

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CITIMORTGAGE, INC.,)	
)	
Plaintiff-Appellee,)	
)	
v.)	Appeal from the Circuit Court
)	of Cook County.
)	
VICTOR O. SMITH,)	
)	
Defendant-Appellant.)	No. 12 CH 24429
)	
DENINA MCCULLUM-SMITH,)	
CITIFINANCIAL SERVICES, INC.,)	The Honorable
ECCLESIASTICAL TRUSTEE, IDA)	Michael F. Otto,
RESOURCE CENTER, UNKNOWN OWNERS,)	Judge, presiding.
and NON-RECORDED CLAIMANTS,)	
)	
Defendant(s).)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in confirming the sale of a home in a foreclosure action.

¶ 2 Victor Smith appeals the trial court's final order confirming the sale of his home in a foreclosure action brought by CitiMortgage. We consider this appeal despite procedural errors and a missing trial court record.

¶ 3 Notwithstanding Smith's claims to the contrary, (i) CitiMortgage had standing to foreclose on the Smith home, (ii) Smith did not show that the mortgage held by CitiMortgage was forged, (iii) the trial court did not err in finding in favor of CitiMortgage or in denying Smith's motions to amend his answer, and (iv) Smith did not have a right to Grace Period Notice. We affirm.

¶ 4 Background

¶ 5 CitiMortgage, Inc. filed a foreclosure action against Victor Smith, his wife Denina McCullum-Smith, and various other defendants, seeking to foreclose on the Smith home. According to the complaint, the Smiths defaulted on their mortgage in 2011 and owed CitiMortgage \$163,686.84.

¶ 6 Smith filed an answer denying everything stated in the complaint and, as an affirmative matter, claimed CitiMortgage did not have standing and the mortgage was fraudulent. CitiMortgage denied all of Smith's affirmative defenses. Smith then moved to dismiss the foreclosure action claiming the mortgage was forged. As proof, he attached a copy of the mortgage nearly identical to that submitted by CitiMortgage, with a difference on the signature page. In Smith's version, under McCullum-Smith's signature a handwritten statement reads: "is signing for the sole purpose of waiving homestead rights." In the version submitted by CitiMortgage, McCullum-Smith's initials appear next to the handwritten statement which has been crossed-out. Smith claimed CitiMortgage fraudulently crossed out the sentence and forged

McCullum-Smith's initials. The court denied his motion to dismiss but noted that Smith could raise the issue as an affirmative defense.

¶ 7 Smith then filed a new amended answer incorporating forgery as an affirmative defense. The court struck the amended answer because Smith failed to get court approval to amend his answer. Thereafter, Smith moved to amend his answer, which was denied. In the denial order the trial court states that Smith has until April 17, 2014 to "file a motion seeking leave to amend answer and affirmative defenses with a proposed pleading that conforms with the Code of Civil Procedure attached." Smith filed two more motions to amend his answer, but both failed to attach a pleading (based on the common law record). The court denied the motions. In his brief Smith contends that he did attach proposed pleadings to the motions to amend, but those attached pleadings are not included in the trial record "for some strange reason." Smith claims the court omitted the attached pleadings intentionally and says he does not know why his motions to amend were denied.

¶ 8 Smith also filed an affidavit claiming CitiMortgage did not own the note. As proof he attached a printout of the Mortgage Electronic Registration System, Inc. (MERS) online portal. The printout has information about a mortgage belonging to a borrower "SMITH," and lists CitiMortgage as the servicer and CitiBank, N.A. as the investor.

¶ 9 Throughout the proceedings, Smith and Mc-Cullum Smith failed to respond to CitiMortgage's interrogatories and deposition requests, despite the court ordering them to do so. The trial court sanctioned the Smiths, striking their answers (and affirmative matters.)

¶ 10 CitiMortgage moved for default. The court granted the motion and entered a judgement of foreclosure. CitiMortgage bought the Smith house at the foreclosure sale for \$109,200.00. The

trial court confirmed the sale and entered a judgement against Smith for \$129,649.56 (the deficiency balance remaining after the sale). Smith appeals this order.

¶ 11

ANALYSIS

¶ 12

Smith's brief is confusing and fails to follow the rules of procedure. His brief appears to argue: (i) CitiMortgage did not have standing to foreclose on the house due to issues with the mortgage or the note or both; (ii) the mortgage agreement contains a forgery; (iii) the court erred in entering various orders in favor of CitiMortgage and in denying Smith's motions to amend his answer; and (iv) CitiMortgage failed to provide Grace Period Notice. Smith failed to file a reply brief, so we proceed without it as allowed by Illinois Supreme Court Rule 341(j) (eff. Jan. 1, 1970).

¶ 13

Smith failed to provide this court with a complete record of the proceedings, and he also failed to present the facts without argument as required by Illinois Supreme Court Rule 341. We also note we are troubled by CitiMortgage's failure to make a single substantial argument in response to Smith's opening brief. Despite these inadequacies, we consider Smith's arguments.

¶ 14

"The law is well settled that appellants bear the duty to present a record which fairly and fully presents all matters necessary and material for a decision of the question raised." (internal quotations omitted) *Emery v. Northeast Illinois Regional Transportation Co.*, 374 Ill. App. 3d 974, 979 (2007); see also Ill. S. Ct. R. 321 (eff. July 30, 1979) (record on appeal shall include reports of proceedings prepared); Ill. S. Ct. R. 323(a) (eff. Jan. 1, 1970) (report of proceedings shall include "all the evidence pertinent to the issues on appeal"). In the absence of a report of proceedings, any doubts will be resolved against the appellants and we presume that the trial court's orders conform with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 15 Standing

¶ 16 Smith argues CitiMortgage lacks standing because (i) it never owned the mortgage or the note; (ii) it never owned the note even if it did own the mortgage; (iii) it did not possess the note when it filed for foreclosure; (iv) the note belonged to CitiBank, not CitiMortgage; and (v) the note was never endorsed.

