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2013 IL App (3d) 121054-U

Order filed October 11, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

UNITED STATES OF AMERICA, acting)	Appeal from the Circuit Court
through the RURAL HOUSING SERVICE or)	of the 13th Judicial Circuit,
successor agency, UNITED STATES)	La Salle County, Illinois,
DEPARTMENT OF AGRICULTURE,)	
)	
Plaintiff-Appellee,)	
)	Appeal No. 3-12-1054
v.)	Circuit No. 11-CH-362
)	
VICTORIA R. HALSTEAD, STANDARD)	
BANK AND TRUST COMPANY and)	
NONRECORD CLAIMANTS,)	Honorable
)	Eugene P. Daugherty
Defendants-Appellants.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court erred in granting summary judgment to mortgagee in foreclosure action where a genuine issue of fact existed regarding whether mortgagor requested mortgagee to provide her with a hearing required by federal regulations before filing its complaint for foreclosure.
- ¶ 2 Plaintiff, United States of America, acting through Rural Housing Service or United States

Department of Agriculture, filed a foreclosure complaint against defendant, Victoria Halstead. Plaintiff served Halstead with notice of the complaint by publication. Halstead filed a motion to dismiss for lack of personal jurisdiction, which the trial court denied. Plaintiff filed a motion for summary judgment on the foreclosure complaint, which the trial court granted. Halstead filed cross-claims against plaintiff for damage to her property, which the trial court dismissed. Plaintiff filed a motion for confirmation of sale, which the trial court granted. Halstead appeals from all of the court's orders. We reverse the trial court's order granting summary judgment to plaintiff and remand for further proceedings.

¶ 3 In September 2001, Halstead obtained a mortgage in the amount of \$109,750 from plaintiff for a residence located in Marseilles. In September 2007, Halstead obtained a second mortgage on the property in the amount of \$48,285.60 from Standard Bank and Trust Company (Standard).

¶ 4 In May 2008, Halstead applied for a moratorium on payment of her mortgage with plaintiff. Plaintiff approved Halstead's request for a moratorium. The moratorium was renewed several times. In March 2010, plaintiff notified Halstead that the moratorium on her loan payments was set to expire on May 4, 2010, requiring her to begin making payments on June 4, 2010. Halstead failed to make her scheduled monthly loan payments thereafter.

¶ 5 On December 29, 2010, plaintiff sent Halstead a "NOTICE OF ACCELERATION OF YOUR MORTGAGE LOAN(S); NOTICE OF INTENT TO FORECLOSE; AND NOTICE OF YOUR OPPORTUNITY TO HAVE A HEARING CONCERNING THIS ACTION." According to the notice, Halstead could request an informal discussion with plaintiff on or before January 13, 2011, or an administrative appeal within 30 days of receipt of the notice. The certified mail return receipt showed that Halstead received the notice on January 5, 2011.

¶ 6 On September 8, 2011, plaintiff filed a complaint for mortgage foreclosure against defendants, Halstead, Standard, and nonrecord claimants. The complaint alleged that Halstead owed plaintiff \$138,608.67.

¶ 7 On October 11, 2011, plaintiff filed an affidavit from process server Brian Cherpeske, which stated that he attempted to serve the complaint on Halstead at the mortgaged property in Marseilles on six occasions from September 12, 2011, to October 3, 2011. On one of those occasions, Cherpeske spoke to Halstead's sister and father and left a business card with them so that Halstead could contact him. Halstead never called him. The last time Cherpeske attempted service, he spoke to Halstead's neighbor, who said that Halstead was staying in Morris and was only in Marseilles sometimes on weekends.

¶ 8 On October 11, 2011, plaintiff filed an affidavit for service by publication. It stated that "Defendant on due inquiry cannot be found, so that process cannot be served upon her." The affidavit listed Halstead's last known address as 1017 Carter Street, Marseilles, and provided that Halstead's current addresses are not known by plaintiff and "upon diligent inquiry *** cannot be ascertained." The affidavit requested that the clerk publish a notice of foreclosure. A notice of foreclosure was published in *The Times* newspaper in Ottawa once each week for three weeks beginning on October 14, 2011.

¶ 9 On December 6, 2011, plaintiff filed a motion for immediate possession of real estate. On the same date, Halstead filed a letter with the court indicating that she found out about plaintiff's foreclosure action against her when searching public records. She stated that she never received a copy of plaintiff's complaint for foreclosure. Halstead requested a copy of the foreclosure complaint and asked that her letter be deemed a "MOTION FOR a 3week EXTENSION OF TIME IN WHICH

TO FILE ANSWER."

