

FIRST DIVISION  
February 27, 2012  
Modified upon denial of rehearing July 23, 2012

No. 1-11-2430

**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).

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WELLS FARGO BANK, NATIONAL	)	Appeal from the
ASSOCIATION, AS TRUSTEE, FOR HSBC	)	Circuit Court of
BANK USA, N. A., 2005-RM1 BY: SAXON	)	Cook County.
MORTGAGE SERVICES, INC., f/k/a	)	
MERITECH MORTGAGE SERVICES, INC.,	)	
AS THEIR ATTORNEY-IN-FACT, ASSIGNEE	)	
OF MORTGAGE ELECTRONIC REGISTRATION	)	
SYSTEMS, INC., AS NOMINEE FOR RESMAE	)	
MORTGAGE CORPORATION,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08 CH 10631
	)	
BUDIMIR LUKOVIC, NADA LUKOVIC,	)	
MORTGAGE ELECTRONIC REGISTRATION	)	
SYSTEMS, INC., UNDER MORTGAGE	)	
RECORDED AS DOCUMENT NUMBER	)	
0436435125, NONRECORD CLAIMANTS,	)	
UNKNOWN TENANTS AND	)	
UNKNOWN OTHERS,	)	Honorable
	)	Jean Prendergast Rooney,
Defendants-Appellants.	)	Judge Presiding.

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ORDER

JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

¶ 1 **HELD:** Trial court's confirmation of foreclosure sale was affirmed where defendants failed to timely raise the issue of standing and provide a complete record on appeal.

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¶2 Defendants Budimir Lukovic and Nada Lukovic ask this court to reverse the order confirming the foreclosure sale of their property because of plaintiff's lack of standing. For the following reasons, we affirm.

¶3 I. BACKGROUND

¶4 On March 20, 2008, a complaint to foreclose a mortgage was filed by plaintiff, "WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR HSBC BANK USA, NA 2005-RM1 BY: SAXON MORTGAGE SERVICES, INC. F/K/A MERITECH MORTGAGE SERVICES, INC., AS THEIR ATTORNEY-IN-FACT, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." The complaint named Budimir Lukovic, Nada Lukovic, and Mortgage Electronic Registrations Systems, Inc., under a mortgage recorded as document number 0436435125, nonrecord claimants, unknown tenants and unknown owners as defendants. The complaint alleged defendants Budimir and Nada Lukovic had "executed a Mortgage to the Plaintiff, WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR HSBC BANK USA, NA 2005 -RM1 BY: SAXON MORTGAGE SERVICES, INC. F/K/A MERITECH MORTGAGE SERVICES, INC., AS THEIR ATTORNEY-IN-FACT, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION, or its predecessors, in the sum of \$344,000." The mortgage was on property located at 1006 W. Frontenac Drive, Arlington Heights, Illinois (the property) and owned by defendants. The mortgage was recorded on December 29, 2004, as document number 0436435124.

¶5 Plaintiff further alleged defendants had executed an adjustable-rate promissory note for the

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amount of the mortgage, which was to be paid in monthly installments of \$2,897.43. The complaint alleged plaintiff was "the owner" of the note and the mortgage. Plaintiff alleged both the note and mortgage were attached to the complaint as exhibits, but the note was not made part of the complaint. The complaint further alleged defendants delivered the mortgage and the note to plaintiff and "did mortgage and warrant" the property to plaintiff.

¶ 6 The mortgage listed Budimir Lukovic and Nada Lukovic as the borrowers and RESMAE as the lender. However, the mortgage further stated that Mortgage Electronic Registration Systems, Inc. (MERS), "is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." The mortgage document also stated: (1) Budimir and Nada had mortgaged the property to "MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS;" and (2) "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise \*\*\* the right to foreclose and sell the Property." The mortgage stated that the borrowers had signed a promissory note dated December 17, 2004, which provided that defendants Budimir and Nada, as borrowers, had agreed to pay the mortgage debt in regular payments at an adjustable rate.

¶ 7 Paragraph 8 of the complaint alleged:

"That default was made in the payment of the installments of principal and interest falling due under the terms of said Note; that default occurred on October 1, 2007, that the Plaintiff is still the owner and legal holder of the Note here above described and that there remains due and owing the Plaintiff as of October 1, 2007, the principal balance of

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\$335,640.78 on the Note described above. There is a \$96.58 per diem."

