

No. 1-15-1669

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BAYVIEW LOAN SERVICING, LLC,)	
)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of Cook County,
)	
v.)	
)	
ROBERT SIMMONS and KAREN SIMMONS,)	
)	No. 08 CH 39559
Defendants-Appellants,)	
)	
(and)	
)	
Karim Shakir; Unknown Owners; and Non-Record)	
Claimants)	Honorable
)	Robert E. Senechalle,
Defendants).)	Judge Presiding.
)	

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's judgment affirmed where (1) the appellate court had jurisdiction to review the orders in a foreclosure case following the circuit court's entry of an order confirming the sale and its entry of a Rule 304(a) finding; (2) summary judgment was properly granted in favor of plaintiff where it established a *prima facie* case of foreclosure that was not rebutted; (3) the court did not err in denying defendants' motion to vacate the summary judgment where the plaintiff provided proper service and notice of the summary judgment motion prior to the hearing;

and (4) the court did not abuse its discretion by confirming the sale where defendants failed to establish that justice was not done.

¶ 2 Plaintiff Bayview Loan Servicing, LLC (Bayview) filed a complaint for foreclosure against defendants Robert and Karen Simmons (the Simmonses), Karim Shakir, Unknown Owners, and Non-Record Claimants, pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2008)). In response to this complaint, the Simmonses filed an answer, affirmative defenses, counterclaims, cross claims, and a third party action. The circuit court subsequently granted summary judgment in favor of Bayview, and the property at issue was sold at a judicial sale. Following the court's confirmation of the sale, the Simmonses filed a motion to reconsider. In its order denying the motion to reconsider, the circuit court made a Rule 304(a) finding. The Simmonses now appeal several of the orders entered during the course of the foreclosure proceedings. They first assert that this court lacks jurisdiction to hear the appeal. In the alternative, they argue that the circuit court: (1) erred in entering summary judgment in favor of Bayview; (2) abused its discretion by denying their motion to vacate the order granting summary judgment; and (3) abused its discretion in confirming the sale of the property at issue. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 A. Bayview's Complaint to Foreclose Mortgage

¶ 5 On October 22, 2008, Bayview filed its complaint to foreclose mortgage against the defendants with respect to the property commonly known as 6341-6343 South Western Avenue in Chicago, Illinois (Property). The complaint alleged that Harim Shakir (Shakir), as the owner of the Property, executed a note and mortgage on the Property in the amount of \$596,000 to InterBay Funding, LLC (InterBay) on November 27, 2006. According to the complaint, Shakir had failed to make payments on the loan from July 2008 through the date of filing. The complaint

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also listed Bayview as the "owner and legal holder of the Note, Mortgage and indebtedness" and the Simmonses as "other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated." Bayview later clarified its inclusion of the Simmonses, explaining that they were named as defendants in the action as a result of "Notice[s] of Lien of Real Estate" against Shakir and which were, according to the complaint, subordinate to the mortgage. The notices included three separate liens, each recorded on November 27, 2007, for \$74,500, \$990,000, and \$178,344, respectively.

¶ 6 Copies of the mortgage and note were attached to the complaint. The mortgage listed Shakir as the mortgagor/borrower and InterBay as the mortgagee/lender. Both the mortgage and the note were signed by Shakir and notarized on November 27, 2006. The assignment of mortgage from InterBay to Bayview, dated and notarized on March 23, 2007, and recorded on May 3, 2007, was also attached to the complaint.

¶ 7 B. The Simmonses' Answer, Affirmative Defenses, and Additional Claims

¶ 8 After receiving various extensions of time to file a response, on August 19, 2009, through their attorneys at the Brooks Law Firm, the Simmonses filed their "Answer, Affirmative Defense, Counterclaim[,] Cross Claim and Third Party Action." In their answer, the Simmonses stated that they had "insufficient knowledge with which to admit or deny " and demanded "strict proof" of a majority of Bayview's allegations, including: that the mortgage, note, and assignment of the mortgage were attached to the complaint; that Shakir was the mortgagor and the Property was the mortgaged real estate at issue; that Shakir was in default of his loan because he had failed to pay his monthly installments since July 2008; and that Bayview had capacity to bring suit as the legal holder of the note, mortgage, and the indebtedness. The Simmonses explicitly denied that Shakir was the present owner of the Property and that their interest in the Property

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was inferior to Bayview's interest. They also admitted to having caused the notices of real estate liens addressed in the complaint to be recorded but again denied that their interest in the Property was inferior to Bayview's.

¶ 9 Two affirmative defenses were raised by the Simmonses: (1) they had a superior right to title because their interest in the Property predated Bayview's interest and Bayview had "constructive, if not actual, notice" of their interest; and (2) the deed between them and Shakir was obtained by fraud and was therefore void.

