2017 IL App (2d) 161024-U
No. 2-16-1024
Order filed August 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CITIMORTGAGE, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff,	)	
	)	
	)	
v.	)	No. 15-CH-666
	)	
GEORGE F. GLENN and JACQUELINE A. GLENN,	)	
	)	
	)	
Defendants-Appellants	)	
	)	Honorable
(Federal National Mortgage Association, Plaintiff-Appellee).	)	Robert W. Rohm,
	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in (1) denying defendants' motion to vacate the default judgment of foreclosure and sale on their property; (2) denying their motion to vacate the judicial sale; and (3) confirming the judicial sale. Therefore, we affirmed.

¶ 2 In this residential mortgage foreclosure action, defendants, George F. Glenn and Jacqueline A. Glenn, appeal from the trial court's rulings denying their motion to vacate the default judgment of foreclosure and sale, and confirming the judicial sale of their property. On

appeal, they argue that: (1) the trial court erred in denying their motion to vacate the default judgment, because the bank's loss mitigation affidavit showed that all foreclosure prevention alternatives had not been exhausted; (2) the trial court erred in denying their motion to vacate the judicial sale, because the property was sold in violation of the Home Affordable Modification Program (HAMP); and (3) the trial court erred in confirming the sale, because justice was not otherwise done. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 6, 2015, CitiMortgage, Inc. (CitiMortgage), filed a complaint to foreclose on the mortgage on defendants' home, located at 1527 Harvest Lane in Westmont, Illinois. CitiMortgage alleged that the mortgage was dated May 21, 2007; that defendants had not paid their monthly installments beginning in October 2014; and that they owed $140,506.75 plus other expenses.

¶ 5 After the first status hearing on August 3, 2015, the trial court listed the case's status as "Loss Mitigation Workout in progress." Defendants were served with process on September 13, 2015. On September 20, 2015, after a status hearing, the trial court listed the case's status as "Preparing for Judgment." Counsel for defendants attended a hearing on December 2, 2015, but did not file an appearance. Defendants were given 28 days to file an appearance and an answer or other pleading.

¶ 6 CitiMortgage filed a loss mitigation affidavit on January 27, 2016. Alexander Hall, a vice president of document control, averred as follows. The loan was eligible for a HAMP modification or traditional, standard, or in-house loss mitigation options. The following steps had been taken to comply with CitiMortgage's obligations under the programs:

> "Sent borrower letter on 7/30/15 stating a Fannie Mae Streamline Modification cannot be approved. Notified borrower on 6/27/15 they have successfully completed the trial payments for the mortgage loan modification. Sent borrower a letter on 4/27/15 stating that the borrowers[']monthly trial payment is due on 5/6/15. Sent borrower an email on 8/28/15."

For the "current status" of the loss mitigations efforts, Hall stated: "No response from borrower, option no longer under review."

¶ 7 On February 10, 2016, defendants' attorney again attended a status hearing without having filed an appearance or responsive pleading. On February 26, 2016, CitiMortgage moved for Federal National Mortgage Association (Fannie Mae) to be substituted as the plaintiff. On March 24, 2016, CitiMortgage moved for an entry of a default order and a judgment of foreclosure and sale. A notice of the motion was sent to defendants at their residence.

¶ 8 On April 6, 2016, the trial court granted CitiMortgage's motion for substitution and entered an order of default and judgment of foreclosure and sale. The redemption period was to expire on July 7, 2016. A notice of the default order and judgment was sent to defendants at their residence.

¶ 9 On June 9, 2016, a notice of sheriff's sale was sent to defendants. The sale was scheduled for July 12, 2016. That day, a different attorney (defendants' current counsel) entered an appearance for defendants and filed an emergency motion to vacate the default and stay the foreclosure sale. Defendants alleged as follows. Before the entry of the default judgment, they had successfully completed the trial payments for a loan modification, but they were not approved for a Fannie Mae Streamline modification and did not pursue other loss mitigation options. They then suffered temporary hardships due to a loss of income from George's job and

Jacqueline's personal injury. However, they had resumed full-time employment and should be able to qualify for a permanent loan modification. Defendants argued that Fannie Mae would not be prejudiced by vacating the default judgment or staying the sheriff's sale while defendants pursued other loss mitigation options, whereas they would otherwise be highly prejudiced.

