2013 IL App (4th) 121007-U

NO. 4-12-1007

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 27, 2013
Carla Bender
4th District Appellate
Court, IL

THE FISHER NATIONAL BANK, Plaintiff-Appellee, v. HAROLD MILES, a/k/a HAROLD E. MILES, Defendant-Appellant, and CENTRUE BANK, f/k/a KANKAKEE FEDERAL SAVINGS BANK; UNITED STATES OF AMERICA; LONGVIEW FARMS, INC.; and CENTRAL FINANCE LOAN CORPORATION, Defendants.	)	Appeal from Circuit Court of Champaign County No. 09CH41 Honorable Michael Q. Jones, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court properly considered the credibility of the witnesses in resolving factual issues, the court's decision on the counterclaim was not against the manifest weight of the evidence.

¶ 2 In January 2009, plaintiff, the Fisher National Bank (Bank), filed a complaint for foreclosure on property owned by defendant, Harold Miles. In June 2009, Miles filed an answer and a counterclaim. In October 2012, the trial court entered judgment in favor of the Bank and against Miles on his counterclaim.

¶ 3 On appeal, Miles argues the trial court erred in finding against him on his counterclaim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2009, the Bank filed a complaint for foreclosure seeking to foreclose on the two parcels of real estate owned by Miles. The Bank alleged Miles defaulted by failing to pay the real estate taxes for 2005, 2006, and 2007. In June 2009, Miles filed his answer and counterclaim. In his counterclaim, Miles alleged he and the Bank entered into an agreement on February 3, 2006, in which the Bank agreed to redeem delinquent real estate taxes on the project thereby permitting Miles to sell individual lots comprising part of the project in excess of $1 million pursuant to existing contracts for sale. Miles claimed the Bank breached the loan agreement and mortgage by failing to redeem the real estate taxes.

¶ 6 In October 2012, the trial court conducted a bench trial on the Bank's complaint for foreclosure and Miles' counterclaim and the following evidence and testimony was presented. On June 14, 2004, the Bank loaned Miles the sum of $2,708,550.45, memorialized by a promissory note executed by Miles and secured by a mortgage on a large tract of real estate containing 100 housing units. The tract of land was subdivided and named the Pheasant Ridge subdivision. Miles rented the housing units to tenants.

¶ 7 On January 26, 2005, the 2004 loan was modified. The modification obligated Miles to make monthly interest payments, and upon the sale of individual units of real estate, the net proceeds were to be first applied to interest, second to a real estate tax reserve, and the balance to principal. The loan was ultimately foreclosed upon by the Bank in Champaign County case No. 06-CH-362.

¶ 8 On January 21, 2005, the Bank made another loan to Miles in the amount of $35,600. The note was due in full on July 20, 2005. A promissory note was secured by a mortgage on two vacant parcels of real estate commonly known as 401 South Chanute and 441

South Chanute in Rantoul.

¶ 9 On August 26, 2005, the loan made on January 21, 2005, was modified to extend the maturity date to December 31, 2005. On July 31, 2006, another modification agreement was executed by both parties extending the maturity date to December 31, 2006. On January 29, 2007, a third modification agreement was executed to extend the maturity date to June 30, 2007. Miles did not pay the 2005 loan in full on June 30, 2007.

¶ 10 The evidence indicated Miles entered into a residential sales contract with Houston Gray to sell a unit for $85,000 in September 2005, with Marjorie O'Brien to sell one unit for $90,000 in November 2005, and with William and Pamela Harshbarger to sell one unit for $75,900 in January 2006.

¶ 11 Jeffrey Wampler, Miles' attorney, first began representing Miles with respect to Pheasant Ridge in 1996 after Miles purchased the property of the former Chanute Air Force base from the United States Government. Wampler first became aware of a lien held by the Internal Revenue Service (IRS) and a real estate tax lien for 2004 when he received title work in January 2006 for the three units Miles was trying to sell. A judgment lien in favor of Longview Farms also existed.

¶ 12 On January 30, 2006, Michael Estes, the Bank's president, sent a letter to Miles' attorney, Jeff Wampler, advising that the Bank was owed 100% of the net proceeds of each unit sold in the Pheasant Ridge subdivision. Even though the Bank was in the first lien position and in order to expedite the sale of the units Miles had contracted for and future units, Estes indicated the Bank was "willing to allow $1,500 per unit to be withheld from our proceeds and forwarded to the IRS."

¶ 13 On February 3, 2006, the Bank's vice president, Eric Stalter, met with Miles and Wampler. After the meeting, Stalter sent a letter to Wampler on February 9, indicating the Bank was willing "to allow $1,000 per unit to be withheld from our proceeds and forwarded to the IRS. This change is due to the bank redeeming the delinquent Real Estate Taxes and improving the position of all who have a lien secondary to the bank." Stalter stated it was a "poorly worded letter," and the agreement was that they would use the sale proceeds of the three lots to redeem the taxes, instead of the bank keeping the proceeds, so the IRS would let the sales go forward. Stalter disagreed that the Bank would be the one redeeming the real estate taxes. Instead, the sale proceeds would be used to redeem the taxes. Stalter stated the Bank did not agree to voluntarily pay the past due real estate taxes.

