2016 IL App (1st) 143115-U

THIRD DIVISION
May 25, 2016

No. 1-14-3115

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BMO HARRIS BANK, N.A. f/k/a Harris, N.A.,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
Plaintiff-Appellant,	)	
	)	No. 10 CH 45741 consolidated with
v.	)	09 D 8739
	)	
DAVID LESSER,	)	The Honorable
	)	Lisa R. Murphy,
Defendant-Appellee,	)	Judge Presiding.
	)	
(ELIZABETH WIENER; MEGHAN MULHER;	)	
LAURA WOLBECK; AILEEN ROONEY;	)	
CITY OF CHICAGO;UNKNOWN OWNERS	)	
and NON-RECORD CLAIMANTS,	)	
	)	
Defendants.)	)	

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court erred in dismissing foreclosure action because the lender's release of wife, who transferred the property to her husband pursuant to the terms of a marital dissolution judgment, did not discharge the debt or bar an action against the husband to foreclose the mortgages on the property.

¶ 2 In this mortgage foreclosure case, the circuit court dismissed plaintiff BMO Harris Bank, N.A.'s (formerly known as Harris, N.A.) mortgage foreclosure action finding that when the bank released Elizabeth Wiener, who signed two notes (each secured by a mortgage) from any

personal liability to repay the outstanding debt, the release also extinguished the underlying debt secured by the mortgages and barred foreclosure on the mortgages. Both mortgages were signed by Wiener and her then-husband, David Lesser. As a result of the circuit court's ruling, Lesser owns his personal residence free of the original loan amount documented in the notes of $1.25 million.

¶ 3 On appeal, BMO Harris claims that the circuit court erred in granting Lesser's section 2-619 motion to dismiss because the result is clearly at odds with the parties' intentions as expressed in the release. We agree and find that nothing in the release's express language or the circumstances surrounding its execution demonstrated an intent to discharge the outstanding debt; instead, the release discharged only the personal liability of Wiener who, by virtue of the judgment for dissolution of marriage, no longer had a legal interest in the mortgaged property. We therefore reverse and remand for further proceedings consistent with this order.

¶ 4 BACKGROUND

¶ 5 On August 17, 2007, Lesser and Wiener executed a first mortgage on their marital residence located at 855 West George Street in Chicago. Lesser and Wiener both signed the mortgage, which listed them as borrowers and BMO Harris as lender. The mortgage secured an initial interest adjustable rate note in the original principal amount of $1,000,000. Wiener signed and executed the note, but Lesser did not. On that same day, Wiener and Lesser signed and executed a second mortgage against the property with BMO Harris as the lender. The second mortgage secured a home equity line of credit disclosure statement and security agreement in the original principal amount of $125,000. Wiener signed and executed the second note, but Lesser did not.

¶ 6 On September 18, 2009, Wiener filed a petition for dissolution of marriage citing irreconcilable differences, and Lesser filed a counter-petition. On June 24, 2010, the circuit

court entered a plenary order of protection granting Lesser exclusive possession of the property and prohibited Wiener from entering or remaining at the residence.

¶ 7 Lesser and Wiener subsequently defaulted on their mortgage payments. On October 20, 2010, BMO Harris filed a complaint to foreclose the first mortgage, which had a principle balance outstanding of $999,999.95, and the second mortgage, which had a principle balance outstanding of $110,996.34. The circuit court later consolidated the foreclosure and divorce proceedings.

¶ 8 On October 5, 2012, the circuit court entered a judgment for dissolution of marriage and awarded Lesser 100% interest in the property free and clear of any claim by Wiener. The judgment also included a provision regarding the parties' liabilities with respect to the outstanding loans, and states in relevant part:

> "The parties' liability for the debt, including without limitation mortgage principal and interest *** for the George Property and pending foreclosure proceeding is reserved. However, given that [Lesser] has been awarded sole ownership of the George Property pursuant to the Judgment for Dissolution of Marriage, [Lesser] is authorized to take action to remove [Wiener's] name from the debt associated with the George Property and to resolve the pending foreclosure proceeding. [Wiener] shall cooperate with [Lesser] in his efforts to resolve the foreclosure proceeding and shall take whatever action necessary to assign her interest in the ownership of, and liability for the debt associated with, the George Property."

¶ 9 On May 29, 2013, Wiener and BMO Harris executed a mutual release. Lesser was not a party to the release. The release included the following relevant provisions:

"WHEREAS, BMO Harris holds claims against Elizabeth Wiener related to a Mortgage and Note dated August 17, 2007, and *** and a Mortgage and Note dated August 17, 2007 *** (hereinafter "Claims"); and

WHEREAS, *** this Release is specifically intended to settle disputed matters that have arisen between BMO Harris and Elizabeth Wiener in the foreclosure action *** and this Release *does not affect BMO Harris' or Elizabeth Wiener's rights against third parties regarding the Claims*;

***

2. The parties hereto agree that BMO Harris *shall retain the security interest created by the Mortgages* referenced above on the property commonly identified as 855 West George Street, Chicago, Illinois 60657 (hereinafter referred to as "Property"); and further agree that *no provision herein can be used as a defense to the pending foreclosure action.*

3. The parties hereto shall conform all interests in the Property pursuant to the judgment entered on October 5, 2012 in the divorce case *In re the Marriage of Elizabeth Wiener v. David M. Lesser* *** failure to do so renders this Release null and void. Further, upon compliance with the terms therein, BMO Harris shall dismiss Elizabeth Wiener from the pending foreclosure action and Elizabeth Wiener agrees to disclaim all interest and rights to the Property, and/or consent to the entry of judgment for foreclosure and sale.

