2011 IL App. (1st) 111966

SECOND DIVISION
December 6, 2011

No. 1-11-1966

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RBS CITIZENS, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	08 CH 16510
	)	
SCOTT LADANY, RED HOT CHICAGO, INC.,	)	Honorable
and SDL BUILDING ENTERPRISES, LLC,	)	Laura C. Liu,
	)	Judge Presiding.
Defendants-Appellants.	)	
	)	
(Jemm Wholesale Meat Co., Inc., Chicago Title	)	
Land Trust Co., Popular Leasing U.S.A., Inc., City	)	
of Chicago, Metropolitan Water Reclamation	)	
District of Greater Chicago, Unknown Owners,	)	
and Non-Record Claimants,	)	
	)	
Defendants.)	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

Held: During a commercial mortgage foreclosure proceeding, trial court correctly granted prejudgment possession of real estate to plaintiff and appointed a receiver because plaintiff's verified motion for appointment of a receiver contained undisputed evidence of an event of default on the mortgage.

¶1 Plaintiff RBS Citizens, N.A. initiated this action in order to foreclose on a commercial mortgage due to an alleged event of default. Plaintiff moved for prejudgment possession of the property and the appointment of a receiver, which the circuit court granted. We affirm.

¶2 BACKGROUND

¶3 Defendants Jemm Wholesale Meat Company, Inc. and SDL Building Enterprises, LLC are the beneficial owners of the real estate at issue in this case, which is held in a land trust. In 2006, Jemm, SDL, and the land trust collectively executed two promissory notes on a loan from plaintiff's predecessor in interest for a total principal of about $4.3 million that was secured by a mortgage on the real estate. The promissory notes were further guaranteed by defendant Scott Ladany and Daniel Goldman,[1] both of whom were shareholders and officers of one or more of the corporate borrowers.

¶4 According to the original complaint, defendants[2] fell behind in their payments on the note. Plaintiff declared them in default and initiated this case in 2008 in order to foreclose on the mortgage. It appears from the record that the parties eventually worked out the problem and defendants became current on their loan, although whether the mortgage was ever formally reinstated is disputed. For whatever reason, however, defendants did not move to dismiss the foreclosure action, as is the usual practice when a default is cured and a mortgage is reinstated. See 735 ILCS 5/15-1602 (West 2010) ("Upon such reinstatement of the mortgage, the foreclosure and any other proceedings for the collection or enforcement of the obligation secured by the mortgage shall be dismissed and the mortgage documents shall remain in full force and effect as if no acceleration or default had occurred."). The foreclosure action was merely stricken from the circuit court's case management call but remained pending for the next two

[1] Goldman was named as a defendant in the original complaint, but he was dropped from the amended complaint due to his discharge in bankruptcy after plaintiff initiated this case.

[2] Although few of the defendants to the action in the circuit court were parties to the note and mortgage (see 735 ILCS 5/15-1501 (West 2010) (detailing necessary and permissible parties to foreclosure proceedings)), nor was one of the parties on appeal (*i.e.*, Red Hot Chicago, Inc.), in order to keep the relative positions of the parties clear we will simply refer to "defendants" when speaking about actions taken by parties that are adverse to plaintiff in this case. Most of the parties named as defendants in this case are only nominal parties that have liens on the underlying real estate.

years. Because the foreclosure action remained pending, whether the mortgage was ever reinstated is irrelevant for purposes of this appeal.

¶5 While the case remained pending, three important events allegedly happened. First, about a month after the complaint was filed, Jemm began winding up its affairs and allegedly executed an assignment for the benefit of its creditors, who then allegedly sold off most of Jemm's assets to another company. Second, that company[3] allegedly leased the real estate from defendants, but the lease expired in July 2008 and was not renewed. Instead, the company remained in possession of the property as a holdover tenant. Third, and most importantly for purposes of our review, David Goldman, one of the guarantors on the notes, filed for bankruptcy in federal court on October 31, 2008.

