2018 IL App (2d) 180002-U
No. 2-18-0002
Order filed September 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NATIONSTAR MORTGAGE, LLC,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CH-2143
	)	
NOELLE DODGE and	)	
JOHN DOLCIMASCOLO,	)	Honorable
	)	Mary Katherine Moran,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment to plaintiff on defendants' affirmative defenses and counterclaims and properly denied defendants' motion to re-open discovery. Affirmed.

¶ 2 In this mortgage foreclosure case, defendants, Noelle Dodge and John Dolcimascolo, appeal from the trial court's: (1) grant of summary judgment to plaintiff, Nationstar Mortgage, LLC, on defendants' affirmative defenses and counterclaims; and (2) denial of defendants' motion to re-open discovery. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Initial Complaint

¶ 5 On August 10, 2007, defendants executed a mortgage with DHI Mortgage Company, Ltd., for property at 1918 Lake Bluff Lane in Pingree Grove. The mortgage was secured by a note ($353,894) executed only by Dodge. The initial monthly payment amount was $2,836.39.

¶ 6 The mortgage lists DHI Mortgage Company, Ltd. as the lender, with Mortgage Electronic Registration Systems, Inc. (MERS) as its nominee. A subsequent document, executed on April 28, 2010, reflects that MERS (as nominee for DHI) assigned the mortgage to Aurora Loan Services, LLC. Next, on October 18, 2012, Aurora assigned the mortgage to Nationstar.

¶ 7 The note lists DHI as the lender and contains several endorsements. The first endorsement is from DHI to Lehman Brothers Bank FSB. The second endorsement is from Lehman Brothers Bank to Lehman Brothers Holdings, Inc. The third endorsement is from Lehman Brothers Holdings Inc. to "_____" (blank endorsement).

¶ 8 Meanwhile, in 2008, Aurora, which was servicing the loan at this point, decreased the monthly escrow amount from $196.93 to $66.54.

¶ 9 In the summer of 2009, Dodge informed Aurora that she could not afford her mortgage payment. She applied for assistance under the Home Affordable Modification Program (HAMP), a loan modification program. She also applied for a loan modification trial period plan (TPP), the first step under the HAMP. Four reduced mortgage payments of $1,525.60 were to be made under that program on the first day of August, September, October, and November 2009. She apparently made those payments as instructed. (Payments made under the TPP were to be held in the suspense account until sufficient funds were made available to credit one full month's payment.) The TPP application, signed by Dodge on July 5, 2009, but not signed by Aurora, states that "when the Lender accepts and posts a payment during the Trial Period it will be

without prejudice to, and *will not be deemed a waiver of, the acceleration of the loan or foreclosure action* and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents." (Emphasis added.)

¶ 10 During this time, in September, October, and November 2009, Aurora also sent Dodge notice-of-default letters. Dodge inquired about the letters and was instructed to ignore them because they were computer-generated and that no consequence would arise so long as she continued to make her TPP payments. The TPP was extended for two months to December 2009 and January 2010 based upon a need for more documentation to support Dodge's application for a permanent loan modification. In a December 2, 2009, letter to Dodge, Aurora stated that it had not received all of her documentation to finalize its review of her qualification for a HAMP permanent loan modification, but was extending her additional time to submit the missing documentation (within 60 days) and extending the TPP. Dodge apparently made those payments.

¶ 11 A January 5, 2010, consolidated notes log (Aurora's internal mortgage recordkeeping system) states that Dodge "*IS CLAIMING HHLD INCOME FROM SPOUSE* IF SHE WISHES TO USE THAT INCOME NEED 2 RECENT, CONSECUTIVE PAYSTUBS." (Emphasis added.) It further states: "NEED 3 ITEMS TO PROVE OCCUPANCY OF HHLD INCOME." A one-month TPP extension was granted on January 20, 2010. A February 2, 2010, entry states that "M1 WILL SEND PAYSTUBS ALONG WITH PAYROLL LEDGER FOR SPOUSE; ALSO SENDING 3 MNTHS JO INT BNK STMS AND WILL INDICATE PAYROLL DEPOSITS FOR SPOUSE."

¶ 12 On February 11, 2010, Aurora notified Dodge that a permanent loan modification under HAMP was denied and that the TPP was terminated because she did not provide *household* income. A February 11, 2010, entry states "REVIEWED WITH S COHN, REQUESTED DOCS ON THE 5TH, NOTHING RECEIVED TO VERIFY HHLD INCOME IS TAXABLE CONCERNED CAN'T PRODUCE RETURNS, CANNOT VERIFY INCOME." Further, the log on that date states: "MOD INELIGIBLE, CANNOT VERIFY HOUSEHOLD INCOME IS TAXABLE, THEREFORE, EXCESSIVE FORBEARANCE."

¶ 13 On May 5, 2010, Aurora filed a complaint against defendants, seeking to foreclose on the mortgage. It alleged that defendants were in default for the monthly payments from October 2009 through the present. Aurora further alleged that it was the legal holder of the note and mortgage, which were attached to the complaint. On July 26, 2010, Aurora moved for judgment for foreclosure and sale.

¶ 14 On July 27, 2010, Dodge, *pro se*, moved to dismiss, alleging that: (1) Aurora's complaint failed to raise material factual issues; (2) Aurora breached the contract by "forcefully requiring [Dodge] to miss payment in order to enter" the HAMP program, which did not require homeowners to miss, skip, or be late with any payments to be eligible for the program; and (3) Aurora breached its fiduciary duty to Dodge by wrongfully denying her a loan modification on the basis that it could not verify her household income as taxable, where it never required Dodge to complete the required IRS form. She sought continued possession of the subject property and a permanent loan modification.

