2014 IL App (1st) 130242-U

FOURTH DIVISION
May 22, 2014

No. 1-13-0242

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	
ANTHONY HERNANDEZ, a/k/a ANTHONY D. HERNANDEZ,	)	
	)	
	)	No. 09 CH 8232
Defendant-Appellant,	)	
	)	
(MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; COUNTRYWIDE HOME LOANS, INC.; UNKNOWN OWNERS; and NONRECORD CLAIMANTS,	)	
	)	Honorable
	)	Anthony C. Kyriakopoulos,
Defendants).	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's orders (1) denying defendant's *pro se* motion in a mortgage foreclosure action where, although defendant failed to appear at scheduled hearing, motion contained nothing more than unsupported legal conclusions and (2) denying defendant's motion to vacate where it did not show that justice was not done.

¶ 2 This appeal involves a mortgage foreclosure action filed by plaintiff,[1] Bank of America, N.A., against defendant, Anthony Hernandez and others, and the subsequent judicial sale involving property located at 4423 West Walton Street in Chicago. Defendant now contends that the trial court lacked personal jurisdiction over him because the service by publication in 2009 was improper. Defendant further contends that the court erred in denying his 2012 motion to vacate all judgments and orders as void. For the reasons that follow, we affirm.

¶ 3 RULE 341 VIOLATIONS

¶ 4 Defendant's brief fails to comply with Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013) including subsection 341(h)(6) which requires a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Although the brief, similar to defendant's filings in the trial court, is replete with claims that plaintiff had unclean hands, operated in bad faith, and committed a fraud upon the court, defendant has failed to support these assertions with proper citation to facts in the record. Thus, we have provided our own detailed, admittedly lengthy, chronology of the relevant events in order to aid in understanding our disposition of this appeal.

¶ 5 BACKGROUND

¶ 6 On November 15, 2006, defendant executed a mortgage in the amount of $75,000 and pledged, as security for that loan, the property commonly known as 4423 W. Walton Street in Chicago. Defendant stopped making payments after June 2008. Plaintiff granted him a repayment plan on October 27, 2008, which allowed for monthly payments of $732.60 for

[1] The complaint was filed by Countrywide Home Loans Servicing, L.P., which later changed its name, and then merged with plaintiff, Bank of America, N.A. We shall refer to each of these parties as "plaintiff."

November 2008 through February 2009. However, defendant failed to pay the required upfront funds of $1,000 due by October 31, 2008, and also failed to make the first repayment plan payment. Plaintiff cancelled the repayment plan on November 6, 2008.

¶ 7 On February 24, 2009, plaintiff filed a complaint to foreclose mortgage alleging that defendant had not paid the monthly installments from July 1, 2008, through February 24, 2009. On February 25, 2009, plaintiff created a reinstatement calculation in the amount of $5,875.30 which plaintiff sent to defendant, informing him that the loan was in foreclosure. After plaintiff's attempts to personally serve defendant failed, service was effectuated by publication in March 2009.[2]

¶ 8 On April 13, 2009, plaintiff received notification from the Cook County Treasurer that defendant's property taxes were delinquent. Pursuant to the terms of the loan, plaintiff paid the delinquent amount of $8,928.99, which included the penalty, and established an escrow account for the loan.

¶ 9 On July 1, 2009, plaintiff filed a motion for entry of an order of default and judgment of foreclosure and sale. Defendant has contended on appeal that the parties entered into a loan modification or workout agreement at this time but the record does not support this assertion. The record contains no copy of any agreement or permanent loan modification. Defendant cites only to a copy of a one-page document from plaintiff. Although the document indicates that a loan modification had been approved, it further states that defendant would be receiving "a package of documents in the mail," and that he should contact plaintiff if he did not receive the workout package by September 14, 2009. The supplemental record contains additional

[2] Defendant later asserted in a motion that he sent plaintiff requests to "validate and verify" the debt, plaintiff received the requests on March 2, 2009, and March 24, 2009, and plaintiff failed to properly respond.

