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2013 IL App (3d) 120272-U

Order filed February 26, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

U.S. BANK NATIONAL ASSOCIATION,	)	Appeal from the Circuit Court
as Trustee for the Structured Asset	)	of the 12th Judicial Circuit,
Investment Loan Trust, 2005-7,	)	Will County, Illinois,
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-12-0272
	)	Circuit No. 06-CH-1910
SHELLY DeCICCO a/k/a SHELLY	)	
BERNHARD-DeCICCO,	)	
	)	Honorable Richard J. Siegel,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Presiding Justice Wright and Justice O'Brien concurred in the judgment.

**ORDER**

¶ 1 *Held:* This court lacks jurisdiction to consider defendant's appeal from the trial court's 2006 grant of summary judgment and corresponding judgment of foreclosure and sale. We do, however, have jurisdiction to review the 2011 order approving the judicial sale. The trial court did not abuse its discretion pursuant to sections 15-1508(b) and 15-1508(d-5) of the Illinois Mortgage Foreclosure Law in approving the judicial sale. Affirmed.

¶ 2 This action commenced on August 11, 2006, when the plaintiff, U.S. Bank, filed a complaint for foreclosure in the circuit court of Will County to foreclose the mortgage of the defendant, Shelly DeCicco. On October 30, 2006, the trial court entered summary judgment and a judgment of foreclosure and sale in favor of plaintiff. That judgment included Rule 304(a) language, rendering it final and appealable. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Following defendant's unsuccessful attempts to save the home through a trial modification plan under the Home Affordable Modification Program (HAMP), the trial court reinstated the foreclosure and scheduled the sheriff's sale.

¶ 3 The plaintiff was the successful bidder at the sheriff's sale, and subsequently filed its motion to confirm the sale. The defendant filed her written objections and, after a hearing on October 20, 2011, the trial court denied defendant's objections and entered an order approving the sale.

¶ 4 The defendant appeals, claiming, *inter alia*, that the trial court abused its discretion in confirming the sale over defendant's objection when defendant qualified for a loan modification under HAMP and that the trial court violated the stay provisions of section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(d-5) (West 2000)). We affirm.

¶ 5 **BACKGROUND**

¶ 6 On May 10, 2005, Shelly DeCicco executed a mortgage and note on real property located in Lockport, Illinois. The original mortgage was through the plaintiff's predecessor, BNC Mortgage, Inc. The principal amount on the note was \$348,500 at 8.6% interest. Pursuant to the

terms of the note, DeCicco was to pay \$2,704.41 per month on the first day of the month, beginning on July 1, 2005.

¶ 7 U.S. Bank instituted foreclosure proceedings on August 11, 2006, alleging that the mortgage had been in default since April 1, 2006, and that the balance due on the note was \$346,584.26 plus interest, costs and fees. DeCicco entered her *pro se* appearance and filed an answer denying plaintiff's allegations that no payments had been made on the note since April 1, 2006. On October 30, 2006, the trial court held a hearing on the plaintiff's complaint for foreclosure, the plaintiff's motion for entry of judgment for foreclosure and sale, and the plaintiff's motion for summary judgment. The trial court issued the judgment for foreclosure and sale that same day, finding that the total amount due and owing on the note, including fees, costs and interests, was \$383,342.61. The judgment for foreclosure and sale included Rule 304(a) language that the order was final and appealable and that there was no just reason for delay of enforcement or appeal therefrom. The trial court also issued its order on plaintiff's motion for summary judgment on October 30, finding defendant's answer was pled without sufficient supporting documentation and, thus, did not raise a genuine issue of material fact sufficient to preclude the entry of summary judgment in favor of plaintiff.

¶ 8 On March 19, 2007, prior to the foreclosure sale, the defendant filed the first of her five Chapter 13 bankruptcies under case Number 07-04830.<sup>1</sup> That case was dismissed on May 9,

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<sup>1</sup> On May 14, 2008, five days after defendant's first Chapter 13 bankruptcy was dismissed, she filed her second Chapter 13 bankruptcy, identified as case Number 08-12256. That case was

2008. On September 23, 2009, plaintiff's loan servicer, America's Servicing Company (ASC), offered the defendant a 90 trial plan period (TPP) under HAMP directives. Pursuant to the terms of the TPP, defendant was required to make three monthly payments of \$3,636.04, commencing on November 1, 2009.

