2018 IL App (1st) 162725-U
Order filed: March 30, 2018

FIFTH DIVISION

No. 1-16-2725

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JPMORGAN CHASE BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 M1 723005
	)	
IRWIN S. NEGRON, a/k/a Irwin Negron,	)	Honorable
	)	Leonard Murray,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: In this forcible entry and detainer action, summary judgment in favor of plaintiff and denial of motion to reconsider are affirmed, where defendant's affirmative defenses were unfounded and there was no issue of fact with respect to plaintiff's immediate right to possession of the subject property.

¶ 2 In this forcible entry and detainer action, defendant-appellant, Irwin S. Negron, a/k/a Irwin Negron, appeals from summary judgment entered in favor of plaintiff-appellee, JPMorgan Chase Bank, N.A. (Chase), as well as from the denial of a motion to reconsider that decision. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 5, 2009, Chase filed a complaint to foreclose a mortgage on a condominium (unit 3S) located at 3426 North Ashland Avenue in Chicago, Illinois (the property). Among

others, the foreclosure action named Irwin and his wife, Ewelina Negron, as defendants and identified them as the owners of the property. On September 22, 2009, a judgment of foreclosure was entered against all defendants, and the order also directed that the property be sold at auction. The order further provided that if no redemption was made prior to such sale, the defendants "shall be forever barred and foreclosed of any right, title, interest, claim, lien or right to redeem in and to the mortgaged real estate," and that "a deed shall be issued to the purchaser according to law and such purchaser shall be let into possession of the mortgaged real estate in accordance with statutory provisions." The delivery of that deed would also "be an entire bar of all claims of parties to the foreclosure and all claims of any non-record claimant who is given notice of the foreclosure as provided by statute." No effort to redeem was made, and Chase was the successful bidder at the sale.

¶ 5 Thereafter, Chase filed a "motion for order approving report of sale and distribution and possession." In the motion, Chase requested that "the Court enter an Order Approving the Report of Sale and Distribution and enter an Order for Possession in favor of the successful bidder, insures, investors, and agents of the plaintiff and against EWELINA E. NEGRON AKA EWELINA NEGRON AKA EWELINA KOZAL." Pursuant to the motion, on August 26, 2010, the court entered an order approving the report of sale and distribution, confirming the sale and granting possession to Chase (order of possession). Specifically, the order of possession stated:

> "That upon request by the successful bidder, including any insures, investors, and agents of Plaintiff[,] [are] entitled to and shall have possession of the premise as of a date 30 days after entry of this Order.
>
> That the Sheriff of Cook County is directed to evict and dispossess EWELINA E. NEGRON AKA EWELINA NEGRON AKA EWELINA KOZAL from the premises

commonly known as 3426 NORTH ASHLAND AVENUE, UNIT 3S, Chicago, IL 60657.'

The Sherriff cannot evict until 30 days after this order.

No occupants other than the individuals named in this Order of Possession may be evicted without a Supplemental Order of Possession or an order from the Forcible Entry and Detainer Court."

¶ 6 Title to the property was conveyed to Federal National Mortgage Association (FNMA) by judicial sale deed dated September 3, 2010. Title was thereafter transferred from FNMA back to Chase by a deed dated June 20, 2012.

¶ 7 On July 12, 2013, Chase filed a motion to amend the order approving sale, *nunc pro tunc*, to include an order directing the Sherriff to evict defendant. The circuit court denied the motion on October 2, 2013, in what was the last order entered in the foreclosure action.

¶ 8 FNMA and Chase also sought to obtain possession of the property pursuant to the Forcible Entry and Detainer Act[1] (735 ILCS 5/9-101, *et seq*. (West 2016)) (Act), ultimately leading to the matter currently before this court. Thus, on September 28, 2011, FNMA filed a complaint under the Act against defendant which was thereafter voluntarily dismissed on May 9, 2012. On December 18, 2012, after title was transferred to Chase, Chase filed a second complaint under the Act that was thereafter voluntarily dismissed on February 5, 2013. On October 3, 2014, Chase filed the third, current forcible entry action seeking to evict defendant under the Act.

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[1] This act was recently amended to remove references to "forcible entry and detainer" and replace such references with "eviction." Pub. Act 100-173 (eff. Jan. 1, 2018) (amending735 ILCS 5/9-101, *et seq*.). We use the former nomenclature here, as this matter was filed and resolved below prior to the amendment.

