FOURTH DIVISION
June 22, 2017

No. 1-16-2228

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWALT, INC. ALTERNATIVE LOAN TRUST 2006-13T1 MORTGAGE PASS-THROUGH CERTIFICATES, 2006-13T1,	)	Appeal from the Circuit Court Cook County.
Plaintiff-Appellee,	)	
v.	)	
PETRU AMAREI, ANISOARA AMAREI a/k/a ANNIE AMMAREI, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., BMO HARRIS BANK, N.A. f/k/a HARRIS, N.A., UNKNOWN OWNERS, and NONRECORD CLAIMANTS,	)	No. 11 CH 32549
Defendants,	)	
(Petru Amarei,	)	Honorable Darryl B. Simko,
Defendant-Appellant).	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in confirming the foreclosure sale and denying defendant's motion to vacate the sale where defendant did not file a

timely application for mortgage assistance, and (2) the trial court properly granted summary judgment where defendant failed to create an issue of material fact.

¶ 2 Plaintiff, Bank of New York Mellon, filed a mortgage foreclosure complaint in September 2011, against defendant Petru Amarei. In November 2015, the trial court entered a judgment of foreclosure and sale in plaintiff's favor. A judicial sale was held and plaintiff filed a motion to confirm the sale in April 2016. Defendant moved to vacate the foreclosure and sale, which the trial court denied and subsequently confirmed the sale in July 2016.

¶ 3 Defendant appeals, arguing that (1) the trial court erred in denying defendant's motion to vacate the sale because defendant had submitted an application with the Home Affordable Modification Program (HAMP) prior to date of the sale, and (2) the trial court erred in granting plaintiff's motion for summary judgment where plaintiff failed to provide sufficient evidence to establish that it sent defendant a notice of acceleration prior to filing foreclosure action.

¶ 4 In September 2011, plaintiff filed a complaint to foreclose mortgage against defendant. The complaint alleged that on March 8, 2006, defendant, as mortgagor, executed a mortgage in the amount of $591,920.00, for the property located at 6425 North Longmeadow Avenue in Lincolnwood, Illinois. The complaint stated that defendant had not paid the monthly payments since February 2009. The total amount due at the time of the complaint was $590,119.77. The mortgage and note were attached to the complaint as exhibits. Defendant and his wife Anisoara Amarei signed the mortgage, but only defendant signed the note.[1]

¶ 5 In October 2012, defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)), arguing that (1) the complaint was legally insufficient under section 2-615 (735 ILCS 5/2-615 (West 2012)) because the plaintiff failed to name all parties in the body of the complaint, and (2) pursuant to

[1] Anisoara Amarei is not a party to the appeal.

section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2012)) the complaint was barred because defendant did not receive a letter of default or notice of acceleration prior to the filing of the foreclosure action as required by the mortgage, plaintiff failed to give defendant a grace period notice, and plaintiff lacked standing because it was not the holder of the note. Defendant attached his own affidavit stating that he has lived continuously at the subject property and did not receive the requisite acceleration or grace period notices.

¶ 6 In response, plaintiff asserted that its complaint properly adhered to the pleading requirements of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2012)), defendants failed to allege any specific facts relating to failure to give notice of acceleration or grace period notice, and plaintiff's standing was established by the endorsed note. Plaintiff attached a copy of notice of intent to accelerate addressed to defendant at the subject property dated March 27, 2009, as well as a grace period notice addressed to defendant at the subject property dated April 21, 2009. In his reply, defendant contended that his affidavit remained uncontroverted since plaintiff did not support its response with any affidavits. Plaintiff filed an amended response to the motion to dismiss which reasserted the same arguments and included an attached affidavit from Candace Parker, the "operations team lead" for Bank of America. Parker stated that Bank of America maintains records for this loan in its capacity as the servicer of the loan. She further stated that she has personal knowledge of Bank of America's procedures for maintaining business records, and the business records were kept electronically through equipment that is industry standard, and the entries were made in the regular course of business at or reasonably near the happening of the event recorded. Parker further stated that a notice of intent to accelerate was sent to defendant via first class mail on March 27, 2009, at the subject property and a grace period notice was sent to defendant on April

21, 2009, at the subject property. The trial court subsequently denied defendant's motion to dismiss in entirety.

