

NOTICE
Decision filed 03/20/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 170060-U

NO. 5-17-0060

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

PHH MORTGAGE CORPORATION, f/k/a)	Appeal from the
Cendant Mortgage Corporation, f/k/a)	Circuit Court of
PHH Mortgage Services Corporation,)	Franklin County.
)	
Plaintiff and Counterdefendant-Appellant,)	
)	
v.)	No. 05-CH-105
)	
OLIVER ASHTIANI, a/k/a Alizera)	
Ashtiani, a/k/a Oliver Reza Ashtiani,)	
and DONNA ASHTIANI,)	
)	
Defendants and Counterplaintiffs-Appellees,)	
)	
and)	
)	
DISCOVER BANK, SIU CREDIT UNION,)	
UNKNOWN HEIRS and NONRECORD CLAIMANTS,)	Honorable
)	Melissa A. Morgan,
Defendants.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal from the interlocutory order of the circuit court denying the appellant's combined motion for judgment on the pleadings and for summary judgment is dismissed for lack of jurisdiction.

¶ 2 The appellant, PHH Mortgage Corporation (PHH),¹ appeals from an interlocutory order entered by the circuit court of Franklin County, denying PHH's combined motion for judgment on the pleadings and for summary judgment within the context of a foreclosure lawsuit brought against the appellees, Oliver and Donna Ashtiani. For reasons that follow, we dismiss the appeal for lack of jurisdiction.

¶ 3 I. Background

¶ 4 Given the lengthy litigation history of this matter, we recite only those facts relevant to this appeal. On July 13, 1999, Oliver executed a promissory note and mortgage with SIU Credit Union for a certain piece of property in West Frankfort, Illinois (West Frankfort property). Donna signed the mortgage only to relinquish her homestead rights, but did not sign the note. On August 4, 1999, SIU Credit Union assigned its rights, title, and interest in the loan documents, note, and mortgage to PHH.

¶ 5 In 2005, Oliver defaulted on the loan, and PHH filed a complaint for foreclosure of the mortgage on October 7, 2005, seeking a judgment of foreclosure and sale of the West Frankfort property pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2004)). In addition, PHH requested an order approving the foreclosure sale, as well as orders granting PHH possession of the West Frankfort property and appointing "Mortgagee in Possession or Receiver, if sought." Attached as exhibits to the complaint were a copy of the mortgage and note executed by

¹PHH Mortgage Services Corporation was incorporated in 1985 in New Jersey. The articles of incorporation were amended on December 19, 1997, to include a name change from PHH Mortgage Services Corporation to Cendant Mortgage Corporation. On February 1, 2005, a second amendment changed the name from Cendant Mortgage Corporation to PHH Mortgage Corporation. Hereinafter, the appellant is referred to as PHH.

Oliver, along with a copy of the assignment. On November 18, 2005, Oliver and Donna, appearing *pro se*, filed an answer but did not raise any affirmative defenses. PHH subsequently filed a motion to appoint a selling officer, a motion for judgment for foreclosure and sale, and a motion for summary judgment. Soon thereafter, Donna filed a petition for Chapter 7 bankruptcy (BK 05-43897) under the Bankruptcy Code (11 U.S.C. § 701 *et seq.* (2000)), and the bankruptcy court stayed the foreclosure proceedings.

¶ 6 On January 6, 2006, following the dismissal of Donna's bankruptcy petition (BK 05-43897), PHH refiled its motion to appoint a selling officer, motion for judgment for foreclosure and sale, and motion for summary judgment. Oliver subsequently filed for Chapter 13 bankruptcy (BK 06-40092) under the Bankruptcy Code, which was dismissed by the bankruptcy court in September 2006. On December 14, 2006, Oliver and Donna filed a joint petition for Chapter 13 bankruptcy (BK 06-41357) under the Bankruptcy Code, and the foreclosure proceedings were stayed until the bankruptcy case was closed on February 16, 2007.

¶ 7 On February 23, 2007, PHH refiled its motion to appoint a selling officer, motion for judgment for foreclosure and sale, and motion for summary judgment. On March 23, 2007, Oliver and Donna, represented by counsel, filed a joint response to PHH's motion for summary judgment. Oliver and Donna also filed a motion to amend their November 18, 2005, answer. Attached to the motion to amend was a copy of a proposed amended answer, which included two affirmative defenses, raised only by Donna, and two counterclaims. The circuit court subsequently granted the motion to amend over PHH's objection, and the amended answer was filed on October 17, 2007. On August 6, 2008,

PHH filed a reply to the counterclaims and affirmative defenses raised in the amended answer.

