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SIXTH DIVISION
June 29, 2018

No. 1-17-0912
2018 IL App (1st) 170912-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIFTH THIRD MORTGAGE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
ALBERT LOTT, VALERIE COBB-LOTT, CITY)	No. 15 CH 11793
OF CHICAGO, UNITED STATES OF AMERICA)	
DEPARTMENT OF HOUSING AND URBAN,)	
DEVELOPMENT,)	
)	
Defendants,)	Honorable
)	Patricia Spratt,
(Valerie Cobb-Lott, Defendant-Appellant).)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted plaintiff's motion for an order approving report of sale and distribution, and denying defendant's motion to reconsider where defendant was not a mortgagor on the subject property; affirmed.
- ¶ 2 Defendant Valerie-Cobb Lott appeals the trial court's order denying her motion to reconsider the court's previous grant of plaintiff Fifth Third Mortgage Company's motion for an order approving report of sale and distribution. On appeal, defendant argues that the trial court erred when it granted plaintiff's request to confirm sale because plaintiff committed a material

violation of the Home Affordable Modification Program (HAMP)¹, a component of the Making Home Affordable Program, when it sold her residence even though defendant had presented a compliant application package. We find that defendant was not a mortgagor of the property at issue here, and thus, we affirm the trial court's decision.

¶ 3 BACKGROUND

¶ 4 This appeal stems from a foreclosure action filed by plaintiff against, *inter alia*, defendant and her husband, Albert Lott. On June 25, 1999, a mortgage was entered into for the property located at 8101 South Woodlawn Avenue in Chicago (property). The mortgage listed the mortgagor as "Albert Lott. Married to Valerie Cobb-Lott[.]" The mortgage consisted of eight pages, and the initials of both Albert and defendant appeared at the bottom of the first six pages. The seventh page was not initialed by any parties. The eighth page was the signature page, which contained the signature of Albert as borrower, and the signature of defendant over the words "Valerie Cobb-Lott, solely for the purpose of waiving homestead." The promissory note that accompanied the mortgage was also dated June 25, 1999. In the "parties" section of the note, the term "Borrower" was defined as "each person signing at the end of this Note, and the person's successors and assigns." At the end of the note, the only signature was that of Albert, and it appeared under the phrase, "by signing below, Borrower accepts and agrees to the terms and covenants contained in this Note."

¶ 5 Plaintiff and Albert subsequently entered into a loan modification agreement dated August 1, 2013. Plaintiff was listed on the note as lender, and Albert was listed on the note as

¹ "HAMP is a program jointly created by the Department of Treasury, the Federal Housing Finance Agency, the Federal National Mortgage Association (Fannie Mae), and the Federal Home Loan Mortgage Corporation (Freddie Mac), which offers financial incentives to mortgage lenders to modify the home loans of borrowers in danger of foreclosure." *Citimortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 1.

borrower. Albert's signature appears over the words "Albert Lott-Borrower" on the signature page, and his signature was notarized and dated August 30, 2013.

¶ 6 On August 5, 2015, plaintiff filed a complaint to foreclose the mortgage on the property. The complaint listed the mortgagor of the property as "Albert Lott[.]" and alleged that the mortgagor "ha[d] not paid the monthly installments of principal, taxes, interest, and insurance for [February 1, 2015], through the present." The complaint further contained the following relevant information:

“(L) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated and alleged to be subordinate and inferior to the mortgage of the [p]laintiff:

Valerie Cobb-Lott, by virtue of the fact that on information and belief he/she is the spouse of Albert Lott and may have some interest in the subject real estate.”

Defendant and Albert were both served with process on August 7, 2015, but neither timely filed an appearance or answer.

¶ 7 On October 9, 2015, plaintiff filed a motion for entry of an order of default and a judgment of foreclosure sale. Plaintiff also filed a motion for summary judgment. On November 3, 2015, the trial court entered an order of default against defendant and Albert, entered a judgment for foreclosure and sale, and granted plaintiff's motion for summary judgment.

¶ 8 On December 29, 2015, defendant filed a *pro se* appearance.