¶ 10 The "counterclaim[,] cross claim, and third party action" (collectively, counterclaim) was brought against Bayview and Shakir, and added as third parties Karis A. Bilal (Bilal), InterBay, Jermaine Manning (Manning), and three businesses associated with Shakir and Manning.¹ The counterclaim alleged a "conspiracy to defraud the Simmonses in connection with a mortgage rescue scheme designed to skim off the substantial equity in the subject property and to divest the Simmonses of ownership." The Simmonses sought "a declaration that they are the true and proper owners of the subject property and that their interest is superior to that of Bayview Loan Servicing, LLC."

¶ 11 We summarize the allegations in the Simmonses' counterclaim to the extent necessary for a full understanding of the present appeal. Essentially, the Simmonses alleged that they had owned the Property since 1996 and, in December 1996, "took out a loan with LaSalle Bank in the amount of \$365,000," secured by a mortgage against the Property. In January 2006, LaSalle Bank began a mortgage foreclosure action against the Simmonses after the Simmonses fell behind in their loan payments. Wishing to retain ownership of the Property, the Simmonses began seeking alternative means of paying off the loan to LaSalle Bank. In July 2006, the

¹ Shakir, Bilal, Manning, and the businesses listed as parties in the Simmonses' counterclaim are not parties to this appeal.

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Simmons met Bilal, an attorney who offered to represent them in their foreclosure and said "he knew some 'foreclosure experts' who could assist them in paying off the LaSalle Bank loan." They retained Bilal, who eventually introduced them to Shakir and Manning. According to the counterclaim, Shakir and Manning described a financial arrangement that "involved the Simmons executing a deed of the property at Manning and Shakir's direction. Even though the Simmons were to execute a deed, the Simmons would still be the owners of the property, which would be documented with a Land Contract." Under this arrangement, the Simmons would be given the opportunity to be put back on the Property's title "at anytime within 12 months after repaying the debt." The Simmons attended a closing of the transaction, "wherein the Simmons executed a Deed in favor of Shakir to hold until such time as the Simmons repaid the debt as indicated" in a "Land Contract Agreement" between the Simmons and Shakir, dated November 28, 2006 (Land Contract). After the closing, the Simmons alleged various occurrences of fraudulent actions by Bilal, Shakir, and Manning. The Simmons claimed that they attempted to buy back the Property from Shakir, according to the terms of the Land Contract, but he refused to accept tender. The Simmons then alleged that "[i]t now appears that Shakir executed a mortgage on the subject property in favor of [InterBay] Funding, LLC in the amount of \$596,000." Both the Land Contract and the November 27, 2006 closing statement were attached to the answer.

¶ 12 The Simmons' counterclaim consisted of eight separate counts, three of which were based on the Simmons' argument that they had a superior interest in the Property: count I, equitable mortgage, in which they sought to void the deed conveyed to Shakir and the subsequent mortgage lien executed by Shakir in favor of InterBay; count II, quiet title, in which they claimed they were "entitled to a conveyance of full title of the subject property, free and

clear of the lien of InterBay or Bayview in exchange for \$596,000"; and count VII, specific performance, in which they demanded that Shakir convey the Property to them as dictated by the Land Contract.² The remaining counts, which were brought against Bilal, Manning, Shakir, or their businesses and in which the Simmonses requested relief in the form of monetary damages, were based on the alleged "conspiracy to defraud the Simmonses."

¶ 13 On January 11, 2010, Bayview answered the Simmonses' counterclaim and also filed its own affirmative defenses. Bayview denied that the Simmonses owned the Property and claimed insufficient information to admit or deny the majority of the Simmonses' remaining factual allegations. Bayview also denied the majority of the Simmonses' legal allegations and the substantive allegations of the Simmonses' affirmative defenses, including that the debt between the Simmonses and Shakir was an equitable mortgage, that Shakir did not own the Property, and that it was on notice of Shakir's limited interest in the Property.

¶ 14 In its affirmative defenses, Bayview argued that: (1) the Simmonses would be unjustly enriched if Bayview's interest in the Property was voided because the Simmonses' LaSalle Bank mortgage was paid off by the InterBay loan; (2) the Simmonses should return to Bayview the \$155,135.05 they received in proceeds from the November 27, 2006 closing with Shakir because that money came from the InterBay loan; and (3) because the Simmonses were prepared to tender \$596,000 to Shakir in accordance with the Land Contract, "the Simmonses should tender the \$596,000 to [Bayview] to satisfy the InterBay Mortgage."

² The only parties to the present appeal are Bayview and the Simmonses. Therefore, we will not detail the procedural aspects of the Simmonses' counterclaim with respect to Bilal or Shakir as they have no bearing on this appeal.

