

No. 1-13-3422

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GMAC MORTGAGE LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
MICHAL BOROWIAK; a/k/a MICHAEL BOROWIAK;)	
JP MORGAN CHASE BANK NATIONAL ASSOCIATION,)	
AS PURCHASER OF THE LOANS AND OTHER ASSETS)	
OF WASHINGTON MUTUAL BANK, FORMERLY)	No. 09 CH 3019
KNOWN WAS WASHINGTON MUTUAL BANK, FA)	
AS SUCCESSOR IN INTEREST TO LONG BEACH)	
MORTGAGE COMPANY FROM THE FEDERAL)	
DEPOSIT INSURANCE CORPORATION, ACTING AS)	
RECEIVER FOR THE SAVINGS BANK AND PURSUANT)	
TO ITS AUTHORITY,)	Honorable
)	David B. Atkins,
Defendants-Appellants.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Company's summary judgment motion in mortgage foreclosure action was affirmed where affidavit of company employee in support of motion contained sufficient factual detail to comply with Supreme Court Rule 191 governing affidavits; moreover, company had standing to foreclose mortgage.

¶ 2 Defendant Michal Borowiak appeals the circuit court's grant of summary judgment for plaintiff GMAC Mortgage, LLC (GMAC) on its foreclosure complaint. On appeal, Borowiak contends the affidavit of a bank employee in support of GMAC's summary judgment motion did not comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), and that the principal balance on the mortgage as stated in the affidavit is incorrect. He also asserts that GMAC lacks standing in this case because the mortgage was not validly assigned to that entity. For the reasons stated below, we affirm.

¶ 3 On January 26, 2009, GMAC filed a complaint to foreclose mortgage against Borowiak and other parties regarding the mortgage and note executed with respect to property at 5138 North Canfield Avenue in Norridge, Illinois. In the complaint, GMAC alleged that Borowiak obtained a mortgage on that property on June 23, 2006, but had not met the monthly payment obligations as of October 2008. The complaint stated the original indebtedness on the property was \$975,000, and that Borowiak was in default on the loan.

¶ 4 In April 2011, counsel for Borowiak filed an appearance; however, no answer to GMAC's foreclosure action was filed. In July 2011, GMAC moved for a default judgment. Attached to that motion was an affidavit of Lisa Clark, an authorized officer of GMAC with access to the business records of Borowiak's loan. Clark attested that the loan was originally made with a principal amount of \$975,000 and had a total amount due as of June 15, 2011, of \$1,201,992.85. Borowiak was given additional time to answer the complaint.

¶ 5 On August 26, 2011, Borowiak filed a motion to dismiss, claiming that GMAC was not allowed to collect the mortgage debt. On January 17, 2012, the circuit court denied Borowiak's motion to dismiss.

¶ 6 On January 31, 2012, Borowiak filed an answer to GMAC's complaint, raising nine affirmative defenses. Among those defenses, Borowiak asserted that GMAC was "not the owner of the note and mortgage and hereby has no standing to bring suit." On April 26, 2012, the circuit court granted GMAC's motion to strike the affirmative defenses.

¶ 7 On August 27, 2012, GMAC moved for summary judgment and for an entry of an order of default and judgment for foreclosure and sale. Attached to GMAC's motion was an affidavit of Lori Ann Dasch, who testified that she was the "authorized officer of GMAC Mortgage, LLC, and as such was authorized to make the affidavit. Dasch averred that in the "regular performance" of her job functions, she had access to and was familiar with GMAC's business records regarding the loan. Dasch attested that based on her review of those records, Borowiak had been in default on the loan since October 1, 2008. Dasch attested the unpaid principal balance on the loan was \$1,031,032.77 and that Borowiak owed a total of \$1,245,601.22 in principal, interest and expenses incurred by GMAC. Also attached to GMAC's motion was a payment history on Borowiak's loan.

¶ 8 In response to GMAC's motion for summary judgment, Borowiak argued that GMAC lacked standing to bring its complaint because GreenPoint Mortgage Funding had not assigned the note to GMAC. He also argued that Clark's affidavit was deficient on several points, including the fact that he owed more than \$1 million on a loan with an original principal balance of \$975,000. GMAC replied that Dasch's affidavit, not Clark's was the basis of its motion. GMAC also asserted that Borowiak had waived any challenge to GMAC's standing and that GreenPoint had transferred the note to GMAC.

¶ 9 On January 8, 2013, the circuit court granted summary judgment for GMAC and entered a judgment of foreclosure and sale. On October 28, 2013, the circuit court approved the sale, which had taken place in April 2013, with GMAC as the winning bidder. Borowiak filed a timely appeal of that order.

¶ 10 The circuit court's decision to grant a motion for summary judgment is reviewed *de novo*. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 18. Summary judgment is proper when the pleadings, depositions, 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 2008).

