2016 IL App (2d) 150364-U
No. 2-15-0364
Order filed May 18, 2016
Modified upon denial of rehearing June 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRSTMERIT BANK, N.A., as successor in interest to George Washington Savings Bank, Plaintiff-Appellee, v. BRIDGEVIEW BANK, as Trustee under Trust Agreement dated December 25, 2008, and known as Trust No. 1-3388; INDOMITABLE, LLC; ROBERT A. KOWALSKI; WILLIAM A. KOWALSKI; UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Lake County. No. 10-CH-3885 Honorable Margaret A. Marcouiller, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in entering judgment of foreclosure and order confirming sale, but amount of deficiency judgment would be modified.

¶ 2 In this appeal, the defendants—Bridgeview Bank (as trustee of a trust), Indomitable, LLC, and Robert and William Kowalski—challenge the judgment of foreclosure and the order approving sale entered with respect to certain property. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 In January 2009, the defendants purchased for development the property at 480 Saunders Road, Lake Forest, for $690,000 (Property). The defendants funded the purchase in part with a $540,000 loan from George Washington Savings Bank (GWSB), secured by a mortgage on the Property. Although the six-acre Property had only one large house and some outbuildings, it had R-3 zoning, permitting the possible future use of the Property for more than one residence. In June 2009, the Plan Commission of Lake Forest granted tentative approval to a plat for a three-lot subdivision on the Property.

¶ 5 The loan matured on January 1, 2010. The defendants defaulted.

¶ 6 On February 19, 2010, GWSB was closed. The Federal Deposit Insurance Corporation (FDIC) was appointed as the receiver. That same day, the FDIC and the plaintiff, FirstMerit Bank, entered into an agreement (Purchase Agreement) whereby the plaintiff acquired many of GWSB's assets, including the note and mortgage for the Property, and the personal guaranties of Robert and William Kowalski (collectively, Note).

¶ 7 In July 2010, the plaintiff filed an action to foreclose upon the Property. Approximately one year later, the plaintiff filed an amended complaint seeking a total of $572,865. The defendants moved to dismiss, arguing that the plaintiff's ownership of the Note was not apparent from the face of the complaint, because the Purchase Agreement contained a reference to certain assets being excluded from the transfer, and the list of those excluded assets was so heavily redacted that it could not be determined whether the Note was among the excluded assets. The

plaintiff responded that the defendants bore the burden of proving lack of standing, and that they had not carried this burden. On the date set for the hearing on the motion, the defendants did not appear and the motion was stricken. Thereafter, the defendants filed an answer asserting, among other things, the affirmative defense of lack of standing.

¶ 8 In November 2012, the plaintiff filed a motion for summary judgment and for entry of a judgment of foreclosure and sale. In support of its motion, the plaintiff attached the affidavit of Deborah Wagner, an officer of the plaintiff. Wagner averred, among other things, that the Note was among the assets of GWSB acquired by the plaintiff through the Purchase Agreement, and that the plaintiff had in its possession the originals of all of the documents upon which it was suing. Copies of the documents were attached to the affidavit. Wagner also averred that, based upon her review of the account, a total of $728,448.14 was the current total indebtedness on the Note. This amount included $1,879 in insurance costs for the Property.

¶ 9 The trial court entered a briefing schedule on the motion, under which the defendants' response was due in December 2012 and the motion would be heard on August 14, 2013. The defendants did not file any written response to the motion for summary judgment.

¶ 10 In June 2013, the defendants sent the plaintiff a contract for sale of the Property. Mark Zoll was the prospective purchaser and the price offered was $400,000. The sale was to be a short sale through which the plaintiff would agree to accept the sale proceeds in full satisfaction of the debt owed by the defendants. According to the later testimony of Kecia Sammons, one of the plaintiff's loan workout officers, the offer was rejected because it was too low. Sammons also testified that, before the plaintiff would approve any short sale, the plaintiff would require the guarantors to submit updated financial information and to sit for a debtor's exam. The record does not reflect that the plaintiff told the defendants of this requirement or requested these items.

¶ 11 On August 8, 2013, the plaintiff filed an updated prove-up affidavit stating that the total indebtedness had risen to $976,429.25. This amount included $18,958.34 for insurance costs. The plaintiff also filed a loss mitigation affidavit pursuant to Illinois Supreme Court Rule 114 (eff. May 1, 2013), in which the plaintiff asserted that there were no applicable loss mitigation programs as the loan was a commercial loan. Sammons was the affiant in both of these affidavits. Lastly, the plaintiff filed a supplemental affidavit regarding its attorney fees.

¶ 12 On August 14, 2013, the date set for the hearing on the plaintiff's motion for summary judgment, the trial court noted the defendants' failure to file any written response, and entered an order permitting them to file a response only to the updated prove-up affidavit and the supplemental affidavit regarding attorney fees.