¶ 8 On August 16, 2010, following discovery, PHH filed a motion for summary judgment, alleging that the counterclaims and affirmative defenses raised by Oliver and Donna in their amended answer were without merit. PHH also alleged that there was no genuine issue of material fact that would prevent summary judgment on PHH's October 7, 2005, foreclosure complaint. Specifically, PHH alleged that the evidence clearly showed that Oliver had defaulted on the loan and, thus, PHH was entitled to judgment as a matter of law. As such, PHH requested that the circuit court enter judgment against Oliver and Donna for a specified amount. In response, Oliver and Donna filed a motion to strike or, in the alternative, to deny PHH's motion for summary judgment. The court subsequently granted the motion to strike PHH's motion for summary judgment.

¶ 9 On August 4, 2011, PHH filed a "second" motion for summary judgment, along with a supporting memorandum. On October 19, 2011, Oliver and Donna, again, filed a motion to strike PHH's second motion for summary judgment, alleging that PHH's motion improperly combined sections 2-615, 2-619, and 2-1005 of the Code of Civil Procedure (Code), thus, the motion failed to comply with section 2-619.1 of the Code, which requires separate sections for combined motions. See 735 ILCS 5/2-615, 2-619, 2-619.1, 2-1005 (West 2016). The parties subsequently entered an agreement allowing PHH to file an amended motion for summary judgment rendering moot the issues raised in Oliver and Donna's motion to strike.

¶ 10 On February 21, 2012, PHH filed a combined motion for judgment on the pleadings, pursuant to section 2-615(e) of the Code (735 ILCS 5/2-615(e) (West 2012)), and second amended motion for summary judgment, pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2012)). In the first section of its combined motion, PHH moved for judgment on the pleadings with regard to one of the counterclaims and both of Donna's alleged affirmative defenses. In the second section of its combined motion, PHH moved for summary judgment on both counts of the counterclaim, as well as Donna's second affirmative defense. In addition, PHH alleged that "[n]o genuine issue of material fact exists which would prevent summary judgment on PHH's Complaint." Lastly, PHH requested the circuit court to enter summary judgment "against [Oliver and Donna] allowing possession of the mortgaged property in accordance with Illinois law," and "in favor of [PHH] and against [Oliver and Donna] on each counterclaim and affirmative defense."

¶ 11 Following a hearing on June 1, 2012, the circuit court took the matter under advisement. The transcript of these proceedings is not contained in the record on appeal. After more than one year had passed without a decision from the court, PHH filed a motion requesting a case management conference, but a conference was never scheduled.

¶ 12 Over the course of several years, PHH filed numerous motions requesting hearings on its combined motion. Oliver and Donna objected to each motion, arguing that PHH "should not be given perpetual redos [*sic*]" and that PHH had failed to provide the court with a transcript of the June 1, 2012, hearing, despite its agreement to do so.

¶ 13 On February 7, 2017, the circuit court denied PHH's combined motion for judgment on the pleadings and for summary judgment. On February 17, 2017, PHH filed a notice of interlocutory appeal as of right from the circuit court's order denying the combined motion. In support, PHH alleged that the court's interlocutory order was appealable under Illinois Supreme Court Rule 307(a)(4) (eff. Nov. 1, 2016), which permits interlocutory appeals from court orders placing or refusing to place a mortgagee in possession of a mortgaged premises.

¶ 14 II. Analysis

¶ 15 On appeal, PHH argues that the circuit court erred by denying PHH's combined motion for judgment on the pleadings and for summary judgment. Before considering the merits of PHH's arguments, however, we find it necessary to consider our jurisdiction. While the parties do not dispute jurisdiction, this court has an independent duty to consider the issue and to dismiss an appeal where our jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011).

