2021 IL App (2d) 200245-U
No. 2-20-0245
Order filed September 10, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE OF STANWICH MORTGAGE LOAN TRUST A,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 16-CH-888
SOLOMON SMITH, JR; UNKNOWN OWNERS, AND NON-RECORD CLAIMANTS,	)	Honorable James D. Orel,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's decision dismissing the complaint with prejudice.

¶ 2 Plaintiff, Wilmington Savings Fund Society, FSB, as Trustee of Stanwich Mortgage Loan Trust A, appeals the trial court's dismissal, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)), of its mortgage-foreclosure complaint against defendants, Solomon Smith, Jr., unknown owners, and non-record claimants. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Complaint and Motion to Dismiss

¶ 5 In August 2012, plaintiff filed its first foreclosure complaint against defendant Smith pertaining to Smith's mortgage at 21W051 Mayfair Road in Lombard.[1] It moved for summary judgment, but apparently had difficulty securing documents to rebut Smith's assertion that plaintiff had not, before pursuing foreclosure, complied with necessary federal regulations. On October 15, 2015, the court granted plaintiff's oral motion to dismiss its case without prejudice.

¶ 6 Around eight months later, on June 3, 2016, plaintiff filed a second foreclosure complaint. The complaint alleged that, in 2010, Smith entered into a mortgage for the subject property, but proceeded to make only seven payments. Plaintiff alleged that Smith was, therefore, in default for required monthly payments from August 1, 2011, through the complaint's filing date.

¶ 7 The record reflects that, for an extended period, the case was continued. On August 23, 2018, Smith moved to dismiss the complaint pursuant to section 2-619(a)(9) of the Code. Smith argued that affirmative matter barred plaintiff's claim because plaintiff had failed to conduct a face-to-face interview with him or make reasonable efforts to arrange such a meeting with him, as required by federal regulations. Specifically, Smith alleged that the subject mortgage was a Federal Housing Administration (FHA) mortgage insured by the United States Department of Housing and Urban Development (HUD); (2) pursuant to HUD regulations, plaintiff was required to make certain reasonable attempts to meet and communicate with him before three monthly

[1] We note that the loan was extended to Smith by Key Mortgage Services, Inc., but was ultimately assigned to plaintiff and serviced by J.P. Morgan Chase Bank, Nation Association. For simplicity, we will refer generally to "plaintiff."

payments on the mortgage went unpaid (here, calculating three months from the August 1, 2011, default date, before October 31, 2011) and before filing for foreclosure (24 C.F.R. § 203.604(b)-(d) (2014));[2] (3) the mortgage required plaintiff's compliance with HUD regulations, and Illinois

[2] The relevant regulations provide:

"(b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, *before three full monthly installments due on the mortgage are unpaid*. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced ***.

(c) A face-to-face meeting is not required if:

(1) The mortgagor does not reside in the mortgaged property,

(2) The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either,

(3) The mortgagor has clearly indicated that he [or she] will not cooperate in the interview,

(4) A repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current, or

(5) A reasonable effort to arrange a meeting is unsuccessful.

(d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as

law interprets the federal regulations as mandatory conditions precedent which, if not complied with, give rise to a valid defense in a foreclosure action (see, *e.g.*, *Bankers Life Co. v. Denton*, 120 Ill. App. 3d 576 (1983)); and (4) plaintiff did not make reasonable efforts to communicate with Smith in the timeframe required by the federal regulations (August 1, 2011 to October 31, 2011) and, thus, was not authorized to file the foreclosure action. Smith attached an affidavit, attesting that he resided at the subject property, but plaintiff did not conduct a face-to-face interview with him at any time after the alleged default, did not visit the property to conduct such a meeting with him, nor did he receive any communication from plaintiff or any other entity requesting a face-to-face interview. He further attested that, if plaintiff had contacted him to arrange a face-to-face meeting, he would have made himself available for the meeting.

