2019 IL App (1st) 181559-U

No. 1-18-1559

Third Division
May 29, 2019

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST III,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 16 CH 3826
ANTHONY OGBONNA, EUCHARIA OGBONNA, MIDLAND FUNDING LLC, UNKNOWN HEIRS AND LEGATEES OF ANTHONY U. OGBONNA, if any, UNKNOWN HEIRS AND LEGATEES OF EUCHARIA OGBONNAM, if any, UNKNOWN OWNERS AND NON RECORD CLAIMANTS,	)	Honorable John Curry, Judge, presiding.
Defendants (Anthony Ogbonna. Defendant-Appellant).	)	

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

O R D E R

¶ 1 *Held*: Affirming judgment of the circuit court of Cook County confirming foreclosure sale of residential property.

¶ 2 This appeal arises out of a mortgage foreclosure action. Defendant-Appellant, Anthony U. Ogbonna, appeals the order of the circuit court of Cook County confirming the judicial sale of his residential real estate. Defendant contends that the circuit court abused its discretion by granting a petition to shorten the redemption period and subsequently entering an order on a motion to approve sale of the property in favor of Plaintiff-Appellee, Wilmington Savings Fund Society. Defendant argues that by granting the petition and motion, "justice was not done" pursuant to section 15-1508 of the Illinois Mortgage Foreclosure Law (IMFL). 735 ILCS 5/15-1508(West 2016). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The factual and procedural background giving rise to the issues in this appeal is as follows. On February 24, 2003, defendant executed a promissory note, secured by mortgage on real property located at 2916 W. 141th Street, Blue Island, Illinois 60406 (the Property). The mortgage was originally held by Legacy Mortgage Corporation. Pursuant to the terms of the promissory note, defendant owed a principal balance of $148,697.00 plus interest, which was to be paid at a monthly rate of $891.51 for 30 years. In March 2014, the mortgage was assigned to Bayview Loan Servicing, LLC ("Bayview").

¶ 5 On March 17, 2016, Bayview initiated a mortgage foreclosure action against defendant after he defaulted on the loan obligation. The action named defendant, as owner and mortgagor of the property; Midland Funding LLC, by virtue of a Memorandum of Judgment in the amount of $1,633.50 against the defendant; Eucharia Ogbonna, as mortgagor under the terms and provisions of the subject real estate mortgage; unknown heirs and legatees of both

defendant and Eucharia, who may have some interest in the subject real estate; and unknown owners and non-record claimants, if any. The complaint substantially followed the complaint form in section 15-1504(a) of the IMFL. The complaint provided that the "[a]mount of original indebtedness including subsequent advances made under [m]ortgage" was $148,697.00, whereas the amount of "loan modification" was $158,257.59. Bayview alleged that since July 1, 2011, defendant failed to make payments on the note and mortgage and entered default. Specifically, defendant failed to make "payments when due and the subject loan has been accelerated. The current unpaid principal balance is $156,423.07, plus accrued interest, court costs, title costs and plaintiff's attorney fees. The per diem rate of interest on this loan is $22.50. The subject loan is paid through July 1, 2011." Attached as exhibits to the complaint were copies of the mortgage agreement, promissory note, assignment of mortgage, and other related documents.

¶ 6 On March 19, 2016, special process server, Edward Tomaszek, attempted service on defendant at the property. However, Tomaszek found that the property was vacant. In his affidavit ("vacancy affidavit"), Tomaszek stated that "[n]o garbage in outside garbage can" was present and "[n]eighbor at 2915 said that the home is vacant," which served as "other visual evidence that property is unoccupied." The affidavit further includes a statement, "can't see inside" and a checklist where Tomaszek indicated that the electric meter was running, there was no utility disconnect notice or uncollected mail at the premises, the lawn was mowed, and no "For Sale" sign was present on the property. Service was also attempted on Midland Funding, LLC and Eucharia. Both were successfully served on March 21 and March 20, 2016, respectively.

¶ 7 On May 5, 2016, a second service attempt was made on defendant at a different location. The occupant of this residence, identifying himself as Kenny, stated that he resided with defendant's ex-spouse, Eucharia, but defendant did not reside at the location. On June 3, 2016, notice by publication was filed, thereby providing notice to defendant, unknown heirs and legatees of the defendant and Eucharia, and unknown owners and non-record claimants, if any, of a foreclosure action commenced against them.

