2018 IL App (2d) 171024-U
No. 2-17-1024
Order filed September 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILMINGTON TRUST, NATIONAL ASSOCIATION, not in its individual capacity, but as trustee for MFRA Trust 2014-1,	)	Appeal from the Circuit Court of Lake County.
Plaintiff/Counter-Defendant-Appellee,	)	
v.	)	No. 09-CH-2963
BRADLEY SNOWER,	)	
Defendant-Appellant/Counter-plaintiff	)	
(JP Morgan Chase Bank, NA, as predecessor to Wilmington Trust, *et al.*, Counter-Defendant/ Appellee).	)	Honorable Margaret A. Marcouiller, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting summary judgment where documentary evidence established that no question of triable fact existed; trial court did not abuse its discretion in denying defendant's request to conduct further discovery; trial court did not abuse its discretion in denying class certification where defendant's allegations were conclusory, motion was inadequately supported, and a reasonable person could conclude that common issues did not predominate over individual one.

¶ 2 I. INTRODUCTION

¶ 3 Defendant/Counter-plaintiff, Bradley Snower, appeals the judgment of the circuit court of Lake County granting summary judgment in favor of plaintiff, Wilmington Trust, National Association, not in its individual capacity, but as trustee for MFRA Trust 2014-1. Defendant also appeals the trial court's dismissal of his counterclaim in which he sought class certification. Defendant raises a number of subordinate issues in the course of making these arguments. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant granted a mortgage on a parcel known as 596 Clavey Lane in Highland Park to one of plaintiff's predecessors in interest (the mortgage was intitially given to Mortgage Electronic Registration Systems as nominee for Washington Mutual Bank, FA; it was then purportedly transferred to JP Morgan Chase Bank, N.A.; and it was then allegedly transferred to plaintiff). The mortgage was given to secure a note requiring defendant to repay $1,495,000. Defendant defaulted on the February 2009 payment, and Chase filed a complaint. Following the filing of the complaint, defendant was approved for a 90-day trial loan-modification plan under which he was to make payments of $4,400. However, after the trial period, it was determined that defendant was not eligible for a loan modification through the Making Home Affordable (MHA) program, as the balance on the loan exceeded the program limits.

¶ 6 Defendant first tried unsuccessfully to remove this case to federal court, and then filed, in lieu of an answer, a class-action counterclaim and eight affirmative defenses. The counterclaims were directed at plaintiff's predecessor, Chase. Each affirmative defense consists of a single-sentence, conclusory statement, such as: "Plaintiff/Counter-defendant is not entitled to any damages under the doctrine of 'unclean hands.' " Defendant's counterpetition includes claims for declaratory judgment, unjust enrichment, and violations of the Illinois Consumer Fraud and

Deceptive Business Practices Act (805 ILCS 505/1 *et seq.* (West 2008)). It also seeks an injunction and an accounting, and it contains a section entitled "Class Allegations." Underpinning many of defendant's claims was the allegation that Chase lacked standing.

¶ 7 Plaintiff's predecessor, Chase, moved to strike the class allegations, asserting defendant's allegations, on their face, did not establish the elements of a class action. The trial court granted the motion, dismissing the class claims with prejudice and giving defendant leave to replead counts alleging unjust enrichment and statutory consumer fraud. Defendant filed an amended counterclaim, again based on the allegation that Chase was not the holder of the note. Chase subsequently filed a motion to dismiss the counterclaim, arguing that defendant's counterclaim was defeated by "public records showing Chase assumed all of Washington Mutual's mortgages and loans through a transaction with the FDIC as Receiver for Washington Mutual in September 2008." It further responded that the holder of a note with an in-blank endorsement has standing to foreclose and that the amended counterclaim failed to allege facts sufficient to state a claim.

¶ 8 Chase also filed motions for summary judgment and judgment of foreclosure and sale. Defendant filed a verified answer. After a substitution of counsel, defendant moved to conduct limited discovery in accordance with Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013). Defendant asserted that there were discrepancies between Chase's affidavit of amounts due and the loss-mitigation affidavit (see Illinois Supreme Court Rule 114 (eff. May 1, 2013)). Defendant also requested an extension of time to respond to Chase's motions, pointing to the pending motion for further discovery. The trial court denied defendant's motions, finding that defendant's prior attorney had "ample time to conduct discovery." It also denied Chase's motion for judgment of foreclosure and sale, finding Chase's loss-mitigation affidavit insufficient. It granted Chase's motion for summary judgment.

