352 So.3d 33
District Court of Appeal of Florida, Second District.

IVY CHASE APARTMENT PROPERTY, LLC, Appellant/Cross-Appellee,

v.

IVY CHASE APARTMENTS, LTD., a Florida limited partnership, and Gail Curtis, individually and as Personal Representative of the Estate of John Curtis, Appellees/Cross-Appellants.

No. 2D21-436
|
June 29, 2022

Synopsis

Background: Mortgagee brought foreclosure action and subsequently assigned promissory note and mortgage to assignee during litigation. The Circuit Court, 6th Judicial Circuit, Pasco County, Declan P. Mansfield, J., dismissed action based on failure to prove that original plaintiff had standing at the time of filing of the complaint. Assignee appealed, and Second District Court of Appeal, 297 So.3d 641, reversed and remanded. After remand, assignee filed unopposed motion to substitute new assignee as plaintiff, which was granted, and debtors filed motion in limine to preclude evidence of damages, which was denied. Following nonjury trial, the Circuit Court denied debtors' motion for involuntary dismissal, and entered judgment for new assignee and awarded damages and interest at default rate of 5%. New assignee appealed, and debtors cross-appealed.

Holdings: The District Court of Appeal, Atkinson, J., held that:

[1] new assignee's testimony at foreclosure trial as to amount of indebtedness, based on prior assignee's business records, which were not admitted into evidence, could not serve as evidence as to the amount of the indebtedness;

[2] new assignee was not required to produce independent evidence of its own standing;

[3] new assignee was entitled to interest at rate of 25% in light of clause in note providing for interest at "the maximum allowable rate permitted by law";

[4] evidence did not support defense that new mortgage assignee was estopped from seeking default interest at a rate higher than 5%;

[5] did not establish that default interest rate was usurious because it was calculated using only a 360-day year; and

[6] debtors could not maintain claim that tax and protective advances sought by new mortgage assignee constituted interest for purposes of usury.

Reversed and remanded.

West Headnotes (24)

[1] Mortgages and Deeds of Trust Weight and sufficiency

The plaintiff in a foreclosure action must present sufficient evidence to prove the amount owed on the note.

[2] Trial Introduction of documentary and demonstrative evidence

A document that was identified but never admitted into evidence as an exhibit is not competent evidence to support a judgment.

[3] Mortgages and Deeds of Trust Weight and sufficiency

Prior mortgage assignee's business records, which new assignee identified as the source of his testimony concerning the amount of the indebtedness, were not admitted into evidence, and thus could not serve as competent substantial evidence to support judgment of foreclosure.

[4] Mortgages and Deeds of Trust Weight and sufficiency

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New mortgage assignee's testimony at foreclosure trial as to amount of indebtedness was not based on his personal knowledge of the amounts of indebtedness, but rather was based on prior assignee's business records, which were not admitted into evidence, and thus testimony could not serve as evidence as to the amount of the indebtedness.

[5] **Mortgages and Deeds of Trust** Weight and sufficiency

Evidence which mortgage debtors introduced during their case-in-chief, including loan documents they received from new mortgage assignee's predecessors-in-interest, that indicated the amount of unpaid principal and interest could not serve as evidence of indebtedness for purposes of debtors' motion for involuntary dismissal made after the close of the new assignee's case and before the debtors' case.

[6] **Mortgages and Deeds of Trust** Weight and sufficiency

Documents admitted during mortgage debtors' defense case in foreclosure action, including loan documents they received from new mortgage assignee's predecessors-in-interest, supported only some but not all of the amount of indebtedness sought by new mortgage assignee and awarded in the final judgment, and thus were insufficient to support the final judgment, even assuming that the erroneous denial of the debtors' motion for involuntary dismissal could be cured by reliance on evidence subsequently admitted during their defense case.

[7] **Appeal and Error** On review of verdict, findings, and sufficiency of evidence

Evidence presented during the defendant's case-in-chief may not be considered in reviewing the denial of a motion for involuntary dismissal made after the close of the plaintiff's case and before the defendant's case.

[8] **Mortgages and Deeds of Trust** Assignees and other transferees

Mortgages and Deeds of Trust Remand

New mortgage assignee was not required to produce independent evidence of its own standing in foreclosure action, where decision on prior appeal had determined that prior assignee had standing, and prior assignee then filed an unopposed motion to substitute new assignee as the plaintiff, attaching copies of the note and mortgage with allonges indicating the assignments; in addition, trial court limited trial on remand to issue of damages, allowing an opportunity neither for the new assignee to support nor the debtors to contest an issue that had already been resolved in the previous appeal.

[9] **Appeal and Error** Necessity of timely objection

Sufficiency of the evidence in a bench trial may be raised on appeal without a contemporaneous objection. Fla. R. Civ. P. 1.530(e).

[10] **Mortgages and Deeds of Trust** In general; grounds

Trial Separate Trials in Same Cause

Prior mortgage assignee did not waive its right to present damages during initial trial, and thus mortgage debtors were not entitled to dismissal of new assignee's foreclosure action following substitution of plaintiff; prior assignee had filed a motion for summary judgment on all issues except damages, which was granted, debtors filed motion for rehearing on the issue of standing, trial court vacated its order and limited initial trial to issue of standing, court involuntarily dismissed claim due to lack of standing, which was reversed on appeal, and court then, after substitution of plaintiff, held trial on damages. Fla. R. Civ. P. 1.270(b).