¶ 13 Despite this order, the defendants filed a response raising the argument that the plaintiff lacked standing because it had not shown that it owned the Note. The defendants also argued that the amount of real estate taxes stated in the updated prove-up affidavit was incorrect, supported by an affidavit by their attorney attesting to a search of the county records of tax payments made between September 1, 2012, through August 14, 2013. They also complained of the large increase in insurance costs. In reply, the plaintiff attached a supplemental affidavit by Sammons, stating that the plaintiff had made other tax payments prior to September 1, 2012, and that these tax payments (which were not included in the defendants' search of the tax records) supported the amount claimed in the prove-up affidavit.

¶ 14 On October 4, 2013, following a hearing, the trial court granted the plaintiff's motion for summary judgment. The trial court found that the plaintiff was the holder of the mortgage relating to the Property. As to the amount due under the complaint, the trial court reduced the attorney fees from $35,690.77 to $24,718.77 (a reduction of $10,972), and reduced the insurance

costs from $18,958.34 to $1,879.67 (a reduction of $17,078.67), for a total reduction of $28,050.67. The trial court therefore held that the total amount due was $959,033.99.

¶ 15 On October 8, 2013, the plaintiff received a new contract for the sale of the Property. In fact, it was the same contract submitted by Zoll in June 2013, but the sale price had been raised to $775,000. (The new amount was initialed to show that Zoll had approved the higher offer.) The record does not reflect any response by the plaintiff. Sammons later testified that the plaintiff rejected the contract because the sale price was less than the judgment amount, and it thought that perhaps it could get a higher price for the property. In addition, as noted above, the plaintiff would require updated financials and a debtor's exam to approve any short sale, although that requirement does not appear to have been communicated to the defendants.

¶ 16 On October 17, at the request of the defendants, the plaintiff issued a loan payoff letter. In it, the plaintiff stated that it would require a payment of $1,034,484 to satisfy the debt and release the Note. Sammons later testified that she prepared this payoff letter from the plaintiff's own records and did not take into account the trial court's finding of the amount owing under the Note. Despite the trial court's reduction of the attorney fees and insurance costs that were due, the payoff letter required payment of the full amount of these costs. The plaintiff did not concede that the October 2013 payoff letter's inclusion of these amounts was improper because, in its view, the amounts were in fact due and owing: the trial court's judgment simply meant that the secured debt recoverable through foreclosure did not include the $28,050.67 that had been deducted. The plaintiff later admitted that the payoff letter was incorrect in one respect, in that it accidentally included $9,400 that had been inserted as a "place holder" for an expense and was not removed when the actual amount of that expense was inserted. However, although the defendants apparently corresponded with the plaintiff's attorney regarding the payoff letter, they

did not raise any question to the plaintiff as to how it arrived at the payoff amount or whether that amount was correct.

¶ 17 On November 5, 2013, the plaintiff received an appraisal of the Property from the appraiser it had hired, Frank Cincotta. Cincotta appraised the Property at $420,000.

¶ 18 On December 4, 2013, the plaintiff filed a notice of sale, setting the sheriff's sale for December 19, 2013. That same day, the plaintiff received a revised sale contract for the Property—the June 2013 contract with the old price crossed out and a new price of $1,015,563 inserted. There were no initials next to the new amount to indicate Zoll's approval of the change. Further, the dates for acceptance and closing listed in the contract had already expired and not been updated. The record does not reflect any response by the plaintiff.

¶ 19 At the defendants' request, the plaintiff generated a second payoff letter on December 9, 2013. The sum demanded in that letter was $1,044,670. As before, the payoff amount included the amounts deducted by the trial court in the foreclosure judgment.

¶ 20 On December 18, 2013, the day before the scheduled sheriff's sale, the defendants entered into an agreement with the plaintiff under which they paid the plaintiff $125,000 of the interest due and owing in return for a four-month delay in the sale. The defendants hoped to sell the Property during this time. However, on February 10, 2014, the plaintiff instructed its attorney to inform the defendants that it would not consider a short sale and wanted to control the sale process. Thus, it intended to proceed with the sheriff's sale. During the four-month period, the plaintiff did not tell prospective buyers to contact the defendants, but to attend the sheriff's sale.

¶ 21 The sheriff's sale was held on June 17, 2014. The plaintiff was the high bidder, bidding $525,000. Zoll did not submit an offer for the Property at the sale.

