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2015 IL App (3d) 140360-U

Order filed April 15, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

BANK OF AMERICA, N.A.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-14-0360
)	Circuit No. 12-CH-2420
)	
SANTIAGO P. SANCHEZ, LA PAZ)	
SANCHEZ, and LETICIA SANCHEZ,)	Honorable Thomas Thanas,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err by granting summary judgment in favor of plaintiff bank after denying defendants' motions to compel depositions and to strike plaintiff's motion for summary judgment.
- ¶ 2 Defendants Santiago P. Sanchez, La Paz Sanchez, and Leticia Sanchez (collectively defendants) appeal the circuit court's decision allowing summary judgment in favor of plaintiff Bank of America, N.A., regarding a "Complaint to Foreclose Mortgage." Defendants opposed summary judgment on the merits, filed a motion to strike the request for summary judgment as a

sanction for plaintiff's untimely production of discovery, and sought to postpone the hearing on the merits of summary judgment until all discovery had been completed.

¶ 3 Defendants appeal the trial court's orders denying their motions to strike plaintiff's motion for summary judgment and request for further discovery. In addition, defendants appeal the order entering a judgment of foreclosure after granting plaintiff's request for summary judgment. We affirm.

¶ 4 **BACKGROUND**

¶ 5 On January 28, 2011, defendants entered into a residential mortgage agreement (the mortgage) and promissory note (the note) in the amount of \$281,200 with Bank of America, N.A., (plaintiff) to purchase real estate located at 2952 Thunderbird Court W, Aurora, Will County, Illinois. On May 10, 2012, plaintiff filed a "Complaint to Foreclose Mortgage" (the complaint) alleging defendants defaulted on their payments as required by the mortgage and note signed on January 28, 2011. Plaintiff attached copies of both the mortgage and note to the foreclosure complaint.¹

¶ 6 At a court status hearing on December 19, 2012, the court granted defendants leave to file any responsive pleadings to the complaint, originally filed on May 10, 2012, within 28 days from December 19, 2012. On January 22, 2013, defendants filed a general, unsworn "Answer and Affirmative Defens [*sic*] to Complaint for Mortgage Foreclosure." One day later, on January 23, 2013, the trial court entered a mandatory bankruptcy stay beginning on January 22, 2013.²

¹ The mortgage listed plaintiff's name as the original lender and listed all three defendants as the borrowers. The note also named plaintiff as the original lender and all three defendants as the borrowers.

² This court order is not part of the appellate record, however, the minute entries for this case document "Matter stricken from the call," on January 23, 2013, and both parties' appellate briefs explain there was a mandatory bankruptcy stay regarding this case until October 23, 2013.

¶ 7 When the bankruptcy stay was lifted several months later, on October 23, 2013, plaintiff filed a motion for summary judgment together with attached affidavits from two of plaintiff's bank officers verifying defendants were in default on the full payments required by the note since October 1, 2011. On the same date, October 23, 2013, defendants refiled an identical copy of their original unverified "Answer and Affirmative Defens [*sic*] to Complaint for Mortgage Foreclosure."

¶ 8 On November 15, 2013, defendants filed an unverified "Motion to Strike Plaintiff's Motion for Summary Judgment Pursuant to Supreme Court Rule 219" due to plaintiff's purported failure to comply with plaintiff's discovery requests. (Ill. Sup. Ct. R. 219 (eff. July 1, 2002)). In addition, defendants filed a "Motion to Compel Discovery." Both motions included an attached copy of a Rule 201(k) letter (Ill. Sup. Ct. R. 201(k) (eff. Jan. 1, 2013)), sent from defense counsel to plaintiff on January 17, 2013, advising plaintiff of plaintiff's failure to reply to defendants' discovery requests served on plaintiff on June 19, 2012.

¶ 9 The court held a hearing on December 4, 2013, to address all pending motions. The court denied defendants' motion to compel discovery that the defense requested from plaintiff on June 19, 2012, and scheduled the matter for hearing on the merits of plaintiff's motion for summary judgment for March 26, 2014.

¶ 10 Two days prior to the date scheduled for a hearing on plaintiff's motion for summary judgment, defendants filed a separate "Motion to Compel Depositions," with attached notices of deposition, issued on March 3, 2014.³ Defendants attached a copy of plaintiff's March 19, 2014 letter objecting to ongoing discovery requests while the motion for summary judgment was

³ The notices of deposition requested plaintiff to produce two of plaintiff's employees on May 14, 2014, for the purpose of deposing those individuals by defendants.

pending specifically because defense counsel “failed to file an affidavit evidencing the need for additional discovery as required by Illinois Supreme Court Rule 191(b).”

