

No. 1-18-0686

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 JUDICIAL DISTRICT

PNC BANK NATIONAL ASSOCIATION, S/B/M TO)	Appeal from the
NATIONAL CITY BANK, S/B/M TO MIDAMERICA)	Circuit Court of
BANK, FSB,)	Cook County
)	
Plaintiff-Appellee,)	
)	No. 09 CH 3437
v.)	
)	
DRAGAN DUBAK and LOLITA DUBAK,)	
)	Honorable
)	Anna M. Loftus,
Defendants-Appellants.)	Judge Presiding.
)	
)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

- ¶ 1 *Held:* Affirming the circuit court of Cook County order granting summary judgment in favor of the plaintiff where plaintiff established its predecessor in interest had standing to file the foreclosure complaint.
- ¶ 2 Defendants Dragan and Lolita Dubak appeal from the circuit court of Cook County's

order granting summary judgment in favor of plaintiff PNC Bank National Association (PNC), successor by merger to National City Bank (NCB), successor by merger to MidAmerica Bank, FSB (MAB). On appeal, defendants contend that the circuit court erred in granting the motion where NCB, the plaintiff at the time the foreclosure action commenced, lacked standing. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 This matter commenced as a mortgage foreclosure action pursuant to the Foreclosure Law (735 ILCS 5/15-1501 *et seq.* (West 2008)). On January 27, 2009, NCB successor by merger to MAB filed the complaint, alleging that on February 3, 2005, Dragan granted a mortgage to MAB on a property located at 814 South 7th Avenue in La Grange, Illinois as security for repayment of a loan evidenced by a promissory note in the principal amount of \$522,000.¹ The complaint further alleged that Dragan was in default for failure to make the September 2008 payment toward the mortgage on the property. Using the statutory form complaint (735 ILCS 5/15-1504 (West 2008)), NCB alleged, “Capacity in which Plaintiff brings this foreclosure: Plaintiff is the holder of the Mortgage given as security.” Attached to the complaint were copies of the mortgage and note, which demonstrated MAB was the original mortgagee. The copy of the note initially filed with the complaint did not include an endorsement.

¶ 5 Defendants failed to timely answer and a default and a judgment of foreclosure and sale were entered on September 16, 2009. On December 8, 2009, defendants’ motion to vacate was granted and they were provided with time to answer the complaint. Defendants filed an unverified answer on January 3, 2010, in which they, in pertinent part, challenged NCB’s

¹ Lolita did not sign the mortgage or note and waived her homestead rights.

standing at the time the complaint was filed. Defendants served plaintiff with written discovery requests to that effect, which were answered on August 22, 2011. During the discovery period, NCB moved to substitute PNC as plaintiff, which was granted by the circuit court on September 10, 2010.

¶ 6 Pursuant to the discovery requests, PNC produced documents that demonstrated the merger of MAB into NCB (effective February 2, 2008) and finally into PNC (effective November 6, 2009). These merger documents from the Federal Reserve System's National Information Center were attached to numerous pleadings filed by the parties.² Then, in October 2012, PNC produced the original note which had an undated endorsement in blank by "National City Mortgage Co." and was signed by Justin Thrun, a loan review administrator for National City Mortgage Co. Subsequently, on June 4, 2013, with leave of court, Dragan filed counterclaims for declaratory judgment, fraud, slander of title/disparagement of property, and quiet title relating to standing. PNC answered the counterclaims and the parties continued engaging in discovery.

¶ 7 PNC ultimately filed the motion for summary judgment at issue in this appeal on July 16, 2013, arguing that no genuine issue of material fact remained for trial and that Dragan was in default for failing to make any payments since September 2008. PNC attached to its motion an affidavit of Dorothy Thomas along with copies of the mortgage and note, the merger documents, the loan payment history, and other correspondence between plaintiff and its predecessors in

² According to the National Information Center's website:

"The National Information Center (NIC) is a central repository of data about banks and other institutions for which the Federal Reserve has a supervisory, regulatory, or research interest, including both domestic and foreign banking organizations operating in the United States. This web site provides access to NIC data, allowing the public to search for detailed information about banking organizations."

<https://www.ffiec.gov/nicpubweb/nicweb/nichome.aspx> (last visited Dec. 6, 2018).

interest to Dragan. In her affidavit, Thomas asserted that she is a mortgage officer of PNC and had the authority to make the affidavit because she is a person familiar with the business and its mode of operation; its computer systems; scanning processes; and the general manner in which payments are received and applied. Relevant to this appeal, Thomas averred that the note was endorsed in blank by National City Mortgage Co. in October 2008 and that effective October 1, 2008, National City Mortgage Co. merged with NCB. Thereafter, NCB merged with PNC on November 6, 2009. Thomas further averred that PNC “is the holder of the note endorsed in blank and is the successor by merger to the original lender MidAmerican Bank, FSB.”

