

No. 1-13-1810

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
FIRST JUDICIAL DISTRICT

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| BAC HOME LOANS SERVICING, LP, |) | Appeal from the |
| f/k/a Countrywide Home Loans Servicing, LP, |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 11 CH 12412 |
| |) | |
| RICARDO ROMO and ADRIANA ROMO, |) | The Honorable |
| |) | Patrick Brennan, |
| Defendants-Appellants. |) | Judge Presiding. |

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Trial court did not abuse its discretion in denying defendants' motion to vacate the judicial sale of their property where, in light of their incomplete application, they failed to prove by a preponderance of the evidence that they applied for assistance under HAMP within the meaning of section 15-1508(d-5) of the Foreclosure Law and, thus, that their property was sold in material violation of HAMP.

¶ 1 Following the sale of their home pursuant to foreclosure, defendants-appellants Ricardo Romo and Adriana Romo (defendants or as named) filed an emergency motion to stay

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confirmation of sale, alleging that plaintiff-appellee BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP (plaintiff), violated section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(d-5) (West 2012)) and the directives of the Home Affordable Modification Program (HAMP), a component of the Making Home Affordable Program (MHAP). After the ensuing litigation, the trial court allowed defendants to convert their motion to stay into a motion to vacate sale and confirmation of sale. Ultimately, the trial court denied defendants' motion. They appeal, contending that plaintiff was required to suspend the sale of the property under the circumstances in order that they be evaluated under HAMP, and that the trial court's confirmation of the sale was invalid. For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 On March 31, 2011, plaintiff filed a complaint to foreclose the existing mortgage against defendants-mortgagors with respect to property located at 5310 South Mayfield Avenue in Chicago. Without any appearance, response or answer from defendants, plaintiff then filed a motion for default, judgment of foreclosure and appointment of a selling officer. The trial court allowed defendants time to answer, but again, they did not. On April 5, 2012, the trial court granted plaintiff's motion. Sale of the property was scheduled for July 9, 2012.

¶ 4 On July 2, 2014, defendants filed their appearance via counsel. As can be gleaned from the record, defendants then filed a motion to vacate and a motion to stay the judicial sale.¹ The

¹A copy of this motion is contained in the appendix to defendants' brief, but is not part of the record on appeal. See *City of Chicago v. Harris Trust & Savings Bank*, 346 Ill. App. 3d 609, 615, n.2 (2004) (reviewing court cannot consider document in appendix if it is not made part of

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trial court denied defendants' motion to vacate but granted their motion to stay, moving the sale date to September 4, 2012. Following the absence of any further litigation, the property was sold on September 5, 2012.

¶ 5 On September 19, 2012, plaintiff filed a motion to approve sale. Plaintiff sent notice of this motion to defendants personally rather than to their counsel. On September 21, 2012, defendants filed an "Emergency Motion to Stay Confirmation of Sale." In their motion, defendants asserted that they had filed a HAMP application for loan modification that was pending at the time of the sale and, as a result, the property was sold in material violation of MHAP, thereby requiring that the sale be vacated pursuant to section 15-1508(d-5) of the Foreclosure Law. In support of their motion, defendants attached documents to show that they had submitted HAMP loan modification applications on June 29, 2012 and August 29, 2012. Defendants' motion was set for hearing on November 26, 2012.

¶ 6 As the record reveals, defendants' June 29, 2012 HAMP application consisted of a cover letter and a 7-page form executed and signed by defendant Ricardo. Even though she, too, was listed as a mortgagor on the property, defendant Adriana did not execute, sign or submit any documents with respect to the HAMP loan modification. Following the submission of this application, plaintiff contacted defendants and informed them that it was incomplete and additional documents were needed before review of the application could be initiated. During the next two months, plaintiff worked with defendants to obtain these documents. On August 29,

record on appeal); accord *Marzouki v. Najjar-Marzouki*, 2014 IL App (1st) 132841, ¶ 20 (this is not proper way to supplement record). However, the record does contain an order issued by the trial court dated July 5, 2012, stating that defendants did present this motion.

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2012, defendants submitted a second HAMP application to plaintiff. Again, this application was executed and signed by defendant Ricardo only, and defendant Adriana did not submit, execute or sign any documents. On August 31, 2012, plaintiff sent a letter to defendants informing them that their application was incomplete and additional documents were still needed. The letter specifically stated that application documents were required from "each borrower" and detailed what forms were still needed, including an "IRS Form 4506-T," a "710 Uniform Borrower Assistance Form," and a "Request for Proof of Hardship Documentation."

