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IN THE
COURT OF APPEALS OF INDIANA

WELLS FARGO BANK, N.A.,	)	
Appellee/Plaintiff/Counterclaim Defendant,	)	
	)	
vs.	)	No. 55A01-1007-MF-334
	)	
REED HODGES, ANGELIA HODGES,	)	
And the Unknown Tenant,	)	
	)	
Appellees-Defendants.	)	
	)	
TIMOTHY SWAFFORD,	)	
Appellant/Defendant/Counterclaim and	)	
Cross-Claim Plaintiff,	)	
	)	
vs.	)	
	)	
REED HODGES and ANGELA HODGES,	)	
Appellants/Cross-Claim Defendants.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew Hanson, Judge
Cause No. 55C01-0809-MF-824

June 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Wells Fargo Bank, N.A. ("the Bank") appeals from the Morgan Circuit Court's order dismissing Timothy Swafford ("Swafford") from the Bank's complaint to foreclose on a mortgage executed in favor of the Bank's assignor by Reed and Angelia Hodges (collectively, "the Hodgeses"). The Bank raises one issue on appeal, which we restate as whether the trial court erred in concluding that the Bank was not entitled to foreclose on the property at issue. Because we hold that genuine issues of material fact remain as to whether any legal or equitable remedy is available to the Bank, and if so, what the terms of that remedy should be, we reverse and remand for further proceedings consistent with this opinion.

Facts and Procedural History

The details of the transaction underlying the mortgage foreclosure action at issue in this appeal were set forth in a previous opinion of this court as follows:

> Swafford, a retired laborer, has a sixth grade education and is illiterate, except that he can read numbers and sign his name. In March 2002, Swafford separated from his wife, who had handled the couple's finances. Shortly thereafter, Swafford learned that she had missed several mortgage payments on the marital residence, which was also Swafford's childhood home. On June 7, 2002, Swafford's divorce property agreement was finalized. Pursuant to the terms of that agreement, he received the marital residence and was to refinance the two outstanding mortgages within ninety days to remove his wife from those obligations. In the months prior to June 7, 2002, he had approached several loan companies about obtaining a loan; his applications were denied because of his prior bankruptcy filing, as well as the impending foreclosure on his home. On June 7, 2002, Swafford went to Indiana Mortgage Funding ("IMF") in

Bloomington, Indiana, and met with mortgage broker Hope Seitzinger. He told Seitzinger that he wanted to apply for a loan to pay off the two mortgages on his home, make some home repairs, and to pay off his car loan and some other debts. His loan application showed the requested loan amount as $52,000.00, with an estimated value of the property of $95,000.00, and liens against the property in the amount of $33,000.00. The application was denied.

Swafford asked Seitzinger if she knew of any way that he could save his home. Seitzinger said that she knew a person who had invested in real estate in the past and might be willing to help Swafford. She called her brother, Reed Hodges, and suggested that he purchase Swafford's house and sell it back to him on land contract. Reed said that he would agree to purchase Swafford's house if he could make a profit and "pay off some of my stuff." Hodges talked it over with his wife, Angelia, and the couple agreed to participate in the transaction. Seitzinger explained to Swafford that he would have to transfer the deed to his house to the Hodgeses and buy the house back on land contract. She believed that he understood that the Hodgeses would pay off the mortgages on his house and that he would receive no additional money from the transaction.

Seitzinger prepared the land contract using a standard IMF form. She also originated a $57,400.00 loan for the Hodgeses that would enable them to purchase Swafford's home.[1] Seitzinger set up the date and time for the closing of these two transactions, and she met with Swafford and his nephew prior to the closing.

The land contract required Swafford to buy back his home for $59,000.00, with interest at the rate of 8.50 percent per annum. The Hodgeses also agreed to pay Swafford $4,000.00 at the time of closing, which Swafford had requested for the purpose of paying off some personal debts. The trial court determined that the value of the benefit Swafford received from the loan was $39,514.17. Swafford and the Hodgeses had never spoken to each other until the day of the closing, when they had a casual conversation with no discussion of the terms of the agreement. Seitzinger was not present at the closing. The Hodgeses concede that they did not provide Swafford with any disclosures regarding the transaction. Prior to closing, no one informed Swafford that Reed and Seitzinger were related.

