2019 IL App (3d) 180038-U

Order filed June 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

NATIONSTAR MORTGAGE, LLC, Plaintiff/Counter-Defendant-Appellee v. ROLAND SANDERS, KEITH A. SANDERS, GLENNIS SANDERS, UNKNOWN OWNERS and NON RECORD CLAIMANTS, Defendants (Roland Sanders, Keith A. Sanders and Glennis Sanders, Defendants/Counter-Plaintiffs-Appellants)	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois Appeal No. 3-18-0038 Circuit No. 10-CH-7018 Honorable Cory D. Lund Judge, Presiding

---

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err when it entered a judgment of foreclosure against defendants who failed to comply with the terms of a mortgage modification agreement.

¶ 2 Defendants Roland Sanders, Keith Sanders and Glennis Sanders brought this interlocutory appeal challenging the trial court's entry of a judgment of foreclosure and judicial sale in favor of plaintiff Nationstar Mortgage, LLC. We affirm.

¶ 3 FACTS

¶ 4 Defendants Roland Sanders and Keith Sanders secured a mortgage for a residential property in Crete in June 2007. Defendant Glennis Sanders, Roland's wife and Keith's mother, also lived at the property and signed the mortgage to waive her homestead rights. After Roland and Glennis suffered financial hardship in 2009, they attempted a loan modification but were unsuccessful. They tried again in April 2010 and were approved in May 2010 for a permanent loan modification with plaintiff Nationstar Mortgage, LLC. The defendants (collectively Sanders) entered into a modification agreement with Nationstar, which provided, in relevant part:

> "The Borrower promises to make monthly payments of principal and interest of U.S. $2,312.28, plus the escrow payment beginning on the 1st day of May, 2010; and continuing thereafter on the same day of each succeeding month until principal and interest are paid in full."

¶ 5 Nationstar filed a complaint for foreclosure against the defendants on November 12, 2010. The two-count complaint also sought a declaratory judgment to void documents recorded by Roland and Keith that purported to release the mortgage. Attached to the complaint was a copy of the mortgage and note. The note was indorsed to GMAC Mortgage LLC. Mediation was attempted but failed. Nationstar moved for a default and foreclosure judgment, which Sanders answered. Nationstar moved for summary judgment and the trial court granted it. Sanders moved for reconsideration, which the trial court denied without prejudice.

¶ 6 Sanders filed a motion to vacate under section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2016)). Attached to the motion were various documents. An April 20, 2010, letter from Nationstar to Sanders indicated a principal and interest payment of $2293.89 was due on May 1, 2010, as well as an escrow amount to be determined once the modification was finalized. The letter informed Sanders that there was an estimated escrow shortage of $11,107.80, and with the escrow arrearage, the total monthly payment would be $4046.65. If the escrow arrearage was paid in a lump sum, the monthly mortgage, interest and escrow payment would be $3863.02. A letter dated May 5, 2010 included the mortgage modification agreement for Roland and Keith to execute, and informed them that with the escrow arrearage, the monthly payment would be $3484.90. If the arrearage was paid in a lump sum, the mortgage, interest and escrow amounts would require a monthly payment of $3301.27. The trial court denied the motion to vacate. Sanders appealed the denial but let the appeal expire and this court dismissed it. *Nationstar Mortgage LLC v. Sanders*, No. 3-13-0256 (2013) (unpublished minute order).

¶ 7 Sanders moved to vacate the summary judgment order under section 2-1301 of the Civil Code (735 ILCS 5/2-1301 (West 2016)). Included with the motion was a proposed answer to Nationstar's complaint which asserted affirmative defenses and counterclaims sounding in conversion and violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et al.* (West 2016)). Sanders filed an answer in August 2013. The trial court granted Sanders's section 2-1301 motion and vacated its summary judgment order. Sanders then responded to Nationstar's summary judgment motion, claiming a genuine issue of material fact existed due to a discrepancy in applying the trial period payments. Nationstar replied, asserting that Sanders failed to support their claim with evidence or affidavit.