¶ 10 At a hearing that day, defendants' attorney stated the following. Defendants had made some trial payments and were denied a modification under the "streamline program." However, according to the loss mitigation affidavit, they were eligible for "three or four different programs" and "a HAMP modification that they never applied for." They were now prepared to submit the HAMP application, though counsel "realize[d] that this [was] a late request to file an application for a HAMP modification." There was some confusion in that defendants thought that their HAMP application was denied, but they "never even applied for it." They were now "prepared to do so," and counsel asked that "the Sheriff's sale be stayed to allow them sufficient time to get that HAMP modification application in." The trial court asked how close defendants were to getting the application ready, and the attorney stated that she "was going to have it presented today." She stated that defendants were "close."

¶ 11 The trial court stated that defendants' motion was "not well-founded," but "in the interest of equity," it would stay the sheriff's sale for 60 days so that defendants could file the HAMP application. Counsel stated, "That would be great." The trial court denied defendants' request to vacate the default judgment and stated that Fannie May could proceed with a sheriff's sale after 60 days without further order of the court.

¶ 12 On August 23, 2016, Fannie Mae sent defendants a notice that a sheriff's sale would take place on September 13, 2016. Defendants did not file any pleadings, and the property was sold. On September 22, 2016, Fannie Mae filed a motion for an order approving the report of sale and

distribution. At a hearing on the motion, defendants objected, and the trial court set a briefing schedule.

¶ 13 On October 19, 2016, defendants filed a motion to vacate the foreclosure sale, alleging as follows. Based on the loss mitigation affidavit, it appeared that they were evaluated for a Fannie Mae Streamline program, even though the mortgage was eligible for a HAMP modification and other loss mitigation options. CitiMortgage never contacted defendants to explain what loss mitigation options were available before the entry of the foreclosure judgment. It was not until defendants retained their current counsel on July 12, 2016, that they learned of their eligibility for a HAMP modification. Due to a death in the family and travel for business, defendants were unable to compile all of the required financial documentation for a HAMP loan modification until they returned home on September 7, 2016. However, by that time their attorney had left the country for vacation and did not return until September 18, 2016. Therefore, defendants were unable to submit the application before the sheriff's sale on September 13, 2016; they submitted a complete application on September 30, 2016. Considering that defendants had applied for a loan modification in 2015 but "were never fully evaluated for a HAMP modification, it was reasonable to conclude that their property was sold in material violation of the program's requirement for proceeding to a judicial sale."

¶ 14 Also on October 19, 2016, defendants filed a response to Fannie Mae's motion for an order approving the report of sale and distribution, with similar allegations. They argued that Fannie Mae should be required to review their HAMP application before seeking confirmation of the sale.

¶ 15 In its reply, Fannie Mae argued that defendants failed to meet their burden to demonstrate both that they applied for assistance and that the property was sold in material violation of

HAMP guidelines. It argued that defendants failed to attach any documents or evidence to support their allegation that they submitted a financial package on September 30, 2016. Fannie Mae argued that, even otherwise, defendants could not show that the property was sold in material violation of HAMP because they did not submit their application until after the sale had taken place. Fannie Mae argued that defendants further failed to establish any other adequate basis to set aside the sale or deny confirmation of the sale.

¶ 16 At a hearing on November 9, 2016, the trial court stated that it should not have previously granted defendants 60 days to file the HAMP application because the application needed to be filed before the scheduled sale. Even with the rescheduled date, the HAMP application, if it was pending, was untimely because it was submitted after the sale. The trial court therefore denied defendants' motion to vacate and granted Fannie Mae's motion to confirm the sale. It entered a deficiency judgment of $42,818.35 against defendants.

¶ 17 On December 1, 2016, defendants filed a motion to reconsider and a motion to stay the execution of the judgment. The trial court denied the motions on December 7, 2016, and defendants timely appealed. We thereafter granted their emergency motion to stay the order confirming the sale and the judgment of possession, until further order of this court.

¶ 18 II. ANALYSIS

¶ 19 A. Motion to Vacate the Default Judgment

¶ 20 Defendants first argue that the trial court erred in denying their motion to vacate the default judgment, which they brought pursuant to section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)). Section 2-1301(e) provides:

> "The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final

> order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2016).

