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FIRST DIVISION
December 19, 2016

No. 1-15-3132
2016 IL App (1st) 153132-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF THE WEST S/B/M)	
AMERUS BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 09 CH 30417
FIUNORT PORTO A/K/A FINORT BORTO,)	
)	Honorable Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.
)	
STEVEN YOUSEPH, BANK OF AMERICA,)	
N.A., SUCCESSOR BY MERGER TO LASALLE)	
BANK, N.A., UNKNOWN HEIRS AND)	
LEGATEES OF FIUNORT PORTO, IF ANY,)	
UNKOWN OWNERS AND NON RECORD)	
CLAIMANTS,)	
)	
Defendants.)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court properly granted motion for partial summary judgment in favor of plaintiff and did not abuse its discretion in confirming the sale of the subject property.

¶ 2 Defendant, Finort Borto (Borto), appeals the circuit court's grant of partial summary judgment in favor of plaintiff, Bank of the West S/B/M Amerus Bank (plaintiff), and the circuit court's order confirming the judicial sale of the subject property. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 On August 27, 2009, plaintiff filed its complaint to foreclose its mortgage on the property located at 6320 N. LaCrosse Avenue in Chicago (subject property). The complaint identified the mortgagor as Steven Youseph, and Borto as the present owner of the subject property.

¶ 5 On April 28, 2010, Youseph and Borto filed their answers and affirmative defenses to plaintiff's complaint to foreclose mortgage. They stated that Borto was the current owner of the subject property, that Borto never gave a mortgage on the subject property to plaintiff or borrowed any funds from plaintiff, and that plaintiff cannot attempt to enforce its unsecured mortgage against a non-mortgagor or non-debtor like Borto.

¶ 6 On January 29, 2013, plaintiff filed a motion for partial summary judgment on defendant's affirmative defenses. The motion stated that on August 30, 1996, Youseph entered into a home equity line of credit with Amerus Bank which has since merged with plaintiff, and that the line of credit was secured by a mortgage. In 1999, Youseph sold the secured property to Borto. Youseph testified in his deposition that he paid off the line of credit, but plaintiff contended that Youseph did not close the line of credit and mistakenly believed that paying the loan down to zero closed the account. Plaintiff alleged that Youseph continued to borrow from plaintiff after the sale of the property based on a mistaken belief that after the sale the loans were unsecured. Plaintiff also contended that Borto had knowledge of the mortgage because Youseph disclosed to Borto that there was a line of credit mortgage. Plaintiff argued that Borto's assertion

that he was not the debtor is not a defense, and that his recourse is instead against his grantor.

Attached to the motion was Youseph's deposition in which he testified that he had paid the line of credit down to zero by the time he sold the property to Borto. However, thereafter he received checks in the mail from plaintiff which he deposited, but he did not think those checks had anything to do with the line of credit. Borto testified in his deposition that he had no idea there was any line of credit on the property until he got notice of the foreclosure proceedings.

¶ 7 On March 4, 2013, Youseph filed for bankruptcy. Accordingly, the circuit court stayed the proceedings on the motion for partial summary judgment against Youseph.

¶ 8 On May 17, 2013, Borto filed his response to the motion for partial summary judgment, stating that there were two genuine issues of material fact: (1) whether Youseph requested that plaintiff close the subject line of credit and release the mortgage when he paid it off fully, and (2) whether the subject mortgage was properly recorded.

¶ 9 On June 10, 2013, plaintiff's motion for partial summary judgment was granted in favor of plaintiff and against Borto.

¶ 10 On April 1, 2015, plaintiff filed a motion for judgment for foreclosure and sale of the subject property, which the circuit court granted. On April 18, 2015, Borto filed a motion to vacate the judgment, arguing that plaintiff's counsel, Pierce & Associates, P.C., appeared on behalf of both plaintiff and Bank of America, a defendant in this case, which violated the Illinois Rules of Professional Conduct.

¶ 11 Thereafter, plaintiff's counsel filed a motion to withdraw as counsel for Bank of America, which was granted, and the circuit court denied Borto's motion to vacate the judgment of foreclosure and sale of the subject property.

¶ 12 On July 17, 2015, Borto filed an emergency motion to stay the sale of the subject property, contending that a buyer had made an offer to purchase the subject property, which was accepted, and therefore the sheriff's sale should be stayed. Borto also indicated that he had requested a payoff letter from plaintiff. The circuit court granted Borto's motion.

¶ 13 The record indicates that a foreclosure sale was held on September 8, 2015, and that the proceeds of the sale were more than sufficient to satisfy plaintiff's judgment and that there remained a surplus of \$208,391.93.

