

2017 IL App (1st) 162220-U

No. 1-16-2220

Order filed October 27, 2017

Fifth Division

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 DISTRICT

PNC BANK, NATIONAL ASSOCIATION,) Appeal from the
) Circuit Court of
Plaintiff-Appellee,) Cook County.
)
v.) No. 11 CH 28297
)
LA WANNA CHALK,) Honorable
Defendant-Appellant.) Pamela McLean Meyerson,
) Judge, Presiding.
)
)

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in striking defendant's two second amended affirmative defenses. And the circuit court did not err in granting summary judgment in favor of PNC Bank, National Association (PNC) on its action to foreclose the note and mortgage at issue.

¶ 2 This appeal arises from a mortgage foreclosure action initiated by plaintiff-appellee PNC

against defendant-appellant LaWanna Chalk in connection with residential property located at 6122 S. Ada Street, Chicago, Illinois. Defendant Chalk, who is proceeding *pro se*, contends on appeal that the circuit court erred in dismissing her second affirmative defenses, with prejudice, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). Defendant also appeals orders of the circuit court granting summary judgment in favor of PNC and entering a judgment of foreclosure and sale of the subject property. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 The factual and procedural background giving rise to the issues in this appeal is as follows. On September 28, 2007, defendant executed loan documents, including a promissory note pursuant to which National City Mortgage Company (National) extended a loan in the original principal amount of \$260,000.00 to finance purchase of the subject property. The promissory note was secured by a mortgage lien on the property.

¶ 5 In July 2011, National assigned all of its rights, title, and interest in the loan documents, promissory note, and mortgage to PNC.

¶ 6 On August 10, 2011, PNC filed a complaint for foreclosure and other relief against various parties, including defendant. PNC tried unsuccessfully to personally serve defendant and afterwards served her by publication on October 13, 2011.

¶ 7 After defendant failed to appear or respond to the complaint, PNC moved for an order of default and a judgment of foreclosure and sale on January 3, 2012. On January 11, 2012, defendant filed a *pro se* appearance in the circuit court of Cook County.

¶ 8 On February 28, 2012, defendant filed her first answer to PNC's complaint, along with a notice to produce under Illinois Supreme Court Rule 237(b) (eff. July 1, 2005), requesting PNC to produce, among other things, the original note and mortgage. A few days later, on March 1, 2012, defendant moved for leave to file an amended answer to the complaint; she attached a proposed amended answer to her motion. That same day, the circuit court entered an order granting defendant leave to file her proposed amended answer *instanter*.

¶ 9 On October 16, 2012, PNC moved for summary judgment, a default judgment of foreclosure and sale, and appointment of a foreclosure sale officer. Defendant then moved for leave to file a second amended answer to the complaint *instanter*, which included eight proposed affirmative defenses.

¶ 10 At the hearing on the respective motions, the circuit court granted defendant's motion for leave to file her proposed second amended answer *instanter*. The court however, limited defendant to the number of affirmative defenses she could file, limiting her to two – challenging PNC's standing and attacking the payment history of the loan. The court also entered a briefing schedule on PNC's motions for summary judgment and default judgment of foreclosure and sale.

¶ 11 On January 16, 2013, defendant filed her second amended answer, asserting two affirmative defenses. Defendant first maintained that PNC lacked standing to bring the foreclosure action, arguing that PNC's complaint was filed without any assignment of the note and mortgage from National. Defendant next claimed that PNC submitted incomplete and inaccurate information regarding her payment history on the loan and argued that PNC's report showing her to be in default had not been proven.

¶ 12 On February 13, 2013, defendant filed a response to PNC's motion for summary judgment. She also filed objections to averments contained in the affidavit of Adam Shields concerning the amounts due and owing on the loan and the loan's payment history. Shields was a document control officer at Select Portfolio Servicing, Inc. (SPS), the servicing agent for PNC.¹

¶ 13 On March 1, 2013, PNC filed a reply to defendant's response to its motion for summary judgment; attached to the reply was a copy of the note endorsed by defendant in blank.

¶ 14 After conducting a hearing on PNC's motion for summary judgment, the circuit court entered an order on March 19, 2013, denying the motion without prejudice. The court ordered PNC to make the original note available to defendant for her inspection at PNC's counsel's law office. On May 16, 2013, defendant and an acquaintance Darryl Gaines, went to the law office where they examined and inspected what PNC claimed was the original note. In her affidavit, defendant acknowledged, among other things, that the note bore handwritten signatures in blue ink.

