2017 IL App (5th) 160360-U

NO. 5-16-0360

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BANTERRA BANK, a State Chartered Bank,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 15-CH-47
	)	
GEORGE A. JENKINS, DOROTEJA JENKINS, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,	)	Honorable
	)	Todd D. Lambert,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is affirmed where the court properly denied the defendants' affirmative defense and entered judgment in foreclosure.

¶ 2 This case concerns a mortgage foreclosure action in which the plaintiff-appellee, Banterra Bank (Banterra), foreclosed on certain properties in Saline County, Illinois. The defendants-appellants, George Jenkins and Doroteja Jenkins (the defendants), appeal the July 25, 2016, denial of their motion to reconsider and vacate, rendering entry of a foreclosure judgment in the Saline County circuit court. They assert that the court erred

in summarily denying their affirmative defense without explaining its reasoning. For the following reasons, we affirm.

¶ 3 On February 29, 2008, the defendants executed a promissory note (note) to Banterra. That same day, they executed a mortgage for residential real estate in Harrisburg, Illinois, the subject property of this cause of action. The mortgage was recorded on March 3, 2008. The mortgage provides that while the borrowers have joint and several liability, "any Borrower who co-signs this Security Instrument but does not execute the Note (a 'co-signer') *** agrees that the Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent." Doroteja Jenkins signed the mortgage but did not sign the note.

¶ 4 On November 25, 2011, the parties entered into an agreement entitled "Mutual Covenant Not to Sue" (covenant). The covenant, in part, states the following:

> "[T]he undersigned, Banterra, hereby covenants not to sue Jenkins, or either of them, on any claim *** arising out of or in connection with (1) a promissory note dated February 25, 2009 in the principal amount of $650,000 *** (the 'House Note'); or (2) a promissory note dated June 16, 2009 executed by Fieldmaster LLC in the principal amount of $250,000 *** (the 'Fieldmaster Note'); or (3) any occurrence, fact, circumstance or omission arising out of the winding up of the business commonly known as Midwest Fabrication *** (the 'Midwest Business') and Jenkins, on their part, covenant not to sue Banterra on any claim, cause of action or other liability that Banterra may have to Jenkins arising out of or in connection with the House Note, the Fieldmaster Note or the Midwest Business."

¶ 5 The covenant explained that the intention of the agreement was to benefit the purchasers (Michael and Yelena Johnson) of certain assets of Midwest Fabrication and Fieldmaster, LLC. The Johnsons were "intended third party beneficiaries of these mutual

covenants solely as relates to the House Note, the Fieldmaster Note, and the Midwest Business." The covenant went on to state that "[s]o that there can be no opportunity for ambiguity, by this document, Banterra will cancel any remaining indebtedness of Jenkins to Banterra upon receipt of a signed original copy of this document executed by all parties listed below." The covenant was signed by Banterra's representative and the defendants.

¶ 6 On December 15, 2013, Banterra and George Jenkins entered into a loan modification agreement (agreement). The agreement applied only to the February 28, 2008, note and mortgage, extending its maturity date and modifying the monthly payments. It stated the following:

> "4. Except to the extent that they are modified by this Modification, the Borrower will comply with all of the covenants, agreements, and requirements of the Note and the Security Instrument, including without limitation, the Borrower's covenants and agreements to make all payments *** that the Borrower is obligated to make under the Security Instrument.
>
> 5. Nothing in this Modification shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. Except as otherwise specifically provided in this Modification, the Note and Security Instrument will remain unchanged and in full effect, and the Borrower and Lender will be bound by, and comply with, all of the terms and provisions thereof, as amended by this Modification."

The agreement was signed by Banterra's representative and George Jenkins; Doroteja Jenkins was neither a party to the agreement nor did she sign it.

¶ 7 On December 16, 2015, Banterra filed a complaint in foreclosure and attached copies of the note, the mortgage, and the loan modification agreement. On February 22, 2016, the defendants filed an answer and an affirmative defense. In the answer, they admitted the existence and validity of the note but denied Banterra's allegations as to the

existence and amount of the default. In the affirmative defense, they claimed that the covenant released them from their indebtedness to Banterra for the loan. On March 14, 2016, Banterra filed a response, requesting that the trial court strike the affirmative defense. The covenant was submitted to the court under seal.

¶ 8 At a May 27, 2016, hearing, the parties requested that the court rule on the affirmative defense. If the affirmative defense was denied, the defendants agreed to the entry of a judgment. However, if it was granted, the parties agreed that the matter would be set for trial.

