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2016 IL App (3d) 160035-U

Order filed November 1, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

NATIONSTAR MORTGAGE LLC,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois.
)	
v.)	Appeal No. 3-16-0035
)	Circuit No. 14-CH-2796
DAVID SHIMKO and KIMBERLY SHIMKO,)	
)	The Honorable
Defendants-Appellants.)	Daniel Rippy,
)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion in denying defendants' motion to strike plaintiff's motion to strike and dismiss affirmative defenses. The trial court did not err in granting plaintiff's motion for summary judgment.

¶ 2 Plaintiff, Nationstar Mortgage LLC (Nationstar), filed a foreclosure complaint against defendants, David Shimko and Kimberly Shimko (collectively, the Shimkos). The trial court denied the Shimkos' motion to strike plaintiff's motion to strike and dismiss affirmative defenses. The trial court also granted summary judgment in favor of Nationstar. The Shimkos

appeal, arguing that the trial court (1) erred in denying their motion to strike Nationstar’s motion to strike and dismiss affirmative defenses and (2) erred in granting summary judgment in favor of Nationstar. We affirm.

¶ 3

FACTS

¶ 4

Nationstar filed a foreclosure complaint against the Shimkos on December 23, 2014. The complaint alleged that the Shimkos executed a mortgage on January 26, 2009, on the property at 15418 Sycamore Court in Lockport, Illinois, and had failed to pay their monthly installments since August 2014. Nationstar attached a copy of the mortgage and note to the complaint and alleged it had capacity to bring the complaint as the mortgagee.

¶ 5

The note named Sierra Pacific Mortgage Company, Inc., as the original lender. Sierra Pacific specially endorsed the note to Countrywide Bank FSB, which later specially endorsed the note to Bank of America. Bank of America endorsed the note in blank. The endorsement in blank read as follows:

“PAY TO THE ORDER

WITHOUT RECOURSE

BANK OF AMERICA, N.A.

BY [signed]

MICHELE SJOLANDER

MANAGING DIRECTOR”

¶ 6

The Shimkos filed a *pro se* appearance and a verified answer and affirmative defenses on February 2, 2015. All six affirmative defenses challenged Nationstar’s right to enforce the note and declare default. Nationstar filed a motion to strike the affirmative defenses on March 11, 2015. The Shimkos filed a motion to strike Nationstar’s motion, claiming Nationstar’s motion

was untimely pursuant to Illinois Supreme Court Rule 182 (eff. Jan. 1, 1967) and Rule 183 (eff. Feb. 16, 2011). On June 17, 2015, the trial court denied the Shimkos' motion and granted Nationstar's motion to strike and dismiss affirmative defenses with prejudice. The trial court determined that Nationstar provided *prima facie* evidence to prove it had standing to bring its claim before the court pursuant to the Illinois Mortgage Foreclosure Law. See 735 ILCS 5/15-1504(a)(2) (West 2014).

¶ 7 Nationstar filed a motion for summary judgment on August 19, 2015, and attached the affidavit of its assistant secretary, Jonathan Lipsey. The affidavit alleged that Nationstar assumed the loan from Bank of America on June 7, 2013, and included the Shimkos' payment history and amount in default. The Shimkos filed a response to Nationstar's motion for summary judgment that challenged Nationstar's legal status as holder of the note.

¶ 8 The trial court granted Nationstar's motion for summary judgment on November 4, 2015. The trial court reasoned that Nationstar met the requirements under the Illinois Mortgage Foreclosure Law when it attached the note and mortgage to the complaint, provided the note for inspection, and provided the affidavit of Lipsey, which stated the amount due on the mortgage. The trial court found that, for these reasons, Nationstar established standing to enforce the note. The trial court ordered judgment of foreclosure on the same day.

¶ 9 The Shimkos filed a motion to reconsider the grant of summary judgment, which the trial court denied.

¶ 10 The Shimkos filed this appeal.

¶ 11 ANALYSIS

¶ 12 I. Motion to Strike Plaintiff's Motion to Strike and Dismiss Affirmative Defenses

¶ 13 The Shimkos argue the trial court erred in denying their motion to strike Nationstar’s motion to strike and dismiss affirmative defenses because Nationstar’s motion was untimely pursuant to Rule 182 and Rule 183.

¶ 14 Rule 182 discusses time limits for filing pleadings and motions. Specifically, Rule 182(c) states: “A motion attacking a pleading other than the complaint must be filed within 21 days after the last day allowed for the filing of the pleading attacked.” Ill. S. Ct. R. 182 (eff. Feb. 16, 2011). Furthermore, Rule 183 provides guidelines for which a party can request an extension of time to file a pleading. Rule 183 states: “The court, for good cause shown on the motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after expiration of the time.” Ill. S. Ct. R. 183 (eff. Jan. 1, 1967). The moving party must prove good cause for extension. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353 (2007). We review a circuit court’s decision on a motion brought pursuant to Rule 183 for an abuse of discretion. *Id.* at 354.

¶ 15 First we address whether Nationstar’s motion was untimely. The Shimkos filed a *pro se* appearance and an answer and affirmative defenses on February 2, 2015. Pursuant to Rule 182(c), Nationstar had 21 days to file any motions in response to the Shimkos’ answer and affirmative defenses. However, Nationstar filed its motion to strike the Shimkos’ affirmative defenses on March 11, 2015, 37 days after the Shimkos’ answer and affirmative defenses was filed and 16 days after the Rule 182(c) time requirement. Therefore, Nationstar untimely filed its motion to strike and dismiss affirmative defenses.

