2015 IL App (1st) 1133441-U

Sixth Division
Order Filed: April 17, 2015

No. 1-13-3441

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SELENE FINANCE, LP, as servicer for TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	)
	) Appeal from the Circuit Court of
	) Cook County
Plaintiff-Appellee,	)
v.	)
	) No. 12 CH 29160
	)
RUSSELL M. FRYE, UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,	) Honorable
	) Alfred M. Swanson,
	) Judge Presiding
Defendants-Appellants,	)
	)

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: The circuit court's order confirming the foreclosure sale of property owned by the defendant is affirmed, where the defendant failed to provide a record on appeal showing that he was denied a hearing on his motion to quash service of process, failed to demonstrate that the plaintiff lacked standing to bring the suit, and forfeited his claim that he was never provided with the requisite grace period notice prior to the filing of the foreclosure complaint.

¶ 1 On July 31, 2012, the plaintiff, Selene Finance, LP, as servicer for Taylor, Bean & Whitaker Mortgage Corp. (Taylor Bean), filed suit against the defendant, Russell M. Frye, under

the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2010)), seeking to foreclose on residential property owned by the defendant. The defendant filed a motion to quash service of process upon him under sections 2-203 and 2-301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-203, 5/2-301 (West 2010)), along with a motion to dismiss the action on the basis that Selene lacked standing. 735 ILCS 5/2-619(a)(9) (West 2010). The circuit court denied both motions, and the defendant now appeals, arguing that (1) the court abused its discretion in denying his motion to quash service without an evidentiary hearing; (2) Selene was without standing to bring the foreclosure action because it was not listed as an assignee on the mortgage assignment document; and (3) the court erred in approving the judicial sale where there is no evidence that Selene sent the defendant a grace period notice as required under section 5-1502(b) and (c) of the Foreclosure Law. We affirm.

¶ 2 On June 20, 2007, the defendant executed a note to Taylor Bean secured by a mortgage on a residence located at 2505 E. 73rd Pl. in Chicago (subject property). The mortgage agreement (mortgage) identified the mortgagee as Mortgage Electronic Registration Systems, Inc. (MERS), "acting solely as a nominee" for the lender, Taylor Bean, and its successors and assigns. The mortgage was recorded on June 22, 2008, under document number 0717322040. In September of 2008, MERS assigned the mortgage to Taylor Bean, and the assignment was recorded in October of 2008.

¶ 3 As of April 1, 2010, the defendant was in default on the loan and had ceased paying any further monthly installments. Accordingly, Selene, as servicer for Taylor Bean, brought the instant action seeking to foreclose on the mortgage. The complaint contained no attachment reflecting any assignment of the mortgage or note to Selene.

¶ 4 On June 7, 2012, the court entered an order appointing a special process server under section 2-202 of the Code (735 ILCS 5/2-202 (West 2010)), and on August 1, 2012, the process server submitted an affidavit, stating that she had effected service upon the defendant through his nephew, Darnell Hill, at the subject property. The affidavit included a description of Hill and a statement that he was over the age of 13, and further averred that a copy of the summons was mailed to the defendant at his usual place of abode.

¶ 5 On January 7, 2013, with the defendant having failed to answer or otherwise appear, Selene moved for the entry of a default judgment and for a judgment of foreclosure and sale of the subject property. On March, 11, 2013, the court granted Selene's motion and entered an order of foreclosure and for the appointment of a selling officer for the subject property.

¶ 6 On June 10, 2013, the defendant entered his *pro se* appearance and filed a jury demand.

¶ 7 On June 12, 2013, Selene purchased the subject property at public auction, and subsequently filed a motion for an order confirming the report of the sale and distribution of the ensuing proceeds and for possession of the subject property. On August 27, 2013, at a hearing on this motion, the defendant appeared, seeking leave of court to file a response to the motion to confirm. The court set a briefing schedule, and continued the hearing to October 15, 2013.

¶ 8 On September 24, 2013, the defendant filed a document entitled "response to plaintiff['s] motion for confirmation and report of sale," which included a motion to quash service of process under sections 2-203 and 2-301 of the Code, and to dismiss the complaint for lack of "standing subject matter jurisdiction" under Code section 2-619(a)(9). In the motion to quash service, the defendant alleged that he had never been served with the foreclosure complaint or any of the subsequent motions and "never knew that any foreclosure proceedings had even [taken] place on [his] property." He supported this claim with his own affidavit, which stated that he lived and

had always lived on the subject property, and that, although the special process server averred to have served his purported nephew, Hill, this statement was "false and not true." Thus, the default judgment was void and must be vacated. With regard to his lack of standing defense, the defendant argued that Selene was without capacity to seek foreclosure because its name did not appear on the assignment of the mortgage.

