NOT DESIGNATED FOR PUBLICATION

SANDRA GUCCIONE GARZA AND ANTHONY PAUL GARZA	*	**NO. 2012-CA-0676**
	*	
VERSUS		**COURT OF APPEAL**
	*	
AYANNA AGE ALVEREZ AND LOUIS AGE	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-05687, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Madeleine M. Landrieu, Judge Joy Cossich Lobrano)

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REVERSED AND REMANDED
February 8, 2013

In this suit on a promissory note, the defendants appeal the trial court's granting of summary judgment in favor of the plaintiffs. We reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 1, 2000, a Sale with Assumption and Second Mortgage was executed between the plaintiffs, Sandra Guccione Garza and Anthony Paul Garza, and the defendants, Ayanna Age Alverez and Louis Age,[1] on property located at 8138 Hayne Boulevard, in New Orleans, Louisiana. The defendants purchased the property for $334,000, paying $50,000 in cash toward the purchase price. In addition, the defendants assumed the plaintiffs' mortgage note for $246,140.00 and entered into a second mortgage for $37, 856.00, for the remaining balance of the purchase price.[2] The plaintiffs also signed a letter addressed to the defendants stating that the outstanding balance on the mortgage was $246,140.00 and the loan was current with the next monthly installment of $2,847.00. Both the Sale with

[1] Louis Age signed as a guarantor on the note.
[2] There appears to be an error in the calculation for the amount of the second mortgage. The remaining purchase price was actually $37, 860.00, a four dollar difference from $37,856.00 listed in the Sale with Assumption and Second Mortgage.

Assumption and Second Mortgage and the letter state that the interest was reduced from ten to eight percent.

When defendants failed to make payments on the assumed mortgage note, the plaintiffs instituted the present suit alleging that defendants owe the remaining balance of $33,468.20 and $1,534.06 in interest plus attorney's fees and legal interest. Defendants filed an answer, generally denying the allegations in the petition.

Plaintiffs filed a motion for summary judgment. Defendants later filed a reconventional demand, which the plaintiffs answered. The reconventional demand alleged that the mortgage note had been paid in full, and that the amortization schedule relied on by the plaintiffs was fraudulent. The defendants also filed an affidavit in opposition to the plaintiffs' motion for summary judgment, which contained the same assertions as those in the reconventional demand. After a hearing,[3] the trial court granted plaintiffs' motion for summary judgment in the amount of $33,468.20 with all interest, costs, and attorneys' fees.[4] The trial court denied defendants' motion for new trial, and this appeal followed.[5]

In this appeal, the defendants assert two assignments of error: 1) the trial court erred in granting plaintiffs' motion for summary judgment when there was evidence of a genuine issue of material fact;[6] and 2) the trial court erred in refusing

[3] A transcript from the February 3, 2012, hearing on the summary judgment motion is not in the record; however, it does not appear to be necessary for the disposition of the case.
[4] In a cross-appeal, plaintiffs requested additional attorneys' fees and costs, alleging that the appeal was frivolous. Considering the following disposition, we deny this request.
[5] Defendants subsequently filed a separate Petition for Damages Due to Breach of Contract, Specific Performance, and Fraud in Civil District Court on April 2, 2012.
[6] It appears that the defendant incorrectly stated the assignment of error as follows: "Whether the trial court erred in denying defendant's motion for summary judgment where there was evidence of a genuine issue of material fact." The only motion for summary judgment filed was by the plaintiffs and it was granted.

to amend defendants' answer based on the affidavit filed in support of the motion for summary judgment.

Defendants argue that the conflicting affidavits submitted on behalf of and in opposition to the motion for summary judgment evidence a genuine issue of material fact: 1) that the debt was extinguished by payment; and 2) the plaintiffs fraudulently produced an amortization schedule. Although the defendants agree that these affirmative defenses were not pled in their answer, they assert that the trial court erred in refusing to consider these defenses or otherwise allow them to amend their answer based on the affidavit filed in support of their opposition to the motion for summary judgment.

The issue presented for this Court is whether the trial court correctly found there was no genuine issue as to a material fact relative to the existence of the debt. First, however, it is necessary to determine whether the affirmative defenses asserted in the defendants' affidavit must be disregarded because they were not pleaded in their answer.

In its written order denying the defendants' motion for new trial, the trial court asserted that the summary judgment was based on the trial court's refusal to consider the untimely pleading of defendants' affirmative defenses. The court refuted the defendants' argument that the pleadings should be amended in accordance with their affirmative defenses.

