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2020 IL App (3d) 180740-U

Order filed January 29, 2020

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2020

BANK OF AMERICA, N.A., as Successor to)	Appeal from the Circuit Court
BAC HOME LOANS SERVICING, LP, f/k/a)	of the 12th Judicial Circuit,
COUNTRYWIDE HOME LOANS)	Will County, Illinois.
SERVICING, LP,)	
)	
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-18-0740
)	Circuit No. 09-CH-3320
STEPHEN K. BARRIX, LAVERGNE)	
COUNTER, UNKNOWN OWNERS and)	
NON-RECORD CLAIMANTS,)	
)	
Defendants)	
)	
(Stephen K. Barrix and Lavergne Counter,)	
)	
Defendants-Appellants).)	Honorable Cory D. Lund,
)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err when it granted summary judgment in favor of plaintiff.

¶ 2 Defendants, Stephen K. Barrix and Lavergne Counter, appeal the circuit court’s granting of summary judgment in favor of plaintiff, Bank of America, NA. Defendants contend that a genuine issue of fact exists as to their timely rescission of their loan obligations. We affirm.

¶ 3 I. FACTS

¶ 4 On May 27, 2007, defendants refinanced an existing residential mortgage loan by borrowing \$365,000 from Countrywide Bank, FSB. Defendants secured the loan with a promissory note and mortgage on their real estate. Less than 18 months later, defendants defaulted.

¶ 5 Subsequently, plaintiff filed a foreclosure action against defendants.¹ In response, defendants mailed a “Notice of Loan Cancellation,” to their original lender claiming to rescind the loan. The letter did not include any indication as to defendants’ ability or intent to tender the funds necessary to rescind.

¶ 6 Relevant to this appeal is defendants third amended affirmative defense. The defense claimed that defendants timely rescinded the loan after Countrywide Bank failed to provide defendants with the requisite number of copies of the notice of their right to rescind at closing.

¶ 7 Plaintiff filed a motion for summary judgment. In relevant part, plaintiff argued that defendants untimely rescinded their loan obligations. In the alternative, plaintiff contended that even if defendants timely rescinded, the court should still grant summary judgment because no dispute existed as to defendants’ inability to tender the amount due to rescind. The tender amount totaled \$463,715.64.

¶ 8 In response, defendants claimed that they timely rescinded because the period for rescission extended due to plaintiff’s failure to provide them with the required copies of their notice of the

¹Countrywide Bank assigned the note to Countrywide Home Loans, Inc., and assigned the mortgage to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP.

right to rescind. Defendants also claimed that they were not required to tender the funds to exercise their right to rescind. The response alleged that it would be “impossible” for defendants to tender the required funds. Defendants attached their affidavit to the response. Contrary to the assertion that it would be impossible to tender the required funds, defendants averred that they were willing and able to tender the required funds for rescission.

¶ 9 At the hearing on plaintiff’s motion for summary judgment, counsel for defendants conceded that defendants “had the inability to tender,” but again argued that they were not required to tender the funds to exercise their right to rescission. The circuit court ultimately granted plaintiff’s motion and entered summary judgment finding no genuine issue of fact existed as to defendants’ rescission claim.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendants contend the circuit court erred in granting summary judgment in favor of plaintiff on their rescission claim. Summary judgment is proper only when “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 2008). “A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts.” *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010). Our review of a summary judgment order is *de novo*. *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

¶ 12 Initially, we note that defendants’ sole argument is that a question of fact remains as to whether they timely rescinded. Defendants do not address the other ground that their rescission claim failed. That is, defendants do not address plaintiff’s argument that even if defendants timely rescinded, there is no issue of fact as to defendants’ ability to tender the required funds for

rescission. Upon review, we find that there is no dispute that defendants were unable to satisfy their tender obligation. Consequently, we need not address whether defendants timely rescinded.

¶ 13 Following a timely rescission: (1) the underlying security interest becomes void and the borrower has no liability for any amount, including any finance charge; (2) within 20 calendar days after receipt of a notice of rescission, the creditor must return any money or property given in connection with the transaction and take action necessary to reflect the termination of the security interest; and (3) the borrower must then tender the money or property to the creditor (or, when the latter would be impracticable or inequitable, its reasonable value). 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d). Under the third requirement, the rescinding borrower must return the loan principle. *Marr v. Bank of America, N.A.*, 662 F. 3d 963, 966 (2011). As a result, rescission is often unavailable to consumers because they are unable to return the unpaid principal. *Id.*

¶ 14 Here, defendants were required to demonstrate that they could satisfy their obligation to tender the money or property to the creditor to effectuate rescission. Absent this showing, defendants cannot demonstrate that they could effectuate rescission. Although defendants' affidavits generally claimed their ability to satisfy their tender obligations, they failed to present any evidence supporting their assertion. To the contrary, counsel for defendants conceded their inability to pay at arguments on plaintiff's motion for summary judgment. Defendants also alleged that it would be "impossible" to tender back the loan proceeds in their response to plaintiff's motion for summary judgment. Even assuming defendants timely provided plaintiff with notice of rescission of their loan obligations, there is no dispute that defendants could not meet their obligation to tender the required funds to plaintiff. Accordingly, the circuit court did not err when it granted summary judgment in favor of plaintiff.

¶ 15

III. CONCLUSION

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 17 Affirmed.