THIRD DIVISION
March 20, 2019

No. 1-18-0405

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF THE CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2004-5 BCS, Plaintiff-Appellee, v. FIKRET VELJACIC; UNKNOWN HEIRS AND LEGATEES OF FIKRET VELJACIC, IF ANY, UKNOWN OWNERS AND NON RECORD CLAIMANTS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County 12 CH 29443 Honorable John J. Curry, Judge Presiding

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Vacated and remanded. Summary judgment in foreclosure case was improper, as supporting affidavit did not comply with Illinois Supreme Court Rule 191.

¶ 2 Defendant Fikret Veljacic appeals from the circuit court's grant of summary judgment to Bank of New York Mellon (Mellon) on its foreclosure complaint. Veljacic primarily contends that the affidavit in support of summary judgment was deficient because it failed to attach a

complete payment history. He also contends that in light of his verified answer and affirmative defenses, the case must proceed to trial. For the following reasons, we agree with his first contention and reverse.

¶ 3 BACKGROUND

¶ 4 In 2004, Veljacic signed a mortgage and note for a property in Cook County. The loan was serviced by Bank of America (BoA). Veljacic made regular payments between 2004 and 2009. Some issues arose in late 2009 regarding the payment of real estate taxes on the property, but they are not germane to our disposition.

¶ 5 On March 5, 2012, BoA issued a Notice of Intent to Accelerate based on Veljacic's failure to pay his February 2012 monthly payment. BoA informed Veljacic that "[he had] the right to cure the default. To cure the default, on or before April 4, 2012, [BoA] must receive the amount of $3,397.76 plus any additional regular payment or payments, late charges, fees and charges which become due on or before April 4, 2012." As we will see below, there is some question about what was, or was not, paid in and around April 2012.

¶ 6 By assignment dated April 11, 2012, BoA transferred Veljacic's loan to Mellon.

¶ 7 Mellon filed a foreclosure complaint in August 2012. The complaint alleged that "the subject loan is paid through March 1, 2012" but that monthly payments, beginning April 2012, had not been made. Veljacic filed a Verified Answer and Affirmative Defenses to the complaint.

¶ 8 In June 2014, Mellon filed its first motion for summary judgment. The court denied summary judgment "without prejudice" for "failure to comply with Rule 191a and 236." Mellon filed its second motion for summary judgment in August 2016 but withdrew it on November 21, 2016. Mellon filed its third motion for summary judgment, identical to the second withdrawn one, in December 2016.

¶ 9 In his response to the motion, Veljacic made a number of arguments. One was that the "[a]ffidavit submitted by Plaintiff fails to meet [the] basic requirements [of Illinois Supreme Court Rule 191]. Plaintiff's affiant *** fails to attach some of the documents he relied on."

¶ 10 In April 2017, the circuit court granted Mellon's third motion for summary judgment and denied reconsideration. Mellon purchased the property at a judicial sale, and the circuit court entered an order approving the sale on January 16, 2018.

¶ 11 On February 13, 2018 Veljacic timely filed his notice of appeal.

¶ 12 ANALYSIS

¶ 13 Veljacic challenges the court's granting of summary judgment. Summary judgment is appropriate if the pleadings, depositions, admission, and any affidavits, reveal no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Citimortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 17; also 735 ILCS 5/2-1005(c) (West 2016). Summary judgment is a drastic measure and is only proper where the movant's right to relief is " 'clear and free from doubt.' " *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14 (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)). We apply *de novo* review to the court's ruling on a motion for summary judgment; we employ the same analysis as the trial court. *Bukowski*, 2015 IL App (1st) 140780, ¶ 17.

¶ 14 I. Supporting Affidavit and Rule 191(a)

¶ 15 Veljacic's primary contention is that the affidavit in support of summary judgment was deficient. In particular, he claims the affidavit fails to include payment records that show an accounting error occurred with respect to the escrow account and how payments were applied.

