2011 IL App (1st) 111355-U

THIRD DIVISION
December 14, 2011

No. 1-11-1355

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, N.A.,	)	APPEAL FROM THE
as Assignee of Citibank, N.A.,	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
	)	
v.	)	
	)	
MAY TOY,	)	
Defendant-Appellant	)	No. 09 CH 1149
	)	
(Marquette National Bank, as Trustee under a	)	
trust agreement dated December 2, 1998, and	)	
known as trust number 14622, Unknown Owners,	)	HONORABLE
and Nonrecord Claimants,	)	JOHN C. GRIFFIN,
Defendants).	)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court of Cook County did not err in appointing a receiver in a foreclosure action. The mortgagee showed a receiver was authorized by the terms of the mortgage and a reasonable probability that the mortgagee will prevail on a final hearing of the cause. The beneficiary of a land trust could challenge the mortgagee's ability to meet those requirements, but once met, could not assert good cause for possession of the property to remain with the mortgagor, as that

argument may only be raised by the trustee of the land trust as mortgagor. The judgment of the circuit court is affirmed.

¶ 2 Defendant May Toy, as beneficiary of a land trust held by defendant Marquette National Bank (Marquette), appeals an order of the circuit court of Cook County appointing a receiver in a foreclosure action brought by plaintiff Citibank, N.A. (Citibank).[1] Toy argues Citibank failed to show a reasonable probability of prevailing at a final hearing on the cause and she showed good cause for possession to remain with the mortgagor. For the following reasons, we reject Toy's arguments and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On January 12, 2009, Citibank filed an action to foreclose the mortgage held on real property commonly known as 315 South Ashland Avenue in Chicago (Property). The Property is a designated landmark building containing three apartment units and a coach house with a garage and two apartments. Title to the Property is held by Marquette as trustee under a land trust dated December 2, 1998. Toy is the principal beneficiary of the land trust.

[1] Defendants Marquette National Bank, as trustee under a trust agreement dated December 2, 1998, and known as trust number 14622, unknown owners, and nonrecord claimants, are not parties to this appeal. As the underlying mortgage and note were subsequently transferred, the circuit court entered orders substituting LSREF2 Nova Investments, LLC, and Wells Fargo Bank, N.A. as the plaintiff on January 6 and May 12, 2011, respectively. For the purpose of simplicity, this order will refer to the plaintiff as Citibank.

¶ 5 The purchase of the Property was financed with a down payment of $194,500 and a commercial loan from Citibank of $773,000, as evidenced by a trustee note executed by Marquette. The terms of the loan required Toy to reside in the Property as her primary residence. The note was secured by a trustee mortgage executed by Marquette and guaranteed by Toy.

¶ 6 Citibank's complaint alleged Marquette was in default under the terms of the note and mortgage as of September 1, 2008. The complaint alleged Marquette owed $39,885.49 through January 1, 2009, with a principal balance due of $603,913.77, plus accrued interest and late charges.

¶ 7 On January 28, 2009, Citibank filed its initial petition for the appointment of a receiver. On May 28, 2009, following briefing by the parties, the circuit court denied the petition without prejudice.

¶ 8 Also on May 28, 2009, Toy filed a verified answer and affirmative defenses to the complaint. The affirmative defenses state Toy tendered several payments late, beginning in July 2008, that were accepted by Citibank, but other late payments were rejected in November 2008. Toy argued: (1) the Property was residential; (2) the mortgagor could not waive its rights to reinstatement or redemption; (3) Citibank erroneously paid property taxes out of Toy's required tax escrow payments for properties not owned by Toy or covered by the mortgage in amounts exceeding the amount due when the complaint was filed; and (4) Citibank breached its duty of good faith and fair dealing relating to the mistaken tax payments. Toy also filed a counterclaim against Citibank, similarly alleging a breach of fiduciary duties. Citibank's answer to the

counterclaim admits it erroneously paid property taxes assessed against other parcels on six occasions, but maintained the amounts were refunded to Toy's escrow account.

¶ 9 On December 18, 2009, Citibank filed an amended complaint.

¶ 10 On December 10, 2010, Citibank filed a verified petition for the appointment of a receiver to possess and manage the Property.

