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2017 IL App (3d) 160666-U

Order filed October 4, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE BANK OF NEW YORK MELLON, AS )	Appeal from the Circuit Court
TRUSTEE FOR CIT MORTGAGE LOAN )	of the 12th Judicial Circuit,
2007-1, BY CALIBER HOME LOANS, INC., )	Will County, Illinois.
f/k/a VERICREST FINANCIAL, INC. AS ITS )	
ATTORNEY-IN-FACT, )	
)	
Plaintiff-Appellee, )	
)	
v. )	
)	
RALPH E. HOLLEY, JOAN HOLLEY, a/k/a )	Appeal No. 3-16-0666
JOAN M. HOLLEY, INCITES, LLC, UNITED )	Circuit No. 13-CH-3253
STATES CORPORATION AGENTS, INC., )	
HOLLEY ESTATE TRUST and ASHBURY )	
HOMEOWNERS ASSOCIATION, )	
)	
Defendants )	
)	
(Ralph E. Holley, Joan Holley, a/k/a Joan M. )	
Holley, )	Honorable
)	Brian Barrett
Defendants-Appellants). )	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Holdridge and Justice O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court properly (1) held that plaintiff had standing to bring foreclosure complaint where it attached to complaint copy of mortgage and note endorsed in blank, and (2) granted summary judgment to plaintiff where it was holder of note and established by affidavit amount mortgagors owed.

¶ 2 Plaintiff, The Bank of New York Mellon, filed a complaint for foreclosure against defendants Ralph Holley, Joan Holley, and others. The Holleys filed several motions to dismiss the complaint for lack of standing, which the trial court denied. Plaintiff filed a motion for summary judgment and motion for judgment of foreclosure and sale, which the Holleys opposed. The trial court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale. Following a sheriff's sale, the trial court filed an order confirming the sale. The Holleys appeal the trial court's finding that plaintiff had standing to file the foreclosure complaint and the order granting summary judgment to plaintiff. We affirm.

¶ 3 **FACTS**

¶ 4 In May 2006, Ralph and Joan Holley borrowed \$510,000 from Accredited Home Lenders, Inc., secured by a mortgage on their home in Naperville. The original mortgage identifies the mortgagee as Mortgage Electronic Registration Systems, Inc. (MERS).

¶ 5 In November 2013, plaintiff, through its attorney-in-fact, Caliber Home Loans, Inc., filed a complaint to foreclose the Holleys' mortgage, alleging that the Holleys defaulted on their mortgage payments. Plaintiff alleged in its complaint that it "is the owner and legal holder of the Note, Mortgage and indebtedness" and attached to the complaint a copy of the mortgage and the note endorsed in blank. Plaintiff also attached an "assignment of mortgage," showing that the mortgage was assigned from MERS to plaintiff in 2010, along with a "corrective assignment of mortgage" from MERS to plaintiff that was executed and recorded in July 2013.

¶ 6 The Holleys filed an "Answer and Motion to Dismiss" alleging that plaintiff lacked standing. Two months later, the Holleys filed a document entitled "Show Cause/Dismissal with

Prejudice” asserting that plaintiff lacked standing. After that, the Holleys filed a “Failure to Show Cause – to Provide Authorized Documents” again asserting that plaintiff lacked standing. The trial court held a hearing at which plaintiff produced the original note and mortgage. The trial court entered an order stating that it treated the Holleys’ pleadings as a motion to dismiss and denied the motion, finding: “Plaintiff has standing and \* \* \* they are a holder.”

¶ 7 A few days later, the Holleys filed another document asserting that plaintiff lacked standing and further asserting that the trial court lacked subject matter jurisdiction over the foreclosure action. The trial court treated the pleading as a motion to reconsider and denied it, finding that it possessed subject matter jurisdiction over the action.

¶ 8 In June 2014, plaintiff filed a motion for summary judgment. The Holleys responded by filing a counterclaim. After that, the Holleys filed a motion to cancel mortgage. Plaintiff filed a motion to strike the Holleys’ purported counterclaim and motion to cancel mortgage. The trial court granted plaintiff’s motion and struck the Holleys’ counterclaim and subsequent pleadings seeking to cancel the mortgage. After the trial court ruled on plaintiff’s motion to strike, the Holleys filed an objection to plaintiff’s motion. The trial court treated the objection as a motion to reconsider and denied it.

