2013 IL App (1st) 130220-U

FIFTH DIVISION
September 27, 2013

No. 1-13-0220

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).

BRICKYARD BANK,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,,	)	
	)	
v.	)	No. 10 CH 21777
	)	
LEO AND SYLVIA FEIGENBAUM,	)	Honorable
	)	Daniel Brennan,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 ***Held***: Plaintiff, through an affidavit from its president, laid a proper foundation for the admission of computer records pertaining to defendants' mortgage under the business records exception to hearsay. The affidavit of plaintiff's president complied with Illinois Supreme Court Rule 191 as it include facts upon which the affiant relied and not merely conclusions. Defendants were not entitled to a "grace period notice letter" under the Illinois Homeowner Protection Act. The trial court's order entering judgment of foreclosure and sale against defendants was affirmed.

¶ 2 The relevant facts of this case are undisputed. On July 29, 2005, plaintiff, Brickyard Bank, made a loan to defendants, Leo and Sylvia Feigenbaum, in the amount of $1,709,910,

secured by a mortgage on the property commonly known as 6600 North St. Louis in Lincolnwood, Illinois (the "property"). On June 12, 2009, plaintiff made an additional loan to defendants in the amount of $56,814.63, secured by the mortgage as modified by the "First Modification of Loan Documents." A default occurred by virtue of nonpayment of the principal, interest and taxes from August 10, 2009, and plaintiff subsequently declared the entire unpaid principal balance to be due and owing. On October 1, 2009, defendant Leo Feigenbaum filed for Chapter 7 bankruptcy in the United States Bankruptcy Court. On December 15, 2009, the bankruptcy court granted plaintiff relief from the automatic stay and allowed it to exercise its rights in the property, including prosecuting a foreclosure action.

¶ 3 On May 20, 2010, plaintiff filed a "Verified Complaint for Foreclosure of Mortgage and Other Relief" in the circuit court of Cook County. Defendants answered the complaint and, on August 4, 2011, plaintiff filed a "Third Amended Verified Complaint for Foreclosure of Mortgage and Other Relief." On October 25, 2011, plaintiff filed a motion for "Summary Judgment of Foreclosure" seeking, among other things, to have the court enter a judgment of foreclosure and sale against defendants. The motion was supported by an affidavit from Mimi Sallis, plaintiff's president and chief executive officer. As relevant to this appeal, Sallis made the following statements in her affidavit:

> "The statements made in this Affidavit are based on the Affiant's personal knowledge and a review of Brickyard's books and records.
>
> Affiant is familiar with Brickyard's business and its procedures for the creation, maintenance and retention of its book and records. These books and records

include documents that evidence and relate to loans made by Brickyard and amounts due and paid under any such loans. Brickyard's records are created, maintained and retained in Brickyard's ordinary and regular course of business. It is the regular course of business for Brickyard to make such records at or around the time of the transactions they each reflect, and to regularly record all payments received in payment of loans made by Brickyard at the time of receipt of payment or within a reasonable time thereafter. The entries in Brickyard's records are made either by a person with first hand knowledge of the events or from information provided by persons with first hand knowledge.

Brickyard's books and records include records of various loans made by Brickyard to [defendants]. ***. Exhibits A through N attached to the Amended Complaint are true and correct copies of the documents executed by [defendants] that memorialize Brickyard's loans to [defendants] and are kept and maintained by Brickyard in its books and records in its regular and ordinary course of business.

In the ordinary and regular course of its business, Brickyard utilizes the proprietary software known as FiServ Navigator ('FiServ') to process and store its customer information and to calculate the amount due and owing at any time on any promissory note or loan. Brickyard utilizes FiServ in the ordinary and regular course of its business to, among other things, track and maintain the amounts due and owing from [defendants] on the First Note and the June 19, 2009 Promissory Note. The entries in FiServ are made at or near the time of the event reflected in

> the entry, either by persons with first hand knowledge of such event, or from information provided by persons with such first hand knowledge.
>
> FiServ is audited internally on a regular basis to ensure that it is functioning properly and that all payments received from a borrower are accurately applied. FiServ has been found to be accurate during these tests and audits.
>
> In Affiant's experience, FiServ is an accurate and efficient means to maintain Brickyard's customer accounts and to determine the amount due and owing on any promissory note or loan at any given time.
>
> Affiant knows of no circumstance where FiServ has provided inaccurate or false data of customers' accounts.
>
> Based on Brickyards books and records, Brickyard has not received any payments due on the Notes, since on or after August 10, 2009."

