2014 IL App (1st) 132414-U

FIFTH DIVISION
June 27, 2014

No. 1-13-2414

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A., successor by merger to BAC HOME LOANS SERVICING, LP, f/k/a COUNTRYWIDE HOME LOAN SERVICING, LP Plaintiff-Appellee, v. JONG PARK, Defendant-Appellant (Ashbury Country Homes III Condominium Association, Mortgage Electronic Registration Systems, Inc., Bank of America, N.A. successor by merger to Countrywide Bank, FSB f/k/a Countrywide Bank, NA, State of Illinois, Ford Motor Credit Co., Discover Bank, Capital One Bank (USA), N.A., Unknown Owners and Nonrecord Claimants, and Ashbury-Country Homes Umbrella Association, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 10 CH 33981 Honorable Laura C. Liu, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly confirmed the judicial sale of the property and denied defendant's motion to deny confirmation because defendant (1) failed to challenge

> service of process in his motion; (2) he was not entitled to service of the amended complaint; (3) he was not entitled to notice of the sheriff's sale because he had previously been found in default; and (4) defendant failed to show by preponderance of the evidence that he submitted a complete HAMP application prior to the sheriff's sale.

¶ 2 Plaintiff, Bank of America, N.A., filed a mortgage foreclosure complaint in September 2009, against defendant, Jong Park. In May 2012, a default judgment and judgment for foreclosure and sale was entered in plaintiff's favor and a judicial sale occurred and plaintiff filed a motion to confirm the sale in August 2012. In September 2012, defendant filed a motion to deny confirmation of sale. In June 2013, after briefing by the parties, the trial court denied defendant's motion and granted plaintiff's motion to confirm the sale.

¶ 3 Defendant appeals, arguing that (1) defendant was not properly served with the summons and complaint; (2) the amended complaint was never served on his attorney of record and the amended complaint did not give proper notice under Supreme Court Rule 105 (Ill. S. Ct. Rule 105 (eff. Jan. 1, 1989)); (3) defendant did not receive proper notice of the sheriff's sale; and (4) the sale should not have been confirmed because defendant had submitted an application with the Home Affordable Modification Program (HAMP) prior to date of the sale.

¶ 4 In September 2009, plaintiff as predecessor BAC Home Loans Servicing, L.P. filed a complaint to foreclose mortgage against defendant. The complaint alleged that on June 14, 2007, defendant, as mortgagor, executed a mortgage in the amount of $189,500, for the property located at 1913 West Ashbury Lane in Inverness, Illinois. The complaint stated that defendant had not paid the monthly payments since April 1, 2009.

¶ 5 The affidavit of the special process server stated that an attempt to serve defendant was made on September 20, 2009, at 6:15 p.m. The process server stated that "The defendant could not be served at this address. The property at this address is vacant. This property is vacant

there are no utilities no furniture nobody is resideing [*sic*] there is a sheriff eviction sign." Plaintiff then filed three affidavits from plaintiff's attorney and an employee from the private detective agency tasked with serving process asserting that service could not be made based on the same service attempt and to allow service by publication for defendant. Service was made by publication with notice in the Chicago Daily Law Bulletin in September and October 2009.

¶ 6 In January 2010, plaintiff filed a motion for entry of an order of default and judgment of foreclosure and sale, noting that no appearance had been filed. On March 2, 2010, plaintiff filed an amended complaint adding a condominium association as a party defendant, but no substantive changes were made as to relief requested against defendant. On the same date, an attorney filed an appearance on defendant's behalf, but no response was filed to plaintiff's foreclosure complaint.

¶ 7 In June 2010, plaintiff filed a second motion for default judgment, which indicated that defendant had not appeared. Later, in August 2010, plaintiff filed a third motion for default judgment, indicating that defendant had appeared *pro se* on March 2, 2010. In March 2012, plaintiff again filed a motion for default judgment, listing defendant as appearing *pro se*. Also on that date, plaintiff filed a motion to substitute party plaintiff because BAC Home Loans Servicing had merged into Bank of America. In April 2012, plaintiff filed an amended motion for default judgment, listing Bank of America as the plaintiff.

