

No. 1-16-2080

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

FIFTH THIRD MORTGAGE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
ABRAHAM RAMIREZ and JACKLYN CONTRERAS,)	No. 14 CH 2394
)	
Defendants-Appellants)	
)	
(Unknown Others, Generally, and Non-Record Claimants,)	Honorable
)	Anna M. Loftus,
Defendants).)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the circuit court's denial of defendants' motion to vacate the judicial sale of their mortgaged property, finding no abuse of discretion.

¶ 2 Plaintiff-appellee, Fifth Third Mortgage Company, filed a complaint to foreclose on the mortgage of defendants-appellants, Abraham Ramirez and Jacklyn Contreras. The circuit court granted plaintiff's motion for summary judgment and judgment of foreclosure, and a judicial sale was held under section 15-1507 of the Illinois Mortgage Foreclosure Law (Foreclosure Law). 735 ILCS 5/15-1507 (West 2012). Defendants filed a motion objecting to the confirmation of the sale and to vacate the sale. On June 28, 2016, the circuit court denied defendants' motion

and confirmed the sale. Defendants appeal the June 28, 2016 order, contending the sale violated certain applicable federal guidelines discussed later herein. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Generally, section 15-1508(b) of the Foreclosure Law governs the circuit court's analysis for approving or disapproving a judicial sale and is the only means by which defendants can move to set aside such a sale. *Citimortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 59. Section 15-1508(b) provides:

“Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale.” 735 ILCS 5/15-1508(b) (West 2012).

¶ 5 However, where defendants seek certain federal assistance in refinancing their mortgage, section 15-1508(d-5) of the Foreclosure Law provides another means for setting aside a judicial sale:

“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 [MHAP] 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

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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 5/1508(d-5) (West 2012).

¶ 6 The appellate court has held that, for a judicial sale to be set aside under section 15-1508(d-5), defendants must show, by a preponderance of the evidence, that: (1) they applied for assistance under MHAP pursuant to the procedures set forth by the Home Affordable Modification Program (HAMP), a component of MHAP (see 12 U.S.C. § 5219 (Supp. III 2010)); and (2) the mortgaged real estate was sold in material violation of those procedures. *Bermudez*, 2014 IL App (1st) 122824, ¶¶ 64, 71-72.

¶ 7 The relevant procedures at issue here are found in the MHAP Handbook for Servicers of Non-GSE Mortgages (December 13, 2012), *available at* <https://www.scribd.com/document/146410248/HANDBOOK-FOR-SERVICERS-OF-NON-GSE-MORTGAGES-2012-THE-MAKING-HOME-AFFORDABLE-PROGRAM> (HAMP Guidelines). In pertinent part, the HAMP Guidelines state:

“When a borrower submits a request for HAMP consideration after a foreclosure sale date has been scheduled and the request is received no later than midnight of the seventh business day prior to the foreclosure sale date (Deadline), the servicer must suspend the sale as necessary to evaluate the borrower for HAMP. Servicers are not required to suspend a foreclosure sale when *** a request for HAMP consideration is received after the Deadline.” HAMP Guidelines, ch. II, § 3.3.

¶ 8 The HAMP Guidelines further provide that, subject to certain exceptions not applicable here, the servicer may not conduct a foreclosure sale within the 30 calendar days after the date of notice of a non-approval of an application for a HAMP modification. *Id.* at § 2.3.2.

¶ 9

II. FACTS

¶ 10 Defendants obtained their mortgage from plaintiff on October 19, 2009, for the property located at 1536 Evers Avenue in Westchester, Illinois. On February 10, 2014, plaintiff filed a foreclosure complaint against defendants.

¶ 11 Plaintiff filed a motion for summary judgment and judgment of foreclosure. Plaintiff also filed a loss mitigation affidavit, stating that defendants' loan was eligible for loan modification through HAMP.

¶ 12 On November 17, 2015, the circuit court granted plaintiff's motion for summary judgment and judgment of foreclosure. Plaintiff filed a notice of sale, and the property was scheduled for judicial sale on February 19, 2016.

