

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).

NO. 4-10-0029

Order filed 2/25/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DUETSCHKE BANK NATIONAL TRUST COMPANY,)	Appeal from
as Trustee for MORGAN STANLEY, MSAC)	Circuit Court of
2007-HE1, Assignee of HOME 123)	Coles County
CORPORATION,)	No. 09CH19
Plaintiff,)	
v.)	
ROSELYN HART, NONRECORD CLAIMANTS,)	
UNKNOWN TENANTS, and UNKNOWN OWNERS,)	
Defendants-Appellants.)	
and)	Honorable
RALPH HART,)	Richard E. Scott,
Intervenor-Appellee.)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the
judgment.

ORDER

Held: Trial court's judgment is affirmed for the following reasons: (1) defendant Roselyn Hart failed to make a timely objection to intervenor Ralph Hart's motion to intervene; (2) the trial court did not abuse its discretion in denying her motion to continue the December 11 trial as it had granted multiple prior continuances; and (3) the statute of frauds did not apply to the oral contract for the property in question because Ralph offered un rebutted testimony he had fully performed the agreement.

In February 2009, plaintiff, Deutsche Bank National Trust Company (Deutsche Bank), as Trustee for Morgan Stanley, MSAC 2007-HE1, assignee of Home 123 Corporation, filed a complaint to foreclose mortgage for property located at 921 North 29th Street, Mattoon, Illinois, against defendant Roselyn Hart.

In March 2009, Ralph Hart filed a motion to intervene, alleging he owned the property in question because he purchased the property from Roselyn. In April 2009, the trial court allowed Ralph's motion to intervene. In May 2009, Ralph filed a cross-claim against Roselyn. In December 2009, the trial court entered judgment in the amount of \$85,000 for Ralph on count I of his cross-claim. We affirm.

I. BACKGROUND

In February 2009, Deutsche Bank filed a complaint to foreclose mortgage against defendant Roselyn Hart. In March 2009, Ralph Hart filed a motion to intervene pursuant to section 2-405 of the Code of Civil Procedure (735 ILCS 5/2-405 (West 2008)), claiming to be the owner of the property in question located at 921 North 29th Street, Mattoon, Illinois.

At an April 13 hearing on Ralph's motion to intervene, which Roselyn did not attend, the trial court allowed Ralph's motion without objection by plaintiff, Deutsche Bank. In May 2009, Ralph filed a cross-claim against Roselyn. Count I of the cross-claim, based on breach of contract, alleged he and Roselyn agreed Roselyn would convey clear title for the property at issue to Ralph in exchange for Ralph paying Roselyn \$10,000 and making the payments on the mortgage in existence in 1998. Ralph alleged he had fully performed the obligations imposed on him by the contract.

Ralph alleged Roselyn breached the agreement by burdening the property with an additional mortgage, failing to satisfy the debt guaranteed by the additional mortgage, and failing to convey clear title for the property to Ralph. Ralph alleged he had been damaged in the amount of \$85,000, the fair market value of the property. Count II of the cross-claim, which is not at issue in this appeal, asked for specific performance from Roselyn.

In July 2009, the trial court entered an order of default in favor of Deutsche Bank against Roselyn because she failed to file an answer or other pleading within the time prescribed by law. The court also entered a judgment of foreclosure and order of sale.

Later that month, on July 24, Ralph filed a notice of trial for October 2, 2009, on his cross-claim against Roselyn. On October 2, 2009, the trial court allowed Roselyn's written motion to continue, filed on October 2, 2009, and the trial was rescheduled for October 23, 2009. (Although the docket entry allowing the motion to continue is dated October 1, 2009, this appears to be a scrivener's error. The case was set for hearing on October 2, 2009, and the docket entry reflects "cause called for hearing." Additionally, Roselyn's motion for continuance is filed stamped October 2, 2009.)

On October 23, 2009, Roselyn appeared for the first

time before the trial court with pleadings she wished to file. Over Ralph's objection, the court allowed Roselyn to file her pleadings, including an answer to Ralph's motion to intervene and a motion to dismiss Ralph's motion to intervene and his cross-claim. Roselyn also filed her own three-count "complaint of false claims" against Ralph. The parties then agreed to a December 11, 2009, trial date.

On October 28, 2009, a judge's certificate of sale and a report of sale for the property were filed. On December 3, 2009, the court entered an order confirming the sale and for deficiency judgment.