¶ 9 On February 5, 2016, a notice of sale was sent to defendant and Albert, stating that on March 10, 2016, the property would be sold at a public auction. On March 3, 2016, defendant, acting *pro se*, filed an emergency motion to stay the judicial sale, alleging that defendant was in

the process of negotiating a loan modification or other work-out with plaintiff. The emergency motion also stated that, “On or about February 9, 2015, I applied for assistance under HAMP. At this time my HAMP application is pending, as I have neither been denied nor approved for HAMP.” Attached to the emergency motion was a copy of the HAMP application, which was dated February 9, 2016, not February 9, 2015, as stated in defendant’s motion. The application listed the borrower’s name as “Albert C. Lott[.]” The line wherein an applicant would list a co-borrower’s name was left blank. The last page of the application contained the signature of Albert Lott, dated February 8, 2016. In addition to some of Albert’s bank statements and pay stubs, there was also an affidavit attached to the application that contained Albert’s signature over the words “Borrower Signature.”

¶ 10 On March 8, 2016, the trial court entered an order stating that over plaintiff’s objection, defendant’s emergency motion to stay the judicial sale was granted and the sale was stayed up to and including April 22, 2016, and may proceed on or after April 23, 2016. Additionally, an attorney was granted leave to file an appearance on behalf of defendant and Albert within seven days.

¶ 11 On May 2, 2016, Ranac, Inc. filed a petition to intervene, stating that it was the successful bidder at the foreclosure sale of the property conducted on April 25, 2016.

¶ 12 On May 3, 2016, plaintiff filed a motion for order approving report of sale and distribution.

¶ 13 On May 13, 2016, counsel filed an additional appearance for defendant only, not Albert. Also on that date, defendant filed an objection to the confirmation of sale, stating that her application for HAMP assistance was still pending because she never received any notice that the application was accepted or denied.

¶ 14 On September 29, 2015, plaintiff filed its reply in support of its motion for order approving report of sale and distribution, stating that defendant did not execute the mortgage, except for the purpose of waiving homestead, the note, or the loan modification agreement. Additionally, the reply noted that Albert's bank statements that were included in an attachment to defendant's emergency motion to stay sale were not addressed to Albert at the property, but instead, were addressed to him at 8019 South Dobson Avenue in Chicago. The reply also contained the assertion that Albert had informed plaintiff that he and defendant were separated, and that he did not live at the property. As a result, plaintiff argued that because Albert did not live at the property, he would not be eligible for HAMP assistance, and thus defendant could not satisfy her burden of showing that the sale occurred in violation of HAMP. Additionally, plaintiff contended that it had, in fact, sent notice to Albert, the applicant, that his request for HAMP assistance was denied.

¶ 15 On November 2, 2016, the trial court entered an order stating, "The court finds defendant has failed to meet her burden under 735 ILCS 5/15-1508(d-5) to establish the property was sold in material violation of the Home Affordable Modification Program." The court, therefore, granted plaintiff's motion in a separate order approving the report of sale and distribution, confirming the sale, and entering an order of possession. The court denied defendant's oral motion to stay entry of the order approving sale pending appeal.

¶ 16 On November 16, 2016, Albert filed an interlocutory notice of appeal, seeking to appeal the court's November 2, 2016, order. This court, on its own motion, dismissed Albert's appeal for want of prosecution on January 19, 2017, because the record on appeal was not timely filed. Albert never sought to vacate this court's order.

¶ 17 On November 29, 2016, defendant, again acting *pro se*, filed an emergency motion to extend stay of possession, asking that she be given an additional 60 days to vacate the property.

¶ 18 On December 1, 2016, defendant filed a motion to reconsider the court’s grant of an order confirming sale of the property. The motion was purportedly brought on behalf of both defendant and Albert, but reflected that defendant, acting *pro se*, prepared the motion. Attached to defendant’s motion to reconsider was a letter from plaintiff addressed to Albert at the property, dated February 10, 2016, stating that plaintiff had “received your complete initial [h]ardship application.” Also attached was another letter from plaintiff addressed to Albert at the property, dated March 4, 2016, stating that “[b]ased on a careful review of the information you provided, you are not eligible for mortgage payment assistance or other alternatives to foreclosure at this time.” The March 4 letter specifically stated:

“Upon receipt of your application for assistance, your file was reviewed for the following alternatives to foreclosure. Please see the list of workout options that you were reviewed for in sequential order based on investor guidelines.

