2016 IL App (1st) 151848-U

No. 1-15-1848

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FIFTH DIVISION
September 30, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, NATIONAL ASSOCIATION,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
STAN SHLYAPOCHNIK; AMBER KING a/k/a	)	
Amber M. King; BARCELONA CONDOMINIUM	)	No. 11 CH 44400
ASSOCIATION #4; and UNKNOWN OWNERS,	)	
	)	
Defendants,	)	
	)	
(STAN SHLYAPOCHNIK,	)	The Honorable
	)	Michael T. Mullen,
Defendant-Appellant.)	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Presiding Justice Gordon dissented.

O R D E R

¶ 1 *HELD*: Summary judgment was proper in the underlying foreclosure case where defendant failed to establish a genuine issue of material fact that plaintiff failed to mail a grace-

period notice prior to instituting foreclosure proceedings as required under the Foreclosure Law. The circuit court properly approved the judicial sale of the subject property.

¶2 Defendant, Stan Shlyapochnik, appeals the circuit court's orders granting summary judgment in favor of plaintiff, Bank of America, National Association, granting a foreclosure judgment, and confirming the report and approving the judicial sale of the subject home in the underlying foreclosure proceedings. Defendant contends the circuit court erred in granting summary judgment where there was a genuine issue of material fact as to whether he received from plaintiff the statutory grace-period notice required pursuant to section 15-1502.5 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1502.5 (West 2010). Defendant additionally contends the circuit court erred in approving the judicial sale of the subject property. Based on the following, we affirm.

¶3 FACTS

¶4 In February 2007, defendant executed a mortgage loan agreement with America's Wholesale Lender for $224,000 in exchange for a promissory note and a mortgage lien against the subject property located on Foster Street in Skokie, Illinois. The mortgage and note were later assigned to Mortgage Electronic Registration Systems, Inc. and then to plaintiff.

¶5 On December 28, 2011, plaintiff filed a complaint for foreclosure, alleging that defendant was in default under the loan for failing to pay the monthly mortgage beginning in February 2009 and thereafter. On February 2, 2012, defendant filed a *pro se* appearance and answer admitting all of the allegations of plaintiff's complaint, except for the allegation as to plaintiff's standing to bring the lawsuit, the allegation regarding the default and amount allegedly due, and the allegation regarding other potential parties of interest, in which defendant stated he had insufficient information to admit or deny those allegations. Defendant also asserted an

affirmative defense that "there is no evidence plaintiff is the holder of the note." Plaintiff responded by filing a reply denying defendant's affirmative defense. On June 26, 2012, without leave of court, defendant filed a *pro se* amended answer mirroring his prior answer. Defendant, however, raised the following affirmative defenses: (1) plaintiff had no standing to foreclose; (2) plaintiff committed fraud; (3) plaintiff engaged in deceptive practices; and (4) plaintiff provided material misrepresentations.

¶6 On September 27, 2012, plaintiff filed a motion for summary judgment directed at defendant's original answer, along with an affidavit in support of that motion authored by Ana S. Alvarado, a senior operations manager for plaintiff, confirming the loan was in default. On November 26, 2012, defendant's counsel filed an appearance and a second amended answer and affirmative defenses, again without leave of court. The second amended answer denied all of the allegations of the complaint except that defendant was the mortgagor and owner of the property. In the second amended affirmative defenses, defendant alleged that he was not in default, that plaintiff engaged in fraud and material misrepresentations, that plaintiff failed to properly report what defendant owed, and that plaintiff was "not the owner of the property being foreclosed." On November 29, 2012, defendant's counsel was granted leave to file his appearance *instanter* and a briefing schedule was entered. Plaintiff filed a reply denying all of defendant's affirmative defenses.