¶ 15 C. Bayview's Motion for Summary Judgment as to Count II of the Counterclaim

¶ 16 On August 25, 2010, Bayview moved for summary judgment as to count II of the Simmonses' counterclaim. Bayview argued that there was no genuine issue of material fact because Bayview, as the assignee of InterBay, was "willing to release its mortgage in accordance with the terms set forth" by the Simmonses in count II, and asked that the court enter an order entitling the Simmonses to purchase the Property from Bayview for \$596,000, "in exchange for a release of the [InterBay] Mortgage."

¶ 17 Alternatively, Bayview sought summary judgment as to its affirmative defense of equitable subrogation. Bayview explained that the Simmonses benefitted from the InterBay mortgage because Shakir paid off the LaSalle Bank mortgage with the InterBay loan. "[InterBay] intended and understood that by paying off the LaSalle Mortgage it would have a first priority lien on the Property" and, therefore, the Simmonses would be unjustly enriched if Bayview's interest in the Property was voided. Bayview concluded that "[p]ursuant to principles of equitable subrogation, [InterBay]'s [and therefore Bayview's] interest in the Property is superior" to the Simmonses' interest.

¶ 18 Although the circuit court set a briefing schedule, the Simmonses did not respond to Bayview's motion for summary judgment. On November 4, 2010, the court granted Bayview's motion for summary judgment "as to Bayview's affirmative defense of equitable subrogation," finding that Bayview's mortgage "in the original amount of \$596,000 is a first priority lien on the subject property in an amount not less than \$366,369.83 and without prejudice as to [Bayview's] right to the remainder due on [Bayview's] loan and mortgage as to be determined."

¶ 19 D. Bayview's June 4, 2013 Summary Judgment Motion

¶ 20 On June 4, 2013, Bayview filed an amended notice of motion, indicating it was filing motions for summary judgment as to Shakir and the Simmonses, a motion for judgment of foreclosure and sale, and a motion to appoint a selling officer, all set to be heard on August 15, 2013. The proof of service Bayview filed with its amended notice of motion showed that it was sent to the Simmonses in the care of Lloyd Brooks, at the Brooks Law Firm, 18110 Dixie Highway Suite 2N, Homewood, Illinois 60430.

¶ 21 In its motion against the Simmonses, Bayview alleged that their answer failed "to raise any genuine issue of material fact" and further alleged that there was "no question" that it was entitled to judgment "as a matter of law." More specifically, Bayview argued that the facts in the case were undisputed and that the "undisputed facts clearly evidence that Karim Shakir is in default with respect to the Mortgage and Note at issue," entitling Bayview to judgment in its favor. In the alternative, Bayview argued that the circuit court should find it had a first priority interest in the Property based on its affirmative defense of equitable subrogation, noting that the court had granted its prior motion for summary judgment as to that affirmative defense.

¶ 22 Bayview supported its motion with an affidavit from Robert D. Repass, the senior vice president of Bayview. In his affidavit, Repass averred that he reviewed and was familiar with the loan documents at issue and with Shakir's payment history on the loan, and that "true and correct" copies of said payment history, the mortgage, and the note were attached as exhibits to the affidavit. Repass verified that Shakir had been in default on his loan since July 2008.

¶ 23 A certificate of service was filed by one of Bayview's attorneys, indicating that on August 8, 2013, at 5 p.m., she deposited a copy of the notice of motion and all of the accompanying motions, including the motion for summary judgment against the Simmonses, "in a U.S. Post

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Office Box in Decatur, Illinois, enclosed in an envelope with proper postage prepaid." According to the certificate, the notice was sent to the Simmonses "c/o Lloyd Brooks, The Brooks Law Firm, 18110 Dixie Highway Ste. 2N, Homewood, IL 60430."

¶ 24 On August 15, 2013, the circuit court granted summary judgment in favor of Bayview and against Shakir and the Simmonses. The court also entered a judgment of foreclosure and sale finding that Bayview was owed a total of \$1,414,734.98; that Bayview's mortgage "is a good, valid and subsisting first lien" on the Property; and that "any lien of or claim to said property by any other party to this proceeding is junior and inferior to the above mentioned liens, and has no right to the proceeds of any Mortgage sale until said liens, and all the costs of this suit have been paid and satisfied in full."

¶ 25 On September 11, 2013, the Simmonses' counsel filed a notice of a law firm change of name and address, showing that the firm name had changed from "The Brooks Law Firm" to the "Consumer Legal Group, P.C.", and the firm had moved to 474 Lincoln Mall Drive, Suite 410, Matteson, Illinois 60443. That same day, the Simmonses' counsel had also moved to vacate the August 15, 2013 summary judgment order and the judgment of foreclosure entered against them. According to the motion to vacate, counsel for the Simmonses had not received notice of Bayview's June 4, 2013 motion for summary judgment or the August 15, 2013, hearing until the day of the hearing, "as the notices were sent to Defense counsel's old mailing address." Therefore, said counsel had not appeared at the hearing on August 15. The Simmonses further alleged that their counsel had called Bayview's counsel and "was informed that there was an error with the courtesy copies and that the motion was not presented." Accordingly, the Simmonses asked the court to vacate the judgments because they were presented in violation of notice requirements and the Simmonses' due process rights.

