Third District Court of Appeal

State of Florida

Opinion filed July 17, 2019.

This Opinion is not final until disposition of any further motion for rehearing and/or motion for rehearing en banc. Any previously-filed motion for rehearing en banc is deemed moot.

No. 3D16-2678
Lower Tribunal No. 12-41555

Michael Rosen,
Appellant,

vs.

Harborside Suites, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Gunster, and Angel A. Cortiñas and Jonathan H. Kaskel, for appellant.

The Lehman Law Firm PLLC, and Gary E. Lehman; Nelson Mullins Broad and Cassel, and Beverly A. Pohl and Christina Lehm (Fort Lauderdale), for appellee.

Before LOGUE, SCALES[1] and LINDSEY, JJ.

[1] Did not participate in oral argument.

PER CURIAM.

On Motion for Rehearing

Our previous opinion in this case affirmed a summary judgment for appellee, plaintiff below, Harborside Suites, LLC ("Harborside"). Appellant, defendant below, Michael Rosen, timely filed a motion for rehearing. After carefully reviewing Rosen's motion, Harborside's response to same, and again scrutinizing the summary judgment evidence in a light most favorable to Rosen, we grant Rosen's motion, withdraw our previous opinion, and replace it with this opinion reversing the trial court's summary judgment and remanding the case for further proceedings consistent with this opinion.

I. Relevant Facts and Procedural Background

In September 2005, Ohio Savings Bank (also known as AmTrust) (the "Bank") entered into a construction loan agreement with a consortium of borrowers (the "Developer"), memorializing a $41 million dollar construction loan. The purpose of this loan was to enable the Developer to construct a condominium project in Hillsborough County.

Rosen, a principal of the Developer, personally guaranteed the loan. Pursuant to the guaranty agreement that Rosen signed, Rosen would be released from his guaranty obligations "*upon* Borrower's satisfaction of the Pre-Sales Requirement in

accordance with the terms and conditions of the [construction loan] Agreement." (emphasis added). The Pre-Sales Requirement is a defined term in the construction loan agreement that requires the Developer to execute and deliver to the Bank a minimum of 125 "valid, binding and then effective Approved Sales Contracts." The construction loan agreement defines an "Approved Sales Contract" as a bona fide, enforceable, non-contingent agreement in a form approved by the Bank. Pursuant to the construction loan agreement, the Developer would be in default of the construction loan agreement if the Developer failed to satisfy the Pre-Sales Requirement on or before February 28, 2006.

The summary judgment record reflects that on or about May 5, 2005, prior to finalizing the loan documents, the Developer delivered 125 contracts that the Developer characterized as "valid, binding and then effective" Approved Sales Contracts to the Bank. An internal Bank memo, dated February 2007, acknowledges that the Developer had met its Pre-Sales Requirement. Additionally, at no point did the Bank ever provide notice to the Developer (or, for that matter, Rosen) that the Developer had defaulted under the construction loan agreement (or any other document memorializing the loan) for not satisfying the Pre-Sales Requirement. Indeed, the Bank continued to fund the loan after February 28, 2006, the date that the Developer was contractually required to satisfy the Pre-Sales Requirement.

The record reflects that the condominium project was built to completion in May 2007; however, due to the housing market recession, a majority of the 125 contracts that had been delivered to the Bank by the Developer went into default and the unit buyers identified in those contracts failed to close on their contracted-for units. The Developer defaulted on its obligations to the Bank in September 2007, and, in 2009, the Bank sued the Developer in Hillsborough County Circuit Court for foreclosure. Rosen was not named as a defendant in that foreclosure action.

On December 4, 2009, the federal Office of Thrift Supervision took possession of the business and property of the Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver. Ultimately, the FDIC assigned the note, mortgage and guaranty to appellee Harborside. On June 20, 2012, the Hillsborough County Circuit Court entered a final judgment of foreclosure against the Developer, which was subsequently assigned to Harborside. On October 17, 2012 (more than five years after the Developer defaulted on its obligations to the Bank), Harborside filed the instant action in Miami-Dade County Circuit Court against Rosen, seeking to recover approximately $39 million allegedly due and owing by Rosen pursuant to the guaranty agreement. Rosen defended against the action arguing, among other things, that all conditions precedent to Rosen being released from his guaranty obligations had occurred (i.e., the Developer had satisfied the Pre-Sales Requirement of the construction loan agreement). Specifically, in the

general allegations incorporated into his affirmative defenses, Rosen asserts: "The Pre-Sales Requirement was met and any liability of Rosen under the Guaranty terminated long before any default on the Loan."

The trial court, though, entered the challenged summary final judgment for Harborside against Rosen, awarding Harborside approximately $24 million. While neither the summary judgment, nor the trial court's order denying rehearing on same, explicate the trial court's reasoning, it appears from the record that the trial court concluded that Rosen was not released from the personal guaranty because the Bank never provided Rosen a written release of the guaranty agreement. It appears as though the trial court construed the lack of a written release as conclusively establishing that Rosen was not entitled to be released from the guaranty agreement, even if the Developer had satisfied the Pre-Sales Requirement.

For the reasons outlined below, we reverse the trial court's summary judgment, and remand for further proceedings.

II. Analysis

In our view, the issue is not whether the Bank executed a written release, but rather, whether Rosen was entitled to one. Whether the Bank actually executed a written release (it did not) is not determinative of whether Rosen was discharged of his guaranty obligation. The issue for the trial court – as framed by Rosen's affirmative defense – was whether the Developer's May 5, 2005 delivery to the Bank

of 125 contracts met the Pre-Sales Requirement, thereby discharging Rosen's obligation under the guaranty. The parties vigorously dispute whether the 125 contracts delivered to the Bank, in May 2005, satisfied the Pre-Sales Requirement. The appellate issue before this Court, in its *de novo* review[2] of the summary judgment evidence, is whether, taking all inferences flowing from the summary judgment evidence in Rosen's favor,[3] Harborside met its summary judgment burden to establish the lack of a genuine issue of material fact on this issue.[4] We conclude that Harborside failed to meet its burden to establish conclusively that the Developer did not satisfy the Pre-Sales Requirement.

