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2014 IL App (3d) 120011-U

Order filed January 10, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

|                                |   |                                      |
|--------------------------------|---|--------------------------------------|
| MANITO MACHINERY, INC.,        | ) | Appeal from the Circuit Court        |
|                                | ) | of the 10th Judicial Circuit,        |
| Plaintiff-Appellant            | ) | Peoria County, Illinois,             |
|                                | ) |                                      |
| (Ralph May and Deborah May,    | ) |                                      |
|                                | ) |                                      |
| Plaintiffs),                   | ) |                                      |
|                                | ) |                                      |
| v.                             | ) | Appeal Nos. 3-12-0011, 3-12-0516 and |
|                                | ) | 3-12-0752                            |
| BANK ONE, N.A., predecessor to | ) |                                      |
| J.P. MORGAN CHASE CO., by      | ) | Circuit No. 05-L-104                 |
| merger; and CODILIS &          | ) |                                      |
| ASSOCIATES, P.C.,              | ) |                                      |
|                                | ) |                                      |
| Defendants-Appellees           | ) |                                      |
|                                | ) |                                      |
| (Thomas James Donahue,         | ) | Honorable                            |
|                                | ) | David J. Dubicki,                    |
| Defendant).                    | ) | Judge, Presiding.                    |
|                                | ) |                                      |

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and Holdridge concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Summary judgments in favor of a mortgagee and its attorneys on claims of conversion of personal property were upheld on appeal because there was no genuine issue of material fact that the mortgagor had actual knowledge of foreclosure proceedings for several months prior to the judicial sale, but failed to take any actions to retrieve personal property. Under the circumstances, such failure to act constituted an abandonment of the personal property.

¶ 2 The plaintiffs, Manito Machinery, Inc., Ralph May, and Deborah May, filed an amended complaint, alleging claims of abuse of process and conversion by the defendants, Bank One, N.A., and Codilis & Associates, P.C., in regard to personal property sold following the foreclosure of Deborah May's home. The amended complaint was dismissed, but we reversed on appeal. See *Manito Machinery, Inc. v. Bank One, N.A.*, 03-09-0735 (2010) (unpublished order under Supreme Court Rule 23). On remand, Bank One and Codilis filed motions for summary judgment. The circuit court granted both motions, and Manito appealed.<sup>1</sup>

¶ 3 FACTS

¶ 4 The facts are more fully set out in the prior appeal. Essentially, Deborah entered into a mortgage on a home in Manito, Illinois, but later defaulted. Upon the default, Bank One filed a foreclosure complaint against Deborah on April 18, 2000. The summons was returned indicating that Deborah could not be found in the county, and contained a notation that Deborah was "now living in Milford, IL." Codilis's private investigator, however, could not locate Deborah. Deborah testified in her deposition that she moved with her husband to Watseka in the middle of 1999, and did not move to Milford until late 2001. The defendant, Thomas Donahue, an attorney

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<sup>1</sup>Deborah May also appealed, but her claims are subject to the automatic stay of the bankruptcy court, arising from her bankruptcy petition. The bankruptcy court entered an order on January 3, 2013, partially lifting the bankruptcy stay, to allow Manito Machinery to pursue these appeals. *In the Matter of the Bankruptcy of May*, No. 12-91499 (Bankr. C.D. Ill.). In accordance with such order, and in compliance with the stay, we have only considered the appeals of Manito Machinery.

with Codilis, filed an affidavit seeking service by publication, asserting that Deborah could not be found. Deborah never answered or appeared in the foreclosure action, and a judgment of foreclosure and sale was entered against her on July 12, 2000. An order confirming sale was entered on January 3, 2001, and Bank One took possession on February 3, 2001. On November 15, 2001, Bank One sold the property to a third party. Deborah did file a motion in December 2001 to vacate the judgment, on the grounds of improper service, but she later withdrew the motion.

