SIXTH DIVISION
August 9, 2019

No. 1-18-2572

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CL45 MW LOAN 1 LLC, as assignee of Greenwich Investors XLIX Trust 2015-1, as assignee of CRE Venture 2011-1, LLC, as assignee of the Federal Deposit Insurance Corporation, as Receiver for Ravenswood Bank f/k/a Community Bank of Ravenswood,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 16 CH 5571
v.	)	
KISHAN N. PATEL, an individual, RITA K. PATEL, an individual, et al.,	)	Honorables Daniel Patrick Brennan and Marian Emily Perkins,
Defendants-Appellants.	)	Judges Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The orders of the circuit court granting summary judgment on the plaintiff's complaint for foreclosure, confirming the sale, and entering a deficiency judgment, are affirmed where consideration supported the 2002 mortgage on the Glenview property and the defendants were not entitled to a set-off.

¶ 2 Defendants, Kishan and Rita Patel, appeal the order of the circuit court granting summary judgment in favor of plaintiff, CL45 MW Loan 1 LLC, on plaintiff's complaint for foreclosure. On appeal, the Patels contend that summary judgment was improper where the subject mortgage was not supported by adequate consideration. Alternatively, the Patels argue that they are entitled to a set-off in the amount of the fair market value of the other property securing the underlying loan. They also contend that the waiver of defenses clause contained in the guaranties and mortgage is unconscionable and unenforceable. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered an order approving sale, granting possession, and entering a deficiency judgment on November 14, 2018. The Patels filed a notice of appeal on December 6, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 On July 31, 2001, Ohm Shiva Food, Inc. (Ohm Shiva) received a $448,800 loan from one of plaintiff's predecessor in interest, Community Bank of Ravenswood (Ravenswood Bank). Ohm Shiva used the loan to purchase commercial property in Algonquin, Illinois, for $561,000. As security for the loan, Ohm Shiva executed a promissory note (Note) and a mortgage on the Algonquin property in favor of Ravenswood Bank. Bhupen Patel, brother of defendant Kishan Patel, was the principal of Ohm Shiva. He is not a party defendant in this action.

¶ 7 Contemporaneous with Ohm Shiva's execution of the Note, and as further security for the Note, Kishan and Rita Patel granted Ravenswood Bank a mortgage on real property located at 2761 Manu Court in Glenview, Illinois. The foreclosure complaint alleged that this mortgage was subordinate to a mortgage that the Patels had granted to First Horizon Home Loans. The

Patels also executed guaranties in which they agreed to repay the funds borrowed from Ravenswood Bank or its assignee, plus interest, as reflected by the Note.

¶ 8 In 2002, the Patels requested that Ravenswood Bank release its July 2001 mortgage so they could refinance their First Horizon mortgage under more favorable terms. After the refinance, Ravenswood would file a new mortgage to replace the released July 2001 mortgage and maintain its second lien position against the Glenview property as security for the Note. Ravenswood Bank agreed to release the mortgage. On November 18, 2002, after refinancing their first loan with Washington Mutual, the Patels granted a new mortgage to Ravenswood. The 2002 mortgage referenced the Note in the original principal amount of $448,800, and stated an interest rate of 8.5 percent.[1] The 2002 mortgage stated that default occurs when a "[Ohm Shiva] fails to make any payment when due under the indebtedness." "Indebtedness" means "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents." As a remedy for default, the lender "may obtain a judicial decree foreclosing [the Patels'] interest in all or any part of the Property."

¶ 9 On September 5, 2006, the Patels executed with Ravenswood Bank a Modification of Mortgage. The modification stated that regarding the "original Promissory Note dated July 31, 2001 in the principal amount of $448,800," the "outstanding principal balance under the Promissory Note is [now] $417,567.33." The modification also provided that "[a]t no time shall the principal amount of indebtedness secured by the Mortgage, not including sums advanced to protect the security interest of Mortgage, exceed $835,134.66." The modification stated that "[e]xcept as expressly modified above, the terms of the original Mortgage shall remain

[1] The mortgage defined the Note as dated on November 18, 2002, which the parties agree is a documentation error where the Note referenced was actually dated July 2001.

unchanged and in full force and effect and are legally valid, binding, and enforceable in accordance with their respective terms." Furthermore, the "GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MODIFICATION OF MORTGAGE AND GRANTOR AGREES TO ITS TERMS." [Emphasis in the original.] Kishan and Rita Patel's signatures are found on the same page as this information. Each Patel also executed a separate Guaranty of Payment on the renewal of the Note at this time.

