2015 IL App (1st) 142971-U

Appellate Court of Illinois,
First District, Second Division.

JP MORGAN CHASE BANK,
N.A., Plaintiff–Appellee,
v.
William MOORE & Yvonne
Moore, Defendants–Appellants
(Ridgeland Manor Homeowners' Association,
State Bank of Countryside, Unknown Owners,
and Nonrecord Claimants, Defendants).

No. 1–14–2971.
|
Aug. 4, 2015.

Appeal from the Circuit Court of Cook County. No. 08 CH 11441, Jesse G. Reyes, Darryl B. Simko, Judges Presiding.

ORDER

Justice LIU delivered the judgment of the court:

***1** ¶ 1 *HELD:* Judgment and order confirming sale in residential foreclosure case affirmed where: (1) mortgagee's filing of third foreclosure complaint did not violate the single filing rule of section 13–217 of the Code or principles of *res judicata* and collateral estoppel; (2) mortgagor failed to establish the mortgagee's noncompliance with HUD regulations; and (3) mortgagee substantially complied with Rule 114.

¶ 2 Plaintiff, Washington Mutual Bank (WAMU), filed this mortgage foreclosure action against defendants, William and Yvonne Moore (collectively, the Moores), after two previous foreclosure suits were involuntarily dismissed. The Moores moved to dismiss the complaint pursuant to section 2–619 of the Code of Civil Procedure (Code) (735 ILCS 5/2–619 (West 2008)), arguing that WAMU, for the third time, had failed to comply with certain regulations established by the United States Department of Housing and Urban Development (HUD). The circuit court denied the motion to dismiss and request for Rule 304(a) language.

¶ 3 The Moores subsequently filed a counterclaim against Chase, which had substituted in as the party plaintiff, alleging a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)). Chase filed a motion to dismiss the counterclaim, motion for summary judgment, and motion for judgment of foreclosure and sale.

¶ 4 Following a hearing, the circuit court granted relief to Chase on all of the motions; the court dismissed the counterclaim, awarded summary judgment, and entered a judgment of foreclosure and sale. In their motion to reconsider, the Moores argued, for the first time, that Chase had failed to submit a loss mitigation affidavit in compliance with Illinois Supreme Court Rule 114 (eff. May 1, 2013). The court denied the motion to reconsider after allowing Chase to tendered a Rule 114 affidavit. Following the sale of the property, the court approved the sale and granted possession of the property to Chase.

¶ 5 On appeal, the Moores contend that the circuit court erred in denying their motion to dismiss and in granting Chase's motion for summary judgment. First, defendants claim that the foreclosure complaint should have been dismissed where it violated the single filing rule of section 13–217 of the Code (735 ILCS 5/13–217 (West 2008)) and raised claims that were barred by *res judicata* and collateral estoppel. Second, the Moores contend that summary judgment should have been denied where Chase failed to comply with HUD regulations and did not timely file a Rule 114 loss mitigation affidavit. For the following reasons, we affirm.

¶ 6 BACKGROUND

¶ 7 This appeal involves claims and defenses asserted during a ten-year span of three foreclosure actions on the same note and mortgage, which began in March of 2004 and ended in September of 2014. A detailed recitation of the procedural history is necessary for purposes of identifying the claims that the Moores contend are barred by *res judicata* and collateral estoppel.

¶ 8 A.2004 Default on Note

***2** ¶ 9 On May 22, 2002, the Moores executed a promissory note and mortgage on a residential property in favor of the lender and mortgagee, WAMU. The mortgage secured a loan of $237,662 and was insured by HUD. In November 2003, the Moores fell into arrears on their monthly payments, and contacted WAMU in January 2004 about a workout plan. [1]

¶ 10 In February, 2004, WAMU sent the Moores a letter acknowledging "receipt of [the Moores'] financial package requesting consideration of a loan workout." WAMU indicated that it needed the Moores' profit and loss statements for 2003 and the most recent bank statements. The Moores submitted certain documents in response; however, on March 12, WAMU informed the borrowers that it was "terminating [its] review of [the Moores'] request for a loan workout" because of a "missing profit and loss statement." Seeking a clarification as to the "missing profit and loss statement," the Moores called a WAMU settlement specialist and also contacted WAMU's workout office. They eventually left a message for the workout specialist but WAMU subsequently discontinued communications with the Moores.