¶ 15 On July 29, 2010, Dodge moved to produce documents, seeking an alleged missing addendum to the note and other documents reflecting that Aurora was the real party in interest. On August 9, 2010, Dolcimascolo filed a *pro se* appearance. On December 6, 2010, defendants

filed an Illinois Supreme Court Rule 214 (eff. July 1, 2014) production request, seeking all documents associated with the mortgage, loan, foreclosure, and servicing of the loan. They also served a request to admit on that date. On January 3, 2011, Aurora served its answers to the request to admit, which was deemed timely.

¶ 16 In its response to Dodge's motion to dismiss, which it filed on February 22, 2011, Aurora argued that Dodge sought improper relief; she did not have a right to a loan modification (her allegations were unsupported by affidavit, the law provided that loan modification negotiations do not require an abatement or delay of the foreclosure process, and she still resided in the subject property); her motion failed to assert grounds for dismissal that appeared on the face of the complaint and failed to provide an affidavit to verify her allegations (to the extent she moved pursuant to section 2-619); Aurora complied with statutory procedure by attaching a copy of the mortgage and note to its complaint; and the fiduciary claim had no factual or legal merit (Dodge, who had requested that her husband's income be considered in review of her loan modification application, had sent a letter to Aurora stating that Dolcimascolo would not provide a copy of his income tax return and, thus, it was denied).

¶ 17 In her reply, Dodge withdrew several counts from her motion to dismiss and focused on her claim that Aurora did not comply with the foreclosure statute in that it failed to attach to its complaint a true copy of the mortgage and note. According to Dodge, there were two addendums missing from the note, which, she claimed, contained relevant information concerning payment and interest rate changes and certain conditions under default. Second, she argued that Aurora did not comply with statutory requirements because it failed to provide evidence to support its claim that it was the legal holder of the mortgage and note. Thus, it lacked standing to bring a foreclosure action. Specifically, Dodge noted that the complaint

identified MERS/DHI Mortgage Company, Ltd., as the mortgagee, whereas the mortgage and note listed DHI Mortgage Company as the lender and MERS as the mortgagee. Dodge attached to her reply a redacted copy of the note that she averred in an attached affidavit she executed on August 10, 2007.

¶ 18 B. Amended Complaint

¶ 19 On March 24, 2011, Aurora moved for leave to file an amended complaint, alleging that DHI, which had extended a loan to Dodge that was secured by a mortgage on the subject property, subsequently sold and assigned all of its rights in the loan and mortgage and that Aurora was the holder, mortgagee, and servicer of the loan and mortgage. Aurora further alleged that an incomplete copy of the note was inadvertently attached to its original complaint. The trial court granted it leave to amend on April 1, 2011.

¶ 20 In its amended complaint, Aurora alleged that defendants were in default since October 2009. The complaint included a copy of the mortgage, note (endorsed in blank), several adjustable rate riders, a planned unit development rider, and a corporate assignment of mortgage.

¶ 21 On April 1, 2011, defendants moved to dismiss, asserting lack of standing and challenging the validity of the corporate assignment of the mortgage. As to the assignment, defendants alleged that Aurora did not take possession of a complete note prior to execution of the assignment. According to defendants, the assignment was executed on April 28, 2010, but, as of February 18, 2011, Aurora's note was missing two addendums. Thus, the assignment was a nullity. Finally, defendants alleged that the note attached to Aurora's complaint had been altered to contain multiple endorsements in blank, whereas the initial note had only one endorsement.

¶ 22 In its response, Aurora argued that: defendants' motion to dismiss was procedurally improper for failure to assert grounds for dismissal that appeared on the face of the complaint or

to attach any affidavit to support the motion; it had standing because it pleaded that it was the mortgagee of record and was designated and authorized to act on behalf of the note's owner and, in any event, it was in possession of the note, which was payable to the bearer because it contained a blank endorsement. Aurora also alleged that it was the mortgagee under the corporate assignment. It next noted that Dodge had attached a mortgage assignment to her motion to dismiss that was not the same document that was attached to Aurora's complaint. Finally, it argued that defendants otherwise failed to address the amended complaint.

¶ 23 In their reply, defendants alleged that Aurora made material misrepresentations and committed a fraud upon the court by submitting altered documents and a false affidavit. They also argued that the amended complaint was misleading and insufficient.

¶ 24 On June 20, 2011, the trial court denied defendants' amended motion to dismiss. It gave defendants 28 days to answer or otherwise plead in response to the amended complaint. No transcript of the hearing is contained in the record on appeal.

¶ 25 On October 13, 2011, defendants moved to strike and dismiss Aurora's first amended complaint, arguing that: (1) the note contained an invalid blank endorsement because there was no endorsement from Lehman Brothers Bank FSB to Lehman Brothers Bank, and, thus, the subsequent endorsements had no force; (2) the mortgage was unenforceable because the note was endorsed to a specific payee (Lehman Brothers Bank FSB) and the mortgage was assigned to a different entity (Aurora); and (3) certain affirmative matters, namely, the fact that Aurora purportedly assigned its rights to the mortgage and note to Federal National Mortgage Association (FNMA) on July 28, 2010, (about eight months prior to amending its complaint), defeated its cause of action because it was not the mortgagee entitled to foreclose.[1]

[1] Defendants attached a document, dated July 28, 2010, wherein Aurora purportedly

¶ 26 Aurora's response is not contained in the record on appeal. Defendants filed their reply on December 13, 2011, and, on December 29, 2011, the trial court denied defendants' motion to dismiss. Defendants were granted until January 26, 2012, to answer the amended complaint and were ordered to answer all outstanding discovery.

