2018 IL App (1st) 172655-U

SIXTH DIVISION
December 28, 2018

No. 1-17-2655

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for American Home Mortgage Investment Trust 2006-1, Plaintiff-Appellee, v. PAMELA J. STEWARD; CURRENT SPOUSE or CIVIL UNION PARTNER, if any, of Pamela J. Steward; UNKNOWN OWNERS, GENERALLY; and NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 12 CH 39239 Honorable Darryl B. Simko, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this mortgage foreclosure case, the circuit court did not err in granting summary judgment in favor of the plaintiff or by confirming the judicial sale.

¶ 2 BACKGROUND

¶ 3 In 2005, defendant Pamela J. Steward executed a note and mortgage on a property located in Matteson, Illinois with American Home Mortgage Acceptance, Inc. The mortgage

contained standard language designating Mortgage Electronic Record Systems (MERS) as the nominal mortgagee. On October 24, 2012, alleging that Steward failed to make timely payments, American Home's successor, Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2006-1, (Deutsche Bank), sued Steward and others to foreclose the mortgage. Attached to the complaint were a copy of the underlying note, indorsed in blank, and an October 15, 2012 assignment of the mortgage from MERS to Deutsche Bank.

¶ 4 Steward filed an answer and affirmative defenses. The answer contained numerous procedural deficiencies, including improperly demanding "strict proof" of the plaintiff's allegations. See *Parkway Bank v. Korzen*, 2013 IL App (1st) 130380, ¶ 36 (defendant must truthfully answer, "so the words 'demand strict proof' do not belong anywhere in a properly drafted answer."). The answer also included seven affirmative defenses: 'affirmative defenses one, two, and five alleged that Deutsche Bank lacked standing; affirmative defenses three and four alleged violations of a pooling and servicing agreement; affirmative defense six alleged that Deutsche Bank breached the mortgage agreement by failing to send an acceleration notice; and affirmative defense seven asserted that 'Steward was current on her loan payments when plaintiff filed the lawsuit.

¶ 5 Deutsche Bank moved to strike all the affirmative defenses pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2-615 (West 2014). Deutsche Bank asserted that the standing affirmative defenses were flawed because they were conclusory and failed to identify some different entity which actually owned the mortgage and note. Additionally, it claimed, failure to record the assignment of the mortgage was irrelevant because there is no requirement to record a mortgage assignment. As to the pooling servicing agreement,

it claimed that the plaintiff had no standing to assert violations of an agreement to which she was not a party. Deutsche Bank further argued that it was improper to frame failure to send an acceleration notice as an affirmative defense because the complaint alleged that the notice *was* sent, and a factual dispute regarding whether an allegation in the complaint is true is not a proper affirmative defense. Finally, it presented a similar argument directed at the final affirmative defense, which asserted that Steward had made timely loan payments and was not in default.

¶ 6 The circuit court granted the plaintiff's motion and struck the affirmative defenses with prejudice. At no time did Steward seek leave to file any amended affirmative defenses. The court then set a briefing schedule on the plaintiff's motion for summary judgment. Steward filed a response to the plaintiff's motion for summary judgment which included her affidavit and several exhibits. Steward also asserted that the plaintiff had judicially admitted certain facts because the plaintiff had not responded to her request to admit facts. (The plaintiff actually did belatedly respond to the request to admit facts, by objecting to all of them on various evidentiary grounds. Steward never sought an order to resolve the objections or to compel the plaintiff to directly respond to them.) In reply, the plaintiff argued that the defendant's response was largely an improper attempt to relitigate the stricken affirmative defenses. The circuit court granted the plaintiff's motion for summary judgment and ordered a judicial sale of the property.

¶ 7 The property was sold at a judicial sale which resulted in a deficiency. The plaintiff moved for an order approving sale, and again the parties briefed the motion. In response, Steward filed "objections" which rehashed many of the same claims she asserted in her affirmative defenses and against the summary judgment motion, namely: (1) the plaintiff had judicially admitted facts by not responding to Steward's request to admit facts; (2) Steward was current in the loan when the case was filed, as demonstrated by various printouts showing certain

payments made through a Wal-Mart electronic banking service; and (3) plaintiff did not demonstrate that it had standing to foreclosure on the loan.

¶ 8 On September 26, 2017, after briefing, the circuit court entered an order approving the selling officer's report of sale and distribution, confirming the sale, and awarding possession to the successful third-party bidder, thus terminating the case. Steward filed a notice of appeal which stated only that she sought reversal of the September 26, 2017 order which had denied her objections to the confirmation of sale.