documentation from plaintiff which notes that defendant's "monthly payments were increased in order to cover the principal and interest portion of [his] loan payment, and additional contribution needed each month to build the balance in [his] escrow account for [his] next tax installment, and the payment of the projected escrow shortage." The total monthly payment was increased, effective with the September 1, 2009 installment, to $1,590.25 ($467.90 for principal and interest; $225.61 for tax payment; $859.29 for shortage payment; and $37.45 as a reserve requirement). Although defendant claims that he started making payments of $1,590.91 per month in July 2009, when he received the email from plaintiff, the record shows that his payments did not start until January 2010.[3]

¶ 10 On September 24, 2009, plaintiff filed its motion for entry of an order of default and judgment of foreclosure and sale. In its motion, plaintiff noted that defendant had been served by publication on March 17, 2009, 60 or more days had passed, and no appearances or answers had been filed. Plaintiff sent notice of the motion to defendant at 4423 West Walton Street in Chicago, informing him that the motion was set for hearing on October 7, 2009, in Daley Center courtroom 2810 at 3 p.m.

¶ 11 On September 30, 2009, defendant, *pro se*, filed a special limited appearance and application to defend as an indigent person, which the court allowed. On October 1, 2009, defendant, unrepresented by counsel, filed a motion,[4] untitled, challenging the court's jurisdiction over him, and making substantive claims regarding the mortgage foreclosure complaint.

[3] Defendant cites to portions of the record containing 28 customer receipts from plaintiff for "principal only," "regular," and "escrow" payments in various amounts between $9.75 and $1,847.65; all of the receipts are dated between January 2010 and March 2011.

[4] Defendant presented his appearance as "Sui Juris and not Pro-Se by special limited appearance untrained in the law in a best effort to defend [his] due process rights, home, equity and property interests and property rights."

¶ 12 On October 7, 2009, both plaintiff's counsel and defendant appeared in court. It is important to note that defendant set his motion for hearing on October 7, 2009, in courtroom 2810 at 3 p.m, which was the same place and time that plaintiff's motion had been scheduled for hearing. In fact, defendant stated in his motion that, on September 27, 2009, he had received notice of plaintiff's motion. Although defendant also complained in his motion that plaintiff's notice was deficient, defendant conceded that "[w]ith the aid of a Chancery clerk, [he] was able to find the actual case that was initiated against [him] and [his] property as case number 09 CH 08232 not the case number 09 CH 8232." Therefore, the contentions in defendant's brief on appeal that (1) defendant never received a copy of plaintiff's motion; and (2) defendant "learned for the first time" that plaintiff had filed a motion when he appeared at the October 7, 2009 court hearing, seem to be patently false. In any event, the trial court scheduled a hearing on defendant's motion for October 21, 2009; plaintiff's motion was entered and continued pending the ruling on defendant's motion.

¶ 13 On October 21, 2009, plaintiff filed an affidavit in support of its allegations. Defendant failed to appear at the scheduled hearing.[5] The court entered an order of default and entered judgment in plaintiff's favor on the mortgage foreclosure and sale, with redemption expiring January 22, 2010. The court also denied defendant's motion. The record contains no copy of a transcript of the hearing or bystander report. According to plaintiff, "[a]fter the entry of judgment, the case was voluntarily stayed as the parties explored loss mitigation options."

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[5] Defendant has made vague, unsupported and contradictory assertions regarding his failure to appear. He has claimed that he "was made to believe that the foreclosure was withdrawn" and has also said he believed it was not necessary to appear at the hearing because unidentified employees of plaintiff had assured him that he did not have to pursue his motion to quash because all collection activity would be terminated. However, defendant has also claimed that he did not fail to appear but, instead, went to the wrong courtroom and found nobody there.

