2017 IL App (2d) 160491-U
No. 2-16-0491
Order filed January 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HSBC BANK USA, N.A., as Trustee on Behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2, Asset Backed Pass-Through Certificates,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CH-3148
MICHAEL GUSTAFSON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; CAMBRIDGE LAKES COMMUNITY ASSOCIATION; and UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,	)	
Defendants	)	Honorable Leonard J. Wojtecki, Christine A. Downs, and Mary Katherine Moran,
(Michael Gustafson, Defendant-Appellant.)	)	Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly (1) dismissed the defendant's second amended affirmative defense of lack of standing pursuant to section 2-615 of the Code of Civil Procedure and (2) granted summary judgment in favor of plaintiff. Defendant forfeited his argument that plaintiff's failure to respond to his request to admit

facts resulted in those facts being deemed admitted. An affidavit submitted in support of plaintiff's motion for summary judgment laid a sufficient foundation to admit the attached documents as business records.

¶ 2 Plaintiff—HSBC Bank USA, N.A., as Trustee on behalf of Ace Securities Corp. Home Equity Loan Trust and for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2, Asset Backed Pass-Through Certificates—filed the instant action seeking to foreclose defendant Michael Gustafson's mortgage. Defendant appealed following confirmation of the judicial sale. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 6, 2010, plaintiff filed a complaint to foreclose defendant's mortgage, alleging that it was "the legal holder of the indebtedness and owner of the mortgage given as security therefore." Plaintiff attached copies of the applicable mortgage and note as exhibits to the complaint. The mortgage identified defendant as the borrower, DHI Mortgage Company, Ltd. (DHI) as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS)—acting solely as nominee for DHI—as the mortgagee. The copy of the note that was attached to the complaint was indorsed in blank by a representative of DHI.

¶ 5 Defendant filed a *pro se* appearance and represented himself for almost three years. One of defendant's myriad defenses was that plaintiff, despite having presented in open court the original loan documents indorsed in blank, lacked standing to foreclose the mortgage. The essence of defendant's theory on this point, as reflected in his court filings, appears to have been as follows. The record contained an assignment of mortgage that was executed and recorded in June 2010, but which purported to document a May 31, 2007, transaction. In that 2010 assignment, MERS, as nominee for DHI, transferred its interest in defendant's mortgage to plaintiff. Defendant noted that plaintiff was the trustee of a securitized trust, which was

governed by a pooling and servicing agreement (PSA) subject to the laws of the state of New York. Trust documents indicated that the trust was formed on May 1, 2007, and that it closed on May 30, 2007. According to defendant, the PSA contemplated the following chain of indorsements of the loan documents: (1) from DHI to an entity called DB Structured Products Inc.; (2) from DB Structured Products Inc. to Ace Securities Corp.; and (3) from Ace Securities Corp. to plaintiff, as trustee of the trust. Defendant proposed that, in contravention of that scheme, the "wet-ink" note that plaintiff possessed reflected only a single indorsement in blank by DHI. Therefore, he argued, "the note and the endorsement chain presented by the Plaintiff does not [*sic*] comply with the requirements of the PSA of the Trust." Nor, he insisted, was there an effective transfer of the mortgage and note to the trust under New York law. Defendant found further flaws with the 2010 assignment in that (1) it reflected that DHI still had ownership of the mortgage on May 31, 2007 (one day after the closing date of the trust) and (2) the assignment supposedly "separated" the mortgage from the note, which meant that plaintiff lost the right to foreclose on the note.

¶ 6 On June 22, 2012, defendant, still acting *pro se*, issued a request to plaintiff to admit 22 facts, all of which appear to be related to his theory of plaintiff's lack of standing. On July 20, 2012, plaintiff filed a motion for an extension of time to file its response and objections to that request. Plaintiff complained that defendant sought admissions of legal conclusions rather than facts. Additionally, plaintiff argued, defendant did not define certain necessary terms, and several of the matters were irrelevant. Due to the "numerous deficiencies in the requests," plaintiff requested an additional 28 days to respond. Defendant responded that there was no good cause shown for the extension requested. In his prayer for relief, defendant asked the court to "A. Refuse Plaintiff's request for another twenty-eight days to respond to Defendant's request

[and] B. Accept all facts set forth in Defendant's Request for Admission of Facts to be deemed true."