¶ 9 Also on May 27, 2016, Banterra filed an affidavit of proof, stating that on February 29, 2008, George Jenkins executed a note to Banterra for $172,000, bearing a 5.75% interest rate, payable in 240 consecutive monthly installments of $1,207.58 beginning on April 1, 2008, with a final payment due on or before March 1, 2028. To secure the payment, the defendants executed a mortgage on their residential real estate. The affidavit also stated that on December 5, 2013, George Jenkins and Banterra entered into a loan modification agreement modifying the original terms of the note by extending the maturity date to December 1, 2053, and providing for monthly payments of $1,561.26 beginning on January 1, 2014. These allegations were not contradicted in any affidavit by the defendants.

¶ 10 That same day, the trial court denied the affirmative defense by a docket entry and entered a foreclosure judgment.

¶ 11 On June 24, 2016, George Jenkins filed a motion to reconsider and vacate the judgment, requesting that the court vacate the judgment due to faulty procedure,

premature determination of facts, and/or reconsideration of the facts in the complaint. On July 5, 2016, Banterra filed a response. On July 25, 2016, the trial court denied the motion, stating:

> "In the Court's review of the affirmative defense, the Court needed a copy of additional documents. The Court placed a teleconference call to the parties' attorneys and requested the document. The parties agreed to produce the document and agreed the document should be filed under seal. The Court reviewed the document which was produced on 5/27/16. *** The Court denied the affirmative defense and entered judgment for [the plaintiff]. The Court did not enter judgment in favor of [the plaintiff] due to default or failure to appear by [the defendants]. The Court entered judgment after following the procedure agreed to by the attorneys for both parties."

The defendants appeal.

¶ 12 The standard of review for motions to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) is *de novo*. 735 ILCS 5/2-619 (West 2016) (allowing for involuntary dismissal based upon certain defects or defenses); *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). Likewise, the standard of review for summary judgment motions pursuant to section 2-1005 of the Code is also *de novo*. 735 ILCS 5/2-1005 (West 2016); *Seymour v. Collins*, 2015 IL 118432, ¶ 42. As the trial court, pursuant to the agreement of the parties, denied the defendants' affirmative defense and entered judgment without issues of fact in evidence, we agree with the parties that the standard of review is *de novo*.

¶ 13 The defendants do not contest the existence, validity, and current holder of the mortgage; they contest only that they were released of that indebtedness by virtue of the covenant. The defendants argue that the trial court erred in striking their affirmative defense because the covenant released them from their obligations under the note. The

defendants cite the language of the covenant that "Banterra will cancel *any* remaining indebtedness of Jenkins to Banterra." (Emphasis added.) As the 2008 note was a "remaining indebtedness" when the covenant was executed in 2011, they assert that they were released of that debt through the covenant.

¶ 14 The defendants note that "any" means "unmeasured or unlimited in amount, number, or extent," and if a word in a contract is not defined, then the court should apply the plain and ordinary meaning to that word. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992).

¶ 15 However, it is also axiomatic that in contract construction, if possible, effect must be given to all of the language so that provisions which appear to be conflicting or inconsistent may be reconciled and harmonized. *In re Halas*, 104 Ill. 2d 83, 92 (1984). Here, the covenant specifically lists three loans over which the parties were agreeing not to sue, explaining that the covenant exists to benefit a third party that intended to purchase certain assets related to these debts. Only then does the covenant state that "by this document, Banterra will cancel any remaining indebtedness of Jenkins[.]" The parties' intention appears to be that "any remaining indebtedness" refers to the Jenkinses' debt remaining on these three loans, as these are the loans relating to the assets to be sold.

¶ 16 Further, rather than invoking the covenant at the time that the loan modification agreement was signed, George Jenkins and Banterra agreed to extend the maturity date and modify the monthly payments on the 2008 note. While conduct is not conclusive, the court looks to the parties' actions under a contract as evidence of their meaning, since the parties to an agreement know best what they meant. *Harris Trust & Savings Bank v.*

Hirsch, 112 Ill. App. 3d 895, 900 (1983). In this instance, by entering into the loan modification agreement two years after the covenant not to sue, George Jenkins ratified the debt that the defendants now seek to avoid. Reading the documents together, the defendants' argument is not supported by the record.

¶ 17 The defendants also argue that because only George Jenkins signed the modification agreement, even if he did borrow additional monies from Banterra after signing the covenant, "such indebtedness would have been unsecured as a re-initiation of a new mortgage would have required Doroteja's signature."

¶ 18 However, as noted in our summary of the facts, the mortgage that Doroteja Jenkins signed provides that a co-signer, *i.e.*, a borrower who signs the security instrument but not the note, agrees that the lender and any other borrower may agree to modify the terms of the security instrument or the note without her consent. By its terms, Doroteja Jenkins was a co-signer, and therefore her consent to the loan modification agreement was not necessary.

¶ 19 For the foregoing reasons, we find that the trial court, pursuant to the course of action agreed upon by the parties, did not err in denying the defendants' affirmative defense and entering judgment on Banterra's complaint. The decision of the trial court is affirmed.

¶ 20 Affirmed.