2015 IL App (2d) 140400-U
No. 2-14-0400
Order filed September 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EMC MORTGAGE CORPORATION,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-CH-1112
	)	
BARBARA J. KEMP,	)	Honorable
	)	Robert G. Gibson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Kemp forfeited her argument that EMC lacked standing, because she did not timely assert this affirmative defense; (2) the trial court did not err in confirming the judicial sale despite Kemp's assertion that she had submitted a HAMP application, because Kemp was ineligible for HAMP based on her loan balance; the trial court acted within its discretion in denying Kemp's motion to reconsider the confirmation of the judicial sale because (3) the foreclosure judgment did not require that EMC pay cash if it was the highest bidder at the sale, and (4) a subsequent letter from EMC saying that a different party was the highest bidder was not a binding admission that would undermine the confirmation; and (5) the statutory interest was correctly computed. Therefore, we affirmed.

¶ 2 In this mortgage foreclosure case, defendant, Barbara J. Kemp, appeals various trial court rulings in favor of plaintiff, EMC Mortgage Corporation (EMC). On appeal, she argues that: (1)

EMC lacked standing to file the mortgage foreclosure suit in its own name; (2) the foreclosure judgment and judicial sale must be set aside because EMC violated the Home Affordable Modification Program (HAMP); (3) the judicial sale was invalid because it did not follow the foreclosure judgment, the notice of sale, and the Du Page County foreclosure bid rules; (4) the order approving the judicial sale should be vacated because a trust/Mellon Bank, not EMC, was the highest bidder; and (5) the interest was incorrectly calculated, resulting in a surplus from the sale that she should receive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This case has been before us on appeal once before, and we largely restate the relevant facts from our prior disposition. See *EMC Mortgage Corp. v. Kemp*, 2011 IL App (2d) 101175-U.

¶ 5 On July 7, 2006, EMC filed a foreclosure complaint, alleging the following. On December 14, 2005, MERS, Inc., as nominee for Maribella Mortgage, LLC, recorded a mortgage in the name of Kemp in the amount of $863,200. EMC, as "legal holder, agent or nominee of the legal holder, of the indebtedness" brought its suit against Kemp. The mortgage was dated November 23, 2005, and Kemp had been in default since March 2006. The mortgage document was attached and identifies the lender as Maribella Mortgage, LLC, and Kemp as the borrower. In the agreement, Kemp also mortgaged the property to MERS as nominee for Maribella and Maribella's successors and assigns. The note was endorsed in blank by Maribella.

¶ 6 On August 31, 2006, Kemp filed a *pro se* motion to dismiss the suit for lack of personal jurisdiction, which was stricken. On October 26, 2006, Kemp then filed a *pro se* answer to the foreclosure suit. In that answer, Kemp denied the allegation that EMC had the capacity to file the suit as the legal holder, agent, or nominee of the legal holder, of the mortgage. On January

17, 2007, Kemp filed a *pro se* counterclaim, alleging that Maribella acted as an agent for EMC and acted as the mortgage lender. Kemp alleged that Maribella and EMC improperly included Anthony Intini[1] on the mortgage and refused to correct the document. EMC moved to dismiss this counterclaim on June 12, 2007, and this motion was granted on October 16, 2007.

¶ 7 Kemp filed an amended counterclaim that was relatively the same. EMC filed a motion to dismiss that counterclaim on January 31, 2008. Attached to the motion to dismiss was an affidavit from Ashley Stephenson, an assistant vice president and assistant manager of foreclosures at EMC. She states that EMC was not involved in the real estate closing of Kemp's property and that the loan was secured with Maribella Mortgage. Maribella assigned the loan to EMC on December 29, 2006. EMC and Maribella had no relationship other than the assignment. A copy of the assignment was also attached. The assignment states that MERS as nominee for Maribella assigned Kemp's mortgage to EMC on December 29, 2006. The assignment was signed on January 12, 2007. EMC's motion to dismiss was granted on May 19, 2008.

