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FIRST DIVISION
September 8, 2014

No. 1-13-1620
2014 IL App (1st) 131620-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JP MORGAN CHASE BANK, NA.,)	
)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 04 CH 3493
)	
ANN SICKON,)	Honorable
)	Lisa Curcio,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concur with the judgment.

ORDER

Held: Summary judgment in favor of bank was proper where defendants failed to produce any evidence in support of their claim that they were under no obligation to pay the unpaid balance on a promissory note.

¶ 1 Defendant Ann Sickon appeals from the trial court's grant of summary judgment in favor of plaintiff JP Morgan Chase Bank, N.A. (Chase) on Count III of Chase's amended complaint. On appeal, defendant Sickon contends that the trial court erred in granting summary judgment to Chase where there were genuine issues of material facts presented. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 In 2004, Chase filed a complaint seeking mortgage foreclosure and other relief against Sickon and Mark Swift on their home in Kenilworth, Illinois. Chase alleged in Count III of its amended complaint that it had extended to Sickon and Swift on or about November 2, 2000, a \$250,000 note, and that Sickon and Swift had failed to pay the unpaid balance. Chase sought \$159,509.34 plus interest, attorneys' fees, and costs.

¶ 4 On June 10, 2004, Swift and Sickon answered the complaint. They admitted to taking the \$250,000 loan, but denied that Chase had performed all of its duties and obligations under the note. As an affirmative defense, Sickon and Swift alleged that they had pledged their Intel stock to Chase as security for the entire term of the loan. Sickon and Swift claimed that they later pledged this Intel stock to another creditor but that Chase had a priority interest on the stock, and "Chase incorrectly told the second creditor that the stock was not previously encumbered such that the stock was wrongfully paid out to the other creditor and unavailable to Sickon and Swift to pay Chase on the \$250,000 note." Based on this "failure to deal properly with the Intel stock," Swift and Sickon argued that they should be discharged from the obligation for which it was pledged.

¶ 5 On May 5, 2011, Chase moved for summary judgment on the \$250,000 note. It claimed that Sickon and Swift had admitted to the authenticity of the note, and did not assert any affirmative defenses relating to the authenticity or the balances due under the \$250,000 note.

¶ 6 In response to Chase's motion, Sickon and Swift stated that on November 2, 2000, they were contacted by Chase and told their accounts were overdrawn by \$250,000 and that the bank was requiring Swift to execute a 30-day note. Swift allegedly executed the note and returned it to the bank. In December 2000, Swift was asked to sign another 30-day note by Chase, which he

did, but requested documentation for the basis of the note. He was again contacted in January 2001, and asked to sign a third note, which he refused to do until he received further documentation. He never received any other documents. Swift alleged that in 2004, Chase took securities in the amount of \$167,000 from Swift's account and took \$94,000 from a checking account. The \$167,000 withdrawal was "never reflected on the statements" and Swift and Sickon denied that they owed any additional funds on the \$250,000 note.

¶ 7 Swift alleged in his response that he learned that the note related to Health Alliance, LLC, and not the personal accounts of Swift and Sickon. Swift and Sickon denied that they owed the note and asserted that they paid in excess of \$95,000 in interest payments not required.

¶ 8 Chase replied to Swift and Sickon's response that they did not owe any additional funds on the note by stating that such statements were not supported by any evidence. Rather, defendants' answer admitted that Chase extended credit to defendants in the form of a \$250,000 note and that the note matured on December 5, 2003. Chase noted that defendants failed to submit a counter-affidavit to Chase's affidavit stating that the \$250,000 note had a balance of \$157,881.56. Chase also argued that defendants should be barred from raising the issue of full payment in their response to Chase's motion for summary judgment because it should have been raised in their answer to Chase's complaint as an affirmative defense. Additionally, Chase attached a loan history to its response, which showed no record of payments made in 2004 in the amounts of \$167,000 or \$94,000.

¶ 9 The motion for summary judgment was heard on March 8, 2012. The trial court noted that it was reasonable to infer that "someone who makes payments in the amount of \$250,000 has some documentation of that payment." The court noted that once the bank came forth with the affidavit saying that funds had not been paid, there is a requirement in Illinois that defendants

would have to come forth with some evidence of payment instead of simply a denial. The court granted Chase's motion for summary judgment on the note.

¶ 10 Defendants filed a motion for reconsideration of the grant of summary judgment. They asserted that Chase held their stock in Intel and that they had provided the stock to Chase.

Defendants argued that the Intel shares had been sold and that the proceeds were not applied to the \$250,000 note as they should have been. Defendants contended that the Intel stock sold for \$181,000, which was more than the amount owed on the note (\$158,992.21) and thus their obligation was terminated.

¶ 11 Defendants further argued that Chase had fraudulently induced them to sign the November 2, 2000, note based on misrepresentations that the note was needed to cover their personal accounts, not their Health Alliance, LLC account. Sickon further contended that Chase had transferred over \$200,000 of Swift's personal funds and applied them to Health Alliance obligations instead of applying the funds to reduce the obligations on the \$250,000 note, which Swift testified to in his deposition.

