No. 1-10-1580

SECOND DIVISION
June 28, 2011

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
FIRST JUDICIAL DISTRICT

HARRIS N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08-CH-24472
	)	
HANSA CHHABRIA and KAMAL CHHABRIA,	)	The Honorable
	)	Pamela H. Gillespie,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment and order.

ORDER

Held: The trial court did not err in granting summary judgment in favor of Harris N.A.'s complaint for foreclosure where the Chhabrias defaulted on their tax payment and failed to fully cure the default pursuant to section 15-1602 of the Mortgage Foreclosure Law. The trial court also did not abuse its discretion in confirming the sheriff's sale, finding that the Chhabrias had notice of the new sale date, the sales price was not unconscionable, and the Chhabrias did not present other evidence that justice was not done.

Defendants Hansa and Kamal Chhabria appeal the order of the circuit court confirming the judicial sale of property executed pursuant to an action brought by plaintiff Harris N.A.

(Harris) to recover upon a promissory note. On appeal, the Chhabrias contend the trial court erred in granting Harris' motion for summary judgment in the foreclosure action where (1) the Chhabrias cured any default by paying their taxes less than two weeks after receiving notice from Harris; (2) the trial court improperly considered their history of making late payments on the mortgage; (3) the Chhabrias did not receive notice of their default of Harris' acceleration demand; and (4) the late payment of taxes is a non-material breach. The Chhabrias also argue that the trial court erred in confirming the subsequent judicial sale where Harris failed to give proper notice of the sale required by section 15-1507(c)(4) of the Mortgage Foreclosure Law (735 ILCS 5/15-1507(c)(4) (West 2006), and the sale was not in the best interest of all the parties. For the reasons hereinafter set forth, we affirm.

JURISDICTION

The trial court entered a final judgment in the instant case on May 7, 2010, and defendants filed their notice of appeal on June 2, 2010. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

BACKGROUND

On May 5, 2005, the Chhabrias executed a mortgage on property located at 2660-2664 N. Halsted Street in Chicago, Illinois, in order to secure a $750,000 loan. The loan was evidenced by a promissory note in which both Hansa and Kamal Chhabria executed separate guaranties. The Chhabrias repeatedly made late payments of principal and interest on the loan, and also failed to pay real estate taxes for 2006 when due. On June 5, 2008, Harris sent the Chhabrias a

demand letter notifying them of their defaults on the mortgage and that Harris was accelerating their debt under the 2005 note. The letter stated that $451,932.31 was due and if Harris did not receive payment within 10 days, it would "take any and all action necessary" including filing a foreclosure action, to collect on the amount due. Along with the acceleration amount, Harris also demanded payment of their "costs and attorney's fees as provided for under the Loan Documents." Kamal Chhabria paid the 2006 taxes in full by June 23, 2008. Harris, however, served the Chhabrias with a complaint for foreclosure and other relief on July 8, 2008.[1]

Harris moved for summary judgment on the complaint, asserting that the Chhabrias' failure to pay the 2006 taxes and their numerous late payments on the 2005 loan evidenced a breach of contract. In their response, the Chhabrias argued that they paid the 2006 real estate taxes due on June 24, 2008, and they had not paid the taxes initially because it was sent to a land trust and they had no notice of the bill. Kamal Chhabria also submitted an affidavit stating that he had been hospitalized for some time and may not have received notification of the taxes due on the property. He averred that he paid the taxes as soon as he received the notice of default sent by Harris. The trial court granted Harris' motion on October 20, 2009 in a judgment of foreclosure and sale, and the Chhabrias filed a motion to reconsider. In the motion, they argued that Harris failed to comply with Illinois Supreme Court Rule 191 (eff. July 1, 2002).

The sheriff's sale was scheduled for December 17, 2009. The notice of sale was published in the Chicago Daily Law Bulletin and Skyline on November 5, November 12, and

[1]The record also shows that the Chhabrias were late paying the second installment of their 2007 taxes. That installment was due on 11/03/2008, but payment was submitted on 1/23/2009.

November 19, 2009. Notice of the sale was served upon the Chhabrias' attorney on November 24, 2009. Since the Chhabrias' motion to reconsider was pending, counsel for Harris requested the sheriff to adjourn the sale to February 10, 2010. Counsel notified Chhabrias' counsel of the change in an email dated December 16, 2009. On February 9, 2010, the trial court denied the Chhabrias' motion to reconsider and the sheriff's sale occurred on February 10, 2010. The sale attracted one successful bidder and brought proceeds of $570,000, leaving a deficiency claim against the Chhabrias.