¶ 27 On January 12, 2012, defendants filed their answer to the amended complaint and raised affirmative defenses (failure of contractual condition precedent; contributory negligence; unclean hands; judicial admission; lack of capacity and standing;) and counterclaims (breach of contract; tortious interference with contract; breach of fiduciary duty; and fraud upon the court).

¶ 28 On July 26, 2012, defendants filed a first amended answer, affirmative defenses, and counterclaims. In a subsequent order, the trial court denied defendants' motion for sanctions against Aurora for alleged discovery violations.

¶ 29 On January 9, 2013, Aurora filed an answer to the amended affirmative defenses and counterclaims. It raised several affirmative matters/defenses, including that: (1) defendants' allegations are barred by waiver, equitable estoppel and/or the voluntary payment doctrine; (2) defendants failed to state a claim or defense for which relief could be granted; and (3) the allegations were barred by the note's and mortgage's language.

¶ 30 On January 3, 2014, Aurora moved for summary judgment as to the amended affirmative defenses and counterclaims. Defendants filed a response in opposition to the motion, and Aurora filed a reply. On April 17, 2014, the trial court denied Aurora's summary judgment motion. No transcript of the hearing is contained in the record on appeal.

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assigned the mortgage to FNMA.

¶ 31 Oral discovery commenced, and Aurora subsequently moved to compel defendants' deposition appearance. On October 17, 2014, the trial court ordered defendants to appear for discovery depositions on November 3, 2014.

¶ 32 Meanwhile, on February 3, 2014, defendants had been granted leave to file a second amended answer, affirmative defenses, and counterclaims. In their second amended pleading, defendants raised two affirmative defenses, namely, failure to satisfy a condition precedent and unclean hands. They also asserted counterclaims for breach of contract, promissory estoppel, tortious interference, breach of fiduciary duty, and violation of the Consumer Fraud and Deceptive Practices Act (ICFA) (815 ILCS 505/1 *et seq.* (West 2016)).

¶ 33 C. Summary Judgment – Affirmative Defenses and Counterclaims

¶ 34 On February 17, 2015, Aurora filed an amended motion for summary judgment that was limited to defendants' second amended affirmative defenses and counterclaims. As to defendants' first affirmative defense—failure of condition precedent—Aurora argued that defendants failed to support their allegations that no default occurred and that Aurora misapplied some of their mortgage and escrow (consisting of tax and insurance obligations) payments. Specifically, they failed to point to any specific payment that was allegedly misapplied. Aurora noted that an affidavit it submitted from Laura McCann, a vice president at the successor entity to Aurora and a vice president at Aurora, showed that Aurora properly applied each payment, that defendants did not qualify for a loan modification and did not bring the loan current after failing to qualify, and, less than two months before the filing of the foreclosure action, there was $24,973.44 due and owing on the loan (with a $1,073.40 suspense balance and -$6,042.46 escrow balance). As to the unclean hands affirmative defense, Aurora argued that it was fatally deficient because it included no additional allegations to support it. Next, Aurora addressed the

first counterclaim—breach of contract—and argued that there was no interest rate change. Rather, the monthly payment increased due to required adjustments to escrow amounts.[2] Next, as to the breach of contract/promissory estoppel counterclaim, Aurora argued that defendants' assertion that there was an alleged breach of the TPP failed because Aurora never signed the TPP and, instead, sought additional information (Dolcimascolo's income) from Dodge to determine if she qualified for a permanent loan modification, which information was never timely provided. Aurora also argued that it never guaranteed defendants that they would be granted a loan modification; rather, it, again, requested income verification to determine whether Dodge qualified for a permanent loan modification, which information she refused to timely provide. Aurora also noted that, on at least three occasions following the failed TPP, defendants were invited to apply for a loan modification and did not do so (including, on at least one occasion, expressly stating their intent not to apply).[3] Next, Aurora addressed defendants' tortious interference counterclaim, wherein defendants asserted that Aurora interfered with their ability to perform on time with respect to the TPP by allegedly applying a June 2009, payment to August rather than June. According to Aurora, only a third party can tortiously interfere with a contract, and, in any event, the McCann affidavit supported its assertion that there was no misapplication of any mortgage payment. Next, Aurora addressed the breach of fiduciary duty counterclaim, arguing that a mortgagor-mortgagee relationship did not create a fiduciary duty and that defendants failed to allege sufficient facts to show such a relationship. Aurora asserted that

[2] It noted that a letter from Aurora, which had stated there was an interest rate change, was incorrect.

[3] It attached to its motion a copy of such letters dated May 6, 2011, January 3, 2012, and February 6, 2012.

defendants failed to submit any allegations of specific facts showing that Aurora had misapplied certain escrow funds and that the misapplication had thrust them into arrearage. Finally, Aurora addressed defendants' statutory fraud counterclaim, arguing that it did not misrepresent or conceal material facts and that defendants failed to specifically plead how Aurora engaged in such acts. According to Aurora, defendants merely repeated their allegations that Aurora misrepresented the terms of the HAMP modification and misinformed defendants of the reasons why the loan modification was denied. Aurora argued that it never guaranteed defendants a loan modification and the fact that they determined defendants did not qualify for such did not give rise to a statutory fraud claim.

