2016 IL App (2d) 150640-U
No. 2-15-0640
Order filed June 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BMO HARRIS BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CH-2616
	)	
SUNIL SRIVASTAVA; SHERYL SRIVASTAVA; SSNN, LLC; SSNN-525 TYLER ROAD, LLC; TYLER RIDGE CONDOMINIUM ASSOCIATION; UNKNOWN OWNERS; UNKNOWN TENANTS; UNKNOWN SPOUSES; UNKNOWN HEIRS; and UNKNOWN AND NONRECORD CLAIMANTS,	)	
	)	
Defendants	)	
	)	Honorable
(Sunil Srivastava and Sheryl Srivastava, Defendants-Appellants).	)	Christine Downs,
	)	Judge, Presiding

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered summary judgment for plaintiff, holding defendants liable on guaranties purportedly executed pursuant to powers of which were further validated by their unimpeached notarizations.

¶ 2 Defendants Sunil and Sheryl Srivastava (the Srivastavas) appeal a judgment in favor of plaintiff, BMO Harris Bank, N.A., that foreclosed a mortgage on real property owned by defendant SSNN-525 Tyler Road, LLC (Tyler Road) and confirmed the sheriff's sale of the property. The Srivastavas contend that the trial court erred in granting plaintiff summary judgment (735 ILCS 5/2-1005(c) (West 2014)) on its claim that they are liable as guarantors of the note, secured by the mortgage, that defendant SSNN, LLC (SSNN) signed. We affirm.

¶ 3 Plaintiff's four-count third amended complaint, filed December 10, 2012, alleged as follows. Plaintiff was the successor of Amcore Bank, N.A. (Amcore), as mortgagee. The property was a condominium unit at 525 Tyler Road in St. Charles. The present owner was Tyler Road. The mortgage, dated August 23, 2005, and recorded September 8, 2005, secured a promissory note, for $520,000, executed by defendant SSNN. The note was dated August 23, 2005. It had matured and was in default.

¶ 4 Count I of the third amended complaint requested foreclosure. Count II, directed against SSNN, alleged as follows. On or about August 23, 2005, SSNN, through Scott Sherman, the attorney-in-fact for the Srivastavas, executed the note. As of October 23, 2012, SSNN owed plaintiff $576,296.45, which included unpaid principal, interest, and other charges. Count II requested a judgment in that amount against SSNN.

¶ 5 Counts III and IV are at issue in this appeal. Each was based on a personal guaranty that either Sunil or Sheryl allegedly had made. Each guaranty, in turn, was allegedly executed by Sherman, based on the power of attorney that Sunil or Sheryl had given him. Count III, directed against Sunil, alleged that, on August 23, 2005, Sunil, through Sherman, executed a guaranty of all amounts due from SSNN to Amcore (now plaintiff); the note was in default, and Sunil was

liable. Count IV, directed against Sheryl, alleged a similar basis of recovery, *i.e.*, her guaranty that Sherman executed on or about August 23, 2005.

¶ 6 The mortgage and promissory note, copies of which were attached to the third amended complaint, were dated August 23, 2005, and signed by Sherman as the Srivastavas' attorney-in-fact. The third amended complaint also attached copies of the two guaranties. Each stated in part, "I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves [*sic*], or with others, may now or at any time in the future, owe [Amcore]." Further, each stated, in part, "I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property." Each document was signed by Sherman as attorney-in-fact for either Sunil or Sheryl, whose name was also handwritten.

¶ 7 Also attached to the third amended complaint were copies of the two-page powers of attorney that Sunil and Sheryl allegedly had executed. Each document contained Sunil or Sheryl's purported signature; was dated August 9, 2005; and was notarized, certifying that Sunil or Sheryl was the person whose name was signed on the document. In each document, the signer nominated Sherman as attorney-in-fact with the authority to mortgage the property and to execute in the signer's name the documents that might be required to obtain a mortgage loan.

¶ 8 SSNN, Tyler Road, and the Srivastavas filed a joint unverified answer to the third amended complaint.[1] The answer to count III (quoting and responding to the fifth paragraph of count III) stated in part as follows:

[1] The condominium association answered separately, not responding to counts III and

"5. On or about August 23, 2005, SUNIL SRIVASTAVA, by his attorney-in-fact, Scott Sherman via the specific Power of Attorney, a true and accurate copy of which is attached hereto as **Exhibit 'F'** and is incorporated herein by reference, executed an Unlimited Guaranty by and through which he guaranteed payment of all amounts due and owing from SSNN to [plaintiff], including, but not limited to, the Note. A True [*sic*] and accurate copy of said Guaranty is attached hereto as **Exhibit 'C'** and is incorporated herein by reference.

