

2013 IL App (1st) 130452-U

No. 1-13-0452

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).

SIXTH DIVISION
October 25, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FOSTER BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 12 L 000029
)	
SUK HO LEE, SANG PIL HAN, JOHN KWON, RACHEL)	
KIM, and HYUNG SUB LEE,)	Honorable
)	Sanjay T. Tailor,
Defendants-Appellants.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* In this breach of contract action against the defendant borrowers and guarantor of a mortgage note, the trial court properly granted the plaintiff lender summary judgment where there was no genuine issue of material fact concerning either the elements of the lender's cause of action or the defendants' affirmative defense of unclean hands, which alleged that the lender had

1-13-0452

violated its own lending policy.

¶ 2 Plaintiff Foster Bank sued defendants Suk Ho Lee, Sang Pil Han, John Kwon, Rachel Kim, and Hyung Sub Lee for breach of contract concerning their failure to repay their indebtedness pursuant to the terms of a mortgage note and guaranty. Plaintiff moved for summary judgment, and the trial court granted that motion.

¶ 3 Defendants appeal, contending summary judgment was precluded by the existence of genuine issues of material fact concerning the elements of the plaintiff's cause of action and defendants' affirmative defense of unclean hands. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 This breach of contract action arose after plaintiff loaned defendants Suk Ho Lee, Sang Pil Han, John Kwon and Rachel Kim (the borrowers) \$1,162,500 pursuant to the terms of a commercial mortgage balloon note executed by the borrowers in July 2006. In April 2010, the note was amended to lower the interest rate. Pursuant to the terms of the note and amendment, the borrowers were required to repay the principal balance with interest in 300 consecutive monthly installments of \$8,402.63 until the August 1, 2011 maturity date.

¶ 6 Also in April 2010, as additional security for the note, defendant Hyung Sub Lee executed a guaranty in favor of plaintiff that guaranteed the obligation of the borrowers to repay the note.

¶ 7 In November 2011, plaintiff sent Hyung Sub Lee a letter stating that the loan had matured, was not renewed, and the entire balance was due. Plaintiff informed Hyung Sub Lee

1-13-0452

that the total payoff as of November 2011 was \$1,188,197.65, and plaintiff would commence legal proceedings if the loan was not paid.

¶ 8 In 2012, plaintiff filed a two-count complaint alleging that the defendant borrowers failed and refused to repay their indebtedness under the note despite demands for payment (count I); and defendant Hyung Sub Lee remained in default of his obligations to plaintiff under the guaranty despite plaintiff's demand for payment (count II). Plaintiff alleged that as a result of the defendants' breaches of the note and the guaranty, the total amount due to plaintiff was \$1,188,197.65 plus interest, which would accrue at the per diem rate of \$196.15. Plaintiff attached as exhibits to the complaint the note, the amendment to the note, the guaranty, and the November 2011 letter demanding payment.

¶ 9 In their answer, the defendants stated that they had insufficient knowledge to form a belief as to the truth of the allegations of default and thus denied the allegations of default and demanded strict proof thereof. Defendant also asserted the affirmative defense of unclean hands. Specifically, defendants alleged plaintiff had violated its own lending policy by disregarding the appraisal value of the commercial real property that secured the loan and by loaning the borrowers an excessive amount of money in order to benefit the seller, who was a member of plaintiff's board of directors. Plaintiff denied the allegations of wrongdoing in defendants' affirmative defense.

¶ 10 Plaintiff moved for summary judgment, arguing that no genuine issues of material fact existed in this matter and plaintiff was entitled to judgment as a matter of law on counts I and II of the complaint. In addition to the pleadings, plaintiff attached to the motion the affidavit of

1-13-0452

Albert Stroka, a collection manager and legal counsel for plaintiff.

¶ 11 Stroka testified that he was personally familiar with the money disbursed to the borrowers and the amounts plaintiff had collected from the borrowers and Hyung Sub Lee. The loan enabled the borrowers to purchase improved commercial property on South Michigan Avenue in Chicago for \$1,550,000 from the sellers, Mr. Won Hee Kang and Mrs. Kum Ok Kang. In June 2006, the property was appraised at \$1,400,000. The \$1,162,500 loan was equal to 75% of the purchase price and 83% of the appraised value of the property. Copies of the appraisal and escrow trust disbursement statement from the closing of the loan were attached to Stroka's affidavit.

