SECOND DIVISION
August 21, 2018

No. 1-17-1193

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Plaintiff-Appellee, v. LIDIA D. POPA a/k/a Lidia Daniela Popa; GABRIEL E. POPA; WASHINGTON MUTUAL BANK; and UNKNOWN OWNERS AND NON-RECORD CLAIMAINTS, Defendants (Lidia D. Popa, Defendant-Appellant.)	)	Appeal from the Circuit Court of Cook County No. 11 CH 1732 Honorable Michael Otto, Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of plaintiff affirmed where defendant failed to timely raise affirmative defense regarding alleged inadequacy of notice of acceleration.

¶ 2 This case arises out of a May 2011 complaint to foreclose the mortgage of defendant-appellant Lidia Popa. The trial court granted summary judgment in favor of plaintiff-appellee U.S. Bank Trust in August 2016 and denied Popa's motion for

reconsideration. The property was sold in January 2017, and the court entered an order approving the sale on April 12, 2017.

¶ 3 On appeal, Popa challenges the entry of summary judgment in favor of U.S. Bank Trust as well as the denial of her motion for reconsideration and the approval of the sale of the property on the ground that the court erred in finding that she waived her affirmative defense that the lender did not send an adequate notice of acceleration as required by the terms of her mortgage. Finding no error, we affirm.

¶ 4 BACKGROUND

¶ 5 On October 13, 2006, Washington Mutual Bank, F.A. loaned Popa $1,215,000 in exchange for a mortgage on her home at 1182 Carol Lane in Glencoe, Illinois. Popa executed a note promising to repay the principal of the loan and the interest thereon. Two provisions of the mortgage are relevant to this appeal: first, paragraph 15, titled "Notices" provides:

> "All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

Second, paragraph 22, titled "Acceleration; Remedies," states, in relevant part:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (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 borrower, 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 proceeding and sale of the Property. ***."

¶ 6 Popa defaulted on the loan in March 2010.[1] At the time of default, the loan had been sold to Chase Home Finance, LLC, who sent Popa a letter titled "Notice of Collection Activity," dated July 6, 2010. The letter informed Popa that she had 30 days from the date of the letter to cure the default, but that if she failed to do so, Chase Home Finance could declare the outstanding principal balance, accrued interest, and any other fees immediately due.

¶ 7 JP Morgan Chase Bank (which had merged with Chase Home Finance, LLC), brought this foreclosure action against Popa on May 11, 2011. Popa answered the complaint and asserted several affirmative defenses, including an allegation that the lender failed to "perform condition precedent to filing foreclosure complaint." The defense, in its entirety, stated:

> "Plaintiff did not mail and Defendants did not receive a notice of acceleration as required by paragraph 22 of the mortgage from Plaintiff, its servicer or attorneys prior to the filing of this petition to foreclose. Defendants have at all relevant times received uninterrupted mail service at their home. They have received no notice from relatives or the U.S. Postal Service of

[1] Prior to default, in May 2009, Popa executed a quitclaim deed and transferred her interest in the subject real property to her son, Gabriel E. Popa. Lidia alone remained on the note.

any problems with the delivery of their mail. There is no history of documents or packages mailed through the U.S. Postal Service not being received."

¶ 8 In its reply, JP Morgan stated that it lacked knowledge sufficient to form a belief as to Popa's mail service but denied all other allegations. Later, on December 11, 2014, JP Morgan filed an affidavit of mailing, in which an operations support specialist averred that the July 6, 2010 Notice of Collection Activity letter was sent to Popa at the Carol Lane address via first class mail. The affidavit further stated that in the course of its business, JP Morgan regularly obtained proof of mailing of such letters from the U.S. Postal Service at or near the time of mailing. Attached to the affidavit was a bulk mail receipt with a print date of July 7, 2010, showing that a "breach letter" was mailed to Popa. The bulk mail receipt bore a U.S. Postal Service stamp dated July 8, 2010.

¶ 9 Plaintiff U.S. Bank Trust, to whom the loan was ultimately sold, moved for summary judgment in February 2016, almost five years after the original complaint for foreclosure was filed. The delay was due, in part, to several motions filed by both Popa as well as her purported assignees, namely the Daniela A. Popa Revocable Living Trust, to which Popa had attempted to deed her interest in the property. (The trial court ultimately vacated its decision allowing the Daniela A. Popa Revocable Living Trust to intervene in the foreclosure proceedings, and the Trust is not a party to this appeal.)

¶ 10 Popa eventually responded to the motion for summary judgment in July 2016, after requesting an extension of time to take the deposition of U.S. Bank Trust's agent. In her response, Popa argued, among other things, that there were issues of material fact as to whether the lender complied with the terms of the mortgage with respect to the acceleration notice. Popa did not dispute that the Notice of Collection Activity letter

amounted to an acceleration notice, but argued that the letter, while dated July 6, was not sent until July 8, as reflected on the stamp on the bulk mail receipt attached to the affidavit of mailing. Thus, pursuant to paragraphs 15 and 22 of the mortgage, she should have had 30 days from July 8 to cure the default; however, the acceleration notice only gave her 30 days from the date of the letter – July 6 – to cure the default. In its reply, U.S. Bank Trust pointed out that this argument differed from Popa's initial affirmative defense, in which she alleged that she had never received the acceleration notice.

