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2018 IL App (3d) 160474-U

Order filed April 30, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

WILMINGTON SAVINGS FUND SOCIETY,)	Appeal from the Circuit Court
FSB, not in its individual capacity but solely as)	of the 12th Judicial Circuit,
trustee for the Primestar-H Fund Trust,)	Will County, Illinois,
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
CATHEY HARDY and TERRENCE)	
HARDY,)	Appeal No. 3-16-0474
)	Circuit No. 08-CH-3700
Defendants-Appellants)	
)	
(Mortgage Electronic Registration Systems, Inc.))	
as Nom. for Countrywide Bank N.A.; Willow)	
Brook Estates Community Association, Inc.;)	
Unknown Owners and Non-Record Claimants,)	Honorable
)	Brian E. Barrett,
Defendants).)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court (1) properly granted summary judgment in favor of the plaintiff where the defendants failed to file a counteraffidavit or any other evidence contesting the facts set forth in the motion for summary judgment and (2) did not

abuse its discretion when it denied the defendants' motions to vacate summary judgment.

¶ 2 Countrywide Home Loans, Inc. (Countrywide I) filed a foreclosure complaint against the defendants, Cathey Hardy and Terrence Hardy. Thereafter, a number of lenders were substituted as the plaintiff due to various assignments during the pendency of the case. The defendants raised lack of standing as an affirmative defense. The trial court granted summary judgment in favor of the final plaintiff, Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as trustee for the Primestar-H Fund Trust (Wilmington), and entered judgment for foreclosure and sale. The defendants appeal.

¶ 3 **FACTS**

¶ 4 On March 6, 2007, the defendants entered into a loan agreement with America's Wholesale Lender (America's Wholesale), whereby they borrowed \$356,000, to be paid back over a 30-year term. They executed a promissory note payable to America's Wholesale and granted a mortgage on the subject property located in Crete, Illinois, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for America's Wholesale. Sometime prior to August 14, 2008, America's Wholesale assigned the loan to Countrywide I.

¶ 5 On August 15, 2008, Countrywide I filed a complaint to foreclose the mortgage against the defendants, alleging that the defendants ceased making month payments on April 1, 2008. Attached to its complaint was a copy of the mortgage and the note.

¶ 6 On November 7, 2008, Countrywide I assigned the loan to Countrywide Home Loans Servicing, LP (Countrywide II). On December 30, 2008, Countrywide I filed a motion to substitute Countrywide II as the plaintiff, which the trial court granted.

¶ 7 On April 21, 2009, Countrywide II changed its name and became BAC Home Loans

Servicing, LP (BAC). On June 23, 2009, Countrywide II filed a motion to substitute BAC as the plaintiff, which the trial court granted.

¶ 8 On July 1, 2011, BAC merged into Bank of America, N.A., and on September 11, 2012, Bank of America was substituted as the plaintiff.

¶ 9 On December 10, 2012, the defendants filed a motion to dismiss for lack of capacity to sue (735 ILCS 5/2-619(a)(2) (West 2012)). The defendants argued that Bank of America was the holder of the mortgage, but that the loan was securitized into the Bank of New York as trustee for CWABS Asset Backed Certificates Trust 2007-7, which was the current holder of the note. The defendants argued that this separation of the note and mortgage meant that Bank of America, as only the holder of the mortgage, lacked privity of contract to sue and was not the legal holder of the defendants' indebtedness.

¶ 10 On December 20, 2012, the defendants filed their answer to the foreclosure complaint. They raised the affirmative defense of standing, arguing that Bank of America lacked standing for the same reasons raised in its December 10, 2012, motion to dismiss.

¶ 11 On April 24, 2013, Bank of America filed a motion for summary judgment and an affidavit in support thereof. The affidavit detailed the chain of title, the defendants' default, and Bank of America's record procedures for the loan. Attached to the affidavit was (1) the note, (2) the assignment of the mortgage from MERS as nominee for America's Wholesale to Countryside I, (3) the assignment of mortgage from Countrywide I to Countrywide II, (4) a certificate of filing demonstrating that Countrywide II changed its name to BAC, and (5) a certificate of merger indicating that BAC merged into Bank of America.

¶ 12 On April 9, 2015, Bank of America filed a motion to substitute Wilmington as the plaintiff. Exhibits attached to the motion demonstrated that the loan transferred from Bank of

America to U.S. Bank N.A., as trustee for PROF-2013-S3 REMIC Trust III, and then to Wilmington. The trial court granted the motion.

¶ 13 On January 19, 2016, the trial court scheduled a hearing on Wilmington's motion for summary judgment for March 8, 2016. (The record is devoid of a motion for summary judgment filed on or around this date by Wilmington. It appears that Wilmington was standing on Bank of America's April 2013 motion for summary judgment that was never disposed of.) The defendants were given 28 days to respond to the motion.

¶ 14 On March 8, 2016, the defendants filed a motion for extension of time to respond to the motion for summary judgment, which the trial court denied. The matter proceeded to a hearing and the court granted Wilmington's motion for summary judgment, finding that no material issue of fact had been raised. The court also granted Wilmington's motion for foreclosure and sale.

