

NOTICE

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2014 IL App (4th) 140416-U

NO. 4-14-0416

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 4, 2014

Carla Bender
4th District Appellate
Court, IL

CF SBC PLEDGOR 1 2012-1 TRUST, a Delaware Statutory Trust,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
CLARK/SCHOOL, LLC, an Illinois Limited Liability Company,)	No. 13CH252
Defendant-Appellant.)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Appleton and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court committed no error in denying defendant's petition to vacate an *ex parte* order appointing a receiver in a mortgage foreclosure action.

¶ 2 Plaintiff, CF SBC Pledgor 1 2012-1 Trust, a Delaware statutory trust, brought a mortgage foreclosure action against defendant, Clark/School, LLC, an Illinois Limited Liability Company, and obtained an *ex parte* order appointing a receiver over the mortgaged property. Defendant filed a petition to vacate the trial court's *ex parte* appointment but the court denied its petition. This interlocutory appeal followed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects the property at issue on appeal is located in Danville, Illinois, and consists of an eight-building apartment complex. In June 2006, defendant obtained a loan

from Washington Mutual Bank, secured by a mortgage on the property. Washington Mutual Bank's interest was ultimately assigned to plaintiff. Relevant to this appeal, defendant agreed under section 4.3 of the parties' mortgage security agreement to keep the property in good condition and repair. Section 4.14 of that agreement noted the mortgage loan was being made in reliance on defendant's continued existence as a limited liability company (LLC). Under that section, defendant agreed to "not alter its name, jurisdiction of organization, structure, ownership or control without the prior written consent of the Lender" and to "do all things necessary to preserve and maintain [its] existence and to ensure its continuous right to carry on its business."

¶ 5 Section 5 of the mortgage security agreement set forth provisions relating to default. Section 5.1(c) defined an "Event of Default" to include defendant's failure to perform its obligations under the parties' agreement when that "failure continues for a period of [30] days after written notice of such failure by Lender to Borrower." However, that section further provided that the notice requirement and the 30-day "cure period" did not apply under the following circumstances:

"(i) any such failure that could, in Lender's judgment, absent immediate exercise by Lender of a right or remedy under [the parties' agreements], result in harm to Lender, impairment of the Note or this Security Instrument or any other security given under any other Loan Document; (ii) any such failure that is not reasonably susceptible of being cured during such 30-day period; (iii) breach of any provision that contains an express cure period; or (iv) any breach of *** section 4.14 of this Security Instrument."

Additionally, section 5.3(a) of the parties' mortgage security agreement set forth the lender's remedies upon default and provided that the Lender may:

"Have a receiver appointed as a matter of right on an *ex parte* basis without notice to Borrower ***. Such receiver shall take possession and control of the Property and shall collect and receive the Rents. If Lender elects to seek the appointment of a receiver for the Property, Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver *ex parte* if permitted by applicable law."

¶ 6 On December 24, 2013, plaintiff filed a complaint against defendant to foreclose the mortgage. It alleged defendant was in default under the terms of the mortgage for failing to (1) maintain the property and (2) preserve and maintain its existence as an LLC. Plaintiff asserted defendant allowed portions of the property to become uninhabitable and alleged as follows:

"More specifically, upon information and belief, a City of Danville building inspector recently inspected the Property and identified numerous issues and code violations, including, but not limited to, no electricity in multiple buildings due to non-payment by [defendant], water pipes leaking and flooding apartments, and garbage being dumped into a ravine on the Property near a city drinking water source.

* * *

Additionally, upon information and belief, [defendant] has not maintained its existence with the State of Illinois as an entity in good standing, and was consequently dissolved on or about September 9, 2011."

Plaintiff attached various loan documents to its complaint, as well as e-mail correspondence between individuals identified in the e-mails as the Danville city attorney, Richard Dahlenburg, environmental code inspector, Rick Brown, and building inspector, Danita Anderson. The e-mails indicate the inspectors identified several maintenance issues on the property, including a lack of electricity due to nonpayment of electric bills by defendant, water leaks and flooding from frozen pipes, and "dumping cabinets and vanities into [a] ravine behind" an apartment building.

¶ 7 The same day it filed its complaint, plaintiff also filed an emergency motion to appoint a receiver pursuant to section 15-1704 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1704 (West 2012)). It reiterated the allegations from its complaint regarding default, including its allegations with respect to the "numerous issues and code violations" on the property and defendant's failure to maintain its existence as an LLC. Referencing sections 4.3, 4.14, and 5.1(c) of the mortgage security agreement, plaintiff alleged defendant's failure to keep the property in good condition and repair and its failure to maintain its existence as an LLC each constituted an "Event of Default" under the mortgage. (We note plaintiff's emergency motion actually references section 5(c) of the mortgage; however no such section exists and it appears from the context of plaintiff's allegations that it intended to reference section 5.1(c).) Plaintiff further asserted section 5.3(a) of the mortgage permitted it to have a receiver

appointed as a matter of right on an *ex parte* basis without notice to defendant "upon or at any time prior to or after initiating a judicial foreclosure."

