

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 121041-U

Order filed May 29, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

CENTRAL MORTGAGE COMPANY,)
)
Plaintiff-Appellee,)
)
v.)
)
ROBERT D. BUSH,)
)
Defendant-Appellant,)
)
and)
)
BARBARA BUSH, HEATHERBROOK)
ESTATES HOMEOWNERS ASSOCIATION,)
INC., FIRST MIDWEST BANK, UNKNOWN)
OWNERS and NON RECORD CLAIMANTS,)
)
Defendants,)

Appeal from the Circuit Court
of the 12th Judicial Circuit,
Will County, Illinois.

FIRST MIDWEST BANK,)
)
Plaintiff,)
)
v.)
)
ROBERT D. BUSH, III,)
)
Defendant.)

Appeal No. 3-12-1041
Circuit Nos. 10-CH-5616, 10-L-829, &
11-CH-2758

ROBERT BUSH,)	
)	
Plaintiff,)	
)	
v.)	
)	
CENTRAL MORTGAGE COMPANY and)	
FIRST MIDWEST BANK,)	The Honorable
)	Richard J. Siegel,
Defendants.)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* In a foreclosure case in which the circuit court denied the homeowner's motion to amend his pleading and granted summary judgment in favor of the mortgage company, the appellate court held that the circuit court erred when it denied the defendant's motion to amend his pleading. Accordingly, the appellate court vacated the grant of summary judgment in favor of the plaintiff and remanded the cause for further proceedings.

¶ 2 The plaintiff, Central Mortgage Company, filed a foreclosure complaint against the defendant, Robert D. Bush, in circuit court case number 10-CH-5616. The case was later consolidated with two related actions, case numbers 10-L-829 and 11-CH-2758. Eventually, the circuit court granted summary judgment in favor of Central Mortgage in case number 10-CH-5616, and Bush appealed. On appeal, Bush raises two arguments with regard to case number 11-CH-2758 and two arguments with regard to case number 10-CH-5616. With regard to case number 11-CH-2758, Bush argues that the circuit court erred when it dismissed his rescission claims and when it denied his motion to reconsider that dismissal. With regard to case number 10-CH-5616, Bush argues that the circuit court erred when it denied his motion for leave to file an amended pleading and when it granted summary judgment in favor of Central Mortgage. We

reverse the circuit court's denial of Bush's motion to file an amended pleading, vacate the grant of summary judgment in favor of Central Mortgage, and remand the cause for further proceedings.

¶ 3

FACTS

¶ 4

On September 13, 2010, Central Mortgage Company filed a foreclosure complaint against the defendant, Robert D. Bush, seeking to recover the alleged \$408,003.17 Bush and his wife still owed on their home in Monee, Illinois. The case was assigned number 10-CH-5616.

¶ 5

On October 6, 2010, Bush proceeded *pro se* and filed an answer and counterclaims. Bush asserted four affirmative defenses: (1) "The Complaint is barred due to violation of the Fair Debt Collection Practices Act, in as much as, the debt was disputed by certified letter on September 20, 2010 and Defendants are entitled to a 30 day grace period after such dispute," (2) "Plaintiff's Complaint is barred due to lack of standing to bring such a claim," (3) Plaintiff's claims against Defendant are barred due to the Agents of Record for Plaintiff's acceptance of consideration and satisfaction of the alleged debt on May 7, 2010," and (4) he rescinded the debt.¹

¶ 6

Bush's three counterclaims were: (1) a claim for damages in that Central Mortgage violated the Fair Debt Collection Practices Act (15 U.S.C. § 1692 (2010)) by failing to respond to Bush's notice of rescission, (2) a claim for damages in that Central Mortgage and its attorneys "filed false and fraudulent legal documents in the courts and county clerks to collect a debt they had no standing to collect," and (3) a claim for punitive damages for Central Mortgage's "frauds and other misconduct upon the public."

¶ 7

Central Mortgage filed a motion to dismiss Bush's answer and counterclaims, and the circuit court granted that motion on December 16, 2010, after a hearing. At the hearing, the

¹ Bush's fourth defense actually contained some answers to the complaint's allegations.

court examined each of Bush's affirmative defenses and counterclaims and ruled on each that he failed to plead facts sufficient to support his claims. The court also gave Bush 28 days to replead. Bush did not replead within that time period.

¶ 8 In January 2011, Bush retained counsel, who filed a motion on January 25, 2011, that sought an extension of time to file an amended pleading. The circuit court denied that motion on February 16, 2011, although no report of proceedings from that date was included in the record on appeal.

