

No. 1-11-2487

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AURORA LOAN SERVICES, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	11 CH 39705
)	
MICHAEL E. HOBBS, JR., a/k/a MICHAEL HOBBS,)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

ORDER

- ¶ 1 *Held:* A party forfeits any objection to a late-filed affidavit by failing to raise a timely objection in the trial court. Where an agreement provides that a creditor "may" present a payment plan to the debtor, the agreement does not obligate the creditor to create such a plan.
- ¶ 2 Aurora Loan Services filed a complaint to foreclose a mortgage it held on property Michael Hobbs owned. The trial court granted Aurora's motion for summary judgment, entered a judgment of foreclosure, and scheduled a judicial sale of the property. Aurora agreed to

postpone the sale in exchange for some payments from Hobbs, but at the end of the postponement, Hobbs still had no plan for repayment of the loan secured by the mortgage. Aurora purchased the property at the judicial sale, and the court entered an order approving the sale.

¶ 3 On appeal, Hobbs contends that the court lacked adequate grounds for granting the foreclosure judgment, and that the court should not have approved the sale because Aurora violated both the parties' agreement and the Truth in Lending Act (TILA) (15 U.S.C. § 1601 *et seq.* (2006)). We find that an affidavit Aurora filed late justified the entry of the order awarding summary judgment, that Hobbs did not present any evidence that would support a finding that Aurora breached the parties' agreement, and that any possible violation of TILA would not give the court grounds to deny the motion for approval of the judicial sale of the property. Accordingly, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 On October 20, 2003, Hobbs mortgaged his home in Lombard, Illinois, to Draper & Kramer Mortgage Corp., in exchange for a loan of \$291,450. In April 2009, Aurora filed a complaint to foreclose the mortgage, alleging that Hobbs had not paid amounts due since November 2007. Hobbs denied the allegation that he defaulted on the loan.

¶ 6 Aurora filed a motion for summary judgment. Aurora did not append to the motion an appropriate affidavit in support of the allegations of the complaint. Hobbs did not respond to the motion for summary judgment. At the hearing on the motion, held on July 2, 2010, Aurora presented an "Affidavit of Prove-Up," signed by an officer of Aurora, who asserted

that she examined Hobbs's loan file and payment history, and with penalties and interest, Hobbs owed a total of \$326,873.63. Hobbs did not object to presentation of the affidavit on the date of the hearing on the motion. The court granted Aurora's motion for summary judgment, entered a judgment of foreclosure, and ordered a judicial sale of the property.

¶ 7 On August 23, 2010, in a document titled the Foreclosure Alternative Agreement (FAA), Hobbs and Aurora agreed that Hobbs would make some monthly payments, in exchange for which, for six months, Aurora would "forbear from exercising any or all of its rights and remedies," including the right to a judicial sale of the property. The parties agreed to set February 10, 2011, as the FAA's expiration date. The FAA provided:

"Because payment of the Plan payments will not cure the Arrearage, Customer's account will remain delinquent. Upon the Expiration Date, Customer must cure the Arrearage through a full reinstatement, payment in full, loan modification agreement or other foreclosure avoidance option that Lender may offer (individually and collectively, a 'Cure Method.')[.] Customer's failure to enter into a Cure Method will result in *** resumption of the foreclosure process."

¶ 8 On February 9, 2011, Hobbs filed an emergency motion to stay the judicial sale of the property. He supported the motion with a copy of the FAA and an affidavit in which Hobbs swore he made the payments required under the FAA. He did not claim that he had cured the arrearage. The trial court continued the emergency motion and gave Aurora leave to respond to the allegations of the motion. Although Aurora filed no response, on March 17,

2011, the court denied the motion to stay the sale and scheduled the judicial sale for April 8, 2011.