¶ 16 Affidavits used to support a motion for summary judgment are governed by Illinois Supreme Court 191 (eff. Jan. 4, 2013). *US Bank National Ass'n v. Avdic*, 2014 IL App (1st)

121759, ¶ 21. Rule 191(a) requires that affidavits, among other things, "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim *** is based;" and "*shall have attached thereto sworn or certified copies of all documents upon which the affiant relies* ***." (Emphasis added.) Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 17 Because affidavits serve as substitute for testimony at trial, "it is necessary that there be strict compliance with Rule 191(a)." *Robidoux v. Oliphant, M.D.*, 201 Ill. 2d 324, 335-36 (2002). This requirement applies equally to the particularity requirement and the attached-papers provision; Rule 191(a)'s "plain language clearly requires that such papers be attached to the affidavit." *Id*. at 339. The requirement that documents be attached is not a mere "technicality" and, if not adhered to, is fatal. *Id*. at 339 ("Rule 191(a) provisions barring conclusionary assertions and requiring an affidavit to state facts with 'particularity' would have little meaning were we to construe the attached-papers provision as merely a technical requirement that could be disregarded so long as the affiant were competent to testify at trial."); see also *PennyMac Corp. v. Colley*, 2015 IL App (3d) 140964, ¶ 16 ("The failure to attach supporting documents is fatal to the submission of the affidavit as substantive evidence."); *Preze v. Borden Chemical, Inc.*, 336 Ill. App. 3d 52, 57 (2002) ("The failure to attach the documents is fatal.").

¶ 18 Again, the motion at issue is the third motion for summary judgment—the first one having been denied for noncompliance with Rule 191 and the second having been withdrawn. This third motion was supported by only one affidavit, that of Chantel P. Moon. We review that affidavit in detail below.

¶ 19 Moon is an Assistant Vice President of Ditech Financial LLC, who works with Mellon to service its mortgage loans. She stated that she is "familiar with the business records maintained by Servicer for the purpose of servicing mortgage loans, collecting payments and pursuing any

delinquencies," which she cumulatively referred to as "Serving Records." These "Servicing Records typically include electronic data compilations and imaged documents pertaining to the loans it services."

¶ 20 Moon testified that the servicer uses a program call "GTA," which is industry standard, to "automatically record and track mortgage payments." She explained that, "[w]hen a mortgage payment is received," the GTA program "is used to process and apply the payment, and to create *the records [she] reviewed*." (Emphasis added.) She further testified that "[t]he Servicing Records pertaining to Defendant's account further reveal that there has been a default in the Defendant's Note and Mortgage, and that sufficient and certified moneys to cure the default have not been tendered ***." Based on her review of the records and the GTA program, Moon determined that Veljacic "failed to pay amounts due under the Note beginning with the payment due on 04/01/2012, and the amount due and owing" is "$ 180,778.67 as of July 27, 2016."

¶ 21 A number of documents are attached to the affidavit. Included are two screenshots/print-outs of what appears to be the computer program, GTA. (We presume from the context that these screenshots were taken on or around July 27, 2016.) Other documents include a "Payoff Inquiry" and account details for "Corporate Advances" and "Escrow" for real estate taxes.

¶ 22 Notably absent, however, is any history pertaining to principal-and-interest payments. No accounting related to those payments. No explanation of payments made, or how they were applied, leading up to or following the supposedly missed payment on "04/01/12."

¶ 23 Yet Moon swore in her affidavit, more than once, that she relied on that payment history. She described data compilations of mortgage payments as part of the "Servicing Records" and explained that those "Servicing Records" showed a default in Veljacic's account. She discussed how the GTA program processed mortgage payments "to create the records [she] reviewed."

¶ 24 Simply put, Moon used the GTA program to accurately produce a payment history that she reviewed, and on which she relied to determine that Veljacic had defaulted on his account, thus entitling Mellon to foreclosure. But the affidavit did not attach the very documents—the payment history—on which she relied. Without their inclusion, there was no way for the circuit court to review the records to determine whether the court was "presented with valid evidentiary facts upon which to base a decision." *Robidoux*, 201 Ill. 2d at 336; see also *PennyMac Corp.*, 2015 IL App (3d) 140964, ¶ 16; *Preze*, 336 Ill. App. 3d at 57. Mellon simply failed to comply with Rule 191, and that noncompliance was fatal.