¶ 10 On April 7, 2010, the Patels entered into a forbearance agreement with Ravenswood Bank. The agreement referenced the July 2001 loan of $448,800 and Ohm Shiva's promissory Note in which it agreed to repay in accordance with the terms contained therein. The agreement stated that the Note was secured in part by a mortgage granted by the Patels against their property in Glenview. As concession to the Patels, Ravenswood Bank reduced the interest rate on the Note to 6% per annum on June 5, 2009, and further reduced the rate to 4% on October 8, 2009.

¶ 11 The agreement stated that the Note was in default from September 5, 2009, to February 5, 2010, and the bank had filed complaints to foreclose commercial mortgage and other relief in both Cook and McHenry counties. The agreement provided that the Patels "have brought the Loan current by making a payment in the amount of $12,626.54 *** and have requested that [Ravenswood Bank] refrain and forbear from taking further action *** to collect all sums due and owing pursuant to the terms of the Note." Under the agreement, the Patels agreed to pay the bank $1,950 per month toward satisfaction of the balance due. The parties agreed that "so long as [the Patels] make the monthly payments set forth in Section 1 herein, [Ravenswood Bank] shall take no action to collect on the outstanding and unpaid amounts due under the Note." Thereafter

the loan was assigned to CRE Venture 2011-1 (CRE), and from CRE to Greenwich Investors XLIX Trust 2015-1 (Greenwich).

¶ 12 Ohm Shiva also failed to pay taxes on the Algonquin property and on October 31, 2011, the property was sold for $9,167.17 at a tax sale. In 2013, the tax purchaser filed and served notice of the tax sale and right to redeem. The deadline for redemption expired on April 23, 2014, with no redemption made.

¶ 13 On April 20, 2016, Greenwich filed a foreclosure complaint against the Patels' property. In the complaint, Greenwich alleged that the note went into default on September 5, 2009, due to nonpayment at maturity, and notwithstanding a demand for payment Ohm Shiva had failed to make payments on the note. The complaint also alleged that Rita Patel breached a commercial guaranty in which she agreed to repay the funds borrowed as reflected in the note. Rita "has failed to pay off the Note obligation, notwithstanding the fact that the Note was accelerated and demand has been made." Greenwich did not seek a personal deficiency judgment against Kishan, who was granted a discharge from bankruptcy in a case filed in federal court.

¶ 14 In response, the Patels filed two amended affirmative defenses. First, the Patels alleged that the mortgage they granted was not supported by consideration. Second, the Patels alleged that they are entitled to a set-off in the amount of the fair market value of the Algonquin property because plaintiff failed to timely redeem the delinquent taxes on that property, and thus violated its duty to protect its collateral. Greenwich filed a motion to strike the affirmative defenses, and on September 1, 2017, the trial court dismissed the affirmative defenses. The court found that consideration existed because the 2002 mortgage "re-pledged the subject property for the 2001 note" and the Patels were not strangers to the debt. The court further found that Ohm Shiva as mortgagor, not the bank as mortgagee, was responsible for paying taxes on the Algonquin

property. Finally, the court determined that the Patels waived their affirmative defenses under the plain language of the guaranties.

¶ 15 On November 8, 2017, the Note, mortgage, and related loan documents were sold to plaintiff. On March 2, 2018, plaintiff filed a motion for summary judgment on the foreclosure complaint. In response, the Patels argued that plaintiff must file a loss mitigation affidavit before filing a summary judgment motion, and reasserted their affirmative defenses. The trial court granted summary judgment in favor of plaintiff and found that the total amount due on the note as of June 21, 2018, was $723,373.48, including interest and attorney fees and costs. On November 14, 2018, the court entered an order approving sale and granting possession, and entered a deficiency judgment of $151,243.26 against Ohm Shiva and Rita Patel, jointly and severally. The Patels filed this appeal.

¶ 16 ANALYSIS

¶ 17 The Patels argue that the trial court should not have granted summary judgment on plaintiff's foreclosure complaint where the underlying mortgage was not supported by adequate consideration. Summary judgment is proper where the pleadings, affidavits, depositions and admissions in the record, viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30-31 (1999). We review the trial court's grant of summary judgment *de novo*. *Id*. at 30.

