2012 IL App (1st) 120975-U

THIRD DIVISION
November 28, 2012

No. 1-12-0975

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ZDE INVESTMENTS, INC.,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
	)	
v.	)	No. 10 L 9546
	)	
	)	HONORABLE
MICHAEL BOSCO,	)	BILL TAYLOR,
Defendant-Appellant.	)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Salone and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant borrower appealed from circuit court orders ordering payment to the plaintiff lender on a balloon note. The appellate court ruled that affidavits signed by the borrower allowed the lender to reject the warranty deed offered in lieu of foreclosure until the lender recorded the deed, which the lender ultimately rejected. Accordingly, there was no accord and satisfaction precluding the lender from suing on the note. The judgment of the circuit court is affirmed.

¶ 2 Defendant, Michael Bosco, appeals orders of the circuit court of Cook County entering judgment on the pleadings in favor of plaintiff, ZDE Investments, Inc. (ZDE), and ordering Bosco to pay ZDE $126,927.50 in principal and interest on a balloon note. On appeal, Bosco

argues that the trial judge erred in entering judgment on the pleadings, because: (1) he denied all liability on the note; (2) ZDE accepted a warranty deed on real property in accord and satisfaction of the amount owed; (3) the documents executed with the purported settlement agreement should be construed against ZDE as the drafter; and (4) ZDE took an unreasonable amount of time to reject the warranty deed and violated the implied covenant of good faith in the parties' agreement. For the following reasons, we reject Bosco's arguments and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses that on August 9, 2010, ZDE filed a verified complaint against Bosco sounding in breach of contract. The complaint alleges that on June 28, 2006, Bosco entered into a balloon note, which was attached as an exhibit to the pleading. ZDE alleged that it performed all of its obligations under the note, but Bosco defaulted in payment due under the note. ZDE sought $108,135.70, plus continuing interest of $31.10 per diem from July 13, 2010.

¶ 5 On October 13, 2010, Bosco filed an answer and affirmative defense. Bosco denied the allegations in ZDE's complaint. Bosco also asserted the affirmative defense of accord and satisfaction. Bosco alleged that the parties entered into a settlement agreement by which Bosco agreed to turn over certain property in Gary, Indiana, in return for a release of personal liability on the note. Bosco also alleged that on March 9, 2009, ZDE's counsel presented Bosco with an estoppel affidavit, warranty deed, and other documents. Bosco allegedly executed and returned the estoppel affidavit and warranty deed on the same date. Bosco asserted that he assumed the

matter was settled, but he was notified on July 16, 2010, that ZDE was not accepting the warranty deed. Bosco maintained the delivery of the warranty deed was an enforceable accord and satisfaction.

¶ 6 On November 4, 2010, ZDE filed its response to Bosco's affirmative defense. ZDE asserted that the settlement agreement included an estoppel affidavit granting ZDE the right to reject the deed, proceed by foreclosure suit, and assert all of its rights under the note and mortgage. ZDE attached a copy of the estoppel affidavit as an exhibit to its response.

¶ 7 ZDE also asserted that Bosco executed a possession affidavit stating that Bosco acknowledged that the warranty deed in lieu of foreclosure was not being accepted by ZDE until it was recorded. ZDE also attached a copy of the possession affidavit to its response. ZDE further asserted that it had attempted to mitigate its damages by marketing the underlying property. Lastly, ZDE asserted that Bosco had no right to assume the matter was settled, based upon the documents preserving ZDE's right to proceed on the note and mortgage.

¶ 8 Although ZDE apparently filed a request to admit facts, the pleading is not included in the record on appeal. On January 26, 2011, Bosco filed his response to the request to admit facts, in which he admitted signing the balloon note, but denied not paying the note, and stated that the property in Gary, Indiana had been turned over in full satisfaction of the note.

¶ 9 On June 1, 2011, ZDE filed a motion for judgment on the pleadings pursuant to section 2-615(e) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615(e) (West 2010)). ZDE argued that no question of material fact remained in the case, because: (1) Bosco signed documents acknowledging the validity of the note and ZDE's reservation of rights; (2) Bosco

failed to attach the settlement agreement to his response and affirmative defense; and (3) Bosco's affirmative defense was belied by documents signed by Bosco and attached to ZDE's response to the affirmative defense.

