THIRD DIVISION
March 2, 2011

No. 1-10-1710

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MB FINANCIAL BANK, as successor in interest to Heritage Community Bank, Plaintiff-Appellee, v. MICHAEL SWEISS, Unknown Owners and Non-Record Claimaints, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 09 CH 44691 Honorable Thomas R. Mulroy, Jr., Judge Presiding.

Justice Murphy delivered the judgment of the court.

Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

HELD: Where defendant presented written notice of a motion for substitution of judge on the day of presenting the motion, the trial court did not abuse its discretion in denying the motion for lack of proper notice.

HELD: Where a commercial mortgage authorizes possession of property by mortgagee upon default and plaintiff provides an affidavit of mortgagee's vice president averring that defendant was in default on the principal and interest due on the mortgage, appointment of a receiver was proper.

Plaintiff, MB Financial Bank, filed the underlying commercial mortgage foreclosure action against defendant, Michael Sweiss, as successor in interest to Heritage Community Bank on November 12, 2009. Plaintiff alleged that defendant had defaulted on the mortgage and note for his failure to make any payments on the principal or interest due under the note and mortgage since May 2009. Defendant moved for substitution of judge as a matter of right on June 1, 2010, the same date the trial court was scheduled to hear plaintiff's motion for default. On June 2, 2010, the trial court denied defendant's motion for lack of proper notice. On June 10, 2010, the trial court denied defendant's motion to reconsider the denial of his motion to substitute judge. On June 14, 2010, the trial court granted plaintiff's motion to appoint a receiver and this interlocutory appeal followed. For the following reasons we affirm.

I. BACKGROUND

Plaintiff filed its complaint to foreclose mortgage on November 12, 2009. Plaintiff asserted that it was the successor in interest to Heritage Community Bank on a mortgage for commercial property with defendant for the property commonly known as 3655 West 63rd Street, Chicago, Illinois. Plaintiff alleged that defendant had failed to make payments on the principal or interest due under the mortgage and note on the property on May 16, 2009, or any subsequent date, leaving a principal balance due of $541,537.50 and a total amount due as of November 10, 2009, of $581.798.82. A copy of the mortgage, signed by defendant and dated November 16, 2007, was attached as an exhibit to the complaint.

Plaintiff attempted to effectuate personal service on defendant numerous times. However, plaintiff's process server's attempts to locate and serve defendant failed. Plaintiff

obtained service by publication in the Chicago Daily Law Bulletin on March 26, April 2 and April 9, 2010.

On April 15, 2010, plaintiff filed a motion for default and scheduled a hearing for June 1, 2010. Notice of the motion was sent to defendant's address of record as well as defense counsel on that same day. On April 19, 2010, plaintiff filed a motion for appointment of a receiver and scheduled it for hearing on June 2, 2010. Again, defendant sent notice to defendant's address of record and counsel on the day of filing.

Plaintiff attached a declaration from counsel to its motion for appointment of a receiver concerning the efforts undertaken to serve defendant. Plaintiff argued that the clear terms of the mortgage expressly authorized it to take possession upon default. Plaintiff asserted that it had a reasonable probability of success on its foreclosure claim based on defendant's failure to timely make payment or remit the balance due when it became due on May 16, 2009. In support, plaintiff attached an affidavit of Dustin J. Ackman, a vice president of plaintiff bank and the lender responsible for managing the subject property. Ackman averred that he was familiar with the allegations of the complaint and stated that the mortgage and promissory note at issue were in default in an amount in excess of $581,798.82.

Counsel for both parties appeared before the trial court on June 1, 2010, though defendant had yet to file an appearance. Despite counsel's failure to file an appearance, he made an oral motion for substitution of judge as a matter of right. The trial court refused to hear the oral motion and also requested that plaintiff re-notice its motion for default when it was prepared to request a judgment. At some point after the hearing, counsel for defendant filed an appearance in

the case. Counsel also filed a written motion for substitution of judge with the clerk's office on June 1, 2010, with a certificate of service indicating that plaintiff was served via U.S. mail on that date.