¶ 11 On appeal, Borowiak largely reasserts the points raised in his response to GMAC's motion for summary judgment. Instead of challenging Clark's affidavit, however, Borowiak contends on appeal that Dasch's affidavit did not comply with Supreme Court Rule 191. In addition, Borowiak contends the loan amount does not correspond with the principal balance stated in the complaint and that GMAC lacks standing to bring a foreclosure action.

¶ 12 We first address Borowiak's claims regarding Dasch's affidavit. Specifically, he contends Dasch's affidavit contains "disqualifying flaws and misrepresentations similar to those" in the affidavit of Clark. Borowiak asserts Dasch's affidavit did not provide sufficient detail as to her "relationship" with GMAC because the affidavit did not state her employer, her length of employment, her job title or "any basis for her authorization" by GMAC.

¶ 13 The plaintiff responds, and we agree, that Borowiak waived any challenge to Dasch's affidavit by failing to raise it in the circuit court, as he did his similar protest to the affidavit of

Clark. See *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 15 (1989). Even had Borowiak preserved this argument for appeal, we would not find a deficiency in Dasch's affidavit.

¶ 14 Supreme Court Rule 191(a) governs the form of affidavits used in connection with motions for summary judgment. Pursuant to the rule, such affidavits "shall be made on the personal knowledge of the affiants" and "shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Rule 191 is met when it appears from the document as a whole that the affidavit is based upon the affiant's personal knowledge, and there is a reasonable inference the affiant could competently testify to its contents at trial. *U.S. Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22.

¶ 15 Dasch's affidavit stated she was the "authorized officer of GMAC Mortgage, LLC" and "servicer for GMAC Mortgage, LLC." She averred that she had personal knowledge of the facts stated therein and had access to GMAC's business records relating to the servicing of the mortgage loan obtained by Borowiak. Contrary to Borowiak's assertions on appeal, Dasch's affidavit describes her position with GMAC and the basis of her ability to attest to the company's records. Although the affidavit does not state the length of Dasch's affiliation with GMAC, we do not find that omission negates the affirmative attestations contained in the affidavit because where it appears from the affidavit as a whole that the affiant could competently testify to the contents, any technical insufficiencies in the affidavit should be disregarded. See *Kirby*, 190 Ill. App. 3d at 15.

¶ 16 Borowiak also asserts that a material issue of fact exists that precludes summary judgment because the original note on the mortgage stated a principal balance of \$975,000, which differs from the amount of unpaid principal balance stated in Dasch's affidavit of

\$1,031,032.77. As GMAC explained in the trial court, and as a review of the documents in the record confirms, Borowiak entered into a loan with negative amortization, meaning that the interest portion of his mortgage payment, *i.e.*, the interest paid by Borowiak, was less than the monthly interest accrued on the loan.

¶ 17 Borowiak's remaining contention on appeal is that GMAC lacks standing to bring the foreclosure complaint. The record indicates that argument was included in Borowiak's answer to the complaint but after the circuit court granted GMAC's motion to strike his affirmative defenses, Borowiak did not replead a defense of GMAC's lack of standing. Alleging lack of standing is an affirmative defense in a civil case, which a defendant waives if not raised in a timely fashion in the circuit court. *Avdic*, 2014 IL App (1st) 121759, ¶ 34. We note that after the circuit court struck Borowiak's affirmative defenses, including the lack of standing, Borowiak later reiterated that assertion in response to GMAC's motion for summary judgment. Therefore, because he raised the contention during the summary judgment proceedings, Borowiak can be said to have preserved his argument for our review. See *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 15 (theories that are not raised during summary judgment proceedings are waived).

¶ 18 However, even though Borowiak's argument has been preserved, we find that GMAC has standing in this case. A foreclosure action may be pursued by the legal holder of the indebtedness, among other parties. *Avdic*, 2014 IL App (1st) 121759, ¶ 35. A mortgagee is the legal holder of an indebtedness or their successor, and a mortgage assignee has standing to bring a foreclosure action. 735 ILCS 5/15-1208 (West 2008).

¶ 19 In its complaint, GMAC pled that the mortgagee was "Mortgage Electronic Registration Systems, Inc. as Nominee for GreenPoint Mortgage Funding, Inc." Dasch stated in her affidavit that GMAC was the "holder of the promissory note and mortgage at issue in this proceeding." GMAC states in its brief to this court that GreenPoint transferred the note, endorsed in blank to GMAC, meaning it was not "specially" endorsed over to any particular named payee. A note endorsed in blank is payable to the bearer, which in this case was GMAC. See 810 ILCS 5/3-205(b) (West 2008). By producing the note, GMAC demonstrated that it had an interest in the mortgage. See *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26 (the mere attachment of a note to a mortgage foreclosure complaint is *prima facie* evidence that the plaintiff owns the note). Borowiak has not raised any contentions on appeal to counter those facts. For those reasons, GMAC had standing to bring this foreclosure action.

¶ 20 In summary, Borowiak has not raised a genuine issue of material fact that would preclude summary judgment. Accordingly, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.