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FIFTH DIVISION  
August 19, 2016

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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WELLS FARGO BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
CAMILLE WILLIAMS; CAPITAL ONE BANK	)	
(USA) N.A., f/k/a Capital One Bank; UNKNOWN	)	No. 09 CH 32742
HEIRS and LEGATEES of CAMILLE WILLIAMS,	)	
if any; UNKNOWN OWNERS and NON-RECORD	)	
CLAIMANTS,	)	
	)	
Defendants,	)	
	)	
(Camille Williams,	)	The Honorable
	)	Michael T. Mullen,
Defendant-Appellant.)	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

**ORDER**

¶ 1 *HELD:* The loss mitigation affidavit submitted by plaintiff complied with Illinois Supreme Court Rule 114 and the circuit court did not err in relying on it in entering a foreclosure judgment of the subject property. In addition, the circuit court did not abuse its discretion in

denying defendant's request to conduct discovery in relation to the loss mitigation affidavit.

Finally, the circuit court did not abuse its discretion in denying defendant's request for leave to file an amended answer.

¶ 2 Defendant, Camille Williams, appeals the orders of the circuit court entering a judgment of foreclosure and sale and approving the foreclosure report for the sale and distribution of the property located on Campbell Avenue in Chicago Heights, Illinois (subject property), as well as an order vacating a prior ruling allowing her to conduct discovery related to an Illinois Supreme Court Rule 114 (eff. May 1, 2013) loss mitigation affidavit submitted by plaintiff, Wells Fargo Bank, N.A. (Wells Fargo) and an order denying her leave to file an amended answer. Defendant contends the circuit court erred in entering a judgment of foreclosure and sale in favor of plaintiff where plaintiff's loss mitigation affidavit was inaccurate and insufficient in violation of Rule 114. Defendant additionally contends the circuit court abused its discretion in refusing to allow her to conduct discovery in relation to plaintiff's loss mitigation affidavit and in denying her motion for leave to file an amended pleading to provide an affirmative defense. Based on the following, we affirm.

¶ 3 **FACTS**

¶ 4 In September 2006, defendant obtained a mortgage loan secured by the subject property from First Magnus Financial Corporation. Thereafter, the mortgage loan was assigned to plaintiff.

¶ 5 The record contains a letter dated February 24, 2009, from plaintiff to defendant acknowledging that defendant requested assistance concerning her mortgage loan. The February 24, 2009, letter advised defendant that her request was under review. The record also contains a letter dated March 6, 2009, from plaintiff to defendant alerting her that her request for loan

modification had been denied because her monthly income and expenses demonstrated that she did not have the ability to afford a modified payment plan. In another letter, dated May 5, 2009, plaintiff acknowledged that defendant again requested assistance concerning her mortgage loan. In a letter dated June 24, 2009, plaintiff offered defendant a special forbearance plan; however, defendant did not accept the forbearance agreement, resulting in her mortgage and note becoming due in March 2009.

¶ 6 On September 10, 2009, plaintiff filed a complaint to foreclose defendant's mortgage. On October 13, 2009, defendant filed a *pro se* answer admitting a number of paragraphs of the complaint, denying a number of paragraphs, and stating that she had insufficient information to admit or deny the remainder of the paragraphs. In relevant part, defendant admitted she was the mortgagor of the subject property with an original indebtedness of \$173,565.00, and denied defendant's request to foreclose. In her answer, plaintiff, however, did not deny any of the "deemed" allegations under section 15-1504(c) of the Illinois Mortgage Foreclosure Law (Mortgage Foreclosure Law) (735 ILCS 5/15-1504(c) (West 2008)), including the allegation that she had received all of the required pre-foreclosure notifications. On the same date, defendant filed an additional document labeled as an answer in which she provided a number of affirmative defenses. In relevant part, defendant alleged plaintiff was prohibited from seeking a foreclosure against her because it failed to present the original mortgage note. Then, on November 5, 2009, defendant subsequently filed another document containing affirmative defenses, alleging that plaintiff's action was "barred by illegality in that banks cannot lend credit," again stating that plaintiff's action was prohibited because it failed to present the original mortgage note, and alleging the contract with plaintiff was *ultra vires* and unenforceable. In yet another document

filed by defendant on April 7, 2010, she repeated that plaintiff was prohibited from seeking foreclosure because it failed to present the original mortgage note.

