

FOURTH DIVISION
May 26, 2016

No. 1-15-0808

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

THE BANK OF NEW YORK MELLON FORMERLY)	Appeal from the
KNOWN AS THE BANK OF NEW YORK AS)	Circuit Court
SUCCESSOR TRUSTEE TO JPMORGAN CHASE)	Cook County.
BANK, N.A., AS TRUSTEE FOR THE)	
CERTIFICATEHOLDERS OF STRUCTURED ASSET)	
MORTGAGE INVESTMENTS II TRUST 2005-AR7)	
MORTGAGE PASS-THROUGH CERTIFICATES,)	
SERIES 2005-AR7,)	14 M1 720397
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
LIZZIE BUIE, and UNKNOWN OCCUPANTS, if any,)	Honorable
)	Sheryl A. Pethers,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting summary judgment in favor of plaintiff in a forcible entry and detainer action where defendant raised a genuine issue of material fact as to whether she had a valid lease on the property.

¶ 2 Defendant, Lizzie Buie, *pro se* appeals from the trial court's order denying her motion to vacate summary judgment entered against her, and in favor of plaintiff, Bank of New York Mellon, in a forcible entry and detainer action.

¶ 3 The record shows that plaintiff obtained ownership rights in the property located at 876 North Maple Drive in Chicago Heights after foreclosure proceedings. The order approving foreclosure report of sale and distribution and for possession and deed was entered on October 11, 2011. Thereafter, on September 5, 2014, plaintiff filed a forcible entry and detainer complaint against defendant and any other unknown occupants, alleging that it was entitled to receive possession of the property, and that defendant was unlawfully withholding possession of it.

¶ 4 Defendant filed an appearance on November 3, 2014, and on November 5, 2014, the trial court entered an order finding that she "submit[ted] to the jurisdiction of the court" and "willingly, knowingly, and voluntarily waive[d] service of process."

¶ 5 On November 25, 2014, plaintiff filed a motion for summary judgment. It argued that summary judgment was appropriate because it had "received legal ownership of the premises via foreclosure, provided the occupant with the requisite ninety (90) day notice, properly pled the relevant facts in its complaint, and served the Defendants with the complaint and summons."

¶ 6 Defendant filed a response to that motion on December 16, 2014, contending that she had a meritorious defense to plaintiff's claim. Specifically, defendant maintained that she had not received the 90 day notice, that she was a tenant at the property, that her rent was current, and that her lease did not expire until August 31, 2015. Defendant submitted a verified affidavit which stated that she had lived in the property since September 2005, and that she "ha[d] a valid lease with the option to purchase that doesn't expire until August 31st, 2015." Defendant further

alleged that she had given the owner "a large down payment in [*sic*] September 1st, 2009," and that she could "provide the signed and dated lease with receipts."

¶ 7 Plaintiff replied on January 20, 2015, and contended that defendant had failed to present a valid defense to the underlying Forcible Entry and Detainer Action. It contended, among other things, that defendant "failed to demonstrate the existence of any rental agreement, let alone one deemed *bona fide* under Illinois law," and pointed out that defendant had failed to include the purported lease or rental receipts in her response.

¶ 8 On January 28, 2015, the court granted plaintiff's motion for summary judgment without further explanation, and entered an order for possession in favor of plaintiff, staying enforcement until March 12, 2015.

¶ 9 On February 24, 2015, defendant filed a motion to vacate the judgment pursuant to section 2-1203(a) of the Code of Civil Procedure (Code). Defendant continued to maintain that she was residing in the property pursuant to a valid lease which did not expire until August 31, 2015. She alleged that she provided plaintiff with copies of her "current pre-paid agreement with previous owners *** and rent receipts" and attached what purported to be those documents to her motion. The purported lease was dated September 1, 2009, and was between defendant and James Jeffries, the mortgagor who had been named in the prior foreclosure proceedings. Defendant agreed to pay \$500 per month as rent on the fifth of the month, and to pay all utilities and maintain lawn service. The purported lease also referenced an "option to purchase" and that a "large down payment" was "acknowledged" by the mortgagor. The agreement specified that it ran from September 31, 2009 until August 31, 2015. Plaintiff did not file a response to defendant's motion.

¶ 10 On March 19, 2015, the trial court denied defendant's motion to vacate without explanation, and defendant filed a timely notice of appeal from that order on the same day. The execution of the order of possession was stayed pending appeal, and defendant acknowledges that she remains in possession of the property.