"[U]p until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e)." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27. There is a liberal policy regarding vacating default judgments under section 2-1301(e). *Id.* ¶ 16. The overriding consideration in ruling on such a motion is whether substantial justice has been done between the litigants and whether it is reasonable to compel the other party to go to trial on the merits. *Id*. In determining whether substantial justice will be achieved, considerations can include a party's diligence or lack thereof, whether the party has a meritorious defense, the severity of the resulting penalty, and the relative hardships on the parties. *Draper & Kramer, Inc., v. King*, 2014 IL App (1st) 132073, ¶ 23. "Although relevant, the party need not necessarily show a meritorious defense and a reasonable excuse for failing to timely assert such defense." *McCluskey*, 2013 IL 115469, ¶ 16. The appropriate considerations depend on the facts of each case. *Id.* Whether to set aside a default is within the trial court's discretion. 735 ILCS 5/2-1301(e) (West 2016); *In re Haley D.*, 2011 IL 110886, ¶ 69. A trial court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view. *JP Morgan Chase Bank, N.A. v. Bank of America, N.A.*, 2015 IL App (1st) 140428, ¶ 42.

¶ 21 In their section 2-1301(e) motion, defendants argued that they had successfully completed the trial payments for a loan modification but were not approved for a Fannie Mae Streamline modification and did not pursue other loss mitigation options. They argued that they then suffered personal hardships but had since resumed full-time employment and should be able to qualify for a permanent loan modification. Defendants argued that Fannie Mae would not be

prejudiced by vacating the default judgment or staying the sheriff's sale, but they would be highly prejudiced if they were not allowed to pursue loss mitigation options. At a hearing on the motion, defendants further argued that the loss mitigation affidavit showed that they were eligible for a HAMP modification of which they were previously unaware.

¶ 22 On appeal, defendants argue that they were diligent in filing their motion to vacate on July 12, 2016, about three months after the trial court entered the April 6, 2016, default judgment. Defendants argue that they had previously hired an attorney who never filed any pleadings and failed to appear at the April 6, 2016, hearing. They contend that when they found out about the scheduled sheriff's sale, they immediately hired current counsel to vacate the default judgment "and explore options to retain their home." Defendants argue that they had previously successfully completed a modification plan by making three monthly payments, but they were denied a permanent loan modification. They allege that they thought nothing more could be done to save their home, especially since no one contacted them after July 2015. They maintain that it was not until they retained counsel one year later that they discovered from CitiMortgage's loss mitigation affidavit that their loan was eligible for three or four other modification programs.

¶ 23 Defendants cite Fannie Mae servicing guidelines in arguing that the servicer was required to explain all loss mitigation options to them and continue to work with them up until the foreclosure sale. Defendants further cite Illinois Supreme Court Rule 114 (eff. May 1, 2013), which states that, before moving for a foreclosure judgment, a mortgagor must "comply with the requirements of any loss mitigation program which applies to the subject mortgage loan" and file a loss mitigation affidavit. If the mortgage does not comply, the trial court "may *** stay the proceedings or deny entry of a foreclosure judgment." *Id.* Defendants argue that the default

judgment should not be allowed to stand because CitiMortgage and Fannie Mae failed to comply with Rule 114 and their own servicing guidelines.

¶ 24 Defendants' reliance on the servicing guidelines and Rule 114 is not persuasive. Defendants did not cite the servicing guidelines in their motion to vacate or in argument before the trial court, thereby forfeiting reliance on them. See *Church Yard Commons Limited Partnership v. Podmajersky, Inc.*, 2017 IL App (1st) 161152, ¶ 33 (arguments not raised in the trial court are forfeited and cannot be raised for the first time on appeal). Even otherwise, defendants cite no authority for the proposition that CitiMortgage and/or Fannie Mae was obligated to comply with the cited servicing guidelines in order to obtain the initial foreclosure judgment. To the extent that defendants are relying on Rule 114 for such authority, enforcement of that rule is within the trial court's discretion (*Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 37)), meaning that compliance with the rule is not mandatory. Moreover, a Rule 114 loss mitigation affidavit was required before judgment only if the mortgagor "appeared or filed an answer or other responsive pleading" (Ill. S. Ct. R. 114 (eff. May 1, 2013)), which did not occur here. Even then, CitiMortgage did in fact file the contemplated affidavit.

