2019 IL App (1st) 1172888-U

SIXTH DIVISION
FEBRUARY 22, 2019

No. 1-17-2888

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
DIANA M. MIELAK; ELIZABETH C. HOULIHAN;	)	
KEVIN M. HOULIHAN; NORTH STAR TRUST	)	
COMPANY, as s/i/i to First Colonial Trust Company,	)	No. 11 CH 35454
as Trustee under the Provisions of a Trust Agreement	)	
dated July 22, 1977 and known as Trust Number 1732;	)	
REPUBLIC BANK OF CHICAGO as s/i/i to Bank	)	
Lincolnwood; UNKNOWN HEIRS AND LEGATEES	)	
OF DIANA M. MIELAK, if any; UNKNOWN OWNERS	)	
AND NON-RECORD CLAIMANTS,	)	
	)	
Defendants	)	Honorable
	)	William B. Sullivan,
(Diana M. Mielak, Defendant-Appellant).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment in favor of the plaintiff and entering a judgment of foreclosure and sale.

¶ 2 The defendant-appellant, Diana M. Mielak, appeals from the judgment of the circuit court of Cook County granting summary judgment in favor of the plaintiff-appellee, Bank of America, N.A. (the Bank) and entering a judgment of foreclosure and sale. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On June 18, 1992, First Colonial Trust Company[1], as Trustee under the provisions of a Trust Agreement dated July 22, 1977 and known as Trust Number 1732, acted as the mortgagor on behalf of Mielak and executed a promissory note in the amount of $90,000. The note was secured by a mortgage on a property located at 602 Hackberry Lane, Mount Prospect, Illinois (the property). Rand Investment Co. was the mortgagee (Rand).[2]

¶ 5 The loan documents provided, in part:

> "1. Until the indebtedness aforesaid shall be fully paid, and in case of the failure of First Party, its successors or assigns to: *** (g) pay before any penalty attaches all general taxes, and pay special taxes, special assessments, water charges, sewer service charges, and other charges against the premises when due, and upon written request, to furnish to Trustee or holders of the note duplicate therefore; *** Trustee or the holders of the note may, but need not, make any payment or perform any act hereinbefore set forth in any form and manner deemed expedient ***. All moneys paid for any of the purposes herein authorized and all expenses

[1] First Colonial Trust Company is not a party to this appeal.
[2] Rand is the Bank's predecessor-in-interest.

paid or incurred in connection therewith, including attorneys' fees and any other moneys advanced by Trustee or holders of the note to protect the mortgaged premises *** shall be so much additional indebtedness secured hereby and shall become immediately due and payable without notice ***.

2. The Trustee or the holders of note hereby secured making any payment hereby authorized relating to taxes or assessments, may do so according to any bill, statement or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof.

3. At the option of the holders of the note and without notice to First Party, its successors or assigns, all unpaid indebtedness secured by this trust deed shall, notwithstanding anything in the note or in this trust deed to the contrary, become due and payable (a) immediately in the case of default in making payment of any installment of principal or interest on the note, or (b) in the event of the failure of First Party or its successors or assigns to do any of the things specifically set forth in paragraph one hereof and such default shall continue for three days, said

> option to be exercised at any time after the expiration of said three day period.
>
> 4. When the indebtedness herby secured shall become due whether by acceleration or otherwise, holders of the note or Trustee shall have the right to foreclose the lien hereof ***."

¶ 6 On February 25, 2004, Rand filed a foreclosure complaint against Mielak (the 2004 foreclosure lawsuit). The 2004 foreclosure lawsuit went to trial, and in February 2007, the court ordered the parties to enter into a loan modification agreement. The court's order specified that the new balance on the loan would be $99,887.99. Although the court stated during proceedings: "I'm going to order *** that there be an escrow account established. It's absolutely fair under the circumstances," the court's written order was silent regarding any escrow payments.

¶ 7 On March 14, 2007, Rand filed a "motion to clarify and/or enforce the order," seeking an order directing Mielak to tender funds for an escrow account for the property's real estate taxes. The court, with a different judge hearing the motion rather than the judge who presided over the trial, denied Rand's motion. The court explained: "there is language in the transcript concerning an escrow agreement, but *** there is no language in the court order about the escrow account."