¶ 8 Plaintiff attached the same e-mail correspondence to its emergency motion that it attached to its complaint. Also attached to its motion was the affidavit of Kenneth L. Frank. In his affidavit, Frank asserted he was a managing director of plaintiff's special servicer, CWC Capital Asset Management LLC, the entity responsible for administering defendant's loan. Frank stated he had access to and knowledge of plaintiff's records regarding the loan account at issue and he could testify to the truth of the following statement: "Defendant *** is in default for failing to maintain the property at issue *** and failing to preserve and maintain [defendant's] existence as [an LLC]."

¶ 9 A December 24, 2013, docket entry shows the trial court granted plaintiff's emergency motion. The docket entry states: "Matter presented to Court for review *ex []parte*. Court grants emergency motion to appoint receiver. Order appointing receiver entered."

¶ 10 On January 21, 2014, defendant filed a petition to vacate the trial court's December 24, 2013, *ex parte* order under section 2-1401(f) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(f) (West 2012)) and a motion to dismiss plaintiff's mortgage foreclosure complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). In connection with its petition to vacate, defendant argued plaintiff failed to comply with the necessary statutory requirements for seeking the *ex parte* appointment of a receiver. Specifically, defendant maintained plaintiff failed to comply with section 15-1706(d) of the Foreclosure Law (735 ILCS 5/15-1706(d) (West 2012)), which it asserted requires a showing of good cause by sworn evidence to support a request to appoint a receiver without service upon one of the parties. Defend-

ant argued Frank's affidavit, which was attached to plaintiff's emergency motion, "failed to show good cause." Defendant also asserted that without meeting the requirements for an *ex parte* appointment of a receiver, plaintiff was required to give defendant notice of the emergency motion. It contended that because no notice was given, the court lacked jurisdiction over defendant and the court's December 24, 2013, *ex parte* order was void.

¶ 11 In its petition to vacate, defendant also argued that no default existed under the mortgage. Specifically, it claimed no default existed under section 4.3 of the mortgage because plaintiff failed to provide it with written notice or a 30-day "cure period" and no default existed under section 4.14 because defendant had been reinstated as an active LLC on January 10, 2014, and was, therefore, "deemed by law to have existed as an LLC without interruption" under section 35-40(d) of the Limited Liability Company Act (LLC Act) (805 ILCS 180/35-40(d) (West 2012)).

¶ 12 Finally, defendant further alleged "the circumstances cited by Plaintiff as the basis for proceeding under the emergency motion were cured well in advance of" the filing of the emergency motion. To support this contention, defendant relied on the affidavit of Mohammed Abdul Khan, defendant's property manager, which was attached to its petition to vacate. Khan averred he was notified on December 10, 2013, that power had been shut off to portions of the property due to nonpayment of the electric bill and that he paid the bill the same day. (Khan asserted a copy of the receipt for payment was attached to his affidavit as exhibit No. 1; however, no such exhibit appears in the appellate record.) Khan further stated he became aware of a broken pipe and subsequent leak and flooding on December 11, 2013, and had water to the building turned off to stop the leak the same day. Khan asserted no emergency existed on the property on

December 24, 2013.

¶ 13 In its motion to dismiss, defendant argued plaintiff's mortgage foreclosure complaint had to be dismissed because no event of default occurred under the mortgage. It reiterated the same arguments regarding the lack of default as raised in its petition to vacate. Included within the attachments to defendant's motion was a letter to defendant from the Illinois Secretary of State dated January 10, 2014. The letter noted defendant's "application for reinstatement ha[d] been placed on file" and stated, "the company has now been returned to good standing."

¶ 14 On April 1, 2014, the trial court conducted a hearing on defendant's petition to vacate the court's *ex parte* order appointing a receiver and defendant's motion to dismiss plaintiff's complaint. The court heard the parties' arguments and took the matters under advisement. On April 25, 2014, the court entered an order denying both defendant's petition to vacate and its motion to dismiss.

¶ 15 This interlocutory appeal, filed pursuant to Illinois Supreme Court Rule 307(b) (eff. Feb. 26, 2010), followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues the trial court's *ex parte* order appointing a receiver should be vacated. It contends plaintiff did not to comply with the requirements of the Foreclosure Law which permit an *ex parte* appointment by failing to provide the court with "sworn evidence" to support its emergency motion. Additionally, it maintains it was not in default under the terms of the mortgage.