¶ 7 Plaintiff's motion for an extension of time to respond to the request to admit facts came before the court, Judge Leonard J. Wojtecki presiding, on August 17, 2012. The record on appeal does not include either a transcript of that proceeding or a bystander's report. The order entered that day states, in its entirety: "This cause coming to be heard on Plaintiff's motion for an extension of time to file response and objections to Defendant's first request for admissions of fact, counsel for HSBC and Michael Gustafson being present and the court being fully advised in the premises: IT IS HEREBY ORDERED: Plaintiff's motion is denied." There is no further mention in the record of defendant's request for admission of facts for another three years.

¶ 8 Meanwhile, on June 28, 2013, counsel appeared on defendant's behalf. On June 19, 2014, defendant, through counsel, filed what he labeled as his "amended answer and second amended affirmative defenses." Only the affirmative defense of lack of standing is relevant to this appeal. Noting that the 2010 assignment evidenced a transfer of interest into the trust on May 31, 2007—one day after the closing date of the trust—defendant alleged that the applicable note was "not properly incorporated into the trust corpus." Therefore, he concluded, the mortgage and note were "not under the control" of plaintiff, and plaintiff was "not in proper possession of this instrument" and could not enforce it. Defendant also complained that the 2010 assignment was signed by one Christina Carter, whose signature had been called into question in a news report. In an attached news article, Carter was identified as a known "robo-signer."

¶ 9 Plaintiff moved to strike the second amended affirmative defense of lack of standing pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). Plaintiff argued that, pursuant to *Bank of America National Ass'n. v. Bassman FBT,*

L.L.C., 2012 IL App (2d) 110729, defendant lacked standing to challenge the transfer of the note and mortgage to plaintiff. Plaintiff further emphasized that it had attached to its complaint the note indorsed in blank, which was *prima facie* evidence of its standing.

¶ 10 In his response, defendant contended that *Bassman* stood for the proposition that "a valid assignment cannot be challenged by the obligor." However, he insisted, he was contending that the 2010 assignment was invalid, inasmuch as "it [was] signed by an individual who [was] not the signatory, was not prepared by any party to this case, [was] prepared in anticipation of litigation, [was] backdated improperly over three years and [was] even *backdated to the wrong date*." (Emphasis in original.) Defendant thus suggested that the assignment bore indications of forgery.

¶ 11 In its reply, plaintiff reiterated its contention that *Bassman* precluded defendant from attacking the transfer of the loan to plaintiff. Plaintiff further maintained that defendant had not pleaded any specific facts to support that the 2010 assignment was forged. On July 25, 2014, the court, Judge Christine A. Downs presiding, entered an order granting plaintiff's motion to strike the second amended affirmative defense of lack of standing with prejudice.

¶ 12 On June 1, 2015, plaintiff filed a motion for summary judgment, which was accompanied by an affidavit from William Long. Long averred the following. He was employed as a contract management coordinator by Ocwen Loan Servicing, LLC (Ocwen), which was plaintiff's servicing agent. Ocwen currently serviced the loan that was the subject of this litigation. In the ordinary course of his employment, he reviewed and analyzed the records for loans serviced by Ocwen. He was familiar with Ocwen's books and records, including records pertaining to the loans that it serviced. In the ordinary course of its business, Ocwen maintained a loan file for every loan that it serviced. Those files, to which he had access, contained loan payment histories

and computer generated records. He reviewed the records of the subject loan in connection with executing his affidavit. The records pertaining to any mortgage loan were comprised of entries made near the time of the occurrence by persons authorized and trained to make such entries. Defendant's loan was current when Ocwen acquired the servicing rights from DHI on February 28, 2007. Long reviewed the payment history and the electronic records of the subject loan to determine the amount due. He averred that true and accurate copies of the documents he reviewed were attached to his affidavit.

