2019 IL App (1st) 19-1169-U

THIRD DIVISION
August 28, 2019

No. 1-19-1169

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WCNSB, L.L.C., a Texas limited liability company, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County, Illinois,
v.	)	Law Division.
	)	No. 2018 CH 6623
VAISHNAV DHABHA, INC., Defendant-Appellant	)	The Honorable Patricia S. Spratt,
and	)	Judge Presiding.
2525 DEVON, INC., an Illinois corporation, and UNKKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants.	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the plaintiff's petition for appointment of a receiver in a commercial mortgage foreclosure action, where the plaintiff established both that it was the legal holder of the note and that there was a reasonable probability that it would prevail on a final hearing of the cause. The defendant failed to present any "good cause" that would justify the reversal of the trial court's order.

¶ 2 This interlocutory appeal stems from a nonresidential mortgage foreclosure action brought by

the plaintiff WCNSB, L.L.C. (WCNSB) against two Illinois corporations, the defendant-appellant Vaishnav Dhaba Inc. (Dhaba) and the defendant 2525 Devon, Inc. (Devon). Dhaba appeals from the circuit court's order appointing an interim receiver for the subject property, contending that such appointment was improper where Dhaba established "good cause" for why the receiver should not be appointed, namely that it was unclear whether the plaintiff was the rightful mortgagee. In addition, Dhaba contends that the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS. 5/15-1101 *et seq.* (West 2016)) does not permit the appointment of an interim receiver. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The supporting record provided to us on appeal is sparse and contains only five documents: (1) the plaintiff's first amended complaint for foreclosure and recovery of deficiency on two promissory notes; (4) the plaintiff's verified petition for appointment of a receiver; (3) the circuit court's order appointing the interim receiver; (4) the plaintiff's response to Dhaba's request to produce; and (5) a notice of the interlocutory appeal. The supporting record contains no report of the proceedings, nor any transcripts or acceptable substitutes from the hearings held before the circuit court. Nor does it contain any pleading by Dhaba responding to the plaintiff's petition for appointment of receiver. From the five documents that are before us, we have been able to glean only the following relevant facts and procedural history.

¶ 5 On July 30, 2003, the defendant Devon executed a mortgage and assignment of rents with the original mortgagee, Devon Bank (the bank), for the commercial property located at 2525 West Devon Avenue, Chicago IL 60659 (the property) in the amount of $1,849,056.66 (hereinafter collectively referred to as the 2003 mortgage). The 2003 mortgage explicitly provides that upon the occurrence of an "event of default," as defined in the mortgage, the mortgagee shall have the

right to make an application for appointment of a receiver for the property. The 2003 mortgage was originally recorded on August 25, 2003, and was then modified ten times (on September 17, 2004, January 10, 2006, December 17, 2007, April 13, 2010, December 24, 2010, February 16, 2012, March 17, 2013, July 17, 2013, July 17, 2014, and October 17, 2014).

¶ 6 On September 17, 2011, Devon executed a second mortgage and assignment of rents with the bank for advances up to the original mortgage amount (collectively referred to as the 2011 mortgage). The 2011 mortgage was cross-collateralized and cross-defaulted with the original 2003 promissory note and mortgage. In addition, just like the 2003 mortgage, it contained a provision stating that upon the occurrence of an "event of default" as defined by the mortgage and note, the mortgagee would have the right to make an application for the appointment of a receiver. The 2011 mortgage was recorded on April 17, 2012, and was subsequently modified four times (on March 17, 2013, July 17, 2013, and October 17, 2014).

¶ 7 The supporting record on appeal does not contain copies of the original promissory notes on either the 2003 or 2011 mortgages. However, it contains two replacement promissory notes that were executed and delivered by Devon and Dhaba to the bank as part of the October 17, 2014, modifications to the 2003 and 2011 mortgages, extending the maturity date of the indebtedness secured by both mortgages to October 17, 2016. These replacement promissory notes are in the amount of $1,849,051.66 for the 2003 mortgage (first note) and the amount of $93,500 for the 2011 mortgage (second note). The two replacement notes are cross-collateralized and secured by both the 2003 and 2011 mortgages.