¶ 12 Stroka testified that plaintiff's loan policy specifically stated that "commercial mortgages shall not exceed 75% of the appraised value of the real estate unless specifically approved by the Directors Loan Committee." The relevant provision of the loan policy was attached as an exhibit to Stroka's affidavit. Stroka averred that the director's loan committee had approved the loan in this instance. Stroka stated that the loan was not made to the borrowers in violation of plaintiff's lending policy because plaintiff had the right to initiate exceptions to its lending limits. Stroka also stated that the borrowers received \$57,757.89 out of the closing proceeds, and could have used that amount to reduce the loan to a value below 79% of the appraised value.

¶ 13 Stroka also testified that plaintiff's 83% loan advance to the borrowers did not violate the Federal Deposit Insurance Corporation (FDIC) loan limit guidelines, which provide that commercial loans may be made up to 85% of the appraised value of improved commercial property. The relevant section of the FDIC's commercial lending guidelines was attached as an

1-13-0452

exhibit to Stroka's affidavit.

¶ 14 Further, Stroka testified that Mr. Kang, the seller of the commercial property, was not a member of plaintiff's board of directors at the time of the loan and had resigned his position as a member of the board more than six years prior to the date of the loan. The affidavit of Mr. Kang attesting to the date of his resignation was attached as an exhibit.

¶ 15 Stroka testified about the terms of the note, amendment and guaranty. He stated that the borrowers had failed to make payments required by the note in a timely manner and were in default. Furthermore, by virtue of the borrowers' breach of their obligations to plaintiff, Hyung Sub Lee also breached his obligations to plaintiff arising under the guaranty by failing to perform the borrowers' obligations under the note. Plaintiff notified Hyung Sub Lee of the default and demanded payment in November 2011, and that letter was attached as an exhibit.

¶ 16 Stroka testified that the payoff calculations for the note were based on his own personal knowledge and review of plaintiff's loan records, which were held and maintained in the normal and ordinary course of business. The payoff statement was attached to Stroka's affidavit. Stroka testified that he prepared the payoff statement in the regular course of plaintiff's business and it was the regular course of plaintiff's business at or around the date the payoff was generated to produce such documents. The payoff was generated from plaintiff's electronic accounting/payment management system, which automatically calculates, tracks and maintains balances and interest owed on obligations. Furthermore, all credits and payments made to plaintiff were applied to the note and reflected in the payoff. Stroka testified that he properly employed and operated the management system, which was recognized as standard in the

1-13-0452

banking industry, to generate the payoff. The outstanding total amount due and owing by defendants as of June 27, 2012 was \$1,233,509.38, plus a \$196.15 per diem.

¶ 17 The trial court granted summary judgment in favor of plaintiff and against defendants for \$1,235,870.48. Thereafter, the trial court denied defendants' motion to reconsider that ruling. Defendants timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)) provides for summary judgment when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill App. 3d 749, 755 (2005). All evidence must be construed in the light most favorable to the nonmoving party and strictly against the moving party. *Pearson v. DaimlerChrysler Corp.*, 349 Ill. App. 3d 688, 697 (2004). The entry of a summary judgment is not a matter committed to the discretion of the trial court, and a reviewing court must independently examine the evidence in support of and in opposition to a motion for summary judgment. *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1006 (1996). Accordingly, we review a trial court's entry of summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 83 Ill. 2d 342, 349 (1998).

¶ 20 The court determines the existence or absence of a genuine issue as to any material fact from the affidavits, depositions, admissions, exhibits and pleadings in the case. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974).

"The facts to be considered by the court are evidentiary facts. [Citation.] Even though a complaint and answer may purport to raise issues of material fact, if such issues are not further supported by evidentiary facts through affidavits or such, summary judgment is then appropriate. [Citation.] If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact. [Citations.]"

