FOURTH DIVISION
August 9, 2018

No. 1-17-1980

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FV-1 INC., in trust for MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC.,	)	
Plaintiff-Appellee,	)	
v.	)	Appeal from the Circuit Court of Cook County
JUAN ESPARZA, PINA ESPARZA, MARIA LUISA SILVA, REYNALDO MORA, PALISADES COLLECTION LLC, PALISADES ACQUISITION XVI, LLC, and UNKNOWN OWNERS AND NONRECORD CLAIMANTS,	)	10 CH 46945
Defendants (Juan Esparza and Pina Esparza, Defendants-Appellants).	)	Honorable Patricia Spratt Judge Presiding

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Trial court did not abuse its discretion in confirming sale.

¶ 2 Defendants (the Esparzas) challenge the circuit court's order confirming the foreclosure sale of their property and the denial of their motion to reconsider that order. Plaintiff defends the trial court's judgment and also claims that this appeal is moot.

¶ 3 For the reasons below, we find that this appeal is not moot, but that the circuit court did not err in confirming the sale. We affirm the court's judgment.

¶ 4 BACKGROUND

¶ 5 The Esparzas had a mortgage with HSBC Bank, N.A. (HSBC). They were unable to make their mortgage payments, and HSBC filed a foreclosure action. Defendants appeared *pro se* and the case was sent to the foreclosure mediation program.

¶ 6 The case returned from mediation without resolution. In November 2014, four years after HSBC filed the case, the circuit court entered summary judgment and a Judgment of Foreclosure and Sale against the Esparzas. The Esparzas filed no opposition to HSBC's motion.

¶ 7 Six years after the foreclosure case was filed, and a year and a half after the entry of summary judgment and judgment of foreclosure—specifically, in March 2016—the Esparzas began applying for mortgage assistance under the federal Home Affordable Modification Program (HAMP), which was part of the Making Home Affordable Program (MHA) established by the U.S. Department of the Treasury in response to the mortgage crisis. The Esparzas eventually submitted most of the necessary documents to Specialized Loan Servicing (SLS), HSBC's servicing agent.

¶ 8 On July 5, 2016, SLS sent the Esparzas a letter notifying them as follows:

> "Your application isn't complete. We need to receive all of the required document(s) by 07/16/2016 so we can review your request.
>
> If you have received this letter and there are less than 38 days until your scheduled sale, please call us immediately at [toll-free phone number] to discuss your options.

> **Please review the list of documents below and send the documents listed under the 'Required Documentation' column so we can continue our review of your request. To avoid delays or cancellation of your request, please complete and return them by 07/16/2016.**" (Emphasis in original.)

¶ 9 The missing documentation referenced in the letter was the paystubs of defendant Juan Esparza. The record contains no indication that those paystubs were submitted by the required date of July 16, nor do the Esparzas contend otherwise.

¶ 10 On July 25, 2016, the Esparzas hired counsel. According to the affidavit of Carla Davidovic, a legal assistant in counsel's firm, the next day—July 26—Davidovic "sent SLS by regular mail *a new* Request for Mortgage Assistance, 60 days of consecutive bank statements, the requested 30 days of recent consecutive paystubs, a new hardship letter, and 2013 state and Federal income tax returns." (Emphasis added).

¶ 11 On July 28, the Esparzas received notice that the property would be sold at foreclosure sale on September 7, 2016. The letter came from counsel for HSBC, Codilis & Associates, ending with: "If you have any questions in regards to this account and the scheduled foreclosure sale you may contact Codilis & Associates, P.C.," then listing the law firm's phone number.

¶ 12 Also on July 28, SLS sent the Esparzas another letter acknowledging receipt of their second request for a modification. Again, SLS requested additional documentation, this time by "08/27/2016." What was missing from the second application was the Esparzas' verification under oath—that is, their signatures beneath the line, at the end of the application form, that reads: "The undersigned certifies under penalty of perjury that all statements in this document are true and correct." The SLS letter thus informed the Esparzas that they needed to provide a "fully completed and executed" form by August 27, 2016.

¶ 13 It is undisputed that the Esparzas never supplied this missing verification.

¶ 14 Davidovic's affidavit states that "[o]n August 17, 2016, I contacted SLS *** to check the status of the application. The representative told me that all requested documents had been received, and that the application was complete and under review. The representative told me that the file had [a] sale date of **September 27, 2016.**" (Emphasis in original.) The number Davidovic called was not the law firm's number (see *supra*, ¶ 11), but rather a toll-free number for SLS, the servicing agent (see *supra*, ¶ 8).

