2015 IL App (2d) 141067-U
Nos. 2-14-1067
Order filed June 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff-Appellee, v. ROBERT STUART a/k/a John Robert Stuart; JENNIFER STUART a/k/a Jennifer Nicole Stuart, Defendants-Appellants, (Citifinancial Service, Inc.; Household Finance Corporation III; American General Financial Services of Illinois, Inc., Plaintiffs).	)	Appeal from the Circuit Court of Kane County. No. 09-CH-1522 Honorable Leonard J. Wojtecki, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly (1) dismissed the defendants' affirmative defense of promissory estoppel; (2) granted the plaintiff summary judgment on its complaint for foreclosure; and (3) confirmed the sale.

¶ 2 This case arises from a mortgage foreclosure action brought by the plaintiff, Federal National Mortgage Association, against the defendants, Robert Stuart and Jennifer Stuart. The

circuit court of Kane County granted the plaintiff's motion for summary judgment on its complaint for foreclosure. The circuit court subsequently granted an order approving the report of sale and distribution, and confirmed the sale and possession in favor of the plaintiff. The defendants appeal, arguing that the trial court erred in (1) dismissing their affirmative defense of promissory estoppel; (2) granting the plaintiff summary judgment on its complaint for foreclosure and (3) approving the report of sale and distribution and for possession. We affirm.

¶ 3 BACKGROUND

¶ 4 On April 27, 2009, the plaintiff filed its complaint to foreclose the mortgage. The complaint alleged that the defendants had executed a mortgage on February 4, 2003, and were in default for failing to make payments under the loan. The complaint attached as exhibits copies of the mortgage and note. The note attached to the plaintiff's complaint contained a blank endorsement by the original lender, Chase Manhattan Mortgage Corporation. On April 29, 2009, the defendants were served with the summons and complaint.

¶ 5 On February 23, 2010, the defendants filed an answer, counterclaims, and affirmative defenses, including the defenses of promissory estoppels and breach of contract. On July 17, 2012, the plaintiff filed a motion to dismiss the affirmative defenses and counterclaims.

¶ 6 On January 22, 2013, the trial court dismissed the defendants' affirmative defenses and counterclaims without prejudice. However, the defendants did not re-plead any affirmative defenses or counterclaims.

¶ 7 On April 15, 2014, the plaintiff filed motions for summary judgment and judgment of foreclosure and sale.

¶ 8 On June 10, 2014, the trial court granted the plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale.

¶ 9 On August 29, 2014, notice was given that the judicial sale would be on September 18, 2014. The service list on the notice of sale included the defendants' attorney of record, Omar F. Uddin. The address that the notice was mailed to matched the address listed on attorney Uddin's appearance.

¶ 10 On September 8, 2014, the defendants filed an emergency motion to stay the judicial sale. The emergency motion noted that the sale was scheduled for September 18, 2014, but alleged that the defendant's counsel had not received a copy of any notice of sale. The motion requested that the sale be stayed because of the plaintiffs' alleged failure to comply with section 15-1507 of the Illinois Mortgage Foreclosure law (the Foreclosure Law) (735 ILCS 5/15-1507 (West 2012)).

¶ 11 On September 16, 2014, the trial court denied the motion to stay the sale. On September 18, 2014, the plaintiff purchased the property for a full debt bid. There was no deficiency judgment.

¶ 12 On September 29, 2014, the trial court approved the sale. On October 29, 2014, the defendants filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 The defendants' first contention on appeal is that the trial court erred in dismissing their affirmative defense of promissory estoppel. The defendants argue that they entered into a loan modification agreement with the plaintiff in April 2008. However, shortly after that date, the plaintiff refused to accept payment from them. The defendants argue that the plaintiff should have realized that they would rely on the plaintiff's compliance with the modification agreement and, as such, they would forgo other options to cure any defaults after approval of the loan modification. Based on their detrimental reliance, the defendants contend that they sufficiently pled the defense of promissory estoppel.