¶ 8 On September 15, 2016, Bayview filed, *inter alia*¸ a motion for judgment of foreclosure, motion for default against defendant, and a petition to shorten the redemption period. Attached to the petition to shorten redemption period was Tomaszek's affidavit from March 2016 which indicated that the property was vacant. On May 15, 2017, defendant called 9-1-1 to make a delayed report of property damage. Defendant claimed that a notice was taped on his front door with a new lock installed. The notice stated that the property "was found to be vacant and/or unsecured," provided an emergency contact number, and was dated March 31, 2017. Despite the lock, defendant was able to enter the property on May 13, 2017 by obtaining the lock code from the mortgage company. Once inside, defendant observed extensive damage, including, *inter alia*¸ torn drywall from the basement ceiling, missing toilets from the upstairs bathroom, and damage to carpets and floors.

¶ 9 On June 6, 2017, a hearing was held on plaintiff's motion for default judgment.[1] Defendant appeared in court through counsel. The circuit court granted defendant 29 days to respond to the complaint. On July 5, 2017, defendant filed his motion to dismiss pursuant to section 735 ILCS 5/5-101 (West 2016) and 735 ILCS 5/5-103 (West 2016). Defendant

[1] During the course of the foreclosure proceedings, the mortgage was assigned from Bayview Loan Servicing, LLC to Bayview Dispositions IIIA, LLC. Thereafter, the subject mortgage was assigned to plaintiff and a motion to substitute party plaintiff was filed. Thus, Bayview is no longer a named plaintiff to the action.

alleged in his motion to dismiss that plaintiff failed to file a security for costs. On September 6, 2017, defendant withdrew his motion and the court granted defendant an additional 28 days to answer or otherwise plead.

¶ 10 As of January 5, 2018, defendant did not file an appearance, answer or motion. On March 14, 2018, the circuit court granted plaintiff's motions for judgment of foreclosure, default, petition to shorten redemption period, and other related motions. The judgment indicated that the statutory period of redemption would expire 30 days after the date the Judgment of Foreclosure and Sale was entered, on April 14, 2018, after which the property would be sold. On May 3, 2018, plaintiff was the highest bidder at the judicial sale of the property. That same day, defendant called 9-1-1 to report a residential burglary, claiming that he noticed that the light was turned on in his upstairs bedroom and first floor hallway when he had turned both lights off before his departure out of the country. Defendant also noticed that his flat screen television and black Sony receiver were missing.

¶ 11 The next day, plaintiff moved for an order approving the report of the sale and distribution. On June 12, 2018, defendant filed a response to plaintiff's motion arguing that the statutory period should not have been shortened as the property was not vacant. Attached to the response was defendant's affidavit, in which he stated that he has lived on the property as his primary residence since the "Summer of 2002." Defendant asserted he was outside of the country taking care of family affairs in Nigeria from January 1, 2018 to April 23, 2018, following his father's death. As such, defendant contended that he did not receive notice of the Motions for Default and Judgment of Foreclosure that was filed with the court on February 14, 2018.

¶ 12 Defendant's affidavit further stated that he did not abandon his property and continued to reside there as his primary residence. Additionally, defendant stated that he did not receive notice of the sale on May 3, 2018 because he was in Nigeria. He claimed that when he found "out a sale occurred and a Motion to Approve Sale was filed, [he] appeared in Court to try and vacate the judgment against [him]." Lastly, defendant claimed that the "mortgage servicer, previously Bayview Loan Servicing" was aware that he was "spending time in Nigeria with his father." Thus, defendant requested the court: (1) "deny plaintiff's motion to approve sale and subsequently rescind the sale"; (2) vacate plaintiff's "February 14, 2018 Default Judgment and Judgment of Foreclosure and Sale, or, in the alternative, reset Defendant's ninety (90) day redemption period to allow him to engage in loss mitigation efforts and explore any potential defenses to the foreclosure lawsuit, including the illegal entry and trespass by the servicer on Defendant's Property"; and (3) "grant defendant leave to file a counter-claim based on plaintiff and its agents' illegal entry and trespass to Defendant's Property." On June 19, 2018, plaintiff filed a reply in support of its motion.

