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2015 IL App (3d) 140675-U

Order filed December 4, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

REPUBLIC BANK OF CHICAGO,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	
	)	Appeal No. 3-14-0675
JODY KIMBRELL,	)	Circuit No. 14-L-12
	)	
Defendant-Appellant	)	
	)	
(Michael Kimbrell and Anna Isaacs,	)	Honorable
	)	Stephen Kouri,
Defendants).	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices O'Brien and Wright concurred in the judgment.

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**ORDER**

¶ 1       *Held:* Summary judgment in favor of plaintiff was proper where plaintiff produced uncontroverted evidence of defendants' breach of contract and defendants failed to produce any evidence to support their position that they were not in breach of the contract.

¶ 2       Plaintiff, Republic Bank of Chicago (Republic Bank), filed a complaint against defendants, Jody Kimbrell, Michael Kimbrell, and Anna Isaacs, based on an alleged breach of a

promissory note. Defendants had executed two promissory notes with Republic, with first and second mortgages on each note. The second mortgages were serving as collateralization of the properties subject to the first mortgages. Defendants paid off one note and Republic Bank filed their complaint based on defendants' alleged failure to repay the other note. Each party filed a motion for summary judgment. The trial court granted Republic Bank's motion for summary judgment and denied defendants' motion for summary judgment. Defendant, Jody Kimbrell, appealed. We affirm.

¶ 3

## FACTS

¶ 4

### I. Background

¶ 5

On May 6, 2005, defendants executed two promissory notes in favor of Republic Bank in the amounts of \$2,051,000 and \$294,500. Both notes were secured by mortgages on tracts of commercial real estate in Peoria, Illinois. Defendants subsequently paid off the \$2,051,000 note in its entirety.

¶ 6

On January 13, 2014, Republic Bank filed a complaint and confession of judgment for \$194,355.58, based on allegations of defendants' breach of the \$294,500 note. The \$294,500 note provided:

"For value received, the undersigned jointly and severally, promise to pay on May 6, 2007, to the order of Republic Bank of Chicago \*\*\*, at the main office of the Bank, in lawful money of the United States, the sum of two hundred ninety four thousand five hundred and no/100 (\$294,500.00) dollars with interest thereon at 7.00% on the principal balance payable in monthly payments of interest only beginning on June 6, 2005."

¶ 7 Republic Bank alleged that defendants failed to make a payment on the \$294,500 note since September 14, 2013. Attached to the complaint, the confession of judgment indicated that defendants had waived service of process and confessed the amount due, and agreed that judgment may be entered without process.<sup>1</sup> On January 28, 2014, the trial court entered a judgment of confession in favor of Republic Bank for \$194,355.58. Defendants were not present at the hearing.

¶ 8 On February 6, 2014, defendants filed a *pro se* motion to vacate the judgment pursuant to section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2012)), arguing they had not received proper notice of the hearing on January 28, 2014, or of the complaint. On March 5, 2014, the trial court denied the defendants' motion to vacate the default judgment, without prejudice, finding defendants failed to provide an affidavit supporting a *prima facie* defense on the merits.

¶ 9 On March 10, 2014, defendants filed a *pro se* amended motion to reopen the judgment entered by confession, arguing that Republic Bank did not have the right to enforce mortgage No. 05-13667 without a note. In support thereof, Jody Kimbrell filed an affidavit indicating that defendants had executed the two aforementioned notes but had paid them off in full.

¶ 10 In its response, Republic Bank indicated that it did not dispute that defendants paid off the \$2,051,000 note. However, while mortgage No. 05-13668 had been released as a result of defendants' payoff of the \$2,051,000 note, mortgage No. 05-13667 associated with \$294,500 note had not been released because the \$294,500 note remained outstanding. Republic Bank

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<sup>1</sup> The trial court subsequently found that, although defendants were not aware of the confession of judgment, the language of the \$294,500 note provided for the procedure of a confession of judgment.

indicated that in recognition of the payoff of the \$2,051,000 note, it modified the interest rate and maturity date of the \$294,500 note and partially released the first mortgage of the \$294,500 note. Under the partial release, Republic Bank released tract 7 because it had been sold in accordance with an agreement by the parties but the mortgage remained as to tracts 9 and 10. Republic Bank argued that defendants failed to present facts of a defense to the merits of their claim of defendants' default. In support of Republic Bank's response, the vice president for Republic Bank filed an affidavit, verifying the complaint and confession of judgment and attesting to the facts contained in Republic Bank's response to defendants' motion.