¶7 Then, on January 18, 2013, defendant filed a response to plaintiff's summary judgment motion. In the response, defendant alleged that plaintiff failed to comply with his discovery requests, thus preventing him from effectively responding to plaintiff's summary judgment motion. In the response, defendant noted that he filed an affidavit and an "amended affirmative

defense,"[1] both of which were attached to the response. In his affidavit, defendant attested that: (1) he "was never served with notice of a grace period" by plaintiff; (2) plaintiff failed to accurately report the funds defendant had paid; (3) plaintiff did not comply with a modification agreement between the parties; (4) plaintiff's affidavit attached to its summary judgment motion was inaccurate; (5) plaintiff did not produce evidence demonstrating Ana Alvarado worked for it—she was not a senior operations manager; and (6) plaintiff was not the holder of the note for the subject property and failed to establish a *prima facie* case demonstrating such. In his "amended affirmative defense," defendant asserted that: (1) he was not in default under the note for the subject property; (2) he was never notified that his loan had been assigned to plaintiff; (3) plaintiff was not the holder of any note for the subject property; (4) plaintiff "never notified [him] of any grace period regarding [his] deliquen[cy] on the subject property;" and (5) plaintiff did not accurately account for payments made by defendant.

¶8 On March 11, 2013, the circuit court held a hearing on plaintiff's summary judgment motion. No transcript or acceptable substitute from the proceeding appears in the record on appeal. On that date, the circuit court granted summary judgment in favor of plaintiff and entered a judgment of foreclosure and sale in plaintiff's favor.

¶9 Then, on April 9, 2013, defendant filed a motion to reconsider, again arguing that plaintiff failed to respond to discovery requests, which thereby prevented defendant from properly attacking plaintiff's summary judgment motion. Defendant attached an affidavit authored by his attorney to the motion to reconsider. In the affidavit, defendant's attorney attested that plaintiff failed to comply with the discovery requests, thus preventing defendant from sufficiently responding to the summary judgment motion. Following a hearing on

[1] Defendant concedes on appeal that the "amended affirmative defenses" were "unauthorized."

December 19, 2013, defendant's motion to reconsider was denied. No transcript or acceptable substitute from the proceeding appears in the record on appeal.

¶ 10 On February 5, 2015, the subject property was sold and plaintiff filed a motion to confirm the report of the judicial sale and to approve the sale. A briefing schedule was set by the court. Defendant filed a motion to set aside the sale of the subject property. In support thereof, defendant stated that he was not served with notice of the date of the sale, that plaintiff did not serve him with the notice of substitution of its attorneys, that the sale price was unreasonable, and that the case had been voluntarily dismissed. On May 19, 2015, the circuit court granted defendant's motion to confirm the report of sale and made a special finding that "there is no evidence of fraud, and that there is no evidence that the sale price was unreasonable." Also on May 19, 2015, in a separate order, the circuit court entered an order approving the sale of the subject property. This notice of appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant contends he established a genuine issue of material fact as to whether he received a statutory grace-period notice required by section 15-1502.5 of the Foreclosure Law, thus preventing the entry of summary judgment. Plaintiff responds that defendant forfeited review of his argument by failing to properly raise the contention in the circuit court.

¶ 13 Summary judgment is appropriate only "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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The circuit court must view the documents and exhibits in a light most favorable to the nonmoving party. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 36. Summary judgment is a drastic measure and may be granted only if the movant's right to

judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The purpose of summary judgment is not to try an issue of fact, but rather to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). If the moving party supplies facts, which, if not contradicted, would entitle the party to judgment as a matter of law, the nonmoving party cannot rely on his pleadings alone to create a genuine issue of material fact. *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008). Instead, "[a]lthough a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Id*. We review a circuit court's order granting summary judgment *de novo*. *Filiung v. Adams*, 387 Ill. App. 3d 40, 53 (2008).

¶14 Section 15-1502.5 of the Foreclosure Law, also known as the Homeowner Protection Act (Act), was "written to provide owners of single-family, owner-occupied properties an additional last minute escape valve to rescue their mortgages before the lender files a suit under the Foreclosure Law. The unwaivable grace period notice required by the Act directs the borrower to various resources available for counseling and loan modification assistance." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 87. More specifically, section 15-1502.5(c) of the Foreclosure Law requires that a mortgagee must "send via U.S. mail" a grace-period notice to the mortgagor informing the mortgagor that it has 30 days to obtain approved housing counseling. No foreclosure action shall be instituted before the mailing of the grace-period notice. 735 ILCS 5/15-1502.5(c) (West 2010).