¶ 8 Defendants were served on March 29, 2008. On April 9, 2008, Budimir filed a *pro se* appearance and a verified answer. His answer denied only the allegations of paragraph 8 of the complaint and admitted all other allegations. Budimir set forth a single affirmative defense stating he had attempted to speak to "the Bank representative in charge of my loan, but they refused to talk to me." Nada did not file an appearance or answer at that time.

¶ 9 Plaintiff filed a motion for summary judgment which first came before the trial court on September 29, 2008. On that date, the trial court granted the law firm, AzulaySeiden Law Group (AzulaySeiden), leave to file appearances on behalf of both Budimir and Nada, set a briefing schedule on the motion for summary judgment, and set the matter for hearing on November 18, 2008. Defendants did not respond to the motion for summary judgment.

¶ 10 On December 15, 2008, Budimir was granted leave to file an amended answer, and Nada was granted leave to file an answer by December 22, 2008. Defendants failed to comply with this order.

¶ 11 On March 6, 2009, AzulaySeiden filed an unverified "amended" answer to the complaint on behalf of Nada, wherein she denied only paragraph 8 and admitted all other allegations of the complaint. She set forth an affirmative defense that she was "current on all mortgage payments for the subject property." On that date, AzulaySeiden filed an unverified-amended answer on behalf of Budimir, wherein he again denied only paragraph 8 and set forth an affirmative defense that he was current on all payments. AzulaySeiden, however, did not file appearances on behalf of Nada and Budimir.

¶ 12 On May 22, 2009, plaintiff filed a motion for default for failure to answer against Nada in

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that she had failed to file an appearance and had not answered within the time granted by the trial court. Plaintiff also filed motions for summary judgment and to appoint a selling officer. It appears these motions were not decided at that time.

¶ 13 On December 21, 2009, attorney James O. Stola filed an appearance on behalf of both Budimir and Nada. Mr. Stola did not have leave of court to file his appearance.

¶ 14 Plaintiff, once again, filed and served a motion for summary judgment on April 20, 2010, which was presented on April 27, 2010. On that date, the court entered an order setting a briefing schedule and a June 28, 2010, hearing on the motion for summary judgment. The motion for summary judgment identified plaintiff, in the caption and body of the motion, exactly as in the complaint. Defendants, again, did not respond to the motion for summary judgment.

¶ 15 In support of the motion for summary judgment, plaintiff presented the affidavit of Regina Alexander, assistant vice president of "SAXON MORTGAGE SERVICES, INC., AS IT'S ATTORNEY-IN-FACT FOR HSBC BANK USA, N.A., AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." Ms. Alexander stated that she had reviewed plaintiff's records, including a history of payments made by defendants as to the note. In her amended affidavit filed on June 28, 2010, she stated that, at that time, defendants owed \$335,640.78 in principal, \$81,321.96 in interest, and \$31,893.48 in other charges under the note and mortgage "described in the complaint." She averred that the note and mortgage were owned by plaintiff.

¶ 16 On April 20, 2010, plaintiff also filed and served a motion for default against Nada and a motion to appoint a selling officer. These two motions referred to plaintiff as "HSBC BANK USA,

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N.A., AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." Defendants did not file responses to any of these motions.

¶ 17 On June 28, 2010, the trial court entered an order granting plaintiff's motion for summary judgment. The trial court then entered a judgment of foreclosure and ordered that the property be sold. The judgment order itself and its caption identified plaintiff as "HSBC BANK USA N.A., AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." The order stated the court had "examined the files and records in this cause" and "the Note" and "Mortgage/Trust Deed" had been "exhibited in open Court." The order included findings that plaintiff had proved the material allegations of the complaint and was entitled to a decree of foreclosure.

¶ 18 In separate orders, on June 28, 2010, the trial court appointed Intercounty Judicial Sales Corporation (IJSC) as selling officer and entered a default against Nada. These two orders also identified plaintiff as "HSBC BANK USA, N.A., AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." However, the caption of the order granting the motion for summary judgment identified plaintiff as in the complaint.

