2019 IL App (1st) 180976-U

FIRST DIVISION
June 3, 2019

No. 1-18-0976

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITIMORTGAGE, INC.,	) Appeal from the Circuit Court of
	) Cook County
Plaintiff-Appellee,	)
	)
v.	)
	) No. 10 CH 39585
JAMES KONDILIS, JOANN KONDILIS,	)
UNKNOWN OWNERS and NON-RECORD	)
CLAIMAINTS,	)
	) Honorable Allen P. Walker
Defendants-Appellants.	) Judge Presiding

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants waived their challenge to plaintiff's capacity to enforce a promissory note where the challenge was raised for the first time in a postjudgment motion to reconsider. At the summary judgment stage, plaintiff amply demonstrated that it was entitled to enforce the obligations under the note at issue and defendants responded with no evidence to create a genuine issue of material fact on the subject.

¶ 2 Plaintiff CitiMortgage, Inc. filed this foreclosure action alleging that defendants James Kondilis and Joann Kondilis failed to make payments in accordance with their credit obligations.

Plaintiff moved for summary judgment, and the trial court granted judgment as a matter of law in plaintiff's favor. Following the entry of the judgment, defendants filed a motion to reconsider arguing that plaintiff failed to demonstrate its capacity to enforce the note because it admitted it had lost the note. The trial court denied the motion to reconsider, and defendants now appeal. We affirm.

¶ 3 BACKGROUND

¶ 4 Non-party ABN AMRO Mortgage Group, Inc. extended a loan to defendants James and Joann Kondilis that was secured by a mortgage on their home in Arlington Heights, Illinois. ABN AMRO transferred its interest to Plaintiff CitiMortgage, Inc. via a special indorsement when ABN AMRO merged into and was succeeded by CitiMortgage. In 2010, defendants allegedly defaulted as a result of non-payment and plaintiff filed suit to foreclose the mortgage. The mortgage and the note were attached to the complaint, with the note bearing a special indorsement in favor of plaintiff.

¶ 5 Defendant Joann Kondilis did not appear in the case. Defendant James Kondilis (hereinafter "defendant")[1], through counsel, moved to dismiss the complaint. In the motion to dismiss, defendant argued that plaintiff failed to give notice of the default prior to filing a foreclosure action and that plaintiff lacked standing to bring this case because, as demonstrated by the complaint and the exhibits attached thereto, plaintiff was not the holder of the note. The trial court denied the motion to dismiss.

¶ 6 Defendant then answered the complaint and asserted affirmative defenses. As affirmative defenses, defendant reasserted that plaintiff failed to provide the required notice and he asserted

[1] The foreclosure action was brought against both James and Joann Kondilis. Joann Kondilis did not participate in the proceedings until a judgment of foreclosure was entered. The arguments advanced on appeal are that the trial court erred with respect to adjudicating matters in the case pertaining to James Kondilis. Therefore, he is referred to herein as "defendant" and where both defendants' interests are addressed they are referred to as "defendants."

that plaintiff committed fraud. Defendant also asserted that plaintiff lacked standing because "CitiMortgage, Inc. does not properly appear on the documents attached to the complaint." Defendant concluded that "Plaintiff has no right to file this action for lack of standing."

¶ 7 Plaintiff filed a motion to strike defendant's affirmative defenses, a motion for summary judgment, and a motion for an order of default against Joann Kondilis. The trial court found that the allegations supporting defendant's affirmative defenses were insufficient, and it struck all of the affirmative defenses asserted by defendant. Turning to the motion for summary judgment, the trial court found that there was no genuine issue of material fact and entered judgment in favor of plaintiff. In conjunction with granting the motion for summary judgment, the trial court entered a default judgment against Joann Kondilis and a judgment for foreclosure and sale.

¶ 8 Attached to the motion for summary judgment is an affidavit from Kathy Bray, a vice president in charge of document control. Although a copy of the note and the indorsement were attached to the complaint, for the first time at the summary judgment stage, plaintiff explained that it was enforcing the note pursuant to a "lost note affidavit." Plaintiff stated that it "was unable to locate the Note in its files." Ms. Bray averred that plaintiff nonetheless had the right to foreclose because it had the right to possess the note. Plaintiff also attached a certificate of its merger with ABN AMRO as evidence that it owns the note. Defendant responded to the motion for summary judgment and did not specifically challenge plaintiff's ownership of the note, but he generally disputed the authenticity of the loan documents and the signatures thereon. Then, for the first time in a motion to reconsider, defendant raised an issue about the lost note, arguing that plaintiff had failed to meet its burden at the summary judgment stage. The trial court denied the motion to reconsider.

¶ 9 On appeal, defendants argue that the trial court erred when it entered summary judgment

in plaintiff's favor because plaintiff never proved its capacity to enforce the note. Being that plaintiff alleged in its complaint that it was the holder of the note, defendants argue that the discrepancy created at the summary judgment stage when plaintiff admitted it did not have possession of the note was a discrepancy sufficient to preclude summary judgment.

¶ 10 ANALYSIS

¶ 11 The issue presented on appeal concerns whether the trial court properly entered judgment as a matter of law in plaintiff's favor. Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish that a genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012); *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12. If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12. We review a trial court's decision to grant summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8.

¶ 12 Plaintiff alleged in its complaint that it was the holder of the note. Defendant argues that plaintiff was required to prove its legal capacity to enforce the note at the summary judgment stage. An allegation of capacity as the mortgagee in a foreclosure proceeding is a material fact and must be proved by the plaintiff. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 21. In support of defendant's position that plaintiff failed to prove its capacity, defendant maintains that Bray's affidavit, in which she averred that plaintiff was seeking to enforce the note under a "lost note affidavit," created a question of fact because plaintiff was not the holder of the note as it had contended throughout the case.

