2017 IL App (1st) 152763-U

FOURTH DIVISION
February 9, 2017

No. 1-15-2763



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| EMERALD LAKE INVESTMENTS, LLC,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ALEXANDER DEE, MAUREEN RYAN, JP MORGAN CHASE BANK, N.A., UNKNOWN OWNERS and NON-RECORD CLAIMANTS<br><br>Defendants,<br><br>(Alexander Dee and Maureen Ryan Defendants-Appellants). | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 11 CH 5599<br><br>Honorable Robert E. Senechalle, Judge Presiding. |

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JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

**ORDER**

*Held*: We affirm the judgment of the circuit court where the court properly denied Ryan's motion to vacate the default judgment, and where the court did not err in finding that plaintiff's affidavits sufficiently proved that defendants defaulted on their mortgage payments and the amount of damages.

¶ 1 Defendants, Alexander Dee and Maureen Ryan, appeal from an order of the circuit court of Cook County approving the sale and granting possession of their jointly owned property. Defendants sought to vacate the default judgment entered against Ryan and the orders of summary judgment and judgment of foreclosure and sale entered against both Dee and Ryan in a mortgage foreclosure action. On appeal, defendants assert that the court erred in entering a default judgment against Ryan because she was not a party to the subject mortgage because the "corrected" mortgage documents were signed only by Dee. Defendants further contend that the circuit court erred in entering summary judgment and a judgment of foreclosure and sale where plaintiff presented insufficient evidence to establish the amount of principal due. Defendants assert that the affidavits plaintiff presented in support of its summary judgment motion were inadequate because the affiants failed to provide proper foundation for the documents attached to their affidavits and lacked personal knowledge for their statements. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 I. BACKGROUND

¶ 3 On February 15, 2011, JP Morgan Chase Bank, N.A. (Chase) filed a complaint against Dee and Ryan seeking to foreclose a mortgage originally issued by Washington Mutual Bank (WaMu). In its complaint, Chase alleged that it was the mortgagee under section 15-1208 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1208 (West 2010)) (Foreclosure Law) and that defendants had been in default on their mortgage payments on the property located at 3731 North Bell Avenue in Chicago, Illinois, since April 1, 2010. Chase attached a copy of the mortgage and the note to its complaint. The mortgage is dated July 11, 2007 and is signed by both Dee and Ryan. The note is signed only by Dee. Chase also attached to its complaint an

adjustable rate rider, which is signed by both Dee and Ryan. Finally, Chase attached transfer documents which showed the transfer of the mortgage from WaMu to Chase.

¶ 4 After numerous unsuccessful personal service attempts, the court granted Chase's motion to serve the complaint on defendants by publication. Chase served defendants by publication in March 2011. On June 26, 2012, the mortgage was assigned to Bayview Loan Servicing (Bayview) and on December 26, 2012, the circuit court granted Bayview's motion to substitute as plaintiff.

¶ 5 On January 23, 2013, Bayview filed a motion for an entry of an order of default and a judgment of foreclosure and sale. Bayview contended that none of the defendants had filed an answer to the complaint or appeared in court and that more than 60 days had passed since the date of service. On March 11, 2013, Dee filed an answer to the complaint and alleged certain affirmative defenses. Specifically, Dee denied the allegations in the complaint or contended that he lacked sufficient knowledge as to the truth of the allegations. Ryan did not file a response or appear. Dee also filed an affirmative defense in which he contended that Bayview lacked standing to bring the mortgage foreclosure action. On April 1, 2013, Bayview filed a motion to dismiss Dee's affirmative defenses, contending that Dee failed to plead sufficient facts to support his contentions and that Bayview had standing to bring the mortgage foreclosure action. On June 13, 2013, the court granted Bayview's motion and dismissed Dee's affirmative defenses.

¶ 6 On July 5, 2013, Bayview filed a motion for an entry of a default judgment against Ryan, a motion for summary judgment against Dee, and a motion for a judgment of foreclosure and sale. Bayview attached to its motion an affidavit from Juan Falero. In his affidavit, Falero averred that he worked for Bayview and was familiar with the business records Bayview maintained for the purpose of servicing mortgage loans. He further averred that he had

personally examined the records detailing the amounts owed on defendants' mortgage, which were kept in the ordinary course of Bayview's business. He averred that after examining these records, he determined that the current outstanding balance on defendants' mortgage was $1,598,711.43. This amount included not only the unpaid principal due on the loan, but also late charges, accrued interest, insurance payments, escrow balances, and other charges. Attached to the affidavit are payment histories and other records from Bayview and the prior loan servicers.

¶ 7 Dee filed a response to Bayview's motion for summary judgment in which he again argued that Bayview lacked standing to foreclose. On December 3, 2013, the court entered orders for a default judgment against Ryan, summary judgment in favor of Bayview against Dee, and a judgment of foreclosure and sale. The notice of sale indicated that the property was to be sold at a judicial sale on March 6, 2014.

¶ 8 On March 4, 2014, new counsel appeared on behalf of Dee and, for the first time during the litigation, Ryan. That same day, defendants filed a motion pursuant to section 2-1301 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2010)) to vacate the order of default, a motion to vacate the judgment of foreclosure and sale, and a motion to stay the judicial sale. Defendants further requested leave to file a responsive pleading on behalf of Ryan. In her motion, Ryan contended that she had a meritorious defense to the summary and default judgments and that substantial justice required that the circuit court's judgment be set aside. Specifically, Ryan contended that the default judgment should be vacated because she was not a party to the subject mortgage. In their motion to vacate the summary judgment and the judgment of foreclosure and sale, defendants contended that the fees Bayview requested were excessive and that Bayview did not meet the "clear and convincing" evidence standard required for

summary judgment. Defendants asserted that Falero's affidavit was deficient because he lacked personal knowledge of the previous servicers' records.

