2020 IL App (3d) 180436-U

Order filed May 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

U.S. BANK TRUST, N.A., as Trustee for LSF9 Master Participation Trust, Plaintiff-Appellee, v. AKANNI O. SALAKO, a/k/a AKANNI SALAKO; AYOOLA SALAKO, a/k/a AYOOLA O. SALAKO; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for St. Francis Mortgage Corporation; ARCHER BANK, s/b/m to Allegiance Community Bank; UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants (Akanni O. Salako, a/k/a Akanni Salako, Defendant-Appellant).	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-18-0436 Circuit No. 12-CH-5434 The Honorable Cory D. Lund, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: In an appeal in a mortgage foreclosure case, the appellate court found that the trial court properly considered the plaintiff's affidavit of amounts due and owing in support of the plaintiff's motion for summary judgment and properly granted summary judgment for the plaintiff, despite the defendant's claims that the plaintiff lacked capacity and standing to foreclose the mortgage. The appellate court, therefore, affirmed the trial court's ruling.

¶ 2 Lender, CitiMortgage, Inc. (CitiMortgage), brought an action against defendant, Akanni O. Salako, and others seeking to foreclose a mortgage held on certain real property in Will County, Illinois. CitiMortgage later assigned its interest in the note and mortgage to Federal National Mortgage Association (Fannie Mae), and Fannie Mae was substituted as the plaintiff in this case. During pretrial proceedings, Fannie Mae filed a motion for summary judgment on the foreclosure complaint. Defendant opposed the motion, claiming that Fannie Mae's affidavit of amounts due and owing was legally insufficient and that Fannie Mae lacked standing to foreclose the mortgage. Following a hearing, the trial court granted summary judgment for Fannie Mae and entered a judgment of foreclosure and sale. Fannie Mae later assigned the judgment to U.S. Bank Trust, N.A., as trustee for a certain trust (U.S. Bank Trust), and U.S. Bank Trust was substituted as the plaintiff in this case. After the property was sold at a sheriff's sale and the sale was confirmed by the trial court, defendant brought this appeal to challenge the trial court's grant of summary judgment. We affirm the trial court's ruling.

¶ 3 I. BACKGROUND

¶ 4 In October 2012, lender, CitiMortgage, filed a complaint in the trial court to foreclose a mortgage held on certain residential real property owned by defendant in Crete, Will County, Illinois. The complaint alleged that in September 2006, defendant borrowed $247,000 from CitiMortgage; that the debt was secured by a mortgage on the subject property; that defendant

had been in default on the loan since June 2012; that defendant currently owed nearly $227,000[1] in principal on the loan, plus interest, costs, fees, and advances; and that CitiMortgage was the mortgagee and current holder of the note.

¶ 5 A copy of the note, mortgage, and an assignment of the mortgage were attached to the complaint. The note was executed in September 2006 in the amount of $247,000. It was signed by defendant as the borrower; listed CitiMortgage as the lender; and was eventually indorsed, either to a specific person/entity (a special indorsement) or in blank.[2] The note indicated that the borrower's promises would be secured by a mortgage. The mortgage was executed at the same time as the note; was signed by defendant as the borrower and by defendant's spouse; listed Mortgage Electronic Registration Systems, Inc. (MERS), in its capacity as the lender's nominee, as the mortgagee; and was duly recorded. The assignment of the mortgage was dated June 2012 and was also duly recorded. In the assignment, MERS assigned any interest it had in the mortgage to CitiMortgage.

¶ 6 Over the next 5½ years, the parties litigated this case with various proceedings taking place in the trial court. In February 2014, CitiMortgage assigned its interest in the note and mortgage to Fannie Mae. Fannie Mae was later substituted for CitiMortgage as the plaintiff in this case.

¶ 7 In May 2015, defendant filed his answer, affirmative defenses, and counterclaim. In his answer, defendant denied that the note attached to the foreclosure complaint was a true copy of the note he had executed, denied that CitiMortgage was still the lender or the current holder of

[1] For the convenience of the reader, many of the amounts that were specifically listed in the trial court pleadings and supporting documents have been listed as approximate amounts in this order.

