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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAK CAPITAL, LLC,)
)
 Appellant,)
)
v.)
)
KATRINA ADAMS, JOHN ADAMS, and)
MARKETKING, LLC,)
)
 Appellees.)
_____)

Case No. 2D19-4371

Opinion filed December 9, 2020.

Appeal from the Circuit Court for Lee
County; Robert J. Branning and Joseph C.
Fuller, Judges.

Ryan W. Owen and David L. Boyette of
Adams and Reese LLP, Sarasota, for
Appellant.

Robson D.C. Powers and Alvaro C. Sanchez
of Burandt, Adamski, Feichthaler &
Sanchez, PLLC, Cape Coral, for Appellees
Katrina and John Adams.

No appearance for Appellee MarketKing,
LLC.

VILLANTI, Judge.

JAK Capital, LLC, appeals the amended final judgment that stripped its
mortgage from a house owned by Katrina Adams, quieted title to the house in favor of

the Adamses, and denied JAK Capital's claim for foreclosure of the mortgage. Because the trial court misapplied the law in entering the amended final judgment, we reverse and remand for entry of a foreclosure judgment in favor of JAK Capital.

Background

The record before this court shows that in July 2010, Katrina Adams inherited a home in Lee County from her father. She and her husband, John Adams, moved into the home shortly thereafter. At that time, there was a relatively small mortgage remaining on the property in favor of HSBC, which the Adamses assumed.

In early 2015, Katrina¹ met Thomas Errico, who was a regular at the restaurant where Katrina worked. Over the course of several discussions, Katrina learned that Errico owned and operated a business called MarketKing, LLC, that flipped houses, and she expressed an interest in learning about that business. Ultimately, the two discussed going into business together, with Katrina contributing capital while Errico taught her the ins and outs of running that type of business.

As part of the process of "going into business together," Errico requested various documents from Katrina, allegedly to show her creditworthiness and her ability to contribute capital. The documents he requested—and that she produced without question in early 2016—included insurance information on her house, a payoff statement from HSBC, and some other financial information. In addition, Katrina obtained a survey of her home and had it appraised, and she provided the survey and appraisal to Errico as well. Katrina testified at the bench trial that she provided all of this

¹We identify the Adamses by their first names only for clarity when they took actions independent of each other.

information to Errico to show him that she had equity in her house from which she could make her capital contribution and also to show that she was financially responsible.

After receiving all of this information from Katrina, Errico provided the Adamses with a packet of documents to review and sign. Both Katrina and John testified that they understood these documents to be a "draft" of the business plan for the new business. However despite the documents allegedly being only a "draft" rather than the final version, both Katrina and John signed the documents and returned them to Errico. One of these documents turned out to be a mortgage on Katrina's house.

Errico, through MarketKing, then used the mortgage signed by the Adamses to obtain a \$150,000 loan from JAK Capital. MarketKing gave a promissory note to JAK Capital for \$150,000 and secured that note with the mortgage on Katrina's house.² As part of the closing on that loan, which occurred in mid-March 2016, JAK Capital paid off the existing HSBC mortgage loan on Katrina's house in the amount of \$15,928.41. After various other closing costs were paid, the remainder of the funds were paid to MarketKing.

The loan in question was a two-year, interest-only loan with a balloon payment of the principal due in April 2018. During 2016 and 2017, JAK Capital received only sporadic interest payments on the loan from MarketKing. In late 2017, JAK Capital sent a letter to MarketKing and the Adamses stating its intent to begin foreclosure

²JAK Capital's principal testified at trial that JAK Capital was in the business of making business loans that were secured by Florida real property. When asked whether it was unusual to have a note signed by one party and a mortgage provided by another, he testified: "[T]hat's not unusual. I mean, we make business loans, and sometimes there's, you know, people that are involved in the business that are willing to, you know, put up some real estate as collateral for the loan."

proceedings on the house. In response, the Adamses filed a single-count complaint against JAK Capital seeking to quiet title to the house. In their complaint, the Adamses alleged that they had never signed the mortgage and that their signatures on the mortgage were forged by Errico.

JAK Capital filed a counterclaim for foreclosure of the mortgage.³ In the Adamses' affirmative defenses to this counterclaim, they alleged only that their signatures on the mortgage were forgeries. Nowhere in either their complaint or their affirmative defenses to the counterclaim did they allege that they were tricked, fooled, deceived, or otherwise defrauded into signing the mortgage by either Errico or JAK Capital.

During the bench trial, however, both Katrina and John admitted that they signed the "draft" business plan documents from Errico without knowing what they were, claiming that the mortgage must have been included in the "draft" business plan without their knowledge. While Katrina continued to assert that she had not signed the mortgage, John testified that he might have signed the mortgage by mistake while they were signing all the other "draft" business plan documents. JAK Capital presented testimony from a handwriting expert that the Adamses' signatures on the mortgage were authentic.