¶ 13 Long further explained in his affidavit that Ocwen used a program called "Real Servicing" to record and track mortgage payments. That program was recognized as standard in the industry. Long then detailed the procedure that Ocwen used to process and apply mortgage payments. According to Long, the records he reviewed were made in the regular course of Ocwen's business, and entries reflecting defendant's payments were in accordance with the procedure outlined. Additionally, he asserted, when properly operated, "Real Servicing" accurately recorded mortgage payments. Long determined that the program was used properly to record defendant's payments. As of September 15, 2014, defendant owed $354,167.49 on the loan.

¶ 14 Ten pages of records were attached to Long's affidavit. The words "Ocwen Financial Solutions Pvt. Ltd" (hereinafter "OFS") were printed at the top of four of those pages. One other page stated "OCWEN MSX-SHSC" at the top.

¶ 15 In response to plaintiff's motion for summary judgment, defendant challenged the sufficiency of Long's affidavit pursuant to Illinois Supreme Court Rules 191 (eff. Jan. 4, 2013) and 236 (eff. Aug. 1, 1992) and Illinois Rule of Evidence 803(6) (eff. Apr. 26, 2012). Defendant asserted that the "critical issue" was that the records supporting the affidavit were

printed by OFS, not Ocwen. To that end, there was no foundation laid for OFS's business practices and procedures. Nor was it established that OFS kept records of this form in the ordinary course of its business at or near the time of the transactions reflected in the records. Defendant further explained that OFS was a company organized and operating under the laws of India. In contrast, defendant noted that Long executed his affidavit in Pennsylvania. (Defendant's counsel filed an affidavit attesting that Ocwen and OFS were "sister companies" but that they were "different operating companies.") Furthermore, defendant argued that the remainder of the records attached to Long's affidavit bore the title "OCWEN MSX-SHSC" and did not reference "Real Servicing." According to defendant, Long did not establish whether the "MSX-SHSC" software was used in the regular course of business or whether the records entered by such software were prepared at or near the time of the relevant transactions.

¶ 16 Plaintiff attached a supplemental affidavit from Long as an exhibit to its reply in support of its motion for summary judgment. Long averred that the records attached to his initial affidavit were true and accurate copies of the records he had reviewed. He continued: "The records that state ['OFS'] are records generated from a different computer program called REALResolution that pulls the figures from Real Servicing[1] and are used by the law firm vendors to verify the figures in the Affidavit." According to Long, "[t]he records that state ['OFS'] are records of the Servicer," *i.e.*, Ocwen. When Long verified the figures in his initial affidavit, he "reviewed both figures from records generated by REALResolution and Real Servicing and confirmed that the figures [were] accurate." He explained that pulling figures in

[1] In his supplemental affidavit, Long referred to this program as "RealServicing" rather than "Real Servicing." For the sake of consistency, we will refer to the program as "Real Servicing," as Long did in his initial affidavit.

two formats allowed him to double check his figures. Long averred that the figures in his initial affidavit were run directly from "Real Servicing" and showed the name "Ocwen." Moreover, "[a]ll figures [were] derived from those input into Real Servicing, [Ocwen's] accepted system." The documents attached to his initial affidavit were generated from Ocwen's books and records, were input at or about the time when payments were received, and were kept in the ordinary course of business.

¶ 17 In his sur-response to plaintiff's motion for summary judgment, defendant continued to argue that Long had not laid a sufficient foundation for the records. Specifically, defendant contended that there was no foundation for Long's averment in his supplemental affidavit that "[t]he records that state ['OFS'] are records of the Servicer." Additionally, according to defendant, "REALResolution does not have the computer program foundation required by" Illinois Supreme Court Rule 113 (eff. May 1, 2013). Nor was Long's statement that OFS's records were part of Ocwen's records "substantiated by the foundation required by" Illinois Supreme Court Rule 236.

¶ 18 In its sur-reply in support of its motion for summary judgment, plaintiff maintained that both of Long's affidavits were legally sufficient. Plaintiff also argued that defendant had incorrectly asserted that the documents attached to Long's initial affidavit were printed by OFS rather than Ocwen. Additionally, plaintiff noted that the four disputed pages referencing OFS contained information that was reflected in the other six pages that were not challenged. Therefore, plaintiff argued, there would be a sufficient basis for summary judgment even if the court disregarded the pages that defendant challenged. Furthermore, plaintiff emphasized that defendant had not contradicted the facts established in Long's affidavits with a counteraffidavit.

