

2011 IL App (2d) 100717
No. 2-10-0717
Order filed December 16, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

HARRIS BANK, N.A.,)	Appeal from the Circuit Court
)	of De Kalb County.
Plaintiff-Appellee,)	
)	
v.)	No. 10-CH-244
)	
FULLERTON SHORES ONE, LLC,)	
TREVOR B. CAIN, DALILA CAIN,)	
UNKNOWN TENANTS OCCUPANTS)	
AND PARTIES IN POSSESSION,)	
UNKNOWN OWNERS, GENERALLY,)	
AND NON-RECORD CLAIMANTS,)	Honorable
)	Melissa S. Barnhart,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where rule to show cause was not a final order, the appeal of the motion to reconsider the issuance of the rule to show cause was not final and appealable.

The trial court correctly found a sufficient basis to appoint a receiver; the business records of plaintiff demonstrated that defendants were in default on commercial loan.

The trial court properly substituted Harris Bank for Amcore Bank as named plaintiff, because Harris Bank had taken over the assets of the Amcore Bank, the original

lender, after the Office of the Comptroller of the Currency appointed the Federal Deposit Insurance Corporation as receiver for Amcore.

¶ 1 Defendants, Fullerton Shores One, LLC, Trevor Cain and Dalila Cain, appeal from the trial court's denial of their motion for reconsideration of the trial court's orders entered June 30 and July 14, 2010. The June 30 order granted the motions of plaintiff, Amcore Bank, National Association of Rockford (Amcore), for rule to show cause and to substitute Harris National Association of Chicago (Harris) as plaintiff. The July 14 order denied defendants' motion to reconsider its May 6 order appointing a receiver for defendants' property.

¶ 2 **BACKGROUND**

¶ 3 Defendants are the owners of record and mortgagors of a multi-unit apartment building in DeKalb, Illinois. On March 27, 2008, defendants executed a business loan agreement with Amcore Bank for \$1,680,000.00 with a maturity date of March 27, 2011. The loan was secured by various instruments from defendants to Amcore as the mortgagee: a note for the full amount; a mortgage on the property; an assignment of rents granting Amcore a security interest in the leases and rents from the property; and joint and several commercial guarantees of Trevor Cain and Dalila Cain.

¶ 4 In December 2009, and each month thereafter until April 2010, defendants failed to make the principal and interest payment due on the 15th of each month. In April 2010, Amcore sought to foreclose on the mortgage and filed a complaint for foreclosure alleging that defendants materially breached the note and loan agreement by refusing and failing to pay the amounts due and owing under the note. The affidavit accompanying the complaint was dated April 22, 2010. The complaint was file-stamped April 27, 2010, and named Amcore as plaintiff. Because the next few months involved numerous motions filed by both parties and multiple court hearings, we will list them chronologically.

¶ 5 On Friday, April 23, 2010, the Office of the Comptroller of the Currency (OCC) appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for Amcore. Harris took over management of Amcore. The bank reopened as Harris on Monday, April 26. All of Amcore's assets, including the subject note and mortgage, were assigned to Harris. Plaintiff's June 10, 2010, motion to substitute Harris for Amcore included a printout of the official FDIC website.¹

¶ 6 On April 27, 2010, Amcore filed its complaint for foreclosure. On April 30, 2010, Amcore filed a motion for appointment of receiver for defendants' property, requesting that Michael J. Eber of High Ridge Partners be appointed. The motion included affidavits in support of the motion executed by Eber and by Robert Wilson, who represented himself as a vice president of Amcore.

¶ 7 On May 6, 2010, defendants filed a section 2-619 (735 ILCS 5/2-619 (West 2008)) motion for dismissal of the action, asserting that Amcore had unclean hands and had "nefariously calculated the annual interest rate using a deceptive method" because, while the promissory note provided a 5.4% per annum interest rate, Amcore actually charged a per annum interest rate of 5.475%. In a footnote in their motion to dismiss before the trial court, defendants pointed out that:

"[t]he Note articulates the bank uses a 360/365 [*sic*] calculation method, which artificially inflates the interest rate to a rate higher than quoted as the per annum. This is because Plaintiff used the per annum rate as opposed to a notional rate producing a per annum rate."