¶ 25 Mellon, for its part, makes no effort to argue that the proper documents were attached to Moon's affidavit. Instead, Mellon argues that this payment history was included elsewhere in the record—specifically in its first motion for summary judgment filed in 2014, where Mellon included an affidavit from an individual named Travis Two Bulls, another Mellon employee. That affidavit appears to include a comprehensive account of the principal-and-interest payments (indeed, all payments) on Velijacic's account from its inception through that date in 2014 when that first motion for summary judgment was filed.

¶ 26 We say the Two Bulls affidavit "appears" to include the complete payment history because it is not necessary or appropriate to review it, because it was not attached to the relevant third motion for summary judgment as required by Rule 191(a). See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *Robidoux*, 201 Ill. 2d at 339. The fact that the relevant documents may exist *somewhere* in the record does not satisfy Rule 191(a). *Lucasey v. Plattner*, 2015 IL App (4th) 140512, ¶¶ 21, 23 ("Given the strict-compliance requirement of *Robidoux*," affidavit was properly stricken for failure to attach relevant documents; it was "utterly irrelevant" that "the various documents [the affiant] failed to attach to his affidavit may be found elsewhere in this record."). The rule is

"rigid;" there is no such thing as "substantial compliance" with Rule 191(a), excusing the failure to attach documents simply if the documents were otherwise available to or in the possession of the opposing party. *Doe by Doe v. Coe*, 2017 IL App (2d) 160875, ¶¶ 16, 18.

¶ 27 Because the affidavit used to support summary judgment did not comply with the attached-documents requirement, we vacate the entry of summary judgment. See *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 129-130 (1992) (trial court erred in granting summary judgment when it relied on affidavit summarizing documents that were not attached). As such, we must also vacate the order approving sale.

¶ 28 We express no opinion one way or the other as to whether Mellon would have been entitled to summary judgment, had it attached the required documents to Moon's affidavit.

¶ 29 We would note that in February 2013, our supreme court adopted rules governing mortgage foreclosures, including requirements related to affidavits filed in support of foreclosure judgments. See Ill. S. Ct. R. 113 (eff. May 1, 2013). Among those requirements, with an exception not relevant here, the plaintiff must include in its supporting affidavit "the payment history that the affiant reviewed and/or relied upon in drafting the affidavit." *Id.*, § (c)(2)(ii).

¶ 30 Rule 113 applies only to foreclosure actions filed on or after May 1, 2013. *Id.*, § (a). The rule thus does not govern the action before us, filed as it was in August 2012. We simply note here that our holding is consistent with Rule 113, though our analysis is based on Rule 191, which applies to affidavits used in support of any motion for summary judgment, in foreclosure actions or otherwise. See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 31 II. Section 15-1506

¶ 32 Because we have found that the affidavit in support of summary judgment did not satisfy the requirements of Rule 191, and we are vacating and remanding, we find it necessary to discuss

one of Veljacic's other arguments. He claims that summary judgment, as a procedural mechanism, is not available to Mellon here. He cites section 15-1506 of the Illinois Mortgage Foreclosure Law, which provides in part that, "in the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court, except: (1) where an allegation of fact in the complaint is not denied by a party's verified answer ***." 735 ILCS 5/15-1506(a)(1) (West 2016). From this, he argues the converse: that because his verified answer *did* deny material facts, the case must go to trial—summary judgment is an inappropriate vehicle.

¶ 33 That is incorrect. Section 15-1506(c) specifically provides that "[n]othing in this Section 15-1506 shall prevent a party from obtaining a summary or default judgment authorized by Article II of the Code of Civil Procedure." 735 ILCS 5/15-1506(c) (West 2016). As such, any question raised by Veljacic's answer goes to the propriety of granting summary judgment, not whether summary judgment is available as a procedural mechanism.

¶ 34 CONCLUSION

¶ 35 We vacate the order entering summary judgment in favor of Mellon and the order approving the sale. We remand for further proceedings.

¶ 36 Vacated and remanded.