2015 IL App (2d) 140541-U
No. 2-14-0541
Order filed April 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CH-1481
	)	
SCOTT PATCHAN and KIM PATCHAN,	)	Honorable
	)	David R. Akemann,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in striking defendants' affirmative defense and granting plaintiff bank summary judgment on its complaint for foreclosure of mortgage.

¶ 2 Defendants, Scott Patchan and Kim Patchan, defaulted on their repayment obligation on a residential mortgage loan, and plaintiff, Bank of America, N.A., commenced this foreclosure action. Plaintiff successfully moved for summary judgment and to strike defendants' affirmative defense, and defendants appeal.

¶ 3 Defendants argue that (1) the trial court should have struck plaintiff's motion for summary judgment and required plaintiff to comply with discovery orders under Illinois

Supreme Court Rule 219(c) (eff. Sept. 1, 2008); (2) the cause should be remanded so defendants can depose plaintiff's representative under Illinois Supreme Court Rule 206(a)(1) (eff. Feb. 16, 2011); and (3) the trial court erred in striking defendants' affirmative defense and granting plaintiff summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On March 10, 2008, defendant executed a mortgage related to the property at 223 Cassidy Lane in Elgin to secure a loan in the amount of $264,929 from the original lender, Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Ryland Mortgage Company. Scott executed a note in favor of Ryland. The note is endorsed in blank, and plaintiff has possession of the note.

¶ 6 On April 25, 2012, plaintiff filed a complaint for foreclosure based on Scott's failure to make the payments required under the loan agreement. On June 20, 2012, defendants moved to dismiss the complaint on the ground that plaintiff lacked standing because it offered no proof of an assignment that would make plaintiff the legal holder of the indebtedness.

¶ 7 A mortgagee establishes a *prima facie* case for foreclosure with the introduction of the mortgage and note, after which the burden of proof shifts to the mortgagor to prove any applicable affirmative defense. *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994). Standing is an affirmative defense and, as such, the defendant bears the burden of proving that the plaintiff does not have standing. The mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note. *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. The trial court denied defendants' motion to dismiss on August 22, 2012, after plaintiff presented the original note in open court.

¶ 8 On September 28, 2012, defendants filed an answer and the affirmative defense that plaintiff lacks standing to bring the action. On October 4, 2012, plaintiff responded with a combined motion to strike the affirmative defense and for summary judgment. Plaintiff argued that the affirmative defense should be dismissed under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) because defendants had failed to plead facts to establish that plaintiff lacks standing to bring the foreclosure action. Plaintiff argued alternatively that the affirmative defense should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)) because plaintiff's production of the original note is affirmative matter defeating the defense. Finally, plaintiff argued that summary judgment was appropriate because plaintiff had produced the mortgage, the note, and an affidavit of the amounts owed. Dorothy Obi, an assistant vice president of plaintiff, filed an affidavit itemizing the indebtedness and stating that Scott owed $281,860, excluding fees and costs. Plaintiff also attached business records to support the calculation.

¶ 9 On November 8, 2012, defendants moved under Rule 219(c) to strike plaintiff's summary judgment motion. Defendants asserted that plaintiff had not yet responded to their first set of interrogatories and first request for production of documents, which had been issued on June 15, 2012. Defendants also asserted that plaintiff had not responded to their notice of deposition of Obi. On December 7, 2012, plaintiff filed its response to the first set of interrogatories, objecting to all of them on the ground that they violated Illinois Supreme Court Rule 213(c) (eff. Sept. 1, 2008), which sets a limit of 30 interrogatories, including sub-parts. Lohrey Henderson, another assistant vice president of plaintiff, certified plaintiff's response to the discovery request. Defendants conceded the violation of Rule 213(c).

¶ 10 On December 19, 2012, the trial court struck a notice of deposition of Obi, and ordered the depositions of Obi and Henderson to be conducted via telephone, after the court learned that the witnesses resided out of state. Defendants sent plaintiff's counsel several letters attempting to schedule the depositions, but they never filed new notices of deposition.

¶ 11 On January 18, 2013, the trial court scheduled a hearing on plaintiff's summary judgment motion on March 20, 2013, and set February 22, 2013, as the deadline for defendants' response. On February 19, 2013, defendants filed an amended motion to strike plaintiff's summary judgment motion.