¶ 13 On February 16, 2016, defendants filed an emergency motion to stay the sale. Defendants stated in their motion that they submitted an application for a loan modification pursuant to HAMP (HAMP application) on January 21, 2016. On February 3, 2016, Cathy Recker, a representative of plaintiff who was assigned to defendants' file, requested additional documents. Defendants submitted the additional documents, and Ms. Recker acknowledged receipt thereof on February 4, 2016. Ms. Recker informed defendants that a decision on the HAMP application would be made within 30 days. As of February 10, 2016, no decision had been made regarding the application. Therefore, defendants requested that the judicial sale be stayed to allow plaintiff additional time to complete the review of their application.

¶ 14 On February 18, 2016, plaintiff's counsel appeared in court and presented defendants' counsel with a letter from plaintiff dated February 17, 2016, denying the HAMP application. The court stayed the judicial sale until February 26, 2016, and ordered the parties to return to court for status on February 25, 2016.

¶ 15 On February 25, 2016, the court stayed the judicial sale until March 25, 2016, and continued the matter for another status hearing on that date. On March 25, 2016, the court entered an order lifting the stay and ordering the sale to “proceed as scheduled on March 29, 2016.”

¶ 16 The judicial sale was conducted on March 29, 2016, and the property was sold to plaintiff for \$203,150. On April 25, 2016, plaintiff filed its motion to confirm the sale. Plaintiff also sought a deficiency judgment against defendant Ramirez for \$77,014.77.

¶ 17 On May 10, 2016, defendants filed a motion objecting to the confirmation of sale and to vacate the sale (motion to vacate). Defendants supported the motion with the affidavit of their daughter, Sonia Contreras. Ms. Contreras attested she was helping defendants with the HAMP process because they are not proficient in English. She submitted the initial request for a HAMP application on defendants’ behalf on January 21, 2016, and was only informed of the denial on February 18, 2016, after plaintiff’s attorney presented a denial letter from plaintiff in open court. The denial letter stated that the application was denied because of an “insufficient cash surplus.” On February 25, 2016, Ms. Contreras called and left a message for Tim Gair, a supervisor/manager for plaintiff, seeking clarification as to the reason for the denial. She left several subsequent messages for Mr. Gair, but did not receive a return phone call.

¶ 18 Ms. Contreras attested that she contacted Ms. Recker, the representative assigned to defendants’ loan file. Ms. Recker sent her an email stating that Mr. Gair wanted defendants to resubmit a HAMP application reflecting a cash contribution from Ms. Contreras towards defendants’ income. As instructed, Ms. Contreras resubmitted the application on March 19, 2016, with the understanding that plaintiff would not go forward with the sale while the application was pending.

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¶ 19 Defendants attached a copy of the March 19, 2016 HAMP application to their motion to vacate.

¶ 20 Defendants stated in their motion that on March 28, 2016, one day before the scheduled judicial sale, they received a letter from plaintiff stating that the HAMP application was denied because there was insufficient time to review the application prior to the sale. Defendants argued in their motion that the judicial sale should not be confirmed because they had a pending HAMP application at the time of the sale and plaintiff acted in bad faith by failing to reschedule the sale so as to properly review their application. Defendants cited section 15-1508(b) of the Foreclosure Law, which provides that a judicial sale should not be confirmed if to do so would cause an injustice. 735 ILCS 5/15-1508(b) (West 2012).

¶ 21 On May 31, 2016, defendants filed a response to plaintiff's motion for confirmation, asserting an additional reason why the judicial sale should not be confirmed. Specifically, defendants argued that plaintiff improperly sold the property on March 29, 2016, the day after the denial of the HAMP application, in violation of the HAMP Guidelines requiring plaintiff to wait 30 days after the denial before conducting the sale. HAMP Guidelines, ch. II, § 2.3.2. Defendants cited section 15-1508(d-5) of the Foreclosure Law, which provides that a judicial sale should not be confirmed where the mortgaged real estate was sold in material violation of the HAMP Guidelines. 735 ILCS 5/15-1508(d-5) (West 2012).

