

No. 1-11-1639

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, as)	Appeal from the
trustee for First Franklin Mortgage Loan Trust 2006-FF11,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
v.)	No. 09 CH 7703
)	
ALICIA KHAN, DOST M. KHAN, HOME LOAN)	
SERVICES, INC., OGDEN AVENUE CONDOMINIUM)	Honorable
ASSOCIATION, MORTGAGE ELECTRONIC)	Margaret Brennan
REGISTRATION SYSTEMS, INC., UNKNOWN)	Judge Presiding.
OWNERS and NON-RECORD CLAIMANTS,)	
)	
Defendants-Appellees.)	

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court erred in granting summary judgment in favor of defendants based on plaintiff's alleged lack of standing where plaintiff presented evidence showing that it had acquired the mortgagee's interests in the mortgage prior to filing its original complaint and defendants did not establish that plaintiff lacked standing.

¶ 2 Plaintiff, Deutsche Bank National Trust Company, appeals from orders of the circuit

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court of Cook County granting summary judgment in favor of defendants, Alicia Khan, Dost Khan, Home Loan Services, Inc., Ogden Avenue Condominium Association, and Mortgage Electronic Registration Systems, Inc. (MERS); denying its motion to reconsider; and granting defendants' petition for attorney fees and costs. On appeal, plaintiff contends that the court erred in granting summary judgment where the evidence shows it had standing to bring its claim and that the court also erred by awarding defendants attorney fees and costs. For the reasons that follow, we reverse and remand.

¶ 3

BACKGROUND

¶ 4 On February 17, 2009, plaintiff filed a complaint to foreclose a mortgage against defendants 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)). Plaintiff alleged that it was the mortgagee and that Alicia Khan, the mortgagor, was in default. Plaintiff attached a copy of the mortgage to its complaint, which was signed by Alicia and Dost Khan and dated May 24, 2006. The mortgage defined Alicia Khan as the borrower and mortgagor; First Franklin, a division of National City Bank of Indiana, as the lender; and MERS, which was acting as a nominee for First Franklin, as the mortgagee. Plaintiff also attached a copy of an adjustable rate note to its complaint, which was signed by Alicia Khan and dated May 24, 2006, in which Khan promised to pay First Franklin \$113,200.00, plus interest, in return for a loan she had received. Plaintiff further attached a document dated February 13, 2009, in which MERS assigned its title and interest in the mortgage at issue to plaintiff and which purported to serve to "memorialize the transfer of this mortgage loan which has previously taken place."

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¶ 5 On July 14, 2009, defendants filed a motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction, and plaintiff then filed a motion to amend its complaint by attaching an endorsed note. On July 27, 2009, the circuit court entered orders granting plaintiff's motion to amend its complaint and providing it leave to file a first amended complaint. On July 29, 2009, the court entered an order granting defendants' motion to dismiss without prejudice and granting plaintiff leave to file an amended complaint. On August 4, 2009, plaintiff filed an amended complaint, which was identical to the original complaint except that the note attached to the complaint was endorsed by First Franklin.

¶ 6 On October 15, 2010, plaintiff filed a motion for summary judgment and judgment of foreclosure and sale in its favor in which it asserted, *inter alia*, that it had standing because the evidence showed that the note and mortgage at issue had been transferred to it on August 1, 2006, before it had filed its complaint. Plaintiff attached a sworn affidavit from Krista Sweeney to its motion in which she related that she was a default litigation specialist for America's Servicing Company, plaintiff's servicing agent, which created and maintained a loan file for each loan it serviced as part of its ordinary course of business. Sweeney had reviewed the file for the loan at issue and determined that Khan had defaulted when she failed to make the October 2008 installment payment and that plaintiff was "the assignee and successor-in-interest to [the] loan originator and at all relevant times has been the holder and owner of the Note and Mortgage being foreclosed on herein." Sweeney further determined that MERS had assigned its interest in the loan to plaintiff on August 1, 2006, and that the transfer was memorialized in the assignment of mortgage attached to plaintiff's amended complaint. Defendants responded that a question of

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material fact existed as to whether plaintiff had standing to foreclose at the time it filed its original complaint and that Sweeney's affidavit did not comply with Illinois Supreme Court Rule 191 (eff. July 1, 2002).

¶ 7 On November 23, 2010, defendants filed a motion for summary judgment in which they asserted that plaintiff did not have standing because it was not the holder of the note at issue when it filed its original complaint and that the assignment of mortgage attached to plaintiff's complaint was a nullity. Plaintiff responded that it had standing because it was the mortgagee of the note at issue under the Foreclosure Law and was a holder and transferee of the note under the Uniform Commercial Code (810 ILCS 5/1-101 *et seq.* (West 2008)).

¶ 8 On January 12, 2011, the circuit court granted defendants' motion for summary judgment and dismissed plaintiff's complaint without prejudice. Plaintiff then filed a motion to reconsider in which it asserted that a question of material fact existed as to whether it had standing and that the court erroneously disregarded Sweeney's uncontradicted affidavit. On April 14, 2011, the court denied plaintiff's motion to reconsider, stating that plaintiff had failed to establish standing when it attached an unendorsed note to its original complaint and that it had failed to cure that issue in the amended complaint.