¶ 11 On March 26, 2014, the trial court denied defendants’ motion to compel further depositions, quashed the deposition notices, and denied defendants’ motion to strike plaintiff’s motion for summary judgment. In addition, the trial court granted summary judgment in favor of plaintiff and entered an order finding summary judgment to be proper because defendants’ pleading in opposition to summary judgment, “as pleaded without supporting documentation, does not raise a genuine issue of material fact sufficient to preclude the entry of Summary Judgment in favor of Plaintiff.” Defendants filed a timely notice of appeal.

¶ 12 ANALYSIS

¶ 13 On appeal, defendants argue the trial court abused its discretion by refusing to strike plaintiff’s motion for summary judgment while discovery was ongoing or as a sanction for plaintiff’s refusal to comply with the defense’s 2012 discovery request before the 2013 bankruptcy stay. Defendants also submit that the trial court erred by denying defendant’s motion to compel additional depositions of plaintiff’s employees before conducting a hearing to decide the merits of plaintiff’s motion for summary judgment. Finally, defendants contend the trial court erred by granting plaintiff’s motion for summary judgment on the merits.

¶ 14 On appeal, plaintiff contends it produced timely discovery up until the first day of the bankruptcy stay in 2013, and thereafter properly refused to conduct additional depositions without a court order mandating the depositions. Therefore, plaintiff submits the trial court’s decision to allow summary judgment in favor of plaintiff resulting in the judgment of foreclosure should be upheld.

¶ 15 Regarding defendants’ request to strike plaintiff’s motion for summary judgment, case law holds that a trial court can properly grant summary judgment, even when ongoing discovery is continued. *Saladino v. Team Chevrolet, Inc.*, 242 Ill. App. 3d 735, 742 (1993). In addition, section 2-1005(a) of the Code of Civil Procedure provides compelling statutory authority for the trial court’s decision to consider the merits of a motion requesting summary judgment even before discovery has ended. This statutory provision specifically provides as follows: “*Any time after the opposite party has appeared* or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.” (Emphasis added). 735 ILCS 5/2-1005(a) (West 2012); see also *U.S. Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 21. Therefore, we find no merit in defendant’s argument that ongoing discovery prohibited the trial court from conducting a hearing on the merits of summary judgment, and conclude the trial court did not abuse its discretion in denying defendants’ motion to strike on this basis.

¶ 16 Next, we review the trial court’s ruling that denied defendants’ request to strike the motion for summary judgment pursuant to Rule 219(c). Ill. Sup. Ct. R. 219(c) (eff. July 1, 2002). In this case, defendants sent a Rule 201(k) letter (Ill. S. Ct. R. 201(k) (eff. Jan. 1, 2013)), dated January 17, 2013, requesting plaintiff to comply with earlier discovery requests. However, it appears to this court that plaintiff did not have an opportunity to produce the requested discovery identified in the Rule 201(k) letter before the mandatory bankruptcy stay went into effect five days later on January 22, 2013. On the day the mandatory stay went into effect, defendants filed their general, unsworn denial of the complaint on January 22, 2013.

Consequently, once the bankruptcy stay was lifted on October 23, 2013, plaintiff filed a motion for summary judgment alleging there were no disputed material facts based on the pleadings.⁴

¶ 17 The decision to impose a particular sanction for discovery violations is within the discretion of the trial court and, thus, we reverse a trial court's decision only if a clear abuse of discretion justifies reversal. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). The case law provides: "A party may not resist a motion for summary judgment simply by identifying potential trial witnesses and then failing to determine what their opinions are or what their testimony might be." *Saladino*, 242 Ill. App. 3d at 742. Based on this record, it appears plaintiff had a valid reason for not responding to the Rule 201(k) letter from January 22, 2013, through October 23, 2013, due to the mandatory bankruptcy stay. Further, defendants did not specify what discovery was needed to oppose plaintiff's motion for summary judgment. Therefore, we affirm the trial court's decision to deny defendants' motion to strike plaintiff's motion for summary judgment as a sanction against plaintiff for untimely production of discovery.

