FOURTH DIVISION
April 30, 2015

No. 14-2862

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COLFIN BAMO II FUNDING, B, LLC, Plaintiff-Appellee, v. CHICAGO TITLE LAND TRUST CO. , 1521 SEDGWICK LTD. PARTNERSHIP, JOYCE L. CARLSON, CHICAGO KITCHEN & BATH, CKB MILLENIUM TRUST, CULINABLU CHICAGO, INC. and RONALD M. STECKHAN, Defendants-Appellants.	)))))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CH 19706 The Honorable David B. Atkins and Michael Otto, Judges Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's orders appointing a receiver and granting summary judgment in favor of plaintiff are affirmed where defendants failed to timely appeal the receiver order and admitted all the facts entitling plaintiff to summary judgment in

their verified answer pursuant to section 1506(a) of the Mortgage Foreclosure Law. See 735 ILCS 5/15-1506(a) (West 2012).

¶ 2 Harris, NA initiated a mortgage foreclosure action in the circuit court of Cook County to foreclose on a property located at 1521 N. Sedgwick in Chicago. During the proceedings the court entered an order appointing a receiver for that property. ColFin Bamo II Funding, B, LLC (ColFin) subsequently took over as party plaintiff in the matter after the guaranties and loan documents at issue were assigned to it. On August 14, 2014, the court granted summary judgment in favor of ColFin. Defendants now appeal the court's orders granting a motion to appoint a receiver (March 21, 2012) and granting summary judgment in favor of ColFin (August 14, 2014).

¶ 3 BACKGROUND

¶ 4 On June 1, 2011, Harris, NA filed a mortgage foreclosure complaint seeking to foreclose on a property located at 1521 N. Sedgwick in Chicago, Illinois. The complaint was filed against various defendants, including Chicago Land Trust Title Co., 1521 Sedgwick Limited Partnership, Chicago Kitchen and Bath, Inc. (Chicago Kitchen), CKB Millennium Trust, Joyce L. Carlson, and Ronald M. Steckhan. The complaint sought damages against the guarantors of the promissory notes relating to the property located at 1521 N. Sedgwick.

¶ 5 Specifically, the foreclosure complaint sought to foreclose on a mortgage dated July 26, 2007 that was secured by a promissory note dated July 26, 2007 from 1521 Sedgwick Limited Partnership in the original principal amount of $1,880,000.00. The complaint alleged that a default occurred under the terms of the note and mortgage based in part on 1521 Sedgwick Limited Partnership's failure to pay the monthly principal and interest payments due on October 16, 2010 or any time thereafter.

¶ 6 On February 23, 2012, Harris, NA sought to substitute party plaintiff to BMO Harris

Bank, NA and also sought to file a Supplemental Motion to Appoint Receiver. On March 20, 2012, defendant Chicago Kitchen filed a motion to Substitute Judge as a Matter of Right. This motion to substitute judge was not filed as an emergency motion, was not noticed for hearing and was not served upon BMO Harris Bank, NA prior to March 21, 2012.

¶ 7 On March 21, 2012, Judge Atkins granted BMO Harris Bank, NA's Supplemental Motion to Appoint a Receiver and also granted the motion to substitute judge. The case was then transferred to Judge Swanson. On April 9, 2012, Judge Atkins signed the Receiver's Bond. Defendant Chicago Kitchen filed a Motion to Set Aside Order Appointing Receiver, which was denied on May 17, 2012 by Judge Swanson.

¶ 8 Defendant Chicago Kitchen filed a Notice of Interlocutory Appeal on May 29, 2012 appealing the circuit court's March 21, 2012 order appointing a receiver and May 17, 2012 order denying the motion to set aside the order appointing the receiver, which was more than 30 days after the court's March 21, 2012 order. BMO Harris Bank, NA, filed a motion to dismiss the interlocutory appeal arguing that: (1) the court lacked jurisdiction over the appeal because Chicago Kitchen was really appealing the order relating to the substitution of judge, which is not a final and appealable order, and (2) the court lacked jurisdiction under Illinois Supreme Court Rule 307 (Ill. S. Ct. R. 307 (eff. Jan. 1, 1970)) because defendant lost his right to file an interlocutory appeal of an order appointing a receiver when he failed to file a notice of appeal within 30 days of the appointment. The motion defendant filed to reconsider the interlocutory order did not toll or extend the 30 day requirement. *Buckland v. Lazar*, 145 Ill. App. 3d 436, 438 (1986). This appellate court dismissed the appeal on August 2, 2012 for want of jurisdiction. Although Chicago Kitchen did not seek review of this appellate court's August 2, 2012 order, it filed a Motion for Supervisory Order with the Illinois Supreme Court a year later, which was

denied.