[1] In order to obtain the loan, the Hodgeses executed a mortgage on the property to First Bank, Inc. securing a promissory note for $57,400.00. By way of assignment, the Bank is the current holder of the note and mortgage.

Swafford and his nephew thought that Swafford would receive additional money following the closing, apparently because Swafford and Seitzinger had initially attempted to obtain a loan in an amount that would allow Swafford to pay off some debts and make various home repairs. Swafford did not receive additional funds after the closing, and he and his nephew visited IMF and asked Seitzinger for an explanation of the fees and costs included in the loan. She failed to provide the requested information. Swafford hired an attorney, who made similar requests, to which the Hodgeses also failed to respond. On July 17, 2003, Swafford filed a complaint against the Hodgeses, Seitzinger, and IMF expressing his intent to rescind the transaction.

The complaint alleged violations of the federal Truth in Lending Act ["the TILA"], the federal Home Ownership and the federal Equity Protection Act, the federal Real Estate Settlement Procedures Act, the Indiana Deceptive Consumer Sales Act, and the Indiana Loan Broker Act. Swafford also claimed fraud, fraudulent misrepresentation, constructive fraud, and equitable estoppel. On October 14, 2004, the trial court granted summary judgment in favor of IMF and denied summary judgment as to the Hodgeses and Seitzinger. A bench trial as to liability was held on February 15, 2005. On August 5, 2005, the trial court ruled in favor of Swafford and against the Hodgeses on the TILA and HOEPA claims. The court also found that the Hodgeses violated RESPA and DCSA and that Swafford had established the elements of equitable estoppel. The court found in favor of the Hodgeses on the remaining claims. It also ruled in favor of Seitzinger on all claims. On September 8, 2005, the Hodgeses filed a motion to correct error, which was denied on September 19, 2005.

On February 6, 2006, the trial court held a hearing on damages and equitable relief. On March 23, 2006, the court ordered the Hodgeses to transfer title to the home back to Swafford by warranty deed and ordered Swafford to sign a promissory note and mortgage on the property in favor of the Hodgeses, reduced by $21,150.00. The court also ordered the Hodgeses to pay $900.00 directly to Swafford, apparently to satisfy the delinquent balance on his car loan. Finally, it ordered the Hodgeses to file a warranty deed, promissory note, mortgage, and a satisfaction of the land contract with the county recorder.

Hodges v. Swafford, 863 N.E.2d 881, 883-85, amended on reh'g, 868 N.E.2d 1179 (Ind. Ct. App. 2007) (footnotes and citations omitted). For reasons that are unclear from the record before us, the Bank was never made a party to this action.

The Hodgeses appealed, and another panel of this court affirmed the trial court's ruling that Swafford was entitled to rescission of the land contract due to the Hodgeses' TILA and HOEPA violations. Id. at 888, 891. However, the court reversed and remanded on the issue of damages. Id. at 892-93. Specifically, the court concluded that as a result of Swafford's rescission under the TILA, the Hodges had retroactively lost the right to charge fees on the loan. Id. at 893. Thus, in order to determine the amount Swafford owed the Hodgeses, the court took the amount of the value Swafford actually received for his direct benefit from the Hodgeses and subtracted the total payments he had already made. Id. at 893. Applying this formula, the court determined that Swafford owed the Hodgeses $8,591.93 and remanded with instructions to order Swafford to execute a promissory note and mortgage in favor of the Hodgeses in that amount. Id. at 893.

