2016 IL App (1st) 153414-U

No. 1-15-3414

Fourth Division
August 25, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHICAGO PATROLMEN'S FEDERAL CREDIT UNION, Plaintiff-Appellee, v. BRICIA WALKER, CLAY WALKER, CHICAGO PATROLMEN'S FEDERAL CREDIT UNION, UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County, Chancery Division No. 13 CH 16726 Honorable Michael T. Mullen, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court did not err by granting summary judgment in favor of plaintiff where defendants failed to raise a genuine issue of material fact regarding whether the grace period and acceleration notices were mailed as required prior to seeking judicial foreclosure of the mortgage agreement.

¶ 2 The instant appeal arises from a mortgage foreclosure action granting summary judgment in favor of plaintiff, Chicago Patrolmen's Federal Credit Union, foreclosing on a residential property owned by defendant-mortgagors Bricia and Clay Walker ("defendants"). On appeal,

defendants allege that a genuine issue of material fact existed regarding whether plaintiff complied with the terms of the mortgage contract by giving defendant notice of its intent to accelerate indebtedness (acceleration notice) and Illinois Mortgage Foreclosure Law (735 ILCS 5/5-1101, *et seq*. (West 2012)), which required plaintiff to send a grace period notice to defendants 30 days prior to filing for foreclosure in the circuit court. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On July 15, 2013, plaintiff filed a complaint seeking judicial foreclosure of a mortgage agreement between plaintiff and defendants for the residential property located at 5110 North Nagle Avenue in Chicago. The complaint alleged foreclosure based upon defendants' nonpayment of the monthly installments due under the loan agreement. A copy of the mortgage agreement was attached to the complaint. The agreement indicated, in relevant part, that plaintiff was required to send an acceleration notice notifying defendants of, *inter alia*, the default under the contract and how the default could be remedied at least 30 days prior to accelerating the debt. According to the contract, any required notices must have been delivered or mailed first class at the property address of the subject loan agreement.

¶ 5 Defendants subsequently filed an answer to plaintiff's complaint denying that plaintiff tendered the requisite notices prior to filing the foreclosure action and raised several affirmative defenses including, in relevant part, that plaintiff failed to comply with the Homeowner Protection Act (Act) (735 ILCS 5/15-1502.5 (West 2012)) by failing to give defendants a grace period notice prior to instituting judicial foreclosure proceedings. Defendants alleged that under the statute, the grace period notice was a condition precedent to filing suit and therefore, the complaint should be dismissed. In addition, defendants alleged that plaintiff failed to comply

with the terms of the mortgage agreement by failing to mail an acceleration notice prior to filing suit. Defendants each attached an affidavit averring, in relevant part, that they maintained a file folder at the property where they keep all documents received from the plaintiff and that, after reviewing the file themselves and with their attorney, they confirmed that the grace period and acceleration notices were never received. The affidavits further averred that, based upon these facts, plaintiff neither delivered nor mailed the required notices before filing the instant foreclosure action. Plaintiff replied generally denying the allegations and attached (1) two undated grace period notices addressed to Bricia and Clay Walker, individually, at the address listed in the mortgage agreement and (2) two acceleration notices (or demand letters), dated March 25, 2013, addressed to defendants individually at the same address. Although the acceleration notices were addressed to defendants at the property address, the salutation read: "Dear Robert Reid."

¶ 6 On August 12, 2014, plaintiff filed a motion for summary judgment and judgment of foreclosure and sale of the property. Attached to this motion, plaintiff included two affidavits from Ray Davis, plaintiff's asset and recovery manager (the "Davis Affidavits"). The first Davis affidavit stated as follows:

¶ 7 " 2. In the regular performance of my job functions, I am familiar with business records maintained by [plaintiff], for the purpose of servicing mortgage loans. These records (which include data compilations, electronically imaged documents, loan payment histories, computer generated records, copies of origination documents, and others) are made at or near the time by, or from information provided by, persons with knowledge of activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by [plaintiff]. It is the regular practice of

[plaintiff's] mortgage servicing business to make these records.

3. As a result of my personal review of the business records maintained by [plaintiff], including Bricia Walker and Clay Walker's loan file, I have acquired personal knowledge of the business records attached hereto and the matters stated herein.

4. Based upon my review of these records:

a. On March 25, 2013, a Grace Period Notice was sent to Bricia Walker at the property address of 5110 North Nagle Ave., Chicago, Illinois 60630.

b. On March 25, 2013, a Grace Period Notice was sent to Clay Walker at the property address of 5110 North Nagle Ave., Chicago, Illinois 60630.

c. Copies of which are attached as Exhibit A."