¶ 8 The Bank and Mielak then entered into a loan modification agreement. The loan modification agreement required Mielak to pay $915.00 per month. The loan modification agreement did not provide for an escrow account for payment of real estate taxes.

¶ 9 The Bank subsequently became the owner of the promissory note on the property. It is unclear from the record before us precisely when or how the Bank became the owner of the note.

¶ 10 On October 12, 2011, the Bank filed a foreclosure complaint against Mielak. The complaint alleged that Mielak had "failed to make payments when due" and that the loan had only been paid through July 1, 2008. Mielak responded by arguing that she made all the payments on her loan, but that the Bank either "never applied them properly" or "refused to take" them. She also claimed that the Bank "refused to let [her] pay the taxes" on the property.

¶ 11 The Bank filed a motion for summary judgment, arguing that there was no genuine issue of material fact. Mielak filed a response, and the Bank subsequently withdrew its motion for summary judgment.

¶ 12 On October 7, 2015, the Bank filed an amended motion for summary judgment. The Bank again argued that there was no genuine issue of material fact and that it was entitled to judgment on its foreclosure complaint. The amended motion for summary judgment claimed that shortly after Mielak entered into a loan modification agreement following the 2004 foreclosure lawsuit, she stopped making both her loan payments and her real estate tax payments. The Bank further claimed that it had paid the property's real estate taxes every year since 2008 "to avoid a loss of its collateral at a tax sale." The Bank noted that the loan documents provided that it could pay the taxes on Mielak's behalf and then add that debt to the total amount owed by Mielak on the promissory note. The Cook County Treasurer tax records were attached to the amended motion demonstrating that the Bank had paid the recent real estate taxes. The amended motion for summary judgment also attached an affidavit by Michael Tornetta, an assistant vice president for the Bank. Tornetta's affidavit stated that the Bank's business records showed that Mielak had defaulted on her required loan payments. The business records attached to Tornetta's affidavit

showed a default amount of $147,786.03, including $14,545.40 for real estate taxes that the Bank had paid.

¶ 13 On February 16, 2016, Mielak filed her response to the Bank's amended motion for summary judgment. She claimed that the loan modification agreement that she entered into after the 2004 foreclosure lawsuit made no provisions for an escrow account and only required her to pay $915.00 per month towards her loan payments. She provided an affidavit stating that she had made the $915.00 payment every month until the Bank rejected her payment in June 2009 and insisted that she pay an escrow of $452.33 per month (toward the real estate taxes). Her affidavit further stated that she paid the property's real estate taxes in 2009 and 2013, and in other years she attempted to pay the real estate taxes, but the county would not let her because the Bank had already paid them. Mielak claimed that the Bank had violated the court's order from the 2004 foreclosure lawsuit by requiring her to pay into an escrow account and then rejecting her loan payments when she refused to do so. Mielak also argued that the Bank was barred by the doctrines of *res judicata* and collateral estoppel because the foreclosure claim had already been litigated in the 2004 foreclosure lawsuit.

¶ 14 The Bank filed a reply brief and asserted that the public records attached to its motion demonstrated that it had paid the real estate taxes on the property for the years between 2008 and 2014, totaling over $14,000. The Bank argued that an escrow account had to be created in order to prevent a tax sale, which would cause both the Bank and Mielak to lose their interest in the property.

¶ 15 On May 6, 2016, following a hearing on the Bank's amended motion for summary judgment, the trial court granted the Bank's motion and ordered a judgment of foreclosure.[3] A judicial sale for the property was held, and the court subsequently entered an order confirming the sale. This appeal followed.

¶ 16 ANALYSIS

¶ 17 We note that we have jurisdiction to review this matter, as Mielak filed a timely notice of appeal following the order confirming the sale of the property. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 18 As a preliminary matter, we address Mielak's claims that the instant foreclosure action is barred by the doctrines of *res judicata* and collateral estoppel. Her claims that both doctrines apply are based on the 2004 foreclosure lawsuit. Specifically, Mielak claims that the Bank is collaterally estopped from bringing the instant foreclosure action because "the issue as to whether the Bank could compel [Mielak] to pay into a tax escrow had clearly been litigated in [the 2004 foreclosure lawsuit]." See *Illinois Health Maintenance Organization Guaranty Association v. Department of Insurance*, 372 Ill. App. 3d 24, 34 (2007) (collateral estoppel is an equitable doctrine that precludes a party from relitigating an issue decided in a prior proceeding). However, the Bank's foreclosure action in the instant matter did not raise the issue of whether Mielak had to pay into a tax escrow account. Instead, it alleged that Mielak had become delinquent on both her loan payments and her real estate tax payments. Thus, collateral estoppel is not applicable. See *Id.* at 34 (one of threshold requirements for application of collateral estoppel is that the issue decided in the prior adjudication is identical to the one presented in the

