2019 IL App (2d) 180901-U
No. 2-18-0901
Order filed September 11, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MCHENRY SAVINGS BANK,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2017-L-153
	)	
MICHAEL G. CORTINA and	)	
SMITHAMUNDSEN,	)	Honorable
	)	Brian R. McKillip,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Birkett and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly struck plaintiff's allegations of pretrial legal malpractice where the underlying foreclosure case went to trial, and thus, such pretrial conduct could not be the proximate cause of plaintiff's damages, and the trial court properly dismissed plaintiff's legal malpractice claim due to the underlying foreclosure court's judicial error, which was an intervening cause that precluded plaintiff from establishing proximate cause; the trial court is affirmed.

¶ 2 Plaintiff, McHenry Savings Bank, brought this legal malpractice claim against defendants, Cortina and SmithAmundsen, hereinafter, "defendants." In the original case, defendants, Michael G. Cortina and his law firm, SmithAmundsen (collectively, Cortina), represented plaintiff in a foreclosure action. After a trial, the foreclosure defendants prevailed.

The trial court dismissed McHenry Savings Bank's complaint against Cortina determining that the foreclosure court committed judicial error, and, therefore, plaintiff could not establish proximate cause. On appeal, plaintiff argues that the trial court erred by (1) striking allegations regarding pretrial negligence and (2) dismissing its amended complaint because the foreclosure court did not commit judicial error. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Initially, we note that we take judicial notice of the orders from the Moys' bankruptcy proceedings, including facts pertinent to this case. Although these proceedings are not part of the record in this case, it is well settled that "we may take judicial notice of public documents that are included in the records of other courts." *Seymour v. Collins*, 2015 IL 118432, ¶ 6 n.1.

¶ 5 In March 2008, the circuit court entered judgment for dissolution of the marriage of Miriam Moy and Perry Moy. On or about the date of dissolution of marriage, Perry signed a quitclaim deed for the real property commonly known as 8220 Crystal Springs Road, Woodstock, Illinois, (the Crystal Springs Property). *In re Perry Moy*, 515 B.R. 709, 710-11 (N.D. Ill., 2014).

¶ 6 A. Foreclosure Case

¶ 7 In November 2009, Cortina filed the underlying foreclosure action on MSB's behalf against Perry and Miriam Moy with respect to Crystal Springs Property. Miriam Moy filed a counterclaim against MSB.

¶ 8 In April 2012, Perry Moy filed a petition for Chapter 13 bankruptcy (11 U.S.C. § 1301 (2006)) in the United States District Court for the Northern District of Illinois. *Perry Moy*, 515 B.R. at 710. In May 2012, Miriam's creditors commenced an involuntary Chapter 7 bankruptcy case. *In re Miriam Moy*, 2016 WL 7745143 (N.D. Ill. 2016). In her bankruptcy schedules

Miriam listed her interest in the Crystal Springs property and scheduled MSB as a secured creditor. *Id*. In March 2013, an order of discharge was entered in Miriam's bankruptcy case. The trustee reported that "there was no property available for distribution from the estate over and above that 'exempted by law' " and the trustee filed a no-asset report. *Id*. at 2. The trustee deemed MSB's interest in the Crystal Springs property abandoned. *Id*. The bankruptcy court granted MSB's motion seeking relief from the stays imposed with respect to Perry Moy and Miriam Moy's bankruptcy proceedings. *Id*.

¶ 9 In the course of the foreclosure litigation, Cortina filed two summary judgment motions which the trial court denied because affidavits of default and amounts due and owing were not attached to the motions.

¶ 10 Back in the bankruptcy court, MSB filed a motion seeking to modify the discharge injunction to allow MSB to proceed against Miriam in the foreclosure court to recover attorney's fees and costs that MSB incurred defending Miriam's counterclaim. *Id*. The bankruptcy court stated "[n]either [MSB] nor [Miriam] contend that [MSB's] foreclosure action violates the discharge to the extent it seeks *in rem* relief against the Crystal Springs Property." *Id*. at 3. The court continued, noting that MSB now seeks to collects attorneys' fees incurred in the foreclosure action not only from the proceeds of the sale of the property but also directly from Miriam as a personal liability. *Id*. The court denied MSB's motion because its claim was discharged in Miriam's bankruptcy proceeding. *Id*. at 8.

¶ 11 The foreclosure action proceeded to trial in February 2016. During MSB's case-in-chief Cortina introduced the promissory note, the mortgage, and the evidence of default into evidence, and rested MSB's case-in-chief.