¶ 11 Defendant filed her appellate brief in this court on October 19, 2015, and plaintiff's response brief was due on November 23, 2015. Plaintiff however, failed to file a response brief, and on February 11, 2016, this court entered an order finding that it had failed to file a brief within the time prescribed by Illinois Supreme Court Rule 343(a) (eff. July 1, 2008), and accordingly, we took this matter on the record and the appellant's brief only. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) ("if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed.")

¶ 12 A year after the Notice of Appeal was filed, 11 months after the docketing statement was filed, 7 months after the record on appeal was filed, and several months after defendant filed her brief on appeal, attorneys for plaintiff first filed an appearance in this court on March 7, 2016. In conjunction with that appearance, plaintiff requested an extension of time to file its response brief, and attached the affidavit of the attorney of record in support. As explanation for the tardy filing, the attorney stated only that his office "was retained to handle the underlying forcible entry and detainer action" but that it "did not receive formal referral instructions and assignment of the pending post judgment litigation until February 25, 2016." On March 24, 2016, this court denied plaintiff's motion due to its untimely nature, however, we allowed defendant to submit a "

five page memorandum of law on or before April 14, 2016, which shall be limited to the issue of whether summary judgment was properly granted by the trial court in light of *Fifth Third Mortgage Co. v. Foster*, 2013 IL App (1st) 121361."

¶ 13 On April 21, 2016, plaintiff filed a motion for leave to file its late memorandum of law instant, claiming that it had not previously received notice of this court's order allowing the memorandum. This court allowed that motion.

¶ 14 Turning to the substance of defendant's appeal, defendant, *pro se*, argues that the trial court erred in granting summary judgment in favor of plaintiff. Among other reasons, she asserts that plaintiff was not entitled to summary judgment because a forcible entry and detainer action may not proceed against a bona fide tenant unless the lease is expired or is terminated. She claims that the trial court ignored her allegation that she had a valid lease. Because we find this issue dispositive of this appeal, we need not discuss defendant's other arguments.

¶ 15 Summary judgment motions are governed by section 2–1005 of the Code. 735 ILCS 5/2–1005 (West 2010). Pursuant to that statute, summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2010). As our supreme court has observed, the standard for summary judgment is a formidable one. *Pielet v. Pielet*, 2012 IL 112064, ¶ 54. The purpose of summary judgment is not to try questions of fact but simply to determine if triable questions of fact exist. Summary judgment should not be granted unless the moving party's right to judgment is clear and free from doubt. If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided

by the trier of fact. *Forsythe v. Clark USA, Inc.*, 224 Ill.2d 274, 280 (2007). Our review of a trial court's decision on a motion for summary judgment is *de novo*. *Fifth Third Mortgage Co. v. Foster*, 2013 IL App (1st) 121361, ¶ 8.

¶ 16 A copy of the final order in the underlying foreclosure case appears in the record, which indicates that defendant was not a party to the foreclosure proceedings. Where a lawful occupant of a foreclosed property is not made a party to the foreclosure proceedings, the new owner is required to initiate forcible entry and detainer (FED) proceedings against the tenant in order to terminate the lease. *Foster*, 2013 IL App (1st) 121361 (2013); *Agribank, FCB v. Rodel Farms, Inc.*, 251 Ill. App. 3d 1050, 1055 (1993); 735 ILCS 5/15–1701(e) (West 1992).

¶ 17 In this case, plaintiff filed a complaint pursuant to the Forcible Entry and Detainer Act (Act), which allows a party to file a FED action against a lessee “[w]hen any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.” 735 ILCS 5/9–102(a)(4) (West 2010). A FED action is a special summary proceeding which demands strict adherence to statutory requirements in order to establish jurisdiction. *Avdich v. Kleinert*, 69 Ill. 2d 1, 6 (1977); *Figueroa v. Deacon*, 404 Ill. App. 3d 48, 52 (2010). Where a FED action is filed prematurely, it cannot be maintained. *Foster*, 2013 IL App (1st) 121361, ¶¶ 12-15; *Avdich*, 69 Ill. 2d at 6, 9.

¶ 18 Pursuant to section 9-207.5 of the Act, the plaintiff

"may terminate a bona fide lease *** only: (i) at the end of the term of the bona fide lease, by no less than 90 days' written notice or (ii) in the case of a bona fide lease that is for a month-to-month

or week-to-week term, by no less than 90 days' written notice." 735
ILCS 5/9-207.5.