[2] One of the disputes that exists between the parties in this case is whether the indorsement on the note was a special indorsement (a specific indorsement to a third party) or a blank indorsement.

the note, denied that MERS was still the mortgagee, and denied that he owed the amount of money that was alleged. As one of his affirmative defenses, defendant claimed that CitiMortgage, MERS, and Fannie Mae all lacked standing to foreclose the mortgage because the underlying note had been specifically assigned by CitiMortgage to a third party, whose name was listed illegibly, by way of the special indorsement. Defendant also claimed, based upon information and belief, that "[p]laintiff" was unable to produce the original note.[3]

¶ 8 In October 2015, Fannie Mae filed an answer to defendant's affirmative defenses and denied defendant's claim that "[p]laintiff" lacked standing to foreclose the mortgage. Fannie Mae also denied defendant's allegation that "[p]laintiff" was unable to produce the original note.

¶ 9 In February 2017, Fannie Mae filed a motion for summary judgment on defendant's affirmative defenses, including defendant's affirmative defense of lack of standing. Fannie Mae claimed in the motion that defendant had failed to establish a lack of standing and had, instead, merely stated legal conclusions that were unsupported by facts. After a hearing, the trial court granted summary judgment for Fannie Mae on defendant's lack-of-standing affirmative defense.

¶ 10 In June 2017, during pretrial proceedings, Fannie Mae filed a motion for summary judgment on the mortgage foreclosure complaint. Attached to the motion were various supporting documents, including an affidavit of the amounts due and owing. The affidavit was signed by a person named Jennette Hall, was dated February 2, 2016, and was notarized. In the affidavit, Hall attested that: (1) she was a foreclosure specialist for Seterus, Inc., an authorized subservicer for Fannie Mae; (2) she had authority to make the affidavit on Seterus's behalf because she had personal knowledge of the facts contained in the affidavit by virtue of her

[3] It is not clear from defendant's answer whether defendant was claiming that the current plaintiff, Fannie Mae, or the prior plaintiff, CitiMortgage, was unable to produce the original note.

position at Seterus and her familiarity with its practices and procedures, with which she was involved on a daily basis as a routine function of her employment; (3) her personal knowledge was also based on her familiarity with the systems of record that Seterus used to create and record information related to residential mortgage loans that it serviced, including the process by which employees entered information in those systems; (4) she was familiar with those systems as she utilized them on a regular basis as a routine function of her employment; (5) she was familiar with the process by which employees entered information, as she had reviewed the training procedures and was an individual who was authorized and trained to access those records; (6) if called to testify at trial on this matter, she could competently testify as to the facts contained in the affidavit; (7) Seterus acquired the subservicing rights for defendant's loan on February 1, 2015, from CitiMortgage; (8) at the time of that transfer, defendant's loan was in default by nearly $50,000; (9) the amount due was based on her review of certain records; (10) a true and accurate copy of the payment history and the other documents that she had reviewed in making her calculations was attached to the affidavit; (11) Seterus used a program called MSP to automatically record and track mortgage payments; (12) that type of tracking and accounting program was recognized as standard in the industry; (13) when a mortgage payment was received, the following procedure was used to process and apply the payment and to create the records that she had reviewed; (14) the servicer's employees entered information relating to customer payments, principal, interest, fees, and other charges in the systems of record at a time when they had personal knowledge of the information; (15) the servicer authorized specific personnel trained to access, enter, and produce information from those records; (16) the record of recording and tracking mortgage payments was updated and saved to the computer record associated with the relevant loan number contemporaneous with the relevant activity on the loan;

