2018 IL App (2d) 170915
No. 2-17-0915
Order filed September 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK N.A., successor by, Merger to WELLS FARGO BANK SOUTHWEST, N.A. f/k/a WACHOVIA MORTGAGE FSB f/k/a WORLD SAVINGS BANK, FSB Plaintiff-Appellee, v. JOSEPHINE BALACHIA-ZAPALIK, SCOTT ZAPALIK a/k/a SCOTT A. ZAPALIK, UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of DuPage County. No. 10-LM-4411 Honorable Robert G. Gibson, Robert W. Rohm, Judge, Presiding.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment in favor of appellee as the affidavit attached to appellee's motion for summary judgment was in conformity with Supreme Court Rule 191(a). Additionally, appellants' attached invoice reflected a one-year hazard insurance payment did not create an issue of material fact to preclude summary judgment. This court lacks jurisdiction to review appellants' arguments

concerning the trial court's July 28, 2016, order denying their motion to reconsider and request for leave to file counterclaims.

¶ 2 I. BACKGROUND

¶ 3 On August 24, 2006, appellants obtained a loan in the amount of $272,000 from World Savings Bank, FSB, which was secured by mortgage on the property at 400 Broker Avenue, Itasca, Illinois. Appellants then obtained a second loan secured by the property in the amount of $35,000 on August 20, 2007, from World Savings Bank, FSB. Appellee, Wells Fargo Bank N.A., (which is the successor by merger to Wells Fargo Bank Southwest, N.A. formerly known as Wachovia Mortgage FSB, formerly known as World Savings Bank FSB), filed a complaint to foreclose mortgage on August 5, 2010.

¶ 4 The first page of the first mortgage states that "[t]his is a first mortgage which secures a note which contains provisions allowing for changes in my interest rate, frequency and amount of payments and principal interest ***. The maximum aggregate principal balance secured by this mortgage is $340,000.00 which is 125% of the original principal note amount." Paragraph 3(E) of that mortgage note is titled "Deferred Interest: Additions to My Unpaid Principal." That section states that "[f]rom time to time, my monthly payments may be insufficient to pay the total amount of monthly interest that is due. If this occurs, the amount of interest that is not paid each month *** will be added to my Principal and will accrue interest at the same rate as the Principal." Additionally relevant here, the mortgage required appellants to "maintain hazard insurance," that, at a minimum, must "cover loss or damage caused by fire" as well as any "hazards normally covered by extended coverage hazard insurance policies."

¶ 5 Count I of appellee's complaint to foreclose mortgage alleged that appellants were in default under the terms of the first mortgage on the property from February 2009 through the

filing of the complaint. The alleged balance due on the first mortgage was $291,895.26, plus interest, costs and fees. Count II alleged that appellants were in default under the terms of the second mortgage on the property from October 2008 through the filing of the complaint. The alleged balance due on the second mortgage was $35,000, plus interest, costs and fees.

¶ 6 Appellants filed an answer and affirmative defenses to the complaint on November 8, 2010. In their answer, appellants denied all material allegations of the complaint. The parties then exchanged discovery until, after a series of continuances covering a period of four years, appellee filed a motion for summary judgment on September 19, 2014.

¶ 7 Appellee's motion for summary judgment argued that appellants' denials of the allegations in the complaint for foreclosure of mortgage were contradicted by the attached affidavits of Yvette Salinas, Vice President of Loan Documentation for Wells Fargo. Both affidavits attest to Salinas's personal knowledge of each mortgage based on her experience with Wells Fargo and her review of appellants' file. Her affidavits describe appellee as the holder of the mortgage note and that the business records of appellee are generated and maintained in the ordinary course of appellee's business using industry-standard software, namely, Mortgage Servicing Platform. Salinas attested that, based on the business records of appellee, appellants owed $415,168.03 on the first mortgage which included interest accruing from March 15, 2009, "Hazard Insurance Disbursements," and other fees. She further attested that appellants owed $42,840.52 on the second mortgage, including interest.

¶ 8 Appellants filed their response to the motion for summary judgment on November 12, 2014. The response argued that (1) the affidavits of Yvette Salinas did not comport with Supreme Court Rule 191(a) because it was based on inadmissible hearsay and not Salinas's personal knowledge; (2) appellant Scott Zapalik never signed the first mortgage, making him an

improperly named defendant; and (3) appellee never verified appellants' ability to repay the mortgage amount pursuant to 205 ILCS 635/5-6.

¶ 9 The trial court held a hearing on appellee's motion for summary judgment on December 9, 2014. The trial court requested that appellants file a sur-response for additional argument on the motion for summary judgment due to appellants having raised new allegations not contained in the motion for summary judgment.