¶ 9 On February 10, 2011, defendants filed a petition for attorney fees pursuant to section 15-1510(a) of the Foreclosure Law (735 ILCS 5/15-1510(a) (West 2010)). Defendants asserted that they were successful on their motions to dismiss and for summary judgment, that plaintiff filed its complaint with either neglect or reckless disregard as to whether it had standing to bring its lawsuit, and that they had been unduly burdened and forced to incur costs and attorney fees as a

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result. On May 17, 2011, the court granted defendants' petition for attorney fees and costs in the amount of \$2,785.50.

¶ 10

ANALYSIS

¶ 11 On appeal, plaintiff contends that the circuit court erred in granting summary judgment in favor of defendants. Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). A triable issue of fact exists where there is a dispute as to a material fact, or where reasonable minds might differ in drawing inferences from facts which are not in dispute. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). We review the circuit court's grant of a motion for summary judgment *de novo*. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

¶ 12 Plaintiff asserts that the circuit court erred in granting summary judgment in favor of defendant because the record shows that it had standing to bring its claim where Sweeney related that it was the owner and holder of the note and mortgage at issue and it attached an endorsed note and a copy of the assignment of mortgage to its amended complaint. Defendants respond that the record establishes that plaintiff did not have standing because it did not obtain legal ownership of the underlying debt, memorialized in the note, prior to filing its complaint.

¶ 13 The doctrine of standing is designed to preclude parties who have no interest in a controversy from bringing suit and requires some injury in fact to a legally cognizable interest.

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Glisson v. City of Marion, 188 Ill. 2d 211, 221 (1999). In Illinois, a plaintiff need not allege facts establishing standing, and the defendant bears the burden of proving the plaintiff lacks standing.

International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security, 215 Ill. 2d 37, 45 (2005).

¶ 14 Initially, a plaintiff may have standing to bring a foreclosure action even if it does not own the note at issue. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). In *Barnes*, 406 Ill. App. 3d at 7-8, this court held that the plaintiff had standing to bring its foreclosure action against the defendant even though it did not own the note at issue where the mortgage identified it as the mortgagee and provided that it was acting as the nominee for the lender and had the authority to foreclose and sell the property. The relevant terms of the mortgage in this case are identical to those in *Barnes* where the mortgage provided that MERS was the mortgagee and was acting as the nominee for First Franklin and that Khan understood and agreed that it had the right to foreclose and sell the property at issue. Thus, MERS had the right bring a foreclosure action against Khan even though the note was owned by First Franklin.

¶ 15 Plaintiff maintains that the assignment of mortgage and Sweeney's affidavit establish that it acquired the right to foreclose from MERS prior to filing its complaint. Defendants respond that the assignment of mortgage from MERS to plaintiff is a nullity because a mortgage is not assignable at law. A mortgage is not assignable at common law, and the assignee of a mortgage must therefore resort to equity to enforce its equitable assignment. *Miller v. Frederick's Brewing Co.*, 405 Ill. 591, 596 (1950). A mortgage foreclosure is an equitable action to enforce the lien placed on a mortgaged property. *Resolution Trust Corp. v. Hardisty*, 269 Ill. App. 3d 613, 616

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(1995); *Northern Trust Co. v. Halas*, 257 Ill. App. 3d 565, 572 (1993).

¶ 16 Pursuant to the mortgage, MERS had the right to foreclose and sell the property at issue. The assignment of mortgage attached to plaintiff's complaint was executed on February 13, 2009, prior to the filing of plaintiff's original complaint, and relates that MERS transferred its interests in the mortgage to plaintiff prior to that date. Also, Sweeney averred in her affidavit that MERS assigned its interest in the mortgage to plaintiff on August 1, 2006. Thus, having acquired such equitable interests in the mortgage, plaintiff could then file a foreclosure claim to enforce its rights. Although defendants assert that this court should disregard Sweeney's affidavit because it does not comply with Illinois Supreme Court Rule 191, the assignment of mortgage attached to plaintiff's complaint is alone sufficient to establish that defendants are not entitled to judgment as a matter of law.

¶ 17 Further, a plaintiff need not allege facts establishing standing, and the defendant bears the burden of proving the plaintiff lacks standing. *International Union of Operating Engineers*, 215 Ill. 2d at 45. In this case, defendants have not presented any evidence proving that plaintiff lacks standing. While defendants assert that the documents attached to plaintiff's complaint and motion for summary judgment are insufficient to establish that it had standing to bring its claim, it was not plaintiff's burden to do so. *U.S. Bank National Ass'n v. Sauer*, 392 Ill. App. 3d 942, 946 (2009). As such, we conclude that when viewed in the light most favorable to plaintiff, the pleadings, affidavits, and exhibits on file do not establish that defendants are entitled to judgment as a matter of law and that the circuit court therefore erred in granting summary judgment in favor of defendants. Having concluded that the circuit court's grant of summary judgment must

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be reversed, we necessarily also conclude that its order granting defendants attorney fees and costs must be reversed as well. *Grossinger MotorCorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1992).

¶ 18 Plaintiff also asserts that this court should enter summary judgment in its favor because the record establishes that it had standing to bring its foreclosure claim. However, the record does not show that the circuit court ever ruled on plaintiff's motion for summary judgment, and we therefore restrict our consideration in this case to the rulings and orders from which plaintiff has appealed.

¶ 19 **CONCLUSION**

¶ 20 Accordingly, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this order.

¶ 21 Reversed and remanded.