¶ 9 On March 5, 2014, the circuit court denied defendants' motion to stay the judicial sale. On March 11, 2014, the circuit court granted Ryan leave to file additional documents to support her motion to vacate the default judgment. In her supplement to the motion, Ryan contended, *inter alia*, that the default judgment against her should be vacated because she was not a party to the subject mortgage. Ryan acknowledged that both she and Dee signed the mortgage attached to the original complaint filed by Chase (and later transferred to Bayview), but contended that after executing the original mortgage, an employee from the title company, Prairie Title Services, Inc., contacted Dee and told him that the original mortgage documents were incorrect and that he would need to sign new documents. These documents, which were mailed to Dee, included a "corrected" mortgage, a new note and a new adjustable rate rider. Ryan contended that the "corrected mortgage" was dated the same day as the original mortgage, July 11, 2007, because it was intended to supplant the original mortgage signed by both Dee and Ryan. Ryan contended that the two mortgage documents are identical except that the "corrected mortgage" is signed by Dee only. Ryan noted, however, that this "corrected mortgage" was apparently never recorded. Ryan attached copies of the "corrected mortgage" and the "corrected adjustable rate rider" signed only by Dee to the supplement to her motion. On June 12, 2014, the subject mortgage was assigned from Bayview to Emerald Lake Investments ("Emerald Lake" or "plaintiff"), and the circuit court subsequently granted Emerald Lake's motion to substitute as plaintiff.

¶ 10 On July 11, 2014, the circuit court denied in part and granted in part Ryan's motion to vacate the default judgment against her. Specifically, the court denied Ryan's motion on the issue of liability, but permitted her to participate in the case regarding the amount of damages

plaintiff would be awarded. In reaching that conclusion, the court stated that the record showed that at the time the subject loan in this case was made, the property was owned by both Dee and Ryan. The court determined that it therefore made "complete sense" that WaMu would require the signatures of both owners of the property on the mortgage. The court observed that Bayview, which was the successor to WaMu with regard to the subject mortgage, had produced a mortgage for the subject property signed by both Dee and Ryan. The court determined that the "whole argument with regard to these so-called corrected documents that were sent *** to Mr. Dee is really a red herring and is not an issue in this case."

¶ 11 The court further found that the record was clear that Ryan knew the litigation was taking place and that she was named as a defendant in the litigation. The court observed that Ryan did not participate in the litigation even though Dee did participate. The court found that there was thus no basis to vacate the default judgment entered against her. The court based this finding on the fact that Ryan did not indicate that she had a meritorious defense to the plaintiff's claim for foreclosure and offered "zero explanation" as to why she did not come forward while the case was in prejudgment if she believed that she did have a meritorious defense.

¶ 12 With regard to the issue of damages, the court found that the Falero affidavit was sufficient to prove the allegation of default under section 1506(a)(1) of the Foreclosure Law (735 ILCS 5/15-1506(a)(1) (West 2010)), but that the affidavit suffered from several infirmities. Specifically, the court found that there was no indication that the records of the prior servicers attached to the affidavit were incorporated into Bayview's records and there was no foundation for the records relied upon by Falero. The court further found that there was no documentary support for the escrow charges, insurance payments, and other damages claimed by plaintiff. The court therefore vacated the summary judgment on the issue of damages and the judgment of

foreclosure and sale. The court then permitted Ryan to participate in the litigation on the issue of damages only.

¶ 13 On September 8, 2014, Emerald Lake filed a motion for summary judgment on the issue of damages only. Emerald Lake attached an affidavit from John Stepanian to its motion. In the affidavit, Stepanian averred that he was the managing partner of Emerald Lake and that he was familiar with the business records Emerald Lake maintained for servicing loans. He further averred that Emerald Lake kept and made these records in the regular course of business and that he had reviewed the payment histories and assignment documents of the previous servicers, WaMu, Chase, and Bayview. Stepanian averred that based on these documents, he determined that the amount due on the mortgage was $1,384,152.35 in unpaid principal and $196,932.64 in accrued interest. Stepanian also averred that defendants were obligated to pay certain amounts for accrued late charges, escrow advances, and attorneys' fees.

¶ 14 On October 21, 2014, defendants deposed Stepanian. In his deposition, Stepanian stated that he was the managing partner of Emerald Lake, a three-person company that purchases defaulted real estate debt. He further stated that he had reviewed the subject mortgage, the note, and the pay history Emerald Lake received from Bayview. Stepanian stated that he received the payment histories from Chase and Bayview, but acknowledged that he did not know anything about the computer systems used by Bayview or Chase in generating and storing these records. Stepanian further testified that Emerald Lake does not accept payments from borrowers, and that FCI Lender Services (FCI), their licensed servicer, accepts those payments. Stepanian stated that he calculated the amount due on the mortgage by looking at the mortgage and note and observing that the borrowers had not provided proof of any payments made after March 2010.

¶ 15 On November 24, 2014, defendants filed a response to plaintiff's motion for summary judgment on the issue of damages. In their response, defendants contended that Stepanian's deposition testimony revealed that the statements in his affidavit were not based on his personal knowledge and that he failed to provide proper foundation for the records of the prior servicers. Defendants asserted that plaintiff therefore lacked adequate documentation to prove the amount of damages. Defendants asserted that Emerald Lake did not have its own records for the mortgage and that the payment histories of the prior servicers attached to plaintiff's motion and relied upon by Stepanian were hearsay. Defendants contended that these documents did not meet any of the exceptions to the rule against hearsay because Stepanian did not have the requisite personal knowledge necessary to establish the proper foundation for admission of the records. Defendants asked the court to therefore strike the Stepanian affidavit and disregard the payment histories attached to the affidavit as inadmissible hearsay.

¶ 16 At a hearing on plaintiff's motion on December 19, 2014, the circuit court found that although it is proper for an affiant to summarize the amounts that are owed as Stepanian did in his affidavit, Stepanian's deposition testimony showed that he had "no knowledge himself whatsoever about any of these figures that are set forth in his affidavit as items of damage." The court found that Stepanian did not explain anything in his affidavit or deposition testimony that would lay a foundation for the records prepared by WaMu, Chase, and Bayview.

¶ 17 The court further stated that there was

> "not a question of fact that there was a default in the case and what the principle [*sic*] balance was at the time that the loan was in default, and I think that the calculation of the interest is a mathematical calculation that anyone who would know what the interest rate was *** could testify by way of

> affidavit. But the issue of these other amounts, [the real estate taxes, insurance, escrow advances, and late charges] *** there needs to be some foundation for those for the court to award those amounts."

The court found that thus there remained an issue of material fact as to what the plaintiff's damages were because there was no evidence as to the amount of the damages plaintiff was requesting aside from the principal balance. The court therefore denied plaintiff's motion for summary judgment without prejudice.