¶ 16 Because Nationstar’s motion was untimely, we discuss its possible admission under Rule 183. Nationstar did not comply with the requirements of Rule 183. There is no evidence provided in the record that indicates Nationstar filed a motion to request an extension with the

court. See *Schwalb v. Wood*, 288 Ill. App. 3d 498, 501-02 (1997) (no justification for failure to file request for extension in a reasonable time when opportunity to do so is present, thus denial of such request was warranted). In fact, the record shows that Nationstar only mentioned its reason for delay *after* the trial court denied the Shimkos' motion to strike. Because no request for extension was presented to the trial court for review in compliance with Rule 183, the trial court abused its discretion in denying the Shimkos' motion to strike Nationstar's motion. As a result, the trial court should have allowed the Shimkos' affirmative defenses to stand.

¶ 17 II. Motion for Summary Judgment

¶ 18 The arguments addressed in the Shimkos' response to Nationstar's motion for summary judgment, and now on appeal, are the same arguments presented in their affirmative defenses. In our review, we consider whether the trial court's error in granting Nationstar's motion to strike and dismiss affirmative defenses affects the trial court's grant of Nationstar's motion for summary judgment. We find it does not.

¶ 19 Summary judgment is appropriate where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). We review the grant of summary judgment *de novo*. *HSBC Bank USA, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 15.

¶ 20 Nationstar argues that it is the legal holder of the note because it established a *prima facie* case for standing pursuant to the Illinois Mortgage Foreclosure Law. The Shimkos argue that the issue is not whether Nationstar has standing but whether Nationstar is the rightful holder of the note. Because of this, the Shimkos claim Nationstar is ignoring its burden to prove its status as legal holder of the note pursuant to the Uniform Commercial Code (UCC) (810 ILCS 5/1-101 *et*

seq. (West 2014)). The Shimkos do not dispute Nationstar’s standing under the Illinois Mortgage Foreclosure Law. Therefore, we will focus our attention on Nationstar’s status as legal holder of the note.

¶ 21 The fact that Nationstar might have standing to file a complaint pursuant to the Illinois Mortgage Foreclosure Law does not mean Nationstar has the capacity to be the legal holder of the note. See *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 24 (noting plaintiff’s status as an assignee under the Illinois Mortgage Foreclosure Law has no bearing on its capacity to be legal holder of the note). The doctrine of standing requires that a party have a real interest in the action brought and in its outcome. *Id.* ¶ 17 (citing *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996)). “In contrast, the ‘legal capacity to sue or be sued’ generally refers to the status of the party, *e.g.*, incompetent, infant [citation], or unincorporated association [citation].” *Id.* Therefore, standing and legal capacity are not the same. *Id.*

¶ 22 Section 3-104 of the UCC classifies a note as a negotiable instrument. 810 ILCS 5/3-104 (West 2014). “A negotiable instrument is an unconditional promise to pay a fixed amount of money” if it is, among other things, “ ‘payable to bearer or to order at the time it is issued or first comes into possession of a holder.’ ” *Rowe*, 2015 IL App (3d) 140553, ¶ 21 (quoting 810 ILCS 5/3–104(a)(1) (West 2010)). Section 3-205 of the UCC states that “ ‘[w]hen indorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specifically indorsed.’ ” *Id.* (quoting 810 ILCS 5/3-205(b) (West 2010)). Further, it is well-established that “ ‘possession of bearer paper is *prima facie* evidence of title thereto, [citation] and sufficient to entitle the plaintiff to a decree of foreclosure.’ ” *Id.* (quoting *Joslyn v. Joslyn*, 386 Ill. 387, 395 (1944)). “Attachment of the note to the complaint is *prima facie*

evidence that the plaintiff owns the note.” *Id.* (citing *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26).

¶ 23 In this case, Nationstar, being the bearer of the note, is the legal holder. The note named Sierra Pacific Mortgage Company, Inc., as the original lender. Sierra Pacific specially endorsed the note to Countrywide Bank FSB, which later specially endorsed the note to Bank of America. Bank of America endorsed the note in blank. In his affidavit, Lipsey stated that Nationstar took possession of the note through Bank of America. A note endorsed in blank is payable to the bearer and legal title may be transferred by possession alone. 810 ILCS 5/3-205(b) (West 2014). Moreover, Nationstar attached the note, along with the mortgage, to the foreclosure complaint in compliance with the Illinois Mortgage Foreclosure Law. See 735 ILCS 5/15-1504(a)(2) (West 2014). As stated above, attachment of a note is *prima facie* evidence that plaintiff owns the note. The Shimkos presented no evidence challenging that *prima facie* showing. Thus, the trial court did not err in granting Nationstar’s motion for summary judgment. Because the issue of the trial court’s grant of Nationstar’s motion for summary judgment is dispositive notwithstanding the Shimkos’ affirmative defenses, the trial court’s error in granting Nationstar’s motion to strike and dismiss affirmative defenses had no impact on the correctness on the ruling granting summary judgment.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the order of the trial court of Will County is affirmed.

¶ 26 Affirmed.