

No. 1-15-3435

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

PNC BANK, NATIONAL ASSOCIATION, sbm to	)	Appeal from the
National City Real Estate Services, LLC,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
ALEKSANDR STRELNIKOV and	)	
VIKTORIYA STRELNIKOV,	)	No. 09 CH 7195
	)	
Defendants-Appellants.	)	
	)	
UNKNOWN OWNERS and NON-RECORD	)	
CLAIMANTS, THE COMMONS OF SURREY	)	
WOODS HOMEOWNERS' ASSOCIATION,	)	Honorable
	)	Pamela McLean Meyerson,
Defendants.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred the judgment.

O R D E R

¶ 1 *Held:* The circuit court's order granting summary judgment in favor of plaintiff PNC Bank is reversed as the affidavits provided in support of the motion did not comply with Illinois Supreme Court Rule 191(a).

¶ 2 Defendants Aleksandr and Viktoriya Strelnikov appeal the circuit court's grant of summary judgment in favor of plaintiff PNC Bank, as successor by merger to National City Mortgage Company, on its complaint for foreclosure of a mortgage on defendants' residential property and the final order approving the sale and distribution of proceeds. On appeal, defendants contend the circuit court erred in denying their motion to strike the affidavit of a PNC Bank employee because the affidavit lacked sufficient detail and did not demonstrate the employee had the requisite personal knowledge to support her attestations. For the reasons that follow, we agree that the affidavits in support of PNC Bank's motion for summary judgment are insufficient, thus requiring reversal of the judgment of the circuit court.

¶ 3 On February 13, 2009, National City filed a complaint seeking judicial foreclosure of a mortgage agreement between National City and defendants for residential property located at 362 Ascot Lane in Streamwood. The complaint alleged that defendants, as mortgagors, had executed a mortgage in the amount of \$204,250 that was recorded in Cook County on April 5, 2004. The foreclosure was based on defendants' failure to pay the monthly payment since December 2008.

¶ 4 On November 3, 2009, defendants filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2008)), asserting that National City did not attach to the complaint a copy of the notice that the loan was being accelerated. The circuit court denied that motion and ordered defendants to answer or otherwise respond to the amended complaint. PNC Bank was substituted as plaintiff for National City after the merger of those entities. On November 30, 2009, defendants filed an

answer to the amended complaint, raising as an affirmative defense that National City/PNC Bank did not send the required acceleration notice.

¶ 5 PNC Bank moved to strike and dismiss defendants' affirmative defense pursuant to section 2-619(9) of the Code (735 ILCS 5/2-619(9) (West 2008)), asserting that it had "issued a written notice of default via first class mail" to both defendants on January 6, 2009. Attached to PNC Bank's motion were copies of the letter dated January 6, 2009, providing notice of the default and addressed to both defendants, as well as a copy of the amended complaint, the mortgage and the promissory note.

¶ 6 Also attached in support of the motion were affidavits of Teresa S. Clopp, which contain identical attestations as to Aleksander Strelnikov and Viktoriya Strelnikov. Because these affidavits are identical other than the name of each defendant, we refer to a single affidavit for the remainder of this decision.

¶ 7 Clopp's affidavit included the following attestations: (1) Clopp was an "authorized officer" with PNC Bank, which was the successor by merger to National City Real Estate Services, LLC; (2) she was authorized to provide an affidavit on behalf of PNC Bank; (3) she had "personally examined the books and records kept in the ordinary course of business and have personal knowledge of the facts stated herein" and could testify to such facts if sworn as a witness; (4) the communication history of the loan indicated that a letter of a written notice of the loan default was mailed to each defendant on January 6, 2009; (5) the communication history was documented in a computer-generated record, "the entries of which are made at the time of the occurrence and made in the ordinary course of business to make and keep a record of communications regarding the subject account"; (6) the entries into that record were at the time

of the occurrence and in the ordinary course of business; and (7) the computer software programs generating those records had been in place for the entire life of the communication histories, were "periodically checked for reliability" and could only be accessed by trained and authorized personnel; (8) the "computer software used in generating these records can only be accessed by trained personnel with the requisite authority and clearance" and Clopp was "one such individual who is authorized and trained to access these records."

¶ 8 In paragraph 5 of Clopp's affidavit, she attested that she had personal knowledge of the following steps, taken in the ordinary course of business: (a) the computer entry was made "contemporaneous with the creation and printing of the computer generated default letter"; (2) when such an entry is made, the letter is sent via first class mail; and (3) contemporaneous with those steps, a copy of the default letter is saved to the computer record associated with the loan.

¶ 9 Defendants moved to strike Clopp's affidavit, asserting it did not indicate that Clopp was a custodian of business records or a person familiar with the business, describe her duties and responsibilities, set forth a foundation for Clopp's knowledge of the process of computer-generated default letters, specify what books and records she examined, or indicate that Clopp was ever employed by National City, the entity that originally issued the mortgage.

¶ 10 On March 11, 2015, the circuit court granted PNC Bank's summary judgment motion and entered a judgment of foreclosure and sale. On November 6, 2015, the circuit court entered an order approving the sale, which had taken place in June 2015, and distribution of the sale proceeds. On December 2, 2015, defendants filed a notice of appeal from those rulings.