[11] **Appeal and Error** Trial

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A trial court's decision to hold separate trials is reviewed for abuse of discretion. Fla. R. Civ. P. 1.270(b).

[12] **Mortgages and Deeds of Trust** Law or equity; hybrid nature

Mortgage foreclosure is an equitable remedy.

[13] **Mortgages and Deeds of Trust** Law or equity; hybrid nature

Foreclosure proceedings are considered equitable by Florida courts.

[14] **Mortgages and Deeds of Trust** Rights of and relief to defendants in general

While foreclosure as remedy may be denied based on equitable considerations like unclean hands or unconscionability, in determining whether to grant equitable relief of foreclosure, trial court is not at liberty to modify terms of note and mortgage that are unambiguous and undisputed.

1 Case that cites this headnote

[15] **Mortgages and Deeds of Trust** Rights of and relief to defendants in general

While trial courts may be at liberty to invoke equitable considerations in determining whether to grant equitable remedy of foreclosure, such equitable considerations cannot justify rewriting terms of parties' agreements upon which right to foreclose is based.

1 Case that cites this headnote

[16] **Interest** Construction and Operation

New mortgage assignee, in foreclosure action, was entitled to interest at rate of 25%, rather than default rate of 5%, in light of clause in note providing for interest at "the maximum allowable rate permitted by law."

1 Case that cites this headnote

[17] **Mortgages and Deeds of Trust** Particular cases

Mortgages and Deeds of Trust Waiver of error in appellate court

Mortgage debtors failed to plead as an affirmative defense in their answer that new mortgage assignee was estopped from seeking default interest at a rate higher than 5% because loan documents indicated that interest rate sought by prior assignee was 5% or less, and therefore waived it on appeal in foreclosure action.

[18] **Mortgages and Deeds of Trust** Trial or hearing in general

Issue of whether new mortgage assignee was estopped from seeking interest in excess of default statutory rate of 5% was not tried by consent in foreclosure action, as new assignee objected to the debtors' presentation of evidence of estoppel and opposed the debtors' motion to amend the pleadings to conform to the evidence of estoppel.

[19] **Mortgages and Deeds of Trust** Particular cases

Evidence did not support mortgage debtors' defense that new mortgage assignee was estopped from seeking default interest at a rate higher than 5% because loan documents indicated that interest rate sought by prior assignee was 5% or less, and thus debtors were not entitled to amend the pleadings in foreclosure action to conform to that evidence; loan documents specified only the "current interest rate" or the "interest rate," not the default interest rate, and debtors did not present any evidence of detrimental reliance on any representation that the default rate was 5%.

[20] **Usury** Waiver or release of usury in general

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Debtors waived the affirmative defense of usury to interest rate by failing to raise it in their answer to foreclosure complaint.

[21] **Usury** Waiver or release of usury in general

Issue of whether interest rate was usurious was not tried by consent in foreclosure action, as new mortgage assignee objected to debtors' motion to amend the pleadings to assert the affirmative defense.

[22] **Usury** Weight and sufficiency

Evidence in foreclosure action did not establish that default interest rate, which was 25% as the "maximum allowable rate permitted by law," was usurious because it was calculated using only a 360-day year, and thus debtors were not entitled to amend the pleadings to conform to the evidence of usury; although the debtors began to question their witness about new mortgage assignee's interest calculations, the trial court sua sponte excluded this testimony because witness had not been proffered as an expert witness on interest rates or interest calculations, and the debtors did not proffer the witness's testimony and it was unclear from the record whether and to what extent the testimony would have supported a defense of usury.

[23] **Usury** Usury as a defense

Usury Weight and sufficiency

Evidence which new mortgage assignee presented at foreclosure trial, including the total amount of default interest and the amount of taxes and protective advances sought, was insufficient to establish debtors' affirmative defense of usury based on default interest rate of 25% which allegedly was calculated on only 360-day year, and thus debtors were not entitled to amend the pleadings to conform to the evidence of usury; debtors did not present evidence that new assignee intended to charge a usurious rate of interest or that they knowingly calculated interest using a 360-day year, but on appeal relied on their own calculations based on assignee's testimony regarding the total amount of default interest sought.

[24] **Usury** Mortgages

Mortgage debtors could not maintain claim in foreclosure action that tax and protective advances sought by new mortgage assignee constituted interest for purposes of usury absent evidence that debtors' promise to reimburse expenses to preserve the collateral in the event of default induced the lender to make the loan; provisions requiring reimbursement were not even operable in the event the parties performed the agreement but were contingent on the debtors failing to perform at some point in the future.

***37** Appeal from the Circuit Court for Pasco County; Declan P. Mansfield, Judge.

Attorneys and Law Firms

Alan R. Poppe of Saul Ewing Arnstein & Lehr LLP, Fort Lauderdale; and Steven Appelbaum of Saul Ewing Arnstein & Lehr LLP, Miami, for Appellant/Cross-Appellee.