¶ 12 Counsel for Miriam Moy moved for a directed finding, arguing that MSB failed to establish a *prima facie* case pursuant to the Illinois Mortgage and Foreclosure Law (Foreclosure Law) (735 ILCS 15/1101 *et. seq.* (West 2016)), because Cortina failed to present (1) the existence of a mortgage, (2) the existence of a note, (3) the existence of the total amount due, (4) evidence of default, (5) evidence of the date of default, and (6) the amount of default or the amount owed or balance due under the mortgage. The foreclosure court granted the motion for directed finding.

¶ 13 Cortina moved to reopen the proofs to call one more witness. After calling counsel into chambers, the court reversed its order denying Miriam Moy's motion for a directed finding. The court stated that the primary reason for denying Miriam Moy's motion was that the court "either overlooked or did not hear Mr. Moy's testimony with regard to the payments. He did testify that he made payment on the mortgage on -- the payments were from his funds. He also made a statement that he had not made a payment on the mortgage since June of 2009[.] *** [T]his is sufficient evidence to establish that the mortgage is in default and that the motion should be denied." Defense counsel then called its first witness.

¶ 14 At the end of the trial, the foreclosure court found in favor of MSB on its foreclosure claim and in favor of MSB on all of Miriam Moy's counterclaims. The court issued a written opinion stating that MSB was "clearly entitled to a foreclosure judgment and that Miriam Moy had produced no evidence of either breach of contract, fraud or actual damages on her counterclaims." The court ordered the attorneys to prepare appropriate orders and to present them to the court for entry at a later date.

¶ 15 Miriam Moy filed a motion for reconsideration arguing that there was no proof introduced at trial as to the amounts due and owing. The court asked MSB to file an affidavit of the amounts due. Cortina filed an affidavit, and Miriam Moy objected, arguing that the affidavit could not be

introduced after trial, after both sides had rested and the proofs were closed. On November 16, 2018, the foreclosure court reversed its prior judgment and granted Miriam's motion for reconsideration. The court stated that "the only evidence adduced in open court was the existence of a note and mortgage and a default in payments." However, "there was no other lawful evidence of the mortgage debt in the record[,] *** [the] evidence in the record was insufficient to support a judgment of foreclosure[, and prove] up of the mortgage debt by means of an affidavit was contrary to the law."

¶ 16 Cortina, on behalf of MSB, filed a posttrial motion arguing that it was entitled to foreclosure because it had established a *prima facie* case. On March 2, 2017, during the hearing of Cortina's posttrial motion, the court stated that MSB failed to present "evidence of the amount owed, the date of the default, the amount of the default, the interests or penalties and the attorney's fees that were involved." The foreclosure court denied Cortina's posttrial motion. The instant malpractice case followed.

¶ 17 B. Legal Malpractice Case

¶ 18 In March 2018 MSB filed its "First Amended Complaint" (hereinafter, "complaint"). Count I of the complaint, alleged "professional negligence – legal malpractice" against Cortina and SmithAmundsen while representing MSB in the foreclosure action on the following grounds:

> "a) Failed to *** file *** a Motion for Summary Judgment properly supported with an affidavit of default and of all sums due, pursuant to the note which the mortgage instrument secured on the subject real estate;
>
> b) Failed to heed the Court['s] admonishments and warning of the need to file an affidavit with a Motion for Summary Judgment in order to prevail ***;

c) Failed to properly prepare and file immediately a proper Motion for Summary Judgment;

d) Failed to immediately move to strike and dismiss the somewhat nonsensical boilerplate affirmative defenses raised by Miriam L. Moy at a time when she was representing herself *pro se*;

e) Failed to supply proper and appropriate affidavits supporting Motions for Summary Judgment after at least two affidavits *** prepared by Cortina were stricken;

f) Improperly and incorrectly advised [MSB] *** to file an involuntary bankruptcy petition against Miriam L. Moy;

g) [F]ailed to promptly and properly move for modification of any stay [in the Bankruptcy Court] to allow the foreclosure action to proceed, and to move promptly for the dismissal of *** a confusing *** Counter-Complaint *** filed by Moy in the foreclosure action which was under the jurisdiction of the Bankruptcy Court;

h) Failed to properly prepare for trial, to include all of the necessary elements of [MSB's] case in chief, and to submit evidence supporting those elements, particularly evidence of arrearages due [MSB] ***;