Harris filed a motion to confirm the sheriff's sale and for entry of deficiency judgment. At the hearing on the motion, the trial court found that Harris had complied with the notice of sale requirement of section 15-1507(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1507(c) (West 2006)). The trial court determined that the initial notice of sale for December 17, 2009, met the requirements of section 15-1507(c), and if the sale was adjourned but held within 60 days of the original notice, statutory notice need not "be re-published or re-sent. What is required is that an announcement be made at the sale that the sale has been rescheduled and it will be held on x date." The court acknowledged there was no evidence indicating an announcement was made, but found that lack of an announcement was not a basis for invalidating the sheriff's sale. Instead, the Chhabrias must show good cause to void the sale. The trial court concluded that "[t]here has been no evidence that justice was not done. [The Chhabrias] were aware of the new sale date, the sale price was corroborated by the appraisal." The trial court entered an order approving the sale on May 7, 2010. The Chhabrias filed this timely appeal on June 2, 2010.

ANALYSIS

Unless the trial court makes a finding that there is no just reason to delay enforcement or appeal, a judgment of foreclosure is not appealable until the court enters orders confirming the sale and directing the distribution. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555 (1989). Therefore, if a party files an appeal within 30 days of the order confirming the sale, this court has jurisdiction to review prior orders leading up to the confirmation. *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 982 (2008). Here, the parties disagree on the trial court order the Chhabrias are appealing from, and the appropriate standard of review. Harris contends that the Chhabrias are appealing from the trial court's order denying their motion to reconsider, and thus the proper standard of review is abuse of discretion. The Chhabrias' arguments on appeal, however, focus mainly on the trial court's grant of summary judgment in the foreclosure action, and its confirmation of the judicial sale. Therefore, we will review the trial court's grant of summary judgment and confirmation of sale under the appropriate standards of review.

The Chhabrias first contend that the trial court erred in granting Harris' motion for summary judgment in the underlying foreclosure action. Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 619 (2002). This court reviews the trial court's grant of summary judgment *de novo*. *Mitchell*, 332 Ill. App. 3d at 620.

A mortgage is a written instrument creating an interest in land used to secure the performance of a duty or the payment of debt. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 111 (1993). "The mortgage instrument is merely a contract as between the immediate parties." *Resolution Trust Corp.*, 248 Ill. App. 3d at 111. Courts must enforce clear and

unambiguous contract terms as written. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 349 (2000). The following are relevant provisions contained in the parties' mortgage agreement:

"**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Mortgage, Grantor shall pay to Lender all amounts secured by this Mortgage as they become due and shall strictly perform all of Grantor's obligations under this Mortgage.

* * *

TAXES AND LIENS. The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

Payment. Grantor shall pay when due (and in all events prior to delinquency) all taxes *** levied against or on account of the Property ***.

* * *

EVENTS OF DEFAULT. Each of the following, at Lender's option, shall constitute an Event of Default under this Mortgage:

Payment Default. Grantor fails to make any payment when due under Indebtedness.

Default on Other Payments. Failure of Grantor within the time required by this Mortgage to make any payment for taxes or insurance ***.

* * *

RIGHTS AND REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

Accelerate Indebtedness. Lender shall have the right at its option without

notice to Grantor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty which Grantor would be required to pay.

* * *

Judicial Foreclosure. Lender may obtain a judicial decree foreclosing Grantor's interest in all or any part of the Property.

Deficiency Judgment. If permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section.

* * *

Attorneys' Fees; Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to

> recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. ***[A]ll reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or enforcement of its rights shall become a part of the Indebtedness payable on demand ***.
>
> * * *

However, Section 15-1602 of the Mortgage Foreclosure Law provides for reinstatement

> "[i]n any foreclosure of a mortgage executed after July 21, 1959 *** by curing all defaults then existing, other than payment of such portion of the principal which would not have been due had no acceleration occurred, and by paying all costs and expenses required by the mortgage to be paid in the event of such defaults, provided that such cure and payment are made prior to the expiration of 90 days from the date the mortgagor *** (i) [has] been served with summons or by publication or (ii) [has] otherwise submitted to the jurisdiction of the court." 735 ILCS 5/15-1602 (West 2006).

