2017 IL App (3d) 160252-U

Order filed March 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

WILMINGTON TRUST, N.A., Successor Trustee to Citibank, N.A. as Trustee f/b/o Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2006-4, Mortgage Pass-Through Certificates, Series 2006-4,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0252
	)	Circuit No. 13-CH-2790
DOROTHY M. BOWIE, and TIMOTHY E. BOWIE,	)	
Defendants-Appellants	)	
(Chicago Title Land Trust Company, as Trustee UTA dated 5/23/12 and known as Trust No. 8002359545, Winston Village Association, Citibank, N.A., as Trustee for Saco I Trust 2006-7, Mortgage-Backed Certificates Series 2006-7, Unknown Beneficiaries of Chicago Title Land Trust Company as Trustee UTA dated 5/23/12 and known as Trust No. 8002359545, Unknown Owners and Non Record Claimants,	)	Honorable Theodore J. Jarz Honorable Roger Rickmon, Judges, Presiding.
Defendants).	)	

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting either plaintiff's motion to substitute party plaintiff or motion for summary judgment.

¶ 2 Defendants, Dorothy and Timothy Bowie, appeal from the circuit court's grant of summary judgment in favor of plaintiff, Wilmington Trust, N.A., successor trustee to Citibank, N.A., as trustee f/b/o Holders of Structure Asset Mortgage Investments II, Inc., Bear Stearns Alt-A Trust 2006-4, Mortgage Pass-Through Certificates, Series 2006-4 (Wilmington), and its entry of foreclosure and sale against defendants. Specifically, defendants argue that the trial court erred in granting plaintiff's motions to substitute party plaintiff and for summary judgment. We affirm.

¶ 3 FACTS

¶ 4 In April 2006, Dorothy Bowie entered into a loan agreement with Entrust Mortgage (Entrust) in which she borrowed $142,400, to be paid back over a 30-year period. She executed a promissory note payable to Entrust; she and Timothy Bowie then granted a mortgage on the subject property located in Bolingbrook, Illinois, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Entrust.

¶ 5 On July 1, 2012, Dorothy ceased making monthly payments on the loan.

¶ 6 On October 15, 2012, MERS, as nominee for Entrust, assigned the subject mortgage to Citibank, N.A., as trustee for Bear Stearns Alt-A Trust, Mortgage Pass-Through Certificates, Series 2006-4 (Citibank).

¶ 7 On December 3, 2012, a "Resignation, Successor Appointment and Acceptance Agreement" (resignation agreement) was entered into between Citibank and plaintiff, whereby Citibank resigned as trustee and plaintiff succeeded Citibank as trustee.

¶ 8 On August 12, 2013, Select Portfolio Servicing, Inc. (Select Portfolio), sent notice to defendants informing them that Select Portfolio was the new mortgage loan servicer and was "collecting the debt on behalf of Wilmington Trust Company, successor trustee to Citibank."

¶ 9 On August 27, 2013, Citibank filed a complaint to foreclose mortgage on the subject property. Attached to the complaint was the October 15, 2012, assignment of mortgage from MERS, as nominee for Entrust, to Citibank.

¶ 10 In September 2014, Select Portfolio mailed another letter to defendants in which it acknowledged receipt of their August 22, 2013, request seeking confirmation as to the owner of the loan. In the letter, Select Portfolio stated that Wilmington, successor trustee to Citibank, "is the owner of the account."

¶ 11 In January 2014, defendants filed a motion to dismiss the complaint to foreclose mortgage, asserting that Citibank lacked standing to foreclose the mortgage because it no longer had any interest in the promissory note. The trial court denied defendants' motion in December 2014.

¶ 12 In January 2015, defendants filed their answer and asserted an affirmative defense. In their answer, defendants denied that Citibank was the holder of the promissory note, or that they owed Citibank any money. They otherwise admitted, or neither admitted nor denied, Citibank's allegations. Regarding their affirmative defense, defendants argued that Citibank lacked standing because it was not the holder of the promissory note.