After hearing the testimony and reviewing all of the documents admitted into evidence, the trial court found that the mortgage was the product of fraud and deceit by MarketKing through Errico and that the Adamses' signatures, and therefore

³JAK Capital's counterclaim also alleged alternative counts for an equitable lien and equitable subrogation. Given our resolution of this appeal, we need not address those counts.

the mortgage to which they were affixed, were not given "knowingly, intelligently and voluntarily." Thus, while the trial court did not find that the Adamses' signatures were forgeries, it refused to enforce the mortgage on the basis that it was procured by fraud. Having made this ruling, the trial court entered final judgment in favor of the Adamses and denied relief to JAK Capital on its counterclaim for foreclosure. JAK Capital now appeals this final judgment.

Analysis

In this appeal, JAK Capital contends that the trial court erred by stripping its mortgage from the house, quieting title in the Adamses' favor, and denying its claim for foreclosure of the mortgage for two separate reasons. We conclude that both of these reasons require reversal of the amended final judgment.

First, because the Adamses never pleaded fraud as a defense to the mortgage, the trial court erred as a matter of law by providing them with relief on this unpleaded basis. Florida Rule of Civil Procedure 1.110(d) identifies fraud as an affirmative defense that must be specifically pleaded or it is waived. In addition, "the circumstances constituting fraud . . . shall be stated with such particularity as the circumstances may permit." Fla. R. Civ. P. 1.120(b); see also Morgan v. W.R. Grace & Co.–Conn., 779 So. 2d 503, 506 (Fla. 2d DCA 2000); Zikofsky v. Robby Vapor Sys., Inc., 846 So. 2d 684, 684 (Fla. 4th DCA 2003) ("[T]o raise an affirmative defense of fraud, the 'pertinent facts and circumstances constituting fraud must be pled with specificity, and all the essential elements of fraudulent conduct must be stated.' " (quoting Cocoves v. Campbell, 819 So. 2d 910, 912 (Fla. 4th DCA 2002))). When a defense listed in rule 1.110(d) is not pleaded, or is not pleaded with sufficient specificity,

it is deemed waived and cannot form the basis for relief. See, e.g., Derouin v. Universal Am. Mortg. Co., LLC, 254 So. 3d 595, 601 (Fla. 2d DCA 2018) (providing that "[I]tigators in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are" and thus "[a]n issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination" (first quoting Bank of Am., N.A. v. Asbury, 165 So. 3d 808, 809 (Fla. 2d DCA 2015); and then quoting Gordon v. Gordon, 543 So. 2d 428, 429 (Fla. 2d DCA 1989))). In short, the trial court cannot award relief on the basis of a defense that has not been pleaded. Id.

Here, the only allegation made in the Adamses' complaint to quiet title and raised in their affirmative defenses to JAK Capital's counterclaim was that their signatures on the mortgage were forged. They specifically alleged that they never signed the mortgage. They did not allege in any pleading at any time that they signed the mortgage by mistake or because Errico misled them into believing that they were signing some other documents or because Errico hid the mortgage in a stack of other documents to trick or deceive them into signing it. The specific fraud that they alleged—but did not prove—was that Errico forged their signatures on the mortgage without their knowledge. Since the Adamses never alleged that they were defrauded into signing the mortgage, the trial court erred by providing them with relief on that basis.

In this appeal, the Adamses argue that their allegations of forgery were sufficient to allege a claim of fraud, and they cite several cases for their theory that forgery is a species of fraud. See, e.g., Padilla v. Padilla, 278 So. 3d 333, 335 (Fla. 3d

DCA 2019). However, rule 1.120(b) requires that the circumstances comprising the fraud be alleged with particularity. While forgery may be a species of fraud, the Adamses never alleged that Errico defrauded them into signing the mortgage. Their only allegation was that they did not sign the mortgage at all. Having failed to prove the allegations they made, the Adamses may not save the judgment by claiming that they could have alleged something else but did not.

Moreover, the record is clear that the issue of fraud—rather than forgery—was not tried by consent. "An issue is tried by consent 'when there is no objection to the introduction of evidence on that issue.'" Derouin, 254 So. 3d at 603 (quoting Fed. Home Loan Mortg. Corp. v. Beekman, 174 So. 3d 472, 475 (Fla. 4th DCA 2015)). Here, when the Adamses moved at the close of evidence to "conform the pleadings to the evidence," JAK Capital objected, and the trial court denied the motion. Further, JAK Capital objected in its written closing argument to the court's consideration of any claim of fraud other than forgery. Hence, it is clear from the record that the issue of fraud by any means other than forgery was neither pleaded nor tried by consent. The Adamses were not entitled to a judgment in their favor on the basis of a fraud they failed to allege, and the amended final judgment in their favor must be reversed on this basis.