¶ 15 Defendant's property was sold at a foreclosure sale on September 7, 2016, with HSBC as the successful bidder. On September 8, HSBC assigned the judgment to Plaintiff FV-1, Inc., which later substituted into the case. Plaintiff then moved to confirm the sale.

¶ 16 The Esparzas filed an objection to the confirmation of sale, arguing that plaintiff had violated Section 1508 of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1508 (Section 1508). Section 1508 provides, in pertinent part:

> "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 *** (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2016).

¶ 17 That law also provides that the court shall set aside the sale and decline to confirm it "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 *** 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).

¶ 18 The trial court ordered briefing and held a hearing. In February 2017, the trial court confirmed the sale. In overruling the Esparzas' objections, the court found:

> "1. Defendant [*sic*] failed to establish the submission of a complete HAMP application;
>
> 2. Defendant [*sic*] failed to meet the burden in establishing a material violation of HAMP with respect to 1508(d-5)
>
> 3. The parties stipulate that no signature page is included in the RMA submission stated to be submitted 7/26/16."

¶ 19 The Esparzas filed a motion to reconsider the February order, which the court denied. This appeal follows.

¶ 20 ANALYSIS

¶ 21 The Esparzas appeal the order confirming the sale and the denial of the motion to reconsider. They argue that plaintiff violated Section 1508, and the court erred in confirming the September 7 sale. In response, plaintiff first argues that this appeal should be dismissed as moot. We address that issue first, as mootness is a threshold question. See *In re Marriage of Donald B. and Roberta B.*, 2014 IL 115464, ¶ 23.

¶ 22 I. Mootness

¶ 23 Illinois courts have consistently held that " '[a]n appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief.' " *Id*. (quoting *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001)). Plaintiff argues that this is precisely such a case, because the MHA and its corresponding HAMP program have been terminated effective December 31, 2016. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2241, 3030 (2015). Thus, says plaintiff, even if the Esparzas prevailed on their appeal, they would not be able to avail themselves of HAMP, a now-defunct program. This

court would be incapable of granting the Esparzas effectual relief.

¶ 24 It is only partially accurate to say that HAMP is defunct. That federal law provided a savings provision for applications already in process:

> "(1) The Making Home Affordable initiate of the Secretary of the Treasury, as authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C 5201 et seq.), shall terminate on December 31, 2016.
>
> (2) Paragraph (1) *shall not apply to any loan modification application made under the Home Affordable Modification Program *** before December 31, 2016*." (Emphasis added.) *Id*.

¶ 25 The issue on appeal is whether the Esparzas did, in fact, submit their HAMP application in proper form during that period of March through August of 2016. (See ¶¶ 7-14.) If they did, not only would they prevail on this appeal, but the savings provision italicized above would permit their HAMP application to survive the program's termination, given that the application predated December 31, 2016. This court, in other words, would be capable of rendering effectual relief to the Esparzas should they prevail on their underlying argument.

¶ 26 Plaintiff cites *U.S. Bank, N.A. v. Coe*, 2017 IL App (1st) 161910, ¶ 19, where the homeowners' argument that they did not receive a Grace Period Notice (GPN) was mooted because the GPN statute had been expressly repealed *without* a savings clause. *Id*., ¶ 8; see 735 ILCS 5/15-1502.5(k) ("This section is repealed July 1, 2016."). Here, in contrast, the savings clause in the federal law keeps the Esparzas' claim alive, should we rule in their favor on appeal.

¶ 27 This appeal is not moot. We turn to the merits.

¶ 28 II. Confirmation of Sale

¶ 29 The Esparzas challenge the confirmation of sale. We review that decision for an abuse of

discretion. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57. The trial court abuses its discretion when it misapplies the law or where no reasonable person would agree with its decision. *Id.* When the plaintiff files a motion to confirm sale and the defendant files a motion to set aside the sale, the standard of review for both motions is abuse of discretion. *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 31. The party seeking to set aside the sale has the burden of proving by a preponderance of the evidence that there is a sufficient basis for doing so. *Id*; see also 735 ILCS 5/15-1508(b), (d-5) (West 2016).

¶ 30 A. "Application for Assistance"

¶ 31 First, the Esparzas argue that they proved, by a preponderance of the evidence, that they "applied for assistance under the Making Home Affordable Program," and that the property was ultimately sold "in material violation of the program's requirements ***." 735 ILCS 5/15-1508(d-5) (West 2016). Thus, they say, the sale must be set aside. See *id*.