Id.

¶ 21 "Where a plaintiff has moved for summary judgment, the materials relied upon must establish the validity of the plaintiff's factual position on *all* the contested elements of the cause of action." *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 7. The movant for summary judgment bears the burden of persuasion and the initial burden of production to come forward with competent evidentiary material which, if uncontradicted, entitles him to judgment as a matter of law. *Wortel v. Somerset Industries, Inc.*, 331 Ill. App. 895, 900 (2002); *Groce*, 282 Ill. App. 3d at 1010. If the movant satisfies his initial burden of production, then the burden shifts to the nonmovant, who cannot rest on his pleadings to raise genuine issues of material fact. *Triple R Development, LLC*, 2012 IL App (4th) 100956, ¶ 12.

¶ 22 In order to prevail on a claim for breach of contract, a plaintiff must allege and prove by a preponderance of the evidence: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant injury

1-13-0452

to the plaintiff. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 198 (1999).

¶ 23

A. Proof of Breach

¶ 24 Defendants argue that the trial court erred in granting summary judgment because plaintiff failed to prove the element of breach in its motion for summary judgment. Defendants complain that plaintiff even failed to allege the necessary factual allegations regarding the issue of breach in its complaint, which was confusing because it merely alleged that the borrowers failed and refused to repay the indebtedness of the note, but no exhibit attached to the complaint showed how the agreement was breached. According to defendants, the complaint was devoid of any factual allegations as to which payments the defendants failed to make and the amount of those payments, and there were no documents proving that the defendants breached the agreement. Defendants also complain that plaintiff, without amending its complaint, changed its theory of recovery by raising, for the first time in its response to defendants' motion to reconsider the grant of summary judgment, the argument that the breach was also based on the defendants' failure to pay back the loan upon maturity.

¶ 25 We find that plaintiff met its burden on the issue of breach of contract. Through the complaint and its attached exhibits and Stroka's affidavit and its attached exhibits, plaintiff established (1) the existence of a valid and enforceable contract, i.e., the note and amendment; (2) performance by plaintiff, i.e., plaintiff's status as holder of the note and plaintiff's funding of the loan; (3) breach of contract by the defendants, i.e., the borrowers' default under the note in that they failed to make timely installment payments required under the note and the defendants' failure to pay all monies due under the note by its maturity date of August 1, 2011; and (4)

1-13-0452

resultant injury to plaintiff, i.e., the amount due to plaintiff as a result of the breach of the note.

¶ 26 Defendants never moved the trial court to have plaintiff's complaint dismissed as insufficient. Moreover, defendants submitted no evidence to rebut the evidence proffered by plaintiff. We find no merit to defendants' complaints concerning any lack of clarity about whether the alleged default was a default in monthly installment payments under the note or a default upon maturity of the note by its terms. Contrary to defendants' assertions on appeal, plaintiff did not change the theory of its case during the course of the litigation. The terms and provisions of the note specifically created a two-fold payment obligation: the loan was amortized over 300 consecutive monthly payments and all amounts owed under the note had to be paid in full on August 1, 2011. It is apparent that the note by its terms required both monthly payments and full payment of the outstanding principal and interest upon maturity of the note. In light of the dual payment obligations under the note, plaintiff's allegation in the complaint that defendants failed to repay the indebtedness of the note encompassed all money due under the note, regardless of whether the default was in the installment payments or upon maturity.

¶ 27 We reject defendants' argument that plaintiff failed to establish defendants' breach of the note. Plaintiff's November 2011 letter to Hyung Sub Lee explicitly stated that the loan had matured, would not be renewed by plaintiff, and the entire balance was due. Under the explicit terms set forth in paragraph 7(a) of the note, "failure to pay, when and as due, any of the Liabilities, or failure to comply with or perform any agreement or covenant of Mortgagor" constituted a default under the note. Furthermore, under the explicit terms of the note, defendant "irrevocably waive[d] presentment, protest, demand and notice of any kind in connection" with

1-13-0452

the note.