¶ 26 The judicial sale of the Property, which was set to take place on November 18, 2013, was stayed by the circuit court "pending the result" on the Simmonses' motion to vacate. On February 18, 2014, the court denied the motion to vacate and lifted the stay of the sale.

¶ 27 E. Motion to Approve and Confirm Sale

¶ 28 The Property was sold for \$172,000 to Bayview as the highest bidder, leaving an *in rem* deficiency of \$1,314,472.20 on the mortgage. On March 14, 2014, Bayview moved to approve and confirm the judicial sale of the Property.

¶ 29 The Simmonses filed an objection to Bayview's motion to confirm, arguing that justice was not being done because they were the true owners of the Property. More specifically, they claimed that they did not receive notice of the summary judgment motion until the day of the hearing "due to Bayview mailing the notice to the wrong address," and that they were misinformed by Bayview's counsel who stated that the motion would not go forward that day. The Simmonses additionally contended that the action arose "out of the fraudulent conduct" of Shakir and Bilal, and noted that they intervened in the foreclosure action based on "that fraud" and Bayview's alleged constructive notice of it. In support of their motion, the Simmonses attached the Attorney Registration and Disciplinary Commission (ARDC) Hearing Board's (Board) report and recommendation based on a hearing conducted with respect to multiple attorney-client interactions of Bilal, including his interactions with the Simmonses. The report, filed on November 29, 2012, shows that the Board recommended Bilal be disbarred. The Simmonses also attached the ARDC's order disbaring Bilal as of November 20, 2013.

¶ 30 The circuit court entered an order confirming the sale of the Property on July 1, 2014. The following October, the Simmonses filed a motion to reconsider the judgment of foreclosure and the order confirming the sale, once again arguing that: (1) the Simmonses' attorneys did not

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receive notice of the hearing on Bayview's summary judgment motion until the day of the hearing, and was informed by Bayview's counsel that the motion would not be presented that day; and (2) Shakir fraudulently obtained the mortgage loan on the Property.

¶ 31 Bayview responded to the Simmonses' motion to reconsider by arguing the motion was "wholly without merit." As to notice, Bayview claimed it had complied with the necessary requirements by mailing notice of the motion to the Simmonses' counsel on August 8, 2015. Bayview also argued that the Simmonses had asserted fraud since filing their first pleading in February 2009 and that, "[a]s such, there is no question the [Simmonses] have had every opportunity to raise the issues of fraud and have not been prevented from doing so by [Bayview] or otherwise."

¶ 32 On April 9, 2015, Robert Simmons filed his affidavit in the circuit court, attesting to the fraudulent actions taken by Bilal, Shakir, and Manning as alleged in the counterclaim. That same day, the circuit court denied the Simmonses' motion to reconsider and "made a finding that there is no just reason for delaying either enforcement or appeal of this ruling on the Motion to Reconsider pursuant [to] Illinois Supreme Court Rule 304(a)."

¶ 33 On May 8, 2015, the Simmonses filed their notice of appeal from: (1) the August 15, 2013 order of summary judgment and judgment of foreclosure against them; (2) the February 18, 2014 order denying their motion to vacate the order of summary judgment; (3) the July 1, 2014 order confirming the sale; and (4) the April 9, 2015 denial of their motion to reconsider.

¶ 34 JURISDICTION

¶ 35 Initially, the Simmonses explain that they "find themselves in the peculiar situation of requesting this Court dismiss their appeal" because they believe we lack jurisdiction to consider the appeal. We disagree.

¶ 36 Generally, an appeal may only be taken from a final order which disposed of every "claim"—*i.e.*, 'any right, liability or matter raised in an action.' " *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 339 (2001) (quoting *Marsh v. Evangelical Covenant Church*, 138 Ill. 2d 458, 465 (1990)). If an order does not resolve all claims, then " 'it must contain an express finding that there is no just reason for delaying an appeal. Otherwise, the order is not appealable.' " *John G. Phillips*, 197 Ill. 2d at 339 (quoting *Marsh*, 138 Ill. 2d at 465); see also Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010) (allowing an appeal to be taken from a final judgment as to fewer than all parties or claims in an action if the trial court makes an express written finding "that there is no just reason for delaying either enforcement or appeal or both"). In addition, Rule 304(a) requires an order to "be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof." (Internal quotation marks omitted.) *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 25. To determine whether an appellate court has jurisdiction, we use a two-part test, asking: "(1) whether the order is 'final' and (2) whether there is any just reason for delaying the appeal." *AT&T v. Lyons & Pinner Electric Co.*, 2014 IL App (2d) 130577, ¶ 20. Therefore, we must first determine whether the judgment that contained the Rule 304(a) language was final.