¶ 8 Each of the replacement promissory notes contains two allonges. The first two are dated December 20, 2016, and show the transfer of both the first and second note from the bank (as the seller/payor) to WCII 1, L.L.C., a Texas corporation (WCII) (as the payee). The second two

allonges are dated June 8, 2017, and show the transfer of both the first and second note from WCII (as the seller/payor) to the plaintiff (as the payee). Correspondingly, on December 20, 2016, the bank executed and delivered an assignment of recorded loan documents assigning both the 2003 and 2011 mortgages to WCII. On June 8, 2017, WCII executed and delivered an assignment of recorded loan documents by which it assigned the 2003 and 2011 mortgages to the plaintiff.

¶ 9 Based on the aforementioned facts, on April 18, 2019, the plaintiff filed its first amended complaint to foreclose the 2003 and 2011 mortgages on the property and recover any deficiency on the two promissory notes against Dhaba and Devon. According to the amended complaint, the property is a commercial building with several commercial tenants, and is not used by either of the defendants as a personal residence. The amended complaint further alleged that the plaintiff was the mortgagee, and the "legal holder of the two promissory notes." In addition, the complaint alleged that as a result of the defendants' failure to make payments, an "event of default" as defined under both the 2003 and 2011 mortgages had occurred, permitting the plaintiff to accelerate the amounts due and demand that the same be paid immediately.

¶ 10 In support of the amended complaint, the plaintiff attached, *inter alia*, copies of: (1) the 2003 mortgage, and all of its modifications; (2) the 2011 mortgage, and all of its modifications; (3) the two replacement promissory notes with the four allonges; (4) a loan purchase and sale agreement between the bank and WCII dated December 20, 2016, under which both promissory notes were sold by the bank to WCII; (5) the bank's assignment of the 2003 and 2011 loan documents to WCII; and (6) WCII's subsequent assignment of both of the notes to the plaintiff.

¶ 11 On April 19, 2019, the plaintiff filed a verified petition for appointment of receiver alleging

that it had filed a complaint to foreclose the mortgages on the commercial property. The petition attached the 2003 and 2011 mortgagees and the replacement promissory notes dated October 17, 2014. According to the petition, there was no dispute as to the defaults under these promissory notes, and there was a reasonable probability that the plaintiff, as the mortgagee, would prevail on a final hearing in the foreclosure proceedings.

¶ 12 In support, the petition attached an affidavit of debt by Andrew Schmeltekopf, an officer of both the plaintiff and WCII, attesting, among other things, to the fact that the plaintiff "owns and holds possession of the promissory notes," under which the defendants owe the sum of $2,274,494.24 as of February 5, 2019 (including attorney's fees and related expenses). The affidavit of debt attached the two replacement promissory notes and the four allonges documenting the transfer of both notes from the bank to WCII and subsequently from WCII to the plaintiff. The affidavit of debt also attached the corresponding assignments of the 2003 and 2011 recorded loan documents initially from the bank to WCII and then from WCII to the plaintiff.

¶ 13 It appears that, on May 7, 2019, Dhaba filed a motion to dismiss the amended complaint for foreclosure, alleging that the plaintiff had failed to attach a copy of the original 2003 promissory note to its amended complaint. In support of its motion, Dhaba apparently attached the plaintiff's response to its request to produce dated March 29, 2019, wherein the plaintiff refused to produce the originals of the promissory note.

¶ 14 While Dhaba's motion to dismiss is not part of the supporting record on appeal, the plaintiff's response to Dhaba's request to produce, is. This discovery response reveals that the plaintiff refused to produce the originals of the promissory note for the 2003 mortgage on the grounds that they were "valuable and irreplaceable negotiable instruments" that could not be shipped

"without significant risk." Instead, the plaintiff produced copies of the same two October 17, 2014, replacement promissory notes attached to its amended complaint.

¶ 15 In addition, as part of its discovery response, and unrelated to the contentions in Dhaba's motion to dismiss, the plaintiff also produced copies of eight allonges. The first four were identical to the ones already attached to its amended complaint for foreclosure and established the December 20, 2016, transfer of the notes from the bank to WCII and the subsequent June 8, 2017, transfer of the same notes from WCII to the plaintiff.