¶ 22 In July 2014, the plaintiff filed a motion seeking confirmation of the sale, approval of the report of sale, an order of possession, and a deficiency judgment of $495,846. The defendants responded with a motion to reduce or abate the deficiency, arguing that it would be inequitable to allow the plaintiff the benefit of a deficiency judgment because its own actions in rejecting the various short sale offers and issuing allegedly inflated payoff letters contributed to that deficiency. The defendants also argued that the sale was procedurally defective in that the notices of sale did not include all of the necessary information, and that the plaintiff had failed to reduce the deficiency by the $125,000 the defendants had paid. Finally, the defendants argued that the sale price was unconscionably low. On this point, both parties submitted appraisals: the plaintiff's appraiser (Cincotta) now valued the Property at $445,000, while the defendants' appraiser valued the Property at $1,030,000. The trial court held that the disparity between the two appraisals, coupled with possible irregularities in the process, required it to hear evidence on the issue of unconscionability.

¶ 23 The evidentiary hearing took place in October 2014. Each side presented testimony by its appraiser. Cincotta, the plaintiff's appraiser, testified as to how he had arrived at his conclusion that the Property was worth $445,000, including the comparable property listings and other relevant factors he had considered. The defendants' appraiser, Peter Soukoulis, offered generally similar testimony as to how he arrived at the valuation of $1,030,000. However, when the trial court asked to see the written information regarding Soukoulis's adjustments to the prices of the properties used for his comparables, Soukoulis said that he had left them at his office. Overall, the primary difference between the two appraisals was that Cincotta based his appraisal on the Property's continued use as a vacant single-family residence that would require substantial renovation, while Soukoulis believed that subdivision of the Property into four

buildable lots was both feasible and likely. In addition, two other witnesses testified. Sammons testified regarding the plaintiff's handling of the various short sale offers and the issuance of the payoff letters. Robert Kowalski, one of the defendants, testified that he viewed the Property as a good investment, and his friend Zoll was interested in purchasing it for the same reason—Zoll had already acquired several of the other nearby lots and was thinking about a larger development. He believed that Zoll did not bid on the Property at the sheriff's sale because not everyone likes purchasing property at a sheriff's sale, and Zoll may have felt it would be wrong to profit from the sale at Kowalski's expense.

¶ 24 On January 13, 2015, the trial court ruled on the pending motions. The trial court noted that, pursuant to section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law), it was required to enter an order confirming the sale unless: (1) the notices required by section 15-1507(c) of the Foreclosure Law were not given, (2) the terms of the sale were unconscionable, (3) the sale was conducted fraudulently, or (4) "justice was otherwise not done." 735 ILCS 5/15-1508(b) (West 2014). The trial court found that none of these factors was present. Despite some concerns raised by the defendants regarding the notices given, those notices complied with the requirements of the Foreclosure Law. As to whether the sale price of $525,000 was unconscionably low, the trial court found that the true value of the Property was somewhere between the plaintiff's appraisal of $445,000 and the amount of $775,000 offered by Zoll. The trial court stated that it would be speculative to consider the Property's value when subdivided because it was not currently subdivided. Further, it found that Soukoulis's estimate lacked credibility because he could not provide the court with the background information detailing his adjustments to the prices of comparable properties. The trial court therefore estimated the value of the Property at $625,000. When compared with this estimate, the sale

price was not unconscionably low. Finally, the trial court rejected the defendants' argument that justice was not done because the plaintiff had rejected the short sale offer of $775,000 for the Property. With respect to this argument, the trial court found credible Sammons's testimony that the plaintiff's requirements for a short sale—updated financial information and the debtor sitting for a debtor's examination—had not been met.

¶ 25 The trial court did not directly address the defendants' motion to reduce or abate the deficiency. However, it reduced the deficiency judgment by the $125,000 that the defendants had paid toward accrued interest, which the plaintiff admitted it had mistakenly failed to credit toward the amount due. Lastly, the trial court addressed the plaintiff's supplemental petitions for additional fees and costs not contained in the judgment of foreclosure. The defendants had argued that any fees and costs incurred before that judgment was entered (but not paid by the plaintiff until after the judgment) could not be recovered. The trial court rejected this argument and granted the supplemental petitions in full. That same date, the trial court entered a written order containing the above findings and rulings. The total amount of the deficiency judgment entered was $536,196.19.

¶ 26 The defendants' motion to reconsider was denied. Thereafter, they filed this appeal.

¶ 27 II. ANALYSIS

¶ 28 On appeal, the defendants challenge both the trial court's entry of summary judgment in favor of the plaintiff and its order confirming the judicial sale. We begin with the entry of summary judgment.

¶ 29 A. Summary Judgment

¶ 30 A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and that the

moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2014); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004).

¶ 31 The defendants first raise the issue of standing, arguing that summary judgment was not proper because there was a factual dispute about the plaintiff's ownership of the Note. According to the defendants, the plaintiff failed to establish its standing to bring the foreclosure action because the materials attached to the complaint left open the question of whether the Note was among the GWSB assets transferred to the plaintiff.