(17) the record was made in the regular course of Seterus's business; (18) the entries reflecting defendant's payments in the instant case were made in accordance with the procedure detailed above, and those entries were made at or near the time that the payment was received; (19) MSP accurately recorded mortgage payments when properly operated; (20) in the present case, MSP was properly operated and accurately recorded defendant's mortgage payments; (21) to the extent that the business records of the loan in this case were created by the prior servicer, CitiMortgage, CitiMortgage's records for the loan were integrated and boarded into Seterus's systems, such that CitiMortgage's records concerning the loan were now part of Seterus's business records; (22) Seterus maintained quality control and verification procedures as part of the boarding process to ensure the accuracy of the boarded records; (23) it was the regular business practice of Seterus to integrate the prior servicer's records into Seterus's business records, and to rely upon the accuracy of those boarded records in providing its loan servicing functions; (24) CitiMortgage's records were integrated and relied upon by Seterus as part of Seterus's business records; (25) Fannie Mae was the holder of the note, which had been properly indorsed; (26) based upon the above, defendant failed to pay amounts that were due under the note; and (27) as of February 24, 2016, the amount of principal due and owing on defendants' loan was nearly $227,000, plus interest, costs, fees, and advances. As Hall had stated in the affidavit, a printout of various payment records related to the loan was attached to the affidavit. Some of the documents had a heading at the top that stated "CITI_Payment_History."

¶ 11 Defendant, who was represented by an attorney, filed a written response opposing the motion for summary judgment. In the response, defendant claimed first that Hall's affidavit was defective as support for Fannie Mae's motion for summary judgment because certain aspects of Hall's personal knowledge were lacking, because the records were not certified, and because the

records were printed by CitiMortgage at a time when Fannie Mae had already become the lender (due to the assignment). Defendant claimed second that a genuine issue of material fact existed as to whether "[p]laintiff"[4] had standing to foreclose the mortgage because CitiMortgage had assigned the note to a third party, whose name was listed illegibly, by way of the special indorsement at the end of the note.

¶ 12 Fannie Mae filed a reply to defendant's response and reiterated its previous position. Fannie Mae also asserted in its response that Hall's affidavit was sufficient to establish the amounts due and owing, that Fannie Mae had standing to foreclose the mortgage, and that Fannie Mae was entitled to a grant of summary judgment.

¶ 13 In August 2017, a hearing was held on the motion for summary judgment. At the conclusion of the hearing, the trial court granted Fannie Mae's motion and entered a judgment of foreclosure and sale. After the judgment of foreclosure and sale was entered, Fannie Mae assigned the judgment to U.S. Bank Trust, and U.S. Bank Trust was substituted as the plaintiff in this case. Defendant filed a motion to reconsider the trial court's grant of summary judgment, but the trial court denied the motion following a hearing. The property was later sold at a sheriff's sale, and the trial court subsequently confirmed the sale. Defendant appealed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues that the trial court erred in granting summary judgment for plaintiff (at that time, Fannie Mae) on the mortgage foreclosure complaint.[5] Defendant asserts

[4] At various times in this case, it is unclear from defendant's pleadings in the trial court whether defendant was referring to CitiMortgage, Fannie Mae, or U.S. Bank Trust (substituted as plaintiff later in the case) when defendant referred to "[p]laintiff" in the pleadings.

[5] For the purpose of simplicity and for the reader's convenience, from this point forward in this order, we will merely refer to the plaintiff in this case as "plaintiff" when possible and will not distinguish between CitiMortgage, Fannie Mae, and U.S. Bank Trust unless necessary to do so.

that summary judgment should not have been granted for plaintiff because: (1) plaintiff failed to present a sufficient affidavit to establish the amount of the default; and (2) plaintiff lacked both capacity and standing to foreclose the mortgage. We will address each of those arguments in turn.