4. BMO Harris does hereby release, cancel, forgive and forever discharge Elizabeth Wiener *** from all actions, claims, demands, damages, obligations, liabilities, controversies and executions *** which have arisen, or may have arisen, or shall arise by reason of the Claims ***." (Emphasis added.)

¶ 10 On December 4, 2013, Lesser filed a "corrected" section 2-619 motion to dismiss the foreclosure complaint claiming that the release discharged the notes, which then had the effect of barring the foreclosure action. Lesser contended that the mortgages were void and unenforceable because the mortgages secured the discharged notes, which he argued was the equivalent of securing nothing. BMO Harris responded that the release did not extinguish the underlying debt, but only released Wiener's personal liability to pay any deficiencies and that its terms manifested BMO Harris' intent to proceed with foreclosure proceedings against the property.

¶ 11 Following a hearing, the circuit court granted Lesser's motion to dismiss with prejudice finding that the release discharged the underlying notes secured by the mortgages. The circuit court denied BMO Harris' motion to reconsider.

¶ 12 ANALYSIS

¶ 13 Before addressing the merits of BMO Harris' claims, we note that Lesser contends BMO Harris failed to meet its burden as appellant of clearly articulating its claims of reversible error in its brief and that failure should serve as a basis to reject the bank's claims outright. Contrary to Lesser's claims, we find that BMO Harris' arguments are clear and concise and that its briefs conform to our rules.

¶ 14 The sole issue on appeal concerns the circuit court's finding that the release of Wiener's personal liability on the notes barred foreclosure of the mortgages warranting dismissal of the foreclosure complaint. BMO Harris claims that the circuit court's failure to consider the parties' intentions as expressed in the release was reversible error. We agree.

¶ 15 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "Affirmative matter" includes any defense apart from one that negates an essential allegation of plaintiff's

cause of action. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). A complaint may be involuntarily dismissed where the plaintiff's claim has been released. 735 ILCS 5/2-619(a)(6) (West 2010). We review the circuit court's ruling on a section 2-619 motion to dismiss *de novo*, *DeLuna*, 223 Ill. 2d at 59, as we do the circuit court's construction of the release, *In re Estate of Gallagher*, 383 Ill. App. 3d 901, 905 (2008).

¶ 16 Because a release is a contract, its interpretation is governed by contract law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991). The cardinal rule of contract interpretation is to give effect to the parties' intent, which can be determined from the document's language. *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). A release containing clear and explicit terms must be enforced as written. *Rakowski v. Lucente*, 104 Ill. 2d 317, 323 (1984). A court may also examine the circumstances surrounding the release's execution to determine the parties' intent. *In re Estate of Gallagher*, 383 Ill. App. 3d at 905; *Doctor's Associates, Inc. v. Duree*, 319 Ill. App. 3d 1032, 1045 (2001). Indeed, no form of words prevents a reviewing court from inquiring into surrounding circumstances to determine whether a release was fairly made and accurately reflects the parties' intentions. *Construction Systems, Inc. v. FagelHaber*, LLC, 2015 IL App (1st) 141700, ¶ 26. The parties' intention is an important consideration because it controls the scope and effect of a release. *Doctor's Associates, Inc.*, 319 Ill. App. 3d at 1045.

¶ 17 Lesser contends that the release's unambiguous language discharged the only obligor's (Wiener's) personal liability to pay the notes, and also discharged the notes. Lesser claims that because the release discharged the notes, the mortgages secured nothing, effectively barring an action to foreclose the mortgages. Lesser asserts that the parties intended to discharge the notes because the release did not expressly provide for BMO Harris' right to pursue the debt or the debt's continued existence.

¶ 18 We cannot construe the release as Lesser urges because we would be impermissibly expanding the release's scope beyond the parties' stated intentions. *Doctor's Associates, Inc.*, 319 Ill. App. 3d at 1045. Here, the release's clear and unambiguous language reveals the parties' intention to discharge Wiener from personal liability on the notes and to dismiss her from the pending foreclosure action. Neither party disputes that construction of the release. But nothing in the release supports Lesser's position that BMO Harris, or Wiener for that matter, intended to extinguish the approximate $1.1 million outstanding debt, exclusive of interest and fees, warranting dismissal of the pending foreclosure action in its entirety. As evidenced by the release's express language, its scope was limited to discharging Wiener only with no effect on the pending foreclosure case. Indeed, the release's express language also unambiguously recited the parties' intention that: (1) their rights against third parties were not affected; (2) BMO Harris retained the security interest (the mortgages) on the property; and (3) the release may not be used as a defense in the pending foreclosure action. Lesser urges this court to ignore this express language and instead rely on the absence of specific language Lesser contends BMO Harris should have used to retain its rights to pursue a cause of action on the defaulted debt. But instead the language used by the parties to the release clearly expresses BMO Harris' intention to retain its right to pursue foreclose of the mortgages. We find no further expression of BMO Harris' intent was necessary.

