2015 IL App (2d) 150396-U
No. 2-15-0396
Order filed December 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ENCORE FUND TRUST 2013-1, f/k/a SunTrust Mortgage, Inc.,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CH-291
RENA F. McCLEAD and MICHAEL A. McCLEAD,	)	
Defendants-Appellants	)	
(Illinois Community Credit Union, Raintree Village Homeowners Association, Unknown Owners, and Non-Record Claimants, Defendants).	)	Honorable John F. McAdams, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The parties' loss-mitigation affidavits did not preclude summary judgment on plaintiff's mortgage-foreclosure complaint: plaintiff's affidavit complied with Rule 114, and defendants' affidavit was not inconsistent; in any event, as defendants did not articulate any prejudice from any violation, the trial court did not abuse its discretion by denying relief.

¶ 2 Defendants, Rena F. McClead and Michael A. McClead, appeal the trial court's grant of summary judgment to plaintiff, Encore Fund Trust 2013-1, on its complaint to foreclose a mortgage. Defendants contend that questions about the veracity of plaintiff's affidavit under Supreme Court Rule 114 (eff. May 1, 2013) should have precluded summary judgment. We affirm.

¶ 3 In 2011, SunTrust Mortgage, Inc., filed a mortgage-foreclosure action against defendants and others. On May 19, 2014, plaintiff was substituted for SunTrust and moved for a judgment of foreclosure. Plaintiff also filed a motion for summary judgment.

¶ 4 Plaintiff's filings included an affidavit pursuant to Rule 114, which requires a mortgage-foreclosure plaintiff to file an affidavit listing the status of any loss-mitigation programs that may apply. Ill. S. Ct. R. 114(b) (eff. May 1, 2013). None of the preprinted boxes on plaintiff's affidavit were checked except the box marked "Other." Handwritten notations stated that defendants were potentially eligible for short sale, 'DIL" (deed in lieu of foreclosure), or reinstatement. It did not state that defendants were potentially eligible for any loan-modification options.

¶ 5 In response to the summary-judgment motion, defendants filed an affidavit from an employee of their counsel stating that Statebridge Company, LLC, servicer of the mortgage loan, "informed me that our clients, Michael and Rena McClead, are not eligible for a loan modification because they did not reaffirm their bankruptcy."

¶ 6 The trial court granted plaintiff summary judgment. The court entered a judgment of foreclosure and sale. Defendants appeal.

¶ 7 Defendants contend that the affidavits created a factual issue that should have precluded summary judgment. Plaintiff responds that any issue raised by the affidavits was not material and that, in any event, the affidavits are consistent.

¶ 8 We begin with a brief overview of Rule 114. The rule, enacted in 2013 in response to the "huge increase in the number of foreclosure cases filed in the Illinois state courts," (Ill. S. Ct. R. 114 (eff. May 1, 2013), Committee Comments), requires that, before moving for a judgment of foreclosure, a plaintiff in a mortgage-foreclosure action must comply with the requirements of any loss-mitigation program that applies to the mortgage at issue. Ill. S. Ct. R. 114(a) (eff. May 1, 2013). To ensure compliance, the rule requires a plaintiff to file an affidavit specifying (1) any type of loss mitigation that applies, (2) the steps taken to offer that type of loss mitigation to the mortgagors, and (3) the status of any such efforts. Ill. S. Ct. R. 114(b) (eff. May 1, 2013). The rule provides a form for the affidavit. Ill. S. Ct. R. 114(c) (eff. May 1, 2013). Finally, the rule provides that the trial court may "stay the proceedings or deny entry of a foreclosure judgment if Plaintiff fails to comply with the requirements of this rule." Ill. S. Ct. R. 114(d) (eff. May 1, 2013).

¶ 9 We interpret supreme court rules the same way as statutes, and we review a lower court's interpretation of either *de novo*. *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 12. Our objective is to ascertain and effectuate the drafters' intent. *Id.* "That intent is best understood by giving the language used its plain and ordinary meaning." *Id.* When the language is clear, we apply it without resort to further aids of construction. *Id.* Our review of a summary judgment is also *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 10 Plaintiff preliminarily contends that any issue concerning the loss-mitigation affidavits is irrelevant in the context of its summary-judgment motion because it does not involve any of the

elements it had to prove to establish its right to summary judgment. See *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003) (summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of *material* fact and that the moving party is entitled to judgment as a matter of law). This may be true, but the rule's plain language gives the trial court discretion to stay the proceedings or deny judgment where a plaintiff does not comply with the rule. Thus, whether plaintiff complied with the rule was material to whether plaintiff is entitled to judgment. We thus turn to the primary issue.

¶ 11 Defendants insist that their affidavit is inconsistent with plaintiff's, calling into question plaintiff's compliance with Rule 114. We simply fail to see how the affidavits are inconsistent. The rule's plain language requires a plaintiff in a foreclosure action to "comply with the requirements of any loss mitigation program which applies" to the loan in question. Ill. S. Ct. R. 114(a) (eff. May 1, 2013). Plaintiff's affidavit, patterned after the form affidavit found in the rule, states that "[t]he subject mortgage loan is eligible for the following loss mitigation programs." The affidavit has boxes for various types of modification programs. None of the boxes is checked, indicating that defendants' mortgage was not eligible for any type of modification program. Defendants' affidavit also states that defendants' mortgage was not eligible for any type of loan modification. Thus, there is simply no inconsistency.

¶ 12 We might be inclined to agree with defendants that plaintiff's affidavit is somewhat perfunctory, but defendants do not explain specifically how it violates the rule. Moreover, they do not argue that any deficiency prejudiced them. They do not contend, for example, that plaintiff failed to explore any mitigation options that were available to them.

¶ 13 In any event, as defendants acknowledge, relief under the rule is discretionary with the trial court. Ill. S. Ct. R. 114(d) (eff. May 1, 2013) (trial court "may" stay proceedings or deny judgment if a violation occurs); *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 37 (use of word "may" demonstrates that there is "some room for judicial discretion" in enforcement of rule). "An abuse of discretion occurs only where no reasonable person could agree with the position taken by the trial court." *In re Estate of Wright*, 377 Ill. App. 3d 800, 803-04 (2007). Given that defendants have not articulated how plaintiff violated the rule or, if it did, how that violation prejudiced them, we cannot say that the trial court abused its discretion by denying relief.

¶ 14 The judgment of the circuit court of Kendall County is affirmed.

¶ 15 Affirmed.