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2011 IL App (3d) 100333-UB

Order filed April 11, 2011
Modified upon denial of rehearing August 16, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

COUNTRYWIDE HOME LOANS, INC.,)	Appeal from the Circuit Court
)	of the 12h Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois
)	
v.)	Appeal No. 3–10–0333
)	No. 08–CH–535
)	
ANITA SCOTT, <i>et al</i> ,)	Honorable
)	Richard J. Siegle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice O’Brien concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Summary judgment in favor of foreclosure reversed and vacated because genuine issues of material fact existed regarding whether a release, prepared and recorded by lender by mistake, should be rescinded by the court and the original mortgage reinstated after third parties claim detrimental reliance on the release. Cause remanded to the trial court for further proceedings.
- ¶ 2 Plaintiff filed an amended complaint for declaratory judgment, rescission, foreclosure of mortgage and for other relief on July 23, 2008, against Anita Scott, along with Paul Scott,

Standard Bank and Trust Company, Barclay Estates Neighborhood Association, North Star Trust Company, unknown owners and nonrecord claimants. The trial court granted plaintiff's motion for summary judgment on all counts and entered a judgment of foreclosure and sale against Anita Scott for the property in question.

¶ 3 Defendant, Anita Scott, appeals claiming that the trial court erred by granting summary judgment because material issues of fact existed. In addition, Anita Scott asserts plaintiff could not proceed on the amended complaint after voluntarily dismissing Paul Scott, the only named borrower on the mortgage contract, from the action.

¶ 4 We reverse and vacate the trial court's orders granting summary judgment and judgment of foreclosure and sale and remand the cause to the trial court for further proceedings.

¶ 5 **FACTS**

¶ 6 Plaintiff, Countrywide Home Loans, Inc., filed an amended complaint for declaratory judgment, rescission, foreclosure of mortgage and for other relief on July 23, 2008. In the three-count complaint, plaintiff listed Anita Scott, Paul Scott, Standard Bank and Trust Company, Barclay Estates Neighborhood Association, North Star Trust Company, unknown owners and nonrecord claimants as defendants to the cause.

¶ 7 In the amended complaint, plaintiff alleged that "Scott" was the owner of record of the property commonly known as 768 Lindsey Lane in Bolingbrook, Illinois. The complaint also alleged that "Scott" executed a mortgage and note with Mortgage Electronic Registration Systems, Inc., a nominee of plaintiff, in the amount of \$316,000, on July 8, 2003. Plaintiff attached to the amended complaint a copy of the recorded mortgage for the property in question, which was executed on July 8, 2003, and signed by Paul Scott as the sole borrower. The

mortgage contained Anita Scott's signature with the notation under her signature stating "Anita Scott signing solely for the purpose of waiving her homestead rights."

¶ 8 The amended complaint admitted that plaintiff executed a release for the full amount of the first mortgage on December 14, 2005, and then recorded a release of this first mortgage on January 6, 2006. The amended complaint claimed the lender prepared and recorded a release of the first and largest mortgage by mistake, since the \$316,000 loan was not paid in full by "Scott" the borrower. Plaintiff's amended complaint alleged "an actual controversy exists as to the validity of the Countrywide mortgage, and the right, title and interest of Countrywide Home Loans, Inc., and Scott in the premises."

¶ 9 Count I of the amended complaint sought declaratory judgment that the 2005 release, recorded on January 6, 2006, be extinguished, expunged and invalid. In Count I, plaintiff also requested an order declaring plaintiff's right, title and interest in the premises to be superior to defendants' right, title, and interest.

¶ 10 Count II sought rescission of the release of mortgage claiming that the release was executed "because of a mistake of fact." Count II also alleged it would be unconscionable for the court to enforce the release of mortgage because of "a mistake of fact." Further, plaintiff claimed the release to be invalid since it was executed without consideration because "Scott's did not pay off the loan."