ANSWER: Defendants admit that Exhibit B is a promissory note with signatures purporting to be those of 'atty in fact' for Sunil Srivstava [*sic*] and Sheryl Srivastava. Defendants lack knowledge or information sufficient to form a belief as to who signed their names and therefore deny allegations regarding the same. The remainder of Paragraph 5 of Count III *** contain [*sic*] legal conclusions which Defendants are not required to admit or deny."

The answer's response to the corresponding paragraph of count IV was essentially identical.

¶ 9 On March 17, 2014, plaintiff moved for summary judgment on counts I, III, and IV of the third amended complaint. As pertinent here, the motion repeated the allegations of the third amended complaint and alleged further as follows. The Srivastavas were liable, through the guaranties that Sherman had executed, for the balance due on the note. First, their deposition testimony showed that they had authorized Sherman (who had died before this action was filed) to execute the guaranties in their names. Second, because the power-of-attorney forms had been notarized, they could not be impeached, except for fraud or imposition, neither of which the Srivastavas had raised as an affirmative defense in the answer to the third amended complaint.

IV.

Third, Sheryl's deposition testimony proved that she had failed to answer a request to admit that she had signed the power of attorney, thus admitting judicially that she had. Fourth, under section 8 of the Illinois Power of Attorney Act (755 ILCS 45/2-8 (West 2004)), plaintiff could rely in good faith on the powers of attorney.

¶ 10 Plaintiff's motion attached copies of the Srivastavas' depositions. We summarize the pertinent testimony.

¶ 11 In her deposition, taken December 9, 2013, Sheryl testified that Sunil had formed SSNN to hold real estate. Shown the deed for the Tyler Road property and the promissory note, Sheryl said that she had not seen either one. She was not familiar with Sherman's signature. Shown a copy of the power-of-attorney form with her purported signature, she said that she did not recognize it and that the signature did not look like hers. She then stated that she did not remember signing the document but might have done so.

¶ 12 Shown a copy of what purported to be her answers to plaintiff's request to admit, Sheryl testified that she did not remember having seen the document before. She acknowledged that it had her name signed to it but she said that the signature was not hers. She did not know who signed the document. As she had not seen it before, she did not know whether the answers were correct. Shown a copy of the guaranty executed in her name, Sheryl testified that the signature was not hers and that she did not know whose it was. Shown a copy of SSNN's answers to plaintiff's request to admit, Sheryl testified that she did not prepare the form and that the signature at the end appeared to be Sunil's.

¶ 13 In his deposition, also taken December 9, 2013, Sunil testified that SSNN was formed as a "blank LLC"; "[n]othing went into SSNN, LLC." Sunil did not recall the date that the Tyler Road property was purchased; he had not attended the closing. Shown a copy of the power of

attorney in his name, Sunil testified that he "might have" seen the document before. He could not say whether the "photocopy" was a true and accurate copy of the original. Asked whether the signature at the bottom was his, he responded, "That is a photocopy of my signature. I believe so." Asked, "[I]s that your signature?," he responded, "I'm not a signature expert, so I wouldn't answer that." He admitted that it looked like his signature. Asked whether he had any reason to believe that someone signed the document on his behalf, Sunil responded, "I don't know." Asked whether he had any evidence that he had not signed the document, he responded, "I do not know."

¶ 14 Opposing counsel then asked Sunil whether he had any reason to dispute that the power of attorney was provided to Amcore at the loan closing in August 2005. Sunil responded that he did: when the suit was filed, plaintiff did not give him the list of the "original documents" that had been provided at the loan closing. Asked whether Sherman had been authorized to sign the promissory note on his behalf, as his attorney-in-fact, Sunil responded, "I do not recall." Asked whether he had any evidence that Sherman signed the note as other than his attorney-in-fact, Sunil responded, "I do not recall."

¶ 15 Opposing counsel then showed Sunil a copy of the mortgage. Sunil testified that he did not know to whom the signature at the end belonged; asked whether Sherman had signed the document as his attorney-in-fact, Sunil responded, "I do not recall." Asked whether he had "any evidence to prove this was not signed by Scott Sherman," Sunil responded, "I do not recall."

¶ 16 Opposing counsel then showed Sunil a copy of the guaranty that Sherman apparently had executed on his behalf and asked whether he recognized the signature at the end. Sunil responded that he did not; that he did not know whether the signature was his; and that he did not know whether Sherman had signed it as his attorney-in-fact. Asked what evidence he had that

Sherman had not signed the document using his power of attorney, Sunil responded, "I have not been provided the original document, the original file of the closing, so I can't tell either way."