¶ 9 On August 10, 2012, plaintiff BMO Harris Bank, NA sought to substitute the party plaintiff to ColFin Bamo II Funding, B, LLC (ColFin), which was granted. On September 12, 2012, plaintiff ColFin moved to substitute the receiver. The court granted this request, and the old receiver's bond was cancelled and a new bond was issued.

¶ 10 On March 15, 2013, ColFin was granted leave to file a Verified Second Amended Complaint, which added Culinablu Chicago, Inc. as a defendant. The Verified Second Amended Complaint, which was filed on March 27, 2013, is the complaint at issue in this appeal. Once added as a new defendant, Culinablu Chicago, Inc. filed a Motion to Substitute Judge as a Matter of Right, and the case was transferred to Judge Otto.

¶ 11 On January 15, 2014, defendants filed a verified answer to the Verified Second Amended Complaint with two affirmative defenses. In the verified answer, defendants' response to 80 of the 96 allegations in the Verified Second Amended Complaint was that they "have insufficient knowledge to either admit or deny these allegations and therefore deny the allegations[.]"

¶ 12 Section 1506(a) of the Mortgage Foreclosure Law states:

> "(a) Evidence. In the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court, except: (1) where an allegation of fact in the complaint is not denied by a party's verified answer or verified counterclaim, or where a party pursuant to subsection (b) of Section 2-610 of the Code of Civil Procedure states, or is deemed to have stated, in its pleading that it has no knowledge of such allegation sufficient to form a belief and attaches the required affidavit, a sworn

verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required." 735 ILCS 5/15-1506(a) (West 2010).

¶ 13 Of relevance to this appeal, defendants' verified answer states that they have insufficient knowledge to admit or deny the following allegations in ColFin's Verified Second Amended Complaint:

"16. On or about July 26, 2007, BMO Harris Bank National Association f/k/a Harris, N.A. ('Harris') made a certain loan and other financial accommodations to Borrower in the original principal amount of $1,880,000.00 ('the Loan').

17. On or about July 26, 2007, in connection with the Loan, Borrower executed and delivered to Harris that certain Promissory Note in the original principal amount of $1,880,000.00 (the 'Note'). The Note together with all modifications of, extensions of and substitutions thereof, and related obligations and liabilities owed by Borrower shall be referred to herein as the 'Indebtedness'. A true and correct copy of the Note is attached hereto as Exhibit A.

* * *

21. On or about July 26, 2007, CKB executed and delivered to Harris that certain Commercial Guaranty pursuant to which it guaranteed the payment and performance of all

obligations owing by Borrower pursuant to the terms and conditions therein (the 'CKB Guaranty'). A true and correct copy of the CKB Guaranty is attached hereto as Exhibit E.

* * *

23. On or about July 26, 2007, Steckhan executed and delivered to Harris that certain commercial guaranty pursuant to which he guaranteed the payment and performance of all obligations owing by Borrower pursuant to the terms and conditions therein (the 'Steckhan Guaranty', and together with the Chicago Kitchen Guaranty, The CKB Guaranty and the Carlson Guaranty, the 'Guarantees'). A true and correct copy of the Steckhan Guaranty is attached hereto as Exhibit G.

24. Effective as of June 27, 2012, Harris endorsed the Note over to Plaintiff pursuant to that certain Endorsement and Allonge to Promissory Note ('Allonge') and assigned the Loan and related documents over to Plaintiff by virtue of that certain General Assignment ('General Assignment'), true and correct copies of which are attached hereto as Group Exhibit H and is incorporated herein by reference.

25. Effective as of June 27, 2012, Harris assigned to Plaintiff all of its rights, title and interest in and to the Loan and the related loan documents pursuant to, among other things, that certain Assignment of Mortgage and Assignment of Assignment of

Rents, which were recorded with the Cook County Recorder of Deeds on July 10, 2012, as Document Nos. 1219241078 and 1219241079, respectively. True and correct copies of the Assignment of Mortgage and Assignment of Assignment of Rents are attached hereto as Exhibits I and J, respectively.

