

NOTICE  
Decision filed 08/05/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150227-U

NO. 5-15-0227

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

U.S. BANK NATIONAL ASSOCIATION,	)	Appeal from the
Successor by Merger of U.S. Bank National	)	Circuit Court of
Association N.D.,	)	Madison County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CH-702
	)	
SERGIUS A. RINALDI,	)	Honorable
	)	Ben L. Beyers II,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Welch and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the record does not show by a preponderance of the evidence that the defendant filed a complete application for loan modification assistance under MHA/HAMP which would deem him to have "applied for assistance," the trial court did not abuse its discretion in approving the report of sale and distribution, confirming the sale, and order for possession of the foreclosed upon property.

¶ 2 The defendant, Sergius A. Rinaldi, appeals *pro se* an order of the circuit court approving the report of sale and distribution, confirming the sale, and for possession of foreclosed upon property. He argues that the court erred in entering such an order while his

application for assistance under the Making Home Affordable (MHA)/Home Affordable Modification Program (HAMP) was pending. For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 On September 16, 2013, U.S. Bank National Association (the Bank) filed a verified complaint to foreclose a mortgage and for other relief regarding the property at 3 West Estates Lane, Glen Carbon, Illinois, against the defendant, his wife, and others. The complaint alleged that the defendant had procured a mortgage through the Bank in June 2003 in the amount of \$200,000 and had defaulted. In his answer, the defendant stated that he had received a HAMP modification program package from the Bank on March 14, 2013. Attached to the defendant's answer was a letter from the Bank setting forth the required documentation and stating that if the Bank did not receive a "substantially complete package" (which, in a footnote on the same page, it defined as "a completed and signed Request for Modification Form and Affidavit ('RMA') and evidence of your income") prior to the seventh business day preceding a scheduled foreclosure sale, it would not consider the loan modification request and the foreclosure would proceed as scheduled.

¶ 5 On or about February 27, 2014, the Bank filed a motion and memorandum in support of summary judgment. Included in the Bank's filing was a loss mitigation affidavit which, under the heading of HAMP, set forth a detailed communications list spanning from March 2013, when the package was issued, until February 2014, with the last entries as follows: "2/5/14 RM made a follow up review call and sent email to borrower advising that the requested documents have not been received. 2/14/14 IRS document received, documents will be uploaded to LDRS."

¶ 6 On March 13, 2014, the date of the summary judgment hearing, the defendant sought a 90-day continuance, alleging that he had retained counsel and that counsel needed time to "investigate and analyze all parts of the law in a [j]udicial [f]oreclosure [p]rocedure." Nowhere in this pleading was any loan modification program discussed. The court granted the defendant's motion, but reset the hearing for April 17, 2014.

¶ 7 On April 17, 2014, the defendant again sought a continuance, alleging that counsel had been unable to obtain all relevant documents pertaining to this case from the plaintiffs. The court denied the motion to continue after argument.

¶ 8 On that same date, the court entered summary judgment against the defendant and his wife in the amount of \$217,477.03, with the statutory right of redemption set to expire on July 16, 2014. The property was set for public sale with any deficiency as a judgment against the defendant. On May 12, 2014, a certificate of mailing was filed stating that the order for default, order for summary judgment and judgment of foreclosure and sale entered on April 17, 2014, was mailed on May 6, 2014, to the defendant and others.

¶ 9 On May 12, 2014, the defendant filed a motion to vacate the notice of entry of default and judgment of foreclosure, alleging that he was not given proper notice as he received the letter two days before the 30-day limit to vacate the order and that he believed the court had stated that it would take the April 17, 2014, motion to continue "under advisement"; that, to date, discovery had not been received from the Bank; that federal laws needed to be investigated by counsel; and that the lender "violated HAMP requirements and did not offer loan modification."

¶ 10 On July 7, 2014, a notice of sale was filed stating that pursuant to the judgment of foreclosure on the property, a judicial sale would be held on July 23, 2014. Sale of the property on that date did not occur, however, and on March 30, 2015, another notice of sale was filed stating that a judicial sale would be held on April 22, 2015. On May 4, 2015, a motion for an order approving the report of sale and distribution, confirming the sale, and for possession was filed, which included a petition for additional attorney fees, alleging that the judgment to the Bank should be \$255,490.67 and that the proceeds from the sale were \$254,366.63, leaving a deficiency to be adjudged to the defendant in the amount of \$1,424.04.

¶ 11 On May 14, 2015, the court entered an order approving the report of sale and distribution, confirming the sale, and for possession. On that same date, the defendant filed a motion to dismiss, void, and rescind the order approving the report of sale and distribution, confirming the sale, and for possession, alleging violations of the MHA/HAMP loss mitigation guidelines; that he had previously faxed the loan modification program documents to the Bank and that they had responded that they were never received; that he had refaxed the documents and still had not received a response; that it was illegal to proceed with foreclosure without response regarding MHA/HAMP; lack of compliance with section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law (the Foreclosure Law) (735 ILCS 5/15-1508(d-5) (West 2014)); a material violation regarding this compliance; and that the sale of the property was not done correctly. The defendant argued that due to these actions, his due process rights were violated. Attached to this pleading was correspondence dated May 18, 2015, in which the Bank "acknowledges receipt of your loss mitigation \*\*\* application \*\*\*

and ha[s] determined that the application is incomplete. The following documents need to be received in our office by 06/18/2015 in order for us to deem your package facially complete \*\*\* and conduct our initial review." The letter requested self-employment income documentation; 2014 income tax return and/or last four months of bank statements; complete 4506-T signed and dated by all contributing parties; and documentation showing receipt of social security income. In this same letter, the Bank stated a " 'facially complete package' consists of a completed and signed Request for Mortgage Assistance ('RMA') or Uniform Borrower Assistance Form ('USAF'), IRS Form 4506T, Dodd-Frank Certification (if applicable), and all income documents as outlined in the RMA or UBAF." The defendant's motion was denied.