The second Davis affidavit was identical to the first, but stated "demand letter" (referring to the acceleration notice) in place of "Grace Period Notice" on the first affidavit.

¶ 8 In response, defendants argued that summary judgment was not warranted as the Davis affidavits were insufficient to overcome their affirmative defenses that no grace period or acceleration notice was given to them prior to the institution of the foreclosure proceedings. Defendants highlighted several defects in the notices including the incorrect salutation on the acceleration notices and the lack of a date on the grace period notices. Defendants argued that the grace period notices were required by statute to include a date and thus, were deficient. In addition, defendants argued that the Davis affidavits failed to indicate how the notices were tendered to defendants which created a genuine issue of material fact regarding whether the notices were mailed.

¶ 9 The trial court subsequently granted plaintiff's motion for summary judgment and entered an order for judicial foreclosure and sale of the property. The property was accordingly

auctioned and sold on May 29, 2015, and the sale was confirmed on November 2, 2015. Defendants now appeal the trial court's ruling granting summary judgment in favor of plaintiff.

¶ 10 ANALYSIS

¶ 11 A. Procedural Default

¶ 12 As an initial matter, we must address plaintiff's assertions of procedural default. In its response brief, plaintiff argues that defendants' brief should be stricken as it fails to contain citations to the record and certain portions do not cite to legal authority. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). It is within our discretion to consider the merits of the appeal despite multiple Rule 341 mistakes (*Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 12) and the errors are not so egregious that they hinder or preclude effective review of the issues on appeal. See *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009). In any case, prior to our consideration of this appeal, we granted defendants' motion to amend its opening brief to include citations to authority. We therefore proceed to the merits of defendants claim.

¶ 13 Additionally, plaintiff filed a motion to strike portions of defendants' reply brief in which defendants argue that the trial court was not entitled to rely on the Davis affidavits in granting summary judgment in favor of plaintiff as they failed to comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which requires sworn or certified copies of all documents upon which the affiant relies to be attached to the affidavit. Plaintiff argues that this argument has been procedurally defaulted as defendants failed to argue this matter in their opening brief as required by Illinois Supreme Court Rule 341(h)(7) and failed to raise this issue before the trial court. The motion was taken with the case.

¶ 14 Issues not raised in the trial court are considered waived and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). In addition,

pursuant to Rule 341(h)(7), points not argued in an opening brief on appeal are forfeited and may not be raised in the reply brief. Ill. S. Ct. R. 341(h)(7); see also *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 30. Our review of the record and defendants' briefs on appeal demonstrate defendants first argued the Davis affidavits failed to comply with Rule 191(a) in this regard in their reply brief. Accordingly, defendants have forfeited this argument and we strike any portions of the reply brief relating to this contention.

¶ 15 B. Grace Period Notices

¶ 16 Prior to addressing the merits of defendants' claims regarding the grace period notices, plaintiff asks this court to address which party bears the burden of proof at summary judgment to establish the requisite notices were sent. Specifically, plaintiff requests that this court expressly overturn our previous decision in *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67, in which a division of this court stated that a mortgage foreclosure complaint does not presumptively include an allegation that the grace period notice was sent prior to the institution of the mortgage foreclosure action. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 102. Rather, plaintiff asks this court to follow our subsequent opinion in *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, in which we held that a mortgage foreclosure complaint plead in the manner required by statute presumptively alleges that the requisite notice was sent although not expressly stated. *Simpson*, 2015 IL App (1st) 142925, ¶ 48. Plaintiff argues, that under a *Simpson* construction, once the requirements are met to establish a *prima facie* case for foreclosure in the complaint, the burden shifts to the defendant to prove the grace period notice was never sent. We need not address this issue, however, as we find that the record contains sufficient evidence to establish the notices were mailed.

¶ 17 Turning now to the substantive arguments on appeal, defendants first contend that a genuine issue of material fact exists regarding whether plaintiff mailed the grace period notice prior to filing the instant foreclosure action as required by the Act. Defendants argue the Davis affidavit alleging the grace period notice was sent was insufficient to prove the notice was mailed as (1) the affidavit's statement that the notice was "sent" is insufficient to establish the notice was "mailed to the Defendants" or "placed in properly addressed envelopes with postage prepaid" as required by the Act and (2) the affidavit does not state that it was office custom to mail the notice or place the notice in properly addressed envelopes for delivery via U.S. mail or that such custom was followed in this instance, which was critical as Davis did not claim to actually mail the notice himself. Alternatively, defendants argue that even if plaintiff established the notice was tendered, it was defective because it was not dated as required by the Act.