¶ 16 A. Standard of Review and Applicable Legal Principles

¶ 17 The purpose of summary judgment is not to try a question of fact but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions on file, and affidavits, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2016); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Id.* In appeals from summary judgment rulings, the standard of review is *de novo*. *Id.* When *de novo* review applies, the appellate court performs the same analysis that the trial court would perform. *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43. A trial court's grant of summary judgment may be affirmed on any basis supported by the record. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 18 B. Insufficient Affidavit

¶ 19 As noted above, in support of his argument on appeal, defendant asserts first that summary judgment should not have been granted for plaintiff because plaintiff failed to present a sufficient affidavit to establish the amount of the default. More specifically, defendant contends that Hall's affidavit of the amounts due and owing failed to comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), was defective, and should have been stricken because: (1) Hall did not claim to have any personal knowledge of the mortgage servicing systems of CitiMortgage or Fannie Mae; (2) Hall had no personal knowledge regarding payments, or lack thereof, leading to the initial default balance of nearly $50,000; (3) Hall did not state whether the business records of the loan were created by CitiMortgage; (4) Hall did not state whether the specific CitiMortgage records were integrated and boarded into Seterus's system; (5) Hall did not claim any personal knowledge regarding how the records were derived or whether they were accurate; (6) the records were not certified; and (7) the records were printed by CitiMortgage at a time when Fannie Mae was the lender. For those reasons, defendant asks that we reverse the trial court's grant of summary judgment for plaintiff and that we remand this case for further proceedings.

¶ 20 Plaintiff (currently U.S. Bank Trust) argues that the trial court's ruling was proper and should be upheld. Plaintiff asserts that Hall's affidavit of the amounts due and owing was sufficient and constituted competent evidence of defendant's default. In making that assertion, plaintiff notes that defendant did not offer any challenge to plaintiff's calculations of the amount of the default and did not file any counteraffidavits in opposition to plaintiff's motion for summary judgment. Thus, plaintiff contends that the affidavits and other documents that it submitted are unrefuted and that there is no genuine issue of material fact that would prevent the entry of summary judgment for plaintiff. As to defendant's specific claims, plaintiff asserts that

the attached financial records show that Hall had sufficient personal knowledge to make the statements contained in the affidavit; that the entity that created the business records is irrelevant; that the prior servicer's business records may be admitted when there is nothing in the record to indicate a lack of trustworthiness as to those records; that Hall's affidavit and the business records were properly certified in that Hall attested in the affidavit that the payment records were true and correct and Hall's affidavit was notarized; that defendant's claim about the date of the business records is a trivial fact that does not give cause to deny plaintiff's motion for summary judgment; and that at most, defendant's concerns about Hall's personal knowledge affect the weight to be given to plaintiff's evidence but do not affect the admissibility of that evidence. For all of the reasons set forth, plaintiff asks that we reject defendant's argument regarding the sufficiency of Hall's affidavit and that we affirm the trial court's grant of summary judgment for plaintiff.

¶ 21 In resolving this issue, we are mindful of the legal principles that apply to summary judgment affidavits and to the admission of business records. First, as to summary judgment affidavits, we note that the purpose of such affidavits is to demonstrate the evidence that will be offered at trial so as to aid the trial court in its determination of whether a genuine issue of material fact exists. *Advertising Checking Bureau, Inc. v. Canal-Randolph Associates*, 101 Ill. App. 3d 140, 145 (1981). The requirements for summary judgment affidavits are set forth in Illinois Supreme Court Rule 191(a). Generally speaking, a summary judgment affidavit is proper under Rule 191(a) if it appears from the document as a whole that the affidavit is based upon the personal knowledge of the affiant and that there is a reasonable inference that the affiant could competently testify to the contents of the affidavit at trial. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22. More specifically, Rule 191(a) requires that summary

judgment affidavits: (1) shall be made on the personal knowledge of the affiant; (2) shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; (3) shall have attached to it sworn or certified copies of all documents upon which the affiant relies; (4) shall not consist of conclusions but of facts admissible in evidence; and (5) shall affirmatively show that the affiant, if sworn as a witness, could testify competently thereto. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *Avdic*, 2014 IL App (1st) 121759, ¶ 21. Summary judgment affidavits take the place of courtroom testimony and should satisfy the same requirements to be deemed competent for consideration. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. In ruling upon a motion for summary judgment, a trial court may not consider evidence that would be inadmissible at trial. *Id.*

