2012 IL App (2d) 110987-U
No. 2-11-0987
Order filed September 18, 2012

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(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCHE BANK TRUST NATIONAL COMPANY, as Trustee for HSI Asset Securitization Corp. 2006-Opt2 Mortgage Pass-Through Certificates, Series 2006-Opt2,	)	Appeal from the Circuit Court of Lee County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-8
ROBERT SPENCER, a/k/a Robert L. Spencer, and CONNIE SPENCER, a/k/a Connie R. Spencer,	)	
Defendants-Appellants	)	
(Option One Mortgage Corp., Blackhawk Lumber Inc., Unknown Owners, and Nonrecord Claimants, Defendants).	)	Honorable Daniel A. Fish, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: We affirmed the trial court's orders, as defendants did not support their points with argument and citation (and in any event did not otherwise show reversible error).

¶ 1 Robert L. Spencer and Connie R. Spencer (defendants) appeal from the orders approving the report of sale and distribution in a foreclosure action and the predicate default foreclosure order. The orders were in favor of plaintiff, Deutsche Bank National Trust Company, as Trustee for HSI Asset Securitization Corp. 2006-Opt2 Mortgage Pass-Through Certificates, Series 2006-Opt2. Defendants' appellate brief contains 12 partially overlapping claims of error. None of the claims is properly supported by argument and citation to authority, and some we do not understand. We therefore affirm the orders.

¶ 2 I. BACKGROUND

¶ 3 On January 29, 2009, plaintiff filed a complaint to foreclose a mortgage. The defendants it named were defendants, Option One Mortgage Corp., Blackhawk Lumber, Inc., unknown owners, and nonrecord claimants. The complaint stated that Option One was the "mortgagee, trustee or grantee in the Mortgage," but did not describe plaintiff's interest specifically.

¶ 4 No defendant appeared within 30 days and, on April 6, 2009, the court entered a judgment of foreclosure. This judgment did not include a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that no just reason existed to delay enforcement or appeal.

¶ 5 The judicial sale took place on September 9, 2010; plaintiff was the purchaser. On September 15, 2010, plaintiff moved for approval of the report of sale and distribution and for the grant of an order of possession.

¶ 6 On November 8, 2010, before the court granted plaintiff's motion, defendants filed what they captioned as an "Answer." In essence, defendants asserted that plaintiff lacked standing to foreclose. Plaintiff filed a detailed reply. It argued that the "Answer" was effectively more like a motion to vacate a default judgment under section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS

5/2-1301(e) (West 2010)) or a petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)) than it was like an answer. It asserted, however, that neither section was applicable; section 2-1401 was unavailable because no final order existed and section 2-1301(e) was unavailable because section 15-1508 of the Code (735 ILCS 5/15-1508 (West 2010)) specifies the sole bases on which a court can refuse to confirm a sheriff's sale. It argued that defendants' attempt to modify the loan showed their awareness of the foreclosure proceedings. It further argued that standing is an affirmative defense that defendants forfeit when they fail to timely raise it, and that Illinois's foreclosure law does not require a plaintiff to plead its standing specifically. However, it chose nevertheless to include the assignment document as an exhibit to the reply.

¶ 7 On December 10, 2010, defendants filed something captioned as either a "Notice of Motion" or an "Affidavit of Prove--up." The document is difficult to parse, but seems to assert that something was wrong with the copy of the "note." Plaintiff moved to strike the filing. On February 10, 2011, defendants filed two more documents. The first primarily responded to the motion to strike. The second asserted that the assignment of the mortgage to plaintiff did not meet recording requirements. Also, defendants asserted that plaintiff acted tortiously when it published a legal advertisement for the judicial sale that described incorrectly the property as having a two-story house.

¶ 8 The court held a hearing on the pending filings on March 15, 2011. The court asked defendants why they had done nothing in the case for more than 18 months. They explained that they had repeatedly called American Home Mortgage (AHM)—which they described as the successor to Option One Mortgage Corp., but probably was the servicing agent—in an attempt to

negotiate a loan modification. They repeatedly supplied certain documents that AHM requested. Defendants' responses suggested that their understanding was that, by seeking a loan modification, they were attempting to negotiate a settlement in the foreclosure action. They further suggested that those with whom they had contact misled them by concealing that the case was going forward in parallel to the loan-modification process. They told the court that AHM employees told them that they did not need to go to court.

