2016 IL App (3d) 140934-U

Order filed September 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

BANK OF AMERICA, N.A., successor by merger to BAC HOME LOANS SERVICING, LP,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	Appeal No. 3-14-0934
	)	Circuit No. 10-CH-2229
v.	)	
	)	Honorable
	)	Thomas A. Thanas,
DENNIS W. PICHA; CYNTHIA WILEY,	)	Judge, Presiding.
Defendants-Appellants, and	)	
CROSSINGS HOME OWNER'S ASSOCIATION; BENEFICIAL ILLINOIS, INC.; UNITED STATES OF AMERICA; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS,	)	
Defendants.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Presiding Justice O'Brien dissented.

ORDER

¶ 1 *Held*: Summary judgment was properly granted for the plaintiff in a foreclosure action where: (1) the defendants judicially admitted facts in their unverified answer sufficient to establish that they had defaulted on the loan; and (2) statements in a verified statement presented by one of the defendants in opposition to summary judgment were conclusory and devoid of factual support.

¶ 2 The plaintiff, Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP (BOA),[1] filed this foreclosure action against the defendants, Dennis Picha and Cynthia Wylie. The trial court granted summary judgment in favor of BOA which resulted in the entry of a judgment for foreclosure and sale. This appeal followed.

¶ 3 FACTS

¶ 4 On April 30, 2007, Metropolitan Home Mortgage, Inc. provided a loan to the defendants, who executed a Note secured by a mortgage on a property located in Naperville. The Note

[1] This action was initially filed by BAC Home Loans Servicing, LP (BAC). BOA (BAC's successor by merger) was substituted as the party plaintiff on September 24, 2014. The captions on the plaintiff's memoranda in support of summary judgment identified BOA as the plaintiff, as did the trial court's order granting summary judgment and foreclosure. Nevertheless, in their notice of appeal and in their briefs on appeal, the defendants identify the plaintiff-appellee as "BAC Home Loan Servicing, LP,", rather than BOA. Neither party has moved to substitute BOA as the appellee. (In its brief on appeal, BOA states that the substitution of BOA "is not at issue"). **Error! Main Document Only.**Pursuant to Illinois Supreme Court Rule 362(f), we may amend a case caption on our own motion to reflect the proper parties on appeal. Ill. S. Ct. R. 362(f) (eff. Feb. 1, 1994); *People v. Sirinsky*, 47 Ill. 2d 183, 187-88 (1970). As in *Sirinsky*, the irregularity in the caption in this case was "a formal one," and amending the caption would "regularize" the record without prejudicing either party. *See Sirinsky*, 47 Ill. 2d at 188. We have therefore amended the case caption to substitute BOA for BAC as the plaintiff-appellee.

provided that the defendants shall make monthly payments of $2,353.41 on the first day of each month beginning on June 1, 2007. It also provided that the defendants would pay interest on the loan at the rate of 7.750 % per year. If the defendants did not make each monthly payment on time and in full, they would be in default under the Note.

¶ 5 The Mortgage entitled the lender to accept any "partial payment insufficient to make the loan current" without waiving any of its rights under the Mortgage or prejudicing its right to refuse such partial payments in the future. However, the Mortgage provided that the lender was "not obligated to apply such payments at the time such payments are accepted." The Mortgage stated that the lender "may hold such unapplied funds until [the defendants] make[] payment to bring the loan current." If the defendants failed to do so within a reasonable time, the lender "shall either apply such funds or return them to the [defendants]." If not applied earlier, any partial payments accepted by the lender were to be "applied to the outstanding principal balance under the Note immediately prior to foreclosure."

¶ 6 The Mortgage also required the defendants to make monthly payments for "escrow items," which included any applicable taxes, assessments, leasehold payments or ground rents on the property, mortgage insurance premiums or other insurance premiums required by the lender, or any sums payable by the defendants to the lender in lieu of the payment of mortgage insurance premiums.

¶ 7 BAC subsequently became the holder of the Note and the mortgagee by transfer. On January 6, 2009, BAC and the defendants executed a loan modification which adjusted the principal amount due under the Note and lowered the interest rate to 5.75 %. In the modified agreement, the defendants agreed to comply with all existing requirements in the Note and mortgage to the extent they were not amended by the modification agreement. The modification

did not amend the defendants' obligation to pay for escrow items or the lender's right to accept partial payments without applying them at the time they were accepted.