Ian C. White and Jonathan Hayes, of Ausley McMullen, Tallahassee, for Appellees/Cross-Appellants.

Opinion

ATKINSON, Judge.

Ivy Chase Apartment Property, LLC (ICAP), appeals the trial court's final judgment of foreclosure in its favor, taking issue only with the portion of the final judgment that awards default interest at a lower rate than it had requested. Ivy Chase Apartments, Ltd., and Gail Curtis, in her individual capacity and as personal representative of the estate of John Curtis (Debtors), cross-appeal the same final judgment of foreclosure in favor of ICAP. Because ICAP presented insufficient evidence of the unpaid principal, the amount of interest, and other amounts due, we reverse and remand for further proceedings.

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Background

Debtors mortgaged their commercial property in exchange for a loan of $1,242,265.48. The note provided that in the event of default, "this [n]ote and all sums due hereunder shall bear interest at the maximum allowable rate permitted by law ('Penalty Rate') from the date of default or maturity until paid." The note also contained a clause that provided that "[n]o act, or omission or commission or waiver of Payee, including specifically any failure to exercise any right, remedy or recourse, shall be effective unless set forth in a written document executed by Payee and then only to the extent specifically recited therein."

Wells Fargo Bank, N.A., ICAP's predecessor-in-interest, filed a foreclosure complaint against the Debtors in December 2011, alleging that the Debtors defaulted by failing to pay the full balance of the loan on its maturity date, December 1, 2011. During the foreclosure proceedings, the party plaintiff was substituted several times. Before ICAP acquired the Debtors' loan, Elizon DB Transfer Agent, LLC (Elizon), was the lender and plaintiff. Elizon moved for summary judgment as to all issues except the amount of damages. The trial court granted the motion. The Debtors moved for rehearing, arguing that genuine issues of material fact remained concerning the original plaintiff's standing. The trial court granted the Debtors' motion for rehearing, vacated its order granting Elizon's motion for summary judgment, and set the case for trial in November 2018. Elizon requested that the trial court limit the November 2018 trial to standing—the only disputed issue identified by the Debtors in their motion for rehearing of the order granting summary judgment. The trial court granted Elizon's request, and the parties only presented evidence and argument on the issue of standing at the November 2018 nonjury trial.

After the November 2018 trial, the Debtors filed a motion for involuntary dismissal, arguing that Elizon failed to prove standing. The trial court granted the motion for involuntary dismissal, concluding that Elizon had failed to prove that the original plaintiff had standing at the inception of the lawsuit. Elizon appealed, and this court reversed and remanded for further proceedings in an opinion that included the following:

> ***38** [T]he record reflects several orders entered by the trial court prior to trial. In one, the court stated that based on its previous rulings the only two material issues that remained in dispute concerned standing. Our decision resolves the issue of standing in Elizon's favor, and the parties have not challenged any other rulings of the trial court in this appeal. However, Elizon acknowledges that issues concerning damages and attorney's fees remain to be resolved. In light of the trial court's orders and Elizon's acknowledgement, on remand the trial court shall conduct such further proceedings as are necessary to resolve all remaining issues not previously determined by the trial court or in this appeal, including damages and attorney's fees.

Elizon DB Transfer Agent, LLC v. Ivy Chase Apartments, Ltd., 297 So. 3d 641, 645–46 (Fla. 2d DCA 2020).

After remand, Elizon filed a motion to substitute ICAP as the plaintiff, attaching documents indicating that Elizon had assigned the note and mortgage to ICAP. The Debtors did not oppose the motion to substitute ICAP as the plaintiff, and the trial court entered an order effectuating the substitution. The Debtors then filed a motion in limine, arguing that Elizon had waived trial on the issue of damages by failing to present any evidence of damages at the nonjury trial in November 2018. The trial court denied the Debtors' motion.

On September 10, October 7, and November 13, 2020, the trial court held a nonjury trial on the issue of damages. ICAP presented only one witness at trial, Kevin Geigle. Mr. Geigle testified that he is the owner of ICAP, an entity he created for the sole purpose of acquiring the loan on the Debtors' property that was the subject of the underlying foreclosure proceedings from Elizon. Mr. Geigle testified as to the amounts of the unpaid principal, interest, and other expenditures including taxes and protective advances. He testified that when ICAP acquired the loan from Elizon, he reviewed all of Elizon's loan documents. Based on his review of Elizon's business records, he testified as to the amount of indebtedness. Elizon's business records were not admitted at trial; no witnesses from Elizon testified at trial. The Debtors objected to Mr. Geigle's testimony regarding the amount of indebtedness, arguing that it lacked foundation and was inadmissible hearsay. The trial court overruled their objections.

Based on the default rate provision in the note that provided for the maximum default interest rate permitted by law, ICAP argued that the default interest rate should be 25%, the highest interest rate permitted by sections 687.02 and .071, Florida Statutes (2020).

At the close of ICAP's case, the Debtors moved for involuntary dismissal, arguing that ICAP failed to present

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sufficient evidence of the amount of indebtedness and renewing their objections to Mr. Geigle's testimony. The trial court denied the Debtors' motion.

