

SIXTH DIVISION
June 30, 2015

No. 1-13-0706

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

HSBC Bank USA, National Association, as Trustee)	Appeal from the
under the Pooling and Servicing Agreement dated)	Circuit Court of
as of November 1, 2006, Fremont Home Loan Trust)	Cook County.
2006-D,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09 CH 15163
)	
)	
JOSE L. MORALES; JULISSA MORALES,)	Honorable
)	David B. Atkins,
Defendants-Appellees,)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Rochford concurred in the judgment.

ORDER

Held: We affirm the circuit court's order dismissing plaintiff's complaint to foreclose the mortgage and its order denying plaintiff's motion to reconsider the dismissal.

¶ 1 Plaintiff HSBC Bank USA, NA, as trustee under the Pooling and Servicing Agreement dated as of November 1, 2006, Fremont Home Loan Trust 2006-D, filed a complaint to foreclose a mortgage against defendants Jose L. Morales and Julissa Morales regarding a single-family residential property located at 4753 South Leamington Avenue, Chicago, Illinois. After extensive motion practice and several hearings, the circuit court granted defendants' motion dismissing the complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)). Plaintiff now appeals from the circuit court's order dismissing the complaint and from the order denying its motion to reconsider the dismissal. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff filed its complaint to foreclose the mortgage in April 2009. Defendants failed to answer or otherwise appear, so on September 24, 2009, the circuit court entered an order of default against defendants and a judgment of foreclosure and sale of the subject property. On December 29, 2009, plaintiff filed proof of mailing notice of sale indicating that on the previous day, December 28th, the notice was mailed to various addresses, one of which was the subject property. The notice of sale indicated that the sale of the subject property would occur on January 14, 2010. Two days prior to the sale, defendant Jose L. Morales filed a *pro se* motion to stay the sale alleging he was never served with the summons and complaint and was presently trying to obtain a loan modification so he could remain in his home.

¶ 4 The subject property was sold at a judicial sale on January 14, 2010, where plaintiff was the successful bidder. That same day, the circuit court dismissed Jose L. Morales's *pro se* motion to stay the sale, holding that the motion was moot because the subject property had been sold.

On January 21, 2010, plaintiff filed a motion for an order approving the report of sale and distribution and for an order of possession.

¶ 5 On February 24, 2010, defendant Julissa Morales filed a *pro se* motion to set aside the sale of the property and to vacate the default judgment pursuant to section 2-1301(e) of the Code on the ground that she was never served with the summons and complaint. Under section 2-1301(e), a trial court may set aside an order "upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 20008). On the same day, defendants retained counsel to represent them. Defendant Julissa Morales's *pro se* motion was amended by counsel to include defendant Jose L. Morales's motion to quash service and set aside the default judgment. These motions were subsequently denied as was a motion to reconsider.

¶ 6 On September 20, 2010, defendants filed a motion requesting the circuit court to stay plaintiff's motion to confirm the sale and to dismiss plaintiff's complaint to foreclose the mortgage based on a lack of subject matter jurisdiction and standing pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)). Defendants argued that the plaintiff was without standing to prosecute its claims for foreclosure and sale due to its lack of ownership of the note and mortgage.

¶ 7 In their subsequent reply in support of the motion to dismiss, defendants argued, among other things, that prior to filing its complaint to foreclose the mortgage, plaintiff failed to send them a grace period notice as required by section 15-1502.5(c) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1502.5(c) (West 2010))¹. Defendants

¹ Section 15-1502.5(c) of the Foreclosure Law requires that when any mortgage secured by residential real property becomes more than thirty days delinquent, the mortgagee is required to send the mortgagor what's referred to as a grace-period notice informing the mortgagor that his

pointed out that section 15-1502.5 became effective on April 6, 2009, the same day plaintiff filed its complaint. Plaintiff countered that the complaint was filed on April 3, 2009, and it was the filing fee that was processed on April 6, 2009.

¶ 8 On March 28, 2011, the circuit court heard oral argument on defendants' motion to dismiss. After the hearing, the court determined that it needed a surresponse and surreply addressing, among other things, plaintiff's compliance with section 15-1502.5(c) of the Foreclosure Law. Plaintiff argued it was not required to comply with section 15-1502.5(c) because it filed its complaint on April 3, 2009, prior to the time this section of the Foreclosure Law became effective on April 6, 2009. Defendants countered that plaintiff was required to comply with section 15-1502.5(c), arguing that plaintiff filed its complaint on April 6, 2009, as evidenced by the clerk's electronic receipt on the complaint and the circuit court docket.

