SIXTH DIVISION
September 28, 2018

No. 1-17-2960

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILMINGTON TRUST, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CH 7688
	)	
VIOREL PODAR and RODICA PODAR,	)	Honorable
	)	Darryl Simko,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held*:** We affirm the summary judgment granted in favor of plaintiff-appellee Wilmington Trust N.A. We affirm the order approving the report of sale and distribution. We do not have jurisdiction over the order which granted reformation of the mortgage documents and decline to address it.

¶ 2 Citibank, N.A., as trustee for the Holders of Structured Asset Mortgage Investments II Trust 2007-AR3, Mortgage Pass-Thru Certificates, Series 2007-AR3 filed this action on March 2, 2012 after defendants-appellants, Viorel Podar and Rodica Podar, failed to make the required payments on the subject property. On September 10, 2015, plaintiff-appellee, Wilmington Trust, N.A., substituted in as plaintiff.

¶ 3 On November 18, 2016, plaintiff filed an amended complaint for foreclosure. The complaint also contained a count seeking reformation of the mortgage, note and assignment to the correct address. Defendants answered and raised one affirmative defense. The affirmative defense argued the acceleration letter defendants received failed to comply with the applicable paragraph from the mortgage agreement.

¶ 4 On April 14, 2017, the circuit court entered summary judgment in favor of plaintiff. In a separate order the court also granted plaintiff's request for reformation. Plaintiff moved for an order approving the sale on July 26, 2017. The circuit court entered an order approving the sale on October 27, 2017. Defendants timely appealed and argue the judgment of foreclosure should not have been entered against them because the acceleration letter failed to comply with paragraph 22 of the mortgage. They also argue the circuit court erred in granting the reformation. Based on these errors, the defendants argue the order approving the report of sale and distribution must be vacated as well.

¶ 5 For the reasons stated more fully below, we find no merit to defendants' argument concerning the acceleration letter and affirm the judgment of foreclosure. We do not have jurisdiction over the reformation issue and decline to engage in an analysis of it. Since defendants' argument for reversing the order approving the report of sale and distribution is based on reversing the above orders, we affirm the order approving the sale and distribution.

¶ 6 JURISDICTION

¶ 7 This foreclosure action commenced on March 2, 2012. On February 9, 2017 plaintiff moved for summary judgment and reformation. On April 14, 2017, the circuit court granted the motion for reformation and summary judgment. On October 27, 2017 the circuit court approved the sale and order of possession. On November 28, 2017 defendants filed a late notice of appeal. On December 20, 2017, realizing the notice was late; defendants filed a motion in this court

pursuant to Illinois Supreme Court Rule 303(d), which allows this court to extend the time under which a notice of appeal can be filed if appellants' motion meets certain conditions. Ill. S. Ct. R. 303(d) (eff. July 1, 2017). We granted the motion, and allowed them to file their late notice of appeal. Accordingly, this court has jurisdiction over the summary judgment order pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 8 As will be discussed in the Analysis Section, we do not have jurisdiction over the order granting reformation of the mortgage, note, and assignment.

¶ 9 BACKGROUND

¶ 10 This appeal involves a loan given on March 9, 2007, to defendant-appellant, Viorel Podar, for a property the documents identified as being at 1848 Weeg Way, Park Ridge, Illinois, 60068. The original lender was Countrywide Bank, N.A. On May 25, 2011, the mortgage was assigned to Citibank N.A., as Trustee for the Holders of Structured Asset Mortgage Investments II Trust 2007-AR3, Mortgage Pass-Through Certificates, Series 2007-AR3 (hereinafter "Citibank").

¶ 11 On March 2, 2012, Citibank filed a complaint to foreclose mortgage against the defendants after they failed to make the required March 2010 payment. The complaint identified the "commonly known address" of the property as 1848 Weeg Way, Park Ridge, IL 60068. On October 15, 2012, the Podars appeared through counsel and filed their answer and affirmative defenses. Three of the four affirmative defenses were dismissed with leave to replead, while their Truth in Lending Act claim was dismissed with prejudice.

¶ 12 A new attorney for defendants filed an appearance on June 25, 2013. The new attorney filed amended affirmative defenses. The first amended affirmative defense alleged Citibank

failed to comply with the statutory grace period notice requirement, while the second defense alleged Citibank's acceleration letter failed to comply with paragraph 22 of the mortgage.