In the affidavit, Sallis proceeded to set forth the various amounts due and owing to plaintiff by defendants as well as the costs, including taxes, that plaintiff had paid with respect to the property. Sallis further stated that in May of 2010, plaintiff liquidated certain certificates of deposit which were collateral for the first note and applied the amounts received to the principal due on the first note and the June 19, 2009 promissory note. Sallis stated that a true and correct copy of the loan history evidencing the credit for this liquidation was attached to the affidavit. Sallis then stated that "[o]n October 12, 2011, FiServ was used in accordance with the regular and ordinary procedures to determine the amounts due, amounts paid, and amounts owing on the First Note and on the June 19, 2009 Promissory Note and all amounts paid by Brickyard Bank for

real estate taxes with respect to the Mortgaged Premises." According to Sallis, a "true and accurate compilation" of amounts due on these notes was also attached to the affidavit. Various computer printouts consistent with the representations made in Sallis's affidavit were attached to the affidavit.

¶ 4 Defendants filed a response to plaintiff's motion for summary judgment. Defendants claimed, among other things, that they were entitled to "grace period letter" pursuant to section 15-1502.5(b) of the Illinois Homeowner Protection Act (735 ILCS 5/15-1502.5(b) (West 2010) (the Act). Defendants stated that defendant Leo Feigenbaum had filed for Chapter 7 bankruptcy on October 1, 2009, that plaintiff received relief from the automatic stay on December 15, 2009, and that "[d]efendants filed for bankruptcy before the foreclosure was filed by plaintiff." Defendants further asserted that under section 15-1502.5(b) of the Act,"a grace period letter is a necessary prerequisite to a foreclosure on a primary residence" "if a particular mortgage delinquency is not protected by a bankruptcy stay." Defendants also stated that "the foreclosure action in the matter at hand began after Defendants had filed for bankruptcy, and where they had made the proper payments for relief." In their response, defendants also claimed that Sallis's affidavit violated Illinois Supreme Court Rule 191 (S. Ct. R. 191(a) (eff. Jan.4, 2013)) because it consisted of conclusions and not facts. Defendants also claimed that the affidavit failed to lay a proper foundation for the admission of the computer printouts attached to the affidavit and therefore those printouts were inadmissible hearsay.

¶ 5 In reply, plaintiff argued that it was not required to sent a grace period letter to defendants because, under the Act, no such letter was required where the mortgagor had filed for protection

from the mortgage by filing a petition for relief under the United States Bankruptcy Code. Plaintiff further argued that Sallis's affidavit complied with Rule 191 and laid a proper foundation for the admission of the computer printouts under the business records exception to hearsay.

¶ 6 On April 17, 2012, the trial court entered a judgment of foreclosure and sale. On July 24, 2012, the trial court denied defendants' motion to reconsider. An order approving the sale of the property was entered by the trial court on January 7, 2013. This appeal followed.

¶ 7 Defendants first contend that Sallis's affidavit violated Supreme Court Rule 191 because it consisted of conclusions instead of facts. Defendants further contend that the affidavit failed to lay the proper foundation for the admission of the computer-generated mortgage records and as such those records were inadmissible hearsay. For these reasons, defendants assert that summary judgment in favor of plaintiff was improper.

¶ 8 "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the nonmoving party is entitled to judgment as a matter of law." *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010). Rule 191 governs the requirements of affidavits used in support of a motion for summary judgment. Rule 191 states, in pertinent part:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2–1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity facts upon

> which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan.4, 2013).

¶ 9 A Rule 191 affidavit "is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony." *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App .3d 1013, 1025 (1992). An affidavit that is conclusory and does not include facts upon which the affiant relies is in violation of Rule 191. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 63 (2001). However, Rule 191 is satisfied if it appears, from the document as a whole, that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 349 (2010).

