2015 IL App (1st) 150507-U
No. 1-15-0507

THIRD DIVISION
November 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 12 CH 27493
v.	)	
JAROSLAW ZAWARTKA,	)	The Honorable Allen P. Walker,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly rejected defendant's affirmative defense of equitable estoppel by entering summary judgment for plaintiff where defendant failed to allege facts sufficient to satisfy any elements of equitable estoppel. In the exercise of our broad discretion, we decline plaintiff's request to impose sanctions against defendant under Illinois Supreme Court Rule 375(b).

¶ 2 Defendant, Jaroslaw Zawartka, appeals from orders of the circuit court of Cook County entering a judgment of foreclosure and sale in favor of plaintiff, Federal National Mortgage Association, and approving the sale of his condominium unit. Defendant contends that the trial

court erred in rejecting certain affirmative defenses to plaintiff's foreclosure complaint by granting plaintiff's motion for summary judgment, entering a judgment of foreclosure and sale, and ultimately confirming the sale of defendant's condominium unit.

¶ 3 BACKGROUND

¶ 4 On July 19, 2012, plaintiff filed a mortgage foreclosure complaint against defendant concerning the mortgage and note executed in connection with defendant's condominium unit located at 280 Monarch Drive in Streamwood, Illinois. Plaintiff alleged that defendant had failed to pay "the monthly installments of principal, interest, taxes and/or insurance for September 2011 through the present; the principal balance due on the note and the mortgage is $185,330.96, plus interest, costs, advances and fees. Interest accrues at a *per diem* rate of $10.16."

¶ 5 Attached as exhibits to the complaint were the mortgage agreement and the promissory note that defendant executed and delivered to America's Wholesale Lender in the original and principal amount of $189,000, and the assignment of the mortgage and note to plaintiff, all dated December 15, 2003. The mortgage contains an acceleration clause in bold print stating, in pertinent part:

> "22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.

> The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence."

¶ 6 The affidavit of special process server Dennis Velickovich was filed on September 5, 2012. Velickovich averred that he personally served defendant with summons and a copy of plaintiff's complaint at 8:30 p.m., on July 26, 2012. Attached to the affidavit was a copy of the six-page summons. Four of those pages refer defendant to Housing and Urban Development (HUD)-approved counseling, two in English and two in Spanish.

¶ 7 Charles Silverman of the law firm of Kaplan Silverman, LLC, entered an appearance for defendant in September 2012. Defendant filed a demand for a bill of particulars in October and plaintiff responded with a motion to strike in December.

¶ 8 The law firm of Charles Aaron Silverman, PC, entered an additional appearance for defendant on March 6, 2013.

¶ 9 In May 2013, plaintiff moved for entry of an order of default against defendant who "was served via personal service with the complaint and summons on July 26, 2012, and filed an appearance on March 6, 2013 but has failed to answer or otherwise plead." Plaintiff also moved for entry of a judgment of foreclosure and sale, an order appointing a selling officer, and to dismiss unknown owners and nonrecord claimants. Attached to plaintiff's motion for judgment

of foreclosure and sale was the affidavit of Andrew Fry, a foreclosure specialist of Seterus, Inc., "as Servicer for Federal National Mortgage Association" (plaintiff). Fry averred that as of May 10, 2013, the total principal, accrued interest, and other expenses on the note and mortgage was $202,031.26.

¶ 10 In June 2013, an agreed order was entered whereby defendant withdrew his demand for a bill of particulars, plaintiff withdrew its motion to strike, and defendant was granted 28 days to answer or otherwise plead.

¶ 11 In July 2013, almost one year after plaintiff filed the underlying foreclosure complaint, defendant filed his answer raising two affirmative defenses: failure of condition precedent and equitable estoppel. As to the affirmative defense of failure of condition precedent, defendant alleged that he "does not have an acceleration letter or a letter advising him to seek HUD counseling, and believes that Plaintiff failed in their responsibilities under paragraph 22 of the mortgage." As to the affirmative defense of equitable estoppel, defendant alleged that English is not his first language, that he discovered upon review with counsel that his monthly income had been changed by the loan officer from $4,000 to $6,500, and that he never received a copy of the tax escrow act at closing or with his loan modification.

¶ 12 In September 2013, plaintiff filed its motion to strike defendant's affirmative defenses pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). Plaintiff denied the allegations presented in defendant's affirmative defenses and stated that defendant's allegations were merely conclusions unsupported by facts or any other evidence and thus insufficient to state a defense that would hinder the subject foreclosure action. As to defendant's allegation that plaintiff failed to provide him the required acceleration letter or a letter advising him to seek HUD counseling, plaintiff stated that it should be stricken because

defendant failed to provide evidence to support the claim. Plaintiff added that pursuant to the terms of the mortgage, notice of acceleration was deemed to have been given when it mailed the notice of acceleration to defendant at the subject property address on October 30, 2011. Plaintiff also stated that a copy of the acceleration notice[1] was tendered to opposing counsel in discovery. As to defendant's allegation that the loan officer changed his monthly income and he did not receive a copy of the tax escrow disclosure statement, plaintiff stated that defendant failed to provide factual evidence to support his estoppel claim, that plaintiff was an assignee and could not be liable for any wrongdoing that occurred at the closing of the subject loan, and that defendant failed to attribute any wrongdoing to plaintiff, who was not the original lender.