¶6 The case finally became active again in 2011, when plaintiff filed a verified motion that asked the circuit court to appoint a receiver for the property. At the same time, plaintiff filed an unverified amended complaint. Unlike the first complaint, the amended complaint did not allege that defendants had defaulted due to nonpayment on the notes. The amended complaint instead alleged that defendants were in default on the mortgage because (1) they had executed an assignment for the benefit of creditors, (2) there was no written lease with the tenant that was then in possession of the real estate, and (3) a guarantor on the note had filed for bankruptcy. Plaintiff alleged that each of these events qualified as an event of default on the mortgage, which it argued entitled it to prejudgment possession of the real estate and the appointment of a receiver.

[3] It appears that another company not named in the complaint, Ladany's Food Enterprises, LLC (LFE) was also a guarantor on the mortgage, and defendant Red Hot Chicago, Inc. is allegedly a successor to LFE's guaranty. The complaint is somewhat unclear on this point, but it seems that either LFE or Red Hot Chicago was the company that purchased Jemm's assets. Either way, Red Hot Chicago ended up as both the tenant on the real estate and a guarantor of the mortgage.

¶7 Defendants filed a verified response, and their primary argument was that although plaintiff had alleged events of default, plaintiff had not *proven* that the defaults had actually occurred. The circuit court disagreed and appointed the receiver. Defendants appeal. See Ill. S. Ct. R. 307(a)(2) (eff. Feb. 26, 2010) (allowing an interlocutory appeal as of right from an order appointing or refusing to appoint a receiver).

¶8 ANALYSIS

¶9 The only issue on appeal is whether the circuit court was correct to grant prejudgment possession of the real estate to plaintiff and to appoint a receiver. We review an order appointing a receiver *de novo*. See *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 868 (1993). Although plaintiff contends that we should review the circuit court's order only for abuse of discretion, we have previously considered and rejected this same argument in several other recent cases and will not revisit it here. See *Bank of America, N.A. v. 108 State Retail LLC*, 401 Ill. App. 158, 164-65 (2010) (citing *People v. Vincent*, 226 Ill. 2d 1, 15-18 (2007)); *Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 391-92 (2010); *Mellon Bank*, 265 Ill. App. 3d at 865-68.

¶10 Under the Illinois Mortgage Foreclosure Law, the circuit court is required to appoint a receiver "[w]henever a mortgagee entitled to possession so requests." 735 ILCS 5/15-1702(a) (West 2010); *cf.* 735 ILCS 5/15-1704(a) (subject to enumerated exceptions, mandating appointment of a receiver "upon request of any party and showing of good cause"). The necessary prerequisite to the appointment of a receiver in this case is therefore whether plaintiff, the mortgagee, is entitled to prejudgment possession of the real estate. Under section 15-1701(b)(2), a mortgagee is entitled to possession 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." 735 ILCS 5/15-1701(b)(2) (West 2010).

¶11 The easiest and most common way for a mortgagee to demonstrate that it will prevail on a final hearing is by proving that the mortgagor has defaulted. See *Mellon Bank*, 265 Ill. App. 3d at 869 ("[A] proven default establishes a reasonable probability of success in a mortgage foreclosure action."); accord *Centerpoint Properties*, 398 Ill. App. 3d at 392; *108 N. State*, 401 Ill. App. 3d at 166. In this case, plaintiff's motion alleges three events of default: (1) the assignment for benefit of creditors, (2) the lack of a lease on the real estate, (3) and the bankruptcy of a guarantor.

¶12 For ease of analysis, we will focus on the guarantor's bankruptcy. The parties do not dispute that the bankruptcy filing of a guarantor is an event of default under the mortgage. Indeed, the mortgage instrument expressly states that one type of event of default is "the Institution by or against the Mortgagor or any guarantor of the Obligations of any proceedings under the Bankruptcy Code 11 USC §101 *et seq*. or any other law in which the Mortgagor or any guarantor of the Obligations is alleged to be insolvent or unable to pay its debts as they mature ***." This satisfies the first prong of the test.

¶13 What is in dispute is whether the second prong has been satisfied, that is, whether plaintiff has proven that a guarantor has filed for bankruptcy. The difficulty for plaintiff is that although the circuit court held a hearing it did not take any evidence, which limits the amount of evidence in the record on this issue. In the original complaint, in which Goldman was named as a defendant, plaintiff did allege that Goldman was a guarantor, but that complaint was not only unverified but was abandoned by plaintiff in favor of the amended complaint, which does not expressly refer to either Goldman or his bankruptcy. See *Barnett v. Zion Park District*, 171 Ill.

