2017 IL App (2d) 160253-U
No. 2-16-0253
Order filed January 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

U.S BANK NATIONAL ASSOCIATION, as Trustee, successor-in-interest to Wachovia Bank, N.A., as Trustee for Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-WWF1,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CH-5103
SCOTT R. HEIKKINEN and JENNIFER J. HEIKKINEN,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: We must remand the cause to the trial court for an evidentiary hearing on whether the note defendants produced in discovery shows that there is no issue of material fact as to whether the grace period notice was timely sent by plaintiff before it filed this foreclosure action. If the trial court finds that a grace period notice was sent and plaintiff waited 30 days before filing suit, then the judgment of the trial court is affirmed.

¶ 2 In this mortgage foreclosure action, defendants, Scott R. and Jennifer J. Heikkinen, appeal from the order of the circuit court granting summary judgment in favor of plaintiff, U.S. Bank, National Association, as Trustee, successor-in-interest to Wachovia Bank, N.A., as

Trustee for Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-WWF1. Defendants contend: (1) the trial court erred in granting plaintiff's motion to strike the affirmative defense alleging that the court lacked subject matter jurisdiction; (2) plaintiff was barred from foreclosing on Jennifer's interest in the property because she signed only the mortgage and not the note; (3) because they did not receive the required 30-day grace period notice from plaintiff, the trial court had no subject matter jurisdiction to enter summary judgment against them; and (4) all orders of the trial court were "subject to vacatur" because defendant's loan servicer did not have a debt collector license from the State of Illinois. For the reasons set forth below, we remand the cause to the trial court for an evidentiary hearing.

¶ 3 I. BACKGROUND

¶ 4 Defendants purchased a single family home located at 1816 Syracuse Road, Naperville, Illinois on August 1, 2003, by warranty deed as tenants by the entirety. On September 3, 2004, defendants refinanced the property for $391,500 from Argent Mortgage Company, LLC. Both defendants signed the mortgage and an adjustable rate rider, but only Scott signed the note. An allonge to the note written on Argent letterhead states that it was incorporated into the note and it included an endorsement of the negotiable instrument for payment without recourse to Ameriquest Mortgage Company. Agents from Ameriquest indorsed the allonge in blank. The mortgage and note were modified on September 28, 2004, and on October 29, 2008.

¶ 5 A. Initial Foreclosure Proceedings

¶ 6 Plaintiff filed a complaint to foreclose the mortgage on September 8, 2010. At that time, defendants' loan had been due on January 1, 2010. On November 7, 2011, the court entered a default judgment against Scott and Jennifer and a judgment of foreclosure was entered.

¶ 7 The sheriff's sale of the property occurred on April 26, 2012. On May 9, 2012, plaintiff

filed a motion for an order approving the report of sale and distribution and for an order of possession, and the sale was confirmed on that date. However, the order confirming the sale was vacated because the hearing on the motion to confirm the sale had been scheduled for May 10, 2012, and the order approving the sale was presented and entered a day earlier, on May 9, 2012. On June 1, 2012, plaintiff once again filed a motion for an order approving the report of sale and distribution and an order for possession.

¶ 8 On June 7, defendants' counsel filed a motion to deny the confirmation of the foreclosure sale. Defendants claimed that (1) the trial court lacked subject matter jurisdiction due to plaintiff's lack of standing; (2) justice was not otherwise done in the sale of the property; and (3) the terms of the sale were unconscionable due to the sale amount. The court granted defendants' motion to deny confirmation on July 16, 2012.

¶ 9 B. Stricken Affirmative Defenses

¶ 10 Defendants filed an answer to the complaint along with their own statement of facts and three affirmative defenses. Defendants argued that (1) plaintiff lacked standing because no assignment of the mortgage to plaintiff was attached to the complaint; (2) plaintiff had not engaged in good faith and fair dealing in communicating with defendants about the loan modification options; and (3) plaintiff could not foreclose on Jennifer's "100% interest" in the property because only Scott signed the note. Plaintiff moved to strike defendants' affirmative defenses and subsequently moved for summary judgment on September 17, 2012.

