

THIRD DIVISION  
February 24, 2016

**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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BANK OF AMERICA, N.A.,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CH 25803
	)	
ROBERT KISIELEWSKI,	)	
	)	The Honorable
Defendant-Appellant.	)	Lewis Michael Nixon,
	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Mason and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly entered summary judgment in favor of Bank of America where the supporting affidavits satisfied the requirements of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), and defendant failed to file any counter-affidavits or present any contradictory evidence.

¶ 2 Defendant, Robert Kisielewski, appeals from orders of the circuit court of Cook County entering summary judgment for plaintiff, Bank of America, N.A., and confirming the sale of his condominium unit in the underlying mortgage foreclosure action. Defendant challenges the legal

sufficiency of the two affidavits that Bank of America attached in support of its motion for summary judgment.

¶ 3

### BACKGROUND

¶ 4

On July 28, 2009, BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP, filed a mortgage foreclosure complaint against defendant concerning the mortgage and note executed in connection with defendant's condominium unit located at 7347 West 71st Street in Bridgeview, Illinois. BAC alleged that defendant was in default for the monthly payments for March 2009 through the present, and that the balance due on the mortgage and note was the principal balance of \$100,890.29, plus interest, costs and fees, and any advances made by BAC.

¶ 5

On August 4, 2010, BAC amended its foreclosure complaint to dismiss Mortgage Electronic Registration Systems, Inc., nominee for Countrywide Home Loans, Inc., as a party, to add Bank of America, successor in interest to Countrywide Home Loans, Inc., as a party, and to attach a true copy of the assignment of mortgage that was executed on August 28, 2009. The assignment stated that Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., assigned all rights and interest under the mortgage to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP.

¶ 6

On July 25, 2011, defendant, through Charles Silverman of the law firm of Kaplan Silverman, LLC, filed a motion to quash service challenging the sufficiency of Bank of America's affidavit in support of service by publication upon him. The circuit court granted defendant's motion in an order entered on September 13, 2011, which also stated that defendant agreed to submit to the court's jurisdiction and was granted 28 days to answer or otherwise plead.

¶ 7 On October 12, 2011, more than one year after BAC amended its foreclosure complaint, defendant filed an answer raising two affirmative defenses: failure of condition precedent and lack of standing. As to the affirmative defense of failure of condition precedent, defendant alleged that BAC was required, under the terms of the mortgage, to send him an acceleration letter prior to filing its complaint, and that BAC could not proceed because he had not received an acceleration letter. As to the affirmative defense of lack of standing, defendant alleged that BAC relied on an assignment that recited no consideration.

¶ 8 The law firm of Charles Aaron Silverman, PC, entered an additional appearance for defendant on February 21, 2013.

¶ 9 On February 13, 2014, BAC filed a motion to substitute Bank of America as the plaintiff and holder of the note secured by the mortgage being foreclosed. Among the exhibits attached were the assignment of mortgage and a certificate of the merger of BAC into Bank of America, dated June 28, 2011, effective July 1, 2011.

¶ 10 On the same date, Bank of America filed motions for entry of an order of default against defendant and a judgment of foreclosure and sale. Bank of America also filed the subject motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)), and attached, *inter alia*, an affidavit of the amounts due and owing under the mortgage loan and an affidavit regarding the notice of acceleration that was sent to defendant as required under the terms of the mortgage.

¶ 11 In his affidavit, Acee Fuller, Jr., an assistant vice president of Bank of America, averred that Bank of America took over servicing of defendant's loan from BAC on July 1, 2011, and that the amount due was based on his review of the records and account information statement attached to his affidavit. Fuller stated that he had personal knowledge and was familiar with

Bank of America's business of servicing residential mortgage loans and its mode of operation because he reviews such business records as part of his responsibilities. Fuller described the software used by Bank of America to record and track mortgage payments. He stated that payment entries in the record-keeping software were made in the regular course of Bank of America's business, that the entries reflecting defendant's payments were made in accordance with established procedure at or near the time each payment was received, and that the software properly and accurately recorded defendant's mortgage payments. Fuller added that the information in his affidavit was taken from Bank of America's business records, which, again, were made at or near the time of the occurrence of matters stated therein by individuals with personal knowledge of the information or from information sent by individuals with personal knowledge, and maintained in the course of Bank of America's regularly conducted business activities and practice. According to Fuller, the attached business records indicated that defendant defaulted by failing to make required payments, and the amount of default was \$131,896.43. Fuller also averred that Bank of America was the holder of the duly indorsed promissory note and the assignee of the security instrument for the referenced loan.

¶ 12 Next, Natalia Canaveral, an assistant vice president and operations team manager of Bank of America, who was authorized to make the affidavit on behalf of Bank of America, as successor by merger to BAC, formerly known as Countrywide Home Loans Servicing, LP, averred that she was familiar with the business records maintained by Bank of America in connection with the subject loan as part of her job responsibilities. Canaveral stated that the information in her affidavit was taken from Bank of America's business records. She averred that she had personal knowledge of Bank of America's procedures for creating and maintaining those records, which were made at or near the time of the occurrence of matters stated therein by

individuals with personal knowledge of the information or from information sent by individuals with personal knowledge, and maintained in the course of Bank of America's regularly conducted business activities and practice. Canaveral added that it was the standard business practice of Bank of America to send a notice of acceleration prior to acceleration on its loan files as required in the mortgage, that the attached documents are true and correct copies, and that Exhibit A was a copy of the notice of acceleration that was sent to defendant. Canaveral further averred that Bank of America sent the notice of acceleration to defendant at the subject property address on April 16, 2009, by U.S. mail.

