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FOURTH DIVISION
December 24, 2014

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Honorable
John Ehrlich,
Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to stay enforcement of a final judgment approving the sale of four foreclosed properties pursuant to Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004), and three of those properties are sold to a third-party purchaser who is not a party to the litigation, defendant's appeal of foreclosure judgment as to those three properties must be dismissed as moot. With respect to the fourth property, we affirm the trial court's ruling granting summary judgment in favor of plaintiff where defendant forfeited the issue of grace period notice on appeal.

¶ 2 Defendant Taner Kapan appeals the circuit court's orders granting summary judgment in favor of plaintiff and approving the sale of foreclosed properties arguing that he was denied grace period notice thus making summary judgment improper. For the reasons below, we affirm the trial court's rulings.

¶ 3

BACKGROUND

¶ 4 Premier Bank made a loan to defendant Kapan and others in the principal sum of \$3,037,412.51. The terms of the loan were memorialized in a Note dated March 31, 2011. The Note was cross collateralized and secured by several prior mortgages and modifications to those mortgages, which included the following properties: 4420-24 W. Armitage Avenue, Chicago, Illinois 60639, 4050-58 W. Armitage Avenue, Chicago, Illinois 60639, 6315-17 W. Grand Avenue, Chicago, Illinois 60639, and 6939 W. Montrose Avenue, Harwood Heights, Illinois 60706. Federal Deposit Insurance Corporation, while acting as the receiver for Premier Bank, sold the loan via a bill of sale to International Bank of Chicago. Plaintiff, CL IL, LCC, is the assignee of International Bank of Chicago.

¶ 5 In this appeal, defendant argues that he resided in the Harwood Heights property. Under the Foreclosure Law (the Act), where residential property is at issue, a lender is required to send grace period notice to the mortgagor 30 days prior to filing a mortgage foreclosure suit. 735

ILCS 5/15-1502.5(c) (West 2010) ("... if a mortgage secured by residential real estate becomes delinquent by more than 30 days the mortgagee shall send via U.S. mail a notice advising the mortgagor that he or she may wish to seek approved housing counseling."). The Act further states: "[n]o foreclosure action under Part 15 of Article XV of the Code of Civil Procedure shall be instituted on a mortgage secured by residential real estate before mailing the notice described in this subsection (c)." 735 ILCS 5/15-1502.5(c) (West 2010).

¶ 6 On July 19, 2012, plaintiff CL IL, LCC filed a nonresidential commercial foreclosure complaint against defendant and several other parties not involved in this appeal. The complaint alleged that defendant had defaulted on his mortgage by not making his monthly installment payments since May 19, 2011 as required under the Note. The complaint further alleged that the March 31, 2011 Note had matured on October 10, 2011. Defendant answered the complaint and filed several affirmative defenses. However, defendant did not argue in his affirmative defense and answer to the complaint that plaintiff failed to comply with the grace period notice requirement or that the complaint should be dismissed on that basis.

¶ 7 During the pendency of the case, plaintiff filed a motion to appoint a receiver. Defendant attempted to file an untimely response to the motion to appoint a receiver, and the trial court denied defendant leave to file the response because it was untimely. Attached to defendant's proposed response to the motion to appoint a receiver was an affidavit from January 22, 2013 in which defendant averred: "I currently reside at 6939 W. Montrose, Harwood Heights, IL 60706 which is a single family home. The Plaintiff never sent and I never received a grace period notice required to be sent pursuant to 735 ILCS 5/15-1502.5."

¶ 8 After defendant answered the complaint, plaintiff moved for summary judgment. Defendant did not file any pleading in opposition to the motion for summary judgment. There is

no transcript of the summary judgment hearing in the record, and there is nothing in the record to indicate that defendant opposed entry of summary judgment or made any argument with regard to the grace period notice requirement.

¶ 9 However, attached to plaintiff's motion for summary judgment is the affidavit that defendant attached to his motion in opposition to the appointment of receiver, which stated he resided at the Harwood Heights property and that he did not receive grace period notice. In its brief, plaintiff alleged it included the affidavit as an attachment to the motion for summary judgment to rebut defendant's assertion in his affirmative defenses that he could not read and write at the time of the proceedings. On July 29, 2013, the circuit court granted summary judgment and entered judgment of foreclosure and sale.

¶ 10 Plaintiff was the successful bidder at both sales. On October 24, 2013 and November 13, 2013, the trial court entered orders, which approved the sale and distribution and confirmed the sale and order of possession for the properties at issue here. Defendant filed a notice of appeal on December 13, 2013 as to the October 24, 2013 and November 13, 2013 orders as well as all orders that were entered, including summary judgment, leading up to the sale of the properties. Defendant never sought a stay of the enforcement of the trial court's orders. The basis of defendant's appeal is that the trial court erred in granting summary judgment in favor of plaintiff because plaintiff failed to send him a grace period notice as required by section 1502.5 of the Act. 735 ILCS 5/15-1502.5 (West 2010).