* * *

27. Borrower is in default of its obligations under the Loan Documents. In particular, Borrower failed to make timely and full payments due under the Note on October 16, 2010 or at any time thereafter. Subsequently the Note matured by its express terms on July 26, 2012, and Borrower failed to pay the Indebtedness due under the Note.

* * *

28. On March 16, 2011, Harris's counsel issued a notice of default to Borrower, Mortgagor and the Guarantors (the 'Borrower Parties'), and demanded payment of the outstanding Indebtedness. As of the date of filing this Complaint, Borrower Parties have failed to pay the entire amount due Plaintiff under the Loan Documents. Attached as Exhibit K is a true and correct copy of the March 16, 2011 notice of default.

29. It is an Event of Default under the Note and the other Loan Documents if Borrower fails to make any payment when due under the Note. It is also an Event of Default under the applicable

Loan Documents if Borrower fails to perform its obligations contained in any other agreement between it and Plaintiff.

30. Further, Mortgagor has not kept the Property free from claims for liens, which is an Event of Default under the Mortgage. See Ex. B, pg. 4. In particular, a lien has been asserted against the property by Allgo and Hryniewicki.

* * *

55. Plaintiff is the owner and holder of the Note, the Chicago Kitchen Guarantee and other Loan Documents.

* * *

66. Plaintiff is the owner and holder of the Note, the CKB Guarantee and other Loan Documents.

* * *

77. Plaintiff is the owner and holder of the Note, the Carlson Guarantee and other Loan Documents.

* * *

88. Plaintiff is the owner and holder of the Note, the Steckhan Guarantee and other Loan Documents."

¶ 14 On March 12, 2014, ColFin moved for summary judgment arguing that defendants' verified answer created no disputed issue of any material fact and that neither affirmative defense asserted by defendants—"inadequate pleading Counts I-VI" or "lack of standing"—had merit such that summary judgment in favor of plaintiff was not warranted. ColFin attached the affidavit of Mr. Ryan Riemer to its motion for summary judgment wherein Mr. Riemer testified

that, among other facts, Harris assigned all of its rights under the loan and loan documents to ColFin pursuant to certain assignment documents, including a General Assignment. The General Assignment provides that all rights under the loan at issue, including all guaranty agreements, are assigned to ColFin.

¶ 15 Prior to responding to the motion for summary judgment, the court allowed defendants the opportunity to conduct oral discovery through May 5, 2014. During that time, defendants took the deposition of Mr. Riemer. During that deposition, Mr. Riemer testified that ColFin acquired all the relevant loan documents, including the promissory note, mortgage, assignment of rents and guaranties. He testified that these were copies and not the original documents. He testified that he has never seen the original guaranties and those were not transferred to ColFin from BMO Harris Bank, NA.

¶ 16 Defendants responded to the motion for summary judgment on June 11, 2014. In that response, defendants did not address ColFin's argument that by operation of law they admitted 80 of the 96 allegations in their verified answer and did not attach a counter-affidavit. Instead, defendants argued that Mr. Riemer's affidavit was improper and sought to strike it. ColFin filed its reply in support of its motion for summary judgment on July 9, 2014. On August 14, 2014, Judge Otto granted summary judgment in favor of ColFin on Counts III-VII of the Verified Second Amended Complaint. Defendants filed a notice of appeal on September 15, 2014, appealing the orders entered by the circuit court on March 21, 2012, wherein Judge Atkins granted the motion to appoint a receiver, and August 14, 2014, wherein Judge Otto granted summary judgment in favor of ColFin on Counts III-VII of the Verified Second Amended Complaint.

¶ 17 ANALYSIS

¶ 18 March 21, 2012 Order Granting Motion to Appoint Receiver

¶ 19 Defendants first argue that the circuit court erred in granting BMO Harris Bank, NA's motion to appoint a receiver because, at the time that motion was granted, there was a motion to substitute judge as a matter of right pending before the court. As a result, defendants argue that the March 21, 2012 order and all subsequent orders entered in this matter are void. ColFin argues that the circuit court did not err in granting the motion to appoint a receiver because: (1) the motion to substitute judge was never properly before the court when it ruled on the motion to appoint a receiver; (2) this court lacks jurisdiction over an appeal of the order granting the motion to appoint a receiver entered on March 21, 2012; (3) defendant's motion to substitute judge was granted, and not denied, so all orders subsequent to March 21, 2012 are valid; and (4) even if the order granting the motion to appoint a receiver was improper, defendants' arguments are now moot since defendants failed to appeal the March 21, 2012 order within 30 days and, since then, two substituted judges upheld that order. For the reasons that follow, we find that we do not have jurisdiction to decide defendants' claim pertaining to the order that was entered on March 21, 2012.