- | | |
|----------------------|--|
| Reinstatement | -Not eligible: Insufficient cash surplus |
| Informal Forbearance | - Not eligible: Insufficient time prior to the scheduled foreclosure sale date |
| Formal Forbearance | - Not eligible: Insufficient time prior to the scheduled foreclosure sale date |
| Special Forbearance | - Not eligible: Insufficient time prior to the scheduled foreclosure sale date |
| Modification | - Not eligible: Insufficient time prior to the scheduled foreclosure sale date |

FHA HAMP Partial Claim	- Not eligible: Insufficient time prior to the scheduled foreclosure sale date
FHA HAMP Modification	- Not eligible: Insufficient time prior to the scheduled foreclosure sale date
FHA HAMP / Partial Claim Modification	- Not eligible: Insufficient time prior to the scheduled foreclosure sale date
Short Sale or Deed in Lieu of Foreclosure	- Not eligible: Insufficient time prior to the scheduled foreclosure sale date”

¶ 19 On December 1, 2016, the court granted defendant’s emergency motion to stay possession, and ordered that possession was stayed through January 2, 2017.

¶ 20 On January 5, 2017, plaintiff filed its response to defendant’s motion to reconsider, arguing that because Albert had filed a notice of interlocutory appeal, the circuit court lacked jurisdiction. Plaintiff also contended that defendant failed to state a basis for reconsideration.

¶ 21 On March 9, 2017, the court denied defendant’s motion to reconsider.

¶ 22 Defendant filed her timely notice of appeal on April 7, 2017.

¶ 23 On April 12, 2017, defendant filed an emergency motion in the circuit court seeking to stay possession while her appeal was pending, which was denied on April 14, 2017.

¶ 24 ANALYSIS

¶ 25 As an initial matter, we find it pertinent to point out that plaintiff asserts in its brief, which was filed on May 16, 2018, that this court lacks jurisdiction pursuant to Illinois Supreme Court Rule 305(k) because this appeal is moot. Ill. S. Ct. R. 305(k) (eff. Jul. 1, 2017). On April 30, 2018, plaintiff filed a motion to dismiss defendant’s appeal as moot pursuant to Rule 305(k), containing the same contentions that plaintiff now raises in its brief. Defendant filed a response

to plaintiff's motion, and this court denied plaintiff's motion to dismiss as moot on May 15, 2018, the day before plaintiff filed its brief. It appears that plaintiff included the mootness argument in its brief due to the closeness in time between when this court denied the motion to dismiss and when plaintiff filed its brief. As further support for this presumption, we note that plaintiff's brief does not mention its motion to dismiss. Nonetheless, because this issue has already been resolved by this court, we do not address it here.

¶ 26 Turning back to the substance of defendant's appeal, defendant's sole contention is that the trial court improperly confirmed the sale of the property because plaintiff committed a material violation of HAMP by allowing the property to be sold even though defendant submitted a complete HAMP application package.

¶ 27 Section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law (Law), in relevant part, states:

“Making Home Affordable Program. 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).

¶ 28 Our supreme court has noted that the provisions of section 15-1508 have been construed as conveying broad discretion onto the circuit courts when approving or disapproving judicial

sales. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (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.* at 178-79.

¶ 29 Plaintiff asserts that defendant is not the proper party to bring this appeal because she was not the mortgagor of the property. Defendant argues that she submitted a complete HAMP application evidencing her eligibility for assistance which should have prevented plaintiff from selling the property. In defendant’s brief, she states, “The record unequivocally shows that Ms. Cobb-Lott applied for assistance under the Making Home Affordable Program on February 9th [sic], 2015 [sic].” This statement is problematic for at least two reasons. The lesser of the two problems is that our review of the record indicates that the HAMP application at issue was, in fact, submitted on February 9, 2016, not February 9, 2015. The bigger problem is the fact that the HAMP application only bears Albert’s name and signature, and the supporting financial information included therewith is only from Albert’s accounts. Thus, this court is perplexed why defendant has represented that she applied for HAMP assistance, when the record indicates that only Albert’s name was on the application, and that defendant’s name does not appear once throughout the entire application. It seems to this court that perhaps defendant completed and submitted the HAMP application in Albert’s name, creating an entire separate set of issues, that although are troubling, are not pertinent to the issues raised in this appeal.

¶ 30 We agree with plaintiff, and find that defendant was not the mortgagor on the property, rendering her ineligible to seek HAMP assistance, and thus, not the proper party to bring this appeal. Section 15-1508(d-5) of the Law uses the term “mortgagor” three times when it states that a court’s judgment shall be set aside if the *mortgagor* brings a motion, wherein the *mortgagor* can show by a preponderance of the evidence that the *mortgagor* applied for

assistance under HAMP, or a similar program, and the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale. (Emphasis added.) 735 ILCS 5/15-1508(d-5) (West 2016).