¶ 11 On appeal, defendants again challenge the legal sufficiency of Clopp's affidavit, asserting that it does not demonstrate Clopp's personal knowledge as to their mortgage loan and is "wholly conclusory and devoid of factual substance" and, therefore, does not comply with Rule 191(a).

¶ 12 Defendants contend that Clopp's affidavit does not comply with the requirements set forth in Rule 191(a) for numerous reasons. Defendants assert that Clopp's status as an "authorized officer" with PNC Bank is insufficient because the affidavit must state her "title or exact position" or describe her job duties, and the affidavit also does not specify when Clopp began employment with PNC Bank. In addition, the affidavit indicates that the notice letters were created in 2009 on behalf of National City, PNC Bank's predecessor in interest, but Clopp does not aver that she ever worked for National City or state that she personally managed the defendant's loan.

¶ 13 Defendants further argue that Clopp did not attest to any personal knowledge of the business operations of National City or the process by which the notice letters were sent, such as the computer software program used to generate the notice letters, or indicate that Clopp was personally familiar with the program. Defendants point out that Clopp's statements in paragraph 5 of the affidavit do not relate to National City or indicate that Clopp had any duties as to their particular mortgage loan, including the supervision, management or servicing of the loan.

¶ 14 Summary judgment is appropriate if the pleadings, depositions and admissions on file, together with the affidavits, if any, viewed in the light most favorable to the non-moving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20. This court reviews *de novo* the circuit court's grant of

a motion for summary judgment. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 18.

¶ 15 Affidavits filed in connection with a motion for summary judgment are governed by Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which 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."

¶ 16 An affidavit submitted in support of a motion for summary judgment must meet the same requirements as competent testimony because it serves as a substitute for testimony at trial. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Rule 191 is satisfied if from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents as a witness at trial. *U.S. Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 22; *Burks Drywall Inc. v. Washington Bank & Trust Co.*, 110 Ill. App. 3d 569, 576 (1982). An affidavit offered in support of a summary judgment motion must be strictly construed, while an affidavit in opposition of such a motion must be liberally construed. *Schultz v. American National Bank*, 40 Ill. App. 3d 800, 807 (1976). We review *de novo* the circuit court's ruling on the legal sufficiency of an

affidavit submitted in support of summary judgment. *JPMorgan Chase Bank, N.A. v. Ivanov*, 2014 IL App (1st) 133553, ¶ 62.

¶ 17 An example of an affidavit meeting the requirements of Rule 191(a) is found in *Avdic*. There, the affiant, Rebecca Armstrong, provided specific factual and pertinent information regarding her employment with the plaintiff bank (U.S. Bank). In the affidavit, which was filed in 2011, Armstrong set forth the length of her employment, stating she had been an employee of U.S. Bank since 2002 and that her duties included reviewing and analyzing U.S. Bank's business and loan record, which included computer-generated payment histories and copies of origination documents. *Avdic*, 2014 IL App (1st) 121759, ¶ 7. In addition, Armstrong averred that she was familiar with, had been trained on, and was qualified to use the computer software system that maintained the records. *Id.* Armstrong further averred that she had reviewed the business records and loan file of the defendant *Avdic*, and Armstrong attested to the total amount due, including the amount of the principal balance. *Id.*

¶ 18 In contrast to the affidavit in *Avdic*, the affidavit provided by Clopp does not contain sufficient evidentiary facts that would reasonably appear to be within her personal knowledge. The affidavit does not indicate how long Clopp had been employed with PNC Bank as an "authorized officer." Therefore, it is unknown how long Clopp had been familiar with PNC Bank's procedures and systems. Moreover, Clopp's attestation that she was authorized to provide an affidavit on behalf of PNC Bank is not accompanied by a description of the duties and responsibilities of her position as an "authorized officer." We note that anyone at PNC Bank could provide an affidavit in that capacity.

¶ 19 In addition, unlike Armstrong's affidavit in *Avdic*, Clopp's affidavit does not contain any factual evidence of her training or familiarity with the records kept in the ordinary course of business. The affidavit does not state that Clopp was trained on the computers that generated the records at issue or if she knows how the records are specifically generated. In essence, the affidavit merely states that Clopp reviewed the records in question, which is insufficient for a Rule 191(a) affidavit. See *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 129 (1992) (affidavit fails to comply with Rule 191(a) when it does not indicate the affiant's personal knowledge as to the amounts disbursed or collected).

¶ 20 In conclusion, Clopp's affidavit lacks sufficient averments to meet the requirements of Rule 191(a). Therefore, the circuit court erred in granting summary judgment to PNC Bank. Given our ruling on that issue, it is not necessary to address defendants' contention that they did not receive notice of the foreclosure proceedings.

¶ 21 Accordingly, the order of the circuit court of Cook County granting summary judgment to PNC Bank is reversed, and the order approving the sale is vacated. This case is remanded to the circuit court for further proceedings in accordance with this order.

¶ 22 Reversed, vacated and remanded.