2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn. *** Allegations in a former complaint not incorporated in the final amended complaint are deemed waived.").

¶ 14 The fact that there was no evidentiary hearing and that the amended complaint is unverified is not necessarily dispositive, given that undisputed facts in an affidavit, a verified motion for appointment of a receiver, or the agreement of the parties can be used to prove a default. See 735 ILCS 5/15-1706 (West 2010) ("A request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion, whether or not such request is included in the complaint or other pleading. Any such request shall be supported by affidavit or other sworn pleading."); compare, *e.g.*, *Brown County State Bank v. Kendrick*, 140 Ill. App. 3d 538, 541 (1986) (receiver appointed after parties filed a verified motion and a verified denial, and the circuit court held an evidentiary hearing), with *Centerpoint Properties*, 398 Ill. App. 3d at 399-400 (no evidentiary hearing required where defendant had an opportunity to submit an offer of proof in opposition to plaintiff's motion but did not do so), *108 N. State*, 401 Ill. App. 3d at 166-68 (documentary evidence establishing default was undisputed by parties), *and Mellon Bank, N.A.*, 65 Ill. App. 3d at 869 (motion supported by affidavit). Although plaintiff's verified motion to appoint a receiver contains only the vague statement that one of the events of default was "the chapter 7 bankruptcy filing of a guarantor," plaintiff's verified reply to defendants' verified response contains significantly more information. In the verified reply, plaintiff states, "On October 31, 2008, Daniel B. Goldman, a guarantor of the Borrower's loan, filed a chapter 7 bankruptcy case in the United States Bankruptcy Court for the Northern District of Illinois."

The verified reply also included as exhibits copies of Goldman's guaranty and docket entries from the bankruptcy court.

¶15 Although waiting to present such detailed and important information until the reply brief is not the best practice, it is notable that defendants have never denied, neither in the circuit court nor on appeal, that Goldman was a guarantor or that he filed for bankruptcy. Defendant could have challenged these facts by filing a verified answer to the amended complaint, or by denying the allegations in a verified surreply, or even by moving to strike plaintiff's reply brief on the ground that it contained additional information and exhibits that had not been included in the original verified motion. Yet defendants did none of these things, so we must therefore treat Goldman's bankruptcy and the corresponding default as an admitted fact at this point in the case, at least for purposes of the motion to appoint a receiver. See 735 ILCS 5/15-1706(a) (West 2010); *cf.* 735 ILCS 5/15-1506(a) (regarding the effect of undisputed verified pleadings or affidavits at trial).

¶16 Based on the proven facts that Goldman filed for bankruptcy and that a bankruptcy by a guarantor is an event of default under the mortgage, we must conclude that plaintiff has shown a proven default.[4] This is not the end of the analysis, however, because the ultimate question is whether the mortgagee is reasonably likely to succeed on the merits. See 735 ILCS 5/15-1701(b)(2) (West 2010). Although plaintiff has shown a proven default, defendants argue that plaintiff's claim will fail at trial because of laches, estoppel, and waiver. These are affirmative defenses that must ordinarily be raised in an answer and supported by factual allegations (see 735 ILCS 5/2-613(d) (West 2010)), but as we noted above defendants have not filed one.

[4] The circuit court appears to have come to the same conclusion, but its written memorandum order inexplicably refers only to a default based on the bankruptcy of the other guarantor, Scott Ladany, who by all accounts is still solvent. Defendants argue (without citation to authority) that this apparent scrivener's error is crucial and is binding on us, but given that we review the appointment of a receiver *de novo* the error does not affect our analysis.

Although we take no position, of course, on the ultimate merits of plaintiff's claim or any affirmative defenses that defendant may raise and prove up at trial, we must at least consider whether defendants' allegations of waiver, estoppel, and laches are sufficiently supported to defeat the motion to appoint a receiver at this stage in the proceedings.