¶ 8 On June 24, 2008, Kemp, through counsel at this point in the proceedings, filed a "slander of title" counterclaim. On October 28, 2008, the trial court granted EMC's motion to dismiss Kemp's second amended counterclaim.

¶ 9 On February 2, 2009, EMC moved for summary judgment on its foreclosure complaint pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)). On March 17, 2009, the trial court granted that motion; the order was entered on a subsequent date that is not clear in the record. On June 2, 2009, the trial court entered a judgment for foreclosure and sale of the property. On July 1, 2009, Kemp filed a motion to reconsider the

[1] Anthony Intini is also referred to as Anthony Antine in the record; the former spelling appears to be correct. He was later dismissed as a party to this litigation.

court's order granting summary judgment in favor of EMC and a motion to stay the sheriff's sale. This motion for reconsideration was denied on September 29, 2009. Next, the sheriff's sale set for October 6 was stayed because Kemp filed for bankruptcy.

¶ 10 On May 6, 2010, the proceedings resumed, and Kemp filed a motion to continue the sheriff's sale set for May 27, stating that while in bankruptcy, she attempted to sell the home as a short sale and had a buyer. The trial court granted the stay the next day. On June 15, Kemp filed another emergency motion to stay the sheriff's sale. This time she attached a short sale contract listing the buyer as Resort Acquisitions, a Florida corporation. The court denied this motion on June 15. On July 9, 2010, the bankruptcy court lifted the automatic stay to allow the sheriff's sale of the property.

¶ 11 On October 5, 2010, Kemp filed an Emergency Motion to Vacate Judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)), a motion to dismiss the foreclosure complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9)(West 2010)), and a motion to continue the sheriff's sale, now scheduled for the same day, October 5. These new motions raised completely new arguments by counsel. First, Kemp argued that her section 2-1401 petition should be granted because EMC lacked proper standing to proceed with the sheriff's sale. She argued her motion was timely because it was filed "within 16 months of the entry of the judgment order," and she filed it within 48 hours of a New York Times article that questioned Chase Home Mortgage's legal methods in obtaining title to properties subject to foreclosure. Kemp stated that even though the bankruptcy order lifting the automatic stay on the sheriff's sale listed "EMC Mortgage Corporation/Chase Home Finance LLC," neither the judgment of foreclosure order dated June 2, 2009, or the sheriff's sale notice dated September 28, 2010, refer to Chase Home Finance as a successor in interest or loan service of Kemp's

mortgage. In the news article, Chase issued a moratorium on its pending mortgage foreclosures. According to Kemp, the court should stay the sheriff's sale until EMC could prove it was the proper party in possession of the mortgage. As to the motion to dismiss, Kemp argued the same, that EMC may not be the proper party for this foreclosure because it may have sold its interest to Chase.

¶ 12 On October 5, the trial court stayed the sheriff's sale for 45 days, denied Kemp's section 2-1401 motion to vacate, and denied Kemp's section 2-619 motion to dismiss. The court included language pursuant to Illinois Supreme Court Rule 304(a), stating there was no just cause to delay the enforcement or appeal of this order. At the hearing on these motions, the trial court recognized that the issue of standing in foreclosure proceedings had made headlines but that in this case, the timing of Kemp's objection to standing was problematic. Counsel for Kemp argued that a stay would allow EMC to submit documentation to the court that it was the proper party and not Chase. The court asked Kemp's counsel whether there was case law indicating that a plaintiff had to show standing again after the judgment for foreclosure was entered before a sheriff's sale could take place. Counsel was unaware of any case law supporting his argument. The court then advised that unless there was any case law supporting Kemp's position, which counsel could raise in a motion for reconsideration, the motions to dismiss and vacate were denied.