[3] There was no report of proceedings in the record before us for the May 6, 2016 hearing on the Bank's amended motion for summary judgment.

lawsuit in question). Mielak additionally contends that *res judicata* bars the Bank's instant foreclosure action because the trial court already issued a final judgment on the foreclosure claim in the 2004 foreclosure lawsuit. See *Deutsche Bank National Trust Co. v. Bodzianowski*, 2016 IL App (3d) 150632, ¶ 17 (*res judicata* bars a second adjudication of the parties' disputes where there has been a former adjudication on the merits). Yet, the instant foreclosure action is not the same claim as brought in the 2004 foreclosure lawsuit. The 2004 foreclosure lawsuit alleged a *different breach* (*i.e.*, a default on the original loan arising out of a different breach date for a different debt amount) than the Bank alleged in this case. See *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 21, 22 *reh'g denied* (Aug. 29, 2017) (a foreclosure action alleging a different breach is a separate cause of action and *res judicata* does not apply). Accordingly, *res judicata* is inapplicable to the instant matter.

¶ 19 Turning to the merits, Mielak purports to identify six separate issues on appeal. However, the majority of issues listed are frivolous and repetitive (*i.e.*, "Did the Bank have the right to reject Mielak's monthly payments since they did not include an escrow payment"). We have determined the scope of our review to be limited to the following issue: whether the court erred in granting summary judgment to the Bank.

¶ 20 Mielak argues that the trial court erred in entering summary judgment because the Bank was not entitled to a judgment of foreclosure. She argues that she continued to make her monthly payment of $915.00 towards the loan, but that the Bank inappropriately applied her payments towards an escrow account that she was not required to pay. She claims that the only reason she defaulted on her loan is because the Bank rejected any payment from her once she refused to pay into an escrow account.

¶ 21 The purpose of summary judgment is to determine if a question of fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Adams*, 211 Ill. 2d at 43. "Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt." *Norris*, 2017 IL App (3d) 150764, ¶ 19. We review appeals from summary judgment rulings *de novo*. *Id.*

¶ 22 Despite Mielak's argument to the contrary, the escrow issue is moot as related to the Bank's instant foreclosure claim. The Bank did not allege that Mielak was required to pay into an escrow account. Instead, the Bank alleged in its pleadings that Mielak had defaulted on her loan payments. Specifically, the Bank alleged that it paid the real estate taxes on Mielak's behalf, and that Mielak became delinquent in her payments when the Bank attempted to recoup those expenses. The Bank attached tax records from the Cook County Treasurer's office to its amended motion for summary judgment, as well as an affidavit by one of its vice presidents familiar with the business records associated with Mielak's loan. These documents demonstrated that Mielak was, in fact, delinquent on her loan payments to the Bank.

¶ 23 Mielak's response pleadings did not dispute the Bank's defaulted payment claims, but merely repeated her argument that the Bank could not force her to pay into an escrow account. She even conceded that the Bank paid the real estate taxes on her behalf for several years and that she did not repay the Bank for those expenses. It necessarily follows that the Bank would

add the tax payments to her debt amount, especially considering that the loan documents specifically provided that the Bank could do so. The escrow issue is really beside the point in this case. Regardless of whether Mielak paid her real estate taxes through an escrow account, she was nonetheless required to pay them. It would be illogical to allow the Bank to pay the property's real estate taxes on Mielak's behalf and then bar the Bank from recouping those expenses merely because the loan modification agreement did not specifically provide for monthly escrow payments.

¶ 24 Based on both parties' pleadings, there was no genuine issue of material fact as to whether Mielak was delinquent on her loan payments to the Bank or whether the Bank had paid the real estate taxes on the property on Mielak's behalf as permitted by their agreement. Therefore, the Bank was entitled to a judgment of foreclosure. The court did not err in entering summary judgment in favor of the Bank and ordering a judgment of foreclosure and sale.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.