¶ 8 In response, Dragan asserted that PNC lacked standing because PNC was not named in the mortgage or note and it did not demonstrate it received the note “for value.” Dragan further argued that National City Mortgage Co. was the true owner of the note as evidenced by the blank endorsement.

¶ 9 In reply, PNC explained that it obtained the note through a series of bank mergers. Specifically, PNC asserted that NCB acquired National City Mortgage Co. effective October 1, 2008. Accordingly, any right or title held by National City Mortgage Co. at the time of the merger vested with NCB.³ PNC further explained that by the time of the filing of the foreclosure complaint, MAB had been merged into and subsequently operated as part of NCB effective February 9, 2008. After the complaint was filed, NCB merged into and was subsequently operated as part of PNC, the substituted plaintiff. PNC contended that pursuant to 12 U.S.C. § 215a(e) (2012), it is the original lender as a result of the mergers between MAB and NCB (2008), and then NCB and PNC (2009).

³ PNC also asserted that the blank endorsement to National City Mortgage Co. was done “inadvertently,” but maintained that, regardless of that mistake, NCB acquired National City Mortgage Co. on October 1, 2008, and was therefore the holder of the note when the foreclosure action commenced.

¶ 10 After a hearing on the motions, the circuit court granted PNC's motion for summary judgment and entered a judgment of foreclosure in the amount of \$884,482.55. The property then proceeded to a judicial sale where it was sold to PNC, the highest bidder. The order approving the sale was entered on March 6, 2018, and included a personal deficiency judgment against Dragan in the amount of \$276,950.25. This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal defendants maintain that summary judgment was entered in error because NCB did not have standing at the time the foreclosure action was filed. Defendants argue, based on the endorsement, that National City Mortgage Co. was the true holder of the note and therefore NCB did not have standing to file the foreclosure complaint.

¶ 13 In response, PNC asserts the circuit court properly granted summary judgment in its favor where there was no issue of material fact that NCB was the holder of the note and thus had standing to sue. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 14 Summary judgment is appropriate if the pleadings, depositions and admissions on file, together with the affidavits, if any, viewed in the light most favorable to the nonmoving party, reveal 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 2016); *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14. This court reviews *de novo* the circuit court's grant of a motion for summary judgment. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18. *De novo* consideration means this court performs the same analysis as the circuit court in deciding a motion for summary judgment. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Korzen*, 2013 IL App (1st) 130380,

¶ 14.

¶ 15 Defendants' sole contention on appeal is that NCB lacked standing to bring the foreclosure action. "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit" and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999); see *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. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15. An action to foreclose upon a mortgage may be filed by a mortgagee, or by an agent or successor of a mortgagee. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 11. The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note. *Korzen*, 2013 IL App (1st) 130380, ¶ 24; see *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 24. As an affirmative defense, the lack of standing is the defendant's burden to plead and prove. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 16 Under the Foreclosure Law, a foreclosure action may be brought by (1) the legal holder of an indebtedness secured by a mortgage, (2) any person designated or authorized to act on behalf of such holder, or (3) an agent or successor of a mortgagee. 735 ILCS 5/15-1208, 15-1501 (West 2008); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). A *prima facie* case for foreclosure is established if the complaint conforms to the requirements set forth in section 15-1504(a) of the Foreclosure Law (735 ILCS 5/15-1504(a) (West 2008)) and the mortgage and note are attached. *Barnes*, 406 Ill. App. 3d at 6. If this is done, the burden shifts to the mortgagor to prove lack of standing. *Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 17 Under the Uniform Commercial Code, persons entitled to enforce a note include its holder or a nonholder in possession of the instrument who has the rights of the holder. See 810 ILCS 5/3-301 (West 2008). A negotiable instrument may be transferred by delivery to another entity for the purpose of giving that entity the right to enforce the instrument. *Id.* § 5/3-203(a). If a note is endorsed in blank, it becomes payable to the bearer and may be negotiated by transfer of possession alone until it is specially endorsed. *Id.* § 5/3-205(b). The Uniform Commercial Code does not require a date for an endorsement to be valid. See *Id.* §§ 5/3-204, 3-205 (requiring only the endorsement for the instrument’s negotiation).