¶ 11 At the hearing on plaintiff's motion, counsel presented the original note and allonge along with the mortgage and argued that defendants' affirmative defense of lack of standing should be stricken because the documents proved plaintiff had standing as the holder of the note, pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et*

seq. (West 2010)). Defendants' counsel stated that, when he reviewed the collateral file, there was no original allonge that could be found, so defendants based their argument on the fact that the original allonge was missing and, in order to be effective, it must be affixed to the note itself. Counsel noted that a copy of the allonge was attached as an exhibit to the mortgage, but argued that, without dates and notarizations on the assignments, there was no way to test the genuineness of the actual endorsement or allonge itself.

¶ 12 The trial court granted plaintiff's motion to strike defendants' affirmative defenses. The court concluded that the note and allonge "establishe[d] the plaintiff as the holder and therefore the proper party to bring this suit." As to defendants' second affirmative defense, the court noted that it could not find any case law "that imposes an obligation on the bank to negotiate or modify the original instruments," and it concluded that it was "legally not *** sufficient." The court also found that defendants' third affirmative defense was invalid because "Jennifer Heikkinen is a necessary party because she does have an interest in this." Before concluding the hearing, defendants' counsel stated that he was not requesting formal discovery but did ask for "a chance to examine the original allonge," which the court approved.

¶ 13 C. Amendment of Complaint and Answer

¶ 14 On June 23, 2014, the trial court granted plaintiff's motion to amend the complaint to correct the name of plaintiff to U.S. Bank National Association, as Trustee, successor-in-interest to Wachovia Bank, N.A., as Trustee for Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-WWF1. The court also granted defendants 14 days to answer or otherwise plead.

¶ 15 On July 14, 2014, defendants filed their answer and affirmative defenses. In their answer, defendants admitted that they had failed to pay monthly installments due under the note.

They stated that they did not have sufficient information to admit or deny whether all notices of default or election to declare the indebtedness due and payable or other notices required to be given had been duly and properly given. As to plaintiff's allegation that "any and all periods of grace or other period of time allowed for the performance of the covenants or conditions claimed to be breached or for the curing of any breaches have expired," defendants answered that these were legal conclusions to which an answer was neither necessary nor appropriate and that to the extent any further response was deemed necessary, defendants denied the allegations and demanded strict proof thereof.

¶ 16 Defendants reasserted the affirmative defense that the court lacked subject matter jurisdiction due to a lack of assignment of the mortgage to plaintiff. Defendants ~~further~~ argued that "a plain viewing" of the endorsements on the allonge showed that they "may have been added after the date of the allonge and may, in fact be forgeries." Because the endorsements on the allonge did not assign the note to plaintiff, defendants argued plaintiff had no justiciable interest in the mortgage, note, or power to foreclose on them.

¶ 17 After it replied to defendants' response, plaintiff filed a motion to compel discovery on November 7, 2014, pointing out that defendants still had not answered plaintiff's discovery requests. The trial court granted defendants 14 days to respond to plaintiff's motion to compel, requests to produce, and to answer interrogatories.

¶ 18 Scott responded to plaintiff's requests to admit. Among other things, Scott admitted the authenticity of the note and mortgage, admitted that he "d[id] not have any documents or information which demonstrate[d] someone other than Plaintiff is currently in possession of the subject Note and Mortgage," and admitted that he did not make any mortgage payments in 2010, 2011, or 2012.

¶ 19 D. Summary Judgment

¶ 20 On March 30, 2015, plaintiff filed a motion for summary judgment. Defendants' response to the motion for summary judgment alleged, in part, that plaintiff had no justiciable interest in the matter; that all orders obtained by the mortgage servicer, America's Servicing Company, as the collection agent of plaintiff, were subject to vacatur; and that plaintiff failed to meet the conditions precedent to the filing of the complaint because plaintiff failed to give a grace period notice to defendants. Defendants included two affidavits by Scott, in which he verified the statements in defendants' response, and averred that he did not remember receiving a grace period notice and could not find any such notice in his files.

