2017 IL App (3d) 160475-U

Order filed November 16, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

WELLS FARGO BANK, N.A., as Trustee for First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-FF6,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0475
	)	Circuit No. 14-CH-1965
ERIC LANDING and CYNTHIA LANDING,	)	
Defendants-Appellants	)	
(Nick Cacich; First Franklin Financial Corporation; Unknown Owners and Non-Record Claimants,	)	
	)	Honorable Brian E. Barrett,
Defendants).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence in the record supports the trial court's order granting summary judgment in Wells Fargo's favor. (2) The trial court did not abuse its discretion by confirming the judicial sale.

¶ 2 The defendants, Eric and Cynthia Landing, appeal the trial court's order granting plaintiff, Wells Fargo Bank, summary judgment in its foreclosure action. The Landings argue that pending discovery disputes precluded summary judgment. They also claim that Wells Fargo failed to substantiate its damages in its summary judgment motion. Finally, the Landings argue that the court erred in confirming the judicial sale, which occurred while the Landings allegedly pursued Home Affordable Modification Program (HAMP) alternatives. We affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 I. Foreclosure Complaint

¶ 5 Wells Fargo filed its foreclosure complaint on September 15, 2014. The complaint alleged that the Landings entered into a 30-year mortgage with First Franklin, a division of National City Bank of Indiana (First Franklin) on March 11, 2005. It also alleged January 1, 2008, was the date of default.

¶ 6 Wells Fargo attached the mortgage, the note, and the assignments to its complaint. According to the note, First Franklin loaned the Landings $194,400. The adjustable interest rate on the principal could range from 6.625% to 12.625% over 30 years. The first five years' payments applied only to interest on the loan, not the principal. If the Landings failed to make a monthly payment, the note holder could send the Landings a notice of default. The note holder could then accelerate repayment if the Landings failed to cure the default by paying the amount overdue and late fees within 30 days after the notice.

¶ 7 First Franklin assigned the note to First Franklin Financial Corporation (First Franklin Financial). Will County recorded the assignment on April 12, 2005. First Franklin Financial

endorsed the note in blank. First Franklin Financial then assigned the note to Wells Fargo. Will County recorded this assignment on October 7, 2013.

¶ 8 The Landings filed their answer and affirmative defense on March 23, 2015. Their affirmative defense challenged Wells Fargo's standing to bring the foreclosure action.

¶ 9 II. Motion for Summary Judgment

¶ 10 After responding to the Landings' affirmative defense, Wells Fargo filed a motion for summary judgment in June 2015. Wells Fargo attached several exhibits to its motion, including a prove-up affidavit, the Landings' payment history, the mortgage, the note, the assignments, and the notice of default. Nationstar Mortgage (the loan servicer) sent the Landings a notice of default on April 2, 2014.

¶ 11 Catrina Wofford, a document execution specialist at Nationstar, testified in Wells Fargo's prove-up affidavit. Wofford had personal knowledge of Nationstar's practices and procedures for servicing residential mortgage loans and the types of loan records Nationstar maintains. Nationstar took over servicing the loan from Bank of America on December 5, 2013; Nationstar incorporated the information from Bank of America's records into Nationstar's business records. Nationstar used LSAMS loan servicing software to track mortgage payments. This type of software was "recognized as standard in the industry." When Nationstar received payments, an employee would input and record the payment in the software. The employee also recorded the transaction type. The software automatically dated the entries. It also automatically calculated and itemized running account totals so that all account balances could be accurately reproduced. To the best of Wofford's knowledge, the software tracked and calculated information "consistent with regulatory requirements." She also attached the Landings' LSAMS payment history report

to the affidavit. From the payment history, she created an itemized accounting of the Landings' mortgage debt as of December 2014, which totaled $363,741.71.

¶ 12 The Landings' counsel filed an affidavit pursuant to Supreme Court Rule 191(b) (eff. Jan. 4, 2013). He claimed that he could not respond to Wells Fargo's motion without discovery. Specifically, he sought documents demonstrating "when [Wells Fargo] came into custody" of the note, when the note holders endorsed the note, and payment codes to understand the Landings' LSAMS payment history attached to Wells Fargo's prove-up affidavit.

¶ 13 The Landings served discovery upon Wells Fargo. Wells Fargo responded to the requests on October 19, 2015, and renoticed its motion for summary judgment. Instead of responding to the motion, the Landings' counsel filed another affidavit stating that Wells Fargo failed to properly respond to discovery. He also filed a motion to compel discovery responses over Wells Fargo's objections.

¶ 14 On January 14, 2016, the trial court heard argument on Wells Fargo's summary judgment motion and the Landings' motion to compel. The Landings argued that summary judgment should not be considered until Wells Fargo answered discovery. Wells Fargo countered that further discovery was unnecessary. Wells Fargo possessed the mortgage note endorsed in blank; any party who possessed the note had standing to enforce its terms. Wells Fargo also argued that the Landings' payment history attached to its summary judgment motion proved the amount of default; the Landings could refute Wells Fargo's proof based on the payment history or their personal knowledge as to when they made payments.