¶ 9 Aurora purchased the property at the judicial sale for \$358,883.08, and filed a motion for an order approving the sale. Hobbs filed a memorandum in opposition to the motion for approval of the sale. He argued that the FAA barred Aurora from pursuing the sale of the property, and that the court should not have foreclosed the mortgage because Draper & Kramer had understated the mortgage loan's finance charge by about \$4000, in violation of TILA. Hobbs appended documents showing that the scheduled payments included total interest of \$265,038.64, although Draper & Kramer told Hobbs he would pay total finance charges of \$261,178.41 over the duration of the loan. On July 29, 2011, the court approved the sale and awarded Aurora possession of the property. Hobbs filed a notice of appeal.

¶ 10 ANALYSIS

¶ 11 Foreclosure

¶ 12 In this appeal, Hobbs argues that the trial court erred when it entered summary judgment on the foreclosure complaint and when it approved the sale. We review the order granting summary judgment *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry.*, 165 Ill. 2d 107, 113 (1995). The trial court should grant summary judgment only if the pleadings, depositions, admissions and affidavits leave no unresolved issue of material fact and warrant the award of judgment to the moving party. *Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 805 (2010).

¶ 13 Here, Aurora supported its motion with the affidavit of an officer who reviewed the loan's

history and determined that Hobbs had not made the payments as scheduled since November 2007. Hobbs presented no affidavits or other evidence to contest Aurora's affidavit. Hobbs argues that we should disregard Aurora's affidavit because Aurora did not attach the affidavit to the motion for summary judgment. If Hobbs had raised this argument in the trial court, Aurora could have easily remedied the defect by resubmitting the motion with the affidavit attached. We find that Hobbs forfeited this objection to the affidavit by failing to raise it in the trial court. See *Arnett v. Snyder*, 331 Ill. App. 3d 518, 523 (2001).

¶ 14 In the two years that have passed since Aurora presented its officer's affidavit, Hobbs has never presented any affidavit or other evidence that could support the conclusion that Aurora's officer swore falsely in the affidavit. Accordingly, we must accept the statements in the affidavit as true. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 381 (1974). The affidavit supports the finding that Hobbs defaulted on the loan, and therefore the trial court correctly granted Aurora summary judgment on the foreclosure complaint. See 735 ILCS 5/15-1506(a)(2) (West 2008); *Masters v. Elder*, 407 Ill. 512, 518-23 (1950).

¶ 15 Order Approving Sale

¶ 16 Next, Hobbs contends that the court erred when it approved the sale of his home to Aurora. Courts have broad discretion to approve or disapprove a judicial sale, and we will not disturb the trial court's decision on a motion to approve a sale unless the court abused its discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 17 Section 15-1508 of the Code of Civil Procedure (735 ILCS 5/15-1508 (West 2008)) governs confirmations of judicial sales. The statute provides:

"Unless the court finds that (i) a notice *** was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2008).

Here, Hobbs contends only that "justice was otherwise not done," because Aurora violated the FAA and the TILA.

¶ 18 FAA

¶ 19 In support of his argument that Aurora violated the FAA, Hobbs presented a copy of the FAA and his affidavit, in which he swore that he made all of the monthly payments as the agreement required. But the FAA permitted Aurora to resume foreclosure proceedings after its expiration date, in February 2011, unless Hobbs cured the arrearage on the loan through one of the methods permitted in the FAA. Hobbs presented no evidence that he cured the arrearage. Hobbs argues that Aurora lost its right to sell Hobbs's home when it "did not live up to its obligation to provide Hobbs with a Cure Method."

¶ 20 The FAA unequivocally imposed on Hobbs a duty to cure the arrearage by the FAA's expiration date. He could cure it (1) by paying all amounts due, including penalties, under the terms of the original loan, to obtain full reinstatement of the loan; (2) by paying in full all amounts loaned, together with penalties and interest; or (3) through a "loan modification agreement or other foreclosure avoidance option that [Aurora] may offer." The contract's use of the word "may" indicates that Aurora could choose to offer such a modification or

foreclosure avoidance option, but the contract does not oblige Aurora to offer such a modification or option. See *Meyers v. Rockford Systems, Inc.*, 254 Ill. App. 3d 56, 65 (1993).