¶ 10 Contrary to defendants' claim, we find that Sallis's affidavit contained detailed factual averments which satisfied the requirements of Supreme Court Rule 191. In the affidavit, Sallis stated that she was familiar with plaintiff's procedures for the creation, maintenance and retention of its books and records. Sallis then explained that plaintiff regularly made records, at or around the time of the transaction they each reflect, of all payments received in payment of loans made by the Bank. Sallis gave a detailed account of how plaintiff, in the regular and ordinary course of its business, used a specific type of software to process and store its customer information and to determine the amount due and owing on any given loan. Sallis went so far as to state that

plaintiff used that software to track and maintain the amounts due from defendants on their two promissory notes. These statements were based on Sallis's personal knowledge and were not mere conclusions and therefore the affidavit did not violate Supreme Court Rule 191.

¶ 11 We also find that the affidavit laid a sufficient foundation for the admission of the computer records pertaining to defendants' mortgage.

¶ 12 Illinois Rules of Evidence 803(6) provides that "records of regularly conducted activity" are not considered inadmissible hearsay where they constitute:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness *** [.]"[1] Ill. R. Evid. 803(6) (eff. Jan. 1, 2011).

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[1]Prior to the adoption of the Illinois Rules of Evidence, Illinois Supreme Court Rule 236 recognized business records as an exception to hearsay in civil cases and section 115-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5(a) (West 2010)) did the same in criminal cases. Illinois Rule of Evidence 803(6) was "carefully crafted to incorporate as applied in both civil and criminal cases all the operative provisions of Rule 236 and 6/115-5 *** in a streamlined fashion." M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.6, at 884 (10th Ed. 2010). The adoption of Illinois Rule of Evidence 803(6) did not change the substantive requirements for the admissibility of business records. See M. Graham, Cleary & Graham's

"The theory upon which entries made in the regular course of business are admissible as an exception to the hearsay rule is that 'since their purpose is to aid in the proper transaction of the business and they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify nonexistent.' " *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005) (quoting M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th Ed.1999)).

¶ 13 The proper foundation for computer-generated records requires a showing that: (1) the electronic computing equipment is recognized as standard; (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded; (3) the particular computer produces an accurate record when properly employed and operated; (4) the particular computer was properly employed and operated in the manner at hand; and (5) the foundation testimony establishes that the sources of information, method and time of preparation indicate its trustworthiness and justify its admission. *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 114-15 (2000); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.6, at 893 (10th Ed. 2010).

¶ 14 The determination of whether business records are admissible is within the sound discretion of the trial court and its determination will not be reversed absent an abuse of that

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Handbook of Illinois Evidence § 803.6, at 884 (10th Ed. 2010) (The change [from Supreme Court Rule 236 and 5/115-5] is solely to as to organization; no substantive change with respect to admissibility of records of regularly conducted activities occurred"); *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 17 ("While Rule 803(8) is new, the legal principles behind it are not").

discretion. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13. An abuse of discretion occurs only where the court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person could take the view adopted by the trial court. *TruServ Corp. v. Ernst & Young LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 15 In this case, Sallis's affidavit contained detailed factual averments describing her personal knowledge of plaintiff's record keeping process. As noted above, Sallis stated that she was familiar with plaintiff's process for creating those records and she explained how those records were created in the ordinary course of business at or near the time of each transaction. Sallis swore that the mortgage records were true and accurate copies of the documents pertaining to defendants' mortgage that were kept and maintained by the Bank. Sallis further explained that plaintiff used specific software during the ordinary course of its business to store its customer information and to track, maintain and calculate the amount due on any given loan or promissory note. Sallis also stated that the entries into the computer system were made at or near the time of each event reflected by the entry and that each entry was made either by someone with firsthand knowledge of the event or from information provided by someone with such first-hand knowledge. Finally, Sallis explained that the software used was audited internally on a regular basis to ensure accuracy and that the software had been found to be accurate during these tests. We conclude that these statements laid the proper foundation for the admission of the computer records pertaining to defendants' mortgage.