¶ 37 Contrary to the Simmonses' contention, there is no question that an order approving a foreclosure sale is a final order for the purposes of Rule 304(a).³ See *In re Marriage of Verdung*,

³ Although the circuit court technically entered the 304(a) language on its denial of the Simmonses' motion to reconsider the judgment of foreclosure and the order approving the sale, we note that postjudgment motions are "closely related" to the underlying judgment. *Montano v. City of Chicago*, 308 Ill. App. 3d 618, 621 (1st Dist. 1999). Moreover, while "the 304(a) language which by its terms refers only to the post-judgment order," the motion to reconsider in this case, "may also be considered as intended to cover the underlying [] judgment so as to make that order, which was final but unappealable, appealable." *Enblom v. Milwaukee Golf Development*, 227 Ill. App. 3d 623, 628 (1st Dist. 1992). Accordingly, we will consider whether the circuit court properly entered the 304(a) language with respect to the underlying judgments of the motion to reconsider, specifically the motion to approve sale.

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126 Ill. 2d 542, 555 (1989) (noting that a foreclosure judgment is final and appealable when the circuit court "enters an order approving the sale and directing the distribution of the property"); *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 21 (same). In the present case, the circuit court entered the order approving and confirming the sale on July 1, 2014. The Property's deed was executed in favor of Bayview two days later, and recorded on August 7, 2014.⁴ Accordingly, the order approving the Property's sale was a final order.

¶ 38 The question then becomes whether the circuit court erred in entering the Rule 304(a) finding, or, in other words, in finding there was no just reason to delay the appeal. The purpose of requiring circuit courts to add Rule 304(a) language to final orders that have not disposed of all parties or claims is due to our supreme court's "often-stated policy against piecemeal appeals." *John G. Phillips*, 197 Ill. 2d at 340-42. To determine whether there is no just reason to delay the appeal, a court must consider the following factors:

"(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made [appealable]; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims,

⁴ The date the deed was executed and recorded were both taken from the Cook County recorder of deeds online records, "of which we can take judicial notice." *Wells Fargo Bank. N.A. v. Simpson*, 2015 IL App (1st) 142925 ¶ 4 n.1.

expense, and the like. [Citations.]" (Internal quotation marks omitted.)

AT&T, 2014 IL App (2d) 130577, ¶ 22.

¶ 39 A circuit court's decision to enter a Rule 304(a) finding is reviewed for an abuse of discretion. *Id.* ¶ 24. " 'An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable [citation] or where no reasonable person would agree with the view adopted by the trial court.' " *Id.* (quoting *People v. Becker*, 239 Ill. 2d 215, 234 (2010)).

¶ 40 The Simmonses claim that the above factors favor finding the circuit court abused its discretion in finding no just reason for delay. The Simmonses, as the appellants, have the burden to "provide a sufficiently complete record to support a claim of error, and in the absence of that record we must presume that the trial court's order conformed with the law and had a sufficient factual basis." *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 15 (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). However, we first note that the circuit court denied the Simmonses' motion to reconsider and made its Rule 304(a) findings after a hearing, but no transcript or bystander's report of the proceeding was included with the record on appeal. See Ill. S. Ct. R. 323(c) (allowing the filing of a bystander's report if no verbatim transcript of court proceedings is available). Without a transcript of the proceeding, we have no record of who requested the Rule 304(a) finding, what arguments were presented to the circuit court, or what its reasons were for making the finding. The circuit court's April 9, 2015 order gives us no further insight to its rationale. The circuit court has wide discretion to determine whether there is any just reason for delay, particularly in light of the "miscellaneous factors" it can consider, including "delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. [Citations.]" (Internal quotation marks omitted.) *AT&T*, 2014 IL App (2d) 130577, ¶ 22. Under these circumstances, we cannot say that its Rule 304(a) finding

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was arbitrary, fanciful, or unreasonable. Accordingly, we have jurisdiction to address the Simmonses' remaining substantive claims.

¶ 41

ANALYSIS

¶ 42 Turning to the substance of the appeal, the Simmonses contend the circuit court: (1) erred in entering summary judgment in favor of Bayview; (2) abused its discretion by denying their motion to vacate its grant of summary judgment; and (3) abused its discretion in approving the Property's sale.

¶ 43

A. Summary Judgment

¶ 44 The Simmonses claim that Bayview's June 4, 2013 summary judgment motion should not have been granted because it "was not sufficiently supported." We disagree. A grant of summary judgment is appropriate " 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14 (quoting 735 ILCS 5/2-1005(c) (West 2010)). Summary judgment "is a drastic measure that should be allowed only 'when the right of the moving party is clear and free from doubt.' " *Marquette Bank v. Heartland Bank & Trust Co.*, 2015 IL App (1st) 142627, ¶ 10 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). At the same time, the party opposing summary judgment must present some factual basis, more than "mere speculation or conjecture," to support his claim. *Feedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶¶ 25-26. An entry of summary judgment is reviewed *de novo*. *Korzen*, 2013 IL App (1st) 130380, ¶ 14.