In their case-in-chief, the Debtors attempted to present evidence of two unpled affirmative defenses—that ICAP was estopped from seeking default interest at a 25% interest rate and that the amount of default interest sought was usurious. As to estoppel, the Debtors presented loan documents they had received from ICAP's predecessors which indicated that the "current interest rate" or "interest rate" was 5% or less. These documents did not identify the default interest rate or penalty rate.[1] As to usury, the Debtors attempted ***39** to present the testimony of Tashia Hale, a limited partner of Ivy Chase Apartments, Ltd. (one of the Debtors), and its records custodian. The following colloquy occurred:

> Q. [By Debtors' counsel] There's an interest calculation in this proposed order of $2,482,000 and change. Have you calculated how that number would have been arrived at?
>
> A. [Ms. Hale] Yes, I have.
>
> Q. And how could you arrive at such a number?
>
> A. You would arrive at that number if you base the interest on 360 days and calculated it out, then you come out to the per diem rate and that's the number. And then you calculate from the 1st of December and running straight days all the way through up until the date of the document.
>
> Q. If I understand your—

The trial court then interrupted, ruling that Ms. Hale would not be permitted to testify as to interest calculations because she had not been proffered as an expert on interest calculations. The Debtors did not object to the trial court's ruling or proffer Ms. Hale's testimony regarding ICAP's interest calculations.

At the close of their case, the Debtors moved to amend their answer to assert the affirmative defenses of usury and estoppel based on the loan documents they had presented. ICAP objected, arguing that the Debtors had waived these affirmative defenses by failing to plead them in their answer or raise them earlier in the proceedings. The trial court denied the Debtors' motion to amend their answer.

After the close of all the evidence, the trial court entered judgment in ICAP's favor. However, as to the amount of default interest, the trial court provided the following explanation:

> At no time did I see a document other than from counsel indicating that an interest rate of 25 percent was somehow anticipated or in some way agreed to by [the Debtors] in this case.
>
> In fact, all of the documentation that was received by counsel, back and forth, recites an interest rate of 5 percent. Now, I know that's not the default interest rate. But at no time was a default interest rate agreed to in excess of 5 percent. It was just picked out of the air by— I'm not sure who. But this is a court of equity. Based on that, since we are a court of equity, I find that ... the interest rate that should carry with this note is 5 percent.

The trial court thereafter entered a written judgment of foreclosure in favor of ICAP, awarding default interest at the 5% interest rate.

Sufficiency of the evidence

On appeal, the Debtors argue that ICAP failed to present sufficient evidence of the outstanding principal balance, interest, and other expenses. They also argue that ICAP failed to prove its own standing.

Proof of Damages

[1] The plaintiff in a foreclosure action "must present sufficient evidence to prove the amount owed on the note." *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 281 (Fla. 2d DCA 2014). "Typically[,] a foreclosure plaintiff proves the amount of indebtedness through the testimony of a competent witness who can authenticate the mortgagee's business records and confirm that they accurately reflect the amount owed on the mortgage. Thereafter, the business ***40** records are admitted into evidence." *Id.*; *see also WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So. 2d 230, 233 (Fla. 2d DCA 2005) ("The trial court properly admitted [loan payment histories as] exhibits ... into evidence as business records .... These documents, together with [the plaintiff's vice president's] testimony constituted competent, substantial evidence to prove [the plaintiff's] damages.").

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In this case, Mr. Geigle—ICAP's owner and sole witness — testified that he created ICAP and that Elizon assigned the note and the mortgage to ICAP. Then Elizon sent him the loan documents and payment history for the Debtors' loan. Mr. Geigle testified, "I reviewed all the documents and information that I collected to make sure everything was in order ... after reviewing a lot—for instance the interest calculations, I wanted to make sure that they were in reports [sic] and that they were accurate, and conformed with the terms of the agreement." Based on what he had gleaned from Elizon's business records, Mr. Geigle testified to the amount of unpaid principal, interest, taxes, protective advances, and other expenses. The parties do not dispute that ICAP failed to admit any business records at trial—no business records of its own nor any of Elizon's records.

[2] **[3]** "A document that was identified but never admitted into evidence as an exhibit is not competent evidence to support a judgment." *Wolkoff*, 153 So. 3d at 281–82 (citing *Correa v. U.S. Bank Nat'l Ass'n*, 118 So. 3d 952, 955 (Fla. 2d DCA 2013)). Mr. Geigle identified Elizon's business records as the source of his testimony concerning the amount of indebtedness. However, these records were not admitted into evidence. Consequently, they cannot serve as competent substantial evidence to support the judgment of foreclosure. *Cf. Sas v. Fed. Nat'l Mortg. Ass'n*, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) ("[T]he trial court abused its discretion in allowing [the plaintiff's litigation specialist] to testify over objection about the contents of [the plaintiff's] business records to prove the amount of the debt without first having admitted those business records.").