¶ 32 Here, the court held a hearing on the Esparzas' objections and made three findings: (1) the Esparzas did not present evidence of a completed HAMP application, (2) the Esparzas had not shown a material violation of HAMP with respect to Section 1508(d-5), and (3) the parties stipulated that the second request for mortgage assistance did not contain a signature page. In sum, the court found that the Esparzas did *not* "apply for assistance" in proper fashion and, thus, no violation of that federal program occurred that would warrant setting aside the sale.

¶ 33 We do not have a transcript of the hearing. We can review some of what was presented to the trial court, but to the extent we cannot, we must construe the record against the party with the burden of demonstrating that an error occurred—here, the Esparzas. *See Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984); *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003); *Bermudez*, 2014 IL App (1st) 122824, ¶ 69.

¶ 34 The trial court found that the parties stipulated to a specific fact: that the second application did not contain a signature page. That signature page, to repeat, was a verification under penalty of perjury to the accuracy of the contents of the entire, lengthy application form. We have nothing in the record to indicate that the Esparzas ever submitted a verified application form after being requested to do so by SLS in July 2016. Nor have the Esparzas ever claimed, at trial or on appeal, that they submitted one.

¶ 35 Without a transcript in the record, and in the absence of any argument or record evidence to the contrary, we have no basis to upset the trial court's finding that the parties stipulated to the absence of a signed application form in the second HAMP application. Thus, the only conclusion we can possibly reach is that the second application for mortgage assistance was *not* a valid, completed application. See *Bermudez*, 2014 IL App (1st) 122824, ¶¶ 68-69 (absent sufficient evidence in record that homeowner submitted complete application package, homeowner could not establish they "applied for assistance" under HAMP).

¶ 36 Nor is there any basis to reject the court's finding that the first application for mortgage assistance likewise fell short of a valid, complete application. It is undisputed that the first application lacked paystubs, that SLS explicitly gave the Esparzas a two-week deadline to supply this missing information, and that the Esparzas did not supply that missing information within that two-week deadline—choosing, instead, to start over with a second application a few weeks later. (See *supra*, ¶¶ 8-9.) The Esparzas do not challenge these facts, nor do they claim that the SLS was mistaken or unreasonable in requiring this missing information by a date certain.

¶ 37 Thus, we uphold the trial court's findings that the Esparzas failed to prove the existence of a completed HAMP application at any time.

¶ 38 In support of their argument that they "applied for [HAMP] assistance," the Esparzas

contend that they filed a "facially complete" application under a federal regulation known as Regulation X. See 12 C.F.R. § 1024.1. Regulation X prohibits a servicer from conducting a foreclosure sale if the borrow has submitted a complete loss mitigation application more than 37 days before the sale. 12 C.F.R. § 1024.41(g). Under that regulation, the servicer must inform the borrower that they received the packet and inform them whether it is complete or incomplete (which SLS did here). 12 C.F.R. § 1024.41(b). If the packet is deemed incomplete, the servicer "shall state the additional documents and information the borrower must submit to make the loss mitigation application complete." *Id*. (Which SLS also did here.)

¶ 39 The Esparzas argue that their applications should be deemed complete as of June 15, 2016, because they were facially complete. Regulation X states:

> "*If a borrower submits all the missing documents and information* as stated in the notice required pursuant to [§ 1024.41(b)], or no additional information is requested by such notice, the application shall be considered facially complete. If the servicer *later* discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information and treat the application as complete for the purposes of [§ 1024.41(g)]. 12 C.F.R. §1024.41(c)(2)(iv) (emphasis added).

From this, the Esparzas argue that the application was facially complete by June 15, 2016, according to the SLS Acknowledgement Letter.

¶ 40 We cannot agree with this argument. "Facially complete" in Regulation X clearly refers to situations where the servicer requests missing information and the borrower submits it, or the servicer never asks for additional information in the first place; in either situation, the application will be deemed complete unless the service later discovers otherwise. *Id*. That is not what

happened here. In both applications submitted, the servicer specifically identified missing documents and specifically requested their submission, but the Esparzas did *not* submit that missing information. These are factual findings by the court that we have already upheld. Under no circumstances could the applications be deemed "facially complete" under Regulation X.