¶ 7 In August 2010, plaintiff filed a motion for summary judgment, arguing that it had submitted sufficient evidence by way of the mortgage, note, and affidavits evidencing that defendant had defaulted on the mortgage, that it was entitled to a foreclosure judgment, and that defendant's answer failed to establish a defense to foreclosure. Plaintiff additionally filed motions to strike defendant's second answer, as well as the November 5, 2009, and April 7, 2010, filings. In an August 23, 2010, written order, the circuit court granted plaintiff's motions to strike, entered and continued plaintiff's summary judgment motion, and ordered defendant to file affirmative defenses on or before September 2010. Defendant failed to comply. Plaintiff subsequently withdrew its summary judgment motion. Discovery ensued.

¶ 8 In March 2012, plaintiff filed another motion for summary judgment and also filed a motion for judgment of foreclosure and sale. In response, defendant filed a motion to strike all of plaintiff's previous filings, arguing that the filings, including the summary judgment motion and motion for judgment of foreclosure and sale, violated the federal rules of civil procedure and Illinois Supreme Court Rule 137. On August 29, 2012, in a written order, the circuit court granted plaintiff's summary judgment motion, noting that defendant did not provide a responsive motion to the summary judgment motion, only a motion to strike with an "unclear" basis in the law. In so ruling, the circuit court found that plaintiff provided sufficient evidence of defendant's default under the mortgage loan and that defendant failed to present sufficient evidence to raise a genuine issue of material fact demonstrating payment or a defense to foreclosure. The court did not rule on the motion for judgment of foreclosure and sale, instead ordering plaintiff to submit "orders for prove-up and entry of judgment of foreclosure" by

September 2012. Defendant subsequently filed for bankruptcy, which prompted a stay on the underlying litigation until November 2012.

¶ 9 In February 2013, plaintiff filed a motion for entry of judgment of foreclosure. Then, in December 2013, plaintiff mistakenly filed another motion for summary judgment, along with another motion for judgment of foreclosure and sale. Attached to plaintiff's summary judgment motion was an affidavit from Chase Adams. In addition, in December 2013, plaintiff filed a loss mitigation affidavit authored by Myrella Martinez. In the affidavit, Martinez averred that she had reviewed defendant's mortgage loan records, learning that the loan was eligible for "Making Home Affordable (MHA) Loss Mitigation Options" and "Proprietary Loss Mitigation Options." Martinez swore that plaintiff sent solicitation letters to and called defendant in compliance with its obligations under the listed programs. Martinez noted that plaintiff had yet to receive all of the necessary information from defendant to perform a loss mitigation analysis.

¶ 10 On March 19, 2014, defendant, through counsel, filed a motion for leave to file an amended answer. The proposed amended answer included an affirmative defense alleging that plaintiff did not comply with the pre-foreclosure notice requirements before proceeding with the foreclosure action. The proposed amended answer did not include any allegations related to the plaintiff's loss mitigation affidavit or compliance with Rule 114. The parties appeared before the court on March 20, 2014; however, no transcript or bystander's report from that date appear in the record on appeal. In a written order dated March 20, 2014, the circuit court provided defendant leave to take the depositions of Martinez and Chase Adams. Plaintiff responded by filing a motion to vacate the March 20, 2014, order allowing for the depositions, as well as a motion to withdraw the second summary judgment motion. Plaintiff simultaneously filed a proposed judgment of foreclosure for the subject property.

