

No. 1-15-3474

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 DISTRICT

GREEN TREE SERVICING, LLC, as Successor in)	Appeal from the
Interest to Bank of America, N.A., as Successor by)	Circuit Court of
Merger to BAC Home Loans Servicing, LP, f/k/a)	Cook County
Countrywide Home Loans Servicing, LP,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10 CH 20981
)	
LESZEK PACHOLEK; MARTA PACHOLEK;)	
MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS, INC.; LLC 1)	
0533303020; UNKNOWN OWNERS AND)	
NON-RECORD CLAIMANTS,)	
)	
Defendants,)	
)	Honorable
(Leszek Pacholek and Marta Pacholek, Defendants-)	Freddrenna M. Lyle,
Appellants).)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order granting summary judgment in favor of the plaintiff was reversed where the prove-up "affidavit" attached in support of the motion failed to show that the affiant was under oath. Because the contents of that statement were

inadmissible, a genuine issue of material fact existed, precluding summary judgment. The order for judgment of foreclosure and sale, the sale held pursuant to that judgment, the order approving sale, the order of possession, and the deficiency judgment are vacated and the matter is remanded.

¶ 2 The plaintiff, Green Tree Servicing, LLC, the successor in interest to Bank of America, N.A., which was the successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing LP (BAC), filed the instant action under section 15 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2010)), seeking to foreclose on a property owned by the defendants, Leszek Pacholek and Marta Pacholek. The circuit court of Cook County granted summary judgment in favor of the plaintiff, and the defendants now appeal. For the following reasons, we reverse the circuit court's order granting summary judgment in favor of the plaintiff; and as a consequence, we vacate the order for judgment of foreclosure and sale, the sale held pursuant to that judgment, the order approving sale, the order of possession, and the deficiency judgment. We also remand the matter for further proceedings.

¶ 3 This action was commenced in May 2010, by BAC against the defendants and others seeking the foreclosure and sale of a residence located at 9532 Greenwood Drive in Des Plaines (subject property). The complaint alleged that, on January 22, 2008, Leszek executed a note to Countrywide Bank, FSB, secured by a mortgage on the subject property. The complaint further alleged that, as of December 2008, Leszek was in default on the loan because he ceased paying the monthly installments.

¶ 4 On December 18, 2014, the plaintiff filed a motion for summary judgment pursuant to section 2-1005(a) the Code (735 ILCS 5/2-1005(a) (West 2014)). In the motion, the plaintiff alleged that it was entitled to judgment as a matter of law because Leszek failed to provide proof

of payment and failed to raise any meritorious defenses; therefore, no genuine issue of material fact existed with respect to Leszek's default of the mortgage terms or the amount of money that he owed the plaintiff.

¶ 5 In support of its motion for summary judgment, the plaintiff attached a prove-up affidavit by one of its foreclosure supervisors, Toni Mills, regarding the amount that Leszek owed under the note. In her affidavit, Mills averred that she had personal knowledge of the facts contained therein due to her supervisory position with the plaintiff. Because of her position, she was also familiar with the plaintiff's practices and procedures, such as "the systems of record that [the plaintiff] use[d] to create and record information to residential mortgage loans that it service[d]" and how the employees input that information. According to Mills, the plaintiff used "GTA"—a computer program that was "standard in the industry"—to record and track mortgage payments, and she described that process. She stated that she was "authorized and trained to access these records."

¶ 6 Mills further averred that the entries regarding Leszek's mortgage payments were made in the regular course of business. According to Mills, as of November 21, 2014, the net amount that Leszek owed was \$534,659.41. She listed the various amounts that comprised this total—for instance, the amounts owed in principal, interest, real estate taxes, hazard insurance, and property inspections—and stated that these figures were based upon her review of the following records: "GTA, Payment History, [and] Payments due." Mills signed and dated her affidavit, and it was notarized.

¶ 7 Although Mills did not mention that she was accompanying her affidavit with documents, she attached partial copies of the mortgage and complaint as well as several documents generated by the plaintiff. These documents contain information about Leszek's mortgage, including a

payoff quote, a copy of the account history beginning in January 2008 which shows the last payment being made on November 17, 2008, a chart displaying Leszek's reinstatement amount through June 1, 2013, a list containing "JUDGMENT FIGURES" through November 21, 2014, and screen shots of Leszek's account information from a computer program. None of these documents were labeled as exhibits to Mills' affidavit.

