DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PROINO BREAKFAST CLUB, II, INC., GEORGE SOULELLIS, and DEMETRA GOUNIS,

Appellants,

v.

OGI CAPITAL, INC.,

Appellee.

No. 2D20-2246

December 8, 2021

Appeal from the Circuit Court for Pinellas County; Thomas M. Ramsberger, Judge.

Michael P. Brundage, of Brundage Law, P.A., Safety Harbor, for Appellants.

Nicole R. Ramirez and Chioma H. Michel, of HD Law Partners, Tampa, for Appellee.

STARGEL, Judge.

Proino Breakfast Club, II, Inc., George Soulellis, and Demetra Gounis (the Appellants) appeal a final summary judgment of

foreclosure entered in favor of OGI Capital, Inc. Because OGI Capital failed to refute or establish the legal insufficiency of two of the Appellants' affirmative defenses, we reverse and remand for further proceedings.

OGI Capital filed this action seeking to foreclose on a $225,000 note and mortgage encumbering the commercial property owned by Proino Breakfast Club and a residential property owned by Soulellis and Gounis. The note was executed by Soulellis, in his capacity as president of Proino, in favor of Obsidian Group Inc., and the mortgage was executed by Soulellis and Gounis individually and by Soulellis on behalf of Proino. Obsidian Group assigned the note and mortgage to OGI Capital prior to the underlying action.

The Appellants filed an answer raising, among other things, affirmative defenses of unclean hands and violations of the Truth in Lending Act (TILA). These defenses were based on allegations that Gus Karamountzos, who controls Obsidian Group and OGI Capital and was a friend and business associate of Soulellis, agreed to lend Soulellis the funds for a down payment on a personal residence but attempted to disguise the loan as a commercial transaction. As part of the agreement, Karamountzos agreed to arrange for the sale

of a restaurant Soulellis owned in Napanee, Ontario, Canada, and use the proceeds from the sale to pay off the loan. According to the Appellants, Karamountzos sold the restaurant for less than fair market value, lied about the sale price, and reneged on his promise to apply the proceeds towards the loan.

In addition, the Appellants filed counterclaims against OGI Capital and a third-party complaint against Obsidian Group and Karamountzos. OGI Capital moved to dismiss the counterclaims and third-party complaint, and the trial court granted the motion without prejudice with leave to amend. After the Appellants failed to file an amended pleading within the allotted time, the trial court entered an amended order dismissing the counterclaims and third-party complaint with prejudice.

OGI Capital eventually moved for summary judgment on the foreclosure count and filed the loan documents, assignment, a copy of a corrective deed, and an affidavit of indebtedness with the trial court. Soulellis and Gounis filed affidavits in opposition supporting their allegations against OGI Capital, Obsidian Group, and Karamountzos. After a hearing that took place over the course of

two days, the trial court entered a final summary judgment of foreclosure in favor of OGI Capital.[1]

"Summary judgment is proper only where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) (citing Fla. R. Civ. P. 1.510(c) (2011); *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)).[2] "Where a defendant pleads affirmative defenses, the plaintiff moving for summary judgment must either factually refute the affirmative defenses by affidavit or establish their legal insufficiency." *Bryson v. Branch Banking & Tr. Co.*, 75 So. 3d 783, 785 (Fla. 2d DCA 2011). In determining whether

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[1] While the record does not contain a transcript from the latter portion of the summary judgment hearing, this does not preclude our review of this issue. *See Southgate Holding, Inc. v. Harte*, 243 So. 3d 1040, 1042 n.3 (Fla. 2d DCA 2018).

[2] The Florida Supreme Court recently amended rule 1.510 to conform with the federal standard for summary judgment. *See* Fla. R. Civ. P. 1.510; *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192 (Fla. 2020). Because the judgment in this case predates the effective date of the amendment, the amended rule does not apply here. *See Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020) (stating that the amendment to rule 1.510 applies prospectively).

summary judgment is appropriate, this court must view "every possible inference in favor of the party against whom summary judgment has been entered." *Maynard v. Household Fin. Corp. III*, 861 So. 2d 1204, 1206 (Fla. 2d DCA 2003).

The Appellants correctly argue that summary judgment should not have been granted because their unclean hands defense was legally sufficient and not factually refuted. "Unclean hands is an equitable defense that is akin to fraud; its 'purpose is to discourage unlawful activity.' " *Cong. Park Off. Condos II, LLC v. First-Citizens Bank & Tr. Co.*, 105 So. 3d 602, 609 (Fla. 4th DCA 2013) (quoting *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992)). In order to constitute unclean hands, conduct "must generally be connected with the matter in litigation and must affect the adverse party." *McCollem v. Chidnese*, 832 So. 2d 194, 196 (Fla. 4th DCA 2002).