¶ 13 On June 27, 2018, the circuit court granted plaintiff's motion for an order approving sale and order to evict. Defendant now appeals that order.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant contends that "justice was not done" pursuant to section 15-1508 of the IMFL. Defendant argues that justice would require defendant be afforded his full statutory redemption period because the property was not abandoned. In support, defendant asserts: (1) the two-year old vacancy affidavit was insufficient to prove abandonment where it was solely based on "[a]ffiant's inability to see inside the home, lack of garbage in the outside garbage can, and a hearsay statement from a neighbor" that the home was vacant; and

(2) plaintiff knew that the property was not abandoned as the "defendant resided at the property and was spending time in Nigeria handling family affairs." Lastly, defendant argues that it would be unjust to approve a "sale when the plaintiff and/or servicing company illegally locked defendant out of his property, on two separate occasions, despite no authority or leave of court to do so." As such, defendant requests this court vacate the circuit court's order shortening the period of redemption and reverse its subsequent order approving the report of sale and distribution.

¶ 16 Section 15-1508 of the IMFL governs confirmation of judicial sales. *Household Bank, FSB v.* Lewis, 229 Ill. 2d 173, 178 (2008). Under the IMFL, "after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b)." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18. Section 15-1508(b) provides, in part, that, the circuit court shall enter an order confirming the sale unless (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2016).

¶ 17 The trial court has "mandatory obligations to (a) conduct a hearing on the confirmation of a judicial sale where a motion to confirm has been made and notice has been given, and (b) following the hearing, to confirm the sale unless it finds that any of the four specified exceptions are present." *Household Bank, FSB,* 229 Ill. 2d at 178. The party opposing the sale bears the burden of proving that sufficient grounds exist for the circuit court to not enter an order approving the sale. *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 35. We will not disturb a circuit court's decision to confirm or deny a

judicial sale absent an abuse of discretion. *Household Bank, FSB*, 229 Ill. 2d 173, 178 (2008). The trial court abuses its discretion when "its ruling rests on an error of law or where no reasonable person would take the view adopted by the circuit court." *CitiMortgage, Inc. v. Bermudez*¸ 2014 IL App (1st) 122824, ¶ 57.

¶ 18 After review of the record, we note that defendant has failed to provide a report of proceedings or an acceptable substitute for the hearing on the motion confirming or approving the sale. Illinois Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal including a certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). If no verbatim account is obtainable, the appellant may file an acceptable substitute, such as a bystander's report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. July 1, 2017). The burden of providing a sufficient record on appeal is placed upon the appellant. *Maniscalco v. Porte Brown, LLC*, 2018 IL App (1st) 180716, ¶ 30. In the absence of a sufficient record, we must presume that the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Id*. (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)). Additionally, any doubts arising from an incomplete record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

¶ 19 In describing the report of proceedings, Rule 323(a), states that it "may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal." Ill. S. Ct. R. 323. Here, no report of proceedings was filed for any hearing. Nor was a bystander's report as authorized under Rule 323(c), nor an agreed statement of facts as authorized by Rule 323(d) filed by the defendant. All that appears

before us is plaintiff's motion for order approving report of sale and distribution and order to evict, defendant's response to that motion, plaintiff's reply in support of its motion, and the circuit court's June 27, 2018 order, "approving report of sale and distribution, confirming sale, and order to evict." Given that there is no transcript of the hearing on the motion for an order approving or confirming sale, no basis exists for holding that the trial court abused its discretion in granting the motion. *Libco Corp. v. Roland*, 99 Ill. App. 3d 1140 (1981). Therefore, we presume that the trial court acted in conformity with the law and had a sufficient factual basis for its finding.

¶ 20 Even if the defendant had provided a report of proceedings, the defendant would not prevail. Here, defendant solely relies on section 15-1508(b)(iv) to argue that the circuit court should not have entered an order confirming the sale. To the extent that any other subsection of 15-1508(b) may be relevant to the issues, defendant fails to clearly articulate how they would apply. Instead, defendant simply argues that justice was not done when the circuit court shortened the redemption period to 30 days based on the finding that the property was abandoned. See 735 ILCS 5/15-1603(b)(4)(providing that the redemption period shall end "30 days after the date the judgment of foreclosure is entered if the court finds that the mortgaged real estate has been abandoned"). At the outset, we note that Section 15-1508(b) does not expressly define "justice otherwise not done." 735 ILCS 5/15-1508(b) (West 2016). In practice, the section is "often invoked by defendants making a last-ditch effort to extricate themselves from a lost foreclosure case." *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147.

