2017 IL App (1st) 160945-U
No. 1-16-0945
Order filed August 15, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BANK OF AMERICA, N.A., Plaintiff-Appellee, v. MELVA MOORE, VERNITA R. JOHNSON, and RONALD L. McINTYRE, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 12 CH 23849 The Honorable Darryl V. Simko, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held:* Plaintiff bank established a *prima facie* case of foreclosure by introducing the mortgage and promissory note, thereby shifting the burden of proof to the defendants to prove affirmative defenses; no further proof is necessary where the defendants' answer failed to deny the allegations in the complaint; the record established service on co-defendant.

¶ 2 Defendant Vernita R. Johnson seeks reversal of the trial court's grant of summary judgment in favor of plaintiff, Bank of America, N.A. Johnson argues that (1) the trial court erred when it allowed the bank to foreclose because the bank lacked standing; (2) summary

judgment was improper because genuine issues of material fact remained unresolved; and (3) defendant Ronald L. McIntyre was not properly served notice. The other two defendants named in the appeal, Moore and Ronald McIntyre, have neither filed briefs nor joined with Johnson.

¶ 3 Background

¶ 4 In August 2009, Moore signed a promissory note for $70,692.00, secured by a mortgage on real property located in Calumet Park, Illinois. In April 2010, Moore executed a quitclaim deed conveying her interest in the property to Vernita R. Johnson and Ronald L. McIntyre. The note and mortgage have been in default since July 2011. In June 2012, the Bank of America filed its complaint to foreclose on the mortgage, attaching the original note and a copy of the original mortgage. In July 2012, the Bank unsuccessfully attempted to serve Moore at the property address. Nine days later, service on Moore was successful at a different address. Johnson was personally served at the property address and McIntyre was served by substitute service. The process server noted that Johnson said, "Defendant doesn't live here."

¶ 5 On March 1, 2013, the Bank moved for summary judgment (735 ILCS 5/2-1005(a) (West 2012). In September, with leave of court, the Bank filed an amended complaint adding Melva Moore as the record owner, removing "Vernita R. Johnson and Ronald L. McIntyre as record owners of the subject property," and adding Johnson's and McIntyre's possible interest in the property by virtue of the quitclaim deed.

¶ 6 Moore counterclaimed, asserting the lender failed to provide a good faith estimate, in violation of the Real Estate Settlement Procedures Act (12 USC § 2601 *et seq.*), and a Truth in Lending Statement and ARM Disclosure, in violation of the Federal Truth and Lending Act (15 USC § 1600 *et seq.*). On December 30, 2013, the Bank moved to strike the affirmative defenses and counterclaims, arguing (i) the TILA and RESPA claims were time-barred and (ii) defendants

failed to set forth specific facts with particularity to establish the elements of their fraud claim, citing *Northwest Federal Savings & Loan Ass'n of Chicago v. Weisberg*, 97 Ill. App. 3d 470, 472-73 (1981). Ten days later, the Bank filed a motion for summary judgment against all defendants. The trial court held a hearing on the motions (no transcript of those proceedings is in the record). The same day the trial court entered a judgment for foreclosure and sale, under section 5/15-1506 of the Illinois Mortgage Foreclosure Law statute. 735 ILCS 5/15-1506 (West 2012).

¶ 7 On March 8, the trial court entered an order approving report of sale and distribution and rendering an *in personam* deficiency judgment against Moore, and directing the sheriff to evict Moore, Johnson, and McIntyre (the record does not include a transcript of those proceedings). On April 4, Moore, Johnson, and McIntyre filed a notice of appeal from orders entered on December 30, 2013 (granting the Bank's motion for summary judgment) and January 11, 2016, (order denying defendants' emergency motion to stay the sale, granting summary judgment, striking defendants' affirmative defenses and counterclaim, judgment of foreclosure and sale).

