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2013 IL App (4th) 121141-U

NO. 4-12-1141

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
 May 9, 2013  
 Carla Bender  
 4<sup>th</sup> District Appellate  
 Court, IL

BOUNDARY WATERS BANK, a Minnesota Banking Corporation,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
DHH, LLC, an Illinois Limited Liability Company,	)	No. 12CH282
Defendant-Appellee,	)	
and	)	
LIBERTY ON THE LAKE, LLC, an Illinois Limited Liability Company; GEORGE L. JOHNSTON, an Individual; JUDITH A. DWYER, as Trustee of the Judith A. Dwyer Trust Dated July 25, 2000; DANIEL HAMELBERG, an Individual; BUSEY BANK, an Illinois Banking Corporation; UNKNOWN OWNERS; and	)	Honorable
NONRECORD CLAIMANTS,	)	Michael Q. Jones,
Defendants.	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.  
 Presiding Justice Steigmann and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because the movant for a stay failed to present a substantial case on the merits, the trial court abused its discretion by staying the proceedings.

¶ 2 Plaintiff, Boundary Waters Bank (Boundary), brought this action for foreclosure. One of the defendants DHH, LLC (DHH), is a junior mortgagee. In an appeal separate from this one, DHH appealed the denial of its amended counterclaim against Boundary. The trial court granted a motion by DHH to stay enforcement of the judgment of foreclosure pending the outcome of DHH's appeal. In this present appeal, Boundary appeals the stay. See Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26,

2010); *Khan v. BDO Seidman, LLP*, 2012 IL App (4th) 120359, ¶ 52.

¶ 3 We reverse the stay because DHH has failed to present a substantial case on the merits. Because of this disposition, we do not reach Boundary's alternative argument that the bond the trial court required of DHH was insufficient.

¶ 4 I. BACKGROUND

¶ 5 A. Boundary's Complaint for Foreclosure

¶ 6 On July 2, 2007, Liberty on the Lake, LLC (Liberty) borrowed over \$12 million from Boundary. To secure this loan, Liberty conveyed to Boundary a mortgage on some land that Liberty intended to develop. According to the record, the "common address" of this land is "Liberty on the Lake subdivisions, Champaign and Savoy, Illinois."

¶ 7 On June 20, 2007, Boundary recorded the mortgage with the Champaign County Recorder of Deeds.

¶ 8 Liberty defaulted on the loan, and on June 22, 2012, Boundary filed a complaint for foreclosure. Boundary alleged in its complaint that Liberty owed it \$9,376,561.32.

¶ 9 Liberty was not the only defendant that Boundary named in its complaint. Boundary also named several junior mortgagees, asking the trial court to terminate their mortgages because Boundary's mortgage had priority. One of the junior mortgagees that Boundary named as a defendant was DHH.

¶ 10 B. DHH's Amended Counterclaim Against Boundary

¶ 11 On November 13, 2012, the trial court gave DHH permission to file, *instanter*, an amended counterclaim against Boundary. In its amended counterclaim, DHH alleged that, to induce utility companies to install electric lines and gas lines on the land, DHH had entered into utility

service agreements with the utility companies. The purpose of these agreements was to guarantee that the utility companies ultimately would be reimbursed the cost of installing the electric lines and gas lines. Without the agreements, the utility companies would not have installed the lines.

¶ 12           Essentially, the agreements required DHH to do two things. First, DHH had to obtain irrevocable letters of credit guaranteeing the utility companies reimbursement in a certain amount. Whenever a lot was sold and utility services to that lot commenced, DHH was to notify the utility companies, and the amount of DHH's obligation would be reduced.

¶ 13           Each utility service agreement had an expiration date. In one agreement, the expiration date was in 2017, and in the other agreements, it was in 2018. At the expiration date, the utility company could require DHH to pay the guaranteed amount of reimbursement, reduced in proportion to the number of lots sold.

¶ 14           Second, DHH had to pay an amount to the utility companies every six months to renew the utility service agreements—a "carrying cost" that DHH would continue to incur until the agreements expired.