¶ 18 PNC directs us to section 215a of the National Banking Act (12 U.S.C. § 215a(e) (2012)) which provides that the successor bank in a merger between national banks or state banks into national banks is deemed to be the same corporation as each of the merging banks, and the “corporate existence of each of the merging banks” continues in the successor bank. Furthermore, “[a]ll *** *choses in action* shall be transferred to and vested in the receiving association by virtue of [the] merger without any deed or other transfer.” (Emphasis added.) *Id.* Black’s Law Dictionary defines a “chose in action” as “the right to bring an action to recover a debt, money, or thing.” Black’s Law Dictionary (10th ed. 2014).

¶ 19 Defendants argue, based on the endorsement, that National City Mortgage Co. was the true holder of the note and therefore NCB did not have standing to file the foreclosure complaint. Defendants rely on *Gilbert* to support their position that NCB lacked standing and therefore summary judgment was entered in error in this case. We disagree that *Gilbert* lends any support to their argument. In *Gilbert*, the question was whether the circuit court erred when it entered summary judgment in favor of the bank where the assignment attached to the amended complaint demonstrated that the interest in the mortgage was not assigned to the plaintiff until several

months after the foreclosure action was filed. *Gilbert*, 2012 IL App (2d) 120164, ¶ 17. Here, in contrast, even considering the late discovery of the endorsement by National City Mortgage Co., NCB was the holder of the mortgage and note pursuant to its merger with MAB and National City Mortgage Co.

¶ 20 The court in *Cornejo*, considered the exact fact scenario at issue in the present case; whether the plaintiff JPMorgan Chase lacked standing at the time the complaint was filed when the note attached to the complaint did not contain an endorsement but the plaintiff thereafter produced the original note containing an endorsement in blank by a different entity. *Cornejo*, 2015 IL App (3d) 140412, ¶ 11. There, the court concluded that plaintiff's attachment of the note to the foreclosure complaint was *prima facie* evidence that it owned the note. *Id.* ¶ 13. This was so even though the copy of the note attached to the complaint was not endorsed. *Id.* The court explained that, "[t]he fact that JPMorgan Chase did not attach the note with the indorsement to its original complaint, nor attach it to the initial motion to strike, was not evidence that JPMorgan Chase did not hold the mortgage and note at the time the complaint was filed in 2011." *Id.* ¶ 14. Without "some evidence," the court reasoned, that "the assignment actually took place after the complaint was filed," the defendants failed to meet their burden of demonstrating that the endorsement was not made prior to the complaint being filed. *Id.*

¶ 21 Here, the fact NCB attached a copy of the note to the complaint established that it possessed the note at the time the complaint was filed and thus had standing. See *id.*; *Garner*, 2013 IL App (1st) 123422, ¶ 26 (the attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff possesses the note); see also *HSBC Bank USA, N.A. v. Rowe*, 2015 IL App (3d) 140553, ¶ 21 (possession of bearer paper sufficiently demonstrates standing and is "sufficient to entitle the plaintiff to a decree of foreclosure" (Internal quotation

marks omitted.)). Moreover, while not a required element of proof in a foreclosure case, plaintiff did produce the original note during discovery thus demonstrating it had possession of the note.

See *Korzen*, 2013 IL App (1st) 130380, ¶ 32.

¶ 22 Notably, defendants have produced no evidence that the endorsement to National City Mortgage Co. occurred after the complaint was filed. See *Cornejo*, 2015 IL App (3d) 140412,

¶ 14. In fact, plaintiff's unrefuted allegations and exhibits established that NCB was the successor by merger to the original lender, MAB, and therefore had standing to file the foreclosure action. Based on the complaint and the attached mortgage and note, NCB complied with section 15-1504(a) and set forth the required information. See *Standard Bank and Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 20 (applying the Illinois counterpart to section 215a of the National Banking Act (12 U.S.C. § 215a(e) (2012)). Specifically, the complaint alleged that the capacity in which NCB brought the suit was as "the holder of the Mortgage given as security." The mortgage and note attached to the complaint provided that the original mortgagee was MAB. The merger documents appended to the motion for summary judgment demonstrated that MAB merged into NCB on February 2, 2008. See *MidFirst Bank v. Riley*, 2018 IL App (1st) 171986, ¶ 28 (inclusion of merger documents demonstrated standing in a foreclosure action). As the legal holder of the indebtedness at the time the foreclosure action was filed on January 27, 2009, NCB was therefore entitled to pursue the foreclosure action.