¶ 9 At the case management status call on November 13, 2009, counsel for plaintiff advised the court that the matter was currently on hold as a result of a repayment plan/loan modification/forbearance plan between the parties. The trial court entered an order dismissing the cause with leave to reinstate in the event of termination and/or suspension of the modification plan by plaintiff for any reason.

¶ 10 The parties are at odds in regard to payments made under the TPP. According to

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dismissed on October 10, 2008. Shortly thereafter, defendant filed her third Chapter 13 bankruptcy, identified as case Number 08-28415, from which plaintiff obtained relief from the automatic stay on August 19, 2009. That case was later dismissed in February 2010. On January 12, 2010, defendant filed her fourth Chapter 13 bankruptcy, identified as case Number 10-01000. That case was dismissed on April 23, 2010, for defendant's failure to make any payments under the plan. Finally, on January 17, 2011, defendant filed her fifth Chapter 13 bankruptcy, identified as case Number 11-01588. That case was ultimately dismissed on March 11, 2011. The court found that the case was filed to "delay, hinder and defraud" the plaintiff, and issued a written order imposing 180-day bar to filing, precluding the defendant from filing another Chapter 13 claim in order to avoid her creditors.

DeCicco, she made two payments under the plan in October and November of 2009. She states that it was those payments that led to the trial court's dismissal without prejudice on November 13, 2009. The plaintiff contends that DeCicco failed to make any payments under the plan, and despite this fact, the plaintiff's servicer continued to work with defendant toward a loan modification.

¶ 11 On July 30, 2010, ASC notified defendant via letter that her request for a preforeclosure sale workout was denied because she failed to respond to ASC's attempts to reach her and, based on the information she provided, ASC had no available alternative program to offer. On August 6, 2010, plaintiff filed a motion to reinstate the case, and cited defendant's breach of the repayment plan on July 2, 2010, in support. The trial court granted the plaintiff's motion on August 11, 2010. Plaintiff issued a notice of sheriff's sale to take place on January 19, 2011. The defendant filed her fifth Chapter 13 bankruptcy on January 17, 2011, identified as case Number 11-01588. As a result, the pending foreclosure sale was canceled. The plaintiff modified the bankruptcy stay on March 4, 2011. On March 11, 2011, the bankruptcy court dismissed defendant's Chapter 13 filing and issued a 180-day bar to filing, finding that the bankruptcy case was filed in order to delay, hinder and defraud defendant's creditors.

¶ 12 The plaintiff, again, issued a notice of sheriff's sale for May 25, 2011. The defendant retained counsel, who presented an emergency motion to vacate the order reinstating case. The motion was supported by defendant's certification that she had (1) never received notice of plaintiff's motion to reinstate the case; and (2) she had made payments totaling \$68,054.44 during the period from October 28, 2008, to December 22, 2009. Defendant claimed that plaintiff's

servicer accepted all other payments under the plan, with the exception of the fifth payment, which ACS rejected due to some confusion about her last name.

¶ 13 Based on those claims, the trial court continued the hearing on the motion to June 8, 2011, and allowed defendant 21 days to submit evidence of the payments, as she had not included any with her certification. The court also continued the sheriff's sale to June 15, 2011.

¶ 14 The parties submitted evidence and argument at the hearing on June 8, 2011. The defendant submitted an itemization of the payments she claimed to have made based on a loan history printout provided by ACS. Plaintiff presented evidence demonstrating that all of defendant's payments under the plan had been reversed for insufficient funds. The trial court denied defendant's emergency motion to vacate the order reinstating the case, and left the sheriff's sale scheduled for June 15, 2011.

¶ 15 Two days prior to the sale, defendant filed a motion to reconsider the denial of her motion to vacate the reinstatement order and a combined motion to amend her *pro se* answer and to vacate the orders of summary judgment and judgment of foreclosure. That motion alleged, among other things, that the affidavit of plaintiff's vice president of loan documentation was false, and that the assignment of the mortgage from the original lender to MERS was a nullity, as it was made without contemporaneous negotiation of the underlying promissory note. The trial court entered an agreed order, allowing plaintiff time to respond to defendant's combined motion, and continuing the sale date to July 20, 2011. After a hearing on July 13, 2011, the trial court denied both of defendant's motions, as well as her oral motion to stay the pending judicial sale while seeking relief.