¶ 28 In addition to the loan documents, plaintiff submitted Stroka's affidavit and attached exhibits, which established that he was personally familiar with the loan disbursement and the amounts collected from defendants. Stroka also testified that the payoff calculations for the note were based on his own personal knowledge and review of plaintiff's loan records; that he prepared the payoff in the regular course of plaintiff's business; that all credits and payments made to plaintiff were reflected in the payoff; and that Stroka properly employed and operated plaintiff's electronic management system to generate the payoff. Through the loan documents, payoff statement, and affidavit, plaintiff clearly established the elements of its case in chief, including defendants' breach. The burden then shifted to defendants, who offered no evidence whatsoever to refute plaintiff's evidence.

¶ 29 Defendants contend, however, that the burden never shifted to them because Stroka's affidavit was full of conclusions and hearsay and, thus, was not admissible into evidence. Defendants complain that Stroka's affidavit merely stated that the borrowers defaulted under the terms of the note without any specific factual support indicating when and in what amount the borrowers defaulted on their loan. Defendants also complain that Stroka did not state whether he personally handled the closing of the loan, whether he was present at the closing, whether he personally issued or witnessed the issuance of the loan, whether he personally put the loan parameters in the computer system or witnessed someone else doing so, and whether he personally received the payments from the defendant and personally credited the payments. Defendants argue that Stroka's affidavit failed to set a proper foundation for admission of the

1-13-0452

payoff statement because plaintiff failed to attach the entire record of the subject loan with payment history, credits and debits, any fees and charges and the dates of those transactions.

¶ 30 Section 2-1005 of the Code governs motions for summary judgment and permits the filing of affidavits in support of and in opposition to such motions. 735 ILCS 5/2-1005 (West 2010). The statute also states that the form and content of those affidavits shall be as provided by Supreme Court Rules. 735 ILCS 5/2-1005(e) (West 2010). Supreme Court Rule 191(a) provides that affidavits submitted in summary judgment proceedings shall consist of facts admissible in evidence and must affirmatively show that the affiant, if sworn as a witness, could competently testify to the matters contained therein. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Furthermore, affidavits must be made on personal knowledge of the affiant and must have attached thereto sworn or certified copies of all papers upon which the affiant relies. *Id.*

¶ 31 We conclude that Stroka's affidavit complied with Rule 191(a) and was properly relied upon by the trial court. Stroka stated on oath that the matters set forth in his affidavit were true and based upon his own personal knowledge, and that he was personally familiar with the monies disbursed and collected by plaintiff concerning the mortgage note at issue in this case. See *U.S. Bank National Association v. Judy J. Sauer*, 392 Ill. App. 3d 942, 947 (2009) (affidavits in which the affiant has first hand knowledge of the material allegations of the complaint as well as the matters set forth in the affidavit, which are based upon the affiant's personal knowledge, comply with Rule 191 and can be properly considered by a trial court in ruling on a motion for summary judgment). Defendants offer no relevant case law to support their contention that, pursuant to Rule 191(a), personal knowledge requires personal handling of the loan transaction, inputting of

1-13-0452

data into the computer system, or receiving of the payments.

¶ 32 Furthermore, we find no merit to defendants' challenge to the admissibility of the payoff statement on the grounds of improper foundation for the business records exception to the hearsay rule. Citing *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122 (1992), defendants assert that the grant of summary judgment to a lender who sues to collect a loan balance is improper when the lender merely presents a summary of the balance due. Defendant both misstates and misapplies the holding in that case.