¶ 15 Promissory estoppel provides a remedy for those who rely to their detriment, under certain circumstances, on promises, despite the absence of any mutual agreement by the parties on all the essential terms of a contract. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 55 (2009). In order to establish a claim of promissory estoppel, a plaintiff must allege: (1) defendant made an unambiguous promise to the plaintiff; (2) the plaintiff relied on that promise; (3) plaintiff's reliance was expected and foreseeable by the defendant; and (4) the plaintiff relied on the promise to its detriment. *Id.* at 51. Promissory estoppel is not available where there is a contract between the parties. *Prentice v. UDC Advisory Services*, 271 Ill. App. 3d 505, 513 (1995). Thus, once it is established, either by admission of a party or by judicial finding, that there is an enforceable contract, then a party may no longer recover under the theory of promissory estoppel. *Id.* at 512.

¶ 16 Here, the defendants assert that they entered into a loan modification agreement with the plaintiff. The plaintiff acknowledges that the loan agreement was modified in 2008. The defendants essentially argue that the plaintiff's failure to adhere to that contract is why they have not made any payments since April 2008. The defendants' argument reflects a breach-of-contract theory, not a theory based on promissory estoppel. Indeed, in their appellate reply brief, the defendants specifically state that their argument pertains to the "[p]laintiff's breach [of the loan modification agreement] in the summer of 2008." As it clear that the defendant's claim rises from a contract that the parties entered into in 2008, they cannot recover under a theory of promissory estoppel. See *id.* Further, although the defendants raised a breach-of-contract affirmative defense in the trial court, they do not contend on appeal that the trial court's dismissal of that affirmative defense was improper. As such, we will not address that issue. See *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 677 (2007) (points not raised on appeal are

forfeited). Accordingly, we find that the trial court properly dismissed the defendants' affirmative defenses.

¶ 17 The defendants' next contention on appeal is that the trial court erred in granting the plaintiff's motion for summary judgment. The defendants argue that there is a conflict in the parties' affidavits as to whether the parties entered into a modified contract in 2008. Based on this discrepancy in the affidavits, the defendants insist that the trial court erred in granting the plaintiff's motion for summary judgment.

¶ 18 The purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)), and such a motion should be granted only when "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 that the moving party is entitled to judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2010)). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997).

¶ 19 Here, in support of its motion for summary judgment, the plaintiff submitted affidavits and exhibits that established a loan was made to the defendants, that the defendants signed the loan documents, that the loan and loan documents were assigned to the plaintiff, and that a default occurred. As the defendants did not submit any contradictory evidence, the trial court properly granted the plaintiff's motion for summary judgment. See *U.S. Bank, National Ass'n v. Advic*, 2014 IL App (1st) 121759, ¶ 32 (upholding a circuit court order awarding summary judgment to a bank in a foreclosure action where the bank's filings contained sufficient evidence

that the mortgagor had defaulted on his mortgage obligations and the mortgagor failed to file any evidence to rebut the bank's claims).

¶ 20 In so ruling, we reject the defendants' argument that a material question of fact remains as to whether the parties entered into a modified agreement in 2008. We find that issue is not in dispute because (1) in its affidavit in support of summary judgment, the plaintiff indicated that there was a 2008 agreement; (2) in its affidavit in opposition to summary judgment, the defendants indicated that there was a 2008 agreement; and (3) on appeal, the plaintiff acknowledges that there was a 2008 agreement. The only evidence to the contrary is the plaintiff's affidavit pursuant to Illinois Supreme Court Rule 114 (Ill. S. Ct. R. 114 (eff. May 1, 2013)), which indicates that "no application for a loan modification was ever received." The plaintiff suggests that the Rule 114 affidavit is not inconsistent with the other affidavits because that affidavit was only indicating that no loan modification occurred after the plaintiff filed its foreclosure action in 2009. Conversely, the defendants insist that the Rule 114 affidavit clearly contradicts the other affidavits.

¶ 21 We believe that, based on the plaintiff's admission in both the trial court and this court that parties entered into a modified agreement in 2008, it is clear that the parties did enter into such an agreement. Thus, for this court to remand to the trial court to address that precise issue would be pointless. Further, we note that the purpose of a Rule 114 affidavit is to ensure that a bank has tried to work out a loan modification agreement with a homeowner before it proceeds with a foreclosure effort. See Ill. S. Ct. R. 114, Committee Comments (adopted Apr. 8, 2013) (explaining that it is in the best interests of all the parties to avoid a foreclosure sale in favor of a workable loss alternative). Here, the defendants maintain that the plaintiff did enter into a loan modification agreement with them. The defendants therefore implicitly acknowledge that the

plaintiff did comply with the spirit and purpose of Rule 114. Accordingly, the possibility that the Rule 114 affidavit was incorrect is not a basis to set aside the trial court's judgment.

