2022 IL App (2d) 200022-U
No. 2-20-0022
Order filed May 31, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCH BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR THE CERTIFICATE HOLDERS OF AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-3,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 17-CH-117
JOHN D. DIEDRICK; KAREN O'CONNOR; FIRST AMERICAN BANK; UNKNOWN HEIRS AND LEGATEES OF JOHN D. DIEDRICK, IF ANY; UNKNOWN HEIRS AND LEGATEES OF KAREN O'CONNOR, IF ANY; UKNOWN OWNERS AND NON RECORD CLAIMANTS,	)	Honorable James D. Orel,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Bridges and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in (1) denying defendants' section 2-619(a)(9) motion to dismiss the foreclosure complaint; (2) striking defendants' affirmative defense with prejudice; or (3) granting plaintiff's motion to confirm sale and awarding personal deficiency of $180,069.81.

¶ 2 Defendants appeal from the entry of an order of confirmation of judicial sale. Defendants take issue with several orders entered by the trial court throughout the pendency of the underlying foreclosure proceedings and seek their reversal. For the reasons that follow, we affirm the trial court's judgment as related to those orders.

¶ 3 I. BACKGROUND

¶ 4 On January 23, 2017, plaintiff filed a complaint to foreclose mortgage against defendants pursuant to section 15-1101 (Illinois Mortgage Foreclosure Law) ("IMFL") of the Code of Civil Procedure (the Code). 735 ILCS 5/15-1101 (West 2016). Defendants John D. Diedrick and Karen A. O'Connor were named as the owners of the subject property at 471 Stagecoach Run, Glen Ellyn (subject property address). The complaint alleged that

> "[Defendants] had not paid the monthly installments of principal, taxes, interest and insurance for [August 1, 2016], through the present; the principal balance due on the Note and Mortgage is $532,853.32, plus interest, costs, advances and fees. Interest accrues pursuant to the Note and any loan modification agreement, and the current per diem is $48.01"

The Note, Mortgage, and loan modification agreement were attached to plaintiff's complaint.

¶ 5 The Mortgage and Note were executed on June 20, 2005, between the borrower, defendants Diedrick and O'Connor, and the lender, American Home Mortgage Acceptance, Inc.[1] Section 22 of the Mortgage reads as follows:

[1] The Mortgage was assigned to plaintiff on December 22, 2014, with Ocwen Loan Servicing, LLC named as servicer for the loan.

> "22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ***. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys fees and costs of title evidence."

Section 15 of the Mortgage reads as follows:

> "15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall

> promptly notify Lender of Borrower's change of address ***. There may by only one designated notice address under this Security Instrument at one time ***. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument."

Section 20 of the Mortgage provides:

> "Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either individual litigant or the member of a class) that arises from the party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with requirements of Section 15)."

Section 8 of the Note, titled "Giving of Notices," states that "any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class to me at the Property Address *** or at a different address if I give the Note Holder a notice of my different address."

¶ 6 In July 2016, defendants executed a loan modification agreement with defendant's Loan Servicer, Ocwen Loan Servicing, LLC (Ocwen). Defendants defaulted on the terms of that agreement on August 1, 2016.

¶ 7 On April 26, 2017, following several failed attempts to locate defendants for service of process, the trial court entered an order granting plaintiff's motion for service by special order of the court pursuant to section 2-203.1 of the Code. 735 ILCS 5.2-203.1 (West 2016). The order allowed plaintiff's process server to serve defendants by posting a copy of the summons and complaint at the subject property address, certified mailing a copy of the summons and complaint

to defendants at the subject property address with request of a return receipt, or regular mailing of a copy of the summons and complaint to defendants at the subject property address. Defendants could still not be located for service of process, prompting plaintiff to file a motion for entry of an order of default and a motion for entry of judgment for foreclosure and sale on July 5, 2017.

¶ 8 The following day, July 6, 2017, attorney Daniel Khwaja entered an appearance on behalf of defendants. On July 10, 2017, the trial court allowed defendants 28 days to file an answer to plaintiff's complaint.