¶ 11 Plaintiff entitled count III of the amended complaint as a "complaint to foreclose mortgage" alleging that the "[m]ortgagors have not paid the monthly installments of principal, taxes, interest and insurance for 09/01/2007, through the present; the principal balance due on the Note and Mortgage is \$297,477.36, plus interest, costs, advances and fees." Plaintiff sought a

judgment of foreclosure and sale, along with an order of possession and judgment for any deficiency, if applicable.

¶ 12 Plaintiff also attached the recorded release of the first mortgage to the amended complaint. This release was signed by an assistant secretary employed with plaintiff on December 14, 2005, and recorded on January 6, 2006. According to the release, plaintiff, “for and in consideration of one dollar, and for other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby remise, release, convey and quit claim unto” Paul Scott the property located at 768 Lindsey Lane in Bolingbrook, Illinois.

¶ 13 On July 2, 2009, an attorney entered her appearance on behalf of Paul Scott. On that same day, Paul Scott filed a motion to dismiss himself as a party. On July 8, 2009, by agreement, the court granted Paul Scott’s motion to dismiss and dismissed Paul Scott as a party defendant with prejudice.

¶ 14 On August 5, 2009, plaintiff filed separate motions for summary judgment against both Standard Bank and Trust Company and Anita Scott. However, on October 21, 2009, at the hearing on plaintiff’s motion for summary judgment against Anita Scott, plaintiff’s counsel acknowledged to the court that Standard Bank and Trust Company had a mortgage on the subject property. Petitioner stipulated that because of its mistake in releasing the mortgage, Standard acted in good faith and “they [Standard Bank & Trust] are ahead of us.”

¶ 15 In the motion for summary judgment filed against Anita Scott, plaintiff claimed that it issued an original mortgage loan on the property on July 8, 2003, for the amount of \$316,000, which listed Paul Scott as the borrower. According to the motion, on July 8, 2003, plaintiff issued a second mortgage as a home equity line of credit in the amount of \$78,945 with Paul

Scott named again as the only borrower. According to the motion for summary judgment, Anita Scott signed both the first and the second mortgages only for the purpose of waiving her homestead rights.

¶ 16 Further, the motion for summary judgment alleged that on December 5, 2005, a caller identifying herself as Anita Scott requested a payoff statement for the second mortgage.

Following this request, plaintiff issued a payoff statement showing the amount of \$79,658.58 remained due on December 7, 2005. Subsequently, plaintiff received two payments between December 8, 2005, and December 14, 2005, totaling \$79,658.58, which paid off the second loan, a home equity loan, in full. After receiving the payoff for the home equity loan, on or about December 14, 2005, plaintiff prepared a release for the original and first loan instead of releasing the smaller home equity loan which plaintiff referred to as the “Second Mortgage.” According to the motion, plaintiff admitted releasing the first mortgage executed on July 8, 2003, for the amount of \$316,000 with Paul Scott, and recorded this release on January 6, 2006.

¶ 17 In support of the motion for summary judgment, plaintiff claimed that Anita Scott had not offered any documentation or proof that the \$316,000 mortgage was paid in full as part of discovery and had only raised a general denial that “the First Mortgage was not paid off and that the release was recorded in error.” Plaintiff asserted that a general denial was insufficient to create a genuine issue of material fact which entitled plaintiff to summary judgment in its favor against Anita Scott. Moreover, in the motion for summary judgment, plaintiff claimed Anita Scott had notice that the larger, first mortgage was unpaid because the judgment for dissolution of marriage entered between Paul Scott and Anita Scott in cause No. 06–D–224 in Will County, Illinois, stated that a mortgage of approximately \$300,000 existed on the marital residence.

¶ 18 On September 2, 2009, Anita Scott filed a response to plaintiff’s motion for summary judgment on the amended complaint. Anita Scott denied contacting the lender to request the amount of the remaining unpaid balance on the loan in December of 2005. She emphasized that plaintiff’s own complaint alleged that “an actual controversy exists as to the validity of the Countrywide Mortgage, and the right, title and interest of Countrywide Home Loans, Inc. and Scott in the premises.” Accordingly, Anita Scott claimed that summary judgment was not appropriate and requested the court to deny the motion for summary judgment.

