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2022 IL App (3d) 210571-U

Order filed November 23, 2022

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2022

HSBC BANK USA, NATIONAL)	Appeal from the Circuit Court
ASSOCIATION, as Trustee of the Fieldstone)	of the 12th Judicial Circuit,
Mortgage Investment Trust, Series 2006-2,)	Will County, Illinois,
)	
Plaintiff-Appellee,)	
)	
v.)	
)	Appeal No. 3-21-0571
ADELINE C. SESTAK, ILLINOIS)	Circuit No. 13-CH-2553
DEPARTMENT OF REVENUE, UNKNOWN)	
OWNERS AND NONRECORD)	
CLAIMANTS,)	
)	
Defendants)	Honorable
)	Theodore J. Jarz,
(Adeline C. Sestak, Defendant-Appellant).)	Judge, Presiding.

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JUSTICE PETERSON delivered the judgment of the court.
Justices Holdridge and Hauptman concurred in the judgment.

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ORDER

¶ 1 *Held:* The trial court did not err when it granted plaintiff's motion for summary judgment and judgment of foreclosure. The trial court also did not err when it granted plaintiff's motion to confirm the sale of the property.

¶ 2 Defendant, Adeline C. Sestak, appeals from an order granting plaintiff, HSBC Bank USA, National Association's, motion for summary judgment and judgment of foreclosure. Defendant contends that a genuine issue of material fact exists which precludes the entry of summary judgment. Defendant also contends that the trial court erred when it confirmed the sheriff's sale of the property. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2006, defendant obtained a mortgage loan in the amount of \$100,000, which was secured by her property located in Mokena, Illinois.

¶ 5 On July 31, 2013, plaintiff filed a complaint for foreclosure. Defendant filed a verified answer through counsel. Defendant filed a motion for summary judgment and judgment of foreclosure. The motion included the affidavit of William Long, the contract management coordinator. The affidavit included a spreadsheet of the monthly charges for principal, interest, and escrow amounts. The spreadsheet included question marks for the amounts of escrow charges for June 2006 through June 2011. From that period on, the escrow charges remained at \$1,059.21 from July 2011 through December 2014. The escrow payment changed to \$365.31 for the month of June 2015.

¶ 6 Defendant did not file a response to plaintiff's motion for summary judgment.

¶ 7 On October 5, 2015, the trial court granted plaintiff's motion for summary judgment and judgment of foreclosure. Plaintiff then filed a motion to confirm the sale. Defendant filed an objection to the confirmation of sale. The court vacated the foreclosure judgment and ordered the parties to participate in mandatory mediation.

¶ 8 Defendant's counsel then moved to withdraw. The court granted the motion and defendant proceeded *pro se*.

¶ 9 On March 1, 2018, mediation terminated. The report included a statement, “if dispute about the application of trustee’s payments remain—issues of fact are for the trial court.”

¶ 10 On September 19, 2018, plaintiff filed a new motion for summary judgment and judgment for foreclosure. The motion included a new affidavit. This time the affidavit was from Franci Boothney. Boothney averred that defendant was in default as of September 1, 2011, with an amount due and owing of \$98,069.22. The records attached to Boothney’s affidavit show that the bank had advanced payments for taxes and insurance on behalf of defendant. The records also show that defendant made her last partial payment on September 12, 2011. Unlike the first affidavit of Long, the spreadsheet in Boothney’s affidavit did not include question marks in the column for escrow charges. Instead, Boothney’s affidavit showed that defendant was charged \$1,059.21 in escrow fees from June 2006 through June 2011. Then, from October 2011 through September 2018, defendant was charged between \$720 and \$365 in escrow fees.

¶ 11 Ultimately, the trial court granted plaintiff’s motion for summary judgment and judgment of foreclosure. Defendant then filed a motion to vacate the order granting summary judgment in plaintiff’s favor. Defendant alleged that she had not been properly served with notice of plaintiff’s motions. The trial court entered an order vacating summary judgment and judgment of foreclosure. The court allowed defendant 30 days to file a response to plaintiff’s motions.

¶ 12 Defendant did not file a response. Instead, defendant filed a motion for leave to conduct discovery and to reset the briefing schedule. The court denied defendant’s motion and granted defendant 28 days to file a response to plaintiff’s motions.

¶ 13 Again, defendant did not file a response. Instead, she filed a motion to strike plaintiff’s motion for summary judgment and judgment of foreclosure. Defendant’s motion argued that plaintiff’s motion should be stricken because it was based upon fraudulent supporting

documentation. For support, she cited a federal case in which Ocwen (the loan servicer) entered into a settlement agreement regarding premature and unauthorized foreclosures and the use of false and deceptive affidavits and other documents. Defendant did not attach an affidavit to her motion to strike.