¶ 9 On August 4, 2017, defendants filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2016). The motion argued that plaintiff failed to send defendants a proper notice of acceleration as required under section 22 of the mortgage as the notice was sent to the wrong address, was not sent by the lender, and was sent to a recipient not authorized to receive the notice. Defendants attached to the motion a September 6, 2016, "Notice of Default" letter sent by Ocwen to defendants "c/o North Legal Services" at 2342 W. North Avenue, Chicago (Chicago address). That address represents the legal office of North Legal Services and attorney Daniel Khwaja. The motion argued that the letter was "defective on its face" and defendants "were never provided the opportunity to cure any purported breach or arrears of the mortgage loan as explicitly provided in [section 22] of the mortgage contract."

¶ 10 Also attached to defendants' motion to dismiss were the affidavits of John Diedrick and Karen O'Connor in which each stated that Khwaja represented them in a previous foreclosure action but revoked his authority to receive or accept notices on their behalf following the previous foreclosure's dismissal. The affidavits further stated that Khwaja communicated the revocation of his authority to Ocwen in August 2016. Defendants averred that Khwaja was retained again to represent them in the pending foreclosure action on July 1, 2017. A notice of defendants' rights

under the Fair Debt Collection Practices Act (FDCPA) was sent to the subject property address by plaintiff's attorney, Codilis & Associates, P.C., dated December 12, 2016. Both affidavits stated that the acceleration notice had been forwarded by Khwaja from the Chicago address to defendants at the subject property address.

¶ 11 Plaintiff filed its response to the motion to dismiss on October 18, 2017, wherein they argued that defendants had not established that they provided written notice of a change of address as required by the mortgage contract. It also argued that plaintiff was required to send notice to defendants' counsel under the FDCPA. Plaintiff maintained that defendants were unable to prove any prejudice due to the notice sent to their attorney's address or because Ocwen, not the Lender, sent the notice.

¶ 12 In their November 21, 2017, reply, defendants argued that plaintiff knew Khwaja no longer represented them when it sent notice of acceleration to the Chicago address. This, defendants claimed, was evidenced by plaintiff's counsel having sent the notice pursuant to the FDCPA to the subject property address. Further, defendants claimed that the unambiguous terms of the mortgage contract were violated, and that plaintiff was required to strictly comply with the contractual conditions.

¶ 13 The trial court denied defendant's motion to dismiss on November 27, 2017.

¶ 14 Defendants filed their answer to plaintiff's complaint on December 27, 2017, asserting as an affirmative defense, plaintiff's non-compliance with section 22 of the mortgage contract. Additionally, defendants asserted a counterclaim for violation of the FDCPA, alleging plaintiff's foreclosure counsel improperly contacted them directly despite knowing defendants were represented by counsel.

¶ 15 On February 20, 2018, plaintiff filed a combined motion to strike and/or for partial summary judgment of defendants' affirmative defense pursuant to section 2-619.1 of the Code, as well as a combined motion to strike and dismiss defendants' counterclaim. Regarding plaintiff's motion on defendants' affirmative defense, it argued that the trial court had already ruled on the merits of that argument when denying defendants' motion to dismiss, rendering the affirmative defense improper. As to the motion regarding dismissal of defendants' counterclaim, plaintiff asserted that defendants' affidavits and pleadings admitted no violation of the FDCPA occurred, and that plaintiff was not a debt collector as defined by the FDCPA, rendering any claims under the statute inapplicable.

¶ 16 Following a hearing on plaintiff's motions, the trial court entered an order on March 12, 2018, granting plaintiff's motion to strike and/or for partial summary judgment as to defendants' affirmative defense, agreeing with plaintiff that it had already substantively ruled on the merits when it denied defendants' motion to dismiss on November 27, 2017. Defendants' affirmative defense was stricken with prejudice. However, defendants were granted leave to file a response to plaintiff's motion to dismiss the counterclaim.

