2017 IL App (1st) 160139-U

THIRD DIVISION
June 21, 2017

No. 1-16-0139

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, successor by merger to National City Mortgage, a division of National City Bank,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 13 CH 11784
DEBORAH JOSSELL and GEORGE JOSSELL,	)	The Honorable Michael Otto,
Defendants-Appellants.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

HELD: Trial court did not err when it refused to set aside judicial sale of foreclosed property where debtors, who discharged the mortgage in bankruptcy and never reaffirmed it, failed to challenge the foreclosure at the appropriate stage of litigation and instead waited until property was sold and their rights already divested. Additionally, trial court did not deny due process in refusing to allow evidentiary hearing with respect to face-to-face interview requirement, nor did it abuse its discretion in denying motion for reconsideration based on fraud that clearly did not occur.

¶ 1 Defendants-appellants Deborah Jossell and George Jossell (defendants) appeal *pro se*

from the trial court's denial of their "motion to vacate judgment and to set aside plaintiff's summary judgment, foreclosure sale order approving sale and order of possession" within the context of a foreclosure lawsuit brought by plaintiff-appellee PNC Bank National, successor by merger to National City Mortgage, a division of National City Bank (plaintiff). The mortgage was insured by the Federal Housing Administration (FHA). On appeal, defendants assert various contentions, primarily that the trial court erred in failing to set aside the judicial sale because plaintiff had violated FHA requirements before proceeding to foreclosure. Defendants also contend that the trial court violated their procedural due process rights when it did not allow for an evidentiary hearing and that it abused its discretion when it denied their motion for reconsideration. Plaintiff has chosen not filed a brief in this matter. Accordingly, we consider this appeal on appellants' brief only, pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 In April 2009, defendants and plaintiff[1] executed a promissory note in the amount of $337,109, secured by a mortgage lien on defendants' real property at 6521 South Kimbark Avenue in Chicago. The loan was an FHA mortgage and, as such, subject to the United States Department of Housing and Urban Development (HUD) mortgage servicing requirements.

¶ 4 In December 2012, defendants failed to make their monthly payment; they also failed to make any subsequent payment. In March 2013, plaintiff sent both defendants letters notifying

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[1]The original lender and holder of the note was National City Mortgage, a division of National City Bank. Upon merger, plaintiff acquired possession of the note and mortgage in November 2009.

them of their default and offering them an opportunity to cure this within 30 days with a payment of $12,483.54, to be made by April 3, 2013. The letters also clarified that if defendants did not cure their default, the maturity of the note would be accelerated and its sum would be immediately due. Defendants did not cure their default by April 2013. Accordingly, plaintiff filed a complaint to foreclose mortgage.

¶ 5 In response, defendants filed a motion to dismiss plaintiff's complaint to foreclose pursuant to section 2-619 of the Illinois Code of Civil Procedure, attacking plaintiff's standing. See 735 ILCS 5/2-619 (West 2012). Following plaintiff's answer, defendants withdrew this motion and, upon leave of court, filed an answer and affirmative defenses to plaintiff's complaint. In their answer, defendants stated that they had filed bankruptcy and the bankruptcy court discharged their debt to plaintiff in August 2009. They further explained that they intended to reaffirm their mortgage but, due to miscommunication with their bankruptcy counsel, they did not. They asserted that, believing that they had, they continued to make payments to plaintiff and they alleged that, in October 2011, they submitted an application for a loan modification. Defendants additionally averred that plaintiff denied their application for modification, as well as their subsequent request for refinancing options, and, therefore, defendants stopped making payments on the loan. Defendants then asserted three affirmative defenses: (1) unclean hands because plaintiff continued to accept loan payments from defendants knowing that the mortgage debt was discharged; (2) breach of implied contractual duty of good faith because plaintiff did not notify defendants that their debt was discharged; and (3) "quasi-estoppel."

¶ 6 After answering defendants' affirmative defenses, plaintiff filed a motion for summary

judgment against defendants and for judgment of foreclosure and sale of the property, stating there was no genuine issue of material fact that defendants defaulted on the mortgage. Attached to plaintiff's motion were an affidavit and accompanying documentation confirming that defendants were provided with written notice of their default and opportunity to cure, as well as a loss mitigation affidavit detailing seven attempts by plaintiff to contact defendants about their indebtedness and modification plan and defendants' failure to respond each time.