Under the terms of the mortgage, the failure to pay real estate taxes constitutes a default. The Chhabrias do not claim that they paid the 2006 taxes on time. The Chhabrias argue that the trial court erred in granting summary judgment because the claimed default, the non-payment of 2006 real estate taxes, was cured prior to Harris' initiation of the foreclosure action. Although they do not cite to it in their argument, the Chhabrias clearly rely on section 15-1602. Harris contends that the Chhabrias waived review of this issue by failing to raise the statute in trial

proceedings. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, in their response to Harris' motion for summary judgment, they did repeatedly deny any default and argued that they were current on their mortgage and note. We will address their contention.

Section 15-1602, however, offers no support to the Chhabrias' argument. The statute clearly states that they may reinstate the mortgage if they cured all existing defaults and paid "all costs and expenses required by the mortgage to be paid in the event of such defaults." 735 ILCS 5/15-1602 (West 2006). Under the mortgage, Harris may recover attorneys' fees and expenses incurred in initiating a "suit to enforce any of the terms" of the mortgage. Harris sent a demand letter on June 5, 2008, which also contained a demand for attorneys' fees on the matter. The Chhabrias were served with the complaint on July 8, 2008. Although they paid the taxes due after receiving Harris' demand letter, there is no evidence in the record that they paid Harris' attorneys' fees or expenses by October 6, 2008, 90 days after service of the complaint. In fact, in their response to the motion for summary judgment, the Chhabrias "deny that [they] owe any attorneys' fees." Without proof that they paid such fees and expenses, they cannot exercise their right to reinstatement pursuant to section 15-1602, and summary judgment in the foreclosure action was proper.

The Chhabrias also argue that the grant of summary judgment was error because the trial court based its judgment in part on their history of making late payments. They contend that "a party accepting late payments suspend[s] its right to timely payments and its right to declare a forfeiture" citing as support *Allabastro v. Wheaton National Bank*, 77 Ill. App. 3d 359 (1979);

Lang v. Parks, 19 Ill. 2d 223 (1960); *Kingsley v. Roeder*, 2 Ill. 2d 131 (1954); *Clevinger v. Ross*, 109 Ill. 349 (1884); *Heeren v. Smith*, 276 Ill. App. 438 (1934); and *Donovan v. Murphy*, 217 Ill. App. 31 (1920). These cases, however, do not support the Chhabrias' argument since they were decided prior to the 1987 enactment of the Mortgage Foreclosure Law. As such, the court determined the issues of notice and default using installment contract law rather than the Mortgage Foreclosure Law applicable here. Two other cases cited, *Verner v. McLarty*, 213 Ga. 472 (1957), and *Stinemeyer v. Wesco Farms, Inc.*, 260 Or. 109 (1971), are from other states. This court is not bound by the decisions of other states. *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 416 (2006).

The Chhabrias do not cite any cases explicitly holding that under the Mortgage Foreclosure Law, a bank's prior acceptance of late payments precludes it from ever initiating a foreclosure action. In fact, acceptance of such late payments does not deprive a mortgagee of the right to institute foreclosure proceedings for subsequent default. "Where subsequent payments are sufficient to cover the amount outstanding, the date of default is [merely] extended." *Federal National Mortgage Association v. Bryant*, 62 Ill. App. 3d 25, 28 (1978). Nonetheless, whether the Chhabrias' history of making late payments constituted a default is immaterial because it is undisputed that they also defaulted on their 2006 tax payment. As discussed above, their failure to pay the taxes constituted a default which they did not fully cure pursuant to section 15-1602, and was an independent basis for Harris to institute foreclosure proceedings. The trial court's grant of summary judgment was proper.

The Chhabrias contend that summary judgment based on their failure to pay real estate

taxes when due was error because the default is a non-material breach in which Harris suffered no prejudice. They also allege that they received no notice of default for failure to pay the acceleration in the demand letter. Review of the record shows that the Chhabrias did not present these issues before the trial court in either their response to Harris' motion for summary judgment, or in their motion to reconsider. Issues raised for the first time on appeal are waived. *Employers Insurance v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 161 (1999). Furthermore, they do not provide citations to authority or to the record for either argument in their briefs. Illinois Supreme Court Rule 341(h)7 (eff. July 1, 2008), requires a clear statement of contention with citations to supporting authority and the pages of record relied upon. Ill-defined and insufficiently presented issues do not satisfy the rule and are considered waived. *Express Valet v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007).

Next, the Chhabrias contend that the trial court erred in confirming the sheriff's sale. Pursuant to section 15-1508(b) of the Mortgage Foreclosure Law, "[u]nless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2006). This court will not disturb the trial court's decision to confirm or reject a judicial sale absent an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). A trial court abuses its discretion if "no reasonable person would take the view adopted by the trial court." *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003).