Citing the Restatement (Second) of Contracts, defendants further asserted that "when one party to a contract commits an 'uncured material failure' in its performance of that contract, then the non-

¹The website contains all the information regarding the receivership of Amcore and Harris as the assuming bank. See <http://www.fdic.gov/bank/individual/failed/amcore.html>.

failing party is relieved of all its duties to continue to perform under that contract.” Restatement (Second) of Contracts, §237 (1981).

¶ 8 A hearing on defendants’ motion to dismiss was held the same day. Defendants argued that Amcore had no standing to file the foreclosure action and the motion to appoint a receiver, because Amcore had itself been placed in receivership by the OCC before the complaint was filed with Amcore as the named plaintiff. Defendants further argued that they were not obliged to perform under the terms of the contract because the interest rate calculation was fraudulent. The trial court made the following findings. The subject property consisted of residential property, owned by the defendants for commercial investment purposes. The property did not fall within the definition of residential real estate based on the fact that it was not the defendants’ personal residence. The mortgage was executed between plaintiff and defendants on March 27, 2008, and provided that in the event of a default the plaintiff/mortgagee had the right to apply for the appointment of a receiver. The trial court found that a default had occurred pursuant to the allegations in counts 1 and 2 of the complaint filed April 27, 2010. The trial further found that due notice had been given pursuant to section 5/15-1706(d) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1706(d) (West 2010)).

¶ 9 The trial court ordered that

“1) the receiver is granted all of the powers obligations and duties as more fully set forth in 735 ILCS 5/15-1704 governing the appointment of a receiver; 2) that the appointment of the receiver is over the objection of the defendants, as to plaintiff’s standing given the order of the Office of the Comptroller of the Currency appointing the FDIC as receiver of Plaintiff Amcore Bank, N.A. The court also finding that defendants have not shown good cause why

a receiver should not be appointed notwithstanding the contention that defendant's inability to undertake discovery with respect to affidavits submitted in support of the motion to appoint a receiver; 3) for the reasons stated on the record and in the court file, the court finding no just reason to delay appeal of this matter and grants to defendants leave to immediately appeal its order appointing Michael Ebber [*sic*] as the receiver pursuant to 304(a); 4) plaintiff shall produce its affiant for deposition on or before May 19, 2010."

¶ 10 Also on May 6, Amcore filed, pursuant to section 5/2-401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-401 (West 2008)), a motion to substitute plaintiff, asking the court to designate Harris as the correct plaintiff. The record reflects that the May 6 motion was unsigned, and this motion was stricken on May 19. On June 10, 2010, Amcore filed a new motion to designate Harris as the correct plaintiff. On the same day, plaintiff also filed a motion to (1) amend the court's May 6, 2010 order to clarify the expenses and repairs a receiver could undertake without the court's permission and to clarify the details the receiver must include in each report it filed with the court; and (2) compel the production of documents.

¶ 11 On May 12, on the oral motion of defendants' attorney, the case was reassigned to a different judge. On May 17, Amcore filed a motion to extend the time to produce its deponent, Robert Wilson², until June 7. Also on May 17, Eber filed his \$100,000 bond as required.

²In this motion, Robert Wilson was described as a vice president of Harris. The motion further averred that defendants' attorney refused plaintiff's offer to depose Mr. Wilson's supervisor, James West, Regional President of Commercial Loans.

¶ 12 On June 4, Amcore filed, pursuant to section 2-1301(d) of the Code, a motion for default for failure to file either an appearance, an answer, or any other responsive pleading within 30 days of service of the complaint, which was accomplished on May 3.

¶ 13 On June 7, 2010, defendants filed a motion to reconsider the appointment of the receiver. Defendants first argued that, plaintiff lacked the authority and standing to have originally brought the motion for an appointment of a receiver because the FDIC had been appointed a receiver for Amcore Bank and plaintiff no longer had any interest in the loan; second, they argued that a fraud against the court had been committed by Robert Wilson, the bank officer who was deposed regarding the business records; and third, that plaintiffs had unclean hands because of fraud against defendants.