¶ 9 In September 2015, plaintiff filed a motion for judgment of foreclosure and sale. Attached to the motion was a loss mitigation affidavit and an affidavit of amounts due and owing from Naomi Feistel, a foreclosure document specialist at Caliber Home Loans, Inc., the servicer of the Holleys’ mortgage loan. Attached to Feistel’s affidavits were computer-generated records from Caliber Home Loans, Inc. showing the amounts the Holleys owed.

¶ 10 In her affidavit of amounts due and owing, Feistel averred that she reviewed the note, mortgage and payment history. She explained that Caliber Home Loans, Inc. uses FISERV to

record and track mortgage payments. She averred that “[t]his type of tracking and accounting program is recognized as standard in the industry.” Feistel described the procedure used by FISERV to process, apply and record payments and stated that “[t]he record is made in the regular course of Caliber Home Loans, Inc.’s business.” She further averred that “the entries reflecting the Defendant’s payments were made in accordance with the procedure detailed above, and these entries were made at or near the time the payment was received.” Feistel concluded: “In the case at bar, the FISERV system was properly operated to accurately record the Defendant’s mortgage payments.” Thereafter, Feistel described the specific amounts owed by the Holleys under the note, including principal, accrued interest, late charges, fees and other expenses, which totaled \$674,316.93 as of September 1, 2015.

¶ 11 The Holleys responded by once again arguing that plaintiff lacked standing to seek foreclosure. They also filed a motion for default judgment against plaintiff. In May 2016, a hearing was held on plaintiff’s motion for summary judgment. Following the hearing, the trial court granted plaintiff’s motion and entered a judgment of foreclosure and sale. The Holleys appealed, and we dismissed their appeal for lack of jurisdiction.

¶ 12 In August 2016, the Holleys’ mortgaged property was sold at a sheriff’s sale. The Holleys filed a motion to set aside the sale, and plaintiff filed a motion for confirmation of the sale. In September 2016, the Holleys served interrogatories and requests to produce on plaintiff. Plaintiff filed a motion to strike the interrogatories and requests to produce. In October 2016, the trial court entered an order confirming the sale of the property.

¶ 13 ANALYSIS

¶ 14 I. Standing

¶ 15 The Holleys argue that the trial court erred in finding that plaintiff had standing to file the foreclosure complaint and also improperly precluded them from arguing that plaintiff lacked standing after denying their motions to dismiss.

¶ 16 A. Trial court’s ruling on standing

¶ 17 “The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome.” *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996). Lack of standing is an affirmative defense, which is the defendant’s burden to plead and prove. *Deutsche Bank National Trust Co. v. Payton*, 2017 IL App (1st) 160305, ¶ 25.

¶ 18 Attaching the note to a foreclosure complaint is *prima facie* evidence that the plaintiff is the holder of the note and has standing to institute the foreclosure action. *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶¶ 30, 67; *Bayview Loan Servicing LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12. The burden then shifts to the defendant to present some evidence that plaintiff lacks standing. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 13.

¶ 19 Here, plaintiff attached the mortgage and note endorsed in blank to their foreclosure complaint. This was *prima facie* evidence that plaintiff owned the note and had standing to file the foreclosure complaint against the Holleys. See *Rogers*, 2016 IL App (2d) 150712, ¶¶ 30, 67; *Cornejo*, 2015 IL App (3d) 140412, ¶ 12. The burden was then on the Holleys to present some evidence that plaintiff was not the rightful holder of the note when it filed its complaint. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 13.

¶ 20 In this case, the Holleys repeatedly asserted that plaintiff lacked standing but failed to present any evidence that plaintiff was not the rightful holder of the note or did not own the note when it filed its foreclosure complaint. Because the Holleys failed to rebut plaintiff’s *prima*

*facie* showing of standing, the trial court properly ruled that plaintiff had standing to file its foreclosure action.

