2015 IL App (2d) 141206-U
No. 2-14-1206
Order filed December 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PNC BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff,	)	
	)	
v.	)	No. 11-CH-5251
	)	
BRIAN ULLRICH, MARIPAT ULLRICH,	)	
UNKNOWN OWNERS AND	)	
NON-RECORD CLAIMANTS	)	
	)	
Defendants-Appellees	)	
	)	
&	)	
	)	
BMO HARRIS BANK, N.A.	)	Honorable
	)	Robert G. Gibson,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Mortgagee was estopped from arguing judicial sale should have been confirmed and that payoff amount was erroneous as the mortgagee withdrew its deposit from the sale and accepted payoff payment. Moreover, mortgagee's arguments were rejected on the merits.

¶ 2 Defendant-appellant BMO Harris Bank appeals from the trial court's order vacating the underlying foreclosure judgment, vacating the judicial sale, and returning the sale proceeds to BMO Harris. In addition, BMO Harris challenges a prior non-final order from the trial court, which set the payoff amount on the homeowners' outstanding loan. We affirm.

¶ 3 In 2002, defendants Brian and Maripat Ullrich obtained a 10-year $100,000 home equity line of credit, or HELOC, on their Downers Grove home from a lender succeeded by BMO Harris. In 2003, the Ullrichs obtained a $304,000 mortgage on the home, their primary mortgage, from a lender succeeded by PNC Bank. Beginning in May 2011, the Ullrichs stopped paying their mortgage and, in November 2011, PNC Bank filed a complaint to foreclose on the home. The complaint named as defendants both the Ullrichs and BMO Harris, the latter as the junior mortgagee. In an unverified answer to the complaint, BMO Harris acknowledged that it had a mortgage on the home, but neglected to state the amount it was due and owed on the note. The Ullrichs did not answer the complaint and were defaulted from the case.

¶ 4 On May 29, 2012, the trial court granted summary judgment in favor of PNC Bank on the foreclosure in the amount of $282,000 (we have rounded to the nearest thousand dollars or dollar where appropriate) and authorized a judicial sale of the home. The judgment acknowledged BMO Harris' junior mortgage, but because BMO Harris' answer did not indicate how much it was owed by the Ullrichs, the judgment stated that the amount owed to BMO Harris would be determined at a later date.

¶ 5 Beginning in June 2012, the Ullrichs attempted to redeem their mortgage (735 ILCS 5/15-1603(b)(1) (West 2010)) and even negotiated with PNC Bank for a temporary loan modification. The Ullrichs then made their mortgage payments for July, August, September, and October. When they missed their November and then their December payments, however, PNC

Bank published notice of the sale and pressed ahead with the auction. At the auction, BMO Harris, the junior mortgagee, came up with the winning bid at $325,000 and deposited that amount with the sheriff. PNC Bank then filed a motion to confirm the sale, which was slated for a confirmation hearing in February.

¶ 6 Prior to the hearing, BMO Harris filed an unverified motion to amend the foreclosure judgment to reflect the amount BMO Harris was owed by the Ullrichs, so that it could be credited that amount against its winning bid on the home. As will be relevant later, one of the exhibits to BMO Harris' motion was a prove-up affidavit from a BMO Harris mortgage officer. The affidavit, which was properly notarized, stated that as of January 23, 2013, the principal balance owed on the Ullrichs' HELOC was $60,000. With interest, penalties, and fees, the "GRAND TOTAL" was $66,000 with interest accruing at a rate of $7 per day.

¶ 7 On February 14, 2013, the day of the confirmation hearing, the Ullrichs appeared in court and filed an emergency motion to vacate the sale. The parties all agreed to continue the case for briefing in response to the Ullrichs' motion. Those briefs touched off an additional round of continuances and more briefing. On July 30, 2013, the court granted BMO Harris' motion to amend the foreclosure judgment and denied the Ullrichs' motion to vacate the sale. The court found that none of the four statutory conditions to forestall the sale's confirmation were present (735 ILCS 5/15-1508 (West 2010)), yet it did not grant PNC Bank's motion to confirm the sale. Instead, the court gave the parties additional time to file briefs as well as to reach a settlement. In October 2013, BMO Harris issued the Ullrichs an updated payoff letter, reflecting that the amount owed on the HELOC was approximately $70,000, which was consistent with the affidavit BMO Harris submitted to the court with its motion to amend the judgment.