[4] On appeal, ICAP argues that it presented competent substantial evidence of the amount of indebtedness by Mr. Geigle's testimony alone because he testified based on his personal knowledge of the amounts of indebtedness. However, the record reflects that Mr. Geigle did not have personal knowledge of the amounts owed beyond his familiarity with Elizon's business records. *See Mace v. M&T Bank*, 292 So. 3d 1215, 1220 (Fla. 2d DCA 2020) ("[T]estimony by a witness without personal knowledge is inadmissible and ... testimony based on what people or documents say, when offered for the truth of the matter, is hearsay and, when unaccompanied by any showing that an exception to the hearsay rule applies, is inadmissible." (first citing § 90.604, Fla. Stat. (2016); then citing § 90.801(1)(c); and then citing *Sas*, 112 So. 3d at 779).

Thus, the trial court abused its discretion by overruling the Debtors' hearsay objections to Mr. Geigle's testimony and permitting his testimony about the amounts due and owing based on Elizon's business records, which were not admitted into evidence. *See Wolkoff*, 153 So. 3d at 281–82; *Sas*, 112 So. 3d at 779. Had Mr. Geigle's testimony been excluded, there would have been no evidence supporting the amount of indebtedness, and the trial court would have been required to grant the Debtors' motion for involuntary dismissal.

[5] **[6]** **[7]** ICAP argues that the judgment may still be affirmed because *the Debtors* introduced evidence during their case-in-chief—loan ***41** documents they received from ICAP's predecessors-in-interest—that indicated the amount of unpaid principal and interest. This argument fails because evidence presented during the defendant's case-in-chief may not be considered in reviewing the denial of a motion for involuntary dismissal made after the close of the plaintiff's case and before the defendant's case. *See Day v. Amini*, 550 So. 2d 169, 171 (Fla. 2d DCA 1989) ("[One of the defendants] made certain statements in the defendants' case from which it may be inferred that the plaintiffs had a cause of action against her for conversion and unjust enrichment. However, in viewing the evidence presented by the plaintiffs, we find the trial court erred by denying [that defendant's] motion for involuntary dismissal at the close of plaintiffs' case. Therefore, we do not consider the evidence presented during the defendants' case."). And even if the erroneous denial of the Debtors' motion for involuntary dismissal could be cured by reliance on evidence subsequently admitted during the Debtors' defense case, the documents admitted by the Debtors supported only some but not all of the amount of indebtedness sought by ICAP and awarded in the final judgment.

Because ICAP did not present sufficient evidence of the amount of indebtedness, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Proof of Standing

In their cross-appeal, Debtors also argue that ICAP failed to prove its own standing to foreclose on the loan. This argument lacks merit.

In the prior appeal in this case, this court concluded that ICAP's most recent predecessor-in-interest, Elizon, had carried its burden to present evidence of standing. *See Elizon*,

297 So. 3d at 645. Thus, ICAP's predecessors' standing is law of the case. *See Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) ("The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.").

After remand, Elizon filed a motion to substitute ICAP as the plaintiff, attaching copies of the note and mortgage with allonges indicating the assignments to ICAP. The Debtors did not object to the motion. The trial court substituted ICAP as the plaintiff, and the parties proceeded to trial on the issue of damages.

[8] **[9]** The Debtors never argued that ICAP failed to present evidence of its own standing in the trial court. Even though sufficiency of the evidence in a bench trial may be raised on appeal without a contemporaneous objection, *see* Fla. R. Civ. P. 1.530(e); *Lacombe v. Deutsche Bank Nat'l Tr. Co.*, 149 So. 3d 152, 153 (Fla. 1st DCA 2014), the Debtors' argument is unavailing. It was not necessary for ICAP to adduce independent evidence of its own standing to foreclose because when it was substituted as plaintiff it stepped into the shoes of a plaintiff whose standing was already law of the case. *See People's Tr. Ins. v. Island Roofing & Restoration, LLC*, 320 So. 3d 817, 819 (Fla. 2d DCA 2021) ("It is well settled that a substituted plaintiff stands in the shoes of the original plaintiff. ..."). In its *unopposed* motion to substitute ICAP as plaintiff, Elizon included copies of the assignments to ICAP, indicating that ICAP was now the holder of the note and mortgage. Further, the trial after remand was limited to the issue of damages, allowing an opportunity neither for the plaintiff to support nor the defendant to contest an issue that had already been resolved in the plaintiff's favor in the previous appeal.

***42 Denial of Debtors' Motion in Limine**

The Debtors argue that the trial court abused its discretion by denying their pretrial motion, in which they asserted that judgment of dismissal should be granted because Elizon had waived its right to present evidence of damages during the November 2018 trial. The trial court was correct to deny the Debtors' meritless motion.

After Elizon (ICAP's most recent predecessor-in-interest) became the plaintiff in the underlying foreclosure proceeding, it filed a motion for summary judgment on all issues except for damages. The trial court granted the motion, reserving on the issue of damages. However, after the Debtors moved for rehearing on the issue of standing, the trial court vacated its order granting summary judgment. Recognizing that the only issue in dispute— other than damages, which had not been argued in Elizon's motion for summary judgment—was standing, the trial court limited the November 2018 trial to the issue of standing. Elizon was not required to present evidence of damages at the November 2018 trial. The trial court thereafter involuntarily dismissed Elizon's claim based on a conclusion that it lacked standing, Elizon appealed, and this court reversed.