¶ 18 Plaintiff responds that the use of the word "sent" is synonymous with "mail" and thus, the language of the affidavit is sufficient to establish the notice was mailed. Plaintiff further argues that defendants' allegations of non-receipt are immaterial and do not create a genuine issue of material fact as to whether notice was given as the notice was tendered as required by statute and defendants' conclusory statements in their affidavits that the grace period notice was never received, and therefore must not have been mailed, violate Illinois Supreme Court Rule 191(a) because these statements were not based on their own personal knowledge. Additionally, plaintiff argues that the lack of a date on the grace period notice is merely a technical defect that resulted in no prejudice to defendants, nor did defendants allege as such; therefore dismissal of the foreclosure action is unwarranted. Notably, defendants do not dispute that the necessary elements to support foreclosure were satisfied; only that plaintiff could not have instituted the action because they failed to comply with conditions precedent.

¶ 19 When a party to suit files for summary judgment, the court must decide whether "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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). If, after construing the evidence in the light most favorable to the non-movant, the court determines no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment must be granted. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). We review *de novo* the trial court's grant or denial of a summary judgment motion. *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993).

¶ 20 The Homeowner Protection Act states that "[N]o mortgagee shall file a complaint to foreclose a mortgage secured by residential real estate until the requirements of this Section have been satisfied." 735 ILCS 5/15-1502.5(b) (West 2012). "[I]f a mortgage secured by residential real estate becomes delinquent by more than 30 days the mortgagee shall send via U.S. mail a notice advising the mortgagor that he or she may wish to seek approved housing counseling. *** Until 30 days after mailing the notice provided for *** no legal action shall be instituted under Part 15 of Article XV of the Code of Civil Procedure." 735 ILCS 5/15-1502.5(c),(d) (West 2012). Thus, notice must come before the filing of a suit. See *id.*; *Aurora Loans Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 23. "The sending of the notice required *** means depositing or causing to be deposited into the United States mail an envelope with first-class postage prepaid that contains the document to be delivered. The envelope shall be addressed to the mortgagor at the common address of the residential real estate securing the mortgage." 735 ILCS 5/15-1502.5(c) (West 2012).

¶ 21 As a general rule, correspondence is presumed to have reached its destination when it has been properly sent through the mail. *City of Chicago v. Supreme Savings & Loan Ass'n.*, 27 Ill. App. 3d 589, 592 (1975). If the addressee denies receipt of the letter, the presumption is rebutted and receipt becomes a question to be resolved by the trier of fact. *Winkfield v. American Continental Ins. Co.*, 110 Ill. App. 2d 156, 160 (1969). The parties agree here that if the sender produces an affidavit by an individual with personal knowledge that the document was sent, the recipient cannot challenge the affidavit through the mere allegation of non-receipt. See *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957). Direct testimony from the person who actually performed the mailing, however, is not necessary in order to give rise to the presumption that the addressee received the correspondence if sufficient corroborating circumstances also exist. *First National Bank of Antioch v. Guerra Construction Co., Inc*., 153 Ill. App. 3d 662, 668 (1987), citing *Tabor & Co. v. Gorenz*, 43 Ill. App. 3d 124, 131 (1976). A mailing may also be proved by evidence of an office custom together with corroborating circumstances showing that the custom was followed in this particular instance. *Finik v. Illinois Dept. of Employment Secretary*, 171 Ill. App. 3d 125, 131 (1988) (citing *Commonwealth Edison Co. v. Property Tax Appeal Board*, 67 Ill. App. 3d 428 (1967)). Thus, the issue on appeal turns on the validity and substance of the Davis affidavit as proof of mailing of the required notices.

¶ 22 With regard to the language contained in the affidavit itself, we see no reason to conclude that the use of the word "sent" was insufficient to properly establish "mailed" as required by the Act. As plaintiff correctly asserts, the language of the Act itself clearly states that a notice is "sent" when it is deposited in the U.S. mail. See 735 ILCS 5/15-1502.5(c). Further, the use of the word "send" is consistently interpreted as synonymous with "mail." See *Northwest Diversified, Inc. v. Mauer*, 341 Ill. App. 3d 27, 37 (2003) (interpreting the word "deliver" under

the homestead exemption and finding that "[i]t does not use the terms 'send' or 'mail,' or any other term synonymous with providing notice through the mail."); see also *Black's Law Dictionary* 1568 (10th Ed. 2014) (defining "send" as, *inter alia*, "[especially] to deposit (a writing or notice) in the mail ***). Defendants' interpretation of the word "sent" also ignores the context in which this term was used in the affidavit. Davis' affidavit specifically states that the notices were "sent to [defendants] at the property address of 5110 North Nagle Ave., Chicago, Illinois 60630." Thus, given the language of the statute, the legal definition of the word "send," and the usage of the word "sent" in conjunction with defendants' full mailing address in the affidavit, we find no ambiguity with the language contained therein and conclude the affidavit sufficiently asserts the notices were "mailed" as required under the Act.