On rehearing, the court amended its decision on damages. Hodges v. Swafford, 868 N.E.2d at 1181. Specifically, the court held that the portions of Swafford's payments covering insurance and property taxes benefitted Swafford and should therefore not be included in the total finance charge forfeited by the Hodgeses. Id. The court went on to instruct the trial court to apply a specific formula on remand to determine the amount

Swafford owed to the Hodgeses and to order Swafford to execute a promissory note and mortgage in favor of the Hodgeses for the amount due. Id.

The trial court subsequently determined the amount Swafford owed, which he paid directly to the Hodgeses rather than executing a promissory note. In accordance with the trial court's order, the Hodgeses transferred title of the property back to Swafford by warranty deed on April 3, 2009. The Hodges also executed a "Satisfaction of Land Contract" on September 11, 2009. Appellant's App. p. 100.

However, nearly a year prior to deeding the property back to Swafford, the Hodgeses had stopped making monthly mortgage payments on the property to the Bank. As a result, the Bank filed its "Amended Complaint on Note and to Foreclose Mortgage on Real Estate" on September 23, 2008, naming the Hodgeses, Swafford, and an unknown tenant as defendants. Id. at 7-10. Swafford was granted an extension of time to file an answer on October 22, 2009, and in the interim, the Bank filed a "Motion for Default and Summary Judgment Entry and Decree of Foreclosure" on November 3, 2008, seeking summary judgment against Swafford and the entry of default judgment against the remaining defendants. Id. at 30-31. Swafford subsequently filed an answer and counterclaim against the Bank and a response to the Bank's motion for summary judgment.

The trial court held hearings on the Bank's motion for summary judgment on February 20 and April 3, 2009. On September 2, 2009, the trial court issued an order denying the Bank's motion for summary judgment as to Swafford and dismissing him as

a defendant. Specifically, the trial court concluded that because the transaction between Swafford and the Hodgeses had been rescinded, the Hodgeses had no interest in the property they sought to mortgage to the Bank's assignor and, as a result, the mortgage did not attach. The trial court therefore concluded that although the Bank could not foreclose on the property, it was entitled to summary judgment against the Hodgeses for the remaining amount due and owing under the promissory note.[2] On June 8, 2010, the trial court entered final judgment reaffirming its dismissal of Swafford and its conclusion that the Bank was not entitled to foreclose on the property, and granting the Bank a judgment against the Hodgeses in the principal amount $53,500.00, plus interest and fees.[3] The Bank now appeals.

Standard of Review

We first observe that Swafford did not file an appellee's brief. Under such circumstances, we apply a less stringent standard of review and may reverse the trial court if the appellant establishes prima facie error. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Prima facie error is defined as at first sight, on first appearance, or on the face of it. Id. However, this rule is not intended to benefit the appellant, but rather to relieve this Court of the burden of developing arguments on the appellee's behalf. State v. Moriarty, 832 N.E.2d 555, 558 (Ind. Ct. App. 2005). The

[2] The Bank originally sought default judgment against the Hodgeses because they failed to timely appear and defend against the complaint. However, the Hodgeses apparently appeared in person at the summary judgment hearing. Appellant's App. p. 80.

[3] The Hodgeses do not participate in this appeal.

burden of demonstrating trial error remains with the appellant. State v. Combs, 921 N.E.2d 846, 850 (Ind. Ct. App. 2010).

By dismissing Swafford as a defendant, the trial court effectively granted summary judgment in his favor. Although Swafford did not file a motion for summary judgment, the trial court was nonetheless empowered to grant summary judgment in his favor because the Bank moved for summary judgment. See Ind. Trial Rule 56(B) ("When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party."). We therefore apply the standard of review applicable to summary judgment determinations. See Indianapolis Newspapers v. Ind. State Lottery Comm'n, 739 N.E.2d 144, 153 (Ind. Ct. App. 2000) (applying the standard of review applicable to summary judgment orders to a trial court's order discharging a party because the order was "akin to summary judgment" in that party's favor), trans. denied.