¶ 13 Kemp filed a motion for reconsideration on November 4. In this motion, Kemp again raised an entirely new argument. Kemp now argued that EMC did not have standing to file its original foreclosure complaint on July 7, 2006, because Maribella had not assigned the mortgage to EMC until December 29, 2006. In support, Kemp cited an unreported New York case in which the court determined that the bank lacked standing to foreclose the mortgage on the date

the action commenced because it was not assigned the mortgage until two months later. Kemp also pointed out a county name error on the assignment documents, which listed Maricopa as the county where the mortgage was recorded. Kemp failed to submit any evidence that this error was anything more than a scrivener's error and that the mortgage was not recorded in Illinois. The motion also failed to address why this issue was not raised earlier other than counsel had recently discovered the New York case.

¶ 14 On November 16, 2010, the trial court denied Kemp's motion for reconsideration and again included Rule 304(a) language. In denying the motion, the court noted that Kemp's motion was well done and that it laid out many issues that were ripe for consideration by appellate courts and the supreme court. However, the court denied the motion because there was no Illinois authority providing that it could rule otherwise in light of the timing of the motion.

¶ 15 Kemp appealed, reasserting her argument that EMC lacked standing at the time it filed its original foreclosure complaint because it had not yet been assigned Kemp's mortgage. In response, EMC argued: that the appellate court lacked jurisdiction because the original foreclosure judgment was not a final order and did not include Rule 304(a) language; that Kemp forfeited the argument that it lacked standing; and that it was the holder of the mortgage note, which was endorsed in blank, and attached to the complaint. This court agreed with EMC's first argument and dismissed the appeal for lack of jurisdiction (*EMC Mortgage Corp. v. Kemp*, 2011 IL App (2d) 101175-U), and the supreme court affirmed (*EMC Mortgage Corp. v. Kemp*, 2012 IL 113419).

¶ 16 A judicial sale of the property took place on October 31, 2013. EMC was identified as the highest bidder, offering the sum of $1,757,519.05, which was the amount of indebtedness including interest, fees, and costs. EMC moved to have the sale confirmed on November 13,

2013. Kemp filed an objection to the confirmation of the sale on November 19, 2013. She argued that EMC did not have standing at the time it filed the complaint. She further argued that the sale had proceeded while she had a HAMP application pending, in violation of HAMP guidelines, and therefore the sale had to be set aside or vacated. In its response, EMC argued that Kemp had forfeited the issue of standing by failing to timely raise it and that she did not provide evidence to meet her burden of proof that she submitted a HAMP application. Kemp's reply included additional documentation regarding her submission of the application.

¶ 17 On February 6, 2014, the trial court granted EMC's motion to confirm the sale over Kemp's objection. In making its ruling, the trial court stated that Kemp did not raise standing as an affirmative defense and that the principal balance exceeded the eligibility requirements for HAMP.

¶ 18 On March 10, 2014, Kemp filed a motion: to reconsider the denial of her objection to the confirmation of sheriff's sale; for a declaratory judgment as to the parties' rights with respect to proceeds from the sheriff's sale; and to stay all proceedings. She argued that: (1) under HAMP guidelines, the property value could be disputed, and she had included a comparative market analysis summary with her HAMP application to negotiate a new loan value; (2) Chase was the true party in interest, and EMC should not have been the bidder at the sheriff's sale; (3) the judicial sale was invalid because it did not follow the sheriff's office's rules, in that there was no exchange of cash; and (4) interest was improperly calculated from the entry of summary judgment on June 2, 2009, resulting in a possible surplus payable to Kemp. The trial court denied the motion on March 27, 2014.

¶ 19 On April 16, 2014, Kemp filed another motion to reconsider, this one based upon newly discovered evidence. She argued that on April 2, she had received a demand letter for possession

of the property that stated that a trust/Mellon Bank was the highest bidder at the foreclosure sale, whereas documents filed with the court stated that EMC was the successful bidder. The trial court denied the motion on April 23, 2014. Kemp filed a notice of appeal on April 25, 2014.

¶ 20 II. ANALYSIS

¶ 21 We begin by noting that Kemp filed two motions to reconsider the confirmation of the sale, whereas Illinois Supreme Court Rule 274 (eff. Jan. 1, 2006) contemplates the filing of only one such motion ("A party may make only one postjudgment motion directed at a judgment order that is otherwise final."). However, Kemp's notice of appeal was still filed within 30 days of the trial court's denial of her first motion to reconsider, so it is clear that we have jurisdiction in this case.

