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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-22-786

PATRICIA ANN BETZINGER AND
STEVEN MICHAEL BETZINGER
APPELLANTS

V.

U.S. BANK, N.A., AS TRUSTEE FOR
MANUFACTURED HOUSING
CONTRACT SENIOR/SUBORDINATE
PASS-THROUGH CERTIFICATE TRUST
1997-3, AS SERVICER

APPELLEE

Opinion Delivered May 29, 2024

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. 23CV-17-1150]

HONORABLE SUSAN WEAVER,
JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

This is an appeal from appellee U.S. Bank's action seeking to obtain possession of property occupied by appellant Patricia Betzinger that U.S. Bank had foreclosed under the Statutory Foreclosure Act (codified at Ark. Code Ann. §§ 18-50-101 et seq. (Repl. 2015 & Supp. 2023)). The trial court granted U.S. Bank summary judgment on its claim for possession of the property and on Mrs. Betzinger's counterclaims. Mrs. Betzinger now appeals, arguing that the order of summary judgment should be reversed because U.S. Bank failed to strictly comply with the provisions of the Statutory Foreclosure Act. Specifically, Mrs. Betzinger argues that U.S. Bank failed to strictly comply with Ark. Code Ann. § 18-50-104(a)(3)(A) (Repl. 2015), which provides:

(a) The trustee or mortgagee may not sell the trust property unless:

....

(3)(A)(i) The beneficiary or mortgagee has certified to its trustee or attorney-in-fact under § 18-50-102 that each mortgagor, grantor, or obligor who applied for loan modification or forbearance assistance has been notified that the mortgagor, grantor, or obligor does not meet the criteria for loan modification or forbearance assistance under any program offered by:

(a) The beneficiary or mortgagee; or

(b) A government agency if the beneficiary or mortgagee participates in the government agency's program.

(ii) *The notice shall be sent to the property address or mailing address of the mortgagor, grantor, or obligor by certified and first-class mail at least ten (10) business days before the sale.*

(Emphasis added.) Mrs. Betzinger contends that there was a lack of strict compliance because there is no evidence in the record that the above-referenced notice was mailed to her by certified and first-class mail. For the reasons explained herein, we affirm.

Our summary-judgment standard is well settled. Summary judgment may be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Greenlee v. J.B. Hunt Transp. Servs.*, 2009 Ark. 506, 342 S.W.3d 274. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *McGrew v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 371 Ark. 567, 268 S.W.3d 890 (2007). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Greenlee, supra*. However, if the moving

party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Moses v. Bridgman*, 355 Ark. 460, 139 S.W.3d 503 (2003). On appellate review, this court determines if summary judgment was appropriate by deciding whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Greenlee, supra*. We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Mrs. Betzinger acquired the property at issue, located at 13 Lawrence Road in Greenbrier, in 1997. She obtained a loan from Green Tree Financial Services Corporation to finance her purchase, and she executed a mortgage against the property to secure the loan's repayment. The mortgage was later assigned to U.S. Bank.

U.S. Bank recorded a notice of default and intention to sell on May 8, 2017, providing notice that the property would be sold at a foreclosure sale on July 7, 2017. This notice was mailed to Mrs. Betzinger on June 2, 2017, and Mrs. Betzinger received the notice and was aware of the foreclosure sale date.

On June 6, 2017, Mrs. Betzinger submitted a hardship letter and loan-mitigation application. The record contains a letter addressed to Mrs. Betzinger and dated June 16, 2017, wherein the Bank purported to notify Mrs. Betzinger that she was not eligible for loan modification. However, as conceded by U.S. Bank both below and on appeal, there is no

evidence in the record that this notice was sent to Mrs. Betzinger by both certified and first-class mail.

The foreclosure sale was held on July 7, 2017, and U.S. Bank purchased the property at the sale. U.S. Bank subsequently demanded that Mrs. Betzinger and all other occupants vacate the property. They did not.

On September 19, 2017, U.S. Bank filed a complaint in unlawful detainer seeking possession of the property. On October 3, 2017, Mrs. Betzinger filed an answer wherein she alleged, among other things, that she never received a letter pertaining to loan modification or forbearance assistance. On October 30, 2017, Mrs. Betzinger filed a counterclaim against U.S. Bank raising multiple claims, including fraud, breach of contract, and breach of fiduciary duty. U.S. Bank filed an answer to Mrs. Betzinger's counterclaim on November 30, 2017, denying each of Mrs. Betzinger's allegations. U.S. Bank filed a motion for summary judgment on Mrs. Betzinger's counterclaim on April 5, 2018.

