2019 IL App (1st) 190088-U

SECOND DIVISION
September 30, 2019

No. 1-19-0088

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

The BANK OF NEW YORK MELLON f/k/a The BANK OF NEW YORK, as Trustee for the Certificate Holders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2006-12, Mortgage Pass-Through Certificates, Series 2006-12,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	No. 14-CH-13719
v.	)	The Honorable Bridget A. Mitchell and
DORAN TIDHAR and GABRIELA TIDHAR, a/k/a Gabriela G. Tidhar,	)	Gerald Vernon Cleary, III, Judges Presiding.
Defendants-Appellants.	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* In mortgage foreclosure action, summary judgment in favor of plaintiff is affirmed, where uncontradicted affidavit testimony by plaintiff's employee laid a sufficient foundation for the admission of business records showing that, prior to filing action, condition precedent of giving notice of default and acceleration had been satisfied.

¶ 2 The plaintiff, the Bank of New York Mellon f/k/a the Bank of New York, as Trustees for the Certificate Holders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2006-12, Mortgage Pass-Through Certificates, Series 2006-12, filed this action to foreclose a mortgage against the

defendants, Doran Tidhar and Gabriela Tidhar. The trial court entered an order granting summary judgment in favor of the plaintiff and against the defendants. Following a judicial sale of the real estate at issue, the trial court entered an order confirming the sale and the distribution of the sale proceeds. The defendants appeal the entry of these orders. We affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 On August 22, 2014, the plaintiff filed a complaint to foreclose a mortgage on the defendants' residential property in Skokie, Illinois. It alleged that the defendants' mortgage was in default due to their failure to make the monthly payments called for by the mortgage from July 1, 2009, through the date of filing. It alleged that the outstanding principal balance was $640,244.50, plus interest. The mortgage was attached as an exhibit to the complaint. The provisions of the mortgage pertinent to this appeal are its paragraphs 22 and 15. In paragraph 22, the parties agreed in pertinent part to the following:

> "Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ***. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding[,] and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date

> specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding."

Paragraph 15 of the mortgage provided in pertinent part, "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

¶ 5 On March 30, 2015, the defendants filed an answer to the complaint. In that pleading, they answered the allegations expressly set forth in the complaint. As the complaint conformed to the statutory form complaint set forth in section 15-1504(a) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504(a) (West 2014)), the defendants also answered the 12 additional allegations that were not expressly set forth in the complaint, but which a statutory form foreclosure complaint is by statute "deemed and construed to include." *Id.* § 15-1504(c). Thus, their answer set forth the following allegations and the defendants' answers to them:

> "(8) that by reason of defaults alleged, if the indebtedness has not matured by its terms, the same has become due by the exercise, by the plaintiff or other persons having such power, of a right or power to declare immediately due and payable the whole of all indebtedness secured by the mortgage;
>
> ANSWER: Deny.
>
> (9) that any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given;
>
> ANSWER: Deny.
>
> (10) that any and all periods of grace or other period of time allowed for the performance of the covenants or for curing of any breaches have expired;

ANSWER: Deny." See *id.* § 15-1504(c)(8)-(10).

¶ 6 On June 30, 2015, the plaintiff filed a motion for summary judgment. It argued that no genuine issue of material fact existed about the fact that the defendants were in default on their mortgage, and therefore the plaintiff was entitled to judgment as a matter of law. While the motion asserted that all conditions precedent under the mortgage had been met, it made no specific statement concerning compliance with the notice requirement of paragraph 22.

¶ 7 On October 13, 2015, the defendants filed a response to the motion for summary judgment. Among other arguments, they contended that the motion should be denied because the plaintiff had failed to comply with the requirement of paragraph 22 of the mortgage that, prior to filing a foreclosure action, the lender give the borrower notice of default and notice that failure to cure the default by a specified date, not less than 30 days from the date the notice was given, might result in the acceleration of the sums secured by the mortgage, foreclosure by judicial proceeding, and sale of the property. They pointed out that their answer denied that any and all notices of default or election to declare the indebtedness due and payable, or other notices required to be given, had been duly and properly given. Further, both defendants attached affidavits stating, "I have never received by mail or otherwise prior to the filing of the case at bar on August 22, 2014 a Notice of Default and Acceleration as set forth in paragraph 22 of the Mortgage attached to Plaintiff's Complaint." Both defendants' affidavits further stated respectively, "I am aware of no other instance where mail intended for my receipt at 9339 Lowell Avenue, Skokie, IL 60076, failed to arrive at this address."