i) Failed to call appropriate witnesses at trial in order to prove the necessary elements of the Moy Foreclosure cause of action;

j) Failed to adequately and properly protect [MSB's] rights and interests by proceeding zealously to conclude the Moy Foreclosure Action when filed, through Summary Judgment, and, further failed to protect [MSB's] right and interests throughout the ensuing proceedings;

k) failed to retain experts, businesses, or individuals outside the [SmithAmundsen] law firm for information or suggestions on how better to assist [MSB] with *** the Moy Foreclosure action, in the event that personnel or resources within [the law firm] were unable or insufficient to provide the appropriate services or advice;

l) Failed to properly calculate and determine the total amount of arrearages ***;

* * *

o) Failed to recognize that the failure to present evidence of damages would be fatal to the foreclosure cause of action, due to the equitable principles in a foreclosure action;"

Count II alleged negligence and vicarious liability against the law firm, SmithAmundsen where Cortina was a partner.

¶ 19 Cortina filed a motion to strike and dismiss MSB's complaint. Part one of Cortina's motion was brought under section 2-615 of the Code (735 ILCS 5/2-615 (West 2018)) and sought to strike certain allegations from the complaint, specifically, the allegations regarding MSB's pre-trial conduct. Cortina argued that such conduct could not have proximately caused the damages alleged by MSB. Cortina's motion also brought under section 2-619(a)(9) (id. at 2-619(a)(9)) arguing that judicial error was a complete bar to MSB's complaint.

¶ 20 On October 23, 2018, the trial court granted Cortina's motion to strike and dismiss. The trial court issued a letter of opinion striking the allegations in the amended complaint that relate to pretrial conduct. The trial court reasoned "[t]here has been no decision on the merits and the plaintiff's cause of action remain[ed] viable. *** [F]or those reasons, the allegations of the [amended complaint] previously discussed are irrelevant and stricken from the [amended complaint]. In addition the court determined that "judicial error in the underlying case

constituted an intervening cause which precludes a finding that the plaintiff's damages were proximately cause by any negligence on the part of the defendant."

¶ 21 On October 24, 2018, the trial court entered an order stating "the allegations in Counts I and II of the [amended complaint regarding pretrial conduct] are stricken." Further, the "entirety of Counts I and II are dismissed, with prejudice, pursuant to [section 2-619(a)(9) of the Code." On October 30, 2018, the trial court entered, *nunc tunc pro*, an order correcting a scrivener's error in the prior order dismissing MSB's complaint. MSB filed its amended notice of appeal on October 31, 2018.

¶ 22 MSB now appeals the dismissal of its amended complaint.

¶ 23 II. ANALYSIS

¶ 24 A. Standard of Review

¶ 25 We review *de novo* motions to dismiss under sections 2-619 and 2-615 of the Code of Civil Procedure. *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16; 735 ILCS 5/2-615, 2-619(a) (West 2018). Therefore, we may affirm or reverse on any basis found in the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004).

¶ 26 Dismissal is proper under section 2-615 when it is clear that the plaintiff has not pled a set of facts that would entitle it to relief. *Huang*, 2014 IL App (1st) 123231, ¶ 17. For the purposes of the motion, well-pleaded factual allegations and reasonable inferences are treated as true. *Id.* Opposition to a section 2-615 motion cannot rely on mere conclusions of law unsupported by specific factual allegations. *Id.*

¶ 27 A motion under section 2-619 admits the legal sufficiency of the pleading, but asserts affirmative matter. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). These motions dispose of issues of law and easily proved issues of fact early in the litigation. *Id.* We "must consider

whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Id*.

¶ 28 B. Pretrial Conduct

¶ 29 MSB argues that the trial court erred by dismissing its complaint because it failed to consider defendants' alleged negligence relating to pretrial conduct in the foreclosure case. Cortina argues that the trial court properly struck these allegations under section 2-615 of the Code because there was no proximate cause between their pretrial conduct and the loss of the foreclosure trial. We agree with Cortina.

¶ 30 The elements of a cause of action for legal malpractice are: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) actual damages; and (4) the actual damages resulted as a proximate cause of the breach. *Huang*, 2014 IL App (1st) 123231, ¶ 25.

¶ 31 Where, as here, MSB alleged legal malpractice involving litigation, no cause of action exists, unless the attorney's negligence proximately caused the loss of the underlying cause of action. *Tri-G, Inc. v. Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006).