¶ 5 In March 2005, Deborah, Ralph, and Manito filed a complaint against the defendants, Bank One, Donahue, and Codilis. After that complaint was dismissed, Deborah and Manito filed an amended complaint against Bank One and Codilis, alleging abuse of process and conversion. The defendants again filed motions to dismiss, which were granted by the circuit court. Deborah and Manito appealed the dismissal of their conversion claims, and we reversed. *Manito Machinery, Inc. v. Bank One, N.A.*, 03-09-0735 (2010) (unpublished order under Supreme Court Rule 23). We found that the plaintiffs' allegations that the defendants' failed to properly notify Deborah of the foreclosure action created a question of fact as to whether the elements of abandonment were proved. *Id.*

¶ 6 On remand, both Codilis and Bank One moved for summary judgment. Bank One argued that there was no genuine issue of material fact that the plaintiffs had actual notice of the foreclosure and sale, and they abandoned their personal property. Codilis argued that it was not liable for any conversion because there was no agency relationship between it and the real estate agency that took possession of the personal property.

¶ 7 In support of its motion for summary judgment, Bank One presented the deposition

testimony of Vicky Brown-Wilson, who was employed by Advanta Mortgage Company in its loss mitigation department. Brown-Wilson testified that she was responsible for servicing Deborah's account for Bank One. Between January and April 2000, Advanta made repeated attempts to contact Deborah, without success. As stated earlier, the foreclosure complaint was filed on April 18, 2000, and the affidavit for service by publication was filed on May 8, 2000. In June 2000, Advanta received a letter from Ralph and Deborah May, dated June 23, 2000, seeking the payoff amount for the loan. The letter provided Advanta with two new addresses for the Mays, one in Watseka and one in Milford. Deborah testified in her deposition that the Milford address was the address of their new business. Brown-Wilson testified that she spoke on the telephone with both Deborah and Ralph May in July 2000. She informed them that the property was in foreclosure, and sent them a reinstatement quote by facsimile to the telephone number provided by Ralph. The records show that Advanta was in contact with Deborah several times during that fall, and that Deborah was informed on October 4, 2000, that the sale date was set for January 3, 2001. Deborah and Ralph May both admitted to receiving the reinstatement quote in July 2000, which clearly states that the loan was in foreclosure. They also acknowledged the numerous telephone calls with Advanta, and Ralph acknowledged that Brown-Wilson told him the property was in foreclosure.

¶ 8 The circuit court granted Bank One's motion, finding that Deborah and the other plaintiffs had actual notice of the foreclosure, and their failure to act constituted abandonment. The circuit court found that Bank One took possession of the personal property on February 3, 2001, the same day that it took possession of the real estate. The plaintiffs were aware of the foreclosure action no later than July 2000, and they had nearly seven month to retrieve their personal

property. Once Bank One lawfully obtained possession of the real estate, it had no duty to preserve the abandoned personal property for Deborah, the mortgagor, much less the other plaintiffs.

¶ 9 The circuit court also granted Codilis's motion. It found that the affidavits submitted in support of the summary judgment showed that the listing agent was not an agent of Codilis, and that Codilis gave no direction to the listing agent with regard to the disposition of the personal property.

¶ 10 Both orders contained rulings under Supreme Court Rule 304(a), and Manito appealed.

¶ 11 ANALYSIS

¶ 12 On remand, Bank One moved for summary judgment on the basis that the plaintiffs had actual knowledge of the foreclosure and sale, so Bank One was entitled to judgment as a matter of law on Manito's claim for conversion. Bank One argued, and the circuit court agreed, that since the plaintiffs had actual knowledge of the foreclosure, they abandoned their personal property by leaving it in the residence, and Bank One had no duty to preserve the personal property for the benefit of Deborah, much less for Manito or Ralph (who were not parties to the mortgage). The plaintiffs do not controvert the evidence showing their knowledge of the foreclosure, and the date of the judicial sale. Instead, they argue that the conversion occurred when the listing agent disposed of the property after Ralph's April 2001 demand for the return of the property.

¶ 13 Summary judgment is proper "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." 735 ILCS 5/2-1005(c) (West

2010). In determining whether a genuine issue as to any material fact exists, pleadings, depositions, and admissions are construed against the party moving for summary judgment. *Williams v. Manchester*, 228 Ill. 2d 404 (2008). Summary judgment is appropriate where the plaintiff cannot establish an element of the cause of action. *Williams*, 228 Ill. 2d at 417. We review an order granting summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill. 2d 90 (1992).