¶ 9 This appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, Steward raises eight contentions of error. As a preliminary argument, Deutsche Bank notes that Steward's notice of appeal states that she only seeks review of the court's order confirming sale, and specifically, in overruling her objections to the sale. Because of this limiting language in the notice of appeal, it suggests that we do not have jurisdiction over any contentions other than the single one relating to the confirmation of sale. While we agree that the notice of appeal is imprecise, we do not find it to be so faulty as to prevent review of Steward's arguments. Steward's objections to the confirmation of sale repeated some of the arguments she made earlier in the case in opposition to summary judgment and with respect to various other defenses. Additionally, this court has held that defenses to a foreclosure asserted in an unsuccessful motion to dismiss may be preserved for appeal because the denial of the motion to dismiss was a step in the procedural progression leading to the foreclosure and confirmation orders. *Citimortgage v. Hoeft*, 2015 IL App (1st) 150549, ¶ 11 (stating "*** had the court granted the motion, the court would have dismissed the case and never entered the later two orders."). The same analysis would hold with respect to stricken affirmative defenses. See also

Citimortgage v. Bukowski, 2015 IL App (1st) 140780, ¶ 13 ("*** defendants' appeal from the final order entered in the case encompasses review of the trial court's orders dismissing the affirmative defenses and entering summary judgment for CitiMortgage"). We thus find the notice of appeal was sufficient to permit review of all of Steward's eight contentions of error.

¶ 12 First, Steward contends that Deutsche Bank lacked standing to sue because it failed to send an acceleration notice required by the mortgage. This argument misrepresents the doctrine of standing. If, in fact, Deutsche Bank failed to send the acceleration notice, that would only establish that it had not satisfied a contractual condition precedent to suing. *Bukowski*, ¶ 16. It would not establish that Deutsche Bank was somehow such a stranger to the mortgage transaction that it lacked standing to sue. As our supreme court has explained, standing concerns whether "issues are raised only by those parties with a real interest in the outcome of the controversy." *Carr v. Koch*, 2012 IL 113414, ¶ 28. Additionally, by failing to deny the deemed allegations in the foreclosure complaint, Steward admitted that all required notices had been sent. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶49.

¶ 13 Steward next contends that the court erred in striking her affirmative defenses. She pleaded seven affirmative defenses. On appeal, she argues only that the court should not have struck her affirmative defense that Deutsche Bank lacked standing because, she as states, its standing "was never proven with admissible evidence under Illinois Rule of Evidence 901." This argument is presented in a confusing manner because at one point, Steward addresses whether the court should have struck the affirmative defense, which it did under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) for failure to state a claim, but then in the same breath, goes on to contend there was a lack of factual *proof* to contradict the affirmative defense. Again, we find this argument misconstrues the doctrine of standing. It is not, and was

not, Deutsche Bank's burden to prove its standing. Standing is an affirmative defense, and as such, it is *defendant's* burden to prove that the plaintiff does *not* have standing. *Lebron v. Gottlieb Mem. Hosp*., 237 Ill. 2d 217 (2010); *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422; *Parkway Bank*, 2013 IL App (1st) 130380, ¶ 24; *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). Since Steward's second point is limited to her contention that Deutsche Bank did not affirmatively prove its standing, we find she has not demonstrated the circuit court committed error on this issue.

¶ 14 In her third argument, Steward contends that Deutsche Bank failed to prove its capacity to sue. As the basis for this alleged lack of proof, Steward only states that Deutsche Bank failed to answer her request to admit facts regarding its holding and ownership of the note and mortgage. As explained more fully below, Steward failed to provide a copy of the request to admit facts in the record, rendering the issue unreviewable. Even so, Deutsche Bank properly alleged, and demonstrated, that it had capacity to sue on the note and mortgage. The complaint contained an attached copy of the note which the original holder of the note indorsed in blank. It also contained an assignment signed by an officer of MERS (the nominal mortgagee) assigning the mortgage to Deutsche Bank. The exhibition of a copy of the note indorsed in blank was *prima facie* proof that Deutsche Bank had the capacity to sue on the note and foreclose the underlying mortgage as the legal holder of the subject indebtedness. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 12. The assignment was consistent with the blank indorsement and further demonstrated Deutsche Bank's capacity.

¶ 15 Steward's next argument is similar. She contends that Deutsche Bank failed to show it was the holder of the note and mortgage. There are several problems with this argument. First, it is not necessary that a foreclosure lawsuit be brought by the actual holder of the note or

mortgage. It may merely be brought by an agent acting on behalf of the holder. See 735 ILCS 5/15-1208 (West 2016) (broadly defining "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.") (Emphasis added). Second, all that Steward provides in support of this argument is a series of queries questioning the provenance of the copy of the note indorsed in blank. For instance, she states: "Was the endorsement put there by the then holder pursuant to 810 ILCS 5/3-205?". Besides putting questions on the table, she offers nothing more from the record tending to demonstrate that Deutsche Bank was not either the legal holder of authorized to act on behalf of the legal holder. Conjectures are not proof, and they certainly are insufficient to demonstrate error. As noted above, Deutsche Bank properly demonstrated not only its standing but its capacity to sue on the note and mortgage.

