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2014 IL App (3d) 130132-U

Order filed June 11, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2014

FIRSTMERIT BANK, N.A., as successor)	
in interest to George Washington Savings)	
Bank,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	
)	Appeal No. 3-13-0132
CATHERINE J. YUNKER; SUBURBAN)	Circuit No. 10-CH-5426
BANK AND TRUST, as trustee under)	
Trust Agreement dated June 12, 2007 and)	The Honorable Richard J. Siegel
known as Trust No. 74-3952,)	Judge, Presiding.
CONSTANTINE N. POULAKIS, OGDEN)	
HILL CEMENT, INC., GLENVIEW)	
WALK ESTATES HOMEOWNERS)	
ASSOCIATION, UNKNOWN OWNERS)	
and NON-RECORD CLAIMANTS,)	
)	
Defendants-Appellants.)	

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff did not provide sufficient foundation to admit the introduction of document showing defendant's loan balance as a business record, because the

document was a mere summary of information in plaintiff's records and not a record of a transaction, act, or occurrence. Accordingly, the trial court's grant of summary judgment in favor of plaintiff was reversed.

¶ 2 Defendant Catherine Yunker received a loan from George Washington Savings Bank, secured by a promissory note and mortgage. She subsequently defaulted on the note. Plaintiff FirstMerit Bank, N.A., acquired the mortgage and note from George Washington and filed a complaint to foreclose the mortgage and to obtain a money judgment on the note. The trial court granted summary judgment in favor of FirstMerit. Yunker appeals, arguing that (1) the affidavits submitted by plaintiff did not show sufficient personal knowledge for the admission of business records, and (2) the trial court erred by refusing to consider defendant's response and counteraffidavit. We reverse and remand.

¶ 3 **FACTS**

¶ 4 On August 15, 2008, George Washington Savings Bank loaned defendant Catherine Yunker \$723,500, which was secured by a promissory note and a construction mortgage. The note was for a construction loan to build a home at the property commonly known as 15634 Jeanne Lane in Homer Glen, Illinois. The mortgagor of the property was Suburban Bank and Trust, as Trustee, under Trust Agreement dated June 27, 2007, and known as Trust No. 74-3952. Yunker was the only party to sign the promissory note as a borrower. The note had a maturity date of September 1, 2009, which required that Yunker repay the entire principal and interest due by that date. Under the terms of the note, George Washington was to administer advances and payouts on the construction loan, and Yunker was the only person authorized to approve these payments.

¶ 5 In 2010, the Illinois Department of Financial and Professional Regulation took custody of George Washington because the bank was undercapitalized and "operating in an unsafe and

unsound condition." George Washington was placed into a receivership under the Federal Deposit Insurance Corporation (FDIC). Pursuant to a purchase and assumption agreement, plaintiff FirstMerit Bank, N.A., acquired all of George Washington's assets from the FDIC on February 19, 2010. At this time, Yunker was already in default on the note.

¶ 6 FirstMerit, acting as a successor in interest to George Washington, filed a complaint against Yunker and the other named defendants to foreclose on the mortgage and for other relief on September 2, 2010. The complaint alleged that the note had a maturity date of September 1, 2009, at which point the entire principal and interest of the note became due. It further alleged that Yunker had failed to pay all amounts due under the note by the maturity date, and that the note had a remaining balance of approximately \$692,485. Count I requested that a judgment of foreclosure and sale be entered. Count II requested that the court enter a money judgment for the outstanding balance on the note.

¶ 7 On July 20, 2011, Yunker answered the complaint. She admitted the existence of the note and mortgage and admitted she did not pay the amount due by the maturity date, but contested the outstanding amount due on the note. Two of the other named defendants—Constantine Poulakis and Suburban Bank and Trust, as trustee under Trust No. 74-3952—failed to appear and a default judgment was entered against them.

¶ 8 The property was evidently sold by agreement of the parties, and the purchase price was less than the amount due on the note. FirstMerit then moved to voluntarily dismiss Count I of its complaint and for summary judgment on Count II of the complaint, requesting the court enter a money judgment for the remaining balance due on the note. FirstMerit attached the affidavit of Kecia Sammons, a loan workout officer for FirstMerit, to its motion for summary judgment. In this affidavit, Sammons averred that FirstMerit kept computerized and written records relating to

loans in the ordinary course of business. She stated that accounting entries on loan accounts at FirstMerit were entered into a computer system which recorded all payments on the account, and that it was FirstMerit's regular practice to record the activity on an account in the ordinary course of business. Sammons also averred that she managed Yunker's account and had reviewed the records of the account, that Yunker's note was in default for non-payment by the maturity date and had not been cured, and that the total amount due and owing on the note was \$420,961.23. Sammons stated that all documents she relied on in making her statements were attached to the affidavit. Attached to the affidavit was the following one page one document, addressed to FirstMerit's attorneys, titled "Construction Loan Payoff Statement."