¶ 8 On April 9, 2010, BAC filed a complaint to foreclose mortgage. The complaint alleged that the defendants had not paid the monthly installments of principal, interest, taxes, and insurance for October 1, 2009, "through the present." In their answer to the complaint, the defendants admitted this allegation. The defendants did not assert any affirmative defenses in their answer. The answer was not verified.

¶ 9 On September 24, 2014, BOA (BAC's successor by merger) filed a motion for summary judgment. When defendants' counsel failed to appear for the presentment of the plaintiff's motions for summary judgment and foreclosure, the trial court entered judgment granting both motions. However, on the defendants' motion, the trial court subsequently vacated both judgments and set a briefing schedule on the plaintiff's motion for summary judgment.

¶ 10 In support if its motion for summary judgment, the plaintiff presented the affidavit of Yisroel Tzvi Estria, the plaintiff's Assistant Vice President, together with certain business records authenticated by Estria. The plaintiff's business records indicated that the defendants had failed to make several monthly payments that were due after the loan modification. Specifically, the records reflected that the defendants made no payments at all in May, July, and December of 2009. The records also showed that certain late payments that the defendant made were held by the plaintiff and were not applied toward the defendants' outstanding debt.

¶ 11 In their response to the plaintiff's motion for summary judgment, the defendants submitted a verified statement executed by Dennis Picha. In his verified statement, Picha swore that: (1) he made each of the payments due under the modification agreement from February 1, 2009, through February 1, 2010; (2) each of the payments he made during that period "included

an amount for principal, interest, and deposits into my escrow account"; (3) despite the fact that Picha "made [his] payments in a timely manner," the plaintiff did not apply his payments in a timely manner; (4) as a result of the plaintiff's failure to timely apply Picha's payments, Picha's escrow account "appear[ed] to be running a significant negative balance" in the fall of 2009; (5) in fact, Picha's escrow account was "not running a significantly negative balance" at that time; (6) because the plaintiff believed that Picha was running a negative balance, it increased Picha's escrow payments significantly, thereby increasing his monthly payment; (7) had the plaintiff properly applied Picha's payments, there would not have been a "significant" increase in the amounts owed; (8) the plaintiff returned the payments Picha made for January and February 2010 and declared his loan to be in default; and (8) Picha attempted to correct the problem with the plaintiff on more than one occasion, but the plaintiff "took no action to correct [its] failure to properly apply payments or calculate the proper escrow amount."

¶ 12 In its reply brief, the plaintiff argued that the defendants had made a judicial admission of default in their answer. The plaintiff also maintained that it was entitled to summary judgment because the allegations contained in Picha's verified statement were "conclusory" and unsupported by any documentation. Moreover, the plaintiff asserted that the defendants' monthly escrow payments were increased to cover advances that the plaintiff had previously made for the payment of taxes and insurance, both of which were "escrow items" under the modified agreement. According to the plaintiff, the business records the plaintiff submitted showed that the defendants defaulted "[b]ecause of the[ir] failure to remit monthly payments, and the[ir] failure to remit payments in an amount sufficient to cover the amount required for monthly escrow."

¶ 13 On November 5, 2014, the trial court granted the plaintiff's motion for summary judgment and entered a judgment for foreclosure and sale. The judgment provided that it was a final and appealable order and that there was no just cause for delaying its enforcement or appeal.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 As an initial matter, we note that the table of contents to the appendix in the defendants' brief on appeal does not contain references to page numbers in the record, as required by Supreme Court Rule 342(a) (eff. Jan. 1, 2005). Instead, the defendants have merely provided a hard copy of the circuit court's online table of contents to the electronic record, which contains links to the documents listed in the table of contents. It can be argued that, in this era of electronically filed records, page numbers to the written record are no longer needed. However, our Supreme Court has not removed the page number requirement from Rule 342(a). Moreover, page numbers to the written record remain useful even if the record is filed electronically, because the e-record is presented to the appellate court as a PDF copy of the written record. Nevertheless, despite the defendant's violation of the Rule, we did not have any difficulty finding the relevant record documents based on the information provided in the defendants' appendix. Thus, we have not required the defendant to refile a properly paginated appendix. The result might have been different if the record had been substantially lengthier. We therefore caution appellants in future cases to include page numbers to the written record on appeal in their appendices.