¶ 11 B.2004 Foreclosure Lawsuit (First)

¶ 12 On March 29, 2004, WAMU filed its first foreclosure complaint, alleging a default on the monthly payment due for November, 2003. The Moores moved to dismiss the complaint pursuant to section 2–619, arguing that WAMU failed to comply with HUD regulations prior to filing the suit. Specifically, the Moores asserted that WAMU failed to: (1) conduct a face-to-face interview, or make a reasonable effort to arrange such an interview; (2) conduct a review of the file to determine compliance with the regulations; and (3) negotiate a repayment plan that took into account the borrowers' circumstances. In its response to the motion to dismiss, WAMU acknowledged its failure to conduct a face-to-face interview.

¶ 13 On November 8, 2004, the circuit court dismissed WAMU's complaint without prejudice, and granted WAMU leave to file an amended complaint.

¶ 14 WAMU did not file an amended complaint, and, instead, asked the Moores for updated income information. The Moores submitted documents that included a workout sheet, bank statements, tax returns, budgets, and pay stubs. WAMU, however, did not reinstate the loan.

C. 2005 Invitation for Face–to–Face Interview

¶ 15 On August 2, 2005, WAMU sent the Moores a "formal written attempt to arrange a face-to-face interview with you in regards to 'Loss Mitigation' settlement options available to you." WAMU requested that the Moores contact one of two designated attorneys to arrange a date and location for the meeting. In response, Mr. Moore sent a letter to both attorneys, informing them that he wanted to arrange a time to meet and had left both of them voice messages. He also stated, "*I hope that I have not been placed in an unfair position, due to the delay and considerable amount of time that has elapsed.*" (Emphasis in original.) After a WAMU attorney suggested arranging a meeting at his office in Northbrook, Illinois, Mr. Moore responded to the request by sending a written communication to WAMU, stating, "Please note and understand that my agreeing to meet with you does not constitute any waiver on our part nor does it represent our acceptance of [WAMU's] purported compliance with the Federal Regulations." He then provided four dates on which he was available to meet.

***3** ¶ 16 On September 6, 2005, WAMU's attorney sent Mr. Moore a letter stating that he had left a message with him "regarding possible dates for the face to face meeting," but had yet to receive a response. He provided three dates on which he was available to meet and stated:

> "If you do not respond within seven days of receipt of this letter, I will assume you no longer wish to participate in the meeting. If that is the case, *Loss Mitigation options are still available to you,* and you may contact Washington Mutual directly to arrange for an application for one of their various settlement options * * *.
>
> It is our position that this communication fulfills all the requirements set forth under the HUD guidelines which you assert as affirmative defenses in your Answer to the complaint to foreclose." (Emphasis in original.)

¶ 17 The Moores claim that they were set to meet with WAMU's counsel after his court call one day; however, when they called, they were informed that counsel had left the area. On a separate occasion, Mr. Moore allegedly drove to Northbrook, but was told by WAMU's counsel that he

could not schedule a meeting that day due to conflicts in his schedule.

¶ 18 D.2005 Foreclosure Lawsuit (Second)

¶ 19 Three months later, on December 28, 2005, WAMU filed its second foreclosure complaint, again alleging default on monthly payments due as of November 2003—the same default that had been alleged in the first suit in 2004. The Moores again moved to dismiss the complaint on the same grounds as they had asserted in their section 2–619 motion in the previous lawsuit. Instead of responding to the motion, WAMU subsequently agreed to the circuit court's entry of an order granting the motion and dismissing the complaint without prejudice.

¶ 20 E.2006 Default and Invitation for Face–to–Face Meeting

¶ 21 On August 28, 2006, WAMU advanced funds to the Moores' account in order to " 'bring the loan within 90 days delinquent' " and reinstated their loan on September 6. According to the Moores, they never received notification of these events.