¶ 14 On January 7, 2010, plaintiff served defendant with a notice of sale of the premises scheduled for January 25, 2010. Defendant does not address the notice of sale and contends he was "unaware" of the October 21, 2009 judgment, so he "continued" to make monthly payments pursuant to a workout agreement. However, as noted earlier, there is no evidence of any payments being made pursuant to any agreement. Instead, the record shows defendant "started" making payments again on January 22, 2010.

¶ 15 On June 16, 2011, at defendant's request, plaintiff sent him a loan history statement that provided a detailed outline of transactions for the mortgage loan. According to defendant, he reviewed the statement "and noticed that the principal was not being reduced." The record indicates that, at that time, defendant stopped making payments. Defendant has made the unsupported assertion that he continued making payments until August 2011 when plaintiff "refused to take" his August payment.

¶ 16 On October 26, 2011, plaintiff served defendant with a notice of sale of the premises, pursuant to the 2009 foreclosure judgment. The notice informed defendant that the sale was scheduled for December 2, 2011. The sale took place on January 5, 2012, and plaintiff was the successful bidder.

¶ 17 On January 12, 2012, plaintiff filed a motion to approve the sale. On January 17, 2012, plaintiff sent defendant a notice informing him that the motion was scheduled for hearing on February 9, 2012 at 3 p.m. in courtroom 2810.

¶ 18 On February 9, 2012, the date scheduled for hearing plaintiff's motion, defendant filed a 14-page "Emergency Motion in the Form of a 2-1401 Motion to Render All Judgments and Orders Void Based On Unclean Hands, Bad Faith, Unfair Dealing, Possible Wrongful Foreclosure and Fraud Upon The Court," this time through counsel, who had not yet filed an

appearance. The court entered an order confirming the judicial sale. On February 10, 2012, defendant's counsel filed his appearance.

¶ 19 On March 2, 2012, defendant re-noticed his motion. The motion is identical to the one filed on February 9, 2012, except for a hand-written change from "2-1401" to "2-1301." On June 6, 2012, the court stayed the order of possession and entered a briefing schedule on defendant's motion. Plaintiff filed its timely response on July 5, 2012. Defendant failed to file his reply by the due date of August 2, 2012.

¶ 20 On September 17, 2012, the day scheduled for hearing, with counsel present for both parties, the court allowed defendant's motion to file his reply *instanter*. The court entered a written order stating that, by the end of the day, plaintiff was to submit to the court copies of defendant's "initial motion to quash" and the "order denying defendant's motion." The order further stated that, upon receipt of the motion and corresponding order, the court would "issue a ruling by mail."

¶ 21 The court issued its ruling on November 21, 2012, denying defendant's motion.[6] On February 15, 2013, this court granted defendant's motion to file a late notice of appeal. As discussed below, we subsequently ordered defendant to file the supplemental record that he referenced in his opening brief.

¶ 22 ANALYSIS

¶ 23 As noted earlier, defendant's brief failed to comply with Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013). Additionally, his brief did not comply with Rule 341(h)(7) which requires the argument portion to "contain the contentions of the appellant and the reasons therefor, with

[6] Defendant asserts on appeal, without support, that neither defendant nor his attorney received a copy of that ruling. This claim is similar to defendant's other claims – all without support in the record - that he never received certain notices, despite proof of service in the record.

citation of the authorities and *the pages of the record relied on*." (Emphasis added.) Defendant made numerous references to a "supplemental record," even though none had been filed. Plaintiff noted this deficiency in its response brief filed on February 13, 2014, and further noted that "[a]lthough defendant stated in his August 22, 2013, Motion for Extension of Time to File Initial Brief that a motion to supplement the record with both his reply and a transcript would be forthcoming, no such motion was ever filed, and no supplemental record exists."

¶ 24 It is the appellant's burden to provide a reviewing court with a sufficiently complete record to allow for meaningful appellate review. *Foutch v.O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a sufficiently complete record, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the trial court's ruling had a sufficient legal and factual basis. *Id*. at 391-92. Plaintiff argued that this court should disregard any reference by defendant to a supplemental record. Instead, we decided to allow defendant the opportunity to provide a complete record and ordered him to file the supplemental record referenced in his brief, which he did on May 1, 2014. No reply brief has been filed.