¶ 8 On May 2, 2012, the trial court entered an order of default against all named defendants and a judgment for foreclosure and sale. In July 2012, plaintiff filed proof of mailing notice of sale to defendant, indicating that the judicial sale would take place on August 6, 2012. On August 16, 2012, plaintiff filed a motion for order approving report of sale and distribution.

¶ 9 On September 18, 2012, a new attorney filed an appearance on defendant's behalf and a motion to deny confirmation of sale, set aside the sale, and vacate judgment of foreclosure and sale. The motion asserted that (1) defendant had a HAMP application pending more than a month before the judicial sale and that HAMP guidelines prohibit conducting a sale until the homeowner has been evaluated for HAMP and (2) the sale should not be confirmed because plaintiff did not give proper notice to defendant's prior counsel of the motion for default judgment or the sale. Defendant attached affidavits from himself and his son, describing the process of filing his HAMP application. They stated that the completed application was delivered to plaintiff on June 15, 2012. On or about July 23 to 25, 2012, defendant was informed that plaintiff needed copies of his actual bank statements, not copies of his online bank account, to proceed with his application. Defendant stated that he delivered the necessary paperwork prior to July 27, 2012.

¶ 10 Later, in his reply in support of his motion to deny confirmation of sale, defendant argued for the first time that he was not properly served in this case because his home is a two-story townhouse and not a one story home as described in one of the affidavits of attempted service. Defendant also asserted for the first time that when plaintiff filed its amended complaint, it failed to service notice in accordance with Supreme Court Rule 105 because defendant was not served personally or by certified or registered mail.

¶ 11 In December 2012, the trial court took the motions under advisement. In June 2013, the trial court entered a written order granting plaintiff's motion to confirm the sale and denying defendant's motion. The court found that defendant failed to establish that he had submitted a completed HAMP application at least seven business days prior to the sale, as required under HAMP guidelines. The court noted the exhibits included emails indicating that as of August 23,

2012, defendant needed to submit additional documentation to complete his application. The court found that all pleadings should have been served on defendant's attorney, but "[t]here is no evidence, however, that Defendant was not sent, or that Defendant did not receive the notice of motion for default judgment prior to the May 2 order entering default and judgment." The court concluded that "there is no evidence that he has been prejudiced by the fact that the notice was sent to him personally and not to his counsel of record." The court further held that plaintiff was not required to serve defendant notice of the sheriff's sale.

¶ 12 This appeal followed.

¶ 13 Under the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2010)), "after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b)." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18. Section 15-1508(b) of the Foreclosure Law confers broad discretion on trial courts in approving or disapproving judicial sales, and a trial court's decision will not be disturbed absent an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 14 Section 15-1508(b) of the Foreclosure Law provides:

> "Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 [735 ILCS 5/15-1507(c) (West 2010)] was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done,

> the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2010).

¶ 15 Here, defendant asserts that the sale should not have been confirmed under subsections (b)(i) and (b)(iv) based on several arguments. Defendant first asserts that the service by publication on him was improper because the affidavits are insufficient. While defendant challenges the service by publication, the essence of his argument is not a challenge of personal jurisdiction. Rather, defendant is using his challenge of service by publication to assert that his attorney's appearance without leave of court in March 2010 was valid and the rest of his arguments follow this line of reason. According to defendant, if the service by publication was invalid, then his attorney's appearance was valid. Then, if his attorney's appearance was valid, the failure to serve the amended complaint on his attorney makes the default judgment entered against him invalid. If the default judgment is not valid, then he was entitled to notice of the sheriff's sale under section 15-1507(c) of the Foreclosure Law and the trial court could not confirm the judicial sale.