¶ 22 Second, with regard to the admission of business records, we note that such records may be admitted into evidence as an exception to the hearsay rule if a proper foundation has been presented. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Avdic*, 2014 IL App (1st) 121759, ¶ 23. To lay a proper foundation for the admission of business records, the proponent must show that the records were made: (1) in the regular course of business; and (2) at or near the time of the event or occurrence. Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Avdic*, 2014 IL App (1st) 121759, ¶ 23. When the business records at issue are computer-generated records, the proper foundation for admission is slightly more complicated. See *Avdic*, 2014 IL App (1st) 121759, ¶ 25. The proponent must establish that: (1) the equipment that produced the records is recognized as standard; (2) the entries were made in the regular course of business at or near the time of the event recorded; and (3) the sources of the information, the method, and the time of preparation were such as to indicate that the records are trustworthy and to justify the admission of the

records. *Id.* Any lack of personal knowledge by the maker of the business records does not affect the admissibility of the records but may affect the amount of weight to be given to the records. *Id.* ¶ 29. When an affidavit with business records has been submitted in support of, or in opposition to, a motion for summary judgment, the trial court must inherently determine, in ruling upon the motion, whether the business records would be admissible at trial. See *Harris Bank Hinsdale, N.A. v. Caliendo,* 235 Ill. App. 3d 1013, 1025 (1992).

¶ 23 Having reviewed Hall's affidavit and the attached records in the present case, we find that Hall's affidavit of the amounts due and owing was legally sufficient. First, as to personal knowledge, Hall averred that she was a foreclosure specialist of Seterus, an authorized subservicer for Fannie Mae; that she had authority to make the statements in the affidavit on Seterus's behalf due to her personal knowledge and familiarity with Seterus's practices and procedures; that she was familiar with the systems of record that Seterus used to create and record information regarding the residential mortgage loans that Seterus serviced; that she used those systems on a regular basis as a routine function of her employment; that she was familiar with the process that employees used to enter information into those systems; that the amount due as stated in the affidavit was based upon her review of certain records; and that a true and accurate copy of those records was attached to the affidavit. When we consider all of the statements that Hall made in her affidavit that pertained to her personal knowledge, we are convinced that Hall's personal knowledge to make the remaining statements in her affidavit as to the amounts due and owing was adequately established. See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *Avdic,* 2014 IL App (1st) 121759, ¶¶ 21-25.

¶ 24 Although defendant suggests that Hall was required to have personal knowledge of CitiMortgage's system and of the procedure by which CitiMortgage's records were incorporated

into Seterus's system, such details are not required under the law. See Ill. S. Ct. Rs. 113(c)(2) (eff. May 1, 2013)[6], 191(a) (eff. Jan. 4, 2013), 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 19 (holding that an affidavit of amounts due and owing submitted by an employee of a loan servicing company in a mortgage foreclosure case complied with Supreme Court Rule 236 and was sufficient to support a grant of summary judgment for the company where the employee averred that she was familiar with the company's business process and that the company's records were made in the regular course of business); *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶¶ 43-46 (holding that the affidavit of a bank's vice president in a mortgage foreclosure case complied with Supreme Court Rule 236 and was sufficient to support a grant of summary judgment for the bank where the affiant averred that in her capacity as a vice president of the bank, she had access to the bank's business records relating to the loan; the affiant reviewed the loan records; the affiant had personal knowledge of how the loan records were kept and maintained; the loan records were maintained by the bank in the course of its regularly conducted business activities; the loan records were made at or near the time of the event by a person with knowledge; it was the bank's regular practice in the ordinary course of business to keep loan records; and certain specified amounts were due and owing on the loan); *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶¶ 12-14 (holding that the affidavit of a bank assistant vice president in a mortgage foreclosure case complied with Supreme Court Rule 236 and was sufficient to support a grant of summary judgment for the bank where the affiant attested that she was personally familiar with the bank's procedures for creating and

