2014 IL App (1st) 133484-U

FIRST DIVISION
September 22, 2014

No. 1-13-3484

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee for the registered holders of Morgan Stanley ABS Capital I, Inc. Trust 2007-HE7 mortgage pass-through certificates, series 2007-HE7,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10 CH 32078
AINA ADEGBEMI,	)	
Defendant-Appellant, and	)	
(HAMILTON MANOR CONDOMINIUM ASSOCIATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for New Century Mortgage Corporation; UNKNOWN OWNERS and NON-RECORD CLAIMANTS,	)	
Defendants).	)	Honorable Anthony Kyriakopoulos, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not abuse its discretion by denying defendant's motion to vacate mortgage foreclosure orders.

¶ 2 BACKGROUND

¶ 3 In 2007, defendant Aina Adegbemi executed a mortgage for residential property located in Chicago with plaintiff Deutsche Bank National Trust's predecessor-in-interest. The loan became delinquent almost immediately, as Adegbemi failed to make payments for July 1, 2009 and thereafter. Deutsche Bank filed this foreclosure case, which ran along its natural course until Adegbemi tried to extricate herself by placing the property on the market for a "short sale." The trial court found that the contract governing the short sale transaction between the parties clearly allowed Deutsche Bank to sell the property and obtain full ownership when it did, despite the fact there was an existing short sale contract between Adegbemi and a potential buyer. We agree with that determination and therefore affirm.

¶ 4 Although she was served with process in August, 2010, Adegbemi did not actively defend this case until almost a year later, in June, 2011. Attorney Alex Ogoke appeared for her and filed a motion to vacate a previous default judgment; the trial court granted that motion.[1] Adegbemi's counsel apparently filed an answer and affirmative defenses, although no copy of them appears in the record. In September, 2012, the court granted Deutsche Bank's motion for summary judgment and ordered the property to be sold to satisfy the mortgage delinquency. A month later, Ocwen Servicing, acting on behalf of Deutsche Bank investors, issued a detailed letter indicating that it was approving a short sale payoff for $37,500 subject to a host of contingencies. The letter is not signed by anyone acting on behalf of Ocwen. At that point, the amount due on the mortgage, with fees and costs, was over $200,000, so Ocwen's offer represented a significant discount on Adegbemi's outstanding loan balance. Among the

[1] We note that the signature purporting to be that of Adegbemi on the affidavit in support of the motion bears no resemblance to her signature on the mortgage and note.

contingencies were: (1) Ocwen had to receive funds November 26, 2012; (2) the short sale had to be an arm's-length transaction supported by affidavit; and (3) the contract would not stay any rights Deutsche Ocwen possessed to sell the property at its foreclosure sale. To further emphasize the last contingency, the beginning of the letter stated in bold capital letters: "**PLEASE TAKE INTO CONSIDERATION THAT OCWEN WILL NOT POSTPONE A SCHEDULED FORECLOSURE SALE, EVEN IF THERE IS A PENDING SALE CONTRACT. NO REQUEST FOR A POSTPONEMENT OF A FORECLOSURE SALE WILL BE GRANTED**." The letter further stated that the "discounted payoff option" expired on the earlier of: (1) "a scheduled foreclosure sale" or (2) December 13, 2012.

¶ 5 On December 7, 2012, Adegbemi filed a "motion to vacate default judgment" which attacked not a default order, but rather the September, 2012 summary judgment order. On December 13, the trial court denied her additional motion to stay the foreclosure sale on the basis that it was moot; the sale had just taken place hours earlier. At the sale, Deutsche Bank made a successful credit bid of $80,000, leaving a $126,905.25 *in rem* deficiency. In January, 2013, Deutsche Bank filed a motion to confirm the judicial sale of the subject property. This motion incorrectly indicated, in a preface, that the property had been sold on September 12, 2012. It further stated that Deutsche Bank now owned the property, which was also incorrect because the court had not yet confirmed the sale.