¶ 15           In DHH's view, it was unjust that DHH would remain obligated on these utility service agreements even after a third party bought the land in a sheriff's sale. Ever since Boundary took possession of the land in July 2012, DHH had no further control over the marketing and sale of lots, even though DHH's liability to the utility companies depended on how many lots were sold. According to DHH, the utility service agreements would unjustly enrich Boundary, the utility companies, and the third-party purchaser while conferring no benefit at all, but rather continuing liability, on DHH.

¶ 16           Therefore, in its amended counterclaim, DHH requested three alternative forms of

relief: (1) an order that Boundary or any third-party purchaser execute "assignments" of the utility service agreements; (2) a money judgment against Boundary in the amount that DHH guaranteed to the utility companies, plus carrying costs; or (3) a money judgment against Boundary in an amount to be determined after the utility extension agreements expired.

¶ 17 C. The Judgment of Foreclosure and Sale

¶ 18 On November 13, 2012, the trial court entered a "Judgment Order of Foreclosure and Sale." In the judgment, the court found that Liberty owed Boundary \$8,566,036.99 plus attorney fees and costs incurred after October 31, 2012. The court further found that Boundary's mortgage was superior to the liens of all the lienholders that Boundary had named as defendants.

¶ 19 Under the heading "Sale of Property," the trial court ordered:

"16. The real estate \*\*\*, with all improvements, fixtures, and appurtenances thereto, shall be sold at public auction to the highest bidder for cash by the Sheriff of Champaign County, at a time and place to be selected by the Sheriff of Champaign County, which is currently anticipated to be December 14, 2012.

The Sheriff's sale shall be subject to this Court's ruling as to the outcome of the DHH, LLC Amended Counterclaim, which is scheduled for hearing on November 27, 2012 at 1:00 p.m. in Courtroom H. Ruling will be issued by December 6, 2012. Any documents required as a result of the Court's ruling shall be supplied by the Sheriff seven (7) days prior to the date of the sale ordered herein."

¶ 20 The proceeds of the sale were to be distributed in the following order of priority: (1) to the sheriff for his disbursements and commissions; (2) to Boundary, as payment toward the \$8,566,036.99 plus any additional costs of the sale; and (3) to Boundary as reimbursement for any advances Boundary made to protect the lien of the judgment and to preserve the real estate, including inspection fees, real estate taxes, and insurance premiums.

¶ 21 The final paragraph of the judgment reads: "A judgment is entered against Liberty on the Lake, LLC in the amount of \$8,566,036.99, plus Plaintiff's attorney's fees and costs incurred after October 31, 2012."

¶ 22 D. Summary Judgment Against DHH on Its Amended Counterclaim,  
Followed by DHH's Interlocutory Appeal

¶ 23 On November 20, 2012, DHH moved for summary judgment in its favor and against Boundary on DHH's amended counterclaim. On November 27, 2012, the trial court denied DHH's motion for summary judgment and entered judgment in Boundary's favor on the amended counterclaim. At that time, the court made no finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 24 On December 5, 2012, DHH filed a motion for reconsideration, which, on December 6, 2012, the trial court denied. The court made no Rule 304(a) finding at that time, either.

¶ 25 On December 7, 2012, DHH filed a notice of appeal, which, on December 12, 2012, DHH amended with leave of court. The amended notice of appeal stated that DHH was appealing from the trial court's orders of November 27, 2012, and December 6, 2012, which, respectively, denied DHH's amended counterclaim and its motion for reconsideration.

¶ 26 DHH's appeal is a separate appeal from the present one. We assigned it case No. 4-

12-1119.

¶ 27

E. The Stay

¶ 28 On December 7, 2012, DHH filed a "Petition To Stay the Proceedings and To Set Bond." DHH requested that the trial court stay the case to await the outcome of its appeal in case No. 4-12-1119.

