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# Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law



## Killing the Golden Goose: Chicago's Northwest Side Preservation Ordinance

BY DONALD HYUN KIOLBASSA AND EMILY HOLMES

**REAL ESTATE IS ONE OF THE** greatest creators of generational wealth for the average person. In summary, Adam Smith wrote in his timeless classic "The Wealth of Nations" that the three ways to make money are salary, profit, and appreciation.

Salary: You have a job.

Profit: You have a small business.

Appreciation: You invest in an appreciable property.

Out of the three, appreciable property is the most critical in creating generational wealth, because it is transferrable to subsequent generations. Generational wealth creates different starting positions in the race of life.

Civilization has deemed generational wealth so important that society has created property law, probate law, and estate planning to preserve it.

Generational wealth is out of reach for most people. However, real estate has been a vehicle that the average person has historically been able to store and pass on wealth.

The City of Chicago's Northwest Side Preservation Ordinance was passed allegedly to stop gentrification but, in practice, it is stripping away the rights of homeowners.

Before we start, let us take a sidebar at the "Goose that Laid the Golden Eggs."

*There was once a farmer that owned a goose that laid a golden egg everyday. Everyday the goose made the farmer richer.*

*Continued on next page*


## Case Summaries

BY JOSEPH W. ROGUL

**TWO RECENT ILLINOIS CASES** are noted here that may be instructive in some practical respects for real state practitioners who have occasion to litigate similar issues.

**1) *Mogan v. City of Chi. and Roscoe Vill. Lofts Condo. Ass'n*, 115 F.4th 841 (7th Circ. 2024)**

In *Mogan v. City of Chi. and Roscoe Vill. Lofts Condo. Ass'n*, the plaintiff was the owner of a condominium unit in the defendant condominium association,

*Continued on npage 4*

## Killing the Golden Goose

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*The farmer loved the goose and the golden eggs. The farmer believed that the goose must have more golden eggs inside. The farmer, blinded by greed, killed the goose. However, there was nothing inside. The farmer not only killed his beloved goose, but lost his ability to create golden eggs.*

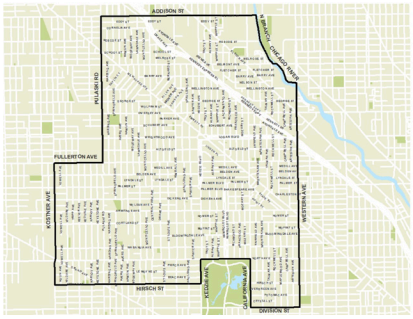
Ladies and gentlemen of the jury, I submit to you that the Northwest Side Preservation Ordinance does not "preserve" but, in fact, kills the golden egg.

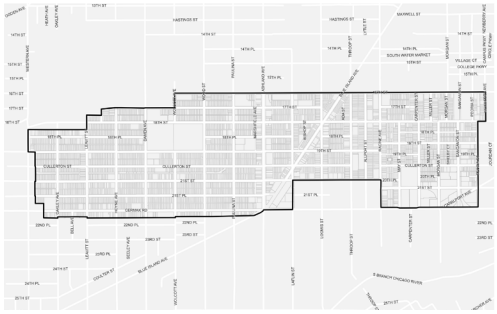
In brief, the Northwest Side Preservation Ordinance gives tenants of residential real estate located in the areas below, the right of first refusal to purchase the property.

Loosely, the guidelines require a landlord must provide a notice of intent to sell to the tenants. Then, the landlord must notify the city via the Department of Buildings that requirements of the ordinance have been met. The amount of notice varies based on the number of units.

*Please note that the author is deliberately avoiding specifics because the enforcement date has changed multiple times. When the author contacted the City of Chicago for comment, there was ambiguity in specifics.*

Exhibit A Screen Shots from the City of Chicago Website of affected Areas.
https://www.chicago.gov/city/en/depts/doh/provdrs/developers/svcs/NWSPreservation.html



The Northwest Side Preservation Ordinance is a forced restriction on the use of land. It adds a "cloud" on title.