[6] The citation to Supreme Court Rule 113 is provided here for the benefit of the reader. Since the foreclosure complaint in this case was filed prior to the effective date of Rule 113, the additional requirements provided for in Rule 113 would not apply in this case.

maintaining its business records, the bank's records pertaining to the defendants' mortgage were made at or near the time of the relevant occurrence by persons with personal knowledge of the information in the records, the records were kept in the course of the bank's regularly conducted business activities, it was the bank's regular practice to make and keep such records, and a certain amount was due and owing on the loan); *Avdic*, 2014 IL App (1st) 121759, ¶¶ 7, 26-27, 29-30 (holding that a bank employee's affidavit in a mortgage foreclosure case complied with Supreme Court Rules 191 and 236 and was sufficient to support a grant of summary judgment in favor of the bank where the bank employee averred that she had been employed by the bank since 2002; the bank maintained records and a file for each of the loans it serviced, which included a loan payment history, computer-generated records, and copies of origination documents; her duties included reviewing and analyzing the bank's business and loan records; the computer software system that the bank used to maintain the records had been in place for the life of the defendant's payment history with the bank, was accounting software customarily used in the banking industry, was periodically checked for reliability, and was only accessible to trained and authorized personnel; she was familiar with, had been trained on, and was qualified to use that computer software system; she had personal knowledge that entries on the payment histories were made at or near the time of the occurrence in the bank's regular course of business; she had reviewed the business records and loan file for the defendant's loan; and a certain specified amount was due and owing on that loan). Furthermore, as plaintiff correctly notes, any lack in Hall's personal knowledge would only affect the weight to be given to that evidence and not the admissibility of that evidence. See *Avdic*, 2014 IL App (1st) 121759, ¶ 29.

¶ 25 Second, with regard to the accuracy of the records, Hall averred in extensive detail the process by which the records were developed, the timing of when the records were developed (at

or near the time when the business entries were made), that the computer records system that was used was standard in the industry, that Seterus had a quality control program in place to confirm that the records were accurate, and that Seterus's records system was working correctly at the time defendant's records were made. While defendant claims that the records were not properly certified, we are not persuaded by that contention. Hall averred in the affidavit that the copy of the records attached to the affidavit was true and correct, and the affidavit itself was notarized. Contrary to defendant's assertion on appeal, the fact that the records were printed by CitiMortgage when the loan had already been assigned to Fannie Mae does not in any way suggest that the records were improper or that the affidavit was insufficient.

¶ 26 Because we have found that Hall's affidavit satisfied all of the applicable legal requirements, we conclude that it was properly considered by the trial court in support of plaintiff's motion for summary judgment. Furthermore, because defendant did not present any counteraffidavits in the summary judgment proceeding, we find that there was no genuine issue of material fact as to the default or as to the amounts due and owing.

¶ 27 C. Capacity and Standing

¶ 28 Defendant asserts second in support of his argument on appeal that summary judgment should not have been granted for plaintiff because the evidence presented by plaintiff in the summary judgment proceeding showed that plaintiff did not have either capacity or standing to foreclose the mortgage or, at the very least, because the evidence showed that a genuine issue of material fact existed as to whether plaintiff had capacity and standing to foreclose the mortgage. Defendant contends that such an issue of material fact existed because the evidence presented in the summary judgment proceeding showed that CitiMortgage, the initial lender, had negotiated the note to a third party, whose name was listed illegibly, by way of the special indorsement at

the end of the note. Thus, according to defendant, CitiMortgage had no ability to assign the note (and mortgage) further and the subsequent assignment to Fannie Mae was invalid. In addition, defendant contends that only the third party listed in the indorsement (or its assignees), and not CitiMortgage, had the ability to foreclose the mortgage. In making those contentions, defendant points out that plaintiff did not present any evidence in the summary judgment proceeding to counter the appearance of a special indorsement on the note or to identify the third party to whom the note was assigned and that plaintiff did not present the original note to clarify whether the indorsement was made to a third party or in blank. For all of the reasons stated, defendant asks this court to find that a genuine issue of material fact exists as to plaintiff's capacity and standing to foreclose the mortgage, to reverse the trial court's grant of summary judgment on that basis, and to remand this case to the trial court for further proceedings.