¶ 22 We now turn to the merits of the appeal.

¶ 23 A. Standing

¶ 24 Kemp first argues that EMC lacked standing to file the foreclosure suit in its own name because, according to the affidavit of its assistant vice president (see supra ¶ 7), it filed suit over five months before it was admittedly assigned the mortgage. Kemp argues that EMC also does not have standing because it received only an assignment of the mortgage, and not the underlying debt.

¶ 25 EMC argues that Kemp forfeited her standing argument, and that even otherwise, EMC had standing at the time it filed suit. On the subject of forfeiture, EMC notes that lack of standing in civil cases is an affirmative defense that will be forfeited if not timely raised in the trial court. See *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). In support of its argument that Kemp did not timely raise the defense here, EMC cites *U.S. Bank National Ass'n v. Avdic*, 2014 IL App (1st) 121759 (the defendant forfeited his standing

argument because he did not raise it until his motion to reconsider the trial court's ruling on the plaintiff's motion for summary judgment), and *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010) (the defendant forfeited standing issue by first raising it in response to the motion to confirm the sale).

¶ 26 Kemp responds that she did not forfeit the issue of standing, because she first raised it in her verified *pro se* answer to the complaint, when she denied the allegation that EMC was "the legal holder, agent or nominee of the legal holder, of the indebtedness." Kemp argues that, in this manner, the instant case is distinguishable from the cases relied on by EMC. See *Avdic*, 2014 IL App (1st) 121759, ¶ 38 (the defendants admitted in their answer that the plaintiff had standing to bring the foreclosure complaint); *Barnes*, 406 Ill. App. 3d at 6-7 (where the defendant did not answer the complaint, it resulted in her admission that the plaintiff had standing). Kemp cites a legal publication/secondary source for the proposition that under Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2005)), standing may be put in issue when that allegation is properly denied. Kemp insists that she continued to raise the standing issue in litigation, to the extent that the trial court granted Rule 304(a) language, and again on remand.

¶ 27 Kemp argues that when she denied EMC's allegation of standing, EMC was on notice that it would be required to set forth proof of standing in order to obtain summary judgment. Kemp argues that once EMC produced an affidavit from its own officer establishing that it did not receive a mortgage assignment until five months after it filed the complaint, a *prima facie* defense was established. Kemp further argues that standing is a component of subject matter jurisdiction that cannot be forfeited.

¶ 28 Addressing the last argument first, this court has stated that a plaintiff's standing is an element of justiciability but is not an element of the trial court's subject matter jurisdiction. *Nationstar Mortgage, LLC v. Canale*, 2014 IL App (2d) 130676, ¶ 17. Therefore, an assertion of lack of standing is subject to forfeiture.

¶ 29 Moreover, we agree with EMC that Kemp has forfeited the issue of standing, for she failed to raise the issue in a timely manner. See *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 18 ("Lack of standing is an affirmative defense that can be forfeited if not timely raised in the trial court."). Although Kemp denied the allegation in her answer, she cites no cases for the proposition that this is the equivalent of an affirmative defense. The secondary source she relies on cites section 15-1504 of the Foreclosure Law (735 ILCS 5/15-1504 (West 2010)) and *U.S. Bank National Ass'n v. Sauer*, 392 Ill. App. 3d 942 (2009), but we find nothing in the statute or case supporting the proposition. To the contrary, "it is well settled that the denial of an allegation in a plaintiff's complaint does not rise to the level of an affirmative defense." *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 18. A party who does not assert an affirmative defense in an answer may still file a cross-motion for summary judgment raising the defense (*id.* ¶ 20), but Kemp did not do so here, even though she was represented by counsel by that time. Rather, she waited over four years from the time of filing to raise the issue, and over a year after the trial court had entered a foreclosure judgment. During this interlude, Kemp raised numerous other issues resulting in various stays in the foreclosure proceedings. We recognize that Kemp has consistently repeated her standing argument in the past few years, but EMC has as consistently asserted forfeiture, and this is the first time a reviewing court has been in the proper procedural position to address the issue.[2] For the reasons stated, we conclude that

