2018 IL App (1st) 171734-U

No. 1-17-1734

Order filed August 31, 2018

Fifth Division

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

MTGLQ INVESTORS, L.P.,	)	Appeal from the
	)	Circuit Court of
Plaintiff	)	Cook County.
	)	
v.	)	No. 2010 CH 2119
	)	
ROBERT J. HOLDEN; CHRISTINE B. HOLDEN;	)	Honorable
AMERICAN CHARTERED BANK; 1550	)	William B. Sullivan,
CONDOMINIUM ASSOCIATION; UNKNOWN	)	Judge, presiding.
OWNERS; and NONRECORD CLAIMANTS,	)	
	)	
Defendants	)	
	)	
(WestVue NLP Trust, acting solely with respect to Series	)	
2014-1,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
Robert J. Holden and Christine B. Holden,	)	
	)	
Defendants-Appellants.)	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Partial summary judgment for the plaintiff was proper where there were no genuine issues of material fact, and the plaintiff was entitled to partial summary judgment as a matter of law.

¶ 2 The defendants, Robert J. Holden (Robert) and Christine B. Holden (Christine) (collectively, the Holdens), appeal from an order of the circuit court of Cook County granting partial summary judgment to the plaintiff, WestVue NPL Trust, acting solely with respect to Series 2014-1 (WestVue), in a mortgage foreclosure suit against the Holdens. On appeal, the Holdens contend that the existence of genuine issues of material fact precluded summary judgment. For the reasons set forth below, we affirm the grant of partial summary judgment.[1]

¶ 3 BACKGROUND

¶ 4 Due to the number of assignments of the mortgage and the note during the proceedings in the circuit court, a history of the litigation is set forth below.

¶ 5 2010 Circuit Court Proceedings

¶ 6 On January 19, 2010, MTGLQ, Investors, L.P. (MTGLQ) filed a complaint to foreclose a mortgage on a condominium unit owned by the Holdens. *Inter alia*, the complaint alleged that: MTGLQ brought the complaint to foreclose a mortgage; true copies of the mortgage and note were attached to the complaint; the Holdens, the mortgagors, were in default for the monthly payments from June 9, 2009, through the present; and MTGLQ brought the complaint as the

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[1] The other named defendants are not parties to this appeal.

agent for the holder and bearer of the mortgage and the note. Attached to the complaint were copies of the mortgage and the note, which was endorsed in blank.

¶ 7 On February 17, 2010, Robert, *pro se*, filed a verified answer to the complaint.[2] Robert admitted the allegations of the complaint except for MTGLQ's capacity allegation, which he denied. He also stated that he had insufficient information to admit or deny whether the copies of the mortgage and the note were true copies and whether MTGLQ was entitled to a deficiency judgment. Robert asserted "[o]ther affirmative matter" stating, "As far as I know Goldman Sachs holds my mortgage and note. I am going to attempt to negotiate a work out plan with my lender." On March 31, 2010, MTGLQ filed a reply to the affirmative defense denying the allegation.

¶ 8 On April 1, 2010, MTGLQ filed a motion for summary judgment on the complaint. On October 26, 2010, the circuit court ordered the motion withdrawn without prejudice to refiling it.

¶ 9 2012 Circuit Court Proceedings

¶ 10 On November 2, 2012, MTGLQ filed a motion to substitute WLR/IVZ RESI NPL LLC as the plaintiff. Attached to the motion was a copy of MTGLQ's May 1, 2012, assignment of the mortgage and the note to Goldman Sachs Mortgage Company, and a copy of Goldman Sachs Mortgage Company's May 1, 2012, assignment of the mortgage and the note to WLR/IVZ RESI NPL LLC.[3]

¶ 11 2014 Circuit Court Proceedings

[2] We are aware that in his answer, Robert admitted and denied/and or claimed to lack sufficient knowledge as to the same allegations. However, these inconsistencies do not impact the result in this case.

[3] The record does not reflect an order granting the motion to substitute WLR/IVZ RESI NPL LLC as the plaintiff.

¶ 12 On June 24, 2014, MTGLQ filed a motion to substitute Greenwich Investors XLIII Trust 2013-1 (Greenwich) as the plaintiff. MTGLQ supported the motion with documentation showing that WLR/IVZ RESI NPL LLC had assigned the mortgage and the note to Greenwich on February 6, 2013.