¶ 29 Plaintiff argues that the trial court's grant of summary judgment was proper and should be upheld. Plaintiff asserts first that defendant has forfeited his claim of lack of standing because defendant did not file an appeal from the trial court's grant of partial summary judgment for plaintiff on defendant's lack-of-standing affirmative defense and has not made the transcript (or other record) from that proceeding part of the record in this appeal. Second, and in the alternative, plaintiff asserts that defendant's argument regarding lack of standing fails because it is based upon the erroneous premise that the note was specifically indorsed to a third party. To the contrary, plaintiff contends, the note was indorsed in blank. Plaintiff maintains, therefore, that it had standing to foreclose the mortgage as the holder of the note. In addition, and in response to defendant's other arguments, plaintiff asserts that: (1) the attachment of the note and the mortgage to the complaint was *prima facie* evidence that plaintiff owned the note; (2) plaintiff was not required to produce further evidence of ownership until defendant plead and

proved that plaintiff lacked standing; (3) plaintiff's allegation in the complaint that it was the mortgagee was sufficient under the Illinois Mortgage Foreclosure Law to set forth plaintiff's capacity to foreclose the mortgage; (4) defendant failed to request an opportunity to view the original note; and (5) there was no genuine issue of material fact as to plaintiff's standing and capacity to file the mortgage foreclosure complaint in this case. For all of the reasons set forth, plaintiff asks this court, although somewhat implicitly, to find that plaintiff had capacity and standing, to reject defendant's assertions to the contrary, and to affirm the trial court's grant of summary judgment for plaintiff.

¶ 30 The purpose of the doctrine of standing is to preclude persons who have no interest in a controversy from bringing suit and to ensure that issues are raised only by those parties that have a real interest in the outcome of the controversy. See *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). A plaintiff is not required to allege facts to establish standing. See *id*. at 224. Rather, lack of standing is an affirmative defense that must be plead and proven by the defendant. *Id*.

¶ 31 Under the Illinois Mortgage Foreclosure Law, an action to foreclose may be brought by the mortgagee (the holder of the indebtedness secured by the mortgage), an agent, or a successor of the mortgagee. See 735 ILCS 5/15-1208, 15-1504(a)(3)(N) (West 2012); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). To establish a *prima facie* case, the plaintiff in a mortgage foreclosure action must file a complaint that complies with the pleading requirements of section 15-1504(a) of the Mortgage Foreclosure Law and must attach a copy of the note and the mortgage to the complaint. See 735 ILCS 5/15-1504(a), (b) (West 2012); see also Ill. S. Ct. R. 113(a), (b) (eff. May 1, 2013) (adding additional documentary requirements for all foreclosure actions filed on or after the effective date of the

rule)[7]; *Farm Credit Bank of St. Louis v. Biethan*, 262 Ill. App. 3d 614, 622 (1994) (in order to establish a *prima facie* case of foreclosure, the plaintiff is only required to introduce the deed of trust and promissory note). The mere fact that a copy of the note is attached to the complaint is *prima facie* evidence that the plaintiff owns the note. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. Although the plaintiff in a mortgage foreclosure action is not required to allege facts necessary to establish standing, the plaintiff must allege in the complaint, as a pleading requirement, the capacity in which the plaintiff brings the action to foreclose. See 735 ILCS 5/15-1504(a)(3)(N) (West 2012).