¶ 25 Regarding defendants' claim that they were diligent, the record shows that an attorney for defendants attended a hearing on December 2, 2015, without filing an appearance. Defendants were then given 28 days to file an appearance and an answer or other pleading. The attorney again attended a hearing on February 10, 2016, without filing an appearance or responsive pleading. Notices of CitiMortgage's motion for default order and a judgment of foreclosure and sale and the subsequent grant of that request were sent to defendants at their residence. Thus, this is not a situation in which defendants were unaware of the proceedings. Defendants were sent a notice of the sheriff's sale on June 9, 2016, and it was not until then that

they hired counsel who entered an appearance to represent them. Counsel filed an emergency motion to vacate the default judgment on the scheduled date of the sheriff's sale. As such, although diligence is but one of many considerations (*Draper & Kramer, Inc.*, 2014 IL App (1st) 132073, ¶ 23), defendants' claim that they had been diligent during the proceedings falls short.

¶ 26 More significantly, the crux of defendants' argument during the hearing on the motion to vacate was that they simply wanted additional time to submit a HAMP application. See *supra* ¶ 10. Their attorney said that they were "close" to filing it, and that she "was going to have it presented" that day. When the trial court stated that it would stay the sheriff's sale for 60 days so that defendants could file the application, their attorney stated, "That would be great." Given that defendants' primary argument for vacating the default judgment was to have time to file a HAMP application that they represented was almost ready, and that the trial court allowed such relief in the form of giving them 60 days to file the application, we cannot say that it abused its discretion in not vacating the underlying default judgment. In other words, under the circumstances of this case, where defendants were aware of the litigation all along but did not have an appearance entered until months after the default judgment, and where the trial court allowed them time to file the application they requested, we cannot say that achieving substantial justice required the trial court to also vacate the underlying default judgment. See *McCluskey*, 2013 IL 115469, ¶ 16. Accordingly, we find no basis to reverse the trial court's denial of defendants' section 2-1301(e) motion.

¶ 27 B. Motion to Vacate and Set Aside the Foreclosure Sale

¶ 28 Defendants next argue that the trial court erred in denying their motion to vacate and set aside the judicial sale, which they brought under section 15-1508(d-5) of the Illinois Mortgage

Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(d-5) (West 2016)). That section provides:

> "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." *Id.*

A judicial foreclosure sale is not complete until it has been approved by the trial court. *Mortgage Electronic Registration Systems, Inc. v. Thompson*, 368 Ill. App. 3d 1035, 1037 (2006). The objecting party has the burden of showing why the sale should not be confirmed. *NAB Bank v. LaSalle Bank*, 2013 IL App (1st) 121147, ¶ 9. The Making Home Affordable Program, which is referenced in section 15-1508(d-5), is 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. HAMP is a component of that program. *Id.* Accordingly, under section 15-1508(d-5), a defendant must prove by a preponderance of the evidence that (1) he or she applied for assistance under HAMP and (2) that the property was sold in material violation of HAMP's requirements for proceeding to judicial sale. *Id.* ¶ 59.

¶ 29 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. "A preponderance of the evidence is proof that the fact at issue is more likely true than not." *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 17.

¶ 30 Defendants argue that they applied for assistance in 2015, long before the sheriff's sale, but were reviewed only for a streamlined modification program and then denied a permanent modification. They argue that Fannie Mae proceeded with the sheriff's sale knowing that their loan was eligible for HAMP and other loan modification programs. Defendants "admit that their second application" was submitted after the sheriff's sale. However, they argue that because their "first application" was never properly evaluated for a HAMP or standard Fannie Mae programs before the sheriff's sale, the second application should be construed as a continuum of their efforts to obtain a loan modification. Defendants argue that Fannie Mae should have also reviewed their HAMP application because their interest in the property had not yet terminated before confirmation of the sale. Defendants maintain that the "act of confirmation was the final 'sale' for which [they] are claiming their property was sold in material violation of HAMP, not the date of the sheriff's sale," because the property was not legally sold until the sale was confirmed on November 9, 2016.

¶ 31 Defendants cite *CitiMortgage Inc. v. Johnson*, 2013 IL App (2d) 120719, *CitiMortgage v. Lewis*, 2014 IL App (1st) 131272, and *Adams*, 2015 IL App (5th) 130470. We examine each in turn. In *Johnson*, the defendants submitted a HAMP application two weeks before the judicial sale (*Johnson*, 2013 IL App (2d) 120719, ¶ 34), and the plaintiff denied the application before the sale took place (*id.* ¶ 6). The defendants argued that the plaintiff provided inadequate notice