¶ 16 The case proceeded to sale on July 20, 2011, with plaintiff as the successful bidder. The plaintiff moved to confirm the sale on August 10, 2011. The sheriff's report indicated the amount of plaintiff's successful bid was \$399,292.08. In its motion, plaintiff sought a deficiency judgment against DeCicco in the amount of \$99,823.02. Defendant filed objections to plaintiff's motion to approve sale, citing plaintiff's failure to comply with HAMP directives and, consequently, plaintiff's violation of section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2000)). Defendant included with her motion the affidavit of one of her attorneys regarding the results of her net present value (NPV) test. To be considered eligible for loan modification under HAMP directives, the mortgagor must have a positive NPV test. She argued that because her NPV test was positive, plaintiff had a duty to consider her for a loan modification, thus the sale should not have been confirmed. Following presentment of that evidence at hearing, the trial court overruled defendant's objection and approved the sale and the deficiency judgment of \$99,823.02 on October 20, 2011.

¶ 17 In a last ditch effort to overturn confirmation of the sale, DeCicco filed a motion to reconsider the order approving the sale on November 18, 2011, claiming that on November 15, she received a letter from the Office of the Comptroller of Currency (Comptroller) indicating that she may be eligible to have the proceedings reviewed in an independent foreclosure review because her property was active in the foreclosure process between January 1, 2009, and December 31, 2010. According to defendant's motion, this independent review process was the direct result of a consent judgment entered on April 4, 2012, between state attorneys general and the five largest loan servicers in the United States, including Wells Fargo Bank, N.A., and Wells

Fargo & Company (the owner of loan servicer ACS in this case). The consent judgment was the product of an investigation into the foreclosure and loan servicing processes that was prompted by the financial crisis and crash of the real estate market. In defendant's motion to reconsider confirmation of the sale, she asserted that pursuant to the terms of the consent judgment, the loan servicer must offer and facilitate loan modifications to those applicants with a positive NPV test.

¶ 18 On February 29, 2012, the trial court denied defendant's motion to reconsider confirmation of the sale. This timely appeal followed.

¶ 19 ANALYSIS

¶ 20 I. Jurisdiction

¶ 21 At the outset, we note that a reviewing court has a *sua sponte* duty to consider whether its jurisdiction is proper. *In re Estate of Bethke*, 2012 IL App (2d) 120568, ¶ 24; *In re Marriage of Link*, 362 Ill. App. 3d 191, 192 (2005). While neither party addressed this issue in their briefs, we find that we lack jurisdiction to review defendant's main argument on appeal based on the trial court's inclusion of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language in its judgment of foreclosure and sale.

¶ 22 The thrust of defendant's argument is that the grant of summary judgment in favor of the plaintiff was in error, as the "the record clearly evidences a material fact question as to the correct amount of credits for payments by defendant, which alone is sufficient [sic] basis for denying the plaintiff's motion for summary judgment and requiring that the fact issues in dispute be resolved at trial." As a result posits defendant, the order confirming the sale is also error based on the erroneously granted summary judgment and judgment of foreclosure and sale.

¶ 23 The trial court included in its judgment of foreclosure and sale Illinois Supreme Court Rule 304(a) language, rendering that judgment, and the grant of summary judgment it was based upon, final and appealable at the time it was entered on October 30, 2006. The order specifically stated:

"(14) APPEALABILITY: This is a final and appealable order and there is no just cause for delaying the enforcement of this judgment or appeal therefrom."

¶ 24 There is no question that this language functions to make the judgment of foreclosure final and appealable under Rule 304(a). *Compare, Kawa v. Harnischfeger Corp.*, 204 Ill. App. 3d 206, 211 (1990) (finding that order stating that there was "no just reason to delay enforcement of this order" was not appealable since it did not refer to Supreme Court rule, finality, or appealability) *with, Kucharski v. Floro*, 191 Ill. App. 3d 1032, 1033-34 (1989) (order that stated this matter is "final and appealable \*\*\* pursuant to Rule 304(a)," was final and appealable, despite the absence of language stating that there was " 'no just reason to delay enforcement or appeal.' ").

¶ 25 Normally, a judgment ordering the foreclosure of a mortgage is not final and appealable until the trial court enters an order approving the sale and directing the distribution. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56 (1989). The judgment of foreclosure is strictly interlocutory. *In re Hodges*, 350 B.R. 796 (2006). Correspondingly, it is the order confirming the sale, not the judgment of foreclosure, which is the final and appealable order in a foreclosure case. *Marion Metal & Roofing Co., Inc. v. Mark Twain Marine Industries, Inc.*, 114 Ill. App. 3d

33, 35 (1983).