¶ 17 On April 10, 2018, defendants filed a motion to reconsider the trial court's March 12, 2018, order striking their affirmative defense as to the pre-acceleration notice. Defendants argued that the trial court misapplied existing law because it based its November 27, 2017, denial of defendants' motion to dismiss on a statutory condition precedent as opposed to a contractual condition precedent requiring strict compliance with such a condition. The trial court denied defendant's motion to reconsider on April 24, 2018, again finding that it had already substantively ruled on the merits regarding the sufficiency of the pre-acceleration notice.

¶ 18 On October 19, 2018, defendants filed an answer with affirmative defense to plaintiff's complaint to foreclose mortgage, as well as an amended counterclaim. Defendants' amended counterclaim alleged that plaintiff was a debt collector as defined under the FDCPA, making its direct communication with defendants instead of their counsel a violation of the statute. Further, defendants alleged that the trial court's November 27, 2017, denial of their motion to dismiss was predicated on its ruling that the acceleration notice was properly sent to defendants' counsel; a determination the trial court could not reach as a matter of law unless the FDCPA was applicable because the FDCPA letter sent directly to defendants when plaintiff knew they were represented by counsel was an attempt to collect a debt in violation of the FDCPA. Defendants continued to assert in their answer to the complaint to foreclose mortgage that the acceleration notice failed to strictly comply with the contractual strictures of the mortgage contract.

¶ 19 Plaintiff filed a combined motion to strike defendants' affirmative defense and to dismiss their amended counterclaim pursuant to section 2-619.1 of the Code on December 12, 2018. On April 8, 2019, the trial court entered an order ruling that defendants' affirmative defense remained stricken but preserved for appeal. Additionally, the trial court's order ruled that defendants could not establish that plaintiff was a debt collector as defined by the FDCPA and, accordingly, granted plaintiff's motion to dismiss defendants' amended counterclaim with prejudice.

¶ 20 Plaintiff then filed a motion for summary judgment on its complaint for foreclosure of mortgage. On August 12, 2019, the trial court granted summary judgment in favor of plaintiff and entered a judgment of foreclosure and sale. The judgment of foreclosure and sale articulated that pursuant to section 15-1508(e) of the Code, deficiency judgment would be entered against defendants provided that the proceeds of the sale were insufficient to satisfy those sums due to plaintiff. Defendants owed $713,609.81 to plaintiff under the judgment of foreclosure and sale.

¶ 21 On November 14, 2019, plaintiff was the high bidder at a sale held by the Du Page County Sheriff's Office, for the sum of $533,540. On November 20, 2019, plaintiff field a motion for order approving report of sale and distribution. On December 2, 2019, the trial court entered an order approving sale of the property, as well as a $180,069.81 *in personam* deficiency judgment against defendants without objection. Defendants requested the trial court to reconsider the order, arguing that the order confirming sale and awarding deficiency judgment should be vacated for failure to comply with the IMFL, the Du Page County Local Court Rules, and plaintiff's lack of prayer for personal deficiency against defendants in its motion for order approving report of sale distribution. The trial court denied defendants request for reconsideration.

¶ 22 On December 4, 2019, defendants filed an amended notice to reconsider the order approving sale of the property. In their amended notice to reconsider, defendants pointed to plaintiff's foreclosure complaint that requested a personal deficiency judgment "if sought," and asserted that plaintiff did not explicitly seek such a personal deficiency judgment in its motion for order approving report of sale and distribution.

¶ 23 On January 8, 2020, the trial court denied defendant's amended motion to reconsider, finding it lacked discretion to deny a personal deficiency judgment under section 15-1508(e) of the IMFL because plaintiff requested such relief in its complaint to foreclose mortgage.

¶ 24 On January 11, 2020, Defendants filed timely notice of appeal.

