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2012 IL App (3d) 110723-U

Order filed September 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

CITIMORTGAGE, INC.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois
)	
v.)	Appeal No. 3-11-0723
)	Circuit No. 08-CH-1410
RUBY PARKER and AUDREY)	
PARKER,)	
)	Honorable Richard J. Siegel,
Defendants-Appellants.)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion pursuant to sections 15-1508(b) and 15-1508(d-5) of the Illinois Mortgage Foreclosure Law in approving the judicial sale. Affirmed.
- ¶ 2 This action was initiated on March 24, 2008, when the plaintiff, CitiMortgage, filed a

complaint for foreclosure in the circuit court of Will County to foreclose the mortgage of the defendants, Ruby and Audrey Parker. After a successful bid at the sheriff's sale, CitiMortgage filed its motion for order approving sheriff's report of sale and distribution. The Parkers filed their written objections, and after a hearing on August 11, 2011, the trial court denied the Parker's objection and entered an order approving the sale. The defendants appeal, claiming the trial court abused its discretion in confirming the sale over the defendants' objection under Illinois Mortgage Foreclosure Law section 15-1508(b)(iv) and in confirming the sale when a trial modification plan was pending under the Home Affordable Modification Program (HAMP). Defendants also argue that the trial court violated the stay provisions of the Making Home Affordable Plan pursuant to section 15-1508(d-5) of the Foreclosure Law and 12 U.S.C § 5201 et seq. (2009). We affirm.

¶ 3

BACKGROUND

¶ 4 On August 16, 2007, Ruby and Audrey Parker executed a mortgage and note on real property located in Monee, Illinois. The original mortgage was through Equity Mortgage Corporation, and the principal amount on the note was \$409,000 at 9% interest. Per the terms of the note, the Parkers were to pay \$3,290.91 per month on the first day of the month, beginning October 1, 2007.

¶ 5 CitiMortgage instituted foreclosure proceedings on March 24, 2008, alleging that the mortgage had been in default since October 1, 2007, and that unpaid principal, interest and escrow of \$31,625.46 had accrued from October 1, 2007, through March 31, 2008. Court records

indicate that the Parkers were served with the summons and complaint on March 29, 2008.

CitiMortgage filed a motion to default the Parkers and, on July 15, 2008, the trial court entered judgment of foreclosure and sale, finding, inter alia: that the Parkers had failed to appear; that they owed a total of \$463,838.31; that they had until October 29, 2008, to redeem the property; and that in the event no redemption was made, the property would be sold at public sale.

¶ 6 The Parkers failed to redeem the property and, as a result, it was sold via public sale on November 5, 2008. The sheriff of Will County filed the sheriff's report of sale and distribution, indicating that the property was sold to CitiMortgage as the highest bidder for \$488,965.03. Following this sale, it came to light that the Parkers had filed for Chapter 11 bankruptcy on November 4, 2008, and the sale of the property should not have proceeded. CitiMortgage filed a motion to vacate the sale. The trial court granted that motion on June 9, 2010. The sale was later renoticed for April 27, 2011. The Parkers filed an emergency motion to stay sale on April 25, 2011, contending that they lacked counsel and were unaware of their rights and responsibilities with respect to the pending foreclosure action, and that they were participants in HAMP. The Parkers specifically argued that they were eligible for a loan modification and the ultimate objective of HAMP was to allow homeowners to keep their homes. The trial court denied the Parkers' motion, and the judicial sale was conducted on April 27, 2011, in which CitiMortgage was again the highest bidder with a sale price of \$644,516.40.