of the sale, and the trial court granted defendants' motion to set aside the sale. *Id.* ¶ 7. The defendants then filed a second HAMP application stating that their bankruptcy had been discharged. *Id.* ¶ 8. After the rescheduled sheriff's sale took place, the defendants moved to deny confirmation of the sale. They argued that the plaintiff violated section 15-1508(d-5) by not complying with HAMP guidelines in that, among other things, the plaintiff failed to process their second application and failed to postpone the sale. *Id.* ¶ 9. The trial court denied defendants' motion and confirmed the sale. *Id.* ¶ 10. This court reversed on appeal, concluding that the second application was eligible for reconsideration under HAMP guidelines because the original application was denied on the basis of a negative net present value of a loan modification, and bankruptcy could change that analysis. *Id.* ¶ 32. We stated that, therefore, the plaintiff should have suspended the sheriff's sale until it evaluated the request for reconsideration. *Id.* ¶ 34.

¶ 32 In *Lewis*, the defendant alleged that the judicial sale should be set aside under section 15-1508(d-5) because she had submitted a complete FHA-HAMP application before the sale. *Lewis*, 2014 IL App (1st) 131272, ¶ 12. The bank argued that: the defendant did not establish when the application was submitted; she did not attach a complete application or explain its absence; and it had determined that she was ineligible for relief under the program. *Id.* ¶ 16. The trial court denied the defendant's motion to set aside the sale. *Id.* ¶ 21. The appellate court vacated the order (*id.* ¶ 54), concluding that a letter denying the defendant's application on the merits showed that defendant had proven by a preponderance of the evidence that she had applied for assistance under FHA-HAMP (*id.* ¶ 48), and that a second letter raised questions about whether the bank had actually completed its review of the defendant's application before the foreclosure sale (*id.* ¶ 52).

¶ 33 In *Adams*, the defendants filed a HAMP application before the foreclosure sale. *Adams*, 2015 IL App (5th) 130470, ¶¶ 3, 9. Because the record showed that the trial court was not aware of the application and its disposition before confirming the sale, and the record further showed that the bank did not timely respond to the defendants' application, the appellate court reversed and remanded. *Id.* ¶ 20.

¶ 34 Defendants additionally cite Fannie Mae Single Family Servicing Guide (Fannie Mae HAMP Guidelines) (January 14, 2015), *available at* https://www.fanniemae.com/content/guide/svc011415.pdf (last visited July 13, 2017), Pt. E-3.4-01, entitled Suspending Foreclosure Proceedings for Workout Negotiations, for the proposition that when a completed HAMP application is received, the servicer "must delay the next legal action" in the foreclosure proceeding. Defendants argue that Fannie Mae received their complete application on September 30, 2016, but did not postpone the next legal action, being the confirmation hearing.

¶ 35 Fannie Mae responds that defendant failed to establish a reason to vacate the sale because they failed to show that they applied for assistance under HAMP. Fannie Mae points out that in order to show that defendants applied for assistance under HAMP for purposes of section 15-1508(d-5), defendants had to show that they "submit[ted] the documentation required by the servicer to determine the borrower's eligibility and verify *** income." *Bermudez*, 2014 IL App (1st) 122824, ¶ 66. Fannie Mae argues that defendants' motion to vacate referenced an application of 77 pages, but the motion had attached only four pages. Fannie Mae recognizes that a HAMP application appears in the record, but Fannie Mae argues that it should be disregarded because: (1) the documents were filed late, on November 9, 2016; (2) the documents were filed without leave of the trial court, in the middle of the hearing on the motion

to confirm the sale; and (3) they lack foundation because they were filed without any affidavits. Fannie Mae argues that defendants also failed to show that they submitted a HAMP application in April 2015, before they were offered a Fannie Mae Streamline Modification, and they have in fact conceded that they did not send a complete package before the judicial sale occurred.

¶ 36 Fannie Mae argues that defendants additionally failed to show that the judicial sale occurred in material violation of HAMP. Fannie Mae argues that because defendants did not submit a HAMP application until 17 days after the judicial sale, the sale could not have materially violated HAMP. According to Fannie Mae, no caselaw suggests that a post-sale application can frustrate the judicial sale. Fannie Mae argues that defendants' assertion, that submitting an application any time before the sale confirmation will trigger the foreclosure law's HAMP provision, ignores the statute's plain language and violates canons of statutory construction.