¶ 32 An action to foreclose upon a mortgage may be filed by a mortgagee, *i.e.*, the holder of an indebtedness secured by a mortgage, or by an agent or successor of a mortgagee. See *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010); 735 ILCS 5/15-1208 (West 2008); 735 ILCS 5/15-1504(a)(3)(N) (West 2008). Lack of standing to bring an action is an affirmative defense, and the burden of proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 33 Here, the defendants raised the issue of standing in their affirmative defenses and in their response to the plaintiff's motion for summary judgment. Thereafter, the plaintiff submitted an affidavit from Wagner (one of its employees), averring that the Note was in fact among the assets transferred from GWSB to the plaintiff and that the original loan documents and guaranties were in the plaintiff's possession. The plaintiff also submitted copies of these documents to the court. The defendant produced no conflicting evidence. Accordingly, it was

undisputed that the plaintiff owned the Note. The trial court did not err in finding that the plaintiff had established its standing to sue on the Note.

¶ 34 The defendants also argue that there was a question of fact regarding the amount of real estate taxes paid by the plaintiff. Once again, however, this contention is not supported by the record. Although the defendants filed an affidavit demonstrating that the amount of taxes paid by the plaintiff between September 1, 2012, and August 14, 2013, was less than the amount which the plaintiff claimed it had paid, this affidavit was rebutted by the plaintiff's evidence that it had paid the remaining amount of taxes prior to September 1, 2012. As the defendants offered no further evidence on this point, they cannot show the existence of any factual dispute that would prevent the entry of summary judgment.

¶ 35 Finally, the defendants argue that the prove-up affidavits and loss mitigation affidavit submitted by the plaintiff were not in the proper form. However, they did not raise this argument before the trial court and thus it is forfeited. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) ("A reviewing court will not consider arguments not presented to the trial court."); *Jeanblanc v. Sweet*, 260 Ill. App. 3d 249, 254 (1994) (arguments raised for the first time on appeal, even from an order which we review *de novo*, are deemed forfeited). In summary, we reject the defendants' arguments that the trial court erred in granting the plaintiff's motion for summary judgment and entering the judgment of foreclosure.

¶ 36 B. Order Confirming Sale

¶ 37 We next turn the the correctness of the trial court's order confirming sale. Once a foreclosed property has been sold at a sheriff's sale, the trial court *must* enter an order confirming the sale unless it finds that: "(i) proper notice of the sale was not given; (ii) the terms of the sale were unconscionable; (iii) the sale was conducted fraudulently; or (iv) justice was

otherwise not done." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18 (citing 735 ILCS 5/15-1508(b) (West 2014)). If any party objects to the confirmation, it is that party's burden to show why the sale should not be confirmed. *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 9.

¶ 38 Here, the defendants argue that the sale price was unconscionably low and that "justice was otherwise not done." As to the first argument, they argue that the trial court erred in two ways: it took the amount bid by the plaintiff at the sale as evidence of the Property's value, and it valued the Property without taking into consideration the Property's potential subdivision into at least three buildable lots. Because of these errors, they argue, the trial court erred in finding that the sale price was not unconscionably low when compared to the Property's value.

¶ 39 We agree with the defendants that, if the trial court had used the sale price in this case as evidence of the Property's value, that would have been error. Where the plaintiff in the foreclosure action is the high bidder at the judicial sale of the foreclosed property, the transaction is not an arm's-length transaction. Thus, although the price paid by a willing buyer to a willing seller is generally a sound indication of an item's value when the sale is at arm's length—see *Walsh v. Property Tax Appeal Board*, 181 Ill. 2d 228, 230 (1998)—it would be error to use this measure in a situation in which the plaintiff controlled both the offer and the acceptance and thus could set any price it liked.

¶ 40 However, contrary to the defendants' argument, that is not what the trial court did here. It did not use the sale price as evidence of the Property's value. Rather, the trial court weighed the evidence of value submitted by the parties. It found the plaintiff's appraiser (who valued the Property at $445,000) to be credible, and found the defendants' appraiser less credible in that he could not produce documentation supporting the adjustments he made to the values of

comparable properties. The trial court further rejected as speculative the defendants' contention that the Property should be valued as if it comprised four buildable lots. The trial court stated that, weighing all of these factors together, it chose a value ($625,000) in between the plaintiff's $445,000 appraisal and the $775,000 offered by Zoll in October 2013. The record does not reflect that the trial court considered the $525,000 bid by the plaintiff as evidence of the Property's value.

¶ 41 Further, as to the trial court's finding that the Property should not be viewed as comprising four buildable lots, that finding was supported by the evidence at trial. The defendants introduced a 2009 plat approval of a three-lot subdivision on the Property, but that plat permitted only three lots, not four, and it was a tentative approval, not a final one. There was no other evidentiary support for the conclusion of the defendants' appraiser that the Property could be subdivided into four buildable lots. Further, the trial court found the defendants' appraiser was less than credible. We will not second-guess such credibility determinations on appeal. See *In re Estate of Bennoon,* 2014 IL App (1st) 122224, ¶ 72 (the trial court "is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility, and to determine the weight their testimony and the other trial evidence should receive."); *Tully v. McLean,* 409 Ill. App. 3d 659, 670-71 (2011) (we "may not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn.").