¶ 22 On September 14, 2006, WAMU sent the Moores a letter stating that their loan on payments due beginning August, 2006 and providing a toll free number for the Moores to call "in order to arrange the necessary face-to-face meeting." In October, the Moores wrote WAMU and requested clarification as to the September 14, 2006 letter. WAMU's attorney responded, by noting that, as of the date of the September letter, the amount due was $4,602.84, which included the amounts for the monthly payments due in August and September of 2006, along with late charges for the two months. In the October, 2006 notice, WAMU again provided a toll-free number to call "in order to arrange the necessary face-to-face meeting" and noted that it was "more than happy to make the trip to your home in order to conduct a face-to-face meeting."

¶ 23 The Moores do not assert that they called the toll-free number or responded to the October notice of default in any manner. On October 13, they filed a complaint with HUD, alleging that WAMU was discriminating against them with respect to the servicing of their loan. WAMU submitted a letter to HUD, explaining that " 'on September 1, 2006 in order to avoid any court argument that it was not entitled to foreclose, [WAMU] advanced payments totaling $85,219 .72 to bring the loan within three installments of being current.' " The HUD action was dismissed on December 27, 2007, for "lack of substantial evidence."

¶ 24 E.2008 Invitation for Face–to–Face Meeting

***4** ¶ 25 In a letter dated January 16, 2008, WAMU informed the Moores that their mortgage was $42,922 in arrears and suggested that the parties schedule a face-to-face meeting. The Moores do not assert that they responded to this letter. Instead, two weeks after the letter, they filed a federal lawsuit against WAMU for violations of the various federal laws.

¶ 26 F.2008—The Third Foreclosure

¶ 27 On March 26, 2008, WAMU filed its third foreclosure complaint against the Moores and other defendants. WAMU alleged that the Moores had defaulted on the monthly payments due beginning in August 2006. In their motion to dismiss the complaint, the Moores argued that prior to commencing the third foreclosure action, WAMU failed to: (1) conduct a face-to-face interview, or make a reasonable effort to conduct such an interview; (2) review its file to determine compliance with HUD regulations; and (3) analyze the Moores' financial situation and develop a repayment plan consistent with their financial circumstances. They later added the arguments that WAMU also violated the single filing rule under section 13–217 of the Code and raised claims that were barred by *res judicata* and collateral estoppel.

¶ 28 Following its substitution as the plaintiff, Chase filed its own response to the motion to dismiss. Chase argued that the 2008 foreclosure complaint was properly before the court because: (1) the single filing rule under section 13–217 did not apply to involuntary dismissals; (2) the Moores' failure to pay the amount due *each* month under the reinstated loan resulted in a new and separate default; and (3) *res judicata* and collateral estoppel did not apply because the prior foreclosure actions were dismissed without prejudice and not on the merits.

¶ 29 With respect to the HUD regulations, Chase argued that the face-to-face meeting requirement did not apply to WAMU because section 203.604 does not require a face-to-face meeting if "[t]he mortgaged property is not within

200 miles of the mortgagee, its servicer, or a branch office of either." 24 C.F.R. § 203.604(c)(2). According to Chase, HUD has interpreted "branch office" to mean "servicing office" and "[b]ecause the closest [WAMU] servicing office is nearly 900 miles from Chicago, the Bank was *not* required to meet personally with defendants." (Emphasis in original.) As support, Chase attached the affidavit of Phillip Gioeli, a WAMU manager, who averred that WAMU maintained only three loan serving centers and they were located in California, Florida, and South Carolina.

¶ 30 At the hearing on July 13, 2009, Chase's attorney argued that despite its attempts to arrange a meeting with the Moores, the result was "missed meetings" and the Moores' desire "to blame foreclosure counsel after agreeing to do this." The court asked what "affirmative actions" the Moores took to "ensure that this meeting would take place." Counsel for the Moores replied that Mr. Moore "went to the courthouse here at least two or three times," according to his affidavit; however, upon arriving at the courthouse, the bank's attorney "would either be gone or it would be inconvenience for him, things of that nature."

