FOURTH DIVISION
August 11, 2016

No. 1-15-2748

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"), A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 14 CH 16621
v.	)	
JOHN T. KURPIEL, JOHN K. KURPIEL, and CHARLENE KURPIEL,	)	Honorable Anna M. Loftus,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's confirmation of judicial sale affirmed. Trial court did not incorrectly find that it lacked discretion to vacate sale under provision that court could refuse to confirm sale if justice was not done. And defendants failed to show that plaintiff's alleged misleading statements about loan modification resulted in their inability to exercise any legal right to halt judicial sale.

¶ 2 Plaintiff Federal National Mortgage Association ("Fannie Mae") foreclosed on a mortgage it held on a home occupied by defendants John T. Kurpiel, John K. Kurpiel, and Charlene Kurpiel. After the property was sold at auction, Fannie Mae sought to have the sale confirmed by the trial court pursuant to section 15-1508(b) of the Code of Civil Procedure (735

ILCS 5/15-1508(b) (West 2014)), but defendants contested the confirmation on the basis that it would be unjust. See 735 ILCS 5/15-1508(b)(iv) (West 2014) (providing that trial court may refuse to confirm judicial sale where "justice was not otherwise done"). Specifically, defendants claimed that they had applied for a loan modification with Fannie Mae's loan servicer and had been told by the servicer that the loan had been approved. The trial court confirmed the sale over defendants' objection.

¶ 3 Defendants appeal, arguing that the trial court erroneously found that it lacked the discretion to vacate the sale because defendants had not alleged that there was a defect in the sale process itself. We reject that argument, as a plain reading of the trial court's order indicates that the trial court recognized its discretion to vacate the sale, but chose not to exercise it. And we reject the contention that the trial court abused its discretion in refusing to vacate the sale, where defendants could not demonstrate that Fannie Mae's actions precluded them from exercising any right that would have stopped or delayed the sale of the property. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 18, 2004, defendants executed a note and mortgage on property located at 5919 West Eddy Street in Chicago. Defendants defaulted on the note, but the borrowers were allowed to modify the terms of their loan pursuant to the Home Affordable Modification Program (HAMP) operated by the United States Department of the Treasury.[1]

[1] HAMP is a program designed for families who have experienced financial hardship and who could make their monthly mortgage payments if the terms were modified. The program has requirements for eligibility and provides incentives to encourage loan modification rather than foreclosure. See U.S. Dept. of Treasury, Home Affordable Modification Program (HAMP), https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx (last updated July 22, 2012).

¶ 6 Defendants once again defaulted on the modified note, and Fannie Mae filed a complaint for foreclosure on October 15, 2014. On January 29, 2015, the trial court entered a default judgment against defendants and a judgment of foreclosure and sale.

¶ 7 On April 13, 2015, Fannie Mae sent defendants a notice of sale, notifying defendants that the judgment of foreclosure had been entered on January 29, and that the property would be sold at public auction on May 19, 2015 at a specified time and location.

¶ 8 The public auction was held on May 19, 2015 and continued to May 20, at which time the property at issue was sold.

¶ 9 Fannie Mae then moved for confirmation of the sale, but defendants filed a written objection. Defendants included with their motion an affidavit from Rebecca Rutka-Kurpiel, the wife of John Kurpiel but not a listed borrower on the note.

¶ 10 In her affidavit, Rebecca said that she lived with defendants at the property and had filed an application for a loan modification with Fannie Mae's loan servicer, Seterus. According to the affidavit, on May 15, 2015, Rebecca called Seterus asking about the status of the application, and was told that "the loan modification application had been received *** and that Seterus had approved us for a modification and would mail us regarding the modification approval." Rebecca said that, after speaking to Seterus, she "was under the impression that [Fannie Mae] would not proceed with its judicial foreclosure sale."

¶ 11 After receiving notice that the property had been sold, Rebecca again called Seterus and asked for an explanation. She spoke to another employee of Seterus, who told her that the property had been sold and that she had been given incorrect information on May 15, 2015. She added:

> "Had I and the *** Defendants been correctly informed of the status of the loan modification application on May 15, 2015, we would have taken action prior to the judicial foreclosure sale to ask the Court to postpone the sale to allow for Seterus to review our application and make a decision on it. Seterus' actions prejudiced our ability to do so."

