2017 IL App (3d) 150738-U

Order filed February 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

BAC HOME LOANS SERVICING, LP, f/k/a COUNTRYWIDE HOME LOANS SERVICING, LP, Plaintiff-Appellee, v. MARK PIPER, a/k/a MARK J. PIPER; CAROLYN PIPER, a/k/a/ CAROLYN S. PIPER; FIRST AMERICAN BANK; INDIAN OAK RECREATION ASSOCIATION; UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants (Mark Piper, Defendant-Appellant).	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-15-0738 Circuit No. 10-CH-2960 The Honorable Daniel Rippy, Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly granted summary judgment to mortgage assignee in foreclosure action where it attached a copy of mortgage, note, and assignment to its foreclosure complaint.

¶ 2 Plaintiff BAC Home Loans Servicing, LP (BAC) filed a mortgage foreclosure action against defendants. Plaintiff filed a motion for summary judgment, which the trial court granted. Thereafter, the trial court entered a judgment of foreclosure and sale, an order approving the sale, and an order of possession. On appeal, defendant Mark Piper argues that plaintiff lacked standing to bring the foreclosure action, was not entitled to summary judgment on its foreclosure complaint, and did not provide proper notice of the summary judgment hearing. We affirm.

¶ 3 FACTS

¶ 4 On October 23, 2006, Mark Piper obtained a loan in the amount of $174,000 from Professional Mortgage Partners, Inc. (PMP). As security for the loan, Mark and his wife, Carolyn Piper, gave PMP a mortgage on their home located at 1097 Churchill Drive in Bolingbrook. The mortgage was recorded on November 3, 2006.

¶ 5 On May 13, 2010, plaintiff filed a mortgage foreclosure action, as the holder of the PMP note and mortgage, alleging that the Pipers were in default of the loan for failing to make monthly mortgage payments beginning in August 2009. Attached as exhibits to the complaint were copies of the mortgage and note. The note is endorsed in blank by Barton S. Pitts, as President of PMP.

¶ 6 Also attached to plaintiff's foreclosure complaint was an "Assignment of Mortgage," wherein Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for PMP, assigned the Pipers' mortgage to plaintiff. According to the document, the assignment occurred "prior to 4/12/10." The document was signed by Andrew Nelson, as an officer of MERS, on April 13, 2010. The assignment was recorded on June 11, 2010.

¶ 7 Defendants filed a *pro se* answer to plaintiff's complaint. On May 7, 2012, attorney Joseph Williams appeared in court and requested leave to file his appearance for defendants *instanter*. The trial court granted the motion.

¶ 8 On June 4, 2012, the Pipers filed a motion to withdraw their *pro se* answer and filed a new answer and affirmative defenses, denying that plaintiff had standing to bring the foreclosure action. Defendants' affirmative defenses alleged that plaintiff did not possess a legal interest in the mortgage or note when it filed its foreclosure action or at any time thereafter. The trial court granted defendants' motion and allowed their answer and affirmative defenses filed on June 4, 2012, to stand. The court ordered plaintiff to file a response to defendants' answer and affirmative defenses by August 1, 2012.

¶ 9 Defendants' counsel appeared in court on behalf of defendants on January 15, 2013. On that date, a hearing was set for March 26, 2013. No one appeared for defendants at the March 26, 2013 hearing. On March 25, 2014, plaintiff filed its reply to defendants' affirmative defenses. In June 2014, the court sent letters to plaintiff's and defendants' counsel. Defense counsel's letter was returned undelivered. At a status hearing on July 14, 2014, neither defendants nor their counsel appeared. No one appeared for defendants at hearings in August or November 2014.

¶ 10 On December 17, 2014, plaintiff filed a motion for summary judgment. Notice of the motion and hearing, scheduled for February 9, 2015, was sent to Mark and Carolyn Piper. On February 9, 2015, the trial court granted plaintiff's motion and entered an order of summary judgment against the Pipers. No one appeared for defendants at the summary judgment hearing. On the same date, the trial court entered a judgment of foreclosure and sale.

¶ 11 On April 9, 2015, defendants filed an emergency motion "to postpone all actions by the court." The trial court denied the motion. On June 17, 2015, defendants filed a motion to disqualify their attorney because the Illinois Attorney Registration and Disciplinary Commission (ARDC) had suspended him from practicing law. Defendants also sought to stay the sale of the property scheduled for June 25, 2015. The trial court granted the motion in part, disqualifying defendants' counsel, but denied defendants' request to stay the sale.

