2015 IL App (1st) 141862-U
No. 1-14-1862
May 26, 2015

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BAYVIEW LOAN SERVICING, LLC, Plaintiff-Appellee, v. IZHAK EISENBERG & BERTA EISENBERG, Defendants-Appellants.	))))))))))	Appeal from the Circuit Court Of Cook County. No. 11 CH 04850 The Honorable Loretta Eadie-Daniels, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Where a party opposes a motion for summary judgment supported by affidavits containing facts sworn to under oath, with unsworn allegations in an answer and affirmative defenses, the answer and affirmative defenses fail to create a genuine issue of material fact, so the moving party is entitled to judgment as a matter of law.

¶ 2 JP Morgan Chase Bank, National Association (Chase) filed a complaint to foreclose the mortgage on the defendants, Izhak and Bertha Eisenberg's (the Eisenbergs), property. The Eisenbergs filed an answer and two affirmative defenses. The circuit court struck their

affirmative defenses without prejudice and required them to replead the defenses. The Eisenbergs repled their defenses. Chase filed a response to the affirmative defenses denying the allegations therein. Chase later filed two affidavits with supporting documentation to refute the Eisenbergs' claims.

¶ 3 Next, Chase filed a motion for summary judgment with affidavits appended to the motion. The Eisenbergs filed a response and alleged that Chase's affidavits lacked the factual basis required by Illinois Supreme Court Rule 191(a) (Rule 191(a)). Ill. S. Ct. R. 191(a) (eff. July 1, 2002). But, the Eisenbergs did not file counteraffidavits in response to Chase's affidavits. Chase filed a response and argued that the Eisenbergs misrepresented the legal requirements for personal knowledge under Rule 191(a) and failed to offer any contradictory evidence to Chase's affidavits. The circuit court granted Chase's motion for summary judgment, granted the judgment of foreclosure and confirmed the order of sale. The Eisenbergs filed this appeal.

¶ 4 We hold that where a party opposes facts sworn to under oath in an affidavit, with unsworn allegations in an answer and affirmative defenses, the answer and affirmative defenses fail to create a genuine issue of material fact so the moving party is entitled to judgment as a matter of law. Accordingly, we affirm the decision of the circuit court.

¶ 5 BACKGROUND

¶ 6 The Eisenbergs executed a note for the property located at 9106 Lamon Avenue, Unit 1S, Skokie, Illinois (the property), with Washington Mutual Bank, FA (Washington Mutual) on March 16, 2005. The note was secured by a mortgage and Washington Mutual was

named as the mortgagee. On September 25, 2008, Washington Mutual closed and Chase's subsidiary, Chase Home Finance, LLC (which will also be referred to as "Chase"[1]) became the servicer of the Eisenbergs' loan.

¶ 7 On August 3, 2010, Chase mailed a notice of default and an intent to accelerate to the Eisenbergs at the property address because the Eisenbergs were in arrears on their monthly mortgage payments. Chase also mailed a "Grace Period Notice" to the Eisenbergs on November 10, 2010.

¶ 8 On February 9, 2011, Chase filed a foreclosure complaint against the Eisenbergs when they failed to make monthly mortgage payments from September 1, 2010 to the "present". On May 11, 2011, the Eisenbergs filed a motion to dismiss the complaint arguing that Chase did not properly allege the capacity in which it brought the foreclosure action. Chase filed a motion requesting leave to file an amended complaint and attached the amended complaint, which alleged that Chase is both the "holder and servicer of the Note." The Eisenbergs subsequently withdrew their motion to dismiss.

¶ 9 The Eisenbergs filed their answer and set forth two affirmative defenses on July 26, 2011. In their affirmative defenses, the Eisenbergs maintain that they were not served with a grace period notice nor were they provided an acceleration notice. The answer and affirmative defenses were not verified by the Eisenbergs. Chase filed a motion to strike the affirmative defenses on December 14, 2011, and on April 3, 2012, the circuit court entered an order striking the affirmative defenses without prejudice and directed the Eisenbergs to

[1] Chase Home Finance, LLC sent both the "Grace Period Notice" and the acceleration letter on "Chase" letterhead, and either in the body of the documents or at the end of the documents, it referred to itself as "Chase."

replead their defenses. In amended affirmative defenses, which were unverified, the Eisenbergs alleged that they regularly checked their mail, that they did not receive either the grace period notice or the acceleration notice, and that "on information and belief" neither notice was sent.

¶ 10 On February 20, 2012, the note and mortgage were transferred to Bayview Loan Servicing, LLC (Bayview). On July 30, 2012, Chase filed a reply alleging that both notices were sent to the Eisenbergs, and filed two affidavits on February 13, 2013 to support its position. The first affidavit was executed by Jeff Fisher, a Document Coordinator for Bayview, who detailed the circumstances under which Chase served the grace period notice upon the Eisenbergs. A copy of the grace period notice dated November 10, 2010, along with a copy of the "Letter Log", which documented when the notice was mailed, was attached to the affidavit. In a second affidavit, Mr. Fisher provided the circumstances under which Chase served a notice of default and an intent to accelerate on the Eisenbergs. Two letters were attached to this affidavit, both dated August 31, 2010, which informed the Eisenbergs of their default. Another "Letter Log" that documented when the letters were mailed was attached to the second affidavit.