¶ 21 In the present case, defendant argues that the property was not abandoned because plaintiff was aware that defendant was residing at the property and was spending time outside

of the country to take care of family matters. Defendant also contends that the vacancy affidavit was insufficient as it was based solely on "other visual evidence that property is unoccupied" such as the "[a]ffiant's inability to see inside the home, lack of garbage in the outside garbage can, and a hearsay statement from a neighbor" that the home was vacant. In making these arguments, defendant concedes that there does not appear to be a factually similar case or case law. Defendant thus characterizes this case to be a case of first impression.

¶ 22 However, "case law teaches the court's discretion under the justice clause is extraordinarily narrow." *NAB* Bank¸ 2013 IL App (1st) 121147, ¶ 27. In *NAB Bank,* the court correctly noted that "[t]here is only a handful of reported cases where a court vacated a sale under the justice clause, and almost all of them did so because of an unconscionable sale price, which is a separately listed basis on which a court can decline to confirm a sale." *Id.* ¶ 18. We decline to expand the scope of the justice clause to include the facts of the present case, where defendant does not claim that the justice clause is implicated by the sale price**.**

¶ 23 The appellate court has also found injustice under section 15-1508(b)(iv) in instances where "the lender's conduct *** prevented the borrowers from protecting their interest in the property and affected their right to redeem the property." *Wells Fargo Bank, N.A. v. McCluskey*¸ 2013 IL 1154649, ¶ 22; see also *Fleet v. Mortgage Corp. v. Deale*¸ 287 Ill. App. 3d 385 (1997)(finding borrowers' right to redeem was impacted where lender mistakenly proceeded with a foreclosure sale and sold the property to third party after the borrowers had exercised their right to redeem); *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915 (1997)(holding that justice was not otherwise done where the sale price along with lender's conduct of repeatedly ignoring borrower's request about what steps to take to

redeem the property prevented borrower from pursuing her right to redeem); *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*¸ 269 Ill. App. 3d 293 (1995)(finding that "it would not be in the interests of justice for the court to have confirmed the sale of the property after [the mortgagee] affirmatively represented to the [mortgagors] that a sale would not take place" on the scheduled date). However, the facts of this case do not warrant a finding of injustice. Here, defendant asserts that plaintiff knew about his travel plans but does not provide any documents, aside from his affidavit, to support his contention. As such, we cannot find that plaintiff's conduct prevented defendant from protecting his rights in the property. Furthermore, the court's grant of a petition shortening the redemption period based on an affidavit alleged to be insufficient in showing abandonment does not constitute misconduct on the part of the plaintiff.

¶ 24 The cases cited above are instructive for another reason. In each case, the court emphasized that the trial court was required to balance the mortgagors' right to redeem against the competing interest of the mortgagee or the bidder at the judicial sale. The court must balance the prejudice to the mortgagors and mortgagees, while considering the need to promote stability in the judicial sale process. With these principles in mind, we find that the scale of equity should tip in favor of plaintiff. Although defendant claims that he did not know about the motions filed against him as he was out of the country from January 1, 2018 to April 23, 2018, defendant had previously filed a motion to dismiss this action. As such, he was aware of the foreclosure action against him before he left the country and was responsible for keeping track of his case. See *Genesis & Sons, Ltd. v. Theodosopulos*, 223 Ill. App. 3d 276, 280 (1991) (providing that "a litigant has the obligation to follow the progress of this case [citation], and the inadvertent failure to do so is not a ground for relief.").

¶ 25 Additionally, defendant had ample opportunities to voice his opposition to the shortened redemption period but did not do so. We find nothing wrong with plaintiff having filed a petition to shorten the redemption period when the record demonstrates that defendant had, up until then, not answered. Even after the court granted defendant additional time to answer or plead, defendant did not file any subsequent appearance, answer, response or motion until after his redemption period expired on April 14, 2018 and plaintiff filed a motion for order confirming sale. We further note that vacating the order and reversing the circuit court's decision to shorten the redemption period would allow defendant to "circumvent the time limitations for redemption and reinstatement and essentially allow for a revival of those provisions that is otherwise explicitly precluded by the Foreclosure Law." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 25 (citing 735 ILCS 5/15-1603(c)(1) (West 2016)("Once expired, the right of redemption *** shall not be revived.").

¶ 26 Lastly, although defendant argues in his brief that it would be unjust to approve a "sale when the plaintiff and/or servicing company illegally locked defendant out of his property, on two separate occasions, despite no authority or leave of court to do so," the defendant later concedes in his reply brief that "this appeal is not about plaintiff's alleged right to break into the property and lock Appellant out multiple times." As such, defendant has waived this argument.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.