¶ 17 We now turn to the merits of the appeal. The defendants argue that the trial court erred in granting summary judgment for the plaintiff because Picha's verified statement created a

genuine issue of material fact regarding whether the defendants had defaulted on the mortgage loan, thereby precluding summary judgment. Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2014). Where there is a dispute regarding a material fact, or where reasonable persons could draw divergent inferences from the undisputed material facts, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet and Eastern Railway Co.*, 165 Ill. 2d 107, 114 (1995). We review a trial court's grant of summary judgment *de novo* (*Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 711 (1994)), viewing all reasonable inferences in favor of the nonmoving party (*Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 199 (2000)).

¶ 18 In this case, the trial court properly granted summary judgment in favor of the plaintiff. In their answer to the plaintiff's complaint, the defendants judicially admitted facts establishing that they defaulted on the loan. In response to the plaintiff's allegation that they had not paid the monthly installments of principal, taxes, interest, and insurance for October 1, 2009, through the present, the defendants answered, "Defendants admit that Mortgagors have not paid the monthly installments of principal, taxes, interest and insurance for 10/1/2009 through the present." A statement of fact that has been admitted in a pleading is a judicial admission and is binding on the party making it. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557 (2005); *State Security Insurance Co. v. Linton*, 67 Ill. App. 3d 480, 484 (1978). Judicial admissions are "formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." (Internal quotation marks omitted.) *Knauerhaze*, 361 Ill. App. 3d at 557-58. In contrast to

judicial admissions, evidentiary admissions must be offered into evidence and are always subject to contradiction or explanation. *Id.* at 558. An admission in an unverified pleading signed by an attorney is binding on the client as a judicial admission unless the pleading is subsequently amended. *Id.*; see also *Kulchawik v. Drabla Manufacturing Co.*, 371 Ill. App. 3d 964, 970 (2007); *Linton*, 67 Ill. App. 3d at 484. On amendment, the admission becomes evidentiary, not judicial. *Kulchawik*, 371 Ill. App. 3d at 970; *Knauerhaze*, 361 Ill. App. 3d at 558; *Pettigrew v. Putterman*, 331 Ill. App. 3d 633, 641 (2002).

¶ 19 In this case, the defendants filed their unverified answer, which was signed by their attorney and which contained the admission noted above, on August 25, 2014. They did not subsequently amend their answer. When the plaintiff moved for summary judgment, the defendants did not disavow their prior admission or seek leave to amend their answer to supersede the prior admission. Nor did they argue that the prior admission was a mistake or otherwise seek to explain or qualify the admission in any way. Instead, the defendants simply contradicted their prior admission in Picha's affidavit. That was both improper and unavailing. Absent an amendment to the answer (which did not occur here), the admission contained in the defendants' answer was a binding judicial admission that could not be contradicted or explained by other evidence. *Knauerhaze*, 361 Ill. App. 3d at 557-58; *Kulchawik*, 371 Ill. App. 3d at 970. Because the defendants admitted facts sufficient to establish their default as a matter of law, summary judgment for the plaintiff was proper. See, *e.g.*, *American National Bank & Trust v. Erickson*, 115 Ill. App. 3d 1026, 1030 (1983) (holding that defendants' judicial admissions "were conclusive as to defendants' liability" for breach of a loan contract and that "summary judgment was properly granted" for plaintiffs).

¶ 20 The defendants argue that the admission contained in their answer does not establish that they defaulted on the loan. According to the defendants, they merely admitted that they did not pay the increased amounts that the plaintiff erroneously claimed were due. They did not admit to defaulting on the loan. To the contrary, the defendants contend that they continued to make sufficient payments under the modified agreement but the plaintiff erroneously refused to apply those payments. They argue that the question whether the payments they made were adequate presents a dispute of material fact that is not amenable to summary judgment.

¶ 21 However, the admission included in the defendants' answer is not so finely parsed. In their answer, the defendants simply admitted that they "have not paid *the monthly installments* of principal, taxes, interest and insurance for 10/1/2009 through the present." (Emphasis added.) The defendants did not state that they did not pay the monthly installments *that the plaintiff falsely claimed were due*. Nor did they explain, qualify, or limit their answer in any way. Rather, the defendants simply admitted that they had not paid "the monthly installments" of principal, taxes, interest and insurance for 10/1/2009 through the present. In the absence of an amended answer, this binding, unqualified judicial admission could not be contradicted, qualified, or limited by Picha's testimony or by any other evidence. *Knauerhaze*, 361 Ill. App. 3d at 557-58; *Kulchawik*, 371 Ill. App. 3d at 970.