¶ 13 On April 7, 2015, plaintiff-appellant, Wilmington Trust, N.A. as Successor Trustee to Citibank, N.A. as Trustee for Structured Asset Mortgage Investments II Trust 2007-AR3, Mortgage Pass-Thru Certificates Series 2007-AR3 moved to substitute in as party plaintiff. The circuit court granted the substitution on September 10, 2015. Plaintiff filed a motion for summary judgment on August 3, 2016, which defendants responded to on October 6, 2016. The response argued a genuine issue of material fact existed as to whether plaintiff (or its predecessor) complied with the statutory grace period notice requirement or sent the proper acceleration notice.

¶ 14 This motion for summary judgment was never ruled on because plaintiff sought leave to file a seconded amended complaint on October 21, 2016. The circuit court granted plaintiff's request to amend on November 18, 2016. The new complaint added a count seeking to reform the mortgage, note and assignment to the actual address of the subject property. While the mortgage documents stated the address as 1848 Weeg Way, the reformation count alleged the address of the property was actually 1849 Weeg Way. The count alleged 1848 Weeg Way did not exist.

¶ 15 Defendants filed an answer to the second amended complaint and raised one affirmative defense. The affirmative defense argued that plaintiff's acceleration letter failed to comply with paragraph 22 of the mortgage. The defendants argued this failure meant plaintiff had not satisfied a condition precedent to filing suit.

¶ 16 On February 9, 2017, plaintiff filed a motion for summary judgment as to the second amended complaint. Plaintiff filed a separate motion for reformation. After briefing from the parties, the circuit court granted the motion for summary judgment on April 14, 2017. On the

same day the court entered a separate order reforming the mortgage documents to reflect an address of 1849 Weeg Way. On July 18, 2017, the subject property was sold at a judicial auction. The circuit court approved the sale on August 15, 2017.

¶ 17 On September 14, 2017, the defendants filed a motion to vacate the order approving the sale and asked for the opportunity to respond to it. The court granted the motion to vacate and ordered briefing on the motion for order approving sale. In arguing that the sale should not be approved, the defendants argued section 15-1508(b)(iv) (735 ILCS 5/15-1508(b)(iv) (West 2016)) had been violated because the court based its summary judgment ruling on a previously filed summary judgment response and not the response defendants filed related to summary judgment on the second amended complaint. The court found no violation of 15-1508(b)(iv) and approved the sale on October 27, 2017.

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 In their first issue, defendants argue the circuit court erred in granting summary judgment in favor of plaintiff because the acceleration letter sent by plaintiff's predecessor failed to comply with the notice requirements set forth in paragraph 22 of the mortgage agreement. They also argue it was sent to the wrong address in violation of paragraph 15 of the mortgage agreement.

¶ 21 Section 2-1005 allows parties to receive judgment in their favor "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2016). If a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). To survive this motion, the nonmoving party need not prove its case, but

must present some evidentiary facts that would arguably entitle it to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). In an appeal from a grant of summary judgment, our review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 22 Under Illinois law, a "condition precedent" represents an act which must be performed or an event that must occur before an agreement becomes effective or before one party to an existing agreement must perform. *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶ 21. A party must strictly comply with a condition precedent (*Midwest Builder Distributing, Inc. v. Lord & Essex, Inc*., 383 Ill. App. 3d 645, 668 (2007)) and failure to comply may be viewed as a breach of the agreement (*Jones v. Seiwert*, 164 Ill. App. 3d 954, 958-59 (1987)). This court will enforce such provisions even if it leads to harsh consequences for the noncomplying party. *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 668. Pursuant to the Illinois Mortgage Foreclosure Law, courts consider a notice of acceleration a condition precedent. *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16.

¶ 23 Based on defendants' argument, we must determine whether the letter sent by plaintiff's predecessor complied with the acceleration requirements. Plaintiff does not dispute that paragraph 22 is a condition precedent, nor does plaintiff dispute that it lays out several requirements a notice of acceleration must contain. Plaintiff argues the notice of acceleration complied with paragraph 22. This paragraph states:

> 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. The notice shall further inform Borrower of the right to reinstate

> after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Based on the language above, the letter to defendants must: (1) give notice to defendants prior to acceleration following their breach of any covenant or agreement, (2) 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 the instrument, foreclosure by judicial proceeding and sale of the Property, and (3) inform defendants of the (a) right to reinstate after acceleration and (b) the right to assert in the foreclosure proceeding the non-existence of a default or any other defense to acceleration or foreclosure.