¶ 18 On December 22, 2014, plaintiff filed a second motion for summary judgment on the issue of damages only. This second motion was identical to the first motion, including the Stepanian affidavit, but plaintiff removed any claims for additional damages, except for accrued interest. On January 23, 2015, plaintiff submitted an affidavit from Jean Dungey-Smith, the Director of Specialty Loan Servicing at FCI. In her affidavit, Dungey-Smith averred that she was the supervisor assigned to the loan servicing that FCI performs for Emerald Lake. She further averred that she was familiar with the subject mortgage and note in this case and was making the affidavit to show the accuracy of the interest calculation on the loan, which she performed in the regular course of her duties at FCI. She averred that she received a copy of the note in the regular course of business and that a copy of the note was attached to the affidavit. She further averred that at the time FCI acquired the servicing rights for defendants' loan, Bayview provided a Servicing Transfer Arm Loan Report for FCI, which showed the principal balance due on the loan on April 1, 2010, was $1,384,152.35. A copy of the loan report was attached to the affidavit.

¶ 19 Dungey-Smith averred that she was familiar with defendants' loan payment history since the loan was acquired by Emerald Lake and that no payments had been made on the loan. She further averred that she used the principal balance contained in the loan report from Bayview and

the interest rate specified in the note to calculate the unpaid interest that had accrued on the note since the date of default through February 20, 2015. Dungey-Smith then described the computer software FCI uses for making this calculation and averred that the software was recognized as the standard in the industry. Dungey-Smith averred FCI uses this computer software to calculate the variable monthly interest rate on mortgage loans each month. She further averred that on January 23, 2015, in the regular course of FCI's business, she entered the relevant information into the computer software and produced a payoff letter, which showed the total interest and principal owed on the note through February 20, 2015, was $1,605,195.60. A copy of the payoff letter was attached to the affidavit.

¶ 20 On January 30, 2015, defendants filed a motion to strike Dungey-Smith's affidavit or, in the alternative, to depose her. Defendants contended that the affidavit was untimely because plaintiff filed it in the middle of the briefing schedule without seeking leave of court to do so. Defendants also contended that they should be permitted to depose Dungey-Smith to determine whether she had the required personal knowledge for her statements in the affidavit. Defendants also filed an Illinois Supreme Court Rule 191(b) (Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013)) affidavit stating their need to depose Dungey-Smith because they believed that the statements contained in her affidavit regarding her personal knowledge of defendants' mortgage payments and history were false. Specifically, defendants contended that material facts were unavailable to them because the facts were known only by Dungey-Smith who was under the control of plaintiff. Defendants further asserted that they could not determine whether the statements in Dungey-Smith's affidavit were true because they had not had an opportunity to depose her. Defendants contended that they believed Dungey-Smith, if deposed, would be unable to testify regarding the factual basis for the statements in her affidavit, such as the date FCI acquired the loan and her

familiarity with defendants' account. Defendants also pointed out discrepancies between Stepanian's affidavit and Dungey-Smith's. In the alternative, defendants requested additional time to respond to plaintiff's motion in light of the newly filed Dungey-Smith affidavit.

¶ 21 On February 20, 2015, the court granted plaintiff leave to file the Dungey-Smith affidavit. The court also granted in part defendants' motion from January 30, 2015, and allowed defendants an additional 28 days to respond to plaintiff's motion for summary judgment, but denied the motion with regard to the other requests for relief. In denying defendants' request to depose Dungey-Smith, the court stated that the only thing she did in her affidavit was take the principal balance, which the court had already determined was not disputed in this case, and apply the interest rate outlined in the note to determine the amount of accrued interest due on the mortgage since the date of default. The court found that defendants had not identified any basis to depose Dungey-Smith where she was "doing nothing more than an interest calculation using the computer program."

¶ 22 At a hearing on plaintiff's motion on April 17, 2015, the court reiterated that it did not admit Stepanian's affidavit because of the foundational issue, but that there was no genuine issue of material fact with regard to the default and the principal balance due. The court stated that the only issue, therefore, was the amount of damages, and all plaintiff was now seeking was the unpaid principal and the accrued interest from the date of the default. The court explained that in her affidavit, Dungey-Smith laid a foundation for the software she used and the only thing she did was calculate the adjustable rate interest. The court thus found that there was not a genuine issue of material fact as to the amount of interest due under the note up to the date specified in the Dungey-Smith affidavit and granted plaintiff's motion for summary judgment. On April 27, 2015, the court entered a judgment of foreclosure and sale in the amount of $1,619,480.85 (the

principal and interest calculations contained in Dungey-Smith's affidavit plus attorneys' fees and costs). The property was subsequently sold at a judicial sale on July 20, 2015. On September 29, 2015, the court entered an order confirming the sale. That same day, defendants filed their notice of appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendants contend that the court erred in denying Ryan's motion to vacate the default judgment against her because she was not a party to the mortgage. Defendants further contend that the court erred in determining that there was no genuine issue of material fact as to the amount of principal due on the loan and that there was a default on the mortgage payments. Defendants also contend that the court erred in denying their motion to strike Dungey-Smith's affidavit or permit them leave to depose her and that the court erred in entering summary judgment where there was no competent evidence of the amounts due. Plaintiff responds that the court did not err in denying Ryan's motion to vacate the default judgment where she did not exercise due diligence or present a meritorious defense. Plaintiff further asserts that the court did not abuse its discretion in denying defendants' request to depose Dungey-Smith and that the court properly denied defendants' motion to strike her affidavit because it was based on business records consistent with Illinois law. Plaintiff maintains that there were no questions of fact that would preclude the entry of summary judgment.

¶ 25 A. Ryan's Motion to Vacate Default Judgment

¶ 26 *1. Standard of Review*

¶ 27 Under section 2-1301 of the Code, the circuit court may set aside a default judgment "upon terms and conditions that shall be reasonable." 735 ILCS 5/2-1301 (West 2010); *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 27. The moving party has the

burden to show sufficient grounds to vacate the default judgment. *Kmiecik*, 2013 IL App (1st) 121700, ¶ 27. In evaluating a section 2-1301 motion, the circuit court should consider the moving party's due diligence and the existence of a meritorious defense. *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 13. We review the circuit court's denial of a motion pursuant to section 2-1301 of the Code for abuse of discretion. *Kmiecik*, 2013 IL App (1st) 121700, ¶ 26. "An abuse of discretion occurs when the trial court 'acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.' " *Id.* (quoting *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999)).