¶ 19 On December 11, 2015, the court, Judge Downs presiding, granted plaintiff's motion for

summary judgment.

¶ 20 During the process of briefing the motion for summary judgment, defendant filed a motion to clarify Judge Wojtecki's August 17, 2012, order, which pertained to the request to admit facts that defendant had issued to plaintiff before he retained counsel. As explained above, the August 17, 2012, order denied plaintiff's motion for a 28-day extension to respond to defendant's request. However, that order did not explicitly indicate that the facts would be deemed admitted, nor did it set a date certain for plaintiff to respond to the request. In his motion to clarify, defendant indicated that his counsel had recently "rediscovered" this court order. Defendant moved the court to clarify the order and construe it as having deemed the subject facts admitted.

¶ 21 On November 6, 2015, Judge Downs held a hearing on the motion to clarify. Defense counsel argued that it had been Judge Wojtecki's intention not to give plaintiff an additional opportunity to respond to the request, thus deeming the facts admitted. Plaintiff's attorney disagreed, mentioning that neither he, defense counsel, nor Judge Downs had actually been at the August 17, 2012, hearing. He also noted that the matter had been before Judge Wojtecki only on plaintiff's motion for an extension of time, not any motion to deem facts admitted. After reviewing the court file and the disputed order, the court concluded that Judge Wojtecki had never ruled on defendant's request to deem facts admitted, which the court said was buried in defendant's prayer for relief when he responded to plaintiff's motion for an extension of time. The court further noted that in the ensuing three years, defendant had never filed a motion to deem those facts admitted. The written order entered with respect to defendant's motion to clarify states that "the order of August 12, 2012, [*sic*] does not deem facts admitted."

¶ 22 On May 23, 2016, the trial court, Judge Mary Katherine Moran presiding, confirmed the

judicial sale. Defendant filed a timely notice of appeal. We note that, in his brief on appeal, defendant incorrectly asserts that we have jurisdiction pursuant to Illinois Supreme Court Rule 304(b) (eff. Mar. 8, 2016). That rule governs certain types of judgments that are appealable without the special finding contemplated by Rule 304(a). An appeal from an order confirming a judicial sale is not one of those specified judgments. Instead, we have jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015), which governs appeals from final judgments in civil cases.

¶ 23 II. ANALYSIS

¶ 24 (A) Defendant's Request to Admit Facts

¶ 25 Defendant first contends that the trial court committed error on August 17, 2012, when it denied plaintiff's motion for an extension of time to respond to defendant's request to admit facts without simultaneously deeming those facts admitted. Defendant argues that, once the court found that there was no good cause for plaintiff failing to comply with the 28-day deadline to respond to the request, it was incumbent on the court to treat the facts as admitted. According to defendant, six particular facts that were admitted would have prevented the court from subsequently striking his affirmative defenses and entering summary judgment in plaintiff's favor.

¶ 26 We need not consider plaintiff's argument that defendant improperly sought admissions of legal conclusions rather than facts. See *P.R.S. International, Inc. v. Shred Pax Corp.*, 184 Ill. 2d 224, 236 (1998) (although requests for admission of facts, including ultimate facts, are appropriate, it is improper to request an opposing party to admit legal conclusions). Even accepting defendant's premise that the statements at issue were deemed admitted by operation of

law, he forfeited his right to rely on such admissions by failing to invoke them in the trial court when litigating the issue of standing.

¶ 27 Following the court's August 17, 2012, order denying plaintiff's motion for an extension of time to respond to the request to admit facts, there was no further mention in the record of the facts that were allegedly admitted until September 17, 2015, when defendant moved to "clarify" the earlier order. By that time, the issue of standing had been resolved in plaintiff's favor for more than a year (the court struck the second amended affirmative defense of lack of standing with prejudice in July 2014). Significantly, defendant never filed a motion to deem facts admitted. He likewise never availed himself of the numerous opportunities during the course of this litigation to rely on the admissions. For example, he failed to cite these admissions in his response to plaintiff's motion to strike the second amended affirmative defense. He subsequently failed to raise the issue in his response to plaintiff's motion for summary judgment. He did not even move the trial court to reconsider its order striking his affirmative defense once his counsel "rediscovered" in September 2015 that plaintiff had never responded to the request for admissions.

