

2015 IL App (2d) 140185-U
No. 2-14-0185
Order filed July 8, 2015

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
SECOND DISTRICT

J.P. MORGAN CHASE BANK, N.A.,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 11-CH-1744
)	
CINDI R. LAMKIN, a/k/a Cindi Lamkin,)	
)	
Defendant-Appellant)	
)	Honorable
(American Painting, Inc., Nonrecord)	Leonard J. Wojtecki,
Claimants, and Unknown Owners, Defendants).)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Without official accounts of the relevant hearings, we could not say that the trial court abused its discretion in denying defendant's motion to vacate a default judgment of foreclosure and granting plaintiff's motion to confirm the sale; the limited record did not support defendant's assertion that her HAMP application was timely so as to require delaying the sale.

¶ 2 Cindi R. Lamkin (defendant), the owner of the property in this foreclosure case, appeals, seeking review of (1) the order denying her motion to vacate the default foreclosure judgment and (2) the confirmation judgment and, in particular, the court's denial of her objections to

confirmation. Because the record on appeal does not does not support her claim or error, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On May 5, 2011, JPMorgan Chase Bank, N.A. (plaintiff), filed a foreclosure complaint relating to the property at 938 Stonehaven Court in Elgin. The named defendants in the complaint were defendant and alleged lienholder American Painting, Inc. Plaintiff was the original lender but had endorsed the note in blank.

¶ 5 On May 25, 2012, neither named defendant having appeared, plaintiff filed a motion for default judgment. The court granted the motion and, on June 18, 2012, entered a judgment for foreclosure and sale. The order did not include a finding of immediate enforceability or appealability pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 6 On June 21, 2012, Paul Shelton filed an appearance for defendant and a motion to vacate the default judgment. No proof of service accompanied the motion, nothing in the record shows that counsel set the motion for hearing, and nothing suggests any disposition of the motion.

¶ 7 The judicial sale was set for 9 a.m., on September 5, 2012. Plaintiff served the notice of sale on defendant individually and not on Shelton. The sale took place as scheduled, and plaintiff was the successful bidder.

¶ 8 On September 16, 2013, the court granted leave for new counsel to appear for defendant. It also granted her leave to file a motion in which she sought to vacate the sale and the default judgment of foreclosure and objected to any attempt to confirm the sale. In the motion, she asserted that, because she had requested a loan modification under the Home Affordable Modification Program (HAMP), the sale should not have gone forward. She further asserted that she had a meritorious defense to the foreclosure in that she had a valid challenge to plaintiff's

standing. She attached copies of what appear to be (1) an application for mortgage modification under HAMP and (2) postal-service tracking statements showing the 9:01 a.m., August 29, 2013, arrival of an envelope at a JPMorgan Chase facility in Louisville, Kentucky.

¶ 9 Plaintiff filed a response, which it served on defendant's new counsel. It argued, among other things, that defendant's request for HAMP modification was untimely under HAMP guidelines. According to a document attached to plaintiff's response, those guidelines require that a request be received "no later than midnight of the seventh business day prior to the foreclosure sale date." Home Affordable Modification Program Handbook for Servicers of Non-GSE Mortgages, v3.0 ch. II, § 3.3, at 53 (Dec. 2, 2010), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf (last visited May 27, 2015) (hereinafter HAMP Guidelines). Plaintiff argued that, taking defendant's documents at face value, plaintiff received defendant's application no earlier than the fourth business day prior to the foreclosure sale date.

¶ 10 The court ruled against defendant's objections on November 13, 2013. Plaintiff filed a motion for confirmation of the sale on November 25, 2013, which it served on defendant individually but not her counsel. Defendant filed a new objection on January 24, 2012, asserting that the law required plaintiff to bid in cash. The court confirmed the sale on January 27, 2014. Defendant filed a timely notice of appeal. The record on appeal is limited to the common-law record.

¶ 11

II. ANALYSIS

¶ 12 On appeal, defendant argues first that plaintiff did not meet its contractual obligations as a HAMP participant to consider her eligibility to have her mortgage modified. She accepts plaintiff's assertion that, for an application for a modification under HAMP to be a basis for

postponing a scheduled sheriff's sale, the lender must receive it "no later than midnight of the seventh business day prior to the foreclosure sale date." HAMP Guidelines, ch. II, § 3.3, at 53. She argues that precedent supports treating Saturday as a business day for this purpose and that, if Saturday is a business day, her application was timely.

