2018 IL App (1st) 17-0621-U

No. 1-17-0621

Order filed March 28, 2018

Modified Order on Petition for Rehearing filed November 27, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff-Appellee	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 12 CH 3724
AMARA I. AKOGU; PAMELA M. AKOGU; UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Honorable Bridget Mitchell, Judge, presiding

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's grant of summary judgment on the loan modification issue is affirmed; the portion of the confirmation order which granted plaintiff's post judgment costs is vacated and the cause is remanded for an evidentiary hearing, limited to that issue.

¶ 2 In this mortgage foreclosure action, defendants, Amara and Pamela Akogu, appeal the trial court's grant of summary judgment in favor of plaintiff, Federal National Mortgage

Association (Fannie Mae). On appeal, defendants contend that a genuine issue of material fact remained as to whether the parties entered into a permanent loan modification agreement; and the trial court erred when it approved the judicial sale and awarded the plaintiff post-judgment advances. For the reasons that follow, we affirm in part, vacate in part, and remand for an evidentiary hearing with respect to post-judgment costs.

¶ 3 BACKGROUND

¶ 4 In 1996, defendants entered into a mortgage agreement with Preferred Mortgage Associates, LTD., for a property located at 1024 Tiverton Court, Schaumburg, IL. Sometime thereafter the mortgage was assigned to Bank of America, N. A. (Bank).

¶ 5 In February 2012, the Bank filed a complaint in the circuit court of Cook County seeking to foreclose on the mortgaged property. Attached to the complaint were the mortgage, the note, and a loan modification agreement entered into by the parties in October 2010. In its complaint, the Bank alleged that defendants had not paid the required monthly installments from October 2011 to the time of the complaint. In July 2012, the Bank filed a motion for an order of default and judgment of foreclosure and sale. In August 2012, the trial court entered an order instructing defendants to "file an appearance and answer or otherwise plead to the complaint by September 2012." Despite the trial court's order, defendants did not respond to the Bank's complaint until October 2012.

¶ 6 On September 22, 2012, while the complaint was pending, the parties entered into a trial payment plan (Plan). The plan required that defendants make equal payments of $1,307.21 for a three-month period commencing November 1, 2012. In a correspondence between the Bank and defendants, the Bank advised defendants that entering into the Plan was the first

step towards permanently modifying defendants' loan. Defendants made three timely payments between the months of November and January in compliance with the Plan.

¶ 7 On April 9, 2013, the Bank informed defendants that they had been approved for a permanent loan modification. In order for the modification to become effective, defendants were required to sign and return two copies of the permanent loan modification agreement and remit the new payment amount of $1368.97 by May 1, 2013. Defendants made a payment to the Bank in the amount of $1244.16 in May 2013 and $1427.64 in June 2013.The Bank rejected defendants' payments for the months of July, August and September.

¶ 8 In May 2014, the Bank filed, *inter alia*, a motion for summary judgment, and a motion for judgment of foreclosure and sale. In its motion for summary judgment, the Bank argued that defendants were in default on the mortgage. It further asserted that defendants' answer to the complaint failed to sufficiently allege any facts that would indicate that a genuine issue of material fact existed. Attached to its motion for summary judgment, the Bank included an affidavit signed by an assistant vice-president averring that defendants defaulted on their loan by failing to make required payments, a loss mitigation affidavit, a copy of defendants' account information statement, and bank records tracking defendants' mortgage payments.

¶ 9 In response to the Bank's motion for summary judgment, defendants filed a counter-affidavit signed by Amara Akogu. Amara averred that defendants entered into a permanent loan modification agreement with the bank by signing and returning the agreement, as instructed; that at the time of the response they could not locate the signature pages of the permanent modification; and despite not having the ability to present the court with the signature pages, the Bank accepted payments for the months of May and June. Amara also noted that the Bank rejected payments for July through September 2013.

¶ 10 The circuit court entered an order instructing the Bank to make available the signed trial period plan offer, and the signed permanent mortgage modification agreement, if they existed. At a status hearing on the Bank's motion for summary judgment, the trial court certified that the Bank tendered a copy of the September 2012 trial period plan offer, an unsigned copy of the April 2013 permanent modification document, and a "modification rejection (signed documents not returned)" in open court. In March 2015, the court granted the Bank's motion for summary judgment and entered a judgment of foreclosure and sale.