¶ 28 *2. Background*

¶ 29 In this case, defendants contend that the court erred in denying Ryan's motion to set aside the default judgment because she had a meritorious defense that she did not mortgage her interest in the property. Ryan maintains that she purchased the property with Dee in May 2005 as a joint tenant, but was not a party to the July 11, 2007, mortgage agreement with WaMu. She contends that she did not sign the "corrected mortgage" and her signature on the mortgage included in the original complaint was a mistake. She asserts that the title company, realizing this mistake, sent the "corrected" mortgage for Dee's signature only. Ryan asserts that it was unduly harsh for the court to deny her motion to vacate the default judgment and not permit her to present this defense.

¶ 30 The record shows that Chase named Ryan as a defendant in this case, and served her with a copy of the complaint in March 2011. On January 23, 2013, Bayview filed a motion for an entry of an order of default and a judgment of foreclosure and sale. On March 11, 2013, Dee filed an answer to the complaint and alleged certain affirmative defenses, but Ryan did not file a

response or appear. On July 5, 2013, Bayview filed a motion for an entry of default against Ryan, a motion for summary judgment against Dee, and a motion for judgment of foreclosure and sale. Dee filed a response to the motion for summary judgment and the motion for judgment of foreclosure and sale in which he argued that Bayview lacked standing to foreclose, but Ryan still did not answer or appear.

¶ 31 On December 3, 2013, the court entered orders for a default judgment against Ryan, summary judgment in favor of Bayview against Dee, and a judgment of foreclosure and sale. The notice of sale indicated that the property was to be sold at a judicial sale on March 6, 2014. On March 4, 2014, new counsel appeared on behalf of Dee and, for the first time during the litigation, Ryan. That same day, Ryan filed her motion pursuant to section 2-1301 of the Code to vacate the default judgment. After permitting Ryan to supplement her motion with additional information, the court denied in part and granted in part Ryan's motion to vacate the default judgment against her. The court denied her motion with respect to liability, but allowed her to participate in the case on the issue of damages.

¶ 32 In denying her motion, the circuit court stated that the record showed that at the time the subject loan in this case was made, the property was owned by both Dee and Ryan and that it therefore made "complete sense" that WaMu would require the signatures of both owners of the property on the mortgage. The court determined that Ryan's argument with regard to the corrected documents was a "red herring" and was not an actual issue in the case.

¶ 33 The court further found that the record was clear that Ryan knew the litigation was taking place and that she was named as a defendant in the litigation. The court observed that Ryan did not participate in the litigation even though Dee did participate. The court thus found that there

was no basis to vacate the default judgment entered against her because Ryan offered "zero explanation" as to why she did not come forward with her alleged meritorious defense earlier.

¶ 34 *3. Section 2-1301 Factors*

¶ 35 a. Due Diligence

¶ 36 As the circuit court recognized, a default judgment should be vacated only where the movant presents a meritorious defense and demonstrates due diligence in presenting that defense to the court. *Hansen*, 2016 IL App (1st) 143720, ¶ 13. In *CitiMortgage, Inc. v. Moran*, we found that default judgment was appropriate where defendant failed to file a motion to vacate the default judgment approximately eight months after plaintiff filed its first motion for an order of default. *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 45. This court has found similar delays were sufficient grounds for demonstrating lack of due diligence. See *e.g.*, *Wilkin Insulation Co. v. Holtz*, 186 Ill. App. 3d 151, 156-57 (1989) (defendant's motion filed eight months after suit was brought, four months after plaintiff filed motion for default judgment, and 30 days after court entered order of default showed lack of due diligence).

¶ 37 In the case at bar, Ryan exhibited a similar lack of due diligence. In *Wilkin*, the "defendant's only response to plaintiff's original complaint was *** a motion filed *** approximately eight months after the suit was brought, more than four months after plaintiff's first motion for default judgment." *Wilkin*, 186 Ill. App. 3d at 157. Here, Ryan acted with even less due diligence than defendants in *Wilkin* and *Moran*. Ryan presented her defense that she was not a party to the mortgage nearly three years after receiving notice of the litigation, nearly eight months after Bayview filed its motion for default, and nearly three months after the court entered the order of default against her. Despite the fact that Dee was actively participating in the litigation, Ryan did not file a motion or appear until two days before the judicial sale was

scheduled to take place. Ryan contends that she was not aware she was being sued and was unrepresented by counsel; however, the record shows that she was named as a defendant in the lawsuit and was served with a copy of the complaint. Her argument, therefore, is unpersuasive. Thus, we cannot say that the circuit court abused its discretion in finding that Ryan failed to show due diligence.

¶ 38 b. Meritorious Defense

¶ 39 The second factor the court should consider in determining whether to vacate a default judgment is whether the movant has presented a meritorious defense. *Moran*, 2014 IL App (1st) 132430, ¶ 46. Here, Ryan filed a motion to vacate the default judgment contending that she was not a party to the subject mortgage because she did not sign the corrected mortgage documents. Ryan acknowledged that this "corrected" mortgage was unrecorded, but attributed this error to the title company. Ryan conceded, however, that she signed the mortgage attached to the original complaint, and did not contest the allegation of default. The court determined that because both Ryan and Dee owned the property, it made "complete sense" that WaMu would require both of them to sign the mortgage documents and that she did so in order to "induce Washington Mutual to make a $1.35 million loan."

¶ 40 We agree with the circuit court that Ryan's argument regarding the corrected mortgage did not create the basis for a meritorious defense. The "corrected" mortgage was never recorded and it was unclear what effect, if any, the "corrected" documents were intended to have. Defendants presented no evidence from the title company or otherwise to show that this "corrected mortgage" was intended to supplant the original mortgage. On the other hand, Ryan signed the original mortgage, initialed every page, and signed the adjustable rate note. This version of the mortgage was the one that was eventually passed from WaMu to Chase, not the

"corrected" mortgage. Accordingly, we cannot say that the circuit court abused its discretion in finding that Ryan had not presented a meritorious defense.