¶ 13 In October 2013, plaintiff filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2012)), seeking a judgment of foreclosure and sale of defendant's condominium unit and arguing that defendant, in his responsive pleading, failed to provide any evidence to raise a genuine issue of material fact as to an affirmative defense and as to the allegations contained in plaintiff's mortgage foreclosure complaint. Attached as an exhibit was the same affidavit of the foreclosure specialist that plaintiff had attached to its motion for judgment of foreclosure and sale.

¶ 14 In November 2013, the trial court scheduled plaintiff's motions for "Summary Judgment/Judgment of Foreclosure & Sale & Motion to Strike Affirmative Defenses" for hearing on March 14, 2014.

¶ 15 In January 2014, defendant filed his response to plaintiff's motion for summary judgment and to strike affirmative defenses. Defendant did not file counter-affidavits to rebut the facts in plaintiff's supporting affidavit for judgment of foreclosure and sale. As to summary judgment,

[1] The common law record does not contain a copy of the acceleration notice.

defendant stated that plaintiff was seeking a "drastic" remedy that should only be allowed when the right of the movant is clear and free from doubt. Defendant recited the affidavit requirements of Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) and the foundational requirements for admission of a business record pursuant to Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992). Defendant stated that an affidavit must not recite facts "on information and belief," that an affidavit must contain facts stated with particularity that support its conclusions, and that an affidavit violates the competence requirement when it contains inadmissible hearsay. As to striking affirmative defenses, defendant recited section 2-613(d) of the Code (735 ILCS 5/2-613(d) (West 2012)), which requires that affirmative defenses must be plainly set forth in the answer. Defendant stated that it is the facts of an affirmative defense that must be alleged with particularity, not matters of law, and that it is not necessary for the correct legal title to be appended to an affirmative defense. Defendant thus concluded that plaintiff's motion for summary judgment and to strike affirmative defenses must be denied.

¶ 16 In February 2014, plaintiff filed a reply to defendant's response. Plaintiff stated that defendant filed his combined response to plaintiff's motions to strike affirmative defenses and for summary judgment, alleging that his affirmative defenses were properly pleaded and that plaintiff's affidavit for judgment was insufficient. Plaintiff stated, however, that it made a *prima facie* showing that it owned the note when it attached a copy of the subject note and mortgage to its complaint. As to defendant's challenge to the sufficiency of the affidavit for judgment, plaintiff stated that defendant failed to attach a counter-affidavit or any other evidence to contradict the facts alleged in plaintiff's pleadings and supporting affidavit.

¶ 17 On March 14, 2014, the trial court contemporaneously entered, *inter alia*, summary judgment against defendant and a judgment of foreclosure and sale in favor of plaintiff. The trial court subsequently entered an order approving sale on January 21, 2015.

¶ 18 Defendant, represented by the same counsel, filed a notice of appeal on February 17, 2015. Defendant specified therein that he was appealing from the "01/21/15 order approving sale, 03/14/14 judgment of foreclosure and sale," and that the relief sought on appeal was, "To overturn the judgment of foreclosure and sale and the order approving sale."

¶ 19 ANALYSIS

¶ 20 As a threshold matter, we note that we have an independent duty to consider our jurisdiction and dismiss the appeal where jurisdiction is lacking. *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 24. Illinois Supreme Court Rule 303(b)(2) (eff. Jan. 1, 2015) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court. "An appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009), quoted in *JP Morgan Chase Bank, N.A. v. Bank of America, N.A.*, 2014 IL App (1st) 140428, ¶ 33.

> "If from the notice of appeal itself and the subsequent proceedings it appears that the appeal was intended, and the appellant and appellee so understood, to have been taken from an unspecified judgment or part thereof, the notice of appeal may be construed as bringing up for review the unspecified part of the order or judgment. Such a construction would be appropriate where the specified order directly relates back to the judgment or order sought to be reviewed. Paraphrasing the language of *Elfman*, the unspecified judgment is reviewable if it is a 'step in the procedural progression leading' to the

judgment specified in the notice of appeal. 567 F.2d 1252, 1254." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 434-35 (1979).

¶ 21 Foreclosure actions involve a bifurcated procedure whereby the trial court enters a judgment of foreclosure and sale, which does not terminate the action and is not appealable absent a specific finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), and then enters an order confirming the sale and distributing the sale proceeds, which is final and appealable. *North Community Bank*, 2015 IL App (1st) 133672, ¶ 25.

