2018 IL App (5th) 160048-U

NO. 5-16-0048

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

COLLINSVILLE BUILDING AND LOAN ASSOCIATION,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CH-314
DAROL HOLSMAN and JULIA HOLSMAN,	)	Honorable Ronald R. Slemer,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Because Illinois Supreme Court Rule 114 is not mandatory, strict compliance is unnecessary, and because there is no remedy available to defendants, this appeal is moot.

¶ 2 Defendants, Darol and Julia Holsman, appeal *pro se* the judgment for foreclosure and denial of their motion to reconsider amended judgment of foreclosure of their home based on plaintiff Collinsville Building and Loan Association's failure to strictly comply with Illinois Supreme Court Rule 114 (eff. May 1, 2013). Taken with this case is plaintiff's motion to dismiss the appeal as moot, defendants' response, and plaintiff's

reply. For the following reasons, we grant plaintiff's motion and we dismiss the appeal as moot.

¶ 3 BACKGROUND

¶ 4 On August 31, 2007, defendants obtained a mortgage in the amount of $611,000 from plaintiff for property and improvements located on 519 Schwarz Road in Edwardsville, Illinois. On several occasions between 2007 and 2013, defendants sought information regarding plaintiff's "buy down" program, through which defendants could reduce their percentage interest on their mortgage, thereby decreasing their monthly payment. Defendants' pursuit of this opportunity went no further. On May 9, 2014, plaintiff filed a complaint for foreclosure for nonpayment since April 1, 2013. On June 18, 2014, defendants filed a request for mediation. On July 2, 2014, defendants filed a petition for Chapter 13 bankruptcy (11 U.S.C. § 1301 (2006)), which included a plan surrendering the subject property. The bankruptcy filing stayed the foreclosure and mediation proceedings. On or about August 6, 2014, an order granting relief from the stay was issued by the bankruptcy court and foreclosure proceedings recommenced.

¶ 5 Ultimately, a bench trial was held on August 17, 2015. Three witnesses were called and evidence was presented to the court. Susan Hemker, president and CEO of plaintiff, testified that the last full payment, prior to defendants' filing bankruptcy, was in June 2012; after their bankruptcy was filed, plaintiff received three payments at the end of 2013 for a total of just under $16,000; and no further payments were received after November 2014. She also presented a copy of the mortgage contract, which was accepted into evidence.

¶ 6 Darol was plaintiff's second witness. He agreed that the mortgage and promissory note were accurate. He did not disagree with Hemker's testimony regarding the arrearages or lack of payment. He testified about the difficulties that he and Julia had gone through, including major medical problems and an automobile accident. He also testified that on the day mediation was to occur, opposing counsel "came and was there and we were there. The only thing we did was show up to find out that he was gone."

¶ 7 The defense's first witness was Julia. She testified that she did not feel like plaintiff participated in mediation in good faith. She stated that opposing counsel was 30 minutes late for mediation and indicated to the mediation program chairman that defendants had filed for bankruptcy, that he could not mediate at that point, and "that we'll get back to it at some other time," but that they never went back. She testified that she understood that he could not discuss anything because of the bankruptcy stay. She also testified that if plaintiff had sat down with them, defendants had a solution that would have paid everything owed.

¶ 8 The defense then called Darol. He identified photographs of the home and stated that he and Julia were securing a reverse mortgage which would have paid all of the debt, but that plaintiff's counsel was unwilling to talk with them at mediation.

¶ 9 Hemker was called as a rebuttal witness and she testified that defendants had inquired about the "buy down" program on several occasions, but took no further steps. On cross-examination, she testified that she never sought to reschedule the mediation nor had the issue gone back to mediation since defendants left bankruptcy, but stated "that

would not be something I would request." The parties were ordered to file closing arguments.

¶ 10 On August 21, 2015, plaintiff filed an argument in support of entry of judgment and prayed for an entry of judgment of foreclosure; judgment for principal, interest, and expenses due; an order to schedule the sale; and an order granting possession. On the same date, defense counsel filed a trial brief, discussing only the lack of a Rule 114 affidavit, arguing that without it the court could not enter judgment for foreclosure.

¶ 11 Judgment for foreclosure and sale was entered on September 8, 2015.

¶ 12 On September 22, 2015, defendants' attorney filed a motion for a judgment as a matter of law or in the alternative for a new trial, alleging that the judgment for foreclosure and sale failed "to include the consumer protections afforded by Illinois Supreme Court Rules 113 and 114 or refer to them at all"; that the court erred by not determining the residential status of the property and miscalculated the redemption period; that the date set for foreclosure was improper; and that plaintiff failed to correctly identify the property.

