COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-1037

PARTRIDGE LANE UNIT OWNERS' TRUST

vs.

LISA PEACHEY[1] & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case involves unit 4-3 of the Town Homes at Partridge Lane Condominium, a twenty-four unit condominium in the town of Lynnfield. The Partridge Lane Unit Owners' Trust (Partridge Lane) filed an action against the owners of unit 4-3, Lisa Peachey, also known as Lisa Flanagan, and Shaun J. Flanagan (collectively, Flanagans).[3] Partridge Lane sought a declaratory judgment that unit 4-3 was subject to affordable housing restrictions along with other equitable remedies. Citibank, National Association, successor to Citicorp Trust Bank, FSB

[1] Also known as Lisa Flanagan.

[2] Shaun J. Flanagan. In addition, the amended complaint named Citibank, National Association, successor to Citicorp Trust Bank, FSB; Department of Housing and Community Development; and town of Lynnfield as "parties in interest."

[3] When necessary, we refer to them by their first names to avoid confusion.

(Citibank), the Department of Housing and Community Development (DHCD), and the town of Lynnfield (town) were joined as interested parties.

The Superior Court judge denied Citibank's motion for summary judgment and granted summary judgment for Partridge Lane, the DHCD, and the town. Citibank appealed. For the following reasons, we reverse the judgment and order the entry of judgment in favor of Citibank.

Background. We summarize the undisputed facts that are material to this appeal. In 1994, the master deed for the Town Homes at Partridge Lane Condominium (master deed) and a regulatory agreement were recorded with the registry of deeds. The regulatory agreement stated that six of the twenty-four Partridge Lane units (three two-bedroom units and three three-bedroom units) are designated "Low and Moderate Income Units." Buyers and sellers of low and moderate income units are required to comply with certain requirements, including a maximum sale price of $84,000 for three-bedroom units. According to the terms of the regulatory agreement, "the Project Sponsor shall execute and shall as a condition of sale cause the purchaser of the Low and Moderate Income Unit to execute a Deed Rider in the form of Exhibit C attached hereto." Neither the regulatory agreement nor the master deed specify which particular units are designated low and moderate income units. Five of the Partridge

Lane units have recorded deed riders, identifying those units as low and moderate income units.

The Flanagans purchased unit 4-3 at Partridge Lane, a three-bedroom unit, in 1995 for $84,000. The condominium unit deed, recorded in the registry of deeds, did not include a deed rider identifying unit 4-3 as a low and moderate income unit. The Flanagans took out a series of mortgages on unit 4-3. In 2008, the Flanagans granted a mortgage in the amount of $237,498.47 on unit 4-3 to Citibank. The other mortgages have since been discharged.

The town and the DHCD contend that unit 4-3 is a low and moderate income unit.[4] In 2012, after learning that the Flanagans were attempting to sell the unit for a price greater than the affordable rate, Partridge Lane filed an equitable action seeking a declaration that unit 4-3 was subject to the affordable housing restrictions. Partridge Lane also sought to reform the deed to reflect that unit 4-3 was a low and moderate income unit, to enjoin the sale of unit 4-3 as a nonaffordable unit, to impose a constructive trust on any sale proceeds above the maximum affordable price, and to record a notice of lis pendens in the registry of deeds. Citibank filed "counterclaims and crossclaims" seeking a "declaratory judgment as to all

[4] Partridge Lane and the Flanagans have not participated in this appeal.

parties" that its mortgage is valid and fully enforceable, and that unit 4-3 is not subject to the affordable housing restrictions.[5]

The parties filed cross motions for summary judgment. Citibank contends that at the time the Flanagans granted it a mortgage on unit 4-3, nothing in the chain of title indicated that the unit was subject to an affordable housing restriction; therefore, argues Citibank, it lacked actual or constructive notice of the deed restriction. The DHCD and the town contend that Citibank had constructive notice of the affordable housing restriction. The judge granted summary judgment in favor of Partridge Lane, the DHCD, and the town, as well as the equitable relief sought in Partridge Lane's amended complaint. Citibank appeals.

Discussion. Summary judgment is appropriate where "all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v.

[5] The remaining counts of Citibank's counterclaim against Partridge Lane have been dismissed and are not at issue in this appeal. Citibank also filed a cross claim against the Flanagans, alleging negligent misrepresentation and intentional misrepresentation. Only Shaun filed an answer to the cross claim; Lisa did not file a response. It appears that the cross claim is still pending; the judgment was not entered pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974). In light of our conclusion that unit 4-3 is not subject to the affordable housing restriction, the cross claim has no reasonable chance of success.

Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). This court reviews the grant of a motion for summary judgment de novo. Federal Natl. Mort. Assn. v. Hendricks, 463 Mass. 635, 637 (2012). "In an action with cross motions for summary judgment, we ask whether the evidence, in the light most favorable to the party losing the contest of cross motions, and the controlling law entitle the prevailing party to judgment." Verrill Farms, LLC v. Farm Family Cas. Ins. Co., 86 Mass. App. Ct. 577, 579 n.2 (2014) (quotation omitted).