¶ 8 On June 3, 2016, the plaintiff filed a reply in support of its motion for summary judgment. It responded to the points set forth above by arguing that the defendants' answer was insufficient to raise an issue of fact about whether the notice of default and acceleration had been sent. It

argued that Illinois Supreme Court Rule 133(c) (eff. Jan. 1, 1967) required that, in denying allegations concerning the performance of a condition precedent in a contract, " 'the facts must be alleged in connection with the denial showing wherein there was a failure to perform.' " It argued that the defendants' answer failed to plead any facts showing the defendants had failed to send the notice of default and acceleration. The plaintiff further pointed out that the mortgage provisions deemed a notice to be given when it was mailed by first class mail. It argued that it was not required to prove the notice was actually received by the defendants.

¶ 9 The plaintiff argued that no genuine issue of material fact existed that a notice of default and intent to accelerate was sent. To support this statement, the plaintiff's reply brief attached the affidavit of Diana C. D'Addona, who averred that she was an assistant vice president at Ditech Financial LLC (Ditech), the loan servicing agent for the plaintiff. D'Addona stated in her affidavit that she was familiar with the business records maintained by Ditech for the purpose of servicing mortgage loans. She stated that she had personal knowledge of the facts set forth in her affidavit based on a review of Ditech's business records, and the information in her affidavit was taken from Ditech's business records. She further stated that the mortgage loan at issue was serviced by another entity prior to Ditech, and the business records of that prior entity had been integrated into Ditech's business records, including the collateral file, payment histories, communication logs, default letters, information, and comments concerning the mortgage loan account. She stated that Ditech maintained quality control and verification procedures to ensure the accuracy of the records transferred from the prior entity, and it was Ditech's regular business practice to rely upon the records of the prior entity in providing mortgage loan services. (D'Addona's affidavit did not identify the name of what she referred to as the "prior entity." However, a second affidavit attached to the plaintiff's reply brief, that of Verlin O. Peacock, Jr.,

another assistant vice president of Ditech, stated that Ditech had acquired the servicing rights for the defendants' loan from RCS (Residential Credit Solutions) on March 1, 2016.)

¶ 10 D'Addona stated further in her affidavit that correspondence giving notice of default and the intent to accelerate dated October 18, 2013, was mailed to defendant Doran Tidhar via regular first class mail, and that a true and accurate copy of that notice was attached to the affidavit. Attached to the affidavit as an exhibit was a document titled "Notice of Default and Intent to Accelerate," addressed to defendant Doran Tidhar at 9339 Lowell Avenue, Skokie, IL 60076, dated October 18, 2013. It bore a postal service permit imprint indicia, which indicated it was sent by first class mail with postage paid. D'Addona's affidavit also averred that a true and accurate copy of the business records demonstrating that the notice of default and intent to accelerate was mailed was attached to the affidavit. A document with the heading "delinquent/breach/letter/info" was then attached as an exhibit to her affidavit.

¶ 11 On August 9, 2016, the defendants filed a surresponse to the motion for summary judgment. They argued that no admissible evidence showed that a notice of default and intent to accelerate had been mailed to defendants prior to the filing of the foreclosure action. They again pointed to their answer to the complaint, in which they denied that any notice of default or election to declare the indebtedness due and payable had been given. They argued that D'Addona had no personal knowledge that any of the documents attached to her affidavit were true and correct copies of the records of the predecessor bank or loan servicer to Ditech, or of the practices or procedures of that prior entity. They argued therefore that her affidavit could not provide foundation for the plaintiff's assertion that a notice was mailed by Ditech's predecessor on October 18, 2013, by first class mail. They further argued that the exhibit attached to D'Addona's affidavit purporting to prove the mailing was insufficient to demonstrate that the

letter was actually mailed to Doran Tidhar on October 18, 2013, because the party, the computer, and the software that produced the record were unidentified.