¶ 11 The trial court granted summary judgment in favor of U.S. Bank Trust on August 23, 2016, finding that the issues raised regarding the acceleration notice were "insufficiently raised in prior pleadings" and were improperly raised for the first time in response to U.S. Bank Trust's motion for summary judgment.

¶ 12 On November 14, 2016, Popa filed a motion to reconsider[2] in light of *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 33, where this court held that a notice of acceleration was a condition precedent to acceleration and foreclosure. In the alternative, Popa's motion sought leave to amend her pleadings to conform to the proofs, *i.e.*, the affidavit of mailing attached to U.S. Bank Trust's motion for summary judgment. The trial court denied the motion to reconsider on the grounds that it was untimely and without merit, and further found that its ruling was consistent with *Accetturo*. The court did not address Popa's motion in the alternative to amend her pleading.

¶ 13 The property was sold at a foreclosure sale in January 2017, and the court

[2] The motion to reconsider is attached as an exhibit to Popa's brief, but was not made part of the record on appeal; as such, we cannot consider it. *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 329 Ill. App. 3d 908, 929 (2002) (reviewing court may not consider any material outside certified record). However, we are able to discern the content of the motion from U.S. Bank Trust's response, as well as Popa's reply in support of the motion, both of which are included in the record.

approved the sale over Popa's objection on April 12, 2017. Popa timely appealed.

¶ 14 ANALYSIS

¶ 15 Here, Popa argues that the court erred in granting summary judgment in favor of U.S. Bank Trust and approving the sale of the property because she raised an issue of fact as to whether the acceleration notice allowed her sufficient time to cure her default.

¶ 16 Summary judgment is appropriate when the pleadings, depositions and affidavits, viewed in the light most favorable to the non-movant, do not raise a genuine issue of material fact, therefore entitling the moving party to judgment as a matter of law. 730 ILCS 5/2-1005 (West 2016); *Progressive Universal Insurance Co. of Illinois v. Libert Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 127-28 (2005). We review *de novo* a trial court's ruling on a motion for summary judgment. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 17 The trial court's decision to grant U.S. Bank Trust's motion for summary judgment was based in relevant part on its finding that Popa waived her argument regarding the alleged defect in the acceleration notice because she did not raise it as an affirmative defense in her answer.

¶ 18 Initially, Popa argues that she did, in fact, timely raise the inadequacy of the acceleration notice, but even a cursory reading of her answer refutes this contention. Her affirmative defense with regard to the acceleration notice began with the allegation that "[p]laintiff did not mail and [d]efendants did not receive a notice of acceleration as required by paragraph 22 of the mortgage." The fact that her defense was premised solely on her non-receipt of the notice is borne out by the fact that the remainder of the allegations in this affirmative defense discuss the mail service at her address.

Specifically, Popa alleged that that she had received "uninterrupted mail service," had "not received notice from relatives or the U.S. Postal Service of any problems with the delivery" of mail, and was unaware of "documents or packages mailed through the U.S. Postal Service not being received or delivered." Thus, while Popa maintains that the language "as required by paragraph 22 of the mortgage" encompassed her argument that the notice was defective, the remainder of the defense reflects that Popa's actual claim was that she did not receive the notice.

¶ 19 Generally, the failure to raise an affirmative defense in an answer waives the defense. See 735 ILCS 5/2-613(d) (West 2016); *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 53-54 (2003). However, under certain circumstances, particularly where there is no surprise to the opposing party, courts have held that an affirmative defense may be raised for the first time in a motion for summary judgment. *Falcon Funding, LLC v. City of Chicago*, 399 Ill. App. 3d 142, 156 (2010); see also *Hanley*, 343 Ill. App. 3d at 54 (collecting cases). We review the trial court's finding of waiver for an abuse of discretion. *Horwitz v. Bankers Life & Casualty Co.*, 319 Ill. App. 3d 390, 399 (2001). An abuse of discretion occurs where the court's ruling is so arbitrary, fanciful, or unreasonable that no reasonable person could agree with it. *People v. Ward*, 2011 IL 108690, ¶ 21.

¶ 20 The record reflects that Popa's delay in raising her affirmative defense surprised U.S. Bank Trust. JP Morgan (the previous mortgage holder) filed its affidavit of mailing in December 2014 in response to Popa's original affirmative defense that she never received the notice of acceleration. It was not until over one and a half years later (and only in response to U.S. Bank Trust's motion for summary judgment) that Popa alleged

the notice was not mailed on the date it was sent, leaving her with insufficient time to cure the default under the terms of paragraph 22 of the mortgage. U.S. Bank Trust could not but be surprised by this new allegation, given Popa's original representation that she never received the acceleration notice in the first place. Additionally, Popa, having been provided a copy of the notice sent to her and thus aware that her allegation of non-receipt would fail, had more than adequate opportunity to amend her affirmative defense to raise any alleged deficiencies in the notice. Popa's failure to raise this affirmative defense earlier coupled with the surprise to U.S. Bank Trust leads us to conclude that the trial court's finding that Popa waived her affirmative defense regarding the deficiency of the acceleration notice was not an abuse of discretion.

