2016 IL App (1st) 160618-U

Sixth Division
Order Filed: September 2, 2016

No. 1-16-0618

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BAYVIEW LOAN SERVICING, LLC,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) Cook County
	)
	)
v.	) No. 08 CH 26833
	)
	)
GEORGE DAVID, a/k/a George L. David,	)
MARLYN DAVID, a/k/a Marlyn Daivd;	)
COLONIAL FUNDING, LLC; DEVON BANK,	)
as trustee u/t/a dated 1/31/2007, a/k/a trust no. 7225;	)
UNKNOWN BENEFICIARY OF DEVON BANK,	)
u/t/a dated 1/31/2007, a/k/a trust no. 7225;	)
UNKNOWN OWNERS and	)
NON-RECORD CLAIMANTS,	)
	)
Defendants,	) Honorable
	) Robert E. Senechalle,
(George David, Defendant-Appellant).	) Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Finding that the defendant forfeited his claim that the plaintiff violated the Consumer Fraud Act, we affirmed the circuit court's judgment of foreclosure and sale of

property owned by the defendant and the circuit court's subsequent order approving the sale and distribution of the proceeds.

¶ 2 The defendant, David George, filed a notice of appeal from the circuit court's judgment of foreclosure and sale of property owned by him and its subsequent order approving the sale and distribution of the sale proceeds. For the reasons which follow, we affirm.

¶ 3 In August of 1987, the defendant purchased an apartment building located at 6522 N. Richmond Street in Chicago (subject property). At all times relevant, the defendant resided in the building with his wife, Marlyn, his children, and other family members. On August 3, 2006, the defendant executed a note to Taylor, Bean & Whitaker Mortgage Corporation secured by a mortgage on the subject property. Due to an illness that rendered him unable to work, the defendant fell in arrears on his mortgage payments.

¶ 4 On July 24, 2008, Taylor, Bean & Whitaker Mortgage Corporation filed a complaint against the defendant, Marlyn and others pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2010)), to foreclose on the mortgage encumbering the subject property. The complaint alleged that, as of November 1, 2007, the defendant was in default on the note secured by the mortgage, and had ceased making the monthly installment payments due thereunder. Attached to the complaint was the mortgage agreement, note and a family rider.

¶ 5 On August 25, 2008, the defendant entered a *pro se* appearance. On April 16, 2009, he and his wife filed an answer to the foreclosure complaint. The answer contained no affirmative defenses and admitted most of the allegations in the complaint. Ownership of the mortgage was subsequently assigned to Bayview Loan Servicing, LLC (Bayview), and Bayview was substituted as a party plaintiff effective August, 20, 2010.

¶ 6 At some point in late 2010, the defendant submitted to Bayview the first of eight applications to modify the terms of his mortgage under the federal Housing Affordable Modification Program (HAMP).[1] On September 10, 2010, pursuant to a stipulation between the parties, the court referred the case to mediation to resolve disputes regarding the HAMP application. However, on May 11, 2011, a memorandum of "no agreement" was filed by the mediator. The court entered an order continuing the matter until August 25, 2011, and requiring that the defendant provide proof that all documents outlined in the "no agreement" memorandum had, in fact, been produced to Bayview by the previously-set deadline of May 31, 2011. On August 25, 2011, the matter was placed back on the trial call.

¶ 7 On June 28, 2012, Bayview filed a motion for summary judgment (735 ILCS 5/2-1005 (West 2010)) seeking a judgment of foreclosure and sale of the subject property. The defendant apparently filed no response to Bayview's motion, and on October 12, 2012, following a hearing, the court granted summary judgment for Bayview and entered a judgment of foreclosure and sale of the subject property. The judicial sale was scheduled for January 15, 2013.

¶ 8 On January 10, 2013, the defendant presented an emergency motion to stay the judicial sale on the basis that he had a pending application under HAMP to obtain a modification of his loan payments. See 735 ILCS 5/15-1508(d-5) (West 2012). The court granted the motion and stayed the sale of the subject property, setting a status hearing for February 26, 2013.

¶ 9 The sale of the subject property was subsequently reset for October 25, 2013, on which date the defendant filed his second emergency request for a stay and also sought an order again referring the matter to mediation. In his motion for a stay of the sale, the defendant alleged that he had begun a new job and was ready to resume making some payments on his mortgage loan,

[1] None of the defendant's HAMP applications appear in the record on appeal.

but was attempting to obtain a modification of his loan terms with the help of various assistance foundations and government agencies. The defendant contended that, on September 20, 2013, Bayview notified him that it was denying his third-requested loan modification stating that, based upon his reported monthly income of $2,488, his debt-to-income ratio fell outside of the range required for a loan modification.[2] The defendant alleged that he sent a response to Bayview disputing its determination of his monthly income and noting that his most recent HAMP application reflected a monthly household income of $6,382. Bayview subsequently sent correspondence to the defendant stating that, in order to obtain a further review of his HAMP application, he was required to provide Bayview with proper documentation of his income. According to the defendant, Bayview's loan representative insisted on having the necessary documents by the following day, which was impossible as the application involved several families. The defendant asserted that he ultimately sent a fourth HAMP application, but that he could no longer trust Bayview because it was not interested in making his loan affordable or restoring him to ownership of his home. As Bayview had already agreed to an earlier stay, the court entered an order denying the defendant's motion for a stay and denying further mediation.

¶ 10 The sale of the subject property was rescheduled for September 30, 2014, and the defendant again sought a stay. The court entered an order granting the stay of the sale of the subject property and continuing the matter until October 30, 2014.

¶ 11 On November 13, 2014, counsel for the defendant entered an appearance. The subject property was ultimately sold at auction nearly one year later, on October 23, 2015.