¶ 18 Next, we address whether the trial court erred by denying defendants' motion to compel depositions of two additional witnesses, filed two days prior to the scheduled hearing for plaintiff's motion for summary judgment. Trial courts have broad discretion when ruling on discovery matters and, absent an abuse of discretion, the trial court's order concerning discovery will not be reversed on appeal. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 352 (1998). Based on the contents of the general motion to compel depositions, we conclude the trial court did not abuse its discretion by denying defendants' motion to compel depositions.

⁴ Plaintiff also filed a simultaneous motion for default regarding any other unknown defendants.

¶ 19 Finally, we address the merits of defendants’ argument that the trial court erred by granting summary judgment. Defendants’ primary argument supporting their opposition to plaintiff’s motion for summary judgment was predicated on an argument that discovery was incomplete. As stated above, neither statutes nor case law require discovery to be completed before a party can move for summary judgment. See 735 ILCS 5/2-1005(a) (West 2012); *Avdic*, 2014 IL App (1st) 121759, ¶ 21; *Saladino*, 242 Ill. App. 3d at 742. This court reviews a trial court’s decision to grant summary judgment *de novo*. *Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 20 The purpose of summary judgment is to determine whether a genuine issue of material fact exists. *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 240 (2011). Summary judgment is proper “if 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.” 735 ILCS 5/2-1005(c) (West 2012); see also *Tagliere*, 408 Ill. App. 3d at 241. “The form of affidavits used in connection with motions for summary judgment is governed by Supreme Court Rule 191 [Ill. S. Ct. R. 191 (eff. Jan. 4, 2013)].” *Avdic*, 2014 IL App (1st) 121759, ¶ 21 (quoting *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992)). Rule 191(a) provides:

“Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively

show that the affiant, if sworn as a witness, can testify competently thereto.” Ill.

S. Ct. R. 191(a) (eff. Jan. 4, 2013).

Additionally, Rule 191(b) provides for a party to file an affidavit when the nonmoving party cannot obtain material facts by affidavit because an affiant is unavailable due to hostility “or otherwise.” Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). Rule 191(b) provides:

“If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof.”

Id.

¶ 21 It is undisputed that defendants failed to file a Rule 191(b) affidavit detailing names of potential witnesses, why their affidavits could not be procured by the defense, or what defendants believed those witnesses would testify to that would be relevant to plaintiff’s motion for summary judgment. The case law clearly provides, “Parties who fail to file Rule 191(b) affidavits cannot complain that the discovery process was insufficient or limited [prior to the court’s ruling on a motion for summary judgment].” *Avdic*, 2014 IL App (1st) 121759, ¶ 39 (citing *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 48 (quoting *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 225 (2002)). Therefore, defendants’ argument that the trial court’s decision

to grant summary judgment should be reversed on grounds that summary judgment was premature based on incomplete discovery is without merit.

¶ 22 In the case at bar, plaintiff filed the foreclosure complaint with copies of the attached mortgage agreement and note. When plaintiff filed its motion for summary judgment, it attached detailed affidavits from bank employees together with attached bank documents in support of the facts alleged in the underlying 2012 complaint. Moreover, plaintiff's motion for summary judgment correctly emphasized that defendants filed a general, unverified response to that complaint that did not operate to give rise to any genuinely disputed material facts. See *Avdic*, 2014 IL App (1st) 121759, ¶ 31.

¶ 23 Once the movant has met its burden of proof, as in the case at bar, the burden of production shifts to the nonmovant. *Helpers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267 (2010). Here, defendants did not file a counter-affidavit or any verified pleadings in opposition to plaintiff's motion for summary judgment. Further, defendants did not submit any affidavits to the court which contradicted the information contained in plaintiff's affidavits in support of its motion for summary judgment.

¶ 24 It is well established that "[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counter[-]affidavit are admitted and must be taken as true for purposes of the motion." *Avdic*, 2014 IL App (1st) 121759, ¶ 31 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)). Based on our *de novo* review of the pleadings and affidavits of record, as well as considering the fact that defendants did not file a Rule 191(b) affidavit detailing the necessity of further evidence prior to proceeding on the motion for summary judgment, we conclude that the trial court properly granted summary judgment in favor

of plaintiff since the pleadings did not give rise to any genuinely-disputed material facts that would warrant denying the request for a judgment on the merits in favor of plaintiffs.

¶ 25

CONCLUSION

¶ 26

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 27

Affirmed.