¶ 25 ANALYSIS

¶ 26 The defendants raise numerous contentions in this appeal. Defendants challenge the following trial court orders: (1) the November 27, 2017, order denying their section 2-619(a)(9) motion to dismiss the foreclosure complaint; (2) the March 12, 2018, order granting plaintiff's section 2-619.1 motion striking their affirmative defense with prejudice; (3) the April 24, 2018,

order denying their motion to reconsider the trial court's March 12, 2018, order striking their affirmative defense; (4) the December 2, 2019, order granting plaintiff's motion to confirm sale and awarding a personal deficiency of $180,069.81; and (5) the January 8, 2020, order denying their motion to reconsider the December 2, 2019, as a misapplication of existing law. We will address each of defendants' contentions in turn.

¶ 27 We begin with defendants' first enumerated contention regarding the trial court's denial of their motion to dismiss the complaint for foreclosure of mortgage pursuant to section 2-619(a)(9) of the Code. Within this contention, defendants make several arguments as to how the trial court erred in making its denial of defendants' motion. They argue that the pre-acceleration notice failed to comply with the condition precedent contained within paragraph 22 of the mortgage contract because the notice was not addressed to them, was not sent to them at the subject property address, was not sent to an authorized representative, and was sent by Ocwen and not plaintiff (the lender). Additionally, defendants argue that because plaintiff mailed the pre-acceleration notice to the Chicago address of attorney Khwaja, who was no longer representing them at the time the September 6, 2016, notice of default was sent, it was substantially deficient for failure to strictly comply with paragraph 22 of the mortgage contract. This failure, defendants assert, prejudiced them through a contractual deprivation of their rights to cure the default before plaintiff filed its foreclosure action.

¶ 28 Our standard of review of a motion to dismiss under section 2–619 of the Code is *de novo. Krilich v. American Nat. Bank and Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569 (2002). A section 2–619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Krilich*, 334 Ill. App. 3d at 569-70.

¶ 29 A section 2–619 proceeding permits a dismissal after the trial court considers issues of law or easily proved issues of fact. *Krilich*, 334 Ill. App. 3d at 570. Section 2–619(a)(9), as asserted by the defendants in the present case, allows dismissal when "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2–619(a)(9) (West 2018). The term "affirmative matter" as used in section 2–619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Krilich*, 334 Ill. App. 3d at 570.

¶ 30 In ruling on a motion to dismiss under section 2–619(a)(9), the trial court may consider pleadings, depositions, and affidavits supporting a defendant's assertion of an affirmative matter, if such a matter is not apparent on the face of the complaint. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is "unfounded or requires the resolution of an essential element of material fact before it is proven." *Epstein*, 178 Ill. 2d at 383, quoting *Kedzie &103rd Currency Exchange, Inc.*, 156 Ill. 2d 112, 116 (1993). The plaintiff may establish this by presenting "affidavits or other proof." 735 ILCS 5/2–619(c) (West 2018). "If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted, and the cause of action dismissed." *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 31 Returning to defendants' first contention, a "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 32. A notice of acceleration is a condition precedent to foreclosure under the IMFL. *CitiMortgage, Inc. v.*

Bukowski, 2015 IL App (1st) 140780, ¶ 16. In Illinois, generally, an acceleration notice requires strict compliance in order to enforce the mortgage contract. See *Accetturo*, 2016 IL App (1st) 152783, ¶¶ 32, 33; see also *Bukowski*, 2015 IL App (1st) 140780, ¶ 16. However, reviewing courts in Illinois have held that a technical defect in a notice sent to the mortgagor does not necessarily preclude enforcement of the contract. See *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶¶ 15-17; *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 27. When there is no prejudice resulting form the technical defect, dismissal of the foreclosure complaint or vacatur of the foreclosure to permit new notice is futile. *Luca*, 2013 IL App (3d) 120601, ¶¶ 15-17.