¶ 16 Defendants nevertheless claim that the affidavit was insufficient to lay a proper foundation. Defendants asserts that to lay a proper foundation, the affiant must have "personal

knowledge of the creation of the record itself, or personal knowledge of each participant in the chain that led to the creation of the record."

¶ 17 This is an inaccurate statement of the law. In order to be qualified to lay a proper foundation, a witness need not have prepared the records in question or have personal knowledge of their creation and the witness also does not have to identify the person whose firsthand knowledge was the basis of the record. See, *e.g.*, M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.6, at 888 (10th Ed. 2010) (citing *Raithel v. Dustcutter, Inc.*, 261 Ill. App. 3d 904 (1994)) ("[T]he custodian or other qualified witness need not have personal knowledge of the matter recorded, * * *. Lack of personal knowledge of the entrant or maker may be shown to affect the weight to be given to the record but does not effect its admissibility"); *Bank of America*, 2013 IL App (5th) 120283, ¶ 12 (noting that under Supreme Court Rule 236, "lack of personal knowledge by the maker may affect the weight of the evidence but not its admissibility"); *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 789-90 (2002) (noting that a proper foundation for the admission of business records requires a showing that the record was made in the regular course of a business at or near the time of the transaction, and that "all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility" (Internal quotation marks omitted.); 2 McCormick On Evidence § 292 (7th ed.) ("[A]nyone with the necessary knowledge is qualified [to lay a proper foundation]; this witness need not have firsthand knowledge of the matter reported or actually have prepared the report or observed its preparation"); 34 Am Jur. 2d, Foundation for Offering Business Records in Evidence, ¶ 4 (2013)

("where the entrant has based the entries on information transmitted by another who had personal knowledge, it is not necessary to produce or even identify the specific individual whose firsthand knowledge was the basis of the entry. A sufficient foundation for the introduction of the record is laid if the party seeking to introduce it is able to show that it was the regular practice of the business to base such records on a transmission from a person with knowledge").

¶ 18 Therefore, the fact that Sallis did not have personal knowledge of the creation of the records pertaining to defendants' mortgage or of each person who created the records did not preclude those records from being admitted into evidence. As noted above, the factual averments in Sallis's affidavit satisfied the foundational requirements and indicated that the records were trustworthy and reliable. Accordingly, the trial court did not abuse its discretion by admitting the records into evidence.

¶ 19 Defendants next contend that they were entitled to a "grace period notice letter" before plaintiff filed its mortgage foreclosure action.

¶ 20 Section 15-1502.5 of the Act provides, in relevant part:

> "(b) *Except in the circumstance in which a mortgagor has filed a petition for relief under the United States Bankruptcy Code*, no mortgagee shall file a complaint to foreclose a mortgage secured by residential real estate until the requirements of this Section have been satisfied.
>
> (c) Notwithstanding any other provision to the contrary, with respect to a particular mortgage secured by residential real

> estate, *the procedures and forbearances described in this Section apply only once per subject mortgage*.
>
> *Except for mortgages secured by residential real estate in which any mortgagor has filed for relief under the United States Bankruptcy Code*, if a mortgage secured by residential real estate becomes delinquent by more than 30 days the mortgagee shall send via U.S. mail a notice advising the mortgagor that he or she may wish to seek approved housing counseling. Notwithstanding anything to the contrary in this Section, nothing shall preclude the mortgagor and mortgagee from communicating with each other during the initial 30 days of delinquency or reaching agreement on a sustainable loan workout plan, or both.
>
> No foreclosure action under Part 15 of Article XV of the Code of Civil Procedure shall be instituted on a mortgage secured by residential real estate before mailing the notice described in this subsection (c)." (Emphasis added.) 735 ILCS 5/15-1502.5 (West 2010).

