2018 IL App (1st) 170411-U

SIXTH DIVISION
March 9, 2018

No. 1-17-0411

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JP MORGAN CHASE BANK, N.A., Plaintiff-Appellee, v. SONIA S. ALFISCAR; LEONARD WISE; JP MORGAN CHASE BANK, N.A.; SHORELINE PARK CONDOMINIUM ASSOCIATION; UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants (Sonia S. Alfiscar and Leonard Wise, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 13 CH 28299 Honorable Freddrenna M. Lyle, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** Because the defendants in this mortgage foreclosure case presented only unsworn and conclusory arguments in opposition to the mortgagee's motion for confirmation of the judicial sale, this court has no basis upon which to reverse that order. Defendants' other contentions of error are without merit. Affirmed.

¶ 2 In 2003, defendant Sonia Alfiscar executed a mortgage and note on a condominium unit at 4970 North Marine Drive in Chicago with oneBank One, N.A. After Alfiscar failed to make

timely payments, oneBank One's successor, JP Morgan Chase Bank, N.A. (Chase), sued Alfiscar and a co-owner of the condominium, defendant Leonard Wise, to foreclose on the mortgage.

¶ 3 Alfiscar and Wise filed an answer denying every single allegation in Chase's complaint, and an appearance. The address listed on the defendants'[1] single-page joint appearance was the address of the condominium. The answer included seven affirmative defenses set forth merely as conclusory sentence fragments, such as "personal injury" and "illegal conversion of property." The defendants also filed a counterclaim accusing Chase of misconduct regarding its relationship with the defendant Shoreline Park Condominium Association, alleging (among other things) that the two entities' interactions created an environment which diminished property values of units in the condominium building. They also filed a jury demand.

¶ 4 Chase moved to dismiss the counterclaim and to strike the affirmative defenses pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2-615 (West 2014). The circuit court granted the motion, but granted the defendants leave to amend their pleadings. The defendants then filed an amended one-count counterclaim which alleged, among other things, that Chase violated the Fair Debt Collection Practices Act by "installing" a Chase employee on the condominium board. Chase again moved to strike the amended counterclaim pursuant to section 2-615. After the defendants failed to respond to that motion, the court dismissed the amended counterclaim with prejudice.

¶ 5 On September 30, 2015, Chase moved for summary judgment on its foreclosure complaint. The circuit court order setting the briefing schedule and hearing date on the motion indicates that both defendants were present in open court. Immediately following the motion for summary judgment in the record on appeal are the court's January 12, 2016 orders granting

[1]We will refer to Alfiscar and Wise as "defendants," noting that while the complaint names some other defendants, their involvement is not at issue in this appeal.

Chase summary judgment, and an order of foreclosure and sale. No response from the defendants appears in the record in the chronological position one would expect to find it.

¶ 6 On February 8, 2016, Chase, using different attorneys than those who were already representing it in the case, filed a motion to prove up a junior lien so that it would be properly accounted for and paid when the property was sold at auction. The junior lien related to a home equity line of credit and second mortgage which Alfiscar had also executed with Chase. The motion contains a sworn proof of service indicating that it was addressed to Alfiscar and sent to the property address.

¶ 7 On February 10, 2016, the defendants filed a motion to reconsider the summary judgment, arguing in a litany of conclusory assertions that, among other things, Chase withheld unspecified documentation, declined to modify the defendants' loan, and never acknowledged that a particular individual with whom the defendants were feuding worked for Chase. The defendants also objected to the case being resolved by summary judgment, which they contended violated their right to trial by jury. The motion was not verified or otherwise submitted under oath, and it contained no affidavits or evidentiary material whatsoever.

¶ 8 On February 26, 2016, the circuit court granted Chase's motion to prove up the value of the lien of the second mortgage it held on the property, finding that there was a $38,290.22 lien in a second priority position behind that of the main mortgage.

