2018 IL App (3d) 160735-U

Order filed March 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

PNC BANK, NATIONAL ASSOCIATION, Plaintiff-Appellee, v. TONY C. ADAMS, a/k/a TONY ADAMS; LAKESHIA T. ADAMS, a/k/a LAKESHIA ADAMS; THE MEADOWS HOMEOWNERS ASSOCIATION; UNKNOWN OWNERS and NON-RECORD CLAIMAINTS, Defendants, (Tony C. Adams, a/k/a Tony Adams, and Lakeshia Adams, a/k/a Lakeshia Adams, Defendants-Appellants).	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-16-0735 Circuit No. 15-CH-1767 The Honorable Brian E. Barrett, Judge, presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: In an appeal in a mortgage foreclosure case, the appellate court found that the trial court properly considered plaintiff's affidavit of amounts due and owing in

support of plaintiff's motion for summary judgment and properly granted summary judgment for plaintiff. The appellate court, therefore, affirmed the trial court's judgment.

¶ 2 Plaintiff, PNC Bank, National Association, brought an action against defendants, Tony and Lakeshia Adams, and others seeking to foreclose upon a mortgage held on certain real property in Will County, Illinois. During pretrial proceedings, plaintiff filed a motion for summary judgment on the foreclosure complaint. Defendants opposed the motion, claiming, among other things, that plaintiff's affidavit of amounts due and owing was legally insufficient. Following a hearing, the trial court granted summary judgment for plaintiff on the mortgage foreclosure complaint. After the property was sold at a sheriff's sale and the sale was confirmed by the trial court, defendants brought this appeal to challenge the trial court's grant of summary judgment for plaintiff. We affirm the trial court's judgment.

¶ 3 FACTS

¶ 4 In August 2015, plaintiff filed a complaint to foreclose upon a mortgage held on certain residential real property owned by defendants in Park Forest, Will County, Illinois. The complaint alleged that in June 2003, defendants borrowed $220,000 from Quest Mortgage Corporation (Quest); that the debt was later modified to approximately $291,000; that the debt was secured by a mortgage on the subject property; that defendants defaulted on the loan in February 2015; that defendants currently owed over $289,000 in principal on the loan, plus interest, costs, and fees; and that plaintiff was the current holder of the note and mortgage.

¶ 5 A copy of the note, mortgage, and a modification agreement were attached to the complaint. The note was executed in June 2003 in the amount of $220,000. It was signed by defendant, Tony Adams, as the borrower; listed Quest as the lender; and was eventually indorsed in blank. The note indicated that the borrower's promises would be secured by a mortgage. The

mortgage was executed at the same time as the note, was signed by both defendants as the borrowers, and was duly recorded. The loan modification agreement was entered into in March 2014 between plaintiff and defendants, increased the principal amount on the loan to approximately $291,000, and was also duly recorded.

¶ 6 In March 2016, during pretrial proceedings, plaintiff filed a motion for summary judgment on the mortgage foreclosure complaint. Attached to the motion (or filed at or near the same time) were various supporting documents, including an affidavit of the amounts due and owing. The affidavit was signed by a person named Bruce Trowman. In the affidavit, Trowman attested that: (1) he was an "[a]uthorized [s]igner" for plaintiff; (2) he had authority to make the affidavit on plaintiff's behalf because he was familiar with plaintiff's business and mode of operation; (3) through his work activity, he had become familiar with the general manner in which payments were received and applied; (4) he had received training on, and was familiar with through regular use, the computer system or systems that reflected the terms of the loan, the payments made, and the additional fees and charges associated with the account; (5) he was familiar with the scanning process used to convert the information contained within the documents into electronic data associated with the account and to store electronic images of the documents; (6) he regularly accessed images of mortgages and notes to confirm the accuracy of the data stated in affidavits as to accounts; (7) if he was called to testify at a trial in the instant case, he could competently testify as to the facts contained within the affidavit; (8) the amounts stated in the affidavit were based upon his review of the records contained in the specified computer records systems; (9) attached to the affidavit was a true and accurate copy of the payment history and screen shots of the computer records; (10) plaintiff used a computer records system, which was recognized as a standard in the industry, to automatically record and track

mortgage payments; (11) when a mortgage payment was received, a specific procedure, which was spelled out in detail in the affidavit, was used to process and apply the payment and to create the records that he had reviewed; (12) the entries in the computer records system that plaintiff used were made at or near the time that the payment was received; (13) the payment information and application records were created simultaneously in the computer records system at the same time as the entry of the data; (14) the record-making process that was described in the affidavit was done in the regular course of plaintiff's business; (15) the computer records system accurately recorded mortgage payments when properly operated; (16) his review of the records gave him no reason to believe that the process for tracking and recording payments was working improperly with respect to defendants' loan; and (17) based upon his review of defendants' mortgage loan records, the amount of principal due and owing on defendants' loan was over $289,000, as of the date of the affidavit, plus interest, costs, fees, and advances.

