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2012 IL App (3d) 110661-U

Order filed May 8, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

BMO HARRIS BANK, N.A. f/k/a HARRIS, N.A.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-11-0661
	)	Circuit Nos. 11-CH-847
JOSEPH CRAIG HOUSE,	)	11-CH-874
	)	11-CH-902
Defendant-Appellant,	)	11-AR-282
	)	
and,	)	
	)	
CHARLENE C. HOUSE; THE	)	
INTERNAL REVENUE SERVICE	)	
OF THE DEPARTMENT OF THE	)	
TREASURY OF THE UNITED	)	
STATES OF AMERICA; THE	)	
DEPARTMENT OF REVENUE OF	)	
THE STATE OF ILLINOIS; AND	)	
UNKNOWN OWNERS AND NON-	)	
RECORD LIEN CLAIMANTS,	)	Honorable
	)	Barbara Petrunaro,
Defendants.	)	Judge, Presiding.

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Justice Wright delivered the judgment of the court.  
Justices Lytton and McDade concurred in the judgment.

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## ORDER

¶ 1 *Held:* The trial court's orders appointing a receiver were not an error because each mortgage authorized plaintiff to take possession of the subject property, and plaintiff demonstrated a reasonable likelihood of success on each complaint for mortgage foreclosure. In addition, the trial court's order properly granted certain enumerated powers which were specifically authorized by statute. Finally, the court's orders did not amount to an injunction.

¶ 2 This matter comes before the court on an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(2) (eff. Feb. 26, 2010). Defendant, Joseph Craig House, appeals from the trial court's orders appointing a receiver to manage defendant's properties, which are currently subject to foreclosure proceedings. Defendant also contends the court improperly included certain paragraphs in each order that specified the scope of the receiver's authority, and the court improperly required defendant to cooperate with the receiver by collecting and then producing documents. We affirm.

¶ 3 **FACTS**

¶ 4 The instant appeal involves three separate properties including a commercial building styled as a single family home, and two other single family homes which defendant operates as rental properties. The parties agree that all three properties are non-residential properties as defined by section 15-1219 of the Illinois Mortgage Foreclosure Law (IMFL). See 735 ILCS 5/15-1219 (West 2010) (defining residential real estate under the IMFL).

¶ 5 On October 28, 2002, plaintiff, BMO Harris Bank, N.A., as mortgagee, and defendant, as mortgagor, executed a promissory note and mortgage for the first property, commonly known as 314 S. Madison Street, Lockport, Illinois. On August 19, 2003, the parties executed a new promissory note pertaining to this address, which required defendant to make payment in the full amount due by August 19, 2008. The modified mortgage itself provided:

“Mortgagor agrees that this assignment is immediately effective after default between the parties to this Security Instrument and effective as to third parties on the recording of the Security Instrument, and this assignment will remain effective during any period of redemption by the Mortgagor until the Secured Debt is satisfied. Mortgagor agrees that Lender may take actual possession of the property without the necessity of commencing legal action and that actual possession is deemed to occur when Lender, or its agent, notifies Mortgagor of default and demands that any tenant pay all future Rents directly to Lender.”

¶ 6 Plaintiff and defendant executed a promissory note and mortgage on April 14, 2006, for the second property, commonly known as 354 Theodore Street, Crest Hill, Illinois.<sup>1</sup> By agreement, the parties modified the mortgage and promissory note pertaining to the second property several times on April 18, 2006, August 18, 2006, and June 12, 2007. The final modification extended the maturity date of the mortgage on the second property until October 4, 2007.

¶ 7 On February 8, 2007, plaintiff and defendant executed a promissory note and mortgage for the third property, commonly known as 356 Theodore Street, Crest Hill, Illinois. Under the terms of this note, defendant was required to pay the total amount due under the note for the third property on February 8, 2008.