¶ 8 Seven months later, on March 22, 2019 (after requesting and receiving three extensions to obtain necessary documents), plaintiff filed its response to the motion. Plaintiff asserted that, on September 10, 2011, after Smith failed to make the August 2011 mortgage payment, plaintiff sent a letter to Smith via United States Postal Service (USPS) certified mail, inviting him to discuss with plaintiff options to resolve the delinquency and alternatives to foreclosure. The letter purported to enclose a "How to Avoid Foreclosure" pamphlet; however, no pamphlet appears in the record. The letter does not mention arranging a face-to-face meeting or any planned visits to

---

having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property." (Emphasis added.) 24 C.F.R. § 203.604(b)-(d) (2014).

the property. A return receipt appears to reflect a signature by "Solomon Smith Jr.," on September 28, 2011.

¶ 9 Plaintiff alleged that, on October 21, 2011, it sent a second letter (this time by USPS mail, but *not* certified with return receipt requested), inviting Smith to "stop by" one of the Chase Homeownership Centers in the Chicagoland area for a one-on-one meeting to discuss his options. The letter does not mention any planned property visits and, although plaintiff claimed that a representative made two visits to the subject property on April 1, 2012, and on April 5, 2012, no evidence to support this assertion was included with the response.

¶ 10 Finally, plaintiff alleged that, on February 8, 2016 (*i.e.*, around four months after it voluntarily dismissed its first foreclosure action on October 15, 2015), it sent a third letter to Smith by USPS certified mail (this time, the receipt does not have a signature reflecting delivery) stating that a representative from the National Creditors Connection, Inc., would visit his home for a face-to-face meeting. Further, plaintiff asserted, on February 22, 2016, plaintiff's representative made a visit to the subject property and attempted to meet with Smith. The business record submitted to demonstrate that the representative visited the property is a computer printout that, in one section, reads "[v]isit to address was made on 2/22/2016 at 14:34, result of visit was no direct contact or unable to verify, unable to deliver letter."

¶ 11 Plaintiff attached an affidavit from a representative, attesting that plaintiff's business records demonstrated that letters were sent and an attempted visit to the property was conducted (*not* three attempted visits, as plaintiff had asserted in the body of the response). As such, plaintiff alleged that this counter-affidavit, along with the copies of the three letters and various collection notes, demonstrated that it made reasonable efforts to arrange a face-to-face meeting with Smith, thus complying with the regulations, and that the court should deny Smith's motion to dismiss.

¶ 12 In reply, Smith argued that plaintiff did not, before three full monthly installments on the loan went unpaid, *i.e.*, before October 31, 2011, conduct a face-to-face meeting or make a reasonable effort to conduct such a meeting with him. Smith noted that, according to the regulations, "[a] reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property." See 24 C.F.R. § 203.604(d) (2014); see also *PNC Bank, National Association v. Wilson*, 2017 IL App (2d) 151189, ¶ 19. Here, however, Smith argued, plaintiff did not conduct the meeting or make reasonable efforts to do so. He argued that the court should not, when assessing plaintiff's compliance with the regulations, consider the October 21, 2011, letter, because that letter was not certified by the U.S. Postal Service as having been dispatched, as required by section 203.604(d) of the Code of Federal Regulations. Similarly, he argued, the court could not consider the February 8, 2016, letter, because it was sent five years too late; *i.e.*, it was not sent to Smith within three months of the alleged default, as required by section 203.604(b). As such, the only relevant letter was dated September 10, 2011, but that letter did not invite Smith to have a face-to-face meeting, inform him of any planned visits to the property, and did not, apparently, even enclose the "How to Avoid Foreclosure" pamphlet referenced therein. Smith also attached a printout from the U.S. Postal Service website reflecting that the tracking number associated with the September 10, 2011, letter was created, but that the mail was never delivered to the postal service.