Many of us remember the "Bundle of Sticks" metaphor from property law. This ordinance takes away several sticks.

For example, the landlord must subject the landlord's right to sell its property to its tenants. Typically, brokers ask for buyers to show evidence that they can actually afford the property, so potential buyers do not needlessly tie up properties. See the form, Notice of Third-Party Purchase Offer, which states: "*The owner may not require the tenant association to prove financial ability before entering into a contract.*"

To make matters worse, the ordinance also clouds title on the tenant buyers. See the form Notice of Third-Party Purchase Offer, which states: "*Property purchased by a tenant association shall be maintained as rent-restricted affordable housing for no less than 30 years.*"

I appreciate the intent of the ordinance, but its practical application will strip ordinary landowners of their property rights. If lawmakers are concerned about gentrification, they should focus on Wall Street investors. This ordinance needlessly devalues the properties located in these areas by adding a Schedule B exception in a commitment for title insurance.

It is the authors' opinion that this ordinance should be deemed unconstitutional.

Lawmakers must be careful here as they are killing the goose, and the average person will have lost their last chance at a golden egg… ■

Real Property

This is the newsletter of the ISBA's Section on Real Estate Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $35 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

**OFFICE**
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

**EDITORS**
Michael J. Maslanka
Nicolette L. Sonntag

**COMMUNICATIONS MANAGER**
Celeste Niemann
✉ cniemann@isba.org

**ART DIRECTOR**
Ticara Turley
✉ tturley@isba.org

# Case Summary: *Wells Fargo Bank, N.A. v. Rodriguez*

BY GREG C. ANDERSON

***WELLS FARGO BANK, N.A. v. RODRIGUEZ,*** 2024 IL App (3d) 230020 is of special interest to those involved in situations where a lender has filed multiple foreclosure actions against a borrower. Wells Fargo Bank initiated three separate foreclosure complaints against its borrower. The borrower was successful in having the third foreclosure case dismissed, based on a violation of the "single refiling rule" (Section 5/13-217 of the Code of Civil Procedure). The Third District affirmed the dismissal.

The property was purchased in 2009 with an original mortgage amount of $364,828. Wells Fargo acquired the mortgage in July 2011. The borrowers defaulted three months later. A loan modification agreement was entered into by the parties in October 2011.

The borrowers defaulted again in May 2012. Subsequently, Wells Fargo sent a default notice which encouraged the borrowers to bring the loan current on or before June 15, 2012, to avoid acceleration. No payment to cure the default was made. In September 2012, Wells Fargo sent a "Notice of Default and Acceleration" declaring the entire balance on the mortgage due and payable. The borrowers did not respond to the notice.

The first foreclosure complaint was filed in October 2012 (Case No.1). The borrowers entered into a trial plan pursuant to the Home Affordable Modification Program (HAMP), but later declined the HAMP loan modification. Wells Fargo voluntarily dismissed Case No. 1 in August 2017.

In January 2018, Wells Fargo filed the second foreclosure complaint (Case No. 2). Upon borrower's motion, the complaint was dismissed with prejudice. Wells Fargo did not move to reconsider or appeal the involuntary dismissal order. Instead, Wells Fargo filed a third foreclosure complaint (Case No. 3). The borrower moved to dismiss Case No. 3 arguing that Case No. 3 was an impermissible second refiling of Case No. 1 and, therefore, was a violation of the "single refiling rule." The borrower supported her motion to dismiss with an affidavit that she did not modify, reinstate, or make a payment on the past due balance on her loan subsequent to receiving the default notice in June 2012.

At the conclusion of the hearing on the motion to dismiss, the circuit court determined that because Wells Fargo accelerated the loan in 2012 before separately filing Case No. 1, the total amount due on the loan remained constant across all three actions and the acceleration of the note remained in effect the entire time. Thus, Case No. 3 arose from the same set of operative facts of Case No. 1 and, therefore, violated the single refiling rule.