[2] We note that in our prior disposition, and in our restated facts above, we stated that

Kemp forfeited her standing argument. See also *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9 (the defendant forfeited the issue of the plaintiff's standing because she did not raise it "while, at the same time, participating and accepting the benefits of the court proceedings."); *cf. Perry*, 2015 IL App (3d) 130673, ¶¶ 18, 20 (the defendants' denial of an allegation was not the equivalent of an affirmative defense, and because they also did not file a cross-motion for summary judgment raising the defense of lack of standing, they forfeited the defense).

¶ 30 B. HAMP

¶ 31 Kemp next argues that the judgment of foreclosure and judicial sale must be set aside because EMC violated HAMP. Kemp cites section 15-1508(d-5) of the Foreclosure Law, which states:

> "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 established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008 *** 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).

"Kemp again raised an entirely new argument" when she argued in November 2010 that EMC did not have standing to file its original foreclosure complain in 2006. *EMC Mortgage Corp.*, 2011 IL App (2d) 101175-U, ¶ 9; *supra* ¶ 13.

Kemp argues that she timely sent the HAMP application prior to the judicial sale and alerted EMC's counsel. She argues that in material violation of the program requirements, EMC sold her home at the sheriff's sale without approving or denying the application.

¶ 32 Kemp notes that at the hearing on her objection to the sale confirmation, the trial court stated that the loan amount for her house, which the complaint alleged was $861,693.01, exceeded the HAMP threshold of $729,750 of unpaid principal balance for a residential unit. Kemp argues that the trial court wrongly assumed the role of an advocate by raising this issue *sua sponte* and that EMC forfeited its right to rely on such a defense by not raising it. Kemp argues that the trial court further abused its power by circumventing the HAMP process itself, as a party denied HAMP relief regarding the valuation of the property has the ability to appeal the denial to the bank, during which negotiations could result in a reasonable settlement. Kemp maintains that she was prohibited from following this process because the trial court, not Chase,[3] denied her application. Kemp argues that this is especially true given that she had submitted an appraisal with her application showing that her property is worth close to the $729,750 figure, and that Chase had signed a consent decree with the federal government requiring it to provide assistance to qualified borrowers.

¶ 33 EMC argues that HAMP created an obligation to modify *eligible* loans to prevent foreclosures. EMC argues that one of HAMP's basic eligibility requirements is that the loan's principal balance must be below the maximum allowed, which was $729,750 for a single family home at the time Kemp filed her application, as compared to her principal balance of $861,693.01. EMC argues that although Kemp focuses on her property value, the eligibility

[3] As stated, the bankruptcy court order lifting the automatic stay named "EMC Mortgage Corporation/Chase Home Finance LLC" as the plaintiff.

analysis accounts only for the principal balance of the loan. EMC contends that, therefore, regardless of any agreement JP Morgan Chase may have reached with the federal government regarding loan modifications, Kemp's loan was not eligible for a HAMP modification, and section 1508(d-5) could not form a basis for denying confirmation of the sale.

¶ 34 A judicial foreclosure sale is not complete until it has been approved by the trial court. *Id*. The objecting party bears the burden of showing why the sale should not be confirmed. *NAB Bank v. LaSalle Bank*, 2013 IL App (1st) 121147, ¶ 9. HAMP is a component of the Making Home Affordable Program, a comprehensive plan to prevent avoidable foreclosures after the collapse of the housing market in 2008. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 1, n.2. Accordingly, under section 15-1508(d-5), a defendant must prove by a preponderance of the evidence that he or she applied for assistance under HAMP and that the property was sold in material violation of HAMP's requirements for proceeding to judicial sale. *Id.* ¶ 59.

