No. 23-1870

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff -Appellee,
and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.,
Defendant,

APPEAL OF: BC57, LLC.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern, Division
Case No. 1:18-cv-05587
The Honorable Manish S. Shah

JOINT BRIEF OF *AMICI CURIAE* ILLINOIS LAND TITLE ASSOCIATION AND ILLINOIS MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF THE PETITION OF BC 57, LLC, FOR *EN BANC* REHEARING

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: Securities and Exchange Commission and Duff v. Equitybuild, Inc.

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The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Illinois Land Title Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Cohon Raizes & Regal LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Amy E. Daleo Date: 05/28/2024

Attorney's Printed Name: Amy E. Daleo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Amy E. Daleo Date: 05/28/2024

Attorney's Printed Name: Amy E. Daleo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☑ No ☐

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Interest of Amici Curiae[1]

The Illinois Land Title Association ("ILTA") is a not-for-profit association of title insurance companies, title insurance agents, and interested attorneys. It has served the Illinois land title community for more than one hundred years. ILTA is the only industry organization in Illinois that addresses legislative and judicial concerns related to land titles for its members and for the citizens of Illinois. See www.illinoislandtitle.org.

ILTA has an interest in this case because the panel's May 6 decision stands to profoundly reshape the way Illinois title insurance companies conduct real estate closings.

The Illinois Mortgage Bankers Association ("IMBA") is the oldest state non-for-profit trade association of mortgage bankers. Since 1920, IMBA has promoted real estate financing and safeguarded Illinois consumers. IMBA offers education to its members and Illinois consumers, and advises legislatures, regulators, and the courts of its views on the effect of laws, regulations, and decisions on the mortgage industry.

IMBA is interested in this case because the panel's decision will result in closing delays that will increase the closing costs of Illinois consumers because of extended rate lock periods. Additionally, the decision results in uncertainty of existing title for Illinois borrowers and their mortgage companies which may prevent their mortgages from being salable in the secondary market.

[1] No party's counsel authored this brief, in whole or in part, and no party or other person besides *amici curiae* ILTA and IMBA, their members, and their counsel, contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E), 29(b)(4).

Introduction

Since 1903, it has been the law of the land in Illinois that payment of a debt *ipso facto* extinguishes, and renders unenforceable, any lien securing repayment of the debt. *Bradley v. Lightcap*, 201 Ill. 511, 517 (1903), *rev'd on other grounds*, 195 U.S. 1 (1904). In its May 6 panel decision, this court recognized that this has long been the common law rule (Panel Opinion, at 7). In the last 121 years, neither the Illinois supreme court, nor any Illinois appellate court, has expressly modified or otherwise taken issue with the common law rule.

Nonetheless, the panel held that the Illinois Mortgage Act, 765 ILCS §§ 905/1 *et seq.* (the "Act"), which became law in 1962, abrogated the common law rule because the panel concluded, wrongly we believe, that there is an irreconcilable repugnancy been the Act and the rule.

As discussed below, buyers and sellers of real estate and title insurers in Illinois have long relied upon the common law rule. Indeed, the title industry has structured its business model in no small part on this core and, until now, accepted principle. Similarly, this principle has contributed to expedited closing and certainty of title for Illinois mortgage borrowers and mortgage lenders. The panel's decision, however, upends the law and will upend the industries' model for closing real estate transactions, making it more expensive for Illinois consumers to buy or get a mortgage. Not only that, but the state of title of countless properties in Illinois will now be called into question. This may result in Illinois mortgages becoming subject to repurchase demand or even becoming unsellable in the secondary market.

Argument

I. The Panel's Decision Upends the Common Law Rule Which Is a Foundation for Illinois's Real Estate Closing Procedures.

A. Illinois real estate closings are conducted as table closings.

Since long before 1962, the title and mortgage industries in Illinois have employed a table closing as a means of conducting a real estate transaction. A table closing usually takes place in one day and is often completed in a couple of hours. At the closing, the seller, the buyer, and in the case of a mortgage loan, the lender, deliver to the title company's closer the signed conveyance, title, and loan documents. J. Bushnell Nielsen, A*merican Land Title Association, Title Escrow Claims Guide* (2024), §13.1, "Types of Escrows and Their Purposes," 2016 WL 6637299.

The title company also collects the funds necessary to satisfy the purchase contract, to extinguish secured debts, and to cover the expenses of the transaction. Upon approval of the documents by the parties and title company, the title company disburses the collected funds to pay the seller, satisfy closing costs, pay off liens, and pay off the seller's (or, in a refinance, the borrower's) mortgage loan, if any. The deal is done. No recordation of the release or mortgage is needed or must be waited for.

