

No. 1-11-0852

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HSBC BANK USA,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 08 CH 44909
)	
JOHN LUCKETT,)	Honorable
)	John C. Griffin,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 **Held:** Defendant's standing argument was not raised as an affirmative defense to the foreclosure complaint and is therefore waived. Trial court did not err in entering the judgment of foreclosure in favor of HSBC where the record does not support defendant's contentions. Trial court did not abuse its discretion in confirming the judicial sale where defendant failed to show how justice was not served.

¶ 2 In this mortgage foreclosure action, defendant John Lockett appeals the circuit court's order approving the judicial sale of the subject property, and the trial court's entry of the order

for judgment of foreclosure against defendant. Defendant argues that plaintiff HSBC Bank USA (HSBC), did not have standing to bring this foreclosure action, and thus, the trial court erred in entering an order of judgment of foreclosure; and that the trial court abused its discretion in approving and confirming the judicial sale of the property. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 On December 2, 2008, plaintiff HSBC filed a complaint to foreclose a mortgage against defendant John Luckett, pursuant to sections 15-1504(a)(1) through (a)(3) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1504(a)(1) through (a)(3) (West 2008)). HSBC alleged that defendant was in default of his residential mortgage loan for \$222,082.05 in unpaid principle. In the complaint, HSBC listed the mortgagee as "Mortgage Electronic Registration Systems, Inc., as Nominee for HSBC Mortgage Corporation (USA)." HSBC, in paragraph three, subsection "1." of its complaint, explained the capacity under which it brought the foreclosure action, stating: "[HSBC] is the Mortgagee under 735 ILCS 5/15-1208." HSBC attached a copy of the mortgage, which was executed by defendant on September 10, 2007, to its complaint.

¶ 5 On January 26, 2009, defendant filed a *pro se* appearance and answer to HSBC's complaint. In his answer, defendant admitted to the allegations listed in the following paragraphs: "1, 2, 3 A B C D E F G H I J K M 1. O P Q S T, 4," and denied sections "L" and "R" of paragraph three. Section "L" listed the other persons whose interest in the real estate was sought to be terminated as subordinate and inferior to that of HSBC's interest. Section "R"

stated:

"Facts in support of a request for appointment of mortgagee in possession or for appointment of a receiver, and identity of such receiver, if sought: Unless otherwise alleged, Plaintiff will pray for said relief after the filing of the instant foreclosure action by separate petition if such relief is sought."

¶ 6 Defendant then listed as an affirmative defense: "There is no note attached."

¶ 7 On April 3, 2009, HSBC filed a motion to amend its complaint. The motion was entered and continued until April 17, 2009. Thereafter, on April 17, 2009, the trial court granted HSBC's motion to file an amended complaint *instanter*. HSBC filed its amended complaint, with copies of the mortgage, note, and assignment attached. Section "N" of paragraph 3 contained the same wording as section "1." of the original complaint, stating: "Capacity in which Plaintiff brings this foreclosure: Plaintiff is the Mortgagee under 735 ILCS 5/15-1208." Section "N" also listed the document number of the attached assignment. The assignment, which was executed on February 27, 2009, stated that Mortgage Electronic Registration Systems (MERS), as nominee for HSBC Mortgage Corporation (USA), assigned all interests under the mortgage to HSBC.

¶ 8 The record contains a notice of filing, file-stamped April 23, 2009, which states that an amended complaint was filed on April 17, 2009, and that a copy of the notice was sent to defendant on April 21, 2009, via U.S. mail. Defendant never answered the amended complaint.

¶ 9 On June 5, 2009, the trial court granted HSBC's motion for entry of judgment of foreclosure, finding that HSBC had standing to maintain the cause of action, and that the

pleadings and proofs presented were sufficient to support the entry of judgment. A judgment of foreclosure was entered against defendant and notices of the sale of the property went out.

¶ 10 According to HSBC's motion for an order approving the judicial sale, defendant filed for Chapter 13 bankruptcy and a stay was automatically placed on the judicial sale. On August 30, 2010, the stay was allegedly modified and HSBC was given authority to proceed with the sale.

¶ 11 On October 8, 2010, defendant filed an emergency motion to stay the sale of the subject property, alleging that he attempted to modify the mortgage loan related to the action and that on October 4, 2010, he received a letter from HSBC Mortgage Corporation USA providing that the loan modification could not be approved due to an incomplete request and an inability to verify defendant's residence. Defendant claimed that he had resided at the subject property since 1998, and that he provided all the necessary information to HSBC Mortgage Corporation USA in his loan modification request. Furthermore, he alleged that he was gainfully employed and took all reasonable steps to save his personal residence, the subject property. Defendant attached his own affidavit and a driver's license to prove his residency, as well as the letter from HSBC Mortgage Corporation USA denying his loan modification request.

