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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GMAT LEGAL TITLE TRUST 2013-1, U.S.)	Appeal from the Circuit Court
BANK, NATIONAL ASSOCIATION, as Legal)	of Cook County.
Title Trustee,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	No. 2012 CH 40163
JOHN P. NESTOR and RACHELE NESTOR,)	
)	
Defendants-Appellants.)	
)	
(Towne Pointe Condominium Association; The)	
United States of America; State of Illinois;)	The Honorable
Unknown Owners; and Non-Record Claimants,)	Anna M. Loftus,
Defendants).)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The denial of defendants' motion to vacate a judgment of foreclosure and the confirmation of a judicial sale of residential property following entry of that judgment are affirmed, where the record on appeal is insufficient to permit review of the circuit court's judgment and does not demonstrate that defendants were entitled to reversal as a matter of law.

¶ 2 Defendants, John Nestor and Rachele Nestor, appeal from a judgment against them entered by the circuit court of Cook County in a mortgage foreclosure action. On appeal, defendants challenge the denial of their motion to vacate a default judgment of foreclosure as well as the judgment confirming the sale of the property following the foreclosure. For the reasons that follow, we affirm the judgment in favor of plaintiff, GMAT Legal Title Trust 2013-1, U.S. Bank National Association.

¶ 3 **BACKGROUND**

¶ 4 In January 2009, defendants executed a promissory note in favor of American Fidelity Mortgage Service, Inc. The promissory note was secured by a mortgage on the property commonly known as 18161 Mager Drive, Tinley Park, Illinois. Thereafter, the promissory note was endorsed to Bank of America, N.A.

¶ 5 On November 1, 2012, plaintiff brought an action against defendants and others, seeking to foreclose the mortgage.¹ The complaint alleged that the mortgage had been in default since August 1, 2010, with a principal balance due of \$225,692.11, plus accrued interest and late charges.

¶ 6 Defendants were ultimately served with process in June 2015 but did not answer or otherwise appear within the time permitted by statute. In February 2016, plaintiff moved for entry of a default order and judgment of foreclosure. Although defendants were served with notice of plaintiff's motion, they did not appear or respond. On February 23, 2016, the circuit court granted plaintiff's motion and entered an order of default against defendants and a

¹ The complaint was filed by Bank of America, N.A., and GMAT Legal Title Trust 2013-1, U.S. Bank National Association, as Legal Title Trustee, was substituted as party plaintiff in February 2016.

judgment of foreclosure and sale. The court also appointed a selling officer to conduct a judicial sale of the property.²

¶ 7 During the following year, the selling officer appointed by the court provided defendants with four successive notices of judicial sale for the subject property, the last of which informed defendants that the property was to be sold at a judicial sale on March 24, 2017. Defendants took no action to set aside the judgment until 13 months after it was entered.

¶ 8 On March 22, 2017, two days before the scheduled sale date, defendants filed an emergency motion to stay the judicial sale and a motion to vacate the judgment of foreclosure, which was filed pursuant to section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)) (Code). Defendants' motion to vacate raised two defenses to the action for foreclosure. First, defendants asserted that plaintiff had failed to comply with a notice provision set forth in Regulation X, the group of regulations promulgated to implement the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 *et seq.* (2012)) (RESPA). According to defendants, plaintiff violated section 1024.41(g) of Regulation X (12 C.F.R. § 1024.41(g) (2013), which precludes a loan servicer from seeking a judgment of foreclosure or an order for sale while the borrower's loss mitigation application is pending. Defendants claimed that plaintiff had failed to provide written notice as to its determination of their loss mitigation application before seeking a foreclosure judgment.

¶ 9 In support of this defense, defendants submitted the affidavit of Lenora Teresi, who attested that she was a loan modification specialist employed by the law firm representing defendants and that, as an authorized agent for defendants, she submitted a timely and complete loss mitigation application for defendants' mortgage on December 31, 2015. Teresi also averred

² The circuit court entered summary judgment against the United States of America and dismissed the Unknown Owners and Non-Record Claimants as party defendants on February 23, 2016.

that a true and correct copy of defendants' loan modification application was attached as an exhibit to her affidavit. In addition, Teresi attested that defendants' loan modification application was "still under review and without a final decision" when plaintiff obtained the February 23, 2016, default judgment against defendants and that, prior to entry of that judgment, plaintiff "did not inform [d]efendants that they were ineligible for any loss mitigation option." The exhibit to Teresi's affidavit consisted of a copy of a loss mitigation application signed by defendants on December 11, 2015, and several supporting documents that included copies of tax returns, profit and loss statements, and bank statements. Certain of the supporting documents were unsigned and others were created and/or signed after December 31, 2015.

