

No. 1-18-0789

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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HSBC BANK USA, N.A., as Trustee on Behalf	)	Appeal from the
of Ace Securities Corp. Home Equity Loan Trust,	)	Circuit Court of
and for the Registered Holders of Ace Securities	)	Cook County.
Corp. Home Equity Loan Trust, Series	)	
2006-ASAP4, Asset Backed Pass-Through	)	
Certificates,	)	
	)	No. 14 CH 6531
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
MIGUEL ARTEAGA a/k/a Miguel J. Arteaga,	)	Honorable
	)	Patricia S. Spratt,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

- ¶ 1 **Held:** We affirm the summary judgment and judgment of foreclosure granted in favor of plaintiff-appellee. We also affirm the order confirming the sale of the subject property.
- ¶ 2 On May 30, 2006, defendant-appellant, Miguel Arteaga a/k/a Miguel J. Arteaga, received a loan from First Capital Mortgage Corporation in the amount of \$207,200 which was secured by a mortgage on property located at 1216 South 59th Avenue, Cicero, Illinois. Defendant failed to

make the required September 2013 mortgage payment and the mortgage went into default. In April 2014, plaintiff-appellee, HSBC Bank USA, N.A., which held the mortgage and note at the time, filed a complaint for foreclosure. In April 2017, it moved for summary judgment. After briefing from the parties, the circuit court granted the motion in July 2017. The subject property was sold in October 2017 and the order approving the sale was entered in March 2018.

¶ 3 Before this court, the defendant argues that the circuit court erred in granting summary judgment. Defendant argues the affidavit attached to the motion for summary judgment was defective and should not have been relied upon. Defendant further contends the judgment of foreclosure order entered by the circuit court was ineffective because certain matters were not contained in the “decretal” part of the order. Finally, he argues the order approving the sale should not have been entered because plaintiff failed to provide notice via e-mail.

¶ 4 For the reasons stated more fully below, we affirm the grant of summary judgment and the judgment of foreclosure entered in favor of plaintiff. The affidavit used in support of summary judgment was not defective and satisfied supreme court rules. We find no issues with the judgment of foreclosure order. Finally, the record demonstrates that defendant failed to comply with the applicable statutory section for challenging improper service regarding a judicial sale.

¶ 5

#### JURISDICTION

¶ 6 This foreclosure action commenced on April 16, 2014. On July 26, 2017, the circuit court granted summary judgment in plaintiff’s favor. The court entered a judgment of foreclosure on the same day. On March 13, 2018, the circuit court approved the sale and order of possession. On April 12, 2018, defendant timely filed his notice of appeal. Accordingly, this court has jurisdiction over this 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).

¶ 7

#### BACKGROUND

¶ 8 This appeal involves a loan of \$207,200 given on May 30, 2006, to defendant-appellant, Miguel Arteaga a/k/a Miguel J. Arteaga, for a property located at 1216 South 59th Avenue, Cicero, Illinois. The original lender was First Capital Mortgage Corporation. The loan was secured by a mortgage executed in favor of First Capital and recorded with the Cook County Recorder of Deeds on June 2, 2006. Defendant failed to make the required September 2013 payment and the mortgage went into default. While unclear from the record, the mortgage and note were eventually obtained by the current plaintiff-appellee, HSBC Bank USA, N.A., as Trustee on behalf of Ace Securities Corporation Home Equity Loan Trust and for the registered holders of Ace Securities Corporation Home Equity Trust, Series 2006-ASAP4, asset backed pass-through certificates.

¶ 9 On April 16, 2014, plaintiff filed a complaint in Cook County seeking to foreclose on the subject property. Attached to the complaint were copies of the original mortgage and note along with a subsequent loan modification agreement executed by defendant. On April 28, 2017, plaintiff filed a motion for summary judgment. Defendant responded on June 22, 2017. Defendant argued the affidavit of amounts due and owing was inadequate because the affiant failed to attach a “certificate of authorization” substantiating her statement that she was authorized to speak on behalf of plaintiff’s loan servicer. After receiving plaintiff’s reply, the circuit court granted the summary judgment motion on July 26, 2017. A judgment of foreclosure and sale was also entered. The subject property was sold at judicial auction on October 30, 2017.