¶ 12 On March 20, 2013, the trial court denied defendants' Rule 219 motion, granted plaintiff's motion to strike the affirmative defense after plaintiff provided the original note bearing a blank endorsement, and granted plaintiff's motion for summary judgment. The court entered a judgment of $291,774 for plaintiff. On April 17, 2013, defendants filed a notice of appeal, but we dismissed the appeal as premature because the trial court had not yet entered a final and appealable order.

¶ 13 On May 8, 2014, the trial court entered an order approving the report of sale and distribution and possession. On June 5, 2014, defendants filed a subsequent notice of appeal, stating that they were appealing the orders entered on March 20, 2013, and May 8, 2014.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendants argue that (1) the trial court should have struck plaintiff's motion for summary judgment and required plaintiff to comply with certain discovery orders; (2) the cause should be remanded so defendants can depose plaintiff's representative; and (3) the trial court erred in striking defendants' affirmative defense and granting plaintiff summary judgment.

For the following reasons, we agree with plaintiff that defendants' arguments do not compel reversal of the judgment or a remand for further proceedings.

¶ 16 A. Discovery Orders

¶ 17 On appeal, defendants renew their argument that plaintiff disregarded their written discovery requests, and therefore, the trial court erred in denying their motion to strike plaintiff's combined motion to strike the affirmative defense and for summary judgment. Rule 219(c) contains a nonexclusive list of sanctions that the trial court may impose, including barring the offending party from filing additional pleadings relating to the claim at issue, for failing to comply with discovery rules or orders. Ill. S. Ct. R. 219(c)(ii) (eff. July 1, 2002); *Fraser v. Jackson*, 2014 IL App (2d) 130283, ¶ 28. " 'The imposition of sanctions under Rule 219 is committed to the sound discretion of the circuit court, and its determination will not be reversed absent a clear abuse of that discretion.' " *Fraser*, 2014 IL App (2d) 130283, ¶ 28 (quoting *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 54). The purpose of any such sanction is to promote discovery, not punish a dilatory party. *Fraser*, 2014 IL App (2d) 130283, ¶ 29. In this case, the trial court did not abuse its discretion in denying the Rule 219(c) motion.

¶ 18 On November 8, 2012, defendants moved under Rule 219(c) to strike plaintiff's combined motion, asserting that plaintiff's response to their first discovery request was several months overdue. On December 7, 2012, plaintiff responded by objecting to the first set of interrogatories on the ground that they exceeded the 30-interrogatory limit set forth in Rule 213(c). Ill. S. Ct. R. 213(c) (eff. Sept. 1, 2008). Defendants conceded the violation. Defendants submitted an amended first set of interrogatories, and eventually a second set of interrogatories, but those submissions came after plaintiff moved for summary judgment and to strike the affirmative defense. Thus, defendants advocate the unreasonably harsh result of striking

plaintiff's combined motion on the ground that plaintiff did not timely respond to a discovery request that violated supreme court rules.

¶ 19 Defendants also argue that plaintiff failed to cooperate in scheduling the depositions of Obi and Henderson. Plaintiff responds that, because defendants failed to send any notices of deposition, plaintiff did not violate the discovery orders at issue. After learning that the witnesses resided out of state, the trial court ordered that the depositions be conducted via telephone, and in fact, defendants filed neither notices of deposition nor an affidavit under Rule 191(b). Rule 191(b) outlines the procedure to follow when material facts are not obtainable in relation to a pending motion for summary judgment, and it requires "naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn," when the affidavits are unobtainable by reason of "hostility or otherwise." Ill. S. Ct. R. 191(b) (eff. July 1, 2002). In the normal course of pretrial proceedings, requiring compliance with Rule 191(b) makes good sense, such as in *Gill v. Chicago Park District*, 85 Ill. App. 3d 903, 906-07 (1980), where the plaintiff had three years to compile discovery and, after the defendant moved for summary judgment, did not file a response or a counteraffidavit, nor did he request additional continuances for discovery purposes. The *Gill* court held that the plaintiff could not argue on appeal that the trial court erred in granting summary judgment when he did not file a Rule 191(b) affidavit. *Gill*, 85 Ill. App. 3d at 907. When the nonmovant has had ample time for discovery, and does not even request a continuance for discovery, there is no reason why noncompliance with Rule 191(b) should be excused; the rule outlines the procedure to be followed for procuring necessary affidavits containing material facts that are unavailable to the nonmovant when the summary judgment motion is filed. Acting as a shield for the nonmovant, Rule 191(b) can stay the disposition of summary judgment until the nonmovant can procure the

affidavits that it knows it needs to respond to the motion if, for instance, the movant is in sole possession of material facts relevant to summary judgment that have yet to come out through discovery. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 28.