¶ 7 In December 2012, defendant filed his answer and affirmative defenses to plaintiff's complaint. In his answer, defendant stated that, "Defendants not having received the notice of default and acceleration as required by the mortgage and the 'grace period notice' required by statute, neither admit nor deny the deemed allegation regarding required notices having been given, and demand strict proof thereof." Defendant raised six affirmative defenses and two counterclaims. Defendant's affirmative defenses were (1) a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2012)); (2) plaintiff committed common law fraud; (3) failed to give grace period notice; (4) failure to perform condition precedent of notice of acceleration prior to filing foreclosure complaint; (5) plaintiff lacked standing; and (6) failure to provide HAMP loan modification options. Defendant also asserted counterclaims of a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and common law fraud.

¶ 8 In February 2013, plaintiff filed motions to strike defendant's affirmative defenses and to dismiss defendant's counterclaims. In May 2013, following briefing, the trial court dismissed defendant's counterclaims with prejudice. In December 2013, plaintiff's motion to strike affirmative defenses was withdrawn without prejudice because defendant filed a chapter 7 bankruptcy in November 2013. In April 2014, plaintiff filed notice that it would present its motion to strike defendant's affirmative defenses. In May 2014, following a hearing, the trial court granted plaintiff's motion. The court dismissed five of the affirmative defenses with prejudice, but dismissed the common law fraud defense without prejudice and allowed 21 days to replead. Defendant filed his amended answer and affirmative defense in June 2014. Plaintiff

subsequently filed a motion to strike the amended affirmative defense, which the trial court granted with prejudice in January 2015.

¶ 9 In July 2015, plaintiff filed a motion for summary judgment arguing that no genuine issue of material fact remained with respect to defendant's default under the terms of the note and mortgage, and the amount due to plaintiff. In support, plaintiff attached an affidavit from an assistant vice president for plaintiff's servicer detailing the amount due and owing. In September 2015, defendant filed his response to the motion for summary judgment and asserted issues of material fact exist as to whether plaintiff satisfied a condition precedent to the mortgage by mailing a notice of acceleration. Defendant also contended that plaintiff's supporting affidavit was defective under Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)) because it was not based on personal knowledge. In October 2015, plaintiff filed its reply and maintained that there were no issues of material fact to preclude summary judgment.

¶ 10 The trial court's ruling on plaintiff's summary judgment motion is not contained in the record on appeal, but both parties agree that the court granted the motion in November 2015. Also in November 2015, the court entered a judgment of foreclosure and sale in the amount of $1,000,309.43. In December 2015, plaintiff initially filed a notice for a judicial sale to occur on February 3, 2016. Later in March 2016, plaintiff filed a notice of judicial sale set for April 21, 2016, which sale occurred. On April 26, 2016, plaintiff filed its motion for order approving report of sale and distribution and a motion for an order of possession. The report of sale and distribution stated that plaintiff placed the highest bid of $461,280 on the subject property. The report also stated that the sale resulted in a deficiency of $593,229.76.

¶ 11 In May 2016, defendant filed a motion to vacate the judicial sale. In his motion, defendant asserted that in December 2015, he hired Citizens Law Group (Citizens) to assist him

in applying for a loan modification. He argued that plaintiff's servicer acted in bad faith by proceeding with the judicial sale on April 21, 2016, after defendant and Citizens had been advised that the sale had been postponed because the file was under review for the loan modification. Defendant contended that he submitted a timely application and diligently submitted any additional requested documents and the judicial sale was conducted in violation of HAMP guidelines as well as section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2014)). In support of his motion, defendant included printed emails between himself and Citizens' attorneys discussing whether the judicial sale had been postponed, and communications from plaintiff's servicer on the sale date. Defendant advanced similar arguments in his response to plaintiff's motion to confirm judicial sale. Defendant attached an affidavit from a loss mitigation processor for Citizens stating that she was informed on April 15, 2016, by the lender's loan mitigation department that the April 21 sale date was no longer scheduled.

