2016 IL App (1st) 152485-U

No. 15-2485

SECOND DIVISION
August 9, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FV-I, IN TRUST FOR MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS, LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 2007 CH 24080
	)	Hon. Darryl Simko, Judge Presiding
MICHAEL NOONAN	)	
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion in refusing to set aside the order confirming the judicial sale. Defendant failed to establish any of the grounds for precluding confirmation of foreclosure sale.

¶ 2 This case involves a residential mortgage foreclosure action instituted by Plaintiff-Appellee FV-I, In Trust for Morgan Stanley Mortgage Capital Holdings, LLC (Bank) against Defendant-Appellant Michael Noonan. Noonan argues on appeal that the circuit court erred in approving the judicial sale claiming that the Bank failed to comply with the requirements to send proper grace period and acceleration notices. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On August 31, 2006, Noonan obtained a mortgage for the property located at 6417 N. Sayre Ave., Chicago Illinois. Noonan failed to make payments on the mortgage on and after October 1, 2006. On December 4, 2006, Chase Home Financing, LLC which was servicing the loan for then holder of the loan, U.S. Bank, sent Noonan a letter informing him the loan was in default and if he did not cure the default within 30 days it could exercise its rights to accelerate the balance or an action of foreclosure against Noonan. On January 11, 2007, counsel for U.S. Bank send Noonan a letter informing him that it was attempting collection on the defaulted loan and that foreclosure would result if the default was not cured.

¶ 5 On January 19, 2007, U.S. Bank filed a complaint for mortgage foreclosure. On or about July 17, 2012, the loan was assigned to the Bank. On October 15, 2012, counsel for Bank a sent a grace period notice to Noonan although the numbers on the address were transposed listing the address 6147 N. Sayre Ave., Chicago Illinois instead of 6417 N. Sayre Ave., Chicago Illinois.

¶ 6 On August 9, 2013, the Bank filed a complaint for mortgage foreclosure against Noonan. On October 28, 2013, Noonan filed a motion to dismiss the complaint. The circuit court denied the motion. On December 30, 2013, Noonan filed an "An answer to Complaint and Affirmative Defenses," where he stated that he executed the Mortgage and the Note, but argued that the Bank was not the holder and owner of the loan. Noonan also raised several affirmative defenses: (1) the Bank did not have standing to pursue the foreclosure action; (2) the Bank did not properly accelerate the note; (3) the grace period notice was defective because was sent by counsel for the Bank and not directly by the Bank. Noonan also served the Bank with several discovery requests. The Bank moved to strike the affirmative defenses and moved to quash some of the written

discovery requests. On May 1, 2014, after briefing and argument, the circuit court struck all the affirmative defenses and quashed certain discovery requests.

¶ 7 On May 20, 2014, Noonan filed a motion for partial summary judgment alleging the same previous affirmative defenses regarding the acceleration and grace period notices. The Bank responded and also moved for summary judgment on June 6, 2014. On August 7, 2014, the circuit court granted summary judgment in favor of the Bank and denied Noonan's motion for partial summary judgment. The property was subsequently sold on December 11, 2014. The Bank moved to approve the sale on January 23, 2015. Noonan objected alleging that the Bank did not have standing and that the trial court erred in striking some of his discovery. Noonan also raised the argument that the court lacked jurisdiction because there was no proof that the grace period notice was sent based on the fact that the record did not show that proper postage was paid. On May 1, 2015, the court overruled Noonan's objections and approved the sale.

¶ 8 On June 1, 2015, Noonan filed a "Motion for Reconsideration of Confirmation of Sale Pursuant to 735 ILCS 5/5-1508" arguing that the court was without jurisdiction over the case because of the lack of proof that the grace period notice had been sent. Subsequently, Noonan filed a document titled "Motion for Leave Amendment to Motion for Reconsideration of Confirmation of Sale Pursuant to 735 ILCS 5/5-1508 [b][iv] with Affidavit in Support" alleging that there was no evidence in the record that the loan was properly assigned to the Bank.

¶ 9 On August 20, 2015, Noonan filed a document titled "Motion to Dismiss for Lack of Jurisdiction pursuant to 725 ILCS 5/2-619 [sic] with Affidavit" where he argued that the Bank failed to prove that the grace period notice was sent because there was no evidence of proper postage. On August 28, 2015, the court heard oral arguments on the motions. During the oral arguments, Noonan argued for the first time that the grace period notice was defective due to a

typographical error listing the address 6147 N. Sayre Ave., Chicago Illinois instead of 6417 N. Sayre Ave., Chicago Illinois. The circuit court denied the motion to dismiss and the motion to reconsider. Noonan filed a notice of appeal seeking review of the circuit court's August 28, 2015 order.