¶ 18 Relevant to this appeal, the Foreclosure Law sets forth two circumstances under which plaintiff could seek the appointment of a receiver. First, the Foreclosure Law provides

that "[w]henver a mortgagee entitled to possession so requests, the court shall appoint a receiver." 735 ILCS 5/15-1702(a) (West 2012). The Foreclosure Law "creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding [citations], and a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so." *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392, 923 N.E.2d 878, 883 (2010). Specifically, section 15-1701(b)(2) of the Foreclosure Law (735 ILCS 5/15-1701(b)(2) (West 2012)) provides that, prior to the entry of a judgment of foreclosure, nonresidential real estate "shall upon request be placed" in the possession of the mortgagee "if (i) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (ii) the court is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause." However, "if the mortgagor shall object and show good cause, the court shall allow the mortgagor to remain in possession." 735 ILCS 5/15-1701(b)(2) (West 2012).

¶ 19 Second, section 15-1704(a) of the Foreclosure Law (735 ILCS 5/15-1704(a) (West 2012)) provides for the appointment of a receiver upon the request of any party to the foreclosure proceedings. Specifically, that section provides as follows: "[n]otwithstanding the provisions of *** Section 15-1701, and except as provided in Section 15-1702, upon request of any party and a showing of good cause, the court shall appoint a receiver for the mortgaged real estate." 735 ILCS 5/15-1704(a) (West 2012).

¶ 20 Additionally, "[a] request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion" and "[a]ny such request shall be supported by affidavit or other sworn pleading." 735 ILCS 5/15-1706(a) (West 2012). Generally, the Foreclosure

Law requires a hearing on the motion and "reasonable" notice to the nonmoving party. 735 ILCS 5/15-1706(c), (d) (West 20012). However, section 15-1706(d) of the Foreclosure Law (735 ILCS 5/18-1706(d) provides as follows:

"Notwithstanding anything *** to the contrary, except with respect to the mortgagor of residential real estate which has not been abandoned, *the court may rule without service on a party*, if the party is in default or if the party making the request shows good cause by affidavit or other sworn evidence." (Emphasis added.)

¶ 21 Here, the parties agree that the appropriate standard of review is *de novo*. Defendant cites *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007), for the proposition that "when a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*." Plaintiff cites *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 868, 638 N.E.2d 640, 646 (1993), wherein the First District held the appropriate standard for reviewing the trial court's decision as to whether to appoint a receiver is the *de novo* standard. There, the court noted the Foreclosure Law contained mandatory language which was a departure from prior enactments on the subject and constituted "persuasive evidence that trial courts were not intended to possess discretion regarding the award of possession once the [Foreclosure Law's] requirements are met." *Mellon Bank*, 265 Ill. App. 3d at 867, 638 N.E.2d at 645.

¶ 22 Additionally, we note *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 165, 928 N.E.2d 42, 50 (2010), wherein the First District held a *de novo* standard of review applied to the Foreclosure Law but noted it was "foreseeable that in a case in which a

trial court has held a full evidentiary hearing on a motion to appoint a receiver, *** an abuse of discretion standard or a manifest weight of the evidence standard would be appropriate to review the lower court's judgmental decision." Under the circumstances presented here, where there was not a full evidentiary hearing by the trial court and the appointment of a receiver was had on an *ex parte* basis, the *de novo* standard of review is appropriate.

¶ 23 As stated, defendant argues plaintiff failed to comply with the requirements of section 15-1706(d) of the Foreclosure Law and was, therefore, not entitled to the *ex parte* appointment of a receiver. In particular, it argues plaintiff failed to support its emergency motion with "sworn evidence" and Frank's affidavit, which was attached to plaintiff's emergency motion, was conclusory and insufficient.

¶ 24 Pursuant to section 15-1706(d), the trial court could rule on plaintiff's emergency motion without service on defendant if defendant was "in default *or* if [plaintiff] show[ed] good cause by affidavit or other sworn evidence." (Emphasis added.) 735 ILCS 5/15-1706(d) (West 2012). We note the use of the word "or" to link two elements "is more properly construed in the disjunctive, rather than the conjunctive sense" and, "in its ordinary sense, **** marks an alternative indicating the various members of the sentence which it connects are to be taken separately." *People v. Frieberg*, 147 Ill. 2d 326, 349, 589 N.E.2d 508, 518 (1992). Thus, the legislature's use of the word "or" in section 15-1706(d) indicates a trial court may rule on an *ex parte* motion to appoint a receiver when either the nonmoving party is in default or, in the alternative, when the moving party "shows good cause by affidavit or other sworn evidence." 735 ILCS 5/15-1706(d) (West 2012).