Mrs. Betzinger filed an amended counterclaim on April 24, 2018.¹ In the amended counterclaim, Mrs. Betzinger argued that U.S. Bank had failed to strictly comply with the provisions of the Statutory Foreclosure Act because it failed to send her notice by both certified and first-class mail at least ten days before the foreclosure sale, informing her that she did not meet the criteria for loan modification or forbearance assistance as required by Ark. Code Ann. § 18-50-104(a)(3)(A)(ii). In her counterclaim, Mrs. Betzinger also added

¹Mrs. Betzinger's amended counterclaim incorporated by reference her original counterclaim.

claims for slander of title, deceptive trade practices, outrage, and abuse of process, asserting that U.S. Bank had failed to follow the mandatory notice requirements and that it had conducted an unlawful sale. U.S. Bank filed an answer to Mrs. Betzinger's amended counterclaim on May 14, 2018, and an amended answer to the amended counterclaim on February 22, 2019. In U.S. Bank's amended answer to the amended counterclaim, it admitted that it could not prove it had sent Mrs. Betzinger notice—by both certified and first-class mail—that she did not meet the criteria for loan modification or forbearance assistance.

On June 24, 2021, U.S. Bank filed a second motion for summary judgment wherein it moved for summary judgment on its claim for possession of the property and on Mrs. Betzinger's counterclaims. In its summary-judgment motion, U.S. Bank relied on the General Assembly's recent enactment of Act 1108 of 2021, which substantially amended Ark. Code Ann. § 18-50-116 of the Statutory Foreclosure Act. Arkansas Code Annotated section 18-50-116 as amended by Act 1108 now provides, in pertinent part:

- (d) Nothing in this chapter shall be construed to:
 - (1) Create an implied right of redemption in favor of any person; or
 - (2)(A) Impair the right of any person or entity to assert his or her legal and equitable rights in a court of competent jurisdiction.
 - (B) However, a claim or defense shall be asserted prior to the sale or the claim or defense is forever barred and terminated, except the mortgagor may assert the following against either the mortgagee or trustee:
 - (i) Fraud by any party; or
 - (ii) Failure to strictly comply with the provisions of this chapter.

(C) Any of the above claims or defenses may not be asserted against a subsequent purchaser for value of the property.

(D) *Any claims or defenses for a violation of subdivision (d)(2)(B)(ii) of this section shall be asserted within thirty (30) days of the foreclosure sale to ensure the finality of sales that substantially comply with this chapter.*

(Emphasis added.) The 2021 amendment added subdivision (d)(2)(D), italicized above, which mandates that a claim for failure to strictly comply with the provisions of this subchapter be asserted within thirty days of the foreclosure sale. See Act 1108 of 2021, § 2. Moreover, the legislative-intent section of Act 1108 states:

(3) It is the intent of the General Assembly that this act be applied to all foreclosure sales held since the enactment of Act 885 of 2011 as that act created consumer protection obligations on the parties availing themselves of the Statutory Foreclosure Act of 1987.

Act 1108 of 2021, § 1(3). Additionally, the Act states, “This act applies retroactively to March 31, 2011.” *Id.* § 3. In its second summary-judgment motion, U.S. Bank asserted that the foreclosure sale was held on July 7, 2017, and that Mrs. Betzinger did not raise any claim that U.S. Bank failed to strictly comply with the provisions of the Statutory Foreclosure Act until October 3, 2017, at the earliest, when she filed her answer to U.S. Bank’s complaint in unlawful detainer. U.S. Bank asserted that because Act 1108 and the thirty-day limitation period prescribed therein was made retroactive to March 31, 2011, and Mrs. Betzinger raised no claim regarding U.S. Bank’s alleged failure to strictly comply with the Statutory Foreclosure Act within thirty days of the foreclosure sale, her challenge in this regard was untimely and therefore barred.