¶ 16 Steward next asserts that the circuit court should have found that Deutsche Bank admitted various facts by not timely answering her request for admissions. Illinois Supreme Court Rule 216 allows a party to request that an opposing party admit or deny certain material facts. The rule requires that the request must be contained in a:

> "separate document which contains only the requests and the documents required for genuine document requests *** serve this document separate from other documents; and *** put the following warning in a prominent place on the first page in 12-point or larger boldface type: **'WARNING: If you fail to serve the response required by Rule 216 within 28 days after you are served with this document, all the facts set forth in the requests will be deemed true and all the documents described in the requests will be deemed genuine.'** " Ill. Sup. Ct. R. 216(g) (eff. July 1, 2014).

If the party fails to respond within 28 days, the facts are deemed admitted. Ill. Sup. Ct. R. 216(c).

¶ 17 To begin, we note that the record does not contain a copy of the request to admit facts. The burden of providing a sufficient record on appeal rests with the appellant (here, Steward). *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Id.* Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.* Because the request to admit facts does not appear in the record, we cannot assess Steward's contentions of error premised on Deutsche Bank's response to the request.

¶ 18 However, the record does demonstrate the following. On April 21, 2016, the court entered an order reflecting that Steward's attorney had tendered a request to admit facts and other discovery materials to Deutsche Bank's attorney, presumably in open court. On June 24, 2016, after the 28-day period to respond had expired, Deutsche Bank's attorney sent Steward's attorney a letter stating that it would take time for the appropriate client representative to execute the response to the request to admit facts and requesting, pursuant to Illinois Supreme Court Rule 201(k), an extension of 30 days until July 26, 2016 to respond to the request. On August 2, 2016, Deutsche Bank's attorneys sent Steward's attorney a response to the request to admit, which objected to every request on various bases, including but not limited to: violation of the attorney-client privilege, vagueness and ambiguity, and requests to admit conclusions of law rather than facts. The response repeats the actual request to admit facts before each of Deutsche Bank's responses. The requests themselves were largely nonsensical, such as: "Admit that You do not claim to have obtained Your rights in the Note as a result of a gift." And "Admit that You have

no Documents establishing that You investigated whether each transferee of the Note obtained the right to enforce it pursuant to the UCC." In retrospect, it appears that Deutsche Bank's objections were generally well-founded.

¶ 19 Steward strongly presses Deutsche Bank's failure to timely respond as a reason for reversal, but her arguments fall far short of the mark. As noted above, we cannot review the issue without a copy of the original request (along with the required boldface admonition and a proof of service showing when it was sent) in the record on appeal. But even if we were to overlook this, her argument is totally insufficient. She contends that the admissions would have prevented the court from entering summary judgment in favor of Deutsche Bank. But in her response to Deutsche Bank's summary judgment motion, she failed to cite any individual admitted fact and develop any argument *why* that particular admission would have prevented summary judgment. The entire content of her response to Deutsche Bank's summary judgment motion relating to the admitted facts read: "Why shouldn't Illinois Supreme Court Rule 216(c) apply to this case and thus, result in Plaintiff admitting the Request To Admit since Plaintiff didn't answer them in 28 days or file a Motion as outlined in said Rule." She then provided the relevant chronology and stated: "Steward asked for answers in the request to admit. Plaintiff objected and 'didn't give us the information we requested." Her appellate brief sheds no more light on the subject.

¶ 20 In addition to the deficiency of the record, we find that Steward has waived the issue of Deutsche Bank's tardy response to the request to admit facts. Supreme Court Rule 341(h)(7) governs the requirements for appellants' briefs. With respect to arguments, the rule states that the briefs shall contain: "Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. Sup. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Both an argument and citation to relevant authority are

required. An argument that contains merely vague allegations may be insufficient if it does not include citations to authority. See, *e.g., Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493 (2002) (three-paragraph argument insufficient to satisfy Rule 341 where argument did not include any citations to authority). As our supreme court has stated, a "reviewing court is not simply a depository into which a party may dump the burden of argument and research." *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. Steward's three-paragraph argument does not tell us which, if any, alleged admissions of fact precluded the entry of summary judgment, or offer any citation to authority in support of such a conclusion.