The parties returned the next day, June 2, 2010, and defendant's counsel presented a written motion for substitution of judge as a matter of right. Counsel for plaintiff argued that the motion should be denied as this was the first he had seen of the motion. The trial court entered an order deeming defendant's notice of the motion to substitute judge as given on the date of the hearing, June 2, 2010. The court denied plaintiff's motion to substitute judge on the basis that the notice to plaintiff was improper and insufficient. The trial court also granted plaintiff's motion to appoint a receiver.

Defendant filed a motion to reconsider the June 2, 2010, order. The trial court denied that motion in a written order dated June 10, 2010. It noted its discretion to determine what constitutes reasonable notice in each individual case. The trial court cited to the fact defendant and his counsel were notified twice in April of the hearings scheduled for June and that they did not file an appearance or notice the motion for substitution of judge during the two months before the hearing. It concluded that providing defendant notice the day that the motion was presented was not reasonable. In addition, the trial court added that the appointment of a receiver is a substantial issue that it ruled upon, foreclosing defendant's ability to move to substitute judge as a matter of right.

Defendant also filed a motion to reconsider the appointment of a receiver and argument was presented on June 14, 2010. Plaintiff noted that the mortgage clearly provides that, upon

failure to make a payment, the mortgagee has the right to accelerate all amounts due and, upon default, has the right to apply for appointment of a receiver. Based on these provisions and defendant's failure to make payments for numerous months, plaintiff argued that it had a reasonable probability of prevailing in the matter. Finally, defendant argued that plaintiff's argument that defendant's failure to attach the note to the complaint was fatal. Plaintiff asserted that attaching the mortgage to the complaint was sufficient for the initial appointment of receiver and that the note was not required until time of judgment; however, plaintiff's counsel moved to amend the complaint to attach the note and the trial court allowed the motion.

The trial court denied defendant's motion to reconsider the appointment of a receiver. The court found that plaintiff had established a reasonable probability of prevailing in the matter and entered its order appointing a receiver. This interlocutory appeal followed.

II. ANALYSIS

A. Motion for Substitution of Judge

Defendant first argues on appeal that the trial court erred in denying his motion for substitution of judge as a matter of right. Under section 2-1001 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1001 (West 2008)), a party has the right to a substitution of judge if it properly makes such a motion before a substantive ruling has been made in the case. Section 2-1001(b) requires that reasonable notice be given to the adverse party or his or her attorney. 735 ILCS 5/2-1011(b) (West 2008).

A trial court's denial of a motion for substitution of judge for improper or insufficient notice will not be disturbed absent an abuse of discretion. *Koch v. Carmona*, 268 Ill. App. 3d 48,

57 (1994). The determination of the propriety of notice given depends on the facts and circumstances of each case. *Peerless Enterprise, Inc. v. Kruse*, 317 Ill. App. 3d 133, 141 (2000). Defendant asserts that the statute and uniform weight of case law establish that the right to substitution of judge is absolute where the motion is filed before a substantial ruling. *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 336 (2002). He concedes that the notice requirement aims to eliminate "judge shopping," but asserts that the trial court abused its discretion in this case in finding that notice was insufficient and that a substantial ruling had been made.

Defendant contends that plaintiff had sufficient time to respond to his motion to substitute because it was filed prior to the June 1, 2010, hearing and the trial court requested that plaintiff re-notice its motion for default set for that date. Therefore, defendant claims that when the motion for substitution of judge was rejected on June 2, 2010, plaintiff had enough time to respond. As defendant argues, the question of whether notice was reasonable depends on the facts and circumstances of each individual case.

We agree with plaintiff that the facts and circumstances of this case support the trial court's conclusion that the notice provided was improper and insufficient and properly denied defendant's motion. Plaintiff undertook months of efforts to properly effectuate personal service on defendant after filing its complaint. When that failed, plaintiff properly effected service via publication. Defendant and counsel were personally served notice nearly six weeks prior to the June 1 and 2, 2010, motion hearings. While defendant had not filed an appearance, there can be no other conclusion that his attempt to substitute judge at the hearing was an attempt to delay proceedings.