¶ 12 Defendants asked the court to deny confirmation based on section 15-1508(b)(iv) of the Code of Civil Procedure (735 ILCS 5/15-1508(b)(iv) (West 2014)), which provides that a court may decline to confirm a foreclosure sale when "justice was not otherwise done." Defendants argued that Rebecca's affidavit showed that justice was not done, as they were improperly told that their loan modification had been approved and, under Fannie Mae's own policies, they were entitled to expedited review of their application before the sale occurred.

¶ 13 Defendants also attached portions of Fannie Mae's loan modification guide. The guide said that, after a borrower had received a HAMP modification, he or she could not seek another HAMP modification but could seek a different type of modification. And the guide stated that, "[w]ithin five business days, the servicer [(here, Seterus)] must acknowledge its receipt of [a modification application] to the borrower in writing." The guide also required the loan servicer to conduct an expedited review of the application when a foreclosure was pending. Thus, defendants claimed, they were seeking a modification pursuant to Fannie Mae's own policies, but were not notified that their application had been denied before the foreclosure sale occurred.

¶ 14 Fannie Mae argued that the fact that defendants did not get another loan modification, when they had already received the HAMP modification, did not constitute an injustice under section 15-1508(b)(iv). Fannie Mae also argued that, even if Rebecca's affidavit was accurate,

"there would have been no basis to postpone the sale because there was no HAMP application pending."

¶ 15 In a written order, the court rejected defendant's request to deny confirmation under section 15-1508(b)(iv), stating that "only defects in the sale process itself provide a basis for vacatur under [that] provision." The court added:

> "The defendants' evidence and allegations that [Fannie Mae] did not consider them for certain loan modification options, and allegedly misrepresented the status of their settlement consideration, is distinguishable from a situation where the plaintiff has promised in writing to accept reinstatement or redemption through a date certain, and later reneged on that promise when the defendants remitted the required repayment. *cf. Citicorp Savings v. First Chicago Trust Co.*, 269 Ill. App. 3d 293, 295 (1995). The defendants have not cited to any appellate authority by which this court could use the justice provision to vacate the sale in these circumstances. Thus, the defendant's request to vacate the sale under Section 15-1508(b)(iv) is denied."

¶ 16 The trial court confirmed the foreclosure sale. Defendants filed this appeal.

¶ 17 II. ANALYSIS

¶ 18 Defendants first argue that the trial court erred in ruling that "only defects in the sale process itself provide a basis for vacating foreclosure sales under section 15-1508(b)(iv)." Defendants contend that the trial court incorrectly found that it lacked the discretion to vacate the sale under section 15-1508(b)(iv) for any reason other than a defect in the sale process.

¶ 19 A plain reading of the trial court's order refutes defendants' argument. The trial court declined to vacate the sale not because it thought it lacked the authority to do so, but rather because it determined, in the exercise of its discretion, that it should not. While the court said

that "only defects in the sale process itself provide a basis for vacatur under [section 15-1508(b)(iv)]," the court also distinguished defendants' complaint about the loan modification procedure from one in which a lender reneged on a promise to accept redemption payments. And the court noted that defendants had not cited any persuasive authority to support the notion that, in this case, justice was not done under section 15-1508(b)(iv). The trial court clearly considered defendants' section 15-1508(b)(iv) argument but rejected it on the merits. We disagree with defendants' claim that the trial court found that it lacked discretion under section 15-1508(b)(iv).

¶ 20 We also find no abuse of discretion in the trial court's refusal to vacate the sale under section 15-1508(b)(iv). See *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008) (court's decision to confirm or reject judicial sale under section 15-1508(b) reviewed for an abuse of discretion). “A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court.” *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005).

¶ 21 Under section 15-1508(b)(iv), a trial court may refuse to confirm a judicial sale of a foreclosed property if "justice was not otherwise done." 735 ILCS 5/15-1508(b)(iv) (West 2014). While section 15-1508(b)(iv) does not say what constitutes such an injustice, our supreme court has stated that this provision "merely codif[ies] the long-standing discretion of the courts of equity to refuse to confirm a judicial sale." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 19. "However, the contours of that discretion have been described as 'not a mere arbitrary discretion but must be exercised in accordance with established principles of law.' " *Id.* (quoting *Shultz v. Milburn*, 366 Ill. 400, 403 (1937)). Rather, "[t]o vacate both the sale and the underlying default judgment of foreclosure the borrower *** must establish under section 15-1508(b)(iv) that justice was not otherwise done because 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.

¶ 22 As sympathetic as we are with any family losing their home to foreclosure, the fact remains that defendants have not identified any meritorious defense they were prevented from raising, nor have they shown how they could have otherwise taken any action to stop the judicial sale. We reach this conclusion for several reasons.