¶ 7 Again, CitiMortgage filed a motion for approval of sale, and the Parkers filed written objections. The Parkers' objections were based on CitiMortgage's alleged "serious errors" in

servicing a previous loan modification offer and on the premise that "justice would not otherwise be served" by the sale, given that the Parkers had a pending HAMP modification application at the time. The "Fannie Mae Loan Modification" in question was dated January 12, 2011, and stated that the Parkers may be eligible for a modification offer by Fannie Mae, as the owner of their loan, if they could make payments during the new trial period. The letter went on to state that to accept the offer, the Parkers must make their first "trial period payment" of \$4,681.40 under the trial-period plan by January 1, 2011. The Parkers argued that because the letter was dated after the date in which the first payment was due, they could not possibly comply with the terms of the trial period plan, therefore, justice would not otherwise be served in approving the sale. The Parkers also argued that they met HAMP eligibility requirements, and that HAMP provides for a suspension of a foreclosure sale when the request for modification is received no later than midnight of the seventh business day prior to the foreclosure sale date. The Parkers filed their fifth HAMP application on April 19, 2011, eight days prior to the scheduled sale date of April 27.

¶ 8 The Parkers supplemented their objection with the affidavit of Audrey Parker, in which he stated that he contacted CitiMortgage upon receiving the trial period plan letter dated January 12, 2011, requiring him to make a trial payment by January 1, 2011. He further stated that CitiMortgage's representative indicated someone would get back to him about the situation; that he was never told his first payment date would be adjusted to February 1; that CitiMortgage did not get back in touch with him; and by the time he called back, CitiMortgage's representative

indicated that the house had already been sold.

¶ 9 In response, plaintiff submitted the affidavit of Jacqueline M. Jackson, who is employed by CitiMortgage as a document control officer. Attached to the affidavit were system notes, which reflect all correspondence and communication with the borrowers in connection with the loan. The notes indicated that Audrey Parker called in regard to the loan modification offer on January 18, 2011, and stated that he would be able to send in the first payment of the trial period by the end of the week. The notes further indicate that as of January 26, CitiMortgage continued to hold foreclosure and await payment. The Parkers were not placed into default on the loan modification offer for failure to make the first payment until February 7, 2011.

¶ 10 The trial court denied the Parkers' objection to the motion approving sale, and entered an order on August 11, 2011, confirming the sale and giving the Parkers 60 days to vacate the premises; there was no deficiency judgment entered against them. The Parkers filed a motion to reconsider on September 9, 2011, raising the same issues briefed in their objection, which the trial court denied on September 28, 2011.

¶ 11 This timely appeal followed.

¶ 12 ANALYSIS

¶ 13 I. Mootness

¶ 14 As an initial matter, CitiMortgage alleges that this appeal is moot pursuant to Illinois Supreme Court Rule 305(k) (eff. July 1, 2004), insofar as the Parkers posted no bond to stay

enforcement of the order approving the sale and, during the time this appeal was pending, the property was transferred to a nonparty, Federal National Mortgage Association (Fannie Mae).

¶ 15 An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief. *Barnard v. Michael*, 392 Ill. 130, 133-34 (1945).

Courts of review will generally not consider moot or abstract questions because our jurisdiction is restricted to cases which present an actual controversy. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001) (citing *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 130-31 (1994)). In the absence of a stay, an appeal is moot if a specific property, possession or ownership of which is the relief being sought on appeal, has been conveyed to third parties. *Town of Libertyville v. Moran*, 179 Ill. App. 3d 800, 886 (1989). Rule 305(k) protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal. *Steinbrecher*, 197 Ill. 2d at 523. Supreme Court Rule 305(k) provides:

"If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of

any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final." Ill. S. Ct. R. 305(k) (eff. July 1, 2004)

¶ 16 Thus, Rule 305(k) requires: (1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding; and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. *Id.* at 523-24.

¶ 17 CitiMortgage contends that all three criteria noted above are satisfied. We disagree. There is no question that the property passed pursuant to a final judgment. The trial court entered the order confirming the sheriff's sale on August 11, 2011, and denied the Parkers' motion to reconsider on September 28, 2011. This is a timely appeal from a final order. It is similarly uncontested that the Parkers failed to perfect a stay of judgment under Rule 305(k). It is the second criteria that gives us pause, thus our analysis of this issue turns on the question of whether or not the property passed to a person or entity who was not a party to the action.

