

2016 IL App (2d) 150362-U  
No. 2-15-0362  
Order filed January 22, 2016

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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HOME STATE BANK, N.A.,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CH-1619
	)	
RONALD RAGAN and PAULA RAGAN;	)	
RELAX DEVELOPERS, LTD.;	)	
HOMEOWNERS ASSOCIATION, if any;	)	
Unknown Owners and Non-Record	)	
Lien Claimants,	)	Honorable
	)	Suzanne C. Mangiamele,
Defendants-Appellants.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in granting lender summary judgment on mortgage foreclosure claim.

¶ 2 Plaintiff, Home State Bank, N.A., filed a mortgage foreclosure action against defendants, Ronald Ragan and Paula Ragan, alleging that defendants failed to make their loan payments. The trial court granted plaintiff summary judgment, entered an order confirming the sheriff's sale of the subject property, and entered a deficiency judgment of \$501,260 against defendants.

Defendants appeal, arguing that (1) the affidavit supporting the summary judgment motion was deficient because the affiant, a vice president of plaintiff, was not qualified to testify to the business records of the mortgage loan servicing company; (2) defendants' answer to the complaint and Ronald's affidavit created questions of fact that preclude summary judgment; (3) the trial court erred in not allowing defendants to take additional discovery; and (4) plaintiff failed to establish that it met the statutory requirements for a judicial sale and deficiency judgment. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 As this is an appeal from the entry of summary judgment, we summarize the facts taken from the pleadings, depositions, and admissions on file, together with the affidavits. See 735 ILCS 5/2-1005(c) (West 2014). On May 23, 2008, the parties executed a promissory note with a term of 30 years and a principal amount of \$1,360,000. The note was secured by a mortgage on the property at 9518 Muirfield Court in Lakemoor. On February 1, 2013, the loan was modified, reducing the term to one year and requiring a balloon payment on February 1, 2014, but leaving the principal balance unchanged.

¶ 5 Defendants allegedly defaulted on the loan when they stopped making payments on July 1, 2013, and failed to pay the property taxes. On October 1, 2013, plaintiff filed a one-count complaint for foreclosure of the mortgage, and defendants filed an answer without affirmative defenses. On February 24, 2014, plaintiff moved for summary judgment. Defendants obtained leave to issue discovery, to which plaintiff responded.

¶ 6 On May 21, 2014, plaintiff filed an amended motion for summary judgment, supplemented with the affidavit of Paula Lutsch, a vice president of plaintiff. Lutsch stated that she had "personal knowledge of all events recorded within the records of Cenlar, FSB," the

company that plaintiff used to service the loan. Lutsch further stated that she was “familiar with [Cenlar] and its mode of operation,” had been employed by plaintiff for three years, and was “qualified and authorized to testify about the methods and processes used by [Cenlar] to collect and record the information contained within its files regarding all events set forth in the complaint filed in this matter.” Lutsch averred that the information recorded and documents collected in Cenlar’s files were “recorded and collected as part of the regular practice of Cenlar’s business, are made in the regular course of business activities, and are compiled by its employees at or near the time of transmission of that information by an employee who has personal knowledge of the transmitted fact.” Lutsch described in detail Cenlar’s method of automatically recording and tracking mortgage payments. She calculated the outstanding balance to be \$1,366,904 on May 30, 2014, with interest accruing at a rate of \$144 per day thereafter. To the summary judgment motion, plaintiff attached documents showing all payment activity since the loan was originated.

¶ 7 In opposition to the amended summary judgment motion, defendants submitted an affidavit by Ronald in which he points out that the motion erroneously states that the balloon payment was due on August 26, 2012. In the affidavit, Ronald asks to depose Lutsch to resolve the discrepancy. It does not appear that any further discovery was issued.

¶ 8 On August 15, 2014, the trial court granted plaintiff summary judgment, and a judicial sale was held on November 20, 2014. The court entered an order approving the sale and entered a deficiency judgment on March 13, 2015. Defendants’ timely appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendants argue that (1) the affidavit supporting the summary judgment motion was deficient because Lutsch was not qualified to testify to the business records of the

mortgage loan servicing company; (2) defendants' answer to the complaint and Ronald's affidavit created questions of fact that preclude summary judgment; (3) the trial court erred in denying defendants discovery; and (4) plaintiff failed to establish that it met the statutory requirements for a judicial sale and deficiency judgment.

