2015 IL App (1st) 150790-U

THIRD DIVISION
October 28, 2015

No. 1-15-0790

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANDREA BILLUPS a/k/a Andrea E. Billups a/k/a Andrea E. Milsap a/k/a Andrea E. Heath, Defendant-Appellant,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division
v.	)	No. 13 CH 03611
BAYVIEW LOAN SERVICING L.L.C., a Delaware Limited Liability Company, Plaintiff-Appellee,	)	The Honorable Alan P. Walker, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted summary judgment in favor of the plaintiff where the affidavit in support of the plaintiff's motion for summary judgment met the requirements of Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)), and the defendant failed to provide a counteraffidavit.

¶ 2 This is an appeal from the circuit court's order granting summary judgment in favor of the plaintiff, Bayview Loan Servicing, L.L.C. against the defendant, Andrea Billups, a/k/a Andrea E. Billups, a/k/a Andrea E. Milsap a/k/a Andrea E. Heath, in a mortgage foreclosure action. The defendant contends that the circuit court erred in granting summary judgment in favor of the

plaintiff because the two affidavits of the amounts due and owning provided by the plaintiff in support of its complaint and motion for summary judgment were: (1) contradictory; (2) lacked personal knowledge; and (3) constituted inadmissible hearsay, in violation of Illinois Supreme Court Rule 191 (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following facts and procedural history. On February 6, 2013, the plaintiff filed a complaint for foreclosure against the defendant, alleging, *inter alia*, that she was in default pursuant to the terms of a mortgage and note executed on February 17, 2006, for the property located at 1937 West 170th Street, Hazel Crest, IL 60429 (hereinafter the property). The plaintiff asserted that the defendant had failed to pay her monthly mortgage obligations, beginning on June 1, 2011. On June 17, 2013, the plaintiff filed: (1) a motion for default judgment (see 735 ICLS 5/15-1506(c) (West 2012)); and (2) a motion for judgment of foreclosure and sale, including, *inter alia*, an affidavit of the amounts due an owning, signed by the plaintiff's vice president, Michael Parrish (hereinafter Parrish).

¶ 5 According to Parish's affidavit, as part of his regular job duties, Parrish was familiar with the plaintiff's business and its mode of operation, including the plaintiff's method of maintaining business records for purposes of servicing mortgage loans, collecting payments and pursuing any delinquencies, *i.e.*, the so called "servicing records." Parrish averred that the "servicing records" typically included electronic data compilations, and imaged documents pertaining to the loans the plaintiff serviced. Parrish further attested that based on his training and general knowledge of the processes by which they are created and maintained, the servicing records "were made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and [were] kept in the ordinary course of the business

activity regularly conducted" by the plaintiff. In addition, according to Parrish, it is the "regular practice" of the plaintiff's mortgage servicing business "to make and update its servicing records."

¶ 6 In his affidavit, Parrish further explained that the plaintiff regularly uses "Servicing Director" a tracking and accounting program, which is recognized as standard in the industry to automatically record and track mortgage payments. According to Parish, when a mortgage payment is received the following procedure is used to process and apply the payment to create a loan history summary. First, authorized persons receive and credit periodic payments at or near the time of the receipt of the payment. The sources of the payments include personal checks, cashier's checks and/or money orders, automatic clearing house withdrawals from the borrower's bank account and/or telephonic payments. Next, the plaintiff uses its computer system, which is accessible and used by authorized persons to input and record account activity at or near the event or occurrence. The computer system automatically dates the entries when made. Finally, the record generated identifies the transaction type. If the record relates to the application of a payment or disbursement it will itemize the amounts applied. The computer system will then automatically calculate running account totals so that all account balances can be accurately reproduced. According to Parrish, Servicing Director accurately records mortgage payments when properly operated, and it was properly operating when the defendant's loan history summary was generated.

¶ 7 Parrish next averred that the plaintiff acquired the servicing rights for the defendant's loan on January 4, 2010, from Equity One, Inc. (hereinafter Equity One). According to Parish, at the time of that transfer the defendant's loan was "delinquent," because she failed to pay amounts due under the note beginning on June 1, 2011, and through July 31, 2012, in the amount of $7.32

per diem, for a total net amount due $117,542.94, plus reasonable attorney's fees and costs. Parrish explained that in calculating the amount due he reviewed and relied on the defendant's loan history summary, which was recorded as part of the regular course of the plaintiff's business using the method described above and at or near the time the payments were received from the defendant. In addition, Parrish's affidavit contained the breakdown of all of the amounts owed by the defendant, including: (1) the principal ($105,361.57); (2) the interest ($4995.89); (3) the escrow advance ($6467.63); (4) the late charges ($111.35); the property inspections ($306.50); and (5) the BPO ($300).

