2013 IL App (2d) 121390-U
No. 2-12-1390
Order filed November 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

UTICA HOLDING COMPANY, an Illinois Corporation,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 11-L-120
RAYMOND R. WALLS, JR., a/k/a Roger Walls,	)	
Defendant-Appellant	)	Honorable J. Edward Prochaska,
(Thomas Albanito, Defendant).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting plaintiff summary judgment on its complaint to recover a loan: plaintiff's supporting affidavit was conclusory and thus violated Rule 191(a), leaving plaintiff without any evidence that it was a "creditor" under the Illinois Credit Agreements Act thus improperly barring defendant's affirmative defenses.

¶ 2 Defendant Raymond R. Walls, Jr., appeals the trial court's order granting plaintiff Utica Holding Company's motion for summary judgment. He contends that the trial court wrongly

determined that Utica was a creditor under the Credit Agreements Act (Act) (815 ILCS 160/0.01 *et seq*. (West 2010)), which acted to bar his affirmative defenses. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On April 5, 2011, Utica filed a complaint against Walls, alleging breach of contract and *quantum meruit*. The complaint alleged that, in 2008, Utica loaned Walls and a coborrower $1,385,000 in connection with a business in which Walls was the majority shareholder. Under a written contract, attached to the pleadings, Walls and his coborrower agreed to repay Utica in equal monthly installments for 12 months, commencing July 15, 2008. No payments were ever made on the obligation. Walls later filed a petition for bankruptcy, and his discharge was denied.

¶ 5 Walls filed an answer, alleging release or satisfaction and estoppel as affirmative defenses. He alleged that, in consideration for release of the obligation, he transferred his majority ownership to Utica and William Myers, Utica's president. He also filed counterclaims for breach of oral contact, estoppel, and an accounting.

¶ 6 Utica moved for summary judgment and to strike the counterclaims, alleging that Walls' affirmative defenses and counterclaims were barred by the Act, which requires credit agreements to be in writing. 815 ILCS 160/2 (West 2010). Utica included the affidavit of Myers, who averred, without providing details, that Utica was organized in July 2006 for investment purposes and was engaged in the business of lending money for business purposes. Myers averred that Utica loaned Walls the money and that Utica never released Walls from his obligations under the contract.

¶ 7 Walls responded with an affidavit from Thomas Tendall, who averred, without providing details, that he worked with Myers and Utica and had personal knowledge of the business operations and relationships between the parties. Tendall averred that the money for the loan came from Myers'

personal bank account. Attached to the affidavit were bank records showing various transfers of money from Myers' account around the time that the loan was made. Tendall then averred that Utica was not formed for investment purposes and that it was formed as a holding company to protect Myers from personal liability and for tax purposes. He averred that Utica did not act as a commercial lender. No factual details were given to support those statements and no specific facts were given to tie the transactions in the bank records to the loan to Walls or how they affected Utica's position as a creditor. The affidavit in the record is not notarized and instead has a statement written in pen that says "Notarized Copy To Be Filed."

¶ 8 Utica moved to strike Tendall's affidavit, arguing that it did not satisfy the requirements of Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) because it stated solely conclusions and did not provide foundation for the attached documents. The trial court struck the affidavit.

¶ 9 The court granted Utica's motion for summary judgment and dismissed the counterclaims on the basis that the contract was a credit agreement under the Act, which required any modification to be in writing. Since Walls did not deny that the loan was made, and his defenses and counterclaims all rested on the existence of an oral contract, he could not recover.

¶ 10 Walls moved for reconsideration, relying on Tendall's affidavit to argue that Utica was not a creditor under the Act. He also argued that the Act applies only to banks and financial institutions. The motion was denied. Walls appeals.

¶ 11 II. ANALYSIS

¶ 12 Walls does not dispute the existence of the loan or his original obligation to pay it. Instead, his sole contention on appeal is that Utica was not a creditor under the Act because it was not a financial institution in the business of loaning money. Thus, he argues that the Act did not apply and

that summary judgment was inappropriate because he raised an oral release of his obligation as a defense.

¶ 13 "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 377 Ill. App. 3d 536, 542 (2007). "Whether the entry of summary judgment was appropriate is a matter we review *de novo*." *Id.* "Construction of a clear and unambiguous contract is a matter of law appropriate for summary judgment." *U S G Interiors, Inc. v. Commercial & Architectural Products, Inc.*, 241 Ill. App. 3d 944, 947 (1993).

¶ 14 Rule 191(a) provides:

> "Affidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 15 A Rule 191 affidavit "is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony." *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). An affidavit that is conclusory and does not include facts upon which the affiant relies is in violation of Rule 191. *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 63 (2001).

¶ 16 Under the Act, a "credit agreement" is "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1(1) (West 2010). " 'Creditor' means a person engaged in the business of lending money or extending credit." 815 ILCS 160/1(2) (West 2010). A "person" is "an individual, corporation, partnership, joint venture, trust estate, unincorporated association or other entity." 815 ILCS 160/1(4) (West 2010). Under section 2 of the Act , "[a] debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing." 815 ILCS 160/2 (West 2010). A modification of an agreement cannot act as a counterclaim or defense unless it meets the writing requirement of section 2. 815 ILCS 160/3 (West 2010). The Act bars even traditional exceptions to writing requirements, such as equitable estoppel. See *McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758, 763 (1995).

¶ 17 Walls contends that the Act does not apply, because Utica is not a creditor. In particular, he contends that Utica is not a creditor because it is a not a financial institution and because Myers invested personal money into the transaction. We observe that the trial court struck Tendall's affidavit, which Walls relies on. Further, Walls' suggestion that only banks, financial service providers, and institutions can be creditors under the Act is incorrect. The Act defines a creditor as a "person" engaged in the business of lending money and it specifically states that a "person" can be an "individual, corporation, partnership, joint venture, trust estate, unincorporated association or other entity." 815 ILCS 160/1(2), (4) (West 2010). Thus, Walls' assertion that Utica cannot meet the statutory requirements because it is not a financial institution lacks merit. However, we

nonetheless determine that there is a genuine issue of material fact as to whether Utica is a creditor under the Act.

¶ 18 In his affidavit, Myers averred that Utica was organized for investment purposes and was in the business of loaning money. This merely stated a conclusion with no facts provided to support it. Thus, the affidavit violated Rule 191(a), leaving Utica without any evidence that it was engaged in the business of lending money or extending credit. That determination would require factual support for Myers' conclusory averment. Because that was absent, summary judgment was not appropriate.

¶ 19 III. CONCLUSION

¶ 20 Utica failed to provide factual support to show that it was a creditor under the Act. Accordingly, the judgment of the circuit court of Winnebago County is reversed, and the cause is remanded.

¶ 21 Reversed and remanded.