¶ 15 On July 16, 2013, the circuit court entered an order striking defendant's motion which sought to compel PNC to produce the original note. The court determined that the motion had not been properly noticed and that defendant had failed to conduct a discovery conference with PNC under Illinois Supreme Court Rule 201(k). The court also granted PNC's motion for an extension of time to respond to defendant's affirmative defenses.

¹ According to Shields, SPS, in its regular course of business, maintains a record keeping system along with a computer database of documents, including loan records and transactions for the mortgages it services.

¶ 16 PNC subsequently filed a combined motion under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)) seeking to strike the affirmative defenses and for a partial summary judgment on the issue of PNC's standing to bring the action to foreclose the mortgage. Attached to the motion was a stipulation signed by defendant and counsel for PNC, stating that on May 16, 2013, defendant went to counsel's law office where she personally viewed what PNC claimed was the original note, mortgage, and assignment of mortgage.

¶ 17 Defendant filed a response to PNC's combined motion on September 24, 2013. On November 5, 2013, defendant filed a petition for a rule to show cause, claiming that PNC failed to produce the original note and mortgage in accordance with the circuit court's order of March 19, 2013. Defendant also filed her own motion for summary judgment on the issue of PNC's standing to bring the foreclosure action.

¶ 18 On November 15, 2013, the circuit court entered a briefing schedule and set a hearing date on PNC's motion to strike defendant's affirmative defenses. In addition, the court denied defendant's petition for a rule to show cause. Defendant voluntarily withdrew her motion for summary judgment.

¶ 19 On December 16, 2013, PNC filed a reply in support of its combined motion to strike defendant's affirmative defenses and for a partial summary judgment on the issue of PNC's standing. On January 10, 2014, defendant renewed her motion for summary judgment.

¶ 20 On January 22, 2014, following a hearing on PNC's motion to strike defendant's two affirmative defenses, the circuit court struck the affirmative defenses, but granted defendant leave to replead them to add additional necessary allegations.

¶ 21 Defendant filed a motion to reconsider and also sought additional time to replead her affirmative defenses. On June 2, 2014, the circuit court held an initial hearing on defendant's motion and entered an order setting a briefing schedule and hearing date for the motion.

¶ 22 PNC responded, defendant replied, and her motion to reconsider proceeded to a hearing on July 23, 2014. The circuit court denied defendant's motion to reconsider, but granted her additional time to replead her two affirmative defenses.

¶ 23 On August 19, 2014, defendant filed eight new affirmative defenses as part of her third amended affirmative defenses.

¶ 24 On April 14, 2015, PNC again moved for summary judgment against defendant. PNC also moved for a default judgment against all other defendants. Defendant filed another motion for summary judgment on June 11, 2015, followed by a response in opposition to PNC's motions for summary judgment and default judgment.

¶ 25 On July 7, 2015, the circuit court held a hearing at which it ordered a briefing schedule on all pending motions and scheduled a final hearing date. PNC and defendant filed their respective response and reply briefs in support of and in opposition to their pending cross-motions for summary judgment.

¶ 26 The circuit court held a hearing on the cross-motions for summary judgment on October 28, 2015. At the hearing, PNC tendered what it claimed was the original note and mortgage for inspection by the court and defendant. The court determined that the note contained defendant's signature in blue ink, including a blank endorsement containing what appeared to be an original signature in blue ink. The mortgage also contained defendant's signature in blue ink.

¶ 27 The circuit court granted PNC's motion for summary judgment and denied defendant's motion for summary judgment. The court determined that PNC established its *prima facie* standing to commence the foreclosure action while defendant failed to meet her burden of proving PNC's lack of standing. The court entered a default judgment of foreclosure and sale in favor of PNC.

¶ 28 Sale of the property went forward on May 9, 2016, where PNC was the successful bidder of the property for \$250,785.99. On May 13, 2016, PNC filed a motion for order approving report of sale and distribution, confirming sale and for possession. After briefing on the motion, the court entered an order confirming the sale of the property on July 13, 2016. This appeal followed.

¶ 29 ANALYSIS

¶ 30 Defendant raises two primary issues on appeal. She first contends the circuit court erred in striking her second amended affirmative defenses. She next maintains the court erred in granting summary judgment in favor of PNC. We disagree on both counts.