¶ 21 But even assuming that Popa did not waive her defense regarding the deficiency in the notice of acceleration, it was nevertheless insufficient to preclude summary judgment in favor of U.S. Bank Trust. Popa claims that the acceleration notice erroneously provided her with only 28 days – not the 30 required pursuant to paragraph 22 of the mortgage – to cure her default. In all other respects, Popa does not dispute that the notice conformed to the requirements of paragraph 22: it specified that the loan was in default, how Popa could cure that default, and that the failure to cure the default could result in acceleration of the amount due under the mortgage, foreclosure, and/or sale of the property.

¶ 22 Under these circumstances, the fact that the notice gave Popa two fewer days than that required under paragraph 22 of the mortgage to cure the default can only be construed as a technical defect. And "a technical defect in the notice sent to the mortgagor will not automatically warrant a dismissal of a foreclosure action." See

Accetturo, 2016 IL App (1st) 152783, ¶ 42 (citing *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15). Rather, where the mortgagor alleges only a technical defect and no resulting prejudice, dismissing the foreclosure complaint (or vacating the foreclosure) to permit new notice would be futile. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27; see also *PNC Bank, N.A. v. Wilson*, 2017 IL App (2d) 151189, ¶ 24. Here, Popa made no attempt to allege prejudice in connection with this alleged defect in the notice, and any such attempt would have been disingenuous. Nothing in the record indicates that she could have cured the $35,050.70 default on her $1.2 million loan if given an additional 48 hours to do so. Indeed, nothing in the record indicates she made any payments on the loan in the 10 months between the date of the acceleration notice and the commencement of this foreclosure action. For these reasons, even if the court had found that Popa did not waive her affirmative defense regarding the deficiency in the acceleration notice, Popa would nevertheless not have been entitled to any relief.

¶ 23 And with regard to Popa's original affirmative defense that a notice of acceleration was never sent, U.S. Bank Trust supported its motion for summary judgment with the affidavit of mailing averring that the notice was sent to Popa. Because this fact was not contradicted by counter-affidavit, the trial court properly accepted it as true. See *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575-76 (2000). There were no other issues of fact sufficient to survive summary judgment.

¶ 24 We further reject Popa's argument that the court erred in denying her motion to reconsider based on *Accetturo*. We review a trial court's ruling on a reconsideration motion for an abuse of discretion. See *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶

28.

¶ 25 In *Accetturo*, we held that the lender's failure to provide a notice of acceleration precluded summary judgment in its favor. *Accetturo*, 2016 IL App (1st) 152783, ¶ 57. There, the lender also argued that Accetturo's "notice argument changed throughout the course of litigation." *Id.* ¶ 29. However, we held that Accetturo timely raised her argument regarding the adequacy of the notice of acceleration where she explicitly alleged that the lender failed to "mail or deliver an *adequate* notice of acceleration." *Id.* ¶ 30. Popa's original affirmative defense, on the other hand, did not challenge the notice's adequacy, but alleged only that it was not received. Accordingly, the decision in *Accetturo* is inapposite and the trial court did not abuse its discretion in denying reconsideration.

¶ 26 Popa's motion to reconsider moved in the alternative to amend her pleadings to conform to the proofs pursuant to 735 ILCS 5/2-616(c) (West 2016). However, the record reflects that the trial court did not rule on this motion. Instead, the court's written order reveals it ruled only on Popa's motion for reconsideration, stating: "This matter coming to be heard upon the defendant's motion to reconsider the entry of judgment; the plaintiff appearing in court; the movant failing to appear; the court finding the defendant's motion is untimely and without merit as the defendant's affirmative defense failed to allege the demand letter [sic] was received but improper; the court further finds its ruling is consistent with *Acceturo* and [*CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780]; it is hereby ordered: (1) defendant's motion to reconsider is denied. ***."[3]

¶ 27 On appeal, Popa argues that the trial court should have allowed her to amend her

[3] The record does not contain a transcript of the hearing on this motion.

affirmative defense. But the court did not deny Popa's motion to amend; it failed to rule on it. This is not tantamount to a denial. See *International Parts, Inc. v. Caterpillar, Inc.*, 260 Ill. App. 3d 1085, 1090 (1994). The party who files a motion seeking relief from the court is obligated to obtain a ruling on that motion. *Id.* The failure to do so waived Popa's argument that she should have been permitted to amend her answer. See *id.*; see also *McCollough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 946 (1993).

¶ 28 For the foregoing reasons, we affirm the grant of summary judgment in favor of US Bank Trust as well as the order approving the sale of the property.

¶ 29 CONCLUSION

¶ 30 Affirmed.