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<sup>1</sup> The April 14, 2006, mortgage actually states that it is secured by the property commonly known as “356” Theodore Street, Crest Hill, Illinois; however, on the subsequent modification of mortgage, dated April 18, 2006, a handwritten notation states the property is commonly known as “354” Theodore Street.

¶ 8 Both of the mortgages for the two properties located at 354 and 356 Theodore Street 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 a foreclosure sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of receivership, against the indebtedness.”

On November 30, 2010, plaintiff sent defendant a notice of default for all three of the properties, and in February, 2011, plaintiff filed to foreclose on the properties.

¶ 9 The three cases were consolidated by court order on June 14, 2011. Prior to consolidation, plaintiff filed a motion to appoint a receiver in each of the cases. Each motion was supported by an affidavit from Jonas Apelqvist, plaintiff’s Vice President, attesting that, according to plaintiff’s records: (1) defendant failed to make payments in full for the amounts due under the respective promissory notes by the applicable due date; and (2) the mortgages provided that plaintiff may take possession of the properties upon default.

¶ 10 On August 9, 2011, defendant filed a counterclaim admitting there was a remaining balance under each of the three loans but alleging conversion, breach of fiduciary duty, and fraud on the part of plaintiff because, in part, plaintiff made assurances to defendant that the mortgage notes would be renewed. The counterclaim remains pending in the trial court.

¶ 11 The trial court granted the plaintiff’s motions for receivership on September 7 and 19, 2011, after finding that each mortgage provided for the appointment of a receiver after a default occurred, and that there was a reasonable probability that a default existed under the mortgages.

The court orders also granted the receiver the power to: establish utility services necessary to “preserve or operate the [p]ropert[ies],” employ staff to maintain the properties, and pay property taxes. The court also ordered defendant to turn over certain documents to the appointed receiver. These documents included copies of all leases; existing and expired permits; contracts related to the operation and management of the properties; and all insurance policies, real estate taxes, notices, and bills which concern the properties. Defendant appeals.

¶ 12

#### ANALYSIS

¶ 13 On appeal, defendant raises three issues. First defendant argues the appointment of a receiver was in error. Second, defendant claims the orders, as written, are unnecessary and damaging to defendant. Third, defendant asserts the trial court’s orders relative to the production of documents and ongoing cooperation with the receiver constitute preliminary-mandatory injunctions. We address each argument in turn.

¶ 14

#### Appointment of a Receiver

¶ 15 Section 15-1702(a) of the IMFL provides that “[w]hen a mortgagee entitled to possession so requests, the court shall appoint a receiver” (735 ILCS 5/15-1702(a) (West 2010)), and according to section 15-1105 of the IMFL, “shall” means “mandatory and not permissive.” (735 ILCS 5/15-1105(b) (West 2010)). Under section 15-1701(b)(2) of the IMFL, a mortgagee is entitled to be placed in possession of the property, “provided that the mortgagee shows (1) that the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause.”

*Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010).

¶ 16 Regarding the first requirement, the mortgages on all three properties involved in this case allowed for plaintiff to be placed in possession of the property prior to the entry of a final foreclosure judgment. Specifically, the mortgage for the 314 Madison Street property stated that upon default, defendant agreed that plaintiff could take actual possession of the property without the need for commencing legal action. See *Bank of America, N.A. v. 108 N. State Retail, LLC*, 401 Ill. App. 3d 158, 166 n.1 (2010) (finding first requirement under section 15-1702(b)(2) satisfied, in part, because loan agreement allowed mortgagee to take possession of the premises upon an event of default). In addition, the mortgages for the Theodore Street properties specifically provided for the appointment of a receiver before a foreclosure sale. See *Centerpoint Properties Trust*, 398 Ill. App. 3d 388, 392 (mortgage providing for appointment of a receiver satisfies first requirement under section 15-1702(b)(2)). Therefore, since all three mortgages in this case authorized plaintiff to take possession of the properties or have a receiver appointed, the plaintiff satisfied the first requirement under section 15-1701(b)(2).

