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2015 IL App (1st) 141989-U

No. 1-14-1989

Order filed March 11, 2015

Third Division

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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<p>PNC BANK, National Association,</p>	<p>)</p>	
	<p>)</p>	
Plaintiff-Appellee,	<p>)</p>	
	<p>)</p>	Appeal from the Circuit Court
v.	<p>)</p>	of Cook County.
	<p>)</p>	
JANINA FORENDA, CZESLAW FORENDA,	<p>)</p>	
and AGATA FORENDA,	<p>)</p>	No. 12 CH 20031
	<p>)</p>	
Defendants-Appellants	<p>)</p>	
	<p>)</p>	The Honorable
(Ireneusz Forenda, Jan Forenda, Unknown Others,	<p>)</p>	John H. Ehrlich,
and Non-record claimants,	<p>)</p>	Judge, presiding.
	<p>)</p>	
Defendants).	<p>)</p>	

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JUSTICE HYMAN delivered the judgment of the court.  
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

**SUMMARY ORDER**

¶ 1 Mortgagee-plaintiff PNC Bank, N.A., brought foreclosure action against mortgagors-defendants. The trial court granted PNC's motion to dismiss mortgagors' affirmative defense and later granted summary judgment in favor of PNC. Mortgagors appealed. We affirm as the substantive matters of this case are identical to a case recently decided by this court.

¶ 2 BACKGROUND

¶ 3 In April 2003, defendants-mortgagors Janina and Jan Forenda received a mortgage from PNC Bank on their home at 2308 N. 74th Avenue, Elmwood Park, IL. In June 2006, all interests in the property were transferred to defendants Ireneusz and Czeslaw Forenda. After defendants defaulted on the mortgage, PNC filed a complaint to foreclose in May 2012.

¶ 4 Defendants answered in October 2012, along with an affirmative defense alleging that the plaintiff did not send a notice of default. The mortgage states that if the defendants are in default, “the Note Holder *may* send [them] a written notice telling [them] that if [they] do not pay the overdue amount by a certain date, the Note Holder *may* require [them] to pay immediately the full amount of principal which has not been paid and all the interest that [they] owe on that amount.” (Emphases added.) In addition, the mortgage states that the defendants must be afforded at least 30 days to pay the full amount from the date on which the notice is delivered.

¶ 5 PNC filed a combined motion to dismiss the defendants’ affirmative defense under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) or a motion for partial summary judgment under section 2-1005 (735 ILCS 5/2-1005 (West 2012)). The court dismissed the defendants’ affirmative defense with prejudice, and subsequently granted summary judgment in favor of PNC.

¶ 6 Defendants appeal the dismissal of their affirmative defense.

¶ 7 ANALYSIS

¶ 8 Defendants argue the trial court erred in striking their affirmative defense based on the claim that PNC did not send them a notice of default. They assert that the default notice was a condition precedent to foreclosure. (PNC’s brief did not address the issue here, which was whether the trial court appropriately struck defendants’ affirmative defense. Instead, it argues that the bank did send the notice.) We review the dismissal of defendants’ affirmative defense *de*

*nov. Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543. *De novo* review means we perform the same analysis a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 9 This court recently disposed of this issue in *CitiMortgage, Inc., v. Bukowski*, 2015 IL App (1st) 140780 (2015). Although *Bukowski* was decided after the parties in the present case filed their briefs, that opinion merely summarizes the state of existing law. In *Bukowski*, the mortgagors' argued that the trial court erred in striking their affirmative defense alleging failure to send an acceleration notice. *Id.* ¶ 15. We affirmed the dismissal, reasoning:

"As CitiMortgage correctly notes, defendants' claim is not a proper affirmative defense as it does not 'give color' to CitiMortgage's complaint but, rather, is an assertion that CitiMortgage has not satisfied a condition precedent to its right to bring suit. The loan documents *require* the lender to 'give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument.' The notice must specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums due, foreclosure by judicial proceeding and sale of the property. If CitiMortgage had not sent an acceleration notice, it would not be entitled to foreclose. *Thus, defendants' assertion that CitiMortgage failed to send the notice attacks CitiMortgage's ability to maintain the action and does not raise new matter that defeats the claim.* [Citations.]" (Emphases added.) *Bukowski*, 2015 IL App (1st) 140780, ¶ 16.

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¶ 10        Though PNC's mortgage is permissive with regard to the acceleration notice, as opposed to CitiMortgage's mandatory requirement, *Bukowski's* exact reasoning applies here. Failure to satisfy a condition precedent is not a valid affirmative defense to foreclosure. Accordingly, the trial court did not err in ruling in PNC's favor when it struck defendants' affirmative defense.

¶ 11        Affirmed.