¶ 20 At the outset, we clarify that the circuit court entered two orders on March 21, 2012: an order granting plaintiff's motion to appoint a receiver and an order granting defendants' motion to substitute judge as a matter of right. Here, defendants appeal the order granting the motion to appoint a receiver. They do not appeal the order granting their motion to substitute judge; they, in fact, prevailed on that motion.

¶ 21 Illinois Supreme Court Rule 307(a)(2) (eff. Jan. 1, 1970) states: "An appeal may be taken to the Appellate Court from an interlocutory order of court: *** (2) appointing or refusing to appoint a receiver or sequestrator[.]" Ill. S. Ct. R. 307(a)(2) (eff. Jan. 1, 1970). Because

the order granting the motion to appoint a receiver was entered on March 21, 2012, this appeal, which was filed more than two years later on September 15, 2014, is untimely. Therefore, we are without jurisdiction to address any arguments relating to that March 21, 2012 interlocutory order. *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 249-50 (1994) ("While it is true that, under Supreme Court Rule 307(a)(2), an order appointing a receiver is appealable as a matter of right [Citation.], a notice of appeal challenging the appointment of a receiver filed more than 30 days after the appointment is ineffective to confer jurisdiction on the reviewing court."); *Wolfe v. Illini Federal Savings & Loan Ass'n*, 158 Ill. App. 3d 321, 324 (1987) ("a party's failure to timely appeal an order appealable under Rule 307(a) renders that order the law of the case and that part of the resulting judgment *res judicata*.").

¶ 22 Although defendants are not appealing the order granting their motion for a substitution of judge as a matter of right, we note that the case defendants cite to in support of their argument that all post-March 21, 2012 orders are void deals with a scenario where the trial court improperly *denied* a motion to substitute judge and, therefore, the subsequent order entered by that judge was void. See *Aussieker v. City of Bloomington*, 355 Ill. App. 3d 498 (2005). The final judgment being appealed in this case was entered by a different judge and defendants' motion to substitute judge in this case was *granted*. Thus, even if defendants were attempting to appeal the order granting *defendant's* motion to substitute judge, the case law they cite on that issue is inapposite.

¶ 23 Finally we note from our review of the record we cannot determine whether the trial court judge was aware that the motion to substitute judge had been filed by defendant on March 20, 2012 at the time he granted the motion for appointment of receiver on March 21, 2012 because a transcript of that hearing is not a part of the record. However to the extent to which

the trial court judge may have erred in appointing a receiver, the error was harmless because the receiver order was an interlocutory order that had no bearing on the determination of the issues in this appeal—whether defendant defaulted on the terms of the mortgage and whether plaintiffs were proper parties entitled to a judgment of foreclosure. *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1057 (2009); *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964) ("Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed.").

¶ 24 August 14, 2014 Order Granting Summary Judgment in Favor of ColFin

¶ 25 Defendants also argue that the circuit court erred in granting summary judgment in favor of ColFin because there was a genuine issue of material fact "as to the alleged breach and the alleged amount due and owing" because the affidavit of Mr. Riemer, which was attached to plaintiff's motion for summary judgment, was inadequate in that it failed to attach documents Mr. Riemer relied on in giving his affidavit testimony and Mr. Riemer's affidavit testimony lacked a proper foundation. Defendants also argue that plaintiff cannot enforce the guaranties in this matter because Mr. Riemer's deposition testimony established that ColFin never received the original guaranties. ColFin responds by arguing that the affidavit of Mr. Riemer was proper and the guaranties were properly enforced. ColFin further argues that even if we were to set aside Mr. Riemer's affidavit and deposition testimony, defendants admitted all the facts in their verified answer pursuant to section 15-1506 of the Mortgage Foreclosure Law (735 ILCS 5/15-1506(a) (West 2010)), that entitle ColFin to summary judgment. Based upon our review of the pleadings, affidavits, depositions, admissions and exhibits on file, we find that the circuit court properly granted summary judgment in favor of ColFin.