¶ 9 On March 3, 2011, counsel for Bush filed a motion to file an amended pleading *instanter*. Attached to that motion was the amended answer, which included several amended affirmative defenses and counterclaims. The amended pleading detailed three affirmative defenses: (1) the failure to accelerate the loan; (2) unclean hands; and (3) rescission. With regard to the counterclaims, counsel for Bush provided several pages of background information before detailing three counterclaims for rescission and damages for violations of the Truth in Lending Act (TILA) (15 U.S.C. § 1601 *et seq.* (2010)); for violations of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 *et seq.* (West 2010))²; and for reformation.

¶ 10 The circuit court held a hearing on the motion on April 28, 2011. At that hearing, counsel for Bush told the court:

"[Bush] was granted leave to file an amended pleading. He retained my office after that leave expired. I came in seeking an extension of that time, and I was denied. I was told that I could just file for leave to file an amended pleading. I did so. At that time there was an objection. So now we're here three months

² This claim also included a mortgage broker company as a third-part defendant.

down the line when all I'm trying to do is get an amended pleading on file, your Honor."

The court noted that it had not received courtesy copies of counsel's motion and said, "you are going to have to wait for me to read this, all right?" The court then asked what was contained in the amended pleading. Counsel for Central Mortgage stated that the allegations made by Bush were not new; that "those were already pled by the defendant pro se."

¶ 11 Next, the circuit court addressed the timeliness of the motion. The court noted that the time for Bush to file an amended pleading expired around January 16, 2011, and told counsel for Bush that "[y]ou don't give me any reason here why this wasn't done within the given period of time." The court told counsel for Bush that the fact that his firm was retained after the time to file for leave expired "doesn't tell me why they didn't file it or they didn't get your services within that period of time." Then, the court denied the motion without prejudice "pending your giving me some reason why it wasn't filed timely."

¶ 12 In June 2011, the circuit court consolidated case number 10-CH-5616 with two other cases involving Bush. The first of those cases was case number 10-L-829, which was an action brought by First Midwest Bank against Bush for an amount allegedly owed to them that was related to Bush's home purchase. The second of those cases was case number 11-CH-2758, in which Bush filed suit against Central Mortgage and First Midwest Bank, and in which Bush invoked TILA. In August 2011, Central Mortgage filed a motion to dismiss the rescission claim against it in case number 11-CH-2758. The circuit court granted that motion in November 2011, and no Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding was attached to that ruling.

¶ 13 In March 2012, Central Mortgage filed a motion for summary judgment in case number 10-CH-5616. In November 2012, the circuit court granted that motion and signed an order for

foreclosure and sale of the subject residence. In its order, the court stated that Bush's answer did not contain sufficient supporting documentation and did not raise a genuine issue of material fact sufficient to preclude the entry of summary judgment in favor of Central Mortgage.

¶ 14 Bush filed a notice of appeal in which he stated he was appealing numerous orders. First, with regard to case number 10-CH-5616, Bush listed the December 2010 order that dismissed his affirmative defenses and counterclaims, the April 2011 order that denied his motion for leave to file an amended pleading *instanter*, and the November 2012 order granting summary judgment in favor of Central Mortgage. Second, with regard to case number 11-CH-2758, Bush listed a November 2011 order that granted Central Mortgage's motion to dismiss, a September 2012 order that denied his motion to reconsider, and an October 2012 order that denied another motion to reconsider.

¶ 15 After Bush filed his appeal in this case, the parties continued to litigate issues in case numbers 10-L-829 and 11-CH-2758. In the former, summary judgment was eventually granted in favor of First Midwest Bank. In the latter, one of the counts in Bush's complaint was dismissed with prejudice.

¶ 16 ANALYSIS

¶ 17 On appeal, Bush raises two arguments with regard to case number 11-CH-2758 and two arguments with regard to case number 10-CH-5616. First, we will address the two arguments related to case number 11-CH-2758; namely, that the circuit court erred when it dismissed Bush's recission claims and when it denied his motion to reconsider that dismissal.

¶ 18 We first determine whether we have jurisdiction to hear Bush's claims with regard to case number 11-CH-2758.

¶ 19 Section 2-1006 of the Code of Civil Procedure provides, in relevant part, that "actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2-1006 (West 2010).

"Illinois courts have recognized three distinct forms of consolidation: (1) where several actions are pending involving the same subject matter, the court may stay proceedings in all but one of the cases and determine whether the disposition of one action may settle the others; (2) where several actions involve an inquiry into the same event in its general aspects, the actions may be tied together, but with separate docket entries, verdicts and judgment, the consolidation being limited to a joint trial; and (3) where several actions are pending which might have been brought as a single action, the cases may be merged into one action, thereby losing their individual identity, to be disposed of as one suit." *Busch v. Mison*, 385 Ill. App. 3d 620, 624 (2008).