¶ 18 A mortgage is a contract between the immediate parties. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 111 (1993). The elements of a valid and enforceable contract include an offer, acceptance, and consideration. *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 26 (2005). "Consideration" is defined as a bargained-for exchange between the

parties. *Id*. "[C]onsideration for a mortgage may consist of either some interest, right, or benefit conferred to the mortgagor, or some forbearance, detriment, loss or responsibility" undertaken by the mortgagee. *Codo v. Union National Bank & Trust Co. of Joliet*, 54 Ill. App. 3d 810, 812 (1977).

¶ 19 The Patels argue that no consideration existed when they executed the July 2001 mortgage in favor of Ravenswood Bank because they "never received any payment or other contemporaneous consideration" in return. Neither Kishan nor Rita owned any part of Ohm Shiva. However, it is well-established that although consideration for a mortgage normally flows between the mortgagor and mortgagee, consideration can also flow to a third party. *Verson v. Steimberg*, 191 Ill. App. 3d 851, 854 (1989). A benefit to a third party can be sufficient consideration for a promise or agreement. *Affiliated Realty & Mortgage Co. v. Jursich*, 17 Ill. App. 3d 146, 150 (1974).

¶ 20 Kishan and Rita executed the 2001 mortgage in order to secure a $448,800 loan made to the business of Kishan's brother, Bhupen. Since Bhupen received a benefit, adequate consideration existed for the 2001 mortgage. *Codo*, 54 Ill. App. 3d at 812. The 2001 mortgage was subsequently released in favor of the 2002 mortgage, which secured the same Note, so consideration existed for the 2002 mortgage as well. The Patels have cited no cases to support their argument that additional consideration was required for the 2002 mortgage. In any event, consideration for the 2002 mortgage also existed where Ravenswood Bank agreed to release their rights under the 2001 mortgage for a promise by the Patels that they would execute the 2002 mortgage. Consideration for a mortgage may consist of some forbearance, detriment, loss or responsibility undertaken by the mortgagee. *Id*.

¶ 21 The Patels argue that although Bhupen received a benefit, there was no consideration because the Patels were strangers to the transaction between Ohm Shiva and plaintiff's predecessor in interest, Ravenswood Bank. They cite *Verson* as support. In that case, the plaintiff filed suit to quiet title on her home. The plaintiff and her husband at the time, Stuart Banks, purchased the residence shortly after they married. When they separated, plaintiff continued to live in the home with the couple's children and continued to make mortgage payments. Banks moved to another residence. *Verson*, 191 Ill. App. 3d at 852. While they were married but separated, Banks entered an agreement to purchase stock in two businesses. As part of the agreement, he agreed to personally guarantee payment of four promissory notes executed in the sale. As additional security, he agreed that he and plaintiff would execute a second mortgage on their residence. *Id*. at 852-53. Banks assured plaintiff that her signature was "just a formality." *Id*. at 853. After the divorce, as part of the property settlement, Banks executed a quitclaim deed for the residence to plaintiff and she assumed payment of the mortgage. The quitclaim deed to plaintiff was made subject to the trust deed and mortgage recorded to secure the notes. *Id*. Banks later defaulted on his obligations under the promissory notes. He was also adjudicated bankrupt and because he listed the promissory notes among his debt, that debt was discharged. *Id*. at 854.

¶ 22 Plaintiff subsequently decided to sell the property and brought suit to remove the trust deed as a cloud on her title. The defendants, however, filed a counterclaim to foreclose on the trust deed. *Id*. at 854. This court agreed with the trial court that plaintiff received no consideration for her signature on the trust deed. It noted that her "only act" was to cosign the trust deed with Banks, from whom she had been separated for more than a year. She was unrelated to any of the other parties in the underlying transaction, and had no communication with them. Rather, plaintiff cosigned the trust deed "only at Banks' urging and upon his

assurances that this was a mere formality since she and Banks held title to the house in joint tenancy." *Id*. at 856. As such, "plaintiff was clearly a stranger to the underlying transaction." *Id*.