¶ 16 However, defendant's argument must fail because he did not raise a challenge to the service by publication until his reply to his motion to deny confirmation. A party contesting jurisdiction on the ground of insufficiency of service of process must object by filing a motion to dismiss or a motion to quash service of process prior to filing any other pleading other than for an extension of time to answer or otherwise appear. 735 ILCS 5/2-301(a) (West 2010). If the party objecting to jurisdiction files a responsive pleading or motion, "that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5) (West 2010). Defendant failed to do so in this case. He appeared by an attorney in March 2010, but failed to file a responsive pleading or take any action in the case until September 2012, when a

new attorney filed the motion to deny confirmation of the sale. Significantly, defendant's motion failed to challenge service of process. "Section 2-301(a-5) makes it clear that any motion, apart from a motion for an extension of time to answer or otherwise appear, filed by the party contesting personal jurisdiction waives all jurisdictional objections." *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 18.

¶ 17 In *Deutsche Bank*, the defendants failed to preserve an objection to the court's jurisdiction because they filed an emergency motion to stay approval of the property sale without including a challenge to the court's jurisdiction. More than six months after the sale had been approved, the defendants, represented by new counsel, filed a motion to quash service, which the trial court denied. Defendant attempts to distinguish *Deutsche Bank*, by noting that the defendants in that case moved to quash service more than 30 days after the trial court approved the judicial sale, but he filed a motion to deny confirmation of sale before a final judgment. However, the operative action by the defendants in *Deutsche Bank* was that the first action they took in the case did not include a jurisdictional challenge, as required by section 2-301(a-5). Like the defendants in *Deutsche Bank*, defendant did not raise an objection to service of process in his motion and under section 2-301(a-5), he waived any challenge to the trial court's jurisdiction.

¶ 18 Defendant next contends that the entry of default judgment was invalid because his attorney was never served with the amended complaint. Plaintiff filed a motion to file an amended complaint on February 18, 2010, and the amended complaint was filed on March 2, 2010. On that same day, defendant's attorney filed an appearance. Defendant offers two arguments on this issue. We note that plaintiff argues that the appearance filed by defendant's attorney was improper because it was filed without leave of the court. However, even if we

presume that the appearance was properly filed, the result does not change and we need not reach that question.

¶ 19 First, he asserts that under Supreme Court Rule 11(a), service of the amended complaint should have been made on his attorney. Supreme Court Rule 11(a) provides, "If a party is represented by an attorney of record, service shall be made upon the attorney. Otherwise service shall be made upon the party." Ill. S. Ct. R. 11(a) (eff. July 1, 2013). Defendant fails to acknowledge the fact that the motion to file an amended complaint was filed prior to his attorney's appearance and that the amended complaint was filed the same day as his attorney's appearance. Defendant does not assert that he failed to receive proper notice of the motion for leave to file an amended complaint. Plaintiff would not have had received notice of defendant's attorney's appearance prior to its filing the amended complaint and was not obligated to reserve the amended complaint after it was properly filed with trial court. Defendant cites no authority requiring plaintiff to serve an amended complaint on a party's attorney when the attorney's appearance was filed the same day as the amended complaint.

¶ 20 Defendant also argues that plaintiff amended its complaint on two occasions without giving him proper notice under Supreme Court Rule 105. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). In February 2010, plaintiff moved for leave to amend its complaint to add Ashbury Country Homes Umbrella Association as a party defendant and sought a judgment of priority over any lien of that association. The amended complaint also listed an assignment of the mortgage. Later, in April 2012, plaintiff moved for leave to amend its complaint to substitute Bank of America as the party plaintiff following a merger.

¶ 21 Supreme Court Rule 105(a) provides, in relevant part:

> "If new or additional relief, whether by amendment, counterclaim, or otherwise, is sought against a party not entitled to notice under Rule 104, notice shall be given him as herein provided." Ill. S. Ct. R. 105(a).