¶ 9 Plaintiff was substituted for Chase on January 6, 2017, as a party-plaintiff. Plaintiff moved for entry of judgment of foreclosure. It attached a new loss-mitigation affidavit. After defendant unsuccessfully moved to strike the motion and new affidavit, the trial court granted plaintiff's motion. This appeal followed.

¶ 10 III. ANALYSIS

¶ 11 On appeal, defendant raises two main issues. First, he argues that the trial court's grant of summary judgment to plaintiff was improper. He also contends that the trial court should not have dismissed his class-action claims. These are issues we review *de novo*. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001) (summary judgment); *Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (1997). In the context of the latter argument, defendant also argues that the trial court should have permitted further discovery in accordance with Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013), which we review for an abuse of discretion. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 22. Whether to certify a class is also a matter lying within the discretion of the trial court. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 674 (2006). An abuse of discretion occurs only where no reasonable person could agree with the trial court. *Clay v. County of Cook*, 325 Ill. App. 3d 893, 901 (2001). On appeal, it is defendant's burden, as the appellant, to affirmatively establish that the trial court erred during the proceedings below. *In re Estate of Elson*, 120 Ill. App. 3d 649, 656-57 (1983). We review the result to which the trial court came rather than its reasoning (*In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002)), and we may affirm on any basis appearing in the record (*Woodard v. Krans*, 234 Ill. App. 3d 690, 699 (1992)). Finally, the record on appeal contains no reports of proceedings or bystanders' reports. To the extent that any of the trial court's decisions could have been impacted by factual findings not presented in the record on appeal, we must presume

those findings were made and support those decisions. *Webster v. Hartman*, 309 Ill. App. 3d 459, 460 (1999).

¶ 12 A. SUMMARY JUDGMENT

¶ 13 We first turn to defendant's argument concerning the trial court's grant of summary judgment. It has oft been stated that "[s]ummary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is appropriate only if "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id*. All evidence must be construed in the light most favorable to the party opposing the motion and strictly against the movant. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Moreover, where multiple relevant inferences are possible, even from undisputed facts, summary judgment must be denied. *Id*.

¶ 14 Defendant contends that an issue of triable fact exists concerning whether he was in default. In support, he states only that he denied the paragraphs in plaintiff's complaint alleging his indebtedness and subsequent default. It is axiomatic that mere denials in an answer are insufficient in themselves to defeat a motion for summary judgment. See *US Bank National Ass'n v. Advic*, 2014 IL App (1st) 121759, ¶¶ 5, 31. Hence, this argument is clearly insufficient for defendant to prevail on appeal.

¶ 15 Defendant next contends that the trial court erred in not allowing him to conduct further discovery. He notes that a defendant lacking knowledge necessary to respond to a motion for summary judgment may file an affidavit in accordance with Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) explaining, *inter alia*, why such information cannot be presented via affidavit. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 47. Whether to allow further

discovery is a matter within the trial court's discretion. *Jiotis*, 2014 IL App (2d) 121293, ¶ 22. We will assume, for the moment, that defendant filed a proper affidavit in accordance with Rule 191(b). The question then becomes whether no reasonable person could agree with the trial court's decision to bar defendant from conducting further discovery.

¶ 16 The trial court denied defendant's request because it found that defendant's "prior attorney had ample time to conduct discovery." Defendant first asserts, citing *Jiotis*, 2014 IL App (2d) 121293, ¶ 29, "The ample time reasoning is fallacious, as strict compliance with Rule 191(b) is not required until the party knows the identity of witnesses who can provide material facts." As we are assuming that defendant's affidavit was sufficient, the question of strict compliance is beside the point. Moreover, it is not pertinent to the question of the timeliness of the request. Defendant then states, again relying on *Jiotis*, 2014 IL App (2d) 121293, ¶ 28, "Reasoning that ample time existed to procure relevant evidence is proper where the party does not request a continuance, however in this case. [defendant] did so." This statement begs the question. In essence, defendant is arguing that his request for additional time to conduct discovery should have been granted because he requested a continuance. Moreover, it is wholly unpersuasive.