¶ 10 Two days later, plaintiff filed a motion for default judgment for mortgage foreclosure. According to the motion, plaintiff served a copy of the summons and foreclosure complaint on Standard on September 26, 2011, and served Halstead by publication from October 14 to 28, 2011, but neither party had filed an answer or other pleading.

¶ 11 One week later, Halstead filed a special appearance and motion to dismiss, arguing that plaintiff failed to make a reasonable effort to serve her. On that same day, Halstead filed an application to sue or defend as a poor person.

¶ 12 The trial court held a hearing on the parties' motions. The court denied Halstead's motion to dismiss, finding that Halstead was "properly served by publication and is in fact aware of these proceedings, and that the court has proper jurisdiction of this matter." The court entered an order granting immediate possession of the property to plaintiff but allowing Halstead to "remove any personal property still on the premises." The court did not rule on plaintiff's motion for default judgment but gave defendants 30 days to answer plaintiff's complaint for foreclosure.

¶ 13 Halstead filed an answer to plaintiff's complaint. In her answer, Halstead asserted that she sent a letter to plaintiff along with a copy of the new loan documents and timely requested an informal discussion with plaintiff. She claimed that plaintiff never responded to her request.

¶ 14 In February 2012, plaintiff filed a motion for summary judgment against defendants. The trial court granted plaintiff's motion. Soon thereafter, the trial court entered a judgment of foreclosure, granting plaintiff a judgment for foreclosure and sale, as well as possession, of the property located at 1017 Carter Street, Marseilles. Within 30 days of the trial court's entry of the judgment for foreclosure, Halstead filed a motion to vacate the judgment, claiming that she did not

receive plaintiff's motion for summary judgment until after the court ruled on it.

¶ 15 The trial court granted Halstead's motion to vacate the foreclosure judgment and set a hearing date for plaintiff's summary judgment motion. In April 2012, the trial court entered an order granting plaintiff a judgment for foreclosure and sale and immediate possession of the property.

¶ 16 In May 2012, Halstead filed a cross-complaint for conversion, alleging that plaintiff denied her access to the property and her belongings within it. She asserted that some of her personal property had been damaged or destroyed and that she incurred unnecessary bills because of plaintiff's refusal to allow her access. Her cross-complaint sought compensatory damages, as well as punitive damages. Plaintiff filed several motions to dismiss Halstead's cross-complaint. Halstead filed a motion to strike plaintiff's motions to dismiss and a motion for sanctions against plaintiff.

¶ 17 On July 16, 2012, plaintiff filed a motion for confirmation and report of sale showing that the property located at 1017 Carter Street, Marseilles was sold at an auction to the highest bidder for \$54,000. Two weeks later, the trial court granted plaintiff's motion and entered an order confirming the sale and approving the report of sale. Soon thereafter, Halstead filed a motion to vacate the trial court's order confirming the sale, arguing that she did not receive notice of plaintiff's motion for confirmation of sale until the day after the hearing at which the court granted the motion. Following a hearing, the trial court found that Halstead did not have notice of the motion for confirmation and report of sale. The trial court vacated the order confirming the sale and set the motion for confirmation of sale for a hearing.

¶ 18 Halstead then filed a motion to set aside the sale. In support of her motion, Halstead attached an affidavit from her father, Kenneth A. Kennedy, which states that Halstead received plaintiff's notice of acceleration and intent to foreclose on January 6, 2011. The affidavit further states that

on "Friday 7, 2011", Kennedy saw Halstead write in big block letters, "I WANT A HEARING!!" across the face of a letter. Kennedy went with Halstead to the post office. Halstead went in the post office alone but returned with a receipt for a certified letter.

¶ 19 In response to defendant's motion to set aside the sale, plaintiff filed an affidavit from one of its employees, Donna M. Wiltshire. That affidavit stated in part: "According to the record of notes filed at our servicing center and our field office file, Victoria Halstead did not exercise any contacts or appeal rights concerning the acceleration of her account that was completed on December 29, 2010."

¶ 20 The trial court granted plaintiff's motion to dismiss Halstead's cross-complaint for conversion. Three weeks later, Halstead filed a motion for declaratory judgment against plaintiff asserting the same damages she claimed in her cross-complaint for conversion and seeking a binding declaration of her rights and remedies under federal court rules, the court of federal claims, and federal statutes. Halstead also filed a petition for rule to show cause for indirect civil contempt against plaintiff, asserting the same damages as she did in her cross-complaint for conversion.

