

No. 1-17-1748

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILMINGTON SAVINGS FUND SOCIETY,)	Appeal from the
d/b/a CHRISTIANA TRUST, not individually but)	Circuit Court of
as trustee for CARLSBAD FUNDING)	Cook County.
MORTGAGE TRUST,)	
)	
Plaintiff-Appellee,)	No. 12 CH 33903
)	
v.)	
)	
JOANNA MALECKI and PAWEL MALECKI,)	Honorable
)	Darryl B. Simko,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in judgment.

ORDER

- ¶ 1 **Held:** We affirm the summary judgment granted in favor of plaintiff-appellee Wilmington Savings Fund Society.
- ¶ 2 JP Morgan Chase Bank initiated a foreclosure action on a property located at 9525 Culver Street, Des Plaines, Illinois, after defendants-appellants, Joanna Malecki and Pawel Malecki,

failed to make the required payments. After two substitutions, plaintiff-appellee, Wilmington Savings Fund Society, d/b/a Christiana Trust, not individually but as a trustee for Carlsbad Funding Mortgage Trust, filed for summary judgment. Finding no issue of material fact, the circuit court granted the motion. The circuit court confirmed the sale of the property. Defendants then filed this appeal.

¶ 3 For the following reasons we affirm the circuit court's grant of summary judgment in favor of plaintiff.

¶ 4 JURISDICTION

¶ 5 This foreclosure action commenced on September 6, 2012. On November 21, 2016 plaintiff moved for summary judgment. On February 2, 2017, the circuit court granted the motion. On June 29, 2017, the circuit court approved the sale and order of possession. On July 12, 2017, defendants filed this notice of appeal. Accordingly, this court has jurisdiction over their matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 6 BACKGROUND

¶ 7 On September 6, 2012, JP Morgan Chase initiated this action when it filed a complaint to foreclose on the mortgage loan given to defendants, Joanna Malecki and Pawel Malecki. The complaint alleged defendants defaulted on the loan when they failed to make the required monthly payment in March 2012. Defendants filed a *pro se* verified answer admitting the essential allegations of the complaint, including the default. JP Morgan Chase then filed an amended complaint. Defendants filed a verified amended answer again admitting default. They also raised three affirmative defenses: (1) defendants' verified answer required JP Morgan's

amended complaint to also be verified, (2) JP Morgan failed to exhaust “conditions precedent” prior to filing suit, and (3) JP Morgan was engaging in unauthorized debt collection practices. JP Morgan filed a verified response denying the affirmative defenses.

¶ 8 On January 5, 2016, the circuit court entered an order substituting Federal National Mortgage Association (commonly known as Fannie Mae) as the plaintiff. On October 27, 2016, the circuit court granted another motion to substitute allowing the current plaintiff-appellee, Wilmington Savings Fund Society, d/b/a Christiana Trust, not individually but as trustee for Carlsbad Funding Mortgage Trust to substitute into this matter. The new plaintiff then moved for summary judgment submitting an affidavit of indebtedness and argued the affirmative defenses failed to raise a genuine issue of material fact. Defendants filed a response but did not attach either a counter-affidavit or other documentary evidence to support their affirmative defenses. The circuit court granted plaintiff’s summary judgment on February 2, 2017. On June 29, 2017, the circuit court granted an order confirming the sale and order of possession.

¶ 9 This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, defendants argue the circuit court erred in granting summary judgment in favor of plaintiff. They argue the failure to verify the amended complaint after they had filed a verified answer to the original complaint should have precluded summary judgment in plaintiff’s favor. They also argue plaintiff violated the Illinois Collection Agency Act and this violation should also have precluded summary judgment.

¶ 12 An appellate court reviews a grant of summary *de novo*. *Warren v. Burris*, 325 Ill. App. 3d 599, 603 (2001). Summary judgment is properly granted if the pleadings, depositions and admissions on file, together with the affidavits, if any, show there is no genuine issue of material

fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Warren*, 325 Ill. App. 3d at 602. When reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of material fact exists where the materially relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). To survive this motion, the nonmoving party need not prove its case, but must present some evidentiary facts that would arguably entitle it to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004).

¶ 13 Under Illinois law, a mortgagee may foreclose its interest in real property upon “either the debt’s maturity or a default of a condition in the instrument.” *Heritage Pullman Bank v. American National Bank & Trust Co. of Chicago*, 164 Ill. App. 3d 680, 685 (1987). A mortgagee establishes a *prima facie* case for foreclosure with the introduction of the mortgage and note, after which the burden of proof shifts to the mortgagor to prove any applicable affirmative defense. *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994). An affirmative defense admits the sufficiency of the opposing party’s claim and asserts a new matter which then defeats it. *Farmers Auto. Ins. Ass’n v. Neumann*, 2015 IL App (3d) 140026, ¶ 16.