¶ 21 In a somewhat convoluted argument, defendants claim that the statute is ambiguous as to the meaning of the phrase "has filed" as it is used in the exception to the notice requirement for situations in which a mortgagor has filed for relief under the United States Bankruptcy Code. Defendants argue that it is unclear whether the phrase "has filed" means a mortgagor who has

filed for bankruptcy "at any time, in any place, even fifty years prior to the current delinquency" or if the phrase applies to a situation in which a stay is imposed by the bankruptcy court and the mortgagee is forbidden from being able to send a notice letter. Defendants further claim that defendant Sylvia Feigenbaum was entitled to receive a notice letter because only defendant Leo Feigenbaum filed for bankruptcy.

¶ 22 In cases involving statutory interpretation, the primary goal is to ascertain and give effect to the intent of the legislature by looking to the language of the statute and applying its plain and ordinary meaning. *Hadley v. Illinois Department of Corrections*, 224 Ill. 2d 365, 371 (2007). When the statutory language is clear and unambiguous, the words are given effect without resorting to other construction aids. *Id*. A court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent. *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 56. Questions of statutory interpretation are reviewed *de novo*. *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund*, 216 Ill. 2d 590, 595 (2005).

¶ 23 We find that the language of the statute is clear and unambiguous. The stature clearly exempts from the notice requirement any residential mortgagor who has sought relief from the mortgage in question by filing for bankruptcy. The language clearly encompasses the situation where a mortgagor files for bankruptcy and then a foreclosure action follows. The bankruptcy proceeding was pending at the time plaintiff initiated its foreclosure action and therefore, at that time, Leo Feigenbaum was a mortgagor who had "filed for relief under the United States Bankruptcy Code." Accordingly, defendants were not entitled to receive notice when the

foreclosure action was filed.

¶ 24 Although in this case the bankruptcy action was pending at the time plaintiff began foreclosure proceedings, we note that the United States District Court has considered the section of the statute at issue in this case and held that the bankruptcy action need not be pending at the time the mortgagee initiates foreclosure proceedings in order for the exception to the notice requirement to apply. See *Boyd v. U.S. Bank, N.A., ex rel. Sasco Aames Mortgage Loan Trust, Series 2003-1,* 787 F. Supp. 2d 747 (N.D. Ill. 2011). In that case, the mortgagor sought relief from a mortgage by filing a bankruptcy action that was dismissed approximately two months before the bank began foreclosure proceedings. *Id*. at 754. The court rejected the mortgagor's argument that the statute excused a mortgagee from complying with the notice requirement only if the mortgagor's bankruptcy action remained pending when the grace period notice was due. *Id*. The court reasoned:

> "That premise cannot be reconciled with the statute's text, which broadly exempts from the notice requirement any residential mortgagor who '*has filed*' for relief under the Bankruptcy Code ***, *a term that encompasses all bankruptcy proceedings, whether or not they remain pending, in which the debtor sought relief from the mortgage in question*." (Emphasis added.) *Id*.

Although this decision is not binding on this court, we agree with its recognition that the phrase "has filed" encompasses all bankruptcy proceedings in which the debtor has sought relief from the subject mortgage. See *People v. Criss*, 307 Ill. App. 3d 888, 900 (1999) (even though

decisions of the United States District Court and the Court of Appeals are not binding on state courts, they can be persuasive authority and can offer guidance to state courts).

¶ 25 Defendants' claim that Sylvia was entitled to the notice letter because she did not file for bankruptcy is also without merit. The notice requirement and its exception are clearly based upon each mortgage, regardless of the number of mortgagors, as the statute explicitly states that "the procedures and forbearances described in this Section apply only once per subject mortgage." 735 ILCS 5/15-1502.5(c) (West 2010). The statute also states that, for any given mortgage, notice is not required when "a mortgagor" or "any mortgagor" has sought relief from that mortgage by filing a petition for relief under the United States Bankruptcy Code. Had the legislature intended the exception to apply only when all of the mortgagors on a given mortgage have applied for bankruptcy, it could have instead used the phrase "all mortgagors." The legislature did not do so and we will not depart from the plain language of the statute and read into it an exception that does exist. Therefore, in this case, the right to notice attached to the mortgage in question was extinguished when Leo Feigenbaum sought relief from that mortgage under the Bankruptcy Code. As the right to notice applies only once per mortgage, Sylvia was not entitled to notice when plaintiff filed its foreclosure action.

¶ 26 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.