¶ 23 The Patels contend that they too were strangers to the underlying transaction between Ohm Shiva and Ravenswood Bank. They claim they had no interest in Ohm Shiva, received no loan proceeds, and merely signed "the documents presented to them by Bhupen." Important distinctions exist, however, between the Patels and the plaintiff in *Verson*. While the plaintiff was separated from Banks when she signed the trust deed, the Patels were closely related to Bhupen, the principal of Ohm Shiva, when they executed their mortgage. Also, while the plaintiff only cosigned a document presented by her estranged husband, with assurances that her signature was just a formality, the Patels would have had to initiate the mortgage process here because it involved their property, not Bhupen's. They could not have just signed a mortgage document obtained by Bhupen without their knowledge.

¶ 24 We are also unpersuaded by the Patels' argument that "they were unsophisticated in terms of business transactions" and "did not understand they were putting their home at risk" by executing the mortgage. The 2001 mortgage with Ravenswood Bank was not their first mortgage on the property. When the Patels executed their First Horizon mortgage, presumably to purchase the property, they must have understood how mortgages work and the consequences of defaulting on their payments. Nonetheless, these issues were clearly addressed in the 2002 mortgage. According to the terms of the mortgage, default occurs when "[Ohm Shiva] fails to make any payment when due" under the Note. As a remedy for default, the lender "may obtain a judicial decree foreclosing [The Patels'] interest in all or any part of the Property." The modification of mortgage agreement they signed stated that "the terms of the original Mortgage shall remain unchanged and in full force and effect and are legally valid, binding, and

enforceable in accordance with their respective terms." The modification further stated that the "GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MODIFICATION OF MORTGAGE AND GRANTOR AGREES TO ITS TERMS." [Emphasis in the original.] The Patels' signatures are found immediately below this statement.

¶ 25 A person "in possession of all his faculties who signs a contract cannot relieve himself from the obligations of the contract by saying he did not know or understand what it contained." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 57. Rather, one has a duty to learn the contents of a written agreement before signing it, "'and is under a duty to determine the obligations which he undertakes by the execution of a written agreement.'" *Id*., quoting *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 43. The Patels do not allege that fraud or misleading assurances induced them to execute their mortgage. Therefore, we find that the Patels were not strangers to the underlying transaction between Ohm Shiva and plaintiff's predecessor in interest, and consideration existed when they executed their mortgage.

¶ 26 Alternatively, the Patels argue that if they are liable under the mortgage, they are entitled to a set-off equal to the fair market value of the Algonquin property that was sold for delinquent taxes. Plaintiff responds that the Patel's set-off defense should have been raised as a counterclaim. "Set-off" is used in two distinct ways: (1) when a defendant has his own cause of action against the plaintiff who filed suit against him; and (2) when a defendant claims that the plaintiff "has done something that results in a reduction" in damages for which the defendant is liable. *Thornton v. Garcini*, 237 Ill. 2d 100, 113 (2010). The second type of set-off, the type the Patels are alleging, is a "claim [that] must be raised in the pleadings." *Id*. Although the Patels raised set-off as an affirmative defense, the parties and the court treated the issue as a counterclaim, with the court finding that the Patels failed to properly state a claim for set-off.

Plaintiff did not object in the proceedings below. Accordingly, for purposes of this appeal, we will address the issue as a counterclaim. See *Dudek, Inc. v. Shred Pax Corp.*, 254 Ill. App. 3d 862, 871 (1993) (treating as a counterclaim the set-off asserted by defendant as an affirmative defense).

¶ 27 The Patels contend that plaintiff was bound by the doctrine of avoidable consequences, and should have redeemed the delinquent taxes on the Algonquin property before it was sold. They argue that if plaintiff had redeemed the taxes, the sale proceeds from the Algonquin property "could have substantially reduced the Patels' liability." Instead, Rita is now liable for a personal deficiency judgment of $151,243.26 under her guaranty. They seek a set-off in the amount of the fair market value of the Algonquin property.

¶ 28 The rule of avoidable consequences was applied in *Maere v. Churchill*, 116 Ill. App. 3d 939 (1983), a case relied on by the Patels. In *Maere*, the plaintiffs purchased two lots in a subdivision of Moline, Illinois. *Id.* at 941. They retained the defendants' law firm to represent them in the closing and review title issues. A certificate of title was issued indicating that the plaintiffs had merchantable title to the lots. While proceeding with plans to build on their lots, plaintiffs discovered that certain restrictive covenants may pertain to the lots in question. Concerned that these restrictions may affect their construction plans, they contacted defendants to look into the issue. Defendants informed the plaintiffs that if they come by the office, defendants would obtain a policy of title insurance to take care of any concerns. Plaintiffs, however, did not follow up and instead contacted other counsel for advice. *Id.*

¶ 29 New counsel later contacted defendants about the restrictive covenants on the title and requested that defendants cure the problem. The defendants obtained and paid for a formal

commitment for title insurance, including insurance for the alleged defects in plaintiffs' title, in an amount of the price of the lots. Plaintiffs did not accept this policy. *Id*. at 942.