¶ 7 On October 16, 2012, before the November 26, 2012 hearing date on defendants' pending motion to stay, the trial court approved the judicial sale of the property and granted plaintiff an order of possession. At the November 26, 2012 hearing, because the order approving sale had already been entered before defendants' motion to stay was adjudged, the trial court issued a new scheduling order. In it, the trial court allowed defendants to convert their pending "Emergency Motion to Stay Confirmation of Sale" into a motion to "Vacate the Sale and Confirmation of Sale." The court also stayed possession of the property and entered a briefing schedule on defendants' motion, set a hearing date of May 2, 2013. In addition, the court noted on the scheduling order that "Defendants did not receive Notice of Plaintiff's Motion to Confirm Sale."

¶ 8 Following plaintiff's filing of its response to defendants' motion, and defendants' reply thereto, the trial court held a hearing and, on May 2, 2013, denied defendants' motion to vacate the sale of the property.

¶ 9

ANALYSIS

¶ 10 Defendants present two contentions on appeal. First, they argue that plaintiff was in

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violation of section 1508(d-5) and HAMP directives by failing to suspend the sale of the property for them to be evaluated under HAMP pursuant to the HAMP loan modification applications they submitted to plaintiff. Second, they argue that the trial court's order confirming the sale of the property was invalid. We disagree with both contentions.

¶ 11 Before turning to the merits of this appeal, we wish to briefly address the threshold matter of the applicable standard of review. That standard is well established in the law and is clear to us; however, we mention it here in this context only because defendants devote several pages of their brief on appeal to the topic. After comparing section 2-1301 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2010)), under which a movant need neither establish the existence of a meritorious claim or defense nor show due diligence or good cause for delay in requesting relief from judgment, with section 2-1401 of the Code, which places a greater burden on the movant to demonstrate by a preponderance of the evidence several factors (such as due diligence, a meritorious defense, etc.) before receiving relief from judgment, defendants insist that their motion to stay, which was converted into a motion to vacate, should be considered under the less onerous standards of section 2-1301. See *First National Bank of Blue Island v. Board of Managers of Faulkner House Condominium Association*, 252 Ill. App. 3d 139, 142-43 (1993) (comparing these mutually exclusive remedies). That is, they essentially state that their motion to vacate should be considered a section 2-1301 motion. Plaintiff, meanwhile, succinctly states that the standard of review of a trial court's approval of a judicial sale is an abuse of discretion.

¶ 12 The correct standard of review is, as plaintiff notes, abuse of discretion. First, regardless

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of whether defendants' motion to vacate the sale of the property as entered by the trial court is considered a section 2-1301 or section 2-1401 petition for relief from judgment, the standard of review under either section is abuse of discretion. See *First National Bank*, 252 Ill. App. 3d 142-43. Within their lengthy discussion regarding the differences between section 2-1301 and section 2-1401, defendants admit as much in their brief. More significantly, however, and specific to the instant cause, our court has just recently reaffirmed that the standard of review applicable to the issue of whether a trial court properly confirmed the judicial sale of property—the crux of this appeal—is abuse of discretion. See *Citimortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57 (“[t]he standard of review of a circuit court’s approval of a judicial sale is an abuse of discretion”); accord *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 13 As such, we further note that a trial court has broad discretion in approving or disapproving the judicial sale of property made at its discretion. See *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 32; *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 388 (1997). A reviewing court will not disturb the trial court’s decision in this context unless an abuse of that discretion is clearly shown. See *Bayview Loan Servicing*, 2013 IL App (1st) 120711, ¶ 32; accord *Maywood-Proviso State Bank v. Cokinis*, 11 Ill. App. 3d 659, 662 (1973). An abuse of discretion occurs only when the trial court’s decision is unreasonable, fanciful or arbitrary, or where no reasonable person would take the view adopted by the court. See *Bermudez*, 2014 IL App (1st) 122824, ¶ 57; see also *Bayview Loan Servicing*, 2013 IL App (1st) 120711, ¶ 32.