¶ 10 On November 2, 2017, defendant filed a motion to reconsider the grant of summary judgment. The motion to reconsider argued that the affidavit of amount due and owing did not

establish the affiant could competently testify in strict compliance with applicable supreme court rules. On November 21, 2017, the circuit court denied defendant's motion to reconsider. On December 22, 2017, plaintiff moved to approve the sale of the subject property. In response, defendant argued the judgment of foreclosure was invalid and that plaintiff had failed to properly serve the notice to approve the judicial sale. After receiving plaintiff's reply, the circuit court rejected defendant's arguments and entered an order approving the sale on March 13, 2018.

¶ 11 This timely appeal followed.

¶ 12 ANALYSIS

¶ 13 In his first issue before this court, defendant argues summary judgment was improperly granted. In support of this argument, he alleges the amounts due and owing affidavit of Kyandra Brown attached to plaintiff's motion for summary judgment failed to comply with applicable supreme court rules because it failed to attach documentation showing that Brown's employer, Ocwen Loan Servicing, LLC, actually serviced defendant's loan on plaintiff's behalf. He also argues the failure to include the word "competent" in the affidavit as it relates to Brown's testimony renders the affidavit inadmissible. We review each argument in turn.

¶ 14 Section 2-1005 of the Code of Civil Procedure allows parties to receive judgment in their favor "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2016). If a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (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). In an appeal from a grant of summary judgment, our review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance*

*Co.*, 154 Ill. 2d 90, 102 (1992). A *de novo* standard of review also applies to whether an affidavit offered in support of summary judgment complies with Rule 191. *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003).

¶ 15 The record demonstrates defendant has admitted that Ocwen Loan Servicing, LLC services the mortgage at issue in this case. For over a century, the rule in Illinois is that where a fact is alleged in a complaint, and admitted in the answer, “the admission is conclusive and evidence tending to dispute it should not be considered.” *Home Ins. & Banking Co. of Tex. v. Myer*, 93 Ill. 271, 274 (1879). Paragraph 2 of the complaint references exhibits C & D, which are the loan modification agreements entered into by defendant. Both of those documents identify Ocwen Loan Servicing, LLC as the loan servicer. In his answer to the complaint, defendant admitted paragraph 2 and therefore admitted the loan modifications referencing Ocwen were authentic. After making this admission, he cannot dispute that Ocwen is the loan servicer as a way to defeat summary judgment.

¶ 16 In his next argument challenging the grant of summary judgment, defendant contends the failure to include the word “competent” preceding the word “testimony” renders the affidavit of Kyandra Brown inadmissible. Supreme Court Rule 191 governs affidavits submitted in support of summary judgment. Rule 191(a) states, in relevant part,

“affidavits submitted in connection with a motion \*\*\* shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.” Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

Defendant argues that pursuant to *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002), our supreme court requires strict compliance with Supreme Court Rule 191(a) and therefore the word “competent” must appear in all affidavits filed in support of motion for summary judgment.

¶ 17 Defendant’s reliance on *Robidoux* is misplaced. A review of *Robidoux* demonstrates the “strict compliance” the supreme court was referring to related to two key parts of an affidavit. First, the supreme court held that a party must strictly comply with the requirement that an affidavit “must consist not of conclusions but of facts admissible in evidence, and it must set forth these facts with particularity.” *Robidoux*, 201 Ill. 2d at 334. Second, an affidavit must strictly comply with the requirement that it have attached “sworn or certified copies of all papers upon which the affiant relied[d] upon.” *Id.* at 343-44. This is to ensure affidavits do not become “a free pass to trial.” *Id.* at 344 citing *Hayes v. Douglas Dynamics, Inc.*, 8 F. 3d 88, 92 (1st Cir. 1993). Defendant does not argue that the facts are not pled with particularity nor does he argue that the proper mortgage servicing records were not attached.

¶ 18 We conclude the word “competent” has no legal significance in regard to an affidavit. “Competent” refers to the substance of the testimony. Testimony contained within an affidavit is “competent” if it demonstrates that the affiant has the requisite knowledge to establish the facts stated in the affidavit itself. In regard to Brown’s affidavit, she satisfied that she had competency to testify as to the amounts due and owing by explaining: (1) she is a contract management coordinator for Ocwen, (2) she is familiar with Ocwen’s business practices, (3) it is part of its business to keep records on loans its services, including defendant’s loan; and (4) she reviewed the payment history and other electronic documents kept by Ocwen and attached to the affidavit to establish the amount due and owing. The facts contained in the affidavit established Brown’s competency to testify to the amounts due and owing and the omission of the word “competent” did not render the affidavit invalid.