¶ 28 The purpose of forfeiting arguments not raised below is to "ensur[e] both that the trial court is given an opportunity to correct any errors prior to appeal and that a party does not obtain a reversal through his or her own inaction." *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 14. If defendant intended to rely on the purported admissions to support his theory of the case, his opportunity to develop the record was in the trial court, not in this court. See *Deboe v. Flick*, 172 Ill. App. 3d 673, 677 (1988) ("A party wishing to rely on an admission requested, but not answered, must raise the failure to respond at some point during the

trial before the failure to respond will have any effect."). Accordingly, the issue is forfeited, and we decline to consider it.

¶ 29 (B) Affirmative Defense of Lack of Standing

¶ 30 Defendant next challenges the July 25, 2014, order granting plaintiff's motion to strike the second amended affirmative defense of lack of standing. Defendant's argument begins from the premise that, during the proceedings on this motion, "he should have had the benefit of the requests to admit." He then asserts that the basis of the trial court's ruling was that, pursuant to *Bassman*, defendant "could not challenge conformity to the trust's bylaws." In an apparent attempt to distinguish *Bassman*, defendant submits the following nearly incomprehensible argument, which seems to echo the theory that he advanced as a *pro se* litigant:

> "Homeowner's contention was that the Assignment is bad quality evidence because it impeaches the Note by being inconsistent with the transfer chain memorialized in the [PSA] and the transfer chain on the Note. The Assignment recites that [MERS] transferred the mortgage and note to Trust in 2007. The [PSA] sets forth a complicated structure of transfers that ought to have happened to deposit the mortgage and the note into the trust. *** The Note is signed inconsistently with either of the two narratives, and Homeowner was then challenging the indorsement of the Note because it followed neither of the two paths. Homeowner's argument was not that the Note failed to follow the PSA and therefore the Note was not properly deposited; the argument was that the Court was presented with evidence of what should have occurred in two forms, and evidence of what did occur in a third form. Since Homeowner challenged that the Trust took delivery of the Note, Homeowner was challenging whether the entity was a holder at all, an issue of whether the deposit ever occurred, and crucially not whether the deposit

> occurred in the wrong way. This would be a legally cognizable claim and not subject to a 2-615 dismissal."

Defendant thus proposes that the court erred in striking his second amended affirmative defense of lack of standing.

¶ 31 In pleading an affirmative defense, a defendant must provide the same degree of specificity that is required of a plaintiff to establish a cause of action. *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 15. A motion filed pursuant to section 2-615 of the Code "challenge[s] the legal sufficiency of a pleading based on defects apparent on its face." *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19. In evaluating the sufficiency of the pleading, the court accepts all well-pleaded facts and reasonable inferences that can be drawn from those facts in the light most favorable to the non-movant. *Blumenthal*, 2016 IL 118781, ¶ 19. Therefore, it is inappropriate to strike an affirmative defense where the well-pleaded facts give rise to the possibility that the defendant will prevail. *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 15. Our review is *de novo*. *Blumenthal*, 2016 IL 118781, ¶ 19.

¶ 32 At the outset, we reiterate that defendant has forfeited his right to rely on any purported factual admissions by failing to invoke them in the trial court when litigating the issue of standing. We also emphasize that appellants are expected and required to present cogent legal arguments supported by citations to relevant authority. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). The failure to do so results in forfeiture of the argument. See *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 13. In his brief, defendant does not identify the "complicated structure of transfers" that he believes should have occurred. Likewise, it is unclear what he means when he mentions "narratives," "paths," or "forms." Furthermore, defendant fails to direct our attention to any specific facts that were alleged in his second

amended affirmative defense. Nor does he cite authority in support of his ultimate legal conclusion, which, as best we can tell, is that plaintiff was not a holder of the note. Under these circumstances, we would certainly be justified in refusing to consider defendant's contention that the trial court erred in striking his second amended affirmative defense of lack of standing.