¶ 42 The defendants also argue that, under section 15-1507(d) of the Foreclosure Law, a court may order property that is "susceptible of division" divided and a portion of it sold to satisfy the debt. 735 ILCS 5/15-1507(d) (West 2014). However, this provision merely permits a trial court to order the sale of less than all of the property if that is sufficient to satisfy the judgment of

foreclosure. It does not require a trial court to value the foreclosure property as if it were subdivided. For all of these reasons, we find no error in the trial court's finding that the sale price was not unconscionably low.

¶ 43 The defendants next argue that the trial court should not have confirmed the sale because "justice was not otherwise done" in this case. To support this argument, they point to the payoff letters issued by the plaintiff (which they contend were improperly inflated, inhibiting their ability to sell the Property) and the fact that the plaintiff told them, during the 120-day extension of the sale date, that it would not accept any short sale and intended to proceed to judicial sale. There are a variety of flaws in these arguments.

¶ 44 We begin with the defendants' contention that the plaintiff's payoff letters did not comply with section 15-1505.5(a) of the Foreclosure Law (735 ILCS 5/15-1505.5(a) (West 2012)). That statute provides that a mortgagee must, within 10 days of being requested to do so, "prepare and deliver an accurate statement of the total outstanding balance of the mortgagor's obligation that would be required to satisfy the obligation in full as of the date of preparation." *Id.* The statute further provides that "a payoff demand statement is accurate if prepared in good faith based on the records of the mortgagee." *Id.*

¶ 45 The defendants argue that the plaintiff's payoff letters did not comply with the statute because the letters were not "prepared in good faith based on the records of the mortgagee." There is no dispute that the payoff letters were prepared from plaintiff's computerized records concerning the amounts of principal, interest, and other costs and fees that had been incurred. However, the defendants contend that the plaintiff acted in bad faith by not updating its own records to reflect the trial court's reductions, in the judgment of foreclosure, of certain expenses claimed by the plaintiff. (As we have noted, the trial court reduced the attorney fees by $10,972

and the insurance costs by $17,078.67 from the amounts sought by the plaintiff in its motion for a summary judgment of foreclosure.) The defendants contend that, because the trial court struck those amounts from the judgment, those amounts should not have been included when the plaintiff calculated "the total outstanding balance of the mortgagor's obligation that would be required to satisfy the obligation in full" under section 15-1505.5(a).

¶ 46 The persuasiveness of the defendants' argument depends on why the trial court reduced the amounts of those expenses. Did the trial court take these reductions because it believed the expenses were never incurred by the plaintiff (or were not recoverable for some other reason)? If so, the plaintiff indeed may have acted in bad faith by including these amounts in the payoff letters. Or did the trial court find that the expenses had been legitimately incurred but had not yet been paid by the plaintiff? If that is the case, then the plaintiff could properly include the amounts in the payoff letters.

¶ 47 The difficulty with the defendants' argument is that we have no idea which of these two possibilities is correct, because the trial court's reason for the reductions does not appear in the record. The judgment of foreclosure contains only the strike-through of the initial amount requested in each category and the insertion of amount allowed. Further, the defendants have not provided us with any transcripts of statements by the trial court that would explain the reductions. In any appeal, it is the responsibility of the appellant to supply a complete record sufficient to permit review of the issues it wishes to raise on appeal. *In re County Treasurer and Ex Officio County Collector*, 373 Ill. App. 3d 679, 684 n.4 (2007). Here, the record submitted by the defendant does not permit us to find that the plaintiff acted in bad faith by including, in its payoff letters, the amounts stricken from the judgment of foreclosure. And although the October 2013 letter mistakenly included the $9,400 "place holder" amount as well as the actual amount of

one expense, it was undisputed that this inclusion was an accidental error, which would not equate to bad faith. Accordingly, we reject the defendants' argument that the payoff letters did not comply with section 15-1505.5(a).

¶ 48 The defendants argue that the fact that the plaintiff did not cooperate with their efforts to sell the Property during the 120-day extension of the sale date also shows that "justice was not otherwise done." However, the plaintiff was under no legal obligation to sell the Property in a private sale once the judgment of foreclosure had been entered. See *McCluskey*, 2013 IL 115469, ¶ 24 ("Once a judgment of foreclosure has been entered and the borrower's reinstatement and redemption rights have expired, the property shall be sold at a foreclosure sale unless the lender agrees to accept other terms."). The defendants also cry foul over the plaintiff's failure to include a credit for their $125,000 payment in the plaintiff's motion to confirm the sale, but the plaintiff admitted that this failure was an error, and the error was corrected prior to the trial court's entry of the order confirming the sale. None of these facts shows that justice was not done in the course of this foreclosure sale.

