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2015 IL App (3d) 150012-U

Order filed November 24, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

U.S. BANK, N.A.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois.
)	
v.)	Appeal No. 3-15-0012
)	Circuit No. 11-CH-5401
CAROLE PYE,)	
)	Honorable Thomas A. Thanas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Defendants abandoned the affirmative defenses they allege were erroneously struck by the trial court. Defendants waived arguments related to these pleadings when they failed to adopt or refer to them in subsequent amended affirmative defenses. Defendants also failed to adequately plead a lack of standing on the part of the plaintiff in a motion to dismiss. Accordingly, we affirm the trial court's rulings on these issues.

¶ 2 This action commenced in November 2011, when plaintiff, U.S. Bank, N.A., filed a complaint for foreclosure in the circuit court of Will County to foreclose the mortgage of Carole Caywood-Pye and Henry Pye. Over the course of the previous two years, the Pyes

unsuccessfully attempted to work with plaintiff to modify the terms of their mortgage. In response to plaintiff's complaint, they filed a series of affirmative defenses and a motion to dismiss, which were struck and denied by the trial court. Successive affirmative defenses and motions to dismiss did not refer to or incorporate prior versions of the pleadings they replaced. Plaintiff ultimately filed a motion for summary judgment; the Pyes did not respond. In December 2014, the trial court entered summary judgment in favor of the plaintiff. During the course of litigation in the trial court, defendant Henry Pye passed away.

¶ 3 The remaining defendant, Carole, appeals the trial court's rulings: (1) striking an affirmative defense alleging a violation of an implied covenant of good faith and fair dealing on the part of the plaintiff; and (2) striking an affirmative defense and denying a motion to dismiss both challenging plaintiff's standing. In response, plaintiff argues: (1) defendant waived any objection to the trial court's dismissal of either affirmative defense when she failed to replead them after they were struck by the trial court, alternatively; (2) plaintiff's standing is established by the record; and (3) defendant failed to plead or demonstrate that plaintiff lacked standing. Plaintiff further asserts that defendant waived any good faith/fair dealing affirmative defense by failing to raise it in response to plaintiff's motion for summary judgment and, even if the good faith and standing affirmative defenses were properly preserved, the trial court appropriately rejected them.

¶ 4 We affirm the trial court's ruling.

¶ 5 **BACKGROUND**

¶ 6 In June 2003, the Pyes executed a promissory note for \$212,500 payable to Chicago Funding, Inc., in order to finance the purchase of their residence in Bolingbrook, Illinois.

Simultaneously, they granted a mortgage to Chicago Funding as collateral for the promissory note. Chicago Funding executed an assignment of the mortgage to plaintiff.

¶ 7 In August 2009, the Pyes contacted plaintiff in an attempt to modify the terms of their mortgage loan and submitted a loan modification application with supporting documentation. They later complied with plaintiff's request for additional documentation in February 2010. In April 2010, Genworth Financial, Inc. (Genworth) directed the Pyes to complete another loan modification application, which Genworth would submit to U.S. Bank on their behalf. They completed the application and mailed it to Genworth later in the month.

¶ 8 In May 2010, plaintiff advised the Pyes that they did not qualify for a loan modification because they did not meet the established financial requirements. In August 2010, plaintiff asked them to submit another loan modification application within 10 days. Defendant contends that they submitted a complete application to plaintiff. Plaintiff subsequently informed them that their loan modification application was denied because they failed to timely submit the requested documentation. The Pyes promptly informed plaintiff they had submitted their application in a timely manner, attaching proof of their application submission before the stated deadline.

¶ 9 In November 2011, plaintiff filed a complaint seeking to foreclose on the mortgage. Defendants subsequently filed a counterclaim and a motion to dismiss, which were struck and denied, respectively, by the trial court. In July 2013, defendants filed a combined answer, affirmative defense, counterclaim, and third party complaint. Defendants later voluntarily withdrew the third party complaint. Defendants' affirmative defense within the hybrid pleading was subcaptioned "Breach of the Implied Covenant of Good Faith and Fair Dealing" and alleged that plaintiff failed to review their loan modification application, thereby abusing its broad discretion under the parties' existing contract. In response, plaintiff filed motions to strike the

affirmative defense and dismiss the countercomplaint. At a hearing on the parties' motions, defense counsel was unable to articulate any legal basis in support of the affirmative defense. When specifically asked to do so by the trial court, defense counsel resigned to rest on the arguments in defendants' pleadings. The trial court dismissed defendants' counterclaim with prejudice and struck their affirmative defense without prejudice.

¶ 10 In February 2014, defendants filed an answer and amended affirmative defense, along with a second motion to dismiss. The amended affirmative defense was subcaptioned "Lack of Standing" and contained the same legal argument as did the second motion to dismiss. Defendants' lack of standing affirmative defense "incorporate[d] by reference the allegations made by Plaintiff in its Complaint to Foreclose Mortgage *** and their Answer thereto[.]" It did not adopt or incorporate by reference any other pleadings. The pleading asserted that plaintiff filed two separate versions of the promissory note, which was the basis for plaintiff's cause of action. One version of the note was attached to the complaint and had an allonge attached to it that was endorsed twice: once on the allonge and once on the note, both by the same person. The other version of the note, produced in discovery, did not have the allonge attached and contained a second endorsement: in blank by U.S. Bank.

¶ 11 Defendants asserted in their amended affirmative defense and second motion to dismiss that plaintiff is not the holder of the note underlying its complaint and therefore lacks capacity to bring this action. Defendants reasoned that separating the allonge from the note negates the endorsements on the allonge and since the endorsement on the allonge is a duplicate of the endorsement on the signature page of the note, the endorsement on the note is negated as well. They further alleged, citing no legal authority, that since the second endorsement is invalid, Chicago Funding is actually the true holder of the note.