¶ 19 A lease is "bona fide" when

"(1) the mortgagor or the child, spouse, or parent of the mortgagor
is not the tenant;
(2) the lease was the result of an arms-length transaction;
(3) the lease requires the receipt of rent that is not substantially less
than fair market rent for the property or the rent is reduced or
subsidized pursuant to a federal, State, or local subsidy; and
(4) either (i) the lease was entered into or renewed on or before the
date of the filing of the lis pendens on the residential real estate in
foreclosure pursuant to Section 2-1901 of this Code or (ii) the lease
was entered into or renewed after the date of the filing of the lis
pendens on the residential real estate in foreclosure and before the
date of the judicial sale of the residential real estate in foreclosure,
and the term of the lease is for one year or less."

¶ 20 Here, defendant maintained in the trial court that she was in possession of the property pursuant to a valid, and current lease, which was to expire on August 31, 2015. She averred to those facts in an affidavit in support of her response to plaintiff's motion for summary judgment, and further alleged that she could provide the "signed and dated lease with receipts." Thereafter, defendant actually did provide what purported to be those documents in support of her motion to vacate summary judgment. The purported lease defendant provided was dated September 1, 2009, with a lease term expiring August 31, 2015. Plaintiff's FED action was filed on September

5, 2014, well before the alleged lease was set to expire. Under section 9–102(a)(4), a FED action would have been premature in such circumstances. See *Foster*, 2013 IL App (1st) 121361, ¶¶ 12–15. Nonetheless, the trial court granted plaintiff's motion for summary judgment, and thereafter denied defendant's motion to vacate, despite the outstanding factual issue of the validity of defendant's lease.

¶ 21 We find this case analogous to *Foster*, 2013 IL App (1st) 121361, in which the plaintiff, who obtained ownership rights to the property as a result of foreclosure proceedings, filed a FED action prior to the expiration of the defendant's lease term. The circuit court granted summary judgment in favor of the plaintiff, but this court reversed, finding that the FED action was filed prematurely.

¶ 22 In plaintiff's memorandum of law, plaintiff distinguishes *Foster* by asserting that in *Foster*, the "[d]efendant-occupant not only attached the lease to her summary judgment response brief, but also previously sent it to the plaintiff's agents and attorneys." It contends that "[t]he *Foster* Court effectively ruled upon the decision of the Circuit Court as to [a] lease presented at summary judgment, not the prospective enforcement of a lease belatedly presented after adjudication of the case." Plaintiff further contends that the "subject lease is outside of the record" because defendant "did not provide the document to the circuit court during adjudication of plaintiff's motion for summary judgment." We disagree, and do not find plaintiff's distinction meaningful.

¶ 23 First, we note that defendant filed a verified affidavit in support of her response to the motion for summary judgment, in which she maintained that she had "a valid lease with the option to purchase that doesn't expire until August 31st, 2015." She further alleged that she could "provide the signed and dated lease with receipts." When facts within an affidavit are not

contradicted by counteraffidavit or other evidentiary material, they must be taken as true for purposes of a motion for summary judgment. *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 299 (1991). In plaintiff's reply, plaintiff did not deny the existence of a lease, or provide any other evidentiary material which would contradict defendant's affidavit, but merely claimed that defendant failed to demonstrate the existence of a bona fide rental agreement. Moreover, when defendant did attach what purported to be that document to her motion to vacate summary judgment, plaintiff did not respond at all.

¶ 24 Additionally, as we noted above, our standard of review in this case is *de novo*, under which this court examines the entire record to determine whether a genuine issue exists as to any material fact. 735 ILCS 5/2–1005(c) (West 2010); *Foster*, 2013 IL App (1st) 121361, ¶ 8. While defendant here did not actually attach the purported lease as an exhibit to her response to the motion for summary judgment, that document is found in the record on appeal because she filed it with her motion to vacate summary judgment. Defendant also maintained in her motion to vacate that plaintiff had been provided a copy of the lease. That document was before the circuit court, and is properly before this court.

¶ 25 In so holding, we express no opinion about the ultimate determination of the validity of defendant's tenancy or whether her lease is *bona fide*, but merely find that defendant raised a genuine issue of material fact which precluded the granting of summary judgment in favor of plaintiff.

¶ 26 For the reasons explained above, we reverse the judgment of the circuit court, and remand this matter for further proceedings consistent with this opinion.

¶ 27 Reversed and remanded.