¶ 12 In June 2016, plaintiff filed its response to defendant's motion to vacate the judicial sale. Plaintiff stated that it postponed the scheduled February sale due to a pending loss mitigation application. The sale was subsequently rescheduled for March 21, 2016, but later postponed because of a change in loan servicer. The sale was then set for April 21. Plaintiff argued that no violation of the Foreclosure Law occurred in conducting the sale on April 21. Plaintiff asserted that defendant failed to authenticate his documents with an affidavit attesting that the copies were true and accurate, and that his exhibits were hearsay because they purported to offer statements "made by a third party relaying statements made by the servicer." Plaintiff also contended that defendant failed to establish that he applied for assistance seven business days prior to the scheduled sale as required under HAMP and the Foreclosure Law. Plaintiff observed

that defendant was submitting documents on April 13 and 15, which was less than seven business days prior to the sale date. Plaintiff attached an affidavit from Danielle Cull, an employer of Ditech Financial, the loan servicer for plaintiff. She stated that she had personal knowledge of Ditech's procedures for creating and maintaining its business records. Based on her review, the business records relating to defendant's loss mitigation application included notations of missing documents. Defendant was advised of the needed missing documents in March and April 2016. A document was received via fax on April 15, 2016. Based upon her review, on April 20, 2016, the file was reviewed and all documents had been received for underwriting, but the judicial sale was unable to be postponed. An exhibit of a table logging all dates, information, and user relating to the application was attached. Plaintiff also filed its reply in support of its motion to approve the judicial sale arguing that defendant has not met his burden under section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2014)), as discussed in its response to the motion to vacate. Plaintiff also asserted that defendant failed to establish any of the bases for denial of confirmation under section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508(b) (West 2014)).

¶ 13 In July 2016, defendant filed his reply in support of his motion to vacate the judicial sale. Defendant argued that he submitted his initial loan mitigation application package in January 2016 to plaintiff's prior loan servicer. When Ditech became the loan servicer, defendant submitted his application package and complied with additional document requests. Defendant further contends that Ditech was required to send defendant written notice regarding its decision on his application. He never received a "non-approval" notice. Under HAMP guidelines, defendant argued that he was entitled to have 30 days from non-approval to provide

supplemental documents for review or consider other options. Defendant attached documents from his loan modification application.

¶ 14 In August 2016, the trial court denied defendant's motion to vacate the judicial sale, stating that "defendant did not meet the burden to show that they fulfilled the requirements of HAMP in a timely manner." The court in separate order granted plaintiff's motion approving the report of sale and distribution and order of possession.

¶ 15 This appeal followed.

¶ 16 On appeal, defendant argues that (1) the trial court erred in denying his motion to vacate the judicial sale because he submitted a timely loan modification application and the property was sold in violation of HAMP guidelines; and (2) the trial court erred in granting summary judgment in favor of plaintiff when plaintiff failed to provide sufficient evidence that it sent defendant notice of acceleration prior to filing its foreclosure action.

¶ 17 We note that no record of proceedings or bystander's report was provided on appeal. It is the duty of the appellant to present this court with a sufficiently complete record of the trial court proceedings to support his claims of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003). "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). Therefore, when the issue on appeal relates to the conduct of a hearing or proceeding, the absence of a transcript or other record of that proceeding means this court must presume the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Rogers*, 204 Ill. 2d at 319. We review a trial court's decision approving a judicial sale for an abuse of discretion. *CitiMortgage, Inc. v.*

Bermudez, 2014 IL App (1st) 122824, ¶ 57 (citing *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008)).

¶ 18 Section 15-1508(d-5) provides, in relevant part:

> "The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program [(MHAP)] established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale." 735 ILCS 5/15-1508(d-5) (West 2014).

¶ 19 Section 15-1508(d-5) "provides an alternate vehicle under which a court must set aside a judicial sale if all statutory requirements are met." *Bermudez*, 2014 IL App (1st) 122824, ¶ 59. Defendant asserts that he submitted a timely complete HAMP application, which was sufficient to delay the judicial sale. "The mortgagor bears the burden of proving the requirements of section 15-1508(d-5) by a preponderance of the evidence." *CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 47.