¶ 9 On October 15, 2013, following a hearing, the court entered an order granting Selene's motion to confirm the sale, and also denying the defendant's motions to quash service and dismiss the complaint for lack of standing. However, no transcript of this hearing was included in the record on appeal. The defendant then filed the instant *pro se* appeal.

¶ 10 The defendant first asserts that he was entitled to a hearing on his motion to quash service because (1) the affidavit of the special process server fails to describe a "member of the defendant's household" as required under section 2-203(a) of the Code (735 ILCS 5/203(a) (West 2010)); (2) as stated in his own affidavit, the alleged recipient of service, Hill, is not his nephew and is unknown to him. In response, Selene argues that the defendant has forfeited his right to challenge service of process against him because he failed to move to quash the service within 60 days of his initial appearance, as mandated under section 15-1505.6 of the Foreclosure Law.

¶ 11 Section 15-1505.6(a) states that, in residential foreclosure cases, the deadline for filing a motion to dismiss or to quash service that objects to the court's personal jurisdiction, unless extended by the court for good cause, is 60 days after the earlier of two events: (1) the date that the moving party filed an appearance; or (2) the date the movant participated in a hearing without filing an appearance. 735 ILCS 5/15-1505.6(a) (West 2010). Section 15-1505.6(b) further provides that, if the defendant files a responsive pleading or a motion (other than for an extension of time to answer or otherwise appear) prior to filing a motion under subsection (a), he

waives any objection to the court's jurisdiction over his person. 735 ILCS 5/15-1505.6(b) (West 2010). Under the plain language of this section, a defendant who enters an appearance and then delays more than 60 days before moving to quash service upon him has waived his right to contest such service, and his motion to quash is properly denied without a hearing. *BAC Home Loans Servicing, LP v. Pieczonka,* 2015 IL App (1st) 133128 ¶ 12.

¶ 12 Here, it is undisputed that the defendant entered his appearance and jury demand on June 10, 2013. On August 27, 2013, at the hearing on Selene's motion to confirm the sale of the property, the defendant appeared and obtained leave to file a response to the motion to confirm. Then, on September 24, 2013, more than 90 days after entering an initial appearance, the defendant filed his motion to quash service of process.

¶ 13 The defendant does not deny that he filed an appearance on June 10 or that he "participated in" the August 27 proceedings on the motion to confirm. However, he contends that the waiver rule of section 15-1505.6 is inapplicable to this case, because the court lacked jurisdiction over him when it entered the underlying judgment of default on March 11, 2013. The fact that he "was never served with a copy of the summons and complaint" rendered the default judgment void *ab initio* as to him and therefore subject to challenge at any time. Further, the defendant argues, his appearance on June 10 operated only to confer jurisdiction over him for orders entered prospectively to that appearance, and in no way validated the underlying void judgment. See *In re Marriage of Verdung,* 126 Ill. 2d 542, 547 (1989); *State Bank of Lake Zurich v. Thill,* 113 Ill. 2d 294, 308 (1986). Accordingly, the defendant urges, he has not waived his right to contest the default judgment and must be given a hearing on his motion to quash.

¶ 14 Assuming, but not deciding, that the defendant is correct in his statement of the law, we are unable to conclude based upon the record before us that he was denied an opportunity to be

heard on his motion to quash. See *BAC Home Loans Servicing,* 2014 IL 116311 ¶ 28, citing *In re Marriage of Verdung* 126 Ill. 2d 542 (rule of "prospective-only" jurisdiction arises from the "due process concept of allowing the defendant his day in court" before sanctioning the entry of a judgment against him). At the hearing on August 27, the court provided both parties with a briefing schedule on the motion to confirm the sale. The defendant subsequently filed his "response" to this motion, which consisted of his motions to quash service of the complaint and dismiss it for lack of subject matter jurisdiction. The record indicates that the matter proceeded to a hearing on October 15, 2013, with each of these issues fully briefed before the court, after which the court entered an order, having been "fully advised on the premises," granting the motion to confirm the sale and denying the defendant's motion to quash.

¶ 15 The appropriate role for this court, then, would be to review the proceedings underlying the circuit court's ruling on the motion to quash. However, we are unable to do this because we have not been provided with a copy of the transcript from the October 15 hearing. Under Supreme Court Rule 323 (eff. December 13, 2005), it was the defendant's burden, as appellant, to provide this court with a sufficient record on which to enable a meaningful review of his claims of error. See also *Corral v. Mervis Industries, Inc*., 217 Ill. 2d 144, 156–57 (2005); *Foutch v. O'Bryant,* 99 Ill. 2d 389 (1984). This means a transcript of the proceedings or a bystander's report if no transcript is available. *Foutch,* 99 Ill. 2d at 391-92. In the absence of such a transcript, this court will not resort to speculation regarding the proceedings below, but will presume that the circuit court's ruling was correct at law and supported by a sufficient factual basis. *Id.* Accordingly, we must uphold the denial of the defendant's motion to quash.