On December 10, Roselyn faxed a request to the clerk of the court seeking a continuance for the December 11 trial because of severe weather in Wisconsin, where she lived, and because she had "Labyrinthitis," which she said prevented her from driving. At the December 11 hearing, Ralph's attorney objected to Roselyn's request for a continuance. The trial court noted a winter storm had occurred in Iowa and Wisconsin earlier in the week, but noted it had no idea of the amount of snowfall in Roselyn's particular town. Ralph's attorney stated he wanted to proceed on the merits, offer Ralph's testimony, and not just receive a default judgment. Ralph's attorney stated he had a brief proposed written judgment which he would provide to Roselyn if the court agreed with the proposed judgment. The court noted

it wanted Roselyn to be clear she could file either a motion to reconsider or appeal a ruling against her.

Ralph testified he resided at the property at issue. He assumed occupancy of the property because of an agreement he made with Roselyn. The agreement called for Ralph to pay Roselyn \$10,000, which Ralph testified he paid. In addition, Ralph testified the agreement required him to make payments on the mortgage existing at the time, along with payments for property insurance and property taxes. Ralph testified he made the mortgage payments directly to Heartland Federal. He also testified he maintained the property and paid the property taxes and insurance when due.

Ralph testified Roselyn told him in August 2006 she wanted to refinance the property. According to Ralph's testimony, he continued to make payments on the property as he and Roselyn had agreed, but, at that point, he began making the payments to Roselyn instead of Heartland Federal because Heartland was no longer the lender. Ralph testified he made all the payments required by his agreement with Roselyn.

According to Ralph's testimony, when Roselyn refinanced the house, the remaining debt on the first mortgage was \$10,506.08. Ralph testified Roselyn told him she was going to take out a \$14,000 loan on the property. However, she borrowed much more than this.

Ralph testified he did not have the resources to pay off the debt from the second mortgage after the foreclosure proceedings were filed. Ralph testified if Roselyn had not refinanced the property, his last payment would have been made in October 2008. He expected to receive title to the property at that time.

Ralph testified he had fully completed all of his obligations under his agreement with Roselyn. According to Ralph, he sought damages in the amount of \$85,000, which he testified was the fair market value of the home. Ralph testified he had spent more than this amount on the property but was only seeking the fair market value of the property.

After hearing Ralph's testimony, the trial court entered judgment in his favor for \$85,000 on count I of his cross-claim. The court found count II of Ralph's cross-claim moot by the December 3, 2009, order confirming the foreclosure sale. The court also denied Roselyn's complaint for false claims. After entering judgment for Ralph, the court and Ralph's attorney had the following exchange:

"THE COURT: Mr. Hart, this agreement that you had with her, was it oral or written?

[RALPH'S ATTORNEY:] It was oral.

THE COURT: Never in writing?

[RALPH'S ATTORNEY:] No, sir.

THE COURT: But when I review her Complaint for False Claims--refresh my recollection--I don't believe she ever denied that there was an oral agreement, she simply said that things weren't followed through as she thought they were going to be or that she did--wasn't given credit for--that was the essence of her false claims.

[RALPH'S ATTORNEY:] May I respond?

THE COURT: She didn't deny there was an agreement of some sort--

[RALPH'S ATTORNEY:] No, sir.

THE COURT: --I don't believe.

[RALPH'S ATTORNEY:] Judge, I believe her pleadings indicate and she has indicated that there was such an agreement with my client. She claims that he did not fulfill that agreement by paying the entirety of the \$10,000, which he testified that he did. She then claims that she--because he didn't fulfill that aspect of the agreement and didn't send her payments in a timely fashion towards those mortgage debts, that she

decided that she would still go forward with this, but wanted him to pay instead of the \$10,000, \$20,000 and obtain financing, that he didn't do that and therefore he is indebted to her for rent above and beyond the payments that he did make. I think that's the essence of her claim.

THE COURT: That was my understanding. There wasn't an issue of Statute of Frauds or anything like that. She agreed there was an oral agreement to do this. That wasn't the issue she was trying to raise.

[RALPH'S ATTORNEY:] That I believe to be true."

On December 14, 2009, Ralph filed a notice of judgments entered December 11, 2009, which his attorney sent to Roselyn. The notice stated the trial court denied Roselyn's request for a continuance and entered judgment against her in Ralph's favor on both his cross-claim and her complaint for false claims.

On January 11, 2010, Roselyn filed several documents with the trial court, including a motion to appeal judgment, a motion for relief from judgment, an answer to Ralph's request to admit, and an answer to Ralph's motion to intervene. In her motion to appeal judgment, Roselyn argued Ralph did not prove the

allegations in his cross-claim. She also argued the allegations were not accurate and the property was only worth \$65,000. She also argued he was not a party to the matter but rather was a debtor of hers. Finally, she argued just reasons existed to delay enforcement of the judgment because (1) Ralph did not prove he fulfilled his responsibilities to Roselyn, (2) she notified the court she could not attend the December 11 hearing because of illness and severe weather, and (3) the documents attached to her motion establish Ralph failed to fulfill his obligations to her.

