

No. 1-18-0720

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**

U.S. BANK, NATIONAL ASSOCIATION, as)	Appeal from the
successor trustee to BANK OF AMERICA, N.A., as))	Circuit Court of
successor trustee to LASALLE BANK NA, as)	Cook County.
trustee for MERRILL LYNCH FIRST FRANKLIN)	
MORTGAGE LOAN ASSET-BACKED)	
CERTIFICATES, SERIES 2007-5,)	
)	No. 2013 CH 9867
Plaintiff-Appellee,)	
)	
v.)	
)	
IRA SALTZMAN and RITA SALTZMAN,)	Honorable
)	Daniel Patrick Brennan,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶1 *Held:* The judgment of the circuit court is affirmed where defendants filed their objections to the foreclosure judgment after a motion to confirm the sale had been filed, but did not seek to set aside the sale pursuant to the grounds set forth in section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2016)).

¶ 2 Defendants, Ira and Rita Saltzman, appeal the order of the circuit court confirming the judicial sale of property upon which defendants had secured their mortgage. Defendants challenge the judgment of foreclosure and the order confirming sale, contending that (1) plaintiff improperly refiled its foreclosure complaint four times, contrary to section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2016)); and (2) plaintiff did not have standing to foreclose the mortgage because its foreclosure complaint failed to attach the required note. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered an order confirming sale on March 27, 2018. Defendants filed a notice of appeal on April 4, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 303 (eff. July 1, 2017), and 304(a) (eff. Mar. 8, 2016), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 On July 25, 2007, defendants were granted a mortgage secured by real property located at 6406 N. Kilbourn Avenue in Lincolnwood, Illinois. Defendants defaulted on the mortgage on December 1, 2008. Plaintiff's predecessor in interest filed a foreclosure complaint on March 13, 2009 (case number 09 CH 11545) ("first complaint"), which was voluntarily dismissed without prejudice on January 24, 2013, by plaintiff.

¶ 7 On April 12, 2013, plaintiff filed a second foreclosure complaint (case number 13 CH 09867) ("second complaint"). Attached to the complaint was a lost note affidavit prepared by an employee of Bank of America, N.A., and a copy of the note which, according to the affidavit, "is a true and correct copy." Plaintiff alleged that it is the "current mortgagee" as successor trustee to Bank of America, N.A., and demonstrated by the assignment of mortgage attached as "Exhibit

C.” Defendants filed a motion to dismiss the second complaint on May 30, 2013, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)), on the basis that plaintiff failed to attach a copy of the promissory note, and plaintiff’s complaint included a defective affidavit. Plaintiff’s second complaint was voluntarily dismissed without prejudice on July 2, 2013.

¶ 8 Plaintiff filed a third complaint on December 23, 2013 (case number 13 CH 28158) (“third complaint”). On May 5, 2015, upon plaintiff’s motion, the trial court reinstated the second complaint (reinstated second complaint) pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)). The third complaint was voluntarily dismissed without prejudice on August 6, 2015.

¶ 9 Plaintiff filed a motion for default, alleging that “sixty days have passed since the last Defendant was served and that none of the Defendants have answered or otherwise pleaded” except for appearances on May 30, 2013. Defendants responded to the motion, arguing that they had filed a motion to dismiss the second complaint on May 30, 2013. They alleged that the trial court never resolved the motion before the second complaint was voluntarily dismissed on July 2, 2013.

¶ 10 Defendants then filed an amended 2-619 motion to dismiss the reinstated second complaint, alleging that plaintiff’s complaint was an improper refiling of its original complaint, the complaint was barred by collateral estoppel, and the prove-up affidavit attached to the complaint was defective. The trial court denied the motion on December 2, 2015, and ordered defendants to answer the reinstated second complaint. In their answer, defendants denied plaintiff’s allegation that as the current mortgagee, it has the capacity to bring this complaint. Defendants alleged “that the original mortgagor filed a petition in bankruptcy the day before this

mortgage was allegedly assigned. As property of the bankrupt's estate, the original holder had no authority to assign estate property without leave of the Trustee."

¶ 11 On March 8, 2016, plaintiff filed a motion for summary judgment, which the trial court continued after it granted defendants' motion to conduct discovery. Plaintiff refiled its motion for summary judgment on February 9, 2017, attaching a copy of the note and mortgage, the assignment of the mortgage, a lost note affidavit, and an affidavit of the amounts due and owing by defendants. The record contains no response by defendants. On March 2, 2017, the trial court granted summary judgment in favor of plaintiff on the reinstated second complaint. In its order, the trial court found "[t]hat all of the material allegations of the Complaint are true and proven against said Defendants and that the Note has been exhibited in open Court ***." The court further found that plaintiff "is entitled to a Decree of Foreclosure" and that a total of \$1,301,233.24 is due to plaintiff "upon the Note and Mortgage security."

¶ 12 The judicial sale took place on December 14, 2017, and plaintiff filed a motion to confirm the sale and for a deficiency judgment on January 10, 2018. On February 22, 2018, defendants filed an objection to the confirmation, arguing that plaintiff lacked standing because it failed to attach the note upon which the mortgage was foreclosed, and that the reinstated second complaint was improperly refiled more than one time. Plaintiff responded that defendants waived their standing argument as the issue may not be raised through an objection to a motion to confirm a sale. The trial court entered an order confirming the sale and for a deficiency judgment on March 27, 2018, and defendants filed this appeal.