¶ 20 The reviewing court in *Bermudez* considered what the phrase "applied for assistance" means under section 15-1508(d-5). In that case, the defendants applied to participate in a "Trial Period Plan" under HAMP, which offered a three-month forbearance plan in which the borrower

makes payments of the estimated modified payment as part of modification program. *Bermudez*, 2014 IL App (1st) 122824, ¶ 6.

¶ 21 After considering the plain meaning of the words "apply" and "assistance," the *Bermudez* court concluded that, "[c]onstruing the language of the statute according to its plain meaning, 'applied for assistance under MHAP' means to formally apply, usually in writing, for help pursuant to the procedures set forth by HAMP, a component of MHAP." *Id.* ¶ 64. Further, "in order to 'apply for assistance under MHAP' pursuant to section 15-1508(d-5) of the Foreclosure Law the borrower must submit the documentation required by the servicer to determine the borrower's eligibility and verify his or her income." *Id.* ¶ 66.

¶ 22 In *Bermudez*, the court found that the defendants failed to show by a preponderance of the evidence that they had "applied for assistance under MHAP" because they failed to provide the required documentation, including a hardship affidavit, a profit-loss statement for a self-employed borrower, and separate tax transcript requests from each defendant. *Id.* ¶ 67. The court also noted that the defendants did not attach the documents they submitted to the bank with their motion to set aside the sale. *Id.* ¶ 68.

¶ 23 The parties agree that under HAMP guidelines, the deadline to file an application for review is no later than midnight of the seventh business day prior to scheduled sale date. If such application documents are received by that deadline, then the servicer must suspend the sale to review the mortgagor's HAMP application. "Servicers are not required to suspend a foreclosure sale when *** a request for HAMP consideration is received after the Deadline." MHAP Handbook for Servicers of Non-GSE Mortgages, Version 5.0, § 3.3 (Jan. 6, 2016).

¶ 24 Here, the deadline was by midnight on April 12, 2016. In its brief, defendant admits that additional documents were requested on April 12, specifically a three-month profit and loss

statement for PA Realty, a business belonging to defendant. The document was submitted on April 13. The final document, a miscellaneous income verification document, was received via fax to plaintiff's servicer on April 15. Defendant contends that the operative date was the filing of his initial application on January 8, 2016, with plaintiff's prior servicer, but cites no authority that the initial application with subsequent requests for additional documentation is sufficient to postpone a judicial sale under HAMP guidelines. Supreme Court Rule 341(h)(7) requires an appellant to include in its brief an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Moreover, it is well-settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal. *Wasleff v. Dever*, 194 Ill. App. 3d 147, 155-56 (1990). Additionally, while defendant has submitted copies of his application to the trial court, he failed to authenticate the documents as true and correct. See *Bermudez*, 2014 IL App (1st) 122824, ¶ 68 (observing that the defendant failed to present sworn evidence that copies of the document is what the party claims it to be).

¶ 25 Defendant also argues that plaintiff's servicer's actions "ran afoul of the very reason for which the program was initiated, which was to assist borrowers in maintaining their properties." The actions at issue were defendant's assertion that representatives from the servicer informed defendant and Citizens' representatives that the sale had been postponed, but in fact, it had not. Again, defendant fails to cite any authority to support his claim that incorrect or misleading statements from a loan servicer's representative are sufficient to postpone a sale. While it is concerning that misinformation may be disclosed to mortgagors, it cannot change the fact that

defendant failed to submit a complete application by the deadline as required under section 15-1508(d-5). Whether the servicer's representatives misinformed defendant does not change the fact that defendant failed to submit a complete application, including all documents requested by the loan servicer, by the deadline.

¶ 26 Defendant further contends that the judicial sale violated HAMP guidelines that require the servicer to send the mortgagor a "non-approval notice" after the application has been reviewed and that a foreclosure sale may not occur within 30 calendar days after the non-approval notice. Defendant does not cite any authority in which the failure to send a non-approval notice constituted a material violation under section 15-1508(d-5), such that the foreclosure sale should be vacated, nor can this court find a case that considered the failure to send a non-approval notice. Moreover, we find defendant's argument to be misplaced. If the foreclosure sale occurred prior to a determination of defendant's untimely application, then no notice would be required. Further, defendant offers no evidence that a review and decision had been rendered on his application at all, and thus, the 30-day grace period was never triggered. Once the foreclosure sale occurred, defendant's untimely application was rendered moot.