¶ 9 On March 13, 2012, the circuit court granted defendants' motion to dismiss without prejudice. After reviewing the parties' written submissions and exhibits in support of their respective motions, and considering the applicable law and the oral arguments presented by the parties at the hearing on the motions, the court determined that plaintiff's complaint to foreclose the mortgage was filed on April 6, 2009, the same date section 15-1502.5 became effective and that plaintiff had failed to demonstrate that it complied with the requirements of this section.

or her loan is more than 30 days past due and they have a 30-day grace period to obtain approved housing counseling. 735 ILCS 5/15-1502.5(c) (West 2010); *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 100. If this, and other requirements are not met, a mortgagee is prohibited from filing a foreclosure complaint. See Stephen F.J. Ornstein, Matthew S. Yoon & John P. Holahan, *Recent Amendments to Illinois Foreclosure Law*, 63 Consumer Fin. L.Q. Rep. 230, 231 (2009).

The court held that the complaint was filed in violation of section 15-1502.5(c) of the Foreclosure Law. The court vacated the judgment of foreclosure and sale, and denied plaintiff's motion to confirm the sale.

¶ 10 On April 6, 2012, defendants filed a petition for attorney fees and costs pursuant to section 15-1510 of the Foreclosure Law (735 ILCS 5/15-1510 (West 2008)), and for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb.1, 1994). On May 4, 2012, plaintiff filed a motion for reconsideration, asking the circuit court to vacate its order of March 13, 2012, and grant plaintiff's motion for an order approving the sale.

¶ 11 On October 25, 2012, the circuit court granted defendants' motion for extension of time to file a response to plaintiff's motion for reconsideration. The court also granted defendants' motion to withdraw their motion for Rule 137 sanctions.

¶ 12 On February 7, 2013, the circuit court entered a three-page order denying plaintiff's motion for reconsideration. Plaintiff filed a notice of appeal on March 8, 2013, appealing the circuit court's order denying its motion to reconsider. On January 9, 2014, the circuit court subsequently denied and struck (for failure to submit courtesy copies) the defendants' motion requesting leave to amend their petition for fees.

¶ 13 ANALYSIS

¶ 14 At the outset, we note that the defendants did not file an appellee's brief in this case. However, because the record is fairly simple and the issues can be decided without an appellee's brief, we will decide the merits of the case. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 15 Plaintiff raises two issues on appeal. First, plaintiff contends the circuit court erred in dismissing its complaint to foreclose the mortgage pursuant to section 2-619 of the Code. And

second, plaintiff argues the circuit court erred in denying its motion to reconsider the dismissal. Neither of these arguments has merit.

¶ 16 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Although defendants' motion to dismiss appears to indicate it was brought under subsection (a)(1) of section 2-619 of the Code, which provides for the dismissal of an action based on lack of subject matter jurisdiction (735 ILCS 5/2-619(a)(1) (West 2008)), the parties and the circuit court seem to have proceeded under subsection (a)(9) of section 2-619, which permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2008). A section 2-619(a)(9) motion assumes a cause of action has been stated, but asserts that the claim is defeated by some affirmative matter that avoids the legal effect of or defeats the claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993).

¶ 17 "On a section 2-619 motion, when there is no right to a jury trial in the action, 'the court may, in its discretion, decide questions of fact upon the hearing of the motion.' " *In re Marriage of Vaughn*, 403 Ill. App. 3d 830, 836 (quoting *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 913 (1993)). If the plaintiff is not entitled to a jury trial, section 2-619 of the Code allows the circuit court to "determine the merits of the dispute based upon the pleadings, affidavits, counteraffidavits, and other evidence offered by the parties." *Crescent Pork, Inc.*, 243 Ill. App. 3d at 912. If the circuit court chooses this course of action, as was the case here, then our duty on appeal is to "review not only the law, but also the facts, and to reverse the circuit court's order if it is clearly against the manifest weight of the evidence." *Id.* A

decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the decision is unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010). Our review is *de novo*. *Van Meter*, 207 Ill. 2d at 368.

¶ 18 Plaintiff argues the circuit court erred in dismissing its complaint to foreclose the mortgage pursuant to section 2-619 of the Code because there were genuine issues of material fact as to whether the complaint was filed on April 3, 2009, when the complaint was dropped off at the clerk's office, or April 6, 2009, as shown on the clerk's electronic receipt stamped on the complaint and on the clerk of the circuit court's docket. Plaintiff contends that ambiguity as to when the complaint was filed raised a genuine issue of fact precluding dismissal under section 2-619(a)(9) of the Code. We must disagree.

¶ 19 Here, there was a dispute as to whether plaintiff's complaint to foreclose the mortgage was filed on April 6, 2009, or April 3, 2009. In a case such as this, where there was no jury demand and plaintiff was not entitled to a jury trial, the circuit court had the discretion under section 2-619 of the Code to resolve the merits of the dispute based on the pleadings, affidavits and other evidence offered by the parties. The circuit court exercised its discretion and determined that the complaint was filed on April 6, 2009. We believe the circuit court's decision was supported by the manifest weight of the evidence.