¶ 13 In April 2015, plaintiff filed several motions, including a motion to substitute party plaintiff and a motion for summary judgment. In its motion to substitute party plaintiff, which was brought under section 2-616 of the Code of Civil Procedure (Code) (735 ILCS 5/2-616 (West 2014)), plaintiff requested that the trial court enter an order substituting Wilmington as plaintiff. In particular, Wilmington asserted it had become the holder of the promissory note secured by the mortgage being foreclosed upon "after this case was filed." Attached to the motion for substitution were the October 2012 assignment of the mortgage from MERS (as nominee for Entrust) to Citibank, and the December 2012 resignation agreement showing that plaintiff succeeded Citibank as trustee.

¶ 14 In its motion for summary judgment, plaintiff asserted it was entitled to summary judgment because no genuine issues of material fact existed with respect to defendants' default under the terms of the promissory note and mortgage, or the amount due. Attached to the motion for summary judgment was the affidavit of Karter Nelson, a document control officer for Select Portfolio, averring that Dorothy had failed to make payments under the promissory note, and the gross amount due and owing on the note as of March 10, 2015, was $136,035.15. He further noted that at the time Select Portfolio acquired the servicing of the loan in August 2013, payment was still due for July 2012.

¶ 15 These motions, as well as another motion to amend the complaint on its face, were presented to the circuit court on May 5, 2015, at which time the court set a briefing schedule only on the motion to substitute party plaintiff.

¶ 16 On May 20, 2015, defendants filed their response to plaintiff's motion to substitute party plaintiff. Defendants argued that the motion should be denied because (1) plaintiff became the trustee 8 months prior to the filing of the complaint and 28 months prior to filing its motion to

substitute party plaintiff, and (2) the proposed substitution would prejudice them. On June 23, 2015, plaintiff filed its response, asserting it had "mistakenly indicated in its Motion to Substitute Party Plaintiff that the basis thereof was due to the subsequent transfer of the underlying Note" but that the "documentary evidence submitted in support thereof clearly indicate it was a scrivener's error—committed by Plaintiff at filing."

¶ 17 Following a June 30, 2015, hearing, the circuit court granted plaintiff's motion to substitute party plaintiff. In particular, it stated: "I think the motion should be granted. I don't see real prejudice here to the defendant. It is late, but I don't see any—other than identifying a proper party plaintiff, I don't see any real prejudice, so the motion will be granted." Defendants were then given 60 days to respond to plaintiff's pending motion for summary judgment.

¶ 18 Defendants did not respond to plaintiff's pending motion for summary judgment. Instead, in July 2015, they filed a motion to dismiss the complaint. In their motion, defendants asserted that "merely substituting the alleged proper party does not cure the fact that at the time of filing of the Complaint, the original Plaintiff, CitiBank, lacked [standing]." In September 2015, the circuit court struck defendants' motion to dismiss and gave them until September 29, 2015, to file their response to plaintiff's motion for summary judgment. Defendants timely filed their response, asserting (1) that Citibank lacked standing at the time the complaint was filed, and (2) summary judgment was improper due to the existence of genuine issues of material fact.

¶ 19 On October 29, 2015, the circuit court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale against defendants.

¶ 20 On November 20, 2015, defendants filed their first notice of appeal. However, on February 8, 2016, this court dismissed the appeal due to lack of jurisdiction. Thereafter, defendants filed a motion in the circuit court to amend the judgment of foreclosure and sale to

include an express written finding that the order was immediately enforceable and appealable. On April 26, 2016, the circuit court granted defendants' motion and modified the judgment of foreclosure and sale to include the language required by Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 21 This appeal followed.

¶ 22 ANALYSIS

¶ 23 On appeal, defendants argue the trial court erred in granting plaintiff's motions to substitute party plaintiff and for summary judgment.

¶ 24 I. Motion to Substitute Party Plaintiff

¶ 25 Defendants first challenge the trial court's grant of plaintiff's motion for substitution of party plaintiff, which was brought under section 2-616 of the Code (735 ILCS 5/2-616 (West 2014)). Specifically, defendants argue that plaintiff's motion failed to meet the requirements of section 2-616 of the Code. In contrast, plaintiff asserts this case involves a simple misnomer that may be corrected at any time.

