2013 IL App (2d) 130202-U
No. 2-13-0202
Order filed June 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST STATE BANK OF ILLINOIS, Plaintiff-Appellee, v. MASS CONSUMPTION, LLC, JOSHUA BLANK, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Kane County. No. 02-CH-3623 Honorable Leonard J. Wojtecki, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* On the Bank's petition for possession of the properties, it showed that it had a reasonable probability of success by the nature of the proven default; it was Mass Consumption's obligation to show some affidavits or evidence that there was not a proven default or that there was some other factual basis to deny the petition, and although it had the opportunity to do so, Mass Consumption did not overcome the presumption; affirmed.

¶ 2 Defendant mortgagor, Mass Consumption, LLC, filed this interlocutory appeal, pursuant to Illinois Supreme Court Rule 307(a)(4) (eff. Feb. 26, 2010), from the order of the circuit court of Kane County placing plaintiff mortgagee, First State Bank of Illinois, in possession of the property located at 60 Birch Street, Carpentersville, Illinois, and 813 North May Street, Aurora, Illinois ("the properties"). Defendant maintains that the order must be vacated because the trial court could not

rule on whether there was a reasonable probability that the mortgagee would prevail in the foreclosure action (see 735 ILCS 5/15-1701 (West 2010)), as there was a pending motion to dismiss and defendant had not yet had an opportunity to admit or deny the allegations in the complaint or the opportunity to present its affirmative defenses in its answer. Although plaintiff has not filed a brief in response, we will consider the appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976). We affirm.

¶ 3 FACTS

¶ 4 The record reflects that, on July 17, 2009, plaintiff and defendant executed a promissory note and mortgage for the properties. Joshua W. Blank, as manager of Mass Consumption, executed a note payable to the Bank in the sum of $286,400. Blank personally guaranteed full and punctual payment and satisfaction of all amounts owed by Mass Consumption to the Bank. The mortgage for the properties included the following language:

> "Mortgagee in Possession. Lender shall have the right to be placed as mortgagee in possession or to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness."

¶ 4 The record further reflects that on November 9, 2012, the Bank filed a two-count verified complaint to foreclose the mortgage and for other relief under the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1101 *et. seq*. (West 2010)), in relation to the properties. Count I is an action to foreclose the mortgage on the properties, and count II is an action for breach of the guaranty by Blank.

¶ 5 On December 13, 2012, the Bank filed a verified petition to be placed as mortgagee in possession of the mortgaged properties pursuant to section 15-1701 of the IMFL (735 ILCS 5/15-1701 (West 2010)). In support of the petition, the Bank states the following. The properties are single family rental properties and are not "residential real estate" as that term is defined in section 15-1219 of the IMFL (735 ILCS 5/15-1219 (West 2010)). The mortgage instruments expressly authorize the Bank to take possession of the mortgaged properties. Mass Consumption defaulted under the note by failing to pay the Bank the unpaid principal balances of the note, together with all accrued and unpaid interest thereon and all other sums due and owing under the note, when the note matured, by its express terms on July 17, 2012.

¶ 6 The petition further states that, under section 15-1701(b)(2) of the IMFL, a mortgagee of non-residential real estate is entitled to be placed in possession of the mortgaged real estate prior to entry of a judgment of foreclosure 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).

¶ 7 The petition also declares that there exists a probability that the Bank would prevail on its foreclosure complaint because Mass Consumption had defaulted on the note by failing to pay the unpaid principal balances, accrued and unpaid interest, and other sums due and owing under the note when the note matured by its express terms on July 17, 2012.

¶ 8 Attached to the petition is a verification by certification in which, Mark W. Johann, vice president of the Bank, certifies that the statements set forth in the verified petition are true and

correct. The trial court set a hearing on the Bank's petition for February 6, 2013, and gave Mass Consumption until January 21, 2013, to file a response to the motion.

¶ 9 On the same day as the Bank filed its motion, Mass Consumption filed a motion to dismiss, pursuant to sections 2-615 and 2-619(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619(a)(2) (West 2010)). In support of its motion to dismiss, Mass Consumption alleged, *inter alia*, that the Bank is precluded from bringing the foreclosure action due to its failure to obtain and pay required licenses for mortgage brokering in Illinois, necessitating dismissal. Mass Consumption further alleged that, in addition to the properties that are the subjects of the Bank's claim, the note is secured by mortgages on two other properties located in Cook County, which are under a foreclosure proceeding in Cook County, and thus, the Bank is attempting to recover an amount greater than that authorized by the note. Mass Consumption argued that, because the Bank is seeking multiple recoveries for the same harm, the complaint must be dismissed.

