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2019 IL App (3d) 180236-U

Order filed August 22, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

MTGLQ INVESTORS, L.P.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	
	)	
MOHAMMED AZIZ KHAN a/k/a	)	
MOHAMMED KHAN, a/k/a MOHAMMED A.	)	
KHAN; CITIFINANCIAL SERVICES, INC.;	)	
SPRINGLEAF FINANCIAL SERVICES OF	)	Appeal No. 3-18-0236
ILLINOIS, INC., f/k/a AMERICAN GENERAL	)	Circuit No. 16-CH-1224
FINANCIAL SERVICES OF ILLINOIS, INC.;	)	
PRAIRIE KNOLL HOMEOWNERS	)	
ASSOCIATION; UNKNOWN OWNERS AND	)	
NON-RECORD CLAIMANTS,	)	
	)	
Defendants	)	The Honorable
	)	Matthew G. Bertani,
(Mohammed Khan, Defendant-Appellant).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices O'Brien and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court properly granted summary judgment to mortgagee where affidavit from current mortgagee's employee established mortgagor's default and amount due based on records of current and prior mortgagees.

¶ 2 The original plaintiff in this action, Suntrust Mortgage Inc., filed a complaint for foreclosure against defendant Khan and others. Several months later, Suntrust assigned Khan's mortgage to plaintiff MTGLQ Investors, L.P. MTGLQ was substituted as plaintiff in the action. MTGLQ filed a motion for summary judgment and attached thereto an Affidavit of Amounts Due and Owing and a Loss Mitigation Affidavit. Khan opposed the motion, arguing that the affidavits were insufficient. The trial court granted MTGLQ's motion for summary judgment and entered judgment of foreclosure and sale. On appeal, Khan argues that the trial court erred in granting MTGLQ's motion for summary judgment. We affirm.

¶ 3 **BACKGROUND**

¶ 4 In April 2007, defendant Mohammed Khan entered into a mortgage contract with Suntrust. The mortgage was secured by real property located at 13609 Meadow Lane in Plainfield. Defendant also executed a promissory note payable to Suntrust in the amount of \$360,000.00.

¶ 5 In July 2016, Suntrust filed a foreclosure complaint against Khan and others. The complaint alleged that Khan defaulted on his mortgage payments beginning in August 2015. Attached to the complaint were copies of the note and mortgage.

¶ 6 In December 2016, Suntrust filed a motion to substitute party plaintiff, asserting that Suntrust assigned its interest in Khan's mortgage to MTGLQ. Attached to the complaint was the assignment of mortgage. In January 2017, the trial court entered an order substituting MTGLQ as plaintiff.

¶ 7 In March 2017, MTGLQ filed motions for an order of default, to dismiss party defendants and for judgment of foreclosure and sale. In April 2017, Khan filed a motion to dismiss plaintiff's mortgage complaint. Khan withdrew that motion a month later. In June 2017,

Khan filed an answer and alleged the affirmative defenses of lack of standing and lack of consideration.

¶ 8 In September 2017, MTGLQ filed motions for summary judgment and for judgment of foreclosure and sale. Attached thereto was an “Affidavit of Amounts Due and Owing” from Michael Bennett, Assistant Secretary of Rushmore Loan Management Services LLC, the servicing agent for Khan’s mortgage. In that affidavit, Bennett swore:

“I have personal knowledge of the facts contained in this affidavit by virtue of my position at RUSHMORE LOAN MANAGEMENT SERVICES LLC and my familiarity with its practices and procedures, with which I am involved on a daily basis as a routine function of my employment. My personal knowledge is also based on my familiarity with the systems of record that RUSHMORE LOAN MANAGEMENT SERVICES LLC uses to create and record information related to residential mortgage loans that it services, including the process by which employees enter information in those systems. I am familiar with these systems as I utilize them on a regular basis as a routine function of my employment, and I am familiar with the process by which employees enter information in those systems, as I have reviewed the training procedures and I am an individual who is authorized and trained to access these records.

It is the regular practice of RUSHMORE LOAN MANAGEMENT SERVICES LLC’s mortgage servicing business to make and update its Servicing Records. If called to testify at trial of this matter, I could competently testify as the facts contained in this affidavit.

RUSHMORE LOAN MANAGEMENT SERVICES LLC acquired the servicing rights for the Defendant's loan on 10/3/16, from SunTrust Mortgage, Inc. At the time of this transfer, the Defendant's loan was in default.

