

No. 1-15-0572

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PNC BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 2013 CH 1233
	)	
TRACY OWENS,	)	Honorable
	)	Michael T. Mullen,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Hall concurred in the judgment.

**O R D E R**

¶ 1 *Held:* We affirmed summary judgment entered in favor of plaintiff-mortgagee in this foreclosure action where defendant-mortgagor forfeited any issue as to the insufficiency of plaintiff's affidavits and the affidavits satisfied the requirements of Supreme Court Rule 191(a).

¶ 2 Defendant-appellant, Tracy Owens, appeals from the circuit court order granting summary judgment in favor of plaintiff-appellee, PNC Bank, N.A., in this mortgage foreclosure action. On appeal, defendant argues that the affidavits filed in support of plaintiff's motion failed to comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). We affirm, as defendant's

argument has been forfeited due to defendant's failure to raise the argument below and the argument also lacks merit.

¶ 3 On June 27, 2003, defendant executed a mortgage and note with lender MidAmerica Bank, FSB. Thereafter, defendant defaulted under the terms of the mortgage and note by failing to make sufficient payments.

¶ 4 On January 15, 2013, plaintiff, as successor by merger to National City Bank, successor by merger to MidAmerica Bank, FSB, filed a complaint to foreclose the subject mortgage which encumbered the property, which is located at 16442 Turner Avenue, Markham, Illinois (the property). Plaintiff attached the note and the mortgage to the complaint and asserted that it was the mortgagee and holder of the note. Plaintiff alleged that there was an unpaid balance on the note and mortgage of \$102,276.09, plus interest and costs, and an unpaid deferred principal balance of \$30,358.96 at 0% interest.

¶ 5 On March 5, 2013, defendant filed an answer. She admitted to the correctness of the note and mortgage attached to the complaint and stated she was "without sufficient knowledge as to whether the amounts demanded as amounts due are accurate." Defendant raised a single affirmative defense which, in essence, was a request that she be allowed to "participate in the borrower assistance programs."

¶ 6 On December 16, 2013, plaintiff filed motions for summary judgment and for judgment of foreclosure and sale. In support of its motion for summary judgment, plaintiff submitted a loss mitigation affidavit (LMA) executed by Luann Jones, an employee and "authorized signer" of plaintiff. The LMA stated that a notice of grace period was sent to defendant on both September 17, 2012, and December 5, 2012.

¶ 7 Plaintiff also attached two affidavits which were executed by Angela Boddie, an employee of and "authorized signer" for plaintiff (together, the Boddie affidavits).

¶ 8 In her "Affidavit in Support of Plaintiff's Motion for Summary Judgment," Ms. Boddie stated that she was employed by plaintiff, had personal knowledge of the facts set forth in her affidavit and was familiar with the allegations of the complaint, and that those allegations were true. Ms. Boddie further averred she had access to and knowledge of plaintiff's loan records and that plaintiff's regular practice is to maintain those records "in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information, transmitted by a person with knowledge."

¶ 9 Ms. Boddie attested to having reviewed defendant's loan records and that her review included an examination of defendant's computerized payment history, which was also generated and maintained by plaintiff in the regular and ordinary course of its business.

¶ 10 Ms. Boddie further stated that the payment history records pertaining to plaintiff's loans were stored and generated by a computer software program, which was periodically checked for reliability, and "found to be reliable at all times." Ms. Boddie is trained and authorized to access payment histories. She had personal knowledge that plaintiff, in the ordinary course of business, continually and contemporaneously updated and saved any activity on loans. Ms. Boddie averred that "[t]he electronic records are stored in a system that is recognized as industry standard." She found that the computer records fully and accurately reflected the history of defendant's mortgage. The affidavit in support of summary judgment attached the note, mortgage, and payment history.

¶ 11 In a separate "Affidavit of Amounts Due and Owing," Ms. Boddie, again based on personal knowledge, detailed plaintiff's procedures in maintaining payment histories on loans in the regular course of its business. After reviewing defendant's loan history records, Ms. Boddie concluded that those records were accurate. Ms. Boddie averred that defendant had failed to make payments under the mortgage and note which were now due and that the gross amount owed by defendant was \$159,075.86. The breakdown of this gross amount, as set forth in this affidavit and as alleged in the complaint, included the unpaid balance of \$102, 276.09 and the deferred principal balance of \$30,358.96.

¶ 12 Defendant filed a response to the motion arguing that plaintiff was not entitled to summary judgment as it failed to send a grace period notice as required by statute. See 735 ILCS 5/15-1502.5 (West 2012). In her response, defendant stated that Ms. Boddie's affidavits were based on hearsay and that plaintiff's computer-generated records were not attached. However, her sole argument for denying plaintiff's motion for summary judgment was that the grace period notice requirement had not been met. Defendant did not move to strike the Boddie affidavits nor plaintiff's motion for summary judgment.

¶ 13 On May 28, 2014, the circuit court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale in plaintiff's favor. The record on appeal does not include a transcript of the proceedings on May 28, 2014. Pursuant to the judgment of foreclosure, the property was sold and the circuit court approved the sale on February 3, 2015. Defendant timely appealed on February 17, 2015.