¶ 8 On July 9, 2013, the defendant appeared in court *pro se* and was granted leave to file an answer within 28 days. On August 5, 2013, the defendant filed her *pro se* verified answer, admitting the majority of the allegations in the complaint but claiming insufficient knowledge to either admit or deny the allegations contained in the following paragraphs of the complaint: (1) paragraph 3(I) (describing the legal description of the mortgaged real estate and the common address); (2) paragraph 3(J) (which requires the plaintiff to list the "statements as to defaults, including, but not necessarily limited to, date of default, current unpaid principal balance, per diem interest accruing, and any further information concerning default," and under which the plaintiff noted that the default occurred when the defendant failed to pay her monthly installments beginning on June 1, 2011, with the amount due and owing as of February 25, 2013, totaling $109,070.47, or $5.85 per diem); (3) paragraph 3(N) (alleging that the plaintiff is the owner and legal holder of the note, mortgage and indebtedness); and (4) paragraph 3(Q) (alleging the necessity of the plaintiff to obtain counsel in litigating this matter).

¶ 9 On December 6, 2013, the plaintiff filed a motion for summary judgment, and an amended

motion for judgment of foreclosure and sale, including a supporting affidavit by Gary Locke (hereinafter Locke), the plaintiff's document coordinator, as to the amounts due and owing. This affidavit was nearly identical to the affidavit provided by Parrish. Specifically, Locke's affidavit matched Parrish's affidavit with respect to the plaintiff's mode of operation and business and its method of inputting and collecting mortgage payment data, including the creation of the defendant's loan history summary. The defendant's entire loan history summary was attached to the affidavit. Locke's affidavit, however, differed from Parrish's in the following respects. First, Locke attested that when the plaintiff obtained the defendant's loan on January 4, 2010, from Equity One, that loan was "current" (rather than "delinquent," as stated in Parrish's affidavit). Second, Locke's affidavit traced the defendant's default up through December 20, 2013, for a total net amount of amount of $119,993.00, or $8.78 per diem, plus reasonable attorney's fees and costs. In addition, Locke's affidavit noted different amounts owed by the defendant for the following: (1) interest ($6153.41); (2) escrow advance ($7385.17); (3) property inspections ($381.50); and (4) BPO ($600).

¶ 10 In response to the plaintiff's motion for summary judgment, on March 21, 2014, the defendant filed the following *pro se* pleadings: (1) a motion to dismiss; (2) a [second] motion to dismiss; (3) an affidavit of notice of termination of contact canceling terminating servicing agreement in support of the motion to dismiss; (2) a verification of debt or else release of claim; (3) a motion to compel; and (6) an amended response to the plaintiff's motion for summary judgment. Throughout these pleadings, the defendant, *inter alia*, inexpertly argued that summary judgment in favor of the plaintiff was improper and dismissal in her favor was proper because: (1) the plaintiff lacked standing to file the mortgage foreclosure action against her since it failed to prove that it was the holder and owner of the note; (2) the plaintiff filed two contradictory

affidavits of amounts due and owing; and (3) counsel for the plaintiff could not act as a debt collector.

¶ 11 After a hearing, [1] on May 16, 2014, the circuit court granted the plaintiff's motion for summary judgment. In doing so, the court found that the plaintiff's affidavit in support of summary judgment complied with Supreme Court Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)) and that the plaintiff had proven its standing and possession of the original mortgage and note by producing the same for inspection in open court. In its order, the court also struck all of the defendant's pleadings filed on March 21, 2014, except for its response to the plaintiff's motion for summary judgment.

¶ 12 On that same date, the circuit court entered a judgment of foreclosure and sale. The defendant then filed a notice of appeal, which was docketed in this court as case No. 14-1627. In response, the plaintiff filed a motion to dismiss arguing that the appeal was premature since no final order had been entered in the case. On September 17, 2014, this court granted the plaintiff's motion and the appeal was dismissed.

¶ 13 The cause proceeded to a foreclosure sale, where the plaintiff was the highest bidder at $53,000. On March 6, 2015, the circuit court granted the plaintiff's motion for an order approving the sale and confirmed the foreclosure sale. At that hearing, the defendant sought time and leave to file a motion objecting to the sale. In doing so, she argued, *inter alia*, that the foreclosure should not have been permitted to go through where the amounts owing that were claimed in the complaint for foreclosure were incorrect. The court denied the defendant's request noting that she should have raised this issue before the plaintiff filed its motion to confirm the sale. The defendant now appeals.

[1] We are without a transcript from this proceeding.

¶ 14 II. ANALYSIS

¶ 15 On appeal, the *pro se* defendant inartfully asserts that the circuit court erred in granting summary judgment in favor of the plaintiff because there remains an issue of fact as to the amounts due and owing on her mortgage, since the two affidavits offered by the plaintiff, as well as the supporting documents are contradictory. In addition, the defendant argues that those affidavits fail to comply with the "personal knowledge" and "sworn and certified copy" requirements of Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)). Finally, the defendant argues that the affidavits fail to lay the proper foundation for the admission of the exhibits attached to them and therefore constitute inadmissible hearsay. For the reasons that follow, we disagree.