¶ 9 Each of the three forcible suits alleged that defendant unlawfully withheld possession of the property because FNMA or Chase was the owner of the property pursuant to the order approving the sale in the foreclosure action, and defendant had not vacated the property in response to a properly served written demand to do so.

¶ 10 On February 13, 2015, defendant filed his answer to the current suit, which generally denied Chase's allegations. Defendant also raised a number of affirmative defenses asserting that Chase's current suit was barred by: (1) section 15-1509(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-101, *et seq*. (West 2016)) (Foreclosure Law); (2) section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2016)); (3) *res judicata*; (4) waiver; and (5) estoppel.

¶ 11 On May 27, 2015, Chase filed a motion for summary judgment asserting that: (1) Chase owned the property; (2) Chase served upon defendant the required written notices of a demand for possession under the Act; and (3) there was no genuine issue of material fact with respect to Chase's right to immediate possession of the property. Defendant filed a cross-motion for summary judgment arguing that Chase's current suit was barred by section 15-1509(c) of the Foreclosure Law and principles of *res judicata*. Both motions were fully briefed, and the circuit court heard arguments.

¶ 12 On June 29, 2016, the circuit court entered a written order which granted Chase's motion for summary judgment and denied defendant's cross-motion. The circuit court found that section 15-1509(c) of the Foreclosure Law did not preclude Chase's eviction action, and that *res judicata* simply did not apply. On September 9, 2016, the court denied defendant's motion to reconsider. Defendant timely appealed.

¶ 13 During the briefing of this appeal, this court denied a motion filed by defendant to replace its initially filed brief with one that specifically included an argument that the circuit court improperly granted summary judgment in favor of Chase, because the circuit court never addressed all five of defendant's affirmative defenses. When this argument was again raised in defendant's reply brief, Chase filed a motion to strike that argument on the basis that its inclusion in defendant's reply brief was a prejudicial and improper "end-run" around this court's prior order. That motion was ordered to be taken with the case.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant contends that the circuit court improperly granted Chase's motion for summary judgment, and improperly denied his cross-motion for summary judgment and motion to reconsider.

¶ 16 Summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). The purpose of summary judgment is not to answer a question of fact, but to determine whether one exists. *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 18. The court must examine the evidence in the light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and must construe the material strictly against the movant and liberally in favor of the nonmovant (*Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)). Although a drastic means of disposing of litigation, summary judgment is, nonetheless, an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009). When reviewing an order granting summary judgment, "we conduct a *de novo*

review of the evidence in the record." *Espinoza*, 165 Ill. 2d at 113. The appellate court reviews the judgment of the circuit court and not the reasons given for that judgment, and we may therefore affirm the circuit court based on any reason found in the record. *Mitchell v. Village of Barrington*, 2016 IL App (1st) 153094, ¶ 26.

¶ 17 The "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010). "When reviewing a denial of a motion to reconsider based only on the circuit court's application of existing law, the standard is *de novo*." *Muhummad v. Muhummad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006).

¶ 18 We first consider defendant's contention that summary judgment was improperly granted in favor of Chase for the reason that, because the prior two forcible entry suits were voluntarily dismissed, the current suit is barred by section 13-217 of the Code.[2] The proper analysis of this question was recently summarized as follows:

> "Section 13-217, which is known as the single refiling rule, is a saving provision that grants a plaintiff the absolute right to refile his or her complaint within one year after a voluntary dismissal or within the remaining period of limitations, whichever is greater. [Citation.] The purpose of section 13-217 is to facilitate the disposition of cases on the merits and to avoid its frustration upon grounds unrelated to the merits. [Citation.] Section 13- 217 was not intended, however, to permit multiple refilings of the same cause

[2] Although section 13-217 of the Code was amended effective March 1995, the public act that made that amendment was later held to be unconstitutional in its entirety by the Illinois Supreme Court in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 378 (1997). The version of section 13-217 that is currently in effect, therefore, is that which was in effect prior to the March 1995 amendment. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

of action. [Citation.] Indeed, our supreme court has interpreted section 13-217 as permitting one, and only one, refiling of a claim, even if the applicable statute of limitations has not expired. [Citations.]