¶ 21 Even if we did not find that Steward waived this issue in light of the violation of Rule 341, we would have difficulty granting Steward relief on this issue. Rule 216 specifically provides what a party must do if an opposing party objects to her request for admission: "Any objection to a request or to an answer shall be heard by the court upon prompt notice and motion *of the party making the request*." (Emphasis added). Ill. Sup. Ct. R. 216(c). Having never requested that the court resolve Deutsche Bank's objections, Steward has failed to demonstrate error on this issue.

¶ 22 As her sixth contention of error, Steward presents two arguments regarding whether the amount which Deutsche Bank claimed she owed was correct. She first contends that because she denied Deutsche Bank's corresponding allegation in her answer, there was a material issue of fact precluding summary judgment. This is simply not correct. Denials in an answer do not have this effect. Instead, it is the respondent's burden to disprove the disputed fact in her response to the other party's summary judgment motion. *Parkway Bank*, 2013 IL App (1st) 130380, ¶ 49. The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact. *Fitzpatrick v. Human Rights Comm'n*, 267 Ill.App.3d 386, 391 (1994). The

remainder of her argument on this point consists of an assertion that she "provided proof" that Deutsche Bank "returned money that she had been paying for her monthly mortgage payments". Again, her argument consists of a question: "*** why did the lender *** return mortgage payments ***?". Nowhere in this portion of her appellate argument does she cite case law, a statute, or even the record as required to meet her burden to demonstrate error. This omission is hardly a technicality. The materials she submitted in response to the summary judgment motion on this issue consisted of a mass of unauthenticated and abstruse printouts, and an argument which essentially said, "Wal-Mart, as agent for the lender, returned money to me, so I stopped making payments. Look at these printouts." Such a vague and supported argument was insufficient to create an issue of material fact preventing summary judgment.

¶ 23 Steward next argues that the circuit court should have granted her leave to file a "counter-motion" for summary judgment, a pleading more commonly known as a cross-motion for summary judgment. On February 27, 2017, the court set a briefing schedule and an April 28 hearing date on Deutsche Bank's motion for summary judgment. The order set a March 31 deadline for Steward's response to the summary judgment motion, and it contains a handwritten notation stating: "There is also a status date March 31, 2017 at 9:30 a.m. for defendant's counsel possibly filing of a cross motion for summary judgment." No court order from March 31 appears in the record. On March 24, however, Steward filed a motion for a one-week extension of time to respond to the motion for summary judgment, which included a title stating that the request for extension also included a request to file a cross-motion for summary judgment *instanter* on the extended date. She set her motion for extension of time for an April 10 hearing. On that day, the court granted her an extension to file her response *instanter*. In the same order, the court denied

her request to file a counter motion for summary judgment. On the set hearing date, April 28, the court granted Deutsche Bank's summary judgment motion.

¶ 24 Steward's appellate brief on this issue consists of but a few sentences. And, as in her appellate brief's section on the issue of the request to admit facts, she provides absolutely no citations or argument on how she could have prevailed if not for the circuit court's alleged error. Her sole legal citation is to section 2-1005(b) of the Code, (735 ILCS 5/2-1005(b) (West 2016)), which provides that a party may move for summary judgment at any time. On that point, she is correct; she was never required to seek leave to file a cross-motion for summary judgment. But she did not, and no copy of any proposed cross-motion for summary judgment is in the record. She has made no argument as to how she was prejudiced by the alleged error, and in light of this additional violation of Rule 341, we find that she has waived this issue as well. And, waiver notwithstanding, once the court granted summary judgment to Deutsche Bank, the issue became moot.

¶ 25 Steward's final argument is that the circuit court erred by confirming the judicial sale even though "justice" would not be done. Section 15–1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2016) provides:

> "Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice [of the sale] *** was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale."

In support of this argument, Steward contends that confirming the judicial sale resulted in "justice" not being done because of the following three errors: (1) Deutsche Bank's failure to

timely respond to her request to admit facts; (2) it did not participate in discovery in good faith; and (3) she should have been "allowed" to file a cross-motion for summary judgment. All of these were possible defenses to the foreclosure order itself, and, as explained above, all of them failed for various reasons. Our supreme court has clearly held that the "justice clause" in section 15-1508(b)(iv) does not provide a second chance for unsuccessful foreclosure defendants to relitigate losing arguments they made in defense to the foreclosure. The court explained: "After a motion to confirm the sale has been filed, it is not sufficient under section 15–1508(b)(iv) to merely raise a meritorious defense to the complaint." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 26. Therefore, Steward's eighth argument is without merit.

¶ 26 CONCLUSION

¶ 27 The circuit court neither erred in granting summary judgment to Deutsche Bank, nor in confirming the judicial sale.

¶ 28 Affirmed.