¶ 17 Sunil identified a copy of his answers to plaintiff's request to admit. He testified that he had prepared the set of answers and that, both then and now, all the answers were correct to the best of his knowledge. Opposing counsel asked why, in response to the request to admit, Sunil had denied that the copy of the power of attorney was identical to the original. Sunil responded, "I just can't tell that it was." He reiterated that he was "never provided the whole package [of closing documents]." He did not believe that the signature was his, because (1) he "just [didn't] believe that that [was]"; (2) it did not look like "the same signature"; and (3) he was not "a signature expert. Somebody could copy it."

¶ 18 Sunil did not recall whether Sherman had been his or Sheryl's attorney on August 23, 2005. He explained that he had denied that he and Sheryl had executed the powers of attorney, because the documents were not provided at the loan closing. Shown a copy of the power of attorney with Sheryl's name signed at the bottom, Sunil testified that he did not recognize the signature. He acknowledged that he had previously provided opposing counsel with a copy of his state identification card with his signature, and he identified the copy at the deposition.

¶ 19 Sunil disputed that he had guaranteed SSNN's note. Asked why, he responded that first he had not seen the document at the closing. Second, after talking to Keith Ouellette of Bayview Loan Servicing, Inc. (Bayview), which had serviced the loan for plaintiff, Sunil concluded that he had not guaranteed the loan. Asked whether he believed that Sheryl had done so, he said that he did not know but that, from speaking to Ouellette, he had some reason to dispute that she had.

¶ 20 On examination by his own attorney, Sunil testified that he did not believe that either he or Sheryl signed the guaranties; he did not know who did. To his knowledge, he had never

authorized Sherman to sign his (Sunil's) name to a document. Sunil believed that the purported power of attorney, dated August 9, 2005, was not in effect as of August 23, 2005, because he did not recall seeing it before August 23, 2005. Sunil had reviewed Sheryl's answers to the request to admit, discussing all the questions with her, and he signed the answers for her. He explained that, at the time, he was at his attorney's office and was speaking to Sheryl by telephone. He did not know whether Sheryl had actually seen the request itself.

¶ 21 Plaintiff's summary-judgment motion attached the affidavit of Linda Conwell, who stated as follows. She was a senior asset manager for Bayview and was partially responsible for managing loans to SSNN. She had reviewed documents pertaining to the loan. She had read the third amended complaint, and, to her knowledge, all of the allegations were true. On August 23, 2005, SSNN, by Sherman as attorney-in-fact for the Srivastavas, as stated in the powers of attorney, executed the note, for $520,000. To secure payment, Sherman as attorney-in-fact for the Srivastavas executed the mortgage and the guaranties. Plaintiff made the loan in good-faith reliance on the powers of attorney. Nothing in the loan file revealed "any documentation which would lead to any indication that the Powers of Attorney were not valid or that the Loan Documents were not validly signed using said Powers of Attorney."

¶ 22 On July 11, 2014, the Srivastavas filed a response to plaintiff's motion. It argued that there were genuine issues as to whether the powers of attorney and the guaranties were valid. The response admitted that the Srivastavas "sign[ed] a power of attorney authorizing Scott Sherman *** to sign documents on their behalf," but it denied that the powers of attorney were "in place" on August 23, 2005. It argued that the guaranties were not valid, because (1) the powers of attorney were not yet in effect; and (2) the Srivastavas did not authorize Sherman to

sign their names to documents. The response also noted that the Srivastavas would depose Ouellette and supplement their response after they did so.

¶ 23 The response attached an affidavit from Sunil, in which he stated as follows. The third amended complaint's allegations that he and Sheryl authorized Sherman to execute the mortgage and guaranties of August 23, 2005, were false. "The signature on the document that Plaintiff purport[ed] to be an August 23, 2005 guaranty by [Sunil]" was not his signature; he did not sign the document or authorize anyone to do so on his behalf. Similarly, the signature on the guaranty in Sheryl's name was not hers. Sunil did remember signing a power-of-attorney form in 2005 allowing Sherman to sign certain documents on his behalf. However, he authorized Sherman not to sign his name on any document, but only to sign his own name on Sunil's behalf. Although Sunil did sign a power of attorney in 2005, he was "certain" that it was "after August 23, 2005." Sheryl also signed a power of attorney, but only after August 23, 2005. She did not authorize Sherman to sign her name to documents.