¶ 14 Subsequently, the trial court entered an order in which it deemed defendant’s motion to strike as a response to plaintiff’s motion for summary judgment and judgment of foreclosure. The court allowed plaintiff leave to file a reply to defendant’s response.

¶ 15 Ultimately, the trial court granted plaintiff’s motion for summary judgment and judgment of foreclosure. Plaintiff filed a motion to confirm the sale of the property. The notice of motion showed that plaintiff served the motion by regular mail to defendant’s former attorney. Plaintiff also sent the motion by regular mail to defendant’s address, but addressed the notice to “Unknown Owners and Non-record Claimants.” The notice did not show that plaintiff addressed a copy of the motion to defendant, individually. Defendant filed an emergency motion requesting time to respond to plaintiff’s motion to confirm the sale of the property. After a hearing, where defendant was represented by counsel, the trial court denied defendant’s emergency motion and approved the sale.

¶ 16 Defendant appeals.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends that the trial court erred when it granted plaintiff’s motion for summary judgment and judgment of foreclosure. She also contends that the trial court erred when it granted plaintiff’s motion to confirm the sheriff’s sale of the property. We address each argument in turn.

¶ 19

A. Summary Judgment

¶ 20

First, defendant contends that summary judgment was improper because issues of material fact remain. Because summary judgment is a drastic means of disposing of litigation, it should only be used where the pleadings and other evidentiary material in the record, when viewed in a light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 61 (2011). “The purpose of summary judgment is not to try a question of fact but to determine whether one exists.” *Tannehill v. Costello*, 401 Ill. App. 3d 39, 42 (2010). We review the circuit court’s granting of summary judgment *de novo*. *Id.* at 41. Upon review, we find there is no genuine issue of material fact where defendant failed to file a counteraffidavit challenging plaintiff’s motion for summary judgment. Therefore, we hold that the trial court did no err when it granted plaintiff’s motion for summary judgment and judgment of foreclosure.

¶ 21

Here, plaintiff’s motion for summary judgment was supported by an affidavit. When a party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant’s affidavits stand as admitted. See *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993). In the absence of a counteraffadavit, we must accept the material facts set forth in the affidavit as true. See *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). Plaintiff proved its case in its motion for summary judgment. Plaintiff established a default and plaintiff’s right to foreclosure. Therefore, the trial court did not err when it granted summary judgment in favor of plaintiff.

¶ 22

In reaching this conclusion, we reject defendant’s argument that there is an issue of material fact because the two different affidavits submitted by plaintiff contain discrepancies. Specifically,

defendant points to Long's affidavit (which supported plaintiff's original motion for summary judgment) and Boothney's affidavit (which supported the operative motion for summary judgment). Defendant argues that the fact that Long's affidavit was incomplete shows that plaintiff fraudulently altered the amounts owed that were included in Boothney's affidavit. In particular, defendant points to the spreadsheet in Long's affidavit which included question marks for the amounts of escrow charges for June 2006 through June 2011. From that period on, the escrow charges were \$1,059.21 from July 2011 through December 2014. On the other hand, the spreadsheet attached to Boothney's affidavit was completely filled in and showed that defendant had been charged escrow fees for the entire life of the loan. According to defendant, plaintiff charged escrow fees, despite the fact that she had been paying the taxes and insurance the entire life of the loan. Defendant maintains that the discrepancies between the Long and Boothney affidavits create a genuine issue of material fact which precludes the entry of summary judgment.

¶ 23 In this case, Long's affidavit was attached to the motion for summary judgment that was granted, but later vacated by the trial court. Boothney's affidavit, on the other hand, supported the operative motion for summary judgment that the trial court granted. Defendant's challenge to Long's affidavit has no bearing on the judgment entered later in the case as Boothney's affidavit was used to support the operative motion for summary judgment. Further, Boothney's affidavit merely corrected any deficiencies in Long's affidavit. Therefore, the discrepancies in the affidavits alone do not create a genuine issue of material fact.

¶ 24 Defendant also challenges Boothney's affidavit itself. Defendant claims that the affidavit shows that she paid the property taxes and insurance on the property. Therefore, defendant argues that plaintiff wrongfully charged her escrow fees. On the contrary, the documents attached to Boothney's affidavit showed that the bank made the payments for taxes and insurance on behalf

of defendant. Defendant also failed to present evidence that she was making payments for taxes and insurance. Thus, there is no evidence that plaintiff wrongfully charged defendant escrow fees. Defendant also argues that the records attached to Boothney's affidavit show that she was current on her monthly payments beyond September 1, 2011. The records show that defendant made her last partial payment on September 12, 2011. The records do not show any further payments made by defendant after that date.