¶ 30 Without resolving the title issues, plaintiffs applied for a construction loan to finance their planned construction on the lots. An attorney for the lender examined the title and noted the restrictive covenants as encumbrances and title defects. The lender informed the plaintiffs that the defects would have to be cured before the loan could be finalized. When informed of this development, the defendants tendered the title insurance policy they had obtained that specifically insured against the noted restrictions. The lender, however, required additional title insurance to cover the improvements plaintiffs planned to make on the properties. The insurance agent assured that such coverage was available for an additional premium, later determined to be $300. *Id*. at 942. However, neither the plaintiffs nor the defendants would pay the additional premium and the loan commitment was lost. Plaintiffs acknowledged that had they paid the $300 additional premium, their loan would have been approved. *Id*. at 942-43.

¶ 31 The plaintiffs filed a complaint against the defendants, claiming breach of contract and negligence. In finding that the plaintiffs were barred from seeking compensatory damages against the defendants, the court applied the rule of avoidable consequences. This doctrine "prevents a party from recovering damages for consequences which that party could reasonably have avoided." *Id*. at 946. Plaintiffs could have avoided the loss of the construction loan, and further damages resulting from that loss, if they had agreed to accept the title insurance and pay the additional premium of $300. "Having failed to avail themselves of a clear opportunity, arranged by the defendants, to minimize their damages," plaintiffs could not seek damages against the defendants that could have been avoided by reasonable action. *Id*. at 947.

¶ 32 The problem with applying the doctrine in this case is that plaintiff here is not seeking damages resulting from the tax sale of the Algonquin property, damages that could have been avoided had plaintiff redeemed the delinquent taxes. Plaintiff makes no claim that it is entitled to the proceeds from a sale of the property for fair market value, which did not occur due to the tax sale. Also, action taken to redeem the taxes on the Algonquin property would not have reduced plaintiff's damages. In fact, the amount of damages incurred would have increased had plaintiff redeemed the taxes. In filing a foreclosure complaint, plaintiff may seek fees and costs as additional damages, including the payment of taxes necessary to protect plaintiff's lien on the mortgage. 735 ILCS 5/15-1504(d)(4) (West 2016). "[A]ny money so paid or expended will become an additional indebtedness secured by the mortgage and will bear interest from the date such monies are advanced at the rate provided in the mortgage." *Id*. §15-1504(d)(6). *Maere* and the doctrine of avoidable consequences are inapplicable here.

¶ 33 Moreover, the Patels' set-off claim presumes that plaintiff was obligated to redeem the delinquent taxes and obligated to foreclose on the Algonquin property before recovering damages from the Patels' mortgage and guaranties. Plaintiff is not a co-owner of the Algonquin property, but a lender that holds a mortgage to secure payment of its loan to Ohm Shiva. As such, plaintiff had no obligation to redeem delinquent taxes on the property. *Johnson v. Beneficial Finance Co. of Illinois, Inc.*, 154 Ill. App. 3d 672, 677 (1987). If plaintiff had redeemed such taxes, it could have sought to recover that payment as costs and expenses. 735 ILCS 5/15-1504(d)(4) (West 2016). The statute, however, does not require plaintiff to do so.

¶ 34 Plaintiff also was not obligated to recover from the Algonquin mortgage before seeking damages against the Patels' on their mortgage and guaranties. It is well-established that "upon default, the mortgagee is allowed to choose whether to proceed on the note or guaranty or to

foreclose upon the mortgage," and may pursue these remedies consecutively or concurrently. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241-42 (2004). None of the documents in the loan transaction specify that recovery for damages due to default must first be pursued against the Algonquin property. Without that requirement, the Patels' claim that the damages found against them should be reduced by the fair market value of the Algonquin property cannot stand.

¶ 35 Due to our disposition of this appeal, we need not consider the Patels' contention that the waiver of defenses clause contained in the guaranties and mortgage is unconscionable and unenforceable.

¶ 36 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 37 Affirmed.