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2017 IL App (3d) 160736-U

Order filed December 19, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE BANK OF NEW YORK MELLON	)	Appeal from the Circuit Court
TRUST CO. N.A. f/k/a THE BANK OF NEW	)	of the 12th Judicial Circuit,
YORK TRUST CO. N.A., AS SUCCESSOR	)	Will County, Illinois.
IN INTEREST TO JPMORGAN CHASE	)	
BANK, NATIONAL ASSOCIATION, f/k/a	)	
JPMORGAN CHASE BANK AS TRUSTEE,	)	
FOR ACE SECURITIES CORP. HOME	)	
EQUITY LOAN TRUST, SERIES 2003-FM1	)	
ASSET BACKED PASS-THROUGH	)	
CERTIFICATES,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-16-0736
	)	Circuit No. 12-CH-5801
RONNIE BROWN; LORROLI BROWN;	)	
CAVALRY PORTFOLIO SERVICES, LLC,	)	
AS ASSIGNEE OF KEY BANK BY MERGER	)	
WITH SOCIETY NATIONAL BANK a/k/a	)	
CAVALRY INVESTMENTS, LLC;	)	
UNKNOWN OWNERS AND NON-RECORD	)	
CLAIMANTS,	)	
	)	
Defendants	)	
	)	
(Ronnie Brown and Lorrolli Brown,	)	Honorable
	)	Brian E. Barrett
Defendants-Appellants).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Holdridge and Justice Carter concurred in the judgment.

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## ORDER

¶ 1 *Held:* Trial court properly granted summary judgment to plaintiff in foreclosure action despite mortgagor's lack-of-standing affirmative defense where plaintiff provided copy of mortgage, promissory note, assignment and allonge containing specific indorsement to plaintiff.

¶ 2 Plaintiff The Bank of New York Mellon Trust Co. N.A. filed a complaint for foreclosure against defendants Ronnie Brown, Lorrolli Brown and others. The Browns raised lack of standing as an affirmative defense. Plaintiff filed a motion for summary judgment. The trial court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale. The trial court then entered an order confirming the sheriff's sale of the property. The Browns appeal the trial court's grant of summary judgment to plaintiff. We affirm.

## ¶ 3 FACTS

¶ 4 In October 2002, defendants Ronnie Brown and Lorrolli Brown entered into a mortgage contract with Fremont Investment and Loan (Fremont). The loan was secured by real property in Crete.

¶ 5 In November 2012, plaintiff filed a foreclosure complaint against defendants. The complaint alleged that plaintiff was the "Mortgagee \*\*\* as the legal holder of the indebtedness and owner of the mortgage given as security thereof." The complaint alleged that defendants failed to make mortgage payments beginning in May 2012. Attached to the complaint were copies of the mortgage and promissory note, an assignment of the mortgage from Fremont to plaintiff dated April 1, 2009, which recites that the mortgage is assigned "Together with said

note therein described”, and a loan modification agreement between plaintiff and the Browns executed in July 2011.

¶ 6 In response, the Browns filed a request to produce and requests to admit, as well as an answer and affirmative defenses, asserting, in part, that the assignment to plaintiff was void because it failed to comply with plaintiff’s Pooling and Servicing Agreement (PSA) and that plaintiff lacked standing to file the foreclosure action. Defendants did not attach a copy of plaintiff’s PSA to its answer or any other pleading.

¶ 7 In February 2016, plaintiff filed a combined motion for summary judgment and to strike defendants’ affirmative defenses. Attached to the motion was a copy of the promissory note signed by the Browns, as well as an allonge containing a specific indorsement from Fremont to plaintiff. Plaintiff also filed a motion for entry of judgment of foreclosure and sale. The Browns filed a response in opposition to plaintiff’s motion, again arguing that plaintiff lacked standing. They did not attach any exhibits or affidavits to their response.

¶ 8 In May 2016, the trial court entered an order granting plaintiff’s motion for summary judgment and a judgment for foreclosure and sale. In September 2016, plaintiff filed a motion for an order approving the report of sale and distribution. In November 2016, the trial court entered an order approving plaintiff’s report of sale and distribution, confirming sale and order of possession.