The trial court agreed and granted Nationstar's motion for summary judgment on July 29, 2014. It entered a judgment of foreclosure and sale the same day. Sanders filed a section 2-1301 motion to vacate the foreclosure order. The trial court vacated the order on August 26, 2014. Sanders filed an amended response to Nationstar's motion for summary judgment. Attached to the response was a copy of the loan modification agreement and payment receipts.

¶ 8 Glennis filed an affidavit in October 2014, averring that she and Roland entered into a permanent modification in May 2010. She further averred that she made the principal and interest payments but was not told the escrow amount. The trial court denied Nationstar's summary judgment motion on October 21, 2014. With leave of the court, Sanders filed an amended answer and raised the affirmative defenses of capacity, contractual performance, promissory estoppel, unclean hands and fraudulent inducement, and brought counterclaims asserting conversion and violations of the Consumer Fraud Act. In its capacity defense, Sanders argued Nationstar did not hold the loan when the foreclosure action was filed. Nationstar moved to reconsider the denial of its motion for summary judgment, which the trial court denied. Nationstar moved to answer Sanders's affirmative defenses and counterclaims, to dismiss the counterclaims, and for summary judgment. The court denied its motions.

¶ 9 A bench trial took place. Eric Lacy, a default specialist with Nationstar, testified. He reviewed loans in default. Nationstar serviced the Sanders loan beginning in 2009. He authenticated the mortgage and stated that, as servicer, Nationstar maintained the note, mortgage and other documents connected with the loan. The note showed that it was indorsed from Homecoming Financial to GMAC and then from GMAC to blank. Sanders unsuccessfully tried a trial modification in 2009. A new loan modification began in May 2010. The agreement provided that Nationstar was to make payments to third parties as required, such as for insurance and

taxes. The principal and interest payment due per the modification agreement was $2312.28, in addition to an escrow amount that was not defined. The modification agreement also included provisions for various fees, such as late fees. He explained how payments are received and input into Nationstar's system and went through the payment history and collection notes connected to the Sanders mortgage.

¶ 10 The payment history established that the loan modification was completed on May 31, 2010, effective May 1, 2010. The modified loan amount was $371,931.50. On May 11, 2010, Nationstar disbursed $5296.83 in taxes and on May 18, 2010, it paid $2193.31 for hazard insurance. Late fees were imposed. A June 18, 2010, letter to Sanders indicated that the loan was in arrears. On June 28, 2010, Nationstar disbursed $563.86 for insurance. Nationstar received a $2312.28 payment from Sanders on June 30, 2010. No escrow payment was submitted. Sanders submitted a payment of $2,312.28 on July 27, 2010. Those two payments combined to cover the May 2010 payment of $4048.76. An acceleration letter was sent to Sanders on August 4, 2010, indicating an arrearage of $14,832.37. The letter specified the default date, the cure amount, the deadline to cure, and warned of the consequences of failing to cure. On August 10, Nationstar advanced $5296.83 for property taxes. On August 26, it disbursed $563.86 for insurance. Sanders made a payment of $2312.28 on August 27. Sanders sent an additional payment on August 30. It was added to funds in the suspense account to satisfy a complete payment for June, making the July payment due. Sanders sent additional payments of $2312.28 on September 30 and November 22. Nationstar returned the November payment. According to Lacy, the principal due on the loan was $371,023.99, and with funds advanced on the loan, the total due was $658,566.15.

¶ 11 Lacy explained the collection notes for the Sanders file, which indicated the following. Glennis contacted Nationstar in March 2009, claiming economic hardship, and modification was discussed. A trial modification took place but did not succeed. Another modification was discussed in April 2010, including the new terms. Glennis discussed making separate escrow payments and was told that all payments would be escrowed. In June, the monthly payments were again discussed with Glennis and she was told the monthly amount was $4048.76. Another discussion took place several days later in which Glennis was again told the full payment amount but disputed it. Nationstar requested Glennis provide information that the tax amount Nationstar was estimating for escrow purposes was incorrect. In July, the escrow issue remained ongoing and the May and June payments were not made. In September, Glennis indicated no further payments would be made until the escrow dispute was resolved. She was told again the total payment amount was $4048.76, and that she was in arrears because she was not making escrow payments. A manager review of the account indicated that taxes and insurance had been advanced. Glennis was told an additional time that the full payment amount was $4048.76.

