

No. 1-14-2310

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST CO.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CH 23202
)	
WOJCIECH KOPEC a/k/a WOJCIECH MAREK)	
KOPEC, DOROTA KOPEC,)	Honorable
)	Michael F. Otto,
Defendants-Appellants.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment of foreclosure and confirmation of judicial sale affirmed over defendants' contention that the trial court erred in denying their motion for summary judgment.

¶ 2 Plaintiff Deutsche Bank National Trust Company filed a complaint to foreclose mortgage against defendants Wojciech Kopec and Dorota Kopec. The circuit court denied defendants' motion for summary judgment, entered summary judgment and judgment of foreclosure in favor of plaintiff, and thereafter confirmed the judicial sale. On appeal, defendants challenge the trial court's denial of their motion for summary judgment.

¶ 3 On November 13, 2006, defendants obtained a mortgage for the property at 10343 South 84th Avenue in Palos Hills, Illinois. Under the terms of the agreement, plaintiff was required, prior to accelerating the mortgage due to breach of any covenant or agreement in this security instrument, to give defendants notice specifying: (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 the defendant, 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 proceedings, and sale of the property.

¶ 4 On December 4, 2011, plaintiff sent defendants notice that their mortgage was in default, that the property would be foreclosed if amounts due thereunder were not made, and in the event of foreclosure, defendants would lose interest in, and rights to, the property. Plaintiff further informed defendants that past due payments on the mortgage were to be made by January 3, 2012, or it would become necessary for it to accelerate the mortgage note and pursue remedies against the property as provided for in the mortgage. Plaintiff also notified defendants that the "[t]otal due to cure the default and bring the loan current as of December 4, 2011" is \$5,298.09, and that:

"[t]o avoid the possibility of acceleration, you must pay this amount plus any additional monthly payments, late charges and other charges that may be due under applicable law after the date of this notice and on or before January 3, 2012."

Plaintiff further informed defendants that if funds were not received by the above-referenced date, it would proceed with acceleration, and once acceleration had occurred, it may take steps to terminate their ownership in the property by a foreclosure proceeding.

¶ 5 In June 2012, plaintiff filed a foreclosure complaint against defendants pursuant to section 15-1504 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1504 (West 2012)) for failure to pay the monthly installments due on their mortgage. Plaintiff alleged that there remained an outstanding principal balance of \$433,267.44 plus interest, attorney fees, foreclosure costs, late charges, advances and expenses incurred by plaintiff due to defendants' failure to make payments.

¶ 6 Plaintiff subsequently filed a motion for judgment of foreclosure, alleging that the Illinois mortgage foreclosure law provides that the circuit court shall enter judgment for plaintiff where its allegations are unopposed or plaintiff sets forth such evidence against defendants where no further evidence is required. In support, plaintiff attached the affidavit of Carolyn D. Mobley, the vice president of loan documentation for Wells Fargo Bank, N.A., which is the servicing agent to plaintiff. Mobley averred that the total amount due to plaintiff on the note through October 1, 2012, was \$449,372.77. Mobley further averred that per diem interest in the amount of \$15.49 will accrue on the principal from October 1, 2012, to the next interest rate change date and accrue thereafter in accordance with the variable rate as set forth in the note. She further averred that defendants have not cured the payment default since plaintiff filed its complaint. Plaintiff also attached an affidavit showing attorney fees and costs totaling \$2,511.

¶ 7 The law firm of Kaplan Silverman, LLC, subsequently entered an appearance for defendants and filed a motion for substitution of judge, which was granted. The law firm of Charles Aaron Silverman PC subsequently entered an additional appearance for defendants, and filed an answer to plaintiff's complaint, alleging, in pertinent part, that defendants deny and demand strict proof thereof that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly

given. In support, defendants cited section 15-1504(c)(9) of the Code (735 ILCS 5/15-1504(c)(9) (West 2012)), which provides that complaints filed pursuant to this section are deemed and construed to include this allegation.

¶ 8 On August 6, 2013, defendants filed a motion for summary judgment, alleging that the requirements for the acceleration notice in the mortgage were drafted by plaintiff, and therefore, under the rules of *contra proferentem*, any ambiguity is held against the drafter, and the words should be construed most strongly against plaintiff who chose them. Defendants further alleged that the notice sent to them on December 4, 2011, states the amount to cure the default by the date of the notice was \$5,298.09, but does not allege the amount to cure the default by January 3, 2013, which would be different than \$5,298.09. Defendant, therefore, asserted that they would not "actually be cured of their default by paying" \$5,298.09, and thus the "[notice] is not only confusing and vague, but does not specify the default."

¶ 9 Defendants also alleged that plaintiff was seeking payments not yet due to cure a default from the past, but under the terms of the mortgage, the notice may only demand the action to cure the default and not to avoid a future default. Defendants also insisted that the remedy for a future missed payment is a late fee, not an acceleration threat.

¶ 10 On October 15, 2013, plaintiff filed a motion for summary judgment, alleging that defendants had not raised a genuine issue of material fact, and therefore, plaintiff was entitled to judgment in its favor. In support of its motion, plaintiff attached the affidavit of Una M. Elmore, the new vice president of loan documentation for Wells Fargo Bank, NA. Elmore averred that defendants failed to pay the amount due under the note, and as of August 5, 2013, the amount due and owing was \$463,972.70. She further averred that the per diem interest in the amount of \$15.49 would accrue on the principal from August 5, 2013, to the next interest rate change date,

and thereafter, in accordance with the variable rate as set forth in the note. Plaintiff also attached an affidavit of attorney fees and costs totaling \$3,035.