¶ 16 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2012); see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Happel v. Wal-Mart Stores, Inc*., 199 Ill. 2d 179, 186 (2002); see also *Pearson v. DaimlerChrysler Corp*., 349 Ill. App. 3d 688, 697 (2004). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park*

Racecourse, LLC, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). Therefore, if a party moving for summary judgment introduces facts that, if not contradicted, would entitle it to judgment as a matter of law, the opposing party may not rely on her pleadings alone to raise issues of material fact. *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004) (citing *Hermes v. Fischer*, 226 Ill. App. 3d 820, 824 (1992)); see also ("To survive a motion for summary judgment, the nonmoving party must come forward with evidentiary material that establishes a genuine issue of fact. [Citation.] "The nonmoving party cannot simply deny the moving party's factual allegations."). Our review of the trial court's entry of summary judgment is *de novo* and we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. See *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 43; see also *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 17 In the present case, the defendant initially argues that summary judgment was improper because the two affidavits offered by the plaintiff attesting to the amounts owed and due by the defendant under the mortgage and note were contradictory, so as to create a genuine issue of material fact. Specifically, the defendant points out that while both affiants attested to the fact that the plaintiff took over the defendant's loan from Equity One on January 4, 2010, in his affidavit, Parrish averred that at the time of this transfer, the defendant was "delinquent" on her account, while Locke stated that she was "current."

¶ 18 The plaintiff responds that this discrepancy in the two affidavits is merely a scrivener's error.

In support and without further explanation, the plaintiff merely points to the arguments it made in its reply to the motion for summary judgment filed on April 11, 2014, wherein it clarified that the affidavit executed by Parrish was incorrect and contained an inadvertent scrivener's errors. While the plaintiff may be correct that Parrish's affidavit contained a scrivener's error, because both affidavits attest to the fact that the defendant failed to pay the amounts due under the note beginning on June 1, 2011, which is six months after (they agree) the plaintiff acquired the defendant's loan from Equity One (on January 4, 2010), the pleading that the plaintiff attempts to rely upon in making its argument is not part of the record on appeal. In fact, this court explicitly denied the plaintiff's motion seeking to supplement the record on appeal to include this pleading, for want of certification or stipulation. Accordingly, we may not consider it.

¶ 19 Nonetheless, for the reasons that shall be more fully articulated below, we find that any alleged discrepancy in the two affidavits does not alter the propriety of the trial court's grant of summary judgment in favor of the plaintiff.

¶ 20 In that respect, we first note that there was only one affidavit (namely Locke's) that the trial court could have properly relied upon in determining whether summary judgment was proper. Parrish's affidavit was filed in support of the plaintiff's complaint rather than its motion for summary judgment and long before the defendant filed her verified answer. What is more, Parrish's affidavit indisputably failed to comply with Rule 191(a) by not attaching sworn or certified copies of any papers upon which Parrish relied upon in determining the amounts owed and due by the plaintiff. See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)).

¶ 21 Supreme Court Rule 191(a) sets forth the requirements of any affidavit used in support of a motion for summary judgment. That Rule states in pertinent part:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 22 In *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339 (2004) our supreme court held that the plain language of Rule 191(a) "clearly requires" that sworn or certified copies of all papers upon which the affiant relies upon must "be attached to the affidavit," and that failure to do so renders the affidavit insufficient under that Rule. As the court explained:

> "The Rule 191(a) provisions barring conclusionary assertions and requiring an affidavit to state facts with 'particularity' would have little meaning were we to construe the attached-papers provision as merely a technical requirement that could be disregarded so long as the affiant were competent to testify at trial." *Robidoux*, 201 Ill. 2d at 339.

¶ 23 In the present case, Parrish's affidavit failed to attach any documents that would have supported his statements regarding the manner in which he determined the amounts due and owing by the defendant. Although Parrish averred that he determined those amounts by using the defendant's loan summary history as generated by the computerized accounting program utilized by the plaintiff, no copies of that loan summary history were attached to his affidavit. As such, his affidavit failed to comply with the strictures of Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)), and could not have been properly considered by the trial court. See *Robidoux*, 201 Ill. 2d at 339; see also *Clemons v. Nissan North America, Inc*., 2013 IL App (4th)

120943, ¶ 36 ("Strict compliance with Rule 191(a) is required to insure the trial court is presented with valid evidentiary facts upon which to base a decision.").