¶ 13 On August 27, 2014, Greenwich filed motions for summary judgment and for a judgment of foreclosure and sale. The motions were supported by the affidavit of Jody Garcia, vice-president of Acqura Loan Services, the loan servicing agent for Greenwich, setting forth the amounts due and owing on the mortgage.

¶ 14 The Holdens retained counsel, who filed an appearance on behalf of both Robert and Christine. The Holdens moved to strike Robert's *pro se* verified answer and for additional time to answer the foreclosure complaint. The circuit court ordered the Holdens to file a proposed answer or responsive pleading to the complaint. Pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), the Holdens filed their proposed motion to dismiss the foreclosure complaint.

¶ 15 On September 16, 2014, the circuit court denied the Holdens' motion to strike Robert's verified *pro se* answer and denied them leave to file their motion to dismiss. The court ordered the Holdens to respond to Greenwich's motion for summary judgment and continued the case to November 18, 2014, for a hearing. The Holdens filed their response to the motion for summary judgment along with an affirmative defense of lack of standing. Greenwich filed a reply.

¶ 16 On November 18, 2014, the circuit court entered an order striking the Holdens' affirmative defense. The court further ordered Ms. Garcia's affidavit of indebtedness stricken for failing to attach the records required by Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013)

and for failing to provide a foundation for the non-business records attached to the affidavit. Greenwich's motions for summary judgment and foreclosure and sale were denied without prejudice. In a separate order, the court granted MTGLQ's motion to substitute Greenwich as the plaintiff.

¶ 17 2015 Circuit Court Proceedings

¶ 18 On September 10, 2015, Greenwich filed a motion to substitute WestVue as the plaintiff. Attached to the motion was Greenwich's January 28, 2015, assignment of the mortgage to WestVue. On September 24, 2015, the circuit court granted the motion, and WestVue was substituted as the plaintiff in these proceedings.

¶ 19 2016 Circuit Court Proceedings

¶ 20 On May 25, 2016, WestVue moved for summary judgment. The motion was supported by the affidavit of Michelle DeArcos, who averred as follows. Ms. DeArcos was employed as a foreclosure supervisor by FCI Lender Services (FCI), WestVue's servicing agent for the Holdens' loan. FCI acquired the servicing rights for the Holdens' loan from ClearSpring Loan Services, Inc. (ClearSpring) on February 20, 2015. At the time of the transfer, the Holdens' loan was delinquent, and they owed $302,605.01. Based on her knowledge of the record keeping systems used and relied on by FCI Lender Services, as of February 29, 2016, the gross amount due on the loan was $305,280.78. Attached was FCI's March 18, 2016, demand loan payoff statement, stating as of February 20, 2015, the amount to pay off the loan was $302,605.01, with daily interest after that date of $52.18.

¶ 21 The Holdens filed a response to WestVue's summary judgment motion, maintaining that Ms. DeArcos' affidavit was defective. They pointed to the unexplained discrepancy between the

total amounts due set forth in Ms. DeArcos' affidavit and the total amounts due set forth in Ms. Garcia's affidavit that was stricken by the circuit court in its November 18, 2014, order denying Greenwich's motion for summary judgment.

¶ 22 The Holdens further maintained that they did not forfeit the standing issue. They asserted that Robert's affirmative defense in his verified answer that Goldman Sachs held the mortgage and note, "amounted to the allegation of lack of standing." The Holdens asserted that WestVue lacked standing because the filing of the foreclosure complaint preceded the assignment of the mortgage. The Holdens pointed out that the chain of assignment of the mortgage did not include Popular Financial Services, LLC (Popular), the entity that endorsed the note in blank. The Holdens argued that since Popular was never assigned an interest in the mortgage, the discrepancy between the assignment of the mortgage and the endorsement of the note created a genuine issue of material fact and precluded summary judgment for WestVue.