¶ 11 To state a *prima facie* case of foreclosure, a plaintiff must introduce the mortgage and note, duly executed and acknowledged before a notary public and recorded in the office of the recorder of deeds, and identified by the mortgagee. *Financial Freedom v. Kirgis*, 377 Ill. App. 3d 107, 131 (2007). The trial court granted plaintiff summary judgment on its foreclosure claim.

¶ 12 Summary judgment is appropriate only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adams*, 211 Ill. 2d at 43.

¶ 13 In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is to be encouraged to expedite the disposition of a lawsuit; however, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Springborn v. Village of Sugar Grove*, 2013 IL App (2d) 120861, ¶ 24. We

review *de novo* a trial court's grant of summary judgment. *Springborn*, 2013 IL App (2d) 120861, ¶ 24.

¶ 14

A. Affidavit

¶ 15 Defendants argue that Lutsch's affidavit is deficient because she was not qualified to testify to Cenlar's business records, which documented defendants' default. The rules of evidence require that a proper foundation be laid for the introduction of a document into evidence, and there must be evidence demonstrating that the document is what the party offering it claims it to be. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 92. Generally, the party offering the document establishes its identity through the testimony of a witness who has sufficient personal knowledge to satisfy the trial court that the document is what it claims to be. *East-West Logistics*, 2014 IL App (1st) 121111, ¶ 92.

¶ 16 An affidavit may also serve to authenticate a document as long as it strictly complies with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). *East-West Logistics*, 2014 IL App (1st) 121111, ¶ 93. Rule 191(a) provides in pertinent part that "[a]ffidavits in support of and in opposition to a motion for summary judgment \*\*\* 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 documents 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).

¶ 17 Defendants argue that the affidavit does not support the order of summary judgment because Lutsch was not employed by or a representative of Cenlar and lacked personal knowledge of defendants' loan. To fulfill the foundational requirements of a business record, the

author or creator of the record need not testify or be cross-examined about the contents of the record. *East-West Logistics*, 2014 IL App (1st) 121111, ¶ 95. The custodian or any other person familiar with the business and its mode of operation may provide testimony for establishing the foundational requirements of a business record. The absence of testimony by the author of the record affects only the weight, not the admissibility of the record. *East-West Logistics*, 2014 IL App (1st) 121111, ¶ 95.

¶ 18 Lutsch's affidavit satisfies Rule 191(a). The affidavit states that she had personal knowledge of all events recorded within Cenlar's records, she was familiar with Cenlar's mode of operation, and she was qualified and authorized to testify about Cenlar's procedure for collecting and recording the information contained within its files regarding the subject matter of the complaint. Lutsch averred that the information in Cenlar's files were recorded and collected in the course of its regular business activities and compiled at or near the time of transmission of that information by an employee who has personal knowledge of the transmitted fact. Lutsch described in detail Cenlar's method of automatically recording and tracking mortgage payments, and the record shows clearly that plaintiff relied on the accuracy of the records in conducting its business.

¶ 19 Defendants argue that the affidavit does not comply with Rule 191(a) because Lutsch failed to attach certified copies of the payment history, loan documents, loan modification, and complaint. Specifically, defendants argue that paragraph 4 of the affidavit refers to the payment history as "Exhibit 2," which was not attached. The affidavit actually refers to the payment history as "Exhibit 1," which is attached. The affidavit incorporates the other documents by reference, and the loan documents and modification are attached to the complaint. Defendants cite no authority that requires these documents, which were already in the record, to be recopied

and attached to the affidavit that was filed in support of the summary judgment motion. *Cf. Otis Elevator Co. v. American Sur. Co. of New York*, 314 Ill. App. 479, 483 (1942) (citing *Roberts v. Sauerman Bros., Inc.*, 300 Ill. App. 213 (1939) (where the plaintiff attaches supporting documents to the complaint and an affidavit for summary judgment adopts those documents, the plaintiff need not attach to the affidavit copies of those documents that are already in the record))).