¶ 32 The term "proximate cause" encompasses two distinct concepts: cause in fact and legal cause. *City of Chicago v. Baretta U.S.A. Corp.*, 213 Ill. 2d 351, 395 (2004). Cause in fact exists "when there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id*. (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992)). To determine whether cause in fact exists, courts first ask whether the injury would have occurred but for the defendant's conduct. *Id*. In addition, when there are multiple factors that may have combined to cause the injury, courts ask whether the defendant's conduct was a material element and a substantial factor in bringing about the injury. *Id*.

¶ 33 The second concept, legal cause, involves an assessment of foreseeability. *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶ 24. Courts ask whether the injury is the type of injury that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. (Internal quotation marks omitted.) *Lee*, 152 Ill. 2d at 456.

¶ 34 Although proximate cause is generally a question of fact, the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Baretta*, 213 Ill. 2d at 395-96. Here, we believe it is appropriate to determine the question as a matter of law, because plaintiff's complaint fails to disclose any allegations that, even if true, would establish proximate cause.

¶ 35 MSB alleged that Cortina negligently acted or failed to act during the pretrial period of the foreclosure case. However, these allegations cannot be the basis for a legal malpractice claim because MSB's case remained viable after Cortina's alleged negligent conduct. A legal malpractice plaintiff may recover as actual damages the attorney fees proximately caused by the defendant's malpractice, only where "the plaintiff can demonstrate she [or he] would not have incurred the fees in the absence of the defendant's negligence." *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 753 (2008). Where a cause of action remains viable after a defendant's alleged negligent conduct, *i.e*, legal malpractice, such conduct cannot be the proximate cause of the plaintiff's damages. *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 621 (2002).

¶ 36 Here, it is not disputed that after Cortina's alleged pretrial negligence, a trial was held in the foreclosure case. Therefore, it cannot be said that, but for Cortina's alleged negligent pretrial conduct, MSB lost its case and suffered damages. After Cortina's alleged pretrial

negligence, MSB's case was still viable. Accordingly, the allegations relating to Cortina's pre-trial conduct cannot be the basis for a cause of action for legal malpractice. See *id*. Therefore, the trial court properly struck these allegations.

¶ 37 B. Judicial Error

¶ 38 Next, MSB argues that the trial court erred by dismissing its complaint pursuant to sections 2-619(9)(a) of the Code. Specifically, MSB contends that the trial court erred by determining that the foreclosure court's judicial error precluded MSB from establishing that Cortina's alleged negligence proximately caused MSB's damages. MSB argues that the foreclosure court did not commit judicial error. We disagree.

¶ 39 1. *Prima Facie* Foreclosure Case

¶ 40 MSB argues that the trial court erred by finding that the foreclosure court committed judicial error. MSB contends that the foreclosure court properly ruled that Cortina failed to prove its case because defendants failed to produce evidence of the accelerated total amount due, accrued interest, penalties, costs, and attorney's fees. Cortina counters that the foreclosure court committed judicial error because they presented a *prima facie* case establishing the right to foreclosure as required by the Foreclosure Law because it produced evidence of the mortgage, the note, and default.

¶ 41 To establish a *prima facie* case of foreclosure in accordance with section 15-1504 of the Foreclosure Law (735 ILCS 5/15-1504 (West 2016)), a plaintiff is required to introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant to prove any affirmative defenses. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67. See also *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994) (the

Foreclosure Law requires only that a complaint in foreclosure attach copies of the mortgage and note secured thereby).

¶ 42 In this case, there is no doubt that Cortina presented evidence of the mortgage, the promissory note, and evidence of default. The foreclosure court stated such in its order granting judgment in favor of MSB. However, in response to Miriam Moy's motion to reconsider, the foreclosure court issued a written order in favor of Miriam Moy and against MSB stating that its prior finding in favor of MSB on its "foreclosure claim was in error." The foreclosure court further stated that the "only evidence adduced in open court was the existence of a *note and mortgage and a default in payments* [however there] was no other lawful evidence of the mortgage debt in the record. [Therefore] the evidence in the record was insufficient to support a judgment of foreclosure [and prove] up of the mortgage debt by means of an affidavit was contrary to the law." (Emphasis added.) Cortina cannot be held accountable for the foreclosure court's acceptance of a legally unsound basis for granting Miriam Moy judgment against MSB. The foreclosure court's error was an intervening cause precluding MSB from establishing that Cortina's alleged negligence proximately caused its damages. Accordingly, the trial court properly dismissed MSB's amended complaint.