¶ 16 The defendant next contends that the court erred in denying his motion to dismiss under Code section 2-619(a)(9), on the basis that Selene lacked standing to bring the foreclosure action because it is not designated as an assignee on the mortgage assignment document. We disagree.

¶ 17 Our review from an order denying a motion to dismiss based upon an alleged lack of standing is *de novo*. *Phillips v. Bally Total Fitness Holding Corp.*, 372 Ill.App.3d 53, 57 (2007). A plaintiff's lack of standing is an affirmative defense, and as such, must be pleaded and proven by the defendant. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252–53 (2010); *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). The plaintiff is not required to plead facts to establish standing in a foreclosure case. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 1234223; *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380 ¶ 24.

¶ 18 Under the Foreclosure Law, an action may be commenced by 1) the legal holder of an indebtedness secured by a mortgage; 2) any person designated or authorized to act on behalf of such holder; or 3) an agent or successor of a mortgagee. 735 ILCS 5/15–1503; *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010); 735 ILCS 5/15–1503, 15–1504(a)(3)(N) (West 2010). A *prima facie* case for foreclosure is established if the complaint conforms to requirements set forth in section 15–1504(a) of the Foreclosure Law (735 ILCS 5/15–1504(a)); *Barnes*, 406 Ill. App. 3d at 7), and the note and mortgage are attached; at this point the burden shifts to the mortgagor to prove lack of standing. *Korzen*, 2013 IL App (1st) 130380 ¶ 24; *Farm Credit Bank v. Biethman*, 262 Ill. App. 3d 614 (1994).

¶ 19 The defendant does not dispute that the complaint for foreclosure fully complied with the requirements of 15–1504(a) or that a copy of the note and mortgage were properly attached. Nor does he take issue with the allegation that Selene filed the suit in its capacity as servicer on

behalf of the lender, Taylor Bean, which had been duly assigned the mortgage by its nominee, MERS. Therefore, with a *prima facie* case for foreclosure having been established, it was incumbent upon the defendant to prove that Selene was without standing to bring the suit. Under the facts of this case, the defendant cannot meet this burden simply by claiming that Selene is not named in writing as an assignee of the mortgage.

¶ 20 Under the Uniform Commercial Code, persons entitled to enforce a note include its holder or a nonholder in possession of the instrument who has the rights of the holder. See 810 ILCS 5/3–301 (West 2010). A negotiable instrument may be transferred by delivery to another entity for the purpose of giving that entity the right to enforce the instrument. 810 ILCS 5/3–203(a) (West 2010). If a note is "[e]ndorsed in blank," it becomes payable to whomever is the bearer, and may be negotiated by transfer of possession alone until it is specially endorsed. *Deutsche Bank National Trust Co. v. Tapla*, 2013 WL 4804855 *2 (N.D. Ill. Sept. 9, 2013), citing 810 ILCS 5/3–205(b) (West 2010). A person in possession of a note payable to bearer is deemed the holder of the instrument, and is entitled to enforce the instrument. See 810 ILCS 5/3–201 (b)(21)(A) (West 2010).

¶ 21 The note evidencing indebtedness for the subject property was made by the defendant and contained an endorsement in blank. As such, it was payable to the bearer, which was undisputedly Selene, who acted upon the note in its capacity as servicer for the assignee, Taylor Bean. This was sufficient to establish that Selene was the legal holder of an indebtedness secured by a mortgage under the Foreclosure Law. 735 ILCS 5/15–1503; *Rosestone Investments*, 2013 IL App (1st) 1234223; *Barnes*, 406 Ill. App. 3d at 7. Accordingly, the defendant's standing claim fails.

¶ 22 Last, the defendant contends that there is no evidence that Selene provided him with the requisite grace period notice prior to filing the action for foreclosure as required under section 1502.5 of the Foreclosure Law. See 735 ILCS 4/15-1502.5 (West 2010).

¶ 23 We agree with Selene that this argument has been twice forfeited, both in the trial court and this court. Most importantly, there is no evidence the defendant ever placed this issue before the court below, as is necessary to preserve his right of review. *U.S. Bank National Ass'n. v. Prabhakaran*, 2013 IL App. (1st) 111224 ¶ 24. Further, in his appeal, the defendant's assertion of this issue consists of one sentence without any real argument or citation to the record. This is insufficient under Supreme Court Rule 341(h)(7)(eff. July 1, 2008). See also *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009); *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). We therefore decline to reach this issue.

¶ 24 For the foregoing reasons, the circuit court's order confirming the sale of the subject property is affirmed.

¶ 25 Affirmed.