¶ 13 In May 2014, defendant filed his response to Bank of America's motion for summary judgment, but he did not file counter-affidavits to rebut the facts in Bank of America's supporting affidavits for summary judgment. Defendant set forth the affidavit requirements of Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) and the business record requirements of Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992), but he did not explain how Bank of America's supporting affidavits were legally deficient under those rules.

¶ 14 In July 2014, Bank of America filed its reply to defendant's response. Bank of America stated that defendant failed to file counter-affidavits or any other evidence to contradict the facts alleged in its supporting affidavits for summary judgment, and that the supporting affidavits were legally sufficient under Supreme Court Rules 191 and 236.

¶ 15 On August 11, 2014, the circuit court entered, *inter alia*, summary judgment against defendant and a judgment of foreclosure and sale in favor of Bank of America. The circuit court subsequently entered an order approving sale on February 9, 2015, and defendant, represented by the same counsel, filed a notice of appeal on March 9, 2015.

¶ 16 ANALYSIS

¶ 17 As a threshold matter, we recognize our independent duty to consider our jurisdiction (*North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 24) and observe that it is defendant's appeal from the February 9, 2015, order approving sale that triggers our review of the circuit court's entry of summary judgment against defendant (*CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 13).

¶ 18 To that end, summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2010)). "However, summary judgment requires the responding party to come forward with the evidence that it has—it is the put up or shut up moment in a lawsuit." (Internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14 (and cases quoted and cited therein), quoted in *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15. Denials in a defendant's answer do not raise a material issue of genuine fact to preclude summary judgment. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. When the party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the opposing party files no counter-affidavits, the material facts set forth in the moving party's affidavit are deemed admitted. *Korzen*, 2013 IL App (1st) 130380, ¶ 49 (construing *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993)). We review *de novo* the circuit court's ruling on the legal sufficiency of an affidavit submitted in support of summary judgment. *JPMorgan Chase Bank, N.A. v. Ivanov*, 2014 IL App (1st) 133553, ¶ 62 (citing *People ex rel. Waller v. Harrison*, 348 Ill. App. 3d 976, 985 (2004)).

¶ 19 As stated, defendant challenges the legal sufficiency of the two affidavits that Bank of America attached in support of its motion for summary judgment. According to defendant, the affidavits were insufficient because they were "not attested to by someone with personal knowledge" and "hearsay within hearsay (sometimes called "double hearsay") because they were based upon information put together in the regular course of business by a company *other than the employer of the affiant*." (Emphasis in original.) Defendant asserts that no one working at Bank of America had personal knowledge of his default "*or the regular business practice relating to the default and the recording of it*." He also insists that although Natalia Canaveral's "cites the regular course of business with respect to acceleration letters," Bank of America did not send defendant the acceleration letter attached to Canaveral's affidavit, and "no employee of Countrywide Home Loans signed any affidavit."

¶ 20 Affidavits submitted in support of summary judgment are governed by Supreme Court Rule 191 (eff. Jan. 4, 2013). *PNC Bank, N.A. v. Zubel*, 2014 IL App (1st) 130976, ¶ 20; *U.S. Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 21. Rule 191 provides, in pertinent part:

"Affidavits in support of \*\*\* 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 the 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).

¶ 21 A Rule 191(a) affidavit serves as a substitute for testimony given in open court and should satisfy the same requisites for competent testimony. *Avdic*, 2014 IL App (1st) 121759, ¶

22. "If, from the document as a whole, it appears 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, Rule 191 is satisfied." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999).

¶ 22 The admission of business records into evidence as an exception to the general rule excluding hearsay is governed by Supreme Court Rule 236 (eff. Aug. 1, 1992). *Avdic*, 2014 IL App (1st) 121759, ¶ 23. The requisite foundation under Rule 236 is only a showing that the records were made in the regular course of business, at or near the time of the transaction. *Id.*; *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42. Likewise, Illinois Rule of Evidence 803(6) (eff. Jan. 1, 2011) governs the admission of "records of regularly conducted activity," including a memorandum, report, record, or data compilation, made at or near the time by a person with knowledge, or from information transmitted by a person with knowledge, if kept in the course of regularly conducted business, and it was the regular practice of that business activity to make such record.

¶ 23 Notwithstanding defendant's contrary suggestions, there is no requirement that the affiants be familiar with the records pertaining to his mortgage loan before litigation arose or have personally made the entries, especially where the lack of personal knowledge goes to the weight of the evidence and not its admissibility. *Avdic*, 2014 IL App (1st) 121759, ¶ 29; *PennyMac Corp. v. Colley*, 2015 IL App (3d) 140964, ¶ 17. "It is the business record itself that is admissible, not the witness's testimony." *Colley*, 2015 IL App (3d) 140964, ¶ 17.

¶ 24 Our *de novo* review leads us to conclude that the affidavits that Bank of America submitted in support of its motion for summary judgment satisfied the requirements of Rule 191 and the business records concerning the underlying mortgage and note were properly admissible.

*Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 19. Moreover, defendant admitted the facts contained in Bank of America's affidavits where he failed to file any counter-affidavits or present any contradictory evidence. *Avdic*, 2014 IL App (1st) 121759, ¶ 31.

¶ 25

#### CONCLUSION

¶ 26

For the reasons stated, we affirm the circuit court of Cook County's entry of summary judgment for Bank of America.

¶ 27

Affirmed.