¶ 43 MSB also argues that Cortina was negligent because it failed to produce evidence of a notice of acceleration to the foreclosure court. Cortina argues, *inter alia*, this issue has no merit because a foreclosure plaintiff need not prove that it sent an acceleration notice. MSB contends that notice of acceleration is a condition precedent to foreclose. MSB cites *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, (2016) and *CitiMortgage, Inc., v. Bukowski*, 2015 IL App (1st) 140780 (2015), to support its argument. Neither case applies here.

¶ 44 In both *Accetturo* and *Bukowski*, the mortgages expressly obligated the lenders to provide the borrowers with notice of acceleration prior to foreclosure. *Accetturo*, 2016 IL App (1st) 152783, ¶ 37; *Bukowski*, 2015 IL App (1st) 140780, ¶ 16. However, here, MSB cites to nothing in this record indicating that the mortgage at issue required MSB to provide the Moys with notice of acceleration. Further, MSB does not indicate that the Moys pleaded this affirmative defense or claimed that MSB failed to meet its obligation under the mortgage. See *Accetturo*, 2016 IL App (1st) 152783, ¶ 35. Thus, *Accetturo* and *Bukowski* are distinguishable from this case.

¶ 45 2. Section 15-1506 of the Foreclosure Law

¶ 46 Next, MSB argues that the trial court erred finding judicial error because it ruled that section 15-1506 of the Foreclosure Law did not require a lender to prove the accelerated total amount due, accrued interest from the last payment to the date of filing, costs, and attorney's fees. Cortina responds that section 15-1506 neither changes the requirements of a *prima facie* case—that is, the existence of a note, a mortgage, and a default—nor imposes new burdens. MSB claims the foreclosure court properly ruled that it failed to produce evidence of the "Acceleration Notice" required by section 15-1506 the Foreclosure Law.

¶ 47 Section 15-1506 provides in relevant part:

> "(a) Evidence. In the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court, except:
>
> (1) where an allegation of fact in the complaint is not denied by a party's verified answer or verified counterclaim, or where a party pursuant to subsection (b) of Section 2-610 of the Code of Civil Procedure states, or is deemed to have stated, in its pleading that it has no knowledge of such allegation sufficient to form a belief and attaches the required affidavit, a sworn verification of the

> complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required; and
>
> (2) where all the allegations of fact in the complaint have been proved by verification of the complaint or affidavit, the court upon motion supported by an affidavit stating the amount which is due the mortgagee, shall enter a judgment of foreclosure as requested in the complaint.
>
> (b) Instruments. In all cases the evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked, and copies thereof shall be filed with the court." 735 ILCS 5/15-1505 (West 2018).

¶ 48 Regarding section 15-1506(a)(2), MSB argues that because Cortina filed an unverified complaint in the foreclosure action, Cortina was required to show evidence to support the allegations contained in the complaint and Cortina failed to do this regarding damages.

¶ 49 The clear Language of section 15-1506(a)(2) applies where there is no trial and the court decides the case solely on the pleadings and the attached documents.

¶ 50 Regarding section 15-1506(b), it is uncontroverted that Cortina provided evidence of indebtedness, *i.e.*, the promissory note, and the mortgage.

¶ 51 Further, MSB's argument that Cortina failed to provide sufficient evidence of damages is disingenuous due to Miriam's discharge in bankruptcy. As the bankruptcy court ruled, MSB was entitled only to seek in rem relief against the Crystal Springs property and MSB was not entitled to seek damages from Miriam as a personal liability to the extent that the proceeds of the property prove insufficient. *In re Miriam Moy*, WL 7745143 (N.D. Ill. 2016), 3. Accordingly, the trial court properly dismissed with prejudice MSB's legal malpractice complaint against

Cortina. Because MSB could only proceed against the property all the claimed defects in the proofs would have been unavailing even if those procedures had been established.

¶ 52 MSB is seeking damages from defendants that it was never entitled to due to the mortgagors' discharge in bankruptcy. Assuming *arguendo* that defendants had been negligent, MSB is seeking damages greater than what it would have otherwise been entitled to; a deed to the real estate that was the security for the loan.

¶ 53 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 54 III. CONCLUSION

¶ 55 The judgment of the circuit court of McHenry County is affirmed.

¶ 56 Affirmed.