¶ 14 Section 15-1508(d-5) of the Foreclosure Law governs the trial court's analysis of whether

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a judicial sale should be approved in accordance with MHAP directives and HAMP. See 2014 IL App (1st) 122824, ¶ 59, citing *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 4-5 (2010). That section provides, in relevant part:

"The court that entered the judgment 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 requirement for proceeding to a judicial sale." 735 ILCS 5/15-1508(d-5) (West 2012).

HAMP is one of the types of assistance described in subsection (i) of Section 15-1508(d-5); it is a federal program established to help eligible homeowners obtain mortgage modifications in an effort to prevent foreclosures that are deemed avoidable. See 12 U.S.C. § 5219(a)(1) (2009). Thus, a defendant to a foreclosure action may, under section 15-1508(d-5), ask that a sale of his property be stayed or continued because he has a HAMP application pending. See 735 ILCS 5/15-1508(d-5) (West 2012); *Bermudez*, 2014 IL App (1st) 122824, ¶ 60. If, meanwhile, his property is sold by judicial sale, he may seek recovery under section 15-1508(d-5) to vacate the sale. See 735 ILCS 5/15-1508(d-5) (West 2012); *Bermudez*, 2014 IL App (1st) 122824, ¶ 60. However, as that section makes clear, the burden is squarely on the defendant to prove, by a preponderance of the evidence, that he applied for assistance under HAMP and that the property was sold in material violation of HAMP's requirements for proceeding to judicial sale. See 735

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ILCS 5/15-1508(d-5) (West 2012); *Bermudez*, 2014 IL App (1st) 122824, ¶ 59. Ultimately, "without applying for assistance under HAMP, one cannot obtain the relief sought under section 15-1508(d-5), vacating the judicial sale." *Bermudez*, 2014 IL App (1st) 122824, ¶ 60.

¶ 15 Defendants in the instant cause assert they proved, by a preponderance of the evidence, that they had applied for HAMP assistance and, while their application was pending, their property was sold in material violation of HAMP's requirements. The central issue, then, is whether defendants "applied for assistance" under HAMP within the meaning of section 15-1508(d-5) for, as just stated, without having first applied for this assistance, their property could not have been sold "in material violation" of HAMP and they could not obtain relief under section 15-1508(d-5), vacating the judicial sale. See 735 ILCS 5/15-1508(d-5) (West 2012); *Bermudez*, 2014 IL App (1st) 122824, ¶ 60.

¶ 16 Our court recently addressed this very issue *Bermudez*, a case we find to be directly on point with the instant cause. In *Bermudez*, a loan servicer brought a foreclosure action against the defendants-mortgagors of certain property. The defendants filed a HAMP application. However, while the application was pending, the trial court entered a judgment of sale and the property was sold. The defendants moved to set aside the sale under section 15-1508(d-5), contending that they had proved, by a preponderance of the evidence, they had applied for assistance via HAMP and the property was sold in material violation of HAMP. The trial court denied their motion. See *Bermudez*, 2014 IL App (1st) 122824, ¶¶ 5-6, 14, 24-28, 44.

¶ 17 On appeal, the *Bermudez* court noted that the threshold issue was "whether [the] defendants 'applied for assistance' under HAMP" in accordance with the mandates of section 15-

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1508(d-5). *Bermudez*, 2014 IL App (1st) 122824, ¶ 60. Interestingly, the defendants admitted they had not submitted a complete application, but insisted that they were only required to demonstrate it was " 'more likely than not' " they applied for assistance by taking certain steps to show an effort to submit the required documentation. *Bermudez*, 2014 IL App (1st) 122824, ¶ 62. The *Bermudez* court wholeheartedly disagreed with that characterization of their burden under section 15-1508(d-5). Examining the plain and ordinary meaning of the Foreclosure Law, and particularly of section 15-1508(d-5), as well as the history and purpose of HAMP, MHAP and their applicable guidelines, the *Bermudez* court held that "in order to 'apply for assistance under MHAP' pursuant to section 15-1508(d-5) of the Foreclosure Law the borrower must submit the documentation required by the servicer to determine the borrower's eligibility and verify his or her income." *Bermudez*, 2014 IL App (1st) 122824, ¶¶ 64-67. Thus, because the defendants, admittedly, had not submitted all the documentation required by the servicer, they had failed to prove by a preponderance of the evidence they had submitted a proper HAMP application. See *Bermudez*, 2014 IL App (1st) 122824, ¶ 67. Consequently, without having applied for HAMP assistance, the defendants had also failed to prove by a preponderance of the evidence that their property was sold in material violation of HAMP and they could not obtain relief under section 15-1508(d-5) to vacate the sale of their property. See *Bermudez*, 2014 IL App (1st) 122824, ¶ 72 (holding that the trial court did not abuse its discretion in denying the mortgagors' motion to vacate the confirmation of sale).

