SECOND DIVISION
January 15, 2013

No. 1-12-0517

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST BANK OF HIGHLAND PARK, Plaintiff-Appellee, v. ROBERT A. COE, Defendant-Appellant. and 6417 NORTH PAULINA UNIT B, LLC, PAULINA PLACE TOWNHOMES HOMEOWNERS ASSOCIATION, ROBERT A. COE, OFER MEGED, UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 33121 Honorable Daniel P. Brennan, Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court's orders placing mortgagee in possession and denying defendant's motion to vacate said order affirmed where statute provided that the court may rule on such a motion without service on a party where the property at issue is not residential property and where defendant is shown to be in default.

¶ 2 Defendant mortgagor, Robert Coe, has filed this interlocutory appeal (Ill. S. Ct. R. 307(a)(4) (eff. Feb. 26, 2010)) from orders of the circuit court of Cook County placing plaintiff mortgagee, First Bank of Highland Park, in possession of the property located at 6417 North Paulina, Unit 2B, in Chicago, Illinois ("the Property"), and denying his subsequent motion to vacate that order. Defendant maintains that the order must be vacated because it was entered *ex parte* without adequate notice to him. Although plaintiff has not filed a brief in response, we will consider the appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 3 The record reflects that on May 13, 2008, plaintiff and defendant executed a promissory note and mortgage for the Property, and that on May 12, 2008, defendant also executed a commercial guaranty in relation thereto. The mortgage for the Property included the following language:

> "**Mortgagee in Possession**. Lender shall have the right to be placed as mortgagee in possession or to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and tocollect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness."

¶ 4 The record further reflects that on September 22, 2011, plaintiff filed a Complaint to Foreclose Mortgage and For Other Relief under the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1101 *et. seq.* (West 2008)), in relation to the Property, and served plaintiff with a summons and complaint via abode service on October 18, 2011.

¶ 5 On November 9, 2011, plaintiff filed a Motion to Place Mortgagee in Possession, pursuant to sections 15-1701(b)(2), 15-1703 and 15-1706(a) of the IMFL, along with a supporting affidavit. In the affidavit, David Smith, plaintiff's Senior Vice President of Commercial Real Estate, averred, in pertinent part, that the Property is commercial property within the meaning of the IMFL and that defendant, the mortgagor, is in default of the promissory note and guaranty he executed in relation to the Property. The record reflects that plaintiff served defendant with the notice of motion and the motion itself, by mailing the documents to him on November 9, 2011. Defendant was advised through the notice of motion that a hearing on the motion was scheduled to take place on November 15, 2011.

¶ 6 On November 15, 2011, the court granted the motion and appointed plaintiff as mortgagee in possession of the property. No transcript of the proceedings is included in the record; however, the record reflects that plaintiff served defendant with the court's order by placing a copy of it in the mail on November 16, 2011.

¶ 7 On November 28, 2011, defendant filed a "Motion to Vacate Order Appointing Mortgagee in Possession Dated November 15, 2011." Therein, defendant argued that he received, and was prejudiced by, improper notice of plaintiff's motion, which violated Cook County Circuit Court Rule 2.1(c), governing notice of hearings. On January 26, 2012, the court denied defendant's motion to vacate after a hearing.

¶ 8 Following that ruling, defendant filed the interlocutory appeal at bar. He first asserts that the order appointing plaintiff as mortgagee in possession of the Property must be vacated because it was entered *ex parte* without due notice to him.

¶ 9 Section 15-1701(b)(2) of the IMFL provides that, in relation to non-residential real estate, if (1) the mortgagee "is so authorized, by the terms of the mortgage," and (2) the court "is satisfied that there is a reasonable probability that the mortgagee will prevail on a final hearing of

the cause," the court "shall" place the mortgagee in possession upon request. 735 ILCS 5/15-1701(b)(2) (West 2008).

¶ 10 In this case, the first requirement under section 15-1701(b)(2) was satisfied in that plaintiff was authorized, under the terms in the mortgage on the Property, to be placed in possession of the property prior to the entry of a final foreclosure judgment. As to the second requirement, plaintiff detailed defendant's default on the payments required under the note and guaranty, as well as a calculation of the amount he owes to plaintiff, in its complaint and in Smith's affidavit, which was attached to the motion to place mortgagee in possession. Under Illinois law, such evidence is sufficient to meet the second requirement of section 15-1701(b)(2). *See Mellon Bank, N.A. v. Midwest Bank & Trust Company*, 265 Ill. App. 3d 859, 869 (1993); *Travelers Ins. Co. v. LaSalle Nat. Bank*, 200 Ill. App. 3d 139, 145-46 (1990).

