

No. 2—10—0742
Order filed April 29, 2011

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
SECOND DISTRICT

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 2006, FREMONT HOME LOAN TRUST 2006-D,)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,)	
v.)	No. 08—CH—4548
MARCELLA A. PALLADINO, SEBASTIAN PALLADINO,)	Honorable
Defendants-Appellants.)	Neal W. Cerne, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Where there were genuine issues of material fact with respect to the plaintiff's standing to bring the mortgage foreclosure complaint, the trial court erred in granting summary judgment in plaintiff's favor.

Defendants, Marcella A. Palladino and Sebastian Palladino, appeal the trial court's grant of summary judgment in favor of plaintiff, HSBC Bank USA, National Association (HSBC Bank), in this mortgage foreclosure action. The Palladinos argue that there were genuine issues of material

fact with respect to HSBC Bank’s standing to bring the mortgage foreclosure complaint, the basis for default, and the enforceability of the mortgage and note due to lender fraud. For the following reasons, we reverse the trial court’s grant of summary judgment in HSBC Bank’s favor and remand for further proceedings.

BACKGROUND

The Palladinos refinanced their Naperville, Illinois, home on August 28, 2006. They obtained financing from Fremont Investment & Loan (Fremont). The Palladinos gave Fremont a mortgage, and they signed a note for \$313,500. The Palladinos defaulted on the loan payments. Fremont filed a foreclosure action against the Palladinos on May 5, 2008, but voluntarily dismissed the case on July 11, 2008. On November 17, 2008, HSBC Bank, as “trustee under the pooling and servicing agreement dated as of November 1, 2006, Fremont Home Loan Trust 2006-D,” filed a complaint to foreclose the Palladinos’ mortgage and requested a deficiency judgment in the event of a deficiency from the foreclosure sale. HSBC Bank alleged that it was the “legal holder, agent or nominee of the legal holder, of the indebtedness” and that it was the “owner, agent or nominee of the owner, of the Mortgage given as security.” It also alleged that Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Fremont, was the mortgagee, trustee, or grantee in the mortgage. The Palladinos answered and filed affirmative defenses, including lack of HSBC Bank’s standing.

HSBC Bank moved for summary judgment; it argued that its standing was established by its possession of the note and a written assignment of the mortgage and note. In support, HSBC Bank attached a copy of the note and purported assignment. The note includes an unnumbered fifth page reflecting an undated stamp with the words, “Pay to the order of [blank] without recourse,” with a

signature above the words: “Fremont Investment & Loan Doug Pollock Assistant Vice President.” The purported assignment is an undated document entitled “Assignment of Mortgage.” The document is notarized although the notary’s certificate is undated. The document contains a stamp which appears to reflect that it was recorded with the Du Page County Recorder on December 17, 2008. The document states that MERS, as nominee for Fremont, “did hereby assign” and deliver to HSBC “prior to 11/13/08” the described mortgage “[t]ogether with all rights and interest in the same and the premises therein and the note or obligation thereby secured” and that “[t]his assignment is made without recourse and without representation or warranty” by assignor. The document is signed by Jill Rein as “certifying officer” for MERS.

In opposition to summary judgment, the Palladinos submitted an affidavit from forensic accountant David P. Sweeney. He attested that under the “Pooling and Servicing Agreement Dated as of November 1, 2006, Fremont Home Loan Trust 2–6-D,” Fremont was the only proper party to bring a foreclosure action in the event of default. He opined that the mortgage and note continued to be Fremont’s property. Sweeney also attested that the assignment referred to in the document upon which HSBC Bank relied had not been recorded.

Following oral argument, the trial court granted HSBC Bank’s motion for summary judgment and entered a judgment of foreclosure and sale. On the issue of standing, the trial court reasoned:

“[T]here is no dispute that there was a Mortgage; there is no dispute that a Note was signed; and there’s no dispute that there’s a default. In my mind these are material facts, and there’s no dispute on those.

The dispute is whether or not there is a proper assignment. The plaintiff has tendered a copy of the—a true and accurate copy of the Note that has a blank endorsement. Pursuant

to the UCC, the holder of a blank endorsement is the holder of that Note. Therefore, they've established their standing. There's no counter evidence to suggest that they are not the holder of that Note, and I think that is the burden of the defendant to come forward with evidence that shows that they are not the holder of the Note.

The pooling agreement, to say that they're *[sic]* agreement says that they're the only ones who can proceed on that, I don't accept. I don't think that's proof of that. They have assigned the Note to HSBC, and I don't see how any pooling agreement would prevent them from doing that. And in addition, Fremont is not here on a loan that's been in default presumably since 2008. It's 2010. And presumably they would be here and not HSBC Bank. So there's no—in my mind, no counter evidence being brought forward by the defendant who is—it's burden to bring forth that evidence that the plaintiff is not the holder in due course of the Note pursuant to case law.”