¶ 26 Summary judgment is proper where the pleadings, affidavits, depositions, admissions,

and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257-58 (2004). Although summary judgment is appropriate if a plaintiff cannot establish an element of his claim, it should only be granted when the right of the moving party is clear and free from doubt. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004). Our review of a ruling on a motion for summary judgment is *de novo*. *Id*.

¶ 27 As stated earlier, section 1506(a) of the Mortgage Foreclosure Law states: "where an allegation of fact in the complaint is not denied by a party's verified answer or verified counterclaim, or where a party pursuant to subsection (b) of Section 2-610 of the Code of Civil Procedure states, or is deemed to have stated, in its pleading that it has no knowledge of such allegation sufficient to form a belief and attaches the required affidavit, a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required." 735 ILCS 5/15-1506(a) (West 2010).

¶ 28 Here, defendants responded to 80 of the 96 allegations in plaintiff's Verified Second Amended Complaint with the response that they lacked sufficient knowledge to affirm or deny allegations. Pursuant to section 1506(a) of the Mortgage Foreclosure Law, those 80 responses are deemed admitted and no further evidence of those facts are required. 735 ILCS 5/15-1506(a) (West 2010). Further, with respect to paragraph 34 of the Second Verified Amended Complaint, defendants' answer admits subparagraph (i), which states that payment under the Note became due on October 16, 2010 following default and the total amount now due is $2,247,790.12, but states that defendants "also deny the deemed allegations contained in Section 1540(c) of the

Illinois Foreclosure Law." Under section 2-610 of the Code of Civil Procedure, those facts are also deemed admitted due to the lack of specificity in the denial. See 735 ILCS 5/2-610 (West 2010).

¶ 29 Admissions in the verified pleadings have "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 80-81 (1992); *see also* 735 ILCS 5/15-1506(a) (West 2010). As such, the admissions in defendants' verified answer, including specifically those admissions in paragraphs 16, 17, 21, 23-25, 27-30 and 34, admit that the loan was made, that they signed the loan documents, that the loan and loan documents were assigned to plaintiff, and that a default occurred. Given these admissions in the pleadings, even setting aside Mr. Riemer's testimony, we find that the circuit court properly granted summary judgment in favor of ColFin on Counts III-VII of the Verified Second Amended Complaint. 735 ILCS 5/2-1005(c) (West 2012) ("Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law"); *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 21 (the admission of the execution of a guaranty and the authenticity of the attached copy to a complaint obviates the need for production of the original guaranty agreement).

¶ 30 Despite the above, defendants fall back on the argument that "the original guaranties were not transferred to Plaintiff." Based on this fact, defendants argue that "[b]eacause Plaintiff did not have the guaranties, it should not be entitled to enforce them." First, defendants argue that they denied all allegations in the Verified Second Amended Complaint that ColFin was the owner and holder of the guaranties and other loan documents at issue in this case, specifically

paragraphs 55, 66, 77 and 88. However, defendants' verified answer actually responded to those allegations as having insufficient knowledge to admit or deny them, which under section 1506(a) of the Mortgage Foreclosure Law, amounts to admissions of those allegations. 735 ILCS 5/2-1506(a) (West 2010). Accordingly, despite defendants' argument otherwise, defendants' verified answer admits that ColFin was the holder and owner of all the guaranties and other loan documents at issue here. Further, defendants' verified answer also admits all the allegations pertaining to the assignment of the loan and all loan documents from BMO Harris Bank, NA to ColFin. As such, given defendants' verified admissions in the pleadings, ColFin may enforce the guaranties against defendants. See *Nissan Motor Acceptance Corp.*, 2012 IL App (1st) 111296 (holding that statements in a verified answer were binding judicial admissions that president signed and delivered guaranty, and that copy of guaranty was attached to complaint). Therefore, we find defendants' argument that the guaranties were not enforceable in this case to be unpersuasive.

¶ 31 CONCLUSION

¶ 32 For all the reasons stated above, we affirm the circuit court's March 21, 2012 order granting the motion to appoint a receiver and August 14, 2014 order granting summary judgment in favor of ColFin on Counts III-VII of the Verified Second Amended Complaint.

¶ 33 Affirmed.