¶ 26 Nevertheless, it is similarly well established that an aggrieved property owner may bring an immediate appeal from a foreclosure judgment where the circuit court has made a written finding under Rule 304(a) that there is no just reason for delaying either enforcement or appeal or both. *Verdung*, 126 Ill. 2d at 555-56; see also *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254 (2008). Based on the foregoing, there is no doubt that the trial court's entry of summary judgment in favor of plaintiff, and the corresponding judgment of foreclosure and sale, was a final and appealable order on October 30, 2006. As such, DeCicco had 30 days to file her notice of appeal with the court clerk pursuant to Rule 303(a). Ill. S. Ct. R. 303(a) (eff. June 4, 2008).

¶ 27 DeCicco failed to bring such an appeal, and therefore her right to challenge the ruling is lost. See *Pines v. Pines*, 262 Ill. App. 3d 923 (1994). If the appellant fails to comply with the deadline for appeals provided in Supreme Court Rule 303, this court lacks authority to consider the appeal. *McCorry v. Gooneratne*, 332 Ill. App. 3d 935, 939 (2002). When the trial court finds no reason to delay enforcement or appeal of a judgment that is final with respect to one of multiple parties to a case, the appellant must file the notice of appeal within 30 days after disposition of postjudgment motions. *Id.*

¶ 28 While there are not multiple parties to this case, the rationale of the court in *McCorry* remains applicable. DeCicco failed to file her notice of appeal as to the judgment of foreclosure and sale within the 30-day limit proscribed by Rule 303(a). Furthermore, there were no post-judgment motions filed. Following the entry of judgment of foreclosure and sale on October 30,

2006, the only other action taken on the case was initiated by the trial court's own motion almost three years later, setting the cause for a status hearing on May 15, 2009.

¶ 29 DeCicco is well outside the established time to appeal the trial court's grant of summary judgment and judgment of foreclosure and sale. We, therefore, lack jurisdiction to review the trial court's grant of summary judgment in favor of plaintiff and the corresponding judgment of foreclosure and sale.

¶ 30 II. Approval of Judicial Sale

¶ 31 While the trial court's orders of October 30, 2006, are beyond our reach on appeal, the defendant maintains that the approval of the judicial sale was error based on two different grounds both occurring after 2006—that she had applied for a modification pursuant to HAMP guidelines, and that she was entitled to independent foreclosure review in accordance with a consent judgment filed in the United States District Court for the District of Columbia. The defendant's appeal from the order approving sale was a timely appeal from a final order, thus we have jurisdiction to address the merits of the defendant's arguments regarding confirmation of the sale.

¶ 32 A. Compliance with HAMP Directives

¶ 33 It is well settled that a judicial sale is not complete until it has been approved by the courts. *Berber v. Hass*, 57 Ill. App. 2d 109, 116 (1965). Trial courts have broad discretion in approving or disapproving the sales made at their direction. *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 388 (1997). A court's decision to confirm or reject a judicial sale will not be disturbed absent an abuse of that discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178

(2008). An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court. *Lakefront Plumbing & Heating, Inc. v. Pappas*, 356 Ill. App. 3d 343, 350 (2005).

¶ 34 Section 15-1508(b) of the Foreclosure Law governs the trial court's analysis in approving or disapproving a sale. Section 15-1508(b) provides, in relevant part, as follows:

"Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of the 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." (Emphasis added.) 735 ILCS 5/15-1508(b) (West 2000)).

¶ 35 Two things warrant acknowledgment here. First, in regard to the court's obligations under section 15-1508(b), the statute uses the word "shall." The Foreclosure Law expressly provides that when "shall" is used, it means that something is mandatory and not permissive. *Household Bank*, 229 Ill. App. 3d at 178; 735 ILCS 5/15-1105(b) (West 2012). Thus, the trial court must approve the judicial sale unless it finds that any of the four specified exceptions are present. *Id.* Second, DeCicco does not argue that one of the four exceptions to approving the sale is present in this case. Rather, she specifically argues that the trial court erroneously

approved the sale in violation of section 15-1508(d-5) because she had reapplied for modification prior to the sale and was eligible for review. 735 ILCS 5/1508(d-5) (West 2011). Proceeding with the sale, according to DeCicco, was a material violation of HAMP directives. We disagree.