¶ 11 In response to plaintiff's summary judgment motion, defendants alleged that plaintiff was seeking a drastic remedy, which should only be granted when the right of the moving party is clear and free from doubt. Defendants then set forth the requirements of affidavits pursuant to Supreme Court Rule 191 (eff. Jan. 4, 2013), and the requirements for admitting a business record. Defendants further stated that an affidavit must not state facts on information and belief, and violates the competence requirement when it contains inadmissible hearsay. Defendants thus concluded that plaintiff's summary judgment motion must be denied.

¶ 12 In December 2013, plaintiff filed a response to defendants' motion for summary judgment, alleging that defendants' answer failed to respond to the allegations of the complaint in conformity with the Code, and thus, the complaint had been judicially admitted. Plaintiff further alleged that the single deviation in defendants' answer is their denial of the "statutory allegation" set forth in section 15-1504(c)(9) of the Code (735 ILCS 5/15-1504(c)(9) (West 2012)). Plaintiff also alleged that the notice of default and acceleration conformed with the requirements of the mortgage agreement.

¶ 13 Plaintiff also noted defendants' claim that the amount due is unclear, citing the rule of *contra proferentem*, but asserted that this rule does not apply here because the language used in the mortgage is clear and concise. Plaintiff explained that the mortgage required notification of the default in payment, that the loan would be accelerated if the default was not cured, and what actions were needed to cure the default. Accordingly, plaintiff alleged there was no ambiguity where the notice specifically provided that the action to cure the default was to pay the sum of \$5,298.09 by January 3, 2012.

¶ 14 Plaintiff further alleged that the rule of *contra proferentem* is a secondary rule of interpretation that should only be invoked after ordinary interpretive guides have been exhausted, and that it should not be invoked in this case because the parties' intentions can be determined by applying the plain meaning of the mortgage which required defendants to pay monthly installments in connection with the mortgage loan. Plaintiff maintained that defendants failed to cure their default, and it therefore filed a foreclosure action against them.

¶ 15 On January 10, 2014, the trial court entered a written order providing that, after being advised in the premises, it was denying defendants' motion for summary judgment, and granting plaintiff's motion for summary judgment. The court also entered a judgment of foreclosure against defendants, ordered a judicial sale, and appointed a selling officer.

¶ 16 The property was subsequently sold, plaintiff moved for confirmation of the sale, and defendants objected to the confirmation. The sale was ultimately confirmed by the trial court on July 2, 2014.

¶ 17 On appeal, defendants contend that this court should reverse the denial of their summary judgment motion because plaintiff failed to satisfy the contractual preconditions of the mortgage by sending a suitable and clear notice of acceleration to them. They assert that the notice sent was confusing and contradictory because it was unclear whether they could cure the default by paying the \$5,298.09 requested, when it also provided that future payments were required to cure the default and avoid acceleration.

¶ 18 Summary judgment is appropriate where the pleadings, depositions, admissions and affidavits on file, when taken together in the light most favorable to the nonmovant, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Summary judgment is a drastic remedy which should

only be granted if the right of the moving party is clear and free from doubt; we review *de novo* the trial court's ruling on a summary judgment motion. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004).

¶ 19 Here, defendants contend that summary judgment should have been granted in their favor because the notice was not clear. We observe that section 15-1504(c)(9) of the Code (735 ILCS 5/15-1504(c)(9) (West 2012)) provides that a foreclosure complaint is deemed and construed to include the allegation that any and all notices of default or election to declare indebtedness due and payable or other notices required to be given have been duly or properly given. 735 ILCS 5/15-1504(c)(9) (West 2012). Subsection (c)(9) does not require plaintiff to issue this notice, but, rather, declares that the statements in the complaint are construed to include the allegation that notice of default was properly given.

¶ 20 The mortgage contract in this case provided what must be specified in such a notice. Defendants maintain that pursuant to the rule of *contra proferentem*, any ambiguity in the mortgage contract is to be held against the drafter. This rule is not an interpretive one, but, rather merely assigns the risk of an unresolvable ambiguity to the party responsible for creating it. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 166 (2002). This rule only applies where we fail to ascertain the intent of the parties using ordinary principles of contractual interpretation; in other words, it is a last resort. *Premier Title Co.*, 328 Ill. App. 3d at 165-66.

¶ 21 Here, the mortgage agreement provided that the acceleration notice shall specify, *inter alia*, the default and the actions required to cure the default. There is no ambiguity in this language, and thus the rule of *contra proferentum* does not apply. Moreover, plaintiff complied with the mortgage agreement by listing the default and the actions that defendants were required to take to prevent acceleration.

¶ 22 Defendants, nonetheless, contend that the acceleration notice sent to them on December 4, 2011, provided that the amount to cure the default as of that date was \$5,298.09, but then was "clouded" by plaintiff's later statement that additional payments and late charges falling due before January 3, 2013, will also be due to cure the default and avoid acceleration. Defendants assert that this language is "contradictory and confusing because [they] could not be sure if [they] would cure a default by paying the \$5,289.09 that the letter requests." We find no contradictory or confusing language in the notice, which clearly set out the amount due and owing to cure the default as of December 4, 2011, and also notified defendants that future payments would be necessary to cure the default when any further indebtedness accrued. As plaintiff points out on appeal, the notice provided the outstanding amount due and owing as of the date of the notice, \$5,298.09, and plainly stated defendants' continuing obligation to make their monthly mortgage payments.

¶ 23 Under the mortgage agreement, defendants were required to "pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note." Defendants were thus aware that they were required to pay the monthly installments as they came due, and the notice, which reminded defendants of this, did not violate the terms of the mortgage, but, rather, specifically stated this requirement in the mortgage agreement. Accordingly, we find that defendants' contentions are unfounded, and find no error by the court in denying defendants' motion for summary judgment.

¶ 24 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.