Standing. As a threshold issue, the DHCD contends that Citibank lacks standing to bring this appeal because on June 19, 2013, Citibank assigned the mortgage to CitiMortgage, Inc., which is not a party to this action. Citibank, however, holds the note secured by the mortgage. Under Massachusetts law, a mortgage and note may be split and the party holding the mortgage will become an equitable trustee for the note holder. See Eaton v. Federal Natl. Mort. Assn., 462 Mass. 569, 578 (2012). Because Citibank, as the note holder, has "a definite interest in the matters in contention in the sense that [its] rights will be significantly affected by a resolution of the point," Bonan v. Boston, 398 Mass. 315, 320 (1986), Citibank has standing to pursue this appeal.

Actual notice. The DHCD now contends that there is a factual dispute as to whether Citibank had actual notice of the

encumbrance based on representations made by the Flanagans to Citibank. "Actual notice is a question of fact." McCarthy v. Lane, 301 Mass. 125, 128 (1938). The DHCD relies on Shaun's answer to Citibank's cross claim for negligent misrepresentation, in which Shaun denies Citibank's allegation that he failed to advise Citibank of the affordable housing restriction. See note 5, supra. An answer to a complaint merely denying allegations is insufficient to raise a genuine issue of material fact. LaLonde v. Eissner, 405 Mass. 207, 209 (1989) ("the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment"). We therefore conclude that on the record presented there were no material facts in dispute.

Constructive notice. An affordable housing restriction may either be "duly recorded and indexed in the grantor index in the registry of deeds or registered in the registry district of the land court for the county or district wherein the land lies." G. L. c. 184, § 26, as amended by St. 1990, c. 520, § 2. Where a property is recorded, as in this case, "[a] buyer of real estate cannot be charged with constructive notice of an equitable restriction unless he can find it recorded somewhere in his chain of title." Stewart v. Alpert, 262 Mass. 34, 38 (1928). See McCusker v. Goode, 185 Mass. 607, 611 (1904) ("It is the policy of our law in regard to the recording of deeds,

that persons desiring to buy may safely trust the record as to the ownership of land, and as to encumbrances upon it which are created by deed"); Tosney v. Chelmsford Village Condominium Assn., 397 Mass. 683, 687-688 (1986) (condominium unit owners have constructive notice of documents recorded with master deed). Accordingly, as a matter of law, Citibank lacked constructive notice of the affordable housing restriction.

Here, no recorded document, including the master deed or regulatory agreement, provided that unit 4-3 was subject to any affordable housing restriction. Moreover, the master deed and the regulatory agreement stated that any units subject to the restriction "shall" have a recorded deed rider.[6] Unit 4-3 had no such recorded deed rider. Contrary to the DHCD's contention, Citibank could not have inferred from unit 4-3's initial $84,000 purchase price alone that the unit was subject to an affordable

[6] The town directs our attention to an affidavit, submitted by James E. Tamagini, a conveyancer and title examiner, who offered his opinion that Citibank had constructive notice that unit 4-3 "could be subject to an affordable housing restriction." A title examiner's affidavit may explain "standard title examination practices." Dalessio v. Baggia, 57 Mass. App. Ct. 468, 472 (2003). However, "[l]ay and expert witnesses are precluded from giving an opinion, for the most part, that involves a conclusion of law or in regard to a mixed question of fact and law." Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 137 (2002). In determining whether, as a matter of law, Citibank had constructive notice of the affordable housing restriction we do not consider this affidavit.

housing restriction. Nor was it required to look to the original purchase price.

The DHCD also relies on Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 359 (1975), for the proposition that Citibank had constructive notice of "any deed given by a grantor in the chain of title during the time he owned the premises in question," which would presumably alert Citibank that only five of the condominium units had deed riders. That case is inapposite because it relates to a "common scheme" where each grantee "is an intended beneficiary of the restrictions and may enforce them against the others." Id. at 358. In this case, where only six of the twenty-four condominium units are subject to an affordable housing restriction, there is no "common scheme." A prospective buyer need not "hunt for obligations," or study encumbrances in other properties in order to divulge a "pattern." Popponesset Beach Assn. v. Marchillo, 39 Mass. App. Ct. 586, 589 (1996).[7]

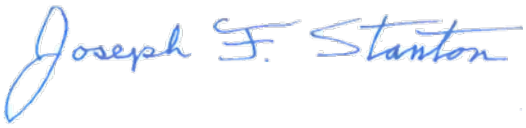
Where neither the unit 4-3 deed, the master deed, nor the regulatory agreement identified the encumbrance, Citibank lacked constructive notice of the affordable housing restriction. There is no genuine dispute of material fact preventing the case

[7] Although Popponesset Beach Assn. v. Marchillo involved registered property, as opposed to recorded property, the same principle applies. See McCusker v. Goode, supra.

from being resolved on the summary judgment record. Accordingly, we reverse the judgment and order the entry of a new judgment in favor of Citibank.[8]

So ordered.

By the Court (Meade, Hanlon & Maldonado, JJ.[9]),



Clerk

Entered: May 22, 2017.

[8] We need not address Citibank's contention that Partridge Lane, DHCD, and the town are not entitled to equitable relief because of their failure to attempt to enforce the affordable housing restriction sooner.

[9] The panelists are listed in order of seniority.