¶ 14 Conversion is the unauthorized assumption of the right to possession or ownership of personal property. *Fortech, L.L.C. v. R.W. Duntelman Co., Inc.*, 366 Ill. App. 3d 804 (2006). To prove a claim of conversion, a plaintiff must show: (1) a right in the property; (2) a right to the immediate possession of the property, which is absolute, unconditional, and not dependent upon the performance of some act; (3) a deprivation of the right by the unauthorized and wrongful assumption of control, dominion, or ownership by the defendant; and, (4) a demand for possession of the property. *Fortech, L.L.C.*, 366 Ill. App. 3d at 809.

¶ 15 As we stated in our prior order, abandonment is a complete defense to an action for conversion. *Manito Machinery, Inc. v. Bank One, N.A.*, 03-09-0735 (2010) (unpublished order under Supreme Court Rule 23); see also 18 Am Jur. 2d Conversion §102 (2010). The undisputed facts show that Deborah and Ralph were both informed of the foreclosure, through telephone calls, mail, and fax, numerous times beginning in at least July 2000. Deborah was also informed in October 2000 that the foreclosure sale was set for January 3, 2001. The judicial sale was indeed held on January 3, and, in February 2001, Bank One took possession of the property through its listing agent. Bank One took possession of the personal property on February 3, 2001, pursuant to a valid court order granting it possession of the real estate. It did not dispose of

the personal property until June 2001. The plaintiffs' efforts with respect to the personal property were Ralph's telephone calls in April 2001, and then the 2005 conversion action. We agree with the circuit court that the plaintiffs had already abandoned the personal property by the time Bank One took possession in February 2001. Since abandonment is a complete defense, and the plaintiffs could not establish all the elements to state a claim for conversion, summary judgment was properly granted to Bank One on the conversion action against it by Manito.

¶ 16 While Codilis' liability depends on an agency relationship between itself and the listing agent, the liability of both Codilis and the listing agent arises from them acting in the scope of their agency for Bank One. While an agent is liable for his or her own tortious acts, even if done at the direction of its principal, see *Fortech, L.L.C.*, 366 Ill. App. 3d at 813, the finding of no conversion due to abandonment with regard to the principal (Bank One) similarly disposes of any claims against alleged agents.

¶ 17 The plaintiffs contend that the trial court abused its discretion in refusing to allow additional discovery by the plaintiffs in response to Codilis' motion for summary judgment. The decision as to whether to allow further pretrial discovery is within the discretion of the trial court. *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443 (2000). Codilis contends that the trial court did not abuse its discretion in denying the motion. The plaintiffs brought their motion pursuant to Supreme Court Rule 191(b), seeking to depose affiants regarding the information contained in their affidavits. The trial court found that Deborah's affidavit, filed in support of the motion, was insufficient because it did not set forth what she believed the affiants would testify to, or the reasons for those beliefs. Supreme Court Rule 191(b) requires facts, not conclusions. *Hindo v. University of Health Sciences/Chicago Medical School*, 237 Ill. App. 3d 453 (1992).

The circuit court's conclusion that the affidavit was insufficient was not an abuse of discretion.

¶ 18 Finally, Manito argues that it was reversible error for the trial court to not consider the emails attached to its motion to vacate. The purpose of a motion to reconsider is to bring to the court's attention any newly discovered evidence, changes in the law, or errors in the court's application of the law. *Gardner v. Navistar International Transportation Co.*, 213 Ill. App. 3d 242 (1991). We review the denial of such a motion for abuse of discretion, considering that the motion should not be allowed in the absence of a reasonable explanation of why the evidence was not available at the time of the original hearing. *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183 (1989). It appears that the emails were available at the time of the summary judgment proceeding, since they were dated in 2004. Also, the emails were ambiguous. We find that the denial of the motion was not an abuse of discretion.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County regarding Manito Machinery is affirmed.

¶ 21 Affirmed.