¶ 45 In a mortgage foreclosure action, to "establish a *prima facie* case of foreclosure in accordance with section 15-1504" of the Foreclosure Law, the plaintiff must introduce evidence

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of the mortgage and promissory note. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67. At that point, the burden of proof shifts to the defendants to prove any affirmative defenses they may have. *Id.*

¶ 46 Bayview successfully established a *prima facie* case of foreclosure by attaching both the mortgage and the note to its complaint. Furthermore, in its complaint, Bayview alleged that: the mortgage, note, and assignment of the mortgage were attached to the complaint; Shakir was the mortgagor and the Property was the mortgaged real estate at issue; Shakir was in default of his loan because he had failed to pay his monthly installments since July 2008; and Bayview had capacity to bring suit as the legal holder of the note, mortgage, and the indebtedness. In response to each of these allegations, the Simmonses claimed insufficient knowledge to admit or deny. However, "[a]n allegation not explicitly denied is admitted unless: (1) the allegation is about damages, (2) the party states that it lacks knowledge of the matter sufficient to form a belief and supports this statement with an affidavit, or (3) the party has not had the chance to deny the allegation." *Korzen*, 2013 IL App (1st) 130380, ¶ 37. "The failure of a defendant to explicitly deny a specific allegation in the complaint will be considered a judicial admission and will dispense with the need of submitting proof on the issue." *Id.* (quoting *Gowdy v. Richter*, 20 Ill. App. 3d 514, 520 (1974)). Although the Simmonses claimed they had insufficient knowledge to admit or deny the above allegations, they did not support their statements with a want of knowledge affidavit and those allegations—that Shakir took out a mortgage on the Property and defaulted on the loan, and that Bayview is the holder of the mortgage—are, therefore, admitted. Bayview also supported its motion with an affidavit from Robert Repass, the senior vice president of Bayview, pursuant to Illinois Supreme Court Rule 191 (eff. July 1, 2002) (requiring affidavits in support of a motion for summary judgment to be made on the personal knowledge

of the affiants and to "set forth with particularity the facts upon which the claim *** is based"). Moreover, contrary to the Simmonses' claim that Bayview's lien, "if valid, is inferior" to theirs, we note that the circuit court ruled in its order dated November 4, 2010—which the Simmonses have not appealed—that Bayview's mortgage was a "first priority lien" on the Property.

¶ 47 Finally, despite the Simmonses' denial that Shakir was the Property's owner, a denial does not create a genuine issue of material fact sufficient to prevent summary judgment. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. The Simmonses presented no evidence supporting their contention that Bayview's mortgage was invalid or inferior to their alleged claim on the Property, or that summary judgment was substantively improper. We acknowledge that the Simmonses argued in their motion to vacate that summary judgment was improper, but they did not support their opposition to summary judgment with substantive evidence. Instead, they focused their argument on the alleged impropriety regarding the hearing, an argument the circuit court found to be meritless. Once Bayview established a *prima facie* case of foreclosure, the burden was on the Simmonses to prove their affirmative defenses (*Adeyiga*, 2014 IL App (1st) 131252, ¶ 67), which they failed to do. We find that the circuit court properly granted summary judgment.

¶ 48 **B. Motion to Vacate**

¶ 49 The Simmonses also contend that the circuit court abused its discretion in denying their motion to vacate its August 15, 2013 order awarding summary judgment in favor of Bayview because they did not have "a fair opportunity to respond" to the summary judgment motion. The Simmonses argue that Bayview violated the requirement that it mail its notice of motion "within 3 days of filing," citing Circuit Court Rule 2.1 (Cook Co. Cir. Ct. R. 2.1 (Aug. 21, 2000)). The Simmonses further contend that Bayview "effectively nullified the little notice given" to them

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"by stating it was not going forward on the motion." They conclude that "[t]he trial court should have vacated the summary judgment upon learning of Bayview's deception."

¶ 50 The Simmonses filed their motion to vacate pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2010)), the purpose of which is "to alert the trial court to errors it has committed and to afford it an opportunity to correct those errors." *Steiner v. Eckert*, 2013 IL App (2d) 121290, ¶ 16 (citing *Regas v. Associated Radiologists, Ltd.*, 230 Ill. App. 3d 959, 967 (1st Dist. 1992)). The judgment on a section 2-1203 motion is reviewed for an abuse of discretion. *Steiner*, 2013 IL App (2d) 121290, ¶ 16.

¶ 51 Specifically with respect to notice, "[t]here is a presumption of delivery if sent by regular mail directed to a proper address. Where the rules provide for that method of service, notice is thus satisfied by the use of regular mail. [Citations.]" (Internal quotation marks omitted.) *BAC Home Loans Servicing, LP v. Popa*, 2015 IL App (1st) 142053, ¶ 22.