In both *Koch* and *Peerless*, the denial of the motion for substitution of judge was found proper for improper and insufficient notice. In *Koch*, the defendant served written notice of its motion for substitution of judge to the plaintiff 24 hours prior to the hearing. *Koch*, 268 Ill. App. 3d at 57. In *Peerless*, the plaintiff was not provided notice of the motion for substitution until the date the motion was presented. *Peerless*, 317 Ill. App. 3d at 141. Similarly, in the instant matter, defendant gave oral notice and attempted to present an oral motion for substitution of judge on June 1, 2001, but the court could not hear the motion as no appearance had been filed. Defendant mailed written notice that day to plaintiff and argued the motion the next day, June 2, 2010. The trial court did not err in finding that this constituted unreasonable notice. Defendant was made aware of the June hearings in April and failed to provide any notice to plaintiff of its intent to seek substitution of judge. Accordingly, as in *Peerless* and *Koch*, denial of the motion was proper.

B. Appointment of a Receiver

Defendant also argues that, as a matter of law, the trial court erred in granting plaintiff's motion for the appointment of a receiver. The Foreclosure Law provides that, for nonresidential mortgage foreclosure cases, upon request, a mortgagee is entitled to possession of the property prior to the entry of a judgment of foreclosure if the mortgagee shows (1) the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. 735 ILCS 5/15-1701(b)(2) (West 2006). Where such a showing is made and the mortgagor has not shown good cause to remain in possession, the court shall appoint a receiver. 735 ILCS 5/15-1701(a), (b)(2) (West 2006).

Therefore, the Foreclosure Law creates a presumption in favor of the mortgagee's right to possession on nonresidential property during the pendency of a mortgage foreclosure proceeding. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 164 (2010). The question of whether the appointment of a receiver was proper is reviewed *de novo*. *Bank of America*, 401 Ill. App. 3d at 164-65.

As argued by plaintiff, the mortgage, specifically page 8 of the mortgage, provides that the mortgagee is authorized to be placed as mortgagee in possession or to have a receiver appointed upon the occurrence of an event of default. Defendant concedes this point, but maintains that plaintiff failed to prove a reasonable probability of prevailing on a final hearing. Defendant contends that plaintiff's failure to attach the note to the complaint or motion is fatal. He also asserts that all instruments presented indicate that Heritage Community Bank, not plaintiff, is the named party. Without evidence of an assignment or an allonge, defendant argues that the trial court erred in finding it likely that plaintiff would prevail at a final hearing because it cannot establish a default where it is not assignee or holder of the note.

First, as referenced by the *Bank of America* court, an affidavit of a mortgagee's vice president that a defendant failed to make proper payments was sufficient to demonstrate a default exists. *Bank of America*, 401 Ill. App. 3d at 166, citing *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 868 (1993). In this case, Ackman, a vice president for mortgagee who manages this asset, sufficiently demonstrated a default by testifying to defendant's failure to make payment as required. The failure to attach the note is not fatal at this stage in the proceedings, but would be necessary for final judgment - a fact plaintiff clearly conceded at the

hearing. In any event, as addressed, plaintiff was granted leave to amend the complaint to attach the note.

Defendant also asserts that the trial court erred based on plaintiff's failure to present evidence that it owns the note. Plaintiff filed its complaint as successor in interest to Heritage Community Bank. Plaintiff also clearly alleged within its complaint that it was bringing the action as mortgagee as the successor in interest to Heritage Community Bank. While Ackman did not specifically state that plaintiff owned the note, he stated that he had reviewed the complaint, testified that each statement of the complaint was true and correct, and that he managed the subject asset for plaintiff. Plaintiff's presentation of evidence demonstrated that it was the mortgagee, owned the note, and was entitled to possession because defendant was in default. Therefore, the trial court found plaintiff was likely to prevail at a final hearing and this was sufficient for the appointment of a receiver.

III. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment to defendant is affirmed.

Affirmed.