¶ 13 Defendant waived the argument he now makes by failing to raise it before the motion for summary judgment was decided. In response to the motion for summary judgment, defendant did not argue, as he does now, that plaintiff failed to demonstrate its entitlement to judgment as a matter of law as a result of failing to attach the lost note affidavit to its motion for summary judgment. Although that argument could have been raised, defendant did not make that argument nor did he otherwise contest ownership of the note or plaintiff's right to enforce the note. Defendant raised the argument for the first time in a postjudgment motion to reconsider, so it is waived. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008) (arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal). While defendant blithely questioned the authenticity of the note and the signatures thereon in his response to the motion for summary judgment, his mere denial was not sufficient to preclude the entry of summary judgment. *Opalka v. Yellen*, 31 Ill. App. 3d 359, 362 (1975) (the nonmoving party may not rest on his pleading or mere denials to survive a summary judgment motion).

¶ 14 Before judgment was entered in plaintiff's favor, defendant never questioned plaintiff's status as the holder or demanded more when confronted with Bray's affidavit. Defendant stood silent on the issue of standing and plaintiff's entitlement to enforce the obligation despite the alleged evidentiary deficiency and despite raising other issues. Defendant is not allowed to remain silent on the issue until losing the motion and then formulate an argument to contend that it was the trial court that erred. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991).

¶ 15 Plaintiff put forth several pieces of evidence in support of its position that it owned the note and was the party entitled to enforce the obligation. A copy of the note bearing a special indorsement to plaintiff was attached to the complaint. Plaintiff submitted a copy of the merger

documents to show that the assets were transferred from ABN AMRO to plaintiff in a merger. Plaintiff submitted the affidavit of Kathy Bray, who stated that she could not locate the note, but she affirmed under penalty of perjury that plaintiff owned the note and the indebtedness and was the party entitled to enforce the obligation. Plaintiff submitted a business record of this particular loan's history that shows the full chain of loan activity from the time the loan was originated by ABN AMRO, through the merger, and onto the time that defendants allegedly stopped making payments. Since plaintiff took ownership, the note has not been transferred to anyone else, and the note was in plaintiff's sole possession when it was lost.

¶ 16 Defendants did not present any evidence to counter the evidence offered by plaintiff. The lost note affidavit was not attached to Bray's affidavit, which is a violation of Supreme Court Rule 191(a) (eff. Jan. 4 2013). However, defendant did not raise the issue. Instead, in response to the motion for summary judgment, defendant only "denie[d] the authenticity of the note and signature." Defendant did make generalized claims about lack of standing in his motion to dismiss and in his affirmative defenses, but those claims did not relate to plaintiff losing the note nor did they have any other evidentiary or legal basis. Defendant never presented any evidence countering plaintiff's affirmative evidence that it was entitled to enforce the note. Defendant had a copy of the lost note affidavit that was tendered to him in discovery, and, before judgment was entered, he raised no issue about it or about Bray's reliance on it. As we have held before, "[i]f defendants meant to contend that a party other than CitiMortgage was the 'rightful' holder of the note, it was their obligation to present evidence that would support their contention." *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 12.

¶ 17 Especially in his reply brief, defendant insinuates that plaintiff made misrepresentations to the court about its status as it relates to its entitlement to bring this case. The record does not

bear out defendant's criticism. Defendant seems to believe that plaintiff representing itself as the holder of the note and then later not producing the note was in some way sinister. But there was no reason to believe that anything was afoot other than what Bray averred—that plaintiff lost and could not locate the note, but was nonetheless entitled to enforce the obligation. There is no indication that plaintiff's allegation that it was the holder in possession of the note was some sort of stratagem or that it was an allegation that plaintiff knew to be untrue when it was made. As plaintiff reaffirms on appeal, it "possessed the original note, specially indorsed to [it], when it filed this case and when it filed its amended complaint in 2011." By the time it moved for summary judgment, it could not locate the note and had to rely on other means to prove its entitlement to a judgment. The trial court did not err when it entered judgment as a matter of law in plaintiff's favor.

¶ 18 Defendant argues that his motion to reconsider should have been granted. Defendant argues that in his motion to reconsider he raised "errors in the application of existing law to the facts of this case." But defendant does not explain why he did not or could not have raised the argument he made in the motion to reconsider at the time the motion for summary judgment was pending. The arguments were readily available to defendant as was all the information necessary to make such an argument. Defendant argues that the court erred in applying the law, but defendant was the one who erred by failing to make the argument. The motion to reconsider was not based on newly-discovered evidence. Everything raised in the motion to reconsider could have been raised in response to the motion for summary judgment. It was not, however, and the argument is waived. *Caywood*, 382 Ill. App. 3d at 134.

¶ 19 Defendant also argues that the trial court erred in confirming the judicial sale. However, defendant's argument in this regard is simply that the court erred in granting summary judgment,

so it likewise should not have confirmed the subsequent judicial sale. Because defendant has failed to show any entitlement to relief on the principal matter in his appeal, he cannot succeed on an argument that the judicial sale was confirmed in error as a consequence. Defendant has presented no basis under the Mortgage Foreclosure Law that would preclude the trial court from having properly confirmed the judicial sale. See 735 ILCS 5/15-1508 (West 2016).

¶ 20 CONCLUSION

¶ 21 Accordingly, we affirm.

¶ 22 Affirmed.