

No. 1-14-3504

2017 IL App (1st) 143504-U

FIFTH DIVISION
January 27, 2017

No. 1-14-3504

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HSBC MORTGAGE SERVICES, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	07 CH 22311
)	
ANDJELKO GALIC,)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

HELD: The circuit court did not err in granting summary judgment in favor of plaintiff. The circuit court did not err in denying defendant's motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), and did not err in denying his motion to stay enforcement of final judgment during the pendency of the appeal or in granting plaintiff attorneys' fees.

¶ 1 In this mortgage foreclosure action, defendant Andjelko Galic appeals a circuit court order granting summary judgment in favor of plaintiff, HSBC Mortgage Services, Inc. Defendant argues that the verified answers and amended affirmative defenses he submitted in response to the plaintiff's complaint to foreclose a mortgage on real property owned by him and his wife raised triable issues of material fact which should have precluded the circuit court from granting summary judgment in plaintiff's favor. Defendant further argues that the affidavits plaintiff attached in support of its motion for summary judgment did not comply with the requirements of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which prescribes the form an affidavit must take when it is submitted in support of or in opposition to a motion for summary judgment. Defendant finally argues the circuit court abused its discretion by failing to impose sanctions against plaintiff pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), which authorizes sanctions against a party who files a pleading not well grounded in fact or warranted by existing law. We disagree with each of these contentions and for the reasons that follow we affirm the judgments of the circuit court.

¶ 2 **BACKGROUND**

¶ 3 This appeal concerns residential property located at 801 S. Harvey Avenue, Oak Park, Illinois. In his discovery deposition conducted on September 16, 2009, defendant stated that he and his wife Kristin M. Galic purchased the subject property at an estate sale. Defendant claimed that he and his wife resided at the property for approximately ten years.

¶ 4 Over the course of these years the couple refinanced their mortgage loan on the property several times. In September 2005, defendant and his wife executed an adjustable rate note in favor of plaintiff to obtain a loan in the principal amount of \$275,000.00. The note for this loan was secured by a mortgage on the subject property.

¶ 5 Defendant allegedly defaulted under the terms of the mortgage and note by failing to make scheduled monthly payments. On August 17, 2007, plaintiff filed a complaint against defendant and his wife, as well as unknown owners and nonrecord claimants seeking a judgment of foreclosure pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1504(a)(1) through (a)(3) (West 2008)). In the complaint, plaintiff alleged the mortgage loan became due on May 1, 2007, and that a default had occurred 30 days thereafter.

¶ 6 On November 21, 2007, plaintiff filed its first motion for summary judgment along with a motion for an order of a default judgment. On January 2, 2008, the circuit court granted plaintiff's motion for summary judgment of foreclosure and for default judgment. However, the court subsequently granted defendant's motion to vacate these judgments and allowed him additional time to file an answer or otherwise plead to the foreclosure complaint.

¶ 7 On April 8, 2008, defendant filed an answer to the complaint raising various affirmative defenses. The circuit court struck the affirmative defenses without prejudice and granted defendant additional time to file amended affirmative defenses, which he filed on September 4, 2008.

¶ 8 On November 19, 2008, plaintiff filed the first of three additional motions for summary judgment, including the last one which was granted on February 15, 2013. On this date, the circuit court granted summary judgment in favor of plaintiff and entered a judgment for foreclosure and judicial sale of the subject property. Defendant's wife was found in default. In decreeing the foreclosure, the court found that the note was in default and that there was due, at the time of the default, the sum of \$270,179.85 in principal, and that the total due, as of the time of the decree, including interest, advances for taxes and hazard insurance, costs and attorneys' fees, amounted to

\$450,008.49. On June 28, 2013, the court denied defendant's motion to reconsider.

¶ 9 On April 24, 2014, the circuit court entered an order approving the report of sale and distribution, confirming the sale, and granting possession of the property to the successful bidder. On October 14, 2014, the court entered an order denying defendant's motion to reconsider the court's order of April 24th and also denied his motion for sanctions. In his motion for sanctions, defendant claimed that plaintiff and its attorneys were aware that there was no default on the loan and that plaintiff had failed to correct its errors. The court also denied defendant's subsequent motion to stay enforcement of final judgment during the pendency of the appeal. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant challenges the circuit court's rulings on summary judgment. Review of a circuit court's ruling granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171, (2003). The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 37.