¶ 10 On January 6, 2015, appellants filed their sur-response to appellee's motion for summary judgment. Relevant here, appellants argued that they had maintained a Travelers Insurance Homeowner's Policy at all time during the litigation. Thus, appellants claimed that appellee was not entitled collect $5,522 in hazard insurance disbursements as claimed in its affidavit of amounts due and owing. Appellants attached an invoice to their sur-response showing that they maintained insurance on the property from July 8, 2011 to July 8, 2012.

¶ 11 On January 28, 2015, appellee filed its sur-reply in support of its motion for summary judgment. Appellee pointed out that the Salinas affidavit reflects hazard insurance disbursements made on appellants' behalf on (1) June 22, 2009, in the amount of $3,052 ($2,199.00 of which was credited back to appellants on July 31, 2009; (2) November 27, 2012, in the amount of $2,248; (3) September 5, 2013, in the amount of $2,421.00. Appellants' account was not charged for hazard insurance payments during the time reflected on their attached Traveler's Insurance invoices.

¶ 12 The trial court heard continued arguments on appellee's motion for summary judgment on February 10, 2015. Summary judgment was granted in favor of appellee and judgment for foreclosure and sale was entered in appellee's favor. On June 16, 2016, appellants filed a *pro se* motion to vacate the judgment of foreclosure, as well as a request for leave to assert

counterclaims against appellee. Among the voluminous attachments to appellant's motion was a January 20, 2016, letter to appellants from Todd Good, an executive resolution specialist with Wells Fargo. The letter was in regard to inquiries submitted to Wells Fargo by appellants, among which was appellants' concern that Josephine Balachia-Zapalik's income was not verified and had been changed following her signing the first mortgage application. Todd Good addressed this concern by writing "[y]our application was submitted under a stated income program, which means documentation to verify the accuracy of your income or assets listed on the application was not required."

¶ 13 The trial court held a hearing on appellants' motion on July 28, 2016. The trial court informed appellants that there was no basis for a motion to vacate the judgment of foreclosure and said "really, what you're asking me to do is reconsider the granting of the summary judgment motion ***. I am going to consider it a motion to reconsider ***." After informing appellants that they had presented no newly discovered evidence, failed to identify a change in the law or any misapplication of the law, the trial court denied appellants' motion.

¶ 14 On September 7, 2017, a sheriff's sale was conducted on the property. Appellee filed a motion to approve the sale on October 5, 2017. The trial court entered an order approving the sale on October 17, 2017. Appellants timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Appellants raise two contentions in the present appeal. First, appellants contend that the trial court erred in granting summary judgment and judgment of foreclosure and sale in its February 10, 2015, order. Second, appellants contend that the trial court's denial of their *pro se* motion to reconsider presented newly obtained evidence and its denial was a misapplication of law. We begin our analysis with a review of the former contention.

¶ 17 Summary judgment is appropriate where 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 that the movant is entitled to judgment as a matter of law. *U.S. Bank Trust National Association, as Owner Trustee for Queen's Park Oval Asset Holding Trust v. Hernandez*, 2017 IL App (2d) 160850, ¶ 14. The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. In making that determination, a court construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. A triable issue of fact exists where the material facts are disputed or where reasonable persons might draw different inferences from undisputed facts. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14.

¶ 18 Appellants' first argument asserting that the trial court erred in determining that there was no genuine issue of material fact to preclude summary judgment claims that the affidavits of Yvette Salinas should have been stricken, as they did not comply with Supreme Court Rule 191(a). Appellants argue that the Salinas affidavits were not based on personal knowledge, but on inadmissible hearsay in reference to the contents of electronic records, data compilations, and accounts that appellee maintains for the collection of payments due on the mortgage note at issue in this appeal.

¶ 19 Rule 191(a) states in pertinent part that:

> "Affidavits in support of and in opposition to a motion for summary judgment *** 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." Ill. S.Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 20 Accordingly, a Rule 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relied. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759 ¶ 22; *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 63 (2001). "[T]he affidavit is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony." *Avdic*, 2014 IL App (1st) 121759 ¶ 22 (quoting *Harris Bank Hinsdale, N.A., v. Caliendo*, 235 Ill. App. 3d. 1013, 1025 (1992)). The circuit court may not consider "evidence that would be inadmissible at trial" when assessing a motion for summary judgment. *Id.* " 'If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)).