CONSTRUCTION LOAN PAYOFF STATEMENT

DATE: 3/6/2012

TO: Joseph R. Santeler
 Chuhak & Tecson, P.C.
 30 S. Wacker Drive, Ste 2600
 Chicago, IL 60606

RE: Borrowers Name: Yunker, Catherine J.
 Loan Number: [REDACTED] 0249
 Property Address: N/A
 Document Numbers: N/A

PRINCIPAL BALANCE:		\$	299,244.01
INTEREST THROUGH 03/05/2012		\$	77,195.57
LATE CHARGE DUE:		\$	2,325.73
RENEWAL FEES DUE:		\$	-
REAL ESTATE TAXES:	16-05-15-302-008-0000		
		2009 \$	2,867.79
		2010 \$	14,360.01
ATTORNEY FEES AND COST:		\$	17,574.61
MECHANIC'S LIEN: OGDEN HILL CEMENT		\$	7,000.00
TITLE FEES		\$	450.00
APPRAISAL FEES:		\$	720.00
		TOTAL REQUIRED TO PAYOFF:	\$ 421,737.72
Per Diem:	\$49.87		

Preparers Initials: PW

Besides the copy of the note and mortgage agreement, FirstMerit did not tender any other documents.

¶ 9 Yunker sought leave to submit an amended answer. The amended answer was substantially the same as the original, but Yunker added an allegation that the note and mortgage were for the construction of a single family home with George Washington to administer the construction pay-outs. She further alleged that George Washington "made unauthorized distributions and knowingly permitted payments made upon forged signatures." Yunker also served a request for production of documents relating to her loan file and sought to depose the person at George Washington responsible for administering her loan account. On April 16, 2012, the court allowed Yunker to amend her answer and ordered that FirstMerit respond to Yunker's discovery requests. After several continuances, the court ordered that Yunker respond to the motion for summary judgment by November 1, 2012.

¶ 10 On October 26, Yunker filed a motion to strike the affidavit of Kecia Sammons. Yunker's motion to strike alleged that the Sammons affidavit was insufficient because Sammons could not testify to the records of George Washington, the original issuer of the note and mortgage. Therefore, Yunker argued that there was no foundation to admit records that were created and kept in George Washington's ordinary course of business.

¶ 11 On December 6, 2012, the court continued the motion for summary judgment and ordered FirstMerit to file a supplemental affidavit in support of its motion. FirstMerit then filed the affidavit of Michael Hayes, a senior vice president of FirstMerit. In his affidavit, Hayes stated that he was involved in FirstMerit's acquisition of assets from George Washington pursuant to the purchase and assumption agreement. One of the assets FirstMerit obtained was the note and mortgage executed by Yunker, which was already in default. FirstMerit received

George Washington's records in its acquisition of assets, which included copies of Yunker's note and mortgage, a payment history on her account, and a record of her default. Under Hayes's supervision, FirstMerit employees reviewed the records from George Washington, and relying on the accuracy of those records, created a computer account for Yunker's loan, which was created accurately and in the ordinary course of business. He stated that the account FirstMerit created for Yunker's loan contained both the records obtained from George Washington and records of all activity on the account since FirstMerit acquired it.

¶ 12 Yunker was given until January 10, 2013, to file a responsive pleading to the supplemental affidavit. Yunker filed a motion to strike Hayes' affidavit, again arguing that the affidavit did not recite facts that were sufficient to admit business records. In addition, Yunker filed an "Alternative Response to Plaintiff's Motion for Summary Judgment,"¹ alleging that FirstMerit was seeking to recover funds that were based on unauthorized distributions to third parties. Attached to this motion was the affidavit of Catherine Yunker. In her affidavit, she stated that she was 79 years of age. In August 2008, her family friend, Constantine Poulakis, purchased a parcel of land and transferred the title into Trust No. 74-3952. Poulakis then approached Yunker and requested that she sign a construction loan to build a residence on the property. Yunker agreed to sign the note. After she signed the loan, she was hospitalized and then placed in a nursing home to recover from an accident. During her hospitalization, Poulakis brought loan documents for Yunker to sign without any notary present. She alleged that some authorizations to disburse funds on the loan were based on forged signatures, and attached one

¹ Yunker's motion to strike and her response to summary judgment are not file stamped until January 17, 2013, but the certificate of service in her notice of filing indicates her attorney mailed these documents to the clerk of the circuit court on January 8, 2013.

disbursement authorization which she alleged contained a forgery of her signature. She also attached a loan document reflecting a payment to her which she never received. On information and belief, Yunker stated that other disbursements on the loan were not authorized by her.

