

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 120117-U

NO. 4-12-0117

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 19, 2012
Carla Bender
4th District Appellate
Court, IL

MORTON COMMUNITY BANK, an Illinois State)	Appeal from
Bank,)	Circuit Court of
Plaintiff-Appellee,)	Macoupin County
v.)	No. 10L45
S&M PROPERTY MANAGEMENT, LLC, RAJIV K.)	Honorable
SHAH, MEDHAVI R. SHAH, GHANSHYAM K.)	Patrick J. Londrigan,
MEHTA, and SHITAL G. MEHTA,)	Judge Presiding.
Defendants-Appellants.)	

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's order granting summary judgment where no genuine issue of material fact remained that Morton was the holder and owner of the promissory note and entitled to enforce it.

¶ 2 On May 2, 2006, Citizens National Bank (Citizens) made a loan to defendants, S&M Property Management, LLC (S&M), Rajiv K. Shah, Medhavi R. Shah, Ghanshyam K. Mehta, and Shital G. Mehta. Defendants and Citizens entered into a promissory note in the principal amount of \$150,000. In May 2009, Morton Community Bank (Morton) acquired assets from Citizens, including the promissory note between defendants and Citizens.

¶ 3 In November 2010, Morton sued defendants to recover on the promissory note. Morton filed a motion for summary judgment, which the trial court later granted.

¶ 4 Defendants appeal, arguing that the trial court erred by granting Morton's motion

for summary judgment because (1) Morton did not establish it was entitled to enforce the promissory note; (2) the affidavit Morton submitted in support of its motion for summary judgment relied upon documents that were not attached to the affidavit in violation of Illinois Supreme Court Rule 191 (amended eff. July 1, 2002); and (3) a genuine issue of material fact existed as to whether the promissory note was among the loans for which Morton was reimbursed by the Federal Deposit Insurance Corporation (FDIC). Because we agree that no genuine issue of material fact remained as to Morton's ability to enforce the promissory note, we affirm.

¶ 5

I. BACKGROUND

¶ 6 In June 2010, Morton sent defendants a letter, informing them that it had acquired "certain assets" of Citizens, including a promissory note defendants entered into with Citizens. Morton indicated that defendants were in default on the note and that Morton was exercising its right to accelerate the balance on the loan. Morton demanded payment in full in the amount of \$41,057.56.

¶ 7 In November 2010, Morton sued defendants. In its verified complaint, Morton alleged that on May 2, 2006, defendants and Citizens entered into a promissory note in the amount of \$150,000. Morton attached a copy of the note to its complaint. Morton alleged that it had acquired the note from Citizens and was the present owner and holder of the note. Morton further asserted that defendants had "failed, neglected and refused to make payment" of the indebtedness. Morton requested judgment on the note, demanding a principal payment of \$40,291.82, interest of \$1,742.18, additional interest at a rate of 10.25% until judgment, and \$275 in late fees, as well as attorney fees and costs and other fees and costs as provided in the

note.

¶ 8 In January 2011, defendants filed an unverified answer to the complaint, admitting that they entered into a promissory note with Citizens. Defendants, however, said they were "without sufficient information or knowledge to either admit or deny" whether (1) Morton had acquired the note from Citizens and (2) Morton was the present owner and holder of the note, and therefore they "den[ied] the same." Defendants also denied they were in default on the note. As an affirmative defense, defendants alleged Morton's claims were "barred by equitable doctrines of *laches*, estoppels [*sic*] and/or waiver."

¶ 9 In August 2011, Morton filed a motion for summary judgment and the affidavit of Keith Johnston, the Senior Vice-President of Morton, in support of its motion. Johnston averred that Morton acquired "certain assets" of Citizens, including the promissory note entered into by defendants and Citizens. Johnston attached a copy of an "FDIC Asset Transfer Agreement" (FDIC agreement) to his affidavit.

¶ 10 In January 2012, defendants filed a memorandum in opposition to the motion for summary judgment. Defendants alleged it was impossible for the trial court to determine from the record before it that (1) Morton had acquired the promissory note from Citizens and (2) Morton had not been reimbursed by the FDIC on the note. Defendants also asserted that Johnston's affidavit, which averred that Morton was the owner of the note, was "merely a conclusion of law given the factual questions raised," and thus, a genuine issue of material fact existed as to whether Morton was the holder and could enforce the note.