¶ 11 At a hearing on August 6, 2014, the circuit court denied defendant's request for leave to file an amended answer, "exercising my discretion in viewing the history of the case." In so doing, the court stated, "[t]his is a 2009 case. The motion seeking to amend the answer [was] brought subsequent to the summary judgment having been entered sometime back, so I am denying that motion." The court then vacated its March 20, 2014, order regarding the depositions "as it was unnecessary to continue these proceedings in any way because that motion has been granted." In addition, the court denied defendant's oral motion to file a written objection to the loss mitigation affidavit, finding "it's clear there is no right to depose the affiant in this situation. It's up to me to allow that or not." Finally, the court entered judgment of foreclosure and sale "based upon the information that's within the record which I have reviewed," specifically referencing the Rule 114 affidavit. Defense counsel argued that the court entered its foreclosure judgment without first considering an argument by defendant regarding the loss mitigation affidavit. The following dialogue ensued:

“[DEFENSE COUNSEL]: With respect to the Rule 114 affidavit it has always been our position that we are at least entitled to contest it. And I understand your Honor not believing a deposition might be necessary, but my client still has not had an opportunity to put anything in writing opposing the affidavit because it's our position that it's inaccurate. It does not properly set forth the state of the loss mitigation efforts by the plaintiff and I think my client should be entitled to point that out to the Court because of course on its face the affidavit may look legitimate to your Honor, but that's because you are unaware of the facts. And that's why my client wants an opportunity to deal with that.

THE COURT: All right. What facts are you disputing?

[DEFENSE COUNSEL]: Well, that the loss mitigation efforts have included everything that the plaintiff was required to do. There are other programs that are at play with respect to my client's loans that aren't even mentioned in that affidavit particularly relating to her FHA loan status. They have not undertaken that and that's one of our major contentions in this case. So until they do so I don't think they're entitled to the judgment of foreclosure under Rule 114(a) which actually sets the standard that they can't have a judgment until they have actually completed. The affidavit in our opinion is just a way of trying to provide your Honor the information to see they complied with 114(a) and our position is they haven't.

THE COURT: There is no alternative affidavit before me. I know you're requesting additional discovery relative to the contents of Ms. Martinez's affidavit, but that motion is denied.

[DEFENSE COUNSEL]: And I'm aware of that. I'm no longer asking for the additional discovery, just the opportunity to file a response. That was what was originally intended with their motion for summary judgment and their motion for judgment of foreclosure. It was just that your Honor was giving me time to take the deposition before giving that objection. Even if your Honor is now deciding I shouldn't have the affidavit, that's within your Honor's discretion, but we then still didn't get our opportunity to file a written objection to the affidavit which my client can do even without additional discovery."

The court maintained its ruling.

¶ 12 Then, on October 24, 2014, defendant filed a motion to reconsider, requesting that the circuit court vacate the entry of foreclosure judgment and that she be permitted to have an evidentiary hearing in connection with the loss mitigation affidavit. In support, defendant attached her own affidavit detailing the loss mitigation history for her loan and highlighting that plaintiff originally only offered assistance in the way of a forbearance agreement. In her affidavit, defendant attested that plaintiff contacted her via telephone in May 2014 to begin a new loan modification process. In a May 2014 letter, plaintiff also notified defendant that she may be eligible for additional workout options, such as a repayment plan, a partial claim, a pre-foreclosure sale, and a deed in lieu of foreclosure. Defendant attested that plaintiff later notified her that she was not qualified for HAMP or FHA loan modifications. In her affidavit, defendant stated that she appealed plaintiff's decision, but the appeal remained unresolved. Defendant additionally attested that Martinez's loss mitigation affidavit contained false statements, such that plaintiff never sent her solicitation letters prior to the date of Martinez's affidavit. Defendant subsequently filed an emergency motion to stay the sale of the subject property. A hearing was held on November 18, 2014; however, no transcript or bystander's report from the proceedings appears in the appellate record. In a November 18, 2014, written order, the circuit court denied defendant's motion to reconsider, as well as the emergency motion to stay the sale. On March 18, 2015, the circuit court entered an order approving the report of sale and distribution of the subject property and an order for possession.