Immediately after remand from the previous appeal and before ICAP had been substituted as party plaintiff, the Debtors filed the pretrial motion asserting entitlement to involuntary dismissal based on Elizon's purported failure to prove the amount of indebtedness during the November 2018 trial. However, Elizon had no reason to put on evidence as to the amount of indebtedness because the trial court had limited the November 2018 trial to the issue of standing.

[10] **[11]** A trial court may order a separate trial on a particular issue "in furtherance of convenience." Fla. R. Civ. P. 1.270(b). Here, the trial court ordered a separate trial on the issue of standing—the only issue that the Debtors' disputed in their motion for rehearing of the trial court's order granting Elizon's motion for summary judgment—and it had previously reserved ruling on the issue of damages. A trial court's decision to hold separate trials is reviewed for abuse of discretion. *Cf. Microclimate Sales Co. v. Doherty*, 731 So. 2d 856, 858 (Fla. 5th DCA 1999) (recognizing that a trial court's decision to conduct separate trials "will not be reversed absent an abuse of discretion" (first citing *Dep't of Transp. v. Powell*, 721 So. 2d 795, 797–98 (Fla. 1st DCA 1998); then citing *Bernstein v. Dwork*, 320 So. 2d 472, 474 (Fla. 3d DCA 1975); and then citing *Sall v. Luxenberg*, 313 So. 2d 775, 776 (Fla. 4th DCA 1975))). However, the Debtors do not argue that the trial court abused its discretion by ordering a separate trial on standing only; instead, they argue that the trial court abused its discretion by failing to involuntarily dismiss ICAP's foreclosure claim because Elizon failed to present any evidence of damages at the November 2018 trial, which the trial court expressly limited to the issue of standing. After granting the Debtors' motion for rehearing—in which they only argued Elizon's failure to prove standing—the trial court properly exercised its discretion to hold a separate trial on the issue of standing alone. And it had previously reserved ruling on the issue of damages. Involuntary dismissal

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based on lack of evidence on that issue would have been unwarranted, and the Debtors' motion seeking such relief was properly denied.

Default Interest Rate

ICAP argues in its appeal that the trial court erred by disregarding the default interest provision of the note and using ***43** equitable considerations to award default interest at 5%. In response to ICAP's appeal and in their cross-appeal, the Debtors argue that the trial court erred by awarding any default interest— and in enforcing the debt—because the default interest rate was usurious. Alternatively, they argue that the trial court's decision to set the default interest rate at 5% was based on competent substantial evidence—the loan documents the Debtors had presented at trial which indicated that ICAP's predecessors-in-interest had sought interest at 5%. The Debtors also argue that these loan documents establish that ICAP was estopped from seeking default interest at a rate greater than 5%.

Equity and the Default Rate Provision

[12] **[13]** "[M]ortgage foreclosure is an equitable remedy." *Smiley v. Manufactured Hous. Assocs. III Ltd. P'ship*, 679 So. 2d 1229, 1232 (Fla. 2d DCA 1996). Thus, foreclosure proceedings are considered equitable by Florida courts. *See, e.g.*, *id.*; *PNC Bank, Nat'l Ass'n v. Smith*, 225 So. 3d 294, 295 (Fla. 5th DCA 2017) ("A foreclosure action is an equitable proceeding ...." (quoting *Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. 4th DCA 1995))).

[14] **[15]** However, while foreclosure as a remedy may be denied based on equitable considerations like unclean hands or unconscionability, *see PNC Bank*, 225 So. 3d at 295, "in determining whether to grant the equitable relief of foreclosure, the trial court is not at liberty to modify terms of a note and mortgage that are unambiguous and undisputed," *Smiley*, 679 So. 2d at 1232 (citing *Dickerson Fla., Inc. v. McPeek*, 651 So. 2d 186 (Fla. 4th DCA 1995)). In other words, while trial courts may be at liberty to invoke equitable considerations in determining *whether* to grant the equitable remedy of foreclosure, such equitable considerations cannot justify rewriting the terms of the parties' agreements upon which the right to foreclose is based. *See id.* ("[T]he note provided for ... a default rate not to exceed 18 percent per annum .... Given the facts of the case, we hold that ... the trial court was without authority to modify the terms of the note and mortgage by failing to give effect to the default rate provision.").

[16] Here, the note contained a clear and unambiguous default rate clause, providing for default interest at "the maximum allowable rate permitted by law." The maximum interest rate for loans that exceed $500,000—like the loan here—is 25% per annum. *See* § 687.02(1) ("[I]f such loan ... exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate exceeds the rate prescribed in s. 687.071."); § 687.071(2) ("Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per annum ... commits a misdemeanor of the second degree ...."). ICAP sought an award of default interest at 25%, the highest rate permitted by law for the loan amount as provided by the default rate provision of the note.

The trial court limited the default interest rate to 5% because it concluded that, in equity, the default rate should be no higher based on the loan documents the Debtors admitted at trial which indicated that ICAP's predecessors-in-interest sought interest at 5%. However, "the trial court is not at liberty to modify the terms of a note and mortgage that are unambiguous and undisputed." *See Smiley*, 679 So. 2d at 1232 (citing *Dickerson Fla.*, 651 So. 2d at 186). Therefore, it erred by limiting the default interest rate to 5%.

