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2017 IL App (3d) 170218-U

Order filed December 18, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

CHRISTIANA TRUST, a Division of	)	Appeal from the Circuit Court
Wilmington Savings Fund Society, Fsb,	)	of the 21st Judicial Circuit,
as Trustee for Stanwich Mortgage Loan	)	Kankakee County, Illinois,
Trust, Series 2013-2,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	Appeal No. 3-17-0218
BARY D. CRUZ-REYES aka Bary D. Cruz;	)	Circuit No. 13-CH-124
NICOLE B. CRUZ, CREDITORS	)	
COLLECTION BUREAU, INC.,	)	
Unknown Owners and Non-Record Claimants,	)	
	)	
Defendants.	)	
	)	Honorable Kenneth A. Leshen and
(Bary D. Cruz-Reyes and Nicole B. Cruz,	)	Honorable Thomas W. Cunnington,
Defendants-Appellants).	)	Judges, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Lytton and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 Held: The trial court properly granted summary judgment in favor of plaintiff where the defendants failed to file a counteraffidavit or any other evidence contesting the facts set forth in the motion for summary judgment. The trial court did not abuse its discretion by approving the foreclosure sale where the defendants failed to

prove by a preponderance of the evidence that the subject property was sold in violation of the HAMP guidelines.

¶ 2 The defendants, Bary D. Cruz-Reyes and Nicole B. Cruz, appeal from the trial court's March 22, 2016, order granting summary judgment in favor of the plaintiff, Christiana Trust, as trustee for Stanwich Mortgage Loan Trust, Series 2013-2, and the trial court's March 6, 2017, order approving the report of sale and distribution following the judgment of foreclosure.

¶ 3 **FACTS**

¶ 4 The defendants, Bary D. Cruz-Reyes and Nicole B. Cruz (defendants), entered into a mortgage with Wells Fargo Bank, N.A. (Wells Fargo). The defendants failed to make payments on the mortgage. On March 12, 2013, Wells Fargo filed a complaint to foreclose the mortgage.

¶ 5 On March 17, 2015, Wells Fargo filed a motion to substitute the party plaintiff from Wells Fargo to "Christiana Trust, A Division Of Wilmington Savings Fund Society, Fsb, As Trustee For Stanwich Mortgage Loan Trust, Series 2013-2" (plaintiff).

¶ 6 On August 19, 2015, defendants filed a motion to dismiss pursuant to section 2-619(9) of the Code of Civil Procedure (735 ILCS 5/2-619(9) (West 2014)), alleging, in relevant part:

1. "[O]n March 27, 2014[,] Carrington Mortgage Services approved a trial period plan under the Home Affordable Modification Program."
2. "The Defendants made the first payment required by the trial period plan in a timely manner."
3. "Subsequent to said first payment, the Defendants received a letter from Selene Finance stating that the servicing of the loan was transferred from Carrington Mortgage Services to Selene Finance."
4. "Selene Finance was unaware of the trial period plan under the Home Affordable Modification Program."

In the motion to dismiss, defendants argued that their approval for the trial plan under the federal Home Affordable Modification Program (HAMP) was an affirmative matter defeating the complaint. On October 7, 2015, the trial court denied defendants' motion to dismiss and granted Wells Fargo's motion to substitute Christiana Trust as the party plaintiff.<sup>1</sup>

¶ 7 On October 21, 2015, defendants filed an answer to the complaint and an affirmative defense, in which defendants once again raised the HAMP loan modification agreement as a defense.

¶ 8 On December 10, 2015, plaintiff filed motions for judgment of foreclosure and for summary judgment. Plaintiff attached supporting affidavits and exhibits containing copies of the mortgage and note. On December 31, 2015, defendants filed a response to the motion for summary judgment, arguing that their approval for a trial plan under HAMP defeated the complaint. Defendants did not attach any supporting affidavits or evidence to their response.

¶ 9 Following a hearing, on March 22, 2016, the trial court issued the court's docket order decision granting plaintiff's motion for summary judgment. In the order, the court stated as follows:

“The Court finds that Defendants have not properly contested the factual allegations in the Plaintiff's summary judgment motion. The Defendants contend that they were approved for a loan modification by Carrington Mortgage Services and made an initial payment. However, this assertion is only made through an allegation in an affirmative defense signed only by Defendants['] attorney and Defendants' Response to Plaintiff's Motion For Summary Judgment is unsupported by either documentary evidence or an [a]ffidavit.”

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<sup>1</sup>On January 22, 2016, the trial court entered a written order granting Wells Fargo's motion to substitute Christiana Trust as the party plaintiff.

¶ 10 On April 20, 2016, defendants filed a motion to reconsider asserting the trial court failed to consider defendants’ affirmative defense when the court granted the motion for summary judgment. The trial court denied defendants’ motion to reconsider on June 1, 2016. On June 1, 2016, the trial court entered a judgment of foreclosure and sale.

¶ 11 On September 7, 2016, the property was sold at a sheriff’s sale. On October 31, 2016, plaintiff filed a motion requesting an order approving the report of sale and distribution, an order of possession, and a deficiency judgment against defendant, Bary Cruz-Reyes. On November 23, 2016, defendants filed a response to the motion to confirm sale, arguing that “justice was not done” by allowing the sale to be confirmed under subsection 15-1508(b) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1508(b) (West 2016).