For the purposes of section 13-217, a complaint is considered to be a refiling of a previously filed complaint if it constitutes the same cause of action under the principles of *res judicata*. [Citation.] In making that determination, Illinois courts apply a transactional test. [Citation.] Under the transactional test, separate claims will be considered to be the same cause of action if both claims arise from a single group of operative facts, regardless of whether they assert different theories of relief. [Citation.]" *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶¶ 20-21.

¶ 19 Here, defendant contends that Chase has violated the single refiling rule because: (1) Chase and FNMA are in privity with each other with respect to their claims of possession to the property; (2) each of the three forcible entry suits sought possession of the same property, and were brought against the same person, defendant; (3) each of the three suits asserted a superior right to possession based upon the outcome of the prior foreclosure proceeding; and (4) as such, each suit arises from a single group of operative facts, such that the current, third-filed suit is barred by section 13-217 of the Code. Even if we accepted defendant's argument with respect to privity, we would disagree with this argument.

¶ 20 The purpose of the Act is to provide a speedy remedy to allow a person who is entitled to the possession of certain real property to be restored to possession. W*ells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. A forcible entry action, therefore, is a limited and distinct proceeding, that determines who is entitled to *immediate possession* of real property. *Id*. As relevant here, the Act provides that "[t]he person entitled to the possession of lands or

tenements may be restored thereto *** [w]hen lands or tenements have been *** sold under the order or judgment of any court in this State *** and the *** party to such order or judgment ***, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his or her agent." 735 ILCS 5/9-102(a)(6) (West 2016).

¶ 21 Certainly, the superior right to possession claimed by FNMA and Chase was based upon a single group of operative facts; the outcome of the prior foreclosure proceeding. However, as the Act makes clear, defendant's failure to surrender possession of the property pursuant to a specific written demand was also an important element of each of three forcible entry suits at issue here. Defendant's alleged failure to surrender possession pursuant to a demand made prior to the 2011 suit filed by FNMA was separate and distinct from defendant's alleged failure to surrender possession in response to the separate demands allegedly made prior to each of the two subsequent forcible entry suits filed by Chase. Indeed, separate demands and refusals to surrender were alleged in each of the three suits, with the written demand alleged in the current suit not served until April 16, 2014. Obviously, the 2014 demand and defendant's subsequent refusal to surrender possession of the property could not have been considered in the prior forcible entry suits filed in 2011 and 2012.

¶ 22 Therefore, because the entirety of each of the three suits cannot be said to be premised upon a single group of operative facts, the transactional test is not satisfied, the suits do not constitute the same cause of action under the principles of *res judicata*, and the current suit is not barred by section 13-217 of the Code.

¶ 23 We next consider defendant's argument that Chase's current suit is barred by section 15-1509(c) of Foreclosure Law, which in relevant part provides "[a]ny vesting of title by *** deed

pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of [ ] all claims of parties to the foreclosure." 735 ILCS 5/15-1509(c) (West 2016). Defendant essentially urges that, because Chase was not granted an award of possession with respect to the property specifically against *defendant* in the foreclosure proceeding, it is barred from now doing so under the Act by virtue of section 15-1509(c) of Foreclosure Law. We disagree.

¶ 24 Defendant's entire argument flows from a fundamental misreading of the nature of the relief granted to Chase in the foreclosure proceeding. The judgment of foreclosure entered in the foreclosure action was entered against *all defendants* in that action, including defendant here, and it further provided that if no redemption was made prior to sale, *all defendants* "shall be forever barred and foreclosed of any right, title, interest, claim, lien or right to redeem in and to" the property. The judgment of foreclosure also generally provided*, without restriction*, that after the sale, "a deed shall be issued to the purchaser according to law and such purchaser shall be let into possession of the mortgaged real estate." Therefore, the judgment of foreclosure provided for the foreclosure of all the rights of all the defendants to that action, and for the transfer of possession of the property to Chase.

¶ 25 It is true that in its "motion for order approving report of sale and distribution and possession," Chase did not specifically seek an order of possession against defendant. However, after the sale, the order of possession entered by the circuit court generally provided, again *without restriction*, that "upon request by the successful bidder *** Plaintiff is entitled to and shall have possession of the premise as of a date 30 days after entry of this Order." This language is not limited to defendant's wife; rather, it applied to all of the defendants to the foreclosure action.