¶ 14 On September 15, 2015, Borto filed a motion to compel the issuance of a payoff letter, arguing that from July 2015 to August 25, 2015, he had requested a payoff letter from Pierce & Associates, plaintiff's counsel, to pay off the judgment of foreclosure, but that counsel had refused to issue the payoff letter "stating many different reasons, including the need to contact [plaintiff]." Emails were attached to the motion. Borto stated that a closing was scheduled for August 25, 2015, but that because there was not a payoff letter, the sale did not close. Borto claimed that the purchaser terminated the contract based on the failure to secure a payoff letter. Borto also claimed that the foreclosure sale subsequently occurred without notice to him, and that the property was sold to a third party. Borto requested the circuit court to set aside the sheriff's sale held on September 8, 2015, and to order plaintiff to issue its payoff letter.

¶ 15 On September 23, 2015, plaintiff filed a motion for an order approving the sale and distribution of the subject property.

¶ 16 On October 22, 2015, the circuit court held a hearing on Borto's emergency motion to compel the issuance of a payoff letter. The circuit court stated that it is only the mortgagor who has the statutory right to receive a payoff letter, not the owner of the property. So the circuit court could not find a statutory basis for the court to order plaintiff to issue a payoff letter to a

non-mortgagor. The circuit court issued an order denying Borto's emergency motion to compel the issuance of a payoff letter.

¶ 17 On November 6, 2015, a hearing was held on whether the court should confirm the sale. Borto argued that justice was not otherwise done in the sale because he had buyers that were willing to pay more than what was paid at the sheriff's sale, but the deals did not go through because of plaintiff's failure to issue a payoff letter. The circuit court noted that plaintiff's failure to issue a payoff letter may have been a "bad business decision" but stated that there was no recourse for making bad business decisions. The circuit court noted that it was "somewhat unusual in this market that those offers to purchase wouldn't have been welcomed by the bank," but that it did "think that the bank's prerogative is to make a bad business decision * * * even if we all concede it is one." The circuit court entered an order approving the sale of the subject property. Borto now appeals.

¶ 18 ANALYSIS

¶ 19 On appeal, Borto contends that (1) summary judgment should not have been entered against him on his affirmative defenses, and (2) the circuit court erred in confirming the sale of the subject property. First, Borto contends that summary judgment should not have been entered against him on his affirmative defenses because the recording of a quitclaim deed to Borto in 1998, coupled with the payout of Youseph's indebtedness, "placed plaintiff on notice of the sale of its collateral under Illinois law," and that plaintiff then had the option of cancelling the credit line. Borto contends on appeal that plaintiff failed to cancel the credit line, and therefore accepted the risk of Youseph's draws on an unsecured line of credit, and thus liability should not have attached to Borto.

¶ 20 As plaintiff notes in its response brief, Borto is raising the argument that because plaintiff failed to cancel the credit line, it accepted the risk of Youseph's draws on an unsecured line of credit for the first time on appeal. Borto submitted as his affirmative defenses to plaintiff's complaint for mortgage foreclosure that he was the current owner of the subject property, that he never gave a mortgage on the subject property to plaintiff or borrowed any funds from plaintiff, and that plaintiff could not attempt to enforce its unsecured mortgage against a non-mortgagee or non-debtor like Borto. Plaintiff then filed a motion for partial summary judgment on defendant's affirmative defenses, stating that Borto knew there was a line of credit on the subject property because Youseph testified in his deposition that he disclosed it to Borto. Plaintiff also stated that while Youseph mistakenly believed that paying his loan down to zero closed the line of credit, it did not, and Youseph continued to borrow from plaintiff under the mistaken belief that the loans were unsecured.

¶ 21 In his response to plaintiff's motion for summary judgment against him, Borto argued that summary judgment was improper because there were two genuine issues of material fact: (1) whether Youseph requested that plaintiff close the subject line of credit and release the mortgage when he paid it off fully, and (2) whether the subject mortgage was properly recorded. The circuit court granted plaintiff's motion for partial summary judgment against Borto, and Borto did not file a motion to reconsider.

¶ 22 Borto is now arguing on appeal that, based on *In re Zecevic*, 344 BR 572 (N.D. Ill. 2006), plaintiff's failure to cancel the credit line after it had been paid down to zero resulted in an unsecured credit line, thus relieving him of liability. Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24. Allowing a party to change its

theory of the case on appeal would weaken the adversarial process and likely prejudice the opposing party. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Borto admits that while "a major thrust of the summary judgment [pleadings] dealt with whether Yoseph [*sic*] requested cancellation of the line of credit," the undisputed facts and the "overarching theory raised by Borto in this appeal were before the circuit court." We disagree. Borto has forfeited any claim regarding plaintiff's failure to cancel the line of credit resulting in an unsecured line of credit. While Borto made other arguments regarding an unsecured line of credit, those arguments focused on Yoseph's failure to cancel the line of credit, not plaintiff's.