Second, even if the issue of fraud had been properly before the court, the Adamses did not prove that they were entitled to relief on that basis against JAK Capital. To be entitled "[t]o set aside a mortgage on the ground of fraud or duress practiced or exercised in its procurement," the party seeking to avoid the mortgage carries the burden to prove that "such fraud or duress [was] participated in to some extent by the mortgagee." Sheppard v. Cherry, 159 So. 661, 662 (Fla. 1935) (citing

Smith v. Commercial Bank, 81 So. 154, 155 (Fla. 1919)); see also Baron v. Estate of Clare, 372 So. 2d 1005, 1006-07 (Fla. 4th DCA 1979). In the absence of evidence of such fraud by the holder of the mortgage, the mortgage will be valid and enforceable.

For example, in Baron, Ronald Baron loaned \$7500 to Granville Clare, who provided a mortgage on real estate he owned as security. 372 So. 2d at 1006. After Clare died, his heirs attempted to invalidate the mortgage, arguing that Clare had been incompetent and "unable to transact any business" at the time he purportedly signed the mortgage. Id. The heirs produced evidence that showed that two individuals who had been caring for Clare at the time had obtained Clare's signature on the mortgage by fraud and had converted the proceeds received from Baron for their own use. Id. However, the evidence showed that Baron was completely unaware of the actions of Clare's caretakers and had not participated in the fraud in any way. Id. Despite no evidence that Baron had been involved in the scheme, the trial court refused to enforce the mortgage, finding that it was "permeated with fraud." Id. The Fourth District reversed this ruling, holding that the trial court erred in refusing to enforce the mortgage held by Baron "because there is simply no evidence that [Baron] was engaged in any fraudulent conduct to the detriment of [Clare]." Id. at 1007. In the absence of such evidence, Baron was entitled to enforce the mortgage against Clare. Id. at 1006-07.

Like the trial court in Baron, the trial court here erred in refusing to enforce the mortgage held by JAK Capital when there was no evidence that JAK Capital engaged in any fraud or deceit. The trial court in this case refused to enforce the mortgage because it found that the Adamses had been defrauded into giving the

mortgage. However, the trial court did not find that the holder of the mortgage—JAK Capital—had participated in the fraud to any extent, nor would there have been any evidence to support such a finding had it been made. Instead, all of the evidence showed that if any fraud occurred, it was perpetrated by Errico. In the absence of any evidence whatsoever that JAK Capital participated in committing the fraud, it was entitled to enforce the mortgage, and the trial court erred by holding otherwise.

In this appeal, as they did in the trial court, the Adamses argue that JAK Capital should not be entitled to enforce the mortgage because it never took any steps to confirm that the Adamses had actually consented to the mortgage. However, on the facts here, JAK Capital had no such obligation. When faced with a mortgage that is regular on its face—such as the mortgage here—a bank or other lender has no obligation to question the legitimacy of that document. See Dines v. Ultimo, 532 So. 2d 1131, 1132 (Fla. 4th DCA 1988) (finding that the bank could enforce its mortgage despite the fraud perpetrated on the homeowners by their son in obtaining their signatures when the mortgage was in the proper legal form and there was nothing to alert the lender to anything out of the ordinary). Given the facial regularity of the mortgage, the Adamses' only avenue of relief would be to prove that JAK Capital "deliberately refused to examine that which it was his duty to examine, or made representations as to a condition which had not been examined without knowing whether it was true or false, and it proved to be untrue." Ocean Bank of Miami v. Inv- Uni Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992). But the Adamses offered no such evidence in this case, and the trial court made no finding that JAK Capital had deliberately refused to investigate a document the authenticity of which it knew or

should have known was questionable. Simply put, JAK Capital had no obligation to go behind the Adamses' signatures on the mortgage when the document was regular on its face.

In sum, the trial court erred by entering final judgment in favor of the Adamses on a claim of fraud that they neither pleaded nor proved. We therefore reverse the amended final judgment, reverse the corresponding judgment for attorney's fees and costs entered in favor of the Adamses, and remand for the trial court to enter final judgment granting foreclosure in favor of JAK Capital. On remand, the trial court should consider the evidence presented at the bench trial concerning the amount of the Adamses' indebtedness to JAK Capital, taking such other evidence as is necessary to enforce the terms of the mortgage.

Reversed and remanded with directions.

BLACK and ATKINSON, JJ., Concur.