¶ 27 As we previously observed, the record on appeal does not include a report of proceedings or a bystander's report from the hearing on plaintiff's motion to confirm the sale and defendant's motion to vacate the sale. Since we are reviewing for an abuse of discretion, absent these transcripts, we must presume that the trial court was in conformity with the law and had a sufficient factual basis. *Rogers*, 204 Ill. 2d at 319. Based on the record before us, we cannot say that the trial court abused its discretion in concluding that defendant failed to prove by a preponderance of the evidence that he submitted a timely application for assistance under HAMP and in denying defendant's motion and confirming the sale.

¶ 28 Next, defendant asserts that the trial court erred in granting plaintiff's motion for summary judgment because there were unresolved issues of material fact. Specifically, defendant contends that there was a question of fact regarding whether plaintiff properly sent a notice of acceleration to defendant as a condition precedent to filing the foreclosure action. Plaintiff maintains that this issue is without merit because the undisputed evidence shows that the required notice was sent, and defendant not deny the allegations that the notice was sent in his answer to the complaint. It is uncontested that the mortgage required notice of acceleration be provided to defendant as the borrower.

¶ 29 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). We review cases involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 30 While 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." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "If a party moving for summary judgment supplies facts which, if not contradicted, would entitle such party to a judgment as a matter of law, the opposing party cannot rely on his pleadings alone to raise issues of material fact." *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). An affidavit operates as testimony at trial in the summary judgment context. *Robidoux*, 201 Ill. 2d at 335. Therefore, facts contained in an affidavit in support of a motion for summary

judgment that are not contradicted by a counteraffidavit are admitted and must be taken as true for purposes of the motion for summary judgment. *Purtill*, 111 Ill.2d at 241.

¶ 31 Defendant previously raised this argument in his motion to dismiss, which was denied, as an affirmative defense, which was stricken, and in his response to plaintiff's summary judgment motion. Each time, defendant supported this argument with a single affidavit in which he stated that he never received the notice. In response, plaintiff filed an affidavit from Candace Parker, the "operations team lead" for Bank of America, stating that she has personal knowledge of Bank of America's procedures for maintaining business records, and the business records were kept electronically through equipment that is industry standard, and the entries were made in the regular course of business at or reasonably near the happening of the event recorded. Parker further stated that a notice of intent to accelerate was sent to defendant via first class mail on March 27, 2009, at the subject property. A copy of the notice was attached to the affidavit as a business record. Defendant asserts that plaintiff failed to provide a counteraffidavit to contradict his affidavit, and therefore, a question of material fact remains. We are not persuaded.

¶ 32 In *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, this court held that the defendants' unsupported denial that they received the acceleration notice was "insufficient to create a genuine issue of material fact, which would defeat CitiMortgage's entitlement to summary judgment." *Id.* ¶ 17-19; see also *Purtill*, 111 Ill. 2d at 241.

¶ 33 Defendant relies on the decision in *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, as support. We find such reliance to be misplaced. As plaintiff notes, in *Acetturo*, the reviewing court distinguished the case from *Bukowski* by pointing out that the defendant in its case did not assert that she failed to receive notice as required under the mortgage, but rather, she argued that

while the bank sent notice, the notice failed to provide the information required by the mortgage terms. *Id.* ¶ 47. Accordingly, the holding in *Acetturo* is distinguishable from the instant case.

¶ 34 Here, the only evidence submitted by defendant on the question of whether notice of acceleration was sent is defendant's own affidavit denying receipt of said notice. However, in response, plaintiff submitted an affidavit and business records showing that the notice of acceleration was properly sent. We agree with *Bukowski* that an unsupported denial is insufficient to create a genuine issue of material fact to preclude the grant of summary judgment. Thus, we find that the trial court did not err in granting plaintiff's motion for summary judgment.

¶ 35 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 36 Affirmed.