final and appealable." The Appellate Court held it did not have jurisdiction over the appeal of the second order because it did not dispose of all claims before the trial court, and did not contain all of the requisite language to actually make it "final and appealable" otherwise. While the Supreme Court does not "require that a circuit court parrot Rule 304(a) exacting in order to invoke it.", there must nonetheless be requisite language to make it clear that the trial court had determined that either Rule 304(a) applies by specific reference to the Rule in the Order, or "that there is no just reason to delay appeal." Since there was no reference in the second order "referencing immediate appeal, the justness of delay or Rule 304(a), [it] does not trigger the rule." Leave to appeal to the Supreme Court of Illinois was denied September 28, 2011, 2011 Ill.LEXIS 1663.

20. REAL ESTATE CONTRACTS; EARNEST MONEY, LIQUIDATED DAMAGES, AND DECLARATORY JUDGMENT:

In another case revolving around a contract to purchase a condominium, the trial court dismissed the buyer's complaint pursuant to Section 2-615, leading to an appeal. Karmi v. 401 North Wabash Venture, LLC, (1st Dist., July 26, 2011), No. 1-10-2670, 2011 Il.App.LEXIS 778. Karmi sought declaratory judgment that the contract to purchase a condominium unit in the Trump International Hotel and Tower had not been terminated by the Seller's notice, together with a myriad of other claims relating to the retention of the earnest money as liquidated damages, consumer fraud and deceptive practices, unjust enrichment and conversion. The purchase price was in excess of $2 million dollars, with a 15% earnest money deposit. The closing was to be in late 2008, and the Seller gave notice it was prepared to close in October, 2008, but the closing was extended to May, 2009 for Karmi to obtain financing. On May 15, 2009, Seller declared the contract terminated and sold the unit to a third party for approximately $2.5 million.

Turning first to the counts requesting declaratory judgment, the Appellate Court affirms the trial court's analysis of a declaratory action. "The declaratory judgment process allows a court to address a controversy after a dispute arises but before steps are taken that give rise to a claim for damages or other relief." Here, that cause was not applicable because the contract had been terminated, and declaratory judgment "is not the proper vehicle for presenting what are, in essence, plaintiffs' breach of contract allegations...a court may dismiss such an action if a party seeks to enforce his rights [to declaratory judgment] after the fact." The claim for unjust enrichment was also dispatched as being procedurally inappropriate; "where a specific contract governs the relationship between the parties, the doctrine of unjust enrichment is inapplicable. [Cite] If the complaint expressly alleges a contract, the count alleging unjust enrichment is properly dismissed." The conversion count was not supportable by the facts. Conversion requires that money belonging solely to someone else is converted by another for his own use. Here, the earnest money claimed to be converted was deposited "for the mutual benefit of the Seller and Purchaser", and could not then be claimed to be solely the property of the Plaintiff and "converted" by the Seller as a party to the escrow. The Court reviewed the notice of default and timing, and found the contract terminated, entitling Seller to retain the earnest money as liquidated damages. Analysis of the particular liquidated damages provisions of this contract, ("No fixed rule applies to all liquidated damages provisions, and courts must evaluate each one on its own facts and circumstances. [cite]", but generally the requirements are that (1) the parties intend to agree in advance to set the damages, (2) the amount is reasonable at the time of contracting, and (3) actual damages would be uncertain and difficult to prove.), found them enforceable here. The fact that the provision referred to the retention of additional sums for deposits and 'extras' over and above the earnest money did not render the amount of the damages a "sum uncertain", nor did the requirement that extrinsic evidence be provided of the sums other than earnest money. The liquidated damages language limited the Seller to retention of the sums deposited as its "sole and exclusive remedy upon termination" and therefore did not violate the "penalty" concerns in the Grossinger and Catholic Charities cases.

21. ZONING; AMENDED ZOINING AND VESTED RIGHTS DOCTRINE:

In 2006, the case of 1350 Lake Shore Associates v. Healy, (2006), 223 Ill.2d 607, presented the vest rights doctrine relating to zoning. The doctrine states that a developer or purchaser, because of a substantial change in position, expenditures or incurrence of obligations made in good faith by as an innocent party under a building permit or in reliance upon the probability of its issuance", obtains a vested property right to complete construction regardless of a subsequent zoning change making the project a violation of the ordinance. The Plaintiff in Christian Assembly Rios De Agua Viva v. The City of Burbank, (1st Dist., March 31, 2011), 408 Ill.App.3d 764, 948 N.E.2d 251, 2011 Ill. App. LEXIS 299, made the same argument, but failed to establish

that there was a probability that the city would approve its special use request to build a church, and therefore had no 'vested right' upon which to enjoin the city's prohibition. The Church was largely Hispanic, and based a part of its appeal on allegations of asserted constitutional rights. It entered into a contract to purchase property formally used as a restaurant for $900,000, and paid $50,000 in earnest money; part of which became non-refundable. The contract had a contingency based upon the Church obtaining approval for a special use permit to allow the use of the property as a church, and provided for time extensions for that process, with provision for termination of the contract and return of a portion of the earnest money if the zoning approval was not obtained. The property was in a commercial district, and required a special use permit, although political, civic, social and fraternal association uses were permitted. The Church claimed the Illinois Religious Freedom Restoration Act, 775 ILCS 35/15, and Illinois Constitution provided it with the right to locate a church on the property, but was denied the permit following a public hearing because of the "lack of tax revenue" the church use would provide the City.

On appeal, the trial court's denial of the preliminary injunction was upheld based on the requirement that the Church show it had a substantial likelihood of ultimate success on the merits. That showing required the Church prevail in its argument that it had a 'vested right' to a special use before the City amended the zoning ordinance to provide that a church was not a permitted use in the commercial district in which it was located. To obtain a vested right, the owner is required to show (1) that there was a probability the city would issue the permit requested prior to the change in zoning, and (2) a substantial change in position in reliance on this probability. Here the Church could do neither. In the beginning, the Church's proposed use was contrary to the zoning for the property and would require a special use permit as an exception. "Although there was a *possibility* that the city would grant the plaintiff's request …plaintiff did not have a reason to believe that the city *probably* would permit such use." (Emphasis in decision, citing Bank of Waukegan v. Village of Vernon Hills, (2nd Dist., 1994), 254 Ill.App.3d 24) The Church's argument was that the restriction on church use, but not other social, civic or fraternal uses, violated the Illinois Constitution and Religious Freedom Restoration Act. Accordingly, it believed it was "probable" that the Church would succeed in its petition to request a special use permit. This argument was rejected: "Plaintiff decided to assume the ordinance was invalid and proceeded, at its own risk, to enter into a contract and expend funds to purchase the property for use as a church.", but "a party does not have a vested right to assume that the ordinance was invalid and proceed in violation of it." Neither could it assume that any post petition amendment of the zoning ordinance would permit a church in the district. Finally, the fact that the contract to purchase contained a right to terminate in the event a permit was not obtained "belies the church's argument that it believed that there was a probability that the city would issue a special use permit and is further evidence that the church at least thought there was a likelihood it would not be allowed to use the property as a church…Because plaintiff failed to establish that there was a 'probability' that the city would approve its request to use the property as a church, it did not have a vested right to do so."