¶ 10 On June 29, 2011, Bosco filed a response to ZDE's motion for judgment on the pleadings and cross-motion for summary judgment, supported by his own affidavit and deposition testimony from ZDE's counsel. Bosco argued that contradictory language in the documents he executed should be construed against ZDE because they were drafted by ZDE's counsel. Bosco also argued that ZDE took an unreasonable time – 16 months – to reject the deed. Bosco further argued that under the law of accord and satisfaction, ZDE had no right to accept the benefits of the settlement agreement and demand payment on the note.

¶ 11 On August 2, 2011, ZDE filed its reply to Bosco's response, arguing that the statute governing acceptance of a deed in lieu of foreclosure (735 ILCS 5/15-1401 (West 2010)) provides: (1) a person may agree not to be relieved of personal liability; (2) the mere tender or recording of the deed shall not constitute acceptance; and (3) for no particular time limit on acceptance or rejection.

¶ 12 On August 11, 2011, the circuit court entered a memorandum order granting ZDE's motion for judgment on the pleadings, ruling that Bosco's affirmative defense of accord and satisfaction were negated by the estoppel and possession affidavits Bosco signed.

¶ 13 On October 19, 2011, Bosco filed a motion to reconsider, arguing that the trial judge had disregarded the law construing contracts against the drafter and the law of accord and satisfaction. On December 6, 2011, ZDE filed its response to the motion to reconsider, arguing

that the trial court's order was correct and the case law cited by Bosco was not on point. On January 27, 2012, the circuit court denied the motion to reconsider.

¶ 14 On February 15, 2012, the circuit court entered a judgment order in the amount of $126,927.50. On the same date, Bosco filed a motion to reconsider, claiming in part that he was entitled to a setoff in the amount of the value of the underlying property. On February 29, the circuit court entered an order granting the motion in part on the ground that the unrecorded warranty deed was void and Bosco remained the owner of the underlying property, but denying the claim for a setoff. On March 29, 2012, Bosco filed a timely notice of appeal to this court.

¶ 15 DISCUSSION

¶ 16 On appeal, Bosco argues that the circuit court erred in granting judgment on the pleadings. When a defendant makes a motion for judgment on the pleadings, he concedes the truth of the well-pled facts of the plaintiff's complaint. *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 442 (2010). In reviewing the motion, we must draw all reasonable inferences in favor of the nonmovant and construe the allegations strictly against the movant. *Nationwide Mutual Fire Insurance Co. v. T and N Master Builder and Renovators*, 2011 IL App (2d) 101143, ¶ 8. We must determine whether there is a genuine issue of material fact presented by the pleadings. *Id*. If no such issue is presented, then we determine whether the movant is entitled to judgment. *Id*. Our standard of review is *de novo*. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003).

¶ 17 Bosco argues that the circuit court erred because he denied all liability or any amount was owed in his answer. Bosco initially denied the allegations of ZDE's complaint. However,

Bosco's response to the request to admit facts admits that he signed the balloon note. Bosco's denial of default was based on his claim that the property in Gary, Indiana had been turned over in full satisfaction of the note. This is clearly not a well-pled denial, but rather a tacit admission that Bosco failed to pay the note under the terms of the note. The bare denial of ZDE's well-pleaded allegations does not raise a genuine issue of material fact precluding judgment on the pleadings. *State Farm Fire and Casualty Co. v. Young*, 2012 IL App (1st) 103736, ¶ 19.

¶ 18 Bosco also notes that "[a] denial of the amount claimed, standing alone, is sufficient to preclude the entry of judgment on the pleadings." *Zipf v. Allstate Insurance Co.*, 54 Ill. App. 3d 103, 108 (1977). However, in *Zipf*, an insurance dispute arising in a personal injury case, the pleadings and the record did not set forth any medical expenses nor the income lost for a determination of the weekly benefits to which plaintiff may have been entitled under her policy. *Id*. In contrast, in this case, Bosco's motion to reconsider the judgment amount did not challenge the amount claimed, except to claim a setoff for the value of the property. The circuit court's order on reconsideration clarified that Bosco remained the owner of the property and denied the setoff. Bosco makes no argument on appeal that the trial court erred in doing so.

¶ 19 Indeed, as ZDE notes, Bosco filed his own cross-motion for summary judgment in opposition to its motion for judgment on the pleadings. When parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005). By moving for summary judgment, Bosco conceded the absence of a genuine issue of material fact precluding the entry of judgment for ZDE.