¶ 11 On March 4, 2014, defendants filed a *pro se* counterclaim against Republic Bank, alleging "Breach of Fiduciary Duty," "Gross Negligence," and "Unjust Enrichment" based on a previously paid mortgage that was held at Republic Bank and transferred to Royal Bank of Canada on August 1, 2008. Defendants indicated that they were bringing the counterclaim to recover damages arising from fraud that caused conflict with Federal National Mortgage Association ("Fannie Mae") when Republic Bank transferred defendants' mortgage on August 1, 2008, and "refused to disclose how the lot descriptions became embedded in the transferred building legal descriptions." Defendants alleged that Republic Bank exchanged forged mortgage documents after the defendants' closing.

¶ 12 On April 1, 2014, the trial court denied the defendants' amended motion to reopen the judgment, finding "the Note in the amount of \$294,500 was not released and remain[ed] outstanding." Defendants were granted 30 days to file an amended pleading.

¶ 13 On April 11, 2014, defendants filed a third *pro se* motion to reopen the judgment, presenting the defense of accord and satisfaction. Defendants contended that mortgages No. 05-13666, No. 05-13668, and No. 05-13669 were fully released and mortgage No. 05-13667 was a

mortgage that did not have a note. Defendants argued that Republic Bank breached its fiduciary duty in its dealings with them, misrepresented the amount of the mortgage at the 2005 closing by \$182,000 in unaccounted funds, and had been unjustly enriched by the \$182,000 and an additional \$337,330.11 in overpayments. In response, Republic Bank filed a motion to strike defendants' third-amended motion to reopen, arguing that defendants failed to plead the defense of accord and satisfaction. The trial court allowed the defendants' motion to reopen the judgment and denied Republic Bank's motion to strike.

¶ 14 II. Defendants' Motion for Summary Judgment

¶ 15 Defendants also filed a motion for summary judgment and, in support thereof, argued that they were charged \$182,500 for funds they did not receive at the closing. Additionally, defendant alleged that they had paid had off the \$294,500 note, but Republic Bank continued to charge them additional monies under mortgage No. 05-13667. Defendants claimed that they paid off mortgage No. 05-13669 in full and that mortgage No. 05-13667 was a duplicative mortgage that Republic Bank did not have the right to enforce because there was no existing note of debt related to it.

¶ 16 In response, Republic Bank denied that there was not a note associated with mortgage No. 05-13667 and denied that mortgage No. 05-13667 was created to defraud defendants. Republic Bank indicated that mortgage No. 05-13667 was associated with the \$294,500 note and both the aforementioned notes had been cross-collateralized in the form of second mortgages. The \$294,500 note provided:

"A default under any instrument, document or agreement covering or relating to any collateral securing this Note shall constitute a default under this Note. In addition, a default under this Note shall be deemed a default under that certain

note in the amount of \$2,051,000.00 made by the undersigned of event date, *visa versa*."

¶ 17 Republic Bank argued that the first mortgage on the \$294,500 note (mortgage No. 05-13667) was the only mortgage that remained outstanding, while the other mortgages had been released. Republic Bank noted that the trial court had previously ruled, "the Note in the amount of \$294,500 was not released and remains outstanding" and defendants failed to produce any documentation to support their claim that the \$294,500 note had been paid in full.

¶ 18 III. Republic Bank's Motion for Summary Judgment

¶ 19 Republic Bank also filed a motion for summary judgment, alleging that defendants executed the two aforementioned promissory notes, with each note having a first mortgage and second mortgage. The second mortgages provided cross-collateralization between the two notes. Specifically, Republic Bank alleged the \$2,051,000 note had a first mortgage (No. 05-13666) on Jeth Court tracts 1, 2, 3, 4, 5, 6, and 8 and a second mortgage (No. 05-13668) on University Street tracts 7, 9, and 10. The \$294,500 note had a first mortgage (No. 05-13667) on University Street tracts 7, 9, and 10 and a second mortgage (No. 05-13669) on Jeth Court tracts 1, 2, 3, 4, 5, 6, and 8. Defendants paid off the \$2,051,000 note, and Republic Bank released the first mortgage (No. 05-13666) regarding the Jeth Court tracts and the second mortgage on the \$294,500 note (No. 05-13-669) regarding those same Jeth Court tracts. Thereafter, on August 21, 2008, Republic Bank issued a partial release of the first mortgage (mortgage No. 05-13667) of the \$294,500 note by releasing University Street tract 7, but it did not release tracts 9 and 10 because the \$294,500 note remained outstanding.

