

2015 IL App (1st) 131349-U
No. 1-13-1349
Order Filed January 16, 2015

SIXTH DIVISION

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
FIRST DISTRICT

WALTER BOITCHOUK,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 12 CH 40460
)	
2113 W. HURON, INC., an Illinois)	
Corporation, UNKNOWN OWNERS,)	
UNKNOWN OCCUPANTS, UNKNOWN)	Honorable
TENANTS AND NONRECORD)	Michael F. Otto,
CLAIMANTS,)	Judge Presiding.
)	
Defendant-Appellee).)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of the mortgagee's motion to appoint a receiver was reversed where the mortgagor failed to establish good cause to remain in possession.

¶ 2 The plaintiff, Walter Boitchouk, brings this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Feb. 26, 2010) from an order of the circuit court of Cook County denying his motion to appoint a receiver. The defendant, 2113 West Huron, Inc., did not file a brief. This court ordered the appeal to be taken on the appellant's brief and the record only. The sole issue on appeal is whether the denial of the motion to appoint a receiver was error.

¶ 3 On November 5, 2012, the plaintiff filed a complaint to foreclose the mortgage he held on real estate located at 2113 West Huron Street, Chicago, Illinois. The complaint alleged that the plaintiff's loan to the defendant, secured by the mortgage, matured on October 6, 2012. As of that date the defendant had made no payments on the loan and was in default. At the time of the filing of the complaint, the defendant owed \$400,000 in principal, \$9,022.22 in interest as of November 5, 2012, with interest accruing in the amount of \$360.66 per day, and \$466.67 in late fees. Under the terms of the mortgage, the plaintiff was entitled to reasonable attorney fees and to have a receiver appointed to take possession of all or a portion of the property upon the filing of the complaint for foreclosure.

¶ 4 On December 14, 2012, the plaintiff filed a motion for the appointment of a receiver pursuant to sections 15-1702 and 15-1704 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1702, 15-1704 (West 2012) (the Foreclosure Law)). In his affidavit in support of the motion, the plaintiff averred as follows. "On or about November 7, 2012," the defendant tendered to him the principal, interest and cost sums due and owing but refused to pay the plaintiff's attorney fees. The plaintiff attached a bill from his attorneys in the amount of \$10,777.18. Since the attorney fees were outstanding, the loan to the defendant remained in

default, and a receiver was necessary to secure the property in safe condition for the residents, to ensure that the real estate taxes were paid and that the rents were collected and not misappropriated.

¶ 5 On February 19, 2013, the defendant appeared, and on March 20, 2013, filed its answer and affirmative defenses. The plaintiff's motion for the appointment of a receiver was continued to April 19, 2013. On April 4, 2013, the defendant filed a motion to stay the proceedings pending an adjudication of the plaintiff's attorney fee petition.

¶ 6 On April 19, 2013, the circuit court denied the defendant's motion to stay the proceedings. The court denied the plaintiff's motion for the appointment of a receiver, finding that the "Defendant has shown good cause not to appoint a receiver" under section 15-1701(b)(2) of the Foreclosure Law (735 ILCS 5/15-1701(b)(2) (West 2012)).

¶ 7 The plaintiff filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 I. Standard of Review

¶ 10 Where no evidentiary hearing has been held on the motion to appoint a receiver, this court's review is *de novo*. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 165 (2010).

¶ 11 II. Discussion

¶ 12 The Foreclosure Law creates a presumption in favor of mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding. *108 N. State Retail LLC*, 401 Ill. App. 3d at 164. In the case of nonresidential property, prior to the entry of a judgment of foreclosure, "if the (i) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (ii) the court is satisfied that there is a

reasonable probability that the mortgagee will prevail on a final hearing of the cause, the mortgagee shall upon request be placed in possession of the real estate, except that if the mortgagor shall object and show good cause, the court shall allow the mortgagor to remain in possession." 735 ILCS 5/15-1701(b)(2) (West 2012); see *108 N. State Retail LLC*, 401 Ill. App. 3d at 164 ("a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so"). The request by a mortgagee entitled to possession of the mortgaged property for the appointment of a receiver "shall" be granted by the circuit court. *108 N. State Retail LLC*, 401 Ill. App. 3d at 164; 735 ILCS 5/15-1702(a) (West 2012). The Foreclosure Law provides that, "' shall' *** means mandatory and not permissive." 735 ILCS 5/15-1105(b) (West 2012).

¶ 13 In order to determine if the plaintiff was entitled to the appointment of a receiver, we must first determine if the terms of the mortgage authorized him to take possession and if there was a reasonable probability he would prevail in a final hearing. If those requirements are satisfied, we then determine if the defendant showed "good cause" for remaining in possession of the real estate. While the circuit court found that the defendant had established "good cause" for remaining in possession, our review is *de novo*, and we owe no deference to the circuit court's determination.

¶ 14 The record on appeal established that the plaintiff was entitled to possession under the terms of the mortgage. It is undisputed that the plaintiff's loan to the defendant matured on October 6, 2012. Under paragraph 15 of the mortgage, the defendant's failure to pay off the loan to the plaintiff on or before that date constituted a default. Under paragraph 16 of the mortgage, upon a default, the plaintiff could declare all sums secured by the mortgage to be

immediately due and payable and foreclose the mortgage. Paragraph 18 of the mortgage document provides in pertinent part as follows:

"Upon acceleration under Paragraphs 15 or 16, and without further notice to Borrower, Lender shall be entitled to have a receiver appointed by a court to enter upon, take possession of and manage the Property and to collect the Rents including those past due. The receiver shall have the power to collect the Rents from the time of acceleration through the pendency of any foreclosure proceeding and during the full statutory period of redemption, if any."

