2018 IL App (2d) 170423-U
No. 2-17-0423
Order filed August 22, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GREEN TREE SERVICING, LLC,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-6385
	)	
JANICE A. KARELLA, ERIC J.	)	
KARELLA, UNKNOWN OWNERS,	)	
and NONRECORD CLAIMANTS,	)	
	)	
Defendants	)	Honorable
	)	Robert G. Gibson and
(Janice A. Karella and Eric J. Karella,	)	Robert W. Rohm,
Defendants-Appellants).	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson concurred in the judgment.
Justice Jorgensen specially concurred.

ORDER

¶ 1 *Held*: The trial court properly entered summary judgment for plaintiff on its foreclosure complaint, as plaintiff refuted defendant's *prima facie* showing of a lack of standing by submitting an assignment document (though not an affidavit) that showed an assignment to the original plaintiff before the suit and thus confirmed that the original plaintiff was, as alleged, the holder of the mortgage and note.

¶ 2 The parties involved in this appeal of a foreclosure judgment are (1) Janice A. Karella (defendant)—she and Eric J. Karella were the property owners and the two named defendants in

the suit—and (2) Green Tree Servicing, LLC, the substituted plaintiff in its role as the assignee of the mortgage and note, the original plaintiff having been BAC Home Loan Servicing LP (BAC) (f/k/a Countrywide Home Loan Servicing, LP). Defendant seeks the reversal of the judgment of foreclosure and the ensuing confirmation of sale. She contends that the trial court erred when, in granting summary judgment for Green Tree, it ruled that BAC's attachment of the note and mortgage to the complaint was sufficient to establish Green Tree's right to foreclose. Consistent with our holding in *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, we conclude that those documents were not a sufficient basis to conclude that Green Tree was the holder of the indebtedness. However, Green Tree asserts as an alternative basis for affirmance that, by filing a copy of the relevant assignment, it did make a sufficient showing of its right to foreclose. We agree, and we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 BAC filed a foreclosure complaint against defendant and Eric J. Karella on December 29, 2009. (Because Janice alone filed many of the documents in this case, we refer to Janice and Eric together as "the Karellas," reserving "defendant" for Janice.) BAC alleged that it was bringing the complaint in the capacity of "legal holder of the Mortgage and Note," and it attached copies of the mortgage and note to the complaint. The note was payable to Countrywide Home Loans, Inc., and named Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee. The note bore no indorsements. The mortgage stated that Countrywide Home Loans, Inc., was "Lender" and that the note was payable to the order of "Lender." Further, MERS was the "nominee for Lender and Lender's successors and assigns" and was the "mortgagee under [the] Security Instrument."

¶ 5 The Karellas answered, denying knowledge of most of the allegations in the complaint and demanding proof of them.

¶ 6 BAC moved to substitute Green Tree as plaintiff. It asserted that it "filed the *** foreclosure action as the holder of the promissory note secured by the mortgage being foreclosed herein." However, "after this case was filed, GREEN TREE SERVICING LLC became the holder of the Note secured by the Mortgage being foreclosed." It filed eight documents in support of that motion. Three of those documents are relevant here: (1) a certificate that Countrywide Home Loans Servicing, LP, became BAC by renaming; (2) a certificate of merger that indicates that BAC merged into Bank of America; and (3) Bank of America's assignment of all its rights in the mortgage and note to Green Tree. (BAC had earlier filed a motion to have Bank of America substituted as plaintiff, but it appears that the court never addressed the motion.)

¶ 7 One of the exhibits BAC put forward was the "assignment" by which it received MERS's rights (as Countrywide Home Loans' nominee) in the mortgage and note:

> "For good and valuable consideration, *** [MERS as nominee for Countrywide Home Loans] *** did hereby assign *** to BAC *** prior to 09/23/09, the [specified] mortgage ***.
>
> Together with all rights and interest in the same and the premises therein described and the note or obligation thereby secured." (Emphasis omitted.)

The document was signed by Diana Athanasopoulos on behalf of MERS; it bears a notarization with the date of September 24, 2009. The court granted BAC's motion to substitute plaintiffs.

