

No. 1-18-0074

**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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BYLINE BANK, f/k/a	)	Appeal from the
NORTH COMMUNITY BANK,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
PETER BUHELOS; JOHN L. MALEVITIS;	)	
CLARISSA BUHELOS;	)	
PAMELA A. MALEVITIS; ATTORNEY	)	
REGISTRATION AND DISCIPLINARY	)	No. 14 CH 9113
COMMISSION (STATE OF ILLINOIS);	)	
BOARD OF MANAGERS OF THE	)	
BRIDGEPORT CONDOMINIUM	)	
ASSOCIATION; UNKNOWN OWNERS AND	)	
NON-RECORD HOLDERS,	)	
	)	
Defendants.	)	
	)	
(John L. Malevitis,	)	Honorable
	)	John J. Curry,
Defendant-Appellant).	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Delort and Justice Connors 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 September 18, 2009, defendant-appellant, John L. Malevitis, and non-appellate parties Pamela A. Malevitis, Peter Buhelos, and Clarissa Buhelos received a loan from North Community Bank in the amount of \$240,000 which was secured by a mortgage on property located at 3450 South Halsted Street, Unit 209 and parking space G-49 in Chicago, Illinois.<sup>1</sup> They failed to make the required May 2013 mortgage payment and the mortgage went into default. In May 2014, North Community Bank filed a complaint for foreclosure. In November 2014, the bank moved for summary judgment. In February 2015, North Community Bank changed its name to Byline Bank. In June 2017, the circuit court granted summary judgment in favor of the bank and the subject property was sold at a judicial auction in September 2017. The order approving the sale was entered in December 2017.

¶ 3 Before this court, Malevitis contends that the circuit court erred in granting summary judgment. He argues several issues of material fact should have precluded the entry of summary judgment including (1) whether the parties entered into a forbearance agreement, (2) whether the amounts due and owing had been properly calculated, and (3) whether Byline had standing to be party-plaintiff. Malevitis also argues the circuit court should not have approved the sale because (1) the notice of sale was defective, (2) the sale was unconscionable, and (3) the sale and deficiency judgment were based on erroneous calculations.

¶ 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. Additionally, the circuit court did not abuse its discretion in approving the sale of the subject property.

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<sup>1</sup> According to the record Peter Buhelos and John Malevitis were the only two individuals to answer and appear. For clarity, Buhelos and Malevitis will be referred to as defendants.

¶ 5

#### JURISDICTION

¶ 6 This foreclosure action commenced on May 30, 2014. On June 5, 2017, the circuit court granted summary judgment in plaintiff's favor. The court entered a judgment of foreclosure on the same day. On December 8, 2017 the circuit court approved the sale and order of possession. On January 5, 2018, Malevitis 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 \$240,000 given by North Community Bank on September 18, 2009 to Malevitis and other non-appellate parties. The loan was secured by a mortgage against a piece of property known as 3450 South Halsted Street, Unit 209 and Parking Space G-49 located in Chicago, Illinois. On May 18, 2013, the borrowers failed to make the required monthly payment due on the loan and defaulted on the mortgage. On March 18, 2014, the loan matured.

¶ 9 On May 30, 2014, North Community Bank filed a complaint in Cook County seeking to foreclose on the subject property. Count I of the complaint alleged a breach of the mortgage and requested foreclosure on the subject property. Count II of the complaint alleged breach of the promissory note against Peter Buhelos. Defendants answered and filed affirmative defenses alleging laches, estoppel, unclean hands, and misrepresentation.

¶ 10 On November 13, 2014, North Community Bank filed a motion for summary judgment and a motion to dismiss defendants' affirmative defenses. The motion for summary judgment was supported by the affidavit of Steven R. Kiefer, the asset manager for North Community Bank who oversaw defendants' loan. On February 17, 2015, North Community Bank changed its

name to Byline Bank. On December 7, 2016, Byline filed a motion to substitute in as party-plaintiff and refiled the motion for summary judgment. It attached an additional affidavit from Christopher Glancy, which supplemented the affidavit of Kiefer.

¶ 11 On April 14, 2017, defendants responded to plaintiff's motion for summary judgment. The response argued several issues precluded the entry of judgment in plaintiff's favor: (1) Byline lacked standing to foreclose on the subject property, (2) genuine issues of material fact existed, (3) plaintiff and defendants entered into a forbearance agreement, and (4) the motion for summary judgment incorrectly calculated the amounts due and owing. On June 5, 2017, the circuit court rejected the assertions made in defendants' response and entered judgment in favor of plaintiff. On the same day, the circuit court also entered orders dismissing defendants' affirmative defenses and granting Byline's motion to substitute. According to the certificate of sale, the judicial auction commenced on September 6, 2017 and was continued to September 14, 2017.