¶ 15 On March 31, 2016, the defendants each filed their own *pro se* motions to vacate summary judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). The defendants reiterated their standing argument.

¶ 16 On April 23, 2016, Wilmington responded to the motions to vacate summary judgment and argued that (1) the motions are improper under section 2-1401 because there was no final order, (2) it was not properly served, (3) the motions were an attempt to raise written arguments opposing the motion for summary judgment that were forfeited because the defendants failed to timely respond to the motion for summary judgment pursuant to the trial court's briefing schedule order, and (4) the defendants cannot establish their standing defense.

¶ 17 On May 3, 2016, the trial court denied the defendants' motions.

¶ 18 On June 9, 2016, the subject property was sold by judicial sale.

¶ 19 On July 12, 2016, the trial court entered an order approving the judicial sale of the

property.

¶ 20 The defendants appeal.

¶ 21 ANALYSIS

¶ 22 On appeal, the defendants argue that the trial court (1) erred as a matter of law when it granted Wilmington’s motion for summary judgment because a genuine issue of material fact existed as to whether Wilmington had standing and (2) abused its discretion when it denied their motion to vacate summary judgment. Wilmington argues that there was no genuine issue of material fact with respect to standing and the trial court did not abuse its discretion when it denied the defendants’ motions. We address each of these contentions in turn.

¶ 23 I. Summary Judgment

¶ 24 Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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). “A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A trial court’s ruling on a motion for summary judgment is subject to *de novo* review. *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 19.

¶ 25 To survive a motion for summary judgment, the nonmoving party must present some evidentiary facts that would arguably entitle him to judgment. *Horwitz v. Holabird & Root*, 212

Ill. 2d 1, 8 (2004). When a party moving for summary judgment files supporting affidavits with well-pleaded facts, and the party opposing the motion files no counteraffidavits, the facts set forth in the movant's affidavits are deemed admitted. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49.

¶ 26 In a foreclosure action, once the plaintiff establishes a *prima facie* case by introducing evidence of the mortgage and the promissory note, the burden shifts to the defendant to prove any affirmative defenses. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67.

¶ 27 In this case, Countrywide I filed its foreclosure complaint on August 15, 2008. Attached to its complaint was a copy of the mortgage and note. The record also contains a recorded assignment of mortgage, which provided that MERS, as nominee for America's Wholesale, assigned its interest to Countrywide I prior to the filing of the foreclosure complaint. Countrywide I assigned the loan to Countrywide II on November 7, 2008, and Countrywide II was substituted as the plaintiff. Countrywide II then changed its name to BAC effective April 21, 2009, and BAC was substituted as the plaintiff. BAC merged with Bank of America on July 1, 2011, and Bank of America was substituted as the plaintiff. The loan was then assigned to U.S. Bank on April 1, 2014, but U.S. Bank was never substituted as the plaintiff. Around February 2015, U.S. Bank assigned the loan to Wilmington, and Wilmington was substituted as the final plaintiff. The affidavit filed with the motion for summary judgment detailed the chain of title, the recordkeeping process for the loan, and the defendants' default.

¶ 28 Based on our review of the record, we conclude that Wilmington set forth a *prima facie* case for foreclosure as a matter of law. The burden then shifted to the defendants to establish that a genuine issue of material fact existed that would preclude summary judgment. *PNC Bank, National Association v. Zubel*, 2014 IL App (1st) 130976, ¶ 18.

¶ 29 The defendants raise many issues to support their argument that a genuine issue of material fact existed as to Wilmington’s standing. Although not raised by either party, we note that the defendants did not file a written response to Wilmington’s motion for summary judgment or a counteraffidavit. While the defendants raised standing as an affirmative defense in their December 2012 answer to the foreclosure complaint, they cannot rely on their pleadings to create a genuine issue of material fact. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. Instead, since Wilmington’s motion for summary judgment was supported by an affidavit, the defendants were required to file a counteraffidavit to create a genuine issue of material fact. See *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974) (even if an answer purports to raise issues of material fact, summary judgment is appropriate if such issues are not further supported by evidentiary facts through affidavits). Thus, since the defendants did not file a counteraffidavit, they failed to establish a genuine issue of material fact to survive summary judgment. See *Korzen*, 2013 IL App (1st) 130380, ¶ 49.

¶ 30 II. Motion to Vacate

¶ 31 Next, the defendants argue that their motions to vacate summary judgment were improperly denied. We review a trial court’s ruling on a motion to vacate for an abuse of discretion. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984). However, the record on appeal contains no transcript from the hearing on the defendants’ motions, no report of proceedings, no bystander’s report, and no agreed statement of facts. The court’s written order only indicates that it denied the motions. Thus, we do not know the basis for the court’s decision. Under these circumstances, there is no basis for us to conclude that the court abused its discretion and we will presume that it heard adequate evidence to support its decision and that its order was in conformity with the law. See *id.* at 391-92 (the appellant has the burden to present a sufficiently

complete record to support a claim of error and any doubts that may arise from the incompleteness of the record will be construed against the appellant).

¶ 32

CONCLUSION

¶ 33

The judgment of the circuit court of Will County is affirmed.

¶ 34

Affirmed.