¶ 21 In reply, plaintiff noted, *inter alia*, that defendants had produced in discovery a set of their internal notes with the following notation: "Received letter Feb 3rd—Grace Period Notice." Plaintiff further argued that it had filed the endorsed-in-blank note with the complaint, providing it with standing to foreclose, and that the Illinois Collection Agency Act, by its terms did not apply to banks. See 225 ILCS 425/2.03 (West 2014). Additionally, plaintiff submitted Scott's responses to plaintiff's requests to admit.

¶ 22 The trial court granted summary judgment and judgment of foreclosure to plaintiff against both defendants on July 6, 2015. Defendants filed a motion to bar enforcement of judgment of foreclosure, in which they presented the same argument from their stricken affirmative defenses that, because Jennifer had signed the mortgage but not the note and defendants held the property as tenants by the entirety, plaintiff could not complete the foreclosure. Defendants also moved to stay the foreclosure sale for 30 days, which the court granted.

¶ 23 At the next hearing on November 3, 2015, the court denied defendants' motion to bar

enforcement of the judgment. The court noted that only Scott signed the note but held that, under established law, "both parties who sign a security instrument are pledging their interest in whatever is secured *** for payment of the debt. And that's exactly what we have." Thus, the court concluded that defendants' motion to bar enforcement of the judgment was "contrary to established law, notwithstanding the fact that it is tenancy by the entirety."

¶ 24 E. Confirmation of Sale

¶ 25 The property sold at a sheriff's sale on November 17, 2015, and plaintiff filed a motion for an order approving the report of sale and distribution and for an order of possession. The successful bidder for the property, DGDB, LLC Series IV, filed a motion to intervene and confirm the sale. Defendants filed a motion to strike the approval of the sale, arguing that no copy of the report of sale and distribution was attached to plaintiff's motion.

¶ 26 The trial court denied defendants' motion to strike and the court entered an order approving the report of sale and distribution, confirming the sale, and entering an order of possession. Defendants filed a motion to reconsider, arguing that (1) the court erred in striking their affirmative defense that foreclosure was barred because Jennifer failed to sign the note, based in part on this court's recent decision in *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, and (2) "newly discovered evidence" showed that the proposed intervenor, DGDB, "does not exist in Illinois," based on a search on the website of the Illinois Secretary of State, rendering the foreclosure sale fraudulent.

¶ 27 The trial court granted DGDB's motion to intervene. Subsequently, it denied the motion to reconsider on March 16, 2016, and stayed the order of possession for 21 days, after which the court directed the sheriff to evict in accordance with the order approving the sale. Defendants timely appeal the summary judgment order in favor of plaintiff.

¶ 28 II. ANALYSIS

¶ 29 A. Standard of Review

¶ 30 Defendants ask us to reverse the trial court's order granting plaintiff's motion for summary judgment. The purpose of summary judgment is not to try an issue of fact, but to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002); Schrager v. North Community Bank, 328 Ill. App. 3d 696, 708 (2002). "Although a plaintiff is not required to prove his [or her] case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Robidoux*, 201 Ill. 2d at 335.

¶ 31 A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The trial court must consider documents and exhibits filed in support or opposition to a motion for summary judgment in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995) (a court "must construe [documents and exhibits] strictly against the movant and liberally in favor of the nonmoving party"). Summary judgment is a drastic measure and should be granted only if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 32 We review a trial court's decision on a motion for summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102; *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519 (2008). Under the *de novo* standard of review, the reviewing court does not need to

defer to the trial court's judgment or reasoning. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007). *De novo* review is completely independent of the trial court's decision. *United States Steel Corp. v. Illinois Pollution Control Board*, 384 Ill. App. 3d 457, 461 (2008). *De novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 33 B. Jurisdiction

¶ 34 Defendants first contend that the trial court erred in granting plaintiff's motion to strike their original affirmative defense on the basis that the court lacked subject matter jurisdiction because the plaintiff named in the complaint did not exist, lacked standing, and had no justiciable interest in the matter. Plaintiff responds that defendants have waived this argument when they filed amended affirmative defenses and failed to include any reference to the stricken defense. Plaintiff also argues that standing and justiciability issues do not involve the court's subject matter jurisdiction. See *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 334-35 (2002).