¶ 14 On February 10, 2006, Wampler sent a letter to Joseph Monsour at the IRS. The letter indicates it was copied to Estes and Stalter. Therein, Wampler stated the meeting between Miles and the Bank resulted in an agreement whereby the Bank would redeem the delinquent real estate taxes and allow $1,000 per property sold to be withheld from the proceeds and forwarded to the IRS. With the agreement in mind, Wampler asked Monsour for a certificate of discharge, which would allow Miles to proceed with the pending sale of the three properties.

¶ 15 Wampler stated the February 10 letter, which he drafted, did not accurately reflect the agreement discussed with the Bank on February 3. Wampler stated it had been agreed that the Bank would not pay the real estate taxes for Miles. Instead, the Bank would allow Miles, if he generated enough net proceeds from the sale of units, to redeem the property taxes. Wampler stated the intent of the February 10 letter was to get the IRS on board to taking $1,000 per unit instead of $1,500 per unit. Wampler stated the letter was "poorly worded," "incomplete, [and]

inaccurate in regard to the real estate taxes."

¶ 16 Stalter never responded to Wampler's February 10 letter to point out his belief it incorrectly stated the terms of the agreement. Neither Wampler, nor anyone else to his knowledge, ever advised the IRS that the February 9 and 10 letters from Stalter and Wampler incorrectly stated the terms of the agreement.

¶ 17 On examination by the trial court, Wampler testified he first became aware of the inaccuracy of the February 10 letter when Miles sued him for malpractice. On examination by Miles' attorney, Wampler stated he became aware his letter was inaccurate when Miles was first represented by his current attorney in August 2008. Upon additional questioning by the court, Wampler testified he became aware of the inaccuracy during the 2006 foreclosure case when his partner, Rick Aeilts, was preparing a response to the complaint in April or May 2007.

¶ 18 Rick Aeilts testified he met with Miles before responding to the foreclosure complaint, and Miles never provided him with any indication that he and the Bank had an agreement. Aeilts stated he asked Wampler about his letter, which referenced the alleged agreement, when Aeilts was preparing a response to the foreclosure case in February 2007. Wampler told him an agreement had been reached whereby if some lots were sold, the proceeds would be used to redeem the taxes.

¶ 19 Miles testified the Pheasant Ridge subdivision contained 100 units. He had sold 11 units by February 2006 with the average selling price between $60,000 and $70,000. Out of those sales, the Bank received $682,125. The original loan was for $2,708,550.45. As of January 26, 2005, the unpaid balance was $2,096,273.99. In January or February 2006, Miles became aware that the IRS had a lien of approximately $105,000, and the Pheasant Ridge real

estate taxes were past due in the amount of $149,267.03. At that time, he sought out Wampler to help him sell the lots that he had contracts for. He attended the meeting on February 3, 2006, and believed the Bank "was going to redeem the taxes." Following the meeting, Miles obtained 10 to 12 sales contracts. Six lots to Devell Hubbard had a gross selling price of $360,000. Two lots to Bernard Coffer had a gross selling price of $120,000. Two other lots had a selling price of $120,000. Miles later learned the arrangement to sell the lots and have the IRS get paid did not go forward. Miles stated he told his attorneys that the Bank had agreed to pay the real estate taxes.

¶ 20 In October 2008, the Pheasant Ridge subdivision was sold pursuant to a judgment of foreclosure and sale with the Bank being the highest bidder at $2,084,660.70. The remaining 89 units had a fair market value of between $4.47 million and $4.7 million. In November 2008, the trial court entered an order confirming the sale. This court affirmed on appeal. *Fisher National Bank v. Miles*, No. 4-08-0928 (Sept. 14, 2009) (unpublished order under Supreme Court Rule 23). In August 2011, the Bank resold the 89 units for $2.675 million.

¶ 21 As stated, the January 2009 complaint for foreclosure, pertaining to the two vacant parcels of real estate, alleged Miles was in default by his failure to pay the real estate taxes for 2005, 2006, and 2007 pursuant to the terms of the mortgage. In his counterclaim, Miles alleged the Bank breached the loan agreement and mortgage by failing to redeem the real estate taxes and by failing to permit him to sell the units/lots pursuant to existing sales contracts because the real estate taxes had not been redeemed by the Bank in accordance with the alleged agreement.

¶ 22 The trial court found the testimony of Wampler more credible than that of Miles.

The court concluded the February 3 agreement did not involve the Bank agreeing to pay the $149,000 in real estate taxes. Instead, the court believed that Wampler really meant to say the Bank would cause the real estate taxes to be redeemed. Thus, the Bank did not breach any agreement to do so. Also, Miles' counterclaim failed because the evidence was uncontradicted as to his default. The court entered judgment in favor of the Bank and against Miles on his counterclaim. The court also declared the judgment on the counterclaim to be final and appealable under Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Miles argues the trial court's finding that the Bank did not orally agree to pay the 2004 real estate taxes on February 3, 2006, was against the manifest weight of the evidence. We disagree.