¶ 31 However, as an initial matter, we reject PNC's suggestion that defendant's argument concerning the circuit court's striking of her second amended affirmative defenses was not preserved for review because her notice of appeal did not specifically identify the court's order striking these pleadings. See, *e.g.*, *NorthBrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶¶ 6-10; *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979).

¶ 32 That being said, we do however find that defendant waived any objection to the circuit court's striking of her second amended affirmative defenses. When the court granted defendant leave to amend her second amended affirmative defenses, rather than amending as ordered and

agreed, defendant filed third amended affirmative defenses that did not refer to, or incorporate, the stricken pleadings. Defendant's actions in amending her pleadings without reference to or incorporation of the stricken second amended affirmative defenses amounted to a waiver of her ability to challenge the circuit court's decision to strike her second amended affirmative defenses. See, e.g., *Larkin v. Sanelli*, 213 Ill. App. 3d 597, 602 (1991) (citing *Foxcroft Townhome Owners Assoc. v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983)); *Bank of America, N.A. v. Basile*, 2014 IL App (3d) 130204, ¶ 25. An affirmative defense is a pleading. 735 ILCS 5/2-613(d) (West 2012). "Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn." *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996). "As *Foxcroft* made clear, this court 'adhere[s] to the principle that a party who files an amended pleading waives any objection to the trial court's ruling on the former ***.' " *Bonhomme v. St. James*, 2012 IL 112393, ¶ 22.

¶ 33 Moreover, even if defendant had not waived her ability to challenge the circuit court's decision to strike her second amended affirmative defenses, our review of the facts and controlling case law indicates the court properly struck these pleadings. In this case, the circuit court struck the second amended affirmative defenses, with prejudice, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). A motion to dismiss an affirmative defense under section 2-615 of the Code admits all well-pled facts constituting the defense, together with all reasonable inferences which may be drawn therefrom, and attacks only the legal sufficiency of those facts. *NorthBrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 15; *Hartmann Realtors*

v. Biffar, 2014 IL App (5th) 130543, ¶ 20; *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854 (1989).

¶ 34 An affirmative defense is a pleading which gives color to the opponent's claim but asserts new matter that defeats an apparent right in the plaintiff. *Hartmann Realtors*, 2014 IL App (5th) 130543, ¶ 20. "An affirmative defense is comprised of allegations that do not negate the essential elements of the plaintiff's cause of action, but rather admit the legal sufficiency of the cause of action, and assert new matter by which the plaintiff's apparent right of recovery is defeated." *NorthBrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 14. "In other words, an affirmative defense is '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's ... claim, even if all the allegations in the complaint are true.'" *Bell v. Taylor*, 827 F.3d 699 (7th Cir. 2016) (quoting Black's Law Dictionary (10th ed. 2014)).

¶ 35 "The facts establishing an affirmative defense must be stated in the defendant's answer with the same degree of specificity that is required of a plaintiff stating a cause of action." *NorthBrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 15. "In order to set forth an affirmative defense, sufficient facts must be alleged to satisfy each element of the affirmative defense." *Hartmann Realtors*, 2014 IL App (5th) 130543, ¶ 20. "In reviewing the sufficiency of an affirmative defense, we are to disregard any conclusions of fact or law not supported by allegations of specific fact." *NorthBrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 15. We review *de novo* an order striking an affirmative defense on the basis of sufficiency. *Id.*

¶ 36 Defendant contends the circuit court erred in striking the following two second amended affirmative defenses: PNC's lack of standing to bring the foreclosure action; and the inability of PNC to prove she was in default on her mortgage payments in light of the discrepancies in her

payment history provided by PNC. We disagree with defendant and find the circuit court properly struck these affirmative defenses because defendant failed to allege facts sufficient to support either of them.

¶ 37 Defendant's affirmative defense attacking PNC's standing to bring the foreclosure action did not allege any facts. Instead, defendant merely asserted that PNC lacked the requisite standing based on the alleged ground that PNC had no interest in the note at the time it filed its complaint. This is not a factual allegation. It is a legal conclusion the circuit court was not bound to accept.

¶ 38 Defendant's affirmative defense concerning her payment history on the loan suffers from similar deficiencies. Defendant fails to assert any new factual matter that would prevent PNC from obtaining the relief sought in its complaint. Defendant does not allege that any of her payments were either not applied or were improperly applied to her loan account and she does not allege that she was not in default on her mortgage payments. Rather, defendant merely denies PNC's allegation that she was in default. In other words, defendant merely rebuts the allegation. A purported affirmative defense that does not defeat a cause of action, but merely rebuts a portion of a plaintiff's evidence is legally insufficient as an affirmative defense and is properly stricken. See *Zook v. Norfolk & Western Ry. Co.*, 268 Ill. App. 3d 157, 169 (1994) (purported affirmative defense properly stricken as insufficient as a matter of law where it would not defeat plaintiff's cause of action even if true but merely rebutted a portion of his evidence).