¶ 12 Plaintiff produced the original note in open court at a hearing on defendants' motions. The trial court denied defendants' second motion to dismiss and granted an oral motion by plaintiff to strike defendants' amended affirmative defense with prejudice.

¶ 13 In March 2014, defendants filed an answer and second amended affirmative defense. This affirmative defense was subcaptioned "Unclean Hands[.]" Once again, defendants' unclean hands affirmative defense "incorporate[d] by reference the allegations made by Plaintiff in its Complaint to Foreclose Mortgage *** and their Answer thereto" and did not adopt or incorporate by reference any other pleadings. This unclean hands affirmative defense vaguely alleges an ethics violation by the plaintiff in its attempt to contact defendants after a cease and desist order was sent to plaintiff by defendants' attorneys. Plaintiff filed a motion to strike defendants' second amended affirmative defense. The trial court ultimately granted plaintiff's motion with prejudice.

¶ 14 Henry Pye passed away in April 2014 and, upon motion by plaintiff, was later dismissed as a defendant in the case. In September 2014, plaintiff filed a motion for summary judgment; defendant did not respond. A judgment of foreclosure and sale was subsequently entered in December 2014.

¶ 15 Defendant argues on appeal that the trial court erred in: (1) striking an affirmative defense alleging a violation of an implied covenant of good faith and fair dealing on the part of the plaintiff; and (2) striking an affirmative defense and denying a motion to dismiss both challenging plaintiff's standing.

¶ 16 ANALYSIS

¶ 17 A trial court's decision to strike an affirmative defense is reviewed *de novo*. *First of America Trust Co. v. First Illini Bancorp, Inc.*, 289 Ill. App. 3d 276, 284 (1997).

¶ 18 The Illinois Supreme Court has long held that when “ ‘an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.’ ” *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). The *Foxcroft* doctrine precludes parties from bringing prior arguments not replead, finding they have “effectively abandoned and withdrew those counts [or arguments] and in so doing waived any appellate review of their dismissal. *The law could not be clearer on this point.*” (Emphasis added.) *Bonhomme v. St. James*, 2012 IL 112393, ¶ 19.

¶ 19 I. Defendant’s Breach of Implied Covenant of
Good Faith and Fair Dealing Claim

¶ 20 Defendant (Carole) argues the trial court erroneously struck her affirmative defense alleging a violation of an implied covenant of good faith and fair dealing on the part of plaintiff. Plaintiff argues defendant waived arguments related to this affirmative defense or, alternatively, defendant’s argument fails legally and factually.

¶ 21 In this case, defendant’s first affirmative defense, based on a breach of good faith and fair dealing argument, was struck by the trial court without prejudice. Defendant subsequently filed an amended affirmative defense, alleging a standing issue, and later a second amended affirmative defense, arguing the plaintiff had “unclean hands.” The amended affirmative defenses did not adopt or incorporate the prior affirmative defenses. Both amended affirmative defenses were ultimately struck by the trial court.

¶ 22 Defendant’s amended affirmative defenses did not adopt or incorporate by reference the breach of good faith and fair dealing argument asserted in her first affirmative defense. Defendant abandoned the claim, and it is not properly before this court. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 19.

¶ 23

II. Defendant's Lack of Standing Claims

¶ 24

Defendant argues that the trial court erred in denying her second motion to dismiss and striking her amended affirmative defense, both based upon allegations that plaintiff lacked standing to sue. In response, plaintiff again invokes the *Foxcroft* doctrine, asserting that defendant abandoned her lack of standing affirmative defense when she failed to adopt it in a subsequent affirmative defense. Plaintiff further argues the record establishes it has standing and that defendant failed to establish plaintiff's lack of standing.

¶ 25

For the reasons stated above, we need not further address defendant's standing claim stemming from the amended affirmative defense. Like the breach of good faith and fair dealing affirmative defense, defendant's lack of standing defense was struck by the trial court and eclipsed by defendant's subsequent filing of another affirmative defense based on a separate argument. Defendant's later filing of an affirmative defense based on "unclean hands" without reference to or incorporation of the lack of standing affirmative defense abandoned the prior pleading. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 19. Defendant has therefore waived the issue.

¶ 26

We now address defendant's remaining lack of standing claim contained in the second motion to dismiss. Courts of review determine *de novo* whether a trial court should have granted a motion to dismiss. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). A plaintiff need not prove standing, rather the defendant has the burden to plead and prove a plaintiff's lack of standing. *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 27

Defendant asserts that plaintiff lacked standing because it produced two versions of the same promissory note in the course of proceedings; one, attached to the complaint and another version produced in response to discovery requests. The parties do not dispute the different

versions produced in this litigation, only the legal consequence of their existence. Defendant's standing argument contained within her motion to dismiss also fails. Again, defendant cites no facts or case law to support her argument that the differing versions of the promissory note deprive the plaintiff of standing. Defendant specifically needs to prove plaintiff lacked standing at the time the complaint was filed; a bank's failure to attach a note with an endorsement to its original complaint is *not* evidence the bank did not hold the mortgage and note at the time the complaint was filed. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶¶ 12-15. Furthermore, we agree with the First District and find that attaching a copy of the note to a foreclosure complaint is *prima facie* evidence the plaintiff owns the note. *Rosestone Investments LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 24. The plaintiff went even further and produced the original note in open court. Thus, defendant has not satisfied her burden of persuasion and we affirm the trial court's February 19, 2014, order denying defendant's motion to dismiss based on lack of standing.

¶ 28

CONCLUSION

¶ 29

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 30

Affirmed.