¶ 21 In addition, to admit business records into evidence as an exception to the general rule excluding hearsay, the proponent must lay a proper foundation by showing that the records were "made (1) in the regular course of business, and (2) at or near the time of the event or occurrence." *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27; Ill. S.Ct. R. 236(a) (eff. Aug. 1, 1992). Where these business records are computer-generated records, the proponent must show that "the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to

indicate their trustworthiness and to justify their admission." *Avdic*, 2014 IL App (1st) 121759 ¶ 25 (quoting *Riley v. Jones Brothers Construction Co.,* 198 Ill. App. 3d 822, 829 (1990)). The determination that records are admissible as business records rests within the sound discretion of the circuit court. *Avdic*, 2014 IL App (1st) 121759 ¶ 25.

¶ 22 An example of an affidavit meeting the requirements of Rule 191(a) is found in *Avdic*. There, the affiant, Rebecca Armstrong, provided specific factual and pertinent information regarding her employment with the plaintiff bank (U.S. Bank). In the affidavit, which was filed in 2011, Armstrong set forth that her duties included reviewing and analyzing U.S. Bank's business and loan record, which included computer-generated payment histories and copies of origination documents. *Avdic*, 2014 IL App (1st) 121759, ¶ 7. In addition, Armstrong averred that she was familiar with, had been trained on, and was qualified to use the computer software system that maintained the records. *Id.* Armstrong further averred that she had reviewed the business records and loan file of the defendant Avdic, and Armstrong attested to the total amount due, including the amount of the principal balance. *Id.*

¶ 23 In the present case, the affidavits supporting appellee's motion for summary judgment were executed by Yvette Salinas, Vice President of Loan Documentation for Wells Fargo. The affidavits were sworn to and subscribed before a notary public on May 13, 2014. Salinas expressed in the affidavits that she "[has] acquired personal knowledge of the matters stated herein by examining these business records" and that "if called to testify at the trial of this matter, I could competently testify as to the facts contained in this affidavit." She further averred that she is "familiar with business records maintained by Wells Fargo for the purpose of servicing mortgage loans" and the "records (which include data compilations, electronically imaged documents, and others) are made at or near the time by, or from information provided by,

persons with knowledge of the activity and transactions reflected in such records, and are kept in the ordinary course of business conducted by Wells Fargo."

¶ 24 Regarding the business records contained in Salinas's affidavits, she expressed that amounts due from appellants are "based on my review of Wells Fargo's business records." Salinas said that "Wells Fargo uses MSP to automatically record and track mortgage payments. To the best of my knowledge, this type of tracking and accounting program is recognized as standard in the industry." Salinas then provided details of the procedure used to process and apply payments to appellants' account to create the records attached to the motion for summary judgment. To the best of Salinas's knowledge, the MSP "generated accurate records related to [appellants'] mortgage payments."

¶ 25 There is no doubt that the Salinas affidavits comport with the requirements of Rule 191(a). The business records contained in the affidavits purport to be made in the regular course of appellee's business and at or near the time of the event. As the records were computer generated, the affidavit states that the Mortgage Servicing Platform (MSP) which produced the records is recognized as the standard in the industry. In the response to appellee's motion for summary judgment containing the affidavits at issue, appellants claimed through their own affidavits that they "have no idea what note [appellee] is referring to in [the Salinas affidavit] nor how it came up with the $415,168.03 amount that it says is owed towards one of the mortgages on the subject property." Although appellants may "have no idea" where appellee acquired the figure reflected as one of the amounts due and owing to appellee, the lack of knowledge articulated in their counter-affidavits does not dispute or contradict the assertions in appellees affidavit in support of summary judgment. "Facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and

must be taken as true for purposes of the motion." *Avdic*, 2014 IL App (1st) 121759, ¶ 31 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)). Therefore, based on the foregoing, we cannot say that the trial court erred by considering the affidavits and attached business records offered in support of summary judgment.

¶ 26 We now move on to appellants' next argument concerning the trial court's grant of summary judgment to appellee, to wit, whether the trial court erred by including appellee's hazard insurance disbursements in the amounts due and owing when appellants claimed that they maintained the requisite insurance. Appellants argue that the affidavits attached to their sur-response opposing summary judgment, in which they attested "[t]hat during the pendency of this action, [they] have had a Travelers Insurance Homeowners Policy," and they attached said invoice which illustrated an effective insurance policy for the period covering July 8, 2011, to July 8, 2012, and created an issue of material fact to preclude summary judgment. Appellants' argument on this issue is without merit.

¶ 27 The mortgage note required appellants to "maintain hazard insurance," that, at a minimum, must "cover loss or damage caused by fire" as well as any "hazards normally covered by extended coverage hazard insurance policies." Appellee's business records contained in the Salinas affidavits reflects hazard insurance disbursements made on appellants' behalf on (1) June 22, 2009, in the amount of $3,052 ($2,199.00 of which was credited back to appellants on July 31, 2009; (2) November 27, 2012, in the amount of $2,248; and (3) September 5, 2013, in the amount of $2,421.00. No evidence was presented by appellants to prove that they were charged for hazard insurance during the time covered in their attached Travelers Insurance invoice, nor did appellants provide any evidence to prove that they maintained hazard insurance to cover any time outside the one-year period reflected on that invoice. Based on the hazard insurance

provisions of the mortgage note and the evidence presented to the trial court, we can find no issue of material fact that would preclude summary judgment on this issue.