¶ 22 The defendants' final contention on appeal is that the trial court abused its discretion in confirming the sale when the defendants' attorney did not receive mailed notice of that sale.

¶ 23 Section 15-1508(b) of the Foreclosure Law provides that the circuit court shall confirm the foreclosure sale unless the court finds that the notice required by section 15-1507(c) was not given. 735 ILCS 5/15-1508(b)(i) (West 2012). If a foreclosure sale is held that was not in compliance with section 15-1507(c), the party that was entitled to notice and "who was not so notified may, by motion supported by affidavit made prior to confirmation of such sale, ask the court which entered the judgment to set aside the sale." 735 ILCS 5/15-1508(c) (West 2012).

¶ 24 Two types of notice are required by section 15-1507(c): (1) public notice; and (2) individual notice to all parties in the action who have appeared and have not been found in default. 735 ILCS 5/15-1507(c)(2), (3) (West 2012). Regarding individual notice, the statute provides that the "notice shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint, not more than 45 days nor less than 7 days prior to the day of sale." 735 ILCS 5/15-1507(c)(3) (West 2012). After notice is given, "a copy thereof shall be filed in the office of the clerk of the court entering the judgment, together with a certificate of counsel or other proof that notice has been served in compliance with this Section." *Id.*

¶ 25 The applicable rules of the court for service of papers other than process and the complaint are Illinois Supreme Court Rules 11 and 12 (eff. Dec. 29, 2009). Illinois Supreme Court Rule 11 sets forth multiple means of effectuating proper service. See Ill. S. Ct. R. 11 (eff. Dec. 29, 2009). The portion of Rule 11 relevant to this appeal provides that documents shall be

served "by depositing them in a United States post office or post office box, enclosed in an envelope, plainly addressed to the attorney at the attorney's business address, or to the party at the party's business address or residence, with postage fully prepaid." Ill. S. Ct. R. 11(b)(3) (eff. Dec. 29, 2009). Illinois Supreme Court Rule 12 provides that service is proved:

> "in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail or delivered the paper to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

¶ 26 "There is a presumption of delivery if [a notice was] sent by regular mail directed to a proper address. Where the rules provide for that method of service, notice is thus satisfied by use of regular mail." *In re Marriage of Betts*, 159 Ill. App. 3d 327, 332 (1987). Otherwise, "[i]f the proper giving of the notice can now be frustrated by the mere allegation of the defendant that he did not receive it, then the giving of notice by mail cannot be relied upon even though the rules specify such a method." *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957). "Although minor defects will be excused, proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12 [citation]." *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502, (1987). " 'Service is complete when all the required acts are done. So, if all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and the fact that he does not thereafter personally receive the papers which were so served or that he receives them at a later date ordinarily does not affect the validity of the service.' " *French v. French*, 43 Ill. App. 2d 29, 36 (1963) (quoting 72 C.J.S. Process § 43, at 1054).

¶ 27 Here, the record reveals that the plaintiff complied with Illinois Supreme Court Rules 11 and 12. The proof of service by mail, filed on August 29, 2014, stated that an attorney deposited the notice of sale in properly addressed envelopes in the U.S. mail with postage prepaid before 5 p.m. on August 29, 2014, at 5707 S. Cass Avenue in Westmont. The proof of service further stated that the attorney mailed a copy to defendants' attorney at the same address that the defendants' attorney presented in his notice of appearance. Although the defendants insist that their attorney did not receive the mailed notice of sale, that assertion alone is insufficient to justify any suggestion that the sale must be vacated. See *Bernier*, 11 Ill.2d at 529; *French*, 43 Ill. App. 2d at 36. Accordingly, the trial court did not abuse its discretion in confirming the sale.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 30 Affirmed.