¶ 25 In this case, plaintiff attached Frank's sworn affidavit to its emergency motion. In

the affidavit, Frank averred that he was the managing director of the entity responsible for administering the parties' mortgage loan and had access to and knowledge of plaintiff's records. Additionally, Frank asserted defendant was in default for failing to preserve and maintain its existence as an LLC. Pursuant to the Foreclosure Law, the trial court was permitted to make an *ex parte* ruling when the movant "show[ed] good cause by affidavit." 735 ILCS 5/15-1706(d) (West 2012). We find Frank's sworn affidavit and assertions of default based upon defendant's failure to maintain its existence as an LLC were sufficient to support the allegations in plaintiff's motion and meet the requirements of section 15-1706(d).

¶ 26 Additionally, defendant does not dispute that, at the time of the proceedings at issue, it had failed to maintain its existence as an LLC. Thus, defendant was in default under section 4.14 of the mortgage. On appeal, defendant argues that because it was later reinstated as an LLC by the Secretary of State, its existence should be deemed to have continued without interruption and, as a result, "facts allegedly constituting a default of the Mortgage are deemed by the LLC Act not to have existed." It cites section 35-40(d) of the LLC Act (805 ILCS 180/35-40(d) (West 2012)), which provides as follows:

"Upon the filing of the application for reinstatement, the [LLC] existence shall be deemed to have continued without interruption from the date of the issuance of the notice of dissolution, and the [LLC] shall stand revived with the powers, duties, and obligations as if it had not been dissolved; and all acts and proceedings of its members or managers, acting or purporting to act in that capacity, that would have been legal and valid but for the dissolution, shall

stand ratified and confirmed."

¶ 27 We find the trial court correctly addressed and rejected this argument in the instant case. The court stated as follows:

"What Defendant ignores, however, is that *at the time* of filing of the Emergency motion on December 24, 2013[,] they were not in good standing and the LLC apparently had been dissolved and had not been in good standing with the State for several years. While it is true that for general purposes the Reinstatement relates back, what is at issue here is whether Plaintiffs were justified *at the time* of filing, in relying upon Defendant's failure to remain in good standing as an LLC[] operating in Illinois." (Emphases in original.)

The court concluded it was "the facts and circumstances present before the Court at the time of the Emergency Motion that [were] relevant for a determination of the propriety of the appointment of the receiver." We agree with the court's determination. The Foreclosure Law permitted the trial court to rule on an *ex parte* motion when the nonmoving party was in default. As defendant was in default under the mortgage at the time the court considered plaintiff's emergency order, it committed no error in ruling on the motion prior to service on defendant.

¶ 28 On appeal, defendant also argues the trial court should not have ruled on plaintiff's emergency motion "without any substantive showing that *** Plaintiff would ultimately prevail in the action[] and *** that necessity or emergency required that the Emergency Motion be granted prior to a service *** on [defendant]." However, to support its position, defendant

cites case law that predates the Foreclosure Law. Section 15-1706(d) of the Foreclosure Law contains the applicable requirements for obtaining an *ex parte* ruling on a motion to appoint a receiver. Those requirements are as discussed and do not include a showing that plaintiff would ultimately prevail in the action or the existence of necessity or an emergency.

¶ 29 Here, the statutory requirements of section 15-1706(d) of the Foreclosure Law were met and the trial court committed no error in ruling on plaintiff's emergency motion to appoint a receiver prior to service of the motion on defendant. Once a determination that the court could enter an *ex parte* ruling was made, the court had authority to appoint a receiver at plaintiff's request pursuant to either section 15-1702(a) or section 15-1704(a). Plaintiff's emergency motion specifically referenced section 15-1704(a), which provides that "upon request of any party and a showing of good cause, the court shall appoint a receiver for the mortgaged real estate." 735 ILCS 5/15-1704(a) (West 2012). Here, plaintiff's emergency motion, which was supported by Frank's affidavit and allegations of default under the mortgage, was sufficient to show "good cause."

¶ 30 We note defendant raises additional arguments with respect to plaintiff's allegation that it was in default for failing to maintain the property at issue; however, we find it unnecessary to address these further arguments given defendant's default under the mortgage for failing to maintain its existence as an LLC. Under the circumstances presented, the trial court committed no error by granting plaintiff's motion to appoint a receiver or by denying defendant's petition to vacate that *ex parte* order.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment.

¶ 33

Affirmed.