

2011 IL App (2d) 110976-U
No. 2-11-0976
Order filed October 12, 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

FIRSTMERIT BANK, N.A., as successor in interest to MIDWEST BANK & TRUST CO.,)	Appeal from the Circuit Court of Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 11-CH-902
)	
POWER MART REAL ESTATE CORPORATION, PYRAMID DEVELOPMENT, LLC, POWER MART CORPORATION, SAMER ODEH, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,)	
)	
Defendants-Appellees.)	Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The trial court abused its discretion in granting the defendants' motion for injunctive relief because there was little likelihood of success on the merits of the defendants' motion.

¶1 The plaintiff, FirstMerit Bank, N.A, appeals from the September 29, 2011, order of the circuit court of Du Page County granting the motion of the defendants, Power Mart Real Estate Corporation, Pyramid Development, LLC, Power Mart Corporation, and Samer Odeh for injunctive

relief that required the plaintiff to return \$339,425.28 to the defendants that it had taken from various accounts belonging to the defendants. We reverse.

¶2 On February 22, 2011, the plaintiff filed a complaint for commercial mortgage foreclosure against the defendants. In support of its complaint, the plaintiff attached a promissory note and mortgage, dated April 17, 2008. The promissory note was for \$700,000 and was executed by defendants in favor of Midwest Bank and Trust Company (Midwest Bank). The promissory note included the following provision:

“To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower’s accounts with Lender (whether checking, savings or some other account). *** Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts, and, at Lender’s option, to administratively freeze all such accounts to allow Lender to protect Lender’s charge and setoff rights provided in this paragraph.”

The plaintiff’s complaint alleged that the plaintiff was the successor in interest and owner of the mortgage indebtedness.

¶3 On April 8, 2011, the defendants filed a motion to strike the complaint, arguing that the plaintiff was not a party to the note and mortgage and therefore did not have standing to bring the foreclosure complaint.

¶4 On September 23, 2011, the plaintiff withdrew \$339,425.28 from the defendants’ bank accounts with the plaintiff and applied it to the unpaid principal balance under the note.

¶5 On September 27, 2011, the defendants filed a “Motion for Mandatory Injunction.” The motion alleged that the plaintiff had not established that it was the assignee or the successor in interest of Midwest Bank. Therefore, the defendants alleged that the plaintiff had unlawfully taken

funds in the defendants' accounts as a set off against the mortgage indebtedness. The defendants sought a mandatory injunction ordering the plaintiff to "disgorge" to the defendants the amount taken as a set off from the defendants' accounts.

¶6 On September 29, 2011, the plaintiff filed a response to the defendants' motion. The plaintiffs argued that the defendants' motion was not properly before the court because the defendants had neither filed a complaint for injunctive relief nor filed any affidavits attesting to why it should be afforded such equitable relief. The plaintiff also argued that it was the successor in interest to Midwest Bank. In support of its response, the plaintiff attached the affidavit of its senior vice president of managed assets, Susan Cassa. Cassa indicated that on April 17, 2008, Midwest Bank had loaned \$700,000 to the defendants. This loan was evidenced by a promissory note and a mortgage. The loan had been modified once and had a due date of December 15, 2010. The mortgage was now in default because the defendants had failed to make monthly payments of principal and accrued interest. Cassa further stated that, on May 14, 2010, FirstMerit Bank had purchased and became the owner of the loans and other assets of Midwest Bank. This included the defendants' loan at issue.

¶7 Also on September 29, 2011, the trial court conducted a hearing on the defendants' motion. The trial court indicated that it was going to consider the defendants' motion for a mandatory injunction as if it were a motion for a temporary restraining order (TRO). Following the hearing, the trial court granted a TRO in the defendants' favor. The trial court explained that the pleadings raised a question of fact regarding a loan modification and the actual maturity date of the note. The trial court also found that there was a question of whether the note had been properly assigned. Following the trial court's ruling, the plaintiff filed a timely notice of appeal.

¶8 The plaintiff's first argument on appeal is that the trial court abused its discretion by granting the defendants' motion for injunctive relief because the defendants did not file a verified complaint that requested such relief nor did they file any affidavits requesting relief. Section 5/11-101 of the Code of Civil Procedure (735 ILCS 5/11-501 (West 2010)) provides that:

“No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had thereon.”

Section 5/11-501 does not specify if a temporary restraining order that is granted with notice must be supported by an affidavit or by a verified complaint. However, our courts have found that a party may properly request a temporary restraining order via a motion. See *Kolstad v. Rankin*, 179 Ill. App. 3d 1022, 1029 (1989) (application for temporary restraining order may be requested by motion). Further, a complaint or motion for a temporary restraining order does not need to be verified or supported by affidavits if the trial court conducted a hearing on the motion where both parties were represented and the trial court based its injunctive order not only on the motion but also on the evidence heard. See *Kobrand Corp. v. Foremost Sales Promotions, Inc.*, 8 Ill. App. 3d 418, 422 (1972). Here, because the trial court conducted a hearing on the defendants' motion and the plaintiff was represented at the hearing, the trial court did not abuse its discretion in ruling on the defendants' motion even though the motion was not supported by affidavits. See *id.*

¶9 We next consider the plaintiff's argument that the trial court erred in granting injunctive relief because the defendants did not establish that they were entitled to such relief. When seeking injunctive relief under the common law, the party seeking a preliminary injunction or TRO must establish facts demonstrating the traditional equitable elements that (1) it has a protected right; (2)

it will suffer irreparable harm if injunctive relief is not granted; (3) its remedy at law is inadequate; and (4) there is a likelihood of success on the merits. *County of Du Page v. Gavrilos*, 359 Ill. App. 3d 629, 634 (2005). These four factors must be established before an injunction can be granted. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 156 (1992). A trial court's decision to grant injunctive relief will not be disturbed absent an abuse of discretion. *Bradford v. Wynstone Property Owners Association*, 355 Ill. App. 3d 736, 739 (2005).

¶10 Here, the defendants did not meet the requirements of an injunction because they failed to establish that there was a likelihood of success on the merits of their claim that they had not defaulted on any indebtedness to the plaintiff. In arguing that they were entitled to an injunction, the defendants acknowledged that they had entered into a mortgage agreement with Midwest Bank. However, they argued that they did not have any such relationship with the plaintiff as the plaintiff had not claimed to be the assignee of Midwest Bank or otherwise explained how it had become the successor of Midwest Bank. In its response to the defendants' motion for an injunction, the plaintiff attached the affidavit of its senior vice president of managed assets. In her affidavit, she indicated that on May 14, 2010, the plaintiff purchased and became the owner of the loans and other assets of the Midwest Bank. The assets included the note, mortgage, and related loan documents that are at issue in this case. Based on these representations, the plaintiff countered the defendants' assertions that the plaintiff was not the actual holder of the mortgage and note at issue. Consequently, the defendants' likelihood of success in arguing later at trial that the plaintiff is not the actual holder of the note and mortgage is low. See *Collins Co., LTD. v. Carboline Co.*, 125 Ill. 2d 498, 511 (1988) (a cause of action based on a contract may be brought by any party in a mutual or successive relationship to the same rights of the property; with respect to the mortgage, any assignment or transfer of the note carries with it an equitable assignment of the mortgage by which

it was secured and an assignment of the mortgage is not required to enforce it). Thus, the trial court abused its discretion in granting the defendants' request for injunctive relief.

¶11 Based on the resolution of the above issue, we need not address the other issues that the plaintiff raises in its appeal.

¶12 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed.

¶13 Reversed.