¶ 20 In response, defendants argued that the parties executed the two loans on May 6, 2005. The first loan was supported by mortgage No. 05-13666, which was paid in full and released on

August 1, 2008. Defendants conceded that mortgage No. 05-13667 existed but claimed that the mortgage "never had a note of debt." Defendants argued that Republic Bank filed their complaint without a note to support the confession of judgment and the alleged second mortgage was a spare mortgage document that Republic Bank used to force defendants to repay the unaccounted for \$182,500 and make overpayments payments. Defendants asked that the trial court deny Republic Bank's summary judgment motion and grant their summary judgment motion based on the doctrine of unclean hands, fraud, misrepresentation, fraudulent concealment, and equitable estoppel.

¶ 21 IV. Hearing on Summary Judgment Motions

¶ 22 On August 22, 2014, a hearing on the parties' motions for summary judgment took place. Republic Bank argued that the affidavit of its vice president, which was attached to its motion for summary judgment, attested to the fact that the notes and mortgages were executed by defendants and that various records attached to Republic Bank's motion were kept in the ordinary course of Republic Bank's business. The attorney for Republic Bank showed the trial court the \$294,500 note and the corresponding first and second mortgages, noting the language of the note provided that under a default all indebtedness would become immediately due in full, without notice, presentation, or demand for payment.

¶ 23 The attorney for Republic Bank argued that the note was a binding contract and signed by defendants, which defendants breached. Republic Bank's attorney further argued that defendants failed to produce evidence proof of payments in support of their claim that the \$294,500 note had been paid. Republic Bank attached the bank's payments records to the motion to summary judgment, which indicated that the last payment the bank received was on March 12, 2013. Republic Bank contended that defendants owed a balance of \$160,283.04, with the note

providing for additional monies for late charges, attorney fees, and expenses, so that the total due was \$194,355.58.

¶ 24 At the hearing, speaking for the defendants, Jody Kimbrell indicated that on August 1, 2008, defendants had paid off the \$2,051,000 note and paid down the \$294,500 note to \$14,000. Defendants had obtained the funds to do so by refinancing the \$2,051,000 note with another lender and using the Jeth Courts properties as security. At that time, Republic Bank released on the mortgages on Jeth Court properties, which was the first mortgage on the \$2,051,000 note and the second mortgage on the \$294,500 note. Jody Kimbrell contended that defendants had paid off the \$294,500 note in April of 2010 but, thereafter, the bank continued to send notice of a remaining balance. Defendants claimed they made extra payments of \$78,000 while they tried to resolve the issue with the bank. During the course of reviewing their past payments, defendant also discovered that \$182,500 was missing from the closing, which they claimed that they had never received. Defendants eventually stopped making payments because they believed that they had already overpaid the note. A representative from the bank told defendants that he would look into the matter but instead defendants received a judgment against them in the mail.

¶ 25 The attorney for Republic Bank explained that on April 22, 2010, Republic Bank had issued a duplicate release of the second mortgage in response to defendants' multiple inquiries. The duplicate release of the second mortgage for the \$2,051,000 note pertained to the cross-collateralization of the University Street properties and was to assure defendants that they did not owe any additional money on the \$2,051,000 note, but no release was given for the first mortgage on the \$294,500 note, which also pertained to the same University Street properties.

¶ 26 The trial court confirmed with defendants that the document that they were claiming was evidence of a release of the \$294,500 note and the first mortgage was a document entitled



"Commercial Second Mortgage Security Agreement." The trial court found the document that defendants offered as evidence of a release of the subject obligation was not a release or cancellation of the \$294,500 note or subject obligation but a release of the second mortgage. The trial court denied defendants' motion for summary judgment and entered summary judgment in favor of Republic Bank and against defendants in the amount of \$194,355.58, plus interest.