Wells Fargo presented three arguments on appeal. First, that the voluntary dismissal of Case No. 1 "deaccelerated" and/or reinstated the loan which thus allows for a new cause of action under the "new default rule." Second, that the involuntary dismissal of Case 2 reinstated the loan thus negating any prior acceleration and avoiding application of the single refiling rule. Third, that Case 3 did not violate the single refiling rule because the operative facts alleged were different from those alleged in the first two cases.

The appellate court determined that because the "Notice of Default and Acceleration" was sent separately from the foreclosure complaints, it survived the dismissal of Cases 1 and 2. Since it was not part of the dismissed complaints, the court determined that once the bank invoked the acceleration clause, the contract became indivisible and the obligation to pay each installment merged into one obligation to pay the entire balance on the note. Furthermore, the court noted that Wells Fargo did not expressly revoke the acceleration clause when it voluntarily dismissed Case No. 1, nor did it otherwise issue a letter or notice to the borrowers reinstating the loan. Since all three complaints were filed subsequent to the acceleration, the court ruled that they were based on the same set of operative facts (default, failure to cure the default, and subsequent acceleration of the note). Consequently, Case No. 3 was an impermissible second refiling of Case No. 1 under Section 5/13-217.

The court also determined that the "new default rule" which typically allows a party entitled to installment payments under a contract to bring a separate action on each installment as they become due was not applicable to the situation. The court distinguished other multiple-foreclosure cases where the acceleration event was deemed to be the filing of the complaint. In those cases, the voluntary dismissal rendered the foreclosure proceedings a nullity and left the parties in the same position as if the actions had never been filed. The result then was that the underlying loan was automatically "deaccelerated" and any subsequent complaints involving new defaults were considered new causes of action and exempt from the single refiling rule. In this matter, the acceleration survived the dismissals precluding any further defaults on future installments. Thus, the "new default rule" is inapplicable.

Multiple attempts to foreclose on a mortgage are not uncommon. Procedural rules such as the "new default rule" allow lenders to avoid violating the "single refiling rule." However, attention must be focused on the history of a loan before filing or defending a foreclosure, especially when previous foreclosure attempts have been made. ■

## Case Summaries

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having purchased it in 2004. According to the complaint, he purchased it with the intent and expectation of letting it for short-term rentals through platforms such as Airbnb. He spent thousands of dollars furnishing and refurbishing it in order to generate leasing revenue and, in fact, he did list the unit on such home-sharing sites and he did earn income from that enterprise. Thereafter, the City of Chicago enacted an ordinance which allowed condo associations to determine that such short-term vacation and shared-housing rentals are not permitted and to inform the appropriate city agency of the prohibition so that the city could place the property on its list of properties which are ineligible for permits to conduct such rental activity.

In 2016, the Roscoe Village Lofts Condominium Association notified the city that the development should be added to the ineligible list and the city did just that, thereby terminating plaintiff's ability to list his unit on Airbnb and other home-sharing rental sites. Plaintiff sued the defendant City of Chicago arguing that the ordinances in question constituted an unconstitutional regulatory "taking" in contravention of the Takings Clause of the Fifth Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment, and joined the condo association as a co-defendant, arguing that such rentals are permitted under the Roscoe Village Lofts bylaws and declaration.

The trial court granted defendant Chicago's motion to dismiss the complaint and declined to exercise jurisdiction over the remaining state claims and the plaintiff appealed. The 7th Circuit Court of Appeals affirmed the trial court's disposition of the matter.

