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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LIBERTY BANK FOR SAVINGS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 2014 CH 4054
)	
BALDEMAR CORRAL and ELIZABETH)	Honorable
CHAIDEZ,)	Bridget Mitchell,
)	Judge, presiding.
Defendants-Appellants.)	

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err by granting summary judgment in favor of plaintiff where defendants failed to establish a genuine issue of material fact regarding the sufficiency of plaintiff's prove-up affidavit provided in support of its motion.
- ¶ 2 In this mortgage foreclosure action, defendants, Baldemar Corral and Elizabeth Chaidez, appeal from the circuit court's grant of summary judgment in favor of plaintiff, Liberty Bank for Savings. On appeal, defendants contend that the affidavits offered by plaintiff in support

of its motion were insufficient to support the trial court's ruling of summary judgment. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4

Plaintiff filed a complaint in the circuit court of Cook County seeking to foreclose a mortgage entered into with defendants. Eventually, plaintiff filed, *inter alia*, a motion for summary judgment and judgment of foreclosure and sale. In support of that motion, plaintiff provided an affidavit of amounts due and owing and a loss mitigation affidavit. Both affidavits were made by Leticia Lara, an individual identified as the "Loan Servicing Specialist for the Lending Department" for plaintiff.

¶ 5

The affidavit of amounts due and owing included a record of defendants' mortgage and identified the mortgage transaction history and the total amount due through April, 16, 2015. Lara averred that in the ordinary course of her employment her responsibilities included reviewing and analyzing the plaintiff's business and loan records. These records were comprised of loan payment histories, computer generated records and copies of origination documents. She also identified the type of computer system used by plaintiff that tracked the mortgage payments and transactions affecting the loan. She further outlined the procedure used to process loan payments and to create records in the identified computer system.

¶ 6

In their response, defendants asked the court to reject plaintiff's affidavit of amounts due and owing as insufficient under Illinois Supreme Court Rules 113 (eff. May 1, 2013), 191 (eff. Jan. 4, 2013), and 236 (eff. Aug. 1, 1992). Defendants noted that Rule 191 requires that the affiant have personal knowledge and that an affidavit "shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191. They argued that plaintiff's affidavit of amounts due and owing was not "foundationally sound" and that

Lara did not possess the requisite personal knowledge to attest to its contents. Plaintiff responded that defendants had not produced an affidavit or pled a single fact to create a genuine issue of material fact. Further, plaintiff asserted, the affidavit complied with Rule 113 and that Rules 191 and 236 did not apply. Plaintiff argued alternatively that even if the rules did apply, the affidavit provided a sufficient basis for the entry of judgment.

¶ 7 Following argument, the circuit court granted plaintiff's motion for summary judgment. Thereafter plaintiff sold the property and the circuit court confirmed the sale at presentment.

¶ 8 ANALYSIS

¶ 9 Defendants solely contend that the trial court erred in granting summary judgment in favor of plaintiff because plaintiff's supporting affidavit was insufficient. They argue that the affidavit of amounts due and owing fails to establish with particularity Lara's qualifications to testify to the specifics of the financial information and her familiarity with those documents.

¶ 10 Plaintiff responds that defendants' specific claims on appeal relating to Lara's lack of personal knowledge were not presented in the circuit court and as a result are forfeited. Plaintiff additionally argues that (1) defendants' claims on appeal are meritless because they did not file a counter-affidavit; and (2) Lara adequately laid a foundation for the records that established defendants' default and the amount due to plaintiff.

¶ 11 As a preliminary matter, we find plaintiffs' claims regarding Lara's affidavit have been properly preserved for our review. The record reveals that in response to plaintiff's motion for summary judgment, defendants challenged the sufficiency of the supporting affidavit by arguing that plaintiff did not lay an adequate foundation and that Lara lacked personal knowledge of the facts to which she averred. Thus, we will proceed with our analysis.

¶ 12 Those familiar principles regarding summary judgment guide our disposition of defendant's claim on appeal. "Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010). Further, when assessing a motion for summary judgment, the circuit court may not consider "evidence that would be inadmissible at trial". *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). Thus, because a supporting affidavit serves as a substitute for testimony taken in open court, it must meet the same requisites as competent testimony. *Id.* Our review of a grant of summary judgment is *de novo*. *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). In reviewing the circuit court's decision on appeal, we review the judgment and not the reasoning of the lower court, and we may affirm on any grounds found present in the record. *Coughlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24.

¶ 13 Although lacking in clarity, here on appeal defendants appear to argue that plaintiff's affidavits suffer due to the affiant's lack of personal knowledge, as required under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), as well as for lack of an adequate foundation under the business records hearsay exception, as required under Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992). They contend that the prove-up affidavit failed to show that the affiant developed personal knowledge of the facts in her capacity as a Loan Servicing Specialist or that she was competent to testify at trial regarding any of the documents identified in the affidavit. They additionally attack the sufficiency of the prove-up affidavit, arguing that (1) the assertion that Lara had access to plaintiff's business records was too

general and superficial to give weight as evidence; and (2) plaintiff's intention for Lara to lay a proper foundation for the admissibility of the affidavit under the business records exception to the hearsay rule "fell short."