¶ 35 Aurora attached to its motion an affidavit from McCann, who averred that Aurora transferred the servicing of defendant's mortgage loan to Nationstar in July 2012. Further, McCann stated that, on August 25, 2010, Aurora sent Dodge a letter (which McCann attached to her affidavit) that incorrectly stated there was a change in the interest rate of the loan. However, as reflected in a payment history that she also attached to her affidavit, McCann averred that there was no interest rate change, but, rather, a change in the monthly payment as a result of changes in the required escrow amounts. Further, Dodge's payments were applied pursuant to the terms of the loan. McCann further stated that, in the summer of 2009, after Dodge informed Aurora that she was unable to afford her mortgage payments, Dodge entered into the HAMP TPP. The TPP provided that Dodge was to make reduced monthly payments on the loan that were due on August 1, September 1, October 1, and November 1, 2009. Servicing notes from Aurora's computer system (also attached to her affidavit) reflected that, after the expiration of the TPP, Dodge sought a permanent loan modification based on, among other things, Dolcimascolo's income. The notes further reflected that, from January 5, 2010, through

February 5, 2010, Aurora made repeated requests upon Dodge to verify Dolcimascolo's taxable income, including a copy of his most recent tax return. However, on February 11, 2010, Aurora received a letter from Dodge (dated February 10, 2010), stating that her spouse would not be providing such information. Accordingly, on the same date, Aurora denied Dodge a permanent loan modification. McCann could find no indication in the records that any Aurora representative ever required or encouraged Dodge to miss a loan payment. Finally, she averred that, after applying Dodge's payments pursuant to the terms of the mortgage and TPP, defendant remained due and owing on her loan as of October 2009 and she did not cure the default before Aurora filed its complaint on May 5, 2010.

¶ 36 In their response, defendants argued that material factual questions precluded summary judgment on their affirmative defenses and counterclaims, including that: (1) Aurora induced Dodge to default, as she was not in default prior to participating in the HAMP program; (2) Aurora misapplied funds in violation of the note and mortgage; (3) Aurora charged excessive late fees and other charges as a result of the TPP; (4) it breached the mortgage by improperly managing the escrow account; (5) Aurora repeatedly instructed Dodge to ignore the notice-of-default letters sent her to during the pendency of the TPP for the HAMP loan modification; (6) it altered the loan terms prematurely, which resulted in a breach of the mortgage and note; (7) Aurora accelerated the loan and foreclosed while holding a large surplus of funds in the suspense and escrow accounts; and (8) Aurora denied Dodge a permanent loan modification without justification while luring her into detrimental reliance based on its misrepresentations.

¶ 37 Defendants specifically addressed each count. As to their affirmative defenses of failure of condition precedent (and unclean hands), they pointed to their deposition testimony and Dodge's counter-affidavit to support their argument that Dodge was lured into defaulting on the

note by instructing her to ignore the default notices and continue making reduced payments and that Aurora assured her that partial payments under the TPP would not lead to default and that the unpaid portions of her regular payments would be added to the end of the loan regardless of whether she qualified for a permanent loan modification. Further, defendants pointed to Aurora's servicing of the loan and its alleged improper crediting of payments and escrow items. As to their breach of contract counterclaim, defendants' arguments centered on the increased escrow payments. They pointed to Aurora's consolidated notes log, which contained an entry stating that no escrow analysis had been conducted during 2009. Defendants argued that it was inconsistent to increase 2009 payments due to an alleged required adjustment to escrow amounts during a year in which no analysis had been completed. Next, addressing the count alleging breach of contract/promissory estoppel, defendants maintained that the TPP was a contract and that Dodge fulfilled her obligations thereunder; thus, Aurora was obligated to offer her a permanent loan modification. Further, Aurora lulled Dodge into believing that acceptance of further reduced payments was necessary to finalize a permanent loan modification by requiring her to send such payments instead of (and not in addition to) her contractually required mortgage payments. Defendants also pointed to a log entry that stated that the homeowner was "MOD ELIGIBLE." They argued that it was reasonable and justified for Dodge to rely upon Aurora's representations. An attachment to the TPP stated that the TPP was a first step to a loan modification and provided that, once income and eligibility for the program were confirmed, Aurora would finalize the modification terms and send Dodge a loan modification agreement. Addressing Aurora's point concerning income verification, defendants asserted that Dodge sent Aurora income verification for Dolcimascolo and that, in any event, the TPP does not require

income verification from non-borrowers or verification of "household income," as Aurora alleges.

¶ 38 Next, turning to the tortious interference counterclaim, defendants responded that Aurora refused to credit a payment for the oldest delinquent loan amount and alleged that Aurora insisted that she was in default before a loan modification could be granted. Aurora became a party to the contracts (via assignment) in April 2010, defendants noted. Also, Aurora refused to properly apply Dodge's June 2009 payment and instead applied it to the August 2009 amount in breach of the mortgage and note. Next, as to the breach of fiduciary duty/breach of contract counterclaim, defendants argued that Aurora owed them a fiduciary duty as to certain aspects of their relationship, such as management of the escrow account. Specifically, Aurora failed to properly allocate and credit funds, which created an artificial arrearage and artificial default. Finally, addressing the statutory fraud count, defendants argued that Aurora misled Dodge and that, even though she met all of the requirements for a loan modification, Aurora refused to modify the loan and, instead, initiated foreclosure proceedings. The TPP required that Dodge provide her income tax returns and other financial information. However, defendants asserted, Aurora changed the requirements of the TPP after Dodge accepted and complied with its terms. It demanded financial documentation from Dolcimascolo, which was deceptive and unfair. Aurora also deceived Dodge when it demanded that she make further reduced payments for two more months and never informed her that she would be foreclosed upon for making such payments while also claiming that, if she did not comply, her loan would not be modified.

