

No. 1-13-1605

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).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

URBAN PARTNERSHIP BANK, as successor	)	
in interest to SHOREBANK,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	Appeal from the
JEAN THIMOT,	)	Circuit Court of
	)	Cook County.
Defendant-Appellant,	)	
	)	12 CH 29092
and	)	
	)	The Honorable
CHICAGO TITLE LAND TRUST COMPANY,	)	Alfred M. Swanson, Jr.,
successor to LASALLE BANK, N.A., as Trustee	)	Judge Presiding.
U/T/A dated February 12, 1998 and known as	)	
Trust No. 123832-04; YANICK THIMOT;	)	
UNKNOWN OWNERS AND NON-RECORD	)	
CLAIMANTS,	)	
	)	
Defendants.	)	

JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

**ORDER**

¶ 1 HELD: The circuit court did not err in entering an order appointing a receiver for the property in foreclosure. (1) Plaintiff bank was entitled to enforce the terms of the mortgages for the property

in foreclosure because it was the successor in interest to the original lender and the lack of standing of plaintiff is an affirmative defense which was not proven by the defendants. (2) The order appointing a receiver also was not void due to the court's striking of the co-defendant's motion for substitution of judge as of right off the call. The defendant did not have standing to assert the rights of his co-defendant regarding the co-defendant's motion for substitution of judge as of right.

¶ 2

## BACKGROUND

¶ 3 On July 30, 2012, plaintiff, Urban Partnership Bank, filed a complaint to foreclose two mortgages on a commercial building located at 7403-05 S. Euclid Ave., Chicago, Illinois. The complaint alleged that defendant, Jean Thimot, and his wife, co-defendant Yanick Thimot, defaulted on the mortgages. The original mortgagee of the mortgages was ShoreBank. On August 20, 2010, ShoreBank was closed by the Illinois Department of Financial and Professional Regulation and the Federal Deposit Insurance Corporation (FDIC) was named receiver. Plaintiff entered into a purchase and assumption agreement with the FDIC as receiver for ShoreBank and assumed the mortgages and notes at issue in this case. All right, title, and interest in and to the assets of ShoreBank were transferred and assigned to plaintiff by the FDIC.

¶ 4 Defendant Jean Thimot was served with a summons and complaint on August 1, 2012. The Law Offices of Arnold H. Landis, P.C., filed an appearance on his behalf on August 21, 2012. Defendant Yanick Thimot was served via substitute service when a copy of the summons and complaint was left with her husband, Jean Thimot.

¶ 5 Plaintiff filed a motion to appoint a receiver on August 20, 2012. On October 19, 2012, a briefing schedule was entered and a hearing was set for December 6, 2012. Defendant Jean Thimot filed his response to plaintiff's motion to appoint a receiver on November 9, 2012. On December 6, 2012, the trial court denied plaintiff's motion to appoint a receiver, without prejudice.

¶ 6 On December 5, 2012, defendant Jean Thimot filed his motion for substitution of judge as of right. The motion was noticed for February 25, 2013. On February 5, 2013, plaintiff filed its objection to

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defendant's motion for substitution of judge as of right. Then, on or about February 25, 2013, defendant Jean Thimot withdrew his motion for substitution of judge as of right.

¶ 7 Meanwhile, on February 4, 2013, plaintiff filed its motion for leave to file a second amended complaint, which was filed on May 3, 2013, as well as an amended motion to appoint a receiver.

¶ 8 Defendant Yanick Thimot, Jean Thimot's wife, filed her separate motion for substitution of judge as of right on May 1, 2013,

¶ 9 On May 10, 2013, the court granted plaintiff's amended motion to appoint a receiver. That same date, the court struck Yanick Thimot's motion for substitution of judge as of right because Yanick Thimot had not yet filed an appearance and was not properly before the court.

¶ 10 Defendant Jean Thimot appeals the order granting plaintiff's motion to appoint a receiver on two grounds: (1) that plaintiff is not authorized to take possession of the property by the terms of the mortgages; and (2) that the order appointing the receiver is void because defendant Yanick Thimot's motion for substitution of judge as of right was improperly stricken. We hold neither of these arguments has merit, and we affirm the order appointing a receiver.