¶ 13 This appeal followed.

¶ 14

ANALYSIS

¶ 15

I. Supreme Court Rule 114

¶ 16 Defendant initially contends the circuit court erred in entering the foreclosure judgment and sale of the subject property where plaintiff's loss mitigation affidavit failed to satisfy Supreme Court Rule 114.

¶ 17 Whether the circuit court properly construed Rule 114 is a question of law, which we review *de novo*. *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 35. When interpreting a supreme court rule, we apply the same rules of construction as those applied when interpreting a statute. *Id.* Therefore, when interpreting a supreme court rule, this court must ascertain and give effect to the intent of the supreme court in promulgating the rule. *Id.* The most reliable indicator of the court's intent is the language of the rule itself, giving the words their plain and ordinary meaning. *Id.* "Committee comments to supreme court rules are not binding but they may be used to determine the application of a rule." *Id.*

¶ 18 Rule 114 was enacted in 2013 in response to the "huge increase in the number of foreclosure cases filed in the Illinois state courts." Ill. S. Ct. R. 114, Committee Comments (adopted April 8, 2013). Pursuant to the rule, "[f]or all actions filed under the Illinois Mortgage Foreclosure Law, and where a mortgagor has appeared or filed an answer or other responsive pleadings, Plaintiff must, prior to moving for a judgment of foreclosure, comply with the requirements of any loss mitigation program which applies to the subject mortgage loan." Ill. S. Ct. R. 114(a) (eff. May 1, 2013). In order to comply with paragraph (a) of Rule 114, "the plaintiff, prior to or at the time of moving for a judgment of foreclosure," must submit an affidavit specifying: "(1) [a]ny type of loss mitigation which applies to the subject mortgage; (2) [w]hat steps were taken to offer said type of loss mitigation to the mortgagor(s); and (3) [t]he

status of any such loss mitigation efforts.” Ill. S. Ct. R. 114(b) (eff. May 1, 2013). The remedy for a violation of subsections (a) and (b) is stated in subsection (d), such that “[t]he court may, either *sua sponte* or upon motion of a mortgagor, stay the proceedings or deny entry of a foreclosure judgment if Plaintiff fails to comply with the requirements of this rule.” Ill. S. Ct. R. 114(d) (eff. May 1, 2013).

¶ 19 The Committee Comments elucidate the purpose of Rule 114. More specifically, the Committee Comments state:

“It is recognized by all members of the Committee that, where possible, it is in the best interests of all parties, the courts, and the local communities to avoid a foreclosure sale in favor of a workable loss mitigation alternative. Toward this end, Rule 114 requires the plaintiff to file an affidavit to document compliance with any loss mitigation program application to the mortgage loan at issue. The affidavit must be filled out and filed prior to or at the time of moving for a judgment of foreclosure. As such, the intended purpose of the rule is to prevent the entry of a judgment of foreclosure where the plaintiff has theretofore failed to comply with applicable loss mitigation requirements, be they local, state, or federal. The filing of the affidavit allows the court to review the plaintiff’s level of compliance with applicable loss mitigation requirements, and, if necessary, to deny a motion for judgment of foreclosure if said compliance is lacking.” Ill. S. Ct. R. 114, Committee Comments (adopted April 8, 2013).

¶ 20 In interpreting Rule 114, this court has stated: “[t]his rule is not written in mandatory terms. The ‘enforcement’ section specifically notes that the court ‘may,’ rather than ‘shall’ deny entry of a foreclosure judgment if the rule is not satisfied. [Citation.] Although the rule serves

the important purpose of helping living mortgagors in the difficult current financial environment, we find that the rule’s use of the word ‘may’ demonstrates that there is some room for judicial discretion regarding the level of strictness of its enforcement.” *Simpson*, 2015 IL App (1st) 142925, ¶ 37.

