2018 IL App (2d) 170486-U
No. 2-17-0486
Order filed April 24, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CAPITAL ONE, N.A., successor by merger to ING Bank, FSB, Plaintiff-Appellee, v. SUSAN M. GREMO, EDWARD GREMO, HARRIS, N.A., TANNER TRAILS HOMEOWNERS ASSOCIATION, UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants (Susan M. Gremo and Edward Gremo, Defendants-Appellants).	)	Appeal from the Circuit Court of Kane County. No. 10-CH-48 Honorable Mary Katherine Moran, Judge, Presiding.

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

ORDER

¶ 1 *Held*: In this foreclosure action, defendants raise a number of contentions regarding the procedures employed by the trial court and its various rulings throughout the more than seven-year pendency of this case. Defendants' contentions are all without merit and we affirm the judgment of the trial court.

¶ 2 On January 6, 2010, plaintiff, Capital One, N.A., as successor by merger to ING Bank FSB, filed a foreclosure action against defendants, Susan M. and Edward Gremo, Harris N.A.,

Tanner Trails Homeowners Association, unknown owners and nonrecord claimants. On May 4, 2017, the circuit court of Kane County entered an order approving the sheriff's sale of the subject property. Susan and Edward Gremo (defendants) appealed, raising eight contentions of error: (1) that the trial court erred by not requiring individual appearances by plaintiff's attorneys; (2) that the trial court erred by failing to require a new complaint after substituting Capital One as named plaintiff and thus, plaintiff lacked capacity to sue because it did not originally possess the note at issue here, and the trial court lacked jurisdiction; (3) plaintiff did not produce all indorsements and allonges with the note in this case; (4) defendants' petition for substitution of judge for cause was improperly not passed to another judge for consideration; (5) plaintiff's affidavit attesting to service by publication was not notarized and thus constituted a fraud on the court; (6) plaintiff was prejudiced by the sheer number of judges involved in this case; (7) the notice of sheriff's sale was improperly issued while defendants' motion for reconsideration was pending; and (8) the trial court erred in striking or denying defendants' combined motion to dismiss. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the facts appearing in the record. On October 2, 2006, Susan Gremo executed a note and mortgage on the subject property, in the amount of $360,000, with plaintiff's predecessor, ING Bank. In May 2009, defendants stopped making payments on the mortgage. On January 6, 2010, ING Bank filed a foreclosure action against defendants.

¶ 5 On November 1, 2012, ING Bank merged into Capital One. On November 23, 2013, in defendant's bankruptcy action, the bankruptcy court entered an order that granted plaintiff's motion for relief from the automatic bankruptcy stay, expressly allowing plaintiff to pursue its foreclosure action against defendants.

¶ 6 On August 4, 2014, after previously voluntarily moving to vacate the judgment order against defendants, plaintiff filed a motion to substitute Capital One as plaintiff. Attached to the motion was a certificate of the merger of ING Bank into Capital One. On August 19, 2014, the trial court granted the motion, and Capital One was substituted as the named plaintiff. On July 28, 2015, defendants' attorney was allowed to withdraw and defendants proceeded in this matter *pro se*.

¶ 7 On November 15, 2015, plaintiff filed a motion for summary judgment. On May 6, 2016, defendants filed a cross-motion for summary judgment. On August 4, 2016, the trial court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment. Thereafter, a sheriff's sale of the property was held. On May 4, 2017, the trial court approved the sheriff's report and sale and entered an order confirming the sale and order of possession.

¶ 8 On June 5, 2017, defendants filed a motion effectively for reconsideration of the trial court's order confirming the sale. On June 15, 2017, defendants filed an emergency petition for substitution of judge for cause. On the same date, defendants' petition for substitution for cause and motion for reconsideration were denied by the trial court. Regarding the petition for substitution, the trial court held that it first had to consider whether defendants had included sufficient allegations to necessitate passing the motion on to another judge for consideration. The trial court determined that the allegations did not rise to the level of demonstrating bias and denied the motion. Defendants timely appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendants argue that the trial court erred by not requiring individual appearances by plaintiff's attorneys. Next, defendants contend that the trial court erred by failing

to require plaintiff to file a new complaint following the merger of ING Bank into Capital One so Capital One did not have the capacity to sue on the note, and the trial court lacked jurisdiction over this matter. Next, defendants argue that not all of the indorsements and allonges were produced with the note in this case. Defendants also contend that the trial court improperly considered their motion for substitution of judge for cause rather than passing it to another judge for consideration. Defendants next argue that that service was defective because plaintiff's affidavit of service by publication was not notarized and thus was not an affidavit, thereby constituting a fraud on the court. Defendants additionally argue that they were prejudiced by the number of judges who were involved in this case. Next, defendants argue that the notice of the sheriff's sale was improperly issued while defendants' motion to reconsider was pending. Finally, defendants contend that the trial court erred in striking or denying their combined motion to dismiss. We will consider each contention in turn.