¶ 12

#### ANALYSIS

¶ 13 On appeal, the defendant's argument is that the trial court erred in denying the defendant's motion to dismiss, void, and rescind the order approving the sale and distribution, for confirmation of the sale, and for possession when the foreclosure and sale occurred in violation of MHA/HAMP loss mitigation guidelines.

¶ 14 Issues that could have been raised, but were not, are waived. *People v. Williams*, 209 Ill. 2d 227 (2004). Because the defendant has presented one issue for appeal, whether the court violated the Foreclosure Law—most specifically, section 15-1508(d-5), in approving the sale, distribution, and ordering possession, all other claims previously asserted by the defendant at trial are waived. Therefore, this court need only deal with this singular issue.

¶ 15 "The provisions of section 15-1508 have been construed as conferring on circuit courts broad discretion in approving or disapproving judicial sales. [Citation.] A court's

decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion. [Citation.]" *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). "An abuse of discretion occurs only where no reasonable person would take the view adopted by the circuit court. [Citation.]" *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 67 (2007).

¶ 16 Section 15-1508(d-5) states:

"The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at any time prior to the confirmation of the sale, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale. \*\*\*." 735 ILCS 5/15-1508 (West 2014).

¶ 17 The case of *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, is analogous to the case at bar. In *CitiMortgage*, the plaintiffs sought foreclosure against the defendants in October 2009. The defendants sought assistance through MHA/HAMP. The defendants received correspondence from CitiMortgage offering them the opportunity to participate in a trial period plan (TPP) under HAMP based upon the income information defendants had provided over the phone and that, to do so, they needed to provide other documentation. The defendants provided some, but not all, of the required information. On January 22, 2010, the

court entered a default order for foreclosure and sale pursuant to the Foreclosure Law. The defendants provided to CitiMortgage additional documentation in further effort to modify. In February 2011, over one year later, the property proceeded to judicial sale, and a motion to confirm the sale was set for April 21, 2011. The defendants filed a motion to set aside the sale of the property, alleging that (1) they had applied for assistance under HAMP and (2) the property proceeded to sale in material violation of HAMP. On January 5, 2012, a hearing on both of the motions was held. The trial court granted the confirmation of sale and denied the defendants' motion to set aside the sale.

¶ 18 The decision in the *CitiMortgage* case came down to the definition of "applied for assistance" under HAMP because, without the defendants having "applied for assistance" under the program, their home could not be sold in "material violation" of the program.

¶ 19 "[I]n order to 'apply for assistance \*\*\*' pursuant to section 15-1508(d-5) of the Foreclosure Law the borrower must submit the documentation required by the servicer to determine the borrower's eligibility and verify his or her income." *CitiMortgage*, 2014 IL App (1st) 122824, ¶ 66. Because the defendants, in that case, failed to provide *all* of the documentation required for the plaintiff to determine eligibility, the defendants cannot be said to have "applied for assistance." Additionally, because the defendants in that case did not "apply for assistance," they could not claim that the sale of the property was in "material violation" of the program. Therefore, in that case, the appellate court affirmed the trial court's holding.

¶ 20 Much like *CitiMortgage*, the defendant in this case submitted an "interest" in HAMP modification—once in October 2013 and again in mid-May 2015, the latter being at the

approximate time the Bank sought an order approving and confirming the sale of the property. Nowhere in the record does it show that at either time the defendant provided *all* of the required documentation requested in order to proceed with determination of his eligibility in the program. In fact, the February 18, 2014, loss mitigation affidavit which was filed by the Bank on or about February 27, 2014, shows numerous phone attempts by agents for U.S. Bank Loss Mitigation to contact, and discussions with, the defendant with several notations that additional documents were necessary and still outstanding. The last notation stated, "2/14/14 IRS document received, documents will be uploaded to LDRS." There is nothing in the court record that demonstrates that the October 2013 packet was a complete application, even after the February 2014 IRS document was received. Further demonstrating that the October 2013 packet was incomplete is the May 2015 acknowledgment of request for loss mitigation options letter provided by the defendant, which, again, requests taxes, forms, and documentation of social security income. There is nothing in the record that shows that the defendant affirmatively provided *all* of the necessary documents to even determine his eligibility for the program. Certainly, as the burden is on the defendant, he had the opportunity to provide copies to the court of any documents that he had previously provided to the Bank that would show his application was indeed complete, if that were the case. We do not find any indication of a complete package upon review of the record. Therefore, because neither packet was complete, the defendant did not "apply for assistance" as designated under the Foreclosure Law. As such, the second allegation presented by the defendant—that the foreclosure occurred in "material violation" of the program—is moot.



¶ 21 Because the record does not show by preponderance of the evidence that the defendant applied for assistance under the Foreclosure Law, the trial court did not abuse its discretion in its order approving report of sale and distribution and confirming the sale and order for possession on the property in question.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

¶ 24 Affirmed.