¶ 8 On November 13, 2013, the parties represented to the court that they were closing in on a

settlement. Recapping the progress that had been made, counsel for BMO Harris stated that the Ullrichs and PNC Bank were close to final negotiated terms for a modified loan agreement. In addition, counsel for BMO Harris stated that the Ullrichs had tendered proof of funds for "the full payoff to BMO [Harris] ***." Counsel last stated that he wanted it on the record that "everybody here" had the intent "to reach a global settlement" for PNC Bank's and BMO Harris' claims against the Ullrichs. The matter was continued for a hearing on PNC Bank's confirmation motion.

¶ 9 On December 19, 2013, the parties told the court that they were less optimistic regarding a settlement. PNC Bank had been negotiating with the Ullrichs for a loan modification based on the original mortgage, including interest and penalties, in order "to bring everything current." However, PNC Bank required additional time to obtain approval for the modification. In the meantime, the Ullrichs could not settle with junior mortgagee BMO Harris until they settled with PNC Bank. With respect to BMO Harris, the Ullrichs tendered proof of funds, in the form of a cashier's check for approximately $70,000, indicating that they could pay BMO Harris the stated payoff amount on the HELOC once they reached a resolution with PNC Bank.

¶ 10 The case was continued several times until May 20, 2014, where in contemplation of a settlement, the court stated that it would order the foreclosure sale be vacated, and order PNC Bank to provide reinstatement figures to the Ullrichs. Further, the court said it would order that, upon reinstatement, the Ullrichs would tender payoff funds to BMO Harris on the home equity line. The court asked the parties to prepare a written order to that effect. After the court's oral pronouncement, counsel for BMO Harris suggested that the written order also direct the sheriff to return BMO Harris' bid money. Then the parties discussed "the [$]70,000—the check that [the Ullrichs] submitted ***." After the court noted that there might be additional per diem interest

(*i.e.*, that the Ullrichs' would likely need to obtain a new cashier's check), counsel for BMO Harris stated that there would also be additional attorney fees, but that the check could be promptly cashed to avoid any shortfall on per diem interest. A status date was then set for June 2014.

¶ 11 Prior to the June hearing, BMO Harris issued a new payoff letter to the Ullrichs, which stated that the principal on the loan was $98,000 and that the payoff amount was $117,000 with interest, fees, and penalties. The letter offered no explanation for the increase. The Ullrichs then filed a motion asking the court to set the payoff amount at the original approximately $70,000, plus interest and reasonable attorney fees. At a hearing on June 12, 2014, counsel for BMO Harris explained that once BMO Harris was the successful bidder at the judicial sale, it used an "algorithm" and classified the home "as REO," or real estate owned property. The payoff amount that BMO Harris had previously stated was premised then on the confirmation of the judicial sale, and a discount of the outstanding home equity note was based on the Ullrichs' equity in their home. BMO Harris' counsel explained that this was a feature of BMO Harris' accounting practices, so that the mortgage officer's affidavit and the payoff letters issued to the Ullrichs "were correct based on how [BMO Harris] does business." The trial court stated that it made "no sense" that BMO Harris would consider itself the owner of the home prior to confirmation of the sale, and gave the parties additional time to brief the issue.