¶ 24 On September 18, 2014, the Srivastavas filed a supplemental memorandum in opposition to plaintiff's motion for summary judgment, basing it on Ouellette's deposition of September 10, 2014. The Srivastavas argued that Ouellette's testimony showed that the guaranties and the original powers of attorney had not been in the file that Bayview received shortly after plaintiff filed this action. Also, there were inconsistencies and oddities in the copies of the powers of attorney that were in Bayview's files, casting doubt on their validity.

¶ 25 In his deposition, Ouellette testified as follows. He was a team leader at Bayview, working on plaintiff's "nonperforming portfolio" and making appropriate recommendations to plaintiff. At the deposition, Ouellette presented a box of documents, produced in response to a subpoena, that were obtained from plaintiff's attorneys and were connected with the Tyler Road

property loan and others involving SSNN. Ouellete explained that he became involved in the matter in August 2011, taking over from the prior asset manager. The prior manager had been attempting unsuccessfully to collect financial documents from Sunil in order to extend the loan. Despite Ouellette's further efforts, Sunil declined to execute an extension. However, by November 2011, Ouellette did receive the remaining financial documents.

¶ 26 Ouellette was shown two documents from the box, which he identified as two powers of attorney by Sunil and Sheryl, authorizing Sherman "to execute loan documents on their behalf with respect to 525 Tyler Road." The documents came out of a file folder marked "SSNN Relationship Master File 2210." Ouellette explained that he assumed that, given the use of the term "Master File," it contained some documents relating to each of the loans between Amcore/plaintiff and SSNN. The file contained several other documents related to the Tyler Road property loan.

¶ 27 Ouellette identified a five-page loan-documentation checklist for the Tyler Road property loan, used to ensure that all the documents necessary for the loan had been executed. Ouellette testified that the checklist did not appear to refer specifically to any powers of attorney, but he explained that the checklist was not "an exhaustive list of all the document [*sic*] that would be required." Also, the list appeared to be of "documents that the borrower or guarantors would be executing in connection with the loan. The power of attorney appear[ed] to have been executed several weeks prior to the loan closing." Nothing in the checklist stated either that a power of attorney was necessary to close the loan or that it was not. Shown the original loan file for the Tyler Road property, Ouellette could not locate any power of attorney; he noted, however, that, as he had testified before, powers of attorney in the names of Sunil and Sheryl had been present in "the box that contained all the files for the relationship" between SSNN and Amcore/plaintiff.

To his knowledge, the forms did not appear elsewhere in the documents he had produced in response to the subpoena.

¶ 28 On September 18, 2014, the trial court granted plaintiff's motion for summary judgment. On October 10, 2014, the court entered an order of foreclosure, and, on October 31, 2014, it denied the Srivastavas' motion to vacate the summary judgment. On May 15, 2014, the court confirmed the sheriff's sale of the Tyler Road property, entering a judgment against SSNN and the Srivastavas, jointly and severally, for $570,987.90. The Srivastanas filed a timely appeal.

¶ 29 On appeal, the Srivastavas argue that the trial court erred in granting plaintiff summary judgment on counts III and IV, because there were genuine factual issues that precluded holding as a matter of law that either Sunil or Sheryl was liable as a guarantor of the loan to SSNN. The Srivastavas' argument boils down to a challenge to the validity of the powers of attorney that, according to plaintiff and the trial court, enabled Sherman to act on the Srivastavas' behalf in executing the guaranties. For the following reasons, we affirm the summary judgment.

¶ 30 Summary judgment should be granted if the pleadings, depositions, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). Our review is *de novo*. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 640-41 (2002).

¶ 31 The Srivastavas' appeal hinges on the validity and effectiveness of the powers of attorney that Sherman allegedly executed in their names. The Srivastavas do not contest that, if the powers of attorney were valid and in effect when Sherman executed the guaranties, then the guaranties were also valid—and that, if the guaranties were valid, then summary judgment on counts III and IV of the third amended complaint was proper. They maintain, however, that

there are genuine factual issues going to whether the powers of attorney were valid and effective as of August 23, 2005.

¶ 32 The Srivastavas' argument cites and briefly discusses several appellate court opinions, without explaining how they apply here. Otherwise, it says little that relates to the facts of this case. The argument refers generally to "the repeated denials [in the Srivastavas' pleadings, depositions, and affidavits]" and notes that "[p]laintiff presented no witness with any first hand [*sic*] knowledge concerning any of the closing documents." In sum, the argument is minimal.