¶ 12 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). "To resist a motion for summary judgment, the opponent must provide some factual basis that would arguably entitle him to judgment." *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008).

¶ 13 Defendant first contends that the allegations in his verified answer raised issues of material fact which should have precluded the circuit court from granting summary judgment in plaintiff's favor. In his verified answer to the foreclosure complaint defendant alleged the following: his monthly mortgage payment was increased for alleged lack of insurance and for non-payment of property taxes; plaintiff refused to specify the amount it paid for property taxes and the property tax period covered by the payments; plaintiff and its predecessors erred in distributing funds held in escrow; plaintiff failed to correctly apply the escrowed funds; plaintiff charged him for liens that were unenforceable; and plaintiff failed to account for distributed funds and otherwise failed to act in good faith.

¶ 14 Our review of relevant case law indicates that these conclusory allegations in defendant's answer were insufficient to create issues of material fact that would preclude summary judgment. Where a party moving for summary judgment provides evidentiary facts which, if not contradicted, would entitle that party to judgment, the party opposing the motion cannot rely solely upon his complaint or answer to raise issues of material fact. *Burks Drywall, Inc. v. Washington Bank & Trust Co.*, 110 Ill. App. 3d 569, 575 (1982). A party opposing summary judgment may not stand on his or her pleadings to create genuine issues of material fact (*Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49) and a verified answer to a complaint does not substitute for specific affidavits in a summary judgment proceeding. *Fryison v. McGee*, 106 Ill. App. 3d 537, 539 (1982). "The fact that the pleading may be verified will generally not affect this rule since the pleading will rarely (and should not) match the specificity of the affidavit." *Central Clearing, Inc. v. Omega Industries, Inc.*, 42 Ill. App. 3d 1025, 1028 (1976).

¶ 15 Here, the allegations in defendant's verified answer are not only conclusory and lacking in factual support, they also fail to rebut the averments made in the affidavits plaintiff submitted in support of its motion for summary judgment. Defendant verified under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2008)) that the allegations in his answer were based upon his beliefs. Our courts have determined that allegations which purport to contradict averments of fact in an affidavit, based only upon information and belief, are insufficient to create issues of material fact precluding summary judgment. *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971).

¶ 16 Defendant next contends the circuit court erred in granting summary judgment in favor of plaintiff because a factual dispute existed as to whether the mortgage loan was actually in default at the time the foreclosure complaint was filed on August 17, 2007. Defendant alleged that on or about June 6, 2007, plaintiff agreed to accept regular monthly payments and not hold him in default until the parties could verify the exact amount of property tax payments made by plaintiff and the amount of credit defendant should receive for overcharges and/or errors that were made by plaintiff and prior lender the Homeowners Loan Corporation.

¶ 17 Defendant claimed that on or about October 13, 2006, the Homeowners Loan Corporation informed him that the office of the Comptroller of Currency had determined that he was due a reimbursement in the amount of \$6,218.99, which represented "illegal fees and other prohibited charges." According to the defendant, based upon this representation, the servicer for the current mortgage agreed to forbear from foreclosing until the amount of this reimbursement, along with the tax payment, could be verified. Defendant testified that the servicing representative told him that if he continued making regular monthly payments, that the plaintiff

would "suspend" efforts to collect the disputed amounts. Defendant argued that by inducing him to perform under these new terms, plaintiff "waived its right to strict performance."

¶ 18 Plaintiff denied these allegations and challenged their accuracy. Defendant nevertheless contends that these allegations were sufficient for the circuit court to deny plaintiff's motion for summary judgment. We disagree.

¶ 19 "Waiver is the voluntary and intentional relinquishment of a known and existing right and may be either express or implied." *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 462 (1995). Parties to a contract may waive provisions contained in the contract for their benefit and such waiver may be established by conduct indicating that strict compliance with those contract provisions is not required. *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 343 (1988). This doctrine prevents a waiving party from lulling another into believing that strict compliance will not be required and then later filing suit for noncompliance. *Wolfram Partnership Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 223-24 (2001).