¶ 11 ANALYSIS

¶ 12 I. Plaintiff's Authority to Take Possession of the Property

¶ 13 Defendant first argues that the order appointing a receiver was erroneously entered because plaintiff is not authorized to take possession of the property. An order appointing a receiver is appealable pursuant to Illinois Supreme Court Rule 307(a)(2). Ill. S. Ct. R. 307(a)(2) (eff. Feb. 26, 2010). Plaintiff is the current owner of the mortgage and thus is the mortgagee as defined by the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2012). See 735 ILCS 5/15-1208 (West 2012). Under the Mortgage Foreclosure Law, "a mortgagee is entitled to be placed in possession of the property prior to the entry of a judgment of foreclosure upon request, provided that the mortgagee shows (1) that

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the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010). A receiver shall be appointed "unless the mortgagor presents 'good cause' to remain in possession." *Asset Guaranty Reinsurance Co. v. American National Bank & Trust Co. of Chicago*, 254 Ill. App. 3d 713, 720 (1993).

¶ 14 Here, plaintiff is authorized under the terms of the mortgages to have a receiver appointed as it is the successor in interest to the original lender, ShoreBank. Where a note has been delivered to a subsequent lender with the intent to transfer title, the party in possession of the note is the owner of the instrument and is entitled to enforce it. The transfer of an instrument "whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." 810 ILCS 5/3-203(b) (West 2012). A mortgage note is transferred when it is delivered by a person other than the mortgagor for the purpose of giving the transferee the right to enforce the note. 810 ILCS 5/3-203(a) (West 2012). Transfer of an instrument, without endorsement, vests in the transferee any right of the transferor to enforce the instrument, regardless of whether the transfer gives rise to a negotiation of the instrument. See 810 ILCS 5/3-203, Comment 2 (West 2012) ("If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer.").

¶ 15 The mortgages define "Lender" as: "ShoreBank, its successors and assigns." The terms of each of the transferred mortgages state, "this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns." Pursuant to the terms of the mortgages, "Lender shall have the right to be placed as mortgagee in possession or to have a receiver appointed to take possession of all or any part of the Property." Plaintiff, as successor to ShoreBank, has the right to have a receiver appointed.

¶ 16 Plaintiff does not need to allege any facts to establish its standing under the mortgages because

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standing is an affirmative defense. See *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004) ("[L]ack of standing is an affirmative defense."). Plaintiff followed the form complaint set forth in the Mortgage Foreclosure Law and pled its capacity under paragraphs 3(n) and 19(n) of its second amended complaint. Plaintiff has also provided to both the trial court and the defendant with the FDIC documents which establish that it is the successor in interest to the FDIC and ShoreBank. Under the Mortgage Foreclosure Law, nothing further is required of plaintiff.

¶ 17 Rather, it is defendant's burden to prove plaintiff's lack of standing, and defendant has failed to prove that plaintiff is not the proper successor in interest to the mortgages.

¶ 18 II. Order Striking Motion for Substitution of Judge As Of Right

¶ 19 Defendant also argues that the order appointing the receiver is void because defendant Yanick Thimot's motion for substitution of judge as of right was improperly stricken, and any order entered after an improper denial of a motion for substitution of judge as of right is void.

¶ 20 Motions for substitution of judge as of right are governed by section 2-1001(a)(2) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1001(a)(2) (West 2012). Under section 2-1001(a)(2) of the Code, a litigant is allowed one substitution of judge without cause as of right only as follows:

"(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

(iii) If any party has not entered an appearance in the case and has not been found in

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default, rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party." 735 ILCS 5/2-1001(a)(2) (West 2010).

¶ 21 Orders entered after a motion for substitution of judge has been improperly denied are void.

*Illinois Licensed Beverage Ass'n, Inc. v. Advanta Leasing Services*, 333 Ill. App. 3d 927, 932 (2002) (citing *Jiffy Lube International, Inc. v. Agarwal*, 277 Ill. App. 3d 722, 727 (1996), *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 336 (2002)). The right to substitution of judge is absolute when properly made, and the circuit court has no discretion to deny the motion. *Cincinnati Ins. Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23 (citing *In re Marriage of Abma*, 308 Ill. App. 3d 605, 609-10 (1999)). "Since the trial court has no discretion to deny a proper motion for substitution of judge as of right, the issue of whether there has been a ruling on a substantial issue in the case presents a question of law and our review is *de novo*." *Illinois Licensed Beverage Ass'n, Inc. v. Advanta Leasing Services*, 333 Ill. App. 3d 927, 932 (2002) (citing *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350 (1999)). We thus review this issue *de novo*.