¶ 15 Next, we determine whether there was a reasonable probability that the plaintiff would prevail in the mortgage foreclosure suit. "[A] proven default establishes a reasonable probability of success in a mortgage foreclosure action." *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 869 (1993). It is undisputed that the defendant refused to pay the plaintiff's attorney fees the plaintiff claimed were incurred in the foreclosure action.

¶ 16 Section 16 of the mortgage document provides in pertinent part as follows:

"Acceleration; Remedies. At any time after an event of default, Lender, at Lender's option, may declare all sums secured by this mortgage and the other loan documents to be immediately due and payable without further demand and may foreclose this mortgage by judicial proceeding. Lender shall be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, reasonable attorneys' fees and costs including abstracts and title reports, all of which shall become part of the secured indebtedness and immediately due and payable, with interest at the default rate." (Emphasis omitted.)

¶ 17 Since the plaintiff's reasonable attorney fees were part of the secured indebtedness, just as

the principal, interest and costs were, the defendant remains in default while the attorney fees remain unpaid. Therefore, the record established that the plaintiff had a reasonable probability of success at the final hearing.

¶ 18 Finally, we must determine whether the defendant established "good cause" for remaining in possession. Since the defendant has not filed a brief in this case, we examine the pleadings before the circuit court to determine whether the defendant established the existence of "good cause."

¶ 19 For the most part, our courts have addressed what does not constitute "good cause" for allowing a mortgagor to remain in possession of nonresidential real estate. See *Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 393 (2010). In *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859 (1993), the mortgagor maintained that it had established "good cause" to retain possession, arguing that the mortgage lacked consideration, the mortgagee had previously accepted late payments and therefore was estopped from foreclosing the mortgage, and the mortgagee had induced the mortgagor to enter into the mortgage using "'maneuvers and sham transactions,' ". *Mellon Bank, N.A.*, 265 Ill. App. 3d at 869. This court rejected those arguments finding that there was consideration for the mortgage, and the acceptance of late payments did not foreclose the mortgagee from ever pursuing a foreclosure action. *Mellon Bank, N.A.*, 265 Ill. App. 3d at 869. Further, the court was not persuaded by the mortgagor's attempt to portray the mortgagee as "an unscrupulous bank taking advantage of a poor, unsophisticated land owner in dire financial straits." *Mellon Bank, N.A.*, 265 Ill. App. 3d at 869. Instead, the court found that the mortgage was executed by sophisticated business men with the assistance of counsel. *Mellon Bank, N.A.*, 265 Ill. App. 3d at 871.

¶ 20 Likewise, in *Travelers Insurance Co. v. La Salle National Bank*, 200 Ill. App. 3d 139 (1990), the defendants-mortgagors maintained they had shown good cause to remain in possession because the plaintiff-mortgagee failed to allege fraud or mismanagement or waste of the real estate and the defendants protected the mortgagee by agreeing to deposit the rents into a joint account with the plaintiff and accounting for the proceeds and operating expenses. This court rejected the defendants' arguments finding that the defendants' fraud and misrepresentation argument was an attempt to shift the burden of establishing good cause to the plaintiff, which, as a nonresidential mortgagee, had no obligation to allege any misdeeds or omissions on the part of the mortgagors in order to be placed in possession of the real property. We also rejected the defendants' argument that their efforts to protect the plaintiff showed good cause to remain in possession, finding that "whether the mortgagee is 'adequately protected' is not a relevant consideration under the statute." *Travelers Insurance Co.*, 200 Ill. App. 3d at 144.

¶ 21 In the first affirmative defense, the defendant alleged that on October 29, 2012, it was prepared to tender \$400,000 to the plaintiff, but the plaintiff refused the tender in order to allow a default to occur. The defendant further alleged that on November 1, 2012, the plaintiff issued a default notice which did not contain a payoff amount or itemization of the alleged default amounts. On November 7, 2012, the plaintiff accepted payment of the principal, interest and costs sought in the November 5, 2012, complaint for foreclosure. In its second affirmative defense, the defendant alleged that the plaintiff failed to mitigate damages, by denying the defendant an opportunity to cure the default. In the circuit court, in its response to the plaintiff's motion for the appointment of a receiver, the defendant argued that the plaintiff should have filed a petition for attorney fees and maintained that the

plaintiff's motions for the appointment of a receiver and seeking discovery after receiving repayment of the loan, the interest due and the costs, were an effort to increase the amount of attorney fees.

¶ 22 The affirmative defenses do not establish good cause for the defendant to remain in possession of the real estate. The plaintiff's October 29, 2012, refusal of the prepayment of the principal did not cause the defendant to default on the loan. As of October 6, 2012, the defendant was already in default. Similar to the defendant-mortgagors arguments in *Mellon Bank, N.A.* and *Travelers Insurance Co.*, the defendant's allegations that the plaintiff's failure to accept payment of the loan and failure to mitigate damages are no more than attempts to shift the burden of proving good cause to the plaintiff, by accusing the plaintiff of wrongdoing, despite the uncontested facts that the defendant defaulted on the loan and refused to pay the plaintiff's attorney fees as required under the terms of the mortgage.

¶ 23 The record in this case established that the plaintiff is entitled to possession of the real property and that the defendant did not overcome the presumption that the plaintiff was entitled to possession of the real estate. As the plaintiff was entitled to possession of the real property, he was entitled to have a receiver appointed as provided under the terms of the mortgage and section 15-1702(a).

¶ 24 The order of the circuit court denying the appointment of a receiver is reversed, and the cause remanded for further proceedings.

¶ 25 Reversed and remanded.