[Cite as *Aurora Loan Servs., L.L.C. v. Sansom-Jones*, 2012-Ohio-5477.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Aurora Loan Services, LLC,	:	
Plaintiff-Appellant,	:	
		No. 12AP-258
v.	:	(C.P.C. No. 10CVE-12-18850)
Victoria Sansom-Jones et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 27, 2012

Manley Deas Kochalski LLC, *Benjamin W. Ogg*, and *Matthew J. Richardson*, for appellant.

Doucet & Associates, LLC, *Gregory A. Wetzel*, and *Troy J. Doucet*, for appellee Victoria Sansom-Jones.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Aurora Loan Services, LLC ("Aurora"), appeals the judgment of the Franklin County Court of Common Pleas, which granted foreclosure and judgment in favor of Aurora in the amount of $43,108 on a note and mortgage signed by defendant-appellee, Victoria Sansom-Jones ("appellee"). For the following reasons, we affirm in part and reverse in part.

I. BACKGROUND

{¶ 2} On December 29, 2010, Aurora filed a complaint for foreclosure against appellee, Joseph Henry Jones, and the Franklin County Treasurer. In it, Aurora alleged that appellee executed a promissory note in connection with her execution of a

mortgage. Aurora also alleged that appellee was in default for nonpayment of the mortgage, that it was entitled to enforce the note and mortgage, and that appellee owed $105,607.97 in unpaid principal, plus interest, late charges, and advances made for the payment of taxes, insurance or other costs incurred for the protection of the premises. In its prayer for relief, Aurora sought full payment of these amounts and a decree of foreclosure.

{¶ 3} On February 18, 2010, appellee filed a motion for mediation and a 120-day stay. The trial court referred the matter to mediation and granted a stay of the answer date. A September 14, 2011 report indicated that mediation was unsuccessful.

{¶ 4} On October 3, 2011, appellee filed an answer to the complaint. In it, appellee specifically denied the allegations contained in paragraph 14, which corresponds to Aurora's prayer for relief. Under "Affirmative Defenses," appellee provided a narrative of her history with Aurora and Countrywide Mortgage ("Countrywide"). She said that she had paid approximately $70,000 on the mortgage. She was no longer living in the home, although she continued to maintain it. She also said that she had a buyer for the home, but Aurora denied the " 'Short Sale.' "

{¶ 5} On October 27, 2011, Aurora moved for summary judgment in its favor. Attached to the motion was the affidavit of an Aurora official. The affidavit stated that the original amount of the mortgage and note was $116,330, appellee was in default, and $105,607.97, plus other interest and expenses, remained due and owing. The affidavit also stated that Aurora had physical possession of the note prior to its commencement of the action and that it was the current assignee of the mortgage. Attached to the affidavit were copies of the following: (1) the note; (2) the mortgage; (3) assignment records; (4) a customer account activity statement for the period of July 1, 2010 to April 20, 2011; (5) military status records; and (6) an August 1, 2011 default notice letter to appellee from attorneys for Aurora.

{¶ 6} On December 1, 2011, the trial court denied Aurora's motion for summary judgment. The court acknowledged that appellee had not responded to the motion. The court found, however, that "genuine issues of material fact there still remain regarding the amount paid and credited to the loan and damages mitigation efforts of plaintiff."

{¶ 7} The court held a bench trial on February 2, 2012. Kelly M. Conner, a mediation supervisor with Aurora Bank FSB, testified on behalf of Aurora. She testified that the original loan amount was $116,330. She verified the account history, including various costs and fees associated with preserving the property while it was vacant, although she could not verify specific charges. Adding these and other expenses, Ms. Conner arrived at a figure of $142,977.61 as the amount due from appellee.

{¶ 8} Ms. Conner also testified that Aurora had denied appellee's attempts at loss mitigation. According to Ms. Conner, Aurora did so because appellee had moved out of the home, and it was vacant. Federal Housing Authority ("FHA") guidelines applied to the mortgage, and those guidelines preclude loss mitigation if the home is vacant.

{¶ 9} Aurora rested on Ms. Conner's testimony and the supporting exhibits. The court asked appellee if she had any objections to the individual exhibits, and she stated that she did not.