¶ 31 Section 15-1209 of the Law defines a mortgagor as: “(i) the person whose interest in the real estate is the subject of the mortgage and (ii) any person claiming through a mortgagor as successor. Where a mortgage is executed by a trustee of a land trust, the mortgagor is the trustee and not the beneficiary or beneficiaries.” 735 ILCS 5/15-1209 (West 2016). “It is axiomatic that lenders do not lend money on residential real estate except if the owner, as identified by title commitment, signs the corresponding mortgage.” *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 39.

¶ 32 Here, Albert is the sole mortgagor. The evidence in the record showing that Albert was the sole mortgagor is overwhelming. The mortgage listed the mortgagor as “Albert Lott. Married to Valerie Cobb-Lott[.]” The mortgage did not list Albert and defendant as co-mortgagors, but instead, only stated defendant’s name to explain to whom Albert was married. The purpose for this explanation is apparent from the signature page of the mortgage, which contained the signature of Albert as borrower, and the signature of defendant over the words “Valerie Cobb-Lott, solely for the purpose of waiving homestead.” By the express language on the face of the mortgage, defendant solely signed the mortgage for the purpose of waiving any potential homestead benefits².

¶ 33 We find this case similar to *Citimortgage, Inc v. Parille*, 2016 IL App (2d) 150286, ¶ 25, wherein the court was faced with determining whether a husband and wife were both mortgagors

² In *GMAC Mortgage, LLC v. Arrigo*, 2014 IL App (2d) 130938, ¶ 34, the court answered a certified question in the negative, finding that “a spouse who is not on title to property, but is the spouse of the titleholder and maintains the property as her primary place of residence cannot claim the homestead exemption.” We point this out because the mortgage here was signed in 1999, well-before *Arrigo* was decided, and at a time when it was not uncommon for a titleholder’s spouse to waive homestead benefits.

when the instrument giving rise to the foreclosure action was signed by both of them. On the signature page of the mortgage at issue, only the wife signed without qualification. *Id.* The husband signed over typewritten text stating that he was signing “solely for the purpose of waiving his homestead rights.” *Id.* The court held that the husband did not sign the mortgage as a mortgagor, explaining that, “There is no reason not to give effect to the typewritten qualification: it merely reinforces the other expressions of intent that [the wife] was to be the sole mortgagor.” *Id.*

¶ 34 Here, we are faced with a nearly identical situation, and find no reason why we should not give effect to the clear language of the mortgage that qualified defendant as signing “solely for the purpose of waiving homestead.” As it did in *Parille*, the qualifying language under defendant’s signature only strengthens the proposition that the parties’ intent was for Albert to be the sole mortgagor.

¶ 35 Further evidence of Albert’s position as the sole mortgagor existed in the “parties” section of the promissory note that accompanied the mortgage, wherein the term “Borrower” was defined as “each person signing at the end of this Note, and the person’s successors and assigns.” The only signature was that of Albert, and it appeared under the phrase, “by signing below, Borrower accepts and agrees to the terms and covenants contained in this Note.” Further still, plaintiff and Albert entered into a loan modification agreement, wherein plaintiff was listed on the accompanying note as lender, and Albert was listed on the note as borrower, with his signature appearing over the words “Albert Lott-Borrower” on the signature page.

¶ 36 Plaintiff also points out that in its complaint it listed Albert, not defendant, as the sole mortgagor, sole title holder, and sole individual personally liable for repayment of the debt. This is significant because defendant never filed an answer to plaintiff’s complaint.

¶ 37 “A proper answer to a complaint must contain an explicit admission or an explicit denial of each allegation in the complaint. (Citation.) An 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. (Citation.) ‘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.’ ” *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 37 (quoting *Gowdy v. Richter*, 20 Ill. App. 3d 514, 520 (1974)).

¶ 38 Here, defendant never filed an answer to plaintiff’s complaint. Thus, even if the aforementioned evidence was not as clear as it is that defendant was not a mortgagor of the property, her failure to answer the complaint operated as a judicial admission that Albert was the sole mortgagor, title holder, and responsible party. Because she was not a mortgagor of the property, defendant was not eligible to seek HAMP benefits, and the fact that she may have completed the application by using Albert’s name does not remedy the fact that she was not a mortgagor of the property. The only person who could have sought HAMP assistance for the property was Albert, the sole mortgagor, and he is not a party to this appeal. As such, we affirm the trial court’s decision.

¶ 39 CONCLUSION

¶ 40 Based on the foregoing, we find that the trial court properly granted plaintiff’s motion for order approving report of sale and distribution, and properly denied defendant’s motion to reconsider. We therefore affirm the trial court’s decision.

¶ 41 Affirmed.