¶ 41 c. Hardship to the Parties

¶ 42 The third factor the court should consider is the penalty and hardship to the parties resulting from the entry of the default order. *Moran*, 2014 IL App (1st) 132430, ¶ 47. Here, the record shows that defendants had been in default on their mortgage payments since 2010, and Chase filed the original complaint in February 2011. Like the plaintiff in *Moran*, plaintiff here has expended time and expense in this protracted litigation. *Moran*, 2014 IL App (1st) 132430, ¶ 48. Ryan claims that the entry of the default imposes hardship on her because she is not a party to the mortgage and her interest in the property will be unjustly sold without her having any interest in the sale proceeds. As discussed above, however, we found this argument meritless. Thus, this factor weighs against vacating the order of default. Weighing these factors it is clear that the court did not deny substantial justice by denying Ryan's motion to vacate the default. *Id.* ¶ 50. We therefore conclude that the circuit court did not abuse its discretion in denying Ryan's motion to vacate the default judgment.

¶ 43 B. No Question of Fact as to the Default and Principal Balance Due

¶ 44 Defendants next contend that the circuit court erred in determining that there was no question of fact that defendants defaulted on their mortgage payments and as to the amount of the principal balance due on the loan. Defendants maintain that the circuit court erred in making this determination because there was no foundation for any of the business records plaintiff attached to its affidavits and there was thus no proof of the principal balance due at the time of the alleged default. Plaintiff does not directly address this argument in its brief, but instead

responds that the circuit court did not err in refusing to strike the affidavits of Stepanian[1] and Dungey-Smith because the affidavits were based on business records consistent with Illinois law.

¶ 45 In granting in part defendants' motion to vacate the summary judgment and judgment of foreclosure and sale, the court found that the fact that Dee failed to admit or deny the allegation of default meant that the Falero affidavit submitted by Bayview was sufficient to prove the allegation of default under section 1506(a)(1) of the Foreclosure Law. 735 ILCS 5/15-1506(a)(1) (West 2010). Section 1506(a)(1) provides that "where an allegation of fact in the complaint is not denied by a party's verified answer or verified counterclaim *** a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof and no further evidence of such fact shall be required." 735 ILCS 5/15-1506(a)(1) (West 2010). Here, only Dee filed a response to Bayview's motion for summary judgment. In his answer, Dee asserted only that Bayview did not have standing to foreclose, but did not contest the allegations that the loan was in default or challenge the amount of principal sought. The record shows that at no point during trial did defendants present any evidence or counterclaims in opposition to plaintiff's claim of default and the principal amount due. Where a party moves for summary judgment and 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. *Bank of America v. Land*, 2013 IL App (5th) 120283, ¶ 16.

¶ 46 Moreover, the record shows that the circuit court stated several times after granting plaintiff's motion for summary judgment on the issue of liability that there was no dispute regarding the fact of default or the principal balance due. The court determined that the issue of damages was the only issue remaining. The record shows that defendants never contested the

[1] As discussed in detail below, plaintiff misrepresents the procedural posture of the case. The court did strike the Stepanian affidavit. This fact, however, does not change our analysis.

court's determination that the amount of principal due and the issue of default were not in dispute. Arguments raised for the first time on appeal, even from a summary judgment order, are waived. *Jeanblanc v. Sweet*, 260 Ill. App. 3d 249, 254 (1994) (citing *Lake County Trust Co. v. Two Bar B, Inc.*, 238 Ill. App. 3d 589, 598 (1992)). Instead of contesting plaintiff's allegations, defendants repeatedly attacked the sufficiency of plaintiff's affidavits for lack of foundation of the attached records and lack of personal knowledge of the affiants.

¶ 47 In support of their contention that the court erred in finding that there was no question of fact as to the fact of default or the principal amount due, defendants point out that the court found Stepanian's affidavit deficient because it was based on prior servicers' records that were not incorporated into Emerald Lake's records. Defendants contend that there was thus no evidence of the principal balance due. The record shows, however, that the court found the Falero affidavit deficient with respect only to the other damages claimed by plaintiff, but not as to the fact of default or the outstanding principal. Specifically, the court determined that there was a legitimate question about the accrued interest, insurance charges, and escrow advances claimed by plaintiff because Falero did not state what records were attached to his affidavit and that it was clear that the records attached to the affidavit detailing these amounts could not have been compiled by Bayview. Thus, the court accepted the Falero affidavit on the issue of default and the amount of principal due, but not to prove plaintiff's other damages. "[W]hen only portions of an affidavit are improper under Rule 191(a), a trial court should only strike the improper portions of the affidavit." *U.S. Bank, Nat. Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22 (quoting *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003)). Accordingly, we find that the circuit court did not err in finding that there was no genuine issue of material fact with regard to the default or the principal balance due.

¶ 48 C. Stepanian and Dungey-Smith Affidavits

¶ 49 Defendants next contend that the court erred in denying their motion to strike the affidavit of Dungey-Smith or, in the alternative, to depose her. Defendants assert that the business records relied upon by Dungey-Smith were not created in the ordinary course of business, but were created for the sole purpose of litigation. Defendants further contend that Dungey-Smith's affidavit suffered from other foundational defects because the business records of the prior servicers of the mortgage were not properly incorporated into Emerald Lake or FCI's records. Defendants maintain, therefore, that more than one person was required to provide an affidavit in order to establish the foundation necessary to admit the records pursuant to the business records exception to the rule against hearsay. Plaintiff responds that the circuit court did not err in refusing to strike the Stepanian affidavit and the Dungey-Smith affidavit where those affidavits were consistent with Illinois law. Plaintiff further maintains that the circuit court did not abuse its discretion in denying defendants' request to depose Dungey-Smith.

¶ 50 *1. The Stepanian Affidavit*

¶ 51 Plaintiff contends that the circuit court did not err in refusing to strike Stepanian's affidavit because it was based on his personal knowledge of business records kept in the ordinary course of Emerald Lake's business. As defendants point out in their reply brief, however, the record shows that the court did not refuse to strike Stepanian's affidavit as plaintiff suggests. The record shows that plaintiff attached the Stepanian affidavit to its first motion for summary judgment on the issue of damages only. After reviewing Stepanian's affidavit and his deposition testimony, the court found that Stepanian had "no knowledge himself whatsoever about any of these figures that are set forth in his affidavit as items of damage." The court determined that Stepanian did not explain anything in his affidavit or deposition testimony that would lay a

foundation for the records prepared by WaMu, Chase, and Bayview. Accordingly, the court denied plaintiff's motion for summary judgment.