¶ 21 Moreover, Hobbs does not claim that he suggested a loan modification or foreclosure avoidance option. Hobbs proffered no evidence to show that Aurora acted in bad faith when it agreed to give Hobbs six months to devise a plan for repayment of the loan. The evidence in the record supports the inference that at the end of the six month period of the FAA, Hobbs simply failed to show Aurora any reasonable plan for curing the arrearage and repaying the loan. Therefore, the evidence does not support an inference that Aurora violated the FAA.

¶ 22 TILA

¶ 23 Finally, Hobbs argues that the trial court should not have approved the sale of his home because the original mortgage to Draper & Kramer violated the TILA. The TILA allows an aggrieved borrower to rescind the entire loan, but if the borrower does so he must return to the lender the money lent. 15 U.S.C. § 1635(b) (2006); *Moore v. Wells Fargo Bank, N.A.*, 597 F. Supp. 2d 612, 616 (E.D. Va. 2009). Hobbs has not formally requested rescission and he has not indicated that he could refund the loaned amount if the court ordered rescission. Moreover, the TILA limits the right to rescission to three years after the borrower received the loan. 15 U.S.C. § 1635(f) (2006); *Wells Fargo v. Terry*, 401 Ill. App. 3d 18, 23 (2010). Because Hobbs accepted the loan in 2003, his right to rescission for violation of the TILA expired in 2006. 15 U.S.C. § 1635(f) (2006). Hobbs cannot now interpose, as a defense to

the foreclosure action, a claim for rescission based on the violation of the TILA in 2003. *Terry*, 401 Ill. App. 3d at 20-21; *U.S. Bank National Ass'n v. Manzo*, 2011 IL APP (1st) 103115 ¶ 38-43.

¶ 24 The TILA also permits aggrieved borrowers to claim damages for violations of the TILA. 15 U.S.C. § 1640 (2006). In *Bank of New York v. Conway*, 916 A.2d 130 (Conn. Super. 2006), the trial court entered a judgment that foreclosed a mortgage, and the borrower, on appeal, pointed out that the lender violated the TILA by padding fees and failing to disclose the fees it charged in connection with the loan. The *Conway* court held:

"Under 15 U.S.C. § 1640(a), damages for violations of TILA's provisions are limited to the 'actual damage sustained,' or statutory penalties not to exceed \$2000. Importantly, no portion of the civil liability provisions of 15 U.S.C. § 1640 provides the consumer with a right to invalidate the entire transaction on the basis of a creditor's failure to disclose.

This court agrees with the numerous judges of the Superior Court who have considered this issue ***. Violations of TILA's disclosure provisions are not valid special defenses in a mortgage foreclosure action." *Conway*, 916 A.2d at 140.

¶ 25 We agree with the court's conclusion in *Conway*. Even if Hobbs could prove a violation of the TILA and establish a claim for damages, he would not establish a viable defense to the

foreclosure action, and the court would have no grounds to deny the order approving sale of Hobbs's home.

¶ 26

CONCLUSION

¶ 27

The affidavit from an officer of Aurora sufficiently established that Hobbs defaulted on the loan, and the default justified the entry of summary judgment in favor of Aurora. Hobbs forfeited his objection to the timeliness of the affidavit by failing to raise the issue in the trial court. Hobbs has not presented any evidence that could support the conclusion that Aurora violated the FAA, as the FAA required Hobbs to devise, before February 10, 2011, a plan to repay the loan, and he has not shown that he presented such a plan. Even if Hobbs can show that Aurora violated the TILA, Hobbs's claim comes too late to permit the court to grant him a rescission of the loan, and the provision in the TILA for an award of damages provides no grounds for denying Aurora's motion for an order approving the judicial sale of Hobbs's home as a remedy for his default on the loan. Accordingly, we affirm the judgment of foreclosure and the order approving the sale of Hobbs's home.

¶ 28

Affirmed.