¶ 11 Preliminarily, however, we note that defendants, throughout their briefs, request that we take judicial notice of numerous items occurring or missing from the record. For example, defendants request that we take judicial notice of the fact that a certain individual attorney did not file an appearance or that an appearance for an individual attorney did not appear in the record. A court may take judicial notice of facts not subject to reasonable dispute and capable of accurate and ready determination by looking at easily accessible sources whose accuracy cannot reasonably be questioned. Ill. R. Evid. 201 (eff. Jan. 1, 2011); *People v. Brown*, 2017 IL App (1st) 150132, ¶ 30. Defendants' requests that we take judicial notice concern the information appearing of record in this case and do not concern facts not subject to reasonable dispute. The requests do, however, all appear to concern information in the record that defendants wish to especially emphasize. Thus, while defendants' requests for judicial notice are improper, we have

carefully reviewed the record and have accorded appropriate consideration to those portions of it that defendants have emphasized.

¶ 12 As a second preliminary matter, we note that defendants assert that we must accord them liberal treatment and forgive any failure to comply with the rules in light of their status as *pro se* litigants. To the contrary, a *pro se* litigant is held to the same standard as a licensed attorney and must comply with the same rules. *Ammar v. Schiller, DuCanto & Fleck, LLP*, 2017 IL App (1st) 162931, ¶ 16. Defendants' reference to the "*Haines* test" is unavailing. The *Haines* test derives from *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). As described by Justice Stevens, under the *Haines* test, a court considers a *pro se* complaint more generously and will not dismiss a complaint unless the court can say with assurance, despite the inartful pleadings of the *pro se* litigant, that no set of facts could be proved that would allow the *pro se* litigant to recover. *Estelle v. Gamble*, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting). Thus, the *Haines* test deals with the court's consideration of the substance of a pleading, not whether the *pro se* litigant followed the necessary rules and deadlines for filing his or her pleadings. By contrast, defendants seem to ask to excuse their failure (if any) to follow the rules to which attorneys are subject, and this request is simply not countenanced under Illinois law. *Ammar*, 2017 IL App (1st) 162931, ¶ 16. With that said, however, we are acutely aware of defendants' status as *pro se* litigants and all that status entails, and we will proceed accordingly. We now turn to defendants' contentions on appeal.

¶ 13 A. Appearances

¶ 14 Defendants first contend that the trial court erred by not requiring each individual attorney to file an individual appearance in violation of Illinois Supreme Court Rule 13(c)(1) (eff. July 1, 2013). Defendants complain that only one attorney filed an individual appearance

for plaintiff, but that attorney did not appear before the trial court in person. Instead, Matthew Robinson was identified by defendants as the attorney who made the bulk of the in-person appearances before the trial court, but Robinson did not file an individual appearance. Defendants argue that Rule 13 requires an individual appearance and in the absence of such an appearance, defendants urge that we presume that the individual is not licensed to practice law. If, according to defendants, a person who purports to represent a party is not licensed to practice law, then the cause must be dismissed or any actions taken by the unlicensed representative must be treated as a nullity. While this may be a true recitation of proper legal principles regarding the effect in a case of an unlicensed legal practitioner, the facts in this case do not support consideration of Robinson as an unlicensed legal practitioner.

¶ 15 In contrast to defendants' requests that we take legal notice of the record on appeal, we may properly take judicial notice of the records of the Attorney Registration and Disciplinary Commission. *BAC Home Loans Servicing, LP v. Popa*, 2015 IL App (1st) 142053, ¶ 21. Regarding Matthew Robinson, those records indicate that he was admitted to the practice of law in this state in 2006 and has been practicing law since. Additionally, Robinson represented at each appearance before the trial court that he was representing plaintiff (and plaintiff, as a corporation, could only appear through a proper representative, so Robinson was also inferentially representing that he was such a proper representative, *i.e.*, a licensed and properly retained attorney). Thus, we infer that Robinson was duly licensed at the times he appeared before the trial court. Accordingly, there is no concern that plaintiff was represented by an unlicensed practitioner.