¶ 20 Accordingly, the remaining issue is whether the circuit court erred in rejecting Bosco's affirmative defense of accord and satisfaction.

¶ 21 An accord and satisfaction is a contractual method of discharging debts or claims between the parties to such an agreement. In order for such an arrangement to exist, there must be: (1) a bona fide dispute as to the claims pending between the parties; (2) an unliquidated sum owed; (3) consideration; (4) a shared mutual intent to compromise the claims; and (5) execution of the agreement. *Saichek v. Lupa*, 204 Ill. 2d 127, 135 (2003). The accord is the actual agreement between the parties, while the satisfaction is its execution or performance. *Id.* Because the concept is grounded on contract law, courts focus on the intent of the parties when discerning whether an accord and satisfaction has been reached and subsequently executed. *Id*. Thus, a transaction will constitute an accord and satisfaction of a claim only where both parties intend it to have that effect. *Holman v. Simborg*, 152 Ill. App. 3d 453, 456 (1987). When a payment of less than what is claimed is tendered and accepted, it will not constitute an accord and satisfaction of the entire claim unless it can be demonstrated that the creditor intended to accept it as full satisfaction. *Id*. Where the facts upon which a claim of accord and satisfaction is asserted are not in dispute, the question of the creditor's assent is one of law to be determined by the circuit court. *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc. v. La Crosse Litho Supply, LLC*, 361 Ill. App. 3d 872, 877 (2005).

¶ 22 In this case, the circuit court correctly noted that the estoppel affidavit included a provision where ZDE "reserves the right to reject said deed, to proceed by foreclosure suit, and to assert all its rights against [Bosco] under the note and mortgage." Such language does not evince

ZDE's intent to compromise. Moreover, the possession affidavit Bosco signed states that he "acknowledges that he understands that the *** warranty deed in lieu of foreclosure is not being accepted by ZDE *** until it is recorded [.]" This language clearly shows the parties understood that the settlement was conditional and not effective until ZDE elected to record the deed.

¶ 23 Bosco relies heavily on *Hrubos v. Helfrick*, 220 Ill. App. 3d 787 (1991), in which this court held that there was an accord of satisfaction where plaintiffs agreed to accept a warranty deed covering a deficient amount of land, and the warranty deed was delivered and accepted without being returned. *Id*. at 792. However, *Hrubos* did not involve affidavits with the language presented here. Moreover, in *Hrubos*, the defendant demanded return of the deed if the plaintiffs were not satisfied. *Id*. at 791. Such is not the case here.

¶ 24 Bosco also cites the general rule that contracts are construed against the drafter. *Signal Capital Corp. v. Lake Shore National Bank*, 273 Ill. App. 3d 761, 772 (1995). However, Bosco fails to identify any ambiguity in any of the documents at issue here. Bosco notes that when a time for performance of an obligation under a contract is not specified, a reasonable time will be implied. *E.g.*, *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1092 (2003). Bosco also notes that a covenant of good faith and fair dealing is implicit in every contract to ensure that no party takes advantage of another in an unforseen manner by exercising discretion arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations. *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 799 (2011).

¶ 25 However, it does not follow that ZDE took an unreasonable amount of time to reject the deed or acted in bad faith. As ZDE notes, the statute governing deeds in lieu of foreclosure

contains no limitations period. 735 ILCS 5/15-1401 (West 2010). Nor has Bosco argued that ZDE's action was untimely under any other statute of limitations. The typical statute of limitations exists primarily "to require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims." *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet*, 61 Ill. 2d 129, 132 (1975). ZDE's actions conformed to the law and the terms of the affidavits Bosco signed, which clearly reflect the intent of the parties. Given the undisputed facts presented in the record on appeal, including ZDE's attempt to mitigate damages by marketing the underlying property, Bosco has failed to show that ZDE took an unreasonable time to reject the deed or acted in bad faith.

¶ 26 In short, Bosco has failed to show that the circuit court erred in concluding that there was no accord and satisfaction in this case. Moreover, Bosco has failed to show any ambiguity in the documents he signed or any violation of an implied contractual duty by ZDE.

¶ 27 CONCLUSION

¶ 28 In sum, we conclude that the circuit court did not err in granting judgment on the pleadings to ZDE. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.