¶ 16 The additional four allonges were all dated December 20, 2016, and showed the transfer of both the first and second replacement promissory notes from the bank (as the seller/payor) to Westdale Capital Investors I, Ltd. (hereinafter the Westdale allonges) (as the payee). Two of these notes (for the first and second mortgage) contain a large handwritten notation of "VOID" on top. Two, however, do not.

¶ 17 In his brief, Dhaba contends that on May 9, 2019, the trial court held a hearing on the plaintiff's petition for the appointment of a receiver. Dhaba asserts that on that same date, the trial court entered a briefing schedule with respect to its motion to dismiss the amended complaint. According to Dhaba, before permitting the parties to fully brief the motion to dismiss, however, the trial court granted the plaintiff's petition for appointment of a receiver on an interim basis. The record before us, however, does not contain a copy of either the briefing schedule or the transcript from the trial court's hearing on the plaintiff's petition for an appointment of a receiver, or any appropriate substitute by which we could confirm Dhaba's claims as to what transpired that day. All we have before us is the trial court's written order granting the plaintiff's petition, with a handwritten notation in the title adding the word "interim" before "receiver." Dhaba now appeals.

¶ 18 II. ARGUMENT

¶ 19 On appeal, Dhaba first contends that the trial court erred in appointing a receiver, where Dhaba established "good cause" for permitting it to remain in possession of the property, namely that the plaintiff's standing to bring the mortgage foreclosure action remains in doubt. For the reasons that follow, we disagree.

¶ 20 The law regarding a trial court's ability to appoint a receiver in a mortgage foreclosure action is well-settled. Prior to the enactment of the IMFL and consistent with the basic principles of injunctive relief, trial courts had broad discretion to award the mortgagee with possession of the property during the pendency of a foreclosure proceeding. The IMFL, which was enacted in 1987, drastically changed this process, taking away virtually all discretion from the trial courts and mandating that they give possession to the mortgagee and appoint a receiver whenever the statutory requirements are met. *CenterPoint Properties Trust v. Olde Prairie Block Owner, L.L.C.*, 398 Ill. App. 3d 388, 391-92 (2010). Relevant to this appeal, section 15-1701 provides that during foreclosure proceedings and prior to the entry of a judgment of foreclosure, in cases involving nonresidential real estate, the mortgagee is entitled to the possession of the property upon request, provided that the mortgagee shows that: (1) the mortgage or other written instrument authorizes such possession; and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. 735 ILCS 5/15-1701 (West 2016). However, if the mortgagor objects and demonstrates "good cause," the court shall allow the mortgagor to remain in possession. 735 ILCS 5/15-1701(b)(2) (West 2016).

¶ 21 Further, section 15-1702(a) of the IMFL provides that "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." (emphasis added). 735 ILCS 5/15-1702(a) (West 2016)). Section 15-1105 of the IMFL defines "shall" as "mandatory and not

permissive." 735 ILCS 5/15-1105(b) (West 2016)). Our courts have repeatedly interpreted these provisions as creating a presumption in favor of the mortgagee's right to possession of nonresidential property and the appointment of a receiver, during the pendency of a mortgage foreclosure proceeding, with the exception that a mortgagor can retain possession if it shows "good cause." See *CenterPoint Properties*, 398 Ill. App. 3d at 392. Our review of the trial court's grant or denial of a petition for appointment of receivership is *de novo*.

¶ 22 On appeal, Dhaba challenges the status of the plaintiff as the mortgagee, claiming that the two Westdale allonges, which were marked "void" and which were produced by the plaintiff in discovery, make "the chain of title *** unclear," so as to have prevented the plaintiff, from being able to claim the status of mortgagee and seek the appointment of the receiver.

¶ 23 At the outset, we note that Dhaba has failed to present us with an adequate and proper record upon which to address this issue. Dhaba is correct in asserting that because this appeal is brought pursuant to Illinois Supreme Court Rule 307(a)(2) (Ill. S. Ct. R. 307(a)(2) (eff. Nov. 1, 2017)), it was not required to provide this court with a full record on appeal as required by Supreme Court Rule 321 (Ill. S. Ct. R. 321 (eff. February 1, 1994)), and that a supporting record complied and authenticated by the affidavit of its attorney pursuant to Supreme Court Rule 328 (Ill. S. Ct. R. 328 (eff. July 1, 2017) was sufficient. Nonetheless, even under Supreme Court Rule 328, it was essential that Dhaba present this court with a supporting record "containing enough of the trial court record to show an appealable order or judgment" and "any other matter necessary to the application made." We find that Dhaba has failed in this regard.