¶ 22 On June 3, 2016, plaintiff filed a response to defendants' motion to vacate, arguing that defendants had not proved by a preponderance of the evidence that on March 19, 2016, they submitted all documents necessary for a HAMP application. Plaintiff also argued that, even if defendants had submitted all required documents in their March 19, 2016, HAMP application,

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the application was untimely because it was submitted six business days and not seven business days prior to the scheduled foreclosure sale. See HAMP Guidelines, ch. II, § 3.3.

¶ 23 On June 22, 2016, defendants filed their reply to plaintiff's response, arguing that their March 19, 2016, HAMP application contained all necessary documents. Defendants also argued that plaintiff's contention that defendants' March 19 HAMP application was untimely "is an attempt to confuse and distract the court as it mischaracterizes defendants' submission as a 'second submission' when in fact it was an amended submission of the [timely] January 21, 2016," HAMP application. Defendants further argued that even if their March 19 HAMP application was untimely, the reason the application was not timely was "due to plaintiff's agent's actions in not responding to defendants' questions for clarifications of the reason for denial [of the January 21, 2016 HAMP application]." Defendants contended that as it was plaintiff's actions that caused defendants to file their March 19 HAMP application after the deadline, "justice was *** not done" (735 ILCS 5/15-1508(b) (West 2012)) and, therefore, the court should deny the confirmation of the judicial sale.

¶ 24 On June 28, 2016, the court entered a written order finding that defendants' March 19, HAMP application was a new application and *not* a supplement to the January 21, 2016, application. The court refused to stay the March 29, 2016, sale because the March 19, 2016, HAMP application was not submitted within seven business days prior to that sale date as required by the HAMP Guidelines. See HAMP Guidelines, ch. II, § 3.3. The court denied defendants' motion to vacate the judicial sale and entered an order confirming the sale.

¶ 25 Defendants Filed a Timely Notice of Appeal.

¶ 26 We review the circuit court's confirmation of a judicial sale for an abuse of discretion. *Bermudez*, 2014 IL App (1st) 122824, ¶ 57. "A circuit court abuses its discretion when its ruling

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rests on an error of law or where no reasonable person would take the view adopted by the circuit court.” *Id.*

¶ 27 Defendants contend the circuit court abused its discretion in denying their motion to vacate the March 29 judicial sale under section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2012)), because the sale was conducted less than 30 days after the denial of their March 19 HAMP application, in violation of the HAMP Guidelines. See HAMP Guidelines, ch. II, § 2.3.2.

¶ 28 Defendants’ argument is unavailing. As discussed earlier in this order, section 15-1508(d-5) of the Foreclosure Law provides that a judicial sale shall be set aside if defendants (the mortgagors) prove by a preponderance of the evidence that: (1) they applied for assistance under MHAP, meaning they formally applied for help pursuant to the procedures set forth in the HAMP Guidelines (see *Bermudez*, 2014 IL App (1st) 122824, ¶ 64); and (2) the mortgaged real estate was sold in material violation of the HAMP Guidelines. 735 ILCS 5/15-1508(d-5) (West 2012); *Bermudez*, 2014 IL App (1st) 122824, ¶¶ 71-72.

¶ 29 The HAMP Guidelines provide that, when a mortgagor submits a HAMP application no later than seven business days prior to the date of the judicial sale (deadline), the mortgagee must suspend the sale as necessary to evaluate the application. HAMP Guidelines, ch. II, § 3.3. If the mortgagee subsequently denies the application, it must wait 30 days before conducting the new sale. *Id.* § 2.3.2.

¶ 30 Thus, the suspension of the judicial sale, and the 30-day waiting period for conducting the new sale, only apply to *timely filed* HAMP applications. However, where the mortgagor submits a HAMP application after the deadline (*i.e.*, less than seven business days prior to the date of the judicial sale), the mortgagee is not required to suspend the sale (*id.* § 3.3), meaning

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that the sale can proceed as scheduled and the 30-day waiting period for conducting a new sale is inapplicable.