¶ 7 Defendants, who were represented by an attorney, filed a written response opposing the motion for summary judgment. In the response, defendants claimed that the affidavits attached to plaintiff's motion were not "foundationally sound," and the affiant did not have the requisite personal knowledge. Although defendants set forth the applicable law regarding the sufficiency of summary judgment affidavits, they did not explain how that law applied under the facts of the present case.

¶ 8 Plaintiff filed a reply to defendants' response and asserted that its "prove-up" affidavit was legally sufficient. In making that assertion, plaintiff noted that defendants did not dispute that they were in default or the amount owed on the loan, did not identify any actual deficiencies in plaintiff's affidavit, and did not file any counter-affidavits. Plaintiff cited various case-law decisions in support of its position.

¶ 9 In June 2016, a hearing was held on the motion for summary judgment. At the conclusion of the hearing, the trial court granted plaintiff's motion and entered a judgment of foreclosure and sale. The property was later sold at a sheriff's sale, and the trial court subsequently confirmed the sale. Defendants appealed.

¶ 10 ANALYSIS

¶ 11 On appeal, defendants argue that the trial court erred in granting summary judgment for plaintiff on the mortgage foreclosure complaint. Defendants assert that summary judgment should not have been granted because a genuine issue of material fact exists as to the amounts due and owing on defendants' loan. According to defendants, such an issue exists because Trowman's affidavit of the amounts due and owing was legally insufficient in that it failed to establish with particularity that Trowman had personal knowledge of the matters to which he was attesting. To the contrary, defendants maintain, Trowman's rote, generalized statements were superficial and wholly conclusory and could not be given any weight as evidence. More specifically, defendants contend, the affidavit failed to specify: (1) Trowman's qualifications to testify with respect to the financial information; (2) how Trowman became familiar with that financial information; (3) how Trowman, in his capacity as an authorized signer for plaintiff, developed personal knowledge of the facts of this case or was otherwise competent to testify at trial as to any of the documents referred to in the affidavit; (4) the details necessary to conclude that Trowman was qualified to interpret the financial records derived from defendants' loan; (5) how Trowman, in the regular course of his duties, acquired any of the documents he purported to regularly access to confirm the accuracy of the information in the affidavit; (6) how Trowman was familiar with plaintiff's business and mode of operation; (7) how Trowman developed sufficient knowledge to make him competent to testify regarding the process by which the

underlying records were created; and (8) how Trowman was competent to summarize the contents of the documents that he had seen. Furthermore, according to defendants, Trowman's affidavit failed to demonstrate that the figures included in the affidavit either were not hearsay or that the documents were admissible under the business records exception to the hearsay rule. For those reasons, defendants contend that Trowman's affidavit of the amounts due and owing was insufficient and could not be considered in support of plaintiff's motion for summary judgment. In making that contention, defendants recognize that the appellate court in other cases has found that affidavits with less detail than the one in the present case complied with the applicable supreme court rules. Defendants, however, argue for a change in the established law and assert that the appellate court's standards for evaluating the sufficiency of such affidavits should be made more stringent. Defendants ask, therefore, that we reverse the trial court's summary judgment ruling and the trial court's order confirming the sale and that we dismiss this case with prejudice or remand this case for further proceedings.

¶ 12 Plaintiff argues that the trial court's summary judgment ruling was proper and should be upheld. In support of that argument, plaintiff asserts first that defendants have forfeited their argument on appeal as to the sufficiency of Trowman's affidavit because defendants: (1) failed to make that argument in the trial court (except for one cursory statement in defendants' trial court brief); (2) failed to argue in the trial court for a change in the existing law as to the sufficiency of affidavits in mortgage foreclosure proceedings; and (3) failed to support their position on appeal with developed argument and citation to authority as required by the supreme court rules. In the alternative, plaintiff asserts that even if defendants' argument on appeal is not forfeited, it should nevertheless be rejected because Trowman's affidavit of the amounts due and owing was in compliance with the supreme court rules. In making that assertion, plaintiff points out that there

is substantial case-law authority in support of its position, as defendants concede. Furthermore, plaintiff maintains, although defendants complain that Trowman did not elaborate in his affidavit on all of the duties involved in his position, such information was not required by the supreme court rules. For all of the reasons set forth, plaintiff asks that we affirm the trial court's judgment.

