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2015 IL App (3d) 130908-U

Order filed May 14, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

BMO HARRIS BANK N.A., Successor in	)	Appeal from the Circuit Court
Interest to Harris Bank Cary-Grove,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
IKE SERVICES, LLC, ERIC C. ISAACSON,	)	
and KIMBERLY A. ISAACSON,	)	
	)	Appeal No. 3-13-0908
Defendants-Appellants,	)	Circuit No. 11-CH-5140
	)	
and	)	
	)	
ELIZABETH COURT CONDOMINIUM	)	
ASSOCIATION, THE CITY OF JOLIET,	)	
ILLINOIS, and UNKNOWN OWNERS and	)	
NON RECORD CLAIMANTS,	)	Honorable
	)	Barbara N. Petrunaro,
Defendants.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The affidavit attached to plaintiff's motion for summary judgment was sufficient to support introduction of attached documents under the business

records exception to the hearsay rule; and (2) judicial sale of property was not unconscionable nor did it prevent justice from being done.

¶ 2 Defendants, IKE Services, LLC, and Eric and Kimberly Isaacson (IKE), issued a mortgage to plaintiff, BMO Harris Bank N.A. (BMO), on 10 parcels of real estate. When IKE defaulted on its obligations, BMO initiated foreclosure proceedings on nine of the properties. BMO moved for summary judgment. Attached to BMO's motion were records showing that IKE had failed to make the required payments and that it owed a particular amount to BMO. The court entered summary judgment for BMO. The properties were sold as a singular entity at a judicial sale. The court confirmed the sale after a hearing. After confirmation, IKE challenged the sale price and sale process for the first time in a motion to reconsider. The court denied that motion. IKE appeals. We affirm.

¶ 3 **FACTS**

¶ 4 In 2005, IKE executed a promissory note in the amount of \$1,300,000 to BMO. To secure payment under the note, IKE executed a single mortgage, granting BMO a lien against 10 parcels of real property in Will County. The mortgage provided that, if IKE defaulted on the mortgage, BMO "shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales." IKE failed to pay the full amount due by the note's maturity date.

¶ 5 BMO filed a complaint seeking foreclosure against nine of the properties as well as money damages for breach of the note. After IKE answered, BMO moved for summary judgment. Attached to the motion for summary judgment was the affidavit of Vickie Wolfe, a vice president of BMO. In the affidavit, Wolfe provided statements that supported the introduction of attached documents under the business records exception to the hearsay rule. Those documents included IKE's payment history and the amount due on the note. In its response to the motion for summary judgment, IKE did not challenge the evidentiary foundation

laid by Wolfe's affidavit.

¶ 6 The court granted BMO's motion for summary judgment. It entered a judgment of foreclosure against the properties, ordering that the properties be sold to satisfy the \$1,131,595.70 that IKE owed BMO on the note.

¶ 7 IKE filed a motion to vacate summary judgment. The trial court allowed IKE to depose Wolfe. At the deposition, Wolfe testified about the computerized record-keeping system utilized by BMO. IKE filed an amended motion to vacate summary judgment, arguing that Wolfe lacked personal knowledge of BMO's computerized payment system. The trial court denied that motion, finding that Wolfe's affidavit contained matters within her knowledge.

¶ 8 The sheriff of Will County conducted a judicial sale of eight of the nine parcels, selling them together as one package. BMO purchased the properties with a bid of \$381,988. BMO moved to confirm the judicial sale. Attached to its motion were appraisals of the sold parcels, valuing them at \$460,000. IKE responded to the motion, arguing that the sold parcels were worth more than the amount due on the loans and requesting that a deficiency judgment not be entered. The response was not supported by any evidence establishing the value of the parcels.

¶ 9 The trial court confirmed the judicial sale and entered a deficiency judgment in the amount of \$1,011,656.13 against IKE. The Isaacsons were dismissed without prejudice from the foreclosure counts and the deficiency judgment because of ongoing bankruptcy proceedings.

¶ 10 IKE filed a motion to reconsider, attached to which was the affidavit of real estate agent David Roth, who valued the properties at \$1,228,000. The court denied the motion, finding that the opinion of Roth should have been obtained and presented to the court prior to confirmation of sale. Because Roth's opinion was not introduced prior to the confirmation, the court held that IKE had waived all arguments regarding the value of the parcels. IKE appeals.

¶ 11

## ANALYSIS

¶ 12

### I. Wolfe Affidavit

¶ 13

IKE first argues that Wolfe's affidavit attached to BMO's motion for summary judgment failed to establish a sufficient foundation to support the business records attached to the motion. According to IKE, Wolfe's deposition testimony contradicted the averments made in her affidavit. IKE urges us to strike the contradictory portions of Wolfe's affidavit. It argues that without those contradictory portions, the attached business records were not supported by a proper foundation, and the court should not have considered them. It further argues that without the business records, the court should have denied the motion for summary judgment.