¶ 49 The defendants cite *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915 (1997), and *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385 (1997), as examples of cases in which courts set aside judicial sales because justice was not done. However, both of these cases involved situations in which a lender had actively obstructed or ignored the homeowner's legal right to redeem the property. The plaintiff's actions here in issuing the payoff letters for the full amount of its expenses and refusing to consider a private sale during the 120-day period do not rise to a similar level of malfeasance or interference with legal rights. Accordingly, *Espinoza* and *Deale* do not assist the defendants.

¶ 50 The remainder of the defendants' arguments relate to the deficiency judgment entered by the trial court. The defendants begin by arguing that the trial court should not have entered a deficiency judgment at all, because the plaintiff did not act in a commercially reasonable way. This argument lacks merit.

¶ 51 Unless the terms of a secured loan state otherwise, a debtor or a guarantor is liable for any deficiency resulting from the sale of the mortgaged property, so long as adequate notice of the sale was given and the sale was commercially reasonable. *Heritage Standard Bank & Trust Co. v. Heritage Standard Bank & Trust Co.*, 149 Ill. App. 3d 563, 567 (1986); see also *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 851 (1985) (guarantor could be held personally liable for deficiency after sale of collateral). Whether a sale was commercially reasonable is a question of fact. *Heritage Standard Bank*, 149 Ill. App. 3d at 571. The "key component in assessing commercial reasonableness" is the sale price (*id.*), although other factors may also be relevant, such as the time, place, and manner of sale; whether the debtor was present or adequately represented at the sale; the creditor's knowledge and capability; and whether the collateral was sold to the creditor (see 33 Ill. Law & Practice, Secured Transactions § 322 (West 2004)). "[M]ere inadequacy of price *** will not vitiate a sale" of collateral unless there is evidence of fraud, mistaken or illegal practice, or other significant irregularities. *Standard Bank & Trust Co. v. Callaghan*, 177 Ill. App. 3d 973, 977 (1988). The trial court's finding as to commercial reasonableness is entitled to great weight, and we will not reverse it unless it is against the manifest weight of the evidence. *Id.* at 978.

¶ 52 Further, although the reviewing court stated, in *Heritage Standard Bank*, 149 Ill. App. 3d at 571, that "[t]he creditor's right to a deficiency judgment may depend on whether the foreclosure sale was commercially reasonable," that court later modified its position to hold that

a lack of commercial reasonableness was not an absolute bar to recovery of a deficiency. See *Standard Bank & Trust*, 177 Ill. App. 3d at 982. Rather, "a creditor's failure to conduct a commercially reasonable sale creates a presumption that the value of the collateral is equal to the amount of the debt, and the creditor must rebut that presumption and show that the value of the collateral is equivalent to its sale price before it can recover damages." *Id*. at 981-82. In such a case, if the creditor's conduct resulted in the sale price being too low by an identifiable amount, that amount will be deducted from the deficiency judgment levied against the debtor. See *id*. at 982 (where the creditor's reliance on an appraiser whom it knew or should have known would submit an improper appraisal resulted in the sale price being $50,000 lower than it should have been, the deficiency would be decreased by $50,000).

¶ 53 As a preliminary matter, we note that the trial court did not directly address the defendants' motion to abate or reduce the deficiency and did not make an explicit finding as to the commercial reasonableness of the sale. However, its order confirming sale, which includes the entry of a deficiency judgment in the amount of $536,196.19 (thereby granting the defendants' request to reduce the amount of the deficiency by $125,000 to reflect the amount paid by the defendants in December 2013), implicitly contains a denial of the request to abate the deficiency in any other respect. In the absence of any indication to the contrary, we presume that this denial rests on an implicit finding by the trial court that the sale was commercially reasonable. As noted above, we must review this finding deferentially, reversing only if it is against the manifest weight of the evidence. *Id*. at 978.

¶ 54 Here, the basis for the defendants' argument that the sale of the Property was not commercially reasonable is the same as for their argument that justice was not otherwise done at the sale—the fact that the sale price of $525,000 was lower than the trial court's $625,000

estimate of the Property's value, coupled with the alleged irregularities in the plaintiff's payoff letters and its refusal to consider a private sale during the 120-day extension of the sale date. However, the case law regarding commercial reasonableness suggests that that concept focuses solely on the terms of the sale itself. We are not aware of any authority supporting the defendants' argument that conduct beyond the manner and terms of the sale is relevant to commercial reasonableness. Thus, the plaintiff's actions with respect to the payoff letters and its unwillingness to entertain a short sale do not fall within the scope of the "irregularities" or fraud that would demonstrate commercial unreasonableness. And the $100,000 difference between the trial court's estimate of value and the Property's sale price cannot, standing alone, establish a lack of commercial reasonableness. *Id*. at 977. Accordingly, the defendants have not shown that the deficiency should be reduced because the sale was not commercially reasonable.