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56(C). Our standard of review is well settled:

> Our analysis proceeds from the premise that summary judgment is a lethal weapon and that courts must be ever mindful of its aims and targets and beware of overkill in its use. . . . When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party. All doubts as to a factual issue must be resolved in the nonmovant's favor. A trial court's grant of summary judgment is "clothed with a presumption of validity," and the appellant has the burden of

> demonstrating that the grant of summary judgment was erroneous. Nevertheless, we must carefully assess the trial court's decision to ensure the nonmovant was not improperly denied his day in court.

Rogier v. Am. Testing & Eng'g Corp., 734 N.E.2d 606, 613 (Ind. Ct. App. 2000) (citations omitted).

Discussion and Decision

In granting summary judgment in Swafford's favor, the trial concluded that, as a matter of law, the Bank could not foreclose on the mortgage because the mortgage had not attached to the property. Specifically, the trial court concluded that because the transaction between the Hodgeses and Swafford was rescinded, "the Hodges[es] had no interest in the property they sought to mortgage to Wells Fargo Bank, and the entire transaction was null and void." Appellant's App. p. 110. The Bank argues that the trial court erred in concluding that the mortgage did not attach because the previous order merely rescinded the land contract and had no effect on the deed from Swafford to the Hodgeses. Accordingly, the Bank claims the Hodgeses had an interest in the property at the time they executed the mortgage and that, as a result, the mortgage attached to the property.

Under the TILA and its implementing regulations,[4] if a credit transaction involves the retention or acquisition of a security interest in a consumer's principal dwelling, the consumer is entitled to rescind the transaction if the lender fails to make the required

[4] These regulations, known as "Regulation Z," are found at 12 C.F.R. pt. 226.

"material disclosures."[5] Hodges v. Swafford, 863 N.E.2d at 892; 12 C.F.R. § 226.23(a)(3) (2011). When a consumer exercises the right to rescind a transaction pursuant to the TILA, "the security interest giving rise to the right of rescission *becomes* void[.]" 12 C.F.R. § 226.23(d)(1) (emphasis added). Thus, the lender must terminate its security interest and return any money or property it received from the borrower, and the consumer must return any money or property received from the lender. 12 C.F.R. § 226.23(d).

Here, the land contract granted the Hodgeses a security interest in Swafford's home. See 12 C.F.R. § 226.2(a)(25) (2011) ("Security interest means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law."); Skendzel v. Marshall, 261 Ind. 226, 234, 301 N.E.2d 641, 646 (1973) (holding that a conditional land contract is viewed "as a sale with a security interest in the form of legal title reserved by the vendor" and that "vendor-vendee should be viewed as mortgagee-mortgagor."); Brenneman Mech. & Elec., Inc. v. First Nat'l Bank of Logansport, 495 N.E.2d 233, 238-39 (Ind. Ct. App. 1986), trans. denied (noting that a deed that is absolute and unconditional on its face "may be nothing more than a mortgage or security interest when executed to secure an existing debt" and that in such a case, the deed will be treated in equity as a mortgage). It is undisputed that the Hodgeses failed to make the requisite disclosures; as a result, Swafford was entitled to rescind the transaction. See 12 C.F.R. §226.23(a)(3). Under Skendzel, it was Swafford's deed to

[5] "Material disclosures" include disclosure of the annual percentage rate, the amount of and method of determining the finance charge, amount to be financed, the number and amount of payments, etc. 15 U.S.C. § 1602(u) (2006).

the Hodgeses that created the security interest; thus, under the TILA, the deed "became void" when the contract was rescinded. See 12 C.F.R. § 226.23(d)(1).

However, it is clear from the language of the TILA that meaning of the term "void" as used in that act differs from the traditional legal meaning of the term.[6] This court has previously noted that the terms "void" and "voidable" have been frequently used interchangeably, without due regard for the technical difference between their meanings. Trook v. Lafayette Bank and Trust Co., 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), trans. denied. "'*[V]oid* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it.'" Id. (quoting Black's Law Dictionary 812 (abridged 5th ed. 1983)) (emphasis and alteration in original).