¶ 35 The standard of review of a court's approval of a judicial sale is an abuse of discretion. *Id.* ¶ 57. The trial court abuses its discretion when its ruling rests on an error of law or where no reasonable person would take the view adopted by it. *Id*. At the same time, the trial court is required to set aside a sale if the mortgagor proves by a preponderance of the evidence that he or she applied for HAMP assistance and that the property was sold in material violation of the program's requirements. 735 ILCS 5/15-1508(d-5) (West 2014); *CitiMortgage, Inc. v. Adams*, 2015 IL App (5th) 130470, ¶ 19.

¶ 36 Given that Kemp had the evidentiary burden of showing that the property was sold in material violation of HAMP's requirements, we find no error in the trial court looking at HAMP's requirements and raising the issue of the loan balance. Kemp does not dispute that one

of the basic eligibility criteria is that the unpaid principal balance of the mortgage for a single unit not be greater than $729,750. See also Making Home Affordable Program's Handbook for Servicers of Non-GSE Mortgages (Aug. 17, 2012), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf (last visited Sept. 1, 2015) (listing this limit); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (2012) (same). Although a bank could ultimately agree to whatever loan modification it chooses, the question before the trial court was whether Kemp met her burden of showing both that she applied for HAMP assistance and that the home was sold in material violation of HAMP's requirements. We agree with EMC that because Kemp's loan amount did not meet HAMP eligibility requirements, it was not error for the trial court to rule that Kemp did not meet her evidentiary burden under section 15-1508(d-5).

¶ 37 C. Payment Method at Judicial Sale

¶ 38 Kemp's third argument on appeal is that the judicial sale was invalid because it did not follow the foreclosure, notice of sale, and Du Page County foreclosure bid rules. Kemp cites *World Savings & Loan Ass'n v. Amerus Bank*, 317 Ill. App. 3d 772 (2010). There, the court stated that under section 15-1507(b) of the Foreclosure Law (735 ILCS 5/15-1507 (West 1998)), " 'the real estate shall be sold at a sale *** on such terms and conditions as shall be specified by the court in the judgment of foreclosure.' " *World Savings & Loan Ass'n*, 317 Ill. App. 3d at 777. The court further stated that an officer making the real estate sale derives his authority from the court order directing the manner of a sale, and his acts will be set aside if he does not follow the directions of the order or decree. *Id.*

¶ 39 Kemp notes that the judgment for foreclosure and sale here states in part:

> "The real estate shall be sold at public auction to the highest bidder for *cash*; the deposit required at the time of sale will be between ten percent (10%) and twenty-five percent (25%) of the successful bid, and the officer conducting the sale shall announce the terms of the sale prior to the auction. The balance of the bid amount is required to be paid within twenty-four (24) hours of the Sale. *All payments of the amount bid shall be in cash or certified funds payable to the Special Commissioner conducting the Sale*." (Emphases added.).

Kemp points out that the notice of sale similarly provides:

> "Sale Terms. This is an "AS IS" sale for "CASH". The successful bidder must deposit 10% down by certified funds; balance, by certified funds, within 24 hours. NO REFUNDS."

Last, Kemp cites the Du Page County foreclosure bid rules, which she contends state:

> "Terms of all sales are 'cash,' in the form of cash, cashiers check, or certified check. Ten percent (10%) of your opening bid is due at the time of sale, the balance within twenty-four (24) hours."

¶ 40 Kemp argues that although EMC was purportedly the highest bidder at the judicial sale, the sheriff did not require it to deposit any cash whatsoever. Kemp cites a letter from the sheriff's office stating that cash was required in all third party sales, but the plaintiff is not considered a third party. The letter stated that the judgment indebtedness is sufficient to purchase the property, and the only time a plaintiff would be required to provide funds is if it bid above the total indebtedness against another bidder.