On May 17, 2022, Mrs. Betzinger filed a response to U.S. Bank’s second motion for summary judgment. In her response, Mrs. Betzinger noted that U.S. Bank had not produced any evidence that it had complied with Ark. Code Ann. § 18-50-104(a)(3)(A)(ii) by sending her a notice by certified and first-class mail informing her that she did not meet the criteria for loan modification or forbearance assistance. Mrs. Betzinger also denied U.S. Bank’s allegation that this claim was time-barred and argued that

[t]he Bank asserts in its motion that the Betzinger’s claims are time barred by the retroactive application of Ark. Code Ann. § 18-50-116 stating, “Any claims or defenses for a violation of subdivision (d)(2)(B)(ii) of this section shall be asserted within thirty (30) days of the foreclosure sale to ensure the finality of sales that substantially comply with this chapter.” This section would apply if a proper statutory foreclosure had been conducted. However, as discussed above, this sale did not comply with the requirements of the statutory foreclosure act and is thus void. Void means void. . . . Here, the Bank seeks to utilize the date of a purported sale to start the clock on what is in effect, a 30-day statute of repose. But the purported sale is a nullity; it is unable, in law, to support the purpose for which it was intended. Therefore, such an event may not now be used to shield the Bank from liability for its conduct.

On May 31, 2022, U.S. Bank replied to Mrs. Betzinger’s response and argued:

[Mrs. Betzinger’s] argument that the foreclosure failed to strictly comply with the statutory foreclosure act is time-barred. The act requires most challenges be raised before a foreclosure sale occurs, but allows “a claim or defense” based on “fraud by any party or failure to strictly comply with the provisions of this act” be raised “within thirty (30) days of the foreclosure sale.” A.C.A. §§ 18-50-116(d)(2)(B), (D). While [Mrs. Betzinger] recognizes this is the law, she nevertheless claims the rule does not apply because the foreclosure “did not comply with the requirements of the statutory foreclosure act.” The general assembly clearly expressed its intent to reject this illogical and circular reasoning to “establish a date of finality in real property sales to avoid creating a cloud on title to real property in the State of Arkansas.” Act 1108, § 1(1), 93rd General Assembly (reg.) 2021. Courts “cannot construe Arkansas’ statutory law in such a way as to render it meaningless” or “interpret a statute to yield absurd results that are contrary to legislative intent.” *Shipley, Inc. v. Long*, 359 Ark. 208, 218, 195 S.W.3d 911, 917 (2004).

On June 7, 2022, the trial court held a hearing on U.S. Bank's second motion for summary judgment. At the hearing, U.S. Bank argued that pursuant to Act 1108 of 2021 and its retroactive application to 2011, Mrs. Betzinger's challenge to the foreclosure sale based on a lack of strict compliance was time-barred because it was not asserted within thirty days of the foreclosure sale. Mrs. Betzinger argued:

In our briefing, I cited to a case, *Henson v. Fleet Mortgage*, [319 Ark. 491, 892 S.W.2d 250 (1995)]. And, in that case, they say you've got to construe the statute strictly. And that when there is a violation of one of these prerequisites, the sale is void. Not voidable, not subject to being set aside, it's a nullity.

....

Now, [U.S. Bank] argues that it's kind of all for naught because this statute has been amended. And he's right, the statute in this case was amended. And this, I believe, is in § 18-50-116, where previously there was a bar to claims already in the statute. And what it said was that after the sale, everyone's claims are barred related to the sale or otherwise. However, that is not true in cases of fraud or failure to strictly comply with the statute. And that makes sense because those are bases for a sale being void. For example, the § 104 that we were talking about is about all the notices a person is supposed to receive.

....

[O]ur contention is a sale never occurred.

....

And so even though the statute was amended to say that claims are barred thirty days after the foreclosure sale took place, it's our contention that when there's a void sale, it's a nullity. . . . And so, our position is the bank's interpretation is absurd. It would lead to absurd consequences and offer borrowers no recourse.

On August 18, 2022, the trial court entered an order granting U.S. Bank summary judgment on its claim for possession of the property and on Mrs. Betzinger's counterclaims.

The trial court found that before the Statutory Foreclosure Act was amended by Act 1108 of 2021, statutory foreclosures that did not strictly follow notice requirements were considered void. However, the 2021 amendment to section 18-50-116 now requires violations of the Statutory Foreclosure Act to be asserted within thirty days of the foreclosure sale to ensure the finality of sales that substantially comply with the subchapter. The trial court found that there was no dispute that Mrs. Betzinger’s counterclaims were brought more than thirty days after the foreclosure sale, that Mrs. Betzinger’s counterclaims and defenses were barred by Ark. Code Ann. § 18-50-116(d)(2)(D), and that U.S. Bank’s motion for summary judgment should be granted.