{¶ 10} Appellee testified that she entered into Chapter 13 bankruptcy to save her home. She was $7,000 in arrears, and she paid it over three years. She stated that the home was foreclosed upon immediately following the bankruptcy's closing due to unpaid fees that Countrywide, which was servicing the loan, added. She said that she paid a total of $70,000 during the period of the bankruptcy. As to this total, the court asked: "And you're saying under oath you're satisfied from the records you've reviewed that 70,000 bucks was paid on this loan for those five years?" (Tr. 33.) Appellee replied: "Yes, as an estimate, Your Honor. Yes, it was 67 to 70,000." (Tr. 33.)

{¶ 11} According to appellee, when she realized that Countrywide and Aurora would not work with her to modify or mediate the loan, she vacated the home in May 2010. On advice from Aurora, she hired a realtor and listed the home for sale. She had a buyer who put a contract on the home in September 2010 for "80 some thousand dollars." (Tr. 35.) Aurora did not approve the sale.

{¶ 12} On cross-examination, counsel for Aurora asked appellee to review the bankruptcy documents and attempted to clarify the issue of payments during the five-year bankruptcy period. During that period, appellee paid to the bankruptcy trustee a

total of $70,814.55, which included her regular monthly mortgage and interest payments and the arrearage appellee owed prior to the bankruptcy being filed. Appellee did not object to admission of the bankruptcy documents.

{¶ 13} Following closing arguments, the court ruled in favor of Aurora and granted foreclosure, but the court awarded damages to Aurora only in the amount of $43,108. The court said that it was "not persuaded by a preponderance of the evidence that FHA guidelines truly precluded loss mitigation efforts that could have reduced the amount that's being sought against [appellee]." (Tr. 58-59.) Instead, the court found, "Countrywide and, to a lesser degree, Aurora failed to use reasonable efforts required under common law to minimize their damages." (Tr. 59.) In particular, the court focused on the September 2010 opportunity to sell the property for $80,000.

{¶ 14} The court also found that Aurora had not proven its entitlement to $2,064 in fees for preservation of the property. Some of those expenses, the court found, were "just crazy." (Tr. 59.)

{¶ 15} The court accepted that $105,000 was owed on the principal. The court deducted the $80,000 Aurora could have received from the September 2010 sale, leaving a deficiency of $25,608 as of that date.

{¶ 16} The court rejected Aurora's claim for $24,143.17 in interest, stating that "Countrywide had inappropriately and unfairly tacked on and taken advantage of the situation." (Tr. 60.) A fair amount of interest owed as of September 2010, the court found, was $12,000. And the court allowed $5,500 in escrowed advances for taxes and insurance.

{¶ 17} All of these figures added up to an award of $43,108 in favor of Aurora. The court confirmed that award in its final judgment and decree in foreclosure.

II. ASSIGNMENTS OF ERROR

{¶ 18} Aurora filed a timely appeal and raises the following assignments of error:

> I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING AURORA'S MOTION FOR SUMMARY JUDGMENT OF AURORA LOAN SERVICES, LLC.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING AURORA HAD A DUTY TO MITIGATE DAMAGES BY ACCEPTING THE SHORT SALE OFFER.

III. THE TRIAL COURT ERRED IN CALCULATING DAMAGES.

III. DISCUSSION

A. First Assignment: Denial of Summary Judgment

{¶ 19} In its first assignment of error, Aurora contends that the trial court erred by denying its motion for summary judgment. In general, "[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150 (1994), syllabus. This court has recognized that this "rule prevents the fundamental unfairness of overturning a fully litigated verdict in favor of a judgment rendered in a summary proceeding based upon a curtailed presentation of evidence." *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 64 (10th Dist.).

{¶ 20} We have also recognized, however, that we may review and reverse a denial of summary judgment on issues that were not litigated at trial and on matters of law. *Id*. at ¶ 65. Here, the trial court denied summary judgment on the ground that questions of fact remained as to the amount due on the note and mortgage and as to Aurora's mitigation efforts. Both issues were litigated at trial; therefore, review of the denial of summary judgment on these grounds would be improper. We overrule Aurora's first assignment of error.