¶ 12 On September 7, 2016, the plaintiff filed a surreply in support of its motion for summary judgment. In addition to reiterating points from its previous briefing, it argued that D'Addona's affidavit established a sufficient foundation for the admission of the business records of the prior loan servicer. It further argued that the factual assertions in her affidavit must be taken as true, based on the defendants' failure to provide a counter-affidavit to contest those factual assertions.

¶ 13 On November 7, 2016, the trial court conducted a hearing on the motion for summary judgment. On November 28, 2016, the trial court granted the plaintiff's motion for summary judgment. No transcript of the proceedings that occurred in the trial court on either of these dates is included in the record on appeal. Following a judicial sale of the property at issue on April 9, 2018, the trial court entered an order approving the report of sale and distribution of the sale proceeds on December 13, 2018. The defendants filed a timely notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, the defendants argue that the trial court erred in granting summary judgment in favor of the plaintiff because a genuine issue of material fact exists as to whether, prior to filing this foreclosure action, the defendants were provided with the notice of default and acceleration required by paragraph 22 of the mortgage. They further argue that, on the basis that summary judgment should not have been entered in the plaintiff's favor, the trial court abused its discretion in entering the order approving the judicial sale of the property.

¶ 16 We review *de novo* the trial court's granting of a motion for summary judgment. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30. 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. *Id.* at ¶ 29. We review a trial court's order confirming the judicial sale of property for abuse of discretion. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57. A trial court abuses its discretion if its ruling rests on an error of law or where no reasonable person would take the view adopted by the court. *Id.*

¶ 17 The plaintiff and the defendants are in agreement that the giving of the notice of default and acceleration required by paragraph 22 of the mortgage was a condition precedent to the plaintiff's right to file this foreclosure action. See *Credit Union 1 v. Carrasco*, 2018 IL App (1st) 172535, ¶ 15 (citing *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 16; *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 33). A condition precedent is a condition in which performance by one party is required before the other party is obligated to perform. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 668 (2007). When contracts contain express conditions precedent, strict compliance with such conditions is required. *Id.* A contract containing a condition precedent does not become enforceable or effective until the condition is performed or the contingency occurs. *Id.*

¶ 18 Thus, the question on appeal is whether the summary judgment record shows that a genuine issue of material fact exists about whether the notice of default and acceleration was given prior to the filing of this action. We note that, because the record on appeal does not include a transcript of what occurred in the trial court on either the date that the motion for summary judgment was heard or the date that it was ruled upon, this court is deprived of the benefit of understanding the trial court's reasoning for its ruling. This is significant because both parties, instead of focusing solely on the evidence in the summary judgment record, extensively brief the issue of whether the defendants' answer was adequate under Illinois Supreme Court Rule 133(c)

(eff. Jan. 1, 1967) to place at issue their denial of the plaintiff's performance of the condition precedent of giving the notice of default and acceleration prior to its filing of the complaint. The plaintiff argues that the defendants' answer constituted a binding judicial admission that the plaintiff did comply with all conditions precedent, including the giving of the notice at issue. Both parties contend that the other has forfeited their respective arguments on the matter.

¶ 19 However, based on the absence of the transcripts from the summary judgment proceedings in the record on appeal, we are unable to determine whether the trial court granted summary judgment based on the defendants' answer to the complaint and not on the evidence in the summary judgment record.[1] It is the defendants' burden as the appellants to present a sufficiently complete record to support their claims of error. *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 21. The lack of these transcripts does not bar our review of the propriety of the entry of summary judgment, though, because our review is *de novo*, and we may affirm a trial court's entry of summary judgment on any basis appearing in the record, regardless of whether the trial court relied on this basis or its reasoning was correct. *Id.* Even if we agreed with the defendants that their answer was sufficient to place at issue the plaintiff's compliance with the condition precedent, they could not rely on their answer alone to raise an issue of material fact to defeat a properly-supported motion for summary judgment. *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 23. Thus, before considering any arguments concerning the answer to the complaint, we examine first whether the evidence in the summary judgment record demonstrates the existence of a genuine issue of material fact.