¶ 11 Defendants subsequently filed a motion for reconsideration and a motion to dismiss the complaint. The circuit court denied defendants' motions. Shortly thereafter, the Bank filed a motion to substitute Fannie Mae as plaintiff, and a motion for an assignment of judgment of foreclosure and sale. The circuit court granted the Bank's motions.

¶ 12 In November 2015, plaintiff moved for an order approving the report of sale. In response defendants argued, *inter alia*, that the report of sale was inadmissible hearsay, and that plaintiff's efforts to collect over $15,000 in post judgment costs for the property taxes and insurance were improper. To support their challenge to plaintiff's recovery of the costs, defendants offered real estate tax records purportedly showing a payment of $2,800.10 made by plaintiff after the entry of the judgment of foreclosure. Plaintiff replied that it was not required to prove-up its costs and advances, and the report of sale sufficiently met the requirements of the judgment of foreclosure and sale, and the Illinois Mortgage Foreclosure Law (hereinafter referred to as the Act.) 735 ILCS 5/15-1508 (West 2016).

¶ 13 On September 8, 2016, the circuit court entered an order approving the Report of Sale and Distribution, confirming the sale and granted plaintiff possession of the property.

Defendants filed a motion to reconsider the court's order approving the sale, and the circuit court denied the motion.

¶ 14 ANALYSIS

¶ 15 Defendants first contend that the circuit court erred in granting summary judgment in favor of plaintiff because a genuine issue of material fact existed as to whether the parties entered into a permanent modified mortgage agreement. Defendants argue that their affidavit served as unrebutted evidence that they accepted the Banks' offer to modify the loan by making monthly payment pursuant to the new agreement. Plaintiff counters that the pleadings and affidavits considered by the court show defendants' failure to establish the existence of a loan modification agreement and, as such, raised no genuine issue of material fact.

¶ 16 In reviewing the circuit court's grant of summary judgment, we review the judgment *de novo*, and we may affirm on any grounds present in the record. *Coughlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010). A genuine issue of fact exists where the material, 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). Thus, to survive a motion for summary judgment, the nonmoving party need not prove his or her case at this preliminary stage of litigation; but, the nonmovant must

present some evidentiary facts that would arguably entitle him or her to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004).

¶ 17 Here, defendants failed to demonstrate that a genuine issue of material fact existed. In its motion, the Bank alleged that defendants were in default on their mortgage, and it provided an affidavit supported by documents demonstrating defendants' default. Defendants filed a counter-affidavit signed by Amara, in rebuttal.

¶ 18 If an affidavit is filed in support of or opposition to a motion for summary judgment, it must strictly comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). The Rule provides,

> "affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, *** 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. Rule 191.

¶ 19 Amara's affidavit asserted, *inter alia*, that they complied with the Banks' instructions of signing and returning copies of the permanent modification agreement but also acknowledged that they could not locate the signature pages. Defendants attached an unsigned copy of the trial period plan, copies of payment receipts during the trial period, an unsigned copy of the loan modification agreement and a bank statement for the month of May. Thus, defendant failed to comply with Rule 191 and provide evidentiary proof to support their rebuttal. See Ill. S. Ct. Rule 191(a) (eff. Jan. 4, 2013). Defendants' assertion

that they could not locate the signature pages at the time of the response does not absolve them of the requirement. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 336 (2002) ("it is necessary that there be strict compliance with Rule 191(a) to insure that trial judges are presented with valid evidentiary facts upon which to base a decision"). Absent proof that the modification agreement was signed, defendants did not adequately rebut the Banks' proofs that they were in default; and therefore, the trial court did not err in granting plaintiff's motion for summary judgment.

