

No. 1-12-1389

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

WELLS FARGO BANK, N.A., as Trustee for the)	Appeal from the
Registered Holders of Banc of America Commercial)	Circuit Court of
Mortgage, Inc., Commercial Mortgage Pass-Through)	Cook County
Certificates Series 2005-4, by and through Special)	
Servicer ORIX Capital Markets, LLC,)	No. 11 CH 42222
)	
Plaintiff-Appellee,)	Honorable
)	Jesse Reyes,
v.)	Judge Presiding.
)	
YP TRILLIUM, LLC,)	
)	
Defendant-Appellant)	
)	
(Unknown Owners, Unknown Occupants, Unknown)	
Tenants, and Non-Record Claimants, Defendants).)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err in granting plaintiff's motion for immediate possession and appointment of a receiver where a proven default was established and defendant did not show good cause as to why it should remain in possession of the property.

¶ 2 Plaintiff-appellee Wells Fargo Bank, N.A. filed a foreclosure action against defendant-appellant YP Trillium, LLC. The circuit court granted Wells Fargo's motion for immediate possession and appointment of receiver. On appeal, YP Trillium contends that the circuit court erred in appointing a receiver because Wells Fargo did not establish that there was a likelihood that it would prevail on the merits and because there was good cause supporting the denial of the appointment of the receiver. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In 2005, YP Trillium obtained a \$14,100,000 loan to purchase an office complex located at 5401 and 5407 Trillium Boulevard in Hoffman Estates, Illinois. The loan was evidenced by a promissory note dated August 15, 2005, and secured by a mortgage of the same date, granting a mortgage lien and security interest to the mortgagee. YP Trillium failed to make complete and timely payments on the note beginning in October 2009. In March 2010, YP Trillium entered into a forbearance agreement with the lender. The forbearance agreement expired on July 31, 2010. The note and mortgage were subsequently assigned to Wells Fargo.

¶ 5 On December 8, 2011, Wells Fargo filed a complaint for foreclosure against YP Trillium. On or about December 9, 2011, Wells Fargo filed a motion for immediate possession and appointment of a receiver. Attached to the motion was an affidavit executed by Adam Diamond, a senior asset manager at ORIX Capital Markets, LLC. The affidavit stated that YP Trillium had defaulted on the mortgage and note, and that the associated trust had not received rental income from the property as required under the terms of the loan. On February 24, 2012, YP Trillium

filed a motion to dismiss on the grounds that ORIX Capital Markets was not registered in the state of Illinois and therefore, as a foreign LLC, could not maintain a civil action in Illinois.

¶ 6 On May 7, 2012, the parties appeared before the circuit court for a hearing on the motion to dismiss and the motion to appoint a receiver. Wells Fargo pointed out that, for purposes of the motion to dismiss, ORIX was not the plaintiff in the lawsuit and its status as a foreign LLC was therefore irrelevant. Because there were still open discovery issues related to the motion to dismiss, the circuit court did not issue a ruling on that motion but instead addressed the motion to appoint a receiver, stating that as far as the court was concerned, the parties before the court were the appropriate parties. After hearing argument from the parties and reviewing the mortgage and loan documents, the circuit court concluded that there was a default and that there was no good cause established as to why a receiver should not be appointed. The circuit court entered an order granting Wells Fargo's motion for immediate possession and the appointment of a receiver.

¶ 7 YP Trillium filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(2) (eff. February 26, 2010) and also filed a motion in circuit court to stay the appointment of the receiver pending resolution of this appeal. The stay was granted on May 11, 2012 and remains in effect at the time of this appeal.

¶ 8 ANALYSIS

¶ 9 YP Trillium contends that the circuit court erred in finding that there was a reasonable probability that Wells Fargo would prevail in the underlying foreclosure action and that YP Trillium presented evidence to establish good cause for not appointing a receiver. Both issues are governed by the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101

et seq. (West 2008)). The Foreclosure Law, enacted in 1987, changed the standard of review of an order appointing a receiver from the previously deferential standard to a *de novo* standard of review.¹ See *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 868 (1993); *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010); *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 164-65 (2010).

This court has noted that in the event that a full evidentiary hearing is held on the motion to appoint a receiver, a more deferential standard of review could still be applicable. *Bank of America*, 401 Ill. App. 3d at 165. However, where, as here, the circuit court's findings were based on a review of the applicable documents and the arguments of the parties, we apply a *de novo* standard of review.

¶ 10 YP Trillium first contends that the circuit court erred in appointing a receiver because Wells Fargo did not establish that it would prevail on the merits where no supporting documents were attached to the affidavit upon which Wells Fargo relied, the statement of default was inaccurate, and YP Trillium's motion to dismiss was still pending and unresolved.

¶ 11 Section 15-1701(b)(2) of the Foreclosure Law provides that the mortgagee is entitled to possession of non-residential real estate prior to an entry of a judgment of foreclosure if such possession is authorized by the terms of the mortgage and the court is satisfied that there is a reasonable probability that the mortgagee will prevail in the foreclosure action. 735 ILCS 5/15-

¹Although appellant included the correct standard of review in its brief, the brief includes no citation to authority for the standard of review, in violation of Illinois Supreme Court Rule 341(h)(3) (eff. July 1, 2008).