In opposition to Harborside's summary judgment motion, and in support of its affirmative defense that he had been released from the guaranty, Rosen submitted the affidavit of Keith Lampitt who, at all material times, was the Operations Manager of the Developer. Lampitt's affidavit states that on May 5, 2005, Lampitt delivered to the Bank 125 valid, binding and effective condominium purchase and sale agreements consistent with the Pre-Sales Requirement of the construction loan agreement. The Lampitt affidavit also asserts that the Bank accepted all 125

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[2] See Gorrin v. Poker Run Acquisitions, Inc., 237 So. 3d 1149, 1153 (Fla. 3d DCA 2018).

[3] See Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 349 (Fla. 3d DCA 2017).

[4] See Gidwani v. Roberts, 248 So. 3d 203, 206-07 (Fla. 3d DCA 2018).

contracts and never provided any notice that these contracts failed to satisfy the Pre-Sales Requirement.

The Lampitt affidavit asserts that, after receiving these contracts, the Bank continued to disperse funds to the Developer consistent with the terms of the construction loan agreement. Rosen argues that the Bank would not have dispersed these funds if the Developer were in default under the construction loan agreement for failure to satisfy the Pre-Sales Requirement. Indeed, it is undisputed that the Bank never notified the Developer of any default of the construction loan agreement for the Developer's failure to satisfy the Pre-Sales Requirement, despite the express provision of the construction loan agreement stating that a failure to satisfy the Pre-Sales Requirement constituted a default. Additionally, an internal memorandum prepared by the Bank, which was made part of the summary judgment record, reads in relevant part as follows: "In February 2007, Borrower met its presale requirement of 125 sold units with total revenues of not less than $60,652,920.00 and, as provided for in the loan documents, and believed Michael Rosen would be released from his guaranty."[5]

[5] Also telling is what is missing from the summary judgment evidence. There is no evidence that the Bank's practice (or for that matter, the practice of any lender) was to honor similar guaranty release language only if the Bank had executed a written release. There is no evidence of a form or template release that the Bank had used for such purposes, or of a copy of a similar written release that the Bank had used in any other transaction.

Harborside argues that any factual or legal issues regarding whether the Developer met the Pre-Sales Requirement are irrelevant. Harborside asserts that Rosen's affirmative defense in this regard is defeated, as a matter of law, based upon the standard, boilerplate language in section 3.5 of the guaranty agreement – requiring a release to be in writing and signed by the parties. Harborside suggests, rather remarkably, that, *irrespective of whether the Developer actually had satisfied the Pre-Sales Requirement*, Rosen was entitled to the benefit of his bargained-for guaranty release language only if the Bank chose to execute an actual written release.[6] But, to the extent that the trial court's summary judgment was premised upon this argument, the trial court impermissibly shifted the summary judgment burden to Rosen.

It is well settled that, to be entitled to summary judgment, a plaintiff must conclusively refute a defendant's well-pled affirmative defenses. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 733 (Fla. 1991) ("A court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted."); Maung v. Nat'l Stamping, LLC, 842 So. 2d 214, 216

[6] Of course, with 20/20 hindsight, Rosen should have obtained a written release from the Bank if he genuinely believed that the Developer's delivery of the 125 contracts to the Bank had released him from his guaranty obligations. Again though, this assumes it was the Bank's practice to draft and issue such written guaranty releases, a fact, as previously mentioned, conspicuously absent from the summary judgment record.

Fla. 3d DCA 2003) ("The law is clear that where a defendant pleads an affirmative defense and the plaintiff does not, by affidavit or other sworn evidence, negate or deny that defense, the plaintiff is not entitled to summary judgment."); Delandro v. America's Mortg. Servicing, Inc., 674 So. 2d 184, 186 (Fla. 3d DCA 1996) ("Where, as here, the nonmoving party has asserted matters by way of affirmative defense, it is the responsibility of the moving party, in this case the lender, to demonstrate that there is no disputed issue of material fact with respect to the affirmative defenses."). By requiring Rosen, the non-movant, to produce a written release to be entitled to the benefit of his guaranty's release provision, the trial court relieved Harborside of its burden to establish that the Developer did not satisfy the Pre-Sales Requirement. To be entitled to summary judgment, Harborside should have been required to meet this burden.[7]

III. Conclusion

Pursuant to the clear and unambiguous terms of Rosen's guaranty agreement, Rosen was released from the guaranty's obligations "upon Borrower's satisfaction of the Pre-Sales Requirement in accordance with the terms and conditions of the [construction loan] Agreement." In response to Harborside's claim against Rosen premised upon this guaranty agreement, Rosen asserted the affirmative defense that

[7] We express no opinion as to whether Harborside *can* meet its summary judgment burden to establish conclusively that the Developer did not satisfy the Pre-Sales Requirement.

he had been released from the guaranty because the Developer (i.e., the borrower) had satisfied the Pre-Sales Requirement. Although Harborside might have established that the Bank never executed a written release, to prevail in its summary judgment motion, Harborside had the burden to establish conclusively that the Developer had not satisfied the Pre-Sales Requirement, which it did not do. We reverse the challenged summary judgment, and remand for proceedings consistent with this opinion.

Reversed and remanded.