¶ 36 The trial court shall set aside a sale held pursuant to section 15-1507 upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program \*\*\* and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale. 735 ILCS 5/15-1508(d-5) (West 2011).

¶ 37 Under the clear terms of section 15-1508(d-5), DeCicco must prove by the preponderance of the evidence that she applied for assistance under HAMP *and* that the real estate was sold in material violation of the program's requirements for proceeding to judicial sale. We find the record lacking in any evidence to suggest that she reapplied for HAMP prior to the sale, or that the judicial sale violated HAMP's directives.

¶ 38 The only evidence that defendant provided the trial court to prove her reapplication for a HAMP modification was a copy of a United States Postal Service (USPS) receipt indicating that she sent express mail to plaintiff's servicer on July 6, 2011, and a letter from the USPS responding to the defendant's request for confirmation that the express mail was delivered to the servicer on July 7, 2011. The contents of the express mail delivery are unknown, and there was no copy of the actual HAMP application provided to the trial court. This information, along with the affidavit of Rick Rogers, was attached to defendant's objection to plaintiff's motion to

approve sale filed on September 16, 2011. Rick Rogers (who was one of DeCicco's attorneys), attested that he was an attorney with an MBA with experience in foreclosure, mortgage default, and loan modification matters. Roger's conducted an NPV test of defendant's property, which he found to be positive and would mean that a HAMP loan modification would be greater than the net present value of a foreclosure in defendant's case. Based upon that evaluation, defendant argues she was eligible for a HAMP modification, and plaintiff wrongfully refused her that opportunity.

¶ 39 However, in alleging that plaintiff materially violated HAMP directives by proceeding to judicial sale, defendant failed to mention that she had previously applied, and been approved for, a loan modification under HAMP in 2009. As such, any subsequent NPV analysis is also irrelevant. On September 23, 2009, ACS offered defendant a 90-day trial period, as evidenced by the payment history and transaction codes introduced by plaintiff in its reply brief in support of its motion for order approving sale. Defendant was required to pay three monthly installments of \$3,636.04. The payment history shows the following transactions took place: (1) on October 22, 2009, a payment in the amount of \$3,636.04 was received and was applied on October 23, 2009, but was later reversed for nonsufficient funds (NSF) on October 27; (2) on November 2, 2009, a payment in the amount of \$3,636.04 was received and was applied on November 3, but was later reversed for NSF on November 16; (3) on November 23, 2009 a payment in the amount of \$3,636.04 was received and was applied to DeCicco's account on November 24, but it was reversed on December 2 for NSF; and (4) on December 22, 2009, another payment of \$3,636.04 was received and applied to the account on December 23, but was reversed for NSF on

December 30.

¶ 40 DeCicco offered no evidence to rebut the reversals noted on the payment history provided by plaintiff, nor did she address the reversals for nonsufficient funds in her motion to reconsider order approving sale and order of possession. Instead, she argued only that the deficiency judgment was miscalculated because it did not account for payments made to plaintiff and its counsel throughout the foreclosure process.

¶ 41 Section 1.2 of the HAMP Directives provides for HAMP eligibility and continuing eligibility requirements. It states, in relevant part, as follows:

"A servicer's obligation to offer the borrower a modification is considered satisfied, and the borrower is not eligible for a subsequent offer, if either (1) the borrower received a modification and lost good standing (as defined in Section 9.4); (2) for TTPs with effective dates on or after June 1, 2010, the borrower received a TPP offer and failed to make one or more payments by the last day of the month in which it was due; or (3) *for TPPs with effective dates prior to June 1, 2010, the borrower received a TPP offer and either (i) failed to make all required payments by the end of the trial period, or (ii) failed to provide all required documents by the end of the trial period.*" (Emphasis added). U.S. Dept. of the Treasury, *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages*, version 3.2, p. 48 (June 1, 2011).

[https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/)

¶ 42 The defendant failed to make the requisite payments under the TPP offered by plaintiff and its servicer on September 23, 2009. Even had defendant proved that she properly reapplied for a HAMP modification via express mail on July 7, 2011, the terms of the HAMP handbook reiterate that plaintiff was under no duty at that point to extend the defendant another TPP, as she failed to make required payments under the first. In addition, chapter II, section 3.3, suspension of scheduled foreclosure sale, provides that: "[w]hen a borrower submits a request for HAMP consideration after a foreclosure sale date has been scheduled and the request is received no later than midnight of the seventh business day prior to the foreclosure sale date (Deadline), the servicer must suspend the sale as necessary to evaluate the borrower for HAMP. Servicers are not required to suspend a foreclosure sale when: \*\*\* (3) a borrower received a TPP offer and failed to make one or more payments under the TPP by the last day of the month in which it was due \*\*\*. *Id.* § 3.3, p. 59.