¶ 15 The court agreed with Wells Fargo and denied the Landings' motion to compel. The court also granted Wells Fargo's motion and entered a judgment of foreclosure. The Landings' counsel asked the court to make a factual finding as to the date of default. The court answered:

"No. The affidavit states it. *** There is a default. There is no counter-affidavit saying it's not in default. *** I don't need to delineate the exact time of default so that if I said it was January 1st you argue no, it was December 31st therefore the Judge is wrong. The affidavits clearly state what they state."

¶ 16 Wells Fargo proceeded with the sale on April 21, 2016. It filed a motion for an order approving the sale on May 13, to which the Landings filed an objection on June 22. The Landings' objection claimed that they started exploring HAMP alternatives in January 2016 (eight years after the default) and submitted the necessary HAMP documents to Wells Fargo in March 2016 (two months after the foreclosure judgment). They also claimed that Wells Fargo misinformed them regarding foreclosure alternatives while they pursued HAMP assistance. The Landings failed to attach any of the HAMP documents as exhibits to their objection.

¶ 17 In its reply, Wells Fargo noted that the Landings failed to state what HAMP relief they sought or what HAMP section prohibited the sale. Wells Fargo also noted that Eric Landing rejected Will County's free mediation program at the case's outset. Mediation would have indefinitely stayed the proceedings while the Landings explored alternatives, including a short sale or deed in lieu of foreclosure.

¶ 18 At the hearing on July 11, 2016, the Landings argued that Wells Fargo implicitly consented to staying the sale by accepting their HAMP application. The trial court rejected this argument: "I am not shocked or disturbed in any way that the bank would say send in whatever you want to send in. We are going to follow the law. We are going to do what we are required to do. We are not making any promises. *** I am not finding that this is the material violation that prevents the confirmation of the sale." The court also noted that the Landings would argue their

HAMP application stayed the sale regardless of whether Wells Fargo accepted or rejected their application.

¶ 19 The trial court confirmed the sale on July 11, 2016. This appeal followed.

¶ 20 ANALYSIS

¶ 21 We first address and reject the Landings' argument that Wells Fargo lacked standing to file its foreclosure complaint. An instrument endorsed in blank becomes bearer paper and may be negotiated by transfer of possession alone, unless and until it is specially endorsed. 810 ILCS 5/3-205(b) (West 2014). First Franklin endorsed the note in blank. Wells Fargo must have possessed the note before attaching it to the complaint—Wells Fargo could not have attached an exhibit it did not possess. By possessing the note prior to filing the complaint, Wells Fargo had standing to negotiate the note and seek foreclosure.

¶ 22 The Landings make two other arguments on appeal. First, they claim that Wells Fargo's refusal to answer discovery precluded summary judgment. They argue Wells Fargo failed to prove the date of default and the amount due to satisfy the mortgage. The Landings also claim they could not dispute these issues or raise an issue of fact without additional discovery. Second, the Landings claim that the trial court abused its discretion by confirming the sale. Specifically, they argue HAMP section 2.3.2 required Wells Fargo to stay the sale for at least 30 days after the Landings submitted their application. We reject both arguments and affirm the trial court's judgment of foreclosure and confirmation of the sale.

¶ 23 I. Summary Judgment

¶ 24 We review summary judgment orders *de novo* and may affirm upon any basis supported by the appellate record. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). Summary judgment is proper where there are no issues of material fact in the record and

the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). A fact issue exists where a material fact is disputed or where different inferences can be reasonably drawn from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). To avoid summary judgment, the opposing party must present evidence that arguably entitles the party to a judgment. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996).

¶ 25 The Landings argue that they could not dispute Wells Fargo's summary judgment motion without additional discovery responses. They also claim that issues of fact preclude summary judgment; specifically, Wells Fargo failed to prove the date of default and amount in default. Wells Fargo counters that the Landings needed no additional discovery to file a response and/or evidence in opposition to the motion for summary judgment. Wells Fargo also argues that it proved the date of default (January 1, 2008) and the amount in default ($$363,741.71). We agree.

¶ 26 A. Date of Default

¶ 27 Nationstar's notice of default, dated April 2, 2014, stated the Landings stopped paying their mortgage on January 1, 2008. Wells Fargo attached the notice and the Landings' payment history to the summary judgment motion. The Landings never claimed that they made payments after January 1, 2008, nor did they produce evidence disputing the date of default. The Landings have personal knowledge as to when they made their mortgage payments; they do not need additional discovery to determine whether they made payments after January 1, 2008. We find no issue of fact as to the date of default.

¶ 28 B. Amount Owed on the Mortgage

¶ 29 The Landings also claim that they could not understand the payment history attached to Wells Fargo's prove-up affidavit; therefore, they could not dispute the amount in default.