¶ 12 On October 12, 2010, the trial court granted defendant's request to stay the judicial sale until November 15, 2010, but authorized the sale thereafter if the matter had not been resolved at that time. Apparently the matter was not resolved because on November 17, 2010, the judicial sale took place. The property was offered for sale at public auction, and HSBC was the highest bidder. HSBC purchased the subject property and moved for an order approving the sale and distribution of the sale.

¶ 13 On January 5, 2011, in response to HSBC's motion to approve the judicial sale, defendant alleged that HSBC had committed fraud on the court because it knowingly and willingly misled the court to believe it had rights and interests in the loan when it did not in fact have any interest in the loan until three months after the foreclosure action commenced. In support of such contention, defendant pointed to the assignment, which assigned the loan to HSBC on February 27, 2009, which was almost three months after the action commenced. Defendant also alleged that the assignment was void because it was created by the assignee, and that the same attorney represented both MERS and HSBC. Defendant further argued that HSBC breached its duty of good faith and fair dealing in reviewing defendant's numerous loan modification requests. Defendant's final contention was that HSBC unlawfully took possession of the subject property before the sale was approved. Defendant attached his own affidavit in support of his response to HSBC's motion to approve the sale.

¶ 14 On January 12, 2011, HSBC correctly noted in its reply brief that defendant's objections to the motion for an order approving the sale did not raise any issues regarding the notice and terms of the sale, nor did he claim the sale was conducted fraudulently, as required by the Foreclosure Law. Further, HSBC claimed that defendant's objections were mainly based on standing, and that defendant had waived his right to challenge standing at that stage of the proceedings. HSBC argued that it fully complied with the Foreclosure Law when it attached a copy of the note and mortgage to its amended complaint, and that defendant's answer to its original complaint did not raise standing as an affirmative defense. Furthermore, defendant failed to answer HSBC's amended complaint, which admitted by default all of HSBC's

allegations, including that it had standing to bring the action.

¶ 15 On February 17, 2011, the trial court approved the sale of the property. In its written order, the court found that all notices of sale were properly given, and that the sale was fairly and properly made. Defendant now appeals from the trial court's order approving and confirming the sale, and the trial court's order of judgment of foreclosure.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues that HSBC lacked standing to bring the foreclosure action, that the trial court erred in entering the judgment of foreclosure, and that the trial court abused its discretion when it granted HSBC's motion for an order confirming the judicial sale of the property. We begin with the issue of standing.

¶ 18 A. Standing

¶ 19 A foreclosure complaint is deemed sufficient if it contains the statements and requests called for by the form set forth in section 15-1504(a) of the Foreclosure Law (735 ILCS 5/15-1504(a) (West 2008)). HSBC complied with that form, pled that it was the mortgagee, and attached a copy of the mortgage and note to its amended complaint. HSBC's amended complaint was legally and factually sufficient and included allegations relative to standing. See *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (MERS's complaint was legally and factually sufficient and included allegations relative to standing where it pled that it was the mortgagee and legal holder of the indebtedness and attached a copy of the note and mortgage to its complaint).

¶ 20 To support his argument that HSBC lacked standing, defendant claims that HSBC was

not assigned the loan at issue until after the original complaint was filed. While it is true that the loan was not assigned to HSBC until after the commencement of the foreclosure action, we find that defendant has waived the issue of standing.

¶ 21 "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit," and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). "[S]tanding requires some injury in fact to a legally cognizable interest." *Glisson*, 406 Ill. 2d at 21. Our supreme court has stated that "lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988); 735 ILCS 5/2-613(d) (West 2008) (affirmative defense of standing is waived if not raised in answer or reply to plaintiff's complaint); *Barnes*, 406 Ill. App. 3d at 7 (defendant forfeited standing issue after she failed to answer the complaint and raised the issue for the first time after the sale had taken place); *Deutsche Bank National Trust Co. v Snick*, 2011 IL App (3d) 100436, ¶ 9 (defendant waived the issue of standing by failing to raise it until her objection to the bank's motion for an order approving and confirming sale).

