

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FIRSTMERIT BANK, N.A., as Assignee)	
of the FDIC, receiver for Midwest Bank)	
and Trust Company,)	
)	
Plaintiff,)	Case No. 12 C 9567
v.)	
)	Judge Joan B. Gottschall
ANTIOCH BOWLING LANES, INC.,)	
et al,)	
)	
Defendants.)	

ORDER

Plaintiff's motion for summary judgment [30] is granted. For details, see below. Parties are to appear for a status hearing on 9/10/2013 at 9:30AM.

STATEMENT

In this foreclosure action, Plaintiff FirstMerit Bank, N.A. ("FirstMerit"), as Assignee of the FDIC, which is the receiver for Midwest Bank and Trust Co. ("Midwest Bank"), has moved for summary judgment against Defendants Antioch Bowling Lanes, Inc., Joseph Sterbenz, and Kenneth Sterbenz (collectively "Defendants"), pursuant to Federal Rule of Civil Procedure 56, and for entry of a judgment of foreclosure and an order of sale. FirstMerit contends that the undisputed facts demonstrate that Defendants have failed to pay the amounts due under a commercial loan guaranteed by Joseph Sterbenz. The court agrees and grants the motion.¹

I. LEGAL STANDARD

Summary judgment is appropriate when the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009). The court ruling on the motion construes all facts and makes all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is called for when the nonmoving party cannot establish an essential element of its case on which it will bear the burden of proof at trial. *Kidwell v. Eisenhower*, 679 F.3d 957, 964 (7th Cir. 2012).

¹ The court previously granted FirstMerit's motion for a default judgment against defendant Chicago Title Land Trust Company and granted defendant Morning Dew Exteriors, Inc.'s motion for leave to file its answer to the complaint. Thus, this order affects only three of the defendants named in the complaint.

II. FACTS

The following facts are undisputed for purposes of the motion for summary judgment. On or about May 14, 2010, Midwest Bank, the original lender in this case, was closed by bank regulatory authorities. The FDIC, in its capacity as receiver for Midwest Bank, sold certain assets of Midwest Bank to FirstMerit, including the Note, Mortgage, Commercial Guaranty, and other loan documents that are the subject of this action. FirstMerit is a federally-chartered national banking association with its main office in Ohio. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because FirstMerit is a citizen of Ohio, and Defendants are citizens of states other than Ohio. The amount in controversy exceeds \$75,000.

The borrower under the loan documents was Antioch Bowling Lanes, Inc., an Illinois corporation that operates as a bowling alley. On or about September 24, 2007, Antioch Bowling Lanes executed and delivered to Midwest Bank a Note in the original principal amount of \$1,034,736.03. FirstMerit is now the owner of the Note. The Note is secured by a Mortgage dated September 24, 2002, that was recorded in Lake County, Illinois on October 10, 2002.

Joseph Sterbenz, a citizen of Florida, guaranteed the amounts due from Antioch Bowling under the loan. On or about September 24, 2007, Joseph Sterbenz executed and delivered to Midwest Bank a Commercial Guaranty, in which he guaranteed and promised to pay to Midwest Bank all amounts due to it from Antioch Bowling Lanes.

The complaint also names Kenneth Sterbenz as a defendant and seeks to terminate his interest in, lien on, or right to possess the mortgaged real estate. FirstMerit names only Antioch Bowling Lanes and Joseph Sterbenz as defendants who are personally liable for a deficiency, however. (Compl., ECF No. 1.) Kenneth Sterbenz is a citizen of Illinois.

The Note matured by its express terms on September 24, 2012. Upon maturity of the Note, FirstMerit demanded payment from Antioch Bowling Lanes and Joseph Sterbenz of all amounts due and owing under the Note. Antioch Bowling Lanes and Joseph Sterbenz failed to pay the Note in full and remain in default under the terms of the Note, Guaranty, and related loan documents.

FirstMerit filed a complaint against Defendants on November 30, 2012, alleging claims for mortgage foreclosure and breach of the Note and Guaranty. In their answer to the complaint, Defendants raised no defenses to their default under the loan documents or to the foreclosure of the mortgage. As a result of the admitted default, the following amounts are due to FirstMerit:

Principal:	\$946,737.78
Interest: (Per Diem after 5/6/2013: \$295.85)	\$75,829.51
Late Fees:	\$61,346.78
Total:	\$1,083,914.07

Pursuant to the Mortgage and Note, FirstMerit is also entitled to recover attorneys' fees, costs, and expenses incurred in enforcing the terms of the Mortgage and Note. As of April 30, 2013, FirstMerit incurred \$37,811.00 in fees and \$1,170.65 in costs while being represented by Thompson Coburn LLP.

Although Defendants concede the truth of the facts stated above, they argue that, under Illinois law, FirstMerit must file a Loss Mitigation Affidavit before obtaining a judgment of foreclosure. As of July 7, 2013, when Defendants filed their Response to the motion for summary judgment, FirstMerit had not filed such an affidavit with the court, and had not informed Defendants whether they were eligible for a loss mitigation program. On July 23, 2013, however, FirstMerit filed a Loss Mitigation Affidavit executed by Michael Hayes, an Executive Vice President of FirstMerit. (Affidavit, ECF No. 43.) The Hayes affidavit states that the Loan is not eligible for review or modification under the Home Affordable Modification Program, the Home Affordable Refinance Program, or other programs available from FirstMerit because it is not a consumer loan, and the mortgaged property is not residential real estate. (*Id.*)

III. ANALYSIS

The sole issue raised by Defendants in opposition to First Merit's motion for summary judgment is that FirstMerit failed to file a Loss Mitigation Affidavit before obtaining a judgment of foreclosure. Defendants point to a new rule issued by the Illinois Supreme Court, Rule 114, applicable to all actions filed under the Illinois Mortgage Foreclosure Law. The new rule requires a mortgagee to file an affidavit prior to, or in connection with, a motion for judgment of foreclosure. The affidavit must state that the mortgagee has complied with the requirements of any applicable loss mitigation programs that apply to the loan. The rule applies to pending foreclosure actions in which a judgment has not yet been entered. *See* Committee Comments, Illinois Supreme Court Rule 114, at http://www.state.il.us/court/supremecourt/rules/Art_II/ArtII.htm#113.

The parties agree that this action is governed by the Illinois Mortgage Foreclosure Law. Although Rule 114 went into effect on May 1, 2013, after FirstMerit's complaint was filed, a judgment of foreclosure has not yet been entered against Defendants. Assuming that foreclosure actions proceeding in federal court must comply with Illinois Supreme Court Rule 114, an issue the court need not reach, a Loss Mitigation Affidavit is required in this case.

Defendants, however, have complied with Rule 114. As explained above, a loss mitigation affidavit was filed on July 24, 2013, explaining that applicable loss mitigation programs apply to residential properties and consumer loans, and that this action involves a commercial foreclosure. The court concludes that the filing of the affidavit has rendered the issue raised by Defendants moot.

The undisputed facts demonstrate that Antioch Bowling Lanes and Joseph Sterbenz failed to pay the Note in full and remain in default under the terms of the Note, Guaranty, and related loan documents. The court concludes that no genuine issue of material fact exists as to

Defendants' liability to FirstMerit. FirstMerit's motion for summary judgment is therefore granted.

IV. CONCLUSION

FirstMerit's motion for summary judgment against Defendants Antioch Bowling Lanes, Inc., Joseph Sterbenz, and Kenneth Sterbenz is granted. The case remains pending against defendant Morning Dew Exteriors, Inc.

DATED: August 6, 2013

 /s/
JOAN B. GOTTSCHALL
United States District Judge