[2] This letter, which is contained in the record, provides the only proof of the contents of the defendant's HAMP application and the basis for Bayview's denial thereof.

¶ 12 On November 13, 2015, Bayview moved for an order approving the report of sale and distribution of the sale proceeds. That same day, the defendant filed a *pro se* motion for a substitution of judge. The defendant asserted that the judge was biased against him and would likely be "offended" by the fact that he had recently brought an action in Federal District Court (*David v. Bayview Loan Servicing, LLC*, No. 15-CV-9274 (N.D. Ill. Oct. 20, 2015)), alleging a violation of his constitutional rights based upon Bayview's use of fraudulent and predatory tactics to circumvent his HAMP applications.

¶ 13 On November 25, 2015, the defendant filed a "Motion to Deny Confirmation of Sale and to Stop All Foreclosure Proceedings" due to the pendency of his federal action against Bayview. The motion asserted, in relevant part, that, since the defendant's default in 2007, he had worked "relentlessly" with Bayview to obtain a loan modification, completing eight "viable and well-supported" HAMP applications. He contended that Bayview "dodged every single application by ignoring the application or falsifying the facts about defendant [*sic*] household income." The defendant also argued that justice had not been served in his case because the circuit court had "not listened to his side of the story" and allowed Bayview to "clearly and treacherously" violate his civil rights.

¶ 14 On December 15, 2015, following a hearing, the court entered an order, *inter alia*, (1) denying the defendant's motion for a substitution of judge; (2) setting a briefing schedule on Bayview's motion to confirm the judicial sale; and (3) allowing the voluntary withdrawal of the defendant's motion to “Deny Confirmation of Sale and to Stop All Foreclosure Proceedings."

¶ 15 On January 12, 2016, the defendant filed his response in opposition to Bayview's motion for an order approving the sale of the subject property and distribution of the sale proceeds. He argued that Bayview's "malfeasance" in reviewing and denying his HAMP applications violated

the federal Department of Housing and Urban Development regulations and the Making Home Affordable program. He relied upon section 15-1508(b) of the Foreclosure Law which precludes the confirmation of a judicial sale upon a finding that "justice was otherwise not done" with regard to the sale. 735 ILCS 5/15-1508(b) (West 2012). In support of his contenions in this regard, the defendant asserted that "his treatment by [Bayview] in the loss mitigation process constitutes a serious miscarriage of justice."

¶ 16 On February 10, 2016, following a hearing, the court entered its order approving the report of the sale of the subject property and distribution of the sale proceeds, confirming the sale and granting possession of the subject property to the successful bidder. Thereafter, defendant, acting *pro se*, filed the instant appeal.

¶ 17 As his sole argument on appeal, the defendant contends that, in repeatedly denying his requests for a modification of his mortgage payments under HAMP, Bayview violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). See 815 ILCS 505/1 *et seq.* (West 2012). The defendant takes no issue with the order granting summary judgment in favor of Bayview or the ensuing judgment of foreclosure, the circumstances of the judicial sale, or the circuit court's confirmation of the sale. In response, Bayview contends that the defendant has forfeited his claim under the Consumer Fraud Act by failing to assert it in the circuit court. We agree.

¶ 18 Initially, we note that the defendant's brief on appeal fails to comply with Illinois Supreme Court Rule 341(h) (eff. Sept. 1, 2006). Among other things, the brief lacks a jurisdictional statement or a statement of objective facts necessary to resolve the defendant's arguments on appeal. Instead, the defendant's "factual background" section is argumentative, devoid of citations to the record, and refers to matter outside of the record on appeal. In

addition, the defendant's brief fails to have an appendix containing either a copy of the notice of appeal or a table of contents of the record. The rules of procedure concerning appellate briefs are rules, not mere suggestions, and this court has the discretion to strike a brief and dismiss the appeal for failure to follow those rules. *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10. The fact that the appellant is acting *pro se* does not excuse his failure to follow the Supreme Court Rules. See *Id*.

¶ 19 In any event, based upon the record before us, it is clear that the defendant did not raise any claim in the circuit court under the Consumer Fraud Act. Such a claim is a statutory cause of action and must be specifically pled. See, *e.g.*, *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 703 (2005). There is no indication of any such pleading in this case.

¶ 20 The defendant acknowledges that he did not previously assert a Consumer Fraud Act claim, but urges that we look beyond this omission and consider the matter, in light of his inexperience with the law and Bayview's "law breaking tactics." However, as a court of review, we do not consider claims as a matter of first impression. It is well settled that a theory not raised in the circuit court is deemed forfeited and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996); *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 99 (1993) (assertion of consumer fraud claim for first time on appeal). Sanctioning the introduction of a new theory on appeal "would 'not only weaken the adversarial process and our system of appellate jurisdiction (*citation*), but would likely prejudice the plaintiff, since [it] may have been able to present evidence to discredit the theory had it been raised in the evidence presentation stage, that is to say, in the trial court.'" *Haudrich*, 169 Ill. 2d at 536 (quoting *Daniels v. Anderson*, 162 Ill. 2d 47, 59 (1994)). Accordingly, we decline to reach the defendant's argument on appeal.

¶ 21 Based upon the foregoing analysis, we find that the defendant has forfeited any claim of error based upon Bayview's alleged violation the Consumer Fraud Act. Further, as the defendant has raised no challenge to the order granting summary judgment in favor of Bayview, the ensuing judgment of foreclosure, the circumstances of the judicial sale of the subject property, or the order confirming the sale and distribution of the proceeds, we affirm the orders of the circuit court.

¶ 22 Affirmed.