

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (3d) 150769-U

Order filed February 10, 2017

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

FIFTH THIRD MORTGAGE COMPANY,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	
MARJORIE ADAMS; WAYNE ADAMS,	)	Appeal No. 3-15-0769
Defendants-Appellants,	)	Circuit No. 10-CH-3017
and	)	
HOEFFERLE-BUTLER ENGINEERING, INC.; UNKNOWN OWNERS and NON RECORD CLAIMANTS,	)	The Honorable
Defendants.	)	Thomas A. Thanas, Judge, presiding.

---

JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and Wright concurred in the judgment.

---

**ORDER**

¶ 1 *Held:* In an appeal in a mortgage-foreclosure case, the appellate court found that: (1) defendant borrower had failed to establish a genuine issue of material fact as to whether plaintiff lender had lacked standing to file suit or whether defendant had

rescinded the note and mortgage; and (2) defendant had forfeited any argument as to the sufficiency of plaintiff's summary judgment affidavits or plaintiff's loss mitigation efforts because defendant had failed to raise those issues in the trial court in the summary judgment proceedings. The appellate court, therefore, affirmed the trial court's order granting summary judgment for plaintiff.

¶ 2 Plaintiff, Fifth Third Mortgage Company, brought an action against defendant, Marjorie Adams, and others to foreclose upon a mortgage held on certain real property in Will County, Illinois, and moved for summary judgment on the foreclosure complaint. Defendant opposed the motion, claimed that plaintiff lacked standing to file the complaint, and pointed out that she had rescinded the note and mortgage. After a hearing, the trial court granted summary judgment for plaintiff on the mortgage foreclosure complaint. Several months later, defendant filed motions to vacate the ruling, claiming that plaintiff lacked standing, that plaintiff's summary judgment affidavits were deficient, and that plaintiff failed to make proper loss mitigation efforts. Following hearings, the trial court denied the motions. Defendant appeals, challenging the trial court's grant of summary judgment for plaintiff. We affirm the trial court's judgment.

¶ 3 **FACTS**

¶ 4 In May 2010, plaintiff filed a complaint to foreclose upon a mortgage held on certain residential real property owned by defendant and her husband in Homer Glen, Will County, Illinois. The complaint alleged that in April 2007, defendant borrowed \$540,000 from plaintiff; that the debt was secured by a mortgage on the subject property; that defendant defaulted on the loan in November 2009; that defendant currently owed over \$529,000 in principal on the loan, plus interest, costs, and fees; that plaintiff was the mortgagee, trustee, or grantee in the mortgage; and that plaintiff was bringing the foreclosure action in its capacity as the agent for the holder of the note and mortgage.

¶ 5 A copy of the note and mortgage were attached to the complaint. The note was executed in April 2007 in the amount of \$540,000. It was signed by defendant as the borrower and specifically listed plaintiff as the lender. The note indicated that the borrower's promises would be secured by a mortgage. The mortgage was executed at the same time as the note, was signed by defendant and her husband as the borrowers, and was duly recorded. In the mortgage, plaintiff was specifically listed as the lender.

¶ 6 In July 2010, defendant, who was representing herself *pro se* in the trial court proceedings, filed a response to the complaint, which was in the nature of an answer. In the response, defendant claimed that plaintiff did not own the note and did not have standing to bring the mortgage foreclosure action. Defendant repeated that claim in later filings. In one of those later filings, defendant attached a copy of a purported assignment, which she had apparently received in response to a request for documents. In the assignment, the plaintiff was listed as the assignor, and the assignee's name was left blank. The assignment was dated June 2007 and listed the correct loan amount, the correct loan number, and the correct street address for the property. The assignment, however, listed the wrong city for the property address and the wrong county for the location of the property. In addition, although the purported assignment was signed by plaintiff, witnessed, and notarized, there was no indication that the assignment was ever recorded.

¶ 7 In January 2014, plaintiff filed an amended motion for summary judgment on the mortgage foreclosure complaint. Attached to the motion were various supporting documents. In addition to those documents, plaintiff later filed a loss mitigation affidavit and an updated affidavit of the amounts due and owing. The loss mitigation affidavit indicated that defendant's loan was eligible for loan modification or a short sale but that defendant was not cooperative

with the loss mitigation efforts. The updated affidavit of the amounts due and owing indicated that defendant owed over \$800,000 on the loan and contained all of the statements necessary to establish the authenticity and admissibility of a copy of the payment record, which was attached, as a business record.

¶ 8 Defendant filed a written response opposing the motion for summary judgment. In the response, one of defendant's main claims was that plaintiff lacked standing to file the mortgage foreclosure complaint. Defendant also pointed out that she had rescinded the note and mortgage. Attached to the response was a copy of the alleged rescission that defendant had prepared and recorded. The rescission was executed in May 2012. Although defendant attached other supporting documents to her response, which were intended to establish that the loan was owned by or had been transferred to a trust or to Wells Fargo, she did not attach or file any affidavits to authenticate those documents or to establish a foundation for their admission.