¶ 10 As their second defense, defendants contended that the terms of their mortgage included the payment of a "yield spread premium" in violation of section 2607(a) of RESPA (12 U.S.C. § 2607(a) (2012)). Defendants claimed that the "yield spread premium" constituted an illegal referral or "kickback" fee, which they intended to assert "for setoff."

¶ 11 The circuit court heard and denied defendants' motions on March 24, 2017. Although the court's written order did not specify the reasons underlying its ruling, the order did include a statement that, "[p]laintiff has provided evidence of loss mitigation [d]enial to [d]efense counsel." The court also denied defendants' motion to stay the judicial sale, and the property was sold that day. The circuit court subsequently confirmed the sale on plaintiff's motion. Defendants timely filed this appeal.³

¶ 12 ANALYSIS

¶ 13 We initially address defendants' argument that the circuit court erred in denying their motion to vacate the foreclosure judgment. Section 2-1301(e) of the Code provides as follows:

³ John Nestor and Rachele Nestor are the only defendants who have challenged the circuit court's judgment.

“[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2016).

¶ 14 As the language of section 2-1301(e) expressly states, the decision of whether to grant a timely motion to vacate a default judgment falls within the discretion of the circuit court. *Id.*; *In re Haley D.*, 2011 IL 110886, ¶ 69. A circuit court abuses its discretion when it “ ‘acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.’ ” *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 14 (quoting *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999)). Because the law favors resolution of controversies based on the substantive rights of the parties, courts apply a liberal policy with respect to the vacatur of default judgments under section 2-1301(e). *In re Haley D.*, *supra* ¶ 69. In ruling on such a motion, the overriding consideration is whether substantial justice is being done between the litigants and whether it is reasonable to compel the plaintiff to proceed to trial on the merits. *Id.* In evaluating whether substantial justice has been done, the circuit court must balance the severity of the penalty to the defendant as a result of the default judgment and the attendant hardship on the plaintiff if required to prove its case on the merits. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 17 (citing *Venzor v. Carmen’s Pizza Corp.*, 235 Ill. App. 3d 1053, 1057-58 (1992)). Also, the existence of a meritorious defense and a reasonable excuse for failing to timely raise such defense are relevant, but not necessary, factors. *Id.* (citing *In re Haley D.*, *supra* ¶ 57); see also *People ex rel. Reid v. Adkins*, 48 Ill. 2d 402, 406 (1971).

¶ 15 Defendants argue that the circuit court's denial of their motion to vacate the judgment of foreclosure constituted an abuse of discretion and prevented substantial justice from being done. In support, defendants contend that all of the above factors weigh in favor of vacatur of the judgment, and they further claim that the circuit court abused its discretion by failing to consider the merits of the defenses asserted in the motion. Defendants also contend that the circuit court misapplied the law with regard to section 1024.41(g) of Regulation X. Plaintiff responds that the record on appeal is inadequate to allow review the circuit court's decision. We agree with plaintiff that the abbreviated record presented in this case precludes a meaningful review of the ruling on defendants' motion to vacate.

¶ 16 In *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), the Illinois Supreme Court considered a defendant's appeal from the denial of a motion to vacate a judgment. *Id.* at 391. The supreme court held an appellant bears the burden of presenting a sufficiently complete record of the proceedings in the circuit court to support a claim of error. *Id.* at 391-92. The court further held that, in the absence of such a record on appeal, it will be presumed that the order entered by the circuit court was in conformity with law and was supported by an adequate factual basis. *Id.* at 392. As a consequence, any doubts arising from the incompleteness of the record will be resolved against the appellant. *Id.* The *Foutch* court noted that the record presented on appeal did not include a report of proceedings or an acceptable substitute, such as a bystander's report or an agreed statement of facts under Supreme Court Rule 323(a), (c), or (d). *Id.* The court concluded that, in the absence of a sufficient record, there was no basis for finding the circuit court abused its discretion in denying the motion to vacate the judgment. *Id.*

¶ 17 Illinois Supreme Court Rule 323 has the force of law and is binding on litigants. *In re Marriage of Thomsen*, 371 Ill. App. 3d 236, 241 (2007). If a verbatim transcript is unavailable,

the appellant is obligated to utilize one of the other alternatives authorized by Rule 323. *In re W.L.W. III*, 299 Ill. App. 3d 881, 884 (1998). Defendants have not done so in this case.