¶ 14

To admit documents into evidence under the business records exception to the hearsay rule, the proponent must lay a foundation that the records were made (1) in the regular course of business; and (2) at or near the time of event or occurrence. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 23; Ill. R. Evid. 803(6) (eff. Apr. 26, 2012). A sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005). The identity of the person who created the record need not be known for the business record to be admissible. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 102. The ultimate issue is whether the foundation establishes that the record is sufficiently trustworthy to justify introduction into evidence. *Id.* ¶ 100. Whether a sufficient foundation has been laid to make business records admissible is reviewed for an abuse of discretion. *Id.* ¶ 81.

¶ 15

We conclude that the uncontradicted portions of Wolfe's affidavit laid a sufficient foundation to support the attached documents as business records. The affidavit is a substitute

for testimony and must meet the same requirements as competent testimony. *Avdic*, 2014 IL App (1st) 121759, ¶ 22.

¶ 16 Wolfe's affidavit stated that she was generally familiar with how BMO keeps its books and records and was BMO's custodian of records for IKE's file. Illinois Supreme Court Rule 191 (eff. July 1, 2002) requires that affidavits supporting a motion for summary judgment must be made upon the personal knowledge of their affiants. The affidavit went on to state that BMO maintains records of all sums loaned to a borrower and any payments the borrower makes to the account. BMO employees update the payment records in the regular course of business and at or near the time payment is made. The computer system regularly computes interest on the account. The computer records referenced by Wolfe's affidavit asserted that IKE failed to make the payments required by the note and alleged a specific unpaid balance.

¶ 17 Even if we were to strike the allegedly contradicted facts noted in IKE's brief, the above facts were uncontradicted by Wolfe's deposition testimony and were sufficient to support the introduction of the attached documents as business records. They established that Wolfe was sufficiently familiar with BMO's record keeping to lay a foundation for the business records. In addition, the facts established that the records were made in the ordinary course of business and were created at or near the time the event—payment—occurred. Because Wolfe's affidavit laid a proper foundation for the business records, the court did not err by granting BMO's motion for summary judgment.

¶ 18 **II. Judicial Sale**

¶ 19 Pursuant to section 1508 of the Illinois Mortgage Foreclosure Law (Foreclosure Law), the court shall confirm a judicial sale unless: (1) proper notice of the sale was not given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was

otherwise not done. 735 ILCS 5/15-1508(b) (West 2012). IKE argues that justice was not done because the eight properties were sold as a whole rather than individually and that the sale price of \$381,988 was unconscionable. We reject both claims.

¶ 20 As to the collective nature of the sale, the mortgage agreement specifically provided that BMO "shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales." In addition, section 1507(d) of the Foreclosure Law provides, "If the real estate which is the subject of a judgment of foreclosure is susceptible of division, the court *may* order it to be sold as necessary to satisfy the judgment." (Emphasis added.) 735 ILCS 5/15-1507(d) (West 2012). Neither the contract nor the statutory language required the court to sell the properties individually.

¶ 21 If IKE wanted the properties sold individually, it should have so moved either prior to the sale or, at the very latest, at the hearing to confirm the sale. Instead, IKE waited until after the court confirmed the sale to argue that the sale was improper. As a result it waived any opportunity to have the properties sold individually. See *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 36 ("A court is well within its authority to not disrupt a judicial sale, especially one that has already been approved after a hearing, because of a party's negligence in not making its arguments sooner.").

¶ 22 IKE also challenges the sale price as unconscionable. The properties sold for \$381,988. BMO's appraisal of the properties valued them at \$460,000. IKE's appraisal valued the properties at \$1,228,000. A court has the discretion to disapprove a judicial sale where the bid is so inadequate that it shocks the conscience. *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 8 (2006). However, a sale may be upheld even where the foreclosure price does not match the estimated value of the property. *Id.* It is well-acknowledged that a forced sale does not usually

bring full value. *World Savings & Loan Ass'n v. Amerus Bank*, 317 Ill. App. 3d 772, 780-81 (2000). Generally, mere inadequacy of price alone is not sufficient to set aside a judicial sale. *Illini Federal Savings & Loan Ass'n v. Doering*, 162 Ill. App. 3d 768, 771 (1987). Rather, unless there is evidence of fraud or other irregularity in the foreclosure proceedings, inadequacy of price alone is not sufficient to set aside a judicial sale. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 35.

¶ 23 Here, there is no evidence that the foreclosure proceedings were plagued by any irregularities. In addition, IKE did not present evidence of the properties' value until after the judicial sale was confirmed, thereby waiving its right to contest the price. *Sewickley*, 2012 IL App (1st) 112977, ¶ 36. We therefore rely on BMO's appraisal price of \$460,000. We cannot say that the sale price of \$381,988 was so inadequate as to shock the conscience.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.