¶ 25 October 1, 2009 *Pro Se* Motion

¶ 26 We first address defendant's contention that the trial court erred in denying his *pro se* motion filed on October 1, 2009. Defendant challenged the court's personal jurisdiction, claiming that plaintiff's attempts to personally serve him at the subject property did not constitute appropriate and diligent service and asserting that he had lived at the subject property with his family since 2004. Among defendant's numerous claims, he asserted that plaintiff had "unclean hands" and had misinformed the court regarding the attempts at service. He also challenged the assignment of the note and mortgage and alleged violations of the Federal "fair debt collection practices act" and "other consumer rights laws."

¶ 27 Plaintiff has correctly noted that, since the trial court's ruling on the issue of personal jurisdiction was based entirely on documentary evidence, our review is *de novo.* See *MacNeil v. Trambert*, 401 Ill. App. 3d 1077, 1080 (2010). "A reviewing court addressing a challenge to personal jurisdiction must resolve in favor of the plaintiff any conflicts in the pleadings and affidavits [citation]; however, a plaintiff's *prima facie* case for jurisdiction can be overcome by a defendant's uncontroverted evidence that defeats jurisdiction." *Id.*

¶ 28 Where a mortgagee in a foreclosure action files an affidavit showing that the mortgagor cannot be found on due inquiry so that process cannot be served upon him, the mortgagor can challenge the affidavit *"by filing an affidavit* showing that upon inquiry he could have been found." (Emphasis added.) *Household Finance Corp., III v. Volpert*, 227 Ill. App. 3d 453, 455 (1992). Although defendant challenged the affidavits submitted by plaintiff, defendant submitted no affidavits or exhibits in support of his October 1, 2009 motion; at least none appear in the record.[7] Section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301 (West 2010)) provides that a motion which challenges personal jurisdiction, must be supported by an affidavit setting forth the facts that constitute the basis for the objection *unless* those facts "are apparent from papers already on file in the case." The papers on file included affidavits submitted by plaintiff from two special process servers, Ryan Ben and Ryan Gatz. Mr. Ben swore that service was attempted on defendant at the subject property at 9:15 on February 28, 2009 and it was discovered that defendant did not reside at the property, two apartments were rented, and the landlord did not live at the property. Mr. Ben further swore that service was

[7] Plaintiff notes that the copy of defendant's motion sent to plaintiff's counsel included a handwritten document purporting to be a sworn statement. However, plaintiff, as well as this court, is not certain if the document was filed.

attempted at 3908 W. North Avenue in Chicago[8] and it was discovered that defendant did not reside there. Special process server Ryan Gatz swore that he discontinued attempting service at the 4423 W. Walton Street address because "2 Apartments all rented out landlord does not live at property." In a second affidavit, Mr. Gatz stated he discontinued attempting service at 3908 W. North Avenue in Chicago because "[t]hey said they do not know Anthony Hernandez." To the extent defendant is now contending that a jurisdictional defect can be ascertained from "papers already on file in the case," *i.e.* the affidavits submitted by plaintiff, his argument is meritless. The only reason asserted in defendant's motion was "it is evident that there is an artifice to falsify information as two different process servers both with the first name Ryan and different last names Gatz and Ben, both swear by affidavit as to gaving *[sic*] attempeted *[sic*] service on the same day at the same time at the same location." As plaintiff notes, this is a misreading of the service affidavits. Mr. Gatz did not stop trying to serve defendant *because he was there* with Mr. Ben. Mr. Ben's affidavit stated that service was attempted. Mr. Gatz swore that he discontinued service based on Mr. Ben's failed service attempts.