The trial court took no action on any of the January 11 filings. This appeal followed.

II. ANALYSIS

As she did in the trial court, Roselyn proceeds *pro se* in this appeal. *Pro se* appellants are held to the same standards as attorneys on appeal. *In re A.H.*, 215 Ill. App. 3d 522, 529-30, 575 N.E.2d 261, 266 (1991). The arguments in Roselyn's brief are difficult to follow. In her initial brief to this court, she cites to the Federal Rules of Civil Procedure and the Illinois Administrative Code, neither of which are relevant in this case. Roselyn raises three issues on appeal: (1) the trial court erred in allowing Ralph to intervene in the case; (2) the trial court erred in denying her motion to continue; and (3) the trial court erred in dismissing the relevance of the statute of frauds and its application to her motion to dismiss Ralph's cross-claim.

A. Motion To Intervene

Although her argument is not entirely clear, Roselyn apparently contends the trial court erred in allowing Ralph to intervene because his motion did not comply with the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure do not apply in this case. Further, Roselyn waived any argument she had with regard to the sufficiency of the pleadings because she did not make a timely objection to his motion to intervene. See 735 ILCS 5/2-612(c) (West 2008). If Roselyn believed Ralph had no right to intervene, she should have filed a written objection, appeared at the hearing, and presented her arguments to the court.

B. Motion To Continue

Roselyn also argues the trial court erred in denying her motion to continue the trial on December 11, 2009. We will only disturb a trial court's decision to deny a motion to continue if the trial court abused its discretion. *Sinram v. Nolan*, 227 Ill. App. 3d 241, 243, 591 N.E.2d 128, 129 (1992). This court has stated:

"Our legal system cannot work efficiently if continuances are readily available on the day of trial. Supreme Court Rule 231(f) (134 Ill. 2d R. 231(f)) addresses that concern by specifically requiring that a

sufficient excuse be shown for a continuance once the cause has been reached for trial. Section 2-1007 of the Code of Civil Procedure [citation] similarly requires a showing of good cause to obtain a continuance, although the granting of a continuance under section 2-1007 is solely at the discretion of the court.

The trial court has broad discretion in ruling on motions for continuance, but that discretion must not be exercised arbitrarily.

A litigant has no absolute right to have a case continued. A decisive factor is whether the party asking for the continuance has shown diligence in proceeding with the cause. [Citation.] If a continuance is not requested until the date of the trial, the moving party must give especially persuasive reasons for continuance because of the potential inconvenience to the witnesses, the parties, and the court. A reviewing court will not interfere with the exercise of the trial court's discretion unless there has

been a manifest abuse of discretion or a palpable injustice apparent on the record." *Sinram*, 227 Ill. App. 3d at 243, 591 N.E.2d at 129.

The trial court in this case did not abuse its discretion in denying Roselyn's motion to continue. Roselyn belatedly requested a continuance (faxed to the clerk the day before the scheduled trial) based on her "current illness of Labyrinthitis," which she said prevented her from driving, and severe weather in Wisconsin. Roselyn should have made arrangements for someone to drive her to court in a timely fashion.

In addition, Roselyn had not shown diligence in proceeding with this case. She did not appear for the hearing on Ralph's motion to intervene. She did not file an answer or other pleading with regard to Deutsche Bank's complaint to foreclose mortgage, resulting in a default order being entered against her. Finally, the trial court had already continued the trial on two separate occasions at her request or as a result of allowing the filing of her motions on the day set for trial, October 23, 2009.

C. Statute of Frauds

We next address Roselyn's argument the trial court erred in dismissing the relevance of the statute of frauds (740 ILCS 80/2 (West 2008)) and its application to the defendant's

motion to dismiss. Roselyn relies on the fact a written contract for the sale of the property did not exist. However, Ralph argues full performance has been held to remove such agreements from the application of the statute of frauds. See *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785-86, 922 N.E.2d 8, 19 (2009).

Roselyn concedes in her reply brief full performance would render her statute-of-fraud argument moot. However, according to Roselyn, Ralph presented nothing other than his own testimony to establish he fully performed his obligations under the contract. However, Ralph's testimony was unrebutted as Roselyn did not appear for the trial.

D. Sufficiency of Evidence Presented by Ralph

Throughout her brief, Roselyn argues Ralph did not present sufficient evidence to establish his claim against her. In essence, she challenges the credibility of Ralph's testimony and cites a lack of documentary evidence. However, her chance to challenge Ralph's testimony was at the hearing, which she did not attend. She also alleges the trial court did not consider evidence submitted by her. However, she did not present any evidence as she was not present for the hearing. It appears Roselyn believes any documents or information filed with the circuit clerk in a case constitute evidence. This is simply not the case.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.