¶ 24 Since we conclude that the trial court could only have properly considered Locke's affidavit we must next address the defendant's grievance that Locke's affidavit too failed to comply with Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)). Specifically, the defendant asserts that Locke's affidavit lacked personal knowledge and constituted inadmissible hearsay because it failed to lay the proper foundation for the exhibits attached to it. We disagree.

¶ 25 It is well settled that a Rule 191(a) affidavit is a substitute for testimony given in open court and therefore must meet the same requirements as competent testimony. *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). Our courts have consistently held that an affidavit meets the requirements of Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)) if it appears from the document as a whole 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." *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (citing *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)).

¶ 26 Contrary to the defendant's position, there can be no doubt that in the present case Locke's affidavit fully complied with Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013)). Locke explicitly stated in his affidavit that as the plaintiff's "document coordinator" he "had authority" to make the affidavit because he was a "person familiar with the business and its mode of operation." He averred that "in the regular performance of [his] job function [for the plaintiff, he was] familiar with the business records maintained by [the plaintiff] for the purpose of servicing mortgage loans, collecting payments and pursuing any delinquencies (the 'servicing records')." In addition, Locke's affidavit contained copies of all of the documents (the defendant's entire

loan history) that Locke relied upon in determining the amounts due. As such, it is undisputable that Locke provided a sworn statement as to his personal knowledge of the facts contained in his affidavit, and that that those statements were supported by the documents that were attached. See *Doria*, 397 Ill. App. 3d at 756 (" '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.' ") (quoting *Kugler*, 309 Ill. App. 3d at 795).

¶ 27 Moreover, Locke's affidavit laid ample foundation for those records. In that respect, in his affidavit, Locke explicitly stated that: (1) he has both training and general knowledge of the process by which the business records are created and maintained; (2) those records are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records; and (3) are kept in the ordinary course of business activity regularly conducted by the plaintiff. In addition, Locke averred that he calculated the amount due by reviewing the defendant's loan history summary, "a true and accurate copy" of which was attached to his affidavit. Locke explained that the defendant's loan history summary was made using Servicing Director, a computer program which automatically records and tracks mortgage payments, and which is recognized as standard in the industry. He added that those records were made in the regular course of business, with entries made at or near the time the payment was received from the defendant, and while Servicing Director properly operated to accurately record her mortgage payments.

¶ 28 Illinois Supreme Court Rule 236, which permits the admission of business records into evidence, requires only that the party tendering the records satisfy the foundational requirements that: (1) the record was made in the regular course of business; and (2) at or near the time of the

event or occurrence. *Kimble v. Earle M. Jorgenson Co*., 358 Ill. App. 3d 400, 414 (2005) (citing *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600, (2003)). "There is no requirement that [the affiant] be familiar with the records before litigation arose or have personally made the entries." *U.S. Bank, Nat. Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 29. "Rather, "[a] sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation." *Kimble*, 358 Ill. App. 3d at 414. Under the record before us, there can be no doubt that Locke has satisfied these requirements. See *Avdic*, 2014 IL App (1st) 121759, ¶ 29 (holding that the factual averments in a bank employee's affidavit provided in support of the bank's motion for summary judgment in a mortgage foreclosure action satisfied the foundational requirements for the admission of the bank's computer records into evidence where the employee's statements established that the attached payment histories were made in the regular course of the bank's business, the entries were made at or near the time of the payments, and the computer software system that generated the records was customarily used in the business, was used for the life of the loan at issue, and was regularly tested for reliability).

¶ 29 Having concluded that Locke's affidavit complies with Rule 191(a) (Ill. S. Ct. R. 191 (a) (eff. Jan. 4, 2013))), we necessarily also find that summary judgment here was proper. In doing so, we note that the defendant's response to the plaintiff's motion for summary judgment was neither verified, nor contained a counteraffidavit. As such, any attempt by the defendant to oppose the plaintiff's summary judgment motion, supported by Locke's affidavit, by standing on her verified answer was inevitably futile. See *Avdic*, 2014 IL App (1st) 121759, ¶ 31 ("Denials in a defendant's answer do not create a material issue of genuine fact to prevent summary judgment. [Citation.] When a party moving for summary judgment files supporting affidavits containing

well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant's affidavits stand as admitted. [Citation.] The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact.") (quoting *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49); see also *1010 Lake shore Ass'n v. Deutsche Bank Nat. Trust Co.*, 2014 IL App (1st) 130962, ¶19 (" "[F]acts contained in an affidavit in support of motion for summary judgment which are not contradicted by a counteraffidavit are admitted and must be taken as true for purposes of the motion.' ") (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)); see also *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 575 (2000) ("Failure to file counteraffidavits in opposition to a summary judgment motion supported by affidavits is fatal."); see also *Kugler*, 309 Ill. App. 3d at 795 ("Courts must accept an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials.").

¶ 30 III. CONCLUSION

¶ 31 Accordingly, for all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.