¶ 6 On January 10, 2013, Adegbemi orally moved for leave to file a joint motion to vacate the sale and in opposition to the confirmation of sale. We have no report of proceedings or bystander's report for that day to illustrate what was presented in the oral motion, but Adegbemi admitted in her next written motion that the oral motion did not address the issue of the short sale. In its later written opinion, the trial court explained that it denied the January 10 motion

because it did not present any valid reason to refuse confirmation of the sale under the applicable statutory standards. The trial court then confirmed the sale, but ordered that the deficiency judgment was *in rem* only, specifically stating that plaintiff "will not pursue collection on the note."

¶ 7 Two weeks later, Adegbemi filed a motion to reconsider the order confirming the sale. This motion had two bases, neither of which, apparently, she had raised before. First, she argued that the sale was invalid because it was conducted in violation of the short sale letter. Second, she contended that the sale price was unconscionably low. However, the motion was not supported by an appraisal or evidentiary material of any sort to establish the fair market value of the property.

¶ 8 The motion was accompanied by a document labeled as an "affidavit," but that designation is questionable in that it merely set forth that Adegbemi "stated" its contents, rather than swore to them. The end of the document contains an ersatz version of a notarial jurat stating that Adegbemi was the "affiant" of the document and that it was "Sworn to and deposed before" someone identified as "me" whose signature is illegible. No notarial seal appears on the affidavit, and the signature purporting to be Adegbemi's does not, again, favorably compare to that on the mortgage and note. The "affidavit" essentially contends that Adegbemi complied with the requirements of the Ocwen short sale letter in all respects. Attached was an original pen-signed "Affidavit of 'Arms-Length Transaction' " which certifies that Adegbemi and the buyer had no agreements, written or implied, that would allow Adegbemi to remain at the property as a renter or regain ownership after the short sale. Again, despite its title, the document is not actually an affidavit because it is not sworn to in any way. Immediately above the signatures on this document is an admonition beginning: "You cannot list the property with

or sell the property to anyone that you are related to or with whom you have a close personal or business relationship." Adegbemi also presented a copy of a real estate sales contract between her and an Akinwumi Williams, listing a sale price of $50,000 and, quite significantly, that Williams's attorney as the buyer was Alex Ogoke, the same attorney who was representing Adegbemi in the pending foreclosure case. It also listed Williams's address and unit number as being the same as the subject property.

¶ 9 Ocwen responded to the motion, arguing that the disclaimers and contingencies in the short sale letter entitled it to sell the property pursuant to the foreclosure order despite the existence of the Adegbemi-Williams contract. Ocwen also noted that Adegbemi violated the arm's-length contingency because: (1) Ogoke could not ethically simultaneously represent Adegbemi in the foreclosure case and Williams in a transaction opposing Adegbemi; and (2) Williams lived at the same address as Adegbemi. Adegbemi filed no reply to Ocwen's defenses even though the briefing schedule provided a date by which she could do so.

¶ 10 The trial court issued a detailed opinion denying Adegbemi's motion to reconsider. It construed the motion as having been brought under section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2010)), under which a court can refuse to confirm a sale if the "sale was conducted fraudulently." The court found that the letter "clearly indicate[d]" that Deutsche Bank was not required to postpone the sale despite the submission of the short sale contract. It also found, as an independent basis for denial, that the contract was not an arm's-length transaction. Finally, the court determined that Adegbemi presented only conclusory allegations, rather than evidentiary facts, to support her argument that the sale was otherwise unconscionable or unfair. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Initially, we note that Deutsche Bank has failed to file an appellee's brief. However, the record is simple and the claimed errors are such that we can easily decide them without the aid of appellee's brief. See *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Therefore, we need not reverse simply because respondent failed to file a brief.

¶ 13 On appeal, Adegbemi again contends that the sale was invalid because of the alleged violation of the short sale contract. She also argues that she did not receive adequate notice of the sale, but this particular contention is simply a variation on her arguments regarding the short sale.

¶ 14 Section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2010)) grants broad discretion to courts in approving or disapproving judicial sales. We review approval of judicial sales for an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). Under section 15-1508(b), the trial court cannot refuse to confirm the sale once a judicial sale is actually held unless: (1) notice of the sale was not properly given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) "justice was otherwise not done." 735 ILCS 5/15-1508(b) (West 2010); see also generally *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶¶ 15, 71. We review orders to confirm foreclosure sales for abuse of discretion. *Korzen*, 2013 IL App (1st) 130380, ¶ 15.