¶ 29 Defendant also raised numerous substantive arguments in his motion. Although defendant's motion did not articulate under which section of the Code of Civil Procedure it was brought, the trial court's ruling referenced section 2-619.1. Section 2-619.1 of the Code allows a defendant to file a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2010). Under either section 2-619 or 2-615 of the Code our review is *de novo*. *Harris, N.A. v. Sauk Village Development, LLC*, 2012 IL App (1st) 120817, ¶ 14 (citing *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361(2009)). However,

[8] Mr. Ben's affidavit also outlines the attempts made to locate defendant through various databases which disclosed evidence that defendant "did or [was] believed to reside" at that address.

we agree with plaintiff's characterization of defendant's initial *pro se* motion as "a collection of unsupported legal conclusions." We conclude the trial court was correct in denying defendant's motion.

¶ 30 February 9, 2012 Motion to Render All Judgments and Orders Void

¶ 31 We next address the trial court's denial of defendant's 14-page "Emergency Motion in the Form of a 2-1301 Motion to Render All Judgments and Orders Void Based On Unclean Hands, Bad Faith, Unfair Dealing, Possible Wrongful Foreclosure and Fraud Upon The Court." Although defendant's brief does not contain the standard of review, plaintiff correctly notes that a trial court's decision to deny a motion to vacate is reviewed for an abuse of discretion. See, *e.g.*, *Standard Bank and Trust Co. v. Madonia*, 2011 Il App (1st) 103516, ¶ 8. Section 2–1301(e) of the Code of Civil Procedure provides that a trial court "may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2–1301(e) (West 2012); *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 11. The moving party has the burden of showing sufficient grounds to vacate a judgment of default. *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 27. We review the circuit court's denial of a section 2–1301 motion to vacate for an abuse of discretion. *Id*. ¶ 26. "An abuse of discretion occurs when the trial court acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted. [Citation.]" (Internal quotation marks omitted.) *Id*. Under the Foreclosure Law, after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by the mandatory provisions of section 15–1508(b) [(735 ILCS 5/15–1508(b) (West 2010))]." *McCluskey*, 2013 IL 115469, ¶ 18. Also,

we review the trial court's judgment, not its reasoning, and we may affirm the judgment for any reason the record supports, regardless of whether the trial court relied on that reason, and regardless of whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 32 In denying defendant's motion to vacate on November 21, 2012, the trial court noted that defendant's motion raised "a plethora of alleged violations and improprieties conducted by Plaintiff against the defendant." The court stated "it is hard for the Court to decipher what theories and evidence it should consider in vacating the order approving sale." The court determined that defendant's arguments could be "lumped into three categories: 1) Defendant never defaulted on the loan; 2) the current plaintiff has no standing to bring the instant lawsuit; [and] 3) the defendant was never served in this matter." The court declined to consider the first two arguments, finding that they were untimely and should have been raised prior to the judgment of foreclosure. The court further noted that defendant "had ample time to bring forth his arguments between October 2009 and February 2012 when the judicial sale was approved." The court also concluded that, apart from being untimely, none of defendant's allegations were well pled and involved nothing more than "wild speculation and innuendo." Therefore, the court declined to vacate any orders under section 2-1301.

¶ 33 Defendant brought his motion to vacate pursuant to section 2-1301 of the Code. However, during the pendency of this appeal, the Illinois Supreme Court, in *Wells Fargo Bank, N.A. v. Katie McCluskey*, 2013 IL 115469, explained that, after the judicial sale has taken place, allowing a party to challenge a default judgment through a section 2-1301 motion to vacate, which requires only traditional considerations of due diligence and whether there is a meritorious defense, was inconsistent with the more restrictive procedures set forth in the Foreclosure Law.

Id., ¶ 25. "Pursuant to section 15–1508(b), upon motion and notice, the court shall confirm the sale unless the court finds that: (i) proper notice of the sale was not given; (ii) the terms of the sale were unconscionable; (iii) the sale was conducted fraudulently; or (iv) *justice was otherwise not done*." (Emphasis added.) *Id*. at ¶ 18 (citing 735 ILCS 5/15-1508(b) (West 2010)). Therefore, "a party seeking to set aside the sale at that point is limited to the three specified grounds related to defects in the sale proceedings, or to the fourth ground, that 'justice was otherwise not done.' [Citation.]" *Id*.

