2019 IL App (1st) 181030-U

FIFTH DIVISION
Order filed: May 24, 2019

No. 1-18-1030

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for American Home Mortgage Assets Trust 2006-5 Mortgage-backed Pass-through Certificates Series 2006-5,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 09 CH 50831
ELLEN RAVITZ a/k/a ELLEN M. RAVITZ; UNKNOWN HEIRS and LEGATEES of ELLEN RAVITZ, if any; UNKNOWN OWNWERS and NON-RECORD CLAIMANTS,	)	
Defendants,	)	Honorable John J. Curry Jr.,
(Ellen Ravitz, Defendant-Appellant).	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the orders of the circuit court granting the plaintiff's motion for summary judgment; entering a judgment of foreclosure and sale; denying the defendant's motion to reconsider the grant of summary judgment; and confirming the foreclosure sale.

¶ 2 The defendant, Ellen Ravitz, appeals from an order of the circuit court of Cook County confirming a judicial sale of the property commonly known as 118 Home Avenue, Oak Park, Illinois (the property) and the underlying orders granting the motion for summary judgment of the plaintiff, Deutsche Bank National Trust Company (Deutsche); entering a judgment of foreclosure and sale; and denying Ravitz's motion to reconsider the grant of summary judgment. For the reasons that follow, we affirm.

¶ 3 The following facts and procedural history, relevant to our disposition of this appeal, were adduced from the pleadings and exhibits of record.

¶ 4 On August 22, 2006, Ravitz executed a promissory note (the note), with the principal sum of $431,250.00, payable to the lender, American Brokers Conduit (ABC). The note was secured by a mortgage on Ravitz's property in which Mortgage Electronic Registration Systems, Inc. (MERS) is designated as the mortgagee in its capacity as nominee for ABC.

¶ 5 Paragraph 22 of the mortgage, entitled "Acceleration, Remedies," provides, in pertinent part:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ***. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property."

¶ 6 On October 19, 2009, a letter was sent to Ravitz from the firm, Moss Codilis, L.L.P, on behalf of the loan servicer, American Home Mortgage Servicing, Inc. (American Home), informing her that she was in default for failing to pay " the required installments when due" on the note and mortgage (notice of acceleration). The notice stated that "as of 10/17/2009[,] the amount of the debt that we are seeking to collect is $3,800.28," and that the notice was not a payoff statement, but rather "the amount necessary to cure the current delinquency." The notice informed Ravitz that she "must pay the full amount of the default *** by the thirty-fifth (35th) day from the date of this letter." The notice further provided that "[i]f you do not pay the full amount of the default, we shall accelerate the entire sum of both principal and interest ***, and invoke any remedies provided for in the Note and [mortgage], including but not limited to the foreclosure sale of the property." The notice also included language informing Ravitz that "notice provisions may be contained within your mortgage/deed of trust which require this notice prior to foreclosure."

¶ 7 On December 18, 2009, Deutsche filed a complaint in the circuit court of Cook County to foreclose on the mortgage, alleging that, since September 2009, Ravitz had been in default on her monthly payments of the principal and interest owed on the note. Attached to the complaint was a copy of the note along with a blank endorsement executed by ABC and a copy of the mortgage. On January 28, 2010, after failed attempts at personal service, Ravitz was served by publication.

¶ 8 Ravitz filed her appearance in June 2010[1] and filed her initial answer, single affirmative defense, and two counterclaims on July 20, 2010. On January 18, 2011, the circuit court dismissed Ravitz's affirmative defense and counterclaims. On July 27, 2011, Ravitz filed her third amended answer, affirmative defenses, and counterclaims, making no allegation that the

[1] The month and year of the file-stamped date are clearly visible; however, the individual day is illegible.

form of the notice of acceleration sent by American Home through Moss Codilis, L.L.P. failed to comply with the terms of the mortgage. In other words, Ravitz did not allege that Deutsche failed to perform a condition precedent to foreclosure—filing a proper notice of acceleration.

¶ 9 Deutsche filed a motion to dismiss the third amended counterclaims and strike the third amended affirmative defenses, which the circuit court denied. On March 18, 2014, Deutsche filed a motion for summary judgment on both its complaint to foreclose on the property as well as Ravitz's affirmative defenses and counterclaims. In support of its motion, Deutsche attached an affidavit of Crystal Kearse, an employee of Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Serving, LLC, Deutsche's servicing agent for the note and mortgage, who testified to the accounting procedures of Ocwen.[2]