¶ 22 In any event, even if the defendants had not made a binding judicial admission sufficient to establish their default, summary judgment would still have been proper. In the Note, the defendants agreed that "[i]f [they] do not pay the full amount of each monthly payment on the date it is due, [they] will be in default." In support of its motion for summary judgment, the plaintiff presented the affidavit of its assistant vice president who swore that the defendants had defaulted by failing to make certain payments. In support of the affidavit, the plaintiff provided

properly authenticated business records which indicated that the defendants made no payments at all during May, July, and December of 2009, and that some of the payments the defendants made in other months were late (*i.e.*, were not made on the date they were due, as required by the Note).

¶ 23 Picha's verified statement was the only evidence that the defendants presented in opposition to summary judgment. In that statement, Picha swore that he made each of the payments due under the modified agreement from February 1, 2009, through February 1, 2010 "in a timely manner." However, Picha provided no documentation, testimony, or other evidence establishing the specific amount of each payment and the date when each payment was made. Picha's conclusory, unsupported assertions that he made all the required payments in a timely manner were inadequate to forestall summary judgment. "Allegations amounting to no more than conclusions of fact are insufficient to create an issue of material fact." *Lackey & Lackey, P.C. v. Prior*, 228 Ill. App. 3d 397, 399-400 (1992); see also *Kosten v. St. Anne's Hospital*, 132 Ill. App. 3d 1073, 1079 (1985) (ruling that "conclusions of fact unsupported by allegations of specific facts from which such conclusions may be drawn will not avail to present a genuine issue of material fact sufficient to take the case to the trier of fact"). "The sufficiency of affidavits offered in support of or in opposition to a motion for summary judgment is governed by Supreme Court Rule 191." *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 51 (quoting *Woolums v. Huss*, 323 Ill.App.3d 628, 635 (2001)). In pertinent part, Rule 191(a) provides that affidavits shall be made on the personal knowledge of the affiants, "*shall set forth with particularity* the facts upon which the *** defense is based, and "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. July 1, 2002) (emphasis added). Accordingly, conclusory statements contained in affidavits " 'may not be

considered in opposition to motions for summary judgment.' " *Perona*, 2014 IL App (1st) 130748, ¶ 51 (quoting *Woolums*, 323 Ill. App. 3d at 626); see also *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 13048210, ¶ 62 (ruling that Rule 191(a) "bars any conclusion, legal or otherwise, for which the affiant provides no specific factual support"); *Kosten*, 132 Ill. App. 3d at 1079 (ruling that "affidavits cannot consist of conclusions but must set forth facts admitted in evidence," and that conclusions that are unsupported by specific facts do not meet the requirements of Rule 191(a)).

¶ 24 Picha's conclusory statements were inadequate to rebut the documentary evidence presented by the plaintiff which showed that the defendants had made no payments in May, July, and December of 2009 and that the defendants made other monthly payments belatedly. Moreover, although Picha swore that his escrow account was not running a "significantly" negative balance in the fall of 2009, he did not deny that his escrow account was running a negative balance at that time. He did not deny that the plaintiff had made advances for the payment of certain of the defendant’s escrow items. Nor did Picha present evidentiary facts supporting his claim that the payments he made were adequate to bring the loan current at the time they were made. Accordingly, Picha's verified statement failed to raise a genuine issue of material fact regarding the defendants' default and the plaintiff's entitlement to summary judgment and foreclosure.

¶ 25 In his verified statement, Picha asserts that the plaintiff failed to apply several of his payments at the time they were made. However, the plaintiff presented documentary evidence suggesting that some of the payments made by the defendants were untimely and were

insufficient to bring the loan current at the time they were made.[2] The defendants failed to present factual evidence to rebut this evidence.[3] The mortgage expressly states that the plaintiff is "not obligated to apply" payments that are insufficient to bring the loan current the time such payments are accepted. To the contrary, the mortgage states that the plaintiff "may hold such unapplied funds until the [defendants] makes payment to bring the Loan current." Accordingly, the plaintiff was not required to apply any of the insufficient payments made by the defendants at the time they were made. As a matter of law, the plaintiff's failure to apply these insufficient payments did not cause the default.