***5** ¶ 31 After considering both sides' arguments, the circuit court denied the Moores' motion to dismiss and their request for Rule 304(a) language. First, the court ruled that the single filing rule did not apply in this case because the dismissals in the first and second foreclosure actions were "court ordered" and "doesn't cause a triggering event under 735 ILCS 5/13–217." Second, the court determined that WAMU did not violate the HUD regulations requiring a face-to-face meeting. Explaining its ruling, the court stated:

> "These were meetings that were suggested, encouraged by the Court. And in compliance with that, the Court's request or recommendation, foreclosure Counsel sought to have these meetings. The meetings never actually took place. * * * [B]eyond [William Moore's] affidavit, we don't have any objective criteria or material to look at in terms of what these meetings were supposed to accomplish."

¶ 32 Following the denial of their motion, the Moores filed a counterclaim, alleging that a violation of the Consumer Fraud Act. Chase moved to dismiss the counterclaim.

¶ 33 Six months later, in April, 2010, the Moores filed their answer and affirmative defenses. They asserted that Chase had: (1) failed to comply with the face-to-face meeting requirement; (2) failed to review its file to determine compliance with HUD regulations; (3) failed to deal fairly and in good faith with them; (4) failed to comply with paragraph 10(d) of the Mortgage agreement, which declined to authorize a foreclosure "if not permitted by regulation of the [HUD] Secretary"; and (5) violated the single filing rule of section 13–217.

¶ 34 On December 3, 2012, Chase filed a motion for summary judgment and for a judgment of foreclosure on its complaint. Counsel for the Moores subsequently withdrew from representation in this case and the Moores were given an additional month to respond to the summary judgment motion and the hearing was scheduled a month after this briefing deadline.

¶ 35 On July 15, 2013, the date of the hearing on the summary judgment motion, the Moores presented an emergency motion seeking additional time to file their response to the motion, asserting that they had only recently learned of their counsel's withdrawal from the case. Mr. Moore, an attorney licensed to practice in Illinois, represented both of the Moores at this hearing. The court denied the emergency request for an extension, and then granted Chase's motion for summary judgment and motion to dismiss the counterclaim. A judgment of foreclosure and sale was also entered on that date.

¶ 36 The Moores moved for reconsideration and argued, additionally, that Chase had failed to file a loss mitigation affidavit pursuant to Rule 114 when it brought its summary judgment motion. Chase then filed a loss mitigation affidavit on October 30, 2013, notwithstanding its argument that it had filed its motion prior to the effective date of Rule 114 (May 1, 2013). The court denied the motion to reconsider and also denied the request for Rule 304(a) language.

***6** ¶ 37 At the judicial sale, Chase was the successful bidder and purchased the property for $143,880. On September 4, 2014, the court entered the orders approving the sale and granting possession to Chase. The Moores timely appealed.

¶ 38 ANALYSIS

¶ 39 The Moores raise the following contentions: (1) that the third foreclosure complaint should have been dismissed because it violated the single filing rule of section 13–217 of the Code and raised claims that were barred by *res judicata* and collateral estoppel; (2) that the third foreclosure complaint should have been dismissed and that summary judgment was not appropriate because Chase failed to comply with applicable HUD regulations; and (3) that Chase's motion for summary judgment should have been denied for failure to timely submit a Rule 114 loss mitigation affidavit. We address each of these issues in turn.

¶ 40 B. Section 13–217 of the Code

¶ 41 The Moores initially argue that the circuit court erred in denying their motion to dismiss where the third foreclosure complaint violated the single filing rule of section 13–217 of the Code. The circuit court found that section 13–217 did not apply to "court ordered" dismissals. According to the Moores, there is a "long history of case law on this subject," and courts have routinely interpreted section 13–217 "to mean that a Plaintiff only has one right to refile an action arising out of the same core of operative facts."

¶ 42 Chase responds that it was not barred from refiling the foreclosure suit under section 13217 because the prior two foreclosure complaints were both involuntarily dismissed. Chase, like the circuit court, interprets section 13–217 as applying only to voluntary dismissals. Chase maintains that the cases cited by the Moores are inapposite because they do not involve prior involuntary dismissals. Finally, Chase argues that a new cause of action arose with each missed payment by the Moores, *i.e.* that there was a continuing default, and that section 13–217 does not apply for that reason as well.