¶ 32 There is no doubt that the notice of acceleration sent to the Chicago address contained information regarding "(a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property" as required in paragraph 22 of the mortgage contract. Defendants have never averred anywhere in the record presented to this court that they were not in breach of the mortgage, note, and loan modification agreement. They have never averred that they had any intent or ability to cure the default prior to plaintiff's filing of the underlying foreclosure action. Both affidavits attached to defendants' motion to dismiss admit that they received the acceleration notice after it was forwarded by Khwaja from the Chicago address to the subject property address.

¶ 33 Defendants' attempts to secure a section 2-619 dismissal of plaintiff's foreclosure complaint seeks simply to force plaintiff to re-issue a notice of acceleration that defendants readily admit in sworn affidavits that they received. No evidence exists in the record, nor do defendants

contend, that a change of address form was executed as required in paragraph 15 of the mortgage contract after Khwaja's initial representation of defendants ended. That genuine issue of fact alone would be enough to support the trial court's denial of defendants' motion to dismiss.

¶ 34 The arguments defendants have raised are purely technical and completely lacking in any claim that they were prejudiced by the manner in which they received notice of acceleration. To reward this argument by reversing the trial court's dismissal of their 2-619 petition without any claim or demonstration of any resulting prejudice or even the suggestion that they attempted to change their address as required by the mortgage contract, this court would be doing exactly what this court intended to avoid in our holding in *Pajor*. We will not do so. Defendants' demand for strict compliance to the mortgage contract while failing to show their own compliance with paragraph 15 is unavailing and made even more so by their sworn admission that they received notice of acceleration following their default under the terms of that mortgage.

¶ 35 The question on appeal is " 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Krilich*, 334 Ill. App. 3d at 570, quoting *Zedella v. Gibson*, 165 Ill. 2d 181, 185-86 (1995). As discussed above, the record is replete with such facts, rendering any consideration of a dismissal of plaintiff's foreclosure complaint under section 2-619 without merit. Here, we find that the notice of acceleration sent to defendants' attorney, and then provided to defendants, contained all the information mandated by paragraph 22 of the mortgage contract. With no evidence showing defendants ever attempted to change their address with plaintiff or Ocwen following the conclusion of Khwaja's representation, the delivery of the notice to the Chicago address is a technical defect. The record clearly shows that the substantive requirements of paragraph 22 were met and that defendants received actual notice of acceleration, a technical defect

such as the one present here does not require dismissal of the foreclosure action. See *Pajor*, at ¶ 25.

¶ 36 At no point have defendants alleged that they were prejudiced by the mailing to the Chicago address, only that paragraph 22 requires strict compliance. Where, as here, the mortgagor has alleged only a technical defect in the notice and has not alleged any resulting prejudice, a dismissal of the foreclosure complaint to permit new notice of the grace period would be futile. *Pajor*, at ¶ 27. As such, the trial court's denial of defendants' 2-619 petition to dismiss plaintiff's complaint for foreclosure was not made in error.

¶ 37 We next examine defendants' contention that the trial court erred in granting plaintiff's 2-619.1 combined motion striking their affirmative defense with prejudice in its March 12, 2018, order, and further erred in denying their motion to reconsider in its April 24, 2018, order. As to the trial court's March 12, 2018, order, defendants argue that the trial court abused its discretion in disallowing them to re-raise defective notice of acceleration as an affirmative defense in their answer to plaintiff's foreclosure complaint. Defendants further argue that the trial court never explicitly prohibited them from re-raising the issue of defective notice of acceleration and should have granted their request for a briefing schedule to address the issue.

¶ 38 Section 2-619(d) of the Code states that "[t]he raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits ***." 735 ILCS 5/2-619(d) (West 2018). Under section 2–619(d), where a party has previously raised affirmative defenses by a section 2–619 motion and the court has disposed of the motion on its merits, the court has adjudicated all the grounds set forth in the motion and the party cannot raise the affirmative defenses again on the

same grounds in a later motion." *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 117-18 (1993).