¶ 52 Plaintiff filed a second motion for summary judgment and attached the same affidavit from Stepanian. Plaintiff removed, however, any claims for accrued late charges, escrow advances, and other items of damages from this second motion. Plaintiff subsequently submitted an affidavit from Dungey-Smith, which detailed the amount of principal and interest due on the mortgage and established a foundation for the computer software she used to determine the amount of accrued interest due. At a hearing on plaintiff's motion on April 17, 2015, defense counsel argued that neither affidavit should be admitted because the Stepanian affidavit conflicted with the Dungey-Smith affidavit and both lacked foundation for the attached records. The following colloquy then took place:

> "The Court: I thought I didn't admit the Stepanian affidavit.
>
> [Defense Counsel]: But that was the first—
>
> The Court: Right. But I didn't admit it into evidence, correct? Wasn't that the problem?
>
> [Plaintiff Counsel]: No.
>
> The Court: Hold on a second. I thought that there was a foundation problem for the Stepanian affidavit, that I found it was inadmissible.
>
> [Defense Counsel]: There was, your Honor, with the first motion for summary judgment. But this was the second motion for summary judgment on damages that was filed three or four days after the first one was denied. And [plaintiff's counsel] included Mr. Stepanian's affidavit a second time. It's the same one as before.
>
> The Court: Did I admit it?
>
> [Defense Counsel]: No, your Honor.
>
> The Court: Okay.
>
> ***
>
> The Court: So my point is, what difference does it make? If neither one of [the Stepanian affidavits] was admitted into evidence, what's the relevance if [the Dungey-Smith] affidavit conflicts with it? It's not evidence."

The court then explained that the Dungey-Smith affidavit was admissible because the only thing she did in the affidavit was take the principal amount due, which the court found was not at issue, and apply the interest rate outlined in the note to determine the amount of accrued interest due. Thus, contrary to plaintiff's representations, the court did admit the Stepanian affidavit as proof of plaintiff's damages. This does not change our analysis, however, because the Dungey-Smith affidavit, which the court did admit, was sufficient to affirm the court's judgment and the amount of damages awarded.

¶ 53 *2. The Dungey-Smith Affidavit*

¶ 54 In her affidavit, Dungey-Smith averred that she was familiar with the subject mortgage owned by Emerald Lake in her capacity as Director of Specialty Loan Servicing at FCI and that she was providing the affidavit to prove the accuracy of the interest accrual calculation on the defendant's mortgage. Dungey-Smith also averred that she received a copy of the adjustable rate note, which detailed the interest rate applicable to the loan. Dungey-Smith averred that she acquired a report from Bayview which detailed the amount of principal due on defendants' mortgage at the time the loan was transferred from Bayview to Emerald Lake and was familiar with the payment history on the loan since it was acquired by Emerald Lake. Dungey-Smith averred that she used this information to calculate the unpaid interest that had accrued on the loan since the date of default and detailed the computer software she used to calculate that amount. Dungey-Smith finally averred that after entering all of the relevant information into the computer software, she determined that the total principal and interest owed on the loan was $1,605,195.60.

¶ 55 The court denied defendants' request to depose Dungey-Smith because the court determined that the only thing she did in her affidavit was a simple mathematical calculation in

applying the interest calculation to the amount of principal due. The court also found that her affidavit established proper foundation for the computer software she used to perform the interest calculation. Accordingly, the court granted plaintiff's motion for summary judgment for the amount specified in Dungey-Smith's affidavit, plus attorneys' fees and costs. Defendants now contend that the court erred in admitting Dungey-Smith's affidavit because it did not comply with Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)), Supreme Court Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992)), and Illinois Rule of Evidence 803(6) (Ill. R. Evid. 803(6) (eff. Apr. 26, 2012)).

¶ 56 a. The Admissibility of Dungey-Smith's Affidavit

¶ 57 "In general, this court reviews a circuit court's decision on a motion to strike an affidavit for an abuse of discretion, but when the motion 'was made in conjunction with the court's ruling on a motion for summary judgment,' we employ a *de novo* standard of review with respect to the motion to strike." *Avdic*, 2014 IL App (1st) 121759, ¶ 18 (quoting *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001). Affidavits submitted in support of a motion for summary judgment must comply with Rule 191(a). Rule 191(a) provides that affidavits in support of a motion for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim" is based, "shall have attached thereto sworn or certified copies of all documents 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). The Rule further provides that "[i]f all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." Ill. S. Ct. R. 191(a) (eff. Jan 4, 2013).

¶ 58 Rule 236 governs the admission of business records into evidence as an exception to the rule against hearsay.[2] *Avdic*, 2014 IL App (1st) 121759, ¶ 23. Rule 236(a) provides that:

> "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." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

To establish foundation for records sought to be admitted under Rule 236, the proponent must show only that the records were made in the regular course of business, at or near the time of the transaction. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42. Notably, "Rule 236 expressly provides that lack of personal knowledge by the maker may affect the weight of the evidence but not its admissibility." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 601 (2003). A party may establish a foundation for admitting business records through the testimony of a records custodian or "another person familiar with the business and its mode of operation." *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13. Similarly, Illinois Rule of Evidence 803(6) provides for the admission of "records of regularly conducted activity" where the records consist of:

[2] Illinois Rule of Evidence 803(6) did not make any substantive changes to the requirements under Illinois Supreme Court Rule 236. *JP Morgan Chase Bank, N.A. v. East-West Logistics, LLC*, 2014 IL App (1st) 121111, ¶ 99.

> "A memorandum, report, record, or data compilation, in any form, of acts [or] events *** made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness ***." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

¶ 59 Here, Dungey-Smith averred that she was the supervisor assigned to the loan servicing FCI performs for Emerald Lake. She further averred that she was familiar with the subject mortgage and note in this case and was making the affidavit to show the accuracy of the interest calculation on the loan, which she performed in the regular course of her duties at FCI. She averred that she received a copy of the mortgage and a copy of the note in the regular course of business and that a copy of the note was attached to the affidavit. She further averred that at the time FCI acquired the servicing rights for defendants' loan, Bayview provided a Servicing Transfer Arm Loan Report for FCI, which showed the principal balance on the loan on April 1, 2010, was $1,384,152.35. A copy of the loan report was attached to the affidavit.