[1] The defendants also state in their brief that the trial court applied the decision in *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, to the case at bar. As discussed below, the court in *Land* held that an affidavit by an employee of the plaintiff bank sufficiently laid the foundation for the admission of the bank's business records, notwithstanding the fact that the records were initially created by a predecessor bank. *Id.* ¶¶ 11-14. The fact that the trial court applied the reasoning of *Land* to the case at bar indicates to this court that it based its ruling on the affidavits and business records, not on a judicial admission in the defendants' answer to the complaint.

¶ 20 The defendants initially purported to show that an issue of fact existed about whether the requisite notice was given through the filing of their own affidavits, in which both defendants stated, "I have never received by mail or otherwise prior to the filing of the case at bar on August 22, 2014 a Notice of Default and Acceleration as set forth in paragraph 22 of the Mortgage attached to Plaintiff's Complaint." Both defendants' affidavits further stated respectively that they were aware of no other instance where mail intended for their receipt failed to arrive at their address. The plaintiff replied to this argument in the trial court by correctly noting that the provision of the mortgage governing the giving of notices provided that a notice is deemed to be given when it is mailed by first class mail, and proof of the defendants' receipt of the notice was not required. Specifically, paragraph 15 of the mortgage states in pertinent part, "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail ***." Thus, the defendants' statements in their affidavits that they did not receive a notice prior to the filing of this action cannot, standing alone, show an issue of fact about whether the notice was given under the terms of the mortgage. See *Bukowski*, 2015 IL App (1st) 140780, ¶¶ 17, 19; *cf. CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 39 (notice properly given under supreme court rules allowing the giving of notice by regular mail cannot be frustrated by allegation that it was not received).

¶ 21 Therefore, the question then becomes whether the summary judgment record shows a genuine issue of material fact about whether the notice required by paragraph 22 was mailed by first class mail to the defendants prior to the filing of this foreclosure action. In the trial court, the plaintiff contended that D'Addona's affidavit provided evidence that a notice of default and acceleration dated October 18, 2013, was mailed to defendant Doran Tidhar by first class mail. Specifically, the plaintiff contended that D'Addona's affidavit laid a sufficient foundation for the

admission of business records showing the notice itself and demonstrating that it was in fact sent.

¶ 22 On appeal, the defendants argue that no admissible evidence exists that the notice of default and acceleration was mailed to the defendants prior to the initiation of this action. They argue that D'Addona's affidavit fails to comply with Illinois Supreme Court Rule 191(a) (eff. Jan 4, 2013) and Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992). Rule 191(a) governs affidavits in support of, or opposition to, a motion for summary judgment. *Woolums v. Huss*, 323 Ill. App. 3d 628, 635 (2001). In pertinent part, that rule requires that affidavits must (1) be made on the personal knowledge of the affiant, (2) set forth with particularity the facts on which the claim is based, (3) attach sworn or certified copies of documents that the affiant relied on, and (4) consist of facts admissible in evidence, not conclusions. Ill. S. Ct. R. 191(a). 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. *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999).

¶ 23 Rule 236(a) governs the requirements for documents to be admitted into evidence as business records. That rule provides as follows:

> "Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term 'business,' as used in

> this rule, includes business, profession, occupation, and calling of every kind." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

Under this rule, it is the business record itself, not the testimony of a witness making reference to the record, which is admissible. *US Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 29.