However, the Landings also argue for the first time on appeal that Wells Fargo failed to prove the amount due.

¶ 30 Prove-up affidavits in mortgage foreclosure cases must (1) state the affiant's identity and source of personal knowledge, (2) identify the books, records, and/or other documents that the affiant reviewed or relied upon in drafting the affidavit, as well as attach the payment history in cases (like this one) where the defendants file an appearance or responsive pleading, and (3) identify any computer program or software that the affiant or entity relies upon to track mortgage payments—including the source of the information, the method and time of preparation to establish the program produces an accurate payment history, and an explanation as to why the records are "business records" under the law. Ill. S. Ct. R. 113(c) (eff. May 1, 2013).

¶ 31 Wells Fargo's prove-up affidavit satisfied Rule 113(c)'s requirements. Wofford had personal knowledge based on her position as a Nationstar document execution specialist. After Nationstar replaced Bank of America as the loan servicer, it incorporated Bank of America's records into the Landings' Nationstar file. The affidavit sufficiently described the LSAMS software. It also stated: "The information in this affidavit is taken from Nationstar's business records," and described Nationstar's procedures for creating and maintaining its records. Wofford also attached the Landings' payment history to the affidavit. Once Wells Fargo filed its summary judgment motion, valid prove-up affidavit, and evidence sufficient to establish its *prima facie* case, the burden shifted to the Landings to establish an issue of fact that precluded summary judgment. See *Allegro Services, Ltd.*, 172 Ill. 2d at 256; *Libolt v. Wiener Circle, Inc*., 2016 IL App (1st) 150118, ¶ 24.

¶ 32 The Landings filed no response to Wells Fargo's summary judgment motion and did not challenge the amount in default in the trial court. In their brief, however, the Landings argue that

Nationstar miscalculated the Landings' interest owed by over $8000. This argument is not evidence. The record before us contains no evidence opposing Wells Fargo's prove-up affidavit, let alone evidence sufficient to raise an issue of fact. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); R. 323 (eff. Dec. 13, 2005). We hold that the trial court properly granted summary judgment in Wells Fargo's favor.

¶ 33 II. Confirming the Sale

¶ 34 Trial courts have broad discretion in approving or disapproving judicial sales. *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 388 (1997). We review foreclosure sale confirmations for abuse of this discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 35 The Landings argue that the trial court abused its discretion by approving the sale because the sale materially violated HAMP section 2.3.2. 735 ILCS 5/15-1508(d-5) (West 2014). They claim that HAMP section 2.3.2 required Wells Fargo to stay the sale at least 30 days after accepting their application.

¶ 36 To set a sale aside under section 15-1508(d-5) of the Code of Civil Procedure (735 ILCS 5/15-1508(d-5) (2014)), a defendant must "file a motion before confirmation of the sale and prove, by a preponderance of the evidence, that the defendant applied for assistance under the MHA and that the sale took place in *material violation* of the MHA's requirements, *i.e.*, the HAMP guidelines for proceeding to a judicial sale." (Emphasis in original.) *Citimortgage, Inc. v. Johnson*, 2013 IL App (2d) 120719, ¶ 33. Defendants must attach a sworn copy of their application to their motion to stay or set aside the sale. *Citimortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 68.

¶ 37 Here, the Landings failed to attach a sworn copy of their HAMP application to their motion—a fatal procedural misstep. Even if they had not procedurally erred, they did not prove a material violation of HAMP's requirements. Section 2.3.2 prohibits, with certain exceptions not applicable to this case, servicers from conducting a foreclosure sale within 30 calendar days after the borrower receives a nonapproval notice. According to the record, the Landings never received a nonapproval notice to trigger the 30-day period. We do not find that HAMP section 2.3.2 requires an automatic 30-day stay of sale whenever a borrower submits application documents. Such a rule would encourage gamesmanship rather than help borrowers find a legitimate alternative to foreclosure.

¶ 38 The Landings also argue that the trial court "abused its discretion by permitting an unjust result to occur [by confirming the sale]." They claim that Wells Fargo provided them with inaccurate information regarding their alternatives to foreclosure. Specifically, the Landings claim that Wells Fargo told them they could not simultaneously pursue HAMP assistance and Home Affordable Foreclosure Alternatives (HAFA).

¶ 39 No evidence in the record indicates that Wells Fargo misrepresented the Landings' foreclosure alternatives—the Landings filed no affidavit or document supporting their allegation. According to the record, the Landings did not seek foreclosure alternatives or apply for borrower assistance programs in the *eight years* between the date of default and date of sale. They also failed to utilize Will County's free foreclosure mediation program at the outset of this case, which would have indefinitely stayed the sale while they explored foreclosure alternatives. No injustice resulted from the trial court's judgment. We hold that the trial court did not abuse its discretion by confirming the sale.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 42 Affirmed.