¶ 25 "The existence of an oral contract, its terms, and the intent of the parties are questions of fact." *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶ 22, 963 N.E.2d 1061.

> "[W]hen there is a factual dispute, the question of whether a contract exists is for the trier of fact to decide. A reviewing court will not overturn a trial court's finding of fact unless the appealing party can prove the findings were against the manifest weight of the evidence. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or where a decision is unreasonable, arbitrary, and not based on any evidence." *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 836, 823 N.E.2d 597, 602

(2005).

¶ 26 In the case *sub judice*, Miles and the Bank alleged they entered into an agreement with respect to the delinquent 2004 real estate taxes. The Bank alleged it agreed with Miles that if he could sell three specific lots, "or enough properties that would generate net proceeds sufficient to redeem the 2004 real estate taxes ***, then Miles could use the net proceeds of the sales to pay the delinquent real estate tax obligation."

¶ 27 Miles, on the other hand, alleged the Bank agreed to redeem the real estate taxes. He relies on Stalter's February 9 letter to Wampler, which states as follows:

> "After our meeting on February 3, 2006, the bank is willing to allow $1,000 per unit to be withheld from our proceeds and forwarded to the IRS. This change is due to the bank redeeming the delinquent Real Estate Taxes and improving the position of all who have a lien secondary to the bank."

He also relies on Wampler's February 10 letter to Monsour, which states, in part, as follows:

> "Due to the blanket mortgage on Mr. Miles' properties, Fisher National Bank would be entitled to all of the proceeds from each closed transaction. Fisher National Bank has agreed to assist Mr. Miles as follows to better the position of all who have a lien secondary to the bank:
>
> 1. Fisher National Bank will redeem the delinquent real estate taxes;
>
> 2. Fisher National Bank will allow One

Thousand Dollars ($1,000.00) per property sold to
be withheld from the proceeds and forward the same
to the Internal Revenue Service."

¶ 28 Obviously, a review of the letters from Stalter and Wampler point in favor of Miles. However, the testimony at the hearing proved otherwise. Stalter testified his letter was "poorly worded" and the Bank did not agree to redeem the real estate taxes. Wampler also stated his letter did not accurately reflect the agreement with the Bank. Wampler stated the agreement did not include the Bank paying the real estate taxes for Miles. Instead, the Bank would allow Miles, if he generated enough net proceeds from the sale of units, to redeem the property taxes. Wampler stated his letter was "poorly worded," "incomplete, [and] inaccurate in regard to the real estate taxes."

¶ 29 The trial court noted this case came down to a credibility determination. The court pointed out Wampler's testimony and found Aeilts verified that the nature of the agreement was one where Miles would sell the property for a sufficient amount to generate enough money to pay off the delinquent real estate taxes. Aeilts also testified Miles admitted not paying the taxes but Miles did not offer anything that would amount to a defense.

¶ 30 "It is well settled that findings of the trial court 'must be given deference because the trial court has the opportunity to view and evaluate witnesses' testimony and is, therefore, in the best position to evaluate their credibility.' " *InsureOne Independent Insurance Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 29, 976 N.E.2d 1014 (quoting *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1012-13, 738 N.E.2d 524, 534 (2000)). "It is not the role of this court to substitute our judgment for that of the circuit court on credibility

determinations." *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 37, 981 N.E.2d 38.

¶ 31 Confronted with the letters and the testimony in this case, the court found Wampler and Aeilts more credible than Miles. While the letters said the Bank would redeem the real estates taxes, Stalter and Wampler were candid that their letters were poorly worded and did not reflect the intent of the parties. Aeilts also stated Wampler pointed out the inaccuracy of the letter. Had the agreement been for the Bank to pay the taxes, one would assume Wampler or Miles would have been adamant in having the Bank comply as soon as possible. However, neither Wampler nor Miles ever made that claim to the Bank during the pendency of the sales contracts. We find the trial court's decision in favor of the Bank was not against the manifest weight of the evidence.

¶ 32 Miles also argues the Bank breached the agreement by failing to cause the taxes to be redeemed from the proceeds of the sale of the 11 viable sales contracts Miles had in hand during April 2006. He claims the Bank only needed to temporarily advance about $70,000 of its funds to redeem the 2004 real estate taxes of $149,267.03 after netting $78,449.50, following the $1,000 payment to the IRS, on the sale of a lot to O'Brien. In his reply brief, Miles claims the Bank would have only needed to advance $20,922.34, based on the sale of O'Brien's lot for $78,449.50 and including the $49,495.19 held by the Bank in an escrow fund.

¶ 33 Miles' arguments are without merit. As pointed out by the Bank, for Miles to transfer clear title to O'Brien, the real estate tax lien had to be paid. The Bank never agreed to advance the money to pay the lien, and it had to be paid in full because it was taxed under one tax identification number. Based on the evidence presented, Miles failed to show a breach of an

agreement with the Bank.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment.

¶ 36 Affirmed.