¶ 11 On January 4, 2011, Toy filed a response to the petition. Toy argued that Citibank had still not shown it was likely to prevail and a dispute remained whether the erroneous tax payments had been refunded. Toy also argued that the Property should be considered residential real estate under section 15-1219 of the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1101, 15-1219 (West 2008)), and thus, possession presumptively rests with the mortgagor under section 15-1701(b)(1) of the IMFL (735 ILCS 5/15-1701(b)(1) (West 2008)), absent a showing of good cause. Toy argued in the alternative that if the Property was nonresidential, she could show good cause for the mortgagor to retain possession, based on irreparable harm she would suffer should a receiver be appointed, weighed against alternate remedies open to Citibank.

¶ 12 On January 24, 2011, Citibank filed a reply in support of the petition, primarily arguing that on January 5, 2009, it exercised its call option under the note, which provides:

> "During the thirty (30) day period ('Option Period') immediately following each Option Date (as defined below), the Note Holder shall have the right, at its election, to:
>
> ***

b. require payment in full of the entire principal amount outstanding, all unpaid advances and all accrued interest hereunder ('Obligations') (referred to as a 'Call Option'); or

If Note Holder elects to exercise a Call Option, notice of such election shall be provided to the undersigned during the Option Period and the undersigned shall pay the Obligations in full to Note Holder on or before the payment date specified in that notice ('Payment Date'), which shall not be less than 90 (ninety) days from the date such notice is mailed.

***

As used herein, the 'Option Date' shall mean January 1, 2009, and each succeeding Option Date shall be one year from the prior Option Date *** until maturity or acceleration of this loan, whichever shall occur first."

Citibank asserted payment in full was not timely made. Citibank attached a letter to Toy, dated January 5, 2009, stating Citibank was electing to exercise its call option, as an exhibit to its reply.

¶ 13 Citibank further argued it had shown a reasonable probability of success on the merits based on its verified allegations of default. Citibank also attached a full escrow transaction summary as an exhibit, disclosing that $4,467.99 had not been refunded to the mortgagor's escrow account and argued the dispute did not cure the default. Moreover, Citibank clarified that it was not seeking appointment of a receiver for the unit where Toy lived, thus concluding the remaining units were nonresidential under the IMFL. Accordingly, Citibank argued the

presumption of possession rested with the mortgagee as to the nonresidential portion of the Property. In addition, Citibank maintained Toy had failed to show good cause to remain in possession, arguing an alleged dispute over amounts due or acceptance of late payments does not constitute good cause.

¶ 14 On March 23, 2011, Citibank filed an affidavit from Citibank vice-president Karma Flower in support of the petition. In the affidavit, Flower states that on January 5, 2009, Citibank informed Toy by letter Citibank was exercising a call option contained in the note as of that date. Under the terms of the call option, the borrower had 90 days from January 5, 2009, to pay the total amount due and owing Citibank. According to Flower, on April 5, 2009, the borrower was obligated to pay Citibank $603,913.77, plus accrued interest. Flower stated that the amount remained unpaid on March 7, 2011.

¶ 15 On April 21, 2011, Toy filed a supplemental response to the petition, arguing the expiration of the call option occurred after Citibank filed suit and thus was only relevant to show bad faith on the part of Citibank. Toy also claimed Citibank made false statements in its affidavits and reply relating to the refund of various tax payments. Toy claimed the amount not refunded to her by Citibank for erroneous tax payments totaled $8,692.52, rather than the $4,467.99 claimed by Citibank. Toy further claimed a $6,608.25 discrepancy in Citibank's 2008 escrow transaction summary. Moreover, Toy argued appointment of a receiver should be barred by the "unclean hands" doctrine.

¶ 16 On May 12, 2011, following a hearing, the circuit court granted the petition to appoint a receiver as to the nonresidential portion of the Property, with all the duties and powers

enumerated in the IMFL, specifying the receiver is authorized to collect all rents relating to the property. On May 18, 2011, Toy filed a timely notice of appeal to this court.

¶ 17 DISCUSSION

¶ 18 On appeal, Toy contends the circuit court erred in appointing a receiver because Citibank did not show a reasonable probability of prevailing in a final hearing on the cause. Toy also contends she asserted affirmative defenses constituting good cause for the mortgagor to retain possession.

¶ 19 Citibank initially responds that the appeal must be denied, because section 15-1701(b)(2) of the IMFL (735 ILCS 5/15-1701(b)(2) (West 2008)) does not vest Toy with the right to object to the appointment of a receiver. Toy replies that Citibank forfeited the argument by failing to raise it in the circuit court. See *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 355 (1998). However, Citibank notes we may affirm the decision of the trial court on any basis supported by the record, regardless of whether the basis was relied upon by the lower court. *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008). Accordingly, we first address whether Toy has standing to object the appointment of a receiver.