The Palladinos moved for reconsideration on grounds, *inter alia*, that HSBC Bank failed to demonstrate its standing to sue on the mortgage and note because it failed to produce either the original note or the actual assignment of the mortgage. Following oral argument, the trial court denied the motion to reconsider, stating:

“With regards to the holder, as we went through the motion for summary judgment, the pleadings that were presented in the affidavit presented by the plaintiff conform with the Illinois Code of Civil Procedure and the Illinois Mortgage Foreclosure Law that states that they merely have to state that they are the holder of the note. That it is the burden of the defendant to bring forth facts that show that or lead one to believe that perhaps they are not the holder. And there is no attempt to do that.

A factual allegation that would state that Bank ABC has sent me a note requesting payment, that would be a factual statement that would show that somebody else is seeking payment on the note and that HSBC, the plaintiff in this case, is not the holder in due course.

But there has been no allegation, no factual allegation that any other party is seeking enforcement of the note. And I think it is important to realize that there is no denial that the note exists, that the note was signed by the defendants, and the defendants owe money on the note.

And the question comes down to, well, who do they pay it to? Did they pay it to HSBC or some other bank but no one says what other bank it could be and no one else is seeking payment. And so without those factual allegations, I think the foreclosure law is clear that the plaintiff prevails.

And that was, as I believe I indicated at the time of the summary judgment that, in my mind, is a strong assessment. I think the plaintiff did provide evidence that they were the holder of the note. All they had to do is provide evidence that they are the holder of the note and a blank endorsement does satisfy that.”

The trial court found no just reason to delay either enforcement of or appeal from its order pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010). The trial court also granted the Palladinos’ motion to stay the sale pending appeal. The Palladinos timely appealed.

ANALYSIS

The Palladinos maintain that the trial court erred in granting summary judgment to HSBC Bank because there were genuine issues of material fact with respect to HSBC Bank’s standing to

bring the mortgage foreclosure complaint. Summary judgment is proper when the pleadings, depositions, and admissions on file, together with the affidavits, demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2—1005(c) (2008); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review an order granting summary judgment *de novo*. *Williams*, 228 Ill. 2d at 417.

The doctrine of standing is designed to ensure that only those parties with a real interest in the outcome of the controversy bring suit. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Accordingly, a plaintiff in a mortgage foreclosure action must have a beneficial interest in the mortgage. *Winkelman v. Kiser*, 27 Ill. 20, 21 (1861). In this regard, section 15—1208 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15—1208 (West 2008)) defines a mortgagee as “(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor.” The Foreclosure Law further requires that “[i]n all cases the evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked, and copies thereof shall be filed with the court.” 735 ILCS 5/15—1506(b) (West 2008).

Initially, HSBC Bank argues that the Palladinos did not meet their burden of pleading the affirmative defense of lack of standing. An affirmative defense “is one which gives color to the opponent’s claim but asserts new matter which defeats the plaintiff’s apparent right to judgment.” *Long v. Kemper Life Insurance Company*, 196 Ill. App. 3d 216, 218 (1990). In its foreclosure complaint, HSBC Bank alleged the capacity in which it sought foreclosure: the “legal holder, agent or nominee of the legal holder, of the indebtedness” and the “owner, agent or nominee of the owner,

of the Mortgage given as security.” The Palladinos pleaded as an affirmative defense that HSBC Bank was not “an interested party duly authorized to bring the instant complaint” and failed to “provide any document whatsoever evidencing [HSBC Bank’s] authority to file the instant complaint.”

According to HSBC Bank, the Palladinos’ purported affirmative defense merely amounted to a denial of HSBC Bank’s allegations regarding the capacity in which it sought foreclosure and “in no way affirmatively establishes that [HSBC Bank] lacks standing.” We disagree. The Palladinos challenged HSBC Bank’s interest in seeking foreclosure—a requirement for proper standing under the Foreclosure Law. Consequently, the Palladinos properly pleaded the affirmative defense of HSBC Bank’s lack of standing.

The question is whether there were genuine issues of material fact with respect to whether HSBC Bank was the current holder of the indebtedness secured by the mortgage under the Foreclosure Law. It was undisputed that Fremont was the initial mortgagee. HSBC Bank supported its summary judgment motion with a purported assignment of the mortgage and note from MERS, as Fremont’s nominee, to HSBC Bank. The Palladinos contested the existence and validity of the assignment through the affidavit of its forensic accountant. An assignment occurs when there is a transfer of some identifiable interest from the assignor to the assignee. *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1988). No particular form of assignment is required. *Klehm*, 164 Ill. App. 3d at 616. Any document that evidences the intent of the assignor to vest ownership of the subject matter of the assignment in the assignee is sufficient to effect an assignment. *Klehm*, 164 Ill. App. 3d at 616. A valid assignment need only assign or transfer the “whole or a part of some

particular thing, debt, or chose in action, and it must describe the subject matter of the assignment with particularity to render it capable of identification.” *Klehm*, 164 Ill. App. 3d at 616-17.

The appellate court’s recent decision in *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (2008), reflects the necessity of establishing a valid assignment where the plaintiff in a foreclosure case is not the original mortgagee. There, the appellate court reversed the trial court’s grant of summary judgment to the plaintiff, a purported assignee of a mortgage and note, on grounds that the assignment upon which the plaintiff relied reflected that the original mortgagee assigned the mortgage and note to Bayview Financial Trading Group, L.P. (an entity related to the plaintiff). *Bayview Loan Servicing*, 382 Ill. App. 3d at 1187-88. The court reasoned that there was no evidence that the plaintiff ever obtained any legal interest in the subject property. *Bayview Loan Servicing*, 382 Ill. App. 3d at 1188. At most, the record reflected that the plaintiff serviced the mortgage payments. *Bayview Loan Servicing*, 382 Ill. App. 3d at 1188.

