2015 IL App (2d) 141167-U
No. 2-14-1167
Order filed July 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2008-C1, BY MIDLAND LOAN SERVICES, INC., ITS SERVICER AND SPECIAL SERVICER,	)	Appeal from the Circuit Court of Lake County.
Plaintiff and Counterdefendant-Appellee,	)	
v.	)	No. 10-CH-2075
WATERSTONE PLACE III, LLC,	)	
Defendant and Counterplaintiff-Appellant,	)	Honorable Luis A. Berrones, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the lender's motion for summary judgment on its complaint for foreclosure.

¶ 2 This case arises from a mortgage foreclosure action brought by the plaintiff, Wells Fargo Bank, N.A (Wells Fargo), against the defendant, Waterstone Place III, LLC (Waterstone). The

circuit court of Lake County granted Wells Fargo's motion for summary judgment on its complaint for foreclosure. Waterstone appeals, arguing that the trial court erred in granting Wells Fargo summary judgment on its complaint for foreclosure because (1) Wells Fargo did not present any evidence to contradict Waterstone's affirmative defenses and its counterclaim and (2) Wells Fargo's failure to provide Waterstone with access to its loan information was unfair. We affirm.

¶ 3 BACKGROUND

¶ 4 On August 9, 2007, Waterstone entered into a loan agreement with Column Financial, Inc., the predecessor in interest to Wells Fargo. The loan agreement provided that Waterstone was to make regular payments of principal and interest on a promissory note. The loan agreement further provided that Waterstone's failure to make a timely payment would constitute a default. The loan agreement also established an "Earnout Reserve." This provision provided that Waterstone would deposit $235,000 with the lender to be placed in the Earnout Reserve to be held as additional security for the loan. The Earnout Reserve could be distributed to Waterstone within 10 days of a written request that met certain prerequisites. One of those prerequisites was that "no Event of Default shall have occurred and be continuing." The loan agreement further provided that in the event of a default, the lender "shall not be obligated to *** apply at any time the balance then remaining in the Earnout Reserve against the indebtedness secured."

¶ 5 Waterstone failed to make its regular payment on May 11, 2009. On May 31, 2009, Waterstone requested to receive the funds in the Earnout Reserve. Wells Fargo did not honor that request.

¶ 6 For the six months after May 11, 2009, Waterstone made late and partial payments as to the outstanding loan balance. In December 2009, it stopped making any payments.

¶ 7 On October 8, 2010, Wells Fargo filed an amended verified complaint for foreclosure. The complaint was supported by the parties' loan agreement.

¶ 8 On April 26, 2011, Waterstone filed its verified answer, affirmative defenses, and counterclaim. In its first affirmative defense, Waterstone alleged that Wells Fargo should be estopped from claiming that Waterstone was in default because it had not provided it with access to information regarding its loan status. In its second affirmative defense, Waterstone alleged that Wells Fargo should be estopped from seeking foreclosure because it had a duty to cure any default by using Waterstone's Earnout Reserve funds. In its counterclaim, Waterstone asserted that Wells Fargo had breached the contract when it failed to return the funds in the Earnout Reserve after being requested to do so.

¶ 9 On April 28, 2011, Wells Fargo filed an answer to both Waterstone's affirmative defenses and counterclaim, denying all of the material allegations.

¶ 10 On April 15, 2014, Wells Fargo filed a motion for summary judgment. The motion was supported by the parties' loan agreement, affidavits, and Waterstone's payment history. On June 19, 2014, the trial court granted summary judgment for Wells Fargo on both its complaint and Waterstone's counterclaim. On October 16, 2014, the trial court entered an order approving and confirming the sale of the property. Waterstone thereafter filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, Waterstone argues that Wells Fargo failed to respond with evidence to contradict Waterstone's affirmative defenses and counterclaim. As such, Waterstone contends that the trial court erred in granting Wells Fargo summary judgment on its counterclaim.

