2014 IL App (2d) 130441-U
No. 2-13-0441
Order filed February 27, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CH-348
TOMASZ GLINKOWSKI and ELIZA GLINKOWSKI,	)	Honorable Robert G. Gibson,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the bank's motion for summary judgment in a mortgage foreclosure proceeding. Affirmed.

¶ 2 Following plaintiff's complaint against defendants to foreclose a mortgage, the trial court granted plaintiff summary judgment and entered a judgment of foreclosure. Subsequently, the court confirmed the sale. Defendant, Tomasz Glinkowski, appeals, arguing that the trial court erred in granting plaintiff summary judgment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 24, 2012, plaintiff filed a complaint for foreclosure on a mortgage on defendants' property in Wood Dale (P.I.N.: 03-16-200-019). Defendant Tomasz answered the complaint, denying most of the allegations. Subsequently, on July 16, 2012, plaintiff moved for summary judgment against Tomasz and, separately, for default judgment against defendant, Eliza Glinkowski. (On July 18, 2012, Eliza filed an appearance.) Plaintiff also filed on July 16, 2012, an affidavit for judgment (the summary judgment motion noted that the affidavit was filed in support thereof) signed by a foreclosure specialist of its mortgage servicer, Seterus, Inc., attesting, *inter alia*, that plaintiff was due $396,190.98 under the mortgage. Accompanying the affidavit was a CitiMortgage, Inc., seven-page, computer printout (dated December 14, 2010) entitled "CUSTOMER ACCOUNT ACTIVITY STATEMENT" and detailing account activity from 2007 to November 2010.[1]

¶ 5 Tomasz filed a response to the summary judgment motion, arguing that Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) requires that a summary judgment motion be accompanied by affidavit complying with the rule, including personal knowledge of the affiant and all documents relied upon to make the allegations. According to Tomasz, the affidavit plaintiff submitted did not comply with Rule 191 because it did not list the documents relied on and did not reflect there was a default or when it occurred. Tomasz also argued that it was unclear if the affidavit was submitted in connection with the summary judgment motion against Tomasz or the default judgment motion against Eliza. Tomasz next noted that he denied plaintiff's allegation that all proper notices had been sent pursuant to the Illinois Mortgage Foreclosure Law (Mortgage

[1] Plaintiff is an assignee (as of January 5, 2012) of the mortgage originally executed (on September 27, 2007) by Tomasz and Mortgage Electronic Registration Systems, Inc., as nominee for CitiMortgage, Inc.

Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2012)). He argued that the statutory "grace period notice" (735 ILCS 5/15-1502.5(c) (West 2012)) had not been sent prior to commencement of the case and that plaintiff had attached no evidence of compliance with the notice requirements. He requested that summary judgment be denied.

¶ 6 Plaintiff replied that the affidavit it submitted contained an itemized list of advances, interest charges and *per diem*, and the principal unpaid balance. It also noted that its complaint listed the unpaid principal balance and *per diem* and that the note included the interest rate, as well as the rate for late charges. As to the grace period notice, plaintiff argued that: (1) Tomasz failed to raise the issue in his answer and, thus, it was forfeited; and (2) he failed to present facts showing that plaintiff failed to mail the grace period notice. Plaintiff further noted as to the grace period notice that the statute did "not require the assurance that a homeowner receives the notice." Plaintiff also noted that it mailed the notice to defendants at the subject address on August 14, 2009. It attached a document entitled "GRACE PERIOD NOTICE" that was dated October 2, 2011.

¶ 7 On September 21, 2012, the trial court: (1) entered an order finding Eliza in default (735 ILCS 5/2-1301(d) (West 2012)); (2) entered a judgment of foreclosure and sale (735 ILCS 5/15-1506 (West 2012)); and (3) granted plaintiff's summary judgment motion as to Tomasz. On January 8, 2013, the subject property was sold (to plaintiff) at a sheriff's sale.

¶ 8 On March 8, 2013, the court entered an order, approving and confirming the report of sale and distribution, confirming the sale of the premises, and entering an order for possession.

¶ 9 This court, on June 3, 2013, allowed Tomasz leave to file a late notice of appeal in the present matter. On June 5, 2013, Tomasz filed (in the trial court) a notice of appeal.

¶ 10 On December 31, 2013, this court granted Tomasz's emergency motion for stay (of eviction) pending appeal (to which plaintiff filed no objection).