¶ 22 "Rule 105 applies to parties who are in default; those who have not appeared either personally or by counsel." *Eckel v. Bynum*, 240 Ill. App. 3d 867, 875 (1992). "Ordinarily, a party who has not appeared need not be served with notices of motions, however, if relief is sought from the party other than that requested in the complaint, the party must be notified." *Id.*

¶ 23 Despite defendant's assertions to the contrary, neither of the amended complaints sought any relief beyond what was requested in the original complaint. Further, defendant's reliance on *Muehlfeldt v. Vlcek*, 112 Ill. App. 2d 190 (1969), as support for notice under Rule 105 is misplaced. In that case, the plaintiff sought to foreclose a mechanics lien and amended the complaint to name a prior mortgagee. The mortgagee appeared and raised an affirmative defense that its mortgage was superior to the mechanics lien because the party failed to name the mortgagee within the statute of limitations. In granting the mortgagee's motion for summary judgment, the trial court found the mortgagee's lien to be superior and also found that the mortgagee was owed $7,491.64. *Muehlfeldt*, 112 Ill. App. 2d at 192-93.

¶ 24 On appeal, the reviewing court affirmed the finding that the mortgagee's lien was superior to the mechanics lien, but held that the trial court's monetary award was improper.

> "As we have seen, the owners of the property had been defaulted before the plaintiffs sought to join [the mortgagee] as a party defendant. There is nothing in the record to indicate that the owners received any notice of the subsequent proceedings or

> copies of the pleadings nor do the pleadings themselves contain a prayer for the relief included in the decree. Since the owners were entitled to notice under Supreme Court Rule 105 (Ill.Rev.Stat.1967, ch. 110A, sec. 105) we do not feel that the portion of the decree that found that [the mortgagee] had a valid first mortgage on the premises was correct." *Id.* at 197.

¶ 25 Unlike *Muehlfeldt*, no relief was sought or awarded beyond what was requested in the original complaint. *Muehlfeldt* did not hold that the addition of a new party required notice under Rule 105, but that Rule 105 notice was required when additional relief was awarded beyond what the defaulted defendants had been previously notified was sought. Here, defendant ignores the fact that monetary relief requested remained the same, but instead offers conjecture that he "could have a claim or defense" against Bank of America without detailing any such claim or defense. Since the relief requested from defendant did not change, defendant was not entitled to notice under Rule 105.

¶ 26 Defendant next argues that he did not receive proper notice of the sheriff's sale. Section 15-1507(c)(3) provides:

> "The party who gives notice of public sale in accordance with subsection (c) of Section 15-1507 shall also give notice to all parties in the action who have appeared and have not theretofore been found by the court to be in default for failure to plead." 735 ILCS 5/15-1507(c)(3) (West 2010).

¶ 27 The trial court entered an order finding defendant to be in default in May 2012. Since defendant had been found in default for failure to plead, he was not entitled to notice of the sheriff's sale under the Foreclosure Law.

¶ 28 Defendant attempts to negate the default finding by focusing on an error in plaintiff's amended motion for default judgment that indicated he appeared *pro se* instead of an appearance by his attorney. Defendant fails to cite any case which held that an order of default would be invalid if the motion for default incorrectly states that a defendant did not appear by counsel. Supreme Court Rule 341(h)(7) requires appellants' brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). " 'A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995) (quoting *Thrall Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)). Contentions supported by some argument, but no authority do not meet the requirements of Supreme Court Rule 341(h)(7) (*People v. Pickens*, 354 Ill. App. 3d 904, 917 (2004)), and, therefore, defendant has forfeited this argument.

¶ 29 Regardless of the mistake in plaintiff's motion, defendant cannot avoid the fact that he appeared in the case through an attorney, but failed to plead. Defendant did not participate in the case at all from the day his attorney filed an appearance in March 2010 until a new attorney filed the motion to deny confirmation of the sale in September 2012. Defendant has not offered any explanation for his inaction of more than two years in this case. The trial court reasonably found him to be in default and, thus, he was not entitled to notice under section 15-1507(c)(3).

¶ 30 Finally, defendant contends that the trial court erred in confirming the sheriff's sale because he had submitted a HAMP application more than 45 days prior to the sale and plaintiff violated the Freddie Mac HAMP guidelines by proceeding with the sale before the HAMP application was considered.

¶ 31 Section 15-1508(d-5) provides, in relevant part:

> "The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale." 735 ILCS 5/15-1508(d-5) (West 2010).