¶ 9 On April 18, 2011, defendants filed a document entitled "Answer and Affirmative Defenses." In it, they denied essential allegations of the complaint. They further asserted plaintiff's lack of standing and claimed that some sort of fraud had occurred, possibly on the basis that the original mortgagee's successor had continued to service the loan after the assignment to plaintiff. On the same day, they filed an "Answer and Counterclaim." The gist of what they asserted in this document seems to be that defendants tried to negotiate with AHM themselves, but found that it repeatedly requested the same documents. Later, they tried to negotiate through something called "National Homeowner's Legal Network." They seemed to suggest that they understood that the National Homeowner's Legal Network was representing them in the foreclosure, but later discovered that it was a "scam." They also seemed to assert that AHM falsely assured them during the foreclosure proceedings that the loan modification was moving forward acceptably.

¶ 10 On May 2, 2011,defendants filed a memorandum in opposition to plaintiff's motion for approval of the report of sale and distribution. In it, they seemed to restate the allegation that the assignment of the mortgage did not comply with the proper formalities. Further, they claimed that plaintiff inflated the service-associated costs. They filed another memorandum in support of their affirmative defenses or counterclaims—they used both descriptions.

¶ 11 On May 18, 2011, plaintiff moved under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) to dismiss the counterclaims. Defendants continued to file documents, including discovery documents. On August 25, 2011, the court struck defendant's pleadings on plaintiff's motions.

¶ 12 On September 9, 2011, the court granted plaintiff's motion for approval of the report of sale and distribution; it also granted the order of possession. Defendants filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 We frequently say that this court is not "a depository in which the appealing party may dump the burden of argument." *Pecora v. Szabo*, 109 Ill. App. 3d 824, 826 (1982). Appellants must support with argument and citation to proper authority the points that they raise, or those points are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Here, defendants list 12 issues. None is properly supported by argument and citation, and some of what they assert we cannot understand at all. We therefore must affirm the judgment of the trial court.

¶ 15 Based on what defendants told the court, they believe that the process was unfair because they thought they were acting responsively by negotiating with AHM over a loan modification. Specifically, they told the court that AHM employees had reassured them that they did not need to go to court if they continued to work on the loan modification. They thus implied that plaintiff's agents gave them bad information that discouraged them from appearing in court. However, defendants do not pursue this line of reasoning in their appellate brief.

¶ 16 As we noted, defendants have not sufficiently supported any of their claims. However, we will briefly address each. We will summarize each claim and then follow with a discussion that explains why each is not a basis for reversal.

¶ 17 A. Point One

¶ 18 Defendants assert that the court did not read defendants' pleadings. Further, plaintiff's counsel acted improperly by testifying (telling the court that defendants failed to act for more than a year and a half).

¶ 19 The transcripts show that, at times, confusion existed about what defendants had filed. However, the transcripts also strongly suggest that the court always made sure that it had seen every document under discussion. If the court did not understand what defendants were trying to do with any particular filing, that is most likely because the documents were difficult to understand. Further, the transcripts do not show plaintiff's counsel testifying. Counsel made arguments to the court about the history of the case and characterized what had happened. Such statements were not evidence, were not under oath, and so were not testimony. See Black's Law Dictionary 1514 (8th ed. 2004) (defining "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition").

¶ 20 B. Point Two

¶ 21 Defendants assert that plaintiff's affidavit regarding service costs and times was inaccurate. The affidavit for plaintiff's prove-up of the amount due on the note "does not have legal authority" and is hearsay. The person who signed the affidavit was in California.

¶ 22 Defendants have not suggested any deficiency in the service on them. Thus, the only way to read this claim is as objecting to the amount of the judgment. However, the judicial sale did not result in a deficiency judgment against defendants. Because, as our discussion as a whole shows, defendants do not give a reason for this court to reverse the sale, any change in the amount of the money judgment is of no benefit to them—it is moot, and this court need not address it. See *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005) ("An appeal is moot if no actual controversy

exists or if events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief").

¶ 23 C. Point Three

¶ 24 Plaintiff did not serve defendants with a notice of the motion for a default judgment or the motion for a judgment of foreclosure.

¶ 25 Defendants had not filed an appearance when the court entered the default judgment. Nothing in the Code requires notices of motions for default judgments (or other motions) to any party that has not filed an appearance. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226 (1986); *cf.* 735 ILCS 5/2-1301(d) (West 2010) (a plaintiff must give a defendant notice that the court *has entered* a default judgment); Ill. Sup. Ct. R. 105 (eff. Jan. 1, 1989) (requiring notice when relief requested in the default judgment is different from what the complaint requests). Thus, no error occurred.

¶ 26 D. Point Four

¶ 27 The description of the property in the published notice of judicial sale was inaccurate about the physical description of the house. Also, plaintiff did not file an appearance.

¶ 28 Defendants do not try to explain why these two seeming mistakes on plaintiff's part would have any significance. No rule or legal doctrine gives every flaw a consequence; a major portion of an appellant's burden is to show that the flaw is a basis for relief. Here, there is no suggestion of harm to defendants from the flaws, and defendants have not addressed why relief should be available for these flaws.