¶ 11 II. ANALYSIS

¶ 12 Initially, we note that, consistent with its inattentiveness in this case, plaintiff has not filed an appellee's brief. However, the record is simple, and we find that the defendant's claimed errors can easily be decided without the aid of an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-32 (1976). Therefore, we review the merits of the appeal. However, we strongly caution plaintiff that this court's role is not to divine a party's position and arguments on appeal. Furthermore, we note that Tomasz's arguments are generally less than clear and are frequently unsupported by citation to relevant authority. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Nevertheless, we choose to address them.

¶ 13 Turning to the merits, Tomasz argues that the trial court erred in granting plaintiff summary judgment, where: (1) the motion failed to comply with Rule 191; and (2) there were factual issues concerning the grace period notice. For the following reasons, we reject Tomasz's arguments.

¶ 14 Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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 2012). "Thus, where the matter before the trial court can be decided as a question of law, the case is a proper one for summary judgment." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 176 (1995). Because summary judgment is a drastic means of disposing of litigation, the movant has the burden of production and proof, the pleadings and

supporting documentation are construed strictly against the movant and liberally in favor of the opponent, and summary judgment should be granted only when the movant's right is clear and free from doubt. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. That said, a plaintiff opposing a summary judgment motion must present some factual basis—not mere speculation or conjecture—that would support his or her claim. *Freedberg v. Ohio Nat'l Ins. Co.*, 2012 IL App (1st) 110938, ¶¶ 25-26; see also *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1044 (2005) (burden shifts to the nonmovant to "come forward with evidentiary material that establishes a genuine issue of fact."). We review *de novo* summary judgment orders. *Batson v. Pinckneyville Elementary School District No. 50*, 294 Ill. App. 3d 832, 835 (1998).

¶ 15 Tomasz first contends that the affidavit in support of plaintiff's motion did not meet Rule 191's requirements and, thus, the trial court erred in granting plaintiff summary judgment. Rule 191 sets out the requirements of an affidavit used in support of a motion for summary judgment. Rule 191 states, in relevant part:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 16 A Rule 191 affidavit is a substitute for testimony given in court and has to meet the same requirements as competent testimony. *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). An affidavit meets the requirements of Rule 191 if it appears from the

document as a whole that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial. *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999). An affidavit may provide the authentication needed to make a document admissible. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 349 (2010). "Further, courts must accept an affidavit as true *if it is uncontradicted by counteraffidavit or other evidentiary materials*." (Emphasis added.) *Kugler*, 309 Ill. App. 3d at 795. "Strict compliance with Rule 191(a) is required to insure the trial court is presented with valid evidentiary facts upon which to base a decision." *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943, ¶ 36.

¶ 17 Section 15-1504(a) of the Mortgage Foreclosure Law contains a form complaint and provides that a foreclosure complaint may be "substantially" in the same form as contained in the statute. It further provides that the complaint contain certain information concerning the mortgage, including a: "Statement as to defaults, including, but not necessarily limited to, date of default, current unpaid principal balance, *per diem* interest accruing, and any further information concerning the default[.]" 735 ILCS 5/15-1504(a)(3)(J) (West 2012).

¶ 18 First, Tomasz concedes that plaintiff's complaint contains a statement as to defaults that follows the statutory form. However, he notes that, in his answer in the trial court, he denied the allegation and, thus, effectively, plaintiff's complaint "stated no basis whatsoever for granting" summary judgment. "It did not allege the existence of a [m]ortgage, the default thereon, and how much is due and owing." This claim fails because Tomasz failed to provide any factual support, even an affidavit, for his denial. *Kugler*, 309 Ill. App. 3d at 795; see also *Practical Offset, Inc. v. Davis*, 83 Ill. App. 3d 566, 573-74 (1980) (the defendant's "bald assertion" in his

deposition was little better than his denial in the answer to the complaint, neither of which was sufficient to give rise to a question of fact to preclude summary judgment).

¶ 19 Tomasz further argues that, "since [plaintiff's complaint] was not verified, [the] affidavit was a prove-up affidavit in support of Judgment as required by 735 ILCS 5/15-1506 or 735 ILCS 5/2-1301[](d)." He fails to explain the import of this allegation or cite to any authority doing the same. Accordingly, the point is forfeited. See, *e.g.*, *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007) (point raised in a brief but not supported by citation to relevant authority fails to satisfy the requirements of Rule 341(h)(7) and is therefore forfeited).

¶ 20 Tomasz next argues that the affidavit did not comply with Rule 191, where it did not allege that Tomasz failed to make the required monthly payment (although he concedes that this allegation *is* contained in the complaint). Contrary to Tomasz's claim, the affidavit does state that "the borrower(s) has failed to make the required monthly payments and is in default pursuant to the terms of the subject note and mortgage."