¶ 43 The foreclosure sale was scheduled for July 20, 2011, and had defendant shown by a preponderance of the evidence that the documents contained within the express mail delivery had been a proper HAMP application, she clearly would have been within the eligible time frame to have her application evaluated and the sale suspended. However, even had she shown that, plaintiff was not required to suspend the sale on July 20, as defendant failed to comply with the terms of the first TPP offered on September 23, 2009. It also bears mentioning that defendant suspended the foreclosure sale on at least four other occasions through the successive filing of Chapter 13 bankruptcy claims. After the fifth such filing, the bankruptcy court ordered a 180-day

stay from filing, finding that defendant's claims were meant for the purpose of delaying the sale and avoiding creditors.

¶ 44 Again, DeCicco did not assert, or provide any proof, that any of the factors of section 15-1508(b) were violated, *i.e.*, failure to give proper notice, the terms of the sale were unconscionable, the sale was conducted fraudulently, or that justice was not otherwise done. As such, the court entered the order confirming the sale as was mandated by statute, and did not abuse its discretion in so doing.

¶ 45 B. April 2012 Consent Judgment

¶ 46 Finally, defendant argues that the consent judgment entered in the United States District Court for the District of Columbia on April 4, 2012, dictates that this court must overturn the order approving the judicial sale. We disagree.

¶ 47 The consent judgment was the culmination of negotiations between 49 state attorneys general, the federal government, and five of the nation's largest banks/mortgage servicers, including Wells Fargo Bank (the owner of ASC). *United States, et. al. v. Bank of America Corp., et al.*, Civil Action No. 12-036, *available at* [http://www.justice.gov/crt/about/hce/documents/scra\\_boa\\_settle.pdf](http://www.justice.gov/crt/about/hce/documents/scra_boa_settle.pdf). In lieu of litigation, the parties entered into a settlement, whereby the mortgage servicers would provide close to \$25 billion of relief for unfair foreclosure practices and predatory lending. *Id.* From that, \$1,489,813,925.00 was directed to provide cash payments to borrowers whose homes were finally sold or taken in foreclosure between and including January 1, 2008, and December 31, 2011, and who met other eligibility requirements. *Id.*

¶ 48 The defendant specifically argues that under the terms of the consent judgment, the

plaintiff was required to stay the foreclosure sale to allow her to submit a loan modification application, and that the consent judgment mandates that plaintiff proceed with loss mitigation such as that prescribed by HAMP. According to defendant, this implies that plaintiff is obligated to conduct a NPV analysis to determine whether it would be more beneficial to plaintiff from a financial standpoint to offer a loan modification as opposed to a foreclosure.

¶ 49 We need not consider the substantive application of the consent judgment. The defendant's argument fails to recognize that the consent judgment she relies upon was filed, and became effective on, April 4, 2012—an effective date subsequent to defendant's notice of appeal filed on March 30, 2012. An appeal must be resolved from the standpoint of the record as it exists at the time the notice of appeal was filed. *In re Marriage of Holder*, 137 Ill. App. 3d 596, 601-02 (1985). Issues arising from matters occurring subsequent to the filing of a notice of appeal are not cognizable by the appellate court. *In re Davies' Estate*, 5 Ill. App. 3d 15 (1972); see also *Shapiro v. DiGuilio*, 95 Ill. App. 2d 184, 189 (1968).

¶ 50 Moreover, the consent judgment was not in the certified record of appeal before this court, and was never considered by the trial court. Only a section of the consent judgment was attached to the appendix of defendant's brief. It is well settled that the theory under which a case is tried in the trial court cannot be changed on review, and an issue not presented to or considered by the trial court cannot be raised for the first time on appeal. *In re Marriage of Schneider*, 214 Ill. 2d 152, 172 (2005). Additionally, attachments to briefs not included in the appellate record are not properly before the reviewing court and cannot be used to supplement the record. *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 394-95 (1991). When a party's brief fails to comply

with that rule, a court of review may strike the brief, or simply disregard the inappropriate material. *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009).

¶ 51 In light of the foregoing, we cannot consider this argument.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 54 Affirmed.