¶ 39 Defendants originally raised the issue of a defective notice of acceleration in violation of paragraph 22 of the mortgage contract in their motion to dismiss the foreclosure complaint pursuant to section 2-619(a)(9) of the Code. The trial court ruled on the merits of this issue when rendering its denial of that motion. Specifically, the trial court found that

> "I think *Pajor* does apply. I think we're talking about strictly a state claim here of a breach of contract, breach of paragraph 22. *** If I was satisfied that a written notice of an address change was sent, even if I was satisfied, I would still find that it's a technical defect, that there was no prejudice because ultimately *** the Defendants received the notice. And that's *** the important part. They got it. No allegation that [the notice of acceleration] did not contain everything it was supposed to contain. *** Any technical defect in that notice resulted in prejudice whatsoever. And according to *** *Pajor*, that makes the notice acceptable. So the *** motion is denied."

¶ 40 "[A]n "affirmative defense" is one in which the defendant gives color to his opponent's claim but asserts new matter which defeats an apparent right in the plaintiff." *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16, quoting *Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854 (1989). Defendants' attempt to repurpose the arguments alleging defective notice as an affirmative defense to plaintiff's complaint for foreclosure was improper as it did not raise a new matter to defeat the claims plaintiff raised therein. Based on a plain reading of section 2-619(d), the trial court disposed of defendants' assertion of defective notice on the merits when denying their section 2-619 motion to dismiss the foreclosure complaint. There was no abuse of

discretion in applying this plain statutory language when granting plaintiff's 2-619.1 motion to strike defendants' improperly raised affirmative defense in the trial court's March 12, 2018, order.

¶ 41 Similarly, the trial court's denial of defendants' motion to reconsider its March 12, 2018, order was not in error. A motion to reconsider must bring to the trial court's attention (1) newly discovered evidence, (2) changes in the law, or (3) errors in the court's previous application of existing law. *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25. Our standard of review is abuse of discretion where the motion to reconsider is based on new evidence, facts, or legal theories not presented in prior proceedings. *Horlacher v. Cohen*, 2017 IL App (1st) 162712, ¶ 80. An abuse of discretion occurs only when the court acts so arbitrarily that no reasonable person would take the court's position. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 12.

¶ 42 In their brief presented to this court, defendants state what was argued in the motion to reconsider but fail to present any coherent arguments as to how the trial court erred in striking their affirmative defense in its March 12, 2018, order. Based on what this court can glean from defendants' brief, they seem to be attempting to again argue points related to plaintiff providing defective notice of acceleration. However, a motion to reconsider the March 12, 2018, order should be contained within the parameters of whether the trial court's judgment that it already ruled on the merits regarding the issue of defective notice, thus statutorily compelling it to strike that affirmative defense as provided in section 2-619(d) (735 ILCS 5/2-619(d) (West 2018). Thus, without any argument from defendant as to how the trial court's application of section 2-619(d) in striking their affirmative defense was in error, we must continue to find that there was no abuse of discretion in applying plain statutory language when granting plaintiff's 2-619.1 motion to strike defendants' improperly raised affirmative defense in the trial court's March 12, 2018, order.

¶ 43 We now turn to defendants' final contentions. Defendants contend that the trial court abused its discretion in the December 2, 2019, order granting plaintiff's motion to confirm sale and awarding a personal deficiency of $180,069.81. Additionally, defendants contend that the trial court erred in denying their motion to reconsider the December 2, 2019, by misapplying existing law.

¶ 44 Defendant argues that plaintiff did not explicitly request a personal deficiency in the foreclosure complaint or the motion to confirm sale, rendering the trial court's $180,069.81 award to plaintiff in violation of the language of both section 15-508 of IMFL (735 ILCS 5/15-1508 (West 2018) and Du Page County Local Rule 6.04.