¶ 39 In its reply, Aurora argued that defendants' arguments were contradicted by the documents upon which they relied. As to the misapplication of payments and escrow account irregularities, Aurora asserted that Dodge had not disputed the accuracy of Aurora's payment

histories, that Dodge mis-read certain documents (the servicing notes, escrow account statement, letters and statements from Aurora, and a TPP checklist). Further, the terms of the loan allowed Aurora to charge late fees. The communications to Dodge reflected that she was to make payments under the TPP, and a document defendants relied on in their response stated that Aurora was not required to suspend a foreclosure action against defendants while concurrently reviewing the loan for a modification. As to the counterclaims, Aurora noted that it never executed the TPP and, instead, sought additional information from Dodge, which was not provided. Thus, there was no contractual agreement and Dodge did not dispute that she never received an executed TPP from Aurora. Dodge claimed income from *both* herself *and* Dolcimascolo, but failed to provide documentation for Dolcimascolo prior to the denial of the permanent loan modification, in violation of the TPP. As to defendants' reliance of the service note that stated they were "MOD ELIGIBLE," it noted that *eligibility* was not the same as actually *qualifying* for a loan modification. Dodge did not qualify for such, Aurora argued, because she did not timely provide necessary financial information. "*By the time Mortgagors claim to have sent Dolcimascalo's tax documents, their loan modification application had been denied.*" (Emphasis added.) Pointing to McCann's affidavit, Aurora also denied that it required or encouraged Dodge to miss any mortgage payments. As to the escrow account, Aurora argued that defendants offered no evidence that property taxes were not properly paid or that they were charged excessive fees. Further, the change in the estimate escrow from $196.93 to $66.24 did not, as defendants' unsupported allegation stated, thrust defendants into an arrearage. Aurora urged that any arrearage and default was caused by defendants' failure to bring the mortgage current once they learned that they did not qualify for a loan modification under the TPP.

Finally, defendants were never guaranteed a modification and Dodge sought a modification based on her *household* income.

¶ 40 On April 14, 2015, the trial court granted Aurora's amended summary judgment motion as to the affirmative defenses and counterclaims. There is no transcript of the hearing in the record on appeal.

¶ 41 On July 21, 2015, the trial court denied defendants' motion to reconsider and set a schedule for oral discovery and the filing and briefing of a motion for summary judgment as to the complaint.

¶ 42 D. Summary Judgment – Complaint

¶ 43 On November 23, 2015, Aurora moved to substitute Nationstar as the plaintiff, alleging that, after the case was filed, Nationstar became the holder of the note secured by the mortgage.

¶ 44 On August 8, 2016, Nationstar moved for judgment of foreclosure and sale. 735 ILCS 5/15-1506 (West 2016). It also moved for summary judgment on the foreclosure complaint. It attached to its motion an affidavit from Latosha Davis, a document execution specialist at Nationstar, who averred that, at the time Nationstar took over servicing of the loan from Aurora, the loan was past due in the amount of $133,442.04. She attached to her affidavit what she averred was a true and accurate copy of the payment history. Davis stated that the entries reflecting Dodge's payment were made in accordance with internal procedures to accurately record Dodge's mortgage payments. The records showed that the total amount of the default was $549,082.25.

¶ 45 In an August 17, 2016, order, the trial court noted that the record reflected that Aurora was plaintiff of record despite Nationstar's filing of the summary judgment motion and that

defendants would have the opportunity to respond to the motion to substitute concurrently with their response to the summary judgment motion.

¶ 46 On September 20, 2016, defendants moved to re-open discovery, attaching an Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) affidavit. They sought to depose Davis. Aurora objected, noting the case's protracted procedural history and alleging defects in the affidavit. The trial court struck the affidavit and permitted defendants, over Aurora's objection, to submit an amended affidavit. On November 28, 2016, defendants filed an amended affidavit. They sought to depose Davis to investigate alleged irregularities or inconsistencies that existed in the payment history.

¶ 47 On January 18, 2017, the trial court denied defendants' motion to re-open discovery. It found that defendants had identified Davis as the person they sought to depose, but failed to identify the material facts that were unavailable to them and failed to specify what was allegedly incomplete or altered in certain documents. The court noted that Aurora had pointed out where the information was contained in Davis's affidavit (of amounts due and owing) and defendants did not refute that. "You did not contradict anything that was in Davis's affidavit." Further, all of the information defendants sought from Davis, the court found, was addressed in her affidavit.

¶ 48 The trial court further noted that the case had been pending since 2010, defendants conducted discovery in 2011, and oral discovery was twice extended in 2015. Defendants did not take advantage of the discovery available to them in 2015, when it was extended. Further, Nationstar, which had been the servicer since July 2012, was known to defendants when Aurora moved to substitute plaintiff in November, "well over a year ago." "You did not seek to depose Nationstar and you did not conduct discovery in 2015." "[Nationstar] has addressed what you believe to be out of sequence transactions and has pointed out in the affidavit where that is listed.

I did not see anything in the reply that refuted what [Nationstar] was saying." Also on January 18, 2017, Nationstar was substituted as the plaintiff.

¶ 49 On April 5, 2017, following a hearing, the trial court granted Nationstar summary judgment and entered a judgment of foreclosure and sale. The court found that: Nationstar was the holder of the original note and mortgage; defendants had not offered a counter-affidavit to refute Davis's affidavit concerning amounts owed and payment history; and Davis's affidavit complied with Illinois Supreme Court rules. As to a purported mortgage assignment to FNMA, the trial court determined that it was not recorded and was labeled confidential, which may have indicated that it was never finalized. In any event, Nationstar possessed the original mortgage and note (and presented it for the court's review) and defendants did not dispute its possession of the original documents.

¶ 50 Defendants moved to reconsider, arguing that the mortgage assignment contradicted Nationstar's status as mortgagee and that the payment history was not accurate. Nationstar responded that its standing was based on its possession of the note endorsed in blank and that defendants failed to submit a counter-affidavit to rebut Nationstar's affidavit concerning the payment history. On July 26, 2017, the trial court denied defendants' motion to reconsider.