Mrs. Betzinger now appeals from the summary judgment entered in favor of U.S. Bank. Mrs. Betzinger argues that the summary judgment should be reversed because U.S. Bank failed to strictly comply with Ark. Code Ann. § 18-50-104(a)(3)(A)(ii) when it did not provide her notice by certified and first-class mail—at least ten days before the foreclosure sale—that she did not meet the criteria for loan modification or forbearance assistance. With respect to Act 1108 of 2021 and its retroactivity clause, Mrs. Betzinger argues that the retroactive application of the Act deprived her of her right to due process.²

We hold that Mrs. Betzinger’s argument provides no ground for reversal on appeal. Before Act 1108 of 2021 was enacted, a mortgagor could challenge a foreclosure sale that

²In her opening brief, Mrs. Betzinger also raised a point arguing that the presiding judge “possibly wasn’t familiar with the whole case.” However, in her reply brief, Mrs. Betzinger conceded that this point “is not an issue.” Because this argument has been withdrawn, we need not address it.

did not strictly comply with the Statutory Foreclosure Act, and there was no express time limitation to make such a claim. See *Brown v. Fed. Home Loan Mortg. Co.*, 2013 Ark. App. 574, 430 S.W.3d 125 (stating that the statutory framework of Ark. Code Ann. § 18-50-116 made it clear that legal or equitable rights must be asserted before a foreclosure sale is held or the claim will be forever barred or terminated, except in cases where fraud or the failure to strictly comply with the applicable statutory provision can be established). However, Act 1108 amended Ark. Code Ann. § 18-50-116 to include the following provision:

Any claims or defenses for a violation of subdivision (d)(2)(B)(ii) of this section [failure to strictly comply with the provisions of this chapter] shall be asserted within thirty (30) days of the foreclosure sale to ensure the finality of sales that substantially comply with this chapter.

Ark. Code Ann. § 18-50-116(d)(2)(D) (Supp. 2023). And Act 1108 provides that it applies retroactively to March 31, 2011, which was long before the foreclosure sale was held in this case. Because Mrs. Betzinger undisputedly did not assert that U.S. Bank had failed to strictly comply with the provisions of this chapter within thirty days of the foreclosure sale, Mrs. Betzinger's challenge was time-barred pursuant to the provisions of section 18-50-116(d)(2)(D) and the retroactive application of Act 1108.

We acknowledge that, for the first time on appeal, Mrs. Betzinger challenges the constitutionality of Act 1108, arguing that the retroactive application of the Act denied her due process. However, we cannot address this argument because this constitutional challenge was not raised below. This court has stated many times that we will not consider arguments raised for the first time on appeal, and even constitutional arguments must be

raised below. *Newton v. State of Ark., Off. of Child Support Enforcement*, 2013 Ark. App. 53; see also *Sutton v. Fields*, 2024 Ark. App. 46, 683 S.W.3d 593 (stating that we will not consider arguments raised for the first time on appeal, even constitutional arguments, because doing so deprives the trial court of the opportunity to fully develop the issue). In Mrs. Betzinger’s response to U.S. Bank’s summary-judgment motion, she acknowledged that the thirty-day period for contesting a violation of strict compliance—per Act 1108 of 2021—“would apply if a proper statutory foreclosure had been conducted,” but she did not argue that retroactive application of this provision was unconstitutional. That being so, we need not address Mrs. Betzinger’s constitutional challenge on appeal.³

Having reviewed the record and Mrs. Betzinger’s arguments on appeal, we conclude that she has not identified any reversible error in the proceedings below. Accordingly, we affirm.

Affirmed.

VIRDEN and GLADWIN, JJ., agree.

Patricia Ann Betzinger and *Stevem Michael Betzinger*, pro se appellants.

³After the record was lodged in this case and after Mrs. Betzinger’s opening brief was filed, our supreme court delivered *Alpe v. Federal National Mortgage Ass’n*, 2023 Ark. 58, 662 S.W.3d 650. In *Alpe*, the supreme court declared, upon certification of the question from the United States District Court for the Eastern District of Arkansas, that Act 1108 of 2021 cannot be constitutionally applied retroactively to a mortgagor who has initiated a claim for strict compliance. However, this ruling is of no consequence in this appeal because the mortgagor in *Alpe* challenged the constitutionality of the retroactive application of Act 1108 in the trial court, whereas Mrs. Betzinger failed to raise such a constitutional challenge in the trial court. Thus, Mrs. Betzinger’s constitutional argument is not preserved.

Akerman, LLP, by: *Christy S. Hawkins*, for appellee.