¶ 60 Dungey-Smith averred that she was familiar with defendants' loan payment history since the loan was acquired by Emerald Lake and that no payments had been made on the loan. She further averred that she used the principal balance contained in the loan report from Bayview and the interest rate specified in the note to calculate the unpaid interest that had accrued on the note since the date of default through February 20, 2015. Dungey-Smith then described the computer software FCI uses for making this calculation and averred that the software was recognized as the standard in the industry. She further averred that on January 23, 2015, in the regular course of

FCI's business, she entered the relevant information into the software and produced a payoff letter, which showed a total interest and principal owed on the loan through February 20, 2015, was $1,605,195.60. A copy of the payoff letter was attached to the affidavit. Dungey-Smith's affidavit was thus admissible pursuant to Rule 236 and provided sufficient basis upon which to conclude that plaintiff was entitled to judgment as a matter of law. See *Land*, 2013 IL App (5th) 120283, ¶ 14; *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 950 (2004).

¶ 61 Defendants contend, however, that Dungey-Smith was not the custodian of the records or an "other qualified person" and that the records were inadmissible because they were created not in the ordinary course of business, but for the express use in litigation. Initially, we observe that there is "no requirement that [Dungey-Smith] be familiar with the record before litigation arose or have personally made the entries into the computer system." *Avdic*, 2014 IL App (1st) 121759, ¶ 29. Moreover, "it makes no difference whether the records are those of a party or a third person authorized by the business to generate the record on the business's behalf." *Land*, 2013 IL App (5th) 120283, ¶ 13 (quoting *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005)). A party may therefore establish a foundation for admitting business records through the testimony of a records custodian or "another person familiar with the business and its mode of operation." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600 (2003). It is clear from her affidavit that Dungey-Smith was familiar with FCI's business and its mode of operation, and thus qualified to establish a foundation for admitting business records.

¶ 62 Moreover, the fact that plaintiff filed Dungey-Smith's affidavit in the circuit court the same day she generated the report and signed the affidavit does not create the presumption that she created the report for the "sole purpose of the summary judgment hearing" as defendants suggest. In her affidavit, Dungey-Smith averred FCI uses a computer program to calculate the

variable monthly interest rate on mortgage loans each month. She further averred that such calculations are done in the ordinary course of FCI's business and that she generated the payoff letter attached to her affidavit in the regular course of business.

¶ 63 We also find no support for defendants' contention that "If there are documents from more than one source, such as payment histories from a prior lender and the present lender, more than one affiant will typically be needed, one for each source." Despite defendants' reliance on Rule 191(a), this court has held that where the affiant is familiar with the business process and the records were made in the regular course of business, the affidavit is admissible even if some of the business records were created by a prior servicer. See, *e.g.*, *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 19 (summarizing the finding in *Land*, 2013 IL App (5th) 120283, ¶ 14, that an "affidavit by an employee of the current holder of the debt was admissible under Rule 236 in a foreclosure proceeding even though some of the business records were created by a prior entity.").

¶ 64 Here, Dungey-Smith's affidavit showed that she was assigned to the subject mortgage and was familiar with the business of FCI and its mode of operation. Her affidavit further showed that she was authorized by FCI to generate the record on its behalf. Defendants place a great deal of emphasis on Stepanian's statement at his deposition that he was the only one qualified to testify regarding the amounts due on the mortgages managed by Emerald Lake; however, Dungey-Smith's affidavit makes it clear that she was a "another person familiar with the business and its mode of operation" who was qualified to establish the foundation for business records. *In re Estate of Weiland*, 338 Ill. App. 3d at 600. Moreover, under Rule 236, 'it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible.' " *Avdic*, 2014 IL App (1st) 121759, ¶ 29 (quoting *Cole Taylor Bank v.*

*Corrigan*, 230 Ill. App. 3d 122, 130 (1992)). Thus, we find the business records attached to Dungey-Smith's affidavit submitted in support of plaintiff's motion for summary judgment satisfied the requirements of Rule 191(a), Rule 236, and Rule of Evidence 803(6). Therefore, the court did not err in finding that the records were admissible to prove the amount of accrued interest. *Cornejo*, 2015 IL App (3d) 140412 ¶ 19. Accordingly, we conclude that the circuit court properly denied defendants' motion to strike Dungey-Smith's affidavit for lack of foundation.

¶ 65 b. Defendants' Request to Depose Dungey-Smith

¶ 66 Defendants next contend that the circuit court erred in denying their request to depose Dungey-Smith. Defendants maintain that they should have been afforded an opportunity to depose Dungey-Smith pursuant to Illinois Rule of Evidence 902(11) (Ill. R. Evid. 902(11) (eff. Jan. 1, 2011)) and Supreme Court Rule 191(b) (Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013)). Plaintiff responds that the court properly denied defendants' request to depose Dungey-Smith where defendants failed to provide a legitimate reason to depose her in order to oppose plaintiff's motion for summary judgment.

¶ 67 "When a party cannot sufficiently respond to a motion for summary judgment because it believes additional discovery is necessary, it may file a Rule 191(b) affidavit." *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 224 (2002). Rule 191(b) provides, in pertinent part, that:

> "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either

> granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

An affidavit pursuant to Rule 191(b) must contain "(1) a statement that material facts are unavailable due to hostility or otherwise; (2) the names of those persons the affiant wants to depose; (3) a showing as to why affidavits could not be procured from those named persons; (4) a statement as to what those persons will testify; (5) the basis for the affiant's belief that those persons will so testify; and (6) the affiant must be a party to the action." *Koukoulomatis by Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 99 (1984). A circuit court is afforded wide latitude in ruling on matters of discovery (*Atlantic Mut. Ins. Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 567 (2000)), and we will not disturb the circuit court's ruling on discovery matters absent an abuse of discretion (*Ragan v. Columbia Mut. Ins. Co.*, 183 Ill. 2d 342, 352 (1998)).

¶ 68 Here, defendants contended in their Rule 191(b) affidavit that material facts were unavailable to them because the facts were known only by Dungey-Smith who was under the control of the plaintiff. Defendants further asserted that they could not determine whether the statements in Dungey-Smith's affidavit were true because they had not had an opportunity to depose her. Defendants contended that they believed Dungey-Smith, if deposed, would be unable to testify regarding the factual basis for the statements in her affidavit, such as the date FCI acquired the loan and her familiarity with defendants' account. Defendants also pointed out discrepancies between Stepanian's affidavit and Dungey-Smith's.