¶ 16 The issue remains, however, what the effect should be for Robinson's failure to file an individual appearance. Rule 13 does not specify any consequences for the failure to file an

individual appearance. In the absence of specified consequences, courts appear to consider whether the opposing party was prejudiced. *Larson v. Pedersen*, 349 Ill. App. 3d 203, 206 (2004). Here, defendants offer the bare and conclusory assertion that they were prejudiced by Robinson's lack of an individual appearance. Yet they offer no specific examples of prejudice. Indeed, no prejudice appears evident because defendants received all communications and pleadings from plaintiff through Robinson or any of the other attorneys representing plaintiff, and defendants were able to tender to plaintiff all of their communications and pleadings through Robinson and the other attorneys representing plaintiff. Until June 2017, defendants did not object on the ground that Robinson had not filed an appearance (although the record shows that, at the initiation of this case in 2010, an appearance was filed on behalf of plaintiff, and the trial court accepted that appearance as sufficient to allow Robinson to continue in his representation of plaintiff). In light of the 7½-year lapse between the initial appearance and defendants' objection to Robinson's lack of an individual appearance, and the fact there is no discernible prejudice in the record accruing to defendants, we reject defendants' contentions on this point.

¶ 17 B. Complaint, Capacity, and Jurisdiction

¶ 18 Defendants next argue that, because Capital One did not hold the note at the outset of the foreclosure action, it lacks capacity to maintain the action. Defendants also contend that the trial court erred in not requiring Capital One to file a new complaint in this action even though Capital One was allowed to substitute for ING Bank as named plaintiff in this action following their merger. Finally, defendants contend that the trial court lacked jurisdiction because of the flaws they have identified. We disagree.

¶ 19 As an initial matter, when, in January 2010, this action was initiated, ING Bank attached the note to its complaint thereby establishing its interest and standing to maintain the foreclosure

action. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶¶ 23-25. On November 1, 2012, ING Bank merged with Capital One. Capital One succeeded to the ownership of the note by virtue of the merger. On August 19, 2014, Capital One was substituted as the named plaintiff by virtue of the merger. No more was necessary. The original complaint remained viable, and, by virtue of the merger, Capital One now owned the note. Accordingly, we reject defendants' contentions.

¶ 20 Defendants cite *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 22, for the proposition that, if a plaintiff in a foreclosure lacks standing at the time of the filing of the action, that lack of standing cannot be later cured by an assignment. *Gilbert*, however, involved the initiation of a suit by the bank before it had been assigned the note; here, by contrast, ING Bank possessed the note at the time this action was instituted and Capital One succeeded to ownership and possession of the note upon its merger with ING Bank. Therefore, *Gilbert* is readily distinguishable.

¶ 21 Defendants also rely on *Perry*, 2015 IL App (3d) 130673, ¶¶22-25, for the proposition that the foreclosing bank must demonstrate its capacity to maintain the foreclosure action as the holder of the note. Here, ING Bank demonstrated its capacity as holder of the note by attaching the note to the complaint. *Id.* ¶¶ 22-23. Upon the merger between ING Bank and Capital One, Capital One succeeded ING Bank as holder of the note (which was still attached to the complaint, and which was produced by Capital One repeatedly during hearings before the trial court). Accordingly, Capital One demonstrated its capacity to maintain this foreclosure action by producing the note in open court after it had succeeded to its ownership by virtue of merger with ING Bank.

¶ 22 Finally, when Capital One demonstrated its standing and capacity and was substituted as named plaintiff, the trial court was able to conclude that it possessed jurisdiction over this matter. Defendants' argument of lack of jurisdiction focuses on the necessity of a complaint to initiate an action; here, that requirement was fulfilled by ING Bank and, when it merged with Capital One, the requirement remained fulfilled. Accordingly, we reject defendants' contentions.

¶ 23 C. The Note, Indorsements, and Allonges

¶ 24 Defendants next contend that plaintiff did not produce the note along with all of its indorsements and allonges, as required by Illinois Supreme Court Rule 113(b) (eff. May 1, 2013). Defendants reason that, because Capital One did not file a new complaint after it merged with ING Bank, Supreme Court Rule 113(b) was violated. We disagree.

¶ 25 First, defendants' premise, that a new complaint was required after the merger, is erroneous. Capital One was properly substituted as named plaintiff. Defendants did not produce any authority demonstrating that after a merger a new complaint must be filed; likewise our research did not discover any such requirement. ING Bank and Capital One both represented that the note attached to the foreclosure complaint or produced in open court included the entirety of all related documents and indorsements. The trial court appropriately accepted the original note displayed and reviewed in open court.