¶ 12 Lacy acknowledged on cross-examination that the modification letter did not specify an escrow amount. He explained once a permanent modification agreement was executed, the arrearages were rolled into the modification and the mortgagors start with a clean slate. On redirect examination, Lacy confirmed though Glennis was informed the amount due was $4048.76, she paid $2312.28. Monthly mortgage statements indicating the total amount due with a breakdown for principal/interest and escrow amounts were sent to Sanders. Despite being told repeatedly the total amount due, including the escrow amount, Sanders did not make a timely full payment throughout the modification period.

¶ 13 Glennis Sanders testified. She handled the family finances. In May 2009, she and Roland began experiencing financial difficulties and struggled to pay the mortgage. Glennis contacted Nationstar and started a trial modification program. The Sanders were approved for a permanent loan modification in April 2010 to begin May 1, 2010, with a principal and interest payment of $2312.28 plus an escrow amount not specified in the modification agreement. In June, she began receiving notices about being in arrears. She questioned how the loan could be in default after one month and disputed the amount due. The loan modification stated an amount of $2312.28, which she tendered on June 28, 2010. She did not recall seeing anything in writing regarding the escrow amount. She admitted that several documents listed the escrow amount but it was never made clear to her. She was not given any answers.

¶ 14 On rebuttal, Lacy testified that Sanders was sent monthly payment reminders, which broke down the amounts due for principal/interest and escrow. Sanders did not offer any evidence to support the affirmative defenses or counterclaims. The trial court granted Nationstar's complaint for foreclosure and entered judgment in a favor of Nationstar on August 2, 2017, on the foreclosure and declaratory judgment and against Sanders on the affirmative defenses and counterclaims.

¶ 15 Sanders moved to reconsider. A hearing took place, where Sanders argued that Nationstar had failed to specify the escrow amount in the loan modification agreement. Sanders also challenged the amount Nationstar claimed was due. The trial court denied the motion. Sanders moved to amend the pleadings to conform to the proofs, challenging the default amount and asserting that the acceleration notice did not comply with the mortgage terms. The motion was heard and denied. The trial court included Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language in the order and Sanders timely appealed.

¶ 16 ANALYSIS

¶ 17 Sanders raised three issues on appeal, including whether the trial court: (1) lacked subject matter jurisdiction, and (2) erred when it entered a foreclosure judgment and (3) when it denied Sanders's motion for reconsideration.

¶ 18 We first address Sanders's challenge to jurisdiction. Sanders argues that the trial court, and by extension this court, lacked jurisdiction to hear the complaint for foreclosure. According to Sanders, Nationstar did not hold the note at the time it filed the foreclosure complaint, reasoning that it therefore lacked standing which precluded Nationstar from bringing a justiciable matter, resulting in lack of jurisdiction in the trial court. Sanders further reasons that if the trial court lacked jurisdiction, this court also lacks jurisdiction and cannot hear the appeal.

¶ 19 Subject matter jurisdiction is constitutionally conferred and grants trial courts "original jurisdiction of all justiciable matters." Ill. Const. 1970, art. VI, § 9. Subject matter jurisdiction refers to the court's power to hear cases. *Advanced Physicians, S.C. v. Provena Glenwood Medical Imaging*, 2018 IL App (3d) 170296, ¶ 19 (citing *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002)). This court reviews *de novo* whether a trial court lacked subject matter jurisdiction. *Habitat Co, LLC. v. Peeples*, 2018 IL App (1st) 171420, ¶ 14.

¶ 20 Standing ensures that only parties with a real interest in the controversy's outcome are involved in the action and requires "some injury in fact to a legally cognizable interest." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Standing must be established at the time the plaintiff files an action. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12. Lack of standing is an affirmative defense which the defendant must plead and prove. *U.S. Bank, N.A. v. Kosterman*, 2015 IL App (1st) 133627, ¶ 10. Whether a party has standing is a

question of law this court reviews *de novo*. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 19.