¶ 7 Defendants did not file any response to plaintiff's motion for summary judgment. On May 15, 2015, the trial court granted summary judgment in plaintiff's favor, as well as judgment of foreclosure and sale. A judicial sale was held on September 17, 2015 and the property was sold to a third party. On October 16, 2015, the trial court approved the sale and entered an order of possession.

¶ 8 On November 13, 2015, defendants filed a motion to vacate judgment and to set aside the trial court's grant of summary judgment to plaintiff, the foreclosure sale, its order approving the sale and its order of possession. In this motion, defendants asserted that plaintiff "breached its agreement" by failing to comply with HUD mortgage servicing requirements, specifically, holding a face-to-face interview with them before three loan installments had become past due. Defendants also denied ever receiving notice of the grace period or acceleration of their note, again claimed they applied for loan modification, asserted that plaintiff failed to submit a loss mitigation affidavit as required, and insisted that plaintiff was committing fraud by redacting facts showing this was an FHA loan. In support of their motion, defendants attached only an affidavit from Deborah Jossell stating she and her husband applied for loan modification prior to

the sale of the property and alleging that she never received notice from plaintiff about anything regarding the property.

¶ 9 On January 14, 2016, the trial court denied defendants' motion to vacate. It is from this order that defendants appeal.

¶ 10 ANALYSIS

¶ 11 Defendants' primary argument is that the trial court erred when it denied their motion to vacate and set aside the sale of their property because plaintiff was in material violation of HUD requirements before proceeding to foreclosure. The federal mortgage servicing requirements defendants highlight are found in title 24, sections 203.604 and 203.606 of the Code of Federal Regulations (24 C. F. R. §§ 203.604, 203.606 (2014)). These regulations require a lender, before bringing a foreclosure action against a defaulting borrower, to have a face-to-face meeting before three installments of the loan have become past due, to seek this interview through a certified mail request and a visit to the property, and to review its file to determine compliance with appropriate servicing requirements.

¶ 12 Defendants filed their motion to vacate "pursuant to section 2-1203(a) of the Illinois Compiled Statues and Illinois Mortgage Foreclosure Law (IMFL) 735 ILCS 5/[15-]1508." A motion to vacate under section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2014)) allows a party to move to vacate a judgment within 30 days of its entry. See *Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st) 141272, ¶ 40 (properly filed section 2-1203 motion will stay enforcement of judgment). Section 15-1508 of the Mortgage Foreclosure Law (735 ILCS 5/15-1508 (West 2014)) deals with the sale and confirmation of sale of a property. On

appeal, we review a trial court's decision with respect to both of these motions pursuant to an abuse of discretion standard. See *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 414 (1993) (denial of motion to vacate is reviewed for abuse of discretion); *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57 (trial court's approval of judicial sale of property is reviewed for abuse of discretion). An abuse of discretion occurs only when the trial court commits an error with respect to the law or where no reasonable person would take the view adopted by it. See *CitiMortgage*, 2014 IL App (1st) 122824, ¶ 57.

¶ 13 Defendants are correct that the failure to comply with HUD mortgage servicing requirements is a defense to a mortgage foreclosure action. See *PNC Bank, National Association v. Wilson*, 2017 IL App (2d) 151189, ¶ 18, citing *Bankers Life Co. v. Denton*, 120 Ill. App. 3d 576, 579 (1983). These requirements include, as defendants point out, a face-to-face interview, or a reasonable effort to arrange such, before three full monthly installments are unpaid. See *PNC Bank*, 2017 IL App (2d) 151189, ¶ 19; 24 C. F. R. § 203.604 (2014).

¶ 14 In the instant cause, defendants insist repeatedly that plaintiff did not contact them in any way to conduct the required face-to-face interview, nor did plaintiff make any reasonable effort to arrange one with them.