¶ 55 Last of all, the defendants raise a host of arguments that various amounts should not have been included in the deficiency judgment. Their first argument is that the order confirming the sale should not have included $99,852 of postjudgment interest. Section 2-1303 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1303 (West 2014)) provides that judgments "shall draw interest at the rate of 9% per annum until satisfied." The defendants argue, however, that the statutory interest rate is superseded here because the judgment of foreclosure contained a different rate: it stated that advances made in order to protect the judgment would "bear interest *** at the 10021 installment contract rate." Because this "10021 installment contract rate" is not defined elsewhere (it appears to have been inadvertently left in from some other judgment typed up by the plaintiff's attorney), the defendants argue that the plaintiff cannot recover any postjudgment interest.

¶ 56 The plaintiff's response is two-fold. First, the defendants forfeited this argument by failing to raise it before the trial court. See *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) (reviewing courts will not consider arguments not presented to the trial court). Second, as stated in the judgment, the erroneously-inserted rate applies only to interest on postjudgment advances of certain costs (none of which have been identified by the defendants), not to the interest on the amount of the foreclosure judgment as a whole. We agree with both of these contentions, and decline to find any error.

¶ 57 The defendants next argue that certain language in paragraph 15 of the judgment of foreclosure prevents the imposition of any deficiency judgment. That paragraph states, in pertinent part:

> "Plaintiff[,] or any of the parties herein, may become the purchaser at the sale. If Plaintiff is the successful bidder at the sale, the amount due the Plaintiff, plus all costs, advances and fees hereunder, shall be taken as a credit on its bid."

The plaintiff argues that this paragraph simply means that, if it was the successful bidder, a credit in the amount of the judgment could be applied with the result that the plaintiff would not have to tender cash to the sheriff. The defendants argue that, under the literal words of the paragraph, the entire amount owed to the plaintiff ($959,033) was required to be applied as a credit, with the result that there would be no deficiency.

¶ 58 A judgment must be construed "like other written instruments[,] with the determinative factor being the intention of the court as gathered from all parts of the judgment itself." *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill.App.3d 597, 605 (1999). Just as we do when construing a statute, in construing a judgment we presume that the court did not intend absurd, inconvenient, or unjust consequences. See *Solon v. Midwest Medical Records Association, Inc.*,

236 Ill. 2d 433, 440-41 (2010). Here, nothing about the judgment as a whole supports reading it as mandating that any successful bid by the plaintiff would necessarily wipe out any deficiency owed. Rather, the interpretation advanced by the plaintiff reflects the trial court's reasonable intention to permit the plaintiff to avoid having to tender any cash if its successful bid was less than the judgment amount. We reject the defendants' arguments to the contrary.

¶ 59 The defendants next object to the inclusion of certain late fees in the judgment, contending that these fees should not have continued to accrue once the Note was foreclosed. However, the defendants never raised this argument before the trial court. Accordingly, it is forfeited. *Hytel Group*, 405 Ill. App. 3d at 127. A party may not look to the appellate court to provide a remedy that it failed to seek in the trial court.

¶ 60 Finally, the defendants argue that the Foreclosure Law does not permit a mortgagee to recover, through the order confirming the sale, costs that were incurred prior to the entry of the judgment of foreclosure. In support, they note that the applicable statutory provision, section 15-1508(b)(1) of the Foreclosure Law (735 ILCS 5/15-1508(b)(1) (West 2014)), allows the recovery only of those costs that "arise" between the judgment and the confirmation. They argue that costs that were incurred prior to the judgment do not "arise" after the judgment, even if they were not paid by the mortgagee until after the judgment was entered.

¶ 61 The primary vehicle by which mortgagees can recover expenses associated with the preservation of the foreclosed property during the foreclosure is section 15-1504 of the Foreclosure Law (735 ILCS 5/15-1504 (West 2014)). See *BMO Harris Bank, N.A. v. Wolverine Properties, LLC*, 2015 IL App (2d) 140921, ¶ 20. Subsection (d) of that provision permits mortgagees to seek attorney fees, real estate taxes, insurance, and other fees and costs incurred during the foreclosure. 735 ILCS 5/15-1504 (West 2014). Subsection (e)(3) provides that, if not

timely redeemed, the mortgaged property may "be sold as directed by the court, to satisfy the *amount due to the plaintiff as set forth in the judgment*, together with the interest thereon at the statutory rate." (Emphasis added.) 735 ILCS 5/1504(e)(3) (West 2014). Thus, the mortgagee may recover any expenses allowable under section 15-1504 that were included in the amount of the judgment of foreclosure, along with the interest on that judgment that accrues thereafter. A mortgagee "must seek to include in the judgment of foreclosure all debts sought; that is a definitive purpose of the judgment of foreclosure." *Wolverine Properties*, 2015 IL App (2d) 140921, ¶ 29.