¶ 33 Even when we overlook the deficiencies in defendant's appellate argument, it is clear that the trial court properly struck that affirmative defense. Defendant alleged that the 2010 assignment evidenced a transfer of his loan into the trust on May 31, 2007—one day after the closing date of the trust. He also alleged that the 2010 assignment was signed by somebody whose signature had been called into question by the media. Even if those facts were true, they did not support defendant's legal conclusion: that plaintiff was not in possession and control of the applicable note and mortgage. See *Northbrook Bank & Trust Co.*, 2015 IL App (1st) 133426, ¶ 23 ("Because Illinois is a fact pleading jurisdiction, we must disregard conclusions of fact or law that are unsupported by specific factual allegations.").

¶ 34 Here, plaintiff attached to its July 2010 complaint a copy of defendant's note that was indorsed in blank by DHI, the original lender. An instrument indorsed in blank is payable to the bearer. 810 ILCS 5/3-205(b) (West 2014). "It is well settled that possession of bearer paper is *prima facie* evidence of title thereto, and is sufficient to entitle the plaintiff to a judgment of foreclosure." *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶ 36. By attaching the note indorsed in blank to its complaint, plaintiff demonstrated that it indeed had possession and control of that bearer paper, regardless of the terms of the trust. Plaintiff at one point even presented the original loan documents in open court, which was more than what the law demands. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 26 ("For over 25 years, the Foreclosure Law has been interpreted as *not* requiring plaintiffs' production of the

original note, nor any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint." (Emphasis in original)). Accordingly, the trial court properly struck defendant's second amended affirmative defense of lack of standing.

¶ 35 (C) Business Records Submitted in Support of Summary Judgment

¶ 36 Defendant finally challenges the December 11, 2015, order entering summary judgment in favor of plaintiff. He again "restates and realleges that he demonstrated a genuine issue of material fact for trial utilizing the admissions of his party opponent." He then argues that Long failed to lay the foundation for the business records that established the amount owing on the subject loan, identifying many of the same alleged deficiencies that he raised in the trial court. It appears that defendant believes that the records were prepared by OFS, not Ocwen, using a computer program that Ocwen itself did not use. Indeed, defendant frames the relevant issue in his brief as "[w]hether a foreclosure plaintiff may lay a foundation for a subsidiary's business records hearsay exemption using an agent of the parent company when the subsidiary uses different record keeping methods from the parent." In the statement of facts in his brief, defendant flatly asserts that "Long laid a foundation for the records of [Ocwen] but attached the records of [OFS]."

¶ 37 Summary judgment is appropriate "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 2014). We review an order granting summary judgment *de novo*. *Parkway Bank & Trust Co.*, 2013 IL App (1st) 130380, ¶ 14; see also *Northbrook Bank & Trust Co.*, 2015 IL App (1st)

133426, ¶ 38 ("In addition, we review *de novo* a trial court's ruling regarding the sufficiency of an affidavit which supports a motion for summary judgment.").

¶ 38 Defendant appears to confine his arguments to the four pages of records attached to Long's initial affidavit that stated "Ocwen Financial Solutions Pvt. Ltd" at the top. Although defendant cites generally to Illinois Supreme Court Rule 113, his arguments appear for the most part to track the substance of subsection (c)(2)(iii) of that rule, which provides:

> "All affidavits submitted in support of entry of a judgment of foreclosure, default or otherwise, shall contain, at a minimum, the following information:
>
> ***
>
> (iii) The identification of any computer program or computer software that the entity relies on to record and track mortgage payments. Identification of the computer program or computer software shall also include the source of the information, the method and time of preparation of the record to establish that the computer program produces an accurate payment history, and an explanation as to why the records should be considered 'business records' within the meaning of the law." Ill. S. Ct. R. 113(c)(2)(iii).

Defendant also cites Illinois Supreme Court Rule 236, which governs the admission of business records:

> "Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a

memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. ***." Ill. S. Ct. R. 236(a).