¶ 51 The judicial sale was noticed for September 21, 2017, and Nationstar subsequently moved to approve the sale, which defendants opposed, arguing that justice was not otherwise done because summary judgment to Aurora was based on a verbatim motion that was previously denied and that no leave to amend the summary judgment motion was either sought or granted. On December 13, 2017, the trial court approved the sale and noted a personal deficiency judgment of $376,226.43 against Dodge. No transcript of the hearing is contained in the record on appeal. Defendants, *pro se*, appeal.

¶ 52 II. ANALYSIS

¶ 53 A. Summary Judgment - Affirmative Defenses and Counterclaims

¶ 54 Defendants argue that the trial court erred in granting Aurora summary judgment on their second amended affirmative defenses and counterclaims. For the following reasons, we disagree.

¶ 55 "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010). A genuine issue of fact exists where the material relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). We review *de novo* the trial court's decision to grant a motion for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 56 As a preliminary matter, defendants argue that the trial court abused its discretion in allowing (and granting) Aurora's amended summary judgment motion, where Aurora did not seek leave of court to file the second motion after its first summary judgment motion was denied. We disagree. First, in the trial court, defendants failed to raise this objection to the amended motion until the end of the proceedings, specifically, two years after the amended motion (to which they filed a response) was granted, when they opposed Nationstar's motion to approve the judicial sale. Accordingly, it is forfeited. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 354 (1998). Second, defendants point to no authority for the proposition that a motion for leave to file is required before a party files a summary judgment *motion*. They rely only on

authority addressing amendments to *pleadings*. See *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593, 597 (2006) (noting distinction between pleadings and motions). Further, we note generally that the summary judgment statute "places no limit on the number of motions for summary judgment that may be brought by a party" and that "a trial court may deny a motion for summary judgment and later change its position and grant that same motion." *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 136-37 (1997); 735 ILCS 5/2-1005 (West 2016). Defendants' argument is unavailing.

¶ 57 Turning to the merits, defendants raise nine arguments, some overlapping, concerning the summary judgment ruling. First, they argue that there was a material factual question as to whether Aurora manufactured a default by manipulating the payments schedule and interfering with the June 2009 payment. They also maintain, in a separate argument, that a triable issue exists as to whether Aurora tortiously interfered with the June 2009 payment. The June 2009 payment was the oldest delinquent payment, and defendants assert (pointing to an Aurora consolidated notes log entry) that, prior to commencement of the TPP, they were instructed to not make it or delay it (it would not be posted until August 2009) because, if paid, it would show that Dodge was able to make her required payments on time and, thus, could jeopardize her eligibility for the TPP. Defendants contend that Aurora's refusal to accept and credit the June 2009 payment in a timely manner generated and manufactured a default that did not exist prior to commencement of the TPP. The materiality here, they assert, is that they have identified an issue of fact as to whether the alleged payment default was manufactured and, thus, whether summary judgment was properly granted to Aurora.

¶ 58 Assuming defendants can raise a tortious interference claim against their loan servicer, we reject this argument. Defendants maintain that the June 2009 payment was not credited until

August, not that it was never credited at all. It remains that, beginning as of October 2009 (as averred to by McCann), Dodge was in default. A March 17, 2010, mortgage statement lists $19,314.96 in past due amounts (not including unpaid late charges and other fees). Even if the June 2009 payment was never credited, it is undisputed that, in October 2009, Dodge was still in default, and defendants do not address the remainder of the past due amounts.

¶ 59 Defendants' second argument is that there was a triable issue concerning whether Aurora has waived its right to accelerate and is equitably estopped from foreclosing because it instructed Dodge to ignore the default notices. They point to instructions Aurora gave Dodge via telephone (that are memorialized in the logs) that, as long as she continued to make her TPP payments, she could ignore the computer-generated default notices that she received for September through November 2009. These instructions, defendants argue, misled Dodge into believing that acceleration and foreclosure would not occur if she complied with Aurora's instructions. Thus, the undisputed evidence showed, in their view, that Aurora had waived its right to accelerate and to foreclose.

¶ 60 We reject this argument outright because, elsewhere, defendants concede that, during the TPP period, all of the rights and remedies pursuant to the original loan documents remained available to Aurora. Defendants cannot complain, on the one hand, that Aurora retained at all times its right to foreclose on the loan, while, on the other hand, asserting that its instructions to ignore the default notices somehow induced defendants into defaulting. Dodge sought payment relief because she could not afford her mortgage payments due to her unemployment. Defendants concede that, during the TPP period, all remedies remained available to Aurora. Ultimately, Dodge was never approved for a permanent loan modification. The instructions to

ignore the default notices, without more, do not show that there was a triable issue as to any inducement.

¶ 61 Defendants' next two arguments primarily concern the escrow account. In one argument, defendants assert that there was a triable issue as to whether Aurora initiated foreclosure with a surplus in the escrow and suspense accounts. They point to the March 17, 2010, mortgage statement, the last statement sent before Aurora filed its foreclosure complaint. In that statement, the suspense account balance is listed as $1,073.46, the escrow balance is "($6,042.46)", and the total amount due (payment, past due amounts, late charges, fees, and advances) is $24,973.44. By defendants' calculations, there is a material factual question as to whether the loan was accelerated with a surplus of $7,115.86 or with a payment default of $24,973.44. In their view, an inference could be made that a material issue exists as to whether Aurora prematurely foreclosed with a surplus of funds.