The seller receives her money, the buyer obtains the keys to the property, and in refinance transactions the borrower shortly after gets her loan. Based on the details of the deal, the buyer and her lender also leave the closing with an insurer-approved commitment for title insurance that spells out what will and will not be covered in the policy of title insurance that will be issued to the owner and her lender shortly thereafter. Any paid-off mortgage will not be an exception to coverage under those policies.

After closing, the title company delivers to the county recorder the deed along with any mortgages, encumbrances, and releases to be recorded. Releases are generally delivered after the lien holder is paid off in full. It may take days or, in the case of Cook County, weeks before the documents appear as recorded: *i.e.,* are accessible to the public in the grantor/grantee index.

The table closing benefits all parties. The fact that the seller has immediate use of her funds is of particular importance in the many instances in which the seller needs those funds to close on the purchase of her next property. She is thus able to relocate and to move her belongings as required by the first transaction. Likewise, the buyer is able to make immediate use of the real estate. He can take possession, make alterations, enter into lease transactions, or collateralize the property. He has his deed and he has a commitment for title insurance to protect his title. A borrower refinancing can immediately receive the loan funds or enjoy lower interest rates. For all parties involved in any of these transactions, no one needs to wait for anything to be recorded.

Table closings are efficient and certain. They are how closings were conducted throughout Illinois in 1962, when the Act, became law. They are how closings are conducted today.

B. The panel's decision may force closings to be conducted in an entirely different manner, as escrow closings.

Should the panel's decision stand, the manner in which real estate closings are conducted must necessarily change. The likely alternative to Illinois's table closings are pure escrow closings, which take days or weeks to close. In a pure escrow closing, the transaction is not closed and funded unless and until all the documents to be recorded, including releases, appear of record in the proper county indexes. J. Bushnell Nielsen, *supra* at §13.1, fn. 12. Because the exchange of payment can only occur upon recordation of deal documents in the proper indexes,

quitclaim deeds and releases of the funder's mortgage are also deposited into the escrow so that the deal can be unwound if a condition fails. *See*, 2 Colo. Prac., Methods of Practice §67:2 (7th ed.). These types of closings keep the parties in limbo and at the mercy of the recorder. The buyer cannot move into her new property, or sell her old one, until the wait is over. The lender's funds are tied up in a loan commitment for an uncertain period of time. Some states use pure escrow closings. Illinois does not. In ILTA's and IMBA's view, what escrow closings gain in certainty, they lose in expense, convenience, and efficiency.

The panel's May 6 decision is in effect a directive that the real estate, mortgage lender, and title industries in Illinois have been doing it all wrong and must now move to a system of pure escrow closings. The unintended consequences of such a directive are profound.

C. The panel's decision introduces inefficiency and uncertainty.

If recordation is the only means of assuring that liens are extinguished, then title companies may not be willing to deliver commitments for title policies at closing. Rather, they may need to wait for recorded releases to post to the county's grantor/grantee index to provide the requisite insurance required by purchasers and their lenders. Neither the Illinois statutes nor its counties' recording systems are set up to accommodate such a radical change.

First, Illinois law affords little urgency in directing mortgagees to deliver releases. The Mortgage Act provides that a mortgagee can take as long as 30 days after payment of a debt to provide a release for recording to the mortgagor. 765 ILCS 905/4. Failing to do so within the 30-day period subjects the mortgagee to a mere $200 penalty, and only if the mortgagee brings a lawsuit against the mortgagor to compel compliance. *Id*. This timetable and minimal penalty does little to induce a lender to provide a release in a more expedient manner.

The county's registrar of titles can reject a non-conforming release of mortgage leading to further delay. Illinois does not provide a statutory mortgage release form. The Counties Code mandates only that the release contain the name and address of the person to whom the release is to be returned, the document number (and where applicable the book and page number) of the instrument to be released, and the name and address of the person who prepared the release. 55 ILCS 5/3-5020.5; 55 ILCS 5/3-5022. Each county's recorder has the right to control the internal operations in their own office. 55 ILCS 5/3-5005.2. Non-conforming releases can be rejected and not recorded. 55 ILCS 5/3-5013.

Once the release is received and accepted by the recorder, the indexing of the release takes time. During the pandemic, it took the Cook County Clerk months to index recorded documents. As of the writing of this brief, the Cook County Clerk's online index has a three-week lag time. *See,* https://crs.cookcountyclerkil.gov/Search (noting the "Documents Indexed Through" date).

Simply put, requiring recorded releases to appear in the grantor/grantee index would significantly delay sale and refinance transactions in Illinois.