¶ 22 Here, the notice of appeal specified that appeal was being taken from the "01/21/15 order approving sale, 03/14/14 judgment of foreclosure and sale" and the relief sought from the reviewing court, "To overturn the judgment of foreclosure and sale and the order approving sale." It is also apparent from defendant's appellate brief that the trial court's rejection of his affirmative defenses to plaintiff's foreclosure complaint is at issue. The trial court's rejection of defendant's affirmative defenses was a "step in the procedural progression" of the foreclosure action that ultimately resulted in the confirmation of the sale of defendant's condominium unit. *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 13. Accordingly, it is defendant's appeal from the January 21, 2015, order approving sale that triggers our review of the trial court's rejection of certain affirmative defenses to plaintiff's foreclosure complaint by entering summary judgment for plaintiff. *Bukowski*, 2015 IL App (1st) 140780, ¶ 13.

¶ 23 To that end, summary judgment is appropriate "if 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." *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2010)). "However, summary judgment requires the responding party to come forward with the evidence

that it has—it is the put up or shut up moment in a lawsuit." (Internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14, quoted in *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15. Denials in a defendant's answer do not raise a material issue of genuine fact to preclude summary judgment. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. When the party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the opposing party files no counter-affidavits, the material facts set forth in the moving party's affidavit are deemed admitted. *Korzen*, 2013 IL App (1st) 130380, ¶ 49 (construing *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993)). Whether an affirmative defense is adequate as a matter of law to create a genuine issue of material fact to preclude summary judgment is subject to *de novo* review. *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15.

¶ 24 As to the merits of defendant's appeal, plaintiff correctly notes that although defendant identifies the question presented on appeal as, "Whether an acceleration letter that does not identify the specific amount needed to cure satisfies a condition precedent to the filing of a mortgage foreclosure complaint," defendant asserts in his statement of facts, "The First Affirmative Defense, failure of a condition precedent, is not at issue in this appeal." See, *e.g.*, *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 90 (similar facts). We further observe that defendant makes no arguments regarding the failure of a condition precedent in the argument section of his appellate brief. Under these circumstances, we do not consider defendant's first affirmative defense in our analysis. *O'Gorman*, 2015 IL App (1st) 133472, ¶ 90.

¶ 25 To the extent that defendant challenges the trial court's rejection of his affirmative defense of equitable estoppel (*Korzen*, 2013 IL App (1st) 130380, ¶ 11 (addressing the merits of

defendants' appeal "so much as we can discern them from their briefs")), we agree with plaintiff that defendant failed to allege sufficient facts to support that defense. In order to plead equitable estoppel as an affirmative defense, defendant must plead and prove, by clear and unequivocal evidence, the following: (1) that the other person misrepresented or concealed material facts; (2) that the other person knew the representations were untrue when they were made; (3) that the party asserting estoppel did not know the representations were untrue when they were made and when they were acted upon; (4) that the other person intended or reasonably expected that the party asserting estoppel would act upon the representations; (5) that the party claiming estoppel reasonably relied on the representations to his detriment; and (6) that the party claiming estoppel would be prejudiced by his reliance on the representations if the other person is permitted to deny the truth thereof. *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313-14 (2001).

¶ 26 Here, the facts alleged by defendant regarding his affirmative defense of equitable estoppel were insufficient as a matter of law. Defendant alleged that English is not his first language, that he discovered upon review with counsel that his monthly income had been changed by the loan officer from $4,000 to $6,500, and that he never received a copy of the tax escrow act at closing or with his loan modification. Defendant, however, failed to allege facts sufficient to satisfy any elements of equitable estoppel, as enumerated above. *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000). Under these circumstances, we conclude that the trial court's rejection of defendant's affirmative defense of equitable estoppel by entering summary judgment for plaintiff was proper. *JPMorgan Chase Bank, N.A. v. East-West Logistics, LLC*, 2014 IL App (1st) 121111, ¶¶ 44-45.

¶ 27 Although plaintiff requests that this court impose sanctions against defendant under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) for filing a frivolous appeal, we observe

that "an unsuccessful appeal does not necessarily indicate that the appeal was frivolous, was taken in bad faith, or otherwise requires the imposition of sanctions." *RBS Citizens, N.A. v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 194 (2011). Considering the circumstances of this appeal, we do not believe that Rule 375(b) sanctions are appropriate. Notwithstanding the deficiencies in defendant's appellate brief (see Ill. S. Ct. R. 375(a) (eff. Feb. 1, 1994)), we feel that it is reasonable that defendant would appeal the trial court's rejection of his affirmative defenses by entering summary judgment for plaintiff given that the issue on appeal is subject to *de novo* review. *RBS Citizens, N.A.*, 407 Ill. App. 3d at 194. "We agree that there is little or no merit to this appeal but in the exercise of our discretion, we decline to impose sanctions." *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011).

¶ 28 CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of foreclosure and sale and the order approving the sale of defendant's condominium unit over defendant's contention that the trial court erred in rejecting his affirmative defense of equitable estoppel by entering summary judgment for plaintiff.

¶ 30 Affirmed.