¶ 12 On July 30, 2015, plaintiff filed a motion for an order approving the report of sale and distribution and an order for possession. Defendants filed a motion to deny the confirmation of sale. The trial court granted plaintiff's motion and entered an order approving the report of sale and distribution and an order for possession and deed.

¶ 13 ANALYSIS

¶ 14 Defendant Mark Piper argues that the trial court erred in granting summary judgment to plaintiff on its foreclosure complaint because plaintiff had no right to file its foreclosure complaint or motion for summary judgment.

¶ 15 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, in addition to any affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The entry of summary judgment is reviewed *de novo*. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 20.

¶ 16 I

¶ 17 Defendant first argues that plaintiff failed to establish its right to enforce the note and mortgage. He claims that the note, endorsed in blank, was invalid. He further claims that the

assignment was invalid because it was not dated, was recorded after plaintiff filed its foreclosure complaint, and was not signed by an officer of MERS.

¶ 18 The doctrine of standing requires that a party have a real interest in the action and its outcome. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12. A party's standing must be determined as of the time the suit is filed. *Id.* An action to foreclose upon a mortgage may be filed by a mortgagee, or by an agent or successor of a mortgagee. *Id.* The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note. *Id.* Lack of standing is an affirmative defense, and the burden of proving that the plaintiff lacked standing at the time the complaint was filed is on the party asserting it. *Id.*

¶ 19 A

¶ 20 A note endorsed in blank is payable to the bearer. *Garner*, 2013 IL App (1st) 123422, ¶ 26. Production of a note endorsed in blank shows that the holder has an interest in the note and is entitled to enforce it and an accompanying mortgage. *Id.*; see 810 ILCS 5/3-201(b) (West 2012).

¶ 21 Here, the note, endorsed in blank, attached to plaintiff's foreclosure complaint was *prima facie* evidence that plaintiff owned the note. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 12; *Garner*, 2013 IL App (1st) 123422, ¶ 26. The burden was on defendant to prove otherwise. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 12. Defendant did not produce any admissible evidence that plaintiff did not own the note at issue. Thus, defendant failed to establish that plaintiff lacked standing to enforce the note and mortgage.

¶ 22 Plaintiff's status as holder of the note was enough to prove that it had standing to institute the foreclosure action against defendants. See *Garner*, 2013 IL App (1st) 123422, ¶ 26; 810

ILCS 5/1-201(b) (West 2012). Nevertheless, plaintiff also had standing as the assignee of the mortgage.

¶ 23 B

¶ 24 A mortgage assignment may be oral or written. *Garner*, 2013 IL App (1st) 123422, ¶ 25. To constitute a valid assignment, no particular form of words is necessary. *Dr. Charles W. Smith III, Ltd. v. Connecticut General Life Insurance Co.*, 122 Ill. App. 3d 725, 727 (1984). Any words that show an intention to transfer the chose in action to the assignee for consideration are sufficient to create an assignment. *Id*.

¶ 25 When a written assignment exists, it may be a mere memorialization of an earlier transfer of interest. *Garner*, 2013 IL App (1st) 123422, ¶ 25. Where a defendant asserts a lack of standing based on the timing of an assignment, he must present evidence that the assignment occurred after the foreclosure complaint was filed. *Cornejo*, 2015 IL App (3d) 140412, ¶¶ 13-15. He must definitively show that the mortgage assignment is not a mere memorialization of a previous transfer. *Garner*, 2013 IL App (1st) 123422, ¶ 25.

¶ 26 There is no requirement that an assignment be recorded to be effective because the assignment, not the recording, creates the interest. See *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987). The purpose of recording is to give third parties the opportunity to ascertain the status of title to property. *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 634 (2000).

¶ 27 A recorded assignment is presumed to be valid and effective. See *In re Estate of Cuneo*, 334 Ill. App. 3d 594, 598 (2002). In order to rebut the presumption, the party challenging its validity must present clear and convincing evidence that it is not valid. *Id*.

¶ 28 Here, the assignment of mortgage attached to plaintiff's complaint, while not dated, states that MERS assigned its rights in defendant's mortgage to plaintiff "prior to 4/12/10." The document was signed by Andrew Nelson, as an officer of MERS, on April 13, 2010, one month before plaintiff filed its foreclosure action. Thus, the assignment provides *prima facie* evidence that plaintiff had an interest in defendant's mortgage when it filed its foreclosure action. The burden was on defendant to show otherwise. See *Cornejo,* 2015 IL App (3d) 140412, ¶¶ 13-15; *Garner,* 2013 IL App (1st) 123422, ¶ 25.