¶ 11 The brief filed by plaintiff contains an affidavit that states on September 5, 2014, plaintiff sold three of the four properties, 4420-24 W. Armitage Avenue, 4050-58 W. Armitage Avenue and 6315-17 W. Grand Avenue, to a *bona fide* third-party purchaser, Ms. Laura Llededo. Ms.

Llmedo is not a party to this litigation. Based on the record before us, the fourth property, 6939 W. Montrose, Harwood Heights, Illinois 60706, is still owned by plaintiff.

¶ 12

ANALYSIS

¶ 13

Mootness

¶ 14 As an initial matter, we must address plaintiff's contention that this appeal is moot.

Plaintiff argues this appeal is moot because defendant posted no bond to stay enforcement of the order approving the sale pursuant to Illinois Supreme Court Rule 305(k) (eff. July 1, 2004), and, during the time this appeal was pending, three of the four properties were sold to a nonparty, Ms. Llmedo. Plaintiff attached an affidavit to its appellate brief confirming that three of the four properties at issue were sold to a third party, Ms. Llmedo, who is not a party to the proceedings.

¶ 15 In the absence of a stay, an appeal is moot if a specific property, possession or ownership of which is the relief being sought on appeal, has been conveyed to third parties. *Town of Libertyville v. Moran*, 179 Ill. App. 3d 800, 886 (1989); see also *People ex rel. First National Bank v. City of North Chicago*, 158 Ill. App. 3d 85, 94-95 (1987); *Illinois Housing Development Authority v. LaSalle National Bank*, 139 Ill. App. 3d 985, 987 (1985); *Arnold v. Leahy Home Building Co.*, 95 Ill. App. 3d 501, 514 (1981); *Horvath v. Loesch*, 87 Ill. App. 3d 615, 619 (1980). An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief. *Barnard v. Michael*, 392 Ill. 130, 133-34 (1945).

Courts of review will generally not consider moot or abstract questions because our jurisdiction is restricted to cases which present an actual controversy. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001) (citing *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 130-31 (1994)).

¶ 16 We may consider an affidavit that demonstrates a case on appeal is moot even though the affidavit not part of the record. As stated in *LaSalle National Bank v. City of Chicago*:

"Since the existence of a real controversy is an essential requisite to appellate jurisdiction, the general rule is that where a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, it will dismiss the appeal or writ of error even though such facts do not appear in the record.

[] From the necessity of the situation courts allow facts which affect their right and duty to proceed in the exercise of their appellate jurisdiction, but which do not appear in the record before it, to be proved by extrinsic evidence. [] Such a fact may be presented, as here, by motion supported by affidavit. " (Internal quotations omitted.) *LaSalle National Bank v. City of Chicago*, 3 Ill. 2d 375, 379 (1954).

Further, "[w]hen facts alleged in an affidavit are not contradicted, those facts are taken as true." *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1078 (1992).

¶ 17 Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004) protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal, if the following three requirements are met: (1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding; and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. *Steinbrecher*, 197 Ill. 2d at 523-24. Specifically, Rule 305(k) provides:

"If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under

subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final.” Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

¶ 18 Here, all of the properties at issue were sold to plaintiff at the foreclosure sale. Title to the property passed to plaintiff pursuant to final judgments on October 24, 2013 and November 13, 2013, when the trial court entered orders approving those sales. *Margaretten & Co., Inc. v. Martinez*, 193 Ill. App. 3d 223 (1990) (Order approving the sale of foreclosed upon property is a final judgment). Although defendant timely appealed the October 24, 2013 and November 13, 2013 orders and related orders, there is nothing in the record to show that he ever requested a stay of judgment at any time. Plaintiff attached an affidavit to its appellate brief stating that after entry of the final judgment, plaintiff sold three of the four properties to Ms. Llededo, who was a *bona fide* purchaser and not a party to this litigation. As such, we find that all three requirements for the application of Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004) were met as to the three properties sold to Ms. Llededo because: (1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not

part of the proceeding; and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. See *Steinbrecher*, 197 Ill. 2d at 523-24. Accordingly, we must dismiss this appeal as moot with respect to those three properties.

¶ 19 Based on the record before us, the property at 6939 W. Montrose, Harwood Heights, Illinois 60706 (the Harwood Heights property), is still owned by plaintiff and, therefore, this appeal with respect to that property is not moot.

¶ 20 Summary Judgment

¶ 21 In this appeal, defendant argues that if the case is moot with regard to three of the properties, the case is not moot with regard to the Harwood Heights property. Defendant's argument on appeal is that the trial court erred in granting summary judgment and confirming the sale of the properties at issue because the record contained an affidavit signed by him indicating that he never received a grace period notice. As such, defendant argues that the circuit court's ruling on summary judgment must be reversed "to determine if in fact a grace period notice was sent."

¶ 22 Plaintiff argues that the circuit court's order granting summary judgment in its favor should be affirmed because: (1) defendant failed to preserve an adequate record on appeal, (2) defendant waived any argument relating to grace period notice on appeal by not raising it as an affirmative defense or in response to its motion for summary judgment, and (3) waiver aside, since the properties at issue were commercial and not residential, defendant was not entitled to grace period notice in the first place.