¶ 8 Green Tree moved for summary judgment. In the motion as amended, it asserted: "Plaintiff has established a prima facie case for foreclosure as it has introduced the Promissory

Note and Mortgage secured thereby and the Defendant has not established any affirmative defenses." It attached affidavits to prove other matters, including one to show the amount of the default.

¶ 9 Defendant filed a document purporting to be an affidavit in support of her response to the motion. Functionally though, the "affidavit" was itself the response. In the "affidavit," she asserted, among other things, that Green Tree lacked standing because it was not a party to the mortgage or note and no document evinced Green Tree's relationship to the parties to the mortgage and note. Green Tree replied, continuing to assert that it had *prima facie* showed its standing by BAC's attachment of copies of the mortgage and note.

¶ 10 The court granted summary judgment for Green Tree and, after further extended litigation, confirmed a judicial sale. Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that a genuine issue of material fact existed as to whether Green Tree had standing to foreclose given that neither Green Tree nor the original plaintiff was named in the mortgage or note and the note bore no indorsements. Green Tree raises three arguments in reply. One, defendant forfeited the lack-of-standing defense. Green Tree notes that lack of standing is an affirmative defense and argues that, as such, it cannot be raised in the response to a motion for summary judgment. Two, it argues that the trial court was correct when it based the grant of summary judgment on the principle that a plaintiff makes "a *prima facie* case of foreclosure by producing a copy of the mortgage and note." Three, as an alternative basis for the grant of summary judgment, the assignments established its standing to sue.

¶ 13 In the headings of her brief, defendant asserts that "during the course of foreclosure proceeding[s,] newly discovered evidence became available and there were changes in existing

laws." We deem that issue to be forfeited for lack of sufficient development. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (the appellant's brief must contain "the contentions of the appellant and the reasons therefor"); see also *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) ("Mere contentions, without argument or citation of authority, do not merit consideration on appeal."). Although defendant filed documents suggesting that entities involved with her mortgage engaged in deceptive practices, she has not developed a legal argument as to how that information should affect this case.

¶ 14 We hold that the Green Tree's introduction of an executed copy of the assignment provides a proper alternative basis for affirming the trial court's grant of summary judgment. However, before we address Green Tree's alternative basis for affirmance, we first conclude that defendant did not forfeit the claim by raising it in response to the motion for summary judgment and that BAC's attachment of copies of the mortgage and note to the complaint did not adequately demonstrate its right to foreclose in the face of defendant's showing that it was not named in the mortgage or note.

¶ 15 Defendant did not forfeit her lack-of-standing defense by raising it in response to the motion for summary judgment. A defendant may raise an affirmative defense in such a response. This rule is particularly well established where, as here, the plaintiff neither objected to the defense's raising nor lost its opportunity to respond to the defense. See *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 54 (2003) (where a party has a full opportunity to respond to an affirmative defense raised in response to a motion for summary judgment and does not object to the defense's being raised, considering the defense is proper); see also *Cross v. Ainsworth Seed Co.*, 199 Ill. App. 3d 910, 918 (1990).

¶ 16 We next address whether the court properly granted summary judgment on the grounds set out by Green Tree. We conclude that, contrary to the trial court's ruling, the copies of the mortgage and note attached to the complaint were not, under the circumstances here, sufficient to establish Green Tree's right to summary judgment. We review *de novo* a grant of summary judgment. *Ally Financial, Inc. v. Pira*, 2017 IL App (2d) 170213, ¶ 38. Summary judgment is proper when the pleadings, affidavits, and other appropriate record evidence show that no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016).

¶ 17 The primary matter at issue in the summary judgment proceedings was Green Tree's standing to bring the foreclosure action. Like a motion for summary judgment, a claim that a party lacks standing raises an issue of law, and our review of a ruling on the question is likewise *de novo*. See *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 39 (review of a ruling on a motion to dismiss for lack of standing is *de novo*). "The doctrine of standing ensures that issues are raised only by those parties who have a sufficient stake in the outcome of the controversy." *Matthews*, 2016 IL 117638, ¶ 39.