¶ 14 Plaintiff counters that Lara's statements are facts that show her familiarity with the records. Further, she adequately laid a foundation for the prove-up affidavit when she (1) established her familiarity with plaintiff's records and procedures, (2) swore that in her employment, her responsibilities included reviewing and analyzing business and loan records, (3) that she was familiar with the records, (4) had access to the records as part of her employment, and (5) that she reviewed the loan payment history, computer generated records and copies of originate documents in connection with executing the affidavit.

¶ 15 Affidavits used in connection with motions for summary judgment are governed by Illinois Supreme Court Rule 191 (eff. Jan. 4 2013). Rule 191 provides, in relevant part, that:

"[a]ffidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191 (eff. Jan. 4, 2013).

If, after assessment of the document, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that he or she could testify competently to its contents at trial, then Rule 191 is satisfied. *US Bank, National Ass'n v. Asim Avdic*, 2014 IL App (1st) 121759, ¶ 22. On the other hand, where it is evident that the

affiant lacks personal knowledge, the weight of the evidence is affected rather than its admissibility. *In re Estate of Weiland*, 338 Ill. App. 3d 585, 601 (2003).

¶ 16 Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992) provides that a business record may be admitted into evidence as an exception to the prohibition against hearsay if the record was made in the regular course of business. To admit business records into evidence, the proponent must lay a proper foundation by showing that the records were " 'made (1) in the regular course of business, and (2) at or near the time of the event or occurrence.' " See *US Bank*, 2014 IL App (1st) 121759, ¶ 23 (quoting *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27); see also Ill. S.Ct. R. 236(a) (eff. Aug. 1, 1992). A party may establish a sufficient foundation for admitting records through presenting testimony of the custodian of records or another person familiar with the business and its mode of operation. *Weiland*, 338 Ill. App. 3d at 600. Showing familiarity with the record requires the party to state facts with particularity to establish the affiant's personal knowledge of the record. See *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 41. Under Rule 236, "it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible." *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992). The determination that records are admissible as business records rests within the sound discretion of the circuit court and absent an abuse of that discretion, a reviewing court will not disturb a trial court's decision. *Weiland*, 338 Ill. App. 3d at 600; see also *US Bank*, 2014 IL App (1st) 121759, ¶ 25.

¶ 17 In her affidavit, Lara averred that that she was a loan servicing specialist with plaintiff; in her capacity as a servicer, she had access to plaintiff's business records relating to the loan; she reviewed the loan records and had personal knowledge of how they were kept and

maintained; the loan records were maintained by plaintiff in the course of its regularly conducted business activities and were made at or near the time of the event, by persons trained and authorized to make such entries; and it was regular practice to keep records such as the loan records in the ordinary course of plaintiff's business. She also provided specific amounts owing on the loan and identified the type of computer system used for tracking and processing mortgage payments. Contrary to defendants' contention, although not the custodian of the records, Lara demonstrated familiarity with the records and sufficiently established that the records were made in the regular course of business in accordance with plaintiff's normal business standards.

¶ 18 We note in passing defendants' reliance on *People v. Singer*, 256 Ill. App. 3d 258, 267 (1993). There, this court found error in the trial court's admittance of an eviction notice as a business record in the absence of witness testimony regarding the landlord's eviction procedures and the failure to explain that procedure to the court. Plaintiff's affidavit does not suffer the same deficiency as did the witness' testimony in *Singer*. Thus, we find *Singer* inapposite. Here, we not only find that the affidavit satisfied the requirements of Rule 191, but that it additionally met the requirements of Rule 236. Accordingly, the affidavit supported entry of summary judgment.

¶ 19 Our determination that plaintiff's supporting affidavit is sufficient to support summary judgment is consistent with this court's holding in *US Bank*, 2014 IL App (1st) 121759 (2014), a case which defendant entreats us to "reverse" as inadequate to guide courts' evaluation of the sufficiency of affidavits in mortgage foreclosure proceedings. Even were we so inclined, and we hasten to add that we are not, we have no authority to do so. In *In re Marriage of Gutman*, 232 Ill. 2d 145 149-150 (2008), our supreme court, citing *Gillen v.*

State Farm Mutual Automobile Insurance Co., 215 Ill. 2d 381, 392 n.2 (2005), admonished that a panel, division, or district of the appellate court has no authority to overrule another panel, division or district of the appellate court. Moreover, we find the analysis in *US Bank* to provide clear and sufficient guidance to the courts in evaluating the sufficiency of affidavits. See also *Bank of America, N.A v. Land*, 2013 IL App (5th) 120283, ¶¶ 10-18.

¶ 20 As a final matter, we note that plaintiffs failed to include in their response to defendant’s motion for summary judgement, either a counter affidavit or any other supporting document to demonstrate a genuine issue of material fact. Our supreme court has held that facts presented in an affidavit in support of a motion for summary judgment which are not contradicted by counter-affidavit are deemed admitted and must be taken as true for purposes of the motion. *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). A party cannot rely on his or her pleadings alone to raise an issue of material fact. *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 23. The mere suggestion that an issue of material fact exists is insufficient to defeat summary judgment. See *In re Marriage of Palacios*, 275 Ill App. 3d 561, 568 (1995). “Even if the complaint and answer purport to raise an issue of fact, summary judgment is nevertheless appropriate if such issues are not further supported by evidentiary facts through affidavits or other proper materials.” *100 W. Monroe Partnership v. Carlson*, 319 Ill. App. 3d 761, 767 (2001).

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we find that the trial court did not err by granting plaintiff summary judgment where defendant failed to establish a genuine issue of material fact. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.