¶ 12 At a hearing on July 31, 2014, the Ullrichs and BMO Harris presented arguments regarding the payoff amount. In a lengthy and thorough oral ruling, the trial court set forth the procedural history of the case and granted the Ullrichs' motion to set the payoff amount at $70,000, plus interest and attorney fees. The court stressed that its ruling was based on the fact that BMO Harris: (1) failed to establish the amount it was owed when the foreclosure judgment

was entered; (2) filed a prove-up affidavit in support of its motion to amend the foreclosure judgment, which represented to the court that the reduced payoff amount was all the Ullrichs owed; and (3) issued the Ullrichs several payoff letters with the reduced payoff amount. Finally, the court noted that the Ullrichs were ready and able to pay the amount BMO Harris told the court it was owed. In closing, the court stated that it did not take this action lightly, but did so after considering the numerous procedural and substantive missteps taken by BMO Harris.

¶ 13 Counsel for BMO Harris then asked the court if its ruling was based on judicial estoppel and that court responded, "Well, I'm not going to put a title on what occurred here. *** Whether th[is] is judicial estoppel or some other doctrine[ ] *** is for somebody else to give a label to it." The case was continued for the calculation of attorney fees. In a written order filed that same day, the court set the payoff amount at $63,000 as of January 23, 2013, with $7 per diem interest, *i.e.*, the date and amounts used in BMO Harris' affidavit, plus attorney fees.

¶ 14 On August 29, 2014, BMO Harris filed a motion seeking the return of the funds it deposited for the judicial sale and a motion to reconsider the payoff order. At a hearing on September 11, 2014, the court granted BMO Harris' motion to return funds and denied the motion to reconsider. The court's written order acknowledged an agreement for reinstatement between the Ullrichs and PNC Bank, and set a payoff amount of $73,000 on the BMO Harris loan, to be deposited in escrow within one week.

¶ 15 On November 6, 2014, the court entered the final order in this case, which vacated the judicial sale, ordered the return of BMO Harris' bid funds, vacated the judgment of foreclosure, and dismissed PNC Bank's foreclosure complaint. BMO Harris timely appealed.

¶ 16 As the highest bidder at the judicial sale of the Ullrichs' home, BMO Harris first argues that the trial court erred when it did not confirm the sale. According to BMO Harris, once the

court found on July 30, 2013, that none of the four statutory conditions to forestall confirmation were present (735 ILCS 5/15-1508 (West 2012)), the court was "required" to confirm the sale. BMO Harris relies on our supreme court's decision in *Household Bank FSB v. Lewis*, 229 Ill. 2d 173 (2008), for support.

¶ 17 As an initial matter, even if BMO Harris has standing to make this argument in the first place (which is doubtful, as we note below), it is estopped from doing so. That is, by asking for and accepting the return of its deposited bid funds, BMO Harris is estopped under the release-of-errors doctrine from arguing that the sale should have been confirmed. See *BA Mortgage, LLC v. Burgholzer*, 339 Ill. App. 3d 911, 912 (2003) (a party who accepts the benefits of a court order releases any claim to the reversal of that order) (citing *Trapp v. Off*, 194 Ill. 287, 302 (1901)); see also 4 C.J.S. Appeal and Error § 287 (2014) (a party who withdraws funds deposited with the court "is estopped to seek to have the judgment reviewed").

¶ 18 Estoppel aside, we also find BMO Harris' argument regarding the sale's confirmation unavailing. *Household Bank* holds that the plaintiff in a foreclosure case—here PNC Bank, *not* BMO Harris—is the proverbial "master" of the cause of action, and therefore has the right to *not* press for the sale's confirmation. *Household Bank*, 229 Ill. 2d at 181. That is exactly what happened here. After the trial court denied the Ullrichs' motion to vacate the sale, it encouraged the parties to pursue a settlement. At that point, PNC Bank effectively walked away from its confirmation motion and, ultimately, engaged in a settlement with the Ullrichs. Although the settlement process between the Ullrichs and PNC Bank took an unusually long amount of time, and a lot of latitude by the trial court, the result was in no way improper. *Household Bank* teaches that settlements are to be encouraged, and that a resolution of foreclosures through litigation should be had only as a matter of last resort. See *id*. at 180 (quoting *People v. American*

National Bank & Trust Co., 32 Ill.2d 115, 120-21 (1965)).