After a brief recitation of the facts in the case, the court went on to rather extensively address the defendants' contention that the plaintiff lacked standing to sue, primarily based upon the 7th Circuit case of *Keep Chicago Livable v. City of Chi.*, 913 F.3d 618 (7th Cir. 2019), a case with similar facts where plaintiffs claimed standing to challenge the same ordinance based upon a general claim of damages. That case held that in order to have standing to sue in cases such as this, mere conclusory allegations of damage were insufficient to establish the "irreducible constitutional minimum of standing." That standard required pleading that the plaintiff had suffered an

injury in fact which is fairly traceable to the challenged conduct of the defendant and that it is likely to be redressed by a favorable judicial decision. At the pleading stage the plaintiff has the burden to clearly allege facts which demonstrate each element of standing. In the instant case, however, the plaintiff specifically pleaded his damages in some detail. In addition to pleading that he had purchased the unit in reliance on his expectation and intent to home-share and rent the unit in this manner, he alleged that he had already engaged in profitable short-term rentals and that the revenue was necessary in order for him to continue to own the unit. He also alleged with some specificity, the rental value of the unit in a lease with a term of one month or more, and that the rental revenue which the unit would generate if rented for shorter terms through home-sharing platforms, was double that amount. He alleged that the additional revenue which he would have earned would allow him to pay the mortgage loan off in less than seven years, saving a substantial amount of mortgage interest and that the fair market value of the unit would be approximately 50% higher if the restrictions did not exist. The court held that the plaintiff's specific and detailed recitation of damages were sufficient to confer standing, and moved on to the merits of the plaintiff's claim.

The court discussed various settled principles applying to the Takings Clause of the Fifth Amendment as it relates to regulation of property rights, including *Murr v. Wis.*, 582 U.S. 383, 137 S. Ct. 1933, 198 L.Ed 2d 497 (2017), which held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 582 U.S. at 393. Also, "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a 'complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."

There is nothing new in the recitation of those commonly held principles. However, the Court of Appeals finally gets around to the one simple fact issue which disposes of the case. The plaintiff's claim is primarily based upon his argument that his purchase of the unit was not covered by any prohibition or restriction on his right to rent his property in the condominium declaration and by-laws. He quotes the operative section of the condo declaration in his original, first amended, and second amended complaints, as prohibiting rentals for less than thirty days only where "hotel services" are provided. Upon the court's examination of the actual language of the declaration as set forth in the exhibit attached to these three pleadings, it is clear that the restriction in the declaration prohibits *all* rentals of less than thirty days, not just those where hotel services are provided, while limiting the prohibition on

rentals of thirty days or more to those where hotel services are provided. The court then disposes of the plaintiff's action by affirming the district court's dismissal, based upon the simple fact that when the plaintiff purchased the unit, his rights were subject to the condominium declaration's absolute prohibition of his activity. The subsequent notification by the condominium association to the city pursuant to the ordinance simply complied with the city's procedure for facilitating the issuance or denial of home-sharing rental permits.

The opinion left this reader wondering why any attorney would even file such an action under these facts and why sanctions were not suggested for an apparent misrepresentation of the dispositive language of the declaration, by leaving out the operative clause of the pertinent provision. The opinion does not give a clue about that, but the two take-aways for plaintiff's counsel in such cases would probably be to make sure that the complaint pleads the elements of standing with great specificity in order to parry a defense motion to dismiss on that basis, and make sure you read the provisions of the condominium declaration—some folks actually read those things.

**2) *Cazaubon v. Blossomgame*, 2024 IL App (3d) 230677-U**

In this Rule 23 opinion, the plaintiffs and defendants are neighbors, owning adjacent single-family homes in Villa Park, IL. The defendants owned their home since 2016 and the plaintiffs bought the home immediately to the north in 2021. In 2023, new neighbor Cazaubon filed an action against the Blossomgames to quiet title to a strip of land running east and west between the homes. The plaintiff's asphalt driveway encroaches over the lot line by about 2.5 to 3.25 feet, and their garage encroaches by a little over 1 to a little less than 2 feet. The basis for the plaintiff's claim was adverse possession, alleging that the encroachments have existed continuously for at least 67 years, including the time that their predecessors in title possessed the land. They averred that the possession was continuously hostile or adverse, actual, open, notorious, and exclusive, under claim of title. They assert that the driveway was constructed, maintained, and repaired during that period, including painting, sealing, and snow and leaf removal, and that the defendants never used the disputed strip in any way, at any time, for any purpose.