¶ 13

ANALYSIS

¶ 14 Defendants appeal the trial court's orders denying their motion to dismiss plaintiff's reinstated second complaint and granting summary judgment on plaintiff's complaint, as well as

the court's final order confirming the judicial sale. We review an appeal involving a section 2-619 motion to dismiss, as well as an appeal from the trial court's grant of summary judgment, *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. The trial court's order confirming sale, however, is reviewed under an abuse of discretion standard. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 15 Defendants raise the issues of standing to bring the foreclosure complaint, improper refile of the complaint, and *res judicata*, all of which target the judgment of foreclosure. However, a judicial sale has been conducted and the trial court has entered an order confirming the sale. Since defendants challenge the judgment of foreclosure at this point, they “necessarily must also seek to set aside the judicial sale” under section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2016)). *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18.

¶ 16 Section 15-1508(b) provides that upon motion and notice, the court shall confirm the sale unless it finds (1) no proper notice of the sale; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. *Id.* “[A] party seeking to set aside the sale at [this] point is limited to the three specified grounds related to defects in the sale proceedings, or to the fourth ground ***.” *Id.* *McCluskey's* analysis of section 15-1508(b) is relevant to our determination here.

¶ 17 Our supreme court noted that “[l]ong before the codification of the Foreclosure Law,” courts have exercised their discretion “to vacate a sale where unfairness is shown that is prejudicial to an interested party.” *Id.* ¶ 19. For example, courts exercised their equitable authority to vacate a judicial sale where the lender's conduct prevented borrowers from protecting their interest in the property or pursuing their right to redeem. *Id.* ¶ 22. Courts would

not, however, refuse to confirm a sale where the error complained of was the result of the party's own negligence. *Id.* ¶ 19. Likewise, “the justice provision under section 15-1508(b)(iv) acts as a safety valve to allow the court to vacate the judicial sale and, in rare cases, the underlying judgment, based on traditional equitable principles.” *Id.* ¶ 25.

¶ 18 With this in mind, our supreme court set the parameters for what constitutes an injustice under section 15-1508(b)(iv). The court concluded that objections to the confirmation under 15-1508(b)(iv) “cannot be based simply on a meritorious pleading defense to the underlying foreclosure complaint ***.” *Id.* Rather, in order to set aside the sale after a motion to confirm has been filed, a party must also establish “that justice was not otherwise done because either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests.” *Id.* ¶ 26.

¶ 19 Defendants question the application of *McCluskey* because the case involved a default judgment of foreclosure, and no default judgment was entered against defendants here. *McCluskey*'s interpretation of section 15-1508(b), however, did not rely on the fact that the underlying judgment was a default judgment. See also *PNC Bank, National Association v. Krier*, 2015 IL App (3d) 140639, ¶¶ 27, 38 (applying the holding in *McCluskey* where the defendant had challenged the summary judgment proceedings). The court simply found that the party challenging the foreclosure judgment, after a motion to confirm the sale has been filed, must also move to set aside the sale under the limited circumstances outlined by the General Assembly in section 15-1508(b). *McCluskey*, 2013 IL 115469, ¶ 18. At this point, the balance of interests has shifted in favor of providing stability in the judicial sale process and it is not enough to raise a meritorious defense to the complaint. *Id.* ¶ 25. Instead, a party seeking to set aside the sale must

do so based on one of the defects in the sale proceedings specified in 15-1508(b), or must allege, pursuant to section 15-1508(b)(iv), that the adverse judgment resulted from injustice based on equitable principles.

¶ 20 Here, the record does not indicate that defendants filed a response to the summary judgment motion, and they did not seek to vacate the order of foreclosure prior to the filing of the motion to confirm the sale. Instead, they filed their objections after the motion to confirm was filed, and more than 11 months after the trial court entered its order granting summary judgment. Therefore, defendants, in challenging the judgment of foreclosure, must also seek to set aside the sale based on the limited grounds specified in section 15-1508(b). *McCluskey*, 2013 IL 115469, ¶ 18. Defendants, however, did not seek to set aside the sale and raised only meritorious defenses against the foreclosure complaint and judgment.

¶ 21 Furthermore, summary judgment was proper where plaintiff attached the mortgage and a copy of the note to its summary judgment motion. The fact that a copy of the note is attached is *prima facie* evidence that plaintiff owns the note, and evidence of the mortgage and promissory note establishes a *prima facie* case of foreclosure. *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶¶ 24, 67. Also, defendants did not file a counteraffidavit or present any evidence to challenge the factual allegations in plaintiff's motion for summary judgment. When a moving party files supporting affidavits containing well-pleaded facts, and the opposing party files no counteraffidavits, "the material facts set forth in the movant's affidavits stand as admitted." *Id.* ¶ 49.

¶ 22 Nor do we find that the court's confirmation of the sale was an abuse of discretion. As our supreme court held in *McCluskey*, the trial court *shall* confirm the sale unless it finds one of the four grounds specified in section 15-1508(b). *McCluskey*, 2013 IL 115469, ¶ 18. The trial

court's order states only that it found that the sale "proceeded in accordance with all the terms of the Judgment heretofore entered ***." There was no finding of deficient notice, or that the terms of the sale were unconscionable, or that it was conducted fraudulently, or that justice was otherwise not done. 735 ILCS 2/15-1508(b) (West 2016). The record contains no transcripts of proceedings that would reveal the basis for the trial court's determination to confirm the sale. It is the duty of defendants, as appellants, to present a sufficiently complete record on appeal. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). Absent such a record, "we will presume that the trial court heard adequate evidence to support its decision and that its order granting [plaintiff's] motion *** was in conformity with the law." *Id.* at 433.

¶ 23 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.