¶ 13 The purpose of summary judgment is not to try a question of fact but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions on file, admissions, and affidavits, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Id.* In appeals from summary judgment rulings, the standard of review is *de novo*. *Id.* When *de novo* review applies, the appellate court performs the same analysis that the trial court would perform. *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43. A trial court's grant of summary judgment may be affirmed on any basis supported by the record. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 14 In resolving the issue that has been presented in this case, we must be mindful of the legal principles that apply to summary judgment affidavits and to the admission of business records.

First, as to summary judgment affidavits, we note that the purpose of such affidavits is to demonstrate the evidence that will be offered at trial so as to aid the trial court in its determination of whether a genuine issue of material fact exists. *Advertising Checking Bureau, Inc. v. Canal-Randolph Associates*, 101 Ill. App. 3d 140, 145 (1981). The requirements for summary judgment affidavits are set forth in Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Generally speaking, a summary judgment affidavit is proper under Rule 191(a) if it appears from the document as a whole that the affidavit is based upon the personal knowledge of the affiant and that there is a reasonable inference that the affiant could competently testify to the contents of the affidavit at trial. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22. More specifically, Rule 191(a) requires that summary judgment affidavits: (1) shall be made on the personal knowledge of the affiant; (2) shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; (3) shall have attached to it sworn or certified copies of all documents upon which the affiant relies; (4) shall not consist of conclusions but of facts admissible in evidence; and (5) shall affirmatively show that the affiant, if sworn as a witness, could testify competently thereto. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *Avdic*, 2014 IL App (1st) 121759, ¶ 21. Summary judgment affidavits take the place of courtroom testimony and should satisfy the same requirements to be deemed competent for consideration. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. In ruling upon a motion summary judgment, a trial court may not consider evidence that would be inadmissible at trial. *Id.*

¶ 15 Second, with regard to the admission of business records, we note that such records may be admitted into evidence as an exception to the hearsay rule if a proper foundation has been presented. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Avdic*, 2014 IL App (1st) 121759, ¶ 23. To lay a proper foundation for the admission of business

records, the proponent must show that the records were made: (1) in the regular course of business; and (2) at or near the time of the event or occurrence. Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Avdic*, 2014 IL App (1st) 121759, ¶ 23. When the business records at issue are computer-generated records, the proper foundation for admission is slightly more complicated. See *Avdic*, 2014 IL App (1st) 121759, ¶ 25. The proponent must establish that: (1) the equipment that produced the records is recognized as standard; (2) the entries were made in the regular course of business at or near the time of the event recorded; and (3) the sources of the information, the method, and the time of preparation were such as to indicate that the records are trustworthy and to justify the admission of the records. *Id.* Any lack of personal knowledge by the maker of the business records does not affect the admissibility of the records but may affect the amount of weight to be given to the records. *Id.* ¶ 29. When an affidavit with business records has been submitted in support of, or in opposition to, a motion for summary judgment, the trial court must inherently determine, in ruling upon the motion, whether the business records would be admissible at trial. See *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992).

¶ 16 In the present case, before we address the merits of the parties' arguments on appeal, we must first address plaintiff's claim that defendants' argument as to the sufficiency of the summary judgment affidavit has been forfeited because defendants failed to make that argument in the trial court and failed to support their position on appeal with proper argument and citation to authority in their appellate brief. While it is well settled that such actions may indeed result in forfeiture of an argument on appeal (see *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶¶ 14-15 (a party's failure to raise an argument in the trial court results in the forfeiture of that argument on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (the

appellant must support its argument on appeal with citation to authority); *Peet v. Bouie Construction, Inc.*, 268 Ill. App. 3d 18, 22 (1994) (the appellate court may disregard issues that are not supported by relevant authority)), we do not believe that defendants have forfeited their argument in this particular case. As plaintiff acknowledges, defendants did make an argument as to the sufficiency of the summary judgment affidavit in their trial court brief, although that argument was very short. In addition, we are hesitant to fault defendants for failing to support their argument on appeal with citation to legal authority when defendants have clearly pointed out in their appellate brief that the established law on this issue is not in their favor, have cited to that established law, and have argued for a change in the law on this issue. We, therefore, reject plaintiff's forfeiture argument.