¶ 18 The instant cause mirrors the principles outlined in *Bermudez* and merits the same result.

¶ 19 The MHA guidelines for non-GSE mortgages set forth the requirements and obligations

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for a mortgagor with respect to HAMP. Pursuant to these, a mortgagor is not considered to have requested consideration for HAMP assistance until he submits an "Initial Package" to his servicer. See U.S. Dep. Of the Treasury, *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages*, version 4.0, p. 76 (August 17, 2012), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf (accessed May 28, 2014). An Initial Package includes a Request for Mortgage Assistance (RMA) form with a Hardship Affidavit, an Internal Revenue Service (IRS) Form 4506-T or 4506T-EZ, evidence of income, and a "Dodd-Frank Certification." See U.S. Dep. Of the Treasury, *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages*, version 4.0, p. 77-78 (August 17, 2012), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf (accessed May 28, 2014). A servicer may only evaluate a mortgagor for HAMP assistance after the mortgagor has submitted all this documentation and the servicer has received this Initial Package. See U.S. Dep. Of the Treasury, *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages*, version 4.0, p. 77 (August 17, 2012), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf (accessed May 28, 2014).

¶ 20 In the instant cause, just as the defendants in *Bermudez*, defendants here did not submit a completed HAMP application to plaintiff and, thus, did not "apply for assistance" under HAMP within the meaning of section 15-1508(d-5) of the Foreclosure Law. Defendants insist they submitted an application on June 29, 2012. However, as the record demonstrates, the June 29 application consisted only of a cover letter and the RMA form, as completed, signed and

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executed by defendant Ricardo. Missing from this application were several necessary documents required under the MHA guidelines and comprising the necessary Initial Package, including the Hardship Affidavit, the IRS forms, evidence of income, and the Dodd-Frank Certification.

Defendant Ricardo did not submit these. Moreover, defendant Adriana, who is listed as a mortgagor on the loan as well, did not submit, sign or execute any document at all; she provided absolutely none of the required information or documentation for a HAMP modification on the loan. Thus, the June 29 application could not be considered for HAMP assistance.

¶ 21 Following the submission of that application, plaintiff contacted defendants and informed them that it was incomplete and additional documents were needed before review of the application could be initiated. During the next two months, plaintiff worked with defendants to obtain these documents. On August 29, 2012, defendants submitted a second HAMP application to plaintiff. However, again, this application was executed and signed by defendant Ricardo only, and defendant Adriana did not submit, execute or sign any documents. And, as the record reveals, plaintiff sent a letter to defendants on August 31, 2012, informing them that their application was incomplete since additional documents were still needed. The letter listed the missing documents as "IRS Form 4506-T," a "710 Uniform Borrower Assistance Form," and a "Request for Proof of Hardship Documentation" as required from "each borrower." Defendants never submitted these forms. Thus, just as the June 29 application, the August 29 application could not be considered for HAMP assistance.

¶ 22 Having failed to submit the required Initial Package documentation, defendants cannot show, by a preponderance of the evidence, that they applied for assistance under HAMP within

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the meaning and requirements of the Foreclosure Law. Consequently, without having first properly applied for this assistance, their property could not have been sold in material violation of HAMP and they could not obtain relief under section 15-1508(d-5), vacating the judicial sale of their property. Accordingly, we find no basis to hold, as defendants would otherwise have us, that the trial court abused its discretion in approving the sale of their property.^{2,3}

¶ 23 Finally, we note one last argument made by defendants on appeal. They claim that the sale of their property should be invalidated because they did not receive proper notice of plaintiff's motion for order approving sale. Plaintiff admits that it filed this motion and sent

²For the record, we note that defendants make much of an argument regarding the timing of the submission of their HAMP applications. Ignoring the fact that their applications were not complete, and citing MHA guideline requirements that a HAMP application be submitted within seven business days prior to the foreclosure sale, defendants state that, because they timely submitted the applications, the sale was required to be halted. Plaintiff counters with its argument that the applications were not timely. However, having already found that defendants' HAMP applications were incomplete, we need not address the additional contentions regarding timing, as they are irrelevant at this point.