The defendants did not answer the complaint. Rather, they filed a motion to dismiss under 735 ILCS 5/2-619(a)(9), which permits dismissal of claims barred by "other affirmative matter" rather than the more specific grounds set forth in the section. The "other affirmative matter" claimed in the motion is that the plaintiffs' complaint failed to support all of the elements of adverse possession in the complaint and that the defendants permitted the plaintiffs to maintain the driveway and garage on the disputed parcel. The plaintiffs' response to the motion correctly argued that a §2-619 motion admits the sufficiency of the complaint and raises affirmative matter which would defeat the claim. The defendants failed to raise an affirmative defense and attempted instead to use the motion to improperly attack the sufficiency of the complaint. The court granted the motion, dismissed the complaint, and the plaintiffs appealed.

On appeal, the court recited the well-known elements of adverse possession, *i.e.*, twenty years' continuous, hostile, actual, open, notorious, and exclusive possession, under claim of title inconsistent with that of the true owner. Adverse possession by successive possessors of property who were in privity can be combined to establish continuous possession. Possession is not hostile or adverse where the property is used with the owner's permission.

The court then proceeds to reverse the trial court's decision, not on principles of real property law, but based on the principles mentioned earlier pertaining to the proper application of a motion under §2-619(a)(9) of the Illinois Code of Civil Procedure. The court quoted from well-settled precedent that "affirmative matter" as used in the Code means any defense other than the negation of an essential allegation of the plaintiff's cause of action, and that a motion under §2-619(a)(9) is appropriate only if an affirmative defense negates the plaintiff's claim. It is not a proper vehicle to contest factual allegations or to attack the sufficiency of the complaint, which is exactly what

the defendants attempted to do in their motion. It does not authorize a "mini-trial" of contested facts in the case.

The opinion closes with an affirmation that a quiet title claim may be based upon adverse possession, citing long-standing authority from the Illinois Supreme Court:

> Title may be quieted and clouds may be removed from the title to lands acquired by adverse possession. Such an owner may successfully use title acquired by adverse possession in an offensive action. Such a title may be asserted against all the world, including the owner of record. *Scales v. Mitchell*, 406 Ill.130, 136 (1950).

The court makes it clear that a deed is not required to support the claim of ownership. The parties apparently did not argue this as an issue in the case, but the court addressed it anyway because the justices believed that the record in the case indicated that the trial court may have been under the misapprehension that a plaintiff in a quiet title action is required to have acquired legal title prior to asserting the claim. The court states, finally, "Thus, to the extent the trial court granted the Blossongames' motion to dismiss based on the Cazaubons' lack of legal title, the trial court erred in dismissing their complaint."

The lesson from this short unpublished opinion may simply be for practitioners defending an action to not confuse a motion under 735 ILCS 5/2-619 with a motion under §2-615. ■

# Save the Date: All About Real Estate Transactions on April 29

**MARK YOUR CALENDARS AND MAKE PLANS TO ATTEND** our Real Estate Section's webinar on Tuesday, April 29, from 8:55 a.m. to 12:05 p.m. Special thanks to our terrific program coordinator *Cheryl A. Morrison* and all-star speaker lineup: *William Anaya, Ellis Levin, Erica Minchella, and Ralph Schumann.*

Registration is coming soon! ■

*Save the Date!*

**All About Real Estate Transactions – New 8.0 Contract, Post-Closing Agreements, Surveys, and Associations**

*Presented by the ISBA Real Estate Law Section*

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