2015 IL App (2d) 140778-U
No. 2-14-0778
Order filed June 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CH-1222
	)	
EDWARD WILMSEN and SHARON WILMSEN,	)	
	)	Honorable
	)	Bradley J. Waller,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendants leave to file their amended affirmative defense to plaintiff's foreclosure complaint: specifically, the proposed amendment adequately pleaded plaintiff's anticipatory breach of a forbearance agreement; although the agreement gave plaintiff the right to pursue a foreclosure without regard to the agreement, a factfinder could determine that plaintiff's exercise of that discretion for no apparent reason was a breach of the implied covenant of good faith and fair dealing.

¶ 2 Plaintiff, Wells Fargo Bank, N.A., sued defendants, Edward Wilmsen and Sharon Wilmsen, to foreclose a mortgage on their home in Oswego. Defendants sought to raise the affirmative defense that plaintiff breached the covenant of good faith and fair dealing by

anticipatorily repudiating a forbearance agreement. The trial court struck the affirmative defense, denied defendants' motion to file an amended one, and subsequently entered a judgment of foreclosure and sale. Defendants appeal, contending that the trial court erred when it denied them leave to file an amended affirmative defense. We reverse and remand.

¶ 3 On January 6, 2010, defendants executed a promissory note and mortgage in favor of Interbank Mortgage Company. Interbank assigned the mortgage note to plaintiff.

¶ 4 In 2011, defendants ceased making mortgage payments. Plaintiff offered defendants a forbearance agreement pursuant to which defendants could make reduced payments of $1,399 for 12 months, with the last payment due on October 1, 2012. The agreement stated that it was temporary and intended to allow defendants to try to improve their finances. The agreement further stated that the loan would remain in default and that defendants would still owe an estimated $28,534.12 at the end of the forbearance period. In addition, the agreement provided that plaintiff, "at its option, may institute foreclosure proceedings according to the terms of the note and security instrument without regard to this agreement."

¶ 5 Defendants made the first 10 payments pursuant to the agreement. On August 16, 2012, defendants received a letter from plaintiff advising them that there was "a balance of $1,824.77 in an unapplied funds account on their loan." Another letter, dated August 10, 2012, informed defendants that their loan was in default "for failure to make payments due." The letter further stated, "Unless the payments on your loan can be brought current by September 13, 2012, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust, which include foreclosure." According to the letter, the then-current balance was $28,210.38.

¶ 6 After receiving the two letters, defendants did not make any more payments. On September 26, 2012, plaintiff filed this action to foreclose the mortgage. Defendants answered and raised as an affirmative defense that plaintiff violated the covenant of good faith and fair dealing by repudiating the forbearance agreement.

¶ 7 The trial court struck the answer and affirmative defense because they were filed without leave of court. With leave of court, defendants refiled the affirmative defense, which was then stricken for failure to attach a copy of the forbearance agreement. Defendants again refiled the affirmative defense, including a copy of the forbearance agreement. Plaintiff moved to once again strike the affirmative defense. The trial court granted the motion, ruling that defendants admitted that they made only 10 of the 12 payments and had offered no proof "that Wells Fargo had terminated this at any time." Defendants were given 28 days to file an amended affirmative defense.

¶ 8 Two weeks after the due date, defendants sought leave to file an amended affirmative defense. The proposed amendment included a copy of the August 10 letter, arguing that it was an anticipatory repudiation of the forbearance agreement. The trial court denied leave to file the amended defense, concluding that it did not meet defendants' "burden to show all payments due were timely made and [the] forbearance agreement allowed for the sending of a demand letter."

¶ 9 After some further procedural matters, the court entered a judgment of foreclosure and sale. Defendants timely appeal.

¶ 10 Defendants contend that the trial court erred by refusing to allow them to file their amended affirmative defense alleging anticipatory repudiation of the forbearance agreement and breach of the covenant of good faith and fair dealing. Defendants contend that it is at least arguable that the August 10 letter, demanding payment of the full outstanding balance two weeks

before the last payment was due under the forbearance agreement, implicitly repudiated that agreement. Moreover, although the forbearance agreement gave plaintiff discretion to proceed with foreclosure "without regard to" that agreement, plaintiff had to exercise its discretion in good faith so as not to frustrate the agreement's purpose. Defendants contend that repudiating the agreement for no apparent reason when defendants were current in their payments was presumptively unreasonable.

¶ 11 The trial court denied defendants leave to file their second amended affirmative defense. In deciding whether the trial court abused its discretion in so doing, we consider (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 12 Previously, the trial court struck the amended affirmative defense pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615(a) (West 2012)). A section 2-615 motion to strike an affirmative defense challenges the legal sufficiency of the defense. See *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20. In reviewing the sufficiency of an affirmative defense, we disregard any conclusions of fact or law not supported by allegations of specific fact. *Id.* We review *de novo* an order striking an affirmative defense on the basis of sufficiency. *Id.*

¶ 13 Here, the ultimate issue is whether defendants' proposed amendment adequately pleaded the affirmative defense. Although defendants' proposed amended affirmative defense was filed approximately two weeks after the deadline imposed by the trial court, and although they had had previous opportunities to amend, plaintiff does not claim prejudice from the late filing. See

Bank of Northern Illinois v. Nugent, 223 Ill. App. 3d 1, 13 (1991) (amendments to pleadings should be liberally allowed unless opposing party would be prejudiced as a result). Further, the trial court denied leave not for any procedural missteps but for the amendment's perceived insufficiency. Thus, we address only that issue.