¶ 26 "Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and, absent an abuse of that discretion, the court's determination will not be overturned on review." *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 842 (2000). "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 27 Initially, we must determine whether plaintiff's act of misnaming itself in the complaint constitutes a misnomer or a misidentification. If this case involves a misnomer, which "is a mistake in name or the provision of an incorrect name," then section 2-401(b) of the Code (735

ILCS 5/2-401(b) (West 2014)) governs. *Bristow v. Westmore Builders, Inc.*, 266 Ill. App. 3d 257, 260 (1994). On the other hand, if this case involves the misidentification of a party, then section 2-616(a) of the Code (735 ILCS 5/2-616 (West 2014)) governs. See, *e.g.*, *Fassero v. Turigliatto*, 349 Ill. App. 3d 368, 370 (2004).

¶ 28 A. Misnomer

¶ 29 Section 2-401(b) provides, "[m]isnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." 735 ILCS 5/2-401(b) (West 2014). Misnomers may be corrected through a motion to amend. *U.S. Bank National Ass'n v. Luckett*, 2013 IL App (1st) 113678, ¶ 22 (quoting 735 ILCS 5/2-616(c) (West 2014) (" '[a] pleading may be amended at anytime, before or after judgment, to conform the pleadings to the proofs,' " upon terms as to costs and continuance that may be just.)). While the vast majority of cases addressing the misnomer/misidentification issue have arisen in the context of misnamed, misidentified, or mischaracterized defendants—rather than a misnamed or misidentified plaintiff which is at issue here—section 2-401(b) clearly applies to all parties. *Bristow*, 266 Ill. App. 3d at 261.

¶ 30 Plaintiff relies on *Bristow*, 266 Ill. App. 3d 257, and *Calvert Distillers Co. v. Vesolowski*, 14 Ill. App. 3d 634 (1973), to support its contention that the original misnaming of itself in the complaint, *i.e.*, naming Citibank as plaintiff, was a misnomer. We find *Bristow* and *Calvert Distillers* distinguishable.

¶ 31 At issue in *Bristow* was whether the plaintiff's styling of its name in its complaint was a misnomer so that the plaintiff's later amendment substituting its proper name related back to the date of the original filing. *Bristow*, 266 Ill. App. 3d at 259. In particular, the plaintiff first styled its name as "Manning Bristow Painting and Decorating, Inc.," a nonexistent legal entity. *Id.* It

later amended the complaint restyling its name as "Manning Bristow d/b/a/ Manning Bristow Painting and Decorating," a sole proprietorship. *Id*. The Second District found "that plaintiff's misstyling himself as a corporation in his initial complaint instead of a sole proprietorship present[ed] a case of misnomer which, under the circumstances [presented, *i.e.*, the parties were fully aware of the identities of the actual litigants and that an actual plaintiff was in existence], resulted in no actual prejudice to defendants." *Id*. at 262. Thus, the court found the amendment related back to the original filing date. *Id*.

¶ 32 At issue in *Calvert Distillers*—a case relied upon by the *Bristow* court—was whether a lawsuit filed by the plaintiff under the name "Calvert Distillers Company, a division of the House of Seagram, Inc., a Delaware corporation," was null because the named plaintiff was not a legal entity. *Calvert Distillers*, 14 Ill. App. 3d at 636. In concluding the lawsuit was valid, the First District found the case involved a misnomer because an actual plaintiff, Joseph E. Seagram and Sons, Inc., existed into which the House of Seagram had merged. *Id*.

¶ 33 Unlike in *Bristow*, *Calvert Distillers*, or *U.S. Bank National Ass'n v. Luckett*, 2013 IL App (1st) 113678, ¶ 19—another case cited by plaintiff where a misnomer was found when the plaintiff filed its complaint under the name "Bank National Association" rather than "U.S. Bank National Association"—the difference between the two names at issue here is not as minor. See also *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781 (2009) (finding a simple misnomer where the plaintiff, whose legal name was "Todd W. Musburger, Ltd.," identified itself as "The Law Offices of Todd W. Musburger, Ltd.")). While both Citibank and plaintiff are involved in this case in the context of their status as a trustee for the same mortgage, the two are entirely different legal entities. Accordingly, we find the misnaming of the plaintiff in this case is a clear case of misidentification, not a simple misnomer.