¶ 69 In denying defendant's request to depose Dungey-Smith, the circuit court stated that:

> "all [Dungey-Smith] has done it seems to the court is to take the—the principle [*sic*] balance owed which the court has previously said is not—is not a disputed issue in this case, and—and apply the note rate using the index and—and it never varies more than three or four tenths of a point using this program.
>
> And so—so I don't see your—a bases [*sic*] in your client's 191 request that this affiant in California who is doing nothing more than interest calculation using the computer program needs to be deposed. And so the request to depose this—this particular affiant would be denied."

The court then extended the time in which defendants could respond to plaintiff's motion given the newly submitted affidavit.

¶ 70 As the circuit court recognized, there was no basis to depose Dungey-Smith where she merely performed a mathematical calculation. As discussed above, Dungey-Smith's affidavit was properly admitted by the court and served the sole purpose of calculating the interest due using the interest rate outlined in the note. Defendants contend, however, that was not the sole purpose of the Dungey-Smith affidavit because the court had previously stricken all other affidavits and records for lack of foundation. Defendants contend that there was therefore no principal balance on the record from which Dungey-Smith could make her interest calculation. As discussed above, however, the court had repeatedly reminded the parties after granting plaintiff's motion for summary judgment on the issue of liability, that there was no question of material fact as to the fact of default and the principal amount due on the loan. At the time plaintiff submitted Dungey-Smith's affidavit, the only question before the court was the amount

of interest due on the loan, as plaintiff had removed its requests for other damages from its second motion for summary judgment on the issue of damages only. The circuit court had already determined that the Falero affidavit was sufficient to prove the fact of default and the principal amount due. Thus, as the circuit court recognized, all the Dungey-Smith affidavit did was calculate the amount of interest that had accrued on the loan since the date of default using the principal balance due on the loan, which was not in dispute. We find nothing in defendants' Rule 191(b) affidavit that would establish a legitimate reason for them to depose Dungey-Smith on the basis of her statements in the affidavit.

¶ 71 Moreover, we find defendants' reliance on *U.S. Bank, N.A. v. Kosterman*, 2015 IL App (1st) 133627 misplaced. In that case, plaintiff filed a motion for summary judgment and attached an affidavit from an employee at the subject bank. *Id.* ¶ 12. Plaintiff did not attach any records to the affidavit to support affiant's averments. *Id.* Defendants filed a Rule 191(b) motion asserting that they could not adequately respond to the affidavit without viewing the records that the affiant relied upon in making the affidavit. *Id.* In response, plaintiff faxed defendants' counsel an 11-page transaction history that was not certified by the affiant and did not contain any indication that it was the record relied upon by the affiant. *Id.* ¶ 13. Plaintiff then claimed that the records relied upon by the affiant were too numerous to make available and offered defendants seven days to amend their response to the motion for summary judgment. *Id.* Defendants filed a notice in the circuit court requesting leave to depose the affiant, but the circuit court granted plaintiff's motion for summary judgment without addressing defendants' Rule 191(b) affidavits or the deposition request, which were eventually struck by the court after plaintiff argued that all of defendants' defenses at that point were "forfeited." *Id.* ¶ 14.

¶ 72 In this case, by contrast, Dungey-Smith's affidavit was accompanied by the records she relied upon and those records were filed in the circuit court. In addition, the court addressed defendants' request to depose Dungey-Smith and their Rule 191(b) affidavits. The court then permitted defendants adequate time, 28 days, to respond to the affidavit and all the records Dungey-Smith relied upon in making her affidavit were available to defendant. This case is thus distinguishable from *Kosterman* where this court found that the circuit court had entered summary judgment "by ambush." *Id.* ¶ 17. Unlike *Kosterman*, the court in this case addressed defendants' Rule 191(b) affidavit and discovery request, but ultimately denied them after a hearing. See *Kosterman*, 2015 IL App (1st) 133627, ¶ 17 (noting that the circuit court did not even acknowledge defendants' Rule 191(b) affidavit averring that they need to conduct a deposition of the affiant). Moreover, the court granted defendants sufficient time, 28 days, to respond to the affidavit, unlike in *Kosterman* where it was plaintiff, rather than the court, who offered defendants only seven additional days to respond to the affidavit. Accordingly, we find that the circuit court did not abuse its discretion in denying plaintiff's request to depose Dungey-Smith.

¶ 73 D. Summary Judgment

¶ 74 Defendants finally contend that the circuit court erred in entering summary judgment where there was no evidence on the record of the amount due. In making this contention, defendants repeat many of the same arguments discussed above including the lack of foundation for the records attached to plaintiff's affidavits, lack of personal knowledge of the affiants, and lack of evidence of the amounts due. Plaintiff responds that there were no questions of fact that would preclude the entry of summary judgment.

¶ 75 "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." *Avdic*, 2014 IL App (1st) 121759, ¶ 21 (quoting *West Bend Mut. Ins. v. Norton*, 406 Ill. App. 3d 741, 744 (2010)). We review *de novo* the circuit court's decision to grant a motion for summary judgment. *Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 76 For the reasons discussed above in addressing defendants' other arguments, we find that defendants have failed to demonstrate that the circuit court erred in entering summary judgment and entering the judgment of foreclosure and sale. As stated, the affidavit of Dungey-Smith conformed to Rule 191 and the business records related to the mortgage and note at issue were properly admissible. Plaintiff presented sufficient evidence to establish its case and defendants failed to submit any contradictory evidence to refute plaintiff's claims. Defendants never presented evidence to rebut plaintiff's claims of default and the principal amount due or the interest calculation performed by Dungey-Smith. Instead, defendants continually challenged plaintiff's affidavits, which we have previously found were sufficient to support the circuit court's rulings. When a party moves for summary judgment and files supporting affidavits containing well-pleaded facts, and the opposing party files no counteraffidavits, the material facts set forth in the movant's affidavits are deemed admitted. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49. Where there is no genuine issue of material fact, summary judgment is proper. See *Avdic*, 2014 IL App (1st) 121759, ¶ 32. Although Dee's initial answer denied some of the contentions in the original complaint, "denials in defendant's answer do not create a material issue of genuine fact to prevent summary judgment." *Korzen*, 2013 IL App (1st) 130380, ¶ 49. Accordingly, we find the circuit court did not err in granting plaintiff's

motion for summary judgment as to liability or damages and entering the judgment of foreclosure and sale.

¶ 77 III. CONCLUSION

¶ 78 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 79 Affirmed.