¶ 21 Turning to the substance of defendant’s argument, she contends the circuit court erred in accepting plaintiff’s “bare bones” loss mitigation affidavit and subsequently entering the foreclosure judgment based upon that insufficient Rule 114 affidavit. Plaintiff submitted an affidavit authored by Martinez, a vice president of loan documentation at Wells Fargo. In her affidavit, Martinez attested that she reviewed defendant’s file and discovered defendant’s mortgage loan was eligible for “Making Home Affordable (MHA) Loan Mitigation Options” and “Propriety Loss Mitigation Options.” Martinez stated that solicitation letters and outbound calls were made to defendant by plaintiff “to comply with its obligations under such programs;” however, plaintiff had not “received all information from [defendant] that [plaintiff] need[ed] to perform a loss mitigation analysis.”

¶ 22 Based on our review of the affidavit, we find it complied with the requirements of Rule 114. The affidavit was filed prior to the time the circuit court considered the judgment of foreclosure. As a result, where there was no evidence before the circuit court that plaintiff was evaluating defendant for a loan modification when it filed the September 10, 2009, foreclosure complaint or when it moved for judgment of foreclosure, we need not address defendant’s argument regarding dual-tracking. Defendant’s arguments regarding dual-tracking rely on her affidavit attached to her motion to reconsider, which was not new evidence incapable of being presented to the court prior to that time and, therefore, was not properly before the court. *People v. \$280,020 U.S. Currency*, 372 Ill. App. 3d 785, 791 (2007) (the purpose of a motion to

reconsider is to bring to the court's attention a change in law, an error in the court's previous application of existing law, or newly discovered evidence not available at the time of the hearing). Moreover, Martinez's loss mitigation affidavit complied with subsection (b) by specifying the types of loss mitigation applicable to defendant's mortgage, what steps were taken to offer the loss mitigation possibilities to defendant, and the status of the loss mitigation efforts. In fact, Martinez's affidavit took the form outlined in subsection (c) of Rule 114. We, therefore, find the circuit court did not err in concluding that Martinez's loss mitigation affidavit satisfied plaintiff's obligations under Rule 114.

¶ 23 The enforcement section (c) of Rule 114 does not apply here because plaintiff complied with the rule. However, even assuming, *arguendo*, plaintiff failed to comply with Rule 114, contrary to defendant's interpretation, the rule is not compulsory. The enforcement section provides the circuit court with discretion to exercise its authority "*sua sponte* or upon motion of a mortgagor" to stay the proceedings or deny entry of a foreclosure judgment. Ill. S. Ct. R. 114(c) (eff. May 1, 2013). The language used in the rule is permissible, in that the supreme court said a circuit court "may" stay the proceedings or deny entry of a foreclosure judgment in the event the mortgagee failed to comply with Rule 114. *Simpson*, 2015 IL App (1st) 142925, ¶ 37.

Accordingly, based on the plain language of Rule 114, *if* plaintiff had failed to comply with Rule 114, which it did not in this case, then the circuit court would have had discretion to determine whether to stay the proceedings or to deny entry of the foreclosure judgment. Moreover, contrary to defendant's attempt to limit the reach of *Simpson* to the particular facts of that case, this court in *Simpson* first interpreted the express language of the rule in finding that Rule 114 is permissive and then applied the rule to the facts of that case. See *Simpson*, 2015 IL App (1st) 142925, ¶ 37. The *Simpson* construction of the rule equally applies to the case before us.