¶ 21 Sanders confuses subject matter jurisdiction with standing. The trial court and this court have subject matter jurisdiction to hear the case. See *Nationstar Mortgage, LLC v. Canale*, 2014 IL App (2d) 130676, ¶ 14 (courts have subject matter jurisdiction to hear foreclosure actions). Nationstar has standing to bring the action as well. See *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67 (foreclosure complaint must be filed by legal holder of the note). Sanders raised the issue of standing in his amended answer as the affirmative defense of "capacity," arguing that Nationstar could not bring the foreclosure action because it did not hold the mortgage and note. However, Nationstar attached the mortgage and note to its foreclosure complaint. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24 (attachment of a copy of the note to the complaint is *prima facie* evidence the plaintiff owns the note). That the note attached to the mortgage was not indorsed in blank does not deprive Nationstar of standing. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 13 (attached note *prima facie* evidence of plaintiff's ownership of the note despite that the note lacked an indorsement in blank). Nationstar produced a note indorsed in blank during the proceedings and it was entered into evidence without objection. See *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 11 (plaintiff produced original note in open court proving ownership of it). We find Nationstar did not lack standing and that the trial court and this court do not lack jurisdiction.

¶ 22 The next issue is whether the trial court erred when it entered a judgment of foreclosure against Sanders. Sanders argues that the evidence did not establish that Nationstar was entitled to a judgment of foreclosure. According to Sanders, Nationstar failed to comply with the conditions precedent required in the modification agreement, specifically submitting that the modification

agreement did not state the amount of the escrow payment; the amount claimed due in the default notice was incorrect; and the acceleration notice did not comply with the terms as set out in the mortgage.

¶ 23 The Illinois Foreclosure Law establishes the pleading requirements to bring a foreclosure complaint. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 10. A mortgagor establishes a *prima facie* case for foreclosure when the complaint for foreclosure conforms to the statutory requirements set forth in section 15-1504(a) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504(a) (West 2016)) and the note and mortgage are attached to the complaint. *MidFirst Bank v. Riley*, 2018 IL App (1st) 171986, ¶ 18. A notice of acceleration is a condition precedent to a foreclosure action. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 33. Where the mortgage includes a condition precedent, the specified act must be performed or the specified event must occur for the mortgage to become effective or for the mortgagee to become obligated to perform. *Id*. ¶ 32. A trial court's judgment of foreclosure will not be reversed unless it is against the manifest weight of the evidence. *Cincinnati Insurance Co. v. Pritchett*, 2018 IL App (3d) 170577, ¶ 16 (citing *Wade v. Stewart Title Guaranty Co.*, 2017 IL App (1st) 161765, ¶ 59).

¶ 24 Sanders relies on *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) as support that Nationstar failed to comply with the necessary contractual requirements to bring the foreclosure action. *Wigod* does not help their cause. *Wigod* is distinguished in that the mortgagee there complied with the terms of the modification agreement. *Id.* at 558. Here, Sanders did not comply with the terms of the modification. The agreement provided that Sanders was to pay principal and interest in the amount of $2312.28 plus the escrow amount. Although the agreement did not specify the amount of the escrow payment, Lacy, Nationstar's default

specialist, testified that Glennis was informed that the total amount due was $4048.76, which included the escrow amount of $1736.48. Nationstar's collection notes indicate Glennis was told the escrow amount on several occasions. The notes also indicated that Sanders was sent a letter after the modification agreement was reached indicating the total monthly amount due, including the escrow amount.

¶ 25 Sanders did not present evidence that any timely full payments were made during the life of the modification or that the loan was not in default as asserted by Nationstar. Neither Roland nor Keith testified at trial. There was no evidence presented as to their awareness of the terms of the modification. Their absence also left without explanation their filing of various documents in Will County in 2009 that purported to release the mortgage. As noted by the trial court, Glennis was not a mortgagee who presumably acted as agent for Roland and Keith, although no evidence was submitted to support any agency. Moreover, without testimony by Roland and Keith, the obligors, as to their understanding of the mortgage modification terms, the only evidence presented by Sanders was that of Glennis, who did not owe on the note. The receipts she submitted that were supposed evidence of payment was inconclusive as it included random receipts, several of which were rejected by the trial court. As such, Nationstar established it was entitled to a judgment of foreclosure.