¶ 14 On June 11, 2010, the trial court granted Amcore's June 10 motion to amend the May 6 order. The trial court issue a supplemental order appointing Eber as receiver. Also on June 11, the trial court granted plaintiff's motion to substitute Harris for Amcore. In the same order, the trial court granted plaintiff's motion for default against defendants.

¶ 15 On June 18, 2010, defendants filed a motion to vacate the June 11 orders. On June 23, the trial court vacated the order of default.

¶ 16 On June 30, 2010, on plaintiff's motion, the trial court issued a rule to show cause for failure to comply with the May 6 order appointing a receiver with "all of the powers, obligations and duties as more fully set forth in" section 15-1704 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1704 (West 2008)). The court found "no just cause to delay the enforcement or appeal from this order" pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)). On July 14 the trial court denied the motion to reconsider the motion for appointment of the receiver and further ordered that Harris would be substituted for Amcore as named plaintiff. On July 14, the court heard

defendant's motion for reconsideration of the rule to show cause. The notice of appeal, filed July 20, appealed the orders entered June 30 and July 14.

¶ 17 On October 13, 2010, the trial court granted the motion for reconsideration and vacated the rule to show cause.³

¶ 18 ANALYSIS

¶ 19 We begin by addressing defendant's second argument regarding the July 12 motion for reconsideration of the issuance of the rule to show cause. On October 13, 2010, the trial court granted the motion to reconsider. We have no report of proceedings for that date, but we allowed appellee's motion to supplement the record with the order itself.

¶ 20 On June 30, 2010, the trial court issued a rule to show cause why defendants should not be held in contempt for their failure to turn over certain documents regarding management of the property to the receiver. On July 14, the trial court denied defendants' motion for reconsideration of the May 6 order. On July 20, defendants filed their notice of appeal from the orders entered June 30 and July 14, 2010. We have no jurisdiction to consider this issue because the issuance of the rule to show cause is not a final and appealable order.⁴ Nevertheless, by virtue of the October 13, 2010, order vacating the rule to show cause, the matter was otherwise mooted during the pendency of this

³This court allowed as a supplement to the record the copy of the three page order entered October 13, 2010, which is virtually illegible.

⁴Because the order issuing a rule is not an final order, it is not appealable despite 304 language; "the trial court cannot make a nonfinal order final and appealable simply by including in its order the requisite 304(a) language." *In re Marriage of Young*, 244 Ill. App.3d 313, 316 (1993).

appeal. We will address the remaining issues as there is presently a final and appealable order to review.

¶ 21 First, we turn to the issue of the substitution of Harris as plaintiff. Defendants argue that the trial court's order of July 14, 2010, denying reconsideration of its grant of plaintiff's motion to appoint a receiver, should be reversed. We review this order under an abuse of discretion standard. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1063 (2010). "A motion to reconsider is meant to bring to the trial court's attention newly discovered evidence not available at the prior hearing, changes in the law, or errors in the trial court's application of existing law." *Id.* at 1063. It is typically reviewed for an abuse of discretion. *Id.* at 1063.

¶ 22 Defendants argue that the trial court erred in allowing the substitution of Harris for Amcore because: 1) Amcore lacked authority and standing; and, 2) there was no "conclusive proof" that Harris had any interest in the subject mortgage. In their argument, defendants cite to one case, *Inland Real Estate Corp. v. Tower Construction Co.*, 174 Ill. App. 3d 421 (1988), where the plaintiff managed the subject apartments as an independent contractor under agreements that conferred no ownership interest upon it. The court found that the plaintiff had the authority to act only in a management capacity, and that it lacked standing to sue. *Id.* at 428. Here, the interests involved were different and substantial. The record shows that Harris was assigned all of Amcore's assets, including the note and mortgage at issue in this case. On June 11, 2010, pursuant to statute (735 ILCS 5/2-401 (West 2008)), the court granted plaintiff's motion to substitute Harris as plaintiff.