¶ 52 Here, it appears that the Simmonses are relying on Circuit Court Rule 2.1(d), which is titled, "Motion in the Law Division, County Department, other than discovery motions" and requires notice of a motion to be served on "all parties *** within three (3) court days of the filing of the motion." However, Bayview's initial complaint and all subsequent pleadings and motions in this case have been filed in the chancery division of the Cook County circuit court. Filings in the chancery division are governed by Cook County Circuit Court Rule 2.1(c)(i), which provides that notice "shall be given in the manner and to the persons described in Supreme Court Rule 11" and that, if sent by mail, "shall be deposited in a United States Post Office or Post Office Box on or before the fifth (5th) court day preceding the hearing of the motion." Cook Co. Cir. Ct. R. 2.1(c)(i) (Aug. 21, 2000).

¶ 53 Illinois Supreme Court Rule 11 dictates that documents may be served by mail by "[d]epositing them in a United States post office or post office box, enclosed in an envelope, plainly addressed to the attorney at the attorney's business address, *** with postage fully prepaid." Ill. S. Ct. R. 11(b)(3) (eff. July 1, 2013). Our supreme court rules further provide that service is proved in the case of service by mail "by certificate of the attorney, *** who deposited the document in the mail *** stating the time and place of mailing ***, the complete address which appeared on the envelope or package, and the fact that proper postage *** was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Jan 4, 2013).

¶ 54 The record shows that on June 4, 2013, Bayview filed its notice of the summary judgment motion and other motions, setting the hearing for August 15, 2013. In addition, one of Bayview's attorneys filed a certificate of service in accordance with Supreme Court Rule 12(b)(3), certifying that on August 8, 2013, at 5 p.m., she deposited a copy of the notice of motion and all of the accompanying motions "in a U.S. Post Office Box in Decatur, Illinois, enclosed in an envelope with proper postage prepaid." According to the certificate, the notice was sent to the Simmonses "c/o Lloyd Brooks, The Brooks Law Firm, 18110 Dixie Highway Ste. 2N, Homewood, IL 60430," which was, at that time, the Brooks Law Firm's address of record. Accordingly, Bayview properly served notice of its motion for summary judgment on the Simmonses.

¶ 55 Substantively, the sole argument made by the Simmonses in their motion to vacate was based on the alleged insufficient notice of the hearing and their allegations that, when contacted on the morning of the summary judgment hearing, Bayview's counsel informed the Simmonses' counsel that the motion would not be presented that day. Bayview suggests in its appellate brief that it responded to the Simmonses' motion to vacate, but no response is contained in the record.

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Moreover, the record on appeal does not include a report of proceedings from the day that the Simmonses' motion to vacate was set to be heard. Again, the Simmonses had the burden to provide us with a "sufficiently complete record to support a claim of error." *Hansen*, 2016 IL App (1st) 143720, ¶ 15 (citing *Foutch*, 99 Ill. 2d 391-92). "In the absence of a report of the proceeding, a reviewing court must assume the circuit court heard sufficient evidence upon which to base its decision." *Regas*, 230 Ill. App. 3d at 967. Without a transcript of the proceeding on the day the Simmonses presented their motion to vacate, we have no idea what transpired before the court.

¶ 56 The only material in the record that addresses this issue is the Simmonses' motion itself, which is unsupported by any evidence or affidavit. We also note that, in the motion, the Simmonses did not address the substance of the summary judgment motion beyond alleging that "anomalies" existed in the case "that may not have been brought to this Court's attention." The motion to vacate was the Simmonses' opportunity to "alert the trial court to errors it has committed and to afford it an opportunity to correct those errors" (*Steiner*, 2013 IL App (2d) 121290, ¶ 16), and yet the Simmonses failed to substantively address why the court had erred in granting summary judgment in favor of Bayview. We must presume, absent any other indication from the record, that the circuit court reviewed the Simmonses' motion, considered any additional arguments that may have presented at the hearing, and ultimately concluded that the motion lacked merit. Furthermore, as addressed above, we find no error in, and therefore no reason to disturb, the circuit court's order granting Bayview's motion for summary judgment. Accordingly, we cannot say that the circuit court abused its discretion in denying the Simmonses' motion to vacate.

¶ 57

C. Order Approving the Sale

¶ 58 Finally, the Simmonses claim that the circuit court erred in granting Bayview's motion to approve and confirm the Property's sale. The circuit court's authority to confirm a judicial sale is set forth specifically under section 15-1508(b) of the Foreclosure Law, which provides:

"Upon motion and notice, in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court *shall* then enter an order confirming the sale." (Emphasis added.) 735 ILCS 5/15-1508(b) (West 2012).