¶ 32 Once the plaintiff has established a *prima facie* case for foreclosure, the burden shifts to the defendant to prove any affirmative defenses that the defendant has raised, including the lack of standing. See *Biethan*, 262 Ill. App. 3d at 622. Denials in a defendant's answer are not sufficient to create a genuine issue of material fact as necessary to prevent a grant of summary judgment for the plaintiff. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. To the contrary, if the plaintiff moves for summary judgment and supplies facts which, if uncontradicted, would entitle the plaintiff to a judgment as a matter of law, the defendant cannot rely on its pleadings alone to raise a genuine issue of material fact. *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986).

¶ 33 In the present case, before we address the merits of the parties' arguments on appeal, we must first address plaintiff's claim that defendant has forfeited his lack-of-standing argument because defendant failed to appeal the trial court's grant of partial summary judgment for plaintiff on defendant's lack-of-standing affirmative defense and failed to make the transcript from that proceeding part of the record on appeal. Plaintiff's claim of forfeiture notwithstanding,

[7] As noted previously, the additional requirements provided for in Supreme Court Rule 113 would not apply in this case since the foreclosure complaint in this case was filed before the effective date of Rule 113.

it is well settled under Illinois law that the final and appealable order in a mortgage foreclosure case is the trial court's order confirming the sale of the subject property. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. Therefore, we do not agree with plaintiff's assertion that defendant was required to appeal from the trial court's grant of partial summary judgment for plaintiff on defendant's lack-of-standing affirmative defense to preserve defendant's claim in that regard for later appeal. See *id.*

¶ 34 Having found that there is no forfeiture in the instant case, we turn to the merits of the parties' arguments on appeal. When we do so, we find that plaintiff's capacity and standing were properly established in the present case. First, as for capacity, plaintiff filed a mortgage foreclosure complaint in this case that complied with the pleading requirements of the Illinois Mortgage Foreclosure Law and set forth in that complaint, as required, the capacity in which it was bringing the foreclosure action. See 735 ILCS 5/15-1504(a)(3)(N) (West 2012). Plaintiff stated that its capacity was that of mortgagee and attached a copy of the note to the complaint. As indicated above, the attachment of the note gave rise to a presumption that plaintiff was the owner of the note at the time the suit was filed, and, along with the mortgage that was also attached to the complaint, provided sufficient proof of plaintiff's capacity—that plaintiff was, in fact, the mortgagee. See *Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 35 Second, as for standing, by filing a proper complaint with the proper documents attached, plaintiff established a *prima facie* case for mortgage foreclosure. See 735 ILCS 5/15-1504(a), (b) (West 2012); *Bietham*, 262 Ill. App. 3d at 622; *Korzen*, 2013 IL App (1st) 130380, ¶ 24. The burden then shifted to defendant to establish that plaintiff lacked standing to foreclose the mortgage. See *Bietham*, 262 Ill. App. 3d at 622. Despite that burden shift, defendant presented no additional evidence and sought, instead, to merely rely upon the appearance of the

indorsement on the note to create a genuine issue of material fact as to standing. However, defendant's mere suggestion—that the indorsement looked like it might have been whited out or changed—was not enough to create a genuine issue of material fact as to whether plaintiff had standing to foreclose the mortgage. See *OneWest Bank FSB v. Cielak*, 2016 IL App (3d) 150224, ¶ 32 (finding that the defendants' speculation as to the history of the note and the lack of an explanation for the voided blank indorsement on the note did not establish that the bank lacked standing to file the amended foreclosure complaint); *Champaign National Bank v. Babcock*, 273 Ill. App. 3d 292, 295 (1995) (finding that the defendant's statement that a copy of the note was marked "paid" did not sufficiently counter the bank's statement of facts that the debt was not paid). Defendant's allegation regarding standing was not sufficiently supported and was properly rejected by the trial court. See *Purtill*, 111 Ill. 2d at 240-41; *Avdic*, 2014 IL App (1st) 121759, ¶¶ 34-37; *Cielak*, 2016 IL App (3d) 150224, ¶ 32; *Babcock*, 273 Ill. App. 3d at 295.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 38 Affirmed.