The TILA provides that when a lender fails to make the required material disclosures, a consumer has the right to rescind the transaction. The lender's security interest does not become "void," however, until the consumer timely exercises that right. But if the security interest were truly void in the strictest sense, it would be a legal nullity and no action would be required to disaffirm it. Additionally, under the TILA, if the consumer chooses not to exercise his or her right to rescind within the applicable time period, the right is waived and the security interest does not terminate; thus, the defect may be cured by the consumer's acquiescence. For these reasons, it may be more

[6] Neither the TILA nor Regulation Z defines "void."

accurate to describe the lender's security interest as voidable upon the consumer's rescission as opposed to void *ab initio*.

In any event, the TILA makes it clear that the security interest only "becomes void" upon rescission. Here, the Hodgeses' security interest came in the form of a deed to granting them legal title to the property. The Hodgeses executed the promissory note and mortgage at issue in this case while in possession of that deed and approximately a year before Swafford rescinded the transaction and the deed became void. Accordingly, at the time the mortgage was executed, the Hodgeses' interest in the property had not yet been extinguished. We therefore conclude that the Bank has made a prima facie showing that the trial court erred in concluding that the Hodgeses had no interest in the property at the time they sought to mortgage it to the Bank's assignor. We therefore reverse the trial court's conclusion that the mortgage did not attach to the property at issue.

It does not necessarily follow, however, that the Bank is entitled to foreclose on the mortgage. We believe that substantial genuine issues of material fact remain regarding the equities of this case, and the interplay between those equities and the Bank's security interest in Swafford's property. Because Swafford has already paid off the amount he owed to the Hodgeses, it may be inequitable to allow the Bank to foreclose on the mortgage and thereby deprive Swafford of ownership of the property.[7] On the other hand, it may be inequitable to cut off the Bank's right to foreclose on the mortgage

[7] Due to their violations of the TILA's disclosure requirements and Swafford's subsequent rescission of the transaction, the Hodgeses forfeited their right to receive finance charges on the loan to Swafford. Thus, it should be noted that the total amount Swafford paid to refinance his home was much less than it would have been had the transaction not been rescinded or if Swafford had obtained the funds through more traditional channels.

based on the Hodgeses' wrongdoing, assuming the Bank was not in a position where it knew or should have known of that wrongdoing.

We find it particularly troubling that the Bank was not joined as a necessary party to Swafford's action to enforce his right to rescind under the TILA. It seems evident on the face of the record that the Bank was a necessary party to any action seeking to transfer title to the property subject to the Bank's mortgage. See In re Paternity of C.M.R., 871 N.E.2d 346, 349 (Ind. Ct. App. 2007) (noting that a necessary party as one who must be joined in the action for a just adjudication). If the Bank had been made a party to the underlying litigation, the parties may have been able to reach a settlement or, if no settlement could be reached, the trial court could have fashioned a complete and appropriate, equitable remedy at a much earlier time.

If Swafford was aware of the Bank's interest in the property during the course of his suit to enforce his right to rescind under TILA, but nevertheless chose not to join the Bank, he may be estopped from denying the Bank's interest. See Zoller v. Zoller, 858 N.E.2d 124, 127 (Ind. Ct. App. 2006) (noting that all forms of estoppel "are based upon the same underlying concept: a person who, by deed or conduct, has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to the other."). Likewise, if the Bank was aware of the litigation and chose not to intervene, it may be estopped from asserting any right to enforce or reform the terms of the mortgage. See id. Swafford's level of sophistication and whether he was aware that the Hodgeses intended to finance their loan to Swafford

by mortgaging the property, together with the extent to which the Bank's assignor knew or should have known of Swafford's interest in the property at or about the time the Hodgeses executed the promissory note and mortgage at issue will also be very relevant in balancing these equities.

For all of these reasons, we reverse and remand with instructions for the trial court to receive additional evidence on whether any legal or equitable remedy is available to the Bank, and if so, what the terms of that remedy should be

Reversed and remanded with instructions.

VAIDIK, J., concurs.

KIRSCH, J., concurs in result.