¶ 17 Indeed, we note that the complaint to foreclose was filed in July 2009. The summary judgment motion was filed on September 25, 2014—over five years later. The trial court concluded that during this period, defendant had ample time to conduct discovery (our discussion of the trial court's holding is limited due to the absence of a report of proceedings or bystander's report of the hearing in which this issue was addressed).

¶ 18 Defendant counters that he sought leave to conduct additional discovery promptly following the filing of the summary judgment motion, to which the affidavit of Gayle Farmer

was attached. The Farmer affidavit details defendant's indebtedness and default. To rebut this affidavit, defendant seeks evidence that he "was offered and accepted a loan modification." The trial court apparently concluded that defendant should have been aware of the necessity of such evidence prior to the filing of the motion for summary judgment and attempted to procure it during the ordinary discovery period (as no record of this hearing appears in the record on appeal, we must presume the trial court made adequate findings to support its decision (*Webster*, 309 Ill. App. 3d at 460)). Given that this issue is at the center of the dispute between the parties, a reasonable person could agree that defendant should have been aware of it prior to the time plaintiff brought the summary judgment motion. As such, regardless of what we might have decided in the first instance, we are compelled to conclude that no abuse of discretion occurred. Trial courts are, after all, "afforded wide latitude in their rulings on discovery matters." *Brown v. Advocate Health & Hospitals Corp.*, 2017 IL App (1st) 161918, ¶ 24

¶ 19 Defendant claims that he made three payments under a trial loan modification plan and then "Chase did not then honor his modification." A letter from Chase to defendant dated February 9, 2010, plainly states, "We are unable to offer you a Home Affordable Modification because the current unpaid principal balance on your Loan is higher than the program limit." Elsewhere, the letter states, "After researching your account, we have determined that you do not qualify for a modification through the Making Home Affordable ('MHA') modification program or through other modification programs offered by Chase at this time." Thus, the undisputed documentary evidence establishes that the modification was a *trial* plan and that after further review, it was determined that defendant was not actually eligible to participate in the plan, as the balance on the loan exceeded the program limits. The reason defendant did not receive the

benefit of the plan had nothing to do with whether he made the trial payments. Nothing here establishes an issue of *material* fact requiring a trial.

¶ 20 In a section titled "Post Summary Judgment Proceedings," defendant attacks the sufficiency of the second loss-mitigation affidavit (see Illinois Supreme Court Rule 114 (eff. May 1, 2013)). Save for a general citation to the legal standards applicable to vacating default judgments (see *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 23), defendant cites no case law in the course of making this argument. Moreover, defendant's claims are largely conclusory. For example, defendant first sets forth the text of Illinois Supreme Court Rule 114(b) (eff. May 1, 2013):

> "Affidavit Prior to or at the Time of Moving for a Judgment of Foreclosure. In order to document the compliance required by paragraph (a) above, Plaintiff, prior to or at the time of moving for a judgment of foreclosure, must file an affidavit specifying:
>
> (1) Any type of loss mitigation which applies to the subject mortgage;
>
> (2) What steps were taken to offer said type of loss mitigation to the mortgagor(s); and
>
> (3) The status of any such loss mitigation efforts."

Without further explanation, citation to authority, or citation to the record, defendant states, "[The second loss-mitigation affidavit] fails the first prong because it fails to rectify any insufficiencies with the affidavits used by Chase at Summary Judgment hearing [*sic*] on February 25, 2015." A court of review "is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." *Obert v. Saville*, 353 Ill. App. 3d 677, 682 (1993). Similarly, regarding the second prong, defendant's entire argument is that. "[T]he second loss-mitigation affidavit] fails to identify any steps taken to contact the borrower, and

therefore fails the second prong." No authority is cited in support of defendant's implicit proposition that such steps are the *sine qua non* of satisfying subsection (2) of Rule 114(b). In short, defendant's argument on this point is wholly insufficient.