¶ 62 We reject this argument. Defendants ignore that Dodge's account had a *negative* escrow balance, as reflected in the use of parentheses around the balance amount and the absence of them around other amounts. Furthermore, in the notes section of the mortgage statements for February and March 2010, for example, Aurora stated that "Your Escrow balance has reached a *negative* amount. This could result in a possible escrow shortage when your escrow account is analyzed. Call Customer Service with any questions you have regarding your Escrow account." (Emphasis added.) The suspense balance was a positive figure, but, as other documents indisputably explained, it would not have been credited as a payment until it reached the full-payment amount. Thus, the statement upon which defendants rely suggests not only a minor positive balance (due to funds in the suspense account), but also over $19,000 in past due amounts.

¶ 63 In a related argument, defendants maintain that there was a triable issue concerning whether Aurora breached its fiduciary duty to Dodge or, alternatively, breached the mortgage contract by improper servicing the escrow account. The loan closing documents, they note, provided that taxes and insurance payments be deposited into escrow and managed by the lender. Aurora's alleged servicing failures as to the escrow account, defendants assert, contributed to the manufactured default. They point to the initial escrow disclosure statement, dated August 10, 2007, which provided that $196.93 would be deposited into escrow every month. However, on November 2, 2007, Aurora's first escrow account statement for the loan stated that it would apply only $66.24 per month toward escrow beginning with the January 1, 2008, payment. This resulted, they argue, in an immediate and artificial shortage that put Dodge's loan into an arrearage the following year. Further, they note that Aurora was required to provide them with an annual escrow accounting, but Aurora failed to properly allocate and credit funds. Defendants contend that Aurora owed them a fiduciary duty as to certain aspects of their relationship, such as with the escrow account, but they breached their duty.

¶ 64 Assuming, without deciding, that Aurora owed defendants a fiduciary duty as to the escrow account, we find unavailing their argument that there was triable issue as to whether it breached any duty by improperly servicing the escrow account. Defendants' only evidence of a breach consists of an initial escrow disclosure statement dated August 10, 2007, that was provided upon closing. However, the statement provides that it "is an *estimate* of activity in your escrow account during the coming year based on payments anticipated to be made from your account." (Emphasis added.) It instructs the borrower to "KEEP THIS STATEMENT FOR COMPARISON WITH THE ACTUAL ACTIVITY IN YOUR ACCOUNT AT THE END OF THE ESCROW ACCOUNTING COMPUTATION YEAR." The statement lists the $196.93

amount to which defendants refer and specifies that the servicer will incorporate a $393.86 cushion (which, apparently, was satisfied by an initial escrow deposit). The foregoing reflects that the $196.93 initial escrow amount was merely an estimate. It certainly does not reflect that it was a set or final amount to which Aurora was bound. Further, defendants do not assert that any tax payments out of the escrow account were not timely paid. Defendants, thus, have failed to show that there was a triable issue concerning management of the escrow account.

¶ 65 Defendants' next argument is that there is a triable issue concerning Aurora's unclean hands. Defendants concede that all of the rights and remedies of the original loan documents remained available to Aurora during the TPP. However, they maintain, again, that Aurora induced Dodge to default on her loan by having her send reduced payments (even beyond the expiration of the TPP) instead of her contractually-required payments and by requiring the June 2009 payment to be delayed. Dodge, they maintain, relied on Aurora's instructions to her own detriment, but Aurora foreclosed after Dodge complied with all of its demands. Similarly, defendants' argue elsewhere that there exists a triable issue concerning whether Aurora breached the TPP contract or, alternatively, whether promissory estoppel applies and Aurora must offer Dodge a permanent loan modification. Specifically, defendants argue that Dodge relied on Aurora's promises and representations that her loan would be modified if she complied with the TPP. They assert that Dodge qualified for a loan modification, pointing to a June 17, 2009, consolidated notes log that states: "HOMEOWNER MOD ELIGIBLE." Defendants also contend that an attachment to the TPP did not state that Aurora needed to take any additional actions once Dodge signed the TPP. Thus, in their view, it was reasonable and justified for Dodge to rely upon Aurora's representations concerning the TPP and a loan modification. Similarly, in a related argument, defendants argue that there is a triable issue concerning whether

Aurora violated the ICFA by instructing Dodge to make further reduced payments beyond the expiration of the TPP because her loan was being underwritten for a permanent loan modification. Specifically, they contend that Dodge was deceived when Aurora demanded that she make further reduced payments after the expiration of the TPP and that, if she sent a higher payment, her loan would not be modified. Aurora, they note, never informed her that she would be foreclosed upon for making further reduced payments, and Aurora's deception led Dodge to believe that, if she did not comply with its instructions, her loan would not be modified. Defendants claim that Aurora changed the TPP's requirements after Dodge accepted its terms and complied with the TPP by providing her financial documentation necessary to determine eligibility for a HAMP modification. Subsequently, Aurora demanded financial documentation from Dolcimascolo, Dodge's then-fiancé, a third party who was not a borrower or a party to the mortgage. They point to an exhibit that they claim states that the TPP required documentation only from borrowers, not spouses or third parties.

¶ 66 We reject these arguments. Defendants do not dispute that the TPP, by design, allows for reduced payments, on a trial basis, to show that a borrower can consistently make the reduced payments and, thereby, avoid default. It is, in essence, an audition for a permanent loan modification. Certain other conditions, of course, need be met, including the provision of certain financial information. It is undisputed that Dodge made the requested TPP payments, but it is also undisputed that she was unemployed throughout this time. Although Dodge made the TPP payments, she apparently could not provide Aurora with satisfactory financial documentation to establish she could continue to make reduced payments if approved for a permanent loan modification. She agreed at some point to provide Dolcimascolo's information, but provided it

to Aurora too late. Defendants' claim that there is a material factual question concerning Aurora's deception fails.