¶ 9 A hearing was held on the motion for summary judgment in March 2014. During the hearing, plaintiff produced the original note in open court. At the conclusion of the hearing, the trial court granted plaintiff's motion for summary judgment. In so doing, the trial court specifically rejected defendant's argument as to lack of standing. The trial court did not specifically address defendant's claim that she had rescinded the note and mortgage. In addition to the summary judgment order, the trial court also entered a judgment for foreclosure and sale of the property.

¶ 10 In June 2014, an attorney entered an appearance for defendant in this case. Two months later, the attorney filed a motion to vacate the prior summary judgment order, to vacate the judgment of foreclosure and sale, and to stay the judicial sale of the property. In the motion, defendant argued for the first time that plaintiff's summary judgment affidavits were insufficient

and that loss mitigation efforts were a disputed issue of material fact. The trial court denied the motion after a hearing, and the attorney later withdrew from the case.

¶ 11 In June 2015, another attorney filed an appearance for defendant in this case. That attorney filed a second motion to vacate the summary judgment order and the judgment of foreclosure and sale. After a hearing, the trial court denied the second motion to vacate as well.

¶ 12 In September 2015, the subject property was sold at a sheriff's sale and was purchased by plaintiff. After costs and fees were deducted, a deficiency of over \$600,000 remained. Later the following month, the trial court entered an order approving the sheriff's report of the sale, distributing the proceeds, and granting plaintiff possession of the property. Defendant filed a notice of appeal and also filed a motion to stay the transfer of possession while the appeal was pending. The trial court denied defendant's request for a stay.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court erred in granting summary judgment for plaintiff on the complaint for mortgage foreclosure. Defendant asserts that summary judgment should not have been granted for plaintiff because: (1) plaintiff's affidavits in support of summary judgment were deficient; and (2) genuine issues of material fact existed as to whether plaintiff had standing to file the mortgage foreclosure action, whether defendant had rescinded the note and mortgage, and whether plaintiff had made proper efforts at loss mitigation. More specifically on the question of standing, defendant contends that a genuine issue of material fact was created by certain inconsistencies that were present in plaintiff's complaint and summary judgment affidavits as to the interest that plaintiff held in the note and mortgage at the time it filed suit; the presence of the written assignment of plaintiff's interest that defendant had received in response to her request for documents; representations that had been made to

defendant by plaintiff's employees that the note and mortgage were owned by Wells Fargo; and the supporting documents that defendant attached to her pleadings in this case, which defendant believes showed that the note and mortgage were actually owned by, or had been transferred to, a trust. For all of the reasons stated, defendant asks that we reverse the trial court's grant of summary judgment and that we remand this case for further proceedings.

¶ 15 Plaintiff argues that the trial court's ruling was proper and should be upheld. Plaintiff asserts that defendant has forfeited any argument relating to the sufficiency of plaintiff's summary judgment affidavits, the alleged rescission of the note and mortgage, and the sufficiency of plaintiff's loss mitigation efforts because defendant failed to raise those arguments in the trial court in the summary judgment proceedings. In the alternative, plaintiff asserts that defendant's arguments on those issues lack merit and should be rejected because plaintiff's summary judgment affidavits were proper, because the defendant failed to exercise her purported right to rescission within the three-year time period provided by law, and because the record showed plaintiff had made sufficient efforts at loss mitigation and that defendant was uncooperative with those efforts. As for defendant's claim of lack of standing, plaintiff asserts that it clearly established standing by attaching a copy of the note and the mortgage to its complaint and by presenting the original note in open court during the summary judgment proceedings, even though it was not required to do so. Plaintiff asserts further that defendant presented no admissible evidence to the contrary. Thus, plaintiff contends that there was no genuine issue of material fact as to plaintiff's standing to file the complaint for mortgage foreclosure. For all of the reasons set forth, plaintiff asks that we affirm the trial court's grant of summary judgment for plaintiff.

¶ 16 The purpose of summary judgment is not to try a question of fact but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Id.* In appeals from summary judgment rulings, the standard of review is *de novo*. *Id.*

¶ 17 The main issue in this appeal is whether plaintiff had standing to file the foreclosure complaint. The purpose of the doctrine of standing is to preclude persons who have no interest in a controversy from bringing suit and to ensure that issues are raised only by those parties that have a real interest in the outcome of the controversy. See *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). A plaintiff is not required to allege facts to establish standing. See *id.* at 224. Rather, lack of standing is an affirmative defense that must be plead and proven by the defendant. *Id.*

¶ 18 Under the Illinois Mortgage Foreclosure Law, an action to foreclose may be brought by the mortgagee (the holder of the indebtedness secured by the mortgage), an agent, or a successor of the mortgagee. See 735 ILCS 5/15-1208, 15-1504(a)(3)(N) (West 2010); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). To establish a