¶ 18 On the record before us, the only indication that a transfer to Fannie Mae actually occurred was a sentence contained within CitiMortgage's brief submitted on appeal. Case law has made clear that under Rule 305(k), the "record must unequivocally disclose that third-party purchaser was not party or nominee of [a] party to the action." *Cosmopolitan National Bank of Chicago v. Nunez*, 265 Ill. App. 3d 1012, 1012 (1994).

¶ 19 In Nunez, the plaintiff, Cosmopolitan National Bank of Chicago, as the titleholder of the property in question, agreed to convey the property under an agreement for a trustee's deed to the defendant, Maricella Nunez. *Id.* at 1013. Under the terms of the agreement, Nunez was to make monthly payments for the property to Gail Perez, the beneficiary of the trust. Nunez failed to make payments as required by the terms of the agreement, and the plaintiff foreclosed. Following the trial court's entry of judgment of possession, Nunez did not request the court to stay enforcement. *Id.* at 1014. Nunez appealed, and the plaintiff moved to dismiss the appeal, claiming that the property was transferred to a third party, Charlene Roth, while the appeal was pending and thus, her appeal was rendered moot. In support, the plaintiff submitted the affidavit of Perez, who stated that Roth was neither a party to the litigation nor a nominee of Perez, and that Roth had paid actual consideration for the property in the amount of \$60,000. In response to the plaintiff's motion to dismiss the appeal, Nunez argued that the record did not unequivocally show that Roth was not a nominee of Perez. *Id.* at 1015. Specifically, Nunez argued that the plaintiff had not provided the court with relevant documentation evidencing the sale, such as the sales contract, the mortgage documents, title insurance documents or Roth's canceled check for the purchase price. *Id.* In dismissing Nunez's appeal as moot, the court found that the documents unequivocally showed that Roth purchased the property and that because the defendant did not request a stay of the judgment, Roth's right, title or interest to the property would not be affected if the court reversed the judgment. *Id.* at 1015-16.

¶ 20 In the instant case, there is no evidence whatsoever to indicate that Fannie Mae is not a nominee of a party to the action. Quite to the contrary, Fannie Mae guaranteed the original loan to the Parkers, and it was through Fannie Mae that the loan modification plan was offered. In Nunez, the plaintiff bank was able to provide the court with copies of the direction to convey, the recorded deed, the closing statement, and the transfer declarations on the real property at issue. CitiMortgage, while claiming the appeal is moot, has provided no documentation in support of that contention. While we find the Parker's argument that the appeal has substantial public interest unpersuasive in this context, we also find that CitiMortgage has provided no peg upon which we can hang our mootness hat. The only facts before us tend to demonstrate that Fannie Mae was, at the very least, a nominee of CitiMortgage. Thus, we cannot say that the record unequivocally discloses that Fannie Mae is not a party, or nominee of a party and, as such, this appeal is not moot.

¶ 21

II. Confirmation of the Sale

¶ 22 It is well settled that a judicial sale is not complete until it has been approved by the courts. *Berber v. Hass*, 57 Ill. App. 2d 109, 116 (1965). Trial courts have broad discretion in approving or disapproving sales made at their direction. *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 388 (1997). Unless an abuse is clearly shown in exercise by the court of that discretion, a court of review will not interfere. *Maywood-Proviso State Bank v. Cokinis*, 11 Ill. App. 3d 659, 662 (1973).

¶ 23 Section 15-1508(b) of the Illinois Mortgage Foreclosure Law governs the trial court's analysis in approving or disapproving a sale. Section 15-1508(b) provides, in relevant part, as follows:

"Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of the 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." (Emphasis added.) 735 ILCS 5/15-1508(b) (West 2000)).

¶ 24 The Parkers argue that the trial court's approval of the judicial sale should be vacated because "justice was not otherwise done" in accordance with section 15-1508(b)(iv). Specifically, they allege that they were offered a trial modification plan under HAMP, which was improperly serviced and, had they been afforded the opportunity to comply with the terms of the plan, their home would not have been foreclosed upon.

