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2018 IL App (3d) 170350-U

Order filed February 23, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

FREEDOM MORTGAGE CORPORATION,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Whiteside County, Illinois.
	)	
v.	)	
	)	
BRIAN BRIESE,	)	Appeal No. 3-17-0350
	)	Circuit No. 12-CH-56
Defendant-Appellant	)	
	)	
(Sondra Briese, Unknown Owners and	)	
Non-Record Claimants,	)	Honorable Patricia A. Joyce,
	)	Honorable John L. Hauptman,
Defendants).	)	Judges, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Lytton and Justice O'Brien concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The mortgage agreement and note's endorsement granted Freedom Mortgage standing to enforce the instruments. (2) Freedom Mortgage's prove-up affidavit satisfied Illinois Supreme Court Rules 113 and 236.

¶ 2 The trial court granted plaintiff, Freedom Mortgage Corporation (FMC), summary judgment on its foreclosure complaint. Defendant, Brian Briese, appeals the trial court's

judgment for foreclosure and sale. Defendant claims that FMC lacked standing and failed to present sufficient affidavit testimony to warrant summary judgment. We affirm.

¶ 3

### BACKGROUND

¶ 4

On July 10, 2007, Sondra and Brian Briese executed a mortgage agreement and 30-year note with Home Mortgage, Inc. (HMI). HMI agreed to loan the Brieses nearly \$275,000 to purchase residential property in Fulton. HMI recorded the mortgage on July 11. On July 19, HMI negotiated the note and specially endorsed it to FMC. Lawrence Lockett, HMI's chief executive officer (CEO) and 25% shareholder, signed the endorsement.

¶ 5

In June 2009, the United States Attorney charged Lockett with securities fraud. The information alleged that Lockett entered into a warehousing credit and security agreement with GMAC Bank on August 20, 2007. Pursuant to the agreement, GMAC became HMI's principal lender. GMAC funded HMI's mortgage loans, then HMI repaid GMAC once it sold the mortgages to third parties. Lockett began submitting fictitious documentation for nonexistent mortgages. The information alleged Lockett received approximately \$15 million from GMAC to fund nonexistent mortgages.

¶ 6

On March 16, 2012, FMC filed a complaint to foreclose on the Brieses' mortgage. The complaint alleged that the Brieses defaulted on the note in November 2009. After two years of motion practice, defendant filed his answer and affirmative defenses on May 1, 2014. The affirmative defenses argued that (1) the mortgage was void as a matter of public policy, (2) FMC lacked standing to foreclose on the mortgage, and (3) "lack of privity of contract." The affirmative defenses' relevant allegations include:

"34. Plaintiff brought the instant matter before the Honorable court without accurate supporting loan documentation

indicating its purported authority to foreclose the subject mortgage.

\*\*\* 40. The purported indorsement from the original lender, Home Mortgage, Inc. is suspect, as it was indorsed by Mr. Lawrence Luckett of Home Mortgage, Inc. \*\*\* 50. MERS is not and was not ever authorized to assign the subject note. \*\*\* 57. At no time did Defendant execute a contract of any sort with Plaintiff. \*\*\* 58. Plaintiff is not a party to the subject mortgage.”

¶ 7 FMC never directly responded to defendant’s affirmative defenses. Instead, it filed a motion for summary judgment on November 4, 2014. FMC attached Tiffany Vuong’s affidavit of indebtedness to its motion. Vuong, an assistant secretary at LoanCare, attorney in fact and unlimited power of attorney for FMC, stated that LoanCare used a software program called MSP 3270 to “automatically record and track mortgage payments.” MSP 3270 and similar accounting programs “[are] recognized as standard in the industry.” Vuong observed the MSP 3270 program contemporaneously record borrowers’ loan payments in computerized files. The computer system automatically dated each entry. The MSP 3270 program electronically recorded defendant’s payments “at the time or near the time that the payment was received.” The program “was properly operated to accurately record the Defendant’s mortgage payments.” As of May 1, 2014, LoanCare’s records indicated that the Brieses owed nearly \$450,000 in principal, interest, escrow advances, and other fees.

¶ 8 On October 28, 2015, the trial court granted FMC’s motion and entered judgment of foreclosure and sale. FMC held the sheriff’s sale on October 6, 2016. On October 11, FMC filed its motion for order to approve the sale and distribution. In his response, defendant asserted that “U.S. taxpayers would be harmed if a line item for escrow costs was allowed in approving the

sale.” The court entered an order approving the sale on April 28, 2017. This appeal followed. We affirm the trial court’s judgment.

¶ 9

## ANALYSIS

¶ 10

Defendant argues on appeal that the trial court improperly granted FMC’s motion for summary judgment. Summary judgment is proper “if 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 a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2016). We review summary judgment orders *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 11

Defendant claims that FMC failed to establish proper standing as a matter of law because of fact questions related to the endorsement’s legitimacy. Defendant also argues that Vuong’s affidavit failed to meet the requirements set forth in Illinois Supreme Court Rules 113 (eff. May 1, 2013) and 236 (eff. Aug. 1, 1992). We find neither argument persuasive.

¶ 12

### I. Standing

¶ 13

Defendant first argues that FMC admitted the second affirmative defense’s allegations by neglecting to file a responsive pleading. These admitted allegations precluded summary judgment. Specifically, defendant cites the following allegations:

“34. Plaintiff brought the instant matter before the Honorable court without accurate supporting loan documentation indicating its purported authority to foreclose the subject mortgage. \*\*\* 40. The purported indorsement from the original lender, Home Mortgage, Inc. is suspect, as it was indorsed by Mr. Lawrence Lockett of Home Mortgage, Inc. \*\*\* 50. MERS is not and was not

ever authorized to assign the subject note. \*\*\* 57. At no time did Defendant execute a contract of any sort with Plaintiff. \*\*\* 58. Plaintiff is not a party to the subject mortgage.”