¶ 21 On September 14, 2012, the trial court held a hearing on plaintiff's motion for confirmation. At the hearing, Halstead argued that plaintiff should not be allowed to foreclose on her property because plaintiff did not comply with the Making Home Affordable Program (735 ILCS 5/15-1508(d-5) (West 2012)) and did not provide her with a hearing when she requested one. The court ruled that Halstead failed to prove by a preponderance of the evidence that plaintiff was required to participate in the Making Home Affordable Program. The court also found that, while it was "not necessarily significant to the Court," Halstead's request for a hearing was untimely, since it was made on February 7, 2011, 32 days after Halstead received the notice of acceleration and notice of intent

to foreclose. The court denied Halstead's motion to set aside the sale of the subject property and granted plaintiff's motion for confirmation of sale. The court entered an order confirming the sale of the property. The court denied and dismissed Halstead's petition for rule to show cause and her motion for declaratory judgment.

¶ 22 Halstead filed a motion to reconsider the court's orders. The court denied and dismissed the motion.

¶ 23 I. Jurisdiction

¶ 24 Personal jurisdiction can vest in the trial court if a party, by his actions, consents to or waives personal jurisdiction. *Owens v. Snyder*, 349 Ill. App. 3d 35, 40 (2004). A party waives any objections to personal jurisdiction by filing a responsive pleading or motion (other than a motion for an extension of time to answer or otherwise appear) before filing a motion objecting to jurisdiction. 735 ILCS 5/2-301(a-5) (West 2010). A motion is "an application to the court for a ruling or an order in a pending case." *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005).

¶ 25 A party also waives any objection to personal jurisdiction by requesting affirmative relief before the court rules on the party's motion objecting to jurisdiction. *In re Marriage of Adler*, 271 Ill. App. 3d 469, 474 (1995). Finally, if a defendant participates in trial court proceedings after the court denies the defendant's motion to dismiss, the defendant waives all objections to the court's personal jurisdiction unless the objection is on the ground that the defendant is not amenable to process in this state. *Id.*; 735 ILCS 5/2-301(c) (West 2010).

¶ 26 Section 2-206 of the Illinois Code of Civil Procedure (Code) governs service by publication and requires that a party seeking service by publication file an affidavit stating that the person to be served "after due diligence cannot be found." 735 ILCS 5/2-206(a) (West 2010). Publication must

then be made in a newspaper published in the county in which the action is pending. *Id.* Within 10 days of the first publication of the notice, the clerk must send a copy of the publication by mail to each defendant whose place of residence is stated in the affidavit. *Id.*

¶ 27 There must be strict compliance with the requirements of section 2-206 of the Code. *In re Marriage of Wilson*, 150 Ill. App. 3d 885, 889 (1986). The failure to mail notice to the last known address of the defendant is sufficient to divest a court of jurisdiction over that defendant. *Markham v. Markham*, 50 Ill. App. 3d 1061, 1065 (1977).

¶ 28 Here, Halstead asserted that she never received a copy of the publication by mail, as required by section 2-206(a) of the Code. Additionally, the record does not contain a certificate indicating that the clerk sent a copy of the publication to Halstead. Thus, there was not strict compliance with section 2-206, vesting the court with jurisdiction over Halstead. See *Wilson*, 150 Ill. App. 3d at 889; *Markham*, 50 Ill. App. 3d at 1065.

¶ 29 Nevertheless, Halstead waived her objection to the court's jurisdiction. On the same day that Halstead filed her motion to dismiss, she filed an application to sue or defend as a poor person. That application constituted a motion because it was "an application to the court for a ruling or an order in a pending case." See *Wolff*, 355 Ill. App. 3d at 407. Since Halstead filed her application before the trial court ruled on her motion to dismiss, Halstead waived her objections to personal jurisdiction. See *Adler*, 271 Ill. App. 3d at 474. Furthermore, Halstead waived her personal jurisdictional objections by participating in the foreclosure proceeding after the trial court denied her motion to dismiss. See *id.*; 735 ILCS 5/2-301(c) (West 2010).

¶ 30 II. Summary Judgment

¶ 31 Summary judgment is proper where "the pleadings, depositions, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party. *Hahn v. Union Pacific R.R. Co.*, 352 Ill. App. 3d 922, 928 (2004). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of City of Chicago*, 202 Ill. 2d 414, 421 (2002). We review *de novo* the circuit court's grant of summary judgment. *Hahn*, 352 Ill. App. 3d at 929.