¶ 23 On August 11, 2016, WestVue was granted leave to file "a supplemental affidavit of the amounts due & owing." On August 24, 2016, WestVue filed the affidavit of David Haddad, who averred as follows. He was employed by Longvue Mortgage Capital, Inc. (Longvue), WestVue's servicing agent for the Holdens' loan. As a function of his employment, Mr. Haddad was familiar with the practices and procedures used to create and record information related to the residential mortgage loans, including the process used by the employees to enter information into those systems. Longvue acquired the servicing rights to the defendants' loan on January 15, 2015, from ClearSpring, whose records relating to the Holdens' loan were integrated into Longvue's systems. At the time, Longvue took over servicing the loan, the Holdens had made no payments on the loan since June 1, 2009, and the loan was delinquent in the amount of

$176,001.69. As of February 29, 2016, the net amount due was $319,028.44. Attached was FCI's demand loan payoff statement, dated August 4, 2016, which stated that the amount to pay off the loan was $326,395.59, with daily interest after February 29, 2016, of $47.26.

¶ 24 In their response to the supplemental affidavit, the Holdens alleged that the Haddad affidavit was deficient in that it contradicted the averments in the DeArcos affidavit as to which company was the servicing agent for the loan and the amount of the loan delinquency. The Holdens further alleged that the amount due in the Haddad affidavit did not match the amounts due on the FCI's statement attached to the affidavit. In its reply, WestVue disputed that any contradictions existed between the two affidavits. WestVue explained that Longvue was the servicer while FCI was the sub-servicer for WestVue for the Holdens' loan. The amounts differed because they were calculated at different times: February 2015 and February 2016. WestVue further stated that the Holdens forfeited their lack of standing defense by not repleading after the affirmative defense was stricken by the circuit court in its November 18, 2014, order.

¶ 25 On October 17, 2016, the circuit court granted summary judgment to WestVue and against the Holdens as to liability only. The court denied WestVue's motion for a judgment of foreclosure and sale. WestVue was granted 35 days to file a prove-up affidavit.

¶ 26 On November 23, 2016, WestVue filed a second affidavit from Ms. DeArcos.[4] In her second affidavit, she clarified that FCI was WestVue's sub-servicing agent for the Holdens' loan. She averred that she had personal knowledge of the facts in the affidavit based on her position as

[4] The Holdens failed to clarify which DeArcos affidavit they claim is deficient. Because this appeal challenges the grant of partial summary judgment, which concerned Ms. DeArcos' first affidavit, adequacy of her second affidavit is not the subject of our review.

foreclosure supervisor for FCI and her familiarity with the systems used to create and record the information related to residential loans. When FCI acquired the sub-servicing rights to the Holden's loan from ClearSpring on February 20, 2015, the loan was in default in the amount of $302,605.01. Ms. DeArcos stated that FCI used the Centurion Loan Servicing software to automatically record and track mortgage payments and described the procedure when a loan payment was received. She stated further that when a loan was transferred to FCI, business records of the prior servicer were integrated into FCI's records. In addition, FCI maintained quality control and verification procedures to ensure the accuracy of its records. In this case, ClearSpring's loan records were integrated into FCI's systems. Based on her review of the loan and payment history and the other relevant documents, Ms. DeArcos averred that, as of November 19, 2016, the amount due and owing on the loan was $324,632.64, with daily interest accruing at $51.81 per day.

¶ 27 2017 Circuit Court Proceedings

¶ 28 On January 10, 2017, the circuit court entered a judgment of foreclosure and denied the Holdens' request to include language making the judgment immediately appealable under Illinois Supreme Court Rule 304(a) (eff. March 8, 2016). On June 12, 2017, the court entered an order confirming the sale of the property, the distribution of the funds and for possession of the property.

¶ 29 On July 10, 2017, the Holdens filed a timely notice of appeal from the order of June 12, 2017.

¶ 30 ANALYSIS

¶ 31 I. Standard of Review

¶ 32 The court applies the *de novo* standard of review to an order of the circuit court granting a motion for summary judgment. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 48.

¶ 33 II. Applicable Principles

¶ 34 " 'Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48 (quoting *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006)). "Summary judgment is precluded where the material facts are disputed or where reasonable people might draw different conclusions from undisputed facts." *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48. To determine if a genuine issue of material fact exists, the court construes the pleadings, affidavits, depositions and other relevant material submitted in connection with the motion against the movant and liberally in favor of the nonmovant. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48. "Copies of written instruments attached to a pleading as an exhibit are considered part of the pleading." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 139 (1999).

¶ 35 III. Discussion

¶ 36 A. Conflicting Affidavits

¶ 37 The Holdens contend that the DeArcos affidavit and the Haddad affidavit submitted in support of WestVue's motion for summary judgment contained contradictory averments that created genuine issues of material fact precluding summary judgment. They point out that affiants were employed by different companies, each claimed that its company was servicing the

loan during the same time periods, and each set forth different amounts due and owing on the loans.