¶ 19 In the response, Anita Scott also claimed that plaintiff admitted that it released the mortgage in December 2005, before she acquired title to the property by quit claim deed. After acquiring title to the property by quit claim deed, Anita Scott received a release of mortgage issued to Paul from plaintiff, dated August 22, 2007, which released any remaining mortgages on the property. Anita Scott claimed she thereafter relied on the status of her title, and obtained a home equity line of credit from Standard Bank and Trust Company.

¶ 20 On October 21, 2009, the trial court conducted a hearing on plaintiff’s motion for summary judgment on the amended complaint. The court found “there is no sworn statement of any sort to support the claim that the mortgage was paid off.” The court observed:

“[T]he fact is is [*sic*] that you [Anita Scott] have been unjustly enriched through their mistake of release of this. You are claiming, no, that, in fact, it was paid. I have seen no evidence anywhere to support the statement that, in fact, that first mortgage was paid off or that you paid it off or that anybody paid it off. And that, I think, is the key to the whole thing.”

The trial court entered a written order that stated the court reviewed Anita Scott's answer to plaintiff's amended complaint and heard arguments of counsel. In the written order, the court found that Anita Scott's "[a]nswer does not raise a genuine issue of material fact sufficient to preclude the entry of [s]ummary [j]udgment."

¶ 21 The order provided, "The mortgage of [p]laintiff is valid, the [r]elease recorded in error is null, void, and extinguished, and Judgment [f]or Foreclosure [a]nd Sale is entered by separate judgment order with a redemption date of January 22, 2010." The trial court entered a judgment for foreclosure and sale in the amount of \$361,736.24, which included unpaid principal, accrued interest, costs of the suit and attorney fees.

¶ 22 Anita Scott then asked for clarification from the court stating, "At this point in time you [trial judge] are granting the motion to rescind the release and [enter the judgment of] the foreclosure all at once." The court replied, "That's correct. That's the way they [plaintiff] have placed it in their order that they have tendered."

¶ 23 On November 20, 2009, Anita Scott filed a motion for reconsideration. In the motion, she asserted that since plaintiff had dismissed Paul Scott from the case, plaintiff could not proceed with an action for foreclosure against the real estate now held solely by Anita Scott because foreclosure was based on Paul Scott's purported breach of a mortgage agreement signed only by Paul Scott in 2003 and released by plaintiff nearly four years prior to the filing of her motion for reconsideration. She also asserted that plaintiff's complaint alleged that a controversy existed regarding the validity of plaintiff's mortgage on the property, and therefore summary judgment was not appropriate.

¶ 24 The court conducted a hearing on Anita Scott's motion for reconsideration on April 8,

2010. Anita Scott questioned the court's jurisdiction to proceed with the case once the court dismissed Paul Scott because he was the only person responsible for the mortgage payments according to the contract.

¶ 25 Plaintiff's counsel responded that it was a business decision to write off liability to Paul Scott since he divorced Anita Scott and quit claimed his interest in the property. Plaintiff did not believe it was necessary to seek an order of default or summary judgment against Paul Scott. The trial court said that it already ruled on the necessary party issue and determined that Paul Scott's dismissal did not preclude the court from entering judgment against other named defendants. The trial court denied the motion for reconsideration.

¶ 26 On April 20, 2010, Anita Scott filed a notice of appeal.

¶ 27 ANALYSIS

¶ 28 On appeal, Anita Scott first argues that the trial court erroneously granted summary judgment in favor of foreclosure for plaintiff because the material facts in this case were disputed. Second, Anita Scott argues that the court lacked jurisdiction to enter summary judgment in favor of plaintiff after plaintiff voluntarily dismissed Paul Scott, a necessary party, with prejudice. Anita Scott asks this court to vacate the trial court's order for summary judgment allowing the judgment of foreclosure and requests this court to dismiss plaintiff's complaint for lack of jurisdiction due to the absence of a necessary party. Plaintiff responds that the trial court properly granted its motion for summary judgment as Anita Scott failed to allege any meritorious defenses and that Paul Scott was not a necessary party.