***44** *Estoppel*

The Debtors argue that even if the trial court erred by limiting the default interest rate to 5%, ICAP was estopped from seeking default interest at a rate higher than 5% because the loan documents the Debtors admitted at trial indicated that the "current interest rate" or "interest rate" that ICAP's predecessors-in-interest sought was 5% or less.

[17] **[18]** The Debtors' estoppel argument lacks merit. First, the Debtors failed to plead estoppel as an affirmative defense in their answer; therefore, it was waived. *See Goodman v. Habif*, 424 So. 2d 171, 172 (Fla. 3d DCA 1983) ("Estoppel is an affirmative defense which must be pleaded and proved before relief can be granted." (citing *Phoenix Ins. Co. v. McQueen*, 286 So. 2d 570 (Fla. 1st DCA 1973))); *E & Y Assets, LLC v. Sahadeo*, 180 So. 3d 1162, 1163 (Fla. 4th

DCA 2015) ("An affirmative defense is waived unless it is pleaded." (quoting *Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010))). The issue was not tried by consent because ICAP objected to the Debtors' presentation of evidence of estoppel and opposed the Debtors' motion to amend the pleadings to conform to the evidence of estoppel. *See JAK Cap., LLC v. Adams*, 306 So. 3d 1285, 1288 (Fla. 2d DCA 2020) ("[W]hen the [appellees] moved at the close of the evidence to 'conform the pleadings to the evidence,' [appellant] objected, and the trial court denied the motion. ... 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.").

[19] The Debtors argue that the trial court abused its discretion by denying their motion to amend the pleadings to conform to the evidence. *See* Fla. R. Civ. P. 1.190(b); *cf. Tracey v. Wells Fargo Bank, N.A., as Trustee for the Certificateholders of Banc of Am. Mortg. Sec., Inc., 2007-2 Tr. Mortg. Pass-Through Certificates, Series 2007-2*, 264 So. 3d 1152, 1154 (Fla. 2d DCA 2019) ("A circuit court's decision to amend the pleadings to conform to the evidence under Florida Rule of Civil Procedure 1.190(b) is one we review for abuse of discretion." (citing *Turna v. Advanced Med-Servs., Inc.*, 842 So. 2d 1075, 1076 (Fla. 2d DCA 2003))). However, the trial court did not abuse its discretion by denying the Debtors' motion because the evidence did not support the defense. All of the loan documents specified only the "current interest rate" or the "interest rate"—not the *default* interest rate. Further, the Debtors did not present any evidence of detrimental reliance on any representation of ICAP or its predecessors-in-interest that the *default* rate was 5%. *Cf. Just. Admin. Comm'n v. Berry*, 5 So. 3d 696, 699 (Fla. 3d DCA 2009) (recognizing that "reliance on [a] representation" and "a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon" are essential elements of the defense of estoppel (quoting *State v. Harris*, 881 So. 2d 1079, 1084 (Fla. 2004))).

Usury

The Debtors argue that even if the trial court erred by limiting the default interest rate to 5%, ICAP forfeited its right to the debt and any interest because it sought a usurious rate of default interest. The Debtors assert two separate bases to support their usury argument. First, they argue that default interest was impermissibly calculated using a 360-day year—instead of a 365-day year—which they contend results in the true interest rate exceeding 25%. Second, they argue that the awards of advanced taxes and protective advances constituted "excess consideration" which should be considered as interest, which, if ***45** added to the amount of default interest sought, would result in a total amount that exceeds 25% of the unpaid principal.

[20] **[21]** The Debtors' arguments concerning usury also lack merit. First, the Debtors waived the affirmative defense of usury by failing to raise it in their answer. *See Gunn Plumbing, Inc. v. Dania Bank*, 252 So. 2d 1, 4 (Fla. 1971) ("The usury statute in this State does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts." (citing *Yaffee v. Int'l Co.*, 80 So. 2d 910 (Fla. 1955))). Usury was not tried by consent because ICAP objected to the motion to amend the pleadings to assert the affirmative defense. *See JAK Cap.*, 306 So. 3d at 1288.

[22] The Debtors argue that the trial court abused its discretion by denying their motion to amend the pleadings to conform to the evidence of usury. However, the Debtors never presented evidence in support of their usury defense or the two theories by which they argue on appeal that the interest rate was usurious. Although the Debtors began to question their witness, Ms. Hale, about ICAP's interest calculations, the trial court sua sponte excluded this testimony because Ms. Hale had not been proffered as an expert witness on interest rates or interest calculations.[2] The Debtors did not proffer Ms. Hale's testimony. *See Palos v. State*, 306 So. 3d 331, 334 (Fla. 3d DCA 2020) ("It is axiomatic that failure to proffer what the excluded evidence would have revealed precludes appellate consideration of the alleged error." (quoting *A. McD. v. State*, 422 So. 2d 336, 337 (Fla. 3d DCA 1982))). It is unclear from the record whether and to what extent Ms. Hale's testimony would have supported a defense of usury and either of the Debtors' usury arguments on appeal.[3] *Cf. Jenkins v. State*, 189 So. 3d 866, 868 n.1 (Fla. 4th DCA 2015) (permitting appellate review of the exclusion of testimony despite counsel's failure to "proffer on the record the exact substance of [the] statement" because it was clear from the record what the witness would have testified, such that the reviewing court "did not have to speculate as to what the statement would have been").