¶ 24 In challenging the status of the plaintiff as the mortgagee on the basis of the two Westdale allonges, Dhaba failed to provide this court with any document in the supporting record that would establish that the discovery responses upon which its entire argument is premised were

ever made a part of the trial court proceedings. Despite Dhaba's contention, there is no record that it ever introduced into evidence, or that the trial court ever admitted into evidence, the Westdale allonges at the May 9, 2019, hearing. Even though the plaintiff's response to the request to produce is part of the supporting record on appeal, this response is neither file-stamped by the circuit court nor attached to any pleading that was filed in the circuit court, so as to establish that the trial court ever looked at it, much less considered it in appointing a receiver in this case.

¶ 25 Moreover, while Dhaba here makes numerous arguments about what transpired at the May 9, 2019, hearing, it fails to provide us with any transcript whatsoever form that date or, for that matter, any acceptable substitute such as a bystanders report, or an agreed statement of facts, as authorized under Illinois Supreme Court Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)), from which we could review its contentions.

¶ 26 Our supreme court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); see also *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 38; *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303–B, ¶ 50) ("[I]t is neither the function nor the obligation of the Appellate Court to act as an advocate or search the record for error."). Without an adequate record preserving the claimed error, a reviewing court must presume the circuit court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2d at 157. "Any doubts resulting from the incompleteness of the record must be resolved against [the mortgagor-appellant]." *CitiMortgage*, 2014 IL App. (1st) 132430, ¶ 41.

¶ 27 In the present case, even though our review of the trial court's order granting the plaintiff's petition for the appointment of a receiver is *de novo,* under the supporting record provided to us by Dhaba, we have absolutely no basis of knowing what evidence and arguments were presented to the trial court in regard to this petition. While we are in possession of the petition itself, we are without any responding pleading from Dhaba so as to know what arguments it raised in opposition to the appointment of the receiver. In addition, the trial court's written order, granting the petition for receivership, makes absolutely no reference to or comments about, either the allonges, or any dispute between the parties regarding the plaintiff's status as the mortgagee. Without a record of what transpired at the hearing on May 9, 2019, we may only speculate as to whether the discovery responses were even brought to the attention of the trial court, and whether if they had, those allonges had any impact on the trial's ruling. As such, we must presume that the trial court's ruling was in conformity with the law and had a sufficient factual basis. See *CitiMortgage,* 2014 IL App. (1st) 132430, ¶ 41; *Corral*, 217 Ill. 2d at 157; *Foutch*, 99 Ill. 2d at 392.

¶ 28 Regardless, even if were to hold that Dhaba had presented an adequate and proper supporting record upon which its appeal of the plaintiff's standing could be determined, for the reasons that follow, we would nonetheless conclude that Dhaba's claims fail on the merits.

¶ 29 In this vein we being by noting that on appeal Dhaba does not question the validity of the two replacement promissory notes and the mortgages securing the debt. Dhaba also does not deny that it defaulted on those promissory notes, or that the language of the 2003 and 2011 mortgages allowed the appointment of a receiver. Nor does it expressly challenge the trial court's ruling that there was a reasonable probability that the plaintiff would prevail on a final hearing in the foreclosure proceedings. Rather, Dhaba narrowly asserts that it showed "good

cause" why it should remain in possession of the property throughout the foreclosure proceedings and why a receiver should not have been appointed, by showing that there was an issue of fact as to whether the plaintiff was the legal holder of the notes, so as to have standing to file the mortgage foreclosure action in the first place. For the reasons that follow, we disagree.