¶ 8 On February 5, 2015, Leszek responded to the plaintiff's motion for summary judgment, alleging that the circuit court should strike Mills' affidavit for failing to comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). According to Leszek, the affidavit's supporting documents were not sworn to or certified; thus, the plaintiff failed to meet "its burden or any foundation for admitting the business records" and the affidavit was "simply comprised of conclusions and unsupported opinions." He also argued that there was improper foundation for the "electronic business records" under Illinois Supreme Court Rule 113(c)(2)(iii) (eff. May 1, 2013) and "evidentiary rules" because Mills did not elaborate on GTA (the computer program used by the plaintiff), and she would not be able to testify about the prior servicers' methods to track the mortgage. Accordingly, Leszek asserted, the records would be inadmissible at trial. Leszek did not attach counter-affidavits or any other evidence to his response.

¶ 9 On March 19, 2015, the circuit court entered, *inter alia*, the following written orders: (1) an order for default against Marta and others; (2) an order granting summary judgment against Leszek; (3) an order for judgment of foreclosure and sale against all defendants; and (4) an order appointing a selling officer. The subject property was sold by judicial sale on June 29, 2015. Thereafter, the plaintiff moved for confirmation of sale, possession of the subject property, and a personal deficiency judgment against Leszek, which the court granted, through a written order, on November 2, 2015. The defendants timely filed their notice of appeal.

¶ 10 On appeal, the defendants argue that Mills' affidavit in support of the plaintiff's motion for summary judgment failed to comply with Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)) because Mills did not reference any accompanying documents in her prove-up affidavit and the documents that were attached to it were not labeled as exhibits and were not sworn to or certified. The defendants assert that, because of this, the circuit court should have stricken the affidavit and denied the plaintiff's motion for summary judgment.

¶ 11 Initially, we address the plaintiff's contention that the defendants failed to comply with Illinois Supreme Court Rule 341 (eff. Jan. 1, 2016) by not citing to the record on appeal in the argument section of their brief. The plaintiff argues that, consequently, the defendants' argument should be deemed waived. Rule 341(h)(7) provides, in relevant part, that an appellant's brief shall contain an argument, setting forth "the contentions of the appellant and the reasons therefore, with citation of the authorities and *the pages of the record relied on.*" (Emphasis added.) Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). By not providing citations to the record in their argument, the defendants in this case technically did not comply with Rule 341(h)(7). Nevertheless, we will consider their argument because they cited to the record in their statement of facts. *Geise v. Phoenix Co. of Chicago*, 159 Ill. 2d 507, 514 (1994) ("[t]he rule of waiver is *** a limitation on the parties and not the courts"). Additionally, the record is small and we have easily found the affidavit at issue.

¶ 12 Turning to the merits, summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file establish the absence of a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Sollami v. Eaton*, 201 Ill. 2d 1, 6 (2002). The purpose of a motion for summary judgment is to determine the existence or absence of a genuine issue as to any material fact; it cannot be

used to resolve a disputed fact. *Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolini & Terpinas*, 2015 IL 117096, ¶ 14. When ruling on a motion for summary judgment, the court must strictly construe all evidentiary material against the movant while liberally construing all of the evidentiary material in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is a drastic remedy which results in the disposition of a case without a trial and, as such, should not be granted unless the right of the movant is free from doubt. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. "[A] court's determination of whether an affidavit offered in connection with a motion for summary judgment complies with Rule 191 is a question of law subject to *de novo* review." *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003). We also review the grant of summary judgment *de novo*. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 23.

¶ 13 "Illinois courts have defined the term['affidavit,'] in consistent fashion for over 100 years[:] *** '[a]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths.'" *Roth v. Illinois Farmers Ins. Co.*, 202 Ill. 2d 490, 493 (2002) (quoting *Harris v. Lester*, 80 Ill. 307, 311 (1875)). A statement is not an affidavit if it "does not show that the person who made it was under oath." *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 7 (1993); see also *Manuel v. McKissack*, 60 Ill. App. 3d 654, 657 (1978) ("Neither statement is an affidavit because neither shows that the person who made it was under oath."). An oath " 'is an appeal by a person to God to witness the truth of what he declares[,] and in its broadest sense it includes any form of attestation by which a party signifies that he is bound in conscience to act truthfully.'" *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 518 (2009) (quoting *In re Rice*, 35 Ill. App. 2d 79, 84 (1962)). "Unsworn statements ***

may not be considered for purposes of section 2-1005(c) of the Code." See *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 43 (where a written report was "entirely insufficient" for the purpose of opposing a motion for summary judgment—the "most obvious fatal deficiency" being that it was not an affidavit, "meaning it was not sworn to, notarized, or otherwise made under oath").

