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2018 IL App (3d) 160567-U

Order filed February 5, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|--|---|-------------------------------|
| PNC BANK, NATIONAL ASSOCIATION, |) | Appeal from the Circuit Court |
| |) | of the 12th Judicial Circuit, |
| Plaintiff-Appellee, |) | Will County, Illinois. |
| |) | |
| v. |) | |
| |) | |
| JACQUELYN WILSON, ALFRED |) | |
| WILSON, aka Alfred L. Wilson, WILLOW |) | |
| BROOK ESTATES COMMUNITY |) | Appeal No. 3-16-0567 |
| ASSOCIATION, INC., aka Willow Brook |) | Circuit No. 14-CH-883 |
| Estates Community Association, UNKNOWN |) | |
| OWNERS and NON-RECORD CLAIMANTS, |) | |
| |) | |
| Defendants |) | |
| |) | |
| (Alfred Wilson, |) | Honorable |
| |) | Brian E. Barrett, |
| Defendant-Appellant). |) | Judge, Presiding. |
| |) | |

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* An order confirming a judicial sale in foreclosure proceedings was upheld where the homeowner failed to raise the issue of standing in a timely manner in the

circuit court. A waived pleading defense, even if meritorious, was not grounds to vacate a sale under the Illinois Mortgage Foreclosure Law.

¶ 2 The plaintiff, PNC Bank, National Association, filed a complaint to foreclose a mortgage against several defendants, including the borrowers Alfred and Jacquelyn Wilson. A judgment of foreclosure was entered, the property sold, and the sheriff's sale was confirmed by the circuit court. Alfred appeals the order confirming the sale. We affirm.

¶ 3 **FACTS**

¶ 4 On April 21, 2014, the Bank, as the mortgagee and the holder of the note, filed a complaint to foreclose a mortgage entered into by the Wilsons. Attached to the complaint was a copy of the mortgage, which was executed on June 1, 2007, and provided that the Wilsons were the borrowers, National City Mortgage was the lender, and the mortgage was secured by real property located on Willow Brook Trail in Crete, Illinois. The Wilsons also executed a note on June 1, 2007, made payable to National City Mortgage. A copy of the note was also attached to the complaint. A third document was attached to the complaint; a loan modification agreement dated May 31, 2013, between the Wilsons as the borrowers and Green Tree Servicing LLC as the lender. The fourth document attached to the complaint was the certification of a merger whereby National City Bank merged with and into PNC Bank, effective December 31, 2008.

¶ 5 The Wilsons answered the complaint but did not raise standing as an affirmative defense to defeat the Bank's claim. Thereafter, the Bank filed a motion for summary judgment, contending that it was entitled to judgment on its complaint as a matter of law, and seeking a judgment of foreclosure and sale. The Wilsons responded to the motion for summary judgment, arguing that there were genuine issues of fact regarding whether they were in default and, if so, by what amount. The Wilsons did not raise standing as a defense to the summary judgment

motion. On November 6, 2015, the circuit court granted the Bank's motion for summary judgment and entered a judgment of foreclosure.

¶ 6 On December 14, 2015, the Wilsons filed a motion requesting the circuit court vacate the judgment of foreclosure and stay the sale of the property. The circuit court denied the motion. Thereafter, the Bank filed a notice for a sheriff's sale to take place on May 5, 2016. Alfred filed a motion to strike the filing and stay the sale. That motion was denied. Alfred then submitted a number of other filings to the circuit court which were either stricken or denied. The sheriff's sale took place on May 5, 2016, and, after the sheriff's report of sale and distribution was filed, the circuit court entered an order confirming the sale on August 19, 2016. Alfred filed an appeal, challenging the order confirming the sale. Alfred's appellate brief, in the conclusion section, also states that he is seeking reversal of the grant of summary judgment that was the basis for the judgment of foreclosure.

¶ 7 ANALYSIS

¶ 8 Alfred argues that the Bank lacked standing to bring the foreclosure suit. Alfred acknowledges his waiver of this issue but contends that the attachment of the loan modification agreement, which listed Green Tree Servicer, LLC, as the "lender," as an attachment to the complaint was *prima facie* evidence of a lack of standing. The Bank contends that Alfred waived the issue of standing and that such a defense could not be asserted as a basis to challenge a judicial sale. In any event, the Bank contends that the pleadings and affidavits on file established that it had standing.

¶ 9 As an initial matter, we address the extent of our appellate jurisdiction. Alfred's Notice of Appeal stated that he disagreed with the circuit court's final decision of August 19, 2016, which was the order confirming the judicial sale. Alfred's appellate brief states that the circuit court

abused its discretion in confirming the sale and also seeks reversal of the grant of summary judgment that was the basis for the judgment of foreclosure, raising the issue of standing to bring the foreclosure action. We find, though, that we lack jurisdiction to review the order entered granting the summary judgment motion for foreclosure because the Notice of Appeal only sought review of the order entered August 19, 2016. See Ill. S. Ct. R. 303(b)(2) (eff. Jan. 1, 2015).

¶ 10 Regardless, the lack of standing is an affirmative defense that the defendant must plead and prove. *Deutsche Bank National Trust Co. v. Jordanov*, 2016 IL App (1st) 152656, ¶ 34. It is waived if not raised in a timely fashion. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9. Alfred contends that the court should overlook his waiver, arguing that the Bank was required to produce competent evidence of its standing. Alfred argues that the court should not follow the weight of authority regarding waiver but should apply a burden-shifting approach like that used in *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 24. While *Gilbert* does discuss the relative burdens of proof regarding standing, it does so in the context of a motion for summary judgment, where the affirmative defense of lack of standing was properly raised. *Id.* ¶ 17. In this case, Alfred did not plead, much less provide any proof, in the circuit court that the Bank lacked standing prior to the entry of the order confirming sale. Thus, the affirmative defense of standing has been waived.

¶ 11 With respect to the judicial sale, under the Illinois Mortgage Foreclosure Law (Foreclosure Law), after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is limited by the provisions of section 15-1508(b) of the Foreclosure Law. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18. Pursuant to section 15-1508(b) of the Foreclosure Law, the court shall confirm the sale unless the court finds

that: (i) proper notice of the sale was not given; (ii) the terms of the sale were unconscionable; (iii) the sale was conducted fraudulently; or (iv) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2016). We review a circuit court's order confirming a judicial foreclosure sale for an abuse of discretion. *Household Bank, F.S.B. v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 12 Alfred argues that the Bank's actions in not submitting documentation regarding its standing constituted a systemic misrepresentation so that justice was not otherwise done. However, objections to the confirmation of sale under section 15-1508(b)(iv) of the Foreclosure Law cannot be based simply on a meritorious pleading defense to the underlying complaint. *McCluskey*, 2013 IL 115469, ¶ 26. In order to prevail, Alfred had to show both a meritorious defense and that the Bank or the circuit court somehow prevented him from being able to provide his meritorious defense. *Id.* ¶ 26. Since Alfred did not give the circuit court any basis to refuse confirmation of sale under section 15-1508 of the Foreclosure Law, we conclude that there was no abuse of discretion in approving the judicial sale.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of Will County is affirmed.

¶ 15 Affirmed.