¶ 20 The mortgage at issue contains a non-waiver clause in paragraph 12 which provides that "[a]ny forbearance by Lender in exercising any right or remedy * * * shall not be a waiver of or preclude the exercise of any right or remedy." In addition, the note also contains a non-waiver provision in paragraph 7(D) which provides that even if the lender does not require the defaulted borrower to pay immediately, it still retains the right to do so at a later time. These non-waiver provisions indicate that even if plaintiff agreed to forbear from foreclosing for a mortgage default, the agreement did not result in a waiver of its right to seek foreclosure at a later date. See, e.g., *LaSalle National Bank v. Helry Corp.*, 136 Ill. App. 3d 897, 904 (1985). There is no merit to the defendant's waiver defense.

¶ 21 Defendant next contends that the affidavits plaintiff submitted in support of its motion for summary judgment on its foreclosure claim were not in compliance with Supreme Court Rule 191(a) (eff. Jan. 4, 2013). This rule provides in relevant part:

"Affidavits 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(a) (eff. Jan. 4, 2013).

¶ 22 "In summary judgment proceedings, the purpose of affidavits is to show whether the issues raised are genuine and whether each party has competent evidence to support his position." *Wiszwaty v. Baumgard*, 257 Ill. App. 3d 812, 819 (1994). Our review of the challenged affidavits reveal that they complied with the requirements of Rule 191(a).

¶ 23 The challenged affidavits provided details regarding the mortgage default. Each of the affiants attested that they were familiar with the terms of the mortgage and note. The affiants indicated that the defendant had not satisfied his obligations under the mortgage and note and identified the amount due and owing. The affiants also stated they had personal knowledge of the plaintiff's business records and explained how these records were kept in the regular course of business for the purpose of servicing mortgage loans, which satisfied the foundational requirements for admission of those business records. See Ill. S. Ct. R. 236(a) ("Any writing or record * * * shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business * * *.") Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 24 The deficiencies defendant identified in the challenged affidavits such as the mislabeling of an exhibit, the failure to attach a certain exhibit, or the misstatement of a dollar amount, were all minor technical deficiencies which did not render the affidavits improper since our courts have determined that "minor technical deficiencies contained in an affidavit does not preclude its consideration because substance and not form controls." *Wiszowaty*, 257 Ill. App. 3d at 819. Moreover, these minor deficiencies were either reconciled by the record or were uncontradicted by the defendant. Defendant did not submit any counteraffidavits or any other evidence contradicting the affiants' sworn statements. "When affidavits presented in support of summary judgment are not contradicted by counter-affidavits, they must be taken as true, even though the adverse party's pleadings allege contrary facts." *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1999).

¶ 25 We hold that the affidavits plaintiff submitted in support of its motion for summary judgment on its foreclosure claim were in compliance with Rule 191(a). Therefore, we find the circuit court did not err in granting summary judgment in favor of plaintiff.

¶ 26 Defendant finally contends the circuit court erred in denying his motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), which authorizes sanctions against a party who files a pleading not well grounded in fact or warranted by existing law. He also argues the court erred in denying his motion to stay enforcement of final judgment during the pendency of the appeal and in granting plaintiff attorneys' fees.

¶ 27 In support of these arguments the defendant contends that for "reasons that are not apparent on the record," the court ignored certain facts, accepted plaintiff's false claim that his answer to the foreclosure complaint was not verified, tolerated plaintiff's failure to comply with

his discovery requests, ignored applicable standards, and denied his motion for sanctions without an explanation.

¶ 28 Although the circuit court did not state the reasons for denying defendant's motion for sanctions, the order denying the motion was entered pursuant to a written motion by plaintiff. As a result, we can assume that the court's reasons for denying the motion for sanctions are those set out in the plaintiff's motion. See, *e.g.*, *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 528 (1997); *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Board*, 2016 IL App (1st) 143045, ¶ 61. More importantly, defendant failed to provide this court with a sufficient record of the proceedings in the circuit court to support his various claims of error. "Our supreme court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record." *Gataric v. Colak*, 2016 IL App (1st) 151281, ¶ 29.

¶ 29 Defendant chose not to file any reports of proceedings or to prepare a bystander's report. Without a record of the proceedings, we must presume that the circuit court acted in conformity with the law and with a sufficient factual basis for its findings. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from an incomplete record will be resolved against the appellant. *Id.*

¶ 30 Accordingly, for the reasons set forth above, we affirm the judgments of the circuit court of Cook County.

¶ 31 Affirmed.