B. Second Assignment: Duty to Mitigate

{¶ 21} In its second assignment of error, Aurora contends that the trial court erred by holding that Aurora had a duty to mitigate its damages and that Aurora failed to do so. In support, Aurora makes the following three arguments: (1) appellee waived the affirmative defense of mitigation by not raising it in her answer; (2) even if appellee properly raised the defense, Aurora had no duty to mitigate by accepting the sale appellee offered; and (3) even if Aurora had a duty to mitigate, it met that duty by

making reasonable efforts, and no reduction in a damage award should result. We address each issue, in turn.

{¶ 22} First, we agree with appellee that she adequately raised the affirmative defense of mitigation of damages in her answer for purposes of Civ.R. 8(C). Under the heading "Affirmative Defenses," she gave a detailed description of her dealings with Aurora and Countrywide and her failed efforts at "foreclosure alternatives and workouts," a " 'Short Sale,' " a " 'Deed in Lieu' of," and mediation. While the answer did not use the term "mitigation," we conclude that it was sufficient to put Aurora on notice of the affirmative defense, particularly as it related to Aurora's failure to accept the sale. *See Viox v. Weinberg*, 169 Ohio App.3d 79, 2006-Ohio-5075, ¶ 18 (1st Dist.) ("A party must have sufficient notice of a proposed affirmative defense to dispute" the matter raised.).

{¶ 23} We also agree with appellee that, even if the answer did not raise the affirmative defense of mitigation adequately, Civ.R. 15(B) requires us to infer an amendment of the answer to conform to the evidence presented at trial. The rule provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Civ.R. 15(B). Here, testimony throughout the trial addressed the question whether Aurora made reasonable efforts to mitigate its losses. At no time did Aurora argue that the issue was not properly before the court. In fact, Aurora's counsel explicitly addressed the issue in closing argument. (*See* Tr. 52) ("The other defense that's been raised related to this foreclosure action here today by [appellee] is that the plaintiff did not take adequate steps related to loss mitigation in order to resolve this issue or to diminish any fees that it may have incurred."). Although appellee did not move to amend her answer to raise mitigation of damages more explicitly, that failure "does not affect the result of the trial of these issues." Civ.R. 15(B).

{¶ 24} Next, we turn to the question of mitigation. As an initial matter, we reject appellee's contention that Aurora has waived its arguments on this question for purposes of appeal. The testimony and argument that lead us to conclude that the issue of mitigation was tried by implied consent also lead us to conclude that Aurora did not

waive its response to appellee's contention that it had a duty to accept the sale appellee offered. While Aurora did not object to appellee's testimony in this respect, Aurora presented its own evidence as to its loss-mitigation efforts, and it addressed the question directly. The question is properly before us now.

{¶ 25} Under the common law of contracts, mitigation is a part of the calculation of damages. It ensures that an injured party remains in the same position it would have been in had the contract not been breached, but at the least cost to the defaulting party. *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, ¶ 12, quoting *F. Ents., Inc. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 159-60 (1976). The duty to mitigate, when it applies, requires an injured party to make reasonable efforts, not extraordinary ones, to limit the damages that result from the breach. *UAP-Columbus JV326132 v. O. Valeria Stores, Inc.*, 10th Dist. No. 07AP-614, 2008-Ohio-588, ¶ 17. Because failure to mitigate is an affirmative defense, the burden to prove it lies with the party raising it. *Baird v. Crop Prod. Servs.*, 12th Dist. No. CA2011-03-003, 2012-Ohio-4022, ¶ 43. Applying these principles here, in order to succeed on her affirmative defense of failure to mitigate, appellee had to prove that Aurora failed to take reasonable efforts to limit the damages it incurred as a result of her default.