¶ 20 I. Standing

¶ 21 Toy is the principal beneficiary of a land trust, while Marquette is the trustee. Generally, in a land trust in Illinois, the trustee's sole purpose is to take and hold title to the trust *res*. *23-25 Bldg. Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 755 (2008). The trustee has no duties with respect to management and control of the property. *Id.* The beneficiary generally manages and exercises all rights of ownership, with the exception of holding title to the property.

Id. Thus, the beneficiary of a land trust has standing in litigation involving his or her rights and liabilities with respect to management and control, use, or possession of the property pursuant to the trust agreement. *Id.* Conversely, in *Madden v. University Club of Evanston*, 97 Ill. App. 3d 330, 333 (1981), this court held an individual beneficiary of trust lacked standing in an action to foreclose mortgage on subject property because he did not have legal title to the property.

¶ 22 This case involves a foreclosure action. However, that facet does not end our analysis. Section 15-1701 of the IMFL provides in relevant part:

> "(a) General. The provisions of this Article shall govern the right to possession of the mortgaged real estate during foreclosure. Possession under this Article includes physical possession of the mortgaged real estate to the same extent to which the mortgagor, absent the foreclosure, would have been entitled to physical possession. For the purposes of Part 17, real estate is residential real estate only if it is residential real estate at the time the foreclosure is commenced.
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> (b) Pre-Judgment. Prior to the entry of a judgment of foreclosure:
>
> (1) In the case of residential real estate, the mortgagor shall be entitled to possession of the real estate except if (i) the mortgagee shall object and show good cause, (ii) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (iii) the court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause, the court shall upon request place the mortgagee in possession. If the residential real estate consists of more than one dwelling unit, then for the purpose of this Part

> residential real estate shall mean only that dwelling unit or units occupied by persons described in clauses (i), (ii) and (iii) of Section 15-1219.
>
> (2) In all other cases, if (i) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (ii) the court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause, the mortgagee shall upon request be placed in possession of the real estate, except that if the mortgagor shall object and show good cause, the court shall allow the mortgagor to remain in possession." 735 ILCS 5/15-1701(a), (b) (West 2008).

Section 15-1209 of the IMFL provides:

> " 'Mortgagor' means (i) the person whose interest in the real estate is the subject of the mortgage and (ii) any person claiming through a mortgagor as successor. Where a mortgage is executed by a trustee of a land trust, the mortgagor is the trustee and not the beneficiary or beneficiaries." 735 ILCS 5/15-1209 (West 2008).

Citibank argues that Toy, as the beneficiary of the land trust, is not the "mortgagor" and thus has no standing to object to the appointment of a receiver.

¶ 23 We disagree. Although section 15-1701(b)(2) of the IMFL provides for the ability of the mortgagor to object, the plain language of the statute does not limit standing to object to the appointment of a receiver to the mortgagor. Rather, section 15-1701(b)(2) of the IMFL merely provides that if the mortgagee has written authorization and the court is satisfied there is a reasonable probability that the mortgagee will prevail on a final hearing, the circuit court may

nevertheless leave the mortgagor in possession upon an objection and a showing of good cause by the mortgagor. Section 15-1701(b)(2) of the IMFL does not bar a party who otherwise has standing from objecting that the mortgagee lacks the proper written authorization or that the mortgagee has failed to show a reasonable probability that the mortgagee will prevail on a final hearing. In this case, the appointment of a receiver interferes with Toy's rights and liabilities with respect to management and control, use, or possession of the Property. Accordingly, Toy has standing to object to whether Citibank met the statutory requirements for appointment of a receiver, even if she does not have the ability to assert good cause for Marquette to retain possession if Citibank meets those requirements.

¶ 24 II. The Requirements For Appointing a Receiver

¶ 25 Generally, "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." 735 ILCS 5/15-1702 (West 2008). As noted earlier, in cases not involving residential real estate, the mortgagee is entitled to possession where: (1) the mortgagee is so authorized by the terms of the mortgage or other written instrument; and (2) the court is satisfied there is a reasonable probability the mortgagee will prevail on a final hearing of the cause. See 735 ILCS 5/15-1701(b) (West 2008). Our standard of review is *de novo*. *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010).