¶ 20 In this case, we believe the consolidation that took place was of the second type described in *Busch*. Case number 10-CH-5616 was a foreclosure action filed by Central Mortgage against Bush, a homeowners association, First Midwest Bank, and unknown owners and non-record claimants. Case number 10-L-829 was an action brought by First Midwest Bank against Bush based on a loan connected to the purchase of Bush's home. Case number 11-CH-2758 was an action Bush filed against Central Mortgage and First Midwest Bank based on rescission claims. The three cases at issue here all retained separate docket entries and records, and had separate rulings. Summary judgment was granted only in case number 10-CH-5616, which prompted Bush's appeal, even though he sought to challenge two rulings from case number 11-CH-2758. During the pendency of this appeal, the parties continued to litigate case numbers 10-L-829 and

11-CH-2758—in the former, summary judgment was eventually granted in favor of First Midwest Bank, and in the latter, one of the counts in Bush's complaint was dismissed with prejudice. Under these circumstances, we hold that the actions were consolidated for mere convenience and retained their separate identities. As there was no Rule 304(a) finding attached to the dismissal of Bush's rescission claim against Central Mortgage in case number 11-CH-2758, we lack jurisdiction to hear Bush's arguments related to that case. See *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008). Thus, the only matter properly before us in this appeal is the grant of summary judgment in case number 10-CH-5616.

¶ 21 With regard to case number 10-CH-5616, Bush argues that the circuit court erred when it denied his motion for leave to file an amended pleading and when it granted summary judgment in favor of Central Mortgage.

¶ 22 Under section 2-616(a) of the Code of Civil Procedure, the parties may be allowed to amend pleadings on just and reasonable terms, including amendments by a defendant that might enable him or her to make a defense or assert a cross-claim. 735 ILCS 5/2-616(a) (West 2010). Generally, Illinois courts have a liberal policy toward the granting of an amended pleading, but the right to amend is neither absolute nor unlimited. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 41. Four factors that a court is required to consider with regard to whether an amended pleading should be allowed are: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). We will not disturb a circuit court's decision to

deny a motion to amend the pleadings unless that decision constituted an abuse of discretion. *Loyola Academy*, 146 Ill. 2d at 273-74.

¶ 23 In this case, the circuit court denied the motion to file an amended pleading *instanter* based solely on timeliness grounds. However, timeliness is only one factor that must be considered in deciding whether to allow a motion to amend a pleading. See *Loyola Academy*, 146 Ill. 2d at 273.

¶ 24 With regard to the first factor, the amended pleading would have cured Bush's defective *pro se* pleading. The circuit court dismissed Bush's *pro se* pleading because he failed to plead facts sufficient to support his claims. The amendments were material, including the amended affirmative defenses and counterclaims, which were not identical to what Bush filed *pro se* despite the statement made by counsel for Central Mortgage. Under these circumstances, the first factor weighed in favor of allowing the amended pleading. See *Loyola Academy*, 146 Ill. 2d at 274-75.

¶ 25 With regard to the second factor, there is no indication that the amended pleading would have caused prejudice or surprise. The amended pleading expounded on the *pro se* pleading, and, to the extent that it included additional matters, those matters were all related to the subject transaction. Further, notice of the amended pleading was mailed on March 1, 2011, including the fact that counsel for Bush had noticed the motion up for hearing on March 16, 2011. On that date, the matter was continued to April 28, 2011, when it was finally heard by the circuit court. The case was not near a trial date, either. For these reasons, the second factor also weighed in favor of allowing the amended pleading. See *Loyola Academy*, 146 Ill. 2d at 275.

¶ 26 With regard to the third factor, it is true that the motion to amend was not timely filed. Bush had been proceeding *pro se* and he failed to replead within the 28-day period allowed by

the circuit court. However, Bush retained counsel within two weeks of the expiration of that time period, and counsel immediately filed for an extension of time to file an amended pleading. That request was denied without prejudice on February 16, 2011, and within two weeks, counsel for Bush filed the motion to file an amended pleading *instanter*. This time period was not of unreasonable length such that any weight carried by this factor in favor of denying the amended pleading was not significant. See *Loyola Academy*, 146 Ill. 2d at 275.

¶ 27 With regard to the fourth factor, it is true that the circuit court gave Bush 28 days to replead between December 2010 and January 2011. Bush did not replead, nor did he obtain counsel until after that period expired. However, again given that counsel for Bush attempted to file an amended pleading in a relatively prompt fashion, any weight carried by this factor in favor of denying the amended pleading was not significant. See *Loyola Academy*, 146 Ill. 2d at 276.

¶ 28 A consideration of all four of the *Loyola Academy* factors—not just timeliness—leads us to the conclusion that the circuit court abused its discretion when it denied the motion to file an amended pleading *instanter*. Because we hold that the circuit court abused its discretion in denying the motion for leave to file the amended pleading *instanter*, we must vacate the grant of summary judgment in favor of Central Mortgage. We also remand the cause for further proceedings.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Will County is reversed in part and vacated in part, and the cause is remanded for further proceedings.

¶ 31 Reversed in part and vacated in part; cause remanded.