¶ 26 Defendants' argument appears to be simply that, because no new complaint was filed (with the attached note), the original note drawn by ING Bank and attached to the foreclosure complaint must have been modified by the merger. Because that hypothetical note was not produced, plaintiff must have violated the requirements of Rule 113(b). Defendants offer no support for this reasoning. Moreover, it does not follow that a note will be assigned to the acquiring company when there is a merger. The result of the merger means that the merging

company acquires the assets of the merged company. Therefore, we would not expect an assignment to the merging company to be made of an asset that now belongs to the merging company.

¶ 27 Finally, defendants fail to support their contention on this point with relevant authority. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). This results in the forfeiture of their contention. See *Ammar*, 2017 IL App (1st) 162931, ¶ 16 (*pro se* litigants are required to follow the rules in the same manner as attorneys).

¶ 28 D. Substitution of Judge for Cause

¶ 29 Defendants next contend that the trial court observed the wrong procedure for resolving defendants' petition for substitution of judge for cause. Specifically, defendants contend that section 2-1001(a)(3)(iii) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(3)(iii) (West 2016)) requires their petition to be heard by a judge other than the judge named in the petition. Defendants argue that the trial court's consideration of the petition to determine if it met procedural and substantive threshold requirements was error and the trial court should have immediately passed the matter to another judge for consideration.

¶ 30 Section 2-1001(a)(3) of the Code provides, pertinently:

> ¶ 31 "(ii) Every application for substitution of judge for cause shall be made by petition, setting forth the specific cause for substitution and praying a substitution of judge. The petition shall be verified by the affidavit of the applicant.
>
> ¶ 32 (iii) Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition. The judge named in the petition need not testify but may submit an affidavit if the judge wishes. If the petition is allowed, the

case shall be assigned to a judge not named in the petition. If the petition is denied, the case shall be assigned back to the judge named in the petition." 735 ILCS 5/2-1001(a)(3) (West 2016).

¶ 33 Our supreme court has definitively interpreted the statute. *In re Estate of Wilson*, 238 Ill. 2d 519 (2010). In order to meet the statute's threshold requirements, the petition must allege grounds that, if true, would justify granting substitution for cause. *Id.* at 554. Where bias or prejudice is alleged as the basis for seeking substitution, it must normally trace back to an extrajudicial source, in other words, from a source other than from what the judge learned from participating in the case. *Id.* The trial court is not required to refer a petition for substitution to another judge when the petition, on its face, fails to comply with the statute's threshold requirements. *Id.* at 555.

¶ 34 Here, defendants did not allege that there was any extrajudicial source leading to the trial court's alleged bias or prejudice. Thus, on the face of the petition, it failed to meet the statute's threshold requirements and the trial court was not obligated to refer it to another judge. *Id.* Defendants alleged that a previous judge had recused herself due to having received an extrajudicial communication. However, the previous judge's recusal did not reflect on the trial court's conduct. Thus, it serves as no basis to establish prejudice on the part of the trial court. Defendants also allege that the trial court and the previous judge spoke, and the trial court relied on the rulings of the previous judge. Even taken as true, the allegations are too vague to discern any prejudice. Moreover, the prior rulings remain in effect until a change in circumstances would warrant a change. Defendants were unable to demonstrate a change in circumstances sufficient to require disturbing the prior rulings. Thus, it was appropriate for the trial court to

rely on the rulings her predecessors had made, even if one predecessor subsequently recused herself.

¶ 35 Because defendants' petition for substitution of judge for cause did not meet the threshold requirements, the trial court was under no obligation to transfer the petition to another judge for consideration. *Id.* Accordingly, we reject defendants' contention on this point.

¶ 36 E. False Statement Concerning Service of Process

¶ 37 Defendants argue that plaintiff failed to properly demonstrate that it had served defendants by publication. Specifically, defendants challenge the affidavit of publication as not qualifying as an affidavit under Illinois law because it was not notarized. Defendants reason that submitting a document labeled "affidavit" that was not notarized constituted a fraud on the court. Defendants argue that, by committing a fraud on the court, plaintiff vitiated the trial court's subject matter jurisdiction. We disagree.

¶ 38 On February 27, 2010, defendants were personally served process with the original ING Bank complaint in this matter. Beginning in August 2014, plaintiff, now Capital One, attempted to personally serve defendants, but, according to the process servers, defendants avoided personal service. On September 18, 2014, plaintiff filed its affidavit of service by publication. On November 5, 2014, defendants' attorney filed an appearance and an answer to plaintiff's foreclosure complaint.

¶ 39 On appeal, defendants do not argue that the service by publication was ineffective to confer personal jurisdiction. Of course, by answering the foreclosure complaint, defendants submitted to the trial court's jurisdiction, thereby foreclosing any argument that the trial court lacked personal jurisdiction.