¶ 12 On October 2, 2017, plaintiff filed a motion seeking approval of the report of sale and distribution, an order confirming sale, an order of possession, and the entry of an *in personam* deficiency judgment. Defendants filed a response on November 14, 2017. The response argued notice was improper because the sale was scheduled for September 6, 2017, but did not occur until September 14, 2017. The response also argued plaintiff did not provide proper notice for the publication of the sale to counsel for defendants, the amounts due and owing were calculated improperly and the sale was unconscionable. The circuit court rejected defendants' arguments and granted plaintiff's requested relief on December 8, 2017. On December 28, 2017, Malevitis filed an emergency motion to stay enforcement of possession pursuant to Illinois Supreme Court Rule 305(B). The circuit court denied the motion on January 3, 2018.

¶ 13 This timely appeal followed.

¶ 14

ANALYSIS

¶ 15 In his first issue before this court, Malevitis argues several issues of material fact should have precluded the entry of summary judgment in plaintiff's favor. Section 2-1005 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).

¶ 16 Malevitis claims summary judgment was improperly granted because the affidavits filed with the response to the motion for summary judgment created a genuine issue of material fact as to the existence of a forbearance agreement. The plaintiff responds that this claim is barred by the Credit Agreement Act because the alleged forbearance agreement was never put into writing. 815 ILCS 160/1 *et seq.* (West 2016) (Credit Act). Defendant does not address the argument in his reply brief.

¶ 17 Section 1(1) of the Credit Act defines a credit agreement as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." *Id.* § 1(1). Section 2 states "[a] debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of

money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.”

*Id.* § 2. Section 3 delineates the scope of the Credit Act:

“Actions not considered agreements. The following actions do not give rise to a claim, counter-claim, or defense by a debtor that a *new credit agreement* is created, unless the agreement satisfies the requirements of Section 2:

\* \* \*

(3) *the agreement by a creditor to modify or amend an existing credit agreement or to otherwise take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement.*” (Emphases added.) *Id.* § 3(3).

Previous courts have determined the statutory language in the Credit Act means “[t]here is no limitation as to the type of actions by a debtor which are barred by the Act, so long as the action is in any way related to a credit agreement.” *First National Bank in Staunton v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d 367, 372 (1994).

¶ 18 The language contained in the Act bars Malevitis from asserting the existence of an oral forbearance agreement. The oral forbearance agreement Malevitis contends exists falls within the scope of Section 3 because it “represents a modification of the existing” loan which would “forbear [plaintiff] from exercising remedies in connection with” it. 815 ILCS 160/3(3) (West 2016). Since the forbearance agreement would fall within the confines of Section 3, it must comply with the requirements found in Section 2. Section 2 requires the agreement be in writing. *Id.* § 2. Since Malevitis admits the alleged forbearance agreement was never reduced to writing, the Credit Act prevents him from maintaining an affirmative defense based on it. Accordingly, the alleged existence of an oral forbearance agreement did not represent a basis to deny summary judgment in plaintiff’s favor.

¶ 19 Next, Malevitis argues plaintiff miscalculated the amounts due and owing. In his response to summary judgment, Malevitis attached his own affidavit (and one from Buhelos)

which contended plaintiff charged defendants \$1,622 for residential property insurance without prior authorization or approval. Malevitis contends that whether or not the \$1,622 was proper represents a question of fact which should have defeated summary judgment.

¶ 20 Affidavits attached in support of a motion for summary judgment must comply with Illinois Supreme Court Rule 191. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Part of Rule 191(a) requires that affidavits “shall have attached thereto sworn or certified copies of all documents upon which the affiant relies.” *Id.* Our supreme court has determined that parties must strictly comply with the “attached-papers provision” of Rule 191(a). *Robidoux v. Oliphant*, 201 Ill. 2d 324, 343-44 (2002).