¶ 29

On December 11, 2012, over Boundary's objection, the trial court granted DHH's petition to stay the proceedings. The docket entry for that date reads: "Court rules that if DHH supplies a letter of credit in amount of \$1,000,000.00 to Boundary Waters by the close of the business day on December 13, 2012, it will stay the sale currently set for December 14, 2012 at 9:00 a.m. Should DHH fail to do so, the sale will proceed."

¶ 30

On December 13, 2012, the trial court supplemented its order of December 11, 2012. The docket entry reads:

"Over objection by the Plaintiff, Motion to stay the sale and approve an installment appeal bond allowed. Approved Rule 305(b) Appeal Bond executed by the court order entered. Order entered. See Order. Sale of 12/14/12 is vacated and continued to 1/11/13. Representation by Mr. Amjad [(counsel for DHH)] that Meyer Capel Law Firm [(Amjad's firm)] has cashier's checks totaling \$500,000.00 on behalf of DHH which are or will be immediately deposited into their client trust account. Meyer Capel firm ordered not to release said funds without further court order. DHH advised that said funds could be applied to any damages sustained by Boundary Waters between

today's date and 1/11/13, should a sheriff sale occur on 1/11/13. Court provides that an affidavit from counsel for DHH verifying the deposit of additional funds in cash or cash equivalent of \$500,000.00 in the trust account of Meyer Capel should be adequate proof to the sheriff of compliance with this order and shall require the sheriff to vacate the sale of 1/11/13."

¶ 31 F. Boundary's Appeal (the Present Appeal)

¶ 32 On December 19, 2012, Boundary filed a notice of interlocutory appeal. This is the appeal before us in the present case. In its notice of appeal, Boundary appeals from the trial court's order granting DHH's petition to stay the proceedings and to set bond.

¶ 33 II. ANALYSIS

¶ 34 A. The Initial Lack of a Rule 304(a) Finding, Since Remedied

¶ 35 In its brief, which it filed on January 28, 2013, Boundary argues that the trial court abused its discretion by staying the proceedings, because, in the absence of a finding pursuant to Rule 304(a), DHH's notice of appeal was ineffective. See *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 12 ("while a judgment of foreclosure is a final order, without Rule 304(a) language added to it, the judgment is not appealable").

¶ 36 This argument is moot because on January 31, 2013, we remanded case No. 4-12-1119 to the trial court for a Rule 304(a) finding and on February 6, 2013, the trial court made the Rule 304(a) finding.

¶ 37 B. DHH's Failure To Present a Substantial Case on the Merits

¶ 38 Courts have the inherent power to grant a stay of proceedings to await the outcome

of an appeal, and we will uphold such a stay unless it is an abuse of discretion. *Stacke v. Bates*, 138 Ill. 2d 295, 302 (1990). Both of the parties in this case appear to agree that, in order for the trial court to be within its discretion in granting the stay, DHH had to "present a substantial case on the merits." *Id.* at 309. *Cf. Khan*, 2012 IL App (4th) 120359, ¶ 74 ("Unless the appeal is clearly frivolous, the circuit court should stay its proceedings for a reasonable length of time, until the appeal resolves the significant shared issue.").

¶ 39 Looking at DHH's amended counterclaim, we do not see a substantial case on the merits. Maybe, in case No. 4-12-1119, DHH will convince us otherwise. On the record before us, however, DHH's prospects do not look good when we consider the supreme court's explication of the law of unjust enrichment.

¶ 40 In *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989), the supreme court said: "To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience."

¶ 41 We do not see how Boundary has "retained a benefit." All Boundary wants is to be paid back. Instead of gaining a benefit, Boundary wants to avoid the detriment of losing the money it lent to Liberty. As a condition of the loan, Boundary required Liberty to give it a mortgage on the land and improvements. Boundary and Liberty must have contemplated that improvements to the land, including the installation of utility lines, would increase the value of the land and therefore reduce Boundary's ultimate loss in the event that Liberty defaulted on the loan. Surely, it never occurred to Boundary and Liberty to regard such a potential outcome as unjust or as an undeserved