¶ 23 Section 2-401(b) provides that "[m]isnomer of a party is not a ground for dismissal but, the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." 735 ILCS 5/2-401(b) (West 2008). Defendants state in their brief

“[t]he Defendants contest [that the FDIC had tendered the interest to Harris Bank], and direct this Court’s attention to the lack of any inclusive evidence that Harris Bank has any interest in this matter.” Defendant then continues to argue that, if it were true that Harris assumed the interest, then Harris, not Amcore, was the rightful interest holder in the underlying loan, so Amcore’s complaint was defective. We reject this entire line of reasoning. The chronology of events was unfortunate, but certainly nothing close to fatal to plaintiff’s case. This was not an attempt by a distinct legal entity to substitute itself for the real party in interest. See *Bristow v. Westmore Builders, Inc.*, 266 Ill. App. 3d 257, 262 (1994) (addressing the “the relatively unusual circumstance where a plaintiff has styled himself as a corporation instead of a sole proprietorship,” the court concluded that the plaintiff was a “single identifiable entity” and the misnomer of plaintiff resulted in no actual prejudice to the defendant).

¶ 24 We agree with Harris that the evidence was sufficient to satisfy the motion to substitute Harris as plaintiff. See *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 808 (2009) (“Defendant cannot seriously contend that he was unaware that plaintiff was a real party in interest in the case at bar.”) Harris stepped into the shoes of Amcore, as it were, and assumed all of Amcore’s assets, which included notes and mortgages held by Amcore. There is no lack of knowledge here as to the identity of the mortgagee, the fact that Amcore was in receivership, and that Harris took over Amcore’s bank operations as of April 27. Defendant’s argument fails on its merits. Therefore, the trial court was correct from the beginning and, thus, could not have abused its discretion by denying the motion to reconsider.

¶ 25 Next, defendants argue that the appointment of the receiver was improper. The pertinent statute provides that “upon request of any party and a showing of good cause, the court shall appoint

a receiver for the mortgaged real estate.” 735 ILCS 5/15-1704 (West 2008). The decision whether to appoint a receiver is within the trial court's discretion. *Midwest Bank and Trust Co. v. US Bank*, 368 Ill. App. 3d 721, 726 (2006). The burden to establish good cause for the denial of the appointment of a receiver is on the mortgagor, not on the mortgagee. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 176 (2010).

¶ 26 Defendants assert that Amcore committed a fraud upon the court and thereby was able to obtain the appointment of a receiver. They cite *Capiccioni v Brennan Naperville Inc.*, 339 Ill. App. 3d 927 (2003) for the proposition that the common law tort of fraud and deceit requires five elements: 1) making a false statement of material fact; 2) knowledge by the maker that the statement is false; 3) intent to induce reliance; 4) reasonable reliance upon the truth of the statement made; and 5) damages. Factors to consider in determining the viability of a claim of fraud under the Consumer Fraud Act are: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC* 407 Ill. App. 3d 183, 191 (2011).

¶ 27 The record reveals that on December 15, 2009, and each month thereafter until April 2010, when the proceedings below commenced, defendants failed to make the principal and interest payments that were due on the 15th of each month. In April, 2010, Amcore sought to foreclose on the mortgage. Amcore's attorney stated that the complaint was prepared on or around April 22, 2010, and it was filed in the circuit court on April 27, 2010, as evidenced by the file-stamped date.

¶ 28 On May 6, 2010, after a hearing, the trial court found that defendants did not show good cause why a receiver should not be appointed and, over defendants' objection, appointed Michael Eber of High Ridge Partners as receiver. The trial court's order granted “all of the powers,

obligations and duties as more fully set forth in 735 ILCS 5/15-1704 governing the appointment of a receiver.”

¶ 29 As proof of the first element of fraud, defendants assert that

“[d]uring his deposition, Mr. Wilson admitted having lied in his affidavit. Although Mr. Wilson stated in his affidavit that he was the vice president at Amcore Bank at the time he executed his affidavit, this was not true.”