¶ 37 As stated, in order to be entitled to the protections under section 15-1508(d-5) related to HAMP, a defendant must prove by a preponderance of the evidence that (1) he or she applied for assistance under HAMP and (2) that the property was sold in material violation of HAMP's requirements for proceeding to judicial sale. *Bermudez*, 2014 IL App (1st) 122824, ¶ 59. Thus, contrary to defendants' argument, merely being eligible for HAMP or other loss mitigation programs is not sufficient under section 15-1508(d-5).

¶ 38 We therefore must examine whether defendants showed, by a preponderance of the evidence, that they applied for assistance under HAMP. The threshold question arises as to whether the application must be submitted before the judicial sale. This inquiry requires us to examine section 15-1508(d-5). In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, which is best indicated by the statute's language, when

given its plain and ordinary meaning. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25. The construction of a statute is a question of law that we review *de novo*. *Bueker v. Madison County*, 2016 IL 120024, ¶ 13.

¶ 39 We agree with Fannie Mae that section 15-1508(d-5)'s plain language requires that a defendant submit a HAMP application before the judicial sale. The statute begins by referring to the trial court's ability to "set aside a sale held pursuant to Section 15-1507" (735 ILCS 5/15-1508(d-5) (West 2016)) which is a judicial sale. See 735 ILCS 5/15-1507 (West 2016). The defendant must provide evidence that the property "was sold in material violation of the program's requirements *for proceeding to a judicial sale*," (emphasis added) (735 ILCS 5/15-1508(d-5) (West 2016)), which would not be logical if the HAMP application could be filed after the judicial sale. See *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 25 (we construe statutes such that no word, clause, or sentence is rendered superfluous or meaningless).

¶ 40 Caselaw also supports the position that a HAMP application must be pending at the time of the judicial sale. In *Johnson*, which defendants cite, the court stated that section 15-1508(d-5) required the defendant to show that he applied for assistance under HAMP and that the sale took place in material violation of HAMP's guidelines "for proceeding to a judicial sale." *Johnson*, 2013 IL App (2d) 120719, ¶ 33. The court further stated that a HAMP application would be untimely if it was received after the deadline of a certain number of days before the "scheduled sale." *Id.* ¶ 35.[1]

[1] Here, different HAMP guidelines apply than in *Johnson*, but they likewise require that the application be submitted before the judicial sale. See Fannie Mae HAMP Guidelines (January 14, 2015), *available at* https://www.fanniemae.com/content/guide/svc011415.pdf (last visited July 13, 2017), Pt. E-3.4. Both parties here rely on Fannie Mae HAMP guidelines.

¶ 41 Accordingly, defendants were required to submit their HAMP application before the judicial sale in order to be eligible for the protections of section 15-1508(d-5). It is clear from the record that they did not claim to have done so. See *supra* ¶ 10.[2] Defendants take the position that their September 30, 2016, HAMP application, filed after the judicial sale, should be construed as a continuation of their efforts in April 2015 to achieve a loan modification. However, as discussed, section 15-1508(d-5) clearly requires that a defendant submit a complete HAMP application before the judicial sale. The caselaw cited by defendants also does not aid their position, and those defendants all submitted their HAMP applications before the judicial sale. See *Adams*, 2015 IL App (5th) 130470, ¶¶ 3, 9; *Lewis*, 2014 IL App (1st) 131272, ¶ 12; *Johnson*, 2013 IL App (2d) 120719, ¶ 34. In sum, defendants failed to provide any evidence that they timely applied for assistance under HAMP.[3]

¶ 42 Correspondingly, we further conclude that defendants failed to show that the judicial sale occurred in material violation of HAMP. Defendants cite Fannie Mae HAMP Guidelines for the proposition that Fannie Mae was required to delay the hearing to confirm the sale because defendants sent their completed HAMP application before that time. See *supra* ¶ 34. However, under the relevant guidelines, the plaintiff is not required to delay any legal action even where a HAMP application is submitted less than 15 days before the judicial sale. Fannie Mae HAMP

[2] To the extent that defendants make such an argument on appeal, we agree with Fannie Mae that defendants failed to provide any evidence indicating that they submitted a HAMP application in April 2015 or before the judicial sale; the record expressly indicates the contrary.

[3] Based on this determination, we need not address Fannie Mae's arguments as to whether defendants sufficiently showed that they applied for assistance under HAMP *after* the judicial sale.

Guidelines (January 14, 2015), *available at* https://www.fanniemae.com/content/guide/svc011415.pdf (last visited July 13, 2017), Pt. E-3.4-01. Here, defendants submitted their HAMP application after the property was sold.

