

## **APPELLATE COURT REJECTS CHALLENGE TO FORECLOSURE BASED ON ALLEGED HAMP NON-COMPLIANCE**

The Illinois Appellate Court, First District, recently affirmed a trial court's denial of a borrower's motion to vacate a default judgment of foreclosure and sale, rejecting the borrower's argument that the mortgagee failed to comply with certain Home Affordable Modification Program (HAMP) guidelines.

A copy of the opinion is available at: [Link to Opinion](#).

In January 2007, the borrower executed a mortgage in the amount of \$360,000, which was later assigned to the mortgagee. In December 2008, the mortgagee filed a complaint seeking to foreclose due to default beginning in August 2008.

The mortgagee amended the complaint in February 2009, and the trial court allowed service by publication after several personal service attempts failed. In May 2009, the mortgagee moved for default judgment as the borrower neither answered the complaint nor appeared. The mortgagee provided an affidavit stating that \$398,386 was due and owing as of September 2009, and the trial court granted the motion and entered a judgment of foreclosure and sale of the property.

In June 2012, the mortgagee moved to vacate the judgment of foreclosure "due to an [undisclosed] error." However, in July 2012, the mortgagee withdrew its motion without prejudice. Two days later, the borrower entered an appearance through counsel.

No further action was taken until April 2013, when the mortgagee again moved for entry of an order of default and judgment of foreclosure and sale. The April 2013 affidavit in support stated that the amount due and owing was now \$487,094. After the borrower failed to file an answer, the trial court granted the motion and entered judgment of foreclosure and sale in favor of the mortgagee.

In August 2013, the trial court granted the mortgagee's motion to set aside the default judgment of foreclosure and sale entered in September 2009 nunc pro tunc to April 2013, the date the court granted default judgment for the second time.

In September 2013, the borrower moved to vacate the order of default and filed an amended motion in October 2013, alleging: 1) the borrower qualified for a HAMP loan modification in 2010 and other loss mitigation programs; 2) the mortgagee informed him that his loan was still active as of 2013; 3) the judgment amount was wrongly inflated; 4) the mortgagee lacked standing; and 5) judgment was

erroneously entered on the mortgagee's original complaint when an amended complaint had been filed. Finally, the borrower argued that the mortgagee's motion for the nunc pro tunc order did not comply with the requirements for notice under Illinois Supreme Court Rules 12, 131 (eff. Jan. 4, 2013), and Rule 105 (eff. Jan. 1, 1989).

In December 2013, after briefing, the trial court denied the borrower's motion to vacate the default judgment.

After several months of back and forth of scheduling judicial sales and stays of the sale, the sale was held in June 2014. In November 2014, the trial court granted the mortgagee's motion to confirm sale, holding that the mortgagee did not "establish that this property was sold in material violation of any of the HAMP regulations." The borrower then appealed.

On appeal, the borrower challenged the trial court's denial of his motion to vacate the April 2013 default judgment brought pursuant to 2-1301(e) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1301(e) (West 2012)).

In evaluating a section 2-1301(e) motion, the trial court considers the moving party's due diligence and the existence of a meritorious defense. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27.

The Appellate Court noted that it was the borrower's burden, **as appellant, to provide a sufficiently complete record to support a claim of error, and in the absence of that record, the Appellate Court must presume that the trial court's order conformed to the law and had a sufficient factual basis.** *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

The First District found that the borrower did not provide a report of proceedings of the hearing on the motion to vacate nor a sufficient substitute. Because the record did not reflect the reasons the trial court denied the motion to vacate, the Appellate Court held the borrower could only prevail if he demonstrated that he was entitled to have the default judgment vacated as a matter of law.

The First District held that the borrower failed to meet that burden because a number of the debtor's contentions of error were patently frivolous, such as omission of attorney's phone number on motion for default. The First District additionally held that none of the alleged errors mandated the conclusion that the trial court abused its discretion or otherwise erred in denying the borrower's motion to vacate.

The last basis of the borrower's appeal was his challenging the order confirming the sale. Section 15-1508(d-5) of the **Illinois Mortgage Foreclosure Law provides that a sale shall be set aside if the mortgagor proves "by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program \* \* \* and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale."** 735 ILCS 5/15-1508(d-5) (West 2012).

The borrower alleged that the mortgagee "illegally revoked" a loan modification under HAMP in 2010. **Under HAMP guidelines, "[b]orrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent modification." Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages 46 (Aug. 19, 2010).** Despite allegedly making timely payments during his trial period, the borrower claimed he was denied a permanent modification.

The Appellate Court initially noted that the borrower failed to demonstrate that the decision to deny a permanent loan modification prevented the judicial sale of a foreclosed property, as **HAMP guidelines require the suspension of a sale only where a HAMP application is pending.** But here, the borrower abandoned his argument that a HAMP application was pending at the time of the judicial sale.

But, more importantly, the First District held that the borrower did not meet his burden to show that the mortgagee's denial of a permanent modification was contrary to HAMP guidelines.

In the borrower's motions to stay the sale, he never alleged that he had satisfied HAMP's trial period requirements. The Appellate Court noted that the borrower never provided the trial court with a copy of his HAMP application or any documents from the mortgagee establishing the terms on which his loan had been approved. Therefore, the Court held that pursuant to the HAMP guidelines, the mortgagee was not required to make the modification permanent.

Accordingly, the Appellate Court affirmed the trial court's orders entering the default judgment of foreclosure and confirming the sale because the borrower failed to sustain his burden to demonstrate any HAMP violations that would have precluded confirmation of the judicial sale.