¶ 13 On January 5, 2016, the court entered an amended order granting judgment of foreclosure, making the following findings: (1) plaintiff complied with Rule 114, as defendants "engaged in the mediation process afforded them *** but terminated the mediation as a result of the stay being imposed" due to bankruptcy proceedings, and that "[u]pon dismissal of the Petition in Bankruptcy, Defendants did not timely request a reassignment to mediation. Plaintiff, through its representatives, participated in good faith in the mediation"; (2) defendants were unable to pay their mortgage to plaintiff;

(3) the court was presented with evidence via the court file and testimony that there was sufficient opportunity afforded to defendants to participate in the available mediation which is to be documented in the affidavit provided for in Rule 114; and (4) the date of redemption should have been listed as December 8, 2015, not September 8, 2015. As a result of these findings, the court denied defendants' motion for a judgment as a matter of law or for a new trial and changed the date of redemption by interlineation to April 5, 2016.

¶ 14 On July 28, 2016, the court entered an order confirming the sale, and on October 28, 2016, plaintiff sold the property to Jeffrey and Christina Swiatek. Defendants appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, defendants argue that the court erred in granting the judgment of foreclosure because of lack of compliance with Illinois Supreme Court Rule 114, specifically that an affidavit was not provided to the court, and that the court erred in denying their motion to vacate the judgment of March 2016 due to lack of compliance with Rule 114.

¶ 17 We begin by addressing plaintiff's argument that this appeal is moot because defendants did not obtain a stay of the judgment and the property has been sold. In its motion to dismiss, plaintiff argues that defendants failed to seek or obtain a stay pending their appeal of the circuit court's order confirming the sale of the subject property, that plaintiff subsequently sold the property to third-party purchasers, and that this appeal is therefore moot.

¶ 18 Illinois Supreme Court Rule 305(k) provides that:

> "If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final." Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

¶ 19 When property subject to the appeal is sold to a nonparty, the appeal is moot unless a stay of judgment was obtained within the time allowed for filing a notice of appeal. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 527-28, 532-33, 759 N.E.2d 509, 517, 520 (2001). This rule additionally "protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal." *Id.* at 523. The rule applies where "(1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding; and (3) the litigating party failed to perfect [a] stay of judgment within the time allowed for filing a notice of appeal." *Id.* at 523-24.

¶ 20 Each of these elements has been satisfied in this case. First, the title to the property passed pursuant to a final judgment when the trial court issued an order confirming the sale; second, it is undisputed that the property was sold to a third party who was not part of the proceeding; and third, defendants admit that they failed to perfect the stay. Consequently, this appeal is moot.

¶ 21 Even if the appeal were not moot, defendants would not prevail. "We construe supreme court rules in the same manner as we construe statutes." *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 35, 36 N.E.3d 266 (citing *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332, 775 N.E.2d 987, 992 (2002)). "[W]hen interpreting a supreme court rule, we must ascertain and give effect to the intent of the supreme court for promulgating the rule. [Citation.] The most reliable indicator of the court's intent is the rule's actual language, which should be given its plain and ordinary meaning." *Id.* "Our review of the construction of a court rule is *de novo.*" *Id.* (citing *In re Estate of Rennick*, 181 Ill. 2d 395, 401, 692 N.E.2d 1150, 1154 (1998)).

¶ 22 Illinois Supreme Court Rule 114 states as follows:

> "(a) Loss Mitigation. For all actions filed under the Illinois Mortgage Foreclosure Law, and where a mortgagor has appeared or filed an answer or other responsive pleading, Plaintiff must, prior to moving for a judgment of foreclosure, comply with the requirements of any loss mitigation program which applies to the subject mortgage loan.
>
> (b) Affidavit Prior to or at the Time of Moving for a Judgment of Foreclosure. In order to document the compliance required by paragraph (a) above, Plaintiff, prior to or at the time of moving for a judgment of foreclosure, must file an affidavit specifying:
>
> (1) Any type of loss mitigation which applies to the subject mortgage;
>
> (2) What steps were taken to offer said type of loss mitigation to the mortgagor(s); and
>
> (3) The status of any such loss mitigation efforts.
>
> (c) Form of Affidavit. The form of the affidavit shall be as set forth below in Form 1, or shall be in a form specified by amendment to this rule, but, in any case, shall contain the information set forth in paragraph (b) above.
>
> * * *
>
> (d) Enforcement. The court may, either *sua sponte* or upon motion of a mortgagor, stay the proceedings or deny entry of a foreclosure judgment if Plaintiff fails to comply with the requirements of this rule." Ill. S. Ct. R. 114 (eff. May 1, 2013).

¶ 23 Section (a) mandates that plaintiffs comply with loss mitigation programs available; section (b) states that an affidavit "must" be filed showing the steps taken and the status; section (c) provides a standard form for the affidavit which "shall" contain information from section (b); and section (d) states that the court "may *** stay the proceedings or deny" the foreclosure if plaintiff fails to comply with the rule.