{¶ 26} As a beginning point, Aurora contends that it had no duty to mitigate under these circumstances. For purposes of this appeal, however, we need not address the question whether Aurora had *any* duty to mitigate its damages below what it considered full recovery. Instead, we assume, without deciding, that Aurora had some duty to mitigate its damages, and we turn to the specific question whether appellee acted unreasonably by declining to accept the "short sale" proposed by appellee. A short sale is generally understood to mean an agreement by which a mortgage holder allows the homeowner to sell her property for less than the amount due on the loan secured by the property. *Wells Fargo Bank, N.A. v. Perkins*, 10th Dist. No. 10AP-1022, 2011-Ohio-3790, ¶ 21.

{¶ 27} At trial, Ms. Conner confirmed that appellee requested loss mitigation on the loan, and Aurora denied the request. As to the reason for that denial, Ms. Conner

stated that the initial denial was "due to an incomplete package," but the last denial "was due to the property being vacant." (Tr. 21.) When questioned by the court, Ms. Conner stated that Aurora denied appellee's request based on FHA guidelines, which "require[] the property to be occupied for any loss [mitigation] attempts." (Tr. 23.) Ms. Conner also said that Aurora would lose its servicing rights with FHA if it failed to follow FHA guidelines.

{¶ 28} In her testimony, appellee said that she vacated the home in May 2010. She said she had a buyer for the property in September 2010, and her realtor sent the contract to Aurora. As to the contract price, appellee stated: "The contract price was for I think 80 some thousand dollars." (Tr. 35.)

{¶ 29} The trial court rejected Aurora's argument that FHA guidelines precluded a short sale of vacant property and found that Aurora had "failed to use reasonable efforts required under common law to minimize" its damages. (Tr. 59.) But even if FHA guidelines would not have precluded a short sale under these circumstances, we fail to see how appellee's vague testimony was sufficient to meet her burden to show that Aurora's response was unreasonable. The reasonableness of any property sale could only be determined based on the current market value of the property, the sales price, and the proposed conditions of the sale, among many other factors.

{¶ 30} Here, appellee testified that her realtor sent Aurora a proposed contract and supporting information for a short sale of "80 some thousand dollars." (Tr. 35.) She did not produce the contract at trial, nor did she identify the buyer, the appraised value of the home, the terms of the sale or even a specific sales price. Without admission of the most basic evidence necessary to define what the offer was, appellee could not have met her burden to show that Aurora failed to take reasonable efforts to mitigate its damages by declining it. Therefore, we sustain Aurora's second assignment of error.

C. Third Assignment: Calculation of Damages

{¶ 31} In its third assignment of error, Aurora contends that the trial court erred in its calculation of damages. More specifically, Aurora states that the trial court abused its discretion in the following ways: (1) by reducing the principal balance by $80,000 for

Aurora's failure to accept the short sale; (2) by reducing the amount of interest due; (3) by reducing the amounts Aurora paid for real estate taxes and insurance on behalf of appellee; and (4) by eliminating other, unspecified, recoverable amounts.

{¶ 32} First, we have already held that the trial court erred by concluding that Aurora failed to mitigate its damages when it declined the short sale offer. Therefore, we agree with Aurora that the trial court should not have reduced the damage award by $80,000.

{¶ 33} As for the reduction in the interest due, it appears that the trial court rejected any claim for damages beyond September 2010, the date of appellee's short sale offer, and reduced the amount of interest due to $12,000 on that basis. It also appears that the trial court similarly rejected Aurora's claim for the taxes and insurance it advanced beyond September 2010 and reduced that amount to $5,500 on that same basis. Because we have determined that appellee failed to meet her burden to show that Aurora acted unreasonably by declining the offer of a short sale, it follows that Aurora should receive damages in the amount of all the interest due under the note and mortgage, as well as the taxes and insurance it advanced on appellee's behalf.

{¶ 34} As for the amount due on these claims, the figure of $11,091.04 for Aurora's advance payments of taxes and insurance on appellee's behalf is undisputed and should be included within the damage award. The figure of $24,143.17 for interest is less clear, however.