¶ 23 Defendants next challenge whether Davis had sufficient personal knowledge of the mailing of the grace period notices such that his affidavit cannot be challenged by an allegation of non-receipt. Defendants argue that, as Davis did not aver that he personally mailed the grace period notices himself, it was necessary for Davis to additionally aver that it was office custom in order to overcome the allegation of non-receipt and that such custom was followed in this particular instance. See *Donnelly v. Washington National Ins. Co.*, 136 Ill. App. 3d 78, 86 (1985). Absent this assertion, defendants argue that Davis must have provided some corroborating evidence of receipt. *Kocurek v. Bowling*, 96 Ill. App. 3d 310, 313 (1981).

¶ 24 First, Davis' averments were sufficient to establish that, according to office custom, the notices were mailed to defendants. As an asset recovery manager servicing mortgage agreements for plaintiff, Davis' position provided him with familiarity of plaintiff's operations. Based upon such familiarity, Davis averred that "plaintiff's records are made at or near the time by, or from information provided by persons with knowledge of such activity and transactions reflected in

such records," which "are kept in the course of business activity conducted regularly." Davis further stated that "[i]t is the regular practice of [plaintiff's] mortgage servicing business to make such records." Davis therefore established his personal knowledge and familiarity with plaintiff's practices and customs. As part of his responsibilities, Davis reviewed all the documents relating to the defendants' mortgage, including any "electronically imaged documents *** computer generated records *** and others," which included a copy of the relative grace period notices "sent" (or mailed) to defendants. Based upon his review of these records, Davis averred that the notices as described were mailed to defendants on March 25, 2013, at 5110 North Nagle Ave., Chicago, Illinois 60630, the property address in the mortgage agreement. See *e.g. US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶¶ 26-27 (employee familiar with operations of company in course of his or her duties may review business records and obtain personal knowledge of facts contained in documents therein). To corroborate Davis' affidavit, plaintiff attached copies of the actual notices to the affidavit as an exhibit. They were printed on plaintiff's letterhead and were properly addressed to defendants at the property address of the subject mortgage. Therefore, although defendants' testimonial allegation of non-receipt may be probative to demonstrate the notices were never mailed (see *Angelo v. Board of Review*, 58 Ill. App. 3d 50, 52 (1978)), plaintiff rebutted such conjecture with an affidavit of someone with sufficient personal knowledge of plaintiff's business practices indicating the notices were mailed according to office custom and corroborating evidence of the mailing by producing copies of the actual notices mailed. *Commonwealth Edison Co.*, 67 Ill. App. 3d 428 (1967); but see *Lynn v. Village of West City*, 36 Ill. App. 3d 561, 563 (1976) (insurance agent testified to his usual practice of making a notice of the claim but could not testify as to the particular transaction because he did not personally mail it nor did he even have a copy of the correspondence).

¶ 25 Defendants also failed to provide any additional evidence (other than arguing the notice lacked a date) to counter this proof. Rather, defendants' only affidavits averred that the address contained on the notices was their primary residence and mailing address and that they maintained a folder at this address with all other correspondence they had received from plaintiff. Accordingly, defendants' allegations of non-receipt were insufficient, without more, to create an issue of fact regarding whether plaintiff tendered the notices. See *e.g. First National Bank of Antioch*, 153 Ill. App. 3d at 667-68. The record therefore establishes the grace period notices were mailed to defendants as required by the Act.