¶ 15 The record before us belies defendants' argument. First, defendants' claims of plaintiff's failure to contact them were not raised in a timely manner. As we will discuss in more detail below, they did not raise this claim in response to plaintiff's motion for summary judgment (to which they did not respond at all), nor in response to the sale of the property, nor when plaintiff moved to confirm that sale. Instead, defendants waited to assert this claim–a claim attacking the

foreclosure portion of this litigation–until after the property was sold and possession was awarded to a third party, in a motion to vacate the sale filed almost 30 days later. To vacate both the sale of the property and the underlying foreclosure, which, as we discuss below, is what defendants are seeking via their motion to vacate, they must have a meritorious defense to the foreclosure and they must show that justice was not otherwise done because the lender prevented them from raising that meritorious defense earlier in the proceedings. See *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 26. Here, not only do defendants not have a meritorious defense to the underlying foreclosure of their property, but they also cannot show that justice was not otherwise done, as it was their own inaction, and not fraud or irregularity on the part of plaintiff, that led to the foreclosure and sale of their property. See *McCluskey*, 2013 IL 115469, ¶ 19 (courts will not refuse to confirm judicial sale under guise of substantial injustice to protect interested party from results of own negligence).

¶ 16 Moreover, the only support for defendants' claim of plaintiff's failure to arrange the face-to-face interview in violation of HUD servicing regulations is the affidavit of defendant Deborah Jossell, as attached to their motion to vacate. Defendant George Jossell submitted nothing attesting to his knowledge of the events of this cause, including whether he was contacted by plaintiff or whether he knew the debt had been discharged. Deborah's affidavit provides no documentation to support her claims. For example, she claims therein that she "check[ed] the mail from time to time" but she "did not receive any written notice" from plaintiff. She also claims that she and defendant George "had applied for a modification prior to the Sale." However, she attaches nothing to support any of this in her scant affidavit. Moreover, she fails

to identify what HUD regulations are at issue, which apply to her loan with plaintiff. And, as noted above, because defendants failed to respond to plaintiff's motion for summary judgment, they never raised plaintiff's failure to follow whatever HUD regulation she now claims is at issue on appeal as an affirmative defense before the trial court.[2] See *Afshar, Inc. v. Condor Air Cargo, Inc.*, 250 Ill. App. 3d 229, 231 (1993) (failure to raise affirmative defense before trial court in answer or reply results in waiver of that defense). Furthermore, she did not attach the application for loan modification which she insists defendants submitted before the sale of their property, nor does her affidavit detail when they did so or when they sent it to plaintiff. In sum, her affidavit–the only document in support of defendants' motion to vacate–contains nothing but vague, conclusory statements, unsupported by any documentation, to show how they apply to defendants' loan.

¶ 17 In contrast to this is plaintiff's documentation in support of its motion for summary judgment. For example, plaintiff presents the affidavit of Christopher Jones, and authorized signer of plaintiff, stating that he is familiar with the business records and practices of plaintiff regarding mortgagors who default on their loans. Jones describes the processes plaintiff uses to record the defaults, calculate the amounts due and track payment history. After certifying that plaintiff followed the same practices in this cause as it regularly does in the course of business, Jones states that plaintiff sent defendants written notice of their default, information about how to cure it and a grace period notice. All these documents are attached to Jones' affidavit.

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[2]The affirmative defenses defendants did file in response to plaintiff's complaint–long before plaintiff's motion for summary judgment–did not assert plaintiff's failure to comply with HUD servicing regulations.

Additionally, and in direct contradiction to defendants' assertions, plaintiff did, indeed, provide a loss mitigation affidavit to the court. In her affidavit, Brittany Sloneker, another authorized signer of plaintiff, details defendants' loan, the loss sustained by plaintiff, and the various loss mitigation programs for which it was eligible. Sloneker then provides information about the steps plaintiff has taken to comply with its obligations, such as sending letters to defendants including a grace period notice, phone contact made with them, and its loss mitigation review. And, the affidavit notes some seven different attempts at loss mitigation plaintiff tried to arrange with defendants, including a HAMP modification attempt, all to which defendants failed to respond.

¶ 18 On this record, we do not find that the trial court abused its discretion in denying defendants' motion to vacate.