¶ 18 Green Tree, citing principally *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, and *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, contends that we may affirm the grant of summary judgment on the same basis it urged to the trial court: that the original plaintiff's attachment of the mortgage and note to the complaint was *prima facie* evidence that the original plaintiff "owned" the mortgage. Defendant, on the other hand, relies on *Gilbert*, 2012 IL App (2d) 120164, ¶ 17, in which we held that, in the absence of other acceptable evidence that the plaintiff had standing, a mortgage and note that tended to contradict the plaintiff's claim to be the holder of the indebtedness was *prima facie* sufficient to

demonstrate the plaintiff's lack of standing. See also *U.S. Bank Trust National Ass'n v. Lopez*, 2018 IL App (2d) 160967, ¶¶ 19-20 (although the ultimate burden of proof for a lack-of-standing defense is on the defendant, once the defendant makes a *prima facie* showing of lack of standing, to be entitled to summary judgment, the plaintiff has burden to refute the evidence of lack of standing). We conclude that, although *Gilbert* and *Korzen* are reconcilable, cases such as *Cornejo* that extended the rule in *Korzen* so as to clearly support Green Tree are inconsistent with *Gilbert*. Moreover, *Cornejo* and like cases lack a clear rationale and go against the logic of negotiable-instruments law. We thus adhere to our holding in *Gilbert* and therefore conclude that Green Tree could not properly rely solely on the attachment of copies of the mortgage and note to establish its standing.

¶ 19 We find no flaw in the *outcome* in *Korzen*. However, the holding as the court phrased it invited improper extension. The *Korzen* court held that "[t]he mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note." *Korzen*, 2013 IL App (1st) 130380, ¶ 24. However, the case's issue was simply whether the plaintiff—which was the original lender, and thus presumably the payee of the note (*Korzen*, 2013 IL App (1st) 130380, ¶ 5)—needed to present the original note in court to demonstrate its possession of the note (*Korzen*, 2013 IL App (1st) 130380, ¶¶ 24-34). Thus, the only question before the *Korzen* court was whether attaching a copy of the note and mortgage was *prima facie* sufficient to show *possession* of the note.

¶ 20 *Cornejo*, 2015 IL App (3d) 140412, ¶ 13, despite its reliance on *Korzen* (by way of *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 24), is another matter. The *Cornejo* court held that a "note attached to the original foreclosure complaint is *prima facie* evidence that [the plaintiff] owned the note." *Cornejo*, 2015 IL App (3d) 140412, ¶ 13. The note

attached to the complaint lacked the indorsement in blank on which the plaintiff relied for its ability to enforce the mortgage. However, the plaintiff later produced the original of the note, which did bear the indorsement. The defendants challenged that indorsement, but the court held that, because the copies attached to the complaint were *prima facie* evidence of ownership when the complaint was filed, the burden was on the defendants to demonstrate that the indorsement seen on the note in court had been made too late. Thus, the copies of the mortgage and note were treated as *prima facie* evidence of the timely indorsement of the note—which indorsement did not appear on the copy of the note. Similarly, *Garner*, 2013 IL App (1st) 123422, ¶ 24, although relying on *Korzen*, held that the plaintiff adequately "supported its claim *that it was the assignee* by attaching copies of the note and mortgage, each bearing [the] defendant's signature." (Emphasis added.) That is, the court presumed that an assignment existed based on the mere attachment of the note to the complaint.

¶ 21 The outcome in *Korzen* was congruent with negotiable-instruments principles. In Illinois's implementation of the Uniform Commercial Code (UCC), the "holder" of a negotiable instrument is defined as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."[1] 810 ILCS 5/1-201(b)(21)(A) (West 2016). Thus, in *Korzen*, the terms of the note must have established the

[1] On this definition, neither BAC nor Green Tree could be the "holder of the note" when Countrywide Home Loans, Inc., was the note's payee, yet BAC alleged that it was bringing the complaint in the capacity of "legal holder of the Mortgage and Note." We express no opinion about whether either could be the "legal holder of the indebtedness," which is the equivalent "[c]apacity in which [the] plaintiff brings [the] foreclosure," as set out in section 15-1504(a)(3)(N) of Illinois's foreclosure law (735 ILCS 5/15-1504(a)(3)(N) (West 2016)).