¶ 59 The plain language of section 15-1508(b) expressly indicates that the court "shall" confirm a sale upon a hearing, "unless it finds that at least one of the foregoing four grounds for denial exists." See *Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶ 28. Our supreme court has recognized that, after a section 15-1508(b) motion to confirm a judicial sale is filed, "the court's discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b)." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18 (citing *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 179 (2008)). In describing the court's discretion under section 15-1508(b), the *McCluskey* court noted that "the contours of that discretion have been described as 'not a mere arbitrary discretion but must be exercised in accordance with established principles of law.'" *McCluskey*, 2013 IL 115469, ¶ 19 (quoting *Shultz v. Milburn*, 366 Ill. 400, 403 (1937)). The supreme court noted that "[e]ach step in the foreclosure action seeks to 'terminate legal and

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equitable interests in real estate' [citation], while additionally providing specific built-in protections to the borrower's equity in the property." *McCluskey*, 2013 IL 115469, ¶ 24 (quoting 735 ILCS 5/15-1203 (West 2010)). To this end, the court explained, "once a motion to confirm the sale under section 15- 1508(b) has been filed, the court has discretion to see that justice has been done, but the balance of interests has shifted between the parties. At this stage of the proceedings, objections to the confirmation under section 15-1508(b)(iv) cannot be based simply on a meritorious pleading defense to the underlying foreclosure complaint." *Id.* ¶ 25. Therefore, in addition to showing a meritorious defense, the borrower must also show that justice was not otherwise done "because the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *Id.* ¶ 26. We review the approval of a judicial sale for an abuse of discretion. *Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 60 The Simmonses present two grounds for why the court abused its discretion in granting the motion to confirm sale. First, they contend that Bayview's alleged "dishonest behavior" regarding the August 15, 2013 summary judgment hearing prevented them from presenting their defense or protecting their property interest. Second, the Simmonses again argue that "[f]raud abounds in the underlying action" due to the conduct of Shakir and Bilal and that, because their fraud claims had not been tried, the Property's sale should have been vacated.

¶ 61 The Simmonses have failed to establish either that Bayview prevented them from raising their meritorious defenses earlier in the proceedings by fraud or that they had equitable defenses. The Simmonses alleged impropriety on the part of Bayview's counsel regarding the August 15, 2013 summary judgment hearing in multiple filings, including their motion to vacate the August

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15, 2013 summary judgment, their objection to Bayview's motion to confirm the sale, and their motion to reconsider the confirmation of sale. No evidence in support of these contentions is contained in the record on appeal. The circuit court heard these allegations and found them to be meritless, and the Simmonses have provided this court with no reason to think otherwise.

¶ 62 Additionally, the Simmonses have alleged their fraud-based defenses with respect to the actions taken by Shakir, Bilal, and Manning since filing their answer and counterclaim in February 2009. Notably, the only evidence offered by the Simmonses to corroborate their allegations of fraud was the Land Contract and the November 27, 2006 closing statement, neither of which, taken alone, is evidence of wrongdoing. Conversely, the Simmonses failed to utilize any one of multiple opportunities they had to provide the circuit court with further support their counterclaim. They did not respond to Bayview's initial summary judgment motion as to count II of their counterclaim, which resulted in a finding that Bayview had a priority lien on the Property. Similarly, the Simmonses did not seek to establish or support the merit of their counterclaim in their motion to vacate the summary judgment. Admittedly, the Simmonses offered further evidence in support of their counterclaim when they objected to the confirmation of sale, at which point they attached the ARDC Board report and Bilal's disbarment order.⁵ However, this evidence was insufficient to show a meritorious defense, let alone establish that Bayview prevented the Simmonses from raising such a defense sooner or that the Simmonses had equitable defenses. *McCluskey*, 2013 IL 115469, ¶ 26. Finally, we note that Robert Simmons eventually filed a Rule 191 affidavit, attesting to the allegations of the fraudulent actions taken by Bilal, Shakir, and Manning. However, it was not filed until the day the court denied the

⁵ We acknowledge that the Simmonses also attached the initial ARDC complaint against Bilal, filed August 31, 2009, to their response to Bilal's combined motion to dismiss and for summary judgment. Although the complaint initiated the Board proceedings against Bilal, the ARDC complaint is not enough to support their claims of fraud against Bilal, and this attachment does not change our analysis.

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Simmons' motion to reconsider the confirmation of sale. Even when considered with the ARDC Board report and Bilal's disbarment order, this evidence is insufficient to show that justice was not done.

¶ 63 We once again note that this court was not provided with a record from the proceeding on the day the sale was confirmed and, as we explained previously, in the absence of a complete record, "we must presume that the trial court's order conformed with the law and had a sufficient factual basis." *Hansen*, 2016 IL App (1st) 143720, ¶ 15 (citing *Foutch*, 99 Ill. 2d at 391-92). In light of the above, we cannot say that the circuit court's confirmation of the sale of the Property was an abuse of discretion.

¶ 64

CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 66 Affirmed.