¶ 14 On appeal, defendant seeks only review of the circuit court order granting plaintiff's motion for summary judgment. Plaintiff's sole argument is that the Boddie affidavits did not

comply with Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Plaintiff complains that the Boddie affidavits included "unsupported conclusions and factual assertions" and do not attach "the computer generated records" which Ms. Boddie relied upon.

¶ 15 Plaintiff responds that defendant's brief does not comply with Supreme Court Rule 341(h) (eff. Feb. 6, 2013), and should be stricken. In the alternative, plaintiff argues that the Boddie affidavits satisfy the requirements of Rule 191. Plaintiff points out that defendant never disputed the veracity of the statements contained in the Boddie affidavits in the circuit court, and has never challenged either the fact that she was in default or the amount of the unpaid balance under the mortgage and note.

¶ 16 Summary judgment may be entered when the pleadings, depositions, and affidavits on file demonstrate that, as a matter of law, the moving party is entitled to judgment. 735 ILCS 5/2-1005(c) (West 2012). "The purpose of summary judgment is not to answer a question of fact, but to determine whether one exists." *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 18 (citing *Garcia v. Wooton Construction, Ltd.*, 387 Ill. App. 3d 497, 504 (2008)). In determining whether a genuine issue of material fact exists, the reviewing court must construe the materials of record strictly against the movant and liberally in favor of the nonmoving party. *Id.* We review the grant of summary judgment *de novo*, and may affirm on any basis found in the record. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 23. Additionally, "a court's determination of whether an affidavit offered in connection with a motion for summary judgment complies with Rule 191 is a question of law subject to *de novo* review." *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003) (citing *Jackson v. Graham*, 323 Ill. App. 3d 766, 774 (2001)).

¶ 17 First, with regard to defendant's brief, we find it does not meet the requirements of Rule 341(h). In particular, the brief does not include a proper statement of facts or a satisfactory appendix with index to the record on appeal. Further, plaintiff does not cite to the record on appeal in her brief. However, as stated above, our review of an order granting summary judgment and the determination of whether the Boddie affidavits comply with Rule 191 is *de novo*. Therefore, we will consider defendant's appeal and deny plaintiff's request to strike the appellant's brief. However, we do agree with plaintiff that defendant has forfeited her specific claim that plaintiff did not provide her notice of the grace period. Because defendant has not raised any argument in her brief as to this issue, it is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 18 Rule 191(a) governs the form of affidavits which are submitted during summary judgment proceedings. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). The rule requires the affiant to have personal knowledge of the asserted matters and be competent to testify as to those matters. Additionally, the affidavit must set forth admissible facts with particularity in a nonconclusory matter. Finally, the affidavit must attach "sworn or certified copies of all documents upon which the affiant relies." *Id.*; *US Bank, National Ass'n. v. Advic*, 2014 IL App (1st) 121759, ¶ 21.

¶ 19 Business records may be admitted into evidence as an exception to the hearsay rule. Ill. S. Ct. R. 236 (eff. Aug. 1, 1992). "Illinois Rules of Evidence 803(6) (eff. Jan. 1, 2011) provides for the admission of 'records of regularly conducted activity' where the records consist of: 'A memorandum, report, record, or data compilation, in any form, of acts [or] events \* \* \* 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 \* \* \*.' " *Advic*, 2014 IL App (1st) 121759, ¶ 23 (quoting Illinois Rules of Evidence 803(6) (eff. Jan. 1, 2011)). "Where computer-generated records are involved, the proponent must show that 'the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to indicate their trustworthiness and to justify their admission.' " *Id.* ¶ 25 (quoting *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 829 (1990)).

¶ 20 Defendant has forfeited any argument as to the affidavits' noncompliance with Rule 191. "First, the sufficiency of an affidavit must be tested either by a motion to strike the affidavit [citation] or by a motion to strike the motion for summary judgment setting forth the objections to the affidavit [citation]." *Kearns v. Board of Education*, 73 Ill. App. 3d 907, 913-14 (1979). Defendant did not move to strike the Boddie affidavits or the motion for summary judgment in the circuit court and, thus, cannot challenge the sufficiency of the Boddie affidavits for the first time on appeal. *Id.*

¶ 21 Forfeiture aside, the Boddie affidavits complied with the requirements of Rule 191 and properly laid the foundation for the pertinent business records.

¶ 22 In her affidavits, Ms. Boddie stated that she had personal knowledge of the truth of the allegations within the foreclosure complaint and of the mortgage, the note, and the business records related to these transactions. She further averred that she was familiar with the maintenance of plaintiff's business records, including how loan histories are kept, updated, and maintained, and that the computer system was reliable and recognized as standard. Ms. Boddie

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authenticated and laid the foundation for the admission of the mortgage, note, and defendant's payment history on the note as business records. Those documents were attached to Ms. Boddie's "Affidavit in Support of Plaintiff's Motion for Summary Judgment," and were admissible based on the foundation laid by Ms. Boddie. It was not necessary to again attach them to her separate affidavit of amount due and owing.

¶ 23 We find that plaintiff's motion for summary judgment was well supported. Defendant did not file a counter-affidavit, nor did she challenge either her default on the mortgage and note or the amounts due. For the reasons stated above, we affirm the grant of summary judgment in favor of plaintiff.

¶ 24 Affirmed.