¶ 34 As part of its analysis, the *McCluskey* court looked to the statutory framework of the Foreclosure Law. *Id*. at ¶ 18. As the court explained: "As this statutory framework reveals, once a motion to confirm the sale under section 15–1508(b) has been filed, the court has discretion to see that justice has been done, but the balance of interests has shifted between the parties." *Id*. at ¶ 25. "At this stage of the proceedings, objections to the confirmation under section 15-1508(b)(iv) cannot be based simply on a meritorious pleading defense to the underlying foreclosure complaint." *Id*. "To allow the borrower to utilize the standards of a section 2-1301(e) motion to both set aside the judicial sale and also unravel the underlying foreclosure judgment — after being given ample statutory opportunity to respond to the allegations of the complaint, and after being fully informed of the court process — would indeed be inconsistent with the need to establish stability in the judicial sale process." *Id*. "Furthermore, it would allow the borrower to circumvent the time limitations for redemption and reinstatement and essentially allow for a revival of those provisions that is otherwise explicitly precluded by the Foreclosure Law." *Id*. (citing 735 ILCS 5/15–1603(c)(1) (West 2010)). The *McCluskey* court further explained that the borrower "must establish under section 15–1508(b)(iv) that justice was not otherwise done because either the lender, through fraud or misrepresentation, prevented the

borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *Id*. at ¶ 26. Defendant did not meet this burden. Although defendant asserted in his motion that plaintiff came to court with unclean hands, in bad faith, and committed fraud upon the court, plaintiff responded in the trial court that defendant had failed to allege any facts in support of these conclusions. We agree.

¶ 35 "The facts which constitute an alleged fraud must be pleaded with sufficient specificity, particularity and certainty to apprise the opposing party of what he is called upon to answer." *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989). "The pleadings must contain specific allegations of facts from which fraud is the necessary or probable inference." *Id*. The party alleging fraud "must at least plead with sufficient particularity facts establishing the elements of fraud, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Id*. Neither defendant's motion, nor his affidavit in support of his motion, alleged with specificity, certainty and particularity the facts necessary to establish the elements of fraud. He also failed to show that plaintiff came to court with "unclean hands." The equitable doctrine of “unclean hands” precludes a party seeking equitable relief from taking advantage of his own wrong. *State Bank of Geneva v. Sorenson,* 167 Ill. App. 3d 674, 680 (1988). "[E]quitable relief may be denied if the party seeking that relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought, and further provided that the misconduct, fraud, or bad faith is in connection with the transaction under consideration." *Id.* In the mortgage foreclosure context, the behavior complained of "must arise out of the transaction in which the note and mortgage were given." (Internal quotation marks omitted.) *Klehm v. Grecian Chalet, Ltd*., 164 Ill. App.

3d 610, 615 (1987). Defendant's claim of "unclean hands" is meritless. Apart from the fact that his assertions regarding the default are vague and unsupported, none of his assertions apply to the transaction in which the note and mortgage were given.

¶ 36 We next address defendant's argument that the court lacked personal jurisdiction. We recognize "the basic legal principle that a judgment entered without jurisdiction over the parties is void *ab initio*." *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 19; *Cf. Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 16 (noting that "nothing in section 15-1509 indicates that the legislature sought to make foreclosure judgments take effect and deprive owners of their properties when the trial court lacked personal jurisdiction over the owners."). As we have already concluded, however, the trial court's 2009 decision denying defendant's motion based on lack of personal jurisdiction was correct. The trial court here addressed defendant's reincorporation of his prior motion to quash service of process and concluded that there were no well pled facts that would support defendant's allegation that service was improper or that false returns were filed. The court noted that "[n]either the old motion, nor any returns of the special process server are attached to Defendant's motion." Noting it had obtained a copy of defendant's October 7, 2009 motion, the court found "no reason to alter its prior ruling denying the motion." The court also declined to consider new grounds raised in defendant's reply because they had not been raised in the initial motion.