¶ 29 In reviewing an order granting summary judgment, all of the facts must be viewed in a light most favorable to the nonmoving party. *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 801

(2007) (citing *Eyrich v. Johnson*, 279 Ill. App. 3d 1067 (1996)). Further, the “depositions, admissions, exhibits and affidavits are to be construed strictly against the movant.” *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 993 (2007). If an examination of the record reveals that “it can be fairly stated that a triable issue of fact exists, the motion should be denied.” *Ramirez v. Smart Corp.*, 371 Ill. App. 3d at 801 (citing *Bellmer by Bellmer v. Charter Security Life Insurance Co.*, 140 Ill. App. 3d 752 (1986)). When a trial court grants summary judgment, we review the court’s decision *de novo*. *Ramirez v. Smart Corp.*, 371 Ill. App. 3d at 801 (citing *Courson ex rel. Courson v. Danville School District No. 118*, 301 Ill. App. 3d 752 (1998)).

¶ 30 In this case, we note that counts I, II, and III of the amended complaint were inextricably linked to one another. Foreclosure by summary judgment could not occur until the court first decided whether the pleadings justified a decision not to enforce the release recorded by plaintiff on January 6, 2006, with respect to Anita Scott's property interests.

¶ 31 The dissent would ignore that at the time plaintiff filed a complaint for foreclosure in the trial court, there was no effective lien against the property. The dissent also ignores that plaintiff had the burden to establish their release should be rescinded by the court *as a matter of law* for purposes of summary judgment.

¶ 32 The case law provides that a party may avoid enforcement of a release where the release “was obtained through fraud, duress, illegality, or mistake.” *Simmons v. Blauw*, 263 Ill. App. 3d 829, 832 (1994) (citing *Frank Rosenberg, Inc. v. Carson Pirie Scott & Co.*, 28 Ill. 2d 573, 579 (1963)). The case law also provides a person requesting a court to declare a release to be invalid and reinstate the mortgage lien due to a mistake must show that the alleged mistake was mutual

on the part of both parties to the released contractual lien. *Simmons v. Blauw*, 263 Ill. App. 3d at 832, (citing *Rakowski v. Lucente*, 104 Ill. 2d 317, 324 (1984)). Invalidation of a release must be proved by clear and convincing evidence. *Simmons v. Blauw*, 263 Ill. App. 3d at 832 (citing *McComb v. Seestadt*, 93 Ill. App. 3d 705, 706 (1981)); *Meyer v. Murray*, 70 Ill. App. 3d 106, 111 (1979).

¶ 33 The amended complaint for foreclosure does not allege the release at issue should be invalidated with respect to Anita's property interests due to fraud, duress, illegality, or mutual mistake by both contracting parties to the mortgage agreement. Instead, plaintiff seeks to have the court selectively rescind the release as to Anita Scott, but concedes the validity of the release of the first, larger mortgage as to third party lender, Standard Bank and Trust.

¶ 34 The contention that plaintiff simply committed a unilateral mistake, in the absence of an alleged fraud, duress, illegality, or mutual mistake, would not warrant summary judgment in favor of setting aside the release resulting from plaintiff's unilateral mistake. Contrary to the result proposed by the dissent, this court has held that a unilateral or self induced mistake is an insufficient basis to avoid a release. *Rock Island Bank & Trust Co. v. Stauduhar*, 59 Ill. App. 3d 892, 898 (1978).

¶ 35 The case law does provide that in some cases, unconscionability may be a basis to avoid enforcement of a valid release. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 23 (2003) (citing *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 839 (1995)). Consequently, plaintiff attempted to plead factual allegations supporting the contention that it would be unconscionable for Anita Scott to defeat foreclosure by claiming good faith, detrimental reliance on the mistaken release.