¶ 25 Defendant also points to unrelated lawsuits involving plaintiff where plaintiff was accused of fraud in foreclosure proceedings. According to defendant, plaintiff settled those cases. However, those unrelated lawsuits and settlement agreements are not part of the record and cannot be considered by this court.

¶ 26 Finally, defendant maintains that plaintiff violated the Real Estate Settlement Procedure Act (RESPA) by increasing her escrow charges beyond the amounts allowed under RESPA. A violation of RESPA does not constitute a defense to a mortgage foreclosure action. See *U.S. Bank National Ass'n v. BMO Harris Bank N.A.*, 2021 IL App (1st) 191555, ¶ 25. Section 2615 of Title 12 of the United States Code governing RESPA provides: "Nothing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan." 12 U.S.C. § 2615 (2018). Consequently, even assuming plaintiff violated RESPA, it is not a defense.

¶ 27 **B. Motion to Confirm the Sale**

¶ 28 Next, defendant contends the trial court erred by granting plaintiff's motion to confirm the sale. The trial court's approval of a judicial sale is reviewed under the abuse of discretion standard. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). The trial court abuses its discretion if

it committed an error of law or where no reasonable person would take the view adopted by the court. *CitiMortgage, Inc. v. Johnson*, 2013 IL App (2d) 120719, ¶ 18. There are four grounds to set aside a sale: “(i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale.” 735 ILCS 5/15-1508(b) (West 2020). Defendant raises the first (inadequate notice) and fourth (injustice) grounds as reasons to set aside the sheriff’s sale.

¶ 29 First, defendant contends that she did not receive adequate notice of plaintiff’s motion to confirm the sheriff’s sale. The notice requirement for the sale of foreclosed property provides that plaintiff:

“shall also give notice to all parties in the action who have appeared and have not theretofore been found by the court to be in default for failure to plead. Such notice shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint, not more than 45 days nor less than 7 days prior to the day of sale.” 735 ILCS 5/15-1507(c)(3) (West 2020).

¶ 30 The applicable rule of court for service of papers other than process and complaint is Illinois Supreme Court Rule 12(b)(5), which provides:

“[I]n case of service by mail or by delivery to a third-party commercial carrier, by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the mail or delivered the document to a third-party commercial carrier or courier, stating the time and place of mailing or delivery, the

complete address that appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid; or” Ill.

S. Ct. R. 12(b)(5) (eff. July 1, 2017).

¶ 31 “There is a presumption of delivery if sent by regular mail directed to a proper address. Where the rules provide for that method of service, notice is thus satisfied by use of regular mail.” *In re Marriage of Betts*, 159 Ill. App. 3d 327, 332 (1987). In addition, no sale “shall be held invalid or be set aside because of any defect in the notice thereof *** except upon good cause shown.” (Emphasis added.) 735 ILCS 5/15-1508(d). “Although minor defects will be excused, proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12 [citation].” *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987). In other words, “an immaterial error in the information shall not invalidate the legal effect of the notice.” *Id.* § 15-1507(c)(1).

¶ 32 Here, plaintiff sent the notice of the motion to confirm the sale to defendant’s address, but addressed the notice to “Unknown Owners and Non-record Claimants.” This is an immaterial error and is not grounds to reject the sale of the property. Plaintiff substantially complied with the notice requirements by sending the notice to defendant’s home address. That the notice was not specifically addressed to defendant does not change the result. Additionally, it is clear defendant received notice of the motion because plaintiff filed an emergency motion requesting time to respond to the motion to approve the sheriff’s sale. She was also represented by an attorney at the November 1, 2021, hearing on the motion to approve the sale.

¶ 33 Second, defendant contends that the sale should not be confirmed on the grounds of injustice. Defendant’s challenge to the sale raised issue with the affidavits supporting plaintiff’s motion for summary judgment. In essence, defendant sought to relitigate the arguments already

made on the motion for summary judgment. The “justice clause” provides a narrow window through which courts can vacate sales because of serious defects in the actual sale process, and not because of alleged errors in the process leading up to the underlying judgment. *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (3d) 121147, ¶ 19. Given that plaintiff’s complaints relate to the entry of summary judgment, and she does not challenge the actual sale process, the injustice clause does not provide grounds for the trial court to reject the sale confirmation. Therefore, the trial court did not err when it entered an order confirming the sale.

¶ 34

III. CONCLUSION

¶ 35

The judgment of the circuit court of Will County is affirmed.

¶ 36

Affirmed.

¶ 37