¶ 13 Moreover, Smith argued, even if the *letters* had complied with the regulations, plaintiff still failed to comply with section 203.604 because there was no visit to the property to see him before October 31, 2011. Smith noted that the document purporting to reflect an attempted visit did not

even name the representative who allegedly made the visit and, in any event, that purported visit in February 2016 was, again, five years after the alleged default date (further, the two alleged, but unsupported, visits in 2012, also did not occur before October 2011). In sum, Smith argued that the complaint should be dismissed because plaintiff clearly did not satisfy the requirements: it did not visit the property to see Smith before October 31, 2011, nor did it invite Smith to have a face-to-face meeting, inform him of any planned visits to the property, or mail a letter to him at the property address seeking a face-to-face interview before October 31, 2011. "Therefore, [p]laintiff's failure to comply with HUD's mortgage servicing requirements, which are mandatory, bars [p]laintiff from bringing this foreclosure action."

¶ 14 Plaintiff moved for leave to file a sur-response. It argued that Smith's motion to dismiss based upon technical violations of section 203.604, such as the method of mailing and timing of solicitations, was an issue of first impression requiring additional argument. Specifically, plaintiff alleged that substantial compliance with section 203.604's requirements should suffice to preclude dismissal. The court granted the motion to file the sur-response. In its sur-response, plaintiff argued that the court should apply a "common-sense approach" to the requirements, and Smith, in an allowed sur-reply, argued that a "common-sense approach," even if adopted, would not help plaintiff, because plaintiff's actions occurred too late to allow Smith to avoid foreclosure proceedings, thus violating the spirit of the regulations. In addition, the parties in their final briefs debated whether an issue of fact exists as to Smith's residence at the property during the relevant period, and whether, based on his residency or lack thereof, a meeting pursuant to section 203.604 was even required.

¶ 15 B. Hearing and Ruling on the Motion

¶ 16 On October 1, 2019, the court granted Smith's motion to dismiss the complaint. At the hearing, the court rejected plaintiff's assertion that certain affidavits suggested that Smith did not reside at the property in 2012 or 2016, such that section 203.604(c)(1) excused the face-to-face meeting requirement. The court asked plaintiff whether it had evidence that Smith did *not* reside at the property in October *2011*, when the regulations required plaintiff to act, and plaintiff's counsel ultimately conceded it had no direct evidence concerning where Smith was living in October 2011.

¶ 17 Noting that it understood plaintiff's primary argument concerning a "common-sense" approach to be premised on foreign authority, the court also queried:

> "doesn't [section] 203.604 say the mortgagee must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting before three monthly installments are due? It is a must requirement. To me, must is absolute. There's no leeway."

¶ 18 The court questioned why plaintiff made no attempt to contact Smith between the October 21, 2011, and February 8, 2016, letters. Plaintiff explained that, during that period, another attempted foreclosure proceeding had been filed and, ultimately, voluntarily dismissed. Smith's counsel interjected:

> "Because they were trying–many times they were given an opportunity to show that they complied [*i.e.*, with section 203.604] over and over and over and until they were not able to do so. They voluntarily dismissed the case, yes. And when this case was filed and I filed a motion to dismiss, there were at least three motions for extension of time. This has taken years, over seven years, to say we tried to comply."

¶ 19 The court noted that the complaint alleged a default date in August 2011, and, accordingly, it rejected plaintiff's argument that its solicitation efforts in February 2016 were sufficient to comply with the regulations:

> "How can you possibly say that [*i.e.*, that the actions in 2016 were sufficient] when the [section] 203.604 says you must have a face-to-face interview within—before the three full monthly installments are due?
>
> Listen, I don't like to dismiss complaints based on these federal regulations. I really don't. It doesn't seem fair. But the federal regulations are what they are. I don't make the rules. I just enforce them. This one is so obvious to me. They were late the first time. Then five years passes [*sic*] and then they file a case which says the default in August of 2011, five years later.
>
> I just don't see a way around it. The word must is must. I've had it in every element of—as a judge in criminal, in civil, now in foreclosure. Must is must. I don't see anything around this. And you certainly didn't present any Illinois case law to support your argument, this common[-]sense approach.
>
> ***
>
> When the Illinois appellate courts start taking a common[-]sense approach that is different than the language in the federal code, then I'll agree with you. But this common[-]sense approach I don't get because it's not how I know from sitting here what must means. Must is mandatory. Must is absolute. You must do it. It wasn't done here.
>
> The facts are quite clear from your complaint. Defaulted August 1st, 2011. The first letter was late. It wasn't within—before the three-month period. Then five years passed and then you filed a complaint still alleging August 1st, 2011. To me, there is no

> common[-]sense approach. You've got to follow what the law says, and the law says to me that you must arrange a face-to-face meeting before the third—three full monthly installments are due. It wasn't done here. Motion to dismiss is granted."

¶ 20 On March 4, 2020, the court denied plaintiff's motion to reconsider. Plaintiff appeals.

¶ 21 II. ANALYSIS

¶ 22 On appeal, plaintiff argues that the court's dismissal of its complaint with prejudice was incorrect, because it "substantially or reasonably complied" with section 203.604 "and nothing more is required." Plaintiff explains that section 203.604 requires a "reasonable effort," meaning a minimum of one letter sent by certified U.S. Mail and at least one trip to the mortgaged property. It asserts that the court erred in interpreting the regulation as requiring strict compliance with section 203.604's three-month deadline, as courts in other jurisdictions (citing, *e.g.*, *Dan-Harry v. PNC Bank, N.A.*, 2019 U.S. Dist. LEXIS 44511, *5 (D.R.I. Mar. 18, 2019)) have found that timeframe to be aspirational, rather than compulsory. Plaintiff asserts that there is no Illinois decision directly on point concerning the application and interpretation of section 203.604, but it notes that some federal decisions support a "common-sense" approach and have held that substantial compliance with section 203.604 is sufficient, because to hold otherwise creates a windfall for the borrower. Plaintiff further asserts that this court, in *Wilson*, 2017 IL App (2d) 151189, ¶ 24, established that, unless the mortgagor has demonstrated some form of prejudice, technical defects in complying with pre-foreclosure requirements do not bar the mortgagee from proceeding with an otherwise valid foreclosure claim. Plaintiff contends that, prior to filing the 2016 foreclosure complaint, it complied with the regulation's requirement that it make a reasonable effort to conduct a face-to-face interview with Smith. "To be clear, [plaintiff] does not assert here or below that it either conducted a face-to-face interview with Smith or made a

reasonable effort to do so prior to the expiration of the three full monthly past-due installment deadline set in Section 203.604." Nevertheless, it contends, the February 8, 2016, letter, and February 22, 2016, visit to the property, while not occurring before three monthly installments were past due, constituted "substantial compliance" under the regulation, because it performed those acts prior to filing the 2016 complaint. For the following reasons, we disagree.

¶ 23 First, we note our standard of review. The trial court granted defendants' motion pursuant to section 2-619(a)(9) of the Code, which allows dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018). We review *de novo* the dismissal of a complaint pursuant to section 2-619(a)(9). See *McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, ¶ 17.

¶ 24 Second, we note that, after the briefs in this appeal were filed, we had occasion to consider this issue and similar arguments in *Freedom Mortgage v. Olivera*, 2021 IL App (2d) 190462. Here, as in *Olivera*, the parties do not dispute that the mortgage was insured by HUD and, thus, was subject to specific servicing requirements. See 24 C.F.R. § 203.500 (2014); *U.S. Bank Trust National Ass'n v. Hernandez*, 2017 IL App (2d) 160850, ¶ 28. As previously noted, those requirements are found in title 24, sections 203.604 and 203.606 of the Code of Federal Regulations (24 C.F.R. §§ 203.604, 203.606 (2014)), and require that, before bringing a foreclosure action against a defaulting borrower, "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid," to seek this interview through a certified mail request and a visit to the property, and to review its file to determine compliance with appropriate servicing requirements. See *Hernandez*, 2017 IL App (2d) 160850, ¶ 28. A "reasonable effort" is defined as sending a minimum of one certified letter to the mortgagor and