¶ 15 The letter in question, read as a whole, makes clear that Deutsche Bank reserved the right to sell the property at a scheduled foreclosure sale notwithstanding the status of any short sale contract. At the time in question, the foreclosure sale was not only scheduled, but the court had commanded that it take place. Given the tremendous loss Deutsche Bank was suffering because of Adegbemi's failure to pay several years' of principal and interest on the loan, we cannot say it

was unjust for Deutsche Bank to enforce its rights under the existing court orders and attempt to minimize its losses. Additionally, while the evidentiary record is a bit thin, the trial court correctly recognized that the underlying arm's-length nature of the short sale transaction was, by virtue of information which Adegbemi herself provided, highly suspicious. In her brief before this court, submitted by an attorney other than Ogoke, Adegbemi breezily glosses over the Ogoke conflict issue, confusingly stating that while Ogoke's name appears on the sale contract, that representation was of no moment because Ogoke's name did not appear a second time on that contract as also representing Adegbemi. That ignores the fact that at the time, he was representing Adegbemi in the intricately inter-related foreclosure case. Like the trial court, we find this apparent conflict raises legitimate questions about the legitimacy of the sale contract, since it is clear that the same attorney cannot simultaneously represent a client and also represent someone in an adversarial transaction against that client. See Ill. R. Prof. Conduct (2010) R. 1.7(a) (eff. Jan. 1, 2010) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" if "the representation of one client will be directly adverse to another client").

¶ 16 Adegbemi strongly argues that Deutsche Bank treated her unfairly because she had received oral assurances from Deutsche Bank or Ocwen representatives regarding the status of her short sale approval. She also complains about the incorrect information Deutsche Bank presented in its notice of sale (see ¶ 5 *supra*), which prematurely asserted that it owned the property and demanded that she vacate the premises. She frames an unclean hands argument around that false notification. Neither argument provides any basis to disturb the trial court's ruling below. Section 3 of the Illinois Credit Agreements Act (815 ILCS 160/3 (West 2010)), provides that, in Illinois, oral modifications to virtually all contracts to borrow money are

unenforceable as against the lender. See also *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 173 (2010). We cannot approve Deutsche Bank's conduct in sending sloppy and precipitous notices to a homeowner, asserting that her residence was already sold on a date on which a court merely *authorized* a sale for months in the future and which told the homeowner to move out. However, when we consider the equities of the entire situation, we find that conduct is far outweighed by the detriment to Deutsche Bank by Adegbemi's failure to pay the loan for so many years.

¶ 17 Adegbemi also forfeited her opportunity to rely on the difference in sale price as a basis to refuse confirmation of the sale. She presented no evidentiary material, or even an unsworn appraisal, to support her contention of the value of the property. "When there is no fraud or other irregularity in the foreclosure proceeding, the price at which the property is sold is the conclusive measure of its value." *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 35 (citing *Loeb v. Stern*, 198 Ill. 371, 383 (1902)); see also *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 20. When determining whether the terms of a judicial sale are unconscionable, courts look at whether there is "a current appraisal or other current indicia of value which is so measurably different than the sale price as to be unconscionable." *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 9 (2006). It is the burden of the mortgagor to overcome that burden. *NAB Bank*, 2013 IL App (1st) 121147, ¶ 9. That burden can only be sustained by presentation of sworn evidentiary material such as an affidavit of a qualified real estate appraiser. *Burtley*, 371 Ill. App. 3d at 9. Since Adegbemi did not provide such material, she cannot use the sale price as a basis to deny the sale confirmation.

¶ 18 CONCLUSION

¶ 19 In the end, this appeal relies on cherry-picking only the clauses in the underlying contract which are favorable, and ignoring those which are not. The trial court properly read the contract as a whole and did not abuse its discretion by refusing to overturn the foreclosure sale. We direct the clerk of this court to transmit a copy of this order to the Attorney Registration and Disciplinary Commission (ARDC) for its information with respect to the actions of attorney Ogoke. *In re Himmel*, 125 Ill. 2d 531 (1988); see also *Cushing v. Greyhound Lines, Inc.*, 2013 IL App (1st) 103197, ¶ 380.

¶ 20 Affirmed.