¶ 24 To the extent defendant argues she was barred from presenting an argument in response to plaintiff's loss mitigation affidavit, defendant fails to cite any rule or statute affording her such an opportunity. Contrary to defendant's insistence, Rule 114 does not include procedural parameters providing for the submission of evidence from the mortgagor. That said, Rule 114 does advise mortgagors that they may request to stay the proceedings or to deny entry of a foreclosure judgment, which defendant did not attempt at any point in writing and only verbally objected to entry of the foreclosure judgment during the August 6, 2014, hearing—eight months after the December 2013 filing of the loss mitigation affidavit. Moreover, defendant did not present a counter-affidavit to Martinez's loss mitigation affidavit until filing her motion to reconsider the foreclosure judgment on October 24, 2014. The record does not contain a transcript or bystander's report from the subsequent November 18, 2014, hearing in which the circuit court considered defendant's motion to reconsider. It was defendant's duty, as the appellant, to provide this court with a complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "In 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. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Accordingly, we presume the circuit court considered and dismissed defendant's counter-affidavit, providing defendant with the desired opportunity to dispute the contents of Martinez's loss mitigation affidavit. We will not further indulge defendant's disputes over the accuracy and sufficiency of Martinez's loss mitigation affidavit where we must presume the circuit court's ruling was in conformance with Rule 114.

¶ 25 Moreover, we find that the circuit court did not err in entering the foreclosure judgment in favor of plaintiff. In her October 13, 2009, answer, defendant admitted she was the mortgagor

of the subject property with the original indebtedness of \$173,565.00. Defendant, in relevant part, objected to plaintiff's requests for judgment of foreclosure and sale and for an order approving the foreclosure sale and granting possession of the subject property. In response to all of the other allegations of plaintiff's complaint, defendant alleged that she had insufficient information to affirm or deny those allegations. After striking defendant's subsequent *pro se* filings seemingly containing an affirmative defense that plaintiff was barred from seeking foreclosure because it failed to present the original mortgage note, the circuit court provided defendant with the opportunity to file affirmative defenses by September 2010. Defendant failed to do so. In fact, defendant did not attempt to file an amended answer or affirmative defenses until March 2014. That said, defendant's October 13, 2009, answer failed to provide a defense to foreclosure. Then, when plaintiff filed its March 2012 motion for summary judgment, defendant failed to oppose that motion, instead filing a motion to "strike" plaintiff's motion for summary judgment and judgment for foreclosure based on inaccurate legal premises. According to section 15-1506(a) of the Code of Civil Procedure (735 ILCS 5/15-1506 (a) (West 2008)), "where an allegation of fact in the complaint is not denied by a party's verified answer, \*\*\* a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such a party and no further evidence of such fact shall be required" and, in those instances where all the allegations of fact in the complaint have been proven, a court "shall enter a judgment of foreclosure as requested in the complaint." Accordingly, based on the record, the circuit court properly entered the foreclosure judgment requested in plaintiff's complaint.

¶ 26 We are not persuaded by defendant's argument regarding her lack of notice for entry of the foreclosure judgment. On August 6, 2014, the circuit court entered an order denying defendant's request for leave to file an amended answer, vacating its March 20, 2014, order

allowing defendant to depose Chase Adams and Martinez, denying defendant's oral motion to file an objection to Martinez's loss mitigation affidavit, and entering judgment of foreclosure and sale. Following the court's March 20, 2014, order granting defendant leave to take the noted depositions, plaintiff filed a motion to vacate that order and proposed a judgment of foreclosure. All matters were entered and continued until a hearing was finally conducted on August 6, 2014. In her appellant brief, defendant does not cite to any authority demonstrating error. We, therefore, conclude defendant has violated Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) and has forfeited her argument. Ill. S. Ct. R. 341(h)(7) ("[a]rgument, which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on. \*\*\*. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.") Despite forfeiture, defendant cannot support a claim of error based on prejudice where the proceedings had been ongoing since September 2009 and the court had clearly entered and continued the most recent proposal for judgment of foreclosure, notifying defendant that the matter was under the court's advisement until the next court date, which was August 6, 2014.

¶ 27 In sum, we conclude that the circuit court did not err in relying on Martinez's loss mitigation affidavit in entering the judgment of foreclosure and sale of the subject property in favor of plaintiff.