¶ 17 Turning to the second requirement, defendant disputes that there is actual default. Relying on his counterclaim, defendant alleges plaintiff misapplied funds and did not honor the agreement to renew the mortgage notes. However, plaintiff submitted Apelqvist's affidavits which documented defendant's failure to pay in full by the respective due date specified in the final promissory note applicable to each property. Even though defendant disputes the outstanding amount due according to the various loans, he does not deny there is an unpaid balance due for each loan. Under Illinois law, such evidence is sufficient to meet the second requirement under section 15-1701(b)(2). See *Mellon Bank, N.A. v. Midwest Bank & Trust Company*, 265 Ill. App. 3d 859, 869 (1993); *Travelers Ins. Co. v. LaSalle Nat. Bank*, 200 Ill.

App. 3d 139, 145-46 (1990). Thus, we agree the trial court correctly decided that plaintiff established a reasonable probability that plaintiff would prevail on the merits since a proven default establishes a reasonable probability of success in a mortgage foreclosure action. *Brown County State Bank v. Kendrick*, 140 Ill. App. 3d 538 (1986).

¶ 18 Next, defendant argues section 15-1701(b)(2) of the IMFL allows a mortgagor to remain in possession of the property subject to the foreclosure proceedings based on a showing of "good cause." 735 ILCS 5/15-1701(b)(2) (West 2010). Here, defendant alleges he has demonstrated good cause because he has maintained the properties and collected rent from the occupying tenants.

¶ 19 In *Travelers Ins. Co. v. LaSalle Nat. Bank*, 200 Ill. App. 3d 139, the mortgagor claimed good cause existed simply because the mortgagee failed to allege any fraud or mismanagement on the part of the mortgagor. The court recognized that "[t]his contention is nothing more than defendants' attempt to shift the burden of making a good cause showing onto plaintiff." *Id.* at 144. Consequently, defendant's allegations that he sufficiently maintained the properties is insufficient to establish good cause. Even if we were to agree that defendant could establish good cause by demonstrating he could manage the property better than the receiver, defendant has produced no evidence supporting that assertion in this case. *Centerpoint Properties Trust*, 398 Ill. App. 3d 388, 395.

¶ 20 Defendant also claims that there is no need for a receiver in this case because these properties are not large, complex commercial properties which require a receiver's specialized knowledge to manage and maintain. However, plaintiff is not required to demonstrate a need for a receiver under the statute, and we find defendant has not established good cause to remain in

possession of the property. Defendant's argument overlooks the fact that, having met the statutory burden, plaintiff is entitled to a receiver if it so requested, both by the terms of the statute for all three properties and according to the express language of the contractual agreement with regard to the Theodore Street properties. 735 ILCS 5/15-1702(a) (West 2010). Accordingly, the appointment of a receiver was proper.

¶ 21 Receiver's Powers

¶ 22 Defendant's second argument on appeal is that certain paragraphs of the trial court's orders appointing a receiver for each property are unnecessary and damaging to defendant's interests. Specifically, defendant contests the necessity of that portion of the trial court's orders which allow the receiver to establish utility accounts with providers, employ staff to maintain the property, and pay property taxes as set out in paragraphs 5(c), 5(f), and 5(g) of each order. He alleges these paragraphs are unnecessary because defendant is able to continue to pay the existing utility accounts, maintain the properties, and pay the property taxes.

¶ 23 We note that section 15-1704(b) specifically states that the receiver shall have the power to "operate, manage and conserve such property," employ custodial help, and pay taxes which have been leveled against the property. 735 ILCS 5/15-1704(b) (West 2010). Defendant would have this court create an exception to the receiver's statutorily enumerated powers when the subject property is being sufficiently maintained by the purported mortgagor in default. Where the statutory language is clear and unambiguous, it "must be enforced as enacted, and a court may not depart from its plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature." *People ex rel. Devine v. \$30,700.00 U.S. Currency*, 199 Ill. 2d