¶ 22 In the case at bar, the foreclosure complaint was filed on December 2, 2008, with a copy of the mortgage attached. The complaint alleged that HSBC had capacity to bring the action because it was the mortgagee under section 1208 of the Foreclosure Law. 735 ILCS 5/15-1208 (West 2008). On January 26, 2009, defendant filed an answer specifically admitting that paragraph. His only affirmative defense was that there was no note attached to the complaint.

On April 17, 2009, HSBC filed an amended complaint with the note attached, as well as the assignment attached. In its amended complaint, HSBC again alleged that it was the mortgagee under section 1208 of the Foreclosure Law. The assignment transferring the loan to HSBC was dated February 27, 2009. Defendant did not answer the amended complaint, and a foreclosure judgment was entered against him. Thereafter, defendant participated in the court proceedings by filing an emergency motion to stay the sale of the property. At no time did defendant raise the issue of standing.

¶ 23 It was not until more than two years after the commencement of the action, on January 5, 2011, in response to HSBC's motion for an order approving the sale, that defendant for the first time alleged that HSBC lacked standing to bring the action. We find that defendant waived the issue of HSBC's standing by failing to raise the issue, while at the same time, participating and accepting benefits of the court proceedings. *Snick*, 2011 IL App (3d) 100436, ¶ 9.

¶ 24 **B. Judgment of Foreclosure**

¶ 25 Defendant contends that the judgment of foreclosure should not have been entered against him because it was "questionable" whether HSBC had standing, and that defendant was not afforded an opportunity to review and respond to the amended complaint. We have already determined that the standing issue has been waived, and thus we turn to defendant's second contention.

¶ 26 The standard of review for the entry of summary judgment in a foreclosure action is *de novo*. See *First Bank and Trust Co. of O'Fallon, Illinois v. King*, 311 Ill. App. 3d 1053, 1056 (2000). Defendant argues that on June 5, 2009, the trial court granted HSBC, *instanter*, the right

1-11-0852

to amend its complaint on June 5, 2009 by attaching the note and assignment to the complaint, and that no notice of motion was ever sent to defendant. Furthermore, defendant argues that he was never provided an opportunity to review and file a responsive pleading to the amended complaint because the judgment was entered at the same time HSBC amended the complaint, on June 5, 2009.

¶ 27 Upon careful review of the record, we do not see support for defendant's arguments. On April 3, 2009, there is an order from the trial court stating that upon HSBC's motions to amend the complaint and for foreclosure of judgment, "due notice given," the motions were to be continued until April 17, 2009. There is a notice of filing, file-stamped April 23, 2009, which states that the amended complaint was filed on April 17, 2009, and that a copy was mailed to defendant on April 21, 2009. Defendant never responded to the amended complaint, and the judgment of foreclosure was entered on June 5, 2009. We can find no support in the record for defendant's contention that he did not receive a copy of the amended complaint and was not afforded an opportunity to respond; thus we reject defendant's argument that the trial court erred in granting the judgment of foreclosure in favor of HSBC. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (appellant has burden to present sufficiently complete record of the trial court proceedings to support claim of error; without such record, this court will presume trial court acted correctly).

¶ 28

C. Remaining Allegations

¶ 29 Defendant's final allegations concern the trial court's grant of HSBC's motion for confirmation and approval of the judicial sale. Confirmation of judicial sales is governed by

section 1508(b) of the Foreclosure Law. 735 ILCS 5/15-1508(b) (West 2008). Section 1508(b) limits a trial court's discretion to refuse confirmation of a judicial sale to four grounds specified in the statute. *Barnes*, 406 Ill. App. 3d at 1 (2010). Subsection (b) of section 1508 provides in pertinent part:

"Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2008).

¶ 30 The provisions of section 15-1508 have been construed as conferring broad discretion on the circuit courts in approving or disapproving judicial sales, and the court's decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). The abuse of discretion standard is the most deferential standard of review available with the exception of no review at all. *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Corelloni*, 177 Ill. 2d 166, 176 (1997).

¶ 31 Here, defendant proceeds under the fourth ground specified in the statute, stating that justice was otherwise not done, and that the trial court abused its discretion by confirming the judicial sale. In support of his argument that justice was otherwise not done, defendant relies

1-11-0852

primarily on the fact that HSBC lacked standing. We have already found that any standing argument has been waived. Since defendant did not give the trial court any other valid basis to refuse confirmation fo the sale under the specific provisions set out in section 15-1508(b), we find that the trial court did not abuse its discretion in approving the judicial sale. See *Snick*, 2011 IL App (3d) 100436, ¶ 11; See also *Barnes*, 406 Ill. App. 3d at 8.

¶ 32

III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 34 Judgement affirmed.