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2017 IL App (3d) 170100-U

Order filed October 5, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

U.S. BANK TRUST, N.A., as Trustee for LSF8)	Appeal from the Circuit Court
Master Participation Trust,)	of the 12th Judicial Circuit,
)	Will County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	
)	
GEORGE CLARK, DARLENE CLARK,)	Appeal No. 3-17-0100
AMERIFIRST HOME IMPROVEMENT)	Circuit No. 14-CH-802
FINANCE CO., UNKNOWN TENANTS,)	
UNKNOWN OWNERS AND NON-RECORD)	
CLAIMANTS,)	
)	
Defendants)	
)	
(George Clark and Darlene Clark,)	Honorable
)	Brian E. Barrett
Defendants-Appellants).)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly granted summary judgment to plaintiff in foreclosure action despite mortgagor's lack-of-standing affirmative defense where plaintiff attached to complaint note endorsed in blank and mortgagor did not provide counteraffidavit or other competent evidence proving lack of standing.

¶ 2 HSBC Mortgage Services, Inc. filed a complaint for foreclosure against defendants George Clark, Darlene Clark, and others. Thereafter, HSBC transferred the Clarks' note and mortgage to plaintiff, which was substituted as a party. The Clarks raised lack of standing as an affirmative defense. Plaintiff filed a motion for summary judgment and motion for judgment of foreclosure and sale. 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 and a deficiency judgment against the Clarks. The Clarks appeal the trial court's grant of summary judgment to plaintiff. We affirm.

¶ 3 **FACTS**

¶ 4 In March 2005, defendants George Clark and Darlene Clark borrowed \$252,000 from Crevecor Mortgage, Inc., secured by a note and mortgage on real property in Monee. The original mortgage identifies the mortgagee as Mortgage Electronic Registration Systems, Inc. (MERS) and Crevecor as the lender.

¶ 5 In April 2014, HSBC Mortgage Services Inc. filed a complaint to foreclose, alleging that the Clarks defaulted on their mortgage by failing to make payments beginning in April 2012. HSBC alleged in its complaint that it "is the legal holder of the indebtedness" and attached to the complaint a copy of the note endorsed in blank, purportedly signed by Thomas J. Barr as "Sr. Vice President" of Crevecor Mortgage, Inc. The endorsement is not dated. Plaintiff also attached to its complaint a "Corporate Assignment of Mortgage," showing that the mortgage was assigned from MERS, as nominee for Crevecor Mortgage, Inc., to HSBC. The assignment was executed and recorded in May 2013.

¶ 6 In January 2015, HSBC filed a motion to substitute party, seeking an order substituting U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust, as the plaintiff. Attached

to the motion was an “Assignment of Mortgage/Deed of Trust” showing that HSBC assigned the Clarks’ mortgage to U.S. Bank Trust, N.A. in July 2014. The assignment was recorded in August 2014. The trial court granted HSBC’s motion and entered an order substituting U.S. Bank Trust, N.A. as the plaintiff.

¶ 7 In March 2015, the Clarks filed an answer to the complaint and raised the affirmative defense of lack of standing. In January 2016, plaintiff filed a motion for summary judgment and a motion for entry of judgment of foreclosure and order of sale. Attached thereto was an affidavit from Nhu Tan, an authorized signatory of Caliber Home Loans, Inc, as attorney in fact for U.S. Bank Trust, N.A., stating that he examined the Clarks’ payment history, mortgage and note and that those documents showed that the Clarks defaulted on their loan. Tan also averred that plaintiff was the holder of the Clarks’ note and mortgage.

¶ 8 The Clarks responded to plaintiffs’ motions, arguing that plaintiff lacked standing to file the foreclosure action because it could be inferred that Crevecor’s blank endorsement was not added to the note until after Crevecor was dissolved, making it invalid. In support of this inference, the Clarks attached to their response (1) an image request form from HSBC, dated October 17, 2012, requesting a copy of the Clarks’ original note “with endorse[ment],” (2) a letter from the Missouri Secretary of State, stating that Crevecor Mortgage, Inc. was administratively dissolved as of November 8, 2007, and (3) a copy of the “Corporate Assignment of Mortgage” dated May 15, 2013 and recorded on May 21, 2013. The Clarks did not file an affidavit with their response.

¶ 9 The trial court held a hearing on plaintiff’s motion for summary judgment. Following the hearing, the trial court granted plaintiff’s motion and simultaneously entered a Judgment of

Foreclosure and Order of Sale. The Clarks filed a motion to reconsider, which the trial court denied.

¶ 10 The Clarks' property was sold at a sheriff's sale for \$186,000, leaving a deficiency of \$211,572.01. Plaintiff filed a motion for an order confirming the sale. The trial court entered an order confirming the sale of the property and entering a deficiency judgment against the Clarks for \$211,572.01.

¶ 11 ANALYSIS

¶ 12 The Clarks argue that the trial court erred in entering summary judgment to plaintiff because they raised a genuine issue of material fact as to when the blank endorsement was placed on their note.