¶ 10 On March 29, 2017, the circuit court entered summary judgment in favor of Deutsche on Ravitz's third amended counterclaims and affirmative defenses, but it did not rule on Deutsche's request for summary judgment on its foreclosure complaint[3]. On June 29, 2017, Deutsche filed its amended motion for summary judgment, attaching another affidavit executed by Kearse. In her affidavit, Kearse averred that: (1) she had access to Ocwen's loan records, which are kept and maintained by REAL Servicing, an account tracking system and Customizable Imaging System (CIS), a document management system; (2) she had knowledge of how information, documents, and records were input and maintained in both the REAL Servicing system and CIS; (3) it is Ocwen's regular course of business to upload the terms of the loan into the REAL Servicing system and upload the copies of the loan documents (including the note, mortgage, and documents received from prior servicers) into CIS at or around the time of origination or

[2] Prior to Ocwen, American Home serviced Ravitz's note and mortgage on behalf of Deutsche.

[3] Paragraph three of the March 29, 2017 order states that summary judgment was entered in favor of Deutsche on its foreclosure complaint; however, the order was later amended to remove paragraph three.

acquisition of the loan and that Ocwen relies on these documents as its own business records; (4) it is Ocwen's regular course of business to upload correspondence between Ocwen and the borrower (including all letters and notices) into CIS at or around the time the correspondence is sent; (5) it is Ocwen's regular course of business to make credit and debit entries into the REAL Servicing system at or around the time the transactions reflected in the entries occur, and "[t]he REAL Servicing system organizes, tracks, and compiles these transactions into an account history, which details the complete payment history of the loan and other computer-generated pages which calculate the then-current indebtedness;" (6) all documents, information, and payment entries are input into the REAL Servicing system or CIS by a person with direct personal knowledge of the information being input; (7) the REAL Servicing system and CIS are standard systems recognized throughout the banking and mortgage industries; (8) all exhibits attached to the affidavit were made in the regular course of business and were kept and maintained in REAL Servicing and/or CIS; (9) she relied on the documents and information obtained from the REAL Servicing system and CIS in making the statements regarding the status of Ravitz's loan; and (10) a computer-generated record obtained from the REAL Servicing system reflects that the following sums were due as of June 13, 2017: (i) $467,376.81 principal balance; (ii) $128,632.96 interest; (iii) $138,654.19 total escrow advances; (iv) $1,123.46 late charges; and (v) $735,787.42 total balance.

¶ 11 On July 26, 2017, Ravitz filed a response to Deutsche's amended motion for summary judgment on its complaint. For the first time, Ravitz argued that Deutsche failed to satisfy a condition precedent to foreclosure by failing to send a proper notice of acceleration that met the requirements of paragraph 22 of the mortgage. She further argued that the Kearse affidavit relied on erroneous loan transaction records from "July 2008 to present" and that those records attached

to the affidavit constituted hearsay. Ravitz did not attach an affidavit to her response to Deutsche's motion for summary judgment to refute any of the material facts raised by Deutsche in support of its motion for summary judgment.

¶ 12 On August 16, 2017, after a hearing on the motion, the circuit court granted Deutsche's motion for summary judgment, and entered a judgment of foreclosure and sale. According to the circuit court, Ravitz's argument, that Deutsche failed to meet a condition precedent to foreclosure by submitting an improper notice of acceleration, was forfeited because it was an untimely affirmative defense raised for the first time in response to Deutsche's motion for summary judgment. The circuit court also reasoned that the argument lacked merit, determined that the notice of acceleration was not "deficient at law," and, consequently, denied Ravitz's oral motion, made during the hearing, for leave to file an amended affirmative defense raising the condition precedent argument. Lastly, the circuit court reasoned that Ravitz's alleged deficiencies of the Kearse affidavit were without merit. On November 3, 2017, Ravitz filed a motion to reconsider the entry of summary judgment and subsequent judgment of foreclosure and sale. The motion to reconsider raised the same arguments presented at the hearing on Deutsche's motion for summary judgment, focusing on the notice of acceleration and the alleged deficiencies of both the Kearse affidavit and the records attached to the affidavit. On December 19, 2017, the circuit court denied Ravitz's motion to reconsider.

¶ 13 On December 29, 2017, the property was sold in a judicial sale, which resulted in a deficiency of $405,912.93. On April 23, 2018, the circuit court confirmed the judicial sale and entered a deficiency judgment in the amount of $405,912.93 against Ravitz. This appeal followed.

¶ 14 On appeal, Ravitz argues that the trial court erred when it: (1) granted summary judgment in favor of Deutsche; (2) denied her motion to reconsider the grant of summary judgment; and (3) confirmed the sale and ordered possession.

¶ 15 We first address the issue of whether the circuit court erred when it granted summary judgment. Ravitz maintains that the circuit court erred when it granted summary judgment in favor of Deutsche when Deutsche: (1) failed to meet a condition precedent to foreclosure—submitting a proper acceleration notice, and (2) relied on the Kearse affidavit containing inaccurate records and hearsay to support its accounting of amounts due and owing on the note.