In the present case, there are genuine issues of material fact with respect to whether there was an assignment of the mortgage and note from Fremont to HSBC Bank. Although HSBC Bank represents that it produced the assignment, the document on which it relies, by its very terms, was, at worst, not an assignment and, at best, inherently inconsistent as to whether it was an assignment. Indeed, the document states that MERS as nominee for Fremont “did” assign (past tense) the mortgage and note to HSBC Bank prior to November 13, 2008, yet also states that the assignment “is” made (present tense) without recourse and without representation or warranty.

In addition to the purported assignment’s inconsistent terms, the document upon which HSBC Bank relies is vague with respect to the date of the purported assignment. The document has a stamp which appears to reflect that it was recorded on December 17, 2008, but states that the

assignment was made “prior to” November 13, 2008. The document itself is undated, as is the notary’s certificate. The date of the assignment is material because standing to sue must exist at the time the action is commenced. *Village of Kildeer v. Village of Lake Zurich*, 167 Ill. App. 3d 783, 786 (1988).

Further, with respect to Jill Rein’s signature on the document as “certifying officer” for MERS, HSBC Bank provided no evidence regarding Rein’s relationship to MERS, her authority to certify that the assignment had taken place, or the information on which she based her representation that an assignment occurred. The record reflects that Rein was an attorney with Pierce & Associations—the law firm representing HSBC. We note that the document is notarized. To the extent HSBC Bank relied on the document as an affidavit in support of its summary judgment motion, Supreme Court Rule 191 (eff. July 1, 2002), provides that affidavits in support and in opposition to summary judgment:

“shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.”

The document fails to meet these basic requirements. Rein provides no explanation for the basis of her personal knowledge and fails to attach any supporting documents.

In contrast to its representation that the document *is* the assignment, HSBC Bank also argues that Illinois law does not require that assignments be in writing. *Buck v. Illinois National Bank & Trust Co.*, 79 Ill. App. 2d 101, 105-06 (1967). However, HSBC Bank failed to establish as a matter

of law that *any* assignment, written or oral, occurred. In sum, the record is replete with genuine issues of material fact regarding whether and when Fremont assigned the mortgage and note to HSBC Bank.

HSBC Bank contends that it did not need to establish a valid assignment because it was in possession of the note, which contained a blank indorsement. HSBC Bank argues that a blank indorsement converts the note to bearer paper; therefore, the note may be transferred by possession alone. See 810 ILCS 5/3-205(b) (West 2008) (“When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.”). However, the Palladinos challenge the authenticity of the note. They argue that the blank indorsement was reflected on an unnumbered, undated fifth page, and that HSBC Bank refused to produce the original note to demonstrate that the blank indorsement was in fact part of the original note.

HSBC Bank argues that the challenge to the note’s authenticity should be disregarded because the Palladinos did not raise the argument until their reconsideration motion in the trial court. See *Woolums v. Huss*, 323 Ill. App. 3d 628, 640 (2001) (“Submission of new matter on a motion to reconsider summary judgment lies in the discretion of the trial court and should not be allowed absent a reasonable explanation of why it was not available at the time of the original hearing.”). HSBC Bank also argues that the Palladinos failed to support their challenge to the note’s authenticity with an affidavit.

However, an affidavit was not necessary because the purported assignment and note themselves raised questions about their authenticity. Why was the note allegedly assigned to HSBC Bank if HSBC Bank already possessed the note? And why did Fremont indorse the note, whereas

MERS, as Fremont's nominee, purportedly assigned the mortgage and note? The record is also unclear as to the reason Fremont initially sued to foreclose the Palladinos' mortgage if HSBC Bank in fact possessed the note. Moreover, HSBC Bank was not prejudiced because it had the opportunity to provide the original note to the trial court but failed to do so. In light of the genuine issues of material fact with respect to the purported assignment of the mortgage and note and challenge to the authenticity of the note, we cannot say that the evidence of indebtedness as required by the Foreclosure Law was established as a matter of law.

HSBC Bank argues alternatively that it was not required to produce the note because it is not necessary for a foreclosure plaintiff to offer a note into evidence unless it is seeking a personal deficiency. See *Abdul-Karim v. First Federal Savings and Loan Association of Champaign*, 101 Ill. 2d 400, 407-08 (1984) (stating that a creditor is free to elect to sue on the note or foreclose on the mortgage or both). This argument ignores that HSBC Bank, in fact, specifically sought a deficiency judgment in its complaint.

In light of our holding, we need not address whether there were genuine issues of material fact regarding the basis for the Palladinos' default and the enforceability of the mortgage and note.

For the foregoing reasons, we reverse the trial court's grant of summary judgment in HSBC Bank's favor and remand for further proceedings.

Reversed and remanded.