¶ 20 In this case, the record indicates that the first set of interrogatories was arguably excessive, the amended interrogatories were served after plaintiff's combined motion was filed, defendants never served notice of the telephonic depositions, and defendants did not file a Rule 191(b) affidavit in response to plaintiff's combined motion. We conclude that, under these circumstances, the trial court did not abuse its discretion in denying defendants' motion to strike plaintiff's combined motion under Rule 219(c).

¶ 21 B. Affirmative Defense and Summary Judgment

¶ 22 In a related argument, defendants argue that the court erred in striking their affirmative defense and granting plaintiff summary judgment. Defendants contend that the motion was premature and should have been struck for plaintiff's noncompliance with discovery orders. Defendants assert that they could not defend the motion because they did not have an opportunity to depose plaintiff's corporate representative.

¶ 23 However, plaintiff correctly points out that a motion for summary judgment may be filed "[a]ny time after the opposite party has appeared or after the time within which he or she is required to appear has expired." 735 ILCS 5/2-1005(a) (West 2012). Defendants do not contend that plaintiff's motion predated their appearance. Moreover, as described above, defendants neither served notice of the telephonic depositions of Obi or Henderson nor filed a Rule 191(b) affidavit in response to plaintiff's combined motion. The trial court found that plaintiff had not abused the rules of discovery, and the court denied defendants relief pursuant to Rule 219(c).

Defendants' failure to file a Rule 191(b) affidavit resulted in forfeiture of any argument that such discovery was necessary for proceeding on plaintiff's combined motion.

¶ 24 Defendants contest the merits of the combined motion only to the extent that they argue "the record is devoid of any material evidence which would support of [*sic*] plaintiff's combined motion." The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007).

¶ 25 In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597 (citing *Hermes v. Fischer*, 226 Ill. App.

3d 820, 824 (1992)). We review *de novo* an order granting or denying summary judgment. See *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 26 Plaintiff supported its complaint for foreclosure and summary judgment motion with the mortgage, note, and an affidavit of the amount due. The complaint also contained the information and requests set forth in section 15-1504(a) of the Code. 735 ILCS 5/15-1504(a) (West 2012). Defendants did not file a counteraffidavit or contest in any way the merits of the summary judgment motion; and therefore, plaintiff's motion supported by affidavit was sufficient for entry of the order.

¶ 27 C. Depositions

¶ 28 Finally, defendants also appear to challenge the trial court's order striking their notice of deposition of Obi and ordering that the depositions of Obi and Henderson be conducted via telephone. Plaintiff responds that defendants may not challenge the order because they failed to mention it the notice of appeal. Indeed, the trial court struck the notice of deposition of Obi on December 19, 2012, but defendants' notice of appeal identifies only the orders entered on March 20, 2013, and May 8, 2014.

¶ 29 Illinois Supreme Court Rule 303(b)(2) (eff. May 30, 2008) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from." A notice of appeal is deemed to include an unspecified interlocutory order if the earlier order was a step in the procedural progression leading to the judgment specified in the notice of appeal. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979). Although the order striking the notice was not listed in the notice of appeal, the order preceded and procedurally led to the judgment. Therefore, we have jurisdiction to review defendants' claim of error as to that order. See *Burtell*, 76 Ill. 2d at 435.

¶ 30 Plaintiff alternatively argues that the order striking the notice of deposition must be affirmed on the ground that defendants have failed to supply this court with a report of proceedings from the hearing. We agree. Under *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error; and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court conformed with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92.

¶ 31 Even in the absence of a report of proceeding, defendants could have taken steps to provide an adequate record on appeal. In this court, defendants could have filed a bystander's report under Illinois Supreme Court Rule 323(c) (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) or an agreed statement of facts under Rule 323(d) (Ill. S. Ct. R. 323(d) (eff. Dec. 13, 2005)). Either could have provided the reasons for the trial court's ruling. Doubts that arise from the incompleteness of the record will be resolved against the appellant (*Foutch*, 99 Ill. 2d at 392), and on this issue, our review is limited to the trial court's reasoning for striking the notice of deposition of Obi, which is not part of the record. The incompleteness of the record hinders our review, and we presume that the order conformed with the law and had a sufficient factual basis. See *Foutch*, 99 Ill. 2d at 391-92.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 34 Affirmed.