¶ 41 Kemp contends that the process that occurred here invalidates the judicial sale because nothing in the foreclosure judgment authorized the sheriff to accept anything other than cash, and

the notice of sale and Du Page County foreclosure bid rules contained the same requirement. Kemp cites *Ehrgott v. Seaborn*, 363 Ill. 292, 293 (1936), where the terms of sale required, among other things, a cash payment of at least one-third the sale price on the day of the sale. The winning bidder submitted less than this amount, and the appellate court held that this justified the trial court's refusal to approve the sale. *Id.* at 296-97. Kemp argues that her sale should likewise be invalidated because EMC clearly departed from the foreclosure order's sale terms that required it to tender a certain amount of cash or certified funds on the sale date.

¶ 42 EMC argues that Kemp forfeited her argument because she first raised it in a motion to reconsider the trial court's confirmation of the sale, rather than in response to EMC's motion to confirm the sale. EMC argues that even otherwise, Kemp's argument is without merit, as she is asserting that it should have given almost $2 million to the selling officer only to have the officer give that money right back to EMC. EMC argues that the cases Kemp cites are distinguishable, as they do not involve a sale to a judgment creditor. EMC further cites language in the judgment of foreclosure stating:

> "In the event the bidder fails to comply with the terms of the purchase as required, then upon demand by the Plaintiff ***, the funds submitted shall be forfeited to the Plaintiff or the Plaintiff has the option to have the property sold to the next highest bidder."

EMC argues that this language implied that it was not bound by the requirements of a cash deposit and payment set out in the order. EMC argues that this is clearly how the trial court and selling officer interpreted the language, and there is nothing to suggest that such an interpretation was an abuse of discretion.

¶ 43 Kemp responds that she did not forfeit her argument because she did not obtain the letter from the sheriff's office confirming that EMC did not pay cash until over three months from the

date of sale. We agree with this argument. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 (the purpose of a motion to reconsider is to, *inter alia*, bring to the trial court's attention newly discovered evidence that was not available at the time of the original hearing).

¶ 44 A trial court has broad discretion in approving or disapproving judicial sales, and its decision to confirm or reject a judicial sale will not be disturbed absent an abuse of discretion. *Adams*, 2015 IL App (5th) 130470, ¶ 18. Similarly, whether to grant or deny a motion to reconsider is within the trial court's sound discretion and will not be reversed unless the trial court abused its discretion. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2014 IL App (1st) 130962, ¶ 23.

¶ 45 Here, the judgment of foreclosure provides:

> "If Plaintiff is the successful bidder at the sale, the amount due Plaintiff, plus all costs, advances and fees, with interest incurred between entry of Judgment and confirmation of sale, shall be taken as credit on its bid."

Thus, contrary to Kemp's argument, the judgment specifically allows for the plaintiff to use the amount of indebtedness as credit on its bid. Here, EMC bid the exact amount of the indebtedness, so under this provision, it was not required to pay additional cash or certified funds. Accordingly, the trial court did not abuse its discretion in approving the judicial sale.

¶ 46 D. Highest Bidder

¶ 47 Kemp next argues that the order approving the judicial sale should be vacated because a trust/Mellon Bank, not EMC, was the highest bidder. Kemp notes that following the October 31, 2013, judicial sale, the sheriff and EMC represented that EMC was the successful bidder on the property, and the trial court confirmed the sale on February 6, 2014. Thereafter, EMC's counsel

sent Kemp a demand letter dated April 1, 2014. It stated that a trust/Mellon Bank[4] "was the highest bidder at the sale, and now owns the property," and was demanding possession.

¶ 48 Kemp cites *People v. Cruz*, 162 Ill. 2d 314 (1994), for the proposition that an attorney may make binding admissions on behalf of his client. Kemp argues that in the letter, EMC's counsel admitted the falsity of the highest bidder named in the pleadings and motions, so the order confirming the sale should be vacated.

¶ 49 EMC again argues that Kemp forfeited this argument by first raising it in a motion to reconsider. EMC argues that, even otherwise, Kemp's argument would fail because she is basing it entirely on a letter sent from EMC's counsel after the sale was confirmed. EMC argues that the letter incorrectly identified a trust/Mellon Bank as the highest bidder at the judicial sale. EMC points out that in the record there is an (undated) notice of transfer of certificate of sale from EMC to the trust/Mellon Bank. EMC argues that its error in the letter to Kemp was without consequence as the trust/Mellon Bank became the property's owner and was entitled to demand possession from Kemp, and the error is not a basis to vacate a confirmed sale.