¶ 25 This argument centers around the letter CitiMortgage sent to the Parkers dated January 12, 2011. The letter provided that to accept the offer and have their loan modified, the Parkers had to make the trial-period payments under the trial-period plan. The first payment under the

plan was due January 1, 2011, in the amount of \$4,681.40. The same amount was due on February 1 and March 1, and the letter indicated if the Parkers complied, their loan would be permanently modified. CitiMortgage acknowledges that the letter was dated January 12, eleven days after the Parkers were to make their first payment under the plan. Without such error, the Parkers contend they would have entered into a modification and prevented the sale from occurring, thus "justice was not otherwise done" in approving the sale. The Parkers contend that they could not accept the trial modification plan as it was written, and it would have to be rewritten in order for them to accept and comply without violating the payment provisions of the trial-period plan. What the Parkers omit, however, is that while the letter states the first payment is due January 1, it goes on to provide that CitiMortgage will accept payments in the month in which they are due. Thus, even if the Parkers had failed to tender their trial payment exactly on the first of the month, as long as they had made a payment during the month in which it was due, CitiMortgage would not have terminated the trial modification plan.

¶ 26 Furthermore, the business notes submitted with the affidavit of document control officer Jacqueline Jackson clearly show that the Parkers called CitiMortgage on January 18, 2011, to advise them that they had just received the documents for the trial period, and that the Parkers could send the first payment by the end of that week. The notes also indicate that the Parkers would send a certified check, and that the CitiMortgage representative supplied them with the address to forward the payments. The Parkers then point to the notes dated January 19, where a CitiMortgage employee reviewed the account and advised to proceed to foreclosure. However,

later notes indicate that CitiMortgage continued to hold foreclosure "while the borrower is on trial," and that there was a request to hold for approved modification with trial. The notes show that as of January 25, 2011, the Parkers had failed to make a single payment under the trial plan.

¶ 27 CitiMortgage did not renege on its offer of a trial modification plan, rather, the Parkers failed to make any payments whatsoever under the terms of the plan. CitiMortgage continued to wait for the January payment as promised, and the record indicates they did not place the Parkers' loan in default until February 7, 2011. The fact that the letter was not sent until January 12 does not render the modification plan "bogus," as the Parkers still had time to comply. Even if, as Audrey Parker avers in his affidavit, he was never told his first payment date would be adjusted, the Parkers still failed to make any payments for January or otherwise. Furthermore, the letter the Parkers acknowledge receiving between January 12 and January 18, 2011, explained that a payment could be made within the month due, even if not paid on the due date.

¶ 28 Additionally, we do not agree that CitiMortgage's actions were violative of HAMP, nor can we find any authority to support the Parkers' contention that a violation of HAMP would warrant setting aside the trial court's confirmation of the sale under the theory that "justice was not otherwise done." The Parkers cite to *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915 (1997), where the trial court disapproved a sheriff's sale when it found the terms of the sale unconscionable, and that justice would not otherwise be done if defendant was to lose her home. In that case, the trial court cited the sales price that was only one-sixth of the appraised value of the home. *Id.* at 928. It also held that justice would not otherwise be done if

the sale was approved, finding the bank engaged in unfair tactics by not accepting defendant's redemption payment and "shrugging her off" because she did not speak English very well. *Id.*

¶ 29 That case is so factually distinguishable from the case at bar it is inapposite. It only serves to highlight our point—that cases dealing with justice and fairness as grounds for disapproval of a sheriff's sale involve unconscionable sales terms or instances where the banks have failed to allow the borrowers to redeem the property, not HAMP violations. See also *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385 (1997); *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173 (2008).