¶ 13 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.

¶ 14 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) governs affidavits in summary judgment proceedings and requires that affidavits be made on the personal knowledge of the affiant; set forth with particularity the facts upon which the defense is based; have attached sworn or certified copies of all papers on which the affiant relies; consist of facts admissible in evidence; and affirmatively show that the affiant, if sworn as a witness, can testify competently

to those facts. When affidavits presented in support of summary judgment are not contradicted by counteraffidavits, they must be taken as true even if the adverse party's pleadings allege contrary facts. *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 53.

¶ 15 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. *Deutsche Bank National Trust Co. v. Payton*, 2017 IL App (1st) 160305, ¶ 29. "Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment." *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584 (2007).

¶ 16 "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. *Payton*, 2017 IL App (1st) 160305, ¶ 25.

¶ 17 An endorsement does not have to be dated to be valid. See 810 ILCS 5/3-204, 3-205 (West 2014). A note endorsed in blank is payable to the bearer and may be negotiated by transfer of possession alone. 810 ILCS 5/3-205(b) (West 2014). The legal holder of the indebtedness may file a foreclosure case. 735 ILCS 5/15-1504(a)(3)(N) (West 2014). The 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. When the plaintiff attaches to a complaint copies of the note and mortgage, the burden shifts to the defendant to plead and prove the plaintiff's lack of standing. *Deutsche Bank National Trust Co. v. Iordanov*, 2016 IL App (1st) 152656, ¶ 45.

¶ 18 Here, HSBC attached to the foreclosure complaint copies of the mortgage and note endorsed in blank. HSBC also submitted a copy of the assignment from MERS that was signed, notarized and recorded prior to the filing of the foreclosure action. In support of its motion for summary judgment, plaintiff attached an affidavit from Nhu Tan, who averred that plaintiff was the holder of the Clarks' mortgage and note. Once plaintiff filed these documents, the burden shifted to the Clarks to prove that plaintiff lacked standing. See *id.*

¶ 19 The Clarks argue that they met their burden of proving that a genuine issue of material fact existed as to plaintiff's standing to file the foreclosure action based on (1) the imaging request from HSBC dated October 17, 2012, (2) the letter showing that Crevecor was administratively dissolved in 2007, and (3) the corporate assignment dated May 2013. We disagree for several reasons.

¶ 20 First, the Clarks failed to file a counteraffidavit in response to plaintiff's motion for summary judgment. None of the documents attached to plaintiff's response meet the standards for affidavits in summary judgment proceedings. See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). By contrast, plaintiff attached to its motion for summary judgment the affidavit of Tan, which stated that plaintiff was the holder of the Clarks' note and mortgage. Because the Clarks did not file a counteraffidavit, that fact must be taken as true. See *Perona*, 2014 IL App (1st) 130748, ¶ 53. As the holder of the Clarks' mortgage and note, plaintiff had standing to bring the foreclosure action. See 735 ILCS 5/15-1504(a)(3)(N) (West 2014).

¶ 21 Additionally, none of the documents attached to the Clarks' response establish that plaintiff lacked standing. The Clarks rely on the documents to suggest that their note was endorsed by an officer of Crevecor after Crevecor was administratively dissolved in 2007. However, the documents do not definitively prove this. Nothing in HSBC's imaging request

establishes that the endorsement was added to the note on the date of the request. While the Clarks contend that the document raises an “inference” that the endorsement was not added to the note until October 2012, that is not enough to defeat plaintiff’s motion for summary judgment. See *Judge-Zeit*, 376 Ill. App. 3d at 584. Further, the assignment of mortgage, dated May 2013, does not establish when the interest in the property was transferred to plaintiff because the assignment could have been a “mere memorialization of a previous transfer.” *Garner*, 2013 IL App (1st) 123422, ¶ 25; see *Iordanov*, 2016 IL App (1st) 152656, ¶¶ 42-45. The Clarks could have, through depositions and interrogatories, definitively shown when the endorsement was added to the note, but they failed to do so. See *Garner*, 2013 IL App 123422, ¶ 25; *Iordanov*, 2016 IL App (1st) 152656, ¶ 42. Thus, they did not meet their burden of proving that plaintiff lacked standing.

¶ 22 Finally, the imaging request attached to the Clarks’ response did not constitute competent evidence. Only evidentiary facts are to be considered by the court on summary judgment motions. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). The imaging document constitutes hearsay, which is not admissible in support of or opposition to a motion for summary judgment. See *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47. Thus, it could not be considered by the court in ruling on plaintiff’s motion for summary judgment.

¶ 23 By attaching the note, endorsed in blank, to its foreclosure complaint, plaintiff adequately established its standing to file the instant action. Because the Clarks did not present sufficient evidence to refute plaintiff’s standing, there was no genuine issue of material fact precluding summary judgment.

¶ 24 CONCLUSION

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