¶ 43 A section 2–619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga,* 223 Ill.2d 49, 59 (2006). We review *de novo* the circuit court's ruling on a section 2–619 motion to dismiss. *Id.*

¶ 44 Section 13–217 of the Code provides:

> "In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff * * * may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue." 735 ILCS 5/13–217 (West 2008).

***7** Our supreme court has ruled that "section 13–217 expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *Flesner v. Youngs Development Co.,* 145 Ill.2d 252, 254 (1991). "The purpose of section 13–217 * * * is to facilitate the disposition of litigation upon the merits and to avoid its frustration upon grounds that are unrelated to the merits." *Gendek v. Jehangir,* 119 Ill.2d 338, 343 (1988).

¶ 45 We agree with Chase that section 13–217 has no applicability in this case. Contrary to the Moores' claim, the single filing rule of section 13–217 is not triggered by any and all dismissals, regardless of type. In *Suslick v. Rothschild Securities Corp.,* 128 Ill.2d 314, 321 (1989), the supreme court held that the appellate court erred in measuring the one-year refiling period of section 13–217 from the date that the plaintiff's previous action was dismissed under section 2619(a)(3) of the Code. In reaching its conclusion, the supreme court explained that this "ground for dismissal is not of the type set out in section 13–217 which gives rise to a right to refile within one year." *Id.*

¶ 46 Here, the first and second foreclosure actions were involuntarily dismissed pursuant to section 2–619 of the Code based on WAMU's failure to comply with the applicable HUD regulations. Like in *Suslick,* neither dismissal was of the type set out in section 13–217. Thus, that section has no applicability under the circumstances. The authority cited by the Moores is inapposite, as each case involved a dismissal of the type set forth in section 13–217. See *Timberlake v.*

Illini Hospital, 175 Ill.2d 159, 164 (1997) (prior version of section 13–217 triggered by plaintiff's voluntary dismissal); *Flesner,* 145 Ill.2d at 253–54 (section 13–217 triggered when plaintiffs' first complaint was dismissed by a federal district court for lack of jurisdiction); *Rockford Mutual Insurance Co. v. Blaase,* 246 Ill.App.3d 498, (1993) (prior version of section 13–217 triggered by plaintiff's voluntary dismissal); *Koffski v. Village of North Barrington,* 988 F.2d 41, 42–43, 45 (7th Cir.1993) (same). We thus find the Moores' reliance on section 13–217 unavailing.

¶ 47 C. *Res Judicata* and Collateral Estoppel

¶ 48 The Moores next argue that the third foreclosure complaint should have been dismissed on the grounds of *res judicata* and/or collateral estoppel. They do not discuss the requirements of either of these affirmative defenses; rather, they merely assert that "the three cases all arose out of the same nucleus of facts."

¶ 49 Chase argues that the prior foreclosure actions did not have any preclusive effect because they were entered without prejudice. Chase also argues that collateral estoppel cannot be applied here because the first two dismissal orders "did not specify which HUD servicing requirements were the subject of the orders, or what reasoning was applied by the courts in each case."

***8** ¶ 50 "*Res Judicata* is an equitable principle intended to prevent multiple lawsuits between the same parties involving the same facts and issues." *Langone v. Schad, Diamond & Shedden, P.C .,* 406 Ill.App.3d 820, 832 (2010). It operates as a bar to "subsequent actions when a final judgment was reached on the merits by a court of competent jurisdiction between their same parties or privies on the same cause of action." *Id.* For *res judicata* to apply, "the moving party must demonstrate (1) an identity of the parties or their privies in the two lawsuits; (2) an identity to the causes of action; and (3) a final judgment on the merits of the first lawsuit." *Id.*

¶ 51 The Moores have failed to demonstrate that the third foreclosure complaint was barred by principles of *res judicata.* Specifically, the Moores' failed to establish the second element: an identity of the causes of action filed in the three foreclosure suits. The record shows that on August 28, 2006, after the second foreclosure complaint was dismissed, and before the third foreclosure complaint was filed, WAMU advanced funds on the Moores' account and brought their loan within 90 days delinquent. WAMU then reinstated the Moores' loan on September 6, 2006. The Moores did not make their monthly payments for August 2006 or any month thereafter. Under our caselaw, each of these missed payments constituted a new cause of action. *Thread & Gage Co., Inc. v. Kucinski,* 116 Ill.App.3d 178, 184 (1983) ("The general rule is that where a money obligation is payable in installments, a separate cause of action arises on each installment and the statute of limitations begins to run against each installment as it becomes due.") The third foreclosure complaint asserted a default "for the period August 2006 through the present." It thus asserted a new cause of action, independent of the cause of action raised in the prior two foreclosure complaints, which asserted a default date of November 2003. Under the circumstances, we find the doctrine of *res judicata* to be inapplicable.