¶ 16 "It is well settled that a reviewing court's jurisdiction is limited to two types of cases; those arising from final orders or judgments and those arising as interlocutory appeals under Supreme Court Rule 307." *E.J. De Paoli Co. v. Novus, Inc.*, 156 Ill. App. 3d 796, 798 (1987). As the appellant, PHH has the burden to establish our jurisdiction. See Ill. S. Ct. R. 341(h)(4) (eff. Jan. 1, 2016). While PHH acknowledges that the circuit court's order denying its combined motion for judgment on the pleadings and for summary judgment was an interlocutory order, PHH maintains that this court has jurisdiction under Illinois Supreme Court Rule 307 (eff. Nov. 1, 2016), which allows for

appeals from certain specified interlocutory orders. In particular, PHH asserts that this appeal is brought under Illinois Supreme Court Rule 307(a)(4) (eff. Nov. 1, 2016), which allows interlocutory appeals as of right from a court order placing or refusing to place a mortgagee in possession of a mortgaged premises. We disagree.

¶ 17 Although PHH correctly notes that Rule 307(a)(4) permits appeals from an interlocutory order placing or refusing to place a mortgagee in possession of mortgaged premises, PHH appeals from an order denying its combined motion for judgment on the pleadings and for summary judgment. PHH's combined motion for judgment on the pleadings and for summary judgment requested the circuit court to enter summary judgment "against [Oliver and Donna] allowing possession of the mortgaged property in accordance with Illinois Law," and "in favor of [PHH] and against [Oliver and Donna] on each counterclaim and affirmative defense." In our view, however, an order denying such motion is not an order "placing or refusing to place a mortgagee in possession of mortgaged premises," as specified in Rule 307(a)(4) (Ill. S. Ct. R. 307(a)(4) (eff. Nov. 1, 2016)).

¶ 18 Section 15-1701 of the Foreclosure Law "govern[s] the right to possession of the mortgaged real estate during foreclosure." 735 ILCS 5/15-1701(a) (West 2016). Prior to the entry of a judgment of foreclosure, "[i]n the case of residential real estate, the mortgagor shall be entitled to possession of the real estate" unless (i) the mortgagee objects and shows good cause, (ii) the mortgagee is so authorized by the terms of the mortgage or other written instrument, and (iii) the court is satisfied there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. 735 ILCS

5/15-1701(b)(1) (West 2016). Subsection (b) of section 15-1701 shall be applicable after the entry of a judgment of foreclosure and through the thirtieth day after a foreclosure sale is confirmed, "regardless of the provisions of the mortgage or other instrument, except that after a sale pursuant to the judgment the holder of the certificate of sale (or, if none, the purchaser at the sale) shall have the mortgagee's right to be placed in possession, with all rights and duties of a mortgagee in possession under this Article."

735 ILCS 5/15-1701(c)(1) (West 2016). Pursuant to section 15-1706(a), "[a] request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion, whether or not such request is included in the complaint or other pleading," and "shall be supported by affidavit or other sworn pleading." 735 ILCS 5/15-1706(a) (West 2016). Section 15-1706(c) further provides that the circuit court shall promptly hold a hearing and rule on a request that a mortgagee be placed in possession or that a receiver be appointed after reasonable notice has been given to all other parties. 735 ILCS 5/15-1706(c) (West 2016).

¶ 19 Here, PHH did not file a separate motion, or petition, requesting to be placed in possession of the mortgaged premises pursuant to section 15-1706(a) of the Foreclosure Law (735 ILCS 5/15-1706(a) (West 2016)). While PHH requested in its combined motion that the circuit court enter summary judgment "against [Oliver and Donna] allowing possession of the mortgaged property in accordance with Illinois Law," PHH did not clearly assert that it was entitled to possession of the West Frankfort property pursuant to section 15-1701 of the Foreclosure Law (735 ILCS 5/15-1701 (West 2016)). Instead, PHH's combined motion challenged the counterclaims and affirmative defenses

set forth in Oliver and Donna's amended answer. Moreover, we note that the transcript from the June 1, 2012, hearing on PHH's combined motion has not been included in the record on appeal. Consequently, PHH has failed to convince this court that the circuit court's interlocutory order, denying PHH's combined motion, equated to an order placing or refusing to place PHH in possession of the West Frankfort property. Therefore, we lack jurisdiction to consider this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(4) (eff. Nov. 1, 2016).

¶ 20

III. Conclusion

¶ 21 For the foregoing reasons, we dismiss this interlocutory appeal of the circuit court's order, denying PHH's combined motion for judgment on the pleadings and for summary judgment, for lack of jurisdiction.

¶ 22 Appeal dismissed.