¶ 24 The defendants argue that D'Addona's affidavit fails to comply with Rule 191(a) in that it demonstrates that she has no personal knowledge regarding the mailing of a notice of default and acceleration to defendant Doran Tidhar. They argue that her affidavit fails to establish that she has personal knowledge of the practices and procedures of the predecessor bank that serviced the defendants' loan, and therefore she could not provide the foundation needed for her assertion that an acceleration notice was mailed by first class mail to Doran Tidhar on October 18, 2013. They argue that her purported "personal knowledge" is based solely on the exhibit attached to her affidavit, and they contend that the exhibit does not demonstrate that notice was mailed to Doran Tidhar on October 18, 2013. Rather, they argue, the exhibit is merely "a screenshot from an unidentified party, from an unidentified computer, created by unidentified software." They argue that D'Addona's testimony is insufficient under Rule 191(a) because she does not set forth the facts underlying her conclusion that the exhibit attached to her affidavit demonstrates that the notice was mailed to defendant Doran Tidhar on October 18, 2013.

¶ 25 We believe that D'Addona's affidavit is in compliance with Rule 191(a). Her affidavit testimony demonstrates sufficient personal knowledge to establish a foundation for the admission of the business records of Ditech, notwithstanding the fact that they were originally created by the prior loan servicer, RCS. A qualified witness may lay an adequate foundation for the admission of business records that were created by a predecessor entity but of which a successor entity integrates into its own business records. *Northbrook Bank & Trust Co. v. 2120*

Division LLC, 2015 IL App (1st) 133426, ¶¶ 41-49; *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶¶ 18-19; *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶¶ 11-14. That witness does not need to be the original entrant or possess personal knowledge of the event that is the subject of the record. *In re Estate of Savage*, 259 Ill. App. 3d 328, 333 (1994). Ordinarily, a witness employed by one business that receives a document from another business could not solely by virtue of receiving and retaining it lay a sufficient foundation for admitting the document as a business record of the issuing business. *International Harvester Credit Corp. v. Helland*, 151 Ill. App. 3d 848, 853 (1986). However, an exception to this rule exists "when the business receiving the information, acting in the regular course of business, integrates the information received into the business's records and relies on it in its day-to-day operations, and surrounding circumstances indicate trustworthiness." Michael H. Graham, Graham's Handbook of Illinois Evidence § 803.6, at 1058-59 (2019 ed.); accord *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 86. "Under such limited circumstances, admissibility through the testimony of the receiving custodian is warranted." *Id.* at 1059 (citing *2120 Division*, 2015 IL App (1st) 133426, ¶¶ 41-49; *Land*, 2013 IL App (5th) 120283, ¶¶ 11-14).

¶ 26 D'Addona's affidavit demonstrates that this exception is applicable in this case, such that her testimony provides sufficient foundation for the admission of the records originally created by the prior loan servicer. First, she averred in her affidavit that she had personal knowledge of the facts she was stating based her review of Ditech's business records, and the information her affidavit was taken from those business records. She further averred that, in the regular performance of her job functions as assistant vice president of Ditech, the loan servicing agent for the plaintiff, she was familiar with the business records maintained by Ditech for the purpose of servicing mortgage loans. Her affidavit further explained that Ditech's business records

included the business records of the prior entity that serviced the defendants' loan. She stated that the loan was serviced by another entity prior to Ditech, and the business records of that prior entity were integrated into the business records of Ditech. Thus, she stated, the prior entity's business records, including the collateral file, payment histories, communication logs, default letters, information, and comments concerning the loan account were integrated into Ditech's business records. Furthermore, she stated in the affidavit that Ditech maintains quality control and verification procedures to ensure the accuracy of the records transferred by a prior entity, and it is the regular business practice of Ditech to integrate the prior entity's records into its own business records and to rely upon the records of the prior entity in providing mortgage loan services. Finally, D'Addona's affidavit attaches sworn copies of the specific documents that she relies upon. We find this affidavit testimony, which is unchallenged by any counter-affidavit, sufficient to bring this case within the exception for the admission of business records created by a predecessor entity but integrated into the business records of a successor entity and relied upon in the day-to-day operations of the successor, under circumstances indicating trustworthiness.