¶ 34 B. Misidentification

¶ 35 As noted, cases involving the misidentification of a party are governed by section 2-616(a) of the Code (735 ILCS 5/2-616 (West 2014)). Section 2-616(a) provides:

> "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim." 735 ILCS 5/2-616(a) (West 2014).

¶ 36 While amendments are freely and liberally allowed, the right to amend is not absolute. *Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 62 (2005). In determining whether a trial court abused its discretion in granting or denying a motion to amend a complaint, a reviewing court considers: "(1) whether the proposed amendment would cure the defective pleading; (2) whether the parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.*

¶ 37 After consideration of the above factors, we find the trial court acted within its discretion in granting plaintiff's motion to substitute party plaintiff under section 2-616(a) of the Code. First, we find that the proposed amendment would cure the defective pleading by substituting Wilmington, the proper party plaintiff, in place of Citibank. Second, we find defendants would

not suffer prejudice or surprise by the amendment. The record shows that defendants were aware of plaintiff's interest in the subject property as early as August 2013, but no later than September 2013, when the mortgage loan servicer responded to defendants' request for confirmation of the owner of the loan, informing them that Wilmington, successor trustee to Citibank, "is the owner of the account." Regarding the third and fourth factors, we note the trial court stated its opinion that the motion was "late," but it nonetheless granted the motion because it saw "no real prejudice" to defendants. The record supports the trial court's reasoning and decision; we find no abuse of discretion.

¶ 38 II. Motion for Summary Judgment

¶ 39 Defendants next challenge the trial court's grant of plaintiff's motion for summary judgment.

¶ 40 "Summary judgment is appropriate when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14 (quoting 735 ILCS 5/2-1005(c) (West 2010)). "Summary 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). Where material facts are disputed, summary judgment is precluded. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review a trial court's entry of summary judgment *de novo*. *Illinois State Bar Ass'n*, 2015 IL 117096, ¶ 14.

¶ 41 Here, defendants contend that summary judgment was improper because genuine issues of material fact exist pertaining to whether Citibank had standing at the time the complaint was filed, and plaintiff's right to summary judgment was not free and clear from doubt. We disagree.

¶ 42 Initially, we note that whether Citibank had standing at the time the complaint was filed is irrelevant to the trial court's grant of summary judgment in favor of plaintiff. Although Citibank filed the complaint in this case, plaintiff—who had standing as the trustee of the subject mortgage at the time the complaint was filed—was allowed to substitute itself as the proper party plaintiff. Citibank's standing at the time the complaint was filed is not a material fact.

¶ 43 We further reject defendants' assertion that plaintiff's right to summary judgment was not free and clear from doubt. Defendants admitted that Dorothy entered into an agreement in which she borrowed $142,400, memorialized by a promissory note, and that the loan was then secured with a mortgage on the subject property. In addition, defendants knew plaintiff was the trustee of the subject mortgage no later than September 2013 and have never disputed that they ceased making payments in breach of the agreement in July 2012, or that they owe the amounts claimed in the complaint or in the affidavit of Select Portfolio's document control officer. Based on the above evidence, there are no genuine issues with regard to any material fact and plaintiff is entitled to judgment as a matter of law. Accordingly, we find the trial court properly granted summary judgment in favor of plaintiff.

¶ 44 In defendant's reply brief, counsel argues for the first time that because of the late substitution, defendants "were denied the opportunity to defend" against plaintiff Wilmington. Defendants further represented to this court, "In the case at hand, there were no pleadings or admissions related to Wilmington." The record shows this representation to be false. Defendants themselves filed such pleadings. Defendants maintained the same arguments below

that they raise here: Citibank's lack of standing at the time it filed the original complaint is fatal to Wilmington's right to summary judgment. In fact, in their response to plaintiff's motion for summary judgment, defendants argued that since Wilmington held all the mortgage-related interests when Citibank filed its complaint, the later substitution of Wilmington was ineffective. Defendants had every opportunity to defend against Wilmington. When they filed their response to plaintiff's motion for summary judgment months after Wilmington was substituted as plaintiff, they chose a defense based upon Wilmington's ownership of the interest. Defendants themselves filed pleadings arguing that Wilmington, not Citibank, was the party with standing to sue. We caution counsel and remind him of his ethical duties when making representations of fact to this or any other court.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 47 Affirmed.