¶ 17 Having found that there is no forfeiture in the present case, we turn to the merits of the parties' arguments on appeal. When we do so, and when we apply the above legal principles to the facts at hand, we find that Trowman's affidavit in the instant case was legally sufficient. First, as to personal knowledge, Trowman averred that he was an authorized signer for plaintiff, that he was familiar with the mode and operation of plaintiff's business, that he had reviewed the loan documents and the computer records, and that the copies of the records that were attached to the affidavit were true and correct. Although defendants suggest that Trowman was required to state in more detail the nature of his position and how he was familiar with the mode and operation of plaintiff's business, such detail is not required under the law. See Ill. S. Ct. Rs. 113(c)(4) (eff. May 1, 2013), 191(a) (eff. Jan. 4, 2013), 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 19 (the appellate court held that an affidavit of amounts due and owing submitted by an employee of a loan servicing company in a mortgage foreclosure case complied with Supreme

Court Rule 236 and was sufficient to support a grant of summary judgment for the company where the employee averred that: (1) she was familiar with the company's business process; and (2) the company's records were made in the regular course of business); *Bay view Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶¶ 43-46 (the appellate court held that a bank's assistant vice president's affidavit in a mortgage foreclosure case complied with Supreme Court Rule 236 and was sufficient to support a grant of summary judgment for the bank where the affiant averred that: (1) in her capacity as a vice president of the bank, she had access to the bank's business records relating to the loan; (2) she reviewed the loan records; (3) she had personal knowledge of how the loan records were kept and maintained; (4) the loan records were maintained by plaintiff in the course of its regularly conducted business activities; (5) the loan records were made at or near the time of the event by a person with knowledge; (6) it was the bank's regular practice in the ordinary course of business to keep loan records; and (7) certain specified amounts were due and owing on the loan); *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶¶ 12-14 (the appellate court held that the affidavit of a bank assistant vice president in a mortgage foreclosure case complied with Supreme Court Rule 236 and was sufficient to support a grant of summary judgment for the bank where the affiant attested that: (1) she was personally familiar with the bank's procedures for creating and maintaining its business records; (2) the bank's records pertaining to the defendants' mortgage were made at or near the time of the relevant occurrence by persons with personal knowledge of the information in the records; (3) the records were kept in the course of the bank's regularly conducted business activities; (4) it was the bank's regular practice to make and keep such records; and (5) a certain amount was due and owing on the loan (the total amount of the default)); *Avdic*, 2014 IL App (1st) 121759, ¶¶ 7, 26-27, 29-30 (the appellate court held that a bank employee's affidavit in a

mortgage foreclosure case complied with Supreme Court Rules 191 and 236 and was sufficient to support a grant of summary judgment in favor of the bank where the bank employee averred that: (1) she had been employed by the bank since 2002; (2) the bank maintained records and a file for each of the loans it serviced, which included a loan payment history, computer-generated records, and copies of origination documents; (3) her duties included reviewing and analyzing the bank's business and loan records; (4) the computer software system that the bank used to maintain the records had been in place for the life of the defendant's payment history with the bank, was accounting software customarily used in the banking industry, was periodically checked for reliability, and was only accessible to trained and authorized personnel; (5) she was familiar with, had been trained on, and was qualified to use that computer software system; (6) she had personal knowledge that entries on the payment histories were made at or near the time of the occurrence in the bank's regular course of business; (7) she had reviewed the business records and loan file for the defendant's loan; and (8) a certain specified amount was due and owing on that loan). While it is true that Supreme Court Rule 113(c)(4) requires the affiant to explain how he or she is familiar with the business and its mode of operation, we find that when the affidavit in the present case is taken as a whole, it provided sufficient details as to that matter.

¶ 18 Second, with regard to the computer records that were attached to the affidavit, Trowman averred in extensive detail the process by which those records were developed, the timing of when those records were developed (at or near the time when the business entries were made), that the computer records system that was used was standard in the industry, and that it appeared to be working correctly with regard to the records for defendants' loan. Again, although defendants protest that more details should have been provided, such details were not required under the existing law (see Ill. S. Ct. Rs. 113(c)(4) (eff. May 1, 2013), 191(a) (eff. Jan. 4, 2013),

236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Cornejo*, 2015 IL App (3d) 140412, ¶ 19; *Szpara*, 2015 IL App (2d) 140331, ¶¶ 41-46; *Land*, 2013 IL App (5th) 120283, ¶¶ 12-14; *Avdic*, 2014 IL App (1st) 121759, ¶¶ 26-32. Nor are we persuaded that the legal requirements should be made more stringent, as defendants suggest. The form that was used in this case was the same or substantially similar to the suggested form set forth in Rule 113 to be used in preparing affidavits of amounts due and owing in mortgage foreclosure cases.

¶ 19 Because we have found that Trowman's affidavit satisfied all of the applicable legal requirements, we must conclude that it was properly considered by the trial court in support of plaintiff's motion for summary judgment. Furthermore, because defendants did not present any counter-affidavits, we find that there was no genuine issue of material fact as to the default or as to the amounts due and owing. The trial court, therefore, properly granted summary judgment for plaintiff on its mortgage foreclosure complaint. See 735 ILCS 5/2-1005(c) (West 2014); *Adams*, 211 Ill. 2d at 43.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 22 Affirmed.