"payable" element of holder status; the only inference the *Korzen* court needed to make was that the ability to attach a copy of the mortgage and note implies possession of the note itself.

¶ 22 The holdings in *Cornejo* and *Garner* required entirely different inferences—in *Cornejo*, that a court could *prima facie* infer a later indorsement from access to an unindorsed copy of the note and, in *Garner*, that the court could *prima facie* infer the existence of an assignment from access to a note that could not have been payable to the plaintiff. We can easily accept a rule of law that allows the court to *prima facie* accept that a copy of a note allows the court both to determine to whom a note is payable and to infer that the party supplying the copy has possession. However, logic does not support a broader rule, such as exemplified by *Cornejo* and *Garner*, that allows the court to infer otherwise unevinced changes involving the rights to the note. In particular, although we recognize that the assignee of a note could need possession of it to enforce it, we cannot justify the leap from copies of mortgages and notes being *prima facie* evidence of possession to the copies being *prima facie* evidence of assignments, which are entirely separate agreements. (In our UCC, a " '[p]erson entitled to enforce' " includes "a nonholder *in possession of the instrument* who has the rights of a holder." (Emphasis added.) 810 ILCS 5/3-301(ii) (West 2016).)

¶ 23 *Gilbert*, on which defendant relies on this point, is consistent with the outcome in *Korzen*, but is inconsistent with the holdings and outcomes in *Cornejo* and *Garner*. In *Gilbert*, in which the plaintiff claimed to be the "holder," we held that a defendant made a *prima facie* case that the plaintiff lacked standing by raising to the court that neither of the entities identified in the note and mortgage as "the lender" and "the holder of the mortgage" were the plaintiff. We further rejected the plaintiff's alternative argument that its standing was established by a timely assignment, the date of which it claimed it had established through the affidavit of a "William F.

Loch," an employee of the plaintiff's loan servicer. *Gilbert*, 2012 IL App (2d) 120164, ¶ 7. Loch averred that "based on his review of 'the documents contained in the Gilbert loan file,' [the nominee had] assigned its interest [to the plaintiff before the complaint was filed]." *Gilbert*, 2012 IL App (2d) 120164, ¶ 7. However, "Loch did not state how he knew that this was when the assignment occurred, and he did not attach any documentary evidence that the assignment had occurred on this date." *Gilbert*, 2012 IL App (2d) 120164, ¶ 7. We held that Loch's affidavit violated the provisions of Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) concerning affidavits in support of motions for summary judgment, in that it failed to "set out the facts on which the affiant's claims were based" and was unaccompanied by copies of "all documents upon which the affiant relies." *Gilbert*, 2012 IL App (2d) 120164, ¶ 20. We thus held that the affidavit could be disregarded. *Gilbert*, 2012 IL App (2d) 120164, ¶ 20. In sum, the mortgage and note's not matching up with the basis on which the plaintiff claimed the right to enforce the mortgage was *prima facie* sufficient support for the defendant's lack-of-standing defense. Further, the plaintiff failed to provide support for its alternative basis for affirmance with cognizable evidence. Had we applied the rule in *Cornejo*, we simply would have said that attachment of the mortgage and note was *prima facie* evidence of "ownership" of the mortgage. Similarly, had we applied the rule in *Garner*, we would have deemed that the attachment of a copy of the mortgage and note was *prima facie* evidence of an assignment. (We note however that, although we did not state so explicitly in *Gilbert*, had the note been indorsed to the plaintiff or been indorsed in blank, we could not have found a lack of standing. Had the copy shown such an indorsement, the inference of possession from access to the mortgage and note would have *prima facie* established that the plaintiff was the note's holder.) We deem that our holding in

Gilbert produces results more logical and more in line with negotiable-instruments principles than the holdings in *Cornejo*, *Garner*, and like cases. We thus adhere to our holding.