¶ 11 On January 5, 2012, the trial court granted Morton's motion for summary judgment. The court found that no genuine issues of material fact existed and that Morton was

entitled to judgment against defendants. The court ordered defendants to pay Morton \$62,422.62—principal in the amount of \$40,291.82; accrued interest of \$8,349.50; late charges of \$435; and attorney fees and costs and other fees and costs in the amount of \$13,346.30. The court also imposed postjudgment interest at a rate of 9% until the judgment was satisfied.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendants appeal, arguing the trial court erred in granting Morton's motion for summary judgment because (1) Morton did not establish that it was entitled to enforce the promissory note; (2) the affidavit Morton submitted in support of its motion for summary judgment relied upon documents that were not attached to the affidavit in violation of Illinois Supreme Court Rule 191; and (3) a genuine issue of material fact existed as to whether the note was among the loans for which Morton was reimbursed by the FDIC.

¶ 15 In response, Morton argues that (1) it demonstrated it was entitled to enforce the promissory note; (2) the trial court did not err by relying on the affidavit; and (3) the note was not included in the loans reimbursed by the FDIC. We address each of the parties' contentions in turn.

¶ 16 A. Summary Judgment and the Standard of Review

¶ 17 Summary judgment is appropriate 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 2010). A plaintiff must present some evidence, but need not prove his case, to support his cause of action during a summary judgment proceeding. *Ross v. Dae Julie*,

Inc., 341 Ill. App. 3d 1065, 1069, 793 N.E.2d 68, 71 (2003). Our review of the trial court's judgment is *de novo*. *Ross*, 341 Ill. App. 3d at 1069, 793 N.E.2d at 71.

¶ 18 B. Holder Status

¶ 19 Defendants first argue that Morton failed to establish it is the present holder and owner of the promissory note. Defendants contend that Morton did not show that Citizens transferred the note to Morton as part of the FDIC agreement. According to the FDIC agreement, schedule 3.1 was supposed to contain a list of certain categories of assets being purchased under the agreement. Schedule 3.1, however, does not contain a list. Instead, schedule 3.1 says "See Attached Lists." However, no lists are attached to schedule 3.1. Thus, defendants posit, because the note was not specifically listed in the FDIC agreement, it was impossible for the court to determine whether the note was included among the assets Morton purchased from Citizens.

¶ 20 Morton responds that it is the current owner and holder of the promissory note. Morton asserts that the language of the FDIC agreement provided that every asset of Citizens was transferred to Morton. Moreover, Morton contends, because schedule 3.2 contains a schedule of assets, which lists without limitation, "[l]oans," it is implied that the note was included in the transferred assets. Morton also argues, notwithstanding the FDIC agreement, defendants admitted their signatures on the note and Morton produced the note, thus entitling Morton to collect judgment on the note.

¶ 21 Whether Morton was a holder, and entitled to enforce the promissory note, is not dependent on language of the FDIC agreement and whether the agreement affirmatively shows a transfer of defendant's note from Citizens to Morton. The possession of a negotiable note is *prima facie* evidence that the possessor is the owner, and a plaintiff claiming to be a holder does

not have to prove his status in court. *Leopold v. Halleck*, 106 Ill. App. 3d 386, 389, 436 N.E.2d 29, 31 (1982). When the signatures on a negotiable note are admitted, production of the instrument entitles a holder to recover on it "unless the defendant proves a defense or claim in recoupment." 810 ILCS 5/3-308(b) (West 2010). Once the defendant presents a defense that challenges the holder's status, it is only then that the holder will have to prove it is entitled to judgment on the note. *Leopold*, 106 Ill. App. 3d at 390, 436 N.E.2d at 32.

¶ 22 In this case, Morton alleged that it was the owner and holder of the promissory note. At the time of the filing of its complaint, Morton was in possession of the promissory note, which it produced for the court. In their answer, defendants admitted they "made, executed, and delivered" the note to Citizens and that the copy of the note attached to Morton's complaint was a "true and accurate copy." Defendants' signatures appear on the copy of the note contained in the record—the same copy that defendants admitted was a "true and accurate copy." Thus, defendants admitted their signatures and, once Morton produced the note, it was entitled to enforce the note unless defendants presented a claim or defense in recoupment.