¶ 36 Allegations of both mistake and unconscionability are questions of fact and “[w]here such facts are alleged, an issue of material fact exists, which if proven, would likely defeat the affirmative defense of prior release.” *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d at 23 (citing *Carlile v. Snap-on Tools*, 271 Ill. App. 3d at 842. Since the court decided this issue by way of summary judgment, we examine the pleadings with regard to the allegations of unconscionability to determine if the facts supporting plaintiff’s assertion were truly undisputed.

¶ 37 Plaintiff’s motion for summary judgment alleged that the documents prepared during the dissolution proceedings put Anita Scott on notice that there was an unpaid balance of approximately \$300,000 at the time of the divorce. In addition, plaintiff contends Anita Scott called plaintiff in 2005 regarding a payoff amount for the second mortgage and thereafter, became aware that plaintiff released the largest lien in error. Based on these alleged facts, plaintiff asserted it would create an unconscionable result if the release was not rescinded with respect to Anita Scott’s property interests.

¶ 38 To defeat the theory that a decision to enforce the release would create an unconscionable result for plaintiff, Anita Scott denied she contacted plaintiff to request the balance due on the second mortgage in 2005. In addition to this denial, she also *claimed* that she detrimentally relied upon the release by obtaining an equity line of credit against the property from Standard Bank and Trust, buying insurance, and paying real estate taxes.

¶ 39 Anita’s denial and claim of detrimental reliance created a dispute regarding a material fact as to whether Anita Scott knew of plaintiff’s prior mistake in releasing the larger, unsatisfied mortgage in Paul Scott’s name alone before she detrimentally relied on the release. We do not know whether Anita Scott will prevail on her allegation of detrimental reliance in good faith.

We acknowledge the dissent makes valid observations based on her status as a lawyer that could defeat this claim. However, her personal expertise and status as a lawyer are not facts alleged in the complaint. We merely conclude that based on these pleadings, the extent of Anita Scott's knowledge before she allegedly relied on the release, previously filed in error by plaintiff, remains a disputed question of fact.

¶ 40 Instead of making findings of facts related to the existence of mutual mistake or purported unconscionability, the court simply allowed summary judgment for foreclosure based upon a finding of unjust enrichment alone. The court stated:

“I have seen no evidence anywhere to support the statement that, in fact, that first mortgage was paid off or that you paid it off or that anybody paid it off. And that, I think, is the key to the whole thing.”

¶ 41 Even if the fact that the first release mortgage had not been paid in full was undisputed, this does not resolve the core issues involved in counts I and II of plaintiff's amended complaint regarding whether the mistake was unilateral or whether it would be unconscionable for Anita Scott who was not a named borrower, to retain superior interests in the property if the court refused to rescind the release. Therefore, we conclude the court erroneously granted summary judgment in favor of plaintiff on all counts after simply declaring that it was undisputed the loan had not been paid before the release was executed.

¶ 42 We next consider Anita Scott's second contention of error on appeal regarding the trial court's lack of jurisdiction to proceed on the amended complaint because plaintiff dismissed its amended complaint with prejudice against Paul Scott, a necessary or indispensable party to the

action. With regard to this issue, Anita requests this court to dismiss all three counts of the amended complaint in lieu of remand.

¶ 43 However, the record reveals that, in the trial court, Anita Scott did not present a motion to dismiss any one of the three counts set out in the *amended* complaint based on lack of jurisdiction arising from the absence of a necessary party. Although, Anita Scott suggested the lack of continuing jurisdiction over Paul Scott should have caused the trial court to *reconsider* its ruling on the motion for summary judgment due to the absence of a necessary party to the release and mortgage, we conclude this contention is not jurisdictional.

¶ 44 In this case, Paul Scott was a necessary party with regard to counts I and II of the amended complaint because he was the only other party to the release which plaintiff hoped the court would declare invalid and the mortgage would be reinstated. However, Paul Scott was served with a copy of plaintiff's action, and an attorney entered her appearance on behalf of Paul Scott and filed a motion to dismiss him as a party. On July 8, 2009, by agreement between plaintiff and Paul Scott, the only parties to the release, the court granted the agreed order and dismissed Paul Scott as a party defendant with prejudice. Nonetheless, the court had acquired personal jurisdiction over Paul Scott, as a party, because he was served and participated in the proceedings until his dismissal *with prejudice*.