¶ 20 "The file mark on a paper constitutes *prima facie* evidence that it was delivered to the proper officer for filing on the date indicated by the file mark." *Ayala v. Goad*, 176 Ill. App. 3d 1091, 1094 (1988); *In re Marriage of Linn*, 260 Ill. App. 3d 698, 700 (1994) (same). In this case, the circuit court's receipt stamp on the complaint to foreclose the mortgage and on the court's case information summary report both indicate the complaint was filed on April 6, 2009. Although the record includes a civil cover sheet reflecting a date of April 3, 2009, this is

insufficient to overcome *prima facie* proof that the complaint was filed on the date indicated by the clerk's stamp, since a civil cover sheet is an administrative document not considered part of the complaint and is not served on the opposing party putting them on notice an action has been filed. The record also includes a copy of the complaint, without a receipt stamp, bearing a faintly visible "APR" and number "3," but the year is completely illegible.

¶ 21 Plaintiff argues there is documentary evidence showing the complaint was delivered to the clerk's office on April 3, 2009. However, our court has determined that mere delivery of a document to the clerk's office is insufficient, by itself, to overcome *prima facie* proof that the document was filed on the date indicated by the clerk's stamp. See *Polka v. Turner*, 182 Ill. App. 3d 705, 709 (1989) ("[e]vidence of delivery, alone, of a complaint to the clerk's office on one date is insufficient to establish the complaint was then in the clerk's exclusive control such as would overcome *prima facie* proof the complaint was filed on a different date as indicated by the clerk's stamp.") The reviewing court observed that "equating mere delivery with filing would create a problematic practice, and, we suggest, one open to abuse." *Id.*

¶ 22 In this case, the circuit court in reaching its decision that the complaint was filed on April 6, 2009, rather than April 3, 2009, noted there was no evidence that the complaint was delivered to the clerk of the court with the understanding that it was to be filed on April 3. The circuit court pointed out that the plaintiff "offered no affidavit or evidence discussing the conversation or direction between the attorney submitting the complaint and the court clerk regarding the filing thereof." We agree with the circuit court's conclusion that "[m]erely leaving bulk complaints and a check for fees with the clerk of the court is insufficient to establish the date of filing." Based on the reasoning set forth in *Polka*, we find the circuit court's decision that plaintiff's complaint to foreclose the mortgage was filed on April 6, 2009, rather than April 3,

2009, was supported by the manifest weight of the evidence and that the complaint was therefore properly dismissed under section 2-619(a)(9) of the Code.

¶ 23 Plaintiff next contends that defendants' section 2-619 motion was fatally defective because it was not supported by an affidavit. Again, we must disagree.

¶ 24 One of the enumerated grounds for a section 2-619 dismissal is that the claim is barred by affirmative matter which avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2008). An affirmative matter "is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). "The affirmative matter must be evident from the face of the complaint, or supported by affidavits or other evidentiary material." *Williams v. Estate of Cole*, 393 Ill. App. 3d 771, 778 (2009).

¶ 25 The affirmative matter defendants asserted in their motion to dismiss was that plaintiff, prior to filing its complaint to foreclose the mortgage, failed to send them a grace period notice as required by section 15-1502.5(c) of the Foreclosure Law. We also note our court has determined that the failure to support a section 2-619 motion with an affidavit is not always fatal since the Civil Practice Law requires that pleadings be liberally construed to fulfill its purpose of providing substantial justice and resolution on the merits, rather than imposing procedural obstacles to litigation. See *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶ 24.

¶ 26 Plaintiff finally contends that the defendants' section 2-619 motion to dismiss was untimely because it was filed after plaintiff sent notice of its motion to confirm sale. Again, we must disagree.

¶ 27 "The highest bid received by a sheriff at a judicial foreclosure sale is merely an irrevocable offer to purchase the property. The offer is not deemed to have been accepted and the sale is not complete until it has been confirmed by the circuit court." *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 181 (2008). "Numerous factors may affect a circuit court's decision to confirm the sale, including issues of notice, unconscionability and fraud. *** Any expectations a bidder may have regarding property offered at a judicial foreclosure sale are therefore speculative." *Id.*

¶ 28 In this case, unlike the case of *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010), which plaintiff cites, the circuit court never confirmed the sale. The court held that plaintiff's complaint to foreclose the mortgage was filed in violation of section 15-1502.5(c) of the Foreclosure Law. As a result, the court vacated the judgment of foreclosure and sale, and denied plaintiff's motion to confirm the sale. The defendants' section 2-619 motion to dismiss was not untimely filed.

¶ 29 For all of these same reasons, we find the circuit court did not abuse its discretion in denying plaintiff's motion to reconsider.

¶ 30 For the foregoing reasons, we affirm the circuit court's order dismissing plaintiff's complaint to foreclose the mortgage and its order denying plaintiff's motion to reconsider the dismissal.

¶ 31 Affirmed.