¶ 17 We review CitiMortgage’s standing to foreclose *de novo*. *Malec v. The City of Belleville*, 384 Ill. App. 3d 465, 468 (2008).

¶ 18 “A foreclosure action may be pursued by ‘the legal holder of the indebtedness, a pledgee, an agent, or a trustee.’ ” *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶ 35 (citing *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010)). CitiMortgage has established it is the “legal holder of the indebtedness” by attaching the note, mortgage, and the assignment of mortgage to the original complaint. *Id.* The assignment of mortgage, dated March 10, 2009, transfers the Smith mortgage and the associated note to CitiMortgage. CitiMortgage possessed both the Smith mortgage and note before it filed for foreclosure, so Smith’s first four arguments are meritless.

¶ 19 Smith claims, because MERS has CitiBank, not CitiMortgage, listed as the investor, the note does not belong to CitiMortgage. CitiMortgage is the entity listed on the assignment of mortgage, and the fact that CitiBank is listed on the MERS website does not invalidate CitiMortgage’s standing.

¶ 20 The note attached to CitiMortgage’s complaint is not endorsed, but CitiMortgage does not need to have an endorsement to enforce the note. See 810 ILCS 5/3-203 (West 2012); *Williams v. Frederick’s Estate*, 289 Ill. App 410 (1937) (“It is true that a note may be assigned

by a separate instrument without indorsement so as to vest the legal title in the assignee, provided, the note is also transferred by delivery to the assignee.”).

¶ 21 CitiMortgage had standing to bring a foreclosure suit against the Smith home.

¶ 22 Forgery

¶ 23 Smith also claims the mortgage produced by CitiMortgage is a forgery based on the difference between the mortgage submitted by CitiMortgage and the one submitted by Smith. According to Smith, the crossed out handwritten note and initials on the CitiMortgage version are evidence of forgery.

¶ 24 Forgery is an affirmative defense to a foreclosure action. See *Krueger v. Dorr*, 22 Ill. App. 2d 513 (1959). “The essential elements of forgery are (1) a false writing or alteration of some instrument in writing; (2) the instrument must be apparently capable of defrauding; and (3) there must be an intent to defraud.” *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 76 (2003). Smith failed to allege CitiMortgage had intent to defraud, and he failed to show that the altered mortgage was capable of defrauding him. The alleged changes here could not defraud Smith because they do not impact his legal obligations under the mortgage. Crossing out McCullum-Smith’s handwritten note did not alter the underlying debt. The obligation to pay (and the timing of the payment) exists regardless of the status of the note under McCullum-Smith’s signature.

¶ 25 Smith has not shown that the alleged forgery had any impact on the validity of his obligation under the note and mortgage.

¶ 26 Trial Court Errors

¶ 27 Smith alleges the trial court erred in granting CitiMortgage’s various motions during trial, and all orders entered in favor of CitiMortgage must be vacated. The final appealable order in a foreclosure is the confirmation of sale, which we review for abuse of discretion. See

CitiMortgage, Inc., v. Morgan, 2014 IL App (1st) 132430, ¶ 22. Smith also can challenge the order of default (*id.*) and discovery sanctions on appeal. *United Excavating & Wrecking, Inc. v. J. L. Wroan & Sons, Inc.*, 43 Ill. App. 3d 101, 104 (1976). We review sanctions for abuse of discretion (*id.*), and we review entering an order of default for an abuse of discretion or denial of substantial justice. *Morgan*, 2014 IL App (1st) 132430, ¶ 22. Smith has failed to provide a record of the trial court proceedings, so any doubts will be resolved against him and we presume that the trial court's orders conform with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. We hold the trial court did not err in granting CitiMortgage's motions.

¶ 28 Smith also claims the trial court erred in denying his motions to amend. We review a trial court's decision denying an amendment for abuse of discretion. *Giles v. Parks*, 2018 IL App (1st) 163152 ¶ 24. "Parties do not have an absolute right to amend; rather, the decision rests in the sound discretion of the trial court." *Id.* Again, we note Smith has not provided an adequate record of the trial court proceedings. In addition, he has done nothing more than allege that his motions to amend conformed with the rules of civil procedure. He offers no evidence to support his claim. Smith failed to show that the trial court abused its discretion in denying his motions to amend his answer.

¶ 29 Grace Period Notice

¶ 30 Smith claims CitiMortgage failed to provide adequate Grace Period Notice as required by the Homeowner Protection Act ((735 ILCS 5/15-1502.5 (West 2012))). But, the Act was repealed July 1, 2016 (735 ILCS 5/15-1502.5(k) (West Supp. 2013)), and, since the Act was a special remedial statute, it no longer has an effect. See *U.S. Bank, N.A. v. Coe*, 2017 IL App (1st) 161910, ¶ 9. In *U.S. Bank, N.A. v. Coe*, the court held that defendants in a foreclosure action instigated in 2012 had no recourse under the Act when they filed their appeal on July 7, 2016.

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Id. ¶ 19. “[T]he effect of an express repeal of a special remedial statute is ‘to destroy the effectiveness of the repealed act * * * as if it had never existed.’” (internal quotation marks omitted). *Id.* ¶ 13. Smith no longer has recourse under the Act.

¶ 31 Affirmed.