¶ 13 On February 7, 2013, the court entered an order in which it: (1) denied Yunker's motions to strike the affidavits of Sammons and Hayes; (2) denied Yunker's alternative response to the motion for summary judgment because the response set forth issues that "were not raised in an affirmative defense and not filed timely"; and (3) granted summary judgment in favor of FirstMerit and against Yunker for \$420,961.23, the outstanding amount on the loan after the sale of the property. Yunker then filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, Yunker raises two arguments. First, she argues that summary judgment was improper because the affidavits submitted by FirstMerit were insufficient to meet the foundational requirements for admitting business records. Specifically, Yunker states that because "all the transactions involving the construction loan and various disbursements and payments, including the alleged default, occurred prior to [FirstMerit's] acquisition of the assets of George Washington," FirstMerit needed to present testimony as to the record keeping practices of George Washington to admit business records regarding her loan. Second, she argues that the trial court erred by not considering the issues raised in her reply to summary judgment and the corresponding affidavit which raised the issue of unauthorized pay-outs on the loan. In response, FirstMerit argues that the records at issue are actually the business records of FirstMerit, because FirstMerit incorporated information from George Washington into its own system. It also argues that the trial court properly struck Yunker's affidavit and response to the motion for summary judgment.

¶ 16 Summary judgment is appropriate where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). An order granting summary judgment is reviewed *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). In addition, we review *de novo* a trial court's ruling on a motion to strike an affidavit when the motion was made in conjunction with the court's ruling on a motion for summary judgment. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001).

¶ 17 In their briefs, the parties have discussed Supreme Court Rule 236, which governs the admission of business records in civil cases. The rule provides that when a record is made in the ordinary course of business, the record is admissible as substantive evidence of an act if the proponent meets certain foundational requirements. *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 819 (2006). It provides:

"Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable

time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term 'business,' as used in this rule, includes business, profession, occupation, and calling of every kind." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

The parties have also discussed Illinois Rule of Evidence 803(6), which also governs the admission of business records as a hearsay exception. The rule provides that records kept in the ordinary course of business are admissible if the information is transmitted by a person with knowledge, the record is made near the time of the act, and it is the business's regular practice to make such a record, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." See Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). Rule of Evidence 803(6) seemingly makes explicit a requirement implicit in Supreme Court Rule 236—that a record is not admissible if the record if the circumstances indicate a lack of trustworthiness.

¶ 18 In this case, FirstMerit sought to admit a business record in connection with its motion for summary judgment on Count II of its complaint, which requested a money judgment for the balance due on the loan. The operative document submitted with that motion was the one-page "Construction Loan Payoff Statement" attached to Sammons's affidavit and reproduced above. For the following reasons, we conclude that the foundation provided by FirstMerit was insufficient to demonstrate that this document is a business record, and therefore it was not admissible.

¶ 19 First, the construction loan payoff statement does not appear to be a record of any act, transaction, event, or occurrence. In Sammons's affidavit, she stated that any payment received by FirstMerit is recorded in the company's computer system as a record of the payment in FirstMerit's ordinary course of business. She also stated that a written record was made of the loan and all the advances paid on the loan. From Sammons's review of Yunker's loan file with FirstMerit, the account was in default and Yunker owed \$420,961.23. The affidavit from Hayes made it clear that the information for Yunker's account with FirstMerit was obtained from the records of George Washington, which were incorporated into FirstMerit's system. While Sammons stated that FirstMerit's records showed the payments and advances made on Yunker's loans, as well as the default on the loan, none of the actual records evidencing those events were admitted. All that was admitted was the construction loan payoff statement, which is not a record of those acts but is seemingly just a summary of Yunker's account with FirstMerit. To put information into evidence as a business record, the record itself must be admitted; an individual may not summarize the information contained in the records in an affidavit without actually submitting the records. See *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992); *Smith v. Williams*, 34 Ill. App. 3d 677, 679-80 (1975).