¶ 37 On appeal, defendant now argues that the trial court erred in not considering the new grounds raised in defendant's reply. Specifically, defendant challenged plaintiff's service affidavits pursuant to this court's opinion in *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213. In *Brewer*, a mortgage foreclosure action, this court held that the mortgagee did not meet the requirements for service by publication because the affidavits were

written in the passive voice and the mortgagee presented no affidavits in which the affiant swore that he *personally* took the necessary steps to serve process. The *Brewer* court remanded the case to the trial court for an evidentiary hearing to determine whether the mortgagee actually took the adequate steps to justify service by publication. *Id.*, ¶ 30. *Brewer* is distinguishable and no remand is necessary. While it is true that the affidavit of one of the process servers, Ryan Ben, is in the passive voice ("attempt made," "it was discovered," and "service of process was unable to be completed") and does not state what the steps the affiant took *personally* ("we attempted to locate the defendant" and "the process server was unable to come in contact with the within named defendant"), the affidavit of another process server, Ryan Gatz, does not suffer from these alleged inadequacies. As defendant concedes, two affidavits by Ryan Gatz state that he personally attempted service. Thus, although the trial court did not consider defendant's argument regarding *Brewer*, we conclude that it is meritless.

¶ 38 Defendant has raised the argument on appeal that plaintiff lacked standing. The trial court ruled that defendant forfeited his argument. Pursuant to *McCluskey*, it was too late for defendant to assert the defense of standing once plaintiff had moved for confirmation of the judicial sale. *McCluskey*, 2013 IL 115469, ¶ 26. We also conclude that defendant's argument is meritless.

¶ 39 The purpose of the doctrine of standing is to ensure that courts are deciding actual controversies and not abstract questions or moot issues. *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36. Lack of standing is an "affirmative matter" that is properly raised under section 2-619(a)(9) of the Code. *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999). “Under Illinois law, a plaintiff need not allege facts establishing standing.” *International Union of Operating Engineers, Local 148, AFL–CIO v. Illinois Department of Employment Security*, 215 Ill.2d 37,

45 (2005). “Rather, it is the defendant's burden to prove and plead lack of standing.” *Id.*; *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24 ("Standing is an affirmative defense and, as such, it is the defendant's burden to prove that the plaintiff does *not* have standing." (Emphasis added.)). Defendant raised the issue of standing in the trial court based on an invalid assignment. As plaintiff notes, assignments in Illinois are not required to be in writing. "Illinois courts have long held that a mortgage assignment may be oral or written." *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 25. "Even when a written assignment exists, it may be a mere memorialization of an earlier transfer of interest." *Id.* We agree with plaintiff that defendant merely suggested that plaintiff had not proven its standing and defendant failed to "establish anything about when the loan was transferred." Also, this court has noted that "the mere attachment of a note to a complaint is *prima facie* evidence that plaintiff owns the note." *Id.* Here, plaintiff attached to the complaint a copy of the mortgage, note, and executed assignment. The assignment occurred on February 20, 2009 and the complaint was filed four days later. Defendant has failed to meet his burden of establishing that plaintiff lacked standing. We conclude that the trial court properly denied defendant's second attempt to raise issues of personal jurisdiction and standing which were determined in plaintiff's favor in 2009.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we affirm the trial court's October 21, 2009 decision denying defendant's *pro se* motion in the mortgage foreclosure action because it contained nothing more than unsupported legal conclusions. We also conclude that the trial court's November 21, 2012 decision denying defendant's section 2-1301 motion to vacate was not an abuse of discretion, and we affirm the circuit court's judgment.

¶ 42 Affirmed.