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2016 IL App (3d) 150305-U

Order filed June 24, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

DEUTSCHE BANK NATIONAL TRUST)	Appeal from the Circuit Court
COMPANY on behalf of FINANCIAL)	of the 12th Judicial Circuit,
ASSET SECURITIES CORP., SOUNDVIEW)	Will County, Illinois.
HOME LOAN TRUST 2007-WMC1,)	
ASSET-BACKED CERTIFICATES, SERIES)	Appeal No. 3-15-0305
2007-WMC1,)	Circuit No. 12-CH-1297
)	
Plaintiff-Appellee,)	Honorable
)	Thomas Thanas,
v.)	Judge, Presiding.
)	
CYNTHIA RENEE DAVIS a/k/a)	
CYNTHIA R. DAVIS,)	
)	
Defendant-Appellant,)	
)	
and)	
)	
JAMES MEANS; MORTGAGE)	
REGISTRATION SYSTEMS, INC.; STATE)	
OF ILLINOIS; WELLS FARGO DEALER)	
SERVICES d/b/a WACHOVIA DEALER)	
SERVICES, INC. f/k/a WFS FINANCIAL,)	
INC; FRANKFORT TIMBERS EDGE)	
SUBDIVISION HOMEOWNERS)	
ASSOCIATION; TIMBERS EDGE)	
HOMEOWNER'S ASSOCIATION, INC.;)	
UNITED STATES OF AMERICA;)	
UNKNOWN OWNERS AND NON RECORD)	
CLAIMANTS; and UNKNOWN)	

OCCUPANTS,)
)
Defendants.)

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Since a borrower's claims under the Truth In Lending Act were untimely as affirmative claims, and could only be asserted as the defensive claims of recoupment or setoff, the voluntary dismissal of the foreclosure action against the borrower rendered the appeal moot.

¶ 2 The defendant, Cynthia Davis, a borrower on a home loan, asserted a counterclaim under the Truth In Lending Act, 15 U.S.C. § 1601 *et seq.* (West 2012), in response to an action to foreclose a home loan brought by the plaintiff Deutsche Bank. The circuit court dismissed Davis's counterclaim and later denied her motion to amend or reconsider. After the foreclosure action was subsequently voluntarily dismissed, Davis appealed.

¶ 3 **FACTS**

¶ 4 On August 31, 2006, Davis entered into a home loan transaction with WMC Mortgage Corporation to borrow \$604,000. Davis secured her promise to pay with a mortgage in favor of WMC and executed an adjustable rate note. The terms of the loan included repayment of the principal with interest, with the interest based upon an adjustable interest rate. At the closing,

WMC delivered loan documents to Davis, including a Truth In Lending Disclosure Statement and a statement entitled Variable Rate Mortgage Program Disclosure.

¶ 5 On March 15, 2012, the plaintiff, Deutsche Bank National Trust Company, on behalf of Financial Asset Securities Corp., Soundview Home Loan Trust 2007-WMC1 Asset-Backed Certificates, Series 2007-WMC1 (Deutsche Bank), filed a foreclosure complaint against numerous defendants, including Davis. Deutsche Bank alleged that it was the current holder of the note. Davis answered the complaint and asserted a counterclaim in recoupment, alleging that the original creditor violated the Trust in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, by failing to provide certain required disclosures at closing. On Deutsche Bank's motion, the counterclaim was dismissed and Davis subsequently filed an amended counterclaim. The amended counterclaim was dismissed on January 9, 2014.

¶ 6 On May 1, 2014, the trial court entered an order of summary judgment and a judgment of foreclosure and sale against Davis. However, those judgments were vacated on July 31, 2014. Thereafter, on August 29, 2014, Davis filed a motion for leave to file a second amended counterclaim or, alternatively, to reconsider the January 9th order dismissing her first amended counterclaim. On September 11, 2014, the trial court again entered summary judgment in favor of Deutsche Bank and entered a judgment of foreclosure and sale. On November 6, 2014, the trial court denied Davis's motion to amend or reconsider, noting that it had reviewed the file and noting the passage of several months with no explanation for the delay in filing.

¶ 7 On March 30, 2015, Deutsche Bank voluntarily dismissed the foreclosure action and reinstated the loan. The judgment of foreclosure was vacated. Davis filed a notice of appeal by placing it in the mail on April 28, 2015, appealing the January 9, 2014, order dismissing her counterclaim and the November 6, 2014, order denying her motion to amend or reconsider.

ANALYSIS

¶ 8

¶ 9

Davis argues that the trial court erred in dismissing her amended counterclaim alleging a violation of TILA. Deutsche Bank argues Davis’s counterclaim was mooted by the voluntary dismissal of the complaint.

¶ 10

Deutsche Bank contends that Davis’s amended counterclaim could only be asserted as a claim in recoupment, so it did not survive the dismissal of Deutsche Bank's complaint. An issue is mooted for purposes of an appeal when its resolution could not have any practical effect to the existing controversy. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1100 (2007).

¶ 11

Davis’s first amended counterclaim sought actual and statutory damages for the alleged TILA violations. Section 1640 of TILA authorizes civil liability in the form of actual damages, statutory damages, costs and attorney fees for lenders who violate the disclosure requirements of TILA. See 15 U.S.C. § 1640(a) (2012). Section 1640(e) of TILA, however, specifies a one-year statute of limitations for any such civil liability claims. 15 U.S.C. § 1640(e) (2012). It is clear that Davis’s counterclaim, which was filed until more than six years after entering into her loan agreement, was untimely. Davis argues, though, that her counterclaim was timely as a defense by recoupment or set-off, expressly provided for in section 1640(e) of TILA. Illinois courts have allowed § 1640(e) of TILA damage claims to be brought in recoupment pursuant to section 13–207 of the Code of Civil Procedure (Code) (735 ILCS 5/13–207 (West 2008)) after the one-year statute of limitations has expired. *U.S. Bank Nat. Ass'n v. Manzo*, 2011 IL App (1st) 103115, ¶ 51. Section 13-207 of the Code provides that “[a] defendant may plead a set-off or counterclaim barred by the statute of limitation.” 735 ILCS 13-207 (West 2012).

¶ 12 Section 13–207 of the Code is a “saving” provision that allows a counterclaim to proceed despite the failure to comply with the appropriate statute of limitations period, based on the principle that a plaintiff waives application of the statute of limitations with regard to potential counterclaims. *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 446 (2005). A plaintiff is not free to withdraw this waiver at will; once application of the statute of limitations has been waived, it remains waived even if the claim that triggered the waiver is later dismissed. *Id.* at 447.

¶ 13 However, the counterclaim at issue is limited by the language of § 1640(e) of TILA to recoupment or set-off. A claim in recoupment is a defense arising out of some feature of the transaction upon which the plaintiff’s action is grounded. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 415 (1998). “[A] setoff is a type of counterclaim that is designed to mitigate the damages that a liable defendant owes to a plaintiff.” *Nadhir v. Salomon*, 2011 IL App (1st) 110851, ¶ 37. As a defensive claim, Davis’s counterclaim was only available to her so long as the claim against her survived. See *Distribution Services, Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811, 812 (5th Cir. 1990) (As a purely defensive procedure, recoupment is available to a defendant so long as the plaintiff’s claim survives). Thus, any claim in recoupment or setoff asserted by Davis did not survive the voluntary dismissal of the foreclosure action.

¶ 14 CONCLUSION

¶ 15 For the reasons set forth above, we dismiss this appeal as moot.

¶ 16 Appeal dismissed.