*prima facie* case, the plaintiff in a mortgage foreclosure action must file a complaint that complies with the pleading requirements of section 15-1504(a) of the Mortgage Foreclosure Law and must attach a copy of the note and the mortgage to the complaint. See 735 ILCS 5/15-1504(a), (b) (West 2010); Ill. S. Ct. R. 113(a), (b) (eff. May 1, 2013) (adding additional documentary requirements for all foreclosure actions filed on or after the effective date of the rule); *Farm Credit Bank of St. Louis v. Bietham*, 262 Ill. App. 3d 614, 622 (1994) (in order to establish a *prima facie* case of foreclosure, the plaintiff is only required to introduce the deed of trust and promissory note). The mere fact that a copy of the note is attached to the complaint is *prima facie* evidence that the plaintiff owns the note. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. Although the plaintiff in a mortgage foreclosure action is not required to allege facts necessary to establish standing, the plaintiff must allege in the complaint, as a pleading requirement, the capacity in which the plaintiff brings the action to foreclose. See 735 ILCS 5/15-1504(a)(3)(N) (West 2010).

¶ 19 Once the plaintiff has established a *prima facie* case for foreclosure, the burden shifts to the defendant to prove any affirmative defenses that the defendant has raised, including the lack of standing. See *Bietham*, 262 Ill. App. 3d at 622. Denials in a defendant's answer are not sufficient to create a genuine issue of material fact as necessary to prevent a grant of summary judgment for the plaintiff. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. To the contrary, if the plaintiff moves for summary judgment and supplies facts which, if uncontradicted, would entitle the plaintiff to a judgment as a matter of law, the defendant cannot rely on its pleadings alone to raise a genuine issue of material fact. *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986).

¶ 20 In the present case, the plaintiff filed a mortgage foreclosure complaint that was in compliance with the pleading requirements of the Illinois Mortgage Foreclosure Law and

attached a copy of the note and mortgage to the complaint. By filing a proper complaint with the proper documents attached, plaintiff established a *prima facie* case for mortgage foreclosure. See 735 ILCS 5/15-1504(a), (b) (West 2010); *Bietham*, 262 Ill. App. 3d at 622; *Korzen*, 2013 IL App (1st) 130380, ¶ 24. The burden then shifted to defendant to establish her affirmative defenses—that the bank lacked standing to enforce the mortgage and that she had rescinded the note and mortgage. See *Bietham*, 262 Ill. App. 3d at 622.

¶ 21 Defendant failed in that burden in both respects. First as to her claim of lack of standing, defendant presented no admissible evidence to support that claim and instead relied upon her own allegations and the documents she had attached to her response to the motion for summary judgment. The trial court, however, could not consider either of those two things in ruling upon the motion. See *Avdic*, 2014 IL App (1st) 121759, ¶ 22 (in a summary judgment proceeding, the trial court may not consider evidence that would be inadmissible at trial). Defendant’s allegations were conclusory and unsupported and her documents on standing were unauthenticated and without foundation. Thus, for the purpose of the summary judgment proceedings, defendant failed to establish her claim of lack of standing. See *Purtill*, 111 Ill. 2d at 240-41; *Avdic*, 2014 IL App (1st) 121759, ¶¶ 22, 32.

¶ 22 Second, regarding defendant’s claim of rescission, it is clear from the record that defendant did not attempt to exercise the purported right of rescission until more than three years after the parties had closed on the loan. At that point, even if defendant had been entitled to rescind the note and mortgage, she could no longer legally do so under the applicable statute. See 15 U.S.C. § 1635(f); *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412, 419 (1998); *U.S. Bank National Ass'n v. Manzo*, 2011 IL App (1st) 103115, ¶ 21. Although defendant claims on appeal that a factual question exists as to when the three year time period started because it is not

clear when the loan was consummated, we reject that contention. The time period started in April 2007 when the parties closed on the loan—that was when defendant signed the note and mortgage and received the funds that she had borrowed. Defendant did not attempt to exercise her right of rescission until May 2012, more than five years later. For the purpose of the summary judgment proceedings, therefore, defendant failed to establish that the note and mortgage had been effectively rescinded. See 15 U.S.C. § 1635(f); *Beach*, 523 U.S. at 412, 419; *Manzo*, 2011 IL App (1st) 103115, ¶ 21. Thus, contrary to defendant’s assertion on appeal, no genuine issue of material fact existed as to either defendant’s claim of lack of standing or her claim of rescission.

¶ 23 Having reached that conclusion, we now turn to address defendant’s remaining arguments on appeal—that plaintiff’s summary judgment affidavits were insufficient and that plaintiff had failed to make proper loss mitigation efforts. As plaintiff correctly notes, defendant did not raise either of those two arguments in the trial court until well after the motion for summary judgment had been granted. Thus, defendant has forfeited on appeal any argument as to those two issues. *Avdic*, 2014 IL App (1st) 121759, ¶ 34 (theories not raised during summary judgment proceedings are forfeited on appeal).

¶ 24 Because defendant’s arguments on the propriety of the trial court’s grant of summary judgment either lack merit or have been forfeited on appeal, we must conclude that the trial court’s grant of summary judgment for the plaintiff in this case was proper.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 27 Affirmed.