¶ 10 ANALYSIS

¶ 11 On appeal, Noonan argues that the circuit court erred in denying his motion for reconsideration and his motion to dismiss when the Bank did not establish that it complied with the requirements of sending a proper grace period notice and a notice of acceleration.

¶ 12 We initially note that the trial court did not err in dismissing Noonan's motion to dismiss because the motion was procedurally improper and did not justify dismissal of the foreclosure. A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). For a motion to be properly brought under section 2-619, the motion (1) must be filed "within the time for pleading," and (2) must concern one of nine listed grounds. 735 ILCS 5/2–619(a) (West 2012). Filing a 2-619 motion after filing an answer, without requesting leave to withdraw the answer, is procedurally improper. *Gulley v. Noy*, 316 Ill. App. 3d 861, 866 (2000); see also Ill. S.Ct. R. 191(a) (eff. July 1, 2002) (section 2-619 motions "must be filed before the last date, if any, set by the trial court for the filing of dispositive motions"). A section 2-619 motion "is intended to be heard and decided before the expense and inconvenience of litigation has been borne by either party or the trial court." *Clemons v. Nissan N. Am., Inc.*, 2013 IL App (4th) 120943, ¶ 33. For a section 2-619 dismissal, our standard of review is *de novo*. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 275 (2009).

¶ 13 Here, Noonan brought the motion to dismiss on August 20, 2015, almost two years after he was served with summons and a copy of the complaint and after he already filed his answer. Noonan never sought leave to withdraw his answer. Moreover, he filed his motion to dismiss after the parties had filed motions for summary judgment, fully briefed, argued the issues, after the circuit court issued its ruling and confirmed the judicial sale. It was only after Noonan filed his motion to reconsider the order confirming the sale that he filed the motion to dismiss. At that juncture, Noonan's motion to dismiss was late and procedurally improper. See *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 26. Therefore, the circuit court did not err in denying Noonan's untimely motion to dismiss.

¶ 14 On appeal from his motion to reconsider, Noonan argues that the trial court abused its discretion in refusing to set aside the order confirming the sale. Noonan asserts that the Bank did not show that proper postage was paid and that the grace period notice contained the wrong address, listing the address of 6147 N. Sayre Ave., Chicago, Illinois instead of the correct one at 6417 N. Sayre Ave., Chicago, Illinois.

¶ 15 " 'Under the Foreclosure Law, after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b).' " *McCluskey*, 2013 IL 115469, ¶ 18 citing *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 179 (2008). Section 15-1508(b) states that the court shall confirm the sale unless it finds that (1) proper notice was not given; (2) 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 2012). Accordingly, the party seeking to avoid confirmation of the sale has the burden of showing why the circumstances of the case fall within section 15-1508(b).

¶ 16 Here, Noonan did not offer the circuit court any evidence demonstrating that the Bank failed to give requisite notice of the sale under section 15-1507, that the terms of the sale were unconscionable, or that the sale was conducted fraudulently, pursuant to section 15-1508(b)(i), (ii), and (iii). We therefore consider Noonan's argument within the framework of section 15-1508(b)(iv) only, which requires a showing that "justice was not otherwise done." 735 ILCS 5/15-1508(b)(iv) (West 2012). However, once a motion to confirm has been filed, a borrower seeking relief from a default judgment and sale pursuant to section 15-1508(b)(iv) must demonstrate "either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *McCluskey*, 2013 IL 115469, ¶ 26.

¶ 17 Noonan cites to our decision in *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, in support of his claim that justice was not otherwise done. In *Adeyiga*, the defendants filed a response to the Bank's summary judgment motion and a section 2-619 motion to dismiss the complaint, alleging "that the Bank had not met its burden of proof to show that it had mailed a grace period notice prior to the filing of the complaint." *Id.* ¶ 26. Attached to the defendants' pleading were affidavits in which they stated that they did not receive the statutory grace period notice required under section 15-1502.5 of the Foreclosure Law. *Id.* The plaintiff-bank did not deny that it failed to send the grace period notice; instead, it argued that the defendants had admitted to receiving the grace period notice where they did not raise the failure to send such notice as an affirmative defense. *Id.* ¶ 31.

¶ 18 Ultimately, the circuit court denied the defendants' motion to dismiss, and awarded the plaintiff summary judgment and judgment of foreclosure and sale. *Id.* ¶ 33. The court found that

where the plaintiff used the "form complaint" provided for in section 15-1504(a) of the Foreclosure Law, "the complaint included the 'deemed' allegation that 'other notices required to be given' had been given." *Id.* ¶ 36. The defendants appealed, arguing that the circuit court erred in finding that they had admitted receiving a grace period notice merely because they did not deny it in their answer. *Id.* ¶ 84. We held that "the trial court erred as a matter of law when it deemed that [the defendants] admitted to receiving the grace period notice, even though the Bank never showed evidence that it mailed or served a notice." *Id.* ¶ 112.