¶ 23 In defendant's one-page reply to plaintiff's response, he argues that the Harwood Heights property was not non-residential property, but rather was residential property wherein he resided.

¶ 24 Summary judgment is appropriate “if 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(c) (West 2010). The purpose of summary judgment is not to try an issue of fact, but to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002); *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002). The trial court must consider documents and exhibits filed in support or opposition to a motion for summary judgment in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 25 We review a trial court's decision on a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992); *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519 (2008). *De novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 26 Section 15-1502.5 of the Judicial Foreclosure Procedure (the Act), which describes the grace period notice at issue here, states: “if a mortgage secured by residential real estate becomes delinquent by more than 30 days the mortgagee shall send via U.S. mail a notice advising the mortgagor that he or she may wish to seek approved housing counseling.” 735 ILCS 5/15-1502.5(c) (West 2010). It further states: “[n]o foreclosure action under Part 15 of Article XV of the Code of Civil Procedure shall be instituted on a mortgage secured by residential real estate before mailing the notice described in this subsection (c).” 735 ILCS 5/15-1502.5(c) (West 2010). The above provisions only apply where the subject property is “residential real estate” as that term is defined in the Act. Section 15-1502.5 of the Act “was written to provide owners of

single-family, owner-occupied properties an additional last-minute escape valve to rescue their mortgages before the lender files a suit under the Foreclosure Law." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 106.

¶ 27 Here, the record contains defendant's affidavit dated January 22, 2013, which states: "I currently reside at 6939 W. Montrose, Harwood Heights, IL 60706 which is a single family home." As such, there is some evidence in the record to suggest plaintiff was required to send grace period notice to defendant with respect to the Harwood Heights property prior to initiating any foreclosure proceedings against that property. See 735 ILCS 5/15-1502.5 (West 2010).

¶ 28 Having found that the trial court record established a question of fact as to whether grace period notice was sent, which would preclude summary judgment, we must now assess plaintiff's argument that defendant waived this issue of grace period notice on appeal.

¶ 29 Despite having numerous opportunities to raise the issue of grace period notice in the trial court, including in his answer, affirmative defenses and in responding to plaintiff's motion for summary judgment, defendant never raised the issue of whether plaintiff complied with grace period notice before the trial court. Defendant made this argument for the first time on appeal. It is well settled that "a party who does not raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal." *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010); *In re Marriage of Culp*, 399 Ill. App. 3d 542, 550 (2010); see also *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 76 (2010). As such, we find defendant forfeited his right to raise the issue of grace period notice on appeal.

¶ 30 Although plaintiff here argues that defendant "waived" the grace period notice issue on appeal, we note that "[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *Home Insurance Co. v. Cincinnati Insurance Co.*,

213 Ill. 2d 307, 326 (2004). Forfeiture, on the other hand, strictly defined, is different from waiver. *Gallagher v. Lenart*, 226 Ill. 2d 208, 229-30 (2007); *People v. Blair*, 215 Ill. 2d 427, 444 n. 2 (2005). Rather than an intentional relinquishment of a known right, forfeiture is the “failure to make the timely assertion of the right.” *Blair*, 215 Ill. 2d at 444 n. 2 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993); *People v. Free*, 122 Ill. 2d 367, 379 (1988) (J. Ryan, specially concurring) (“Waiver is an intelligent relinquishment of a known right of a privilege. [Citation omitted.] Procedural default, on the other hand, relates to a failure by counsel to comply with certain procedural requirements which results in the forfeiture of the right to raise error on appeal.”). Given that defendant never raised the issue of grace period notice in the trial court, we find that defendant forfeited that issue and cannot raise it for the first time on appeal here. Accordingly, we affirm the trial court's ruling. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009) (we may affirm the judgment of the trial court on any basis appearing in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct.).

¶ 31 Although defendant argues that *Adeyiga* supports his argument that this case must be remanded for a finding on whether grace period notice was sent, we find *Adeyiga* distinguishable from the case at bar. The defendant in *Adeyiga* raised the issue of grace period notice in his motion to dismiss and response to summary judgment. *Adeyiga*, 2014 IL App. (1st) 131252, ¶¶ 4, 25-26, 31-33. As such, in *Adeyiga*, the trial court had an opportunity to review the issue of grace period notice before the appellate court was asked to address the issue. Here, defendant never raised the issue of grace period notice at any time in the trial court. For that key reason, we find *Adeyiga* distinguishable from the case at bar.

¶ 32

Conclusion

¶ 33 For the reasons above, we find this appeal moot as to three of the four properties at issue: 4420-24 W. Armitage Avenue, 4050-58 W. Armitage Avenue and 6315-17 W. Grand Avenue.

We affirm the trial court's ruling with respect to the fourth property, 6939 W. Montrose Avenue, Harwood Heights Illinois because defendant forfeited his grace period notice defense by failing to present that argument in the trial court and for raising it for the first time on appeal.

¶ 34 Appeal dismissed as moot in accordance with Illinois Supreme Court Rule 23(c) (3) (eff. Jan 31, 1972) in part; affirmed in part.