¶ 12 On February 1, 2017, the trial court held a hearing on plaintiff’s motion requesting approval of the sale. At the hearing, defendants’ counsel handed the trial judge three exhibits to support defendants’ claim that defendants were approved to participate in a trial plan under HAMP. Plaintiff’s counsel objected to the exhibits on the ground that he had never seen the exhibits and the exhibits were not attached to defendants’ response brief.<sup>2</sup> The trial court took the matter under advisement and stated the court would issue a written decision.

¶ 13 On March 6, 2017, the trial court issued a memorandum of decision granting plaintiff’s motion requesting approval of the sale. In the court’s March 6, 2017, decision, the court noted that the exhibits presented by defendants’ counsel at the February 1, 2017, hearing on the motion to confirm the sale was the first time “any semblance of evidence has been provided to the court that defendant[s] had been accepted into the HAMP loan modification program.” The court stated as follows regarding the exhibits:

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<sup>2</sup>The aforementioned exhibits were not made a part of the record or included in defendants’ appendix on appeal.

“There was no foundation laid for the photocopies marked as defendants['] Exhibit 1, 2, and 3 to be admitted and no motion to have them admitted was made. Even assuming the exhibits have been properly admitted, although they do indicate an acceptance of the defendants into the HAMP program on March 27, 2014, the document indicates that there were to have been three timely monthly payments made in the amount of \$1,578 each on May 1, 2014, June 1, 2014, and July 1, 2014. Exhibit 1 states that this is a trial period plan and is the first step in qualifying for a permanent loan modification. Exhibit 2, dated July 9, 2015, indicates only the first payment of \$1,578 was acknowledged to have been made on May 2, 2014, (which was a day after the due date). There was no proof or argument that the second payment was made which would have been due on June 1, 2014, well before the letter to the defendant[s] that the servicer had been changed. That letter, (Exhibit 3,) from Selene Finance was dated June 16, 2014, which was 15 days after the second payment was due.”

The court noted that defendants did not present any evidence regarding whether Selene Finance was provided a copy of the HAMP agreement or, if so, what their response was. In the court's March 6, 2017, decision, the court concluded that the court could not find that justice had not been done because defendants failed to provide evidence of their agreement and proof of compliance with the trial period plan under the HAMP agreement at the time of the summary judgment motion, or in defendants' objection to the motion for confirmation of sale. Further the court stated, “[e]ven if this evidence had been presented, this defense has been raised and re-raised multiple times and this court has determined that the defense is not a viable defense to defeat Plaintiff's action for foreclosure.” On March 6, 2017, the court entered an order

“approving [the] report of sale and distribution, confirming sale and order of possession.” On March 29, 2017, defendants filed a notice of appeal.

¶ 14

#### ANALYSIS

¶ 15

In this appeal, defendants argue the trial court erred by granting summary judgment in favor of plaintiff, which resulted in a judgment of foreclosure and the sale of defendants’ property. Further, defendants argue the trial court erred by confirming and approving the report of the sale of the property and the final distribution of the proceeds of the sale.

¶ 16

Conversely, plaintiff argues that the trial court properly awarded plaintiff summary judgment, as defendants could not rest on their pleading to create a genuine issue of material fact. Further, plaintiff asserts the trial court properly confirmed the foreclosure sale, as defendants failed to prove by a preponderance of the evidence that the subject property was sold in violation of HAMP guidelines.

¶ 17

#### I. The Trial Court’s March 22, 2016, Summary Judgment Order

¶ 18

Defendants argue the trial court erred by granting summary judgment in favor of plaintiff on the basis that defendants’ response to the motion for summary judgment was unsupported by either documentary evidence or an affidavit. Defendants argue that plaintiff, as the movant for summary judgment, had the burden of establishing plaintiff was entitled to judgment as a matter of law and contradicting defendants’ affirmative defense.

¶ 19

Plaintiff counters that defendants had the burden of proving their affirmative defense and because defendants failed to do so, plaintiff had no obligation to disprove defendants’ affirmative defense.

¶ 20

Summary judgment should be granted only where the pleadings, depositions and admissions on file, together with any affidavits and exhibits, when viewed in the light most

favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336, 339 (2010). Once the party moving for summary judgment supplies facts that, if not contradicted, would justify summary judgment in the movant's favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470 (2001). We review summary judgment orders *de novo*. *Id.* at 470-71.

¶ 21 In a foreclosure action, once plaintiff establishes a *prima facie* case by introducing evidence of the mortgage and promissory note, the burden shifts to the defendant to prove any affirmative defenses. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67.

¶ 22 Here, plaintiff sought entry of summary judgment and a judgment of foreclosure against defendants and supported the motions with affidavits required by Illinois Supreme Court Rules 113 and 114. See Ill. S. Ct. R. 113 (eff. May 1, 2013); Ill. S. Ct. R. 114 (eff. May 1, 2013). Based on our review of plaintiff's motions and the supporting affidavits and attachments, we conclude that plaintiff set forth a *prima facie* case for foreclosure as a matter of law. The burden then shifted to defendants to establish that a genuine issue of material fact existed that precluded summary judgment. *PNC Bank, National Association v. Zubel*, 2014 IL App (1st) 130976, ¶ 18.