¶ 16 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Our review of summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). In conducting our review, we independently examine the evidentiary material presented in support of, and in opposition to, the motion for summary judgment to determine whether there is an issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Arra v. First State Bank & Trust Co. of Franklin Park*, 250 Ill. App. 3d 403, 406 (1993).

¶ 17 We note that, instead of alleging that Deutsche failed to satisfy a condition precedent to foreclosure by submitting an improper acceleration notice in her answer, she raised this affirmative defense for the first time in her response to Deutsche's motion for summary judgment. Generally, in order to avoid surprise to the opposite party, an affirmative defense must be raised in a party's answer to a complaint; otherwise, the defense is forfeited. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 376 (2008). However, an affirmative

defense is not forfeited, even though it was not raised in an answer to a complaint, "if the defense is subsequently raised without objection in a motion for summary judgment." *Id.* at 376 (citing *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774, 780 (2005)). Here, Deutsche objected to Ravitz's argument both in its reply to Ravitz's response to its motion for summary judgment as well as during the hearing on the motion. Specifically, Deutsche argued that Ravitz failed to raise the condition precedent argument in her previous answers and affirmative defenses and waited eight years to raise the argument for the first time.

¶ 18 We find that Ravitz's delay in raising her affirmative defense surprised Deutsche. It was not until six years after filing her third amended answer, affirmative defenses, and counterclaims that she raised this affirmative defense, for the first time, in her response to Deutsche's motion for summary judgment. Moreover, Ravitz had numerous opportunities to amend her affirmative defenses having received the acceleration notice nearly eight years prior to the hearing on Deutsche's motion for summary judgment. Ravitz's failure to raise this affirmative defense earlier, coupled with the surprise to Deutsche and its objection to the affirmative defense, leads us to conclude that Ravitz forfeited her affirmative defense.

¶ 19 Nevertheless, Ravitz's argument that Deutsche failed to perform a condition precedent is without merit. She maintains that the circuit court erred in granting summary judgment in favor of Deutsche because Deutsche failed to perform a condition precedent to foreclosure in that the notice of acceleration did not comply with paragraph 22 of the mortgage as it did not: (1) define the action needed to cure the default; (2) make clear the amount needed to cure the default; and (3) specify that failure to cure the default may result in a judicial foreclosure. Ravitz argues that these failures amounted to more than a technical defect and created a confusing "hybrid" acceleration notice and collection letter. We disagree.

¶ 20 Again, paragraph 22 of the mortgage requires that the notice shall specify:

> "(a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property."

The October 19, 2009 notice of acceleration informed Ravitz that she was in default for failing to pay "the required installments when due" on the note and mortgage. The notice specified the default, stating "as of 10/17/2009[,] the amount of the debt that we are seeking to collect is $3,800.28." The notice specified the action required to cure the default and a date not less than 30 days from the date of the notice within which to cure the default, stating that she "must pay the full amount of the default *** by the thirty-fifth (35th) day from the date of this letter." The notice specified that failure to cure the default may result in acceleration of the sums owed and foreclosure and sale, stating "[i]f you do not pay the full amount of the default, we will accelerate the entire sum of both principal and interest ***, and invoke any remedies provided for in the Note and [mortgage], including but not limited to the foreclosure sale of the property."

¶ 21 Therefore, we find that the language in the acceleration notice tracks the language and content required in paragraph 22 of the mortgage. The fact that the acceleration notice did not use the exact language, word-for-word, as the language in paragraph 22 of the mortgage does not constitute a failure to perform a condition precedent to foreclosure and can only be construed as a technical defect. A technical defect in an acceleration notice "will not automatically warrant a

dismissal of a foreclosure action." See *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 42 (citing *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15). Where a borrower alleges only a technical defect and no resulting prejudice, dismissing the foreclosure complaint to permit new notice would be futile. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27.

¶ 22 Here, Ravitz made no attempt to allege prejudice in connection with the alleged defect in the notice of acceleration, effectively maintaining she need not assert prejudice and that Deutsche cannot assert that there was "no prejudice" as a defense to the allegation that it failed to perform a contractually mandated condition precedent. However, we find that the failures that Ravitz maintain exist in the notice amount only to technical defects and that any attempt to argue prejudice would have been disingenuous.