¶ 21 Tomasz also notes, without citation to any authority, that the affidavit is dated May 9, 2012, but reflects amounts due on May 11, 2012 (two days after its execution). This claim is raised for the first time on appeal and, thus, is forfeited. *U.S. Bank National Ass'n. v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24. Forfeiture aside, we note that the references to May 11, 2012, in the affidavit (which was filed on July 16, 2012) are made only with respect to the accrued interest calculation and the document notes that interest "will continue to accrue at $17.40 per day (based upon an annual interest rate of 2.0%) from May 1, 2012[,] until judgment is entered." Because the accrued interest changes daily and the affidavit clearly reflects this and that the ultimate figure will almost certainly be different than the figure reflected in the affidavit,

the two-day disparity between the anticipated accrued interest figure and the execution date of the affidavit is of little import.

¶ 22 We turn next to Tomasz's second argument. Tomasz argues that summary judgment should have been denied because plaintiff's complaint failed to allege that plaintiff served defendant with the grace period notice. Tomasz notes that, in his answer to plaintiff's complaint, he denied the (deemed) allegation that all notices required to be given had, in fact, been given. Thus, he reasons, the question whether plaintiff sent the grace period notice presented a factual question precluding summary judgment. For the following reasons, this claim also fails.

¶ 23 In part, section 15-1502.5(c) of the Mortgage Foreclosure Law requires that a grace period notice inform the mortgagor of certain matters and that it be mailed in an envelope that is "addressed to the mortgagor at the common address of the residential real estate securing the mortgage." 735 ILCS 5/15-1502.5(c) (West 2012). If this and other requirements are not met, a mortgagee is prohibited from filing a foreclosure complaint. 735 ILCS 5/15-1502.5(b) (West 2012). However, a technical defect in the notice sent to the mortgagor will not necessarily warrant a dismissal of a foreclosure action. See *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 25 ("[w]here, as here, the mortgagor has alleged only a technical defect in the notice and has not alleged any resulting prejudice, a dismissal of the foreclosure complaint to permit new notice of the grace period would be futile; we would not read the section to require such a result unless its plain language compelled it.")

¶ 24 Tomasz complains that plaintiff did not *allege* that it served him with the notice. He notes that, because plaintiff filed a form complaint, certain allegations are deemed to have been made. 735 ILCS 5/15-1504(c)(9) (West 2012) ("that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly

and properly given"). Tomasz contends that, in his answer to plaintiff's complaint, he denied the deemed allegations and, therefore, there was a factual question precluding summary judgment. We disagree.

¶ 25 Here, the grace period notice contained in the record is dated October 2, 2011. Plaintiff filed its complaint on January 24, 2012 (more than 30 days after the date on the notice). See *Pajor*, 2012 IL App (2d) 110899, ¶ 23 (notice must be sent before the suit). Plaintiff, as Tomasz notes, attached the notice to its reply to Tomasz's response to the summary judgment motion, wherein Tomasz had argued that plaintiff had not attached evidence of compliance with the notice requirement. Tomasz argues that, because the notice was attached to plaintiff's (September 12, 2012) reply, he "had no opportunity to respond to the contents of said notice," although he also notes that the matter was set for hearing on September 21, 2012. Tomasz does *not* claim that he raised the matter at the hearing or explain (here) his failure to do so. In its reply, plaintiff argued that Tomasz waived the argument because he failed to present it in his answer. Plaintiff also attached a copy of the notice addressed to Tomasz (but claimed, contrary to the date on the document itself, that it was mailed on August 14, 2009) and argued that the statute does not require the *assurance* that the homeowner *receive* the notice. Tomasz argues that plaintiff did not attach an affidavit showing that the notice was sent. He urges that, by denying the deemed allegations, he did raise the factual issue.

¶ 26 We reject Tomasz's argument. The statute provides that: "The sending of the notice required under this subsection (c) means depositing or causing to be deposited into the United States mail an envelope with first-class postage prepaid that contains the document to be delivered. The envelope shall be addressed to the mortgagor at the common address of the residential real estate securing the mortgage." 735 ILCS 5/15-1502.5(c) (West 2012). Section

15-1506(a)(1) of the Mortgage Foreclosure Law provides that "when an allegation of fact in the complaint is not denied by a party's *verified* answer[,] *** a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required[.]" (Emphasis added.) 735 ILCS 5/15-1506(a)(1) (West 2012). Further, when a party moves for summary judgment, files supporting affidavits containing well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant's affidavits stand as admitted. See *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993). The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact. *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 391 (1994). Here, Tomasz's answer was not verified and he did not submit any affidavits attesting that he (or even Eliza) did not receive the grace period notice. His bald denial, therefore, did not create a material factual issue precluding summary judgment.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 29 Affirmed.