II. The Panel's Decision Will Cause Turmoil for Title Insurers Examining the Chain of Title.

The panel's decision not only has implications for future transactions. It also calls into question the current state of title and the continued enforceability of prior liens on countless parcels of real estate where the debt has been paid but the mortgage lien has not been released of record or the release has been misfiled, or the release has immaterial defects.[2] Based upon the

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[2] A myriad of reasons exist for the failure to record a release of mortgage. The recorder may reject the release for noncompliance or be understaffed and delay recordation; the release may get lost; the release may contain an error misidentifying the recorded mortgage; or the lender may no longer exist. *See* R. Wilson Freyermuth, *Why Mortgagors Can't Get No Satisfaction*, 72 Missouri. L. Rev. 1159, 1159-60 (2007).

common law rule that payment of a debt extinguishes the lien, many of these mortgage liens were insured over at the table closing by title companies based upon proof of payment or by virtue of hold harmless letters from previous title companies who conducted prior closings. Now, pursuant to the panel's May 6 ruling, the risks undertaken by title insurers have increased because the ruling suggests that they can no longer rely upon prior payment having extinguished the liens. Increased risk almost certainly leads to higher premiums.

Moreover, obtaining releases of mortgages prior to the closing would be difficult and time-consuming and is often impossible in any event. Many unreleased mortgages appearing of record were conveyed by previous owners, about whom the present owners have little or no information. In many cases the banks or lenders which held those mortgages are no longer in operation. Where a release of an old mortgage cannot be obtained because the lender cannot be found, the buyer may have to either take title to the property subject to that lien, or the seller may have to pay an additional premium for coverage over the lien. When such coverage would be available it would increase the costs for Illinois borrowers; and when it is not available, it may prevent a loan from being made, as it will not be capable of being sold in the secondary market.

III. The Act Supplements and Complements the Common Law Rule

A mortgagor and her mortgagee don't need a system of recordation to tell them when the underlying mortgage debt has been paid. The Act is not needed to tell them what they already know. The purpose of the Act is to inform the rest of the world what is known of record about the status of title, including the status of liens on title, so that those interested in transacting with real property are on notice of what is of record.

When a release of mortgage is recorded, the Illinois title industry does not treat such recordation as the final act that gives legal effect to the release. Because, under the common law

rule, the mortgage is no longer enforceable once the debt it secures is paid, the industry recognizes recordation as confirmation, for public notice purposes, of what has already occurred.

For these reasons, the Act supplements and is not in the slightest way repugnant to, the common law rule.

Moreover, the panel decision overlooks the fact that mortgages need not be recorded to be valid. "The land recording system exists merely to provide notice of ownership of real property, or of possession of a lien, such as a mortgage, on such property, for the benefit of the owner or the lien holder. Recording is therefore optional." *See Macon County, III v. MERSCORP, Inc.*, 742 F.3d 711, 713 (7th Cir. 2014). On the other hand, the Act's language relating to the manner in which releases may be recorded applies only to those mortgages that *are* recorded. *See* 765 ILCS 905/2. For mortgages that are not recorded, however, the panel decision has nothing to say and the common law rule would still control. Unrecorded mortgages are rendered unenforceable upon payment, without the need for anything more.

The panel could not have intended to create two different regimes for extinguishing mortgages. Neither is there any reason to believe that in 1962 the legislature intended to do so. The common law rule treats recorded and unrecorded mortgages the same way: they are no longer enforceable upon payment of the debt. Because the Act is intended to give notice to the world, not to specify the last act required to give legal effect to the extinguishment of a mortgage, the Act squarely supplements the common law rule. The two are not irreconcilably repugnant to each other.

Conclusion

The common law rule is straightforward. It is conducive to efficiency. It has served Illinois well for more than 120 years. The Act operates to clarify the title records, not to extinguish mortgages.

The unintended consequences of the panel's decision are deeply troublesome. The panel's decision injects delay, uncertainty, and inefficiency into real estate system that has functioned smoothly.

The full court should reverse the panel decision. Barring that, the full court should ask the Illinois supreme court to answer the dispositive question in this case: whether the Act abrogated the common law rule. The issue is too important to real estate consumers, title insurers, and mortgagors to allow the panel's decision to foster the uncertainty, disruption and unfruitful litigation that will surely ensue.

Respectfully submitted,

/s/ Carrie A. Dolan .

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4). Excluding the parts of the document exempted by Fed. R. App. P. 32(f), and including the *Interest of Amici Curiae* section, the document contains 2,592 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 16 in 12-point Times New Roman font for the main text and footnotes.

Dated: May 28, 2024

By: */s/ Carrie A. Dolan*