¶ 23 Moreover, the argument that Ravitz was confused about whether the letter was an acceleration notice or a collection notice, characterizing it as a "hybrid" collection letter, is unpersuasive. Ravitz was not tasked with ascertaining what type of notice she received as the notice clearly tracked the acceleration notice language in paragraph 22 of the mortgage. It also provided a sentence, which effectively labeled the notice as an acceleration notice sent prior to foreclosure, stating that "notice provisions may be contained within your mortgage/deed of trust which require this notice prior to foreclosure." Moreover, the notice clearly informed her that payments on her default should be remitted to her servicer, American Home and not Moss Codilis, L.L.P. Therefore, we fail to see how the notice of acceleration could have been interpreted as anything other than a notice of acceleration that properly satisfied the requirements of the condition precedent to foreclosure.

¶ 24 Based on the foregoing, we find that, the circuit court did not err when it granted the motion for summary judgment in favor of Deutsche as there was no genuine issue of material fact as to whether a condition precedent was met.

¶ 25 Next, Ravitz maintains that there was a genuine issue of material fact as to the accuracy of Deutsche's accounting of the amounts due and owning. Specifically, Ravitz maintains that Deutsche relied on the Kearse affidavit, which contained inaccurate loan transaction records and hearsay, to support its accounting of amounts due and owing on the note.

¶ 26 In her response to Deutsche's motion for summary judgment, Ravitz attacks the sufficiency of the Kearse affidavit but did not file any affidavits or other counter-evidentiary material contradicting the averments in the Kearse affidavit. She argued, as she does on appeal, *inter alia*, that: (1) Kearse lacked personal knowledge of the matters asserted in the affidavit and simply looked at the records on her computer screen; (2) Deutsche omitted a complete set of transaction records and failed to admit that the missing records contain errors, thereby undermining the "accuracy, thoroughness, and veracity of the Kearse [a]ffidavit;" and (3) Deutsche relies on the Kearse affidavit which contains loan transaction records that are hearsay evidence because the records were generated for the purposes of litigation and Kearse made no effort to assert that any prior servicing records were incorporated or integrated into Ocwen's system for use in its day-to-day operations.

¶ 27 Deutsche contends that Ravitz's argument in this regard does not contradict the evidence establishing the accuracy of the figures in the Kearse affidavit. We agree with Deutsche.

¶ 28 Well-alleged facts contained in an affidavit submitted in support of a motion for summary judgment are taken as true unless contradicted by counter-evidentiary material submitted in opposition, notwithstanding the existence of contrary averments in the adverse

party's pleadings. *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill. 2d 580, 587 (1971). The Kearse affidavit establishes, *inter alia*, that: (1) she has personal knowledge of Ocwen's account tracking software and document management system; (2) it was Ocwen's regular course of business to make both credit and debit entries into the REAL Servicing system at or around the time of the transactions reflected in the system; (3) the credit and debit entries are made by persons with direct knowledge of the information being input into the system; and (4) the system organizes, tracks, and compiles the transactions into an account history, detailing the complete payment history of the loan. As the Kearse affidavit was not contradicted by evidentiary material submitted by Ravitz, we take the averments as true.

¶ 29 The foregoing analysis leads us to conclude that no genuine issue of material fact exists on the accuracy of Deutsche's accounting of the amounts due and owning. Further, Ravitz did not submit any evidentiary material contradicting Kearse's averments in her affidavit. We conclude, therefore, that Deutsche was entitled to judgment as a matter of law and the circuit court correctly granted its motion for summary judgment and entered a judgment of foreclosure and sale.

¶ 30 Lastly, Ravitz argues that the circuit court erred in denying her motion to reconsider the circuit court's grant of summary judgment. We disagree.

¶ 31 The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was unavailable at the time of the hearing, changes in the law, or errors in the court's previous application of existing law. *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1991). As a general rule, a motion to reconsider is left to the sound discretion of the circuit court. *Id.* However, a motion to reconsider an order granting summary judgment raises the question of whether the circuit court erred in its previous application of

existing law. *Id.* Because the denial of a motion to reconsider an order granting summary judgment raises a question of law, our review is *de novo*. *Joel R. v. Board of Education of Mannheim School District 83*, 292 Ill. App. 3d 607, 613 (1997).

¶ 32 Ravitz's motion to reconsider fails to offer any newly discovered evidence that was not available at the time of hearing. The motion also makes no mention of changes in the law subsequent to the circuit court's entry of summary judgment. It merely maintains that the circuit court erred in its application of existing law in granting the motion for summary judgment and presents the same arguments it raised at the hearing on the motion for summary judgment. As we have already determined that the circuit court did not err in its findings that Ravitz failed to establish a genuine issue of material fact and that Deutsche was entitled to judgment as a matter of law, we hold that the circuit court committed no error in denying Ravitz's motion to reconsider. *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 578 (2000). Accordingly, we affirm the circuit court's denial of Ravitz's motion to reconsider and subsequent order confirming the judicial sale.

¶ 33 Affirmed.