¶ 20 Defendants also argue that they accepted the loan by making monthly payments consistent with the terms of the permanent loan modification agreement. We disagree. Our review of defendants' counter-affidavit and supporting evidence showed that defendants did not make payments in accordance with the proposed modification agreement. Defendants payment for the months of May and June and those payments rejected by plaintiff were not consistent with the payment amount identified in the permanent modification agreement. Furthermore, plaintiff's acceptance of the payments does not create a modification where the agreement stipulated that acceptance of the modification required both the return of the signature pages and tender of a specific payment amount by the specified date. *Calo, Inc. v. AMF Pinspotters, Inc.*, 31 Ill. App. 2d 2, 8-9 (1961) ("where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until this is done"). As we have discussed, the failure by defendants to provide the court with evidence of an agreement to permanently modify its loan did not present a genuine issue of material fact.

¶ 21 Defendants next argue that the circuit court erred when it awarded plaintiff over $17,000 in post-judgment advances. Specifically, defendants contend that plaintiff should not have

been awarded post-judgment advances without providing a sufficient basis for those costs. They argue that neither an affidavit nor any other supporting documents were presented to the trial court to determine that the claimed post judgment costs were actually advanced. Further, in reliance on *BMO Harris Bank, N.A. v. Wolverine Properties, LLC*, 2015 IL App (2d) 140921, they maintain that the circuit court erred when it had no evidence to reasonably conclude that the claimed post-judgment advances were made after the judgment of foreclosure was entered.

¶ 22 Plaintiff does not dispute the absence of evidence to support its claimed costs. Rather, in response on rehearing, it takes the position that defendants' challenge is moot or alternatively, without merit. In reply, defendants argue that plaintiff forfeited this mootness argument by failing to raise it in the circuit court as well as in its initial brief to this court.

¶ 23 Generally, "[p]oints not argued [by appellants or appellees] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). However, mootness arguments "may be raised at any time" and cannot be forfeited because they relate to a court's authority to hear a given controversy. See *In re J.B.*¸ 204 Ill. 2d 386, 388 (2003) (holding that arguments providing that the State forfeited a mootness claim ignored "basic principles" of law). Additionally, a "reviewing court has the duty to raise such issues *sua sponte* if they are not raised by the parties." *Id.* Therefore, we find that plaintiff has not forfeited its mootness argument and we proceed to address it on the merits.

¶ 24 Plaintiff argues that defendants' challenge on appeal is limited to their interest in the sale proceeds given that a judicial deed has already been issued to plaintiff. See 735 Ill. Comp. Stat. Ann. 5/15-1509 (providing that "[a]ny person seeking relief from any judgment or order

entered in the foreclosure *** may claim only an interest in the proceeds of sale.") Plaintiff then argues that any challenges by defendants concerning the alleged impropriety of the post-judgment advances are "academic" or "moot" because plaintiff, as a matter of fact, made a "full-credit bid"[1] and recovered nothing from the sale. Given that there were no proceeds, plaintiff contends that defendants did not have nor could they claim an interest in the sale proceeds. In support, plaintiff points to the Report of Sale and Distribution which includes the total amount due, the total proceeds from the sale, and the resulting surplus or deficiency. The Report of Sale and Distribution provides that the total amount due and total proceeds of sale are the same and there was no resulting surplus or deficiency. As such, plaintiff asserts that the resolution of this matter by the court would solely serve an "academic" purpose rather than provide defendants "effectual relief."

¶ 25 Defendants dispute plaintiff's claim that there was no surplus. They argue that the issue of post-judgment costs is not moot because plaintiff "artificially inflated its post-judgment advances in an effort to create the impression that it made [a full credit] bid," thus, resulting in a surplus of proceeds that was not accurately reflected by the Report of Sale and Distribution. Since defendants essentially claim an interest in the proceeds of the sale, if any, and the issue of whether there was a surplus is disputed, we find that their appeal of the post judgment cost is not moot. Our inquiry now turns to the evidentiary objection to the Report of Sale and Distribution raised by the defendants.