¶ 9 On March 1, 2016, while the defendants' motion to reconsider was still pending, Chase sent four separate notices of the judicial sale: one to each of the two defendants at the property address they specified on their appearance, and one to each of the two defendants at a post office box they listed on the motion to reconsider. Chase sent the additional notices to the post office box despite the fact that the defendants never filed a change of address notice with the court or

amended their original appearance so as to require service to the post office box. Chase submitted a sworn proof of service regarding its transmission of the notice. The notice advised that the sale would take place on April 14, 2016 at a specified time and location.

¶ 10 Chase then responded to the defendants' motion to reconsider. Chase's response set forth the procedural history of the case to date. It clearly indicated, on page one thereof, that the court had already dismissed the defendants' counterclaim with prejudice. In the response, Chase also advised the court that the defendants "appear to have filed" a response to the original motion for summary judgment in the form of a file-stamped pleading labeled "Motion to Deny Plaintiff's Motion for Default, Motion for Summary Judgment, Supreme Court Rule 114 Affidavit, and Motion for Entry of Judgment of Foreclosure and Sale, and then Proceed to Discovery and Jury Trial." Chase appended a copy of this "motion to deny" to its response to the defendants' motion to reconsider, but noted that the "motion to deny" did not appear anywhere in the "Court's docket." It appears that rather than file a response to Chase's motion for summary judgment as specified by the court's briefing schedule order, the defendants filed a procedurally improper "motion to deny" on the date their response to Chase's summary judgment was due. The defendants set the "motion to deny" for hearing on January 12, 2016, the same day the motion for summary judgment was to be heard following briefing.

¶ 11 The defendants' "motion to deny" was unverified and did not include any evidentiary material. It failed to address the mortgage delinquency in any way. It merely consisted of a series of vague and conclusory allegations to the effect that Chase's prove-up affidavit was inaccurate, and that Chase violated unspecified "US Federal and State of Illinois Banking Laws," presented unspecified false testimony, imposed "fake assessments and legal fees" and that there were criminal conspiracies between Chase and the condominium association.

¶ 12 On May 23, 2016, the circuit court denied the defendants' motion to reconsider. The defendants then filed a notice of appeal seeking review of the order of foreclosure and sale, but this court dismissed the appeal for lack of jurisdiction because the circuit court had yet to enter a final and appealable order.[2] See *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56 (1989) (holding that an order of foreclosure and sale is not a final or appealable order).

¶ 13 On September 29, 2016, Chase filed a motion to confirm the judicial sale, along with a selling officer's report indicating that the property was sold to a third-party bidder and that the sale resulted in a surplus over the mortgage delinquency. The selling officer's report did not, however, reflect any payment to satisfy Chase's proved-up second lien for its junior mortgage. The motion was accompanied by a sworn proof of service indicating that four copies were sent to both defendants at their post office box and the property address. Chase set the motion for a November 6, 2016, hearing.

¶ 14 The defendants moved to reschedule the hearing on Chase's motion, noting therein that they had never seen the sale documents until October 6 and would be in the Philippines on the November 6 hearing date. Chase then re-noticed its motion to confirm the sale for a November 2, 2016 hearing. Chase's amended motion included a revised selling officer's report which differed from the original in some respects. It reduced the amount "due under judgment" slightly, but included new charges of $42,642.26 for additional attorney fees incurred by Chase's special litigation counsel and unspecified additional attorney fees of $2,170. The net result was that the sale now resulted in a small deficiency owed by the defendants. Again, the motion was accompanied by a sworn proof of service showing four copies were sent to both defendants at both addresses.

[2] *JP Morgan Chase Bank v. Alfiscar*, Case No. 1-16-1481 (order of July 17, 2016).

¶ 15 On November 2, the circuit court entered an order setting the motion to confirm sale for November 17, particularly stating: "Plaintiff to try to provide basis for additional attorney fees in report of sale by 11-14-16." The order does not indicate whether defendants were present in court.

¶ 16 On November 10, Chase sent defendants a new notice of the November 17 hearing on its motion to confirm sale, accompanied by a proof of service in the now-familiar form. Included with this notice was another amended selling officer's report which differed from each of the two earlier versions. The second amended report reflected payment of Chase's junior lien in the amount of $42,642.26 (presumably increased from the original amount due to accrued interest), and excluded the $42,642.26 in attorney fees which had been included in the prior report, resulting in the same deficiency due from the defendants.