¶ 23 First, a reminder of the operative dates in this dispute:

- October 15, 2014: Complaint for foreclosure filed, after defendants default on their already-once-modified note;
- January 29, 2015: Trial court enters judgment of foreclosure and sale;
- April 13, 2015: Fannie Mae sends defendants a notice of sale, notifying them of the judgment of foreclosure and of the judicial sale to take place on May 19, 2015;
- Friday, May 15, 2015: According to her affidavit, Rebecca has phone conversation with Fannie Mae's loan servicer, Seterus, during which conversation she is advised that a second loan modification has been approved.
- Tuesday, May 19, 2015: Public auction for judicial sale begins.

¶ 24 Accepting Rebecca's affidavit as true for the purposes of this discussion, the record before us thus shows that the information that lulled defendants into a false sense of security was provided to them on the Friday before the following Tuesday's judicial sale. Until that Friday, May 15—virtually on the eve of the judicial sale—defendants, by their own admission, had no reason to believe that they were going to stop the judicial sale from occurring. They certainly point to nothing that prevented them from raising a meritorious defense to the complaint filed in October 2014, and on which they were defaulted in January 2015.

¶ 25 Nor do they explain how, absent the incorrect information given to them on Friday, May 15, they "would have taken action *** to ask the Court to postpone the sale to allow for Seterus to review [their] application and make a decision on it." They have never claimed that they had a motion filed, or even ready to be filed, to prevent the sale the following Tuesday, before Seterus told them their second loan modification had been approved.

¶ 26 And more to the point, they do not explain what the content of that last-minute legal challenge to the upcoming judicial sale would have been. They concede that they were not entitled to a second HAMP modification, so they could not availed themselves of the provision in section 15-508 that renders a judicial sale invalid if a valid HAMP application is pending. See 735 ILCS 5/15-1508(d-5) (West 2014) (sale must be set aside where mortgagor can prove by preponderance of evidence that he or she applied for HAMP modification, and home was sold "in material violation of the program's requirements"). Defendants, correctly, have made no attempt to claim protection under that statutory provision.

¶ 27 Absent that, defendants have not cited any contractual or statutory provision that would have obliged Fannie Mae to consider a second request for some other kind of loan modification or some settlement offer. Without any indication that defendants were prevented from exercising any right to stop or at least delay the judicial sale, we cannot say that the trial court abused its discretion.

¶ 28 Those cases that have found it appropriate to use section 15-1508(b)(iv) to vacate a judicial sale are illustrative. In each of those cases, the lenders took some action that prevented the borrowers from exercising a legal right that they held that would prevent the judicial sale from going forward; frequently, they prevented the borrowers from exercising their right to redeem the property. See, *e.g.*, *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 386-87, 389

(1997) (borrowers tendered lender "the total amount of the mortgage foreclosure judgment" during the statutory redemption period, but lender sold property anyway, even though lender promised borrowers it would not proceed with sale if it received full payment); *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915, 927-28 (1997) (mortgagee sold property for one-sixth of fair market value even though mortgagor repeatedly informed mortgagee that she had the money to redeem the property and wanted to do so); *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill. App. 3d 293, 295, 300-01 (1995) (affirming refusal to confirm sale where mortgagee told mortgagors they would accept reinstatement payment through a certain date, but then proceeded with judicial sale before that date even though mortgagors had the necessary funds to reinstate mortgage).

¶ 29 Here, defendants do not allege that they had the money to redeem the property and satisfy the foreclosure judgment. They do not claim a lack of time to redeem, or that Fannie Mae's actions somehow thwarted their good-faith attempt to redeem. They do not claim that they lacked notice of the judicial sale. They do not claim that they were prevented from raising some meritorious defense. Nor do they allege that they were entitled—whether through an agreement with Fannie Mae or by law—to any further modifications of the note and mortgage.

¶ 30 Simply put, defendants have not shown that Fannie Mae's actions prevented them from doing anything that would have stopped the sale of the property. Instead, defendants merely alleged that they would have taken some unspecified action to try to delay the foreclosure sale had they known that the loan modification had been denied. In these circumstances, we cannot say that the trial court's ruling was so unreasonable that no reasonable person would adopt the trial court's view. *Schneider*, 214 Ill. 2d at 173. We find no abuse of discretion in the trial court's refusal to vacate the sale under section 15-1508(b)(iv).

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated above, we affirm the trial court's judgment.

¶ 33 Affirmed.