¶ 24 Although *Gilbert* is fatal to Green Tree's argument in support of the grounds on which the trial court granted summary judgment, it is not fatal to the alternative basis for affirmance that Green Tree puts forward. Green Tree argues that the assignment document executed by Athanasopoulos is sufficient to establish its right to foreclose the mortgage and thus a sufficient basis to affirm the summary judgment and ensuing orders. We may affirm a trial court's grant of summary judgment on any basis that the record supports (*e.g.*, *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 19); the copy of the assignment provides such a basis. It is unquestionable that a proper assignment of a mortgage and note gives the assignee the right to foreclose the mortgage. See, *e.g.*, *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 637 (2000) (the assignee of a mortgagee stands in the shoes of the mortgagee and has the power to enforce the mortgage as if the mortgagee).

¶ 25 Defendant argues that there was a genuine issue of material fact as to whether an assignment occurred. We note that she disputes only the effect of the assignment document, not its identity. She contends that the assignment was not made on the personal knowledge of Athanasopoulos as is required by Rule 191(a). But Green Tree offered the assignment not as an affidavit but as a memorialization of the contract assigning the mortgage. See, *e.g.*, *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 48 (an assignment is a contract). If we read section 2-1005 of the Code of Civil Procedure (Code) completely literally, a court should decide a motion for summary judgment on "the pleadings, depositions, and admissions on file, together with the affidavits." 735 ILCS 5/2-1005(c) (West 2014). Thus, a document such as the assignment should play no role in deciding a motion for summary judgment. However, as we

noted in *Wanandi v. Black*, 2014 IL App (2d) 130948, ¶¶ 25-28, when other documents are more direct evidence than an affidavit could be, then, even when the Code seems to require that evidence be in the form of affidavits, the documents can be admissible if no dispute exists about their identity. Thus, in *White Way Sign & Maintenance Co. v. Montclare Lanes, Inc.*, 42 Ill. App. 3d 199, 200-01 (1976), a certified copy of a trust agreement was sufficient to support the motion to dismiss, despite the Code's requirement that the motion be supported by affidavit. The assignment is thus admissible.

¶ 26 As admissible and uncontradicted evidence, the assignment refuted defendant's *prima facie* showing of lack of standing; it thus forms a basis on which we may affirm the grant of summary judgment. Because defendant does not contest the assignment's identity, we can take it for what it appears to be, a memorialization of a prior assignment to BAC executed before BAC filed the foreclosure complaint. Moreover, because the prior assignment occurred before BAC filed the complaint, no concern results from the uncertainty as to how much earlier the assignment took place. As we noted in *Gilbert*, 2012 IL App (2d) 120164, ¶ 24, "an assignment can validly document a transfer that occurred prior to the date the assignment was executed." Furthermore, the rule that standing to sue must exist when the suit is filed (*Gilbert*, 2012 IL App (2d) 120164, ¶ 15) is thus satisfied. Thus, Green Tree refuted defendant's *prima facie* showing of its lack of standing and was entitled to summary judgment.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the grant of summary judgment for foreclosure and the ensuing conformation of sale.

¶ 29 Affirmed.

¶ 30 JUSTICE JORGENSEN, specially concurring:

¶ 31 I agree with the outcome here because the dispute concerns only the effect of the assignment document, not its identity, and we treat the document as simply memorializing the prior assignment.

¶ 32 I write separately, however, to note that, if the identity of the document as proof of the assignment were challenged, I would not agree that the document as presented contains sufficient foundation to support entry of summary judgment. As the court found with respect to the affidavit in *Gilbert*, 2012 IL App (2d) 120164, ¶¶ 19-20, I would find that this document, too, lacks sufficient foundation. Although the purported affiant was "duly sworn," nowhere does she swear to the truth and accuracy of the information contained within the document. Again, the document itself is not an assignment but, instead, it purports to memorialize a prior assignment. However, the affiant does not actually attest to the transfer's occurrence; rather, she swears only that she is informed of the instrument's contents (again, with no indication of the veracity of those contents) and that she voluntarily executed it. Further, even if the affiant were swearing that the assignment occurred, there is no foundation establishing how she knows that to be the case. For example, the document provides no information explaining who the affiant is or the position she holds within the company, other than the unexplained and vague position of "certifying officer."

¶ 33 In sum, I believe the document has several defects that would, in another case, render it insufficient proof of the assignment for entry of summary judgment.