¶ 52 The Moores claim that the third foreclosure complaint should have also been dismissed based on principles of collateral estoppel. Although the Moores note that collateral estoppel bars the relitigation of issues decided in earlier proceedings, they have not identified what issue or fact Chase should have been collaterally estopped from asserting. Their argument amounts to a conclusion that collateral estoppel applies.

¶ 53 "A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented." *Thrall Car Manufacturing Co. v. Lindquist,* 145 Ill.App.3d 712, 719 (1986). We are "not a depository in which the appellant may dump the burden of argument and research." *Id.* We find that the Moores have waived their collateral estoppel claim by failing to present us with a cohesive legal argument. Ill. S.Ct. R. 341(h)(7) (eff.Feb.6, 2013).

¶ 54 D. Compliance with HUD Regulations

***9** ¶ 55 The Moores next contend that the court should have dismissed the third foreclosure complaint and denied summary judgment to Chase on the grounds that Chase failed to comply with the applicable HUD regulations. They argue that Chase: (1) failed to comply with the face-to-face meeting requirement of 24 C.F.R. § 203.604; (2) failed to perform a monthly evaluation as required by 24 C.F.R. § 203.605; and (3) failed to perform a pre-foreclosure review in accordance with 24 C.F.R. § 203.606.

¶ 56 We initially decline to consider the Moores' arguments in the context of reviewing the order granting Chase's motion for summary judgment. Section 2–619(d) of the Code states that "[t]he raising of any of the [listed grounds for dismissal] by motion under this Section does not preclude the raising of them subsequently by answer *unless the court has disposed of the motion on its merits.*" (Emphasis added.) 735 ILCS 5/2–619(d) (West 2012). Here, the court ruled on the merits of the above arguments—*i.e.,* the failure to comply with HUD regulations and violation of the single filing rule of section 13–217—when it denied the Moores' section 2–619 motion to dismiss. The Moores were therefore precluded from raising those arguments in their answer as affirmative defenses. Because these arguments were not properly the subject of summary judgment, we consider only whether the court erred in granting the Moores' section 2–619 motion to dismiss.

¶ 57 In *Bankers Life Co. v. Denton,* 120 Ill.App.3d 576, 579 (1983), this court found "that the mortgagee must comply with [sections 203.604 and 203.606] prior to the commencement of a foreclosure proceeding." We held that a mortgagee's "failure to comply with these servicing regulations which are mandatory and have the force and effect of law can be raised in a foreclosure proceeding as an affirmative defense." *Id.*

¶ 58 Chase argues that WAMU was not subject to the face-to-face meeting requirement of section 203.604 because: (1) it did not maintain a "branch office" within 200 miles of the mortgaged property,[2] and (2) the Moores clearly indicated that they would not cooperate in the interview.

¶ 59 Section 203.604 states that "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." 24 C.F.R. § 203.604(b). However, a face-to-face meeting is not required if "[t]he mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either" (24 C.F.R. § 203.604(c)(2)), or if "[t]he mortgagor has clearly indicated that he will not cooperate in the interview" (24 C.F.R. § 203.604(c)(3)).

¶ 60 The parties devote most of their argument to whether the 200–mile exception to the face-to-face meeting requirement applies. We, however, find the second exception dispositive of this issue; that is, we find that the Moores clearly indicated that they would not cooperate in any interview with WAMU, thereby excusing WAMU from the face-to-face meeting requirement. We reject the Moores' argument that Chase has waived any argument regarding their lack of cooperation by failing to raise that argument in the circuit court. At the hearing on the Moores' motion to dismiss, counsel for Chase alerted the court to William Moores' stand-offish behavior in response to WAMU's attempt to schedule a meeting. The record shows that the court also had the Moores' lack of cooperation on its mind. At one point, it went out of its way to ask counsel for the Moores about the affirmative actions taken by William Moore to ensure that a meeting would take place. Given the comments by counsel for Chase and the court, we cannot say that Chase has waived its argument that the Moores were unwilling to cooperate.