¶ 32 In response to plaintiff's motion for summary judgment, Halstead did not deny that she entered into a mortgage loan with plaintiff and was in default of that loan. However, she claimed that plaintiff should be precluded from foreclosing on her home because it failed to provide her with a hearing despite her request for one.

¶ 33 When an agency like the Rural Housing Service makes an adverse decision, such as a decision to accelerate a participant's mortgage loan, the participant has several avenues to seek review and appeal of the agency's decision. See 7 C.F.R. §§ 11.5 & 11.6 (1999). First, the participant, "may request an agency informal review." 7 C.F.R. § 11.5(b) (1999). Additionally, "a participant also shall have the right to utilize any available alternative dispute resolution (ADR) or mediation program *** in order to attempt to seek resolution of an adverse decision ***." 7 C.F.R. § 11.5(c) (1999). Finally, a participant may request an appeal hearing with the National Appeals Division not later than 30 days after the date on which the participant receives notice of the adverse decision. 7 C.F.R. § 11.6(b) (1999). During the appeal process, the agency may not take adverse action against the participant. See 7 C.F.R. § 1900.54 (1995).

¶ 34 Federal agencies must comply with all regulatory requirements before proceeding with a foreclosure action. See *United States v. Gomiller*, 545 F. Supp. 17, 21 (N.D. Miss. 1981); *United States v. Rodriguez*, 453 F. Supp. 21, 22 (E.D. Wash. 1978). Borrowers may raise an agency's noncompliance with federal regulations as a defense to a complaint for foreclosure. See *Bankers Life Co. v. Denton*, 120 Ill. App. 3d 576 (1983); *Federal National Mortgage Ass'n v. Moore*, 609 F. Supp. 194 (N.D. Ill. 1985).

¶ 35 Here, Halstead notified the court that she timely requested a hearing from plaintiff after she received the notice of acceleration of her mortgage. Halstead's claim was supported by an affidavit from her father, Kennedy, which stated that Halstead sent a certified letter to plaintiff on "Friday 7, 2011", requesting a hearing. The trial court construed Kennedy's affidavit to state that Halstead mailed her letter to plaintiff on February 7, 2011, more than 30 days after receiving the notice from plaintiff. However, we find the trial court's interpretation of Kennedy's affidavit to be in error. In 2011, January 7 fell on a Friday, while February 7 fell on a Monday. Therefore, we understand Kennedy's affidavit to indicate that Halstead requested a hearing on January 7, 2011, just one or two days after she received the notice and well within the time limitation for requesting a hearing. See 7 C.F.R. §§ 11.5 & 11.6 (1999).

¶ 36 Halstead's testimony and evidence that she timely requested a hearing from plaintiff is contradicted by an affidavit filed by Wiltshire, plaintiff's employee, which stated that Halstead did not exercise her appeal rights. Thus, we find that there exists a genuine issue of material fact regarding whether Halstead requested a hearing to seek review of plaintiff's adverse decision. If, as she claims, she timely contacted plaintiff requesting a hearing following its decision to accelerate her loan, then she was entitled to a hearing, pursuant to federal regulations. See *id.* If plaintiff

ignored Halstead's request for a hearing, it violated federal regulations and is not entitled to foreclose on plaintiff's mortgage. See *id.*; *Gomiller*, 545 F. Supp. at 21; *Rodriguez*, 453 F. Supp. at 22.

¶ 37 Because there is a genuine issue of material fact regarding whether Halstead timely sought review of plaintiff's decision to accelerate her loan, we reverse the trial court's order granting summary judgment to plaintiff and remand this case to the trial court for further proceedings to determine whether Halstead timely sought review of plaintiff's adverse decision.

¶ 38 III. Remaining Claims

¶ 39 Halstead raises many other issues on appeal, including the trial court's orders dismissing her cross-complaints, confirming the sale of the property, denying her motion to set aside the sale, dismissing her motion for declaratory judgment, and denying her motion for reconsideration. We have reviewed each of the claims raised by Halstead and find that they have no merit. The orders entered by the trial court were correct. We reverse only the trial court's order granting summary judgment to plaintiff on its foreclosure complaint and remand for further proceedings.

¶ 40 The judgment of the circuit court of La Salle County is reversed and remanded.

¶ 41 Reversed and remanded.