¶ 35 While defendants' arguments are couched in terms of their affirmative defense as it related to subject matter jurisdiction, they also argued that these issues raised questions of material fact in opposition to plaintiff's summary judgment motion. Given that context, we will address defendants' claims.

¶ 36 Defendants argue that the captioned plaintiff in this case did not exist and therefore had no standing or justiciable interest in the case. When a plaintiff lacks standing in a foreclosure action, the trial court's entry of summary judgment and orders of foreclosure and sale are improper as a matter of law. *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 1188 (2008). "The doctrine of standing is designed to preclude persons who have no interest in a

controversy from bringing suit" and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). "[S]tanding requires some injury in fact to a legally cognizable interest *** ." *Id*. at 221.

¶ 37 Defendants presented no evidence in opposition to the summary judgment motion that plaintiff did not exist. Rather, they relied on a motion to substitute party where the original plaintiff sought to substitute a different plaintiff based on the fact that the original plaintiff assigned its interest to the new party subsequent to the filing of the case. Defendants point to the fact that there was no assignment attached to the motion, which they claim proves that this assignment never happened.

¶ 38 We fail to see how the motion to substitute, which was granted, proves that there was "no effective assignment of the Note or Mortgage to Plaintiff." To establish a *prima facie* case of foreclosure in accordance with section 15-1504 of the Foreclosure Law (735 ILCS 5/15-1504 (West 2010)), a plaintiff is required to introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant to prove any affirmative defenses. *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994). Section 15-1504 does not require that a foreclosure be filed by the owner of the note and mortgage, and instead states that the legal holder of the indebtedness, a pledgee, an agent, or a trustee may file the lawsuit. 735 ILCS 5/15-1504(a)(3)(N) (West 2010).

¶ 39 Here, plaintiff pleaded correctly that it was "holder of the Indebtedness based on the attached Note." As holder of the note, plaintiff established it was also holder of the mortgage, as "[t]he assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured." *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 635

(2000). A separate assignment of the mortgage is not required. See *US Bank, National Ass'n v. Avdic*, 2014 IL (1st) 121759, ¶ ¶ 35-37 (holding plaintiff had standing as holder of note despite absence of a written assignment of mortgage). Clearly, when the complaint was filed, plaintiff held the note and allonge, which was indorsed in blank. As holder of that bearer paper, plaintiff had standing to enforce the note. Because plaintiff had standing to enforce the note, defendants' assignment claim does not create a genuine issue of material fact.

¶ 40 As to defendants' assertion that plaintiff did not exist at the time of the filing of the complaint, which they contend "that there is no trust" with the name of plaintiff in this case, plaintiff responds that defendants provided no citations to the record to support this assertion and accordingly have waived this argument. Defendants argue that plaintiff "conceded that it did not exist at the time of the filing of the Complaint" when it filed a motion to substitute party and alleged that it "assigned its interest." The motion to substitute party alleges that, at the time of the filing, the original plaintiff named in the complaint was the mortgagee of the mortgage being foreclosed and that, after the case was filed, the original plaintiff assigned its interest to US Bank, National Association as Trustee, successor-in-interest to Wachovia Bank, N.A., as Trustee for Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-WWF1. Nowhere in the motion to substitute does plaintiff concede that the original plaintiff did not exist at the time the complaint was filed. Moreover, because lack of standing must be established by the proponent, defendant, at least, should have sought discovery and made a demand for production of the trust document. Based on the record before us, defendant has failed to make a *prima facie* showing of lack of standing.

¶ 41 Defendants next maintain that summary judgment should not have been granted because the allonge was ineffective as it was not "affixed" to the note, which is required "under UCC

[s]ection 3-204(a)." Plaintiff points out that defendants provide no citation to the record in support of this argument and "it is demonstrably false." The record shows the note and allonge are attached to the complaint as exhibit B. The allonge states that it is incorporated into the "attached" note and it references the note by loan number, principal balance, borrower's name, and property address. This is sufficient to establish that the allonge was "affixed" to the note.