¶ 20 Finally, defendants argue that the summary judgment motion incorrectly specified August 26, 2012, as the loan's maturation date. Plaintiff concedes the clerical error and points out that Lutsch's affidavit and the loan documents correctly show that the original maturation date was June 1, 2038, and that the loan modification shortened the date to February 1, 2014. Plaintiff reiterates that defendants stopped making payment in July 2013, long before the loan, as modified, matured. Defendants put undue emphasis on the clerical error without addressing the underlying allegations in the summary judgment motion and the supporting affidavit, and we reject their argument, accordingly.

¶ 21 B. Questions of Fact

¶ 22 Defendants next argue that their answer to the complaint and Ronald's affidavit created questions of fact that preclude summary judgment. Defendants' entire argument is that "the effect of [their] answer of insufficient knowledge is a denial of the allegation" and that Ronald's affidavit refuted plaintiff's allegations "in numerous material respects." Defendants fail to develop this argument at all as required by Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), and thus, they have forfeited it. Defendants have not identified which allegations they are referring to and in what numerous respects they were refuted by Ronald's affidavit. We decline to comb the record and articulate defendants' argument for them.

¶ 23 Regardless, if a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). Thus, defendants' denials in their pleadings and affidavits, alone, are insufficient to avoid the summary judgment entered on plaintiff's claim.

¶ 24 C. Discovery

¶ 25 Defendants also argue that the trial court erred in denying them additional discovery before granting plaintiff summary judgment. Defendants' entire argument on the issue is: "[a]s set forth in the affidavit of [Ronald], pursuant to Illinois Supreme Court Rule 191(b), [defendants] needed further discovery to in order to [*sic*] adequately respond to [plaintiff's] motion." In his affidavit, Ronald mentions the clerical error regarding the loan maturation date, but defendants do not otherwise elaborate on the type of information they hoped to reveal through additional discovery, why it was necessary, or under what authority it was required. Defendants again fail to develop their argument as required by Rule 341(h)(7), and thus, they have forfeited it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Furthermore, the record shows that the trial court afforded defendants an opportunity for some discovery before ruling on the motion, and defendants do not allege that plaintiff failed to comply with their requests. Defendants' failure to take the deposition of Lutsch, who was available to them, despite engaging in discovery is not a ground for mandating additional discovery.

¶ 26 D. Judicial Sale

¶ 27 Finally, defendants argue that the trial court erred in granting plaintiff's motion to confirm the judicial sale and entering a deficiency judgment against defendants. Citing sections 15-507 and 15-1508(a) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-507, 15-



1508(a) (West 2014)), defendants argue that plaintiff's motion "failed to establish that these requirements were met" and was "fatally defective and should have been denied." Section 15-507 prescribes the procedure for a judicial sale of the subject of a foreclosure judgment, and section 15-1508(a) provides that "[t]he person conducting the sale shall promptly make a report to the court, which report shall include a copy of all receipts and, if any, certificate of sale." 735 ILCS 5/15-1508(a) (West 2014). Here, defendants allege that plaintiff's motion was deficient because (1) it was not verified and (2) it lacked evidentiary support in that the sheriff's report of sale and distribution was not attached. First, defendants cite no authority requiring verification of the motion for confirmation, and, thus, the argument is forfeited. Second, the record shows that, although the sheriff's report was tendered to the court and defense counsel separately, the report was attached to plaintiff's reply to defendants' opposing brief. The record contains copies of the report of sale, the receipt of sale, the certificate of sale, notice of sale, and publications. The trial court and defense counsel were in receipt of the sheriff's report before the court heard the motion for confirmation. The record refutes defendants' claim of lack of evidentiary support for the confirmation of sale.

¶ 28

### III. CONCLUSION

¶ 29 For the reasons stated, the summary judgment of mortgage foreclosure entered by the circuit court of McHenry County is affirmed.

¶ 30 Affirmed.