¶ 40 Instead, defendants argue that, because the affidavit of publication was not subscribed and sworn before a notary public, it is not an affidavit. Defendants, we note, do not provide any authority in support of this specific issue. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (a party forfeits his or her argument if he or she does not support the argument with pertinent authority).

¶ 41 Regardless of defendants' argument, the affidavit of publication is proper. We note that plaintiff's attorney verified the affidavit pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)). Section 1-109 provides, pertinently: "Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath." *Id.* Pursuant to section 1-109, then, plaintiff properly created and certified the affidavit of service by publication, and the document properly memorializes plaintiff's efforts to serve defendants by publication. Accordingly, we hold that the affidavit of service is proper and does not constitute a fraud on the court. We further note that there is no prohibition to certifying pursuant to section 1-109 an affidavit of publication and defendants make no such argument. Because there is no fraud on the trial court, defendants' contention fails.

¶ 42 F. Multiple Judges

¶ 43 Defendants contend that they were prejudiced by the sheer number of judges who presided in this matter. Defendants fail to develop their argument beyond the fact that one judge recused because she received an *ex parte* communication. Defendants ignore the fact that this case persisted for over seven years before it was resolved. Defendants do not argue in any specific way that they were prejudiced; rather, defendants make the bare and conclusory assertion that the number of judges who presided in this matter constitutes a due process violation. This argument is wholly insufficient. *Velocity Investments, LLC v. Alston*, 397 Ill.

App. 3d 296, 297 (2010) (the appellate court is entitled to have the issues clearly defined with pertinent authority presented and coherent arguments developed; it is not a repository for a party to foist upon it the burden of argument and research). We therefore deem defendants' argument to be forfeited for its insufficiency. *Id.* Additionally, in light of the fact that defendants have not identified any specific instances of prejudice accruing from the number of judges presiding over this matter, they cannot show entitlement to any viable relief.

¶ 44 G. Notice of Sale

¶ 45 Defendants next contend that a notice of sheriff's sale was issued while their motion to reconsider was pending. Defendants argue that the pendency of the motion to reconsider invalidates the notice of sale.

¶ 46 Defendants do not cite to pertinent authority to support their reasoning, thus forfeiting this contention. Ill. S. Ct. R. 341(h)(7). Additionally, defendants make no argument that the notice was deficient. Finally, there is no authority uncovered by our research that a notice of a sheriff's sale may not be issued while a motion to reconsider is pending. We further note that, in any event, defendants' motion to reconsider was denied, so there was no actual basis to disturb the sheriff's sale of the property.

¶ 47 H. Combined Motion to Dismiss

¶ 48 Defendants last argue that their combined motion to dismiss should have been granted rather than being stricken or denied. On September 16, 2015, defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). Defendants argue that they filed a personal bankruptcy action, so the debt to plaintiff was discharged in the bankruptcy. We disagree.

¶ 49 On November 13, 2013, the bankruptcy court entered an order granting plaintiff relief from the automatic bankruptcy stay and granting it permission to pursue all nonbankruptcy remedies regarding the subject property. We take judicial notice of the bankruptcy court's order. *Seymour v. Collins*, 2015 IL 118432, ¶ 6 n.1. Thus, the debt remained undischarged, and plaintiff was granted relief from the automatic bankruptcy stay to pursue this foreclosure action.

¶ 50 Defendants also argue that Capital One was not included in the complaint. This is incorrect. Capital One was substituted as the named plaintiff in this action. Thus, it succeeded to that status and became the named plaintiff in complaint. Defendants' argument is without merit.

¶ 51 Defendants also reiterate their argument that ING Bank did not transfer to Capital One the note and mortgage. However, this overlooks the effect of the merger in which Capital One succeeded ING Bank as owner of the note and mortgage. Accordingly, we again reject defendants' contention.

¶ 52 Defendants argue that their combined motion was stricken for not obtaining leave of court to file the motion. Defendants apparently rely on a bystander's report attached as an appendix to their reply brief. Plaintiff filed a motion to strike the bystander's report from the appendix of defendants' reply brief. We grant the motion to strike. It does not appear that defendants followed the procedure to certify the bystander's report in the trial court. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005).

¶ 53 Finally, throughout their argument on appeal concerning the combined motion to dismiss, defendants cite to no pertinent authority to support their contentions and their argument is vague, undeveloped, and confusing. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Velocity Investments*, 397 Ill. App. 3d at 297. Accordingly, we reject defendants' contentions.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 56 Affirmed.