***10** ¶ 61 For purposes of our analysis, we consider only those events occurring after the Moores' default in August 2006, which gave rise to the third foreclosure complaint that WAMU filed on March 26, 2008. It is this default which would have triggered WAMU's duty to attempt a face-to-face interview under the applicable HUD regulations. See 24 C.F.R. § 203.604(b)

¶ 62 The record shows that on September 14, 2006, WAMU sent the Moores a letter informing them of their August 2006 default and providing them with a toll free number to call "in order to arrange the necessary face-to-face meeting." The Moores apparently never called this number. Rather, on October 4, 2006, the Moores wrote WAMU requesting clarification of the September 14, 2006 letter. Then, on October 13, 2006, the Moores filed a complaint with HUD alleging discrimination by WAMU. On November 2, 2006, an attorney for WAMU sent a written response to the Moores noting the default and again providing the toll free number to call "in order to arrange the necessary face-to-face meeting." In his letter, counsel for WAMU noted that WAMU was "more than happy to make the trip to your home in order to conduct a face-to-face meeting." The Moores do not claim that they called the number or that they responded in any other fashion. Over one year later, on December 27, 2007, the Moores' HUD complaint was dismissed for "lack of substantial evidence." On January 16, 2008, WAMU wrote the Moores a third time that their mortgage was still in arrears and that it wanted to schedule a face-to-face meeting. Again, the Moores do not claim that they responded; instead, on January 28, 2008, they filed a federal lawsuit against WAMU.

¶ 63 Based on the communications (and, to some extent, the lack of communications) between the parties after the

August 2006 default, the record supports a finding that the Moores did not engage in acts consistent with an intent to cooperate in a face-to-face interview with WAMU. As early as September 2006, WAMU reached out to the Moores to inform them of their August 2006 default and to schedule a face-to-face meeting. The record shows no effort by the Moores to respond. Over the course of the next year or so, WAMU sent the Moores two more letters in an attempt to schedule a face-to-face meeting. Again, the Moores appear to have made no effort to respond. The record shows that, in lieu of responding to WAMU, the Moores filed two complaints against WAMU, one with HUD and one in federal court. The Moores' failure to respond, coupled with their commencement of additional proceedings against WAMU during the time that WAMU communicated its attempts to arrange a face-to-face meeting, can only be interpreted as indicia of an unwillingness to commit to such a meeting. There is nothing in the record to demonstrate that the Moores were unaware of WAMU's attempts to schedule a meeting or that they attempted to respond to WAMU's invitation for a meeting, prior to the filing of the third foreclosure complaint on March 26, 2008.

***11** ¶ 64 Under the circumstances presented in the record, we cannot say that WAMU was noncompliant with section 203.604 under the circumstances presented in the record. WAMU was not required to hold a face-to-face meeting, or make a reasonable effort to hold such a meeting, when the mortgagors had so clearly indicated that they had no intention of cooperating. 24 C.F.R. § 203.604(c)(3); United States Department of Housing & Urban Development Handbook 4330.1 Rev–5, Ch. 7–7(C)(4)(c) (noting that the " 'face-to-face interview rule' ' does not apply when "the mortgagor will not cooperate").

¶ 65 The Moores argue that WAMU also did not comply with 24 C.F .R. § 203.605 and 24 C.F.R. § 203.606. According to the Moores, "the record is void of evidence" showing a monthly evaluation as required by 24 C.F.R. § 203.605, and a pre-foreclosure review in accordance with 24 C.F.R. § 203.606. The Moores have not cited any authority showing that Chase is required to submit evidence of a monthly evaluation pursuant to 24 C.F.R. § 203.605, or any evidence that Chase did not perform such a monthly evaluation. We therefore find this issue to be waived. Ill. S.Ct. R. 341(h)(7); *Thrall Car Manufacturing,* 145 Ill.App.3d at 719. As for WAMU's alleged failure to conduct a pre-foreclosure review in accordance with 24 C.F.R. § 203.606, it appears this claim is based solely upon the fact that WAMU did not conduct a face-to-face meeting with the Moores. Because we have found that WAMU was excused from conducting such a meeting, this claim must be rejected. In sum, the Moores have failed to show WAMU's noncompliance with the applicable HUD regulations. We conclude that the circuit court did not err in denying the Moores' motion to dismiss.