Barnes, 406 Ill. App. 3d at 7; 735 ILCS 5/15-1208, 1504(a) (West 2008); see *Mundie*, 2016 IL App (1st) 152931, ¶ 11 (an action to foreclose upon a mortgage may be filed by a mortgagee, or by an agent or successor of a mortgagee). In addition, after the complaint was filed NCB merged into PNC and NCB filed a motion to substitute plaintiff due to the merger of the two banks, which was granted by the circuit court. Accordingly, PNC demonstrated that at the time it filed

the complaint, NCB was the holder of the mortgage and note.

¶ 23 Defendants further assert that an affidavit from Justin Thrun, the individual who signed the blank endorsement on behalf of National City Mortgage Co., was necessary to establish standing. However, the fact the note contained a blank endorsement and was held by PNC, the successor in interest to NCB, was sufficient to establish NCB's standing. This is because when an instrument is endorsed in blank becomes payable to bearer and may be negotiated by transfer of possession alone until specifically endorsed. See 810 ILCS 5/3-205(b) (West 2008).

Moreover, the documents provided by PNC in support of its motion for summary judgment established that NCB acquired National City Mortgage Co. on October 1, 2008, three months prior to the filing of the foreclosure complaint. Therefore, any interest National City Mortgage Co. would have had in the mortgage and note was vested in NCB at the time the complaint was filed.

¶ 24 Defendants argue, however, that the trial court erred in relying on the merger documents where (1) it could not take judicial notice of the documents and (2) Thomas' affidavit contained hearsay and was not based on her personal knowledge of the merger or endorsement.

¶ 25 In summary judgment proceedings, the purpose of affidavits is to demonstrate whether the issues raised are genuine and whether each party has competent evidence to support its position. *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992).

Affidavits filed in connection with a motion for summary judgment are governed by Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which provides in relevant part:

“Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the

claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.”

¶ 26 An affidavit submitted in support of a motion for summary judgment must meet the same requirements as competent testimony because it serves as a substitute for testimony at trial.

Robidoux v. Oliphant, 201 Ill. 2d 324, 335 (2002). Rule 191 is satisfied if from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents as a witness at trial. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. An affidavit offered in support of a summary judgment motion must be strictly construed, while an affidavit in opposition of such a motion must be liberally construed. *Schultz v. American National Bank and Trust Co.*, 40 Ill. App. 3d 800, 807 (1976).

¶ 27 Importantly, when moving for summary judgment a party may do so with or without the support of affidavits. 735 ILCS 5/2-1005(a), (b) (West 2016). Even if we were to strike those portions of Thomas’ affidavit relating to the merger and endorsement of the note, we would still conclude that the circuit court’s determination that plaintiff had standing was proper. First, “An appellate court may take judicial notice of readily verifiable facts if doing so will aid in the efficient disposition of a case, even if judicial notice was not sought in the trial court.” (Internal quotation marks omitted.) *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶¶ 37, 38 (taking judicial notice that the plaintiff was a subsidiary of a bank). Accordingly, we take judicial notice of the merger documents as they are all documents originating from the public record, specifically the NIC’s website database.

¶ 28 Second, while the appearance of the endorsement during discovery is certainly curious, it alone does not create a genuine issue of material fact as defendants suggest. As explained above, at the time the foreclosure action was filed NCB was the holder of the mortgage and note as evidenced by the copies of the mortgage and note attached to the complaint. See 810 ILCS 5/3-301 (West 2008). This is *prima facie* evidence that NCB was the holder of the note even though it lacked the endorsement in blank. See *Riley*, 2018 IL App (1st) 171986, ¶ 20; *Cornejo*, 2015 IL App (3d) 140412, ¶ 13. The timing of the mergers in conjunction with the fact NCB was the holder of the note at the time the complaint was filed establishes that NCB had standing to bring the foreclosure action. See 735 ILCS 5/15-1208 (West 2008).

¶ 29 In sum, a successor bank that merges with the original mortgagee obtains the mortgage rights possessed by the original bank as a matter of law. See 12 U.S.C. § 215a(e) (2012); see also *Madonia*, 2011 IL App (1st) 103516, ¶ 19 (under Illinois state law (205 ILCS 5/28 (West 2008))). Here, plaintiff's unrefuted allegations and exhibits established that NCB was the successor by merger to the original lender, MAB, and therefore had standing to file the foreclosure action. The burden then shifted to defendants to prove that there was a genuine issue of material fact that NCB was not the note's holder. See *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 69. Defendants failed to meet this burden and therefore the circuit court did not err in its determination that plaintiff had standing to pursue the foreclosure.

¶ 30 CONCLUSION

¶ 31 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.