In fact, the deposition testimony reflects that Wilson admitted that his statement that he was the vice president at Amcore, as opposed to Harris, was a mistake. We do not find that he admitted that he lied about his position with Amcore as asserted by defendants. In the deposition, Wilson also stated that he did not personally see the note being executed, that he did not process the payments at the bank, and that, based on what he read, the mortgage attached to the complaint was a true and correct copy of the mortgage. We do not agree with defendants’ averment that these statements indicate that Wilson “admitted that despite his having sworn to having personal knowledge of certain statements within his affidavit, he in fact did not have any personal knowledge regarding any of the statements within his affidavit.” We caution counsel against drawing sweeping conclusions that cannot be supported by the record provided to this court.

¶ 30 Defendants go on to assert that Wilson knew his statement was false, and that the purpose of his affidavit was to induce the trial court to rely on it and grant the motion for the appointment of a receiver. Additionally, defendants assert that the trial court relied on the sworn statements in Wilson’s affidavit, with damages caused thereby in that they were “deprived [of] their lawful right to own and manage their property.” After arguing that the affidavit was a fraud on the court,

defendants argue that Amcore had unclean hands as a result. Therefore, defendants conclude, the appointment of the receiver should be reversed.

¶ 31 While this argument is creative, its logic fails.

“Anyone familiar with the business and its procedures may testify as to the manner in which records are prepared and the general procedures for maintaining such records in the ordinary course of business. [Citation.] The foundation requirements for admission of documents under this exception are that it is a writing or record made as memorandum of the event made in the ordinary course of business and it was the regular course of the business to make such a record at that time. [Citation.] A lack of personal knowledge of the record does not affect the admissibility of the record, but may affect the weight of the evidence. [Citation.]” *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 819 (2006).

Wilson’s affidavit and deposition testimony indicated that he managed classified credits and loans that were in default and that, in his position in the asset risk management department at “Amcore, now known as Harris,” he was familiar with the business and the procedures involved. He stated that the mortgage and the note were prepared in the normal course of business and were true and correct copies of the loan documents. He further stated that his affidavit regarding defendants’ defaults and the total unpaid amounts owed under the note were based on his review of the loan file. We agree with the trial court that Wilson’s affidavit and his testimony in his disposition were not fraudulent. Therefore, we cannot say that the trial court’s denial of the motion to reconsider the appointment of a receiver was an abuse of discretion. *Wilfong*, 401 Ill. App. 3d at 1063.

¶ 32 Defendants assert that Amcore had unclean hands and had “nefariously calculated the annual interest rate using a deceptive method.” Defendants claim that the promissory note provided a 5.4%

per annum interest rate but Amcore actually charged a per annum interest rate of 5.475%, and this was “deceptive.” However, the language of the note itself controls; a contract's meaning and whether it is ambiguous are questions of law, subject to *de novo* review. *RBS Citizens, National Ass'n*, 407 Ill. App. 3d at 189. In this case, the promissory note provided for an annual interest rate of 5.4% per annum, and further provided that the interest on the note would be

“computed on a 365/360 basis: that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.”

Defendants argued before the court below that “[t]he Note articulates the bank uses a 365/360 calculation method, which artificially inflates the interest rate to a rate higher than quoted as the per annum.” However, despite defendants’ assertions to the contrary, both below and before this court, the terms of the contract provide for exactly this method of computation. Further, this method of computing interest has been held to not violate the Illinois Interest Act (815 ILCS 205/1 *et seq.* (West 2010)) in the context of the type of commercial loan at issue here. See *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 35.

¶ 33 We find that the note’s interest provision was unambiguous, and an examination of the interest charged indicates no deviation from terms of the Note. Defendants point to nothing within the record which might indicate any impropriety or deception on the part of Amcore. Therefore, we cannot find that Amcore violated the Consumer Fraud Act by offending public policy, injuring defendants, or somehow acting in an immoral, unethical, oppressive or unscrupulous manner.

¶ 34 As stated by the court in *RBS Citizens, National Ass'n*, “[t]his court has held that “ ‘[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.’ ” *Id.* at 192, citing *D.S.A. Finance Corp. v. County of Cook*, 345 Ill.App.3d 554, 561 (2003) (quoting *Chicago Export Packing Co. v. Teledyne Industries, Inc.*, 207 Ill. App. 3d 659, 663 (1990)).

¶ 35 For these reasons, the judgment of the trial court of De Kalb County is affirmed.