¶ 26 Defendants challenge the accuracy of plaintiff's claim that it made a "full credit bid" by arguing that the Report of Sale and Distribution served as insufficient evidence to prove the

[1] A "full credit bid" is equal to ""the unpaid principal and interest of the mortgage debt, together with the costs, fees, and other expenses of the foreclosure." *Republic Bank of Chicago v. 1st Advantage Bank*, 2013 IL App (1st) 120885, ¶ 16 (quoting *Alliance Mortgage Co v. Rothwell*, 900 P.2d 601, 608 (Cal. 1995)).

amount of post-judgment advances. Plaintiff, on the other hand, argues that defendants' claim is without merit because the Report of Sale and Distribution complied with the Act's requirements for requesting post-judgment costs and fees. Relying on *Citimortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107, ¶ 22, plaintiff maintains that beyond the inclusion of the claim in the Report of Sale, nothing more was required.

¶ 27 The Report of Sale and Distribution contained an itemized statement of plaintiff's claimed "post-judgment advances not included in judgment." Of the $17,085.66 total advances claimed, $976.50 was designated for additional attorney/paralegal fees; $15,872.16 for taxes/insurance and $246 for inspection. In rebuttal, defendants presented a report of taxes which reflected payment of $2,800.10 in real estate taxes subsequent to entry of the judgment of foreclosure.

¶ 28 Section 1504 provides that in its complaint a mortgagee may request a judgment for attorney's fees, costs and expenses. 735 ILCS 5/15-1504 (a)(1)(v) (West 2016). This request shall be construed to include allegations that "the plaintiff has been compelled to advance or will be compelled to advance, various sums of money in payment of costs, fees, expenses and disbursements incurred in connection with the foreclosure[.]" 735 ILCS 5/15-1504 (d)(2). At a confirmation of the sale, the court's order may approve the mortgagee's fees and costs arising between the entry of the judgment of foreclosure and the confirmation hearing, those costs and fees to be allowable to the same extent as provided in the note and mortgage and in Section 15-1504. See 735 ILCS 5/15-1508 (b)(1).

¶ 29 In urging this court to reject defendant's requests for a prove-up of its post-judgment costs, plaintiff argues that because the statue does not expressly provide for a prove-up, it would be improper for this court to require it. We reject this argument out of hand. Based on

statute, it is clear that plaintiffs are entitled to claim post judgment costs, as long as those costs were incurred after entry of the judgment of foreclosure. The statute is silent with respect to what modicum of proof is necessary to support such a claim. Nevertheless, where a party to litigation presents a claim, it is axiomatic that, unless there is agreement or acquiescence, the claimant bears the burden of proof. Clearly, in this case, there was neither agreement nor acquiescence. Upon plaintiff's filing of the motion for approval of the Report of Sale and Distribution, defendants filed a response in which they challenged the claimed amount. In fact, they presented evidence in rebuttal. We cannot excuse a party's lack of support of its claim merely because a statute does not expressly provide for the same.

¶ 30 Further, we have considered *Citimortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107, and even if we could agree with the reasoning, which is sparse on this issue, we find it factually inapposite. There, nearly two years after the judicial foreclosure of her property, the defendant filed a petition under section 2-1401 of the Code of Civil Procedure, seeking to modify the order confirming the sale. *Id.* ¶1. In her petition, the defendant alleged that a surplus existed from the sale of her property to which she was entitled. *Id.* The plaintiff *Citimortgage* responded that no surplus existed and that an "unallocated amount" in the sheriff's report was attributable to accrued interest and additional post judgment fees, costs, and advances to which it was entitled. *Id.* ¶7. Plaintiff attached to the response an itemized list of its fees, costs, and advances. *Id.* Defendant replied that plaintiff was not allowed to collect "post judgment interest" under the law and that the plaintiff's explanation included additional prejudgment fees, costs, and advances that were not made part of the record. *Id.* ¶8.

¶ 31 In its analysis, the court concluded that the plaintiffs were legally entitled to collect the post judgment interest in question. *Id.* ¶21. As a corollary to its post judgment interest determination, the court considered whether plaintiffs were entitled to post judgment costs in the absence of "any evidence at or prior to the time of the order confirming the sale as to what specifically those costs or advances were." Id. at ¶ 22. Ultimately, the court found that those costs, although not itemized, were specifically listed in the sheriff's report and approved by the court at the time of confirmation of the sale. Thus, the court held that the reimbursement was proper. Id. at ¶10.