³We also note for the record that, for the first time, plaintiff states in its appellate brief that "upon further investigation since the filing of this appeal, the mortgage being foreclosed is a GSE mortgage owned by Fannie Mae," and presents additional argument applying Fannie Mae HAMP guidelines as opposed to MHA HAMP guidelines. Plaintiff acknowledges that there is nothing in the record to prove Fannie Mae ownership of the mortgage and that this entire cause, from its inception, has been argued by both parties under the MHA guidelines. The only authority plaintiff cites is a website it claims shows this ownership. However, as it is within our purview to take judicial notice of information on a public website even though the information does not appear in the record (*People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n.9), we visited that website, entered the necessary information and received a response stating "[i]t appears that Fannie Mae does not own your [defendants'] loan, based on the information you entered." See <http://www.faniemae.com/loanlookup/> (Accessed May 28, 2014). Accordingly, without more, and because both parties here litigated this cause consistently relying on the MHA guidelines for non-GSE mortgages throughout this cause, rather than on those for government-owned mortgages, we find any review of this cause under the latter irrelevant.

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notice of it to defendants personally, but did not send notice to their attorney. However, a lack of notice does not automatically render an order void. See *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 557 (2000); accord *In re American Mutual Reinsurance Co.*, 238 Ill. App. 3d 1, 11 (1992).

Rather, it is only voidable; the determining factor is whether the nonmoving party suffered any harm or prejudice, such as the prevention of appearing in court or the denial of an opportunity to be heard or to respond. See *Savage*, 312 Ill. App. 3d at 557; *American Mutual*, 238 Ill. App. 3d at 11. In addition, if the nonmoving party subsequently appears and does not object after the order is entered, he may very well have waived his right to notice. See *Savage*, 312 Ill. App. 3d at 557.

¶ 24 In the instant cause, the trial court granted plaintiff's motion to approve sale on October 16, 2012 and gave it possession of the property, while defendants' "Emergency Motion to Stay Confirmation of Sale" was pending. At the November 26, 2012 hearing on defendants' motion, defendants' attorney appeared in court and presented their motion to vacate. At this time, realizing that the order approving sale had already been entered before hearing defendants' motion to stay, and noting that defendants had not received notice of plaintiff's motion to approve sale, the trial court issued a new scheduling order allowing defendants to convert their motion to stay into a motion to vacate the sale, staying possession of the property, and setting a hearing date of May 2, 2013. The trial court thereafter held a hearing on May 2, 2013, ultimately denying defendants' motion to vacate the sale.

¶ 25 Based on the record before us, it is our view that defendants and their attorney had ample opportunity to raise an objection to the sale, despite the alleged lack of notice of plaintiff's

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motion to approve it. Clearly, the trial court realized what had occurred and noted as much for the record. It then issued a revised scheduling order in the cause, accommodating the situation procedurally by converting defendants' motion, staying the possession it had awarded plaintiff, and setting a new hearing date on the issue. With this, it cannot be said that defendants suffered any harm or prejudice here. They appeared in court at that subsequent hearing and had the opportunity to respond to plaintiff's motion and be heard. See *Savage*, 312 Ill. App. 3d at 557; *American Mutual*, 238 Ill. App. 3d at 11. In light of this, we find, contrary to defendants' insistence, that the fact their attorney initially may not have received proper notice of the motion to approve sale does not merit the invalidation of the sale.

¶ 26 In light of their incomplete application, defendants failed to prove by a preponderance of the evidence that they applied for assistance under HAMP within the meaning of section 15-1508(d-5) of the Foreclosure Law, as was their burden. Consequently, having failed to meet this threshold requirement, their property could not have been sold in material violation of HAMP and they could not have obtained the relief they sought under section 15-1508(d-5), vacating the judicial sale. Accordingly, based on all this, we find that the trial court did not abuse its discretion in denying defendants' motion to vacate the sale.

¶ 27 CONCLUSION

¶ 28 For all the foregoing reasons, we affirm the judgment of the trial court.

¶ 29 Affirmed.