¶ 21 B. Trial court’s treatment of the Holleys’ lack of standing assertions

¶ 22 The Holleys also argue that the trial court improperly precluded them from asserting that plaintiff lacked standing after it denied their motions to dismiss. To support their argument, they rely on *U.S. Bank, N.A. v. Kosterman*, 2015 IL App (1st) 133627. In *Kosterman*, the trial court struck the defendants’ affirmative defense of lack of standing, holding that lack of standing was not an affirmative defense. *Id.* ¶ 9. The court also struck the defendants’ discovery requests that sought to determine if the plaintiff had standing. *Id.* ¶ 14. The appellate court reversed, finding that the trial court erred in ruling that lack of standing was an affirmative defense and in striking the defendants’ discovery requests because the defendants “never even had an opportunity to explore their defenses.” *Id.* ¶¶ 10, 15.

¶ 23 We find *Kosterman* distinguishable from the circumstances in this case. Here, the Holleys were permitted to raise their affirmative defense of lack of standing. In fact, they raised that defense many times in various motions and pleadings filed in the trial court. The trial court reviewed those pleadings and ultimately ruled that plaintiff had standing to bring the foreclosure action as a holder of the note.

¶ 24 The Holleys contend that, like the defendants in *Kosterman*, they were precluded from exploring their lack of standing defense. However, this contention is not supported by the record. Unlike the defendants in *Kosterman*, who filed discovery requests soon after the plaintiff filed its motion for summary judgment and had those requests stricken, the Holleys did not seek discovery in a timely manner. The Holleys served their first set of interrogatories and requests to produce on plaintiff in September 2016, nearly three years after the foreclosure complaint was

filed, over two years after plaintiff filed its motion for summary judgment, and over four months after the trial court entered its judgment of foreclosure and sale. Under these circumstances, the trial court did not preclude defendants' from supporting their lack of standing defense, and the trial court properly ruled that plaintiff had standing to bring the foreclosure action.

¶ 25 II. Summary judgment

¶ 26 The Holleys also argue that the trial court erred in entering summary judgment in favor of plaintiff because (1) plaintiff failed to establish its capacity to bring the action, and (2) Feistel's affidavit of the amounts due and owing was insufficient.

¶ 27 Summary judgment is proper when "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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 28 Once a party files a motion for summary judgment with supporting affidavits, the burden shifts to the non-moving party to prove that there is a genuine issue of material fact. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 69. A complaint, answer, or responsive pleadings may purport to raise issues of material fact, but if such issues are not further supported by evidentiary facts in affidavits, admissions or depositions, summary judgment is appropriate. *Payton*, 2017 IL App (1st) 160305, ¶ 29. A trial court's ruling on a motion for summary judgment is subject to *de novo* review. *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 13.

¶ 29 A. Capacity

¶ 30 An allegation of capacity as the mortgagee in a foreclosure proceeding is a material fact that must be proved. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 21. Section 15-208 of the Illinois Code of Civil Procedure (Code) defines a mortgagee as “(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor.” 735 ILCS 5/15-1208 (West 2014). The “legal holder of the indebtedness” may bring a foreclosure suit. See 735 ILCS 5/15-1504(a)(3)(N) (West 2014).

¶ 31 A party can prove its capacity as the holder of the indebtedness by being the bearer of the note. *Perry*, 2015 IL App (3d) 130673, ¶ 25. “[T]he mere attachment of a note to a complaint is *prima facie* evidence that plaintiff owns the note.” *Rosestone Investments LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26. By presenting to the court a note endorsed in blank, a party presents a *prima facie* case that it is the bearer of the note and legal holder of the indebtedness and, thus, has capacity as mortgagee to file a foreclosure action. *Perry*, 2015 IL App (3d) 130673, ¶¶ 25, 31.

¶ 32 Here, plaintiff alleged in its complaint that it filed its foreclosure action in its capacity as “the owner and legal holder of the Note, Mortgage and indebtedness.” Plaintiff filed and submitted to the court copies of the mortgage and the note endorsed in blank. Plaintiff also submitted a copy of the assignment from MERS to plaintiff that was signed, notarized and recorded prior to the filing of the foreclosure action. Once plaintiff filed its motion for summary judgment with these supporting documents, the burden shifted to the Holleys to prove that there was a genuine issue of material fact. See *Adeyiga*, 2014 IL App (1st) 131252, ¶ 69.