¶ 27 Defendant, Jody Kimbrell, appealed.

¶ 28 ANALYSIS

¶ 29 On appeal, Kimbrell argues that the trial court erred by granting Republic Bank summary judgment. Kimbrell contends that both notes defendants executed with Republic Bank were fully paid. She claims that Republic Bank charged \$182,500 to the defendants' loan at closing, with the whereabouts of those funds unknown. Kimbrell also argues that Republic Bank deceived defendants by collecting \$78,142.18 in over-payment, which was not actually owed to Republic Bank, in addition to the unaccounted for \$182,500. Kimbrell further argues that Republic Bank used a paid note as evidence of the alleged debt owed, which did not have a loan number and was "swapped" from another mortgage. Kimbrell requests that this Court reverse the trial court's order granting Republic Bank summary judgment and remand for further proceedings.

¶ 30 Republic Bank, in response on appeal, contends that the trial court did not err in granting summary judgment because there was no genuine issue of material fact as to whether the note was a valid contract and defendants defaulted under the note. In reply, Kimbrell argues Republic Bank could not enforce a note from a paid and released mortgage as a valid and enforceable contract. She asserts that a promissory note is "an IOU" and, under "Illinois Mortgage law," only

if a borrower does not repay the note then the bank can foreclose and take the property that secures the note.

¶ 31 In a summary judgment motion, the movant assumes a cause of action has been properly pled and requests a determination as to whether there are any issues of material fact to be tried. *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 190 (1989). Summary judgment should be granted where the pleadings, depositions, and admissions on file, together with any affidavits show that there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012). Whether a trial court erred in ruling on a motion for summary judgment is determined by a *de novo* review of the ruling. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 32 On a motion for summary judgment, the movant satisfies its initial burden of production by affirmatively showing that the case must be resolved in its favor by presenting evidence that, unless is controverted, requires judgment as a matter of law. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355 (2000). A second method can be used to obtain summary judgment where the burden of proof is on the nonmoving party, and the movant shows that nonmovant has insufficient evidence to prove an essential element of the cause of action (*Celotex* test). *Id.* citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that a defendant satisfies its burden of production when it "point[s] out" the absence of evidence supporting plaintiff's position); see also *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688 (2000) (reversing the grant of defendant's motion for summary judgment where defendant failed to meet its burden of showing that plaintiff lacked sufficient evidence); *Kociscak v. Kelly*, 2011 IL App (1st) 102811, ¶¶ 23-32 (affirming grant of summary judgment in favor of defendant where the only proof of defendant's alleged negligence was inadmissible

evidence). Once a movant meets its initial burden of production, the burden shifts to the nonmovant to present some factual basis that would arguably entitle the nonmovant to a judgment. *Hutchcraft*, 312 Ill. App. 3d at 355.

¶ 33 In this case, both parties moved for summary judgment regarding Republic Bank's breach of contract claim. To support a breach of contract claim, a plaintiff must show: (1) the existence of valid and enforceable contract; (2) plaintiff's performance of its obligations under the contract; (3) defendant's breach of the contract; and (4) damage or injury to the plaintiff. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68.

¶ 34 Here, there is no dispute that defendants executed the note on May 6, 2005, under which they promised to repay Republic Bank \$294,500, plus interest. Republic bank satisfied its initial burden of production by affirmatively showing its own performance under the note and defendant's failure to make timely payments in accordance with the note. Thus, unless defendants met their burden to adequately controvert Republic Bank's showing of their breach, Republic Bank was entitled to a judgment as a matter of law. Additionally, to prevail on their motion for summary judgment, defendants had the burden of showing that Republic Bank had insufficient evidence to prove an element of its breach of contract claim so that they were entitled to a judgment as a matter of law.

¶ 35 Defendants claimed that Republic Bank did not perform its obligation under the contract because they were not given a portion of the \$294,500. However, defendants failed to produce any supporting documentation or evidence. Defendants also claimed that they were not in breach of the note because they paid the note in full. However, defendants failed to meet their burden to controvert plaintiff's records of nonpayment.