¶ 23 Forfeiture aside, we note that Borto cites to a federal district court case in support of his new argument, and holdings of federal district courts are not precedential or binding on this court. See *County of Du Page v. Lake Street Spa, Inc.*, 395 Ill. App. 3d 110, 122 (2009).

¶ 24 Borto's second argument on appeal is that the circuit court abused its discretion in confirming the sale of the subject property because plaintiff refused to provide him with a payoff letter, which resulted in his failure to close on the sale of the property. Plaintiff responds that because Borto had no right to request a payoff demand, the court properly confirmed the sale. We ultimately find that the circuit court did not abuse its discretion, but express concern over plaintiff's refusal to issue a payoff letter to Borto.

¶ 25 Confirmation of judicial sales is governed by section 15-1508 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508 (West 2012)) (Foreclosure Law). Subsection (b) of that statute provides that upon motion and notice, the court shall confirm the sale unless the court finds that: (i) proper notice of the sale was not given; (ii) the terms of the sale were unconscionable; (iii) the sale was conducted fraudulently; or (iv) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2012). These provisions have been construed as conferring on

circuit courts broad discretion in approving or disapproving judicial sales. *Household Bank F.S.B. v. Lewis*, 229 Ill. 2d 173, 179 (2008). "A court's decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion." *Id.* An abuse of discretion occurs when the circuit court's ruling is unreasonable, fanciful, arbitrary, or where no reasonable person would agree with the view of the circuit court. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 26 Plaintiff contends that according to section 1505.5 of the Foreclosure Law, Borto lacked authority to make a payoff demand because he was not the mortgagor (or its authorized agent). See 735 ILCS 5/15-1505.5(a) (West 2012) ("In a foreclosure action subject to this Article, on the written demand of a mortgagor or the mortgagor's authorized agent (which shall include the mortgagor's name, the mortgaged property's address, and the mortgage account or loan number), a mortgagee or the mortgagee's authorized agent shall prepare and deliver an accurate statement of the total outstanding balance of the mortgagor's obligation that would be required to satisfy the obligation in full as of the date of preparation * * * .")¹ Borto's argument, however, is not that the circuit court should have compelled plaintiff to issue a payoff demand, but rather that the circuit court abused its discretion in confirming the sale because justice was not otherwise done where plaintiff interfered in Borto's private sale of the subject property by refusing to issue a payoff demand to Borto. Borto contends that the private sale was for \$390,000, whereas the sheriff's sale only realized \$270,000.

¶ 27 While we agree with Borto that plaintiff's refusal to issue the payoff letter seems unreasonable and against its best interests, we can find no authority upon which to find that the circuit court abused its discretion in confirming the sheriff's sale of the subject property in this case. The circuit court, by confirming the sale, found that the sale did not represent a set of

¹ Neither party argues on appeal that Borto was the mortgagor's agent.

circumstances where "justice was not otherwise done." 735 ILCS 5/15-1508(b)(iv) (West 2012). It is well settled that inadequacy of sales price alone is an insufficient basis for a circuit court to not confirm a judicial sale. *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 43. "That factor should be combined with some other facts, such as evidence of fraud, mistake or violation of the duty of the officer conducting the sale, to afford relief." *Id.* In *Commercial Credit Loans v. Espinoza*, 293 Ill. App. 3d 915, 927 (1997), the circuit court relied on the fact that the mortgagor's repeated requests about what steps to take to redeem the property went unanswered, coupled with a sales price that represented one-sixth of the property's proven fair market value, in its decision to deny confirmation of sale. This court found that the circuit court did not abuse its discretion in making that decision. *Id.* Here, the circumstances are different. The plaintiff's failure to issue the payoff letter was purportedly based on its understanding that only the mortgagor could request a payoff letter. Furthermore, the realized price, while less than the private sale price, was certainly not one-sixth of the amount. While we agree with the circuit court that plaintiff's conduct may have amounted to a "poor business decision," we simply cannot find authority upon which to base a finding the circuit court abused its discretion in confirming the judicial sale despite the existence of a questionable business decision that allegedly frustrated a private sale to a third party. We are unwilling to find that the circuit court's decision to confirm the judicial sale was unreasonable, fanciful or arbitrary, or that no reasonable person could agree with the decision.

¶ 28

CONCLUSION

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

¶ 30 Affirmed.