¶ 19 Noonan's reliance on *Adeyiga* is misplaced. In *Adeyiga*, the defendants raised their grace period notice defense prior to the entry of a judgment of foreclosure and sale, sale of the property, expiration of the redemption period following sale, and most importantly, before a motion to confirm the sale was filed. *Id.* ¶¶ 25–26. In contrast, here, Noonan did not raise the instant challenges that the grace period notice was defective due to the mislabeled address or that the Bank failed to prove that proper postage had been paid at any time during the underlying proceedings until after the Bank filed its motion to confirm the sale. The record indicates that while Noonan did contend that the grace period was improper in his motion for partial summary judgment and in his answer, he merely argued that the grace period notice was defective because it was sent by counsel for the Bank and not by the Bank itself. Accordingly, we find *Adeyiga* inapplicable here and our review of the circuit court's orders is confined to an analysis of whether the court abused its discretion when it confirmed the sale pursuant to section 15-1508(b).

¶ 20 Noonan did not point to anything in the record to demonstrate that there was any fraud or misrepresentation that prevented him from raising his defenses earlier, or that an equitable defense exists because he was otherwise prevented from protecting his property interests. *McCluskey*, 2013 IL 115469, ¶ 26. Noonan did not show that there was any fraud in this case

where he merely alleged that the Bank failed to send grace period notice. He did not show that he has an equitable defense because lack of grace period notice represents a statutory, rather than equitable, defense. Accordingly, we conclude that the alleged lack of grace period notice did not satisfy the grounds of section 15-1508(b) and the trial court did not abuse its discretion in refusing to set aside the order confirming the judicial sale. See *Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶¶ 31-36.

¶ 21 Noonan also argues that the Bank breached the mortgage contract by failing to properly accelerate the mortgage. Under the terms of the mortgage contract, the mortgagor was required, prior to accelerating the mortgage due to breach of any covenant or agreement in this security instrument, to give defendants notice specifying: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to the defendant, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this security instrument, foreclosure by judicial proceedings, and sale of the property. Noonan contends that there is insufficient evidence that the required notice was sent and the Bank thus failed to satisfy a condition precedent to bringing the present foreclosure action.

¶ 22 The record reflects that the Bank's predecessor in interest sent Noonan the notice of acceleration. Specially, on December 4, 2006, Chase Home Financing, LLC which was servicing the loan for U.S. Bank, the initial holder of the loan, sent Noonan an acceleration letter informing him that the loan was in default and that if he did not cure the default within 30 days it could exercise its right to accelerate the balance and pursue an action of foreclosure. On January 11, 2007, counsel for U.S. Bank sent defendant a letter informing him that it was attempting collection on the defaulted loan and that a foreclosure action would result if the

default was not cured. U.S. Bank filed a complaint for mortgage foreclosure when defendant failed to cure and subsequently assigned its interest in the loan to the Bank. The Bank re-instated the foreclosure action against Noonan.

¶ 23 Defendant does not dispute that the letters were sent or that he received them but seems to be arguing that the Bank was required to send an identical notice when it commenced the second foreclosure. However, the mortgage contract not require the Bank to issue a new notice every time it initiates a judicial proceeding on the mortgage contract, but instead requires that the Bank give the borrower proper notice prior to the initial acceleration of the debt. See *Fid. Bank v. Krenisky*, 72 Conn. App. 700, 708 (Conn. App. Ct. 2002) ("The Plaintiff provided such a notice before accelerating the debt and commencing its first foreclosure action; no further notice, such as a subsequent notice of default, notice of acceleration or foreclosure, was required prior to the plaintiff commencing its second foreclosure action. By instituting its first foreclosure action, the plaintiff validly exercised its right to accelerate the entire mortgage debt").

¶ 24 Here, it is undisputed by the parties that the 2006 letter complied with the acceleration notice requirements in the mortgage contract. Thus, for nearly 7 years before the Bank filed its complaint to foreclose Noonan had notice of the loan holder's ongoing intent to accelerate the debt. There is no evidence that in that time Noonan made any attempt to contact the Bank or its predecessors in interest to cure the default or to modify the terms of the loan, despite being given the appropriate information by the Bank and ample opportunity to do so. Accordingly, since the parties were in the same position at the initiation of the instant foreclosure action in August of 2013 as they were in December 2006 when the initial notice of acceleration was issued, we find that the Bank met its notice obligations under the mortgage. Therefore, the circuit court did not abuse its discretion in refusing to set aside the judicial sale based on this basis.

¶ 25 CONCLUSION

¶ 26 Based on the foregoing, we affirm the circuit court's judgment.

¶ 27 Affirmed.