1701(b)(2) (West 2008). However, if the mortgagor objects and shows good cause, the court shall allow the mortgagor to remain in possession. 735 ILCS 5/15-1701(b)(2) (West 2008). This court has held that the Foreclosure Law creates a presumption in favor of the mortgagee's right to possession. *Bank of America*, 401 Ill. App. 3d at 164. Section 15-1702(a) further provides that "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." 735 ILCS 5/15-1702(a) (West 2008).

¶ 12 Article 8 of the mortgage contains provisions of the rights and remedies in the event of default and provides, *inter alia*, that the mortgagee is entitled to possession of the property should the mortgagor default. Section 17.11 of the mortgage provides that in addition to provisions in the mortgage entitling it to possession, the mortgagee will have the right under the Foreclosure Law to be placed in possession of the property or request to have a receiver appointed. Thus, possession is authorized by the terms of the mortgage as required under the Foreclosure Law and we must address whether there is a reasonable probability that Wells Fargo will prevail in the foreclosure action.

¶ 13 In Illinois, a proven default has been held to establish a reasonable probability that the mortgagee will prevail in a foreclosure action. *Bank of America*, 401 Ill. App. 3d at 166; *Mellon*, 265 Ill. App. 3d at 868. YP Trillium provides no support for its argument that the requirements for affidavits in support of certain types of motions under Illinois Supreme Court Rule 191(a) (eff. January 4, 2013) should be extended to affidavits generally, requiring sworn or certified copies of the documents on which the affiant relies to be attached to the affidavit, and we have found no authority for this proposition. Indeed, this court has held that an affidavit from an

executive of the mortgagee stating that the mortgagor failed to pay real estate taxes, a mechanics' lien existed on the property, and the mortgagee had not been reimbursed for its payment to bondholders was sufficient to establish default in a foreclosure action. *Mellon*, 265 Ill. App. 3d at 869. Therefore, the affidavit submitted by Wells Fargo stating that YP Trillium had defaulted on the mortgage and note, and that the associated trust had not received rental income from the property as required under the terms of the loan was sufficient to establish default. Moreover, under the forbearance agreement of March 2010, YP Trillium admitted it was in default. See *CenterPoint*, 398 Ill. App. 3d at 392 (holding that an admission of default was sufficient to establish a reasonable probability of success in a mortgage foreclosure action). Thus, because a proven default has been established, we conclude that the circuit court did not err in finding that Wells Fargo would likely prevail in the foreclosure action.

¶ 14 We now turn to YP Trillium's argument that it established good cause supporting the denial of the appointment of a receiver. We note that although both YP Trillium and the circuit court refer to the statutory requirement as a showing of good cause why a receiver should not be appointed, that is not the standard set forth in the Foreclosure Law. Possession of the property and the appointment of a receiver are addressed separately under the statute. A mortgagee can request and be granted possession of the property without requesting the appointment of a receiver. The requirement to show good cause, as used in the context of the case *sub judice*, relates to possession, not the appointment of a receiver. Under the Foreclosure Law, if the mortgagee establishes that it is entitled to possession, the only way the mortgagor can remain in possession is by showing good cause as to why it should remain in possession. 735 ILCS 5/15-

1701(b)(2) (West 2008). The section of the Foreclosure Law that addresses whether a receiver shall be appointed does not mention an exception for a showing of good cause. See 735 ILCS 5/15-1702(a) (West 2008) ("[w]hen a mortgagee entitled to possession so requests, the court shall appoint a receiver."). A showing of good cause in connection with appointing a receiver is only relevant when the mortgagor objects to the appointment of a particular designee. See 735 ILCS 5/15-1702(b) (West 2008). However, in a case where the mortgagor objects and shows good cause why a particular designee should not be the receiver, such a showing does not ultimately defeat the appointment of a receiver because the mortgagee is entitled to make another designation. See 735 ILCS 5/15-1702(b) (West 2008). Thus, a more accurate statement of the issue in the instant case is whether YP Trillium established good cause as to why it should remain in possession of the property.

¶ 15 YP Trillium contends, in one paragraph and with no citations to relevant authority, that it established good cause because Wells Fargo was delinquent in responding to discovery. YP Trillium further accuses Wells Fargo of hiding documents and asserts that the documents sought "may have given Appellant defenses to Appellee's motion." This argument is completely devoid of merit. It is well settled that the burden to establish good cause is on the mortgagor, not on the mortgagee. *Bank of America*, 401 Ill. App. 3d at 176 (citing *Travelers Insurance Co. v. LaSalle National Bank*, 200 Ill App. 3d 139, 143 (1990)). YP Trillium's argument is purely speculative and has the effect of impermissibly shifting the burden to Wells Fargo to show why there is not good cause. YP Trillium has not met its burden of rebutting the presumption in favor of the mortgagee's right to possession. Thus, the circuit court did not err in finding that YP Trillium did

1-12-1389

not establish good cause as to why it should remain in possession of the property.

¶ 16 For the reasons stated herein, we hold that the circuit court did not err in granting Wells Fargo's motion for immediate possession and the appointment of a receiver.

¶ 17 Affirmed.