¶ 17 On November 17, 2016, the court set a briefing schedule on Chase's motion to confirm sale. The order is silent regarding whether defendants were present that day. However, the defendants' response to motion to confirm sale refers to "open discussion on 17 Nov 16" which "disclosed the order [establishing Chase's second lien] signed on 26 Feb 16 [which] had never been seen by defendants." The defendants' response also complained about lack of documentation and generally denied the accuracy of Chase's computations, denials again presented only through a series of unsworn conclusory statements. Chase replied, arguing that the defendants' response failed to address the criteria courts use to review confirmations of judicial sales, as outlined by our supreme court's recent decision in *Wells Fargo v. McCluskey*, 2013 IL 115469, ¶¶ 26.

¶ 18 On the set hearing date of January 13, 2017, the court continued Chase's motion until January 20, noting in an order that the defendants were handed a copy of Chase's reply in open

court. In the meantime, although the briefing permitted by the court's earlier order had been completed, the defendants filed a "reply" (actually, a sur-response) in opposition to confirmation of sale, without leave of court to do so. The sur-response asserted, among other things, that defendants had "never been provided" with any documents regarding the February 26, 2016 hearing to prove up the junior lien. Despite their persistent and repeated complaint about lack of notice of the prove-up of the junior lien, the defendants never contested that the amount determined by the court was arithmetically correct, and, more importantly, they never sought to vacate the order granting the second lien.

¶ 19 On January 20, 2017, the circuit court entered an order approving the report of sale and distribution, confirming the sale, approving the selling officer's report, and awarding possession to the third-party bidder, thus terminating the case. On February 16, 2017, the defendants filed a notice of appeal stating that they sought review only of the January 20, 2017 order confirming sale.

¶ 20 The defendants filed a *pro se* brief which this court struck on Chase's motion for numerous violations of Illinois Supreme Court Rules 341 and 342. The defendants then filed the amended brief which is now before us. Chase moved to strike that brief and dismiss the appeal, but this court denied that motion. The amended brief contains no copy of the notice of appeal, as required by Illinois Supreme Court Rule 342(a) (Ill. Sup. Ct. R. 342(a) (eff. Jan. 1, 1995)). It also contains an incomplete jurisdictional statement and no statement of facts summarizing the history of the case or the pleadings presented below with citations to the record, as required by Illinois Supreme Court Rule 341(h)(4) and 341 (h)(6) (eff. Jan. 1, 2016). The argument section of the brief essentially consists of bullet-point style statements of basic principles of law followed by citations to statutes, and statements such as "All of the hearings suggest that the

defendants have no case" and "That is why a jury trial is necessary to force the plaintiff to provide documents testimony and persons involved in open court to address these actions." Noting these deficiencies, Chase again asks us to strike the defendants' arguments and summarily affirm the judgment of the circuit court. Chase's characterization of the defendants' brief is apt, not only because of the various omissions in the brief, but because the brief is so confusingly drafted. The brief could well be stricken, and the appeal dismissed, for these violations. *Parkway Bank v. Korzen*, 2013 IL App (1st) 130380, ¶10. However, doing so is left to our discretion. The defendants are clearly frustrated and confused regarding the proper way to proceed with their claims, and unfortunately did not obtain assistance from any of the self-help agencies which assist defendants in foreclosure cases. Just as we did in *Korzen*, we find that resolving the case on the merits would provide guidance to lower courts and to the parties. *Id.* Also, the record is slim and we have the benefit of a cogent appellee's brief, so we will consider the appeal on the merits. See *Twardowski v. Holiday Hosp. Franchising, Inc*., 321 Ill. App. 3d 509, 511 (2001) (citing cases).

¶ 21 The defendants characterize their issues on appeal as whether: (1) the court provided a fair hearing; (2) certification and notice were properly done; (3) documents were withheld from defendants; and (4) fraud was used by plaintiff to foreclose. But the only issue properly before us, as framed by the defendants' notice of appeal, is whether the circuit court properly entered the order confirming sale.