¶ 23 Where a party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the party opposing the motion does not submit any counteraffidavits, the material facts set forth in the movant's affidavits must be taken as true. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49, *as supplemented* (Dec. 16, 2013). In this case, defendants did not submit any counteraffidavits or other evidence in response to the summary

judgment motion. In fact, defendants did not submit “any semblance of evidence” related to their affirmative defense until after the court granted summary judgment and after the property had already been sold. Even more problematic, the three exhibits that defendants’ counsel presented to the trial court at the February 1, 2017, hearing were not made a part of the record and were not provided for this court in defendants’ appendix on appeal.<sup>3</sup> Based on this record, we conclude that defendants’ affirmative defense, as pleaded without adequate supporting documentation, does not create a genuine issue of material fact to survive summary judgment.

¶ 24 We also reject defendants’ argument on appeal that plaintiff had the burden of disproving defendants’ affirmative defense, even though defendants submitted no evidence in support of their affirmative defense in the summary judgment proceeding. It is well established that the party asserting an affirmative defense has the burden of proving the affirmative defense. *Baylor v. Thiess*, 2 Ill. App. 3d 582, 584 (1971). Therefore, we affirm the trial court’s March 22, 2016, order.

¶ 25 II. The Trial Court’s March 6, 2017, Order Approving Sale

¶ 26 Next, defendants argue the trial court should not have confirmed the sale because “justice was not done” pursuant to subsection 15-1508(b)(iv) of the Code (735 ILCS 5/15-1508(b)(iv) (West 2016)). Citing to subsection 15-1508(d-5) of the Code (735 ILCS 5/15-1508(d-5) (West 2016)), defendants assert that at the time of the sale, defendants were approved for a trial plan under HAMP, and their home was sold in material violation of the HAMP guidelines. Conversely, plaintiff argues that the trial court properly confirmed the sale because defendants’ contentions are unsupported by evidence.

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<sup>3</sup>The appellant has the duty to provide on appeal a sufficiently complete record of the lower court proceedings to support the appellant’s claim of error. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 16.



¶ 27 Subsection 15-1508(b) of the Code confers broad discretion on trial courts to decide whether or not to approve judicial sales. 735 ILCS 5/15-1508(b) (West 2016); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 4 (2010). We will not disturb that exercise of discretion absent an abuse of discretion. *Id.* Under subsection 15-1508(b)(iv), upon motion and notice, a court shall enter an order confirming the sale unless the court finds that “justice was otherwise not done.” 735 ILCS 5/15-1508(b)(iv) (West 2016). The party seeking to oppose a judicial sale bears the burden of proving that sufficient grounds exist to disapprove the judicial sale. *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 35.

¶ 28 In this case, although defendants produced some evidence to show that defendants initially participated in a trial period plan and made the first required payment, defendants did not produce evidence establishing defendants completed the remaining steps necessary to qualify for a permanent loan modification. On these facts, we cannot say that no reasonable person could find that defendants failed to satisfy their burden of proof, as the trial court did. *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 24 (an abuse of discretion occurs only where no reasonable person would take the same view).

¶ 29 Additionally, defendants assert that the sale cannot be confirmed because their property was sold in material violation of HAMP’s requirements for proceeding to a judicial sale in violation of subsection 15-1508(d-5) of the Code. See 735 ILCS 5/15-1508(d-5) (West 2016). Subsection 15-1508(d-5) states, in relevant part:

“The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the

evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale."

735 ILCS 5/15-1508(d-5) (West 2016).

¶ 30 On appeal, defendants contest the trial court's ruling on the basis that "there was no evidence that the Defendants *did not* fulfill any of the requirements of said program." (Emphasis added.) However, as plaintiff argues, this is yet another instance of defendants misplacing the burden of proof. The plain language of subsection 15-1508(d-5) places the burden on defendants to prove by a preponderance of the evidence that defendants applied for assistance under HAMP and that the property was sold in material violation of HAMP's requirements for proceeding to a judicial sale. 735 ILCS 5/15-1508(d-5) (West 2016).

¶ 31 Defendants failed to satisfy their burden due to their failure to supply any evidence to show compliance with the trial plan under HAMP. Defendants have also not identified any provision of the HAMP guidelines that was violated, either in the trial court or on appeal. See *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 72 (defendants' failure to properly raise the issue of which HAMP guideline was violated in the trial court resulted in waiver on appeal). Accordingly, the trial court did not abuse the court's discretion in finding that defendants failed to satisfy their burden, and did not err in confirming the sale. We affirm the trial court's March 6, 2017, decision granting plaintiff's motion requesting an order approving

the report of sale and distribution, an order of possession, and for a deficiency judgment against defendant, Bary D. Cruz-Reyes.

¶ 32

CONCLUSION

¶ 33

The judgment of the circuit court of Kankakee County is affirmed.

¶ 34

Affirmed.