¶ 10 On January 22, 2013, Mass Consumption filed its response in opposition to plaintiff's petition to be placed as mortgagee in possession. In the response, Mass Consumption set forth the following three arguments: (1) the power to place a mortgagee in possession is a "drastic, harsh and dangerous one that "ought never to be made except in cases of necessity upon a clear showing that [an] emergency exists" and should be exercised "only under the extremist of circumstances"; (2) it is "impossible" for the court to determine whether the Bank has established a reasonable probability that it will prevail at a final hearing because Mass Consumption had not yet filed its answer due to its pending motion to dismiss; and (3) the Bank did not provide any evidence suggesting that Mass Consumption is mismanaging the properties.

¶ 11 A hearing was held on February 6, 2013, on the Bank's petition to be placed as mortgagee in possession. The Bank apprised the court that there is no dispute that: (1) the case is a commercial foreclosure action under section 1702 of the IMFL; (2) the loan documents allow the Bank to be placed as mortgagee in possession; and (3) there is a proven default. The Bank argued that, under case law, a proven default is sufficient to establish a reasonable probability of succeeding on the merits of the foreclosure.

¶ 12 Mass Consumption responded that the Bank did not have a reasonable probability of success as required because case law establishes the proper standard, which the Bank failed to meet; the Bank failed to present evidence of mismanagement of the properties; and, it is impossible to establish a reasonable probability of success before Mass Consumption files an answer and while there is a pending motion to dismiss. Mass Consumption argued that, given the pending motion to dismiss and the lack of an answer on file, it would be entirely premature and impossible for the trial court to find a reasonable probability of success.

¶ 13 The Bank contended that these arguments were baseless for the following reasons. First, the cases relied upon by Mass Consumption were decided prior to the enactment of the IMFL, where the standard was apparently very different and the mortgagee was then required to show an emergency situation to place a mortgagee in possession. Second, evidence of mismanagement is the standard in a residential foreclosure action but is not the standard in a non-residential action, as in this case, and therefore, the Bank need not show if Mass Consumption is mismanaging the properties. Third, there is no case law which provides that a pending motion to dismiss bars the trial court from granting a motion to be placed as a receiver in possession. Fourth, there is nothing in the statute that says a mortgagee cannot place the possession before an answer is on file. Fifth, a motion to dismiss

concedes all well-pled facts in the complaint, and under that standard, the Bank has shown that it has a reasonable probability of success by the nature of the proven default; it was Mass Consumption's obligation to show some affidavits or evidence that there was not a proven default or that there was some other factual basis to deny the petition, and Mass Consumption had not done so. See *The Travelers Insurance Co. v. LaSalle National Bank*, 200 Ill. App. 3d 139, 146 (1990) (where requirements of section 15-1701(b)(2) are satisfied, burden shifts to mortgagor to object and to show good cause as to why mortgagor should be entitled to remain in possession).

¶ 14 The trial court was concerned with Mass Consumption's argument in its motion to dismiss that the Bank is not a legal entity because the Bank had not obtained the required license. However, the Bank answered that banks are exempt from the registration requirements under the law. Mass Consumption acknowledged that, if that was the case, then it would concede that in its reply. The court subsequently granted the Bank's petition and stated to Mass Consumption: "If you come up with something that will undo this while this case is pending, bring it before me." Mass Consumption was given until February 20, 2013, to file a reply in support of its motion to dismiss and a hearing was set for the motion to dismiss.

¶ 15 Mass Consumption filed the reply in support of its motion to dismiss. In the reply, Mass Consumption contended, as it previously had, that the Bank was seeking double compensation by attempting to recover multiple deficiencies because the note is secured by mortgages on two other properties located in Cook County, which were under a separate foreclosure proceeding in Cook County.

¶ 16 On February 27, 2013, the trial court entered the order placing the Bank in possession of the properties. On the same date, the trial court denied Mass Consumption's motion to dismiss and gave Mass Consumption 30 days to file a response to the complaint.

¶ 17 Mass Consumption did not file an answer to the complaint for foreclosure or otherwise respond to the trial court's suggestion that it "come up with something that will undo [the granting of the petitioner to place the Bank in possession] while this case is pending." Instead, it filed a timely notice of interlocutory appeal in which it appeals from the trial court's order placing the Bank as mortgagee in possession.