¶ 38 In his *pro se* verified answer to the foreclosure complaint, Robert admitted that Christine and he were the mortgagors and the loan was in default. The Holdens' claims that the affidavits were defective went to how much was due and owing on their loan, not whether they were liable on the loan, a fact they had already admitted. There is no evidence that the circuit court relied on the affidavits since it entered summary judgment as to liability only, not as to damages. Since the affidavits raised no material questions of fact as to liability, summary judgment on liability was proper.

¶ 39 The Holdens argue that if the affidavits were insufficient to support the motion for a judgment of foreclosure, they cannot support a motion for summary judgment. As their sole authority, they cite an unpublished case of this court in violation of Illinois Supreme Court Rule 23(e) (eff. Apr. 1, 2018). Not only does Rule 23(e) state that unpublished cases are not precedential, the rule further states that such cases "may not be cited," except in situations not present in this case. Ill. S. Ct. R. 23(e) (eff. April 1, 2018). Since the Holdens' argument is not otherwise supported by authority, it is forfeited. Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018).

¶ 40 B. The Pleadings

¶ 41 The Holdens contend that Robert's *pro se* answer denying MTGLQ's capacity allegation and raising its lack of standing as an affirmative defense raised genuine fact questions precluding partial summary judgment on liability.

¶ 42 Lack of standing and lack of capacity are not synonymous. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 21. " 'The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and its outcome.' " *Perry*, 2015 IL App (3d) 130673, ¶ 17 (quoting *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996)). "[T]he 'legal capacity to sue or be sued' generally refers to the status of the party, *e.g.*, incompetent, infant (citation), or unincorporated association (citation)." *Perry*, 2015 IL App (3d) 130673, ¶ 17.

¶ 43 1. *Standing*

¶ 44 The Holdens contend that the affirmative defense alleged by Robert in his *pro se* verified answer, *i.e.*, that Goldman Sachs held his mortgage and note, was admitted because MTGLQ failed to file a reply. However, the record reveals that on March 31, 2010, MGLQ filed its reply denying the affirmative defense.

¶ 45 Even if it was not admitted, the Holdens contend the affirmative defense allegation that Goldman Sachs held their mortgage and note must be taken as true for purposes of summary judgment. They further contend that a reasonable inference from the allegation that Goldman Sachs held their mortgage and note is that another party did not. *Employers Insurance of Wausau*, 186 Ill. 2d at 138 (the court noted that a motion for judgment on the pleadings is like a motion for summary judgment; well pleaded facts and the reasonable inferences therefrom must be taken as true for purposes of ruling on the motion). Because Goldman Sachs was not the plaintiff, the Holdens maintain that the affirmative defense created a genuine issue of fact as to whether WestVue had standing to pursue the foreclosure complaint against them.

¶ 46 " 'The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact.' " *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 31 (quoting *Parkway Bank & Trust Co. v. Korzen*, 2013 Il App (1st) 130380, ¶ 49). In this case, the record contains the documents showing the history of the assignments of the Holdens' mortgage and note. As established by the exhibits to the foreclosure complaint, at the time it was filed, the original mortgagee, M.E.R.S. Inc., as nominee for 21st Century Mortgage Bankers, had assigned the mortgage and note to MTGLQ as of January 18, 2010, the day before the complaint was filed.[5] It was not until May 1, 2012, that MTGLQ assigned the mortgage and note to Goldman Sachs. On the same date, Goldman Sachs assigned the mortgage and note to WLR/IVZ RESI NPL, LLL, who later assigned them to Greenwich. The final assignment was from Greenwich to WestVue.

¶ 47 Robert's affirmative defense was filed on February 17, 2010, whereas Goldman Sachs was not assigned the mortgage and note until May 1, 2012, and immediately assigned them to WLR/IVZ RESI NPL, LLL. In the response to WestVue's motion for summary judgment, the Holdens did not provide contrary evidence to support their affirmative defense that Goldman Sachs held the mortgage and note at the time the complaint was filed, or that it held the mortgage and note at the time WestVue filed for summary judgment. Therefore, no genuine issue of material fact was created by the Robert's *pro se* affirmative defense.