making at least one trip to see the mortgagor at the mortgaged property. 24 C.F.R. § 203.604(d) (2014). The regulations provide that the mortgagee may not institute foreclosure proceedings before complying with section 203.604. See 24 C.F.R. § 203.500 (2014) ("It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed."); see also 24 C.F.R. § 203.606(a) (2014) ("Before initiating foreclosure, the mortgagee must ensure that all servicing requirements of this subpart have been met.").

¶ 25 We reiterated in *Olivera* that, "[i]n Illinois, the failure to comply with HUD's mortgage servicing requirements is a complete defense to a mortgage foreclosure action." *Olivera*, 2021 IL App (2d) 190462, ¶ 29 (citing *Federal National Mortgage Ass'n v. Moore*, 609 F. Supp. 194 (N.D. Ill. 1985)). Indeed, "[b]ecause these government-insured mortgage programs recognize that mortgagors will often have difficulty making full and timely payments, HUD promulgated very specific regulations outlining the mortgage servicing responsibilities of mortgagees." *Wilson*, 2017 IL App (2d) 151189, ¶ 18. Moreover, "[t]he notice requirements are integral to the government-insured mortgage loan program and insure that financially strapped homeowners will have every opportunity to take informed steps to retain their homes." *Mortgage Associates Inc. v. Smith*, No. 86-C-1 (N.D. Ill. 1986), 1986 WL 10384 (citing *Moore*, 609 F. Supp. at 197). A mortgagee's failure to comply with the servicing regulations can be raised by the mortgagor as an affirmative defense. *Denton*, 120 Ill. App. 3d at 578-79. The burden of proving an affirmative defense is on the party asserting it. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 16.

¶ 26 In *Olivera*, we rejected the plaintiff's argument that "substantial-compliance" with the regulations outside of the time frame identified in section 203.604 is permissible. *Olivera*, 2021

IL App (2d) 190462, ¶ 33. We acknowledged there exists some foreign authority holding otherwise. *Id.* ¶ 34. However, we looked at Illinois law and emphasized that our courts, starting with *Denton*, have held that the failure to comply with the HUD's servicing regulations is a defense to foreclosure. *Id.* ¶ 35; see also *Denton*, 120 Ill. App. 3d at 579 ("The failure to comply with these servicing regulations which are mandatory and have the force and effect of law can be raised in a foreclosure proceeding as an affirmative defense."). Moreover, we noted that federal courts have applied Illinois' interpretation of the regulations to find that a failure to comply is a "complete defense" to a foreclosure action (see, *e.g.*, *Moore*, 609 F. Supp. at 194) and that, while a substantial-compliance argument is not inherently inconsistent with general authority allowing defendants an affirmative defense to foreclosure, it remains that our courts have generally required compliance with the rules before a foreclosure judgment may be entered (see, *e.g.*, *Hernandez*, 2017 IL App (2d) 160850, ¶ 28, 36 (reversing summary judgment in mortgagee's favor in a foreclosure case, where mortgagee offered no proof that the letter was "dispatched" as required by section 203.604; declining to hold that "noncompliance with section 203.604 may be excused in cases of inevitable foreclosure (however that may be determined)," but also *declining to decide* whether substantial compliance would be permitted if the letter was dispatched by a private carrier, as opposed to the United States Postal Service, as required by the regulations). *Olivera*, 2021 IL App (2d) 190462, ¶ 35.