¶ 11 Defendant contends, however, that he received insufficient notice of plaintiff's motion and the related hearing. The proof of service shows that plaintiff mailed the requisite documents to defendant on November 9, 2011; six days prior to the scheduled date for the hearing. Defendant maintains that he did not receive these documents until November 15, 2011, after the hearing had already taken place. According to defendant, a court holiday and a weekend intervened in the time plaintiff mailed the documents, so he was only provided with three court days of notice, in violation of Cook County Circuit Court Rule 2.1(c), which provides that five court days of notice is required when notice of a hearing is given via mail. Cook Co. Cir. Ct. R. 2.1(c) (Aug. 21, 2000).

¶ 12 Section 15-1706 of the IMFL provides that "after reasonable notice has been given to all other parties," the court shall hold a hearing and rule on a request that a mortgagee be placed in possession. 735 ILCS 5/15-1706(c) (West 2008). What constitutes "reasonable notice" for such hearings is specifically set forth as follows:

> "For the purpose of subsection (c) of Section 15-1706, notice shall be reasonable if given as much in advance of the hearing as notice of motions generally is required to be given under applicable court rules, and if served in the same manner as motions generally are served; except, if the mortgagor has not been served with the complaint, the mortgagor must be served in the same manner as required for service of process. *Notwithstanding anything in the foregoing sentence to the contrary*, except with respect to the mortgagor of residential real estate which has not been abandoned, the court may rule without service on a party, if the party is in default or if the party making the request shows good cause by affidavit or other sworn evidence. If the mortgagor is not served prior to the hearing, he shall be given notice of the hearing to the same extent as applicable court rules may provide for post-hearing notice of emergency and *ex parte* motions." 735 ILCS 5/15-1706(d) (West 2008) (emphasis added).

¶ 13 In his brief, defendant quotes the portion of subsection 5-1706(d) that refers to "applicable court rules," in support of his argument that Cook County Circuit Court Rule 2.1(c) applies here, but fails to acknowledge the remaining text in that subsection. Under the quoted provision, the court may rule on a motion to place mortgagee in possession *without service on a party*, provided that (1) the property at issue is not residential property and (2) the party is in default or the party making the request shows good cause by affidavit. 735 ILCS 5/15-1706(d) (West 2008). Accordingly, the court is authorized to rule in the matter without service on a party as long as the specified factors were present.

¶ 14 In this case, the record shows that those factors were present to allow the court to rule on plaintiff's motion to place mortgagee in possession without service on defendant. In support of its motion, plaintiff submitted Smith's affidavit, in which he averred that the Property is commercial property, that defendant was in default of the note and the guaranty he executed in relation to the Property, and specified the amount of the default. Under these circumstances, defendant's argument that the court's order must be vacated due to insufficient notice fails.

¶ 15 In reaching this conclusion, we have considered *Acosta v. Sharlin*, 295 Ill. App. 3d 102 (1998), upon which defendant relies, and find it distinguishable. In *Acosta*, which involved a healing art malpractice claim, defendant mailed notice of a rescheduled hearing on a motion for summary judgment four days prior to the hearing date. *Acosta*, 295 Ill. App. 3d at 103-04. This court held that "fairness required the trial court to grant plaintiff's motion to vacate the summary judgment, in part, because the notice defendant supplied of the new hearing date was of questionable validity." *Acosta*, 295 Ill. App. 3d at 104-05. Here, unlike *Acosta*, the provisions of the IMFL apply, including the specification that the court may rule on a motion to place mortgagee in possession without service on a party under certain circumstances, that we have found present. 735 ILCS 5/15-1706(d) (West 2008). Accordingly, *Acosta* is inapplicable to this case.

¶ 16 Having so found, we have no basis for vacating the order of possession entered by the court. Defendant's motion to vacate was based on the arguments ruled on above and found wanting. No transcript, or acceptable substitute (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) of the hearing on defendant's motion to vacate has been included in the record, and thus any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Given the incomplete record on appeal, we must presume that the trial court ruled or acted correctly (*Moenning v. Union Pacific R.R. Co.*, 2012 IL App

(1st) 101866, ¶ 38), and that the order was entered in conformity with the law and was properly supported by the evidence. *Foutch*, 99 Ill. 2d at 393.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.