¶ 19 In his next argument, defendant complains that the order approving sale was improper because it was entered on the basis of a judgment of foreclosure which lacked the necessary adjudications. Defendant argues that several determinations of the court made in the “findings” section rather than the “adjudications” section render the judgment of foreclosure unenforceable.

¶ 20 Section 15-1506 of the Mortgage Foreclosure Act states “[a] judgment of foreclosure shall include the last date for redemption and all rulings of the court entered with respect to each request for relief set forth in the complaint.” 735 ILCS 5/12-1506(e) (West 2016). Moreover, while it is true “only the decretal portion of an order may operate effectively as a judgment (*Buchanan v. Lenz*, 115 Ill. App. 3d 722, 726 (1984)), a decree must be construed in its entirety and should include consideration of the entire record, prior pleadings, and former decrees concerning the same cause (*Baldi v. Chicago Title & Trust Co.* 113 Ill. App. 3d 29, 33 (1983)).” *Village of Gilberts v. Holiday Park Corp.*, 150 Ill. App. 3d 932, 938 (1986).

¶ 21 After reviewing the record, we find the judgment of foreclosure valid and enforceable. The order identifies the last date of redemption, October 27, 2017. All of the relief requested by plaintiff in its foreclosure complaint is contained within the decretal portion of the judgment: (1) a judgment of foreclosure (paragraph 1); (2) a personal deficiency judgment (paragraph 8(c)); (3) an order of possession (paragraph 8(b)); (4) an award of attorney fees (paragraph 1) and (5) an order appointing a selling officer (paragraph 13). Even though the finding of default and the amount due and owing are contained within the “findings” section, the decretal portion necessarily incorporates those findings because the judgment of foreclosure should be read as a whole. See *Village of Gilberts*, 150 Ill. App. 3d at 938.

¶ 22 In his last issue, defendant argues the order approving sale was improperly served by plaintiff because notice was provided via U.S. mail instead of e-mail. In support of his argument, defendant cites to section 15-1507(c)(3) of the Mortgage Foreclosure Act and Supreme Court

Rule 11. Section 15-1507(c)(3) states in relevant part that notice be given to “all parties in the action” and “[s]uch notice shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint.” 735 ILCS 5/15-1507(c)(3) (West 2016). Rule 11(c) governs service of papers other than service of a summons or a complaint and provides that “[u]nless otherwise specified by rule or order of court, documents shall be served electronically.” Ill. S. Ct. R. 11(c) (eff. Jan 1, 2016).

¶ 23 We disagree with defendant that the sale should be set aside. While section 15-1507(c) governs “notice of sale,” section 15-1508(c) governs the “failure to give notice.” Section 15-1508(c) states in relevant part, “any party entitled to notice provided for in paragraph (3) of that subsection (c) [referring to section 15-1507(c)(3)] who is not so notified may, by motion **supported by affidavit** made prior to confirmation of such sale, ask the court which entered the judgment to set aside the sale.” (Emphasis added.) 735 ILCS 5/15-1508(c) (West 2016). Defendant’s response to the motion to approve the sale did not contain an affidavit and therefore failed to comply with section 15-1508(c).

¶ 24 Even if an affidavit was filed, we would still not set aside the sale. Defendant ignores his own attorney’s failure to comply with Rule 11. Rule 11(b) states, “an attorney **must**, \*\*\*, include on the appearance and all pleadings filed in court an e-mail address to which documents and notices will be served in conformance with Rule 131(d).” (Emphasis added.) Ill. S. Ct. R. 11(b) (eff. Jan. 1, 2016). The record demonstrates defendant’s trial counsel did not provide an e-mail address on his appearance form. Instead, plaintiff served defendant notice via U.S. mail, which was listed on the appearance form. Finally, we note that defendant neither claims he did not timely receive the notice nor does he claim any prejudice from receiving it via U.S. mail. We therefore decline to set aside the order approving the judicial sale.



¶ 25

CONCLUSION

¶ 26 For the reasons stated above, we affirm the grant of summary judgment entered in favor of plaintiff. The order approving the sale is also affirmed.

¶ 27 Affirmed.