¶ 13 Defendant next argues that it was a denial of substantial justice for the court not to have vacated the default judgment. In support of this, she cites the liberal rules for vacating default judgments (see, e.g., *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 16) and again points to her HAMP application as a basis. She also points to plaintiff's failure to serve her lawyers with documents as a basis for vacating the default.

¶ 14 We conclude that, because defendant has failed to provide a record of the relevant proceedings sufficient to support her claims of error, we must presume that the court acted properly in refusing to vacate the default. For the same reason, we must presume that any service errors were resolved or waived in court.

¶ 15 We review a court's denial of a motion to vacate a default judgment for an abuse of discretion. E.g., *McCluskey*, 2013 IL 115469, ¶ 17. Similarly, we review a court's ruling on a motion to confirm a judicial sale for an abuse of discretion E.g., *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). Where a court's ruling on a motion is a matter for its discretion, under the rule in *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), we generally cannot reverse that ruling absent a record sufficient to show the basis for the court's decision. Under *Foutch*, the "appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92. "Any doubts which may arise from the incompleteness of the

record will be resolved against the appellant.” *Foutch*, 99 Ill. 2d at 392. The supreme court ruled in *Foutch* that, where the record showed that the trial court, in denying a motion to vacate a judgment, considered material adduced at the hearing, but the record did not show what those matters were, the reviewing court was required to presume that the material adduced was sufficient to support the denial. *Foutch*, 99 Ill. 2d at 393-94.

¶ 16 The record here lacks transcripts¹ both of (1) the hearing on defendant’s motion seeking to vacate the sale and the default judgment of foreclosure and objecting to any attempt to confirm the sale, and of (2) the hearing on plaintiff’s motion to confirm the sale. The record therefore lacks any documentation of the court’s basis for denying defendant’s motion and for granting plaintiff’s motion. Therefore, under the principles of *Foutch*, we must presume that the court had a proper basis for both rulings. Moreover, lacking transcripts (or transcript equivalents) of either of the relevant hearings, we must presume that the court properly took into account the liberal standards for vacating a default judgment. We further must presume that the court properly addressed plaintiff’s seeming errors in service, as defendant could have waived such errors. See, e.g., *Eads v. Thomas*, 167 Ill. App. 3d 529, 534 (1988) (by declining a continuance, a party waived the error of the motion’s late service).

¶ 17 Defendant appears to suggest that even the limited record before us is sufficient to show that, based on her timely request for HAMP relief, the court should have denied confirmation of the sale. We do not agree. The parties agree that only a *timely* application for HAMP mortgage modification requires a lender to put off a judicial sale. They also agree that the relevant deadline for receipt of an application is “no later than midnight of the seventh business day prior

¹ It also lacks either of the allowed substitutes for transcripts—bystander’s reports or an agreed statement of facts. See Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005).

to the foreclosure sale date.” HAMP Guidelines, ch. II, § 3.3, at 53. Giving defendant every benefit of the doubt, her application was too late by that standard. The deadline language we have just quoted requires that, in counting seven days, we do not count the day of the sale at all; the day of the sale is not a “day prior to the foreclosure sale date.” However, it does mean that we do count as a day any fraction of the day on which the application arrived. We also assume for the sake of argument that Saturdays are business days. Defendant’s exhibits suggest that plaintiff received her application on August 29, 2013, a Thursday. That is the first day. Friday and Saturday are the second and third days. Defendant does not claim that Sunday (September 1, 2013) was a business day, so Monday, September 2, was the fourth day.² September 3 and September 4 were the fifth and sixth days, but September 5 was the day of sale, and we cannot count it. Her application was thus untimely and therefore could not be a basis for refusing to confirm the sale.

¶ 18

III. CONCLUSION

¶ 19 For the reasons stated, we affirm the confirmation of sale and its predicate foreclosure judgment.

¶ 20 Affirmed.

² We note, however, that Monday was Labor Day and arguably does not count as a business day. Regardless, even counting Monday as a business day, the application was untimely.