¶ 21 To conclude, defendant has failed to carry his burden on appeal of showing that the trial court abused its discretion in denying his request to conduct further discovery or that it erred in granting summary judgment in favor of plaintiff.

¶ 22 B. DISMISSAL OF THE CLASS-ACTION COUNTERCLAIM

¶ 23 Defendant also contends that the trial court erred in striking his amended class-action counterclaim. The proponent of a class action bears the burden of establishing the statutory criteria. *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 761 (2008). Those criteria are as follows:

> "(1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (West 2014).

A trial court is not limited to considering the allegations of the complaint and may make a factual inquiry, as necessary, to ascertain whether plaintiff has satisfied these elements. *Cruz*, 383 Ill. App. 3d at 764; see also *Szabo v. Bridgeport Machines, Inc.*, 249 F. 3d 272, 675-76 (7th Cir. 2001) (followed in *Cruz*).

¶ 24 Hence, it is defendant's burden on review to show that no reasonable person could conclude that he has not met the statutory criteria. See *Health Cost Controls v. Sevilla*, 365 Ill.

App. 3d 795, 805 (2006) ("[I]n order to reverse, we would be required to find that no other reasonable conclusion could be reached but that a class action would be appropriate."). Defendant barely addresses the numerosity requirement. Regarding the requirement that "The class is so numerous that joinder of all members is impracticable" (735 ILCS 5/2-801 (West 2014)), defendant's allegation is completely conclusory. Defendant alleged as follows, "The class is so numerous that joinder of all members is impracticable, as the Class includes thousands of persons." The class sought to be certified is limited to "Chase mortgagors throughout Illinois and/or Lake County." In *Cruz*, 383 Ill. App. 3d at 767, regarding the numerosity requirement, the plaintiff submitted, as an exhibit to their motion for class certification, time sheets "to demonstrate that upwards of 90 employees were denied correct overtime pay." Defendant points to nothing similar here. Indeed, given the absence of a record of this proceeding, we must presume that the trial court properly found that the class was not so numerous as to satisfy this requirement. See *Webster*, 309 Ill. App. 3d at 460.

¶ 25 Moreover, a reasonable person could conclude that the second requirement, commonality, has not been met. Commonality is established where "the same or similar conduct or a pattern of conduct" aggrieves all members of the proposed class. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 548 (2003). Defendant's allegations concerning commonality include such issues as whether Chase was the proper holder of the notes in question and whether affidavits filed by Chase were made on the personal knowledge of the affiant. Nowhere does defendant mention the failure to honor a loan modification. In assessing commonality, the question is "not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court." *Bueker v. Madison County*, 2016 IL App (5th) 150282, ¶ 26. Given the amount

of time and effort defendant expends regarding the loan modification, a reasonable person could conclude that the alleged common issues identified by defendant do not predominate over this issue. As such, we cannot find an abuse of discretion here.

¶ 26 The third requirement is that "[t]he representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801 (West 2014). Defendant states that his attorneys "are competent, qualified and experienced to prosecute the action on behalf of the [c]lass." However, other than this bare, conclusory allegation, he provides no further information establishing that they have handled cases such as this one in the past or anything else that would establish their competence to handle a class action matter.

¶ 27 Finally, we note that defendant's claim that a class action would be "an appropriate method for the fair and efficient adjudication of the controversy" (735 ILCS 5/2-801 (West 2014)) is based entirely on the numerosity of the class. However, it is not known how many other similar actions are already underway throughout the state. Requiring such actions to be stayed and their plaintiffs to accept class adjudication could be disruptive. On the other hand, if such parties opted out of the class, class adjudication would do little to advance the goal of judicial efficiency. Defendant does not address such concerns. Again, a reasonable person could agree with the trial court's ultimate decision.

¶ 28 In sum, defendant has not carried his burden of showing that no reasonable person would agree that class certification is not appropriate in this case. Accordingly, we cannot conclude that an abuse of discretion occurred.

¶ 29 IV. CONCLUSION

¶ 30 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed.

¶ 31 Affirmed.