¶ 22 Section 15–1508(b) of the Code governs confirmation of judicial sales following foreclosures. It 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 [of the sale] * * * 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." 735 ILCS 5/15–1508(b) (West 2014).

¶ 23 Defendants' appeal fails for a simple reason. As noted above, in the circuit court, the defendants opposed Chase's motions only by submitting unsworn arguments without any affidavits or properly authenticated documentation. To demonstrate that one of the triggering conditions was not fulfilled, the defendants were required to submit admissible evidentiary material, such as sworn affidavits or an affidavit from an expert real estate appraiser. *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 8-9 (2006). Defendants instead relied on their arguments which, in addition to complaints about lack of service of pleadings, were basically *ad hominem* attacks on Chase and one of its employees regarding tangential disputes involving Chase and the condominium association. These claims were not only not admissible evidence to attack the validity of the sale, they were not probative as to whether the sale was properly confirmed. See *Coley v. St. Bernard's Hospital*, 281 Ill. App. 3d 587, 593 (1996) ("It is true that the proposed second amended complaint is not evidence."); *Wilson v. Wilson*, 56 Ill. App. 2d 187, 194 (1965) ("The petition stands in lieu of a complaint and, although sworn to, is not evidence."). Additionally, we note that section 15-1508(c) of the Code requires a foreclosure defendant who claims she did not receive notice of a sale and wishes to challenge the sale on that basis to post a bond. The defendants did not do so.

¶ 24 We briefly address the defendants' other points. They have repeatedly claimed they were entitled to a jury trial, but well established Illinois authorities instruct us that they were not. First, a litigant has no right to have a jury determine the facts in equity cases such as mortgage foreclosures. *South Holland Trust & Saving Bank v. Witvoet* , 18 Ill. App. 3d 24, 25 (1974). Second, even if a case might be triable before a jury, the court can still resolve the case by summary judgment when, as here, there are no properly contested issues of fact to be resolved by the jury. In those situations, the right to a jury trial is not implicated and, therefore, summary judgment does not deny a party her right to a trial by jury. *Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 48 (1998) (citing *Alamo Rent A Car, Inc. v. Ryan*, 268 Ill. App. 3d 268 (1994); *Empire Moving & Warehouse Corp. v. Hyde Park Bank & Trust Co.*, 43 Ill. App. 3d 991 (1976).

¶ 25 Along the same line, the defendants also complain that resolving the case on motions thwarted their desire to "force" Chase to provide testimony, but the record contains nothing showing that the defendants ever filed a discovery request upon Chase at any time, nor that they sought judicial relief to compel Chase to respond to any delinquent discovery request. No court permission would have been required for them to undertake discovery as soon as they filed their answer and appearance. Ill. Sup. Ct. R. 201(d) (eff. July 30, 2014).

¶ 26 Finally, defendants complain that they were not "served" with a host of pleadings that they claim to have seen for the first time only when they obtained the record on appeal. Two sections of their brief contain a list of pages in the record containing pleadings they claim not to have received. Because of the nature of this argument, it is not preserved in the record, and so we cannot grant relief on these contentions. This is a court of review, not first view. See *Holland v. Florida*, 560 U.S. 631, 654 (2010).

¶ 27 Even so, our review of the record reveals that many of the allegedly non-served documents were either irrelevant or unimportant to the confirmation order which is the subject of this appeal, or that defendants' contentions are disingenuous because they are contradicted by the record. The fact that the defendants actively defended the case and filed numerous pleadings belies their assertion that they received virtually no pleadings along the way. Their credibility is further strained by the fact that the sworn service list shows Chase's counsel sent no less than four separate copies of almost every pleading to them. And we are guided by the well-recognized principle that a litigant has an obligation to keep track of the status of her own case. See *Bank of Ravenswood v. Domino's Pizza, Inc.*, 269 Ill. App. 3d 714, 720 (1995) ("Regardless of any possible negligence on the part of its original attorneys in notifying it of their withdrawal, Domino's was aware of the claim against it and had an independent duty to follow the progress of its case."); *Genesis & Sons, Ltd. v. Theodosopoulos*, 223 Ill. App. 3d 276, 280 (1991) ("[A] litigant has the obligation to follow the progress of his case [citation], and the inadvertent failure to do so is not a ground for relief."). All pleadings were available in the court file and listed on the Clerk of the Circuit Court's public web site. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, n. 4 (taking judicial notice of court clerk's on-line docket entries).