¶ 19 Even if defendants' affidavit contained more substance, and even if it were amply supported by documents that showed, for example, that they had applied for a loan modification or that a modification on their loan was pending at the time of sale–some argument of merit–it would be, as is often said in colloquial terms, too little too late.

¶ 20 Within this context, we return to the element of timing which we mentioned at the outset of our decision here. It is axiomatic that a creditor, such as plaintiff here, with a loan secured by a lien of the assets of a debtor who, like defendants here, become bankrupt before the loan is repaid may look to the lien for satisfaction of the debt. See *Federal National Mortgage Ass'n v. Schildgen*, 252 Ill. App. 3d 984, 987 (1993). When a debtor seeks to challenge the propriety of the foreclosure of his property, he must do so at the foreclosure stage of litigation and cannot

wait until a sale of that property has already been confirmed by the court. That is, when a defendant moves to vacate a default judgment of foreclosure after the judicial sale of the mortgaged property, he is also, inherently, seeking to set aside the judicial sale. See *McCluskey*, 2013 IL 115469, ¶ 18. However, at this late stage, the debtor is limited to asserting attacks related to defects in the *sale* proceedings; he cannot now raise or alleged defects pertinent to the how the foreclosure took place. See *McCluskey*, 2013 IL 115469, ¶ 18 (it is "far too late" to assert defenses to the foreclosure after the sale has been confirmed; even if such defenses were meritorious, to allow this would be inconsistent with the need to establish stability in judicial sales process). Accordingly, "after a motion to confirm the judicial sale has been filed, a [debtor] seeking to set aside a default judgment of foreclosure may only do so by filing objections to the confirmation of the sale." *McCluskey*, 2013 IL 115469, ¶ 27.

¶ 21 In their motion to vacate, which was supposed to attack the sale, defendants alleged only that plaintiff breached the loan agreement and proceeded to foreclosure in violation of the HUD mortgage servicing requirement that it hold a face-to-face interview with defendants before they missed three payments. Clearly, defendants were challenging the propriety of the foreclosure–which was far too late as this cause had long-since proceeded to the sale stage. Despite having been properly served, as well as having notice of their default, notice of the judgment of foreclosure, notice of the sale, and admitting that they did not make their required payments, did not reaffirm their mortgage after bankruptcy, and did not try to cure their default, defendants waited until after default judgment and after the sale to raise a defense to the underlying foreclosure. With their property rights already divested, it was far too late. See

McCluskey, 2013 IL 115469, ¶¶ 27, 31.

¶ 22 Accordingly, the trial court did not err when it failed to set aside the judicial sale of defendants' property.

¶ 23 Defendants' remaining two arguments assert further error on the part of the trial court. First, defendants insist that the court denied them due process when it did not allow an evidentiary hearing on their motion to vacate to further investigate their claims of HUD servicing violations on the part of plaintiff in failing to conduct an interview with them. Putting aside that they present only a scant argument and no pertinent legal citation, defendants' claim cannot stand. The Second District of this court recently dealt with the face-to-face interview requirement in *PNC Bank, National Ass'n v. Wilson*, 2017 IL App (2d) 151189. There, as here, a mortgagor who declared bankruptcy but failed to reaffirm his mortgage sought to challenged the mortgagee's foreclosure of his property, claiming that before filing its foreclosure complaint, the mortgagee did not attempt to arrange and hold a face-to-face interview, as HUD servicing requirements mandate. See *Wilson*, 2017 IL App (2d) 151189, ¶¶ 4-7. In holding that the mortgagee's failure did not bar it from foreclosing on the property, the *Wilson* court explained that the mortgagor's argument was futile. This was because, as that court pointed out, the requirement of a face-to-face meeting "contemplates that there is a contract between the parties that could be remediated or ameliorated." *Wilson*, 2017 IL App (2d) 151189, ¶25. However, since the mortgagor did not reaffirm the mortgage after being discharged in bankruptcy, there was no contract to remediate or ameliorate. See *Wilson*, 2017 IL App (2d) 151189, ¶ 26 (discharge in bankruptcy without reaffirmation of mortgage "means [the mortgagor is] no longer

bound by the mortgage contract between the parties and should not be allowed to enjoy any benefits of the mortgage contract that [his] own volitional act has nullified"). And, without the binding contract, *i.e.*, with a nullified mortgage, its requirement of a face-to-face interview is rendered meaningless. See *Wilson*, 2017 IL App (2d) 151189, ¶ 26 ("[t]o send notice in order to remediate or ameliorate a mortgage contract when the contract has been nullified by the act of the debtor is futile and meaningless").