¶15 Defendant argues that he filed a response to plaintiff's summary judgment motion along with "an affidavit that arguably meets the requirements of a[n Illinois Supreme Court] Rule

191(a) counter-affidavit." In that affidavit, defendant attested that he "was never served with notice of grace period" by plaintiff. Defendant concedes that the response itself did not raise any challenges to the lack of grace period notice; however, defendant maintains that he properly raised the matter prior to entry of the foreclosure judgment and satisfied Rule 191(a) where the response incorporated the affidavit therein and was written in first person and sworn to under oath. Defendant further argues that plaintiff failed to contradict the lack of grace period notice, thereby creating a genuine issue of material fact. Plaintiff responds that defendant forfeited review of the matter by failing to raise the issue before the circuit court. Plaintiff argues that consideration of defendant's contention contravenes the values of judicial economy, while also unfairly raises the argument at the appellate level where presentation of evidence is no longer possible.

¶16 "It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). The purposes underlying the doctrine of forfeiture are to preserve finite judicial resources by encouraging litigants to present alleged errors to the trial court, thereby providing the trial court an opportunity to correct any errors and to prevent unfair prejudice to the opposing party. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). That said, it is generally understood that forfeiture is an admonition on the parties and not a limitation on the court. *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 33.

¶17 We conclude that defendant did not forfeit review of his contention on appeal. We recognize that defendant's challenge to the lack of grace-period notice was minimal, at best; however, it did appear in his affidavit in support of his response to plaintiff's summary judgment motion. We, therefore, address the merits of defendant's argument.

¶ 18 The question before this court is whether there was a genuine issue of material fact as to plaintiff's mailing of the grace-period notice prior to instituting the underlying foreclosure proceedings, thus preventing entry of judgment as a matter of law. Plaintiff's foreclosure complaint followed the form provided in section 15-1504(a) of the Foreclosure Law. See 735 ILCS 5/15-1504(a) (West 2010). That form does not require any allegation that it mailed a grace-period notice in compliance with section 15-1502.5(c). See 735 ILCS 5/15-1504(b) (West 2010) ("[a] foreclosure complaint need only contain such statements and requests as called for by the form set forth in subsection (a) of Section 15-1504 as may be appropriate for the relief sought"). Then, in plaintiff's motion for summary judgment, it alleged that defendant was in default under the parties' loan agreement, attaching and incorporating copies of the promissory note and mortgage, along with an affidavit confirming same. Plaintiff noted, in the motion, that defendant failed to provide a counter-affidavit contradicting plaintiff's *prima facie* basis for recovery. Plaintiff addressed defendant's affirmative defense of standing by establishing that the mortgage rightfully had been assigned to it. After plaintiff had filed its summary judgment motion, defendant's counsel was granted leave to file an appearance. At that time, defendant also filed an answer, by and through counsel, without leave of court. Nevertheless, that answer made no mention of a failure by plaintiff to mail a grace-period notice; instead, four affirmative defenses were alleged, none of which included a lack of grace-period notice. Moreover, our review of defendant's response to plaintiff's summary judgment motion did not include an argument regarding the grace-period notice, or lack thereof; rather, defendant's response argued that it was prevented from effectively responding because plaintiff refused to comply with his discovery requests. Defendant's responsive pleading did incorporate his affidavit, in which he attested that he was "never served with notice of a grace period" by plaintiff. We conclude, however, that

defendant's attestation failed to present a genuine issue of material fact preventing entry of summary judgment in plaintiff's favor.