¶ 28 We cite an example of the flaws with defendants' service complaints. Defendants claim that Chase did not serve them with its section 2-615 motion to dismiss the amended counterclaim. The defendants never responded to Chase's motion to dismiss the amended counterclaim, leaving open the question as to whether the defendants knew such a motion was pending. But on page one of its April 13, 2016 response to the defendants' motion to reconsider, Chase specifically noted that the court had dismissed the amended counterclaims with prejudice on October 17, 2014. Despite that notice, defendants never moved to vacate the October 17,

2014 counterclaim dismissal order based on lack of notice. The defendants therefore waived any claim regarding lack of notice of the dismissal of the amended counterclaim. See *Pharr v. Chicago Transit Authority*, 220 Ill. App. 3d 509, 515 (1991) ("A party cannot sit on his hands and let perceived errors into the record* * *."). Further, Chase was required to answer or otherwise plead to the amended counterclaim within 21 days of its filing. Ill. S. Ct. R. 182. Chase's failure to respond to the amended counterclaim within that time also put defendants on notice to inquire regarding the status. Finally, defendants appealed the confirmation of sale order, even though that order would not have been appealable had the amended counterclaim still been pending.

¶ 29 Two of the allegedly non-served pleadings are relevant to the order confirming sale. Defendants claim that until they received the appellate record, they were unaware of both Chase's February 8, 2016 motion to prove up its junior lien and the order granting that motion. The junior lien was reflected in the second amended selling officer's report and its inclusion increased the deficiency owed by Alfiscar. Chase retained the Freedman Anselmo law firm to represent its interests as to the junior lien. The firm was not representing Chase on its main foreclosure claim. Freedman Anselmo did not mimic the service list that Chase had used previously, which required transmission of four separate copies of the pleadings to each of the two defendants both at the post office box listed on their appearance, and at the property address. Instead, the firm sent a single copy only to defendant Alfiscar at the property address, which was indeed the address listed on her and West's single-page joint appearance. The better practice would have been to send each defendant a separate copy to their specified address, but it was sufficient because the defendants filed a single joint appearance. Relatedly, defendants claim they received documents for the November 17, 2016 hearing on Chase's motion to confirm sale

only when they appeared at the hearing, which begs the question of how they knew about the hearing at all. Nonetheless, the court set a generous briefing schedule on the motion, allowing ample time for them to prepare a response. When Chase presented an amended selling officer's report at the January 13, 2017 hearing date which reflected payment of the junior lien, the defendants refused an offer to step aside to review the amended report while sitting in the back of the courtroom. But the court did not insist they do so; instead, the court granted them another continuance to review the documents and reset the matter for a week later, January 20, 2017.

¶ 30 Even so, the defendants do not dispute that the amount due under the junior mortgage was accurate, and they did not specifically challenge the amount when it was included in the selling officer's second amended report. They also do not dispute the authenticity of the home equity loan which is in the record and signed by Alfiscar. More importantly, when they received the second amended selling officer's report which reflected the payoff of the junior lien, and then obtained an extra week to review it, they did not move to vacate the order determining the amount of the junior lien. Instead, they filed a sur-response vehemently objecting to lack of contemporaneous notice regarding the prove-up order, but then *admitting* that they had belatedly received the order a few months earlier, on November 17, 2016. During those months, defendants did nothing to secure relief regarding lack of notice of the motion to prove-up the junior lien. Therefore, based on this record, we cannot find a sufficient basis to grant defendants relief.

¶ 31 We have reviewed the defendants' other contentions of error and find them without merit.

¶ 32 Affirmed.