¶ 28 We now turn to appellants' final argument regarding the trial court's finding of summary judgment in favor of appellee in which they argue that appellee never verified their income pursuant to section 137/20 of the Illinois High Risk Home Loan Act (the Act). 815 ILCS 137/20 (West 2014).

¶ 29 Appellee argues that this argument is forfeited by appellants. Appellee calls any argument related to HRHLA forfeited as it was not raised as an affirmative defense in appellants' answer to the original complaint for foreclosure. See *R & B Kapital Dev., LLC v. N. Shore Cmty. Bank & Trust Co.*, 358 Ill. App. 3d 912, 921 (2005); *Mountain States Mortg. Ctr., Inc. v. Allen*, 257 Ill. App. 3d 372, 382 (1993) ("The failure to raise an affirmative defense constitutes a waiver of that defense."). Appellee is correct but not because appellants didn't raise the issue as an affirmative defense, but because they didn't raise it in the trial court at any time. Appellants' briefs presented to this court go to great lengths to argue reversal based on appellee's failure to verify their income pursuant to the Act, but appellants raised the issue for first time in this appeal. It is well settled that issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.* 169 Ill. 2d 525, 536 (1996). Therefore, because appellants' argument concerning appellee's failure to verify their income pursuant to the Act is forfeited, there remains no issue of material fact to preclude summary judgment.

¶ 30 Appellants' final contention is that the trial court erred in denying their *pro se* motion to reconsider and *pro se* request for leave to file counterclaims. Appellants argue that their motion to reconsider contained newly-discovered evidence in the form of a letter from Todd Good,

Executive Resolution Specialist with Wells Fargo, which evidenced appellee's failure to verify their income. In the alternative, appellant argues that the trial court abused its discretion in denying their request to file counterclaims as untimely.

¶ 31 Before discussing the merits of appellants' arguments on this final contention, we must discuss this court's jurisdiction, or lack thereof, to examine the trial court's order denying the motion to reconsider. Appellants' notice of appeal states that they "seek reversal of the [trial court's] decision on February 10, 2015, that granted Summary Judgment to [appellee] and awarded it Judgment for Foreclosure and Sale ***." The notice of appeal does not mention the July 28, 2016, order denying appellants' *pro se* motion for reconsideration. However, the notice of appeal does state that the February 10, 2015, order granting summary judgment "resulted in the Sheriff's Sale" and the "October 17, 2017 [order] which approved the Report of Sale, Distribution and subsequent order of possession."

¶ 32 A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court to permit review of the trial court's judgment such that it may be affirmed, reversed, or modified. *Lake Cty. Grading Co., LLC v. Forever Constr., Inc.*, 2017 IL App (2d), ¶ 34. A notice of appeal must be specific as to the judgments being submitted for review, but the notice of appeal should be considered as a whole and will be deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appealed. *Id.* A defect in the notice will not be deemed fatal where the deficiency is of form, rather than of substance, and there is no prejudice to the appellee. *Id.*

¶ 33 Appellee argues that this court lacks jurisdiction over this order because it was not "a step in the procedural progression leading to the judgment specified in the notice of appeal." *Burtell*

v. First Charter Serv. Corp., 76 Ill. 2d 427, 435 (1979). Appellee further argues that where an appellant specifically mentions a different judgment from the one subsequently challenged in that party's brief, this court has no jurisdiction to review any judgment order other than the one identified in the notice. See *People v. Smith*, 228 Ill. 2d 95, 105 (2008).

¶ 34 We agree with appellee. Neither appellants' *pro se* motion to reconsider or their request for leave to file counterclaims could be considered part of the procedural progression leading to the entry of the February 10, 2015, order granting summary judgment for foreclosure and sale as both were made over a year after the order for summary judgment was entered. Further, Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S.Ct. R. 303(b)(2) (eff. July 1, 2017). When an appeal is taken from a specified judgment, the appellate court acquires no jurisdiction to review other judgments or parts of judgments not specified or inferred from the notice of appeal. *Neiman v. Economy Preferred Ins. Co.*, 357 Ill. App. 3d 786, 790 (2005). Therefore, this court lacks jurisdiction to review appellants' arguments concerning the trial court's July 28, 2016, order denying their motion to reconsider and request for leave to file counterclaims.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of DuPage County.

¶ 37 Affirmed.