¶ 41 We uphold the trial court's finding that the Esparzas failed to prove that they "applied for assistance" under the HAMP program. Thus, the Esparzas cannot establish a violation of section 15-1508(d-5). See *Bermudez*, 2014 IL App (1st) 122824, ¶ 72.

¶ 42 B. "Justice" Provision

¶ 43 Next, the Esparzas argue that the sale should have been set aside in accordance with Section 1508(b)(iv) of our foreclosure statute, the provision that allows the court to set aside a foreclosure sale when it finds that "justice was otherwise not done." 735 ILCS 5/15-1508(b) (West 2016). What constitutes injustice under Section 1508(b)(iv) is not defined by the statute. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 19. Section 1508(b)(iv) "acts as a safety valve to allow the court to vacate the judicial sale *** based on traditional equitable principles." *Deutsche Bank National Trust v. Cichosz*, 2014 IL App (1st) 131387, ¶ 13; see also *McCluskey*, 2013 IL 115469, ¶ 25. "The 'justice clause' provides a narrow window through which courts can undo sales because of serious defects in the actual sales process. *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 19. The party challenging the sale bears the burden of proving injustice. *Cichosz*, 2014 IL App (1st) 131387, ¶ 13; see also *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure LLC*, 2013 IL App (1st) 120711, ¶ 41.

¶ 44 The Esparzas point to the affidavit of their lawyers' legal assistant, Ms. Davidovic, who attested to the events that occurred after the second HAMP application was submitted in July 2016 (emphasis in original):

> "On August 17, 2016, I contacted SLS by telephone at [toll-free number] to check the status of the application. The representative told me that all requested documents had been received, and that the application was complete and under review. The representative told me that the file had [a] sale date of **September 27, 2016.**"

¶ 45 The Esparzas argue that an injustice occurred in that SLS, plaintiff's agent, gave them the wrong sales date—September 27, instead of the correct date of September 7, 2016—thus "lull[ing] them into a false sense of security that prevented them from exercising their legal right to move the Court to stay the September 7th sale."

¶ 46 We have no basis to conclude that the trial court erred when it rejected this argument. First, the Esparzas present this affidavit testimony as if we are required to accept it as true and conclusive. But we are not. Much more to the point, we do not know if the trial court believed it. Having no transcript of the hearing, we cannot know the trial court's take on this testimony. We do not know if Ms. Davidovic testified at the hearing, if she was credible when she did, whether any counter-evidence was presented orally, or what the trial court thought of Ms. Davidovic's testimony. It is entirely possible that the trial court simply did not believe the information contained in that affidavit.

¶ 47 It is likewise possible that the trial court would have it found it unreasonable for the Esparzas and their counsel to rely conclusively on an oral, telephonic notice of a September 27 sales date over the statutorily-required *written* notice, which stated the date was September 7. See 735 ILCS 5/15-1507(c)(3) (requiring notice of sale "to all parties in the [foreclosure] action *** in the manner provided in the applicable rules of court for service of papers other than process and complaint ***").

¶ 48 For that matter, we do not know if the trial court based its ruling on the hearsay objection plaintiff raised against the affidavit in the trial court. We do not know if that objection was raised at the hearing, whether a response was given, or whether the trial court based its ruling on a hearsay issue, much less its reasoning for doing so.

¶ 49 Absent a transcript, and thus any insight into the trial court's reasoning, we have no basis to find error. We cannot say that the trial court's refusal to find an injustice under these facts was an abuse of discretion.

¶ 50 In any event, the cases cited by the Esparzas set forth far clearer examples of injustice than any we could glean from this case. See *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 390 (1997) (property was sold even though redemption had occurred); *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App 3d. 915, 928 (1997) (borrower's attempt to redeem was "shrugged off" due to language barrier, and sale price was unconscionably low—only one-sixth of fair market value); *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill. App. 3d 293, 300 (1995) (property had been offered for sale "by mistake" because parties had agreed to give borrower time to reinstate mortgage). We find them readily distinguishable.

¶ 51 III. Motion to Reconsider

¶ 52 The Esparzas also moved to reconsider the order confirming sale. Because we find no error in confirming the sale, and the motion to reconsider relied on the same arguments as their initial objection, the trial court did not err in denying the motion to reconsider. See *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 21 ("[b]ecause the motion to reconsider relied on the same faulty premises as the original response, the trial court could not have abused its discretion in denying the motion to reconsider.")

¶ 53 We affirm the judgment of the circuit court.

¶ 54 Affirmed.