To the extent that the business records of the loan in this matter were created by a prior servicer, and the prior servicer's records for the loan were integrated and boarded into RUSHMORE LOAN MANAGEMENT SERVICES LLC's systems, such that SunTrust's records concerning the Loan are now part of RUSHMORE LOAN MANAGEMENT SERVICES LLC's business records. RUSHMORE LOAN MANAGEMENT SERVICES LLC maintains quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records. It is the regular business practice of RUSHMORE HOME LOAN SERVICES LLC to integrate the prior servicer's records into RUSHMORE LOAN MANAGEMENT SERVICES LLC's business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions. SunTrust's records are integrated and relied upon by RUSHMORE LOAN MANAGEMENT SERVICES LLC as part of RUSHMORE LOAN MANAGEMENT SERVICES LLC's business records.

The amount due is based on my review of the following records: Payment History and MSP. A true and accurate copy of the payment history and any other document I reviewed when making this calculation is attached to this affidavit.

RUSHMORE LOAN MANAGEMENT SERVICES LLC uses MSP to automatically record and track mortgage payments. This type of tracking and accounting program is recognized as standard in the industry. When a mortgage

payment is received, the following procedure is used to process and apply the payment, and to create the records I reviewed: when a payment is received, the payment is input and recorded into MSP which tracks the account activity, including credits for payments, at or near the time the activity occurs. It is RUSHMORE LOAN MANAGEMENT SERVICES LLC's regular practice to make such records and MSP will automatically calculate the amount due under the mortgagor's account. This record is made in the regular course of RUSHMORE LOAN MANAGEMENT SERVICES LLC's business. In the case at bar, the entries reflecting the Defendant's payments were made in accordance with the procedure detailed above, and these entries were made at or near the time the payment was received. MSP accurately records mortgage payments when properly operated. In the case at bar, MSP was properly operated to accurately record Mohammed Aziz Khan's mortgage payments.

Based on the foregoing, Mohammed Aziz Khan failed to pay amounts due under the Note beginning with the payment due on August 1, 2015, and the amount due and owing as of 08/08/2017 is: \* \* \* \$409,802.63."

Attached to the affidavit were approximately 20 pages of records related to Khan's mortgage, dated from September 2013 to July 2017.

¶ 9 Also attached to the motion for summary judgment was a Loss Mitigation Affidavit in which Bennett averred that he reviewed the records related to Khan's mortgage and determined that Khan's mortgage was eligible for several loss mitigation programs. Bennett averred that MTGLQ complied with its obligations under those programs.

¶ 10 Khan filed a response to the motion for summary judgment, arguing that Bennett's affidavits were inadequate. Khan did not file a counter-affidavit. After taking the matter "under advisement," in October 2017, the trial court entered an order for summary judgment in favor of MTGLQ and a judgment for foreclosure and sale. Khan's property was sold in January 2018. In March 2018, MTGLQ filed a motion for an order approving the report of sale and distribution, an eviction order and a personal deficiency judgment. The trial court granted the motion and entered an order approving the report of sale and distribution, confirming the sale, evicting Khan, and entering a personal deficiency judgment against Khan.

¶ 11 ANALYSIS

¶ 12 Khan argues that the trial court erred in granting summary judgment to MTGLQ because Bennett's prove-up affidavit was inadequate. Specifically, he contends that the affidavit did not (1) specify how Bennett developed personal knowledge about Khan's mortgage, or (2) attach all of the necessary documents, specifically records from Suntrust.

¶ 13 Summary judgment is proper when "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 2018). To survive a motion for summary judgment, the nonmoving party need not prove his case but must present some evidence that would arguably entitle him to judgment. *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 13. Summary judgment is "an appropriate mechanism to employ to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt." *Id.* A trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Id.* We also review *de novo* a trial court's ruling

regarding the sufficiency of an affidavit supporting a motion for summary judgment. *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 38 (2015).

¶ 14 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) governs affidavits filed in support of motions for summary judgment. It states in pertinent part:

“Affidavits in support of \* \* \* a motion for summary judgment under section 2-1005 of the Code of Civil Procedure \* \* \* shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all 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).

A party complies with Rule 191 “when the contents of the affidavit are based on the personal knowledge of the affiant and the affiant could competently testify to its contents.” *First Federal Savings and Loan Ass’n of Chicago v. Chicago Title and Trust Co.*, 155 Ill. App. 3d 664, 666 (1987).

¶ 15 An affidavit from an employee of the current mortgagee complies with Rule 191 even if some of the business records relied upon and reviewed by the affiant came from a prior lender. See *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶¶ 46-49; *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶¶ 11-14. It is not necessary for an employee of the prior lender to also prepare an affidavit. *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 49.

¶ 16 When the plaintiff files an affidavit in support of a motion for summary judgment, the court must accept the facts set forth in the affidavit as true unless the defendant files a counter-affidavit that complies with Rule 191. See *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 46; *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶ 31. “The mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment.” *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (1995).