¶ 50 We conclude that Kemp has not forfeited her argument because, just like the last argument, it is based on new evidence that was not available to her prior to the confirmation of the judicial sale. However, the case Kemp relies on for the binding nature of admissions concerns statements made during trial (see *Cruz*, 162 Ill. 2d at 375), which is not the situation

[4] The letter specifically named "THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR-IN-INTEREST TO JP MORGAN CHASE BANK, N.A., AS TRUSTEE FOR BEAR STEARNS ASSSET [*sic*] BACK SECURITIES, BEAR STEARNS ALT-A TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-2."

here. See also *Gaston v. Founders Insurance Co.*, 365 Ill. App. 3d 303, 318-19 (2006) ("An attorney's statement in court constitutes a binding admission of the party which cannot be refuted."). As the documents in the record reflect that EMC was in fact the successful bidder and then sold its interest to the trust/Mellon Bank, the trial court did not abuse its discretion in denying Kemp's motion to reconsider the confirmation of the judicial sale.

¶ 51 E. Surplus

¶ 52 Last, Kemp argues that we should declare a surplus under section 15-1512 of the Foreclosure Law (735 ILCS 5/15-1512 (West 2014)). Kemp points out that the receipt of sale provides that EMC's bid of $1,757,519.05 included $464,225.96 of interest of 9% from the date of the judgment to the date of sale. Kemp maintains that it appears that the interest amount was determined based on the date the trial court entered a judgment for foreclosure and sale of the property, June 2, 2009. Kemp argues that since a final judgment occurs only with the order confirming the judicial sale and directing the distribution (see *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 42), the statutory 9% postjudgment interest rate should begin to accrue then, which here was on February 6, 2014. Kemp maintains that the foreclosure judgment supports this result, for it provides: "Any bid at sale shall be deemed to include, without the necessity of a court order, interest at the statutory judgment rate on any unpaid portion of the sale price from the date of sale to the date of payment." Kemp argues that correctly computing the interest rate leaves a significant surplus, which should be distributed to her.

¶ 53 EMC argues that this exact issue was recently resolved in *BAC Home Loans Servicing, LP v. Popa*, 2015 IL App (1st) 142053. We agree. In *Popa*, the court stated that the Foreclosure Law provides that " '[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of judgment until satisfied.' " *Id.* ¶ 34 (quoting 735 ILCS 5/2-1301 (West

2012)). The court emphasized that the statute did not specify that the judgment had to be final and appealable. *Id.* The court further stated that section 15-1504(e)(3) of the Foreclosure Law stated that a plaintiff's request for foreclosure is deemed and construed to mean that the plaintiff was requesting:

> " '[I]n default of such payment in accordance with the judgment, the mortgaged real estate be sold as directed by the court, to satisfy the amount due to the plaintiff as set forth in the judgment, together with the interest thereon at the statutory judgment rate from the date of the judgment[.]' " *Id.* ¶ 35 (quoting 735 ILCS 5/15-1504(e)(3) (West 2012)).

The court stated that the legislature's use of the word "judgment" above referred to the foreclosure judgment, which includes the total amount the defendant owes to the plaintiff before the property has been sold, and not the order confirming the sale. *Id.* The court stated, "Accordingly, the Foreclosure Law clearly provides for the plaintiff's recovery of interest at the statutory rate after the foreclosure judgment has been entered and before the confirmation of sale." *Id.*

¶ 54 We agree with the *Popa* court's interpretation of the relevant statutes. Kemp's reliance of the foreclosure judgment for a contrary result is misplaced, as the provision she cites relates to bids for the sale of the property, specifying that statutory interest accrues on the unpaid portion on the sale price from the date of sale to the date of payment; the provision does not relate to statutory interest on the judgment.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 57 Affirmed.