¶ 42 Defendants also argue on appeal that the allonge was a photocopy and not an original. Defendants' amended answer denied the authenticity of the allonge, however, that denial was not "in a pleading verified by oath." Therefore, the "assignment[s]" evidenced by the allonge was "admitted." See 735 ILCS 5/2-605(b) (West 2010). Also, any allegation that the allonge presented in court was a photocopy was not contained in a verified pleading, deposition, admission, or affidavit, and therefore, was not competent evidence presented in opposition to summary judgment. Thus, defendants failed to adequately support this theory to prevent entry of summary judgment in plaintiff's favor.

¶ 43 C. Tenancy by the Entirety

¶ 44 Defendants next argue that they took the property by way of tenancy by the entirety and, when Jennifer did not sign the note, there was no debt created as to her 100% interest. Plaintiff raises a valid claim that this issue has been forfeited. Defendants raised this issue in their first affirmative defenses, which were stricken by the trial court. When defendants filed amended affirmative defenses, they did not incorporate this stricken defense by reference. See *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)).

¶ 45 Defendants also did not raise this issue in response to plaintiff's summary judgment motion. They raised it in a pleading captioned "Motion to Bar Enforcement of the Judgment"

after the court entered the summary judgment order. Plaintiff asserts that this actually was a motion to reconsider the summary judgment, which improperly contained an argument not previously raised in opposition to the summary judgment. Defendants counter that the motion sought injunctive relief. Jennifer is a party to this action and she previously had filed an affirmative defense raising her tenancy by the entirety claim. There was nothing to prevent her from including this argument as a basis for denying the summary judgment. Filing a postjudgment motion for injunctive relief on this basis was improper, as she could not seek an equitable remedy where she had an adequate remedy at law. See *Newton v. Aitken*, 260 Ill. App. 3d 717, 720 (1994) (it is axiomatic that a plaintiff cannot seek an equitable remedy where an adequate remedy at law exists). Clearly, defendants' motion was a motion to reconsider summary judgment, not a motion to bar enforcement of the judgment, which improperly raised a new issue resulting in forfeiture of this claim.

¶ 46 Forfeiture aside, defendants' arguments are meritless. Defendants maintain that the foreclosure is ineffective to defeat Jennifer's 100% ownership interest in the property because Jennifer did not sign the note. Defendants also contend that Jennifer's tenancy by the entirety interest is protected by section 12-112 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/12-112 (West 2010)). Section 12-112 provides that real property "held in tenancy by the entirety shall not be liable to be sold upon judgment entered *** *against only one of the tenants*." (Emphasis added.) 735 ILCS 5/12-112 (West 2010)).

¶ 47 These exact arguments were rejected by the Appellate Court, Third District in *Onewest Bank FSB v. Cielak*, 2016 IL App (3d) 150224. Similar to defendants, the Cielaks argued that the judgment against the husband for defaulting on his obligations under the note could not be enforced by foreclosing the wife's interest in the real estate. They argued that the mortgage was

invalid because the wife did not sign the note and the property was held in tenancy by the entirety. *Id*. at ¶ 18.

¶ 48 The appellate court noted that the husband received a loan, which was memorialized by the note, in return for the Cielaks' grant of a mortgage lien in their real estate to secure payment of the loan. The court found that the loan to the husband *via* the note was only "the underlying debt secured by the mortgage executed by the Cielaks," and the note and mortgage "were signed together, executed contemporaneously, and intended to complement each other." *Id*. ¶ 20. Thus, the court concluded that the mere fact that only the husband signed the note governing the loan did not invalidate the note or mortgage. *Id*. ¶ 20.

¶ 49 In the instant case, by signing and initialing every page of the mortgage, Jennifer also was a borrower, and since the judgment appropriately was entered against both defendants, the protections of section 12-112 do not apply. By its plain language, section 12-112 has no application to this case. The judgment was not "against only one of the tenants," as the statute requires. 735 ILCS 5/12-112 (West 2010). Here, the trial court properly granted summary judgment and judgment of foreclosure against *both* defendants.