{¶ 35} At the conclusion of the trial, the court noted Aurora's claim for interest in the amount of $24,143.17, but stated "that's got some of these fees and extra charges that I believe based on the evidence Countrywide had inappropriately and unfairly tacked on and taken advantage of the situation." (Tr. 60.) The court then went on to reduce the interest due to $12,000 as of September 2010, when Aurora declined the short sale offer, but gave no figure for a reduction based on the "tacked on" "fees and extra charges." Presumably, the court was referring to appellee's testimony that Countrywide "tacked on" fees at the end of the bankruptcy and that the bankruptcy was closed due to her inability to make a lump-sum payment of $4,000. (Tr. 43.) As appellee admitted to the court, however, the bankruptcy documents do not reflect these

added charges. (*See* Tr. 48.) Instead, the trustee's motion to dismiss the bankruptcy (exhibit No. 10) and the order of dismissal (exhibit No. 11) indicate that the bankruptcy was closed due to appellee's "partial and/or irregular payments," which created a four-month arrearage, the repayment of which would require an extension of the bankruptcy plan to a period in excess of 104 months, in violation of federal law. As appellee's monthly payment at that time was $1,092.37, it appears that the purported $4,000 lump-sum payment was actually the four-month arrearage; without payment of the arrearage, the bankruptcy plan would have had to be extended beyond the terms of the original plan, in violation of federal law. In her testimony, appellee blamed her lawyer for the confusion about the bankruptcy payment period, which she stated was 60 months, and the payment amount.

{¶ 36} In its brief, Aurora does not address the court's reduction in damages for these "tacked on" fees and charges during or following the bankruptcy, except to state generally that appellee "failed to present any evidence that any other amount was due and owing or that the amounts claimed by Aurora were incorrect." (Appellant's brief at 19.) Ms. Conner testified that "[t]he interest due as of February 2nd, 2012, is $24,143.17." (Tr. 16.) Aurora's counsel described that figure as the interest due and stated to the court that Aurora arrived at that figure by computing interest at the contractual rate of 6.375 percent, beginning in August 2008, when appellee defaulted, as reflected in exhibit No. 7. A thorough review of the record in this matter has revealed no competent, credible evidence upon which to conclude that the figure of $24,143.17 includes any fees and charges other than interest due under the note and mortgage. The court reduced the interest award to $12,000, which the court stated reflected a "fair amount of interest to allow as of September 2010." (Tr. 60.) Because we have concluded appellee failed to show that Aurora acted unreasonably by declining her offer of a short sale in September 2010, we conclude that Aurora should be awarded $24,143.17 in interest for the entire period.

{¶ 37} Finally, we address the trial court's rejection of Aurora's claim for $2,064.34 in expenses relating to inspection, property preservation, and appraisals. Again, Aurora does not specifically address these expenses in its brief, except its general

statement that appellee failed to present any evidence to show that a different amount was due. Actually, there was significant testimony before the trial court as to the $2,064.34 in claimed expenses. The trial court and appellee questioned Ms. Conner about the individual amounts. (*See* Tr. 12-15, 17-19, 25-26.) Ms. Conner explained these expenses in general terms, but she could not provide evidence to support individual expenditures. Appellee contended in her closing argument that she maintained the property, even after she vacated, and these expenses were unnecessary. Given the absence of specific evidence to explain Aurora's expenditures, the trial court's rejection of these expenses was not against the manifest weight of the evidence.

{¶ 38} In summary, we overrule in part and sustain in part Aurora's third assignment of error. We agree with Aurora that the trial court erred by reducing the damage award for its failure to accept appellee's offer of a short sale, including the court's reduction of the award by $80,000, reduction of the interest award to $12,000, and reduction of the award for advanced taxes and insurance to $5,500. We disagree, however, that the trial court erred by not awarding Aurora damages in the amount of $2,064.34 for expenses relating to preservation of the property. Reducing Aurora's proposed amount by $2,064.34, the damage award should have been in favor of Aurora in the amount of $140,913.27.

IV. CONCLUSION

{¶ 39} In conclusion, we overrule Aurora's first assignment of error, sustain its second assignment of error, and overrule in part and sustain in part its third assignment of error. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas. We remand this matter to the trial court in order that it may award judgment in favor of Aurora in the amount of $140,913.27.

Judgment affirmed in part, reversed in part;
cause remanded with instructions.

BRYANT and TYACK, JJ., concur.