¶ 29 E. Point Five

¶ 30 Plaintiff advertised the sale as on July 15, 2010, but it took place on September 9, 2010.

¶ 31 The postponed sale was not error. Under section 15-1507(c)(4) of the Code (735 ILCS 5/15-1507(c)(4) (West 2010)), "if [an] adjourned sale is to occur less than 60 days after the last scheduled sale, notice of any adjourned sale need not be given pursuant to this Section." But, "in the event of adjournment, the person conducting the sale shall, upon adjournment, announce the date, time and place upon which the adjourned sale shall be held." 735 ILCS 5/15-1507(c)(4) (West 2010). The sale was within 60 days of the advertised sale, and nothing suggests that the sale officer did not make the proper announcement at the time of adjournment.

¶ 32 F. Point Six

¶ 33 Plaintiff cited a decision while it was still subject to revision. Counsel for plaintiff "testified" concerning defendants' participation in the case.

¶ 34 Defendants again point to what they assert are errors without explaining why those errors should result in vacating the foreclosure judgment or judicial sale. Moreover, in these instances, the asserted errors are not errors.

¶ 35 Citing a decision during the period in which the issuing court can withdraw or revise it is not unethical if done openly. Perhaps citing such a decision could cause the citing party to have an implicit duty to alert the court and the other party if the issuing court modifies the decision. See Ill. R. of Prof'l Conduct 3.3(a)(2) (eff. Jan. 1, 2010) (a lawyer must disclose known adverse authority). Here, though, the decision at issue has remained in a form that supports plaintiff's position.

¶ 36 Plaintiff's attorney, as we noted, never testified. Counsel characterized defendants' participation in the case. The specific comment of which defendants here complain—" 'Defendant, who sat back and did nothing for almost two years from the cases being filed[,] *** [seeks] to vacate a judgment without a clear showing of diligence' "—is plaintiff's argument about how the court

should view defendants' conduct, not an attempt to convey facts to the court. Of course, judges could not manage courtrooms if attorneys could not properly make representations about what was happening out of court, which is a major reason that a rule exists against attorneys making false statements of fact to tribunals (Illinois Rule of Professional Conduct of 2010 3.3(a)(1)). Here, though, counsel only argued for plaintiff's interpretation of the facts.

¶ 37 Defendants' real objection here is likely that they view their attempt to get the loan modified as something like settlement negotiations. This would put counsel's comment in a different light. Counsel clearly did not understand it that way, and the comments remain a simple characterization.

¶ 38 G. Point Seven

¶ 39 Something was wrong with the documents by which Option One transferred the rights in the mortgage to plaintiff.

¶ 40 We read this claim as defendants' asserting the defense that plaintiff lacked standing, a defense that defendants tried to raise below. Initially, we note that it is not clear whether standing would have been a viable issue even at the start of the proceedings.

> "The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome. The purpose of the doctrine is to ensure that courts are deciding actual, specific controversies and not abstract questions or moot issues." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996).

Plaintiff alleged that Option One was the original mortgagor, made that company a defendant, and duly served it. Thus, Option One had every opportunity to assert its rights in the mortgage. Obviously, by the definition of "standing," plaintiff had standing to assert the superiority of its rights over those of Option One. The *real* question of standing is whether *defendants* had standing to assert

the superiority of Option One's rights over those of plaintiff when Option One had chosen not to do so. Defendants make no argument that they did.

¶ 41 Plaintiff, however, is also correct that lack of standing is an affirmative defense that defendants will forfeit if they do not timely raise it (*e.g.*, *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)). Given this and the rule of section 15-1508 (that only four reasons exist for a court to refuse to confirm a sheriff's sale), postsale is clearly too late to raise standing.

¶ 42 H. Point Eight

¶ 43 Defendants object to the notice of some of plaintiff's motions and to the appearance of additional counsel.

¶ 44 This is a further instance in which defendants point to a flaw, or alleged flaw, in plaintiff's filings or actions without giving us any reason to grant relief.

¶ 45 I. Point Nine; Point Ten; Point Eleven

¶ 46 These points restate claims that defendants made elsewhere.

¶ 47 J. Point Twelve

¶ 48 "The four most asked questions did the court find; (i) a notice require in accordance with subsection (c) of section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) the justice was not otherwise done."

¶ 49 Defendants here cite the standards on which a court can refuse to approve a judicial sale. We can draw no conclusion as to defendants' meaning here.

¶ 50 III. CONCLUSION

¶ 42 None of the points raised by defendants on appeal contains a basis for reversal; for the reasons stated, we affirm the orders for possession and approving the report of sale and distribution.

¶ 43 Affirmed.