¶ 50 Defendants' reliance on *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, and *In re Yotis*, 518 B.R. 481 (Bankr. N.D. Ill. 2014) is misplaced. In *Parille*, the husband signed the mortgage only as to his waiver of homestead rights. Unlike in our case, the husband in *Parille* did not sign as the borrower, initial every page of the mortgage, and was not listed as a borrower. *CitiMortgage*, 2016 IL App (2d) 150286, ¶ 25. Similarly, in *Yotis*, only one spouse was the

debtor.[1] *Yotis*, 518 B.R. at 482-83. In our case, both defendants were the borrowers. *Cielak* is more factually consistent with the case at bar.

¶ 51 D. Loan Servicer

¶ 52 Defendants next argue that the loan servicer in this case, ASC, was not licensed as a collection agency and therefore summary judgment was improper. Defendants fail to cite any authority to support their claim that the non-licensure of a loan servicer, who is named in a foreclosure complaint but is not a party to the action, has any bearing on orders entered in the case. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) requires arguments to be supported by authority, and an absence of such authority forfeits the arguments. *In re Addison R.*, 2013 IL App (2d) 121318, ¶ 31. "A reviewing court is entitled to have the issues before it clearly defined and is not simply a repository in which appellants may dump the burden of argument and research; an appellant's failure to properly present his own arguments can amount to waiver [forfeiture] of those claims on appeal." *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005). As such, we find this claim is forfeited as well.

[1] We note that defendants included in their brief a quote from *Yotis* that goes on for 10 pages. Supreme Court Rule 341(a) (eff. Jan. 1, 2016)) dictates that "lengthy quotations are not favored and should be included only where they will aid the court's comprehension of the argument." The Rules are not intended as either suggestions or aspirational statements but serve as mandatory guidelines that must be followed. See *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. We put these defendants and other parties with cases pending in this court on notice that future violations of the Rules may result in this court striking their briefs on this court's own motion.

¶ 53 E. Grace Period Notice

¶ 54 We last address defendants' contention that the trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether they received the required grace period notice from plaintiff, pursuant to section 15-1502.5 of the Foreclosure Law (735 ILCS 5/15-1502.5 (West 2010)).[2] Section 15-1502.5 requires that the mortgagee mail a 30-day grace period notice to the mortgagor prior to any foreclosure action. 735 ILCS 5/15-1502.5 (b), (c), (d) (West 2010)[3]; *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ ¶ 99-100.

¶ 55 Plaintiff cites two reasons to reject defendants' argument: (1) by not denying that they received all required notices related to the foreclosure, in particular their failure to deny the allegation that they received such notices, including a grace period notice, it resulted in a binding judicial admission; and (2) defendants tendered evidence in discovery showing that they received the grace period notice. The document referred to contains Scott's internal notes, which states: "Received letter Feb 3rd—Grace Period Notice."

[2] Defendants argue that section 1502.5 is "jurisdictional" because it creates a "condition precedent to the filing of the Complaint," and that Scott's affidavit stating that he had not found a grace period notice in his files showed that plaintiff "failed to comply" with section 1502.5. While defendants again couch this argument in terms of subject matter jurisdiction, which is not appropriate per *Belleville Toyota*, they do contest the granting of summary judgment, which we will review.

[3] Plaintiff is under the mistaken belief that this section "expired" on July 1, 2016. Only section 15-1502.2(k) "expired;" which does not affect the required 30-day grace period notice.

¶ 56 Regarding plaintiff's first argument, plaintiff's complaint alleges "[t]hat any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given." Defendants responded that they did not have sufficient information to either admit or deny the allegations that they received all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given. Plaintiff contends that this admission applies to the grace period notice and that, because defendants did not support this answer with an affidavit showing why they lacked knowledge to answer this allegation, the answer must be deemed admitted.[4] See 735 ILCS 5/2-610(b) (West 2010).

¶ 57 In *Adeyiga*, a mortgage foreclosure case, the Bank moved for summary judgment after one of the defendants filed an answer. *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 14, 20. The defendants filed a response to the summary judgment motion and a section 2-619 motion to dismiss the complaint (735 ILCS 5/2-619 (West 2010)), alleging "that the Bank had not met its burden of proof to show that it had mailed a grace period notice prior to the filing of the complaint." *Id*. ¶ 26. Attached to the defendants' pleading were affidavits in which they averred that they did not receive the statutory grace period notice required under section 15-1502.5. *Id*.

[4] Plaintiff's complaint further alleges [t]hat any and all periods of grace or other period of time allowed for the performance of the covenants or conditions claimed to be breached or for the curing of any breaches have expired." Defendants replied that those "allegations state legal conclusions to which an answer is neither necessary nor appropriate," and "[t]o the extent any further response is deemed necessary," defendants denied the allegations but "demand[ed] strict proof thereof."

The Bank, in reply, did not deny that it failed to send the grace period notice; instead, it argued that the defendants had admitted to receiving the grace period notice where they did not raise the failure to send such notice as an affirmative defense. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 31.

¶ 58 Ultimately, the trial court denied the defendants' motion to dismiss and awarded the Bank summary judgment and judgment of foreclosure and sale. *Id.* ¶ 33. The trial court found that, where the Bank used the "form complaint" provided for in section 15-1504(a) of the Foreclosure Law, "the complaint included the 'deemed' allegation that 'other notices required to be given' had been given." *Id.* ¶ 36. The trial court had interpreted "other notices required to be given" to include the grace period notice described in section 15-1505.2. *Id.* ¶ 101. In the trial court's opinion, if a defendant did not deny "this unstated allegation," it was admitted and therefore, the issue had been waived. *Id.* ¶ 102. The defendants appealed, arguing that the trial court erred in finding that they had admitted receiving a grace period notice merely because they did not deny it in their answer. *Id.* ¶ 84.

¶ 59 The Bank contended, relying on the logic of the trial court, that the defendants lost the ability to challenge a lack of grace period notice by not denying in an answer that it was sent, despite the fact that the complaint failed to state that this notice was sent, and regardless of whether the notice was actually sent.

¶ 60 The Appellate Court, First District undertook an extensive analysis of the relevant statutory provisions and agreed with the defendants' argument. *Id.* ¶¶ 97-112. The appellate court determined that the trial court's interpretation of the Foreclosure Law did not reflect the intent of the legislature and that the language "other notices required to be given" in section 15-1504 does not include the grace period notice required by section 15-1502.5. *Id.* ¶ 102. The appellate court concluded that "the trial court erred as a matter of law when it deemed that [the

defendants] admitted to receiving the grace period notice, even though the Bank never showed evidence that it mailed or served a notice." *Id.* ¶ 112. The appellate court noted that "[n]either this court nor the Illinois Supreme Court has ever held that a sale may be confirmed on appeal without *any* grace period notice being sent. Indeed, section 15-1502.5(h) of the Foreclosure Law states that there can be no waiver of this prerequisite." (Emphasis in original.) *Adeyiga*, 2014 IL App (1st) 131252, ¶ 94. Since there was no evidence in the record that the Bank sent a "grace period notice" prior to filing its complaint, which is required before any foreclosure action may be commenced under the Foreclosure Law by sections 15-1502.5(b) and (c), the cause was remanded for an evidentiary hearing so that the trial court could determine whether the statutory grace period notice was sent by the Bank and whether the Bank waited the requisite amount of time before filing suit. *Id.* ¶ 112.

¶ 61 Plaintiff relies on *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, arguing that the First District expressly declined to follow its own decision in *Adeyiga* to the extent it "held that the failure to deny a deemed allegation in a foreclosure complaint can be overlooked." *Simpson*, 2015 IL App (1st) 142925, ¶ 49. In *Simpson*, the Bank filed a foreclosure suit against the defendant, who was the deceased mortgagor's granddaughter. The defendant failed to respond to the lender's summary judgment motion and lost the case. She filed several motions to vacate and challenge the sale of the property but provided an insufficient basis to vacate or invalidate the sale. *Simpson*, 2015 IL App (1st) 142925, ¶ 2.

¶ 62 One issue the appellate court addressed involved the effect of an out-of-order deed on the mortgaged property. The defendant argued that a trust owned the property when the deceased executed the tenth mortgage, so defendants' signature on the mortgage did not create any lien against the property. *Simpson*, 2015 IL App (1st) 142925, ¶ 43. Before analyzing the issue, the

appellate court noted that the defendant had admitted a number of facts in her answer which negated her defenses. *Simpson*, 2015 IL App (1st) 142925, ¶ 44 (citing *Parkway Bank and Trust Co. v. Korzen*, 2103 IL App (1st) 130380, ¶ 43 (holding that, by failing to deny the 12 statutorily specified allegations set forth in section 5/1504(c) of the Foreclosure Law (735 ILCS 5/15-1504(c) (West 2010)), defendants admitted the authenticity of the copy of the mortgage and note attached to the complaint). The court declined to follow the portion in *Adeyiga* which held that the failure to deny a deemed allegation in a foreclosure complaint can be overlooked. *Simpson*, 2015 IL App (1st) 142925, ¶ 49. We find *Simpson* distinguishable. Unlike in *Simpson*, *Adeyiga* dealt specifically with the 30-day grace period notice.

¶ 63 We find *Wells Fargo Bank, N.A. v. Bednarz*, 2016 IL App (1st) 152738, similarly distinguishable. *Bednarz* held that section 15-1504, which provides for deemed and construed allegations in the statutory form complaint for foreclosures did not violate due process. The *Bednarz* court noted that, under subsections (c), (d), and (e) of section 15-1504, " '[i]f the complaint "is "substantially" in the specified statutory form, the allegations in the complaint "are deemed and construed" to also include 12 more statutorily specified allegations.' " *Bednarz*, 2016 IL App (1st) 152738, ¶ 8 (quoting *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 43). *Bednarz* also cites *Simpson*, 2015 IL App (1st) 142925, ¶ 49 for the proposition that, if a defendant fails to deny the "deemed and construed" allegations in his answer to a foreclosure complaint, the allegations are considered admitted. *Bednarz*, 2016 IL App (1st) 152738, ¶ 8. Like *Simpson*, *Bednarz* did not consider section 15-1502.5 and whether the failure to deny a deemed allegation in a foreclosure complaint applies to the 30-day grace period notice. We agree with the holding in *Adeyiga* that the legislature intended that the 30-day grace period notice is mandatory and that this notice is not included in the "other notices required to be given

in section 15-1504." The legislature's most recent pronouncement on the issue is found in section 15-1502.5(h), which states that this notice is not subject to waiver. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 103.

¶ 64 Thus, the only issue before us is whether the note defendants produced in discovery shows that there is no issue of fact on whether notice was sent. While it is true that this note directly contradicts Scott's affidavit in which he stated that he did not remember receiving the notice, there remains a timing issue. As *Adeyiga* points out, the purpose of the notice is to give a mortgagor time to modify the loan or seek other relief before a foreclosure action is filed. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 106. In this case, there may be evidence that the notice was sent and received on February 3, but there still remains a question regarding what year the notice was sent. Thus, we must remand the cause to the trial court for an evidentiary hearing on whether the note defendants produced in discovery shows that there is no issue of material fact as to whether the grace period notice was timely sent by plaintiff before it filed this foreclosure action. See *Adeyiga*, 2014 IL App (1st) 131252, ¶ 112.

¶ 65 III. CONCLUSION

¶ 66 For the preceding reasons, we remand the cause to the trial court to determine in an evidentiary hearing whether the grace period notice was sent and whether plaintiff waited past 30 days to file its suit. If the trial court finds that no grace period notice was sent or that such notice was not timely, we determine that: (1) the trial court abused its discretion in confirming the judicial sale and all subsequent orders; (2) and in that case, the judicial sale must be vacated in accordance with section 15-1508(b) of the Foreclosure Law (735 ILCS 5-1508(b) (West 2010)); and (3) the case must be dismissed. See *Adeyiga*, 2014 IL App (1st) 131252, ¶ 125. If the trial

court finds that a grace period notice was sent and plaintiff waited 30 days before filing suit, then the judgment of the trial court is affirmed.

¶ 67 Remanded for an evidentiary hearing.