¶ 66 E. Loss Mitigation Affidavit

¶ 67 The Moores finally contend that the court erred in entering a judgment of foreclosure where Chase did not first provide a loss mitigation affidavit in compliance with Illinois Supreme Court Rule 114 (eff. May 1, 2013). Rule 114, which became effective on May 1, 2013, requires the plaintiff to file a loss mitigation affidavit "prior to moving for a judgment of foreclosure ." Chase argues that it was not required to file a Rule 114 loss mitigation affidavit because it moved for a judgment of foreclosure prior to the effective date of Rule 114.

¶ 68 The committee comments to Rule 114 state:

> "The affidavit required is intended to apply to all judgments on or after the effective date of the rule, no matter the foreclosure filing date. Because the affidavit must be filed prior to the entry of a foreclosure judgment, *the effective date requires application to any case where a judgment of foreclosure has not yet been entered.* Thus, although a case may already have been filed prior to the effective date of Rule 114, the Rule would apply if a judgment of foreclosure has not yet been entered." (Emphasis added.) Ill. S.Ct. R. 114, Committee Comments (adopted Apr. 8, 2013).

***12** Because the court granted summary judgment to Chase on July 15, 2013, after the effective date of Rule 114, Chase was required to file a loss mitigation affidavit prior to obtaining its summary judgment of foreclosure.

¶ 69 Although Chase did not strictly comply with Rule 114, we do not believe that reversal of summary judgment is warranted. The record shows that Chase eventually filed a loss mitigation affidavit after the Moores raised the issue in their amended motion to reconsider. We find that substantial compliance with the rule was enough in this case. This court recently observed that Rule 114 is "not written in mandatory terms." *Wells Fargo Bank, N.A. v. Simpson,* 2015 IL App (1st) 142925, ¶ 37. We stated:

> "The 'enforcement section specifically notes that the court 'may,' rather than 'shall' deny entry of a foreclosure judgment if the rule is not satisfied. Ill. S.Ct. R. 114(d)

(eff. May 1, 2013). Although the rule serves the important purpose of helping * * * mortgagors in the difficult current financial environment, we find that the rule's use of the word 'may' demonstrates that it is directory rather than mandatory such that it allows some room for judicial discretion regarding its enforcement." *Id.*

We agree with the *Simpson* court that Rule 114 allows for some discretion by the circuit court. Here, we find that summary judgment should not be reversed where Chase eventually filed a loss mitigation affidavit, albeit an untimely one.

¶ 70 CONCLUSION

¶ 71 Upon our review of the record, we find no reason to vacate the court's July 13, 2009 order denying the Moores' motion to dismiss the complaint or the July 15, 2013 orders granting Chase's motion to dismiss the counterclaim, motion for summary judgment and motion for judgment of foreclosure and sale.

¶ 72 The 2008 foreclosure complaint did not violate the single filing rule of section 13–217 and was not otherwise barred under the principles of *res judicata* or collateral estoppel. Additionally, Chase did not violate the HUD regulations. Finally, Chase's failure to file a Rule 114 affidavit prior to the court's entry of judgment of foreclosure and sale does not warrant a vacatur of the orders granting summary judgment and judgment of foreclosure and sale, because the court had discretion to consider the Rule 114 affidavit that Chase subsequently filed.

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

¶ 74 Affirmed.

All Citations

Not Reported in N.E.3d, 2015 IL App (1st) 142971-U, 2015 WL 4640421

Footnotes

1 On January 9, 2004, WAMU sent a letter to the Moores, stating that it was denying their application for Homeowner's Assistance due to insufficient income.

2 Because WAMU was the mortgagee during the relevant time period, Chase properly addresses whether WAMU had a branch office within the relevant geographic area.