¶ 11 Chase filed a motion for summary judgment against the Eisenbergs on July 30, 2013, attaching as exhibits the previously filed affidavits of Jeff Fisher and supporting documentation regarding the grace period and the acceleration notices which were mailed to the Eisenbergs. On November 14, 2013, the Eisenbergs filed their response to Chase's motion

for summary judgment alleging that Chase's affidavits lacked the factual basis required by Rule 191(a). The Eisenbergs did not submit counteraffidavits with their response.

¶ 12 Chase filed a reply arguing that the Eisenbergs misrepresented the legal requirements for personal knowledge under Rule 191(a) and that they failed to offer any contradictory evidence to Chase's affidavits. The circuit court granted Chase's motion for summary judgment and later granted Chase a judgment of foreclosure.

¶ 13 On March 5, 2014, a notice of sale of the property was published. Bayview purchased the property at the sale on April 16, 2014. On May 1, 2014, Chase filed a motion for confirmation of sale, which was granted by the circuit court on May 19, 2014.

¶ 14 The Eisenbergs filed a notice of appeal seeking review of the circuit court's 1) January 10, 2014 order granting summary judgment, 2) May 19, 2014 order confirming the sale, and 3) April 2, 2013 order striking the Eisenberg's affirmative defenses without prejudice. We will not address the third issue because the Eisenbergs repled their affirmative defenses and this Court cannot grant them any effectual relief. *People ex rel. Hartigan v. Illinois Commerce Commission*, 131 Ill. App. 3d 376, 378 (1985).

¶ 15 ANALYSIS

¶ 16 In this case, the appellate court must review the circuit court's order granting Chase's motion for summary judgment. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is only appropriate when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams,* 228 Ill. 2d at 417. A court must construe the "pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent" in determining whether a genuine issue as to any material fact exists. *Williams,* 228 Ill. 2d at 417.

¶ 17 Summary judgment is precluded where "the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams,* 228 Ill. 2d at 417. Summary judgment should be allowed "only where the right of the moving party is clear and free from doubt." *Williams,* 228 Ill. 2d at 417 citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004) (and cases cited therein). Reviewing courts review appeals from orders granting summary judgment *de novo*. *Williams,* 228 Ill. 2d at 417.

¶ 18 The Eisenbergs' sole argument in their brief is that Chase's motion for summary judgment should have been denied because the Eisenbergs' affirmative defenses raised genuine issues of material fact. Specifically, they argue that Chase failed to send notice in the form of an acceleration letter to the Eisenbergs prior to the acceleration of the note and prior to filing the foreclosure complaint.

¶ 19 While a "plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "If a 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 on his pleadings alone to raise issues of material fact." *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). An affidavit operates as testimony at trial in the summary judgment context. *Robidoux*, 201 Ill. 2d at 335. Therefore, facts contained in an affidavit in support of a motion for summary judgment that are not contradicted by a counteraffidavit are admitted and must be taken as true for purposes of the motion for summary judgment. *Purtill*, 111 Ill. 2d at 241.

¶ 20 Chase responded to the Eisenbergs' amended affirmative defenses, alleging that they were not served with a grace period notice or a notice of default, with two affidavits and supporting documentation that directly refuted the allegations set forth in the Eisenbergs' affirmative defenses. When Chase filed its motion for summary judgment, it appended the same affidavits it filed in its response to the Eisenbergs' amended affirmative defenses. The Eisenbergs rested on their pleadings and did not file counteraffidavits or any other evidentiary materials (admissions, answers to interrogatories, or deposition transcripts containing testimony) that would contradict the allegations in Chase's affidavits and create a genuine issue of material fact.

¶ 21 The question we must answer is whether the unsworn allegations in the Eisenbergs' answer and affirmative defenses are sufficient to create a genuine issue of material fact and survive Chase's sworn affidavits supporting its motion for summary judgment.

¶ 22 In *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, this Court held that the defendants' unsupported denial that they received the acceleration notice was "insufficient to

create a genuine issue of material fact, which would defeat CitiMortgage's entitlement to summary judgment." *CitiMortgage*, 2015 IL App (1st) 140780, ¶ 17-19; see also *Purtill*, 111 Ill. 2d at 241.

¶ 23 Mr. Fisher signed two affidavits and swore that Chase served the Eisenbergs with both the grace period notice and the acceleration letter on November 10, 2010 and August 31, 2010, respectively. The Eisenbergs did not file counteraffidavits to rebut the facts in Mr. Fishers' affidavits when they responded to the motion for summary judgment. Therefore, the Eisenbergs' unsworn allegations that they did not receive the grace period notice or the acceleration letter are insufficient to rebut the sworn facts in Chase's affidavits. *CitiMortgage*, 2015 IL App (1st) 140780, ¶ 17-19; see also *Purtill*, 111 Ill. 2d at 241.

¶ 24 We find that the Eisenbergs failed to create a genuine issue of material fact by resting on the unsworn allegations in their answer and affirmative defenses and by failing to file counteraffidavits when responding to Chase's motion for summary judgment. Therefore, we hold that the circuit court did not err when it granted Chase's motion for summary judgment or when it entered an order confirming sale. Accordingly, we affirm the decision of the circuit court.

¶ 25 CONCLUSION

¶ 26 Here, a party opposed facts sworn to under oath in two supporting affidavits, with unsworn allegations in an answer and affirmative defenses. The unsworn answer and affirmative defenses failed to create a genuine issue of material fact. Therefore, the moving

party was entitled to judgment as a matter of law. Accordingly, we affirm the decision of the circuit court.

¶ 27 Affirmed.