¶ 26 It is also the case that in the order of possession, the circuit court only specifically authorized the Sherriff to evict defendant's wife. However, that order went on to clarify that "occupants other than the individuals named in this Order of Possession may be evicted with[ ] a Supplemental Order of Possession or an order from the Forcible Entry and Detainer Court." Thus, provision for the eviction of all occupants was included in the order of possession.

¶ 27 In light of the above, it is evident that Chase was granted a right to possession of the property against *defendant* in the foreclosure proceeding. Moreover, while Chase's right to *enforce* that right to possession via eviction of defendant by the Sherriff may not have been specifically awarded in the foreclosure action, that right was protected by the language providing that "occupants other than the individuals named in this Order of Possession may be evicted" by an order entered pursuant to the Act. Thus, the right to possession of the property and the ability to enforce that right specifically against defendant were awarded to Chase in the foreclosure action, such that Chase's current suit cannot be barred by section 15-1509(c) of the Foreclosure Law.

¶ 28 Furthermore, we agree with Chase that its present efforts to obtain possession of the property against defendant are also protected by the language of section 15-1508(g) of the Foreclosure Law, which provides: "*the failure to personally name, include, or seek an eviction order against a person in the confirmation order shall not abrogate any right that the purchaser may have to possession of the mortgaged real estate and to maintain an eviction proceeding under* [*the Act*]" (Emphasis added.) 735 ILCS 5/15-1508(g) (West 2016). This provision of the Foreclosure Law clearly protects Chase's right to bring the current forcible entry action.

¶ 29 We next consider defendant's argument that Chase's current suit cannot be supported by section 15-1701(d) of the Foreclosure Law, which contains certain limitations on the rights of

foreclosure purchasers such as Chase from pursing actions for possession and eviction after confirmation of the foreclosure sale. See 735 ILCS 5/15-1701(d) (West 2016). However, defendant's arguments in this regard again flow from the same fundamental misreading of the nature of the relief granted to Chase in the foreclosure proceeding discussed above. As such, for the same reasons discussed above, they are rejected.

¶ 30 Just as importantly, section 1701(a) of the Foreclosure Law specifically states that the "provisions of this Article shall govern the right to possession of the mortgaged real estate *during foreclosure*." (Emphasis added.) 735 ILCS 5/15-1701(a) (West 2016). As such, those provisions are simply irrelevant to the present matter, in which Chase proceeds under the Act and does so well after the foreclosure proceeding ended.

¶ 31 Next, we address defendant's argument that this suit is barred by the principles of *res judicata*, waiver, and estoppel. The final two contentions, that this suit is barred by waiver and estoppel, represent the final two affirmative defenses raised below but not raised on appeal until defendant filed his reply brief. They therefore are subject to the motion to strike filed by Chase and taken with the case, as discussed *supra* ¶ 13. Because the outcome of this appeal will not be changed by our very brief ensuing discussion of these issues, we deny Chase's motion to strike and address these issues on the merits.

¶ 32 Once again, all of these arguments are premised on the notion that a right to possession of the property, and the ability to enforce that right against defendant, were never awarded to Chase in the foreclosure action, and as such that they may not now be sought here. For all the reasons discussed above, we reiterate that this is simply not the case and accordingly reject defendant's arguments based upon *res judicata*, waiver, and estoppel.

¶ 33 Having rejected each of the specific arguments defendant has raised against the summary judgment entered in favor of Chase, as well as from the denial of a motion to reconsider that decision, we now address the ultimate question of whether or not those orders were in fact proper. See *Forest Preserve District of Cook County v. Illinois Labor Relations Board, Local Panel*, 369 Ill. App. 3d 733, 751 (2006) (even when a motion for summary judgment is unopposed, the court must nonetheless conduct an examination to determine whether the moving party is entitled to summary judgment). We find that they were.

¶ 34 As discussed above, a forcible entry action determines who is entitled to *immediate possession* of real property, with a plaintiff such as Chase being required to establish both a superior right to possession as well as a defendant's failure to surrender possession of the property following a specific written demand. Here, there are no genuine issues of material fact with respect to these matters. The record clearly reflects that Chase was awarded title and possession to the property in the foreclosure action, and that defendant has refused to surrender possession after being served with Chase's written demand that he do so.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court—which awarded summary judgment in favor of Chase, and denied defendant's cross-motion for summary judgment and motion to reconsider—is affirmed.

¶ 37 Affirmed.