¶ 19 Importantly, a mortgage foreclosure proceeding is a *quasi in rem* action because it involves a claim against the property and a monetary claim for personal liability against the mortgagor. *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 535-36 (2010); *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶ 33. The mortgagee may also bring a separate suit on the promissory note–a purely *in personam* proceeding. *Turczak*, 2013 IL App (1st) 121964, ¶ 33. Thus, a foreclosure suit and a proceeding on a promissory note are legally

distinct remedies. *Id*. Indeed, a mortgage and accompanying note constitute separate contracts and give rise to legally distinct remedies. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2004). Consequently, upon default, the mortgagee may elect to foreclose on the mortgage or proceed on the note, and those alternative remedies may be pursued consecutively or concurrently. *Id*.

¶ 20 As stated, it is apparent that BMO Harris intended to release Wiener's personal liability on the notes, which barred any future action against her on the notes. But the release of that cause of action cannot equally bar the legally distinct remedy of foreclosure. Significantly, Lesser does not dispute that BMO Harris loaned $1.25 million pursuant to notes executed by Wiener and secured by the mortgages against the property or that he and Wiener defaulted in payment of the debt. We are mindful that a mortgage foreclosure action is a proceeding in equity, *Northern Trust Co. v. Halas*, 257 Ill. App. 3d 565, 572 (1993), and we cannot imagine a more inequitable result than Lesser receiving the property free and clear with no responsibility to pay the debt, nor can we envision that BMO Harris intended that result when it executed the release with Wiener.

¶ 21 In this case, the circumstances surrounding the release's execution also support the conclusion that BMO Harris and Wiener intended to discharge only Wiener's personal liability to pay the debt because she no longer had any interest in the property, but not to discharge the debt secured by the mortgages against the property. In fact, not only did the release expressly retain the security interest created by the mortgages, but the release also expressly referenced the marital dissolution judgment and contemplated that the parties would conform all interests in the property (awarded to Lesser) to the judgment. The judgment authorized Lesser to remove Wiener's name from the debt on the property and for Wiener to assign her ownership interest and liability for the property's debt to Lesser. The judgment undoubtedly did not envision the

extinguishment of the debt when it awarded ownership of the property to Lesser. The circumstances surrounding the release's execution irrefutably support BMO Harris' position that the release's scope was limited to discharging only Wiener's personal liability on the notes and not to discharge the underlying debt.

¶ 22 Lesser relies on the proposition of law that for a mortgage to be valid, debt must exist and argues that the discharge of the notes voided the mortgages. *Rue v. Dole*, 107 Ill. 275, 281 (1883); *Freer v. Lake*, 115 Ill. 662, 667 (1886); *Bacon v. National German-American Bank of St. Paul*, 191 Ill. 205, 209 (1901); *DeVoigne v. Chicago Title & Trust Co.*, 304 Ill. 177, 183 (1922); and *Warner v. Gosnell*, 8 Ill. 2d 24, 31 (1956). But as already discussed, BMO Harris did not discharge the debt in the release; thus, the mortgages remained valid.

¶ 23 Lesser also argues that because he did not sign the notes and the only party who did sign the notes was released, the mortgages securing the notes were a nullity without force and effect. This argument is also unconvincing as "it is not uncommon for notes and the corresponding mortgages securing them to be executed by different parties." *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 17; see also *Lakeview Loan Servicing, LLC v. Pendleton*, 2015 IL App (1st) 143114, ¶¶ 28, 31 (consumer whose home was subject to a mortgage that secured a promissory note entitled to receive rescission disclosures even though the consumer had no personal obligations on the promissory note). Moreover, a review of the corresponding notes and mortgages reveals that the documents were written together, executed contemporaneously and intended to complement each other. *17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 17. In this case, the mere fact that Lesser did not sign the notes does not invalidate the notes or mortgages. See *id.* (rejecting a claim that a mortgage was invalid on the basis that the mortgagor did not execute both the note and mortgage).

¶ 24 Despite Lesser's creative attempt to find a loophole to invalidate a $1.125 million loan on property he was awarded free and clear of any interest of his former wife, Lesser presented no basis to involuntarily dismiss BMO Harris' foreclosure complaint. As a contract, we must give effect to the parties' intentions regarding the release. In doing so, it is evident that the parties intended to discharge only Wiener's personal liability on the notes, but did not intend to extinguish BMO Harris' separate action for foreclosure of the mortgages on the property. Accordingly, the circuit court erred in granting Lesser's motion to dismiss BMO Harris' foreclosure action, and we reverse and remand for further proceedings consistent with this order.

¶ 25 Reversed and remanded.