¶ 20 Here, FirstMerit did not submit the records of the disbursements of funds on Yunker's loan, the record of the payments on the loan, or the records of the loan's default. This is a crucial distinction between the present matter and other cases where successor banks have sought a judgment based on a loan issued by another bank. For instance, in *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120293, the plaintiff bank acquired defendant's mortgage from a predecessor bank and moved to foreclose. In connection with its motion for summary judgment, the plaintiff bank submitted an affidavit from its vice president discussing its record keeping

practices along with "a record of all payments" made on the loan. *Land*, 2013 IL App (5th) 120293, ¶ 5. The *Land* court rejected the defendant's argument that the affidavit of the vice-president was insufficient to admit business records because it contained information as to the records kept by another company; the court ruled that the affidavit regarding plaintiff's record keeping practices was sufficient to allow for the admission of business records. *Land*, 2013 IL App (5th) 120293, ¶¶ 11-14. The bank in *Land* actually submitted the loan records of its predecessor, unlike FirstMerit, who in this case merely admitted a summary of the records containing information from when George Washington had managed the loan.

¶ 21 In addition to the fact that the document attached to Sammons's affidavit was not a record of an act, transaction, or occurrence, it was apparently prepared in anticipation of litigation. Documents prepared in anticipation of litigation are not admissible as business records because they do not possess the same trustworthiness of other records prepared in the ordinary course of business. *Old Colony*, 364 Ill. App. 3d at 819. Nowhere in her affidavit does Sammons state that the document on which she relied was created in the ordinary course of business. The document is addressed to FirstMerit's attorneys. The document was apparently generated from FirstMerit's computer system and sent to FirstMerit's attorneys. Given the appearance of this document and the statements in Sammons's affidavit, we cannot conclude that it was even created in the ordinary course of business. Accordingly, the document was not admissible as a business record. Without this document, FirstMerit has not proved that it was entitled to judgment as a matter of law. We thus reverse the trial court's grant of summary judgment.

¶ 22 In the interest of aiding the administration of this case on remand, we will also address the trial court's decision to strike Yunker's defense alleging that George Washington made unauthorized disbursements on the loan. The trial court struck Yunker's alternative response to

summary judgment because it pertained to issues that were not raised in an affirmative defense and was not timely filed. For two reasons, we conclude that Yunker should be able to raise this defense on remand.

¶ 23 First, while Yunker did not technically plead this issue as a separately designated affirmative defense in her answer, she did enough to comply with the requirements of the Code of Civil Procedure. The statute requires that the facts constituting an affirmative defense or any defense which, affirmative or not, would likely take the other party by surprise if not expressly stated in the pleading, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (West 2012). The purpose of requiring that affirmative defenses be pled is to assure that the plaintiff is not taken by surprise when the defense is raised. *Spagat v. Schak*, 130 Ill. App. 3d 130, 134 (1985). In her amended answer, Yunker pled facts indicating that George Washington administered payouts on the loan and knowingly made unauthorized distributions based on forged signatures and unnotarized authorizations. While an affirmative defense should be separately pled and designated as such (see 735 ILCS 5/2-603(b) (West 2010)), the failure to specifically designate an affirmative defense in one's pleadings may be disregarded where sufficient facts are alleged to set out the defense. See *Capital Development Bd., for Use of P.J. Gallas Elec. Contractors, Inc. v. G.A. Rafel & Co., Inc.*, 143 Ill. App. 3d 553, 557 (1986). Here, Yunker alleged facts to raise the defense, and she put FirstMerit on notice that Yunker's defense would entail that unauthorized distributions were approved by the lender.

¶ 24 Second, we believe that enabling Yunker to present her defense comports with the Code of Civil Procedure's liberal construction and preference that cases be resolved on their merits. *Marsh v. Nellessen*, 235 Ill. App. 3d 998, 1002 (1992) ("The purpose of the Code is to provide substantial justice and a resolution on the merits rather than to impose procedural hurdles to

litigation."). See also 735 ILCS 5/2-603(c) (West 2012) ("Pleadings shall be liberally construed with a view to doing substantial justice between the parties."). In her answer and her affidavit filed in response to the motion for summary judgment, Yunker has alleged facts that, if proven true, could mean that at least part of the debt on which FirstMerit seeks to hold her liable is invalid due to George Washington's knowing breach of its duty as a lender. Given that FirstMerit was put on notice of these facts in Yunker's amended answer, it is in the interest of substantial justice that Yunker be allowed to present this defense. On remand, the trial court should allow Yunker to amend her answer to set forth her affirmative defenses in sufficient detail and in conformance with the Code of Civil Procedure.

¶ 25

CONCLUSION

¶ 26

For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings consistent with this opinion.

¶ 27

Reversed and remanded.