¶19 Because plaintiff presented a *prima facie* case for foreclosure by introducing evidence of the mortgage and promissory note, the burden shifted to defendant to prove any affirmative defenses. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 67. Defendant failed to do so. In fact, defendant's affidavit in response to plaintiff's summary judgment motion wherein the allegation that he was "not served with a grace period notice" appeared did not comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). See *PNC Bank, N.A. v. Zubel*, 2014 IL App (1st) 130976, ¶ 20 (affidavits submitted in conjunction with a motion for summary judgment are governed by Rule 191(a)). Rule 191(a) provides, in relevant part:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiant; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; ***; 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).

Defendant's affidavit merely stated that he was "never served with notice of a grace period" by plaintiff. There were no facts provided upon which the defense was based; rather, the affidavit merely offered a conclusion in violation of Rule 191(a). See *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 52 ("[a]n affidavit that is conclusory and does not include facts upon which the affiant relies is in violation of Rule 191"); *cf. Adeyiga*, 2014 IL App (1st) 131252, ¶ 26 (where the mortgagees challenged the mortgagor's summary judgment motion for failing to provide proof that it mailed a grace-period notice prior to filing the complaint and both

mortgagees provided affidavits that they did not receive notice of default or a grace-period notice).

¶20 We recognize defendant's argument that plaintiff did not motion the circuit court to strike his affidavit and that a Rule 191(a) challenge to an affidavit cannot be asserted for the first time on appeal; however, we again cite the rule that forfeiture is an admonition on the parties and not a limitation on this court. *Garcia*, 2011 IL App (1st) 103085, ¶ 33. Moreover, there is no transcript or acceptable substitute from the summary judgment hearing. It was defendant's burden, as the appellant, to present a sufficiently complete record of the circuit court proceedings to support his claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984). In the absence of such a record on appeal, we must presume that the circuit court's order was in conformity with law and had sufficient factual basis. *Id*. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id*. Because we have no transcript from the summary judgment hearing, we must presume the circuit court's order granting summary judgment was in conformity with the law and supported by the facts. In addition, the circuit court's foreclosure judgment provided that "all the material allegations of the Complaint and those deemed to be made pursuant to 735 ILCS 5/15-1504(c) 1-11, of the Illinois Code of Civil Procedure are true and proven." Sections 15-1504(c)(9) and (10) of the Foreclosure Law provide "that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given" and "that any and all periods of grace or other period of time allowed for the performance of the covenants or conditions claimed to be breached or for the curing of any breaches have expired." 735 ILCS 5/15-1504(c)(9), (10) (West 2010). Accordingly, the circuit court's foreclosure judgment expressly provided that notices, such as the grace-period notice, had been "duly and properly

given" and that the grace period had expired. Defendant recognizes as much in his brief, but argues that this finding was in error where his affidavit created a genuine issue of material fact. As stated, defendant's affidavit was insufficient and conclusory and, therefore, did not create a genuine issue of material fact to contest plaintiff's *prima facie* claim for foreclosure. We, therefore, conclude that the circuit court properly granted summary judgment in plaintiff's favor.

¶21 Defendant additionally contends the circuit court erred in approving the judicial sale of the subject property.

¶22 The parties dispute the appropriate standard of review. Defendant acknowledges that the standard of review of a circuit court's approval of a judicial sale generally is an abuse of discretion. *CitiMortgage Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57. Defendant, however, argues that we should apply a *de novo* standard of review because the circuit court heard no testimony and based its decision entirely on documentary evidence. The record on appeal does not contain a transcript from the May 19, 2015, hearing of plaintiff's motion to confirm the judicial sale. Accordingly, we have no basis to determine what transpired in the hearing that led to the circuit court's order approving the sale of the subject property. We, therefore, have no basis upon which to decide if the circuit court heard testimony or if it based its decision entirely on documentary evidence.