The Chhabrias argue that the sale did not fully comply with the notice provisions of

section 15-1507. Specifically, the sale did not comply with subsection (c)(4) which provides that '[i]n the event of adjournment, the person conducting the sale shall, upon adjournment, announce the date, time and place upon which the adjourned sale shall be held." 735 ILCS 15-1507(c)(4) (West 2006). They argue that, upon adjournment of the sale scheduled for December 17, 2009, there was no evidence the sheriff made an announcement of the date, time and place of the rescheduled sale as required by statute.

The trial court, however, determined that such a defect in notice did not invalidate the sale absent a showing of good cause. Section 15-1508(d) provides that

> "[N]o sale under this Article shall be held invalid or be set aside because of any defect in the notice thereof or in the publication of the same, or in the proceedings of the officer conducting the sale, except upon good cause shown in a hearing pursuant to subsection (b) of Section 15-1508." 735 ILCS 5/15-1508(d) (West 2006).

Defects in the public notice alone are not sufficient to constitute "good cause" for invalidating a judicial sale. *GMB Financial Group*, 385 Ill. App. 3d at 997. However, if the property was sold at a price substantially less than its actual value and the sale failed to comply with all of the notice provisions of section 15-1507, that could constitute good cause. *Cragin Federal Bank for Savings v. American National Bank and Trust Co. of Chicago*, 262 Ill. App. 3d 115, 121 (1994).

The record reveals that the trial court here noted that no evidence was presented one way or the other that the sheriff made an announcement that the December 17 sale was adjourned. However, it found that the Chhabrias' attorney was aware of the new sales date, and any party

interested in the sale could find contact information for Harris' firm at the bottom of the publication in order to ascertain the date of the sale. The trial court also noted that the appraised market value of the property was $610,000, its disposition value was $520,000, and its liquidation value was $457,000. The trial court reasoned that "a judicial auction qualifies as a limited marketing period and that the appraisal supports a value of $457,000. But the ultimate bid on this which was $570,000, there's just absolutely no evidence that somehow establishes the value is unconscionable or even below what the appraisal found." Furthermore, the Chhabrias presented no specific evidence before the court that there were potential buyers who did not attend the sale because they did not know when it would take place. Since the Chhabrias were aware of the new sale date, the sale price was not unconscionable, and they did not present other evidence that justice was not done, the trial court confirmed the sale. We cannot say that no reasonable person would have adopted this view. Therefore, the trial court did not abuse its discretion in confirming the judicial sale.

The Chhabrias also contend that they received no notice of the sale because although the letter sent by Harris stated that the sale was adjourned to February 10, 2010,[2] the sale actually took place on February 11, 2010. Section 15-1508(c) provides that a party entitled to the notice provided in paragraph (3) who was not so notified may ask the court to invalidate the sale. *Cragin*, 262 Ill. App. 3d at 120. The Chhabrias, however, do not specify where in the record is evidence that the sale actually occurred on February 11, 2010. The record does contain the

[2]The letter actually has the date February 10, 2009, but the parties acknowledge that the "09" was a typographical error. The parties do not dispute that the sale was to take place in 2010.

sheriff's report on the sale which stated that it took place on February 10, 2010, at 12 p.m. Since they acknowledge receiving notice that the adjourned sale would take place on February 10, 2010, and the record shows that the sale actually occurred on February 10, 2010, they received sufficient notice and the trial court properly confirmed the sale.

The Chhabrias' final contention is that the trial court erred in confirming the sale because "justice was otherwise not done." As support, they cite to *Levy v. Broadway-Carmen Bldg. Corp.*, 366 Ill. 279 (1937), and *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385 (1997). In *Levy*, the court was concerned with situations where "such gross inadequacy [of sales price] is combined with fraud or mistake *** [that] it will incline the court strongly to afford" relief. *Levy*, 366 Ill. at 284. In *Fleet*, the plaintiff mistakenly proceeded with a foreclosure sale when the defendants had already exercised their right to redeem and sold the property to another party for the full judgment amount. *Fleet*, 287 Ill. App. 3d at 386-87. Here, the sales price of $570,000 was not grossly inadequate, nor did the Chhabrias exercise a right to redeem and sell the property prior to the sale. As the trial court stated, they have not presented other evidence that justice was not done and confirmation of the sale was proper.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.