¶ 18 ANALYSIS

¶ 19 As stated, section 15-1701(b)(2) of the IMFL provides that, in foreclosure matters concerning other than residential real estate, a mortgagee is entitled to be placed in possession of the property prior to the entry of a judgment of foreclosure upon request, provided that the mortgagee shows: (1) that the mortgage documents authorize such possession, and (2) 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). A proven default establishes a reasonable probability of succeeding in a mortgage foreclosure action. *Bank of America v. 108 N. State Retail*, *LLC*, 401 Ill. App. 3d 158, 166 (2010).

¶ 20 Where the two requirements of section 15-1701(b)(2) are satisfied, the burden then shifts to the mortgagor to object and to show good cause as to why the mortgagor should be entitled to remain in possession. *Bank of America*, 401 Ill. App. 3d at 166. In the case of nonresidential real estate, the presumptive right of possession during foreclosure lies with the mortgagee. *Travelers*, 200 Ill. App. 3d at 143.

¶ 21 The sum of Mass Consumption's argument on appeal is that it was premature for the trial court to conclude that there was a "reasonable probability" that the Bank would prevail in the foreclosure action because of the procedural posture of the case. Mass Consumption contends that the Bank could not establish a reasonable probability in the underlying foreclosure action because Mass Consumption had a pending motion to dismiss. Mass Consumption points out that the pendency of an undecided motion to dismiss, if successful, would have caused the matter to be dismissed thereby precluding the granting of the Bank's petition. More importantly, Mass Consumption points out that the court was unable to determine the likelihood of success because the court lacked knowledge of the contents of Mass Consumption's answer. Mass Consumption asserts that, since "Mass Consumption had not yet had the opportunity to plead its defenses, thereby depriving the circuit court of an opportunity to judge the validity of the defenses, the circuit court was precluded from finding that a reasonable probability of success on the merits existed." We find Mass Consumption's arguments unavailing.

¶ 22 In this case, the Bank duly satisfied the two statutory requirements entitling it to be placed in possession of the mortgaged premises. The Bank submitted to the trial court a copy of the mortgage which authorized such possession, and the Bank's foreclosure complaint and affidavit satisfied the trial court that there was a reasonable probability that the Bank would prevail on its foreclosure complaint. Mass Consumption is the mortgagor of nonresidential real estate. The Bank has shown that it has a reasonable probability of success by the nature of the proven default; it was Mass Consumption's obligation to show some affidavits or evidence that there was not a proven default or that there was some other factual basis to deny the petition, and Mass Consumption did not do so. See *The Travelers Insurance*, 200 Ill. App. 3d at 146.

¶ 23 Mass Consumption's motion to dismiss or failure to file an answer does not preclude the trial court from determining if the Bank established a reasonable probability that it will prevail at a final hearing in the cause. The statute provides that a mortgagee is entitled to be placed in possession of the property *prior* to the entry of a judgment of foreclosure upon request, provided that the mortgagee shows the mortgage documents authorize such possession and a reasonable probability that the mortgagee will prevail on a final hearing of the cause. 735 ILCS 5/15-1701(b)(2) (West 2010). In order to establish a reasonable probability that it will prevail at a final hearing, the Bank need only establish a proven default under the mortgage it is seeking to foreclose. See *Bank of America v. 108 State Retail, LLC*, 401 Ill. App. 3d 158, 166 (2010). Here, the Bank demonstrated that it would likely prevail at a final hearing because it established a proven default, as the verified petition states that Mass Consumption failed to pay the loan secured by the mortgage when the loan matured. In its response to the petition, Mass Consumption does not deny it failed to pay the loan at maturity and it has not submitted any counter-affidavit or other evidence contradicting the statements made in the Bank's verified petition. Regardless of whether Mass Consumption has filed a motion to dismiss and not yet answered the complaint, it is clearly possible for the trial court to determine if the Bank has established a proven default.

¶ 24 Furthermore, we note that, contrary to Mass Consumption's assertion, the trial court did deny Mass Consumption's motion to dismiss on the same day that it granted the Bank's petition for possession. Additionally, the trial court gave Mass Consumption 30 days to file an answer to the complaint. Instead of filing an answer to the complaint, Mass Consumption filed this appeal arguing that the Bank's petition was premature because of the pendency of the motion to dismiss and because Mass Consumption had not yet had the opportunity to file an answer to the complaint. Quite simply,

Mass Consumption had the opportunity to respond with a good cause argument as to why it should remain in possession of the properties and did not, and thus, it did not overcome the statutory presumption. Moreover, instead of responding, Mass Consumption filed this appeal, thereby creating the very problem of which it now complains on appeal. We have reviewed the cases cited by Mass Consumption in support of its argument and find them irrelevant.

¶ 25 CONCLUSION

¶ 26 For the preceding reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 27 Affirmed.