¶ 12 The trial court denied the motion for reconsideration stating the statements made by Swift in his deposition in connection to the note were his conclusions, unsupported by facts, and that Swift's deposition testimony did not raise a genuine issue of material fact as to the note. The court further found that the motion presented no newly discovered evidence which was not available at the time of the first hearing, no changes in the law, and no errors in the court's previous application of existing law at the time of the court's grant of summary judgment.

¶ 13 Defendant Sickon now appeals.

¶ 14

II. ANALYSIS

¶ 15 On appeal, defendant Sickon contends that she and Swift raised issues of fact as to how much money was owed on the note. Specifically, Sickon contends that Swift's deposition testimony and defendants' responses to Chase's motion for summary judgment were sufficient to defeat Chase's motion.

¶ 16 The standards governing summary judgment motions are well established. The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is proper, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002). Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where dispute exists as to a material fact, summary judgment should be denied. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. A2d 107, 114 (1995). We review the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 17 Sickon alleges that Swift's deposition testimony and defendants' response to Chase's motion for summary judgment make it clear that there is a contested issue of fact, and that summary judgment was improper. Sickon acknowledges that defendants admitted to taking the \$250,000 credit in their answer to the complaint, but allege that they consistently denied that Chase had performed all of its duties and obligations under the note. In their response to Chase's motion for summary judgment, they alleged that they pledged their Intel stock to Chase as security for the term of the loan, and that the stock was wrongfully paid out to another creditor. In their answers to interrogatories, defendants asserted that Chase had fraudulently induced them

to enter into the note by claiming it was necessary because they were overdrawn on their personal accounts. And at Swift's deposition, he testified that Chase sold his investment valued at \$116,000 and told him it that it would be applied to his loan. Sickon contends that because all inferences must be resolved in favor of the nonmoving party, this court must assume that defendants may prevail.

¶ 18 We must first address the parties' respective burdens at the summary judgment stage of proceedings. As the party moving for summary judgment, Chase had the burden of proof and the initial burden of production. *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933 (2001). The moving party can meet the initial burden of production either "(1) by affirmatively disproving the other party's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test), or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test) (citations omitted)." *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89 (2000); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (a party moving for summary judgment could meet its initial burden of production by pointing out to the court that there is an absence of evidence to support the nonmoving party's case). If the moving party meets the initial burden of production, then the burden of production shifts to the nonmoving party, who must then present some factual basis that would arguably entitle it to judgment as a matter of law. *Pecora*, 323 Ill. App. 3d at 933. A court should grant summary judgment on a *Celotex*-type motion "only when the record indicates that a [party] has had extensive opportunities to establish her case but has failed in any way to demonstrate that she could [do so]." *Williams*, 316 Ill. App. 3d at 694.

¶ 19 In the case at bar, defendants admitted in their answer to the complaint that they had accepted a \$250,000 line of credit from Chase, and that they had "failed to satisfy the unpaid

balance of the Note." In its motion for summary judgment, Chase attached an affidavit of one of its employees, Michael Gitterman, which stated that defendants had failed to satisfy the unpaid amount due on the note. In their response to Chase's motion for summary judgment, defendants alleged that in 2004, Chase took securities in the amount of \$167,000 from Swift's account and took \$94,000 from a checking account which should have been applied to the note. Defendants alleged that they did not owe any additional funds on the note. However, this alleged affirmative defense that they did not owe any additional funds on the note did not appear in defendants' answer to Chase's complaint. *Cordeck Sales Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 374 (2008) ("in order to avoid surprise to the opposite party, an affirmative defense must be set out completely in a party's answer to a complaint and failure to do so results in waiver of the defense.") Additionally, defendants could not assert that they did not owe any additional funds on the note when they had previously admitted a failure to pay the unpaid amount on the note. See *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 569 (1995) (a factual dispute cannot be created by a party as a result of contradicting a previous unequivocal judicial admission).

¶ 20 Moreover, defendants did not file any documentation supporting their allegation that they had no obligation to pay the unpaid amount of the note, or that Chase failed to properly deal with Intel stock. *Palacios*, 275 Ill. App. 3d at 568 (the mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment). Nor did defendants file a counter-affidavit to Chase's affidavit which stated that Swift and Sickon had failed to pay the balance on the note when it matured. *Prather v. Decatur Memorial Hospital*, 95 Ill. App. 4d 470, 472 (1981) ("[w]here facts contained in an affidavit in support of a motion for summary judgment are not contradicted by counter-affidavit, such facts are admitted and must be taken as true.")

¶ 21 Accordingly, we find that while defendants had extensive opportunities to establish their case, that they failed to submit any documentation or counter-affidavits supporting their case, and thus, summary judgment was properly granted in favor of Chase on the note.¹

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County.

¶ 24 Affirmed.

¹ We do not address defendant's argument that the trial court incorrectly characterized defendant's testimony as conclusions instead of facts because there were no citations to authority in the argument. *Mazur v. Hunt*, 227 Ill. App. 3d 785, 793 (1992) ("failure to cite to any authority in support of an argument *** constitutes waiver of that argument.")