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[5] The Holdens maintained that the assignment from M.E.R.S. to MTGLQ was on January 25, 2010, and therefore subsequent to the filing of the foreclosure complaint. The assignment of the mortgage stated in pertinent part as follows: "For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc. AS NOMINEE FOR 21 ST CENTURY MORTGAGE BANKERS, its successors and/or assigns (hereinafter M.E.R.S., INC.), did hereby assign, transfer, convey without warranties and without recourse; set over and deliver to MTGLQ Investors, L.P.[,] (hereinafter called the Assignee), its successors and assigns, *prior to 1/18/10*, the following described mortgage:" (Emphasis ours).

¶ 48 2. *Capacity*

¶ 49 Section 15-1504(a)(3)(N) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) requires a plaintiff to state the capacity in which it brings the foreclosure complaint. See 735 ILCS 5/15-1504(a)(3)(N) (West 2018) (setting forth such alternatives as "legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate"). In the complaint, MTGLQ set forth that it was agent for the holder of the mortgage and the note. Attached to the complaint were copies of the mortgage and the note, endorsed in blank. By attaching copies of the mortgage and the note, MTGLQ sufficiently pleaded capacity. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 12 (the plaintiff sufficiently pleaded capacity as the legal holder of the indebtedness by attaching copies of the mortgage and the note endorsed in blank to the complaint). Capacity must be proved even when admitted by the defendant. *Perry*, 2015 IL App (3d) 130673, ¶ 21.

¶ 50 "The mere fact that a copy of the note is attached to the complaint itself is *prima facie* evidence that the plaintiff owns the note." *Korzen*, 2013 IL App (1st) 130380, ¶ 24. The Holdens maintain that in order to prove it was the holder of the note WestVue was required to provide an affidavit averring that WestVue was the holder of the note, relying on *Perry*. In *Perry*, the reviewing court held the plaintiff had proved its capacity to bring the foreclosure suit where copies of the note were attached to both the complaint and the motion for summary judgment, and the plaintiff provided an affidavit stating that it was the holder of note. *Perry*, 2015 IL App (3d) 130673, ¶ 31.

¶ 51 The Holdens point out that neither the DeArcos nor the Haddad affidavits contained an averment that WestVue was the holder of the note. In their response to WestVue's motion for

summary judgment, the Holdens argued that the affidavits were insufficient as to the loan amount due and that WestVue lacked standing. They did not argue that WestVue failed to prove capacity because the affidavits failed to aver that WestVue was the holder of the note. Arguments not asserted in the trial court are forfeited on appeal. *Perry*, 2015 IL App (3d) 130673, ¶ 26.

¶ 52 In the present case, MTGLQ pleaded its capacity to bring the action and provided *prima facie* evidence that it was the holder of the note. While Robert denied the capacity allegation, " '[d]enials in a defendant's answer do not create a material issue of genuine fact to prevent summary judgment. [Citation.] *** The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact.' " *Avdic*, 2014 IL App (1st) 121759, ¶ 31(quoting *Korzen*, 2013 Il App (1st) 130380, ¶ 49).

¶ 53 Capacity was sufficiently pleaded in the complaint for foreclosure, and there was *prima facie* evidence that WestVue, as the ultimate assignee of MTGLQ, was the holder of the note. In opposing summary judgment, the Holdens failed to argue that the lack of an averment that WestVue was the holder of the note raised a question of fact as to whether WestVue had proven it was the holder of the note, and they did not present any evidence to the contrary.

¶ 54 We conclude that no genuine issue of material fact was raised as to WestVue's capacity to foreclose the Holdens' loan. Therefore, summary judgment for WestVue on liability was proper.

¶ 55 3. Compliance with Rule 191(a)

¶ 56 The Holdens contend that the DeArcos and Haddad affidavits failed to comply with Rule 191(a).

¶ 57 In rejecting the Holdens' argument that the DeArcos and Haddad affidavits created genuine issues of material fact, we found that the affidavits addressed the amounts due and owing on their loan, not their liability. We further found that the circuit court did not rely on those affidavits in granting summary judgment as to liability to WestVue. Therefore, it is unnecessary to address whether the DeArcos and Haddad affidavits complied with Rule 191(a).

¶ 58 CONCLUSION

¶ 59 We affirm the circuit court's grant of partial summary judgment to WestVue.

¶ 60 Affirmed.