¶ 26 Next, Sanders asserts the acceleration letter Nationstar sent to Sanders failed to comply with the mortgage terms, and as a failed condition precedent, it precluded Nationstar from foreclosing on the mortgage.

¶ 27 The provision at issue, "Acceleration; Remedies," stated, in 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. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure."

¶ 28 Sanders raised this issue for the first time posttrial in its motion for leave to amend the pleadings to conform to the proofs, arguing that the default amount was incorrect and thus a failed condition precedent to the foreclosure action. The trial court denied the motion for leave to amend to conform the pleadings to the proof, finding the issue of a deficient acceleration letter was waived as Sanders could have raised the issue of a deficient acceleration letter earlier in the proceedings. Although Sanders raised a number of affirmative defenses in its answer, a failed condition precedent was not one of the defenses asserted. In addition, the defenses that were raised were inadequately pleaded and consisted of conclusions unsupported by facts or affidavit. For example, in the affirmative defense titled, "capacity," Sanders asserts that Nationstar did not own the note and mortgage and that Federal National Mortgage Association owned them. No details regarding ownership of the loan and mortgage were presented by Sanders and there was no documentary support attached to the pleading. Sanders was required to present facts and the conclusory statements presented were insufficient to sustain the pleadings. See *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008) (Illinois is a fact-pleading jurisdiction and a plaintiff is required to plead facts, not conclusions, to sustain a cause of action). At trial, Sanders

never raised capacity or did not present evidence in support of any of the pleaded affirmative defenses.

¶ 29 There is no evidence that Nationstar failed to satisfy the requirement of the acceleration letter as a condition precedent to foreclosure. The acceleration letter Nationstar sent to Sanders stated that the mortgage was in default; specified the amount due and the date by which the default must be cured; informed that Nationstar would accelerate the loan if the default was not timely cured and that Sanders could reinstate the loan or claim they were not in default. The acceleration letter alerted Sanders to the fact of default, the steps necessary to cure it and the consequences of failing to cure. The acceleration notice complied with the terms of the mortgage and Nationstar complied with the agreement's condition precedent of an acceleration notice providing the information set forth in the agreement's acceleration provision.

¶ 30 Sanders claims the acceleration letter was deficient in that it stated an incorrect amount of default. The letter provided the amount of default as established at trial. The loan modification began in May 2010 and Sanders failed to make a complete payment beginning with the May payment. The default amount included advances Nationstar made for taxes and insurance, as well as other fees as allowed by the terms of the modification agreement. Sanders's disagreement with the amount due does not mean the amount was incorrect. The trial court accepted Nationstar's figures and Sanders did not present any evidence to establish the numbers were wrong. We find the trial court did not err when it found in favor of Nationstar where Sanders did not prove payment or compliance with the terms of the mortgage.

¶ 31 The final issue is whether the trial court erred when it denied Sanders's motion for reconsideration. Sanders argues that the trial court should have granted its motion to reconsider, where they paid the amount set out in the modification letter and could not be in default; that

Nationstar never amended the agreement to include the escrow amount; and that Nationstar accepted the principal and interest payment for six months, thus modifying the terms of the agreement and negating a default.

¶ 32 A motion to reconsider is designed to bring to the attention of the court: (1) newly discovered evidence not available at trial; (2) changes in the law; and (3) errors in the trial court's application of the law. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991). This court reviews a trial court's denial of a motion to reconsider for an abuse of discretion. *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 41.

¶ 33 Sanders did not present to the trial court newly discovered evidence, changes in the law or the court's misapplication of the law. Rather, Sanders again argued the default amount was incorrect, that they paid the amount due as required in the modification agreement and that Nationstar accepted payments and cannot now complain the payments were inadequate. Sanders failed to establish that they complied with the modification agreement. They were properly informed of the default. The motion to reconsider added nothing to support Sanders's claim or to require the trial court to reconsider its entry of a judgment of foreclosure in favor of Nationstar. We find the trial court properly denied Sanders's motion to reconsider.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 36 Affirmed.