¶ 24 "This rule is not written in mandatory terms. The 'enforcement' section specifically notes that the court 'may,' rather than 'shall,' deny entry of a foreclosure judgment if the rule is not satisfied. [Citation.] Although the rule serves the important purpose of helping living mortgagors in the difficult current financial environment, we find that the rule's use of the word 'may' demonstrates that there is some room for judicial discretion regarding the level of strictness of its enforcement ***." *Wells Fargo Bank, N.A.*, 2015 IL App (1st) 142925, ¶ 37.

¶ 25 Further, "[c]ommittee comments to supreme court rules are not binding but they may be used to determine the application of a rule." *Id.* ¶ 35 (citing *Wright v. Desate, Inc.*, 292 Ill. App. 3d 952, 954, 686 N.E.2d 1199, 1201 (1997)). The committee comments go on to state:

> "The context out of which Rule 114 arises is the huge increase in the number of foreclosure cases filed in the Illinois state courts. It is recognized by all members of the Committee that, wherever possible, it is in the best interests of all parties, the courts, and the local communities to avoid a foreclosure sale in favor of a workable loss mitigation alternative. Toward this end, Rule 114 requires the plaintiff to file an affidavit to document compliance with any loss mitigation program applicable to the mortgage loan at issue. The affidavit must be filled out and filed prior to or at the time of moving for a judgment of foreclosure. As such, the intended purpose of the rule is to prevent the entry of a judgment of foreclosure

where the plaintiff has theretofore failed to comply with applicable loss mitigation requirements, be they local, state, or federal. *The filing of the affidavit allows the court to review the plaintiff's level of compliance with applicable loss mitigation requirements, and, if necessary, to deny a motion for judgment of foreclosure if said compliance is lacking.*

Specific procedures for filing and presenting the affidavit to the court may differ from county to county. Where counties have mediation programs in place, it is advisable that the county adopt procedures to incorporate the loss mitigation affidavit into the mediation process. Where no mediation program is in place, or where an individual case is not subject to mediation, the county and individual courts should consider appropriate local procedures to facilitate the use of the affidavit in achieving its intended purpose. The affidavit requirement is intended to apply to all judgments on or after the effective date of the rule, no matter the foreclosure filing date. Because the affidavit must be filed prior to the entry of a foreclosure judgment, the effective date requires application to any case where a judgment of foreclosure has not yet been entered. Thus, although a case may already have been filed prior to the effective date of Rule 114, the Rule would apply if a judgment of foreclosure has not yet been entered." (Emphasis added.) Ill. S. Ct. R. 114, Committee Comments (adopted Apr. 8, 2013).

¶ 26 The purpose of the affidavit is to allow the court to "review the plaintiff's level of compliance" with the loss mitigation process and, if the court finds that compliance lacking, it may stay the proceedings or deny entry of the foreclosure. In this case, the court reviewed plaintiff's compliance—by way of review of the record and testimony of the parties—and made specific findings that plaintiff did comply.

¶ 27 According to the court's order of January 5, 2016, the court made the following findings:

"1. Plaintiff complied with the provisions of Illinois Supreme Court Rule 114 in that Defendants engaged in the mediation process afforded them by the Madison County Circuit Court, but terminated the mediation as a result of the stay being imposed upon their filing of a Petition for Relief with the United States

Bankruptcy Court. Upon dismissal of the Petition in Bankruptcy, Defendants did not timely request a reassignment to mediation. Plaintiff, through its representatives, participated in good faith in the mediation.

***

3. Plaintiff, Collinsville Building and Loan Association, participated in the mediation process afforded all parties by the Madison County Circuit Court, evidence of that participation being in the Court file and established by testimony presented in Court. Sufficient evidence was presented to the Court that sufficient opportunity was afforded Defendants *** to participate in the available mediation process which is to be documented in the Affidavit provided for in Illinois Supreme Court Rule 114."

¶ 28 In reviewing the record, we cannot say that the court acted arbitrarily or beyond the bounds of reason. At hearing, both plaintiff and defendants testified as to speaking about the "buy down" program to decrease the interest rate on defendants' mortgage and thereby reduce their monthly payments, and all three witnesses testified that after the inquiries, no application was submitted by defendants. Additionally, both plaintiff and defendants testified that the mediation appointment was scheduled and the parties appeared but they could not mediate due to defendants' bankruptcy stay. As noted above, the purpose of the affidavit is to provide the court with enough information to determine plaintiff's compliance with loss mitigation efforts, and the testimony provided such information. Defendants suffered no prejudice from the lack of the affidavit.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we grant plaintiff's motion to dismiss the appeal as moot.

¶ 31 Appeal dismissed.