¶ 33 In *Cole Taylor Bank*, the bank sued the guarantor to recover on a guaranty. The trial court denied the guarantor's request for a continuance to complete discovery and granted summary judgment in favor of the bank without allowing the guarantor to obtain discovery of the bank's records. *Cole Taylor Bank*, 230 Ill. App. 3d at 124-26. The appellate court reversed the grant of summary judgment, finding the bank's records contained information that was solely in the bank's possession and was relevant to the issue of fact involving the question of damages and whether the guarantor's obligation had been released. *Id.* at 127-28. The bank had failed to provide the guarantor with any discovery, and the relevant facts could be ascertained only by the inspection of a large number of documents comprised of detailed statements. *Id.* at 128-29. Specifically, the financing agreement in question involved accounts receivables and numerous transactions and, thus, the balance due could not be easily calculated, unlike the situation involving a loan with a single disbursement of funds. *Id.* at 127. Accordingly, while a summary of those documents could be received into evidence, the mass of documents had to be placed either in the hands of the court or made accessible to the opposing party for inspection. *Id.* at

1-13-0452

129. Furthermore, the affidavit of the bank vice-president was inadmissible because it did not show his familiarity with the bank's bookkeeping records concerning the amounts disbursed or the amounts collected and he did not name or provide the documents upon which he relied when he made his conclusion about the current balance due. *Id.* at 129-130.

¶ 34 *Cole Taylor Bank* is distinguishable from the instant case, which involves a single disbursement of funds from which a balance can easily be calculated. Moreover, the record does not indicate either any dispute between the parties concerning discovery or any motion filed by defendants to compel discovery. In addition, Stroka's affidavit was admissible where he established that he was familiar with the bank's bookkeeping records concerning the amounts disbursed and collected and he explained how he used the bank's electronic management system to generate the payoff statement.

¶ 35 The record establishes that plaintiff satisfied its burden of production with Stroka's affidavit and attachments. The burden then shifted to defendants, who failed to submit any evidence to refute the evidence proffered by plaintiff. Accordingly, plaintiff established all the elements of its cause of action, there was no genuine issue of material fact in dispute, and plaintiff was entitled to summary judgment as a matter of law.

¶ 36 B. Affirmative Defense of Unclean Hands

¶ 37 Defendants contend summary judgment in favor of plaintiff was improper because plaintiff did not meet its burden to negate defendants' affirmative defense of unclean hands. Specifically, defendants alleged that plaintiff violated its own lending policy because the note exceeded its lendable amount by disregarding the appraised value of the collateral. Defendants

1-13-0452

also alleged that plaintiff loaned an excessive amount of money to the borrowers in order to benefit a member of plaintiff's board of directors.

¶ 38 We find that plaintiff's evidence demonstrated defendants' inability to prove the asserted affirmative defense of unclean hands. Plaintiff submitted Stroka's affidavit, which directly refuted defendants' unsupported allegations of unclean hands. Stroka prepared and executed the affidavit in his capacity as collection manager, legal counsel and the duly authorized representative of plaintiff. Furthermore, the appraisal was submitted with his affidavit as a document relied upon by plaintiff in approving the loan. To that extent, Stroka's attestation was sufficient to authenticate the appraisal and provide foundation for it. Moreover defendants failed to offer any evidence to challenge the value of the property set forth in the appraisal or plaintiff's reliance thereon. Notably, defendants themselves, in order to assert their claim of unclean hands, relied on the appraisal.

¶ 39 As stated in Stroka's affidavit, plaintiff's lending policy provided that it had discretion to make commercial loans in excess of 75% of the appraised value if approved by the directors' loan committee. Furthermore FDIC guidelines provided that commercial loans on improved property may be made up to 85% of the appraised value of improved commercial property. In this instance, the purchase price of the improved commercial property was \$1,550,000, and plaintiff loaned the borrowers \$1,162,500 on the property, which was appraised at \$1,400,000. Based on these numbers, the loan was 83% of the appraised value of the property. Stroka's statement that the lending committee approved the loan and strictly complied with FDIC guidelines was based on his personal knowledge of the transaction and his position at the plaintiff bank. Additional

1-13-0452

evidence of the committee approval of the loan was not necessary because defendants did not challenge plaintiff's initial proffered evidence with any other evidence. Moreover, Mr. Kang's affidavit clearly established that he, the seller in the real estate transaction, was not a member of plaintiff's board of directors at the time the loan was made and had resigned more than six years prior to the loan being made.

¶ 40 We conclude that plaintiff successfully negated the affirmative defense set forth by defendants and, thus, was entitled to summary judgment as a matter of law.

¶ 41

III. CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 43 Affirmed.