¶ 19 On January 25, 2011, plaintiff filed and served a notice of sale of the property, stating that pursuant to the judgment of foreclosure entered on June 28, 2010, IJSC would sell the property on February 8, 2011. The caption on the notice of sale identified plaintiff as "HSBC BANK USA, N.A.,

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AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION."

¶ 20 On February 9, 2011, with leave of court, the law firm Fish, Brydes & Associates, filed a substitute appearance on behalf of Budimir and Nada, and on April 12, 2011, filed a motion to vacate the order granting plaintiff summary judgment. In seeking to vacate the order granting summary judgment, Budimir and Nada argued there existed a question of fact as to whether plaintiff had standing to bring the law suit, because the complaint did not include defendants' note, nor any assignment of the mortgage, and the affidavit of Ms. Alexander was defective because she was not an agent of plaintiff. The motion to vacate was denied on April 28, 2011.

¶ 21 On April 22, 2011, plaintiff filed a motion for confirmation of the foreclosure sale. Plaintiff was identified as "HSBC BANK USA N.A., AS TRUSTEE FOR ACE 2005-RM1, ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR RESMAE MORTGAGE CORPORATION." (Hereinafter HSBC BANK USA, N.A.). Attached to the motion was IJSC's report of sale and distribution and receipt of payment from the purchaser. These documents showed that plaintiff HSBC BANK USA, N.A. made the highest bid—\$245,000—for the property, and provided full payment on this bid. On June 22, 2011, defendants filed their response to the motion to confirm the sale. In their response, defendants argued that HSBC BANK USA, N.A. was not a party to the lawsuit and, therefore, it had no standing to bring the motion for confirmation of sale. On July 29, 2011, the trial court entered an order confirming the sale with a notation that defense counsel had appeared and made an unspecified "objection" to the sale's

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confirmation. The order confirming the sale identified plaintiff as HSBC BANK USA, N.A. Budimir and Nada filed a notice of appeal from the July 29, 2011, order confirming the sale.

¶ 22 On appeal, defendants assert: (1) the foreclosure suit was brought on behalf of Wells Fargo; (2) the complaint did not allege "HSBC" had an interest, or otherwise, had standing; (3) "HSBC" did not appear or intervene in this action; and (4) therefore, the motions brought in "HSBC's" name, and the judgments in "HSBC's" name, were improper. Defendants seek reversal of the orders granting the motions for default, to appoint a selling officer, and confirmation of the sale. Defendants do not seek reversal of the orders granting summary judgment against them and denying their motion to vacate summary judgment, and have presented no arguments challenging those orders. Plaintiff responds that documentation was provided to the trial court showing "HSBC" had an interest in the case and had standing when the judgment for foreclosure was entered.

¶ 23 The doctrine of standing requires that a party bringing suit have a real interest in the controversy and some injury in fact to a legally cognizable interest. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). 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). It is the defendant's burden to plead and prove a plaintiff lacks standing. *Id.* The lack of standing to bring suit is an affirmative defense and is waived unless timely raised. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988); see 735 ILCS 5/2-613(d) (West 2010) (an affirmative defense must be set forth in answer or reply); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010) (standing issue forfeited by defendant in foreclosure action where defendant did not file an answer and raised the issue for the

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first time after foreclosure and sale); *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App. (3rd) 100436, ¶ 9 (standing waived by defendant when raised as an objection to motion for order confirming sale).

¶ 24 A plaintiff, in a mortgage foreclosure suit, must have a beneficial interest in the mortgage. *Winkelman v. Kiser*, 27 Ill. 21, 21 (1861). The Illinois Mortgage Foreclosure Law (hereinafter Foreclosure Law), which governs this action (735 ILCS 5/15-1106(f) (West 2010)), sets forth the general form of a foreclosure complaint in section 15-1504(a). 735 ILCS 5/15-1504(a) (West 2010). The statutory short form complaint may include the nature of the instrument, names of the mortgagor and mortgagee, and capacity in which plaintiff brings the suit. 735 ILCS 5/15-1504(a)(3)(A), (C), (D), (N) (West 2010). Section 15-1504(a)(3)(N) states, when setting forth the plaintiff's capacity to bring suit, the complaint should allege "whether plaintiff is the legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate." 735 ILCS 5/