¶ 29 The only evidence defendant presented was the date of recording of the assignment, which occurred after plaintiff filed its complaint. However, the date of recording is irrelevant since the assignment became effective when it was signed, not when it was recorded. See *Klehm,* 164 Ill. App. 3d at 616. Defendant also failed to present any evidence, let alone clear and convincing evidence, that the assignment was not signed by an officer of MERS. Because defendant did not present any admissible evidence showing that plaintiff did not possess an interest in defendant's note and mortgage when it filed its foreclosure action, we reject defendant's standing claim.

¶ 30 II

¶ 31 Defendant also argues that plaintiff was not entitled to summary judgment because it failed to timely respond to his affirmative defenses.

¶ 32 If a party files a response after a deadline imposed by the trial court without obtaining leave of court, the response is not rendered a nullity. *Parkway Bank & Trust Co. v. Meseljevic,* 406 Ill. App. 3d 435, 439 (2010). Instead, it is within the trial court's discretion to strike the pleading or allow it. *Id.*

¶ 33 As a general rule, when a party fails to reply to an affirmative defense, the facts contained in the affirmative defense may be deemed to have been admitted by the party. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 770 (1993). However, there are several exceptions to this rule. First, a response is only required when the affirmative defense contains "new matter" that was not previously set forth in the allegations of the complaint. See *Greer v. Illinois Housing Development Authority*, 150 Ill. App. 3d 357, 366 (1986). Second, only facts, not legal conclusions, alleged in a defense are admitted. *Andrews*, 256 Ill. App. 3d at 770. Finally, a party may challenge the sufficiency of an affirmative defense in a summary judgment motion. *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2010). A trial court may grant summary judgment to a plaintiff in a mortgage foreclosure action even if it failed to respond to the defendant's affirmative defenses where the defenses lack merit. See *Federal National Mortgage Ass'n v. Schildgen*, 252 Ill. App. 3d 984, 990 (1993).

¶ 34 Here, plaintiff filed its response to defendant's answer and affirmative defenses, without leave of court, after the deadline set by the trial court. The trial court had discretion to strike plaintiff's response or allow it. *Meseljevic*, 406 Ill. App. 3d at 439. Since the trial court did not strike plaintiff's response, the response stands.

¶ 35 Even assuming, *arguendo*, that plaintiff's response was not properly filed, plaintiff could attack the sufficiency of defendant's affirmative defenses for the first time in a motion for summary judgment. See *Falcon Funding, LLC*, 399 Ill. App. 3d at 156; *Schildgen*, 252 Ill. App. 3d at 990. In granting plaintiff's motion for summary judgment, the trial court found that none of defendant's affirmative defenses were sufficient to preclude plaintiff from obtaining summary judgment in its foreclosure action. See *Schildgen*, 252 Ill. App. 3d at 990. We agree.

¶ 36 III

¶ 37 Finally, defendant argues that his due process rights were violated because plaintiff did not provide proper notice of the summary judgment hearing.

¶ 38 Attorneys have a legal and ethical duty to act with reasonable diligence in representing their client's interests, including tracking their cases and learning the date upon which a hearing is to occur. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 549 (2008); *Tiller v. Semonis*, 263 Ill. App. 3d 653, 657 (1994). The failure of a party to be notified of the date of a hearing does not constitute an excuse for failing to appear at the hearing. *Tiller*, 263 Ill. App. 3d at 657.

¶ 39 Defendants filed their motion for summary judgment on December 17, 2014. Six months earlier, a letter sent to defense counsel's address was returned undelivered. Plaintiff served notice of its summary judgment motion and hearing on defendants themselves, instead of their attorney. Defendant does not contend that he did not receive notice of the summary judgment hearing. Rather, he claims that his counsel did not receive notice of it. This argument fails for two reasons. First, it was his counsel's duty to keep track of his case and learn about the date of the hearing even if he did not receive notice of it. See *Jackson*, 384 Ill. App. 3d at 549; *Tiller*, 263 Ill. App. 3d at 657. Second, defense counsel's failure to receive notice of the hearing did not excuse defendant's failure to appear. See *Tiller*, 263 Ill. App. 3d at 657. Under these circumstances, plaintiff was not deprived of his due process rights.

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court of Will County is affirmed.

¶ 42 Affirmed.