¶ 24 The instant cause mirrors *Wilson* in this respect and merits the same result. Defendants here filed bankruptcy and were discharged from their mortgage, yet, admittedly, they failed to reaffirm it. Just as the *Wilson* court noted, their failure to do so nullified their mortgage–there was no longer a contract between them and plaintiff. Without a contract, there was nothing to be remediated or ameliorated. This further means no requirement for a face-to-face interview, a benefit defendants would have enjoyed had they not nullified the mortgage. Just as the *Wilson* court held, to insist on this requirement under these facts is futile. Therefore, we find no merit to defendants' claim of a due process violation on the part of the trial court in failing to conduct an evidentiary hearing with respect to the face-to-face interview requirement in this cause.

¶ 25 Defendants' final argument claims that the trial court abused its discretion when it denied their motion for reconsideration "after facts in the record showed plaintiff committed fraud on the court." The "fraud" defendants assert plaintiff committed was the redaction of their FHA loan number in an effort to "conceal facts before the Court knowing[plaintiff] filed a premature mortgage foreclosure action." Their argument borders on the frivolous.

¶ 26 As even defendants recognize, a motion to reconsider, which is reviewed pursuant to an

abuse of discretion standard, is meant to bring to the trial court's attention newly discovered evidence, changes in the law, or errors in the previous application of existing law to the facts at hand. See *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 16. Defendants' motion for reconsideration does not satisfy this requirement; it does not present newly discovered evidence previously unavailable to the trial court, nor does it assert a change in the law, nor does it claim an error in the application of existing law to the instant cause. Rather, defendants only allege that, by redacting their loan number on documents filed with the court, plaintiffs committed "fraud" by attempting to "conceal" the material fact that their loan was an FHA mortgage, and therefore subject to HUD servicing requirements. This is a complete mischaracterization of what occurred here.

¶ 27 First and foremost, we fail to see how defendants can claim "fraud" here when the information they argue plaintiff concealed was information that was in their own possession all along. It was not as if defendants did not know they had an FHA mortgage. And, they certainly knew their loan number. Plaintiff never hid these facts. There simply cannot be fraud when nothing is being hidden.

¶ 28 Moreover, and significantly, defendants do not at all describe when, how or on what documents plaintiff redacted their loan number, nor do they provide any record citation to such. From our thorough review of the record, we found that plaintiff blacked out defendants' loan number on the first page of a copy of the mortgage, on the first page of the copy of the note, within a certificate of exemption, and on a payoff statement, as well as in the grace period notice and default notice letters it sent to defendants. All of these documents were attached to

plaintiff's foreclosure complaint. While this is, technically, a redaction, we fail to see how it was any attempt to “conceal” material facts by plaintiff concerning defendants’ loan. With respect to the grace period notice and default notices, these were sent directly to defendants who knew the FHA status of their loan. With respect to the other documents, while the loan number is blacked out, either immediately above or next to the blacked-out line, it specifies on every single one of these documents that the loan is an "FHA" loan. That characterization was never redacted by plaintiff and is clear and apparent on every pertinent document in the record. Moreover, this fact was never contested by plaintiff; all the parties here conceded at the outset of litigation that defendants’ loan was an FHA loan subject to HUD servicing requirements, and the trial court was well aware of this, as well. It was never a secret or a point of dispute. Plaintiff’s redaction of the loan number on these documents attached to its foreclosure complaint was nothing more than careful practice, so as to keep defendants’ loan number and accompanying financial information out of the public domain. This practice is quite common, and it hardly constitutes fraud on the court.

¶ 29 CONCLUSION

¶ 30 Accordingly, we affirm the judgment of the trial court.

¶ 31 Affirmed.