¶ 31 In this appeal, defendants have abandoned their claim made in the circuit court that the March 19, 2016, HAMP application was timely, as it was an amended submission of the January 21, 2016, application. Defendants concede on appeal that the March 19 HAMP application was a new application that was due by March 18, seven business days before the March 29, 2016, sale, but they filed it one day too late. As the March 19 HAMP application was untimely, section 3.3 of the HAMP Guidelines provided that plaintiff was not required to suspend the sale scheduled for March 29, 2016 and, thus, the 30-day waiting period for conducting a new judicial sale did not apply. *Id.* Therefore, as the March 29 sale was in accordance with, and *not* in material violation of, the HAMP Guidelines for proceeding to a judicial sale, defendants have failed to show by a preponderance of the evidence that the sale must be set aside under section 15-1508(d-5) of the Foreclosure Law.

¶ 32 Defendants also argue that the circuit court abused its discretion in denying their motion to vacate the March 29 sale under section 15-1508(b) of the Foreclosure Law, which provides that a judicial sale should not be confirmed when such a sale would prevent “justice” from being done. 735 ILCS 5/15-1508(b) (West 2012). Defendants contend that it was plaintiff’s actions that caused defendants to file their March 19 application one day after the deadline, and therefore that justice was not done and the court should have vacated the sale.

¶ 33 Defendants’ argument is not supported by the record. In their motion to vacate the sale, defendants attached the affidavit of their daughter, Sonia Contreras, who attested that defendants filed an initial HAMP application on January 21, 2016. On February 18, 2016, defendants learned in court that their HAMP application had been denied the day before, February 17, 2016,

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due to “insufficient cash surplus.” On February 25, 2016, Ms. Contreras contacted Tim Gair, a supervisor/manager for plaintiff, for clarification of the reason for the denial and she made subsequent calls to Mr. Gair on an unspecified date or dates. Mr. Gair did not return the calls, so Ms. Contreras contacted another employee of plaintiff, Ms. Recker, who sent an email explaining what was lacking from the application. Ms. Contreras did not state the date or dates she engaged in this communication with Ms. Recker and the emails are not included in the record on appeal. Ms. Contreras submitted the new HAMP application on behalf of defendants on March 19, 2016, one day after the deadline.

¶ 34 Defendants blame plaintiff’s delay in responding to Ms. Contreras’ requests for clarification of the denial of the January 21, 2016, application for their untimely filing of the March 19, 2016, HAMP application. However, the record is unclear as to the length of the delay and the reason therefor. All we know for certain from the record is that Ms. Contreras herself waited one week, until February 25, 2016, to contact plaintiff (via Mr. Gair) after notification of the denial and that, when Mr. Gair did not respond, Ms. Contreras made subsequent phone calls on an unspecified date to Mr. Gair that were also not returned. Ms. Contreras subsequently contacted Ms. Recker, who emailed her the requested clarification on an unspecified date. On this record, it is impossible for us to determine how long plaintiff (via Mr. Gair and Ms. Recker) delayed in responding to Ms. Contreras’ request for clarification or the reason for any delay; in fact, in the absence of any evidence of the dates of Ms. Contreras’ email communication with Ms. Recker, we cannot say with any degree of certainty that there was *any* material delay, as it is possible Ms. Contreras communicated with Ms. Recker on the same day (February 25, 2016) she asked Mr. Gair for clarification.

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¶ 35 The June 28, 2016, hearing on defendants' motion to vacate may have provided some answers regarding the dates of the email communication between Ms. Contreras and Ms. Recker, and the reason for any delay by plaintiff in responding to Ms. Contreras' request for clarification. However, the record contains no transcript of the hearing, nor does it contain the email communication between Ms. Contreras and Ms. Recker. Defendants, as the appellants, have the burden to present a sufficiently complete record to support their claim of error and in the absence of such a record, we presume the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 36 For all the foregoing reasons, we affirm the circuit court.

¶ 37 Affirmed.