¶ 22 We hold that defendant Jean Thimot lacks standing to assert the allegedly improper striking of defendant Yanick Thimot's motion for substitution of judge as of right. Plaintiff's citation to *Powell v. Dean Foods Company*, 2012 IL 111714, is on point. In *Powell*, four defendants moved for substitution of judge as of right, and their motions were granted. *Powell*, 2012 IL 111714 at ¶ 10. The plaintiff moved to reconsider the grant of one defendant's motion for substitution of judge, Alco, Inc., as that entity was merely an alternate name for another entity, Alder Group, Inc., and the defendants agreed that this was the case and that the motion for substitution of judge on behalf of Alco, Inc., was filed inadvertently. *Powell*, 2012 IL 111714 at ¶¶ 11, 12. Alder Group, Inc. then filed a motion for substitution of judge as of right,

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which the court denied, ruling that the court had already made a substantial ruling on a substantive issue when it determined the defendant's corporate status. *Powell*, 2012 IL 111714 at ¶ 13. All the defendants lost after a jury trial and appealed, arguing in part that the court erred in denying the Alder Group, Inc.'s motion for substitution of judge as of right, and that all subsequent orders in the case were void. *Powell*, 2012 IL 111714 at ¶ 16. The appellate court agreed and held that all defendants had standing to challenge Alder Group, Inc.'s denial of the substitution of judge motion and vacated all orders and the jury's verdict, but the Illinois Supreme Court reversed, holding that the other defendants did not have standing to challenge the denial of Alder Group, Inc.'s motion for substitution of judge. *Powell*, 2012 IL 111714 at ¶ 42. The supreme court held that the other defendants were attempting to assert the rights of Alder Group, Inc., and not their own rights. *Id.* Alder Group, Inc. was dismissed from the case, and because the remaining defendants lacked standing to challenge the trial court's order denying Alder Group, Inc.'s motion for substitution of judge as of right, the supreme court vacated the appellate court order and reinstated the judgments against the defendants. *Powell*, 2012 IL 111714 at ¶ 47.

¶ 23 We find *Powell* controls our resolution of this issue. Here, defendant Jean Thimot is asserting the right of defendant Yanick Thimot. Defendant Jean Thimot does not have standing to assert Yanick Thimot's right. We note also that Jean Thimot withdrew his motion for substitution of judge and cannot now complain of any error. The order appointing a receiver is not void.

¶ 24 Even if, assuming for the sake of argument, defendant Jean Thimot had standing to raise this argument, we are without jurisdiction because defendant Yanick Thimot's motion for substitution of judge as of right was merely stricken off the call and was never ruled on, and so there is no final, appealable order. The jurisdiction of the appellate court is limited to reviewing final orders only. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). "A final order is one that 'disposes of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.'" *In re Estate of*

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*Yucis*, 382 Ill. App. 3d 1062, 1069 (2008) (quoting *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1103 (1991)). An order is final as to a particular issue, and therefore appealable, if it contains a determination of the issue on the merits or else terminates consideration of the issue in such a way that the issue no longer remains subject to future action in the trial court. *Id.*; *Verdung*, 126 Ill. 2d at 553.

¶ 25 Here, defendant Yanick Thimot's motion for substitution of judge as of right was merely stricken off the call, and thus it is still pending in the circuit court and there is no final, appealable order or judgment. See *Belluomini v. Lancome*, 207 Ill.App.3d 583 (1990) (held, where the circuit court entered an order stating that the plaintiff's motion to vacate was "stricken," the order did not constitute a ruling on the merits and the struck motion remained pending). See also *One West Bank, FSB v. Topor*, 2013 IL App (1st) 120010 (held, where the circuit court struck a section 2-1401 petition and ordered the filing of a second petition, there was no final, appealable judgment). Therefore, even if defendant Jean Thimot had standing, we do not have jurisdiction and would be bound to dismiss this portion of the appeal. See *Department of Healthcare & Family Services v. Cortez*, 2012 IL App 2d 120502, ¶ 7 (noting that a reviewing court has a duty to consider *sua sponte* whether it has jurisdiction and must dismiss an appeal if jurisdiction is lacking).

¶ 26

#### CONCLUSION

¶ 27 The circuit court did not err in entering the order appointing a receiver for the subject property. Plaintiff is entitled to enforce the terms of the mortgages because it is the successor in interest to the original lender and defendants have not proven the affirmative defense of lack of standing of plaintiff.

¶ 28 The order appointing a receiver also is not void due to the fact that defendant Yanick Thimot's motion for substitution of judge as of right was stricken off the call. Defendant Jean Thimot does not have standing to assert the rights of defendant Yanick Thimot regarding Yanick Thimot's motion for

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substitution of judge as of right. Even if Jean Thimot had standing, we do not have appellate jurisdiction of this issue because there is no final appealable order deciding Yanick Thimot's motion.

¶ 29 Affirmed.