¶ 33 The Holleys failed to present any evidence refuting plaintiff’s *prima facie* case and raising a genuine issue of material fact. Instead, they argued that plaintiff did not adequately



prove that it owned the note when it filed its foreclosure action. We disagree. By filing the note, endorsed in blank, along with the assignment to plaintiff, which was dated before plaintiff filed its foreclosure action, plaintiff adequately established its capacity to file the instant action. Because the Holleys did not present any evidence to refute plaintiff's ownership of the note, there was no genuine issue of material fact precluding summary judgment to plaintiff.

¶ 34 B. Feistel's Affidavit

¶ 35 Finally, the Holleys argue that Feistel's affidavit should not have been relied upon by the trial court to grant summary judgment because it failed to lay a proper foundation for the admission of Caliber's business records.

¶ 36 Illinois Supreme Court Rule 191 governs the form of affidavits used in connection with motions for summary judgment. *Perry*, 2015 IL App (3d) 130673, ¶ 27. The rule provides in pertinent part:

“Affidavits in support of \* \* \* a motion for summary judgment under section 2-1005 of the Code of Civil Procedure \* \* \* shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

“If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently

testify to its contents at trial, Rule 191 is satisfied.” *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999).

¶ 37 Supreme Court Rule 236 governs the admission of business records into evidence as an exception to the rule against hearsay. *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶ 23. Rule 236(a) provides:

“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. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility.” Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 38 To establish a foundation for records sought to be admitted under Rule 236, the proponent must show only that the records were made in the regular course of business, at or near the time of the transaction. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42. A party may establish a foundation for admitting business records through the testimony of a records custodian or “another person familiar with the business and its mode of operation.” *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13.

¶ 39 Similarly, Illinois Rule of Evidence 803(6) provides for the admission of “records of regularly conducted activity” where the records consist of:

“A memorandum, report, record, or data compilation, in any form, of acts [or] events \*\*\* made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness \*\*\*.” Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

¶ 40 “Where 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 to justify their admission.’ ” *Avdic*, 2014 IL App (1st) 121759, ¶ 25 (quoting *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 829 (1990)). The determination that records are admissible as business records rests within the sound discretion of the trial court. *Id.*

¶ 41 “[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.” *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). Additionally, arguments not asserted in the trial court are deemed waived on appeal. *Perry*, 2015 IL App (3d) 130673, ¶ 26.

¶ 42 Here, the Holleys failed to object to Feistel’s affidavit at trial. Therefore, their arguments are waived. See *Perry*, 2015 IL App (3d) 130673, ¶ 26. Waiver aside, the affidavit was sufficient to support plaintiff’s motion for summary judgment.

¶ 43 Feistel averred that she is a foreclosure document specialist with Caliber Home Loans Inc. and, as such, is familiar with how Caliber creates and retains records related to the mortgage loans it services. She further averred that she reviewed the note, mortgage and payment history in this case and attached them to her affidavit. She described the computer software Caliber uses to process, apply and record payments and averred that it is recognized as standard in the industry. She further averred that the records were made in the regular course of Caliber's business and that the entries were made at or near the time the payment was received.

¶ 44 Feistel's affidavit states that she is familiar with Caliber's business and mode of operation, thus qualifying her to establish a foundation for admitting the business records. See *Land*, 2013 IL App (5th) 120283, ¶ 13. She also established that the computer software used to create the records is standard in the industry, the entries were made at or near the time payments were made and the records were made in the regular course of Caliber's business, thereby satisfying the foundational requirements for the admission of the records. See *Avdic*, 2014 IL App (1st) 121759, ¶ 30. Because the affidavit was unopposed, we take it as true. See *Purtill*, 111 Ill. 2d at 241; *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 46.

¶ 45 Feistel's affidavit and the business records attached thereto provided sufficient evidence to establish the amounts the Holleys owed under their mortgage. The Holleys presented no competing affidavit or evidence to contradict the evidence contained in the affidavit and business records. Thus, the trial court properly granted summary judgment to plaintiff. See *Purtill*, 111 Ill. 2d at 241.

¶ 46 CONCLUSION

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

Affirmed.