Here, the Appellants' unclean hands defense is based on their claim that Karamountzos' failure to follow through on his promise to sell Soulellis' restaurant for fair market value and apply the proceeds towards the loan caused them to default. These allegations, which are directly related to the underlying action, are

legally sufficient to support a defense of unclean hands. *See, e.g.*, *Marin v. Seven of Five Ltd.*, 921 So. 2d 699, 700-01 (Fla. 4th DCA 2006) (holding that mortgagor's allegations that mortgagee failed to honor an oral agreement concerning a new financing arrangement were legally sufficient to support an affirmative defense of unclean hands). Because OGI Capital failed to present any evidence contradicting the factual basis for this defense, summary judgment was not warranted.

OGI Capital also failed to refute the Appellants' affirmative defense based on violations of the TILA. While OGI Capital argues that this defense is legally insufficient because the TILA does not apply to commercial transactions, the court must "examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature." *Tower v. Moss*, 625 F.2d 1161, 1166 (5th Cir. 1980). The nature of the transaction will ultimately be determined "by the entire surrounding factual circumstances." *Id.* at 1166 n.4. Because OGI Capital has failed to submit any evidence to refute the Appellants' claims that the *true*

nature of the loan was for consumer purposes, there remains a genuine issue of material fact as to the applicability of the TILA.

The Appellants' second issue involves the dismissal of their counterclaims and third-party complaint. After the trial court dismissed the counterclaims and third-party complaint with prejudice, the Appellants moved for reconsideration and rehearing. OGI Capital then moved to strike the Appellants' motion as untimely. Ultimately, the trial court rendered an order denying the motion for reconsideration and rehearing and granting the motion to strike on the grounds that the Appellants' counterclaims did not "arise out of the transaction or occurrence that is the subject matter of [OGI Capital's] claim" and therefore were permissive and not compulsory—apparently in agreement with OGI Capital's position that the motion was untimely because the order dismissing the counterclaims and third-party claim with prejudice was a final order. *See generally* Fla. R. Civ. P. 1.530 (motions for rehearing of final orders must be served within fifteen days).

The Appellants argue that this was error. They contend that because their counterclaims were compulsory, the dismissal order was nonfinal and not appealable until the entry of final judgment in

the main action, and thus their motion for reconsideration was timely. *See Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014) (explaining that motions for reconsideration of interlocutory orders "may be filed at any time before the entry of final judgment").

Because motions for reconsideration of nonfinal orders are not bound by the same time constraints as motions for rehearing of final orders, this issue turns on whether the counterclaim dismissal order was a final or nonfinal order. Under these circumstances, that depends on whether the counterclaims were compulsory or permissive. *See Taussig v. Ins. Co. of N. Am.*, 301 So. 2d 21, 23 (Fla. 2d DCA 1974) (explaining that orders dismissing compulsory counterclaims are nonfinal, while orders dismissing permissive counterclaims are final).

"[A] permissive counterclaim does not arise out of the transaction or occurrence that is the subject matter of the main claim." *4040 IBIS Circle, LLC v. JPMorgan Chase Bank*, 193 So. 3d 957, 960 (Fla. 4th DCA 2016) (citing Fla. R. Civ. P. 1.170(b)). On the other hand, "[c]ompulsory counterclaims bear a 'logical relationship' to the plaintiff's claims in that they arise out of the 'same aggregate of operative facts as the original claim.' " *Id.*

(quoting *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14, 20 (Fla. 1992)).

The causes of action raised in the counterclaims and third-party complaint in this case arise out of the same aggregate of operative facts which precipitated the loan transaction and, by extension, the foreclosure action. Because these claims bear a logical relationship to OGI Capital's foreclosure complaint, they are compulsory and not permissive. As such, the counterclaim dismissal order was nonfinal and nonappealable, and the Appellants were free to move for reconsideration of that order at any time prior to the entry of final judgment. Accordingly, to the extent the trial court denied the Appellants' motion for reconsideration based on the mistaken belief that their claims were permissive rather than compulsory, it erred. On remand, the trial court should revisit the Appellants' motion for reconsideration in order to determine whether any relief is warranted.[3]

Reversed and remanded.

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[3] We express no opinion as to merits of the Appellants' motion for reconsideration or the propriety of the trial court's decision to dismiss the counterclaims and third-party complaint in the first instance.

NORTHCUTT and KELLY, JJ., Concur.

Opinion subject to revision prior to official publication.