¶ 67 Further, defendants' reliance on the log entry that states "HOMEOWNER MOD ELIGIBLE" to support their claim that Dodge *qualified* for a loan modification is misplaced. Other entries belie this claim and show that Dodge, who, again, was unemployed, sought to rely on *household* income to qualify for a permanent loan modification. A January 5, 2010, consolidated notes log states that Dodge "*IS CLAIMING HHLD INCOME FROM SPOUSE* IF SHE WISHES TO USE THAT INCOME NEED 2 RECENT, CONSECUTIVE PAYSTUBS." (Emphasis added.) It further states: "NEED 3 ITEMS TO PROVE OCCUPANCY OF HHLD INCOME." A February 2, 2010, entry states that "M1 WILL SEND PAYSTUBS ALONG WITH PAYROLL LEDGER FOR SPOUSE; ALSO SENDING 3 MNTHS JO INT BNK STMS AND WILL INDICATE PAYROLL DEPOSITS FOR SPOUSE." A February 11, 2010, entry states "REVIEWED WITH S COHN, REQUESTED DOCS ON THE 5TH, NOTHING RECEIVED TO VERIFY HHLD INCOME IS TAXABLE CONCERNED CAN'T PRODUCE RETURNS, CANNOT VERIFY INCOME." Further, the log on that date states: "MOD INELIGIBLE, CANNOT VERIFY HOUSEHOLD INCOME IS TAXABLE, THEREFORE, EXCESSIVE FORBEARANCE." On February 11, 2010, in writing, Aurora informed Dodge, who had been unemployed since August 2008, that it had reviewed her mortgage loan for possible workout options, but was unable to offer her a HAMP modification because she was an ineligible borrower, as her income could not be verified. Apparently, Aurora received Dolcimascolo's documents some time *after* the loan modification was denied. Defendants do *not* assert that they *timely* provided the income information.

¶ 68 Next, defendants argue that there is a triable issue concerning whether Aurora breached the mortgage and note by prematurely raising the interest rate. They assert that, beginning on March 1, 2009, Aurora prematurely and arbitrarily raised Dodge's monthly payment amount from $3,170.40 to $3,219.16. Noting that Aurora responded that a letter sent by a research specialist about an alleged interest rate change was erroneous and that the payment increased due to an escrow change, defendants further note that the consolidated notes log does not contain this explanation. They also note that no escrow analysis was conducted in 2009. Defendants assert that Aurora offers no contradictory evidence concerning its failure to properly apply funds and manage her escrow account. They urge that McCann's bare assertion that there was no change to the interest rate and that the change in the loan amount was due to the escrow change is conclusory and does not identify any business records supporting her claim.

¶ 69 We reject defendants' argument. McCann attached to her affidavit a customer account activity statement. Apparently reflecting a disbursement, the statement shows a county tax balance in September 2011 of -$4,519.82. In contrast, in August 2010 and May 2010, the county tax balance was, in each case, -$4,330.59. Thus, between 2010 and 2011, the payments out of the escrow account increased to satisfy the property tax obligation. Defendants do not address this data, nor do they point to specific account entries to support their argument.

¶ 70 B. Motion to Re-Open Discovery

¶ 71 Defendants' final argument is that the trial court abused its discretion in denying their motion to re-open discovery after Nationstar submitted new documents and evidence in support of the 2016 motion for summary judgment on the complaint. For the following reasons, we find no error.

¶ 72 The trial court has broad discretion in ruling on discovery matters, and the exercise of this broad discretion will not be overturned on appeal unless there was a clear abuse of that discretion. *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 16. A court abuses its discretion where no reasonable person would agree with the court's position. *Petraski v. Thedos*, 382 Ill. App. 3d 22, 26 (2008).

¶ 73 In their motion, defendant sought to depose Davis to investigate alleged irregularities or inconsistencies that existed in the payment history. They alleged that they could not sufficiently respond to the summary judgment motion because the payment history Davis attached to her affidavit did not show how or when the payment default had occurred and was lacking data from August 2007 through September 2009. They also asserted that four transactions were listed out of sequence. Defendants maintained that discovery was closed before Nationstar attempted to intervene in the case and that they had no opportunity to depose or seek discovery of Nationstar personnel because they were unknown to them.

¶ 74 We conclude that the trial court did not abuse its discretion. In denying defendants' motion to re-open discovery, the trial court found that defendants failed to identify the material facts that were unavailable to them and failed to specify what was incomplete or altered in certain documents. The court noted that Aurora had pointed out where the information was contained in Davis's affidavit (of amounts due and owing, including the *entire* mortgage history), and defendants did not refute that. "You did not contradict anything that was in Davis's affidavit." "Plaintiff has addressed what you believe to be out of sequence transactions [noting that the four line items were the initial creation on its computer system of Nationstar's payment history for the loan] and has pointed out in the affidavit where that is listed. I did not see anything in the reply that refuted what Plaintiff was saying." Further, all of the information

defendants sought from Davis, the court found, was addressed in her affidavit. The trial court further noted that the case had been pending since 2010, defendants conducted discovery in 2011 and oral discovery was twice extended in 2015. Defendants did not take advantage of the discovery available to them in 2015 when it was extended. Further, Nationstar, which had been the servicer since July 2012, was known to defendants when Aurora moved to substitute plaintiff in November, "well over a year ago." "You did not seek to depose Nationstar and you did not conduct discovery in 2015." The foregoing reflects that there was no error in the court's assessment. Defendants' reading of the payment history is incorrect, and they otherwise failed to identify any specific information they sought by deposing Davis.

¶ 75 III. CONCLUSION

¶ 76 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 77 Affirmed.