¶ 14 In this case, Mills did not include *any* language in her prove-up "affidavit" indicating that she was under oath or " 'bound in conscience to act truthfully.' " *Id.* Her "affidavit," however, was notarized in Arizona. The notarization, in relevant part, states: "The foregoing instrument was *acknowledged* before me [on] this *** day *** by Toni Mills." (Emphasis added.) In order to determine whether this notarization satisfies the requirement that affiants be under oath (*Northrop*, 242 Ill. App. 3d at 7; see also *Manuel*, 60 Ill. App. 3d at 657), a review of Arizona law is necessary.

¶ 15 Similar to Illinois' definition of an affidavit, in Arizona, an affidavit is " 'a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true.' " *Beatie v. Beatie*, 235 Ariz. 427, 432 (2014) (quoting *Matter of Wetzel*, 143 Ariz. 35, 43 (1984)). Additionally, section 41-311 of the Arizona Revised Statutes Annotated defines an "acknowledgment" as "a notarial act in which a notary certifies that a signer, whose identity is proven by satisfactory evidence, appeared before the notary and *acknowledged that the signer signed the document.*" (Emphasis added.) A.R.S. § 41-311(1); see also *State v. Solis*, 236 Ariz. 242, 245 (2014). Conversely, a "jurat" is defined as "a notarial act in which the notary certifies that a signer, whose identity is proven by satisfactory evidence, has made in the notary's presence a voluntary signature and has taken an oath or affirmation vouching for the truthfulness of the signed document." A.R.S. § 41-311(5);

see also *Solis*, 236 Ariz. at 245. An "oath" or "affirmation" is defined as "a notarial act or part of a notarial act in which a person made a vow in the presence of the notary under penalty of perjury, with reference made to a supreme being in the case of an oath." A.R.S. § 41-311(9).

¶ 16 Here, the Arizonan notary public only acknowledged that Mills signed the document. A.R.S. § 41-311(1). Without a jurat or any language within the affidavit signifying that Mills' statements were true under the penalty of perjury, we conclude that Mills was not under oath. Consequently, her "affidavit" is merely an unsworn statement and the circuit court should not have relied on it in granting summary judgment. *Essig*, 2015 IL App (4th) 140546, ¶ 43; *Manuel*, 60 Ill. App. 3d at 657; *Northrop*, 242 Ill. App. 3d at 7; see also *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992) (citing *Kaplan v. Disera*, 199 Ill. App. 3d 1093, 1096 (1990) ("Evidence which would be inadmissible at trial may not be considered in support of *** a motion for summary judgment.")). Because Mills' statement was inadmissible, the documents attached in support of it were likewise inadmissible. See *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 484-85 (2006) (where a party failed to properly authenticate email that it attached to a summary judgment motion because it did not submit an affidavit or take a deposition of the alleged author of the email).

¶ 17 Having found that Mills' statement was not an affidavit and that it may not be relied upon in support of a motion for summary judgment, we next address the defendants' contention that the circuit court erred in granting summary judgment. Without the facts contained in Mills' statement—*i.e.*, the amount the defendants owed the plaintiff under the note, a genuine issue of material fact exists in this case. Accordingly, the plaintiff was not entitled to judgment as a matter of law and the circuit court erred in granting summary judgment.

¶ 18 We reject the plaintiff's contention that, because the defendants did not submit any counter-affidavits or other evidence to oppose the assertions in Mills' "affidavit," we must accept those assertions as true. See *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986) ("facts contained in *an affidavit* in support of a motion for summary judgment which are not contradicted by counter[
]affidavit are admitted and must be taken as true for purposes of the motion." (Emphasis added.)). As stated above, Mills' statement was not an affidavit and it cannot be used to support a motion for summary judgment. Therefore, the defendants were not required to contradict the facts alleged therein by filing a counter-affidavit. The plaintiff, as the movant, has the burden of establishing that it is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Sollami*, 201 Ill. 2d at 6. Without the facts in Mills' statement, the plaintiff is unable to make this showing.

¶ 19 Because we reverse the circuit court's order granting summary judgment entered in favor of the plaintiff on March 19, 2015, we must vacate: (1) the order for judgment of foreclosure and sale entered on March 19, 2015; (2) the sale of the subject property conducted, pursuant to that judgment, on June 29, 2015; (3) the order approving the sale entered on November 2, 2015; (4) the order of possession of the subject property entered on November 2, 2015; and (5) the deficiency judgment entered against Leszek in the sum of \$253,528.89. We also remand the cause for further proceedings.

¶ 20 Reversed in part, vacated in part and remanded.