¶ 14 In this case, plaintiff sought foreclosure of the mortgaged property based on defendants’ default on their mortgage obligations. Specifically, plaintiff alleged defendants stopped making the required monthly payments in March 2012. In both their verified answer and amended verified answer the defendants admitted they had stopped making the required payments in March 2012. The verified amended answer raised three affirmative defenses: (1) Chase’s failure

to verify the amended complaint pursuant to section 2-605 (735 ILCS 5/2-605(a) (West 2012)), (2) failure to give notice of the breach to defendants and an opportunity to cure, and (3) Chase was engaging in the unauthorized practice of debt collection in violation of the Illinois Collection Agency Act (225 ILCS 425/1 *et al.* (West 2012)). The defendants restated the first and third affirmative defenses in response to plaintiff's motion for summary judgment, but it contained no attachments. On appeal before us, defendants reiterate the first and third affirmative defense should have been sufficient to defeat summary judgment. We disagree.

¶ 15 Defendants contend plaintiff's amended complaint should have been verified because they filed a verified answer to the original complaint. Section 2-605 states in relevant part, "[a]ny pleading, although not required to be sworn to, may be verified by the oath of the party filing it or of any other person or persons having knowledge of the facts pleaded. *** If any pleading is so verified, every subsequent pleading must also be verified, unless verification is excused." 735 ILCS 5/2-605(a) (West 2012).

¶ 16 A violation of section 2-605 does not represent an affirmative defense. It neither "admits the sufficiency of the opposing party's claim" nor "asserts a new matter which then defeats it." *Farmers Auto. Ins. Ass'n*, 2015 IL App (3d) 140026, ¶ 16. Furthermore, defendants' argument that the filing of a verified answer required plaintiff to file a verified amended complaint would create an absurd result. *In re B.L.S.*, 202 Ill. 2d 510, 517 (2002) (a reviewing court must construe a statute to avoid absurd, inconvenient, or unjust results). Under defendants' interpretation, any defendant could force the filing of a verified amended complaint by filing a verified answer even if the original complaint was not verified. We reject this argument. See *People ex rel. Hartigan v. All American Aluminum and Construction Co., Inc.*, 171 Ill. App. 3d 27, (1988) (explaining the general rule that where the first pleading required no verification any amendment also need

not be verified). Defendant's reliance on section 2-605 is completely misplaced. Plaintiff did not need to verify the amended complaint and this claim did not represent a basis for denying summary judgment.

¶ 17 Defendants' second argument concerning a possible violation of the Illinois Collection Agency Act (225 ILCS 425/1 *et al.* (West 2012)) is also insufficient to defeat plaintiff's motion for summary judgment. In moving for summary judgment, plaintiff established the existence of a mortgage and note. Defendants, in both their verified answer and amended verified answer, admitted they were in default. The establishment of these facts demonstrated plaintiff's right to foreclose on the subject property. *Heritage Pullman Bank*, 164 Ill. App. 3d at 685; *Farm Credit Bank*, 262 Ill. App. 3d at 622. The burden then shifted to defendants to present evidence showing a genuine issue of material fact or that plaintiff was not entitled to judgment as a matter of law. *Triple R. Development LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶¶ 12, 16.

¶ 18 While defendants argued in their response that plaintiff was in violation of the Illinois Collection Agency Act, they failed to attach any evidence to support this allegation. It is well established a "nonmoving party may not rely solely upon its pleadings to raise an issue of material fact. Nor is mere argument alone sufficient to raise such an issue." (internal citation omitted) *Performance Food Group Co., LLC v. ARBA Care Center of Bloomington LLC*, 2017 IL App (3d) 160348, ¶ 18. Additionally, defendants bore the burden of demonstrating a violation of the Act. *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 35. The failure to attach any evidence to their response meant defendants could not demonstrate plaintiff was engaging in the unauthorized collection of debts in violation of the

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Act. Defendants failed to show a genuine issue of material fact and, therefore, the circuit court did not err in granting summary judgment in favor of plaintiff.

¶ 19

CONCLUSION

¶ 20 Based on the foregoing, we affirm the grant of summary judgment in favor of plaintiff.

¶ 21 Affirmed.