¶ 18 Here, as in *Foutch*, the record does not contain a report of proceedings, a bystander’s report, or an agreed statement of facts for the hearing on defendants’ motion to vacate the judgment of foreclosure. Without a sufficient record, this court has no means by which to discern the basis for the circuit court’s ruling. As a consequence, we are unable to determine whether the circuit court erred in balancing the severity of the default judgment and the hardship to plaintiff if required to prove its case, nor can we evaluate whether the circuit court failed to consider the defenses raised in defendants’ motion or erred in assessing whether they had a reasonable excuse for failing to raise those defenses in a timely manner. Given the deficiency of the record, we lack the necessary foundation for appellate review. See *Foutch*, 99 Ill. 2d at 391 (observing that “[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant”); see also *Hansen, supra* ¶¶ 15-16; *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 41.

¶ 19 The absence of any explanation for the circuit court’s ruling also thwarts defendants’ assertion that the circuit court misapplied the law regarding section 1024.41(g) of Regulation X. That section governs loss mitigation procedures and provides, in relevant part:

“If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

- (1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the

appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied[.]” 12 C.F.R. § 1024.41(g) (2013).

¶ 20 Defendants contend that they timely submitted a complete loss mitigation application on December 31, 2015, and that plaintiff did not give them written notice that their application had been denied prior to seeking a judgment of foreclosure, as required by section 1024.41(g). According to defendants, the circuit court misapplied the law because plaintiff failed to satisfy the pre-conditions set forth in the regulation before moving for entry of the foreclosure judgment. However, as indicated above, where the record is insufficient to support a claim of error, it will be presumed that the circuit court's order conformed to the law and had an adequate basis in fact. *Foutch*, 99 Ill. 2d at 392.

¶ 21 Based on the common law record presented here, the circuit court could have concluded that defendants failed to establish that a complete loss mitigation application was submitted in December 2015. This conclusion finds support in the fact that the loss mitigation application filed as an exhibit to Teresi's affidavit included several documents that were created and/or signed after December 31, 2015. In light of that circumstance, the circuit court reasonably could have determined that defendants did not submit a complete loss mitigation application in December 2015. Alternatively, the court could have concluded that plaintiff had provided defendants with notice of its denial of loss mitigation. That conclusion is supported by the circuit court's order of March 24, 2017, which specifically states that “[p]laintiff has provided evidence of loss mitigation [d]enial to [d]efense counsel.” Nothing in the record refutes these conclusions

as a matter of law.⁴ Moreover, either conclusion would have served as a basis to reject defendants' contention that section 1024.41(g) had been violated and would have justified denial of the motion to vacate on that ground.

¶ 22 In the absence of a sufficient record of the hearing on defendants' motion to vacate, this court must presume that the circuit court followed the law and had an adequate factual basis for its ruling. *Id.* Contrary to defendants' assertion, the record does not support the claim that the circuit court misapplied the law with regard to section 1024.41(g).

¶ 23 Lastly, we note that defendants' notice of appeal also seeks reversal of the circuit court's final judgment confirming the sale of the property. That challenge, however, is premised solely on the ground that the circuit court misapplied the law as to section 1024.41(g). This argument necessarily fails for the reasons explained above. Accordingly, we find no basis for determining that the circuit court abused its discretion in granting plaintiff's motion for confirmation of the judicial sale. See *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008) (holding that a circuit court's decision to confirm a judicial sale will not be disturbed absent an abuse of discretion).

¶ 24 CONCLUSION

¶ 25 The record on appeal provides no basis for this court to conclude that the circuit court's denial of defendants' motion to vacate the judgment of foreclosure or its confirmation of the judicial sale following entry of that judgment constituted either an abuse of discretion or a denial of substantial justice. Accordingly, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.

⁴ Although Teresi's affidavit asserted that defendants had not received notice of a denial of loss mitigation from plaintiff, that averment was not based on Teresi's personal knowledge because she could not attest to what notice defendants did or did not receive, and the record does not contain affidavits from defendants attesting that plaintiff failed to provide them with notice of loss mitigation denial.