¶ 32 Section 15-1508(d-5) "provides an alternate vehicle under which a court must set aside a judicial sale if all statutory requirements are met." *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 59. Defendant asserts that he submitted a complete HAMP application on June 15, 2012.

¶ 33 The reviewing court in *Bermudez* considered what the phrase "applied for assistance" means under section 15-1508(d-5). In that case, the defendants applied to participate in a "Trial

Period Plan" under HAMP, which offered a three-month forbearance plan in which the borrower makes payments of the estimated modified payment as part of modification program. *Id.* ¶ 6.

> "In order to determine whether defendants 'applied for assistance under the Making Home Affordable Program [MHAP]' in accordance with section 15-1508(d5), we begin by looking to the plain and ordinary meaning of 'applied.' See *Blum* [*v. Koster*, 235 Ill. 2d 21, 29 (2009)]. The Foreclosure Law does not define the phrase 'applied for assistance' for purposes of section 15-1508(d-5). It is therefore appropriate for us to consult a dictionary to determine its plain meaning. See *Relf v. Shatayeva*, 2013 IL 114925, ¶ 32 (consulting a dictionary to determine the plain meaning of 'personal representative' as it was not defined in the Code of Civil Procedure). To 'apply' means '[t]o make a formal request or motion.' Black's Law Dictionary 116 (9th ed. 2009). A prior edition of Black's Law Dictionary defined 'apply' as follows: '[t]o make a formal request or petition, usually in writing, to a *** company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion.' Black's Law Dictionary 91 (5th ed. 1979). Another definition is, 'to make an appeal or a request esp. formally and often in writing and usu. for something of benefit to oneself.' Webster's Third New International Dictionary 105 (1993). The word 'assistance' is

synonymous with the verbs 'to help' and 'to aid.' *Id.* at 132." *Id.* ¶ 63.

¶ 34 The *Bermudez* court found that, "[c]onstruing the language of the statute according to its plain meaning, 'applied for assistance under MHAP' means to formally apply, usually in writing, for help pursuant to the procedures set forth by HAMP, a component of MHAP." *Id.* ¶ 64. Further, "in order to 'apply for assistance under MHAP' pursuant to section 15-1508(d-5) of the Foreclosure Law the borrower must submit the documentation required by the servicer to determine the borrower's eligibility and verify his or her income." *Id.* ¶ 66.

¶ 35 In *Bermudez*, the court found that the defendants failed to show by a preponderance of the evidence that they had "applied for assistance under MHAP" because they failed to provide the required documentation, including a hardship affidavit, a profit-loss statement for a self-employed borrower, and separate tax transcript requests from each defendant. *Id.* ¶ 67. The court also noted that the defendants did not attach the documents they submitted to the bank with their motion to set aside the sale. *Id.* ¶ 68.

¶ 36 In the present case, contrary to defendant's assertion, the record does not show by a preponderance of the evidence that he "applied for assistance under MHAP" prior to the date of the sheriff's sale. One of defendant's exhibits in the trial court was a copy of emails between his son and a Bank of America employee discussing defendant's HAMP application. These emails indicated that defendant needed to submit additional items "in order to submit to underwriting for review." These documents included a hardship letter and 2010 and 2011 tax returns. The email requesting these documents was dated August 23, 2012, more than two weeks after the date of the sheriff's sale. As in *Bermudez*, defendant also failed to attach the application itself or the supporting documents he submitted to plaintiff for consideration. Instead, defendant Park

offered affidavits from himself and his son detailing the HAMP application procedure and stating that certain documents were submitted, including a hardship letter, defendant's profit and loss statement for his taxi business, his 2011 tax return, and printouts of his bank statements. The only other exhibit was the aforementioned emails which indicated that defendant had necessary documents outstanding after the sheriff's sale had been conducted. Based on the record before us, defendant failed to establish by a preponderance of the evidence that he submitted a HAMP application prior to the sheriff's sale and the trial court did not abuse its discretion in denying defendant's motion to deny confirmation on this basis.

¶ 37 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 38 Affirmed.