IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Taylor Bean & Whitaker Mortgage Corp.,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12 CH 19424
	)	
Aleksandr Manzhul, Lyudmila Manzhul, and Mortgage Electronic Registration Systems, Inc.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A defendant seeking to vacate a default order prior to final judgment must show that setting aside the default would lead to substantial justice between the litigants. By filing their motion to vacate, the Manzhuls have shown that they may finally be taking this case seriously, which is enough to inch them over the threshold. Although the Manzhuls' motion to vacate will be granted, they may, as explained below, face additional pleading hurdles.

FACTS

On May 4, 2007, the Manzhuls executed the mortgage and note on which they later allegedly defaulted. Taylor Bean & Whitaker filed its complaint on May 25, 2012 and served the Manzhuls five days later. On September 17, 2012, Judge David B. Atkins entered an order of default and a judgment of foreclosure and sale in Taylor Bean's favor. On December 21, 2012, the Manzhuls filed motions to vacate the default, for leave to file an answer to the complaint with affirmative defenses, and to stay the sale of their property. Judge Atkins stayed and rescheduled the January 2, 2013 sheriff's sale to March 1, 2013. On April 18, 2013, this court stayed the sale until after a May 1, 2013 hearing on the Manzhuls' motion to vacate.

ANALYSIS

The Illinois Code of Civil Procedure gives courts discretion to set aside a default at any time before the entry of a final order or judgment. 735 ILCS 5/2-1301(e). The party seeking to set aside such a judgment has the burden of establishing sufficient grounds to justify the request. *Wells Fargo Bk., N.A. v. McCluskey*, 2012 IL App (2d) 110961, ¶ 9. A court's overriding concern at this stage of the proceedings is whether vacating the judgment would lead to substantial justice between the litigants.[1] *In re Haley D.*, 2011 IL 110886, ¶ 57. This is not a considerable burden. *Id.*

[1] Taylor Bean argues that this court may grant the Manzhuls' motion to vacate only after they establish a meritorious defense. Resp. at 3. That argument is incorrect since the meritorious-defense standard applies only in those

Substantial justice in this instance may be measured by what has occurred up to this point and what would occur if this court were to grant the Manzhuls' motion to vacate. As to past matters, it is noted that Taylor Bean has prosecuted this case in a timely fashion and is ready to proceed to a sheriff's sale. On the other hand, the Manzhuls argue that they obtained an attorney soon after the court entered the September 17, 2012 default judgment. That may be true, but the Manzhuls fail to explain the nearly four-month gap between their May 30, 2012 receipt of the summons and complaint and their receipt of the default order. While the Manzhuls claim ignorance, Motion at 1, that argument is unpersuasive. The summons and complaint plainly stated what the Manzhuls needed to do; they simply ignored their legal responsibilities. Moreover, the Manzhuls were sophisticated enough to obtain a mortgage on the non-owner-occupied property now in foreclosure, which strongly suggests that they were sophisticated enough to have hired an attorney sooner given the gravity of the complaint. At the end of the day, however, their attorney eventually filed a motion to vacate the default judgment.

As to future matters, granting the Manzhuls' motion for leave would permit them to file a wholly inadequate answer and deficient affirmative defenses. The Code of Civil Procedure expressly provides that a defendant claiming to lack knowledge of a particular allegation must attach an affidavit "of the truth of the statement of want of knowledge. . . ." 735 ILCS 5/2-610(b). The Manzhuls did not attach the required affidavits. Moreover, it is unclear how the Manzhuls can deny the complaint's allegations about a mortgage they executed, Prop. Ans. at 1-2, particularly when they fail to aver that they lack any knowledge of it. Such responses and omissions violate the statutory pleading requirements.

In addition, each of the Manzhuls' 11 affirmative defenses is inadequate in at least one respect. The Code of Civil Procedure requires that a defendant "plainly set forth" all facts in an affirmative defense, 735 ILCS 5/2-613(d), while the common law holds that only facts, not legal conclusions, are admitted for purposes of establishing an affirmative defense. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769-70 (1st Dist. 1993). Affirmative defenses based on a plaintiff's conduct or failure to act must contain specific factual allegations that establish the defense's necessary elements. In other words, parroting the elements of a cause of action is unacceptable. The failings of the Manzhuls' affirmative defenses are:

> First Affirmative Defense – no facts allege why the loan originator and servicer are indispensable parties or why Taylor Bean is an improper plaintiff;
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> Second Affirmative Defense – REPSA violations neither void a mortgage or note nor invalidate or render unenforceable any sale, loan, mortgage, or lien, *Ebbinghausen v. JP Morgan Chase Bk., N.A.*, 2013 U.S. Dist. LEXIS 835, at *28 n.22 (D. Minn. Jan. 3, 2013), *citing* 12 U.S.C. § 2615;
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> Third Affirmative Defense –Taylor Bean did not need to own the note at the time Taylor Bean filed suit because the Illinois Uniform Commercial Code permits a

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instances in which a defendant seeks to vacate a judgment more than 30 days after its entry. *In re Haley D.*, 2011 IL 110886, at ¶ 58, *citing* 735 ILCS 5/2-1401(a) and cases.

non-holder in possession of a negotiable instrument to enforce its terms, 810 ILCS 5/3-301(ii);

Fourth Affirmative Defense – the five-year statute of limitations, 735 ILCS 5/13-205, may bar the claim based on the May 4, 2007 mortgage and note and the May 25, 2012 filing of the complaint, and no facts alleging common-law fraud are pleaded with "sufficient specificity, particularity and certainty," *Green v. Rogers*, 234 Ill. 2d 478, 460-61 (2009), *quoting Board of Ed. v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989);

Fifth Affirmative Defense – no facts are alleged to support the defense, and it directly contradicts the Manzhuls' answer to paragraph 3(J) of the complaint;

Sixth Affirmative Defense – no facts are alleged to support the defense;

Seventh through Eleventh Affirmative Defenses – no facts are alleged to support these defenses, each is a legal conclusion, and each may be barred by the Illinois Uniform Commercial Code, 810 ILCS 5/3-301.

Although Taylor Bean has proceeded diligently in this matter, substantial justice would be better served by vacating the default judgment, permitting the Manzhuls to file a responsive pleading, and allowing Taylor Bean to proceed on a broader record. Substantial justice would be disserved, however, if the Manzhuls were to file their proposed answer and affirmative defenses. Indeed, this court admonishes the Manzhuls that they may be subject to a dispositive motion should they file a responsive pleading as poorly pleaded as the one currently proposed.

It is, therefore, ordered that:

1. the Manzhuls' motion to vacate is granted;
2. the September 17, 2012 orders of default, dismissing unknown owners and non-record claimants, and judgment of foreclosure and sale are each vacated;
3. the Manzhuls' motion for leave to file an answer and affirmative defenses is granted;
4. the proposed answer and affirmative defenses are stricken;
5. the Manzhuls are given until May 8, 2013 to file a responsive pleading; and
6. the May 1, 2013 status date is stricken.

Dated: 24 April 2013

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075