¶ 28 **II. Abuse of Discretion**

¶ 29 Defendant additionally contends the circuit court abused its discretion in denying her request to conduct discovery of Martinez and denying her motion for leave to file an amended answer.

¶ 30 We turn first to defendant’s argument regarding the denial of her request to depose Martinez. As recognized by defendant, “[g]enerally speaking, a trial court is afforded great latitude in rulings on discovery matters, and a court of review will not disturb such rulings absent a manifest abuse of discretion.” *D.C. v. S.A.*, 178 Ill. 2d 551, 559 (1997). A circuit court abuses its discretion “when it acts arbitrary without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.” *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999).

¶ 31 We acknowledge that no transcript or bystander’s report appear in the record from March 20, 2014, the date when the court granted defendant leave to depose Martinez. We, therefore, have no method by which to assess the use of the court’s discretion on that date. See *Foutch*, 99 Ill. 2d at 392. Moreover, the transcript from the August 6, 2014, hearing reveals that the circuit court explicitly recognized its discretion to allow discovery related to the loss mitigation affidavit, noting “it’s clear there is no right to depose the affiant in this situation. It’s up to me to allow that or not.” In fact, after the circuit court announced its ruling vacating its prior grant of leave to depose Martinez, defendant’s attorney stated that he was no longer seeking the opportunity to depose Martinez. Defendant, therefore, did not object to the court’s decision to vacate its March 20, 2014, order. Defendant recognized the circuit court’s discretion and, based on the record before us, we cannot find an abuse of that discretion.

¶ 32 We next turn to defendant’s argument that the circuit court erred in denying her leave to file an amended answer. In her appellant brief, defendant argued that “[t]he central purpose of the amendment was to bring to the forefront [her] claims that [plaintiff] was not in compliance with its FHA loss mitigation duties.” Defendant’s characterization of the proposed amended answer is disingenuous. In fact, defendant’s proposed amended answer argued that plaintiff

failed to comply with HUD's pre-foreclosure requirements. The proposed amended answer made no mention of plaintiff's compliance with its loss mitigation duties.

¶ 33 That said, it is well established that parties do not have an absolute and unlimited right to amend their pleadings. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 21.

Whether to grant leave to amend a complaint is within the discretion of the circuit court and will not be considered "prejudicial error unless there has been a manifest abuse of such discretion."

*Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). When assessing whether to allow a party to amend its pleadings, the circuit court may consider: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Id.*

¶ 34 We conclude that the circuit court did not abuse its discretion in denying defendant's request for leave to file the proposed amended answer. The first factor inquires whether the proposed amendment would cure the defective pleading. The proposed amendment to include an affirmative defense that plaintiff failed to comply with the pre-foreclosure requirements was an affirmative defense to plaintiff's foreclosure complaint. Fundamentally, the proposed amendment could not cure the "defective" answer where summary judgment had already been granted on plaintiff's foreclosure complaint. The proper method for challenging entry of summary judgment would have been a motion to reconsider; not an amendment to a pleading that had already been considered and rejected in granting summary judgment in favor of plaintiff. Moreover, plaintiff would suffer prejudice and surprise by virtue of the proposed amendment because summary judgment had already been granted on the pleadings, which included defendant's original answer which failed to deny that all pre-foreclosure notices had

been deemed to be given pursuant to section 15-1504(c)(9) of the Mortgage Foreclosure Law (735 ILCS 5/15-1504(c)(9) (West 2008)). In addition, summary judgment had been granted on August 29, 2012, and defendant requested leave to file her proposed amended answer on March 19, 2014. Simply stated, the proposed amended answer was not timely. Finally, the record reveals that defendant was explicitly instructed to provide affirmative defenses by September 2010, which she failed to do. In sum, no error occurred here.

¶ 35

#### CONCLUSION

¶ 36 We affirm the decision of the circuit court granting judgment of foreclosure and sale and subsequently approving the report of sale and distribution of the subject property.

¶ 37 Affirmed.