¶17 The problem with defendants' argument is that the affirmative defenses are unsupported by verified facts. Without a verified answer in the record that pleads specific facts in support of the defenses, we are limited to solely the facts presented in defendants' verified response to plaintiff's motion to appoint a receiver. Aside from the speculative assertion that plaintiff must have known about Goldman's bankruptcy long before plaintiff moved for appointment of a receiver, the only facts that defendants offer in their verified response in support of their arguments are as follows:

> "In the intervening 2 ½ years [between Goldman's bankruptcy and plaintiff's filing of the amended complaint], Plaintiff did not declare a default, did not accelerate, but did accepted [*sic*] payments from the Defendants without objection. Had Defendants been aware of Plaintiff's position they could have arranged for other financing or otherwise dealt with the purported default. Any such claim should now be barred."

¶18 As defendants acknowledge, waiver is the intentional relinquishment of a known right (*Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (discussing the difference between forfeiture and waiver)), but what is notably absent from defendants' verified response is any fact demonstrating that plaintiff knowingly and intentionally gave up its right to foreclose on the

mortgage in the event of a guarantor's bankruptcy. Without such a fact in evidence, there is no basis for a defense of waiver.[5]

¶ 19 Nor does defendants' verified response support a defense of equitable estoppel, by which a party "is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). In order to defeat a claim based on equitable estoppel, a party must demonstrate that:

> "(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *Id.* at 313-14.

¶ 20 Even if we were to assume that defendants were prejudiced by plaintiff's two-and-a-half-year delay in declaring defendants in default due to Goldman's bankruptcy, the verified response contains no allegations of any material, untrue statements about the bankruptcy by plaintiff that defendants reasonably relied upon. There are consequently no facts on which defendants could base a defense of equitable estoppel.

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[5] This is in contrast to fairly extensive evidence in the verified response and its exhibits that could be construed as a waiver of the original default for lack of payment on the loan. It is reasonably undisputed that the payment default was cured not long after plaintiff filed this case, although whether the mortgage was ever formally reinstated after that is at least debatable.

¶21 Finally, the verified response contains no basis for a defense of laches. "The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party." *Van Milligan v. Board of Fire & Police Commissioners*, 158 Ill. 2d 85, 89 (1994). Neither element is supported by defendants' verified response. Regarding the first element, defendants merely speculate that plaintiff must have known about the bankruptcy as soon as Goldman filed it and was therefore culpably dilatory because it waited two and a half years before amending the complaint and moving for appointment of a receiver. Yet defendants do not offer any facts to support their speculative assertions. Even if we assumed that plaintiff did know about the bankruptcy, defendants have not offered any facts to explain why a delay of two and a half years displays a lack of due diligence. Notably, the mortgage instrument specifies that, "[o]n the occurrence of any Event of Default [plaintiff] may, *at any time thereafter, at its option and,* to the extent permitted by applicable law, *without notice* **** [f]ile a suit for foreclosure of this Mortgage and/or collect the Obligations." (Emphasis added.) Given that the instrument allows plaintiff to pursue foreclosure at any time and without notice after a default, a delay of two and a half years is not by itself evidence of a lack of due diligence.

¶22 Nor have defendants presented any facts that might indicate that they were prejudiced by the delay. Although defendants claim that they might have "arranged for other financing or otherwise dealt with the purported default" had they known about it, we cannot see how that would have solved the problem. A default based on the bankruptcy of a guarantor is not the same as a default based on nonpayment of a loan, which can be cured by making the loan current. In fact, we do not even know whether a default based on a guarantor's bankruptcy can be cured, and neither defendants' verified response nor their brief on appeal offers an explanation or tells us what they might have done differently had plaintiff declared defendants in

default as soon as Goldman filed for bankruptcy. Absent any additional facts, there is no reason to believe that defendants would be in any other position than the one that they are in now, which means that they have not been prejudiced by plaintiff's delay.

¶ 23 CONCLUSION

¶ 24 Plaintiff has demonstrated a proven default by defendants on the mortgage based on Goldman's bankruptcy, and none of defendants' proffered affirmative defenses are sufficiently supported by defendants' verified response to plaintiff's motion in order to preclude us from reasonably believing that plaintiff will be successful on the merits when this case proceeds to trial. Plaintiff is consequently entitled to prejudgment possession of the real estate and to appointment of the receiver. Given that plaintiff has proven that Goldman's bankruptcy constitutes an event of default under the mortgage, we need not consider whether plaintiff has proven the other two alleged events of default.

¶ 25 Affirmed.