¶ 9 ANALYSIS

¶ 10 The Browns argue that the trial court erred in granting summary judgment to plaintiff because there was a genuine issue of material fact as to plaintiff’s standing to bring the foreclosure action. They contend that plaintiff lacked standing because the assignment from Fremont violated plaintiff’s PSA.

¶ 11 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). 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.

¶ 12 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 to sue must be determined as of the time the suit is filed. *Id.* Lack of standing to bring an action is an affirmative defense that it is the defendant’s burden to plead and prove. *Id.*

¶ 13 A mortgagee has standing to bring a foreclosure action. *OneWest Bank FSB v. Cielak*, 2016 IL App (3d) 150224, ¶ 29. Section 15–1208 of the Foreclosure Law 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).

¶ 14 A plaintiff with possession of a note is the holder of the note. *Citimortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 11. Any issue regarding the manner in which the plaintiff acquired the note does not affect the plaintiff’s undisputed status as holder. *Id.* The plaintiff’s possession of a note together with the assignment of the mortgage, which states that it was assigned “[t]ogether with the Note,” is *prima facie* proof that the plaintiff is entitled to foreclose the note and mortgage. *Id.* (citing 735 ILCS 5/15-1208 (West 2010)).

¶ 15 The mere attachment of a note to a complaint is *prima facie* evidence that plaintiff owns the note even if it lacks an indorsement. *Cornejo*, 2015 IL App (3d) 140412, ¶ 13. The burden then shifts to the defendant to present some evidence that the transfer did not occur before the complaint was filed. *Id.*

¶ 16 When the holder of a note files a motion for summary judgment, it is the defendant's burden to present evidence that would raise a genuine issue of material fact that some other person or entity was the "rightful" holder of the note. *Sconyers*, 2014 IL App (1st) 130023, ¶ 12. Where no such evidence is presented, the trial court should grant summary judgment to the plaintiff. *Id.* ¶ 13.

¶ 17 Here, plaintiff attached to its complaint a copy of the note, mortgage and assignment, which stated that both the note and mortgage were assigned from Fremont to plaintiff. Thereafter, plaintiff filed its motion for summary judgment, accompanied by the note as well as an allonge containing a specific indorsement from Fremont to plaintiff. This was *prima facie* evidence that plaintiff was the mortgagee with the right to enforce the note and mortgage. See *Sconyers*, 2014 IL App (1st) 130023, ¶ 11. It does not matter that plaintiff did not attach the specifically-indorsed note to its complaint. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 14. Once plaintiff presented the allonge containing the specific endorsement, the burden then shifted to defendants to prove that plaintiff did not hold the mortgage and note when it filed its complaint or that someone other than plaintiff was the rightful holder of the note. See *id.* ¶¶ 13-14; *Sconyers*, 2014 IL App (1st) 130023, ¶ 12.

¶ 18 The Browns did not present any evidence refuting plaintiff's status as rightful holder of the note when it filed its foreclosure complaint. Instead, the Browns argued that plaintiff could

not enforce the note because plaintiff obtained it in violation of its PSA. We reject this contention.

¶ 19 First, the Browns failed to meet their burden of proving that the assignment from Fremont to plaintiff violated plaintiff's PSA because the Browns never provided a copy of the PSA to the court. Section 2-606 of the Code of Civil Procedure provides in pertinent part: "If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606 (West 2014). Here, the Browns did not provide a copy of the PSA or an affidavit explaining why they could not provide it. Thus, they failed to comply with section 2-606 of the Code and did not prove a violation of the PSA. Moreover, even if the assignment did not comply with plaintiff's PSA, the Browns lack standing to challenge the assignment because they were not a party to the PSA and noncompliance does not render the transfer void. See *Bank of America National Ass'n v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶¶ 14-21.

¶ 20 In this case, by providing the mortgage, assignment, note and allonge containing a specific endorsement to plaintiff, plaintiff presented sufficient evidence to establish its standing. The Browns failed to present any evidence to the contrary. The trial court properly granted summary judgment to plaintiff.

¶ 21 CONCLUSION

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

¶ 23 Affirmed.