¶ 26 Defendants nonetheless contend in their opening brief that, even if mailed, the grace period notices were defective and could not satisfy plaintiff's obligation under the Act. Specifically, defendants argue that the facts "mandate a reversal of the order granting summary judgment" as "the [c]ourt should have found that even if a Grace Period Notice was given to the Defendants, the Grace Period Notice was defective and did not comply with the requirements of the Homeowner Protection Act" as "the Grace Period Notices allegedly given to Defendants are not dated." Plaintiff responds that the lack of a date was merely a technical defect that did not result in prejudice, nor have defendants alleged they were prejudiced by plaintiff's failure to include a date on the notice, which was required to create a genuine issue of material fact. See *Pajor*, 2012 IL App (2d) 110899, ¶ 25. Defendants respond in their reply brief that the issue is not whether the notices were "flawless" but whether notice was given at all because the lack of a mailing date is further support that the grace period notices were not tendered in the first instance. They argue that "without a date of mailing on the Grace Period Notice and without any admissible evidence regarding the mailing of the same" a genuine issue of material fact existed regarding plaintiff's compliance with the Act. To this extent, defendants contend they are not

required to show prejudice when the allegation is that the notice was never tendered. See *Banco Popular N.A. v. Gizynski*, 2015 IL App (1st) 142871, ¶ 39.

¶ 27 Although we agree with defendants that a showing of prejudice is not required if the record establishes notice was not tendered, as previously explained, we find the record sufficient to establish plaintiff mailed the grace period notice more than 30 days prior to filing the instant foreclosure action. Thus, defendants' reliance on *Banco Popular N.A.*, 2015 IL App (1st) 142871, is inapposite. Here, defendants' only allegation of a defect in the notices was the lack of a date. Further, our review of the notices demonstrates they complied with all remaining statutory requirements. See 735 ILCS 5/15-1502.5(c). Under these circumstances, plaintiff's failure to include a date was a technical defect. As plaintiff points out, however, defendants have not alleged nor demonstrated that they were prejudiced by this error and thus, any argument in this regard fails. See *Pajor*, 2012 IL App (2d) 110899, ¶ 27. As this court has explained, "[w]here, as here, the mortgagor has alleged only 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[.] *** Nothing in section 15-1502.5 states that flawless notice of the grace period is a condition precedent to a foreclosure judgment." *Id.* ¶¶ 27-28. To presume otherwise, could potentially warrant dismissal of the proceedings upon any minor error in the notice's content.

¶ 28 "The Homeowner Protection Act was written to provide owners of *** owner-occupied properties an additional last-minute escape valve to rescue their mortgages before the lender files a suit under the Foreclosure Law. The grace period notice required by the Act directs the borrower to various resources available for counseling and loan modification assistance." *Adeyiga*, 2014 IL App (1st) 131252, ¶ 106 (citing 735 ILCS 5/15-1502.5(c)). Where, as here, the

record suggests such opportunity was given and the notice properly included the available resources to enable defendants to take advantage of such opportunity, the purpose of the statute would be frustrated if the mere lack of a date printed on the notice, by itself, was sufficient to render the notice defective under the Act. See *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 73 (where a "process *** utilized did not occur exactly as the statute dictates, the law would not require a futile act to redo the process.").

¶ 29 Plaintiff has sufficiently proved that foreclosure was warranted and the record establishes plaintiff complied with the conditions required to bring the action itself, therefore the minor technical defect in the grace period notice was not sufficient to create a genuine issue of material fact precluding a finding of foreclosure on summary judgment. See *e.g. Ben Franklin Financial Corp. v. Davis*, 226 Ill. App. 3d 414 (1992) (inconsistency in paragraphs of complaint regarding date upon which payment on promissory note was accelerated did not create genuine issue of material fact to preclude summary judgment).

¶ 30 C. Acceleration Notice

¶ 31 Defendants also allege that a genuine issue of material fact existed regarding whether the acceleration notices were mailed as required by the terms of the mortgage agreement. However, based upon our foregoing analysis of the grace period notices and the nearly identical record concerning the acceleration notices, we see no reason to distinguish the acceleration notices from the grace period notices in this matter. Briefly, we note that the acceleration notices are dated March 25, 2013, the same day the grace period notices were also mailed. In addition, the notices bear the correct name and address of defendants although the salutation in the body of the notices read "Dear Robert Reid." Further, defendants do not allege any substantive defect in the notices themselves. Accordingly, we conclude the acceleration notices were tendered to defendants as

required under the terms of the mortgage agreement and no genuine issue of material fact existed regarding their mailing or validity.

¶ 32 CONCLUSION

¶ 33 In conclusion, the record affirmatively establishes that plaintiff complied with the conditions precedent prior to filing the instant foreclosure action by mailing to defendants the requisite grace period and acceleration notices. Defendants have failed to establish a genuine issue of material fact regarding whether the notices were mailed or substantively valid. The trial court therefore did not err by granting summary judgment in favor of plaintiff and entering an order of foreclosure and sale on the property.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.