Because the trial court should not have ruled against it on its counterclaim, Waterstone argues that the trial court erred in granting Wells Fargo summary judgment.

¶ 13 At the outset, we note that the purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)), and such a motion should be granted only 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 judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2010)). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). This court reviews the trial court's ruling on a motion for summary judgment *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

¶ 14 Here, in support of its motion for summary judgment, Wells Fargo submitted affidavits and exhibits that established a loan was made to Waterstone, that Waterstone signed the loan documents, that the loan and loan documents were assigned to Wells Fargo, and that a default occurred. As the defendants did not submit any contradictory evidence, the trial court properly granted the plaintiff's motion for summary judgment. See *U.S. Bank, National Ass'n v. Advic*, 2014 IL App (1st) 121759, ¶ 32 (upholding a circuit court order awarding summary judgment to a bank in a foreclosure action where the bank's filings contained sufficient evidence that the mortgagor had defaulted on his mortgage obligations and the mortgagor failed to file any evidence to rebut the bank's claims).

¶ 15 In so ruling, we reject Waterstone's argument that summary judgment was improper because Wells Fargo did not submit any evidence to contradict its affirmative defenses and

counterclaim. In support of its argument, Waterstone cites *Ferris Elevator Company, Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (1996), which provides that a party must plead an affirmative defense if it "asserts new matter" which would defeat the claim. Waterstone further relies on section 2-613(d) of the Illinois Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2010)) which provides that an affirmative defense must be plead if failure to do so would cause the opposite party surprise.

¶ 16 Here, Waterstone's affirmative defense regarding the Earnout Reserve was based on its assertion that Wells Fargo should have applied the funds in the Earnout Reserve to the outstanding loan when it went into default. This argument is contradicted by the plain language of the parties' loan agreement which provided that Wells Fargo did not have to apply funds from the Earnout Reserve to the loan if the loan was in default.

¶ 17 Waterstone's counterclaim was based on its argument that Wells Fargo breached the loan agreement first when it refused to return to Waterstone the funds in the Earnout Reserve. This argument is also undermined by the parties' loan agreement which provides that Waterstone was not entitled to the return of the Earnout Reserve if it was in default and Waterstone's payment history which reflects that it was in default at the time it requested the funds in the Earnout Reserve.

¶ 18 Both the parties' loan agreement and Waterstone's payment history were attached to Wells Fargo's motion for summary judgment. As that evidence was already in the record, Wells Fargo did not need to also attach that same evidence in response to Waterstone's affirmative defense or counterclaim because it did not constitute "new matter" and therefore should not have surprised Waterstone.

¶ 19 We also find that Waterstone's other affirmative defense—that its lack of access to its loan account information was grounds to defeat Wells Fargo's foreclosure action—to be without merit. Waterstone acknowledges that there was nothing in the parties' loan agreement nor is there any legal precedent that affords it the right to such information. However, Waterstone asks that we "recognize the fundamental inequity" of Wells Fargo not providing it with its loan account information. We observe no such inequity. We find that the underlying premise of Waterstone's argument—that it is unfair that it has to keep track of how much it is repaying the lender on a monthly basis—is unsound as it does not place an unreasonable burden on Waterstone. Further, although Waterstone suggests that it would be possible for the lender to make a mistake in keeping track of the payments being made and therefore possibly cause prejudice to the borrower, that is all the more reason for the borrower (Waterstone) to keep better records as to how much it is repaying. We also note that Waterstone does not allege that Wells Fargo made any mistakes in recording the payments Waterstone had made.

¶ 20 In sum, we find that Waterstone's affirmative defense regarding the Earnout Reserve and its counterclaim were contradicted by the record. Its affirmative defense regarding a lack of loan account information did not set forth any grounds for equitable relief. Thus, neither Waterstone's affirmative defenses nor its counterclaim set forth any reasons to disturb the trial court's grant of summary for Wells Fargo on its complaint for foreclosure.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 23 Affirmed.