¶23 That said, under either standard of review, we conclude that the circuit court properly approved the judicial sale of the subject property. Section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508(b) (West 2010)) provides that a circuit court shall confirm a judicial sale unless it finds that: (1) a notice required in accordance with section 15-1507(c) was not given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was not otherwise done. On appeal, defendant contends the sale should not have been

approved where justice was not otherwise done due to plaintiff's failure to send a grace-period notice prior to filing the underlying lawsuit. Defendant, however, did not present this argument in his motion to reconsider the circuit court's order granting summary judgment in favor of plaintiff or in his response to plaintiff's motion to confirm the judicial sale. Without a transcript, we have no basis to determine if defendant challenged the order confirming the judicial sale in terms of not having received a grace-period notice. *Cf. Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶ 37 (finding, in compliance with *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 26, that section 15-1508(b) could not be satisfied where the defendant merely argued the plaintiff failed to mail the grace-period notice without also establishing any fraud or misrepresentation that prevented the defendant from raising the defense earlier, nor establishing any equitable defenses that reveal the defendant was prevented from protecting his property interests). In fact, defendant does not even contend that he made such an argument before the circuit court. No matter, without a transcript, we must presume the circuit court's order was in conformity with the law and based upon the facts. *Foutch*, 99 Ill. 2d at 393. We, therefore, conclude the circuit court properly approved the judicial sale of the subject property.

¶24 CONCLUSION

¶25 We affirm the judgment of the circuit court.

¶26 Affirmed.

¶27 PRESIDING JUSTICE GORDON, dissenting.

¶28 I must respectfully dissent.

¶29 The defendant in his affidavit in response to plaintiff's motion for summary judgment averred that he was "never served with notice of a grace period." The majority in ¶ 20 states "[t]here were no facts provided upon which the defense was based; rather, the affidavit merely

offered a conclusion in violation of Rule 191(a). [Citation] ('[a]n affidavit that is conclusory and does not include facts upon which the affiant relies is in violation of Rule 191')." I do not know what more a person can say when they have not received a grace-period notice than to say they have not received it.

¶30 Section 15-1502.5 of the Illinois Mortgage Foreclosure Law (Foreclosure Law), commonly known as the Homeowner Protection Act (the Act), describes protections afforded to mortgagors of residential property (735 ILCS 5/15-1502.5 (West 2010)). The Act was written to provide owners of single-family, owner-occupied properties an additional last-minute escape valve to rescue their mortgages before the lender files a suit under the Foreclosure Law. The grace period notice required by the Act directs the borrower to various resources available for counseling and loan modification assistance. 735 ILCS 5/15-1502.5(c) (West 2010). If a counseling agency approved by the United States Department of Housing and Urban Development notifies the lender within the 30-day period that the borrower is seeking approved counseling services, the lender cannot file suit until an additional 30 days has passed. 735 ILCS 5/15-1502.5(c) (West 2010). A grace period notice is required before any foreclosure action may be instituted. Section 15-1502.5(c) of the Foreclosure Law provides that:

> "No foreclosure action under Part 15 of Article XV of the Code of Civil Procedure shall be instituted on a mortgage secured by residential real estate before mailing the notice described in this subsection (c).
>
> The notice required in this subsection (c) shall state the date on which the notice was mailed, shall be headed in bold 14-point type 'GRACE PERIOD NOTICE', and shall state the following in 14-point type: 'YOUR LOAN IS MORE THAN 30 DAYS PAST DUE. YOU MAY BE EXPERIENCING

> FINANCIAL DIFFICULTY. *** A LIST OF APPROVED COUNSELING AGENCIES MAY BE OBTAINED FROM THE ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION.'
>
> ***
>
> The sending of the notice required under this subsection (c) means depositing or causing to be deposited into the United States mail an envelope with first-class postage prepaid that contains the document to be delivered. The envelope shall be addressed to the mortgagor at the common address of the residential real estate securing the mortgage." 735 ILCS 5/15-1502.5(c) (West 2010).

¶31 Plaintiff's complaint does not allege they mailed or served the notice, plaintiff's motion for summary judgment does not state they mailed or served the notice, and the record on appeal does not contain the notice. As a result, the summary judgment motion of plaintiff should be denied and all orders entered thereafter vacated because there is a substantive issue as to whether a notice was mailed or served by plaintiff.