¶ 19 Furthermore, in making its argument that the sale should have been confirmed, BMO Harris merely assumes that it has standing to pursue confirmation. But the issue is not so cut and dried. As our supreme court said in *Household Bank*, "being the highest bidder at a judicial sale [does not] confer[ ] on the bidder some legally cognizable interest in the property." *Id*. at 181. Generally, until the sale is confirmed by the circuit court, the high-bidder's expectations concerning the property are speculative at best. *Id*. Whether that means BMO Harris has standing to pursue confirmation or not, we have considered and rejected BMO Harris' argument on the merits. That is, that the trial court did not abuse its discretion when it declined to confirm the sale in the absence of a plaintiff or seller willing to confirm the sale.

¶ 20 BMO Harris' second argument—that the trial court erred when it set the Ullrichs' payoff amount at $73,000 rather than $117,000—fares no better. BMO Harris argues that there was no "legal" basis for the trial court to "modify" its loan contract with the Ullrichs by "[i]ncredibly" discounting the note. BMO Harris further asserts that the trial court "did not state a basis for its decision, instead stating that it 'is for somebody else to put a label to it.' "

¶ 21 Estoppel under the release-of-errors doctrine hobbles this argument by BMO Harris as well. The trial court's final order—which returned BMO Harris' bid funds and dismissed PNC Bank's foreclosure complaint—was premised on the Ullrichs having tendered, and BMO Harris having accepted, the Ullrichs' payoff funds. Accordingly, for all the record shows, BMO Harris accepted the benefit of the trial court's judgment and cashed the Ullrichs' payoff check. As with its first argument then, BMO Harris is likewise estopped from challenging the payoff order under the release-of-errors doctrine. See *BA Mortgage, LLC*, 339 Ill. App. 3d at 912.

¶ 22 That said, we take the time to reject BMO Harris' payoff argument on the merits. BMO Harris attempts to paint the trial court's decision concerning the payoff amount as haphazard and unprincipled; it was anything but. The trial court noted that it did not arrive at its decision "lightly"—a fact borne out by the court's thorough and thoughtful statement of its ruling from the bench. The record reflects that the trial court's decision was principally based upon the affidavit BMO Harris submitted from its loan officer in support of its motion to modify the foreclosure judgment, and that BMO Harris intended that the trial court would accept the truth of the facts alleged. In its motion and affidavit, BMO Harris swore to the court that the amount it was due and owed by the Ullrichs was $66,000, and the court modified the foreclosure judgment accordingly. The trial court, of course, was entitled to take BMO Harris at its word and the label *we* put to the court's decision to hold BMO Harris to its word is judicial estoppel. See *Seymour v. Collins*, 2015 IL 118432, ¶¶ 38, 48 (stating that judicial estoppel is a matter of sound judicial discretion, designed to address "the problem of a party acting in bad faith, playing fast and loose with the court" by taking inconsistent positions (internal quotation marks omitted)); Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U.L. Rev. 1244, 1245 (1986) ("Recognizing that allowing inconsistent positions brings the judicial system into disrepute, *** judicial estoppel *** safeguard[s] the administration of justice and thereby preserve[s] the public confidence in the purity and efficiency of judicial proceedings." (internal quotation marks omitted)).

¶ 23 We note that BMO Harris does not argue that judicial estoppel was inappropriate in this case, and it has forfeited its opportunity to do so. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Instead, BMO Harris characterizes the trial court's payoff order as an improper exercise in promissory estoppel or contract modification. The record is clear however that the trial court's

decision was based on judicial estoppel principles. Furthermore, without citing any relevant authority concerning judicial estoppel, BMO Harris argues that the $73,000 payoff amount was not an accurate reflection of the Ullrichs' "full" indebtedness. However, under the doctrine of judicial estoppel, the court's concern "is with inconsistent positions taken by [the offending party], not with the truthfulness of either position." *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 53. After carefully considering the record in this case and the parties' arguments, we determine that the trial court did not abuse its discretion in setting the payoff amount consistent with BMO Harris' motion to amend and its supporting affidavit.

¶ 24 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 25 Affirmed.