Since there was no evidence presented to support the Debtors' usury arguments, the trial court did not abuse its discretion by

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denying their motion to amend the pleadings to conform to the evidence. To the extent that the Debtors' usury arguments are predicated on testimony that was excluded and not proffered at trial, these arguments are unpreserved. *Cf.* *Palos*, 306 So. 3d at 334.

[23] To the extent that the Debtors usury arguments are predicated on evidence ICAP presented at trial—the total amount of default interest and the amount of taxes and protective advances sought by ICAP—these arguments lack merit. The Debtors argue that the default interest ***46** rate is usurious because the interest was calculated based on a 360-day year. *See* *Ellis Nat'l Bank of Tallahassee v. Davis*, 359 So. 2d 466, 468 (Fla. 1st DCA 1978) (affirming the trial court's judgment in favor of borrowers because the lender intentionally sought a usurious amount of interest by calculating interest using a 360-day year rather than a 365-day year). However, the Debtors did not present evidence that ICAP intended to charge a usurious rate of interest or that they knowingly calculated interest using a 360-day year. *See* *Dixon v. Sharp*, 276 So. 2d 817, 820 (Fla. 1973) ("Florida Courts recognize that usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, [b]ut is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent. To work a forfeiture under the statute the principal must knowingly and willfully charge or accept more than the amount of interest prohibited." (citations omitted)). Instead, on appeal, the Debtors rely on their own calculations based on Mr. Geigle's testimony regarding the total amount of default interest sought. Unable to point to evidence in the record that supports their appellate argument regarding the 360-day year calculation itself, the Debtors are at a loss regarding record support for the proposition that ICAP used such a calculation by design in order to obtain interest in excess of that allowed by the usury statute. As such, the trial court did not abuse its discretion by denying the motion to amend the pleadings to conform to the evidence.

The Debtors' excess consideration argument also lacks merit. The Debtors rely on *Jersey Palm-Gross v. Paper*, 639 So. 2d 664, 667 (Fla. 4th DCA 1994), to argue that the tax and protective advances sought by ICAP constitute interest for purposes of the usury statute. *Id.* ("If a borrower promises or is otherwise required to pay a bonus or other consideration as an inducement to the lender to make the loan, such added obligations may be considered interest and can render a loan usurious."). However, *Jersey Palm-Gross* does not support their position. In *Jersey Palm-Gross*, when the borrowers sought to obtain a loan, the lender was aware that they were in significant financial need. *Id.* at 666. The lender proposed loan documents to the borrowers "which included a demand for a 15% equity interest in the [borrowers'] partnership." *Id.* The lender made it clear that "the partnership interest was an inducement to make the loan, even though he had previously agreed to loan the money at a 15% interest rate." *Id.* This partnership equity was considered in calculating the interest rate for purposes of the usury statute, and the Fourth District approved of that calculation. *Id.* at 667.

[24] Here, the Debtors argue that the tax and protective advances sought by ICAP constitute other consideration to induce the loan. However, the Debtors did not present any evidence that the Debtors' promise to reimburse expenses to preserve the collateral in the event of default induced the lender to make the loan. In *Jersey Palm-Gross*, the partnership interest was consideration to induce the lender to make the loan—something that was demanded by the lender that the borrowers were required to provide at the outset before being permitted to borrow the money. Here, the reimbursement provisions were not consideration serving as inducement to enter into the loan; to the contrary, the provisions requiring reimbursement were not even operable in the event the parties performed the agreement but were contingent on the Debtors failing to perform at some point in the future. There would be no need to reimburse ICAP's expenses to preserve the collateral unless ***47** the Debtors were to default on repayment of the loan. The Debtors' reliance on the *Jersey Palm-Gross* opinion to justify consideration of such reimbursement in the calculation of interest to conclude that the usury statute had been violated is unavailing, and the trial court did not abuse its discretion by denying the Debtors' motion to amend the pleadings to conform to the evidence.

Conclusion

We reverse the final judgment of foreclosure because ICAP presented insufficient evidence of the unpaid principal, the amount of interest, and other amounts due. We remand for further proceedings consistent with this opinion. *See* *Tracey*, 264 So. 3d at 1168; *Sas*, 112 So. 3d at 780 ("[W]e reverse and remand for further proceedings to properly establish the amounts allegedly due and owing.").

Reversed and remanded.

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VILLANTI and BLACK, JJ., Concur.

All Citations

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Footnotes

1 At oral argument, counsel for the Debtors suggested that the record included one loan document that identified 5% as the "default rate" but conceded that this loan document was not executed by ICAP or one of its predecessors. However, the record does not include any loan documents indicating a "default interest" rate of 5%.

2 We do not reach the merits of this evidentiary ruling because it was not raised on appeal. *See Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) ("When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.").

3 While the court considered, and is appreciative of, the parties' briefing regarding the mathematics of the 360-day versus 365-day year calculations, further discussion of the dilemma and its potential effect on the effective interest rate is obviated by our conclusion that the Debtors did not present any evidence to support this argument and failed to present evidence of intent to charge a usurious rate.

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