¶ 17 Illinois Supreme Court Rule 113(c) (eff. July 1, 2018) sets forth the requirements for a prove-up affidavit submitted in support of entry of a judgment of foreclosure. It states that such an affidavit shall contain:

“(i) The identity of the affiant and an explanation as to whether the affiant is a custodian of records or a person familiar with the business and its mode of operation. If the affiant is a person familiar with the business and its mode of operation, the affidavit shall explain how the affiant is familiar with the business and its mode of operation.

(ii) An identification of the books, records, and/or other documents in addition to the payment history that the affiant reviewed and/or relied upon in drafting the affidavit, specifically including records transferred from any previous lender or servicer. The payment history must be attached to the affidavit in only those cases where the defendant(s) filed an appearance or responsive pleading to the complaint for foreclosure.

(iii) The identification of any computer program or computer software that the entity relies on to record and track mortgage payments. Identification of the

computer program or computer software shall also include the source of the information, the method and time of preparation of the record to establish that the computer program produces an accurate payment history, and an explanation as to why the records should be considered ‘business records’ within the meaning of the law.” Ill. S. Ct. R. 113(c)(2) (eff. July 1, 2018).

¶ 18 Illinois Supreme Court Rule 236(a) codifies the business-records exception to the hearsay rule and provides as follows:

“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 (eff. Aug. 1, 1992).

¶ 19 Here, Bennett stated in his Affidavit of Amounts Due and Owing that he was an assistant secretary at Rushmore, the servicing agent for Khan’s loan. Bennett stated that he had personal knowledge of Khan’s loan and the practices and procedures Rushmore uses to create and record information about residential mortgage loans. Bennett explained how records from Khan’s prior lender, Suntrust, were integrated into Rushmore’s records. Bennett identified the records he reviewed to create his affidavit. He also explained the systems and procedures used to record mortgage payments at Rushmore, including a program called MSP. According to Bennett, MSP

is a tracking and accounting program recognized as standard in the industry. The records created by Rushmore using MSP are made in the regular course of Rushmore's business, entries are made at or near the time payment is received, and are accurate with respect to Khan's mortgage payments.

¶ 20 Because Bennett's affidavit indicates that it was based on his personal knowledge of Khan's loan, it satisfies Illinois Supreme Court Rule 191. The affidavit also satisfies Rule 113(c)(2) (eff. July 1, 2018) because it sets forth Bennett's familiarity with Rushmore's record-keeping practices, identifies the records Bennett relied on in drafting his affidavit, and identifies the program Rushmore used to record and track mortgage. Finally, Bennett's affidavit establishes that the records attached thereto were maintained in the ordinary course of Rushmore's business and satisfies the foundational requirements for the admission of business records pursuant to Supreme Court Rule 236(a) (eff. Aug. 1, 1992).

¶ 21 We reject Khan's contentions that Bennett's affidavit and supporting documents were insufficient to support the trial court's grant of summary judgment to MTGLQ. First, Khan argues that Bennett failed to specify how he was familiar with Khan's mortgage loan records. We disagree. In his affidavit, Bennett identified himself as an assistant secretary of Rushmore and stated that, as a routine function of his employment, he is involved with creating and recording information related to residential mortgage loans that Rushmore services, including Khan's mortgage loan. The information provided in Bennett's affidavit establishes his personal knowledge of Khan's loan and his familiarity with Rushmore's business and its mode of operation, and, therefore, complies with Supreme Court Rules 190 and 113(c)(2).

¶ 22 Additionally, Khan argues that the documents attached to Bennett's complaint were insufficient because they did not include records from his prior lender, Suntrust. We disagree that

Suntrust's records were necessary to prove that MTGLQ was entitled to summary judgment. As explained by Bennett in his affidavit, Suntrust's records were integrated into and made part of Rushmore's business records. Bennett explained the process of the integration, which ensured the accuracy of Rushmore's records. The records attached to Bennett's affidavit dated back as far as September 2013, well before MTGLQ took over the loan and well before Khan's alleged default in August 2015. Because the records show the balance of Khan's loan and the payments and nonpayments as of the date of default, they are sufficient to support MTGLQ's motion for summary judgment.

¶ 23 Finally, we reject Khan's arguments that Bennett's affidavit was inadequate because Khan failed to submit a counter-affidavit contradicting any of the information contained in Bennett's affidavit. In the absence of a counter-affidavit, the trial court properly relied on Bennett's affidavit and the facts contained therein when entering summary judgment in favor of MTGLQ. See *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 46; *Avdic*, 2014 IL App (1st) 121759, ¶ 31; *Land*, 2013 IL App (5th) 120283, ¶ 17. Based on the evidence presented by MTGLQ and the lack of contradictory evidence from Khan, the trial court properly granted summary judgment to MTGLQ.

¶ 24

#### CONCLUSION

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

¶ 26 Affirmed.