¶ 32 We note initially, that there is no indication from *CitiMortgage* that the defendant raised any objection to the claimed post judgment costs at the time of the court's approval of the sale. Further, it is not entirely clear from our reading of the court's opinion that that specific argument was raised by the defendant in her 2-1401 petition. Further, it appears that the issue there was even more troubling than here, that being no itemization of the costs at the time of confirmation. Yet, on review the court found it appropriate to affirm the trial court's approval of the same.

¶ 33 Unlike in *CitiMortgage*, here the issue regarding post judgment claims was first raised by defendants in response to plaintiff's motion for entry of an order confirming sale, then in a subsequent motion for reconsideration and now here on appeal. Regardless of any perceived similarity of facts, to the extent that *CitiMortgage* stands for the proposition that a plaintiff in a foreclosure action need not prove up its claims for post judgment costs, we decline to follow it.

¶ 34 Plaintiff cautions that to require it to prove up its claimed post judgment costs is not only burdensome, but would create a new rule. We can hardly see how proof of payment of taxes,

for which an amount certain has been included in the report of sale, creates any greater burden than asserting the claim in the first place. Further, we do not perceive placing the burden of proof on a claimant as creating a new rule. Where a party in litigation seeks to recover on a claim, the burden appropriately rests with him or her to support it with competent evidence, especially where the other party has presented some evidence in rebuttal.

¶ 35 We note in passing that plaintiff offers no means by which defendants could have objected to the post judgment cost claims prior to the claim being made. That said, we acknowledge that upon a motion to confirm a sale, the court shall conduct a hearing and will confirm the sale unless it finds that (1) proper notice was not given, (2) terms of the sale were unconscionable, (3) the sale was conducted fraudulently, or (4) justice was otherwise not done. 735 ILCS 515-1508(b) (West 2016); *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 32. Absent a finding on one or more of these bases, the sale will be confirmed. However, as we understand defendant's challenge, it is not one which would seek to defeat confirmation of the sale, but is more narrowly a challenge to the award of plaintiff's claimed post judgment costs.

¶ 36 Indeed, the circuit court's decision to enter an order confirming a sale is not affected by its decision regarding the award of post-judgment costs. Notably the Act provides that the confirmation order "may" also approve post judgment costs. See 735 ILCS 5/15-1508 (West 2016). In *Bank of America N.A. v. Higgin*, 2014 IL App (2d) 131302, the court held that where a modification to a motion for confirmation of sale would not have the effect of setting aside the sale, section 1508 factors do not apply. We believe that the same reasoning applies with equal force here.

¶ 37 Defendants seek to defeat consideration of plaintiff's post judgment cost claim by characterizing it as inadmissible hearsay. They maintain that the selling officer had no personal knowledge of the claimed costs and therefore could not attest to its legitimacy. They maintain that the entries, which do not fall within any of the hearsay rules exceptions, lack reliability and should be stricken.

¶ 38 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted in court and is generally inadmissible unless it falls within a hearsay exception. *Podromos v. Evergreen Securities, Inc.*, 341 Ill. App.3d 718, 728 (2003). We are not persuaded that plaintiff's post-judgment claim qualifies as a statement for purposes of the hearsay rule. It is purely and simply a claim for costs allegedly advanced by plaintiff and, consistent with the Act, included in the Report of Sale and Distribution. Its inclusion in the Report is for purposes of identifying it as a cost and not for the purpose of asserting the "truth" of those costs. That plaintiff failed to support its claim does not qualify it as a hearsay statement. But even if we were able to somehow view the claim as hearsay, defendants' argument would still fail, as only the weight of the "claim" evidence would be affected and not its admissibility. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); see also *City of Chicago v. Old Colony Partners, L.P.*, 346 Ill. App. 3d 806, 819 (2006).

CONCLUSION

¶ 39 For the foregoing reasons, we affirm the trial court's grant of summary judgment on the loan modification issue, vacate that portion of confirmation order which granted plaintiff's post judgment costs and remand for an evidentiary hearing, limited to that issue. In so doing, we express no opinion on the caliber of defendants' rebuttal evidence.

¶ 40 Affirmed in part, vacated in part, and remanded.