¶ 23 Accordingly, we agree that Morton made a *prima facie* showing of its holder status. However, that does not end our inquiry. Thus, we turn to whether defendant presented a valid defense to Morton's holder status and whether summary judgment was appropriate.

¶ 24 C. Rule 191 and the Affidavit

¶ 25 Defendants next argue that the trial court erred by considering the affidavit of Johnston when it granted Morton's motion for summary judgment. Defendants maintain that Morton has the burden of establishing that the note was transferred from Citizens to Morton. Defendants argue that the only evidence Morton presented in support of this factual issue was

the affidavit of Johnston, and that affidavit was not properly filed under Rule 191 because Morton failed to attach supporting documents to the affidavit. See Ill. S. Ct. R. 191(a) (amended eff. July, 1 2002) (affidavits in support of a motion for summary judgment must have "attached thereto sworn or certified copies of all papers upon which the affiant relies").

¶ 26 Morton responds that (1) it was not required to show that Citizens transferred the promissory note to Morton and (2) it did provide supporting documentation establishing it is the current owner and holder of the note. We agree with Morton.

¶ 27 The record on appeal shows Morton attached supporting documentation to its affidavit. In the affidavit, Johnston averred that Morton "acquired certain assets of Citizens, including the note" and that Morton is the current owner and holder of the note. Morton attached a copy of the FDIC agreement to the affidavit, and incorporated the agreement by reference therein. Thus, Morton complied with Rule 191.

¶ 28 We further note that defendants take issue with this documentation for the same reasons previously discussed—namely, that schedules 3.1 and 3.2 identify "loans" in general as transferred assets, as opposed to specifically identifying the original promissory note between defendants and Citizens. Defendants urge this court to find that such documents are not adequate proof that Morton is the owner of the note and entitled to enforce the note. However, as we have concluded, Morton does not have "the burden of establishing that the note was transferred," as defendants maintain. To enforce the note, Morton was only required to show that the signatures were admitted and that it was in possession of the note, both of which it established. Thus, regardless of Morton's compliance with Rule 191, Morton made a *prima facie* showing of its holder status.

¶ 29

D. FDIC Reimbursement

¶ 30 Having decided that Morton made a *prima facie* showing that it was a holder, we address whether defendants established a valid defense to Morton's holder status—namely, that Morton has already been paid on the promissory note—and whether the trial court erred by granting summary judgment in light of defendants' defense.

¶ 31 Defendants argue that the trial court erred by granting Morton's motion for summary judgment because it was impossible to determine from the pleadings whether Morton had already been paid on the promissory note. Thus, defendants contend, Morton should not be allowed to recover on the note a second time if it has already been reimbursed.

¶ 32 In support of their argument, defendants point to section 4.15 of the FDIC agreement. Section 4.15 states that the FDIC would reimburse Morton for loss-sharing on certain loans. Section 4.15 further states that those loans that were to be reimbursed by the FDIC were identified on schedules 4.15A and 4.15B. However, schedules 4.15A and 4.15B state "[t]o [b]e [p]rovided at a [l]ater [d]ate," and thus are not helpful, as they did not show the notes for which Morton had been reimbursed. Defendants argue that without a list identifying specific loans, it was impossible for the trial court to determine whether the FDIC reimbursed Morton on defendant's promissory note, and summary judgment was therefore improper.

¶ 33 Morton maintains that summary judgment was appropriate because defendants had the burden of establishing a defense—that the note had already been paid by the FDIC—and they did not. We agree that defendants do have the affirmative duty of establishing payment, and they have failed to do so. See *Tuttle v. Rose*, 102 Ill. App. 3d 865, 867, 430 N.E.2d 356, 358 (1981) (where executor of estate found promissory note between the defendant and decedent in

decedent's safety deposit box and sued the defendant to enforce the note, the defendant had the burden of proving any defense, including payment, by a preponderance of the evidence).

¶ 34 Defendants did not submit any evidence that the promissory note has already been paid. Defendants merely speculated that the FDIC paid Morton on the promissory note. Mere speculation "that a genuine issue of fact exists without presenting any statement of fact" to contradict the movant's version of events is not enough to overcome summary judgment. *Peltz v. Chicago Transit Authority*, 31 Ill. App. 3d 948, 951, 335 N.E.2d 74, 77 (1975). Thus, the trial court properly granted summary judgment.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.