¶ 21 The affidavits filed with the summary judgment response do not create a genuine issue of material fact concerning the hazard insurance cost because neither affidavit attached any documentation to support the claim that the insurance was improperly charged. The mortgage document attached to the summary judgment motion states, “[i]f Grantor [the defendants] fails \*\*\* (B) to provide any required insurance on the Property \*\*\* then Lender [the plaintiff] may do so. \*\*\* All such expenses will become part of the Indebtedness.” Also attached to plaintiff’s motion was a letter from Byline Bank dated September 12, 2016. The letter, marked “second and final notice,” states Byline’s records show the hazard insurance on the subject property had lapsed and Byline lacked any records showing new coverage had been obtained. The letter further informed defendants that Byline would purchase the hazard insurance at defendants’ expense. The hazard insurance cost \$1,622 annually. Based on the above provision in the mortgage, plaintiff had the authority to charge to defendants the cost of obtaining hazard insurance if defendants failed to purchase it themselves.

¶ 22 Based on the language in the mortgage, plaintiff did not need defendants’ authorization or approval to obtain insurance coverage if defendants failed to obtain it. The mortgage allowed

plaintiff to include this expense as part of the indebtedness. Defendants did not attach any documentation demonstrating: (1) defendants had insurance in place during the period in question, (2) that plaintiff was required to obtain defendants' approval before obtaining insurance coverage, or (3) the letter dated September 12, 2016 incorrectly stated the premium amount. Absent any supporting documentation, defendants' affidavits were insufficient to create an issue of material fact.

¶ 23 In his final argument concerning summary judgment, Malevitis contends Byline Bank failed to demonstrate it had standing to foreclose on the subject mortgage. Defendants' affidavits attached to the summary judgment response stated that defendants "ha[d] never entered [into] any written or oral agreement with Byline Bank \*\*\* and [defendants] never executed any other documents agreeing to substitute Byline for [North Community Bank] in the mortgage at issue."

¶ 24 Malevitis' standing argument lacks merit. Attached to plaintiff's motion for summary judgment was a letter from Marc A. Edwards, a manager from the Division of Banking at the Illinois Department of Financial and Professional Regulation. The letter acknowledges a previously sent letter by North Community Bank desiring to change its name to Byline Bank. The letter indicates that the name change from North Community Bank to Byline Bank will become effective February 17, 2015. Defendants did not present any documentation rebutting this letter from the Illinois Department of Financial and Professional Regulation. The letter demonstrates North Community Bank became Byline Bank on February 17, 2015. For this reason, Byline Bank had standing to foreclose on the subject mortgage.

¶ 25 Malevitis has failed to demonstrate any genuine issue of material fact which would preclude the entry of summary judgment in plaintiff's favor. The grant of summary judgment is therefore affirmed.



¶ 26 In his next issue, Malevitis argues the trial court abused its discretion in approving the sale of the subject property. He raises three arguments in support of reversing the circuit court's order approving the sale: (1) the notice of sale contained the wrong address, (2) the sale was unconscionable, and (3) the sale and deficiency judgment were based on erroneous calculations. An abuse of discretion standard of review applies to a circuit court's approval of an order of sale and distribution. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 27 After reviewing the record, we conclude Malevitis has forfeited his first argument. Defendants' response to plaintiff's motion to approve sale did not argue the notice was improper because it contained the wrong address.<sup>2</sup> Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1109 (2006). We decline to address the forfeited argument.

¶ 28 Malevitis' other arguments lack merit. Malevitis claims the sale was unconscionable because plaintiff bought the subject property for \$198,000 and he claims it is worth between \$280,000 and \$300,000.<sup>3</sup> Illinois law recognizes, "the price of properties sold at judicial sales is dependent on a number of factors, and these properties may not be sold for their full value." *Nationwide Advantage Mortg. Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 35. " '[I]nadequacy of price alone is not sufficient cause for setting aside a judicial sale.' " *Lyons Savings & Loan Ass'n v. Gash Associates*, 189 Ill. App. 3d 684, 689 (1989) (quoting *Illini Federal Savings & Loan Ass'n v. Doering*, 162 Ill. App. 3d 768, 771 (1987)). Given this case law, we reject Malevitis' argument that the sale was unconscionable because the property may have been sold below market value.

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<sup>2</sup> The notice of sale identifies the property as 3540 South Halsted instead of 3450 South Halsted.

<sup>3</sup> Malevitis does not cite to any documentation in the record supporting his valuation.

¶ 29 Malevitis' last argument for setting aside the sale is based on the alleged discrepancy in the amount due and owing regarding the hazard insurance. As stated above, there is no dispute regarding the amount due and owing because defendants failed to provide any evidence that plaintiff wrongfully charged for the hazard insurance.

¶ 30 Malevitis presents no meritorious arguments demonstrating the circuit court abused its discretion in approving the sale and distribution. We therefore affirm the order approving the sale of the subject property.

¶ 31

#### CONCLUSION

¶ 32 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.

¶ 33 Affirmed.