¶ 33 Given the paucity of the argument against the trial court's judgment, and the failure of the argument to cite either to specific facts of record or to pertinent authority (or at least to tell us why the authority cited is pertinent), we would be well within our prerogative to hold that the Srivastavas have forfeited their argument and to affirm without addressing the merits. See *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 401 (1987) (issues that are briefed only inadequately are forfeited); *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993) (it is not appellate court's function to act as advocate or search record for error); Nonetheless, in the interests of justice, we address the merits. We agree with plaintiff that summary judgment was proper, as there was no *genuine* factual issue as to the validity and effectiveness of the powers of attorney. There are two bases, advanced by plaintiff, for our conclusion.

¶ 34 First, the Srivastavas made judicial admissions that negate their argument on appeal. In their unverified answer to the third amended complaint, they did not explicitly deny that they executed the powers of attorney. Instead, they pleaded that they did not know enough to say who signed their names to the documents. Under section 2-610(b) of the Code of Civil Procedure (735 ILCS 5/2-610(b) (West 2012)), every allegation in a complaint, except for

allegations of damages, that is not explicitly denied is admitted, "unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, *and attaches an affidavit of the truth of the statement of want of knowledge* or unless the party has had no opportunity to deny." (Emphasis added.) 735 ILCS 5/2-610(b) (West 2012)). The Srivastavas' answer did not attach the required affidavit. Moreover, the answer stated only that they lacked sufficient knowledge to form a belief as to who signed their names to the note and mortgage; it did not mention the guaranties or the powers of attorney at all and did not contest that the powers of attorney were dated and signed on August 9, 2005, as they stated facially. Even if we construe the answer as pleading no knowledge of who signed the Srivastavas' names to the powers of attorney, it was insufficient under section 2-610(b).

¶ 35 Also, as plaintiff contends, under section 2-605(b) of the Code, "[t]he allegation of the execution or assignment of any written instrument is admitted unless denied in a pleading verified by oath, except in cases in which verification is excused by the court." 735 ILCS 5/2-605(b) (West 2012). As plaintiff observes, the answer failed the verification requirement. Therefore, in their pleadings, the Srivastavas admitted that they had signed the powers of attorney. By itself, this admission withdrew the issue from contestation and dispensed with the need for plaintiff to submit proof on the issue. See *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 31; *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 38.

¶ 36 There is a second reason why the Srivastavas failed to raise a genuine issue of material fact as the validity and effectiveness of the powers of attorney on August 23, 2005. The powers of attorney were duly notarized. When an instrument has been acknowledged by a notary and substantially complies with the Illinois Notary Public Act (see 5 ILCS 312/6-101 *et seq*. (West 2004)), it may not be impeached except for fraud and imposition. *Resolution Trust Corp. v.*

Hardisty, 269 Ill. App. 3d 613, 616 (1995); *Krueger v. Dorr*, 22 Ill. App. 2d 513, 528 (1959). And the party seeking to impeach the instrument must do so by clear and convincing evidence from a disinterested witness. *Hardisty*, 269 Ill. App. 3d at 616-17; *Krueger*, 22 Ill. App. 3d at 528. Otherwise, the notary's acknowledgment is *prima facie* proof of the matters certified. *Miller v. Swanson*, 66 Ill. App. 2d 179, 189 (1965).

¶ 37 Here, the Srivastavas never pleaded fraud or imposition; they did not supply the testimony of any disinterested witness even to suggest that there was any fraud or impropriety in the execution of the powers of attorney; and Sunil admitted in his deposition that he and Sheryl signed the powers of attorney, disputing only when they did so. Sunil's affidavit was of no help, even ignoring that it came from an interested witness; it did not allege fraud and relied on the unsupported conclusion that he and Sheryl signed the powers of attorney sometime before August 23, 2005 (see *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 20). And the deposition testimony of Ouellette, although a disinterested witness, did not remotely support a claim of fraud or imposition in the execution of the powers of attorney. Finally, the (pharisaical) assertion that the Srivastavas authorized Sherman to sign documents as their attorney-in-fact and not to sign their names on the documents would not affect the validity of the powers of attorney.

¶ 38 We hold that there was no genuine issue of material fact as to the validity and effectiveness of the powers of attorney on August 23, 2005, when Sherman, on the Srivastavas' behalf as their attorney-in-fact, executed the guaranties that plainly made them personally liable on the note and mortgage that SSNN signed. Therefore, summary judgment on counts III and IV of the third amended complaint was proper.

¶ 39 The judgment of the circuit court of Kane County is affirmed.

¶ 40 Affirmed.