¶ 26 The defendants argue that the plaintiff has waived its objection to Picha's verified statement by failing to challenge the sufficiency of that statement before the trial court. We do not find this argument persuasive. "The sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by motion to strike or otherwise in the trial

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[2] The plaintiff argues that, due to the defendants' missed payments and various advances made by the plaintiff for the payment of escrow items like taxes and insurance, the defendants' monthly payments increased. Although the defendants made payments thereafter, those payments were insufficient to bring the loan current because they were not made in the proper, increased amount.

[3] Picha's verified statement contained conclusory assertions that his payments were timely and sufficient at the time they were made, but no factual evidence in support of those assertions. Moreover, although Picha asserted that, if the payments he made had been properly applied by the plaintiff, there would not have been a "significant" increase in the amounts Picha owed, he did not claim that there would have been *no* increase in the amount he owed had the payments been properly applied.

court." *Santschi v. Gorter*, 63 Ill. App. 3d 394, 396 (1978). However, contrary to the defendants' argument, the plaintiff did challenge the sufficiency of Picha's verified statement in the trial court proceedings. In its Reply in support of its motion for summary judgment, the plaintiff argued that Picha's verified statement was "insufficient to create a genuine issue of material fact" because, *inter alia*, it consisted of "conclusory statements" that "payments were made from March 2009 through December 2009, but not applied in a timely manner." The plaintiff noted that the defendants "did not offer any documentary proof that full and timely payments of their mortgage obligations were made." That is the same argument that the plaintiff raises on appeal. Accordingly, the plaintiff has not waived its challenge to the conclusory nature of the statements contained in Picha's verified statement.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 29 Affirmed.

¶ 30 PRESIDING JUSTICE O'BRIEN, dissenting.

¶ 31 I do not believe the defendant’s admissions were an acknowledgement of default and therefore, I respectfully disagree with the majority disposition. Summary judgment is only appropriate when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2–1005(c) (West 2014). The sworn statement by Picha directly contradicts the plaintiff’s assertion that Picha did not make payments for the months of May, June, and July. Therefore, there is a genuine issue as to a material fact. Picha states, based upon his own personal knowledge, that he submitted payments when they were due, but the Plaintiff did not apply them when they were received, and, instead,

applied them at a later date. It is not appropriate to resolve issues of fact at the summary judgment stage.

¶ 32 The plaintiff argues, and the trial court agreed, when admitting to not paying the monthly installments for October 1, 2009, the defendants' answer is a judicial admission. I believe the plaintiff and the trial court erred in determining the defendants' acknowledgement that he did not pay the amount claimed to be due by the plaintiff was an acknowledgment that the defendants were in default. The defendants did admit to not paying the monthly installments of principal, taxes, interest, and insurance for October 1, 2009, through the present. The defendants further stated the plaintiff lacks sufficient knowledge or information to admit the remaining allegations in subparagraph 3(J) of the complaint. The allegations in subparagraph 3(J) are: first and foremost default, and then principal amount due and the interest accrual. It is reasonable to infer from the answer that the defendants do not agree that there was a duty on their part to pay the increased monthly payment. The general judicial admission rule is qualified. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 50. "Judicial admissions only apply when a party's testimony, taken as a whole, is unequivocal." *Id.* Picha's testimony as a whole is not unequivocal. Picha cannot default if he never had the obligation to pay the increased payments. The defendants' response to the motion for summary judgment suggests that there was no obligation to pay an increased mortgage because the mortgagee had no right to increase the mortgage payment. Therefore, the defendants' admission of a non-payment is not an admission of default.

¶ 33 I also disagree with the majority's determination that Picha's affidavit did not satisfy the requirements set forth in Supreme Court Rule 191(a) (eff. Jan. 1, 2013) because Picha's sworn statement is not supported by facts, and just states conclusions. When we review an affidavit, we

look at the entire document and " '[i]f, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). Looking at the document Picha provided as a whole, there is a reasonable inference that the affiant (Picha) could competently testify to its contents at trial. Therefore, Rule 191 is satisfied by Picha's document. I believe the defendants have demonstrated that there are genuine issues of material fact that make entry of summary judgment inappropriate.

¶ 34 I would reverse the trial court and remand for further proceedings consistent with this dissent.