¶ 45 Mortgage foreclosures, judicial sales, and deficiency judgments are all governed by the IMFL. 735 ILCS 5/15–1101 *et seq*. (West 2018). Section 15–1508(e) of the IMFL, entitled "Deficiency Judgment," stipulates as follows:

> "In any order confirming a sale pursuant to the judgment of foreclosure, the court shall also enter a personal judgment for deficiency against any party (i) if otherwise authorized and (ii) to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15–1508. Except as otherwise provided in this Article, a judgment may be entered for any balance of money that may be found due to the plaintiff, over and above the proceeds of the sale or sales, and enforcement may be had for the collection of such balance, the same as when the judgment is solely for the payment of money. Such judgment may be entered, or enforcement had, only in cases where personal service has been had upon the persons personally liable for the mortgage indebtedness, unless they have entered their appearance in the foreclosure action." 735 ILCS 5/15–1508(e) (West 2018).

The word "shall," as used in the Foreclosure Law, means mandatory, rather than permissive. 735 ILCS 5/15–1105(b) (West 2018). In any statute, the word "shall" ordinarily imposes an imperative duty. *U.S. Bank Trust, N.A. v. Atchley*, 2015 IL App (3d) 150144, ¶ 11. Accordingly, a trial court must grant an *in personam* deficiency judgment in favor of a plaintiff under section 15–1508(e) of the Foreclosure Law when the requirements set forth in that section are met. *Id*.

¶ 46 In the present case, plaintiff sought an *in personam* deficiency judgment against defendants in the original foreclosure complaint. The complaint listed defendants as the persons personally liable for any deficiency, and plaintiff attached the note and mortgage, both signed by defendants. Additionally, the mortgage, note, and loan modification were attached to the complaint for foreclosure. Paragraph 9 of the note advised defendants that "each person is fully and personally obligated to keep all of the promises made in this Note, including the promised to pay the full amount owed. *** The Note Holder may enforce its rights under this Note against each person individually or against all of us together." The trial court's foreclosure judgment further advised defendants that a personal deficiency judgment would be entered if the proceeds of the property sale were insufficient to satisfy the loan. The deficiency, totaling $180,069.81, was proven upon the presentation of the sheriff's report of sale. All statutory requirements of section 15–1508(e) of the IMFL were met. Thus, the trial court had an imperative duty to grant an *in personam* deficiency judgment in favor of a plaintiff under section 15–1508(e) of the IMFL. See *Atchley*, at ¶ 12.

¶ 47 We also disagree with defendants' assertion that Du Page County Local Rule 6.04 dictates that plaintiff must have requested a personal deficiency judgment. Du Page County Local Rule 6.04 states, in relevant part, that

> "(a) Filing: All case or claim dispositive motions, other than motions arising during the course of trial, shall be filed no later than sixty-three (63) days before the scheduled trial

date, except by prior leave of court and for good cause shown. The title to each motion shall indicate the relief sought and the applicable section of the Code of Civil Procedure."

¶ 48 Illinois courts define a dispositive motion as one which, if granted, results in a final dismissal or judgment. *See Gibellina v. Handley*, 127 Ill. 2d 122, 138 (1989). Here, plaintiff's motion was titled "Motion for Order Approving Report of Sale and Distribution" and prayed for "this Court to enter an Order Approving the Report of Sale and Distribution." While we do not agree with defendants' assertion that Du Page County Local Rule 6.04 applies to plaintiff's "Motion for Order Approving Report of Sale and Distribution" as a "case or claim dispositive motion," we need not reach that issue as plaintiff's motion is sufficient in its indication of the relief it seeks from the trial court. The trial court entered an order approving the report of sale and distribution, including the *in personam* deficiency award of $180,069.81, granting the relief plaintiff sought in the title of the motion. Defendant's suggestion that Du Page County Local Rule 6.04 dictates that plaintiff must list every specific subsection of relief requested in the title of its motion, strikes this court as disingenuous and absurd. Additionally, defendant provides no basis for this court to entertain such a reading of that Rule. As such, the trial court was not in error in confirming the sale of the property and awarding *in personam* deficiency to plaintiff, nor was it in error in denying defendant's motion to reconsider that order.

¶ 33 III.CONCLUSION

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

¶ 35 Affirmed.