¶ 27 For the same reasons, we reject plaintiff's substantial-compliance argument here. In addition, we note that plaintiff's reliance on *Wilson* is misplaced, because, even if *Wilson* held that certain technical defects with pre-foreclosure requirements do not, absent prejudice, bar a foreclosure claim, we held in *Olivera* that the defect alleged here is *not* merely technical. *Olivera*, 2021 IL App (2d) 190462, ¶ 40. Although plaintiff may wish to *treat* section 203.604's

requirements as mere technicalities, the requirement to meet with the borrowers before three monthly installments due on the mortgage go unpaid is intended to try to quickly fashion an arrangement or repayment plan that can *avoid* a default and, ultimately, a foreclosure. See, *e.g.*, *Bagley v. Wells Fargo Bank, N.A.*, 2013 WL 350527, at *5 (E.D. Va. Jan. 29, 2013) ("12 U.S.C. § 1715, which authorizes HUD to implement [section] 203.604, requires lenders to engage 'in loss mitigation actions for the purpose of providing an alternative to foreclosure 'when a borrower is in default or facing imminent default.' 12 U.S.C. § 1715. *** The face-to-face meeting creates an opportunity for homeowners in default to avoid foreclosure, thus surely a plaintiff may be harmed if they are denied this opportunity, even if they are not able to pay the full debt at the time of the meeting."). Here, Smith's loan was accelerated and placed into foreclosure in August 2012, before he had an opportunity to discuss foreclosure options with his lender. Therefore, plaintiff's actions, years after the alleged default, did not provide Smith a true alterative to foreclosure or an opportunity to avoid default. Accordingly, we disagree with plaintiff that the timing requirement is merely a technicality with no implications for resulting prejudice. As such, we find inapplicable plaintiff's cited authority suggesting that only substantial compliance is required for these requirements.

¶ 28 Plaintiff argues that affirming the trial court results in substantial injustice, because it now apparently lacks any ability to comply with the regulation and proceed with foreclosure, despite Smith's lack of payment on the loan for almost nine years. We disagree. Again, as we made clear in *Olivera*, it is not unreasonable to require strict compliance, and we disagree that requiring compliance with the three-month time requirement necessarily means that, once a lender has failed to meet that initial period, foreclosure is forever barred. *Olivera*, 2021 IL App (2d) 190462, ¶¶ 38-41. We explained that, while the lender cannot go back to act before the initial three payments

were missed, it can essentially "start over," by "forgiving" missed payments to bring the loan current, waiting to see if more payments are missed, and timely complying with the regulations. *Id.* ¶¶ 40-41. If foreclosure is still required, a *new* complaint with a *new* default date would be legally permissible. *Id.* We also explained that the payments would not exactly be "forgiven"; rather, the extent of personal liability resulting in a possible deficiency judgment would be reduced, according to the new default date alleged in the newly filed proceedings, and any loss realized upon the sale of the property without a deficiency judgment stems from plaintiff's own initial noncompliance with the regulations. *Id.*

¶ 29 We also note, again, as similar to the facts in *Olivera*, that plaintiff's entire argument here presumes that its efforts were reasonable, but simply fell outside of the three-month timeframe. Even if, under plaintiff's approach, reasonableness and equity remain the key touchstones, we see no reasonable compliance, where, here, at best, plaintiff mailed a letter without even offering a meeting, sent a second letter suggesting that Smith "stop by" a Chicagoland location, and then, four months *after* it dismissed its first foreclosure complaint (and five years after the alleged default date) sent Smith a letter saying a representative would attempt a meeting, which never took place and, to the extent someone stopped by, we do not even know who made that attempt. These actions, *years* after the alleged default, did not provide Smith a true alterative to foreclosure or an opportunity to avoid default. In other words, even if we *were* to consider whether plaintiff's actions satisfied a substantial, as opposed to strict, compliance standard, we are not convinced plaintiff acted reasonably, where it pleaded a 2011 default date, but its alleged attempt to meet with Smith did not occur until 2016. To the extent that the District Court of Rhode Island found the facts in *Grimaldi v. U.S. Bank National Ass'n*, 2018 U.S. Dist. LEXIS 70927, *2 (D.R.I.) supported substantial compliance, where a property visit was made five years after the default date,

we disagree that such is the case here and, again, reiterate that this court has not, in any event, accepted that substantial compliance with section 203.604's timeframe is permissible.