¶ 24 After reviewing the "Notice of Intent To Accelerate" letter found in the record, we agree with the circuit court that it complies with the requirements set forth in paragraph 22. First, the letter gives notice prior to acceleration because it was sent on May 17, 2010 and informs defendants the loan will be accelerated if not cured by June 16, 2010. Next, the letter states the loan is "serious default" and explains that in order to cure defendants must pay $7,115.94 by June 16, 2010. June 16, 2010 is a date "not less than 30 days from the date the notice is given to the Borrower, by which the default must be cured." The letter clearly states that failure to cure by June 16, 2010 will result in acceleration. The letter informs defendant they have the right to cure the default after acceleration and prior to foreclosure if all amounts past due are paid within the time permitted by law. Finally, the letter states, "you may have the right to bring a court action to

assert the non-existence of a default or any other defense you may have to acceleration and foreclosure."

¶ 25 Defendants take issue with the last sentence because the language does not mirror the language found in paragraph 22. In support of this argument, defendants rely on *Cathay Bank v. Accetturo*, a case where this court reversed summary judgment because the notice of acceleration did not comply with the required paragraph of the mortgage. 2016 IL App (1st) 152783, ¶ 42. In *Accetturo*, this court found "most of the information that Cathay Bank was mandated by paragraph 21 to provide was missing from all five letters" and the failure was "more than a technical defect." *Id.*

¶ 26 Unlike *Accetturo*, the acceleration letter in this matter provides all the information required by the mortgage agreement. Even to defendants' specific argument, the letter informs defendants of the right to assert possible defenses to the acceleration or foreclosure. At best, the difference in language amounts to no more than a technical defect. *Citimortgage, Inc. v. Hoeft*, 2015 IL App (1st) 150459, ¶ 11; *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 15. Also important to our consideration, defendants do not allege this claimed defect resulted in prejudice. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27. The acceleration letter at issue in this case met the requirements of paragraph 22 and, therefore, the condition precedent to filing suit was satisfied.

¶ 27 We also reject defendants' argument that summary judgment should have been denied because the notice of acceleration was not sent to the "property address" listed in the mortgage. Paragraph 15 of the mortgage document required all notices to be sent to the "property address." In the documents, this address was stated as 1848 Weeg Way. As stated by plaintiff and not disputed by defendant, 1848 Weeg Way does not exist as a physical address. The letter was sent to 1849 Weeg Way, the actual address of the subject property and where defendants were

residing at the time. Defendants' argument that the letter should have been sent to a non-existent address lacks common sense and does not represent a basis for reversing summary judgment.

¶ 28 Based on the above, the circuit court did not err in granting summary judgment in favor of plaintiff in this foreclosure action.

¶ 29 Defendants next challenge the circuit court's order reforming the mortgage documents to reflect the correct address, but a review of the record demonstrates we are without jurisdiction to consider the issue. It is the duty of this court to consider the matter of jurisdiction *sua sponte* and we cannot consider the merits of an appeal when proper jurisdiction is lacking. *E.J. De Paoli Co. v. Novus, Inc.*, 156 Ill. App. 3d 796, 798 (1987). The circuit court granted plaintiff's reformation request in a separate order. The last paragraph of this order states, "[T]hat the Court finds no just reason to delay either enforcement or appeal of this order pursuant to Ill. Supreme Court Rule 304(a)."

¶ 30 The inclusion of such language rendered the circuit court's reformation order final and appealable on the date it was entered, April 17, 2017. Defendants failed to appeal this order within 30 days of its entry. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998) (concluding an appellate court loses jurisdiction over an order which contains final and appealable language pursuant to Rule 304(a) after 30 days, even if that order does not dispose of all claims or parties involved in the action). Defendants' initial notice of appeal was not filed until November 28, 2017, well outside the required 30 day timeframe. We are therefore without jurisdiction to consider the challenge to this order and we decline to address it.

¶ 31 Lastly, defendants seek reversal of the order approving the report of sale and distribution based on reversing the summary judgment and the reformation orders. Since both those orders stand, we affirm the order approving the report of sale and distribution.

¶ 32 CONCLUSION

¶ 33 For the reasons stated above, we affirm the grant of summary judgment entered in favor of plaintiff. The order approving the sale and distribution is also affirmed. We do not have jurisdiction to consider the merits of defendants' challenge to the reformation order and that portion of the appeal is dismissed.

¶ 34 Affirmed in part and dismissed in part.