¶ 62 However, a mortgagee may also recover certain expenses that arise after the judgment of foreclosure and before the entry of the order confirming sale. 735 ILCS 5/15-1508(b)(1) (West 2014) (the order confirming sale may, *inter alia*, "approve the mortgagee's fees and costs arising between the entry of the judgment of foreclosure and the confirmation hearing, those costs and fees to be allowable to the same extent as provided in the note and mortgage and in Section 15-1504."). In this case, the deficiency judgment in the order confirming sale included $38,034 in real estate taxes, receiver fees, insurance costs, and appraisal costs, most of which were not paid by the plaintiff until after the entry of the judgment of foreclosure, although many of those costs had accrued before then.

¶ 63 Recent cases from this court have set limits on the expenses that can be recovered under section 15-1508(b). In *Bank of America, N.A. v. Higgin*, 2014 IL App (2d) 131302, ¶¶ 27-29, we held that a plaintiff could not recover for a real estate tax payment it made *after the sheriff's sale*, because that expenditure was made to benefit the purchaser of the property, not to preserve the property prior to sale. Addressing the other end of the timeline, we have also held that a plaintiff could not recover a real estate tax payment made *before the judgment of foreclosure*, which the

plaintiff had failed to seek prior to the entry of that judgment (or even prior to the sale). See *Wolverine Properties*, 2015 IL App (2d) 140921, ¶ 27. Because the sheriff relies on the amount of the foreclosure judgment in conducting the sale (as do potential bidders, in deciding whether and how much to bid), a plaintiff must seek to ensure that all of the expenses it wishes to recover are included in that judgment. *Id*. at ¶ 29. Because the plaintiff in *Wolverine Properties* had not provided any reason other than its own inadvertence for failing to include a $500,000 real estate tax payment in its prove-up affidavit, it could not recover that amount as a deficiency judgment against the defendant. *Id*. ("recovery must be governed by the amount sought in the foreclosure judgment and by those costs incurred *between* the judgment and the sale" (emphasis in original)).

¶ 64 The defendants' argument is that, as a matter of law, expenses incurred before the judgment was entered, but paid in the period between the judgment and the sale, cannot be recovered under section 15-1508(b) because they did not "arise" during that period. We reject this reading of "arise." When interpreting a statute, our task is to "ascertain and give effect to the legislature's intent." *Lieb v. Judges' Retirement System*, 314 Ill. App. 3d 87, 92 (2000). As noted above, when construing a statute we presume that the legislature did not intend absurd, inconvenient, or unjust consequences. See *Solon*, 236 Ill. 2d at 440-41. If "arise" is defined as the defendants suggest, to mean all expenses that a plaintiff knows that it is in the process of incurring, that term would include expenses for which the plaintiff has not yet been billed or the amount of which is otherwise unknown. It would be absurd to require a plaintiff to include amounts that are not yet known in a prove-up affidavit for a foreclosure judgment. Moreover, we note that both *Higgin* and *Wolverine Properties* adopt the time when an expense is paid as the relevant date for determining when an expense arose: in *Higgin*, the tax payment was made after the sale, and in *Wolverine Properties* the tax payment was made before the judgment.

Accordingly, we reject the defendants' interpretation of "arise" as excluding any expense that the plaintiff had reason to know it was incurring (even if the plaintiff did not yet know the amount of that expense), but failed to include in the expenses requested in the judgment of foreclosure. The trial court did not abuse its discretion in permitting the plaintiff to recover for expenses it paid between the date of the foreclosure judgment and the date of the sale.

¶ 65 Nevertheless, there is one error that appears on the face of the record: a portion of the $38,034.18 about which the defendants complain is, in fact, not recoverable under section 15-1508(b). In its appellate brief, the plaintiff states that it made a $11,647.57 real estate tax payment over two months before the foreclosure judgment was entered. Yet it did not file any supplemental prove-up affidavit seeking to include this amount in the judgment of foreclosure. Under *Wolverine Properties*, this amount should not have been included in the deficiency judgment entered against the defendants.

¶ 66 Pursuant to Illinois Supreme Court Rule 366 (a)(5) (eff. Feb. 1 1994), we may modify the judgment so that it conforms to the applicable law. Accordingly, we subtract $11,647.57 from the deficiency judgment entered in the trial court's order confirming the sale. In all other respects, we affirm the trial court's order dated January 13, 2015, confirming the sale.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the circuit court of Lake County's October 4, 2013, judgment of foreclosure, and its order of January 13, 2015, confirming the sale, but modify the latter order to decrease the amount of the deficiency judgment to $524,548.62 ($536,196.19 minus $11,647.57).

¶ 69 Affirmed as modified.