¶ 30 It is well-settled that a plaintiff in a mortgage foreclosure action "is not required to allege facts establishing standing[.]" *US Bank Nat'l Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 34. "[R]ather the burden rests with the defendant to plead and prove *lack* of standing." *Id.* (Emphasis added.); see also *CitiMortgage*, 2014 IL App (1st) 13240, ¶ 38. An action to foreclose upon a mortgage may be filed by a mortgagee, as "the holder of an indebtedness *** secured by a mortgage" or by an agent or successor of a mortgagee. 735 ILCS 5/15-1208 (West 2016)). Because under the Uniform Commercial Code, the party holding the note is presumed to own it (810 ILCS 5/5-310 (West 2016)), the IMFL does not require the plaintiff "to submit any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than a copy of the mortgage and note attached to the complaint." *CitiMortgage*, 2014 IL App (1st) 13240, ¶ 40. Accordingly, "[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." *Avdic*, 2014 IL App (1st) 121759, ¶ 34. Indeed, Illinois Supreme Court Rule 113(b) requires that "a copy of the note, as it currently exists, including all indorsements and allonges" be attached to the mortgage foreclosure complaint. Ill. S. Ct. R. 113(b) (eff. July 1, 2018).

¶ 31 In the present case, the plaintiff presented *prima facie* evidence that it owns the replacement promissory notes, simply by attaching copies of those promissory notes to its complaint. The allonges attached to and explained through the complaint and the affidavit of debt established the transfers of the promissory notes from the bank to WCII and form WCII to the plaintiff. In

addition, both the complaint and the affidavit of debt attached publicly recorded assignments of the recorded loan documents confirming the transfer of the two mortgages first from the bank to WCII and subsequently from WCII to the plaintiff.

¶ 32 Accordingly, the burden fell upon Dhaba to establish a lack of standing and thereby "good cause" to rebut the presumption in favor of the plaintiff's right to possession and the appointment of a receiver. Dhaba has done neither.

¶ 33 In his brief, Dhaba merely speculates that the plaintiff's responses to discovery "reveal that the chain of title is unclear," because of the additional Westdale allonges, only some of which are marked "void." Dhaba criticizes the plaintiff's refusal to produce the originals of these allonges, arguing that if the originals had been produced it would have been possible to determine whether, when, why and by whom they were voided, and conclusively establish their impact on the plaintiff's standing in this case. In thus speculating, however, Dhaba fails to recognize that originals are not a required element of proof in a mortgage foreclosure action (*Parkway Bank and Trust Co. v. Korzen*, 2013 Ill App (1st) 130380, ¶ 32), and that therefore, its demand to see the original Westdale allonges by no means shows "good cause" to deny the appointment of the receiver.

¶ 34 Nor does the fact that Dhaba's motion to dismiss the plaintiff's complaint remained pending constitute "good cause" to preclude any such appointment. The plain language of section 15-1701 of the IMFL, which creates a presumption in favor of granting a nonresidential mortgagee possession of the property, followed by an appointment of a receiver, governs "the right to possession "*during foreclosure*," and "[*p*]*rior to the entry of a judgment of foreclosure*." 735 ILCS 5/15-1701(a)-(b) (West 2016). There is no requirement under the IMFL that the mortgagor files its answer or has a ruling on a motion to dismiss before the trial court can appoint a

receiver. See *Id*. As such, were we to consider the merits of Dhaba's appeal, we would still find that there is no reason to reverse the finding of the trial court.

¶ 35 On appeal, Dhaba next contends that the trial court erred when it appointed an interim receiver because the statute does not permit such an appointment. Dhaba does not challenge any of the conditions, requirements or duties imposed on the receiver by the trial court. Instead, it takes issues with the court's use of the word "interim" in the title of the order. Dhaba contends that the court was not authorized to appoint an interim receiver.

¶ 36 Initially, we note that Dhaba's three sentence argument fails to provide both any meaningful reasoning or any citation to legal authority in support of this proposition. As our supreme court has aptly observed, "a reviewing court is not simply a depository in which a party may dump the burden of argument and research." *People ex rel. Illinois Dept. of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. A court of review is entitled to have the issues clearly defined and to be cited pertinent authority. *Id*. A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7), (i) (see Ill. S. Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013); see also *Vancura v. Katris*, 238 Ill.2d 352, 370 (2010) ("Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.")). "Failure to comply with the rule's requirements results in forfeiture." *E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. Accordingly, we find this argument forfeited for purposes of appeal.

¶ 37 III. CONCLUSION

¶ 38 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 39 Affirmed