¶ 14 The parties dispute whether the August 10 letter anticipatorily repudiated the forbearance agreement. An anticipatory breach, also called anticipatory repudiation, is a manifestation by one party to a contract of its intent not to perform its contractual duty when the time comes for it to do so even if the other party has rendered full and complete performance. *In re Marriage of Olsen*, 124 Ill. 2d 19, 24 (1998). One party's repudiation of the contract excuses the other party from further performance. *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1032 (2007) (citing *Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill. App. 3d 800, 806 (1994), and 23 Richard A. Lord, Williston on Contracts § 63:33, at 561-62 (4th ed. 2002)). In addition, if the party who repudiated the contract subsequently sues the nonrepudiating party for failing to perform, the plaintiff's repudiation is a defense. *Id.* Anticipatory repudiation is a question of fact. *Timmerman v. Grain Exchange, LLC*, 394 Ill. App. 3d 189, 201 (2009).

¶ 15 Here, it is at least a factual question whether the August 10 letter anticipatorily repudiated the forbearance agreement. Plaintiff insists that the letter merely "reminded" defendants, consistent with the forbearance agreement, that a balance of about $28,000 would be due after they made all the required payments. It points out that the letter did not refer to the forbearance agreement or suggest that plaintiff would not accept further payments pursuant to that agreement.

¶ 16 Although an anticipatory repudiation must be clear (*Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 293, 317-18 (2002)), plaintiff cites no case holding that a party's intent to repudiate a contract must be expressly stated. See *Tobriner v. Mayfair*

Extension, Inc., 250 F. Supp. 614, 617 (D.D.C. 1966), *aff'd sub nom. Luxenberg v. Mayfair Extension, Inc.*, 382 F.2d 475 (D.C. Cir. 1967) ("[A]nticipatory breach is not founded only upon the spoken words of the breaching party. Were this so, the right of action would founder ineffectively upon the false or evasive verbiage of the wrongdoer."). Here, a factfinder could reasonably conclude that a letter stating that unless defendants brought the account current by September 13, 2012, "it will become necessary to require immediate payment in full" and pursue additional remedies, including foreclosure, demonstrated plaintiff's intent to disregard the forbearance agreement. Indeed, September 13 was more than two weeks before the final payment pursuant to the forbearance agreement was due, yet the letter expressly stated that failing to make all delinquent payments by September 13 would make it "necessary" for plaintiff to pursue all remedies, including foreclosure pursuant to the mortgage.

¶ 17 Plaintiff, as did the trial court, focuses on defendants' admission that they did not make the final two payments pursuant to the forbearance agreement. However, as noted, one party's repudiation of an agreement excuses the other party's performance. *Tower Investors, LLC*, 371 Ill. App. 3d at 1032. Thus, if plaintiff repudiated the agreement, defendants were not required to make the final two payments. In other words, if defendants reasonably believed that plaintiff would not honor the agreement in any event, tendering the final two payments would have been futile.

¶ 18 Plaintiff alternatively contends that this does not matter, because the forbearance agreement gave it the right to pursue foreclosure without regard to that agreement. As defendants argue, however, every contract contains an implied covenant of good faith and fair dealing. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). The purpose of this duty "is to ensure that parties do not take advantage of each other in

a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract." *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 191 (2011). "Disputes involving the exercise of good faith arise when one party is given broad discretion in performing its obligations under the contract." *The Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 42. "In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion." *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004). "Where a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the covenant of good faith and fair dealing requires that the discretion be exercised 'reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.' [Citation.]" *Id.*

¶ 19 Defendants note that the provision allowing plaintiff to proceed with foreclosure "without regard to" the forbearance agreement vested plaintiff with broad discretion. They contend that abrogating the agreement for no apparent reason when they were current with their payments was precisely such an arbitrary and capricious exercise of that discretion. We agree that a factfinder could reach that result.

¶ 20 Plaintiff insists, however, that defendants have pleaded no facts in support of their assertion that plaintiff repudiated the agreement in bad faith. Plaintiff appears to confuse factual allegations with evidence. Defendants were not required to plead evidence, only ultimate facts. *Chandler v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 348 (2003). Defendants pleaded that when plaintiff sent the letter on August 10 they were current in their payments pursuant to the forbearance agreement, and the pleadings suggest no legitimate reason for plaintiff to have

abrogated the agreement at that time. That is the definition of "arbitrary." See Merriam-Webster's Collegiate Dictionary 59 (10th ed. 2001) (defining "arbitrary" *inter alia* as "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will").

¶ 21 Plaintiff suggests that its action was justified because defendants were not going to be able to bring the loan current in any event. Defendants' proposed affirmative defense pleaded that they had forgone opportunities to seek alternative financing elsewhere because of plaintiff's implicit promise to work with them at the conclusion of the forbearance agreement. In any event, when ruling on a section 2-615 motion, the court may consider only the allegations in the pleadings; it is inappropriate for a party to rely on facts outside the pleadings. *Winters v. Wangler*, 386 Ill. App. 3d 788, 793, 796 (2008).

¶ 22 In summary, defendants' proposed amended affirmative defense adequately pleaded that plaintiff breached its covenant of good faith and fair dealing by anticipatorily repudiating the forbearance agreement. Accordingly, we reverse the trial court's order denying leave to file the amended affirmative defense, we reverse the judgment of foreclosure and sale, and we remand the cause.

¶ 23 Reversed and remanded.