¶ 8 Analysis

¶ 9 Both parties' briefs fail to comply with all the requirements of Illinois Supreme Court Rule 341. Johnson's arguments are in large part difficult to understand and unsupported by the law or by the record, while the Bank fails to cite authority for most of its points, and relies on an unreported Rule 23 Order with no precedential value. This court is entitled to be presented with plainly defined issues, citations to pertinent authority, and cohesive arguments. *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). We may strike a brief and dismiss the appeal for failure to comply with those rules as the rules of procedure. *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). Despite these deficiencies, however, we decline to dismiss the appeal. See *In re*

Estate of Jackson, 354 Ill.App.3d 616, 620 (2004) (reviewing court has discretion to review merits despite multiple Rule 341 mistakes).

¶ 10 The Bank asserts that Johnson has waived any challenge of the order approving the sale because she does not argue the merits of the issue in her opening brief. We agree. See Illinois Supreme Court Rule 341(h)(7) (eff. ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). These forfeiture principles apply equally to *pro se* litigants as well as those represented by counsel. *Porter v. Urbana-Champaign Sanitary District*, 237 Ill. App. 3d 296, 299 (1992).

¶ 11 In any case, Johnson's arguments fail. She first argues the Bank violated the TILA (15 USC § 1600 *et seq.*) and RESPA (12 USC § 2601 *et seq.*). Claims under TILA expire three years after a loan origination and RESPA claims are limited to one year. Not only were both arguments time-barred, Johnson as the grantee of a quitclaim deed cannot raise these arguments against the Bank. Moore was the mortgagor and the only party with any rights under these Acts.

¶ 12 Johnson also asserts the bank lacked standing and therefore the trial court erred when it allowed the bank to foreclose. In Illinois, a mortgagee may foreclose its interest in real property on "either the debt's maturity or a default of a condition in the instrument." *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 18 (quoting *Heritage Pullman Bank v. American National Bank & Trust Co. of Chicago*, 164 Ill. App. 3d 680, 685 (1987). In a foreclosure action, the plaintiff's provision of a copy of the note is *prima facie* evidence that the plaintiff owns the note. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. For the Bank to establish a *prima facie* case of foreclosure, it was required only to introduce the mortgage and promissory note, after which the burden of proof shifted to the defendants to prove any applicable affirmative defenses. *Zubel*, 2014 IL App (1st) 130976, ¶ 18. "[L]ack of standing is an

affirmative defense, which is the defendant's burden to plead and prove" (*Deutsche Bank National Trust Co. v. Payton*, 2017 IL App (1st) 160305, ¶ 25), and is waived if not raised in a timely fashion in the trial court. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). Neither Johnson nor her codefendants raised the bank's standing as an affirmative defense in their answer filed November 5, 2013. Thus, this issue is waived.

¶ 13 Moreover, the Bank made a *prima facie* showing of standing, which defendants failed to rebut. The Foreclosure Law defines a mortgagee as the holder of an indebtedness and any person claiming through a mortgagee as successor (735 ILCS 5/15-1208 (West 2006)), including the mortgagee's assignee. *Id.* ¶ 28. Here, the Bank provided copies of the mortgage and the note, and an assignment of the mortgage executed by Mortgage Electronic Registration Systems, fulfilling the pleading requirements.

¶ 14 Johnson next asserts summary judgment was improper as genuine issues of material fact remained unresolved. Our review of a grant of summary judgment is *de novo.* As noted, the Bank made its *prima facie* case in its complaint. Defendants' answer did not contest any of the allegations in the complaint, thus admitting the material allegations. See 735 ILCS 5/2-610 (a) (West 2010) ("Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." Every allegation not explicitly denied is admitted. 735 ILCS 5/2-610 (b) (West 2010). Under *Korzen*, 2013 IL App (1st) 130380, ¶ 37, the defendants' failure to deny is a judicial admission and no further proof of the allegations is necessary.

¶ 15 Finally, Johnson avers, "Ronald McIntyre was never served." McIntyre did not challenge his service in the trial court nor did he file a brief in this court or join in Johnson's brief. Hence, this argument is waived. Moreover, the record directly contradicts Johnson's assertion. McIntyre

was served via substitute service, and in fact, the process server's sworn affidavit states that Johnson herself accepted service on his behalf. The argument is meritless.

¶ 16 We affirm.