¶ 45 Although jurisdictional issues may be attacked at any stage of any proceedings, we have determined that Anita Scott's second issue on appeal is not jurisdictional. This assertion is in the nature of a defense to plaintiff's allegations of mistake. In other words, Anita Scott asserts rescission, which makes a foreclosure action possible, cannot be declared by summary judgment since it is undisputed that Anita Scott was not a party to the contracts and Paul Scott was no

longer a party to the litigation.

¶ 46 However, Anita Scott did not include this contention of error in her response to plaintiff's motion for summary judgment, but instead introduced the issue in a motion to reconsider.

Arguments that could and should have been raised at the hearing on the motion for summary judgment cannot be raised for the first time in a motion for reconsideration. Therefore, Anita Scott has forfeited this issue regarding the dismissal of Paul Scott for purposes of this appeal from the decision regarding summary judgment. See *Holzer v. Motorola Lighting Inc.*, 295 Ill. App. 3d 963, 978 (1998); *Continental Casualty Co. v. Security Insurance Co. of Hartford*, 279 Ill. App. 3d 815, 821 (1996)

¶ 47 The trial court's orders granting summary judgment and judgment for foreclosure and sale against Anita Scott are hereby reversed and vacated for the reasons set forth in this decision.

¶ 48 **CONCLUSION**

¶ 49 The judgments of the circuit court of Will County granting summary judgment and entering judgment for foreclosure and sale on behalf of plaintiff and against Anita Scott are hereby reversed and vacated.

¶ 50 Orders reversed and vacated, cause remanded._____

¶ 51 JUSTICE SCHMIDT, dissenting:

¶ 52 I respectfully dissent from the majority's decision to deny rehearing. Upon rehearing, I would affirm the trial court's decision to grant summary judgment.

¶ 53 Evidence of record establishes clearly that the mortgage at issue was released by mistake. Countrywide has established that mortgage was not paid. Anita Scott claims she disputes this but puts forth no evidence that it was paid. Anita cannot defeat summary judgment by simply

denying that which has been proven.

¶ 54 Anita also claims that Countrywide lost its claim when it dismissed Paul Scott since Paul is a necessary party. Paul Scott is not a necessary party. Countrywide has made it clear in this litigation that it is not seeking a deficiency judgment and will not be seeking a deficiency judgment from anyone. It is simply exercising its right to foreclose on the lien on the subject property. Paul has no interest in the property. Of course, Countrywide cannot seek a deficiency judgment against Anita Scott since she did not sign the original note which the mortgage secures.

¶ 55 The record is also clear that Anita Scott took this property by quitclaim deed and that she knew when she took the property that it was encumbered by a mortgage. She was to refinance the mortgage. She has neither pled nor established facts sufficient to establish an equitable estoppel against Countrywide. It is also abundantly clear from reading the record that Countrywide has attempted to work with Anita Scott to amend the mortgage so that she could keep the property. She apparently does not desire to do so if that involves having to pay the mortgage. Regardless, Anita Scott raises no legal or factual issues which preclude Countrywide's right to judgment. I agree with the trial court that, as a matter of law, Anita's allegations that securing a home equity loan, buying insurance and paying taxes did not constitute detrimental reliance. Also, Anita has not alleged how taking any of these actions worked to her detriment. Ergo, Countrywide is entitled to judgment as a matter of law. She has not pled facts sufficient to establish an equitable estoppel defense. See *Geddes v. Mill Creek Country Club, Inc.*, 196, Ill. 2d 302 (2001).

¶ 56 As the trial court noted, to allow Anita to keep this property would provide her with an unjust enrichment. Furthermore, Anita Scott is not an unsophisticated divorcee, but rather, an

attorney at law who has represented herself throughout these proceedings.

¶ 57 For the reasons stated above, I respectfully dissent from the majority's denial of rehearing in this case. I would affirm the trial court.