¶ 26 Toy argues Citibank failed to show a reasonable probability of prevailing on a final hearing of the cause. Citibank responds that a reasonable probability of its success is established by: (1) the allegations of default set forth in its amended complaint, verified petition and affidavit; (2) Toy's admission of late payments; and (3) the affidavit of a Citibank employee

attesting to the exercise of the call option in the note. This court has held that a proven default establishes a reasonable probability of succeeding in the mortgage foreclosure action. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 166 (2010). In a proper case, default may be proven with affidavits from the mortgagee. See *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 869 (1993). We note, however, the affidavits in *Mellon Bank* were uncontradicted. Toy asserts she was not in default because Citibank owed her more in escrow overpayments than the delinquent amount alleged in the complaint.

¶ 27 Toy relies on *Chicago Title & Trust Co. v. Exchange National Bank of Chicago*, 19 Ill. App. 3d 565 (1974), which ruled "[t]here is no default which would permit the mortgagor to accelerate the maturity of the debt when there is a set-off available which is equal to or exceeds the amount of the indebtedness due at the time of default." *Id.* at 567 (citing *Mason v. Griffith*, 281 Ill. 246, 256 (1917)). This court reasoned "it would be inequitable to permit one by his own act to cause a partial failure of the consideration for the mortgage without requiring him to credit the amount of such failure upon the indebtedness for the purchase price of the property." *Id.* This case involves foreclosure by the mortgagee, but Toy apparently believes the same equitable reasoning should apply in this context.

¶ 28 However, according to Toy's own supplemental response to the petition to appoint a receiver, the amount not refunded to Toy from Citibank's erroneous tax payments would be $8,692.52. Toy also claimed a $6,608.25 discrepancy in Citibank's 2008 escrow transaction summary. The complaint alleged the default from September 1, 2008, through January 1, 2009, totaled $39,885.49. Thus far in the litigation, Toy has failed to show a set-off in excess of the

indebtedness existed when Citibank accelerated the loan. Accordingly, even assuming for the sake of argument that the equitable rule stated in *Chicago Title & Trust Co.*, and Toy's calculations are correct, Toy's argument would fail, based on the record before us.

¶ 29 Toy next argues Citibank should be equitably estopped from relying on the call option to show a proven default. However, Citibank correctly notes that it need not rely on the call option to prove a default occurred, based on the evidence submitted by Citibank and admissions made by Toy.

¶ 30 Toy further argues Citibank's claim should be barred by the doctrine of unclean hands. However, like Citibank's invocation of the call option, Toy failed to plead unclean hands as an affirmative defense. Toy mentions unclean hands in her supplemental response to the petition, and then only in passing, merely citing *Brown v. Ryan*, 338 Ill. App. 864, 875 (2003), for the general proposition that a party may not benefit from its own wrongdoing, without developing the argument. Toy's brief mentions unclean hands in passing, but cites no authority on the issue; cursory references are insufficient to comply with the requirement of Illinois Supreme Court Rule 341(h)(7) (eff. Sept.1, 2006) that her brief contain arguments in support of her arguments. Accordingly, Toy's argument is forfeited on appeal.

¶ 31 Indeed, the circuit court made a similar observation. Toy cites the court's comment from the certified bystander's report in response to Toy's assertion of unclean hands that "[i]n the course of a case, things come out and you do have a cause of action but I'm going to grant plaintiff's petition." Toy interprets this comment as acknowledging she has a cause of action, but

in context, the judge was merely recognizing that as the litigation progressed, Toy might be able to show a valid objection, but had failed to do so thus far.

¶ 32 III. Good Cause

¶ 33 Finally, Toy asserts there was good cause for the mortgagor to remain in possession, even if Citibank otherwise met the statutory requirements for appointing a receiver. For the reasons earlier stated, good cause must be asserted by the mortgagor. Marquette failed to object and assert good cause in this case. Accordingly, Toy's argument fails.

¶ 34 CONCLUSION

¶ 35 In sum, in order to obtain the appointment of a receiver, Citibank needed only to show it was authorized by the terms of the mortgage or other written instrument and a reasonable probability that the mortgagee will prevail on a final hearing of the cause. Based on the record before us at this stage of the litigation, the circuit court did not err in concluding that such a probability exists, even if the possibility also exists that Citibank might not prevail at a final hearing. Thus, we conclude the circuit court did not err in ordering the appointment of a receiver in this case. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.