¶ 30 It is worth noting that the Parkers' home sold for \$644,516.40. The note securing the mortgage was \$409,000. Even with substantial fees and interest, there was no deficiency judgment entered against the Parkers by the trial court. Much to our chagrin, the record before us does not provide a clear picture of how many payments the Parkers actually made. There is no ledger showing when or to whom payments were made, nor is there any indication of when the mortgage and note were transferred to CitiMortgage from the originating bank. The only information we were able to glean in this regard came from the system notes attached to Jacqueline Jackson's affidavit. The entry states that the last payment CitiMortgage received from the Parkers was on May 26, 2010. Assuming this was the last payment, as the Parkers have not produced any evidence and/or argument to the contrary, the Parkers continued to reside in the home until on or about October 10, 2011 (this date is 60 days following the trial court's August 11, 2011, order). That is approximately 1 year, 4 months and 15 days in the home without

making any payments whatsoever. This is in addition to the first six months of the mortgage's existence during which the Parkers made no payments. We cannot discern how many payments, if any, were made between March 2008 and May 2010. The Parkers were able to walk away without a financially crippling deficiency judgment being levied against them. We cannot find injustice in this record.

¶ 31 The trial court reviewed the terms of the sale, found that none of the deficiencies in section 15-1508(b) existed, and accordingly approved the sale. The Parkers had opportunities to make trial-plan payments and failed to do so. We find that the trial court did not abuse its discretion in confirming the judicial sale and affirm.

¶ 32 III. Making Home Affordable Program

¶ 33 The Parkers also contend that the trial court erred in approving the sale when there was a trial modification plan pending acceptance under the Making Home Affordable Program (MHAP). Again, a review of a trial court's decision to set aside a sheriff's sale is whether the court abused its discretion. *Northwest Diversified, Inc. v. Mauer*, 341 Ill. App. 3d 27, 33 (2003).

¶ 34 Section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law governs the trial court's analysis of whether or not a judicial sale should be approved in accordance with the directives of the Making Home Affordable Program and HAMP. Section 15-1508(d-5) provides, in relevant part, as follows:

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." 735 ILCS 5/15-1508(d-5) (West 2000).

¶ 35 HAMP, as established by the United States Department of the Treasury, allows the treasury to work with loan service providers to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures." 12 U.S.C. § 5219(a)(1) (2009). The Parkers argue that the sale of their home was in material violation of the MHAP's requirements for proceeding to a judicial sale, insofar as CitiMortgage failed to consider their fifth HAMP application for a modification and inappropriately proceeded to foreclosure.

¶ 36 We find that argument to be without merit. It is uncontested that the Parkers filed their fifth HAMP application for modification on April 19, 2011—eight days before the scheduled sheriff's sale. However, their reliance on this fifth application to thwart the ultimate sale of their home is misguided. According to section 3.1.1 of the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages, if the borrower submits a request for HAMP consideration, a servicer must suspend a sale as necessary to evaluate the borrower for HAMP.

This section goes on to explain that there are a number of reasons why a servicer is not required to suspend a foreclosure sale, most notably if: *** (3) a borrower received a TPP (trial payment plan) offer and failed to make one or more payments under the TPP by the last day of the month in which it was due ***. U.S Dept. of the Treasury, Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages, version 3.1, p. 58 (May 2, 2011).

https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_31.pdf
(accessed Sept. 5, 2012).

¶ 37 The Parkers were offered a trial payment plan after submitting their HAMP application for the fourth time. As discussed above, it was under this trial plan that the Parkers failed to make any payments. Following MHAP and HAMP guidelines, it was not necessary for CitiMortgage to stay the foreclosure sale at that point. The Parkers' filing of a subsequent HAMP application was merely an attempt to block the sale, not a properly submitted application for a loan modification based on a change in their financial circumstances. Indeed, the Parkers were denied HAMP modifications on July 23, 2010, and again on November 4, 2010. The fifth application filed days before the scheduled sale was based on the same financial information that was provided on their earlier applications. Moreover, the Parkers' interpretation of both HAMP and MHAP guidelines would allow homeowners to use successive modification applications as an perpetual shield against a properly conducted foreclosure proceeding and sale.

¶ 38 The Parkers failed to prove by a preponderance of the evidence that their home was sold in material violation of the program's requirements for proceeding to a judicial sale.

Accordingly, the trial court had wide latitude in determining whether or not to approve the sale. After a thorough review of the record, we cannot say that the trial court abused its discretion in approving the sale.

¶ 39

CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 41 Affirmed.