¶ 27 Finding that the business records attached to D'Addona's affidavits are admissible through her testimony, we further conclude that they sufficiently establish that the notice of default and acceleration was mailed by first class mail to Doran Tidhar on October 18, 2013. The exhibits attached to the affidavit include a notice of default and acceleration addressed to defendant Doran Tidhar at 9339 Lowell Avenue, Skokie, IL 60076, dated October 18, 2013. It bears a postal service permit imprint indicia, indicating it was sent by first class mail with U.S. postage and fees paid. Further, the exhibit with the heading "delinquent/breach/letter/info" then appears to be a computer screen-shot indicating that such a letter was sent. D'Addona's affidavit testimony is that this business record exhibit demonstrates that the notice of default and

acceleration dated October 18, 2013, was mailed. Taking the affidavit and exhibits as a whole, we find D'Addona's affidavit testimony on this point to be sufficient such that, in the absence of a counter-affidavit or other evidentiary material contradicting them, the facts as set stated in the affidavit must be accepted as true. *2120 Division*, 2015 IL App (1st) 133426, ¶¶ 43-44; *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575-76 (2000).

¶ 28 We reject the defendants' argument that a genuine issue of material fact exists about whether the notice was mailed because the exhibit to D'Addona's affidavit is merely "a screenshot from an unidentified party, from an unidentified computer, created by unidentified software." We find this case to be distinguishable from the case of *U.S. Bank Trust National Ass'n v. Lopez*, 2018 IL App (2d) 160967, on which the defendants rely. In that case, the court found that a plaintiff bank had failed to establish as a matter of law that, prior to initiating a foreclosure proceeding, it had complied with a requirement (not involved in this case) that it send a letter to the defendant " 'certified by the Postal Service as having been dispatched.' " *Id.* ¶¶ 32, 40 (quoting 24 C.F.R. § 203.604(d) (2014)). The plaintiff submitted an affidavit stating that the letter at issue was sent via FedEx. *Id.* ¶ 34. Attached to the affidavit was an exhibit purporting to be the letter and a FedEx shipping label. *Id.* The court held that the shipping label did not offer proof of dispatch. *Id.* ¶ 37. Further, the court noted that the plaintiff cited "a 55-page record of a 'screenprint,' which purportedly showed a dispatch." *Id.* However, the court found that the plaintiff's affidavit did not sufficiently identify what about the 55-page screenprint established a dispatch. *Id.* In this case, there was no similar requirement on the plaintiff to show that the notice it sent was "certified by the Postal Service as having been dispatched." Rather, paragraph 15 of the mortgage required in pertinent part only that it be "mailed by first class mail." As stated above, we find that the uncontradicted affidavit testimony of D'Addona and the business records

attached to her affidavit sufficiently establish that the notice was mailed by first class mail.

¶ 29 We note that the defendants had ample time while this litigation was ongoing to conduct discovery in an attempt to obtain evidence that might undermine the plaintiff's evidence that a notice of default and acceleration had been properly given under the terms of the mortgage prior to the filing of this suit. Nothing in the summary judgment record indicates that they took the deposition of D'Addona to obtain testimony that might demonstrate an issue of fact on this point. As the defendants have failed to submit any counter-affidavit or other evidence that would demonstrate the existence of a genuine issue of material fact about whether the notice of default and acceleration required by paragraph 22 of the mortgage was given, the trial court properly entered summary judgment in favor of the plaintiff.

¶ 30 Based on our conclusion that the evidence in the summary judgment record demonstrates that no genuine issue of material fact exists about whether the notice of default and acceleration was properly given, we need not address any argument about whether the defendants' answer to the complaint was sufficient to join at issue the plaintiff's compliance with this condition precedent. Further, the defendants' argument that the trial court abused its discretion in entering the order approving the judicial sale of the property was based entirely on their contention that summary judgment should not have been entered in the plaintiff's favor. As we have held that summary judgment was properly granted in favor of the plaintiff, we reject the defendants' argument that the trial court abused its discretion in approving the judicial sale of the property.

¶ 31 III. CONCLUSION

¶ 32 In conclusion, we affirm the orders of the trial court granting summary judgment in favor of the plaintiff and against the defendants and approving the judicial sale of the property.

¶ 33 Affirmed.