¶ 43 Defendants had the burden of showing, by a preponderance of the evidence, both that they timely applied for HAMP assistance and that the home was sold in material violation of HAMP's requirements. It was not an abuse of discretion for the trial court to determine that they failed to meet this burden, and to deny their motion to vacate the foreclosure sale under section 15-1508(d-5).

¶ 44 C. Confirmation of the Judicial Sale

¶ 45 Last, defendants argue that the trial court erred in confirming the sale under section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508(b) (West 2016)). Under that statute, a party seeking to set aside the sale must show that proper notice of the sale was not given; the sale's terms were unconscionable; the sale was conducted fraudulently; or justice was not otherwise done. *Id.* Defendants argue that justice was not otherwise done in this case.

¶ 46 Once the plaintiff has filed a motion to confirm the judicial sale, "the court has discretion to see that justice has been done, but the balance of interests has shifted between the parties" from the borrower to the lender. *McCluskey*, 2013 IL 115469, ¶ 25. Objections to the sale's confirmation cannot be based on just a meritorious defense to the underlying foreclosure complaint. *Id.* "To show that justice was not otherwise done, a party must establish that the lender, through fraud or misrepresentation, prevented the borrower from raising the meritorious defense to the complaint, or the borrower was otherwise prevented from protecting his property interests." *DLJ Mortgage Capital, Inc. v. Frederick*, 2014 IL App (1st) 123176, ¶ 16. We

review an order confirming a judicial sale for an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 47 Defendants argue that the trial court abused its discretion by improperly considering the interests of the third-party purchaser when ruling on Fannie Mae's motion to confirm. During the hearing, the trial court asked if the purchaser wanted to say anything, and he responded:

> "Your Honor, at this point, I mean, it's up to you. I have nothing to say. I just don't want to continue. If your Honor thinks this is the – they have the right to vacate the sale, then I will want my money right away. I really rather not have it continued."

Fannie Mae's attorney argued in part that "there's a huge prejudicial effect if a third-party purchaser gets his sale vacated after the fact"; that "he's already been delayed"; and "I'm sure he would like to move on with this property, as well." Defendants point out that being the highest bidder at a judicial sale does not give the bidder any legally cognizable interest in the property. See *Deutsche Bank National Trust v. Ivicic*, 2015 IL App (2d) 140970, ¶ 28. Defendants argue that encouraging the trial court to consider the interests of a third party not involved in the litigation was improper, inflammatory, and highly prejudicial.

¶ 48 Defendants further argue that the trial court erred in not reading their motion to vacate the judicial sale before the confirmation hearing, and in not allowing counsel to conduct an evidentiary hearing to prove that they applied for assistance under HAMP.

¶ 49 We conclude that the trial court did not abuse its discretion in confirming the judicial sale. The trial court stated at the beginning of the hearing that it reviewed a response to the motion to confirm the sale but did not realize that the motion to vacate the judicial sale was attached. Defense counsel did not ask the trial court to take a recess to read the motion, but instead stated, "It is, essentially, the same argument." Our reading of the motions led to the same

conclusion. See *supra* ¶¶ 13-14. Counsel was further allowed to fully argue the motions. As far as an evidentiary hearing, such a hearing may be conducted where the defendant presents allegations and evidence that the sale was not in conformity with section 15-1508. *Lewis*, 2014 IL App (1st) 131272, ¶ 52. Here, defendants never explicitly claimed that they filed a HAMP application before the judicial sale, and we have determined that the post-sale application was insufficient under section 15-1508(d-5). Defendants further failed to provide an offer of proof as to what their testimony would have added. Accordingly, we find no error by the trial court in these regards.

¶ 50 Turning to the issue of the third-party purchaser, the trial court did allow the purchaser to speak, and Fannie Mae's attorney also mentioned him in argument. However, the purchaser deferred to the trial court's judgment, and the trial court's ruling expressly relied on section 1508(b), which was proper. Therefore, it cannot be said that the trial court abused its discretion in granting Fannie Mae's motion to confirm the judicial sale.

¶ 51 As a final matter, as stated, we previously granted defendants' motion to stay the order confirming the sale and the judgment of possession, until further order of this court. As we are affirming the trial court's rulings in favor of Fannie Mae, we correspondingly lift our stay at this time.

¶ 52 III. CONCLUSION

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

¶ 54 Affirmed.