¶ 30 "A proceeding to foreclose a mortgage is a proceeding in equity. *** Under long-standing equitable principles, a party seeking to invoke the aid of a court of equity must *do equity*." (Emphasis added.) *Wilson*, 2017 IL App (2d) 151189, ¶ 25. The regulations place upon the lender the burden to ensure, before foreclosing, that it complied with the regulations (24 C.F.R. § 203.606(a) ("[b]efore initiating foreclosure, the mortgagee must ensure that all servicing requirements of this subpart have been met")), which, unless an exception exists, include a requirement to perform section 203.604's actions within the timeframe delineated. Our holding here, as in *Olivera*, simply incentivizes lenders to follow the rules or quickly cure any violation thereof, so as to possibly limit the number of missed payments that might need "forgiveness." That, in turn, is c*onsistent* with HUD's expressed intention that mortgagees protect its financial interests. See, *e.g.*, 24 C.F.R. § 203.501 (2014) (mortgagees must take appropriate actions to generate the smallest financial loss to HUD); 24 C.F.R. § 203.600 (2014) (that mortgagees take *prompt action* to collect amounts due to minimize the number of accounts in default or delinquent status).

¶ 31 We finally address plaintiff's argument that a factual dispute exists as to whether Smith resided in the property in 2011, because, if he did not, plaintiff contends that section 203.604(c) excused it from seeking the face-to-face meeting. See 24 C.F.R. § 203.604(c)(1) (2014). It notes that, in support of his motion to dismiss, Smith had filed two affidavits, attesting that he resided at the property as his primary residence since January 1, 2011. Plaintiff, however, submitted: (1) an affidavit from a process server (obtained during the first foreclosure case), which provided that, in *August 2012*, Smith did not reside at the property, but was acting as a landlord there; (2) an affidavit

from a special process server (in this case) in which the affiant states that, on *June 28, 2016*, Smith's mother confirmed that Smith resided elsewhere; and (3) a second affidavit from the same process server in which the affiant attests that, as of *August 1, 2019*, Smith registered his vehicle at a different address, not the subject property. Plaintiff contends that its affidavits are "irreconcilable" with Smith's affidavits, in which he attests to the residing at the property as his primary residence since January 1, 2011. As such, and because the facts must be construed in its favor when ruling on the motion to dismiss, plaintiff argues that its affidavits create a reasonable inference that Smith did not reside at the property from August to November, 2011.

¶ 32 Based upon the complaint's *alleged date of default*, we, like the trial court, do not find these arguments persuasive. For example, as the trial court aptly noted, the question is whether Smith lived in the subject property in October 2011, the period when plaintiff, based on the default date alleged in its complaint, was required to seek a face-to-face meeting. Thus, even if plaintiff produced evidence suggesting that Smith did not live at the property in August 2012, or five years later, in 2016, its evidence did not, as counsel conceded at the hearing, establish where Smith lived in October 2011, and was far short of establishing that he did *not* live at the subject property between August 1, 2011, and October 31, 2011. As such, there is no genuine issue of fact concerning Smith's residency *in 2011*.

¶ 33 In summary, in Illinois, noncompliance with HUD's regulations is a defense to foreclosure. Based upon the default date alleged in the complaint here, plaintiff did not comply with section 203.604's requirements in a timely fashion. Indeed, it did not attempt compliance until *five years* after the alleged default date. The court's dismissal of the complaint with prejudice is affirmed.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 36 Affirmed.