¶ 14 A party’s failure to reply to an affirmative defense constitutes an admission of the defense’s allegations of fact. *Mooney v. Underwriters at Lloyd’s, London*, 33 Ill. 2d 566, 570 (1965). Allegations 34, 40, 50, and 58 contain only factual and legal *conclusions*, not allegations of fact. Litigants who neglect to file a responsive pleading do not admit such conclusions. See *Andrews v. Cramer*, 256 Ill. App. 3d 766, 770 (1993). Allegation 57 is irrelevant to FMC’s standing; the law clearly allows mortgagees to negotiate mortgage and note instruments. See 810 ILCS 5/3-201 (West 2016); *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶¶ 12-13.

¶ 15 Even if we deemed the allegations admitted, they could not preclude summary judgment. The endorsement made FMC the note and mortgage’s holder. 810 ILCS 5/3-201 (West 2016). The holder is entitled to enforce the instrument. 810 ILCS 5/3-301 (West 2016).

¶ 16 Defendant claims that Lockett’s securities fraud indictment undermined the legitimacy of his endorsement to FMC. This argument fails for two reasons. First, defendant reasons that a forgery or other inauthentic feature in an endorsement precludes the subsequent holder from obtaining the superior legal rights available to a holder in due course. See 810 ILCS 5/3-302 (West 2016). Throughout this case, FMC claimed to be a holder, not a holder in due course. A mere holder may be entitled to enforce an instrument even if the holder does not own or wrongfully possesses the instrument. 810 ILCS 5/3-301 (West 2016).

¶ 17 Second, defendant presented no evidence showing that Lockett forged the endorsement or mortgage documents. Although a pleading “may purport to raise issues of material fact, if such

issues are not further supported by evidentiary facts through affidavits or such, summary judgment is then appropriate.” *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). Lockett’s security fraud charges addressed HMI’s August 2007 contract with GMAC. Defendant entered into this mortgage in July 2007. Lockett’s criminal actions included fraudulently obtaining money from GMAC through nonexistent mortgages. Defendant does not claim that he never signed the mortgage agreement and note for the Fulton property. Defendant failed to provide any evidence that Lockett forged or altered *this* mortgage agreement, note, or endorsement. Without this evidence, the trial court properly found that FMC could enforce the mortgage and note instruments pursuant to the endorsement.

¶ 18 II. Vuong Affidavit

¶ 19 Defendant also claims that Vuong’s affidavit violated Illinois Supreme Court Rules 113 (eff. May 1, 2013) and 236 (eff. Aug. 1, 1992). Specifically, he argues that the affidavit improperly failed to state the precise time when LoanCare’s computer system updated the MSP 3270 program and accounting records each day. FMC argues that defendant waived this argument by not raising it in the trial court. See *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 279 (1989). Regardless of whether defendant waived his claim, it fails on its merits.

¶ 20 Rule 113(c)(2)(iii) requires mortgage foreclosure prove-up affidavits to identify “any computer program or computer software that the entity relies on to record and track mortgage payments \*\*\* the source of the information, the method and time of preparation of the record to establish that the computer program produces an accurate payment history, and an explanation as to why the records should be considered ‘business records’ within the meaning of the law.” Ill. S. Ct. R. 113(c)(2)(iii) (eff. May 1, 2013). Rule 236(a) states that written records of any act “shall be admissible” as business records “if it was the regular course of the business to make such a

memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter.” Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 21 Vuong’s affidavit identifies the MSP 3270 software. She stated that “when a borrower makes a payment on a loan, that payment information is entered into the computerized loan file for that borrower *at the time of payment* automatically.” She reiterates that the entries reflecting defendant’s payments “were made at the time or near the time that the payment was received.” She stated multiple times that LoanCare created these payment records in the regular course of business. The Brieses’ payment history reflected LoanCare’s computerized loan file.

¶ 22 Vuong’s affidavit clearly sets forth the information that Rule 113 requires. It establishes the accuracy of the MSP 3270 software and the Brieses’ payment history. In fact, defendant never cited any discrepancies in the payment history. He merely attempts to claim that a typographical error undermines the entire document’s validity—we reject this argument.

¶ 23 The affidavit also establishes that the payment history is an admissible business record pursuant to Rule 236. Vuong unequivocally stated that the system recorded defendant’s payments “at or near the time that the payment was received.” The system automatically dated entries in defendant’s loan file and tracked his payment history. LoanCare utilized the MSP 3270 software to manage computerized loan files in the regular course of business. Vuong stated that she received training from LoanCare and “observed that payments made by borrowers are recorded in borrowers’ computerized loan files when the payments are paid.” Other businesses in the industry customarily used this type of software and computerized record system. Vuong’s affidavit established proper foundation for a business record under Rule 236. See *Bayview Loan Servicing, LLC*, 2015 IL App (3d) 140412, ¶ 19; *U.S. Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶¶ 26-30.

¶ 24 We find no fact issue or other affirmative matter that precluded summary judgment in this case. We affirm the trial court's order granting FMC summary judgment, order of foreclosure and sale, and order approving the sale.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Whiteside County.

¶ 27 Affirmed.