The law takes a liberal approach toward allowing amended pleadings in order to promote the interests of justice. *Hibernia Nat. Bank v. Antonini*, 33,436,

p. 6 (La. App. 2 Cir. 8/23/00), 767 So.2d 143, 146-47 (citing *Reeder v. North*, 97–0239 (La. 10/21/97), 701 So.2d 1291). Amendment of pleadings should be liberally allowed, provided the movant is acting in good faith, the amendment is not sought as a delaying tactic, the opponent will not be unduly prejudiced and trial of the issues will not be unduly delayed. *Id.* (citing *Premier Bank, Nat. Ass'n v. Robinson*, 618 So.2d 1037 (La. App. 1 Cir.1993). The decision as to whether to grant a defendant leave to amend an answer is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal except where an abuse of discretion has occurred and indicates a possibility of resulting injustice. *Id.* at 6, 767 So.2d at 147(citing *Hogan v. State Farm Auto Ins. Co.*, 94–0004 (La. App. 1 Cir. 12/22/94), 649 So.2d 45, *writ denied*, 95–0215 (La. 3/17/95), 651 So.2d 276).

We further note the Supreme Court's indulgent treatment of affirmative defenses first raised by affidavit in opposition to summary judgment as expressed in *Vermilion Corp. v. Vaughn*, 397 So.2d 490 (La. 1981). There the Supreme Court set forth that the answer should be deemed amended in conformity with the proof offered by the affidavits or a formal amendment allowed. *See also*, *Hibernia National Bank* , *supra* at 6–8, 767 So.2d at 146, where the court found that the trial judge abused its discretion when denying defendant's motion for leave to amend answer; *Gulf Coast Bank and Trust Co. v. Elmore*, 10–1237, p. 7, (La. App. 4 Cir. 1/26/11), 57 So.3d 553, 557, wherein this Court explained why the affidavit filed on behalf of the defendants was not sufficient to defeat summary judgment, thus it would not warrant a remand to the trial court in order to allow

them an opportunity to amend their answer with the affirmative defense offered therein.

In accordance with foregoing jurisprudence, we find that the trial court erred in refusing to allow defendants to amend their answer, and now address the merits of the summary judgment.

Favored in Louisiana, the summary judgment procedure "is designed to secure the just, speedy, and inexpensive determination of every action" and "shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). An appellate court reviews a district court's decision granting summary judgment *de novo*, using the same standard applied by the trial court in deciding the motion for summary judgment. Under this standard, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)[7]; *Lingoni v. Hibernia Nat. Bank*, 09–737, p. 4 (La. App. 4 Cir. 3/3/10), 33 So.3d 372, 375 (citations omitted).

If the court finds that a genuine issue of material fact exists, then summary judgment must be rejected. *Doe v. ABC Corp*., 04-1806, p. 6 (La. App. 4 Cir. 1/24/07), 951 So.2d 452, 457 (citation omitted). The mover for summary judgment must make a prima facie showing of each fact necessary to prove his case; if a prima facie case is made, the burden shifts to the opposing party to raise

[7] This article was amended effective January 1, 2012; however, the amendment is inapplicable here.

genuine issues of material fact to preclude the granting of summary judgment. La. C.C.P. art. 966 (B); *U.S. Risk Mgmt., L.L.C. v. Day*, 11-533, p. 5 (La. App. 4 Cir. 9/28/11), 73 So.3d 1100, 1103.

The plaintiffs attached to their petition: 1) a copy of the bearer note along with the original mortgage note, which was executed by the plaintiffs; and 2) a copy of the sale with assumption and second mortgage, which was executed by the defendants. They also submitted an affidavit with their motion for summary judgment, declaring that a new amortization schedule was created after Hurricane Katrina, when they agreed to extend the loan three months past the maturity date.[8] Accordingly, we find there is *prima facie* proof that the debt existed. The burden then shifts to the defendant to prove a genuine issue of material fact.

The defendants' affidavit provides: 1) the affiant never agreed to any amortization schedule as interest was already calculated into the note; 2) the mortgage note has been paid in full; and 3) monthly payments were made from November of 2000 through October of 2009. We find this sufficient to overcome summary judgment.

Accordingly, the trial court's rulings are hereby reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

[8] The record does not include a copy of the original or modified amortization schedule. Plaintiffs have attached a copy of an amortization schedule to their appellate brief. However, it is impossible to determine whether this evidence was admitted at the hearing because the transcript is unavailable. Nevertheless, our decision to reverse and remand the case makes it unnecessary to make such a determination.