¶ 39 Next, we find the circuit court did not err in granting summary judgment in favor of PNC on its action to foreclose the note and mortgage. Review of a circuit court's ruling granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill.

App. 3d 167, 171, (2003). The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 37.

¶ 40 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). "To resist a motion for summary judgment, the opponent must provide some factual basis that would arguably entitle him to judgment." *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008).

¶ 41 Defendant claims the circuit court erred in granting summary judgment in favor of PNC because material issues of fact existed as to whether PNC was the holder of the note with standing to bring the mortgage foreclosure action at the time it filed its complaint. We disagree.

¶ 42 "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). "A party's standing to sue must be determined as of the time the suit is filed." *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15. "Under Illinois law, a plaintiff need not allege facts establishing standing." *In re Estate of Levi Schlenker*, 209 Ill. 2d 456, 461 (2004). Rather, it is the defendant's burden to plead and prove lack of standing. *Id*; *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 43 In the context of a mortgage foreclosure action, attaching a copy of the note to the foreclosure complaint is *prima facie* evidence that the plaintiff owns the note and has standing to

pursue an action to enforce it. *Bayview Loan Servicing LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12; *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶ 30.

¶ 44 A note is a negotiable instrument as defined by section 3-104 of the Illinois Uniform Commercial Code (Commercial Code) (810 ILCS 5/3-104 (West 2014)). *HSBC Bank USA, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 21. When a negotiable instrument is endorsed in blank, as was the case here, the "instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed." 810 ILCS 5/3-205(b) (West 2014).

¶ 45 In general, a person or entity in possession of a bearer instrument is considered a holder, and a holder of a bearer instrument is entitled to enforce its terms. 810 ILCS 5/1-201(b)(21)(A) (West 2014). Therefore, by demonstrating that it was in possession of the note endorsed in blank by defendant's original lender, PNC established it was the holder of the note with standing to enforce its terms. Additionally, the record indicated that the original note-holder, National, assigned all its rights to PNC regarding defendant's mortgage in July 2011.

¶ 46 Defendant contends that a genuine issue of fact existed as to the holder of the note where the copy of the note PNC attached to its complaint was not endorsed, but the copy of the note PNC later attached to its motion for summary judgment was endorsed in blank. Again, we must disagree.

¶ 47 Our courts have determined that such a discrepancy does not raise a question of fact as to who holds title to a note. See *HSBC Bank USA, National Ass'n*, 2015 IL App (3d) 140553, ¶¶ 20-23; *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 14. The discrepancy in that PNC attached a copy of the note to its complaint that was not endorsed and later, attached

a copy of the same note endorsed in blank to its motion for summary judgment, did not create a genuine issue of material fact as to the holder of the note.²

¶ 48 Finally, defendant attempts to create an issue of fact concerning whether she was in default under the terms of the note and mortgage by arguing that the Internet printout she attached to her second amended affirmative defenses and later in her response to PNC's motion for summary judgment, indicated her loan was paid in full. We do not believe that the information contained in the Internet printout was sufficient evidence to create an issue of fact as to whether defendant was in default, particularly in light of the fact that defendant failed to provide any evidence that she made a monthly mortgage payment on March 1, 2010, or each month thereafter.

¶ 49 In sum, we find that no genuine issues of material fact existed as to whether PNC was the holder of the note with standing to bring the mortgage foreclosure action at the time it filed its complaint. The circuit court's grant of summary judgment in favor of PNC was proper.

¶ 50 For the foregoing reasons, we affirm the orders of the circuit court of Cook County striking defendant's second amended affirmative defenses and granting summary judgment in favor of PNC.

¶ 51 Affirmed.

² Illinois Supreme Court Rule 113(b) (Ill. S. Ct. R. 113(b) (eff. May 1, 2013) now requires that the copy of the note attached to a foreclosure complaint must be a copy of the note as it currently exists, together with endorsements and allonges, but not necessarily assignments. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 26, footnote 4. Because this rule only applies to cases filed after May 1, 2013, it is not relevant to our analysis.