¶ 39 Courts have explained that "to admit business records into evidence as an exception to the general rule excluding hearsay, the proponent must lay a proper foundation by showing that the records were 'made (1) in the regular course of business, and (2) at or near the time of the event or occurrence.' " *U.S. Bank, National Ass'n. v. Avdic*, 2014 IL App (1st) 121759, ¶ 23 (quoting *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27). Additionally, "[w]here computer-generated records are involved, the proponent must show that 'the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to indicate their trustworthiness and to justify their admission.' " *Avdic*, 2014 IL App (1st) 121759, ¶ 25 (quoting *Riley v. Jones Brothers Constr. Co.*, 198 Ill. App. 3d 822, 829 (1990)).

¶ 40 Plaintiff relied on Long's initial affidavit to establish that defendant owed $354,167.49 as of September 15, 2014. In that affidavit, Long asserted the following regarding the foundation for the records attached: (1) Ocwen maintained a loan file in the normal course of its business for each loan it serviced; (2) records kept with respect to mortgage loans were comprised of entries made at or near the time of the events reflected; (3) Long ascertained the amount defendant owed by reviewing the "payment history and other electronic records concerning the subject mortgage loan," true and accurate copies of which were attached to the affidavit; (4) Ocwen used a program called "Real Servicing," which was standard in the industry, to automatically track payments; (5) the procedure for applying payments received included recording the account

activity at or near the time of the event; and (6) the records pertaining to defendant's loan were made in accordance with this procedure.

¶ 41 When defendant subsequently questioned the fact that 4 of the 10 pages of records that were produced mentioned a company called OFS, Long filed a supplemental affidavit averring *inter alia*: (1) the documents mentioning OFS were Ocwen's records, but they were "generated from a different computer program called REALResolution that pulls the figures from Real Servicing and are used by the law firm vendors to verify" figures; (2) he reviewed records generated by both "REALResolution" and "Real Servicing" and confirmed that the figures were accurate; (3) pulling figures in two formats allowed him to double check the figures; (4) the figures for his affidavit were run directly from "Real Servicing" and showed the name "Ocwen"; (5) all figures were derived from inputs into Real Servicing, which was Ocwen's accepted system; and (6) the documents attached to his initial affidavit contained "figures and documents" generated from Ocwen's books and records, which were kept in the regular course of business and input at or around the time payments were received.

¶ 42 Long's affidavits provided an adequate foundation for the admission of the contested documents as business records. As an initial matter, we note that, by its very terms, Supreme Court Rule 113, relied on by defendant in his opening brief, does not even apply to the present action, which was filed before May 1, 2013. Ill. S. Ct. R. 113(a). Additionally, the premise of defendant's argument—that the records attached to Long's initial affidavit were prepared by OFS rather than Ocwen using a computer program that Ocwen itself did not use—is based on a tortured reading of the affidavits. Long specifically averred that, although some of the records stated OFS at the top, they were actually Ocwen's records. It is unclear exactly what further foundation defendant believes was necessary to support Long's unambiguous statement on that

point. Long further established that, although "REALResolution" was a different program from "Real Servicing," it merely accessed information that was stored in "Real Servicing," which was Ocwen's standard program. He also explained that the information pertaining to defendant's loan was input contemporaneously with the events reflected in the records and was prepared in the ordinary course of business.

¶ 43 Moreover, as plaintiff notes, defendant does not specifically challenge the remaining six pages of records that were attached to Long's initial affidavit. Those records showed that defendant made no payments toward his loan after January 2010. They also reflected the applicable interest rate and the outstanding principal balance. Accordingly, those records contained much of the same information as the ones that defendant challenged. Apart from submitting an affidavit from his counsel attesting that OFS and Ocwen were different companies, defendant did not provide any evidence to dispute the amount owed. Where a party does not file a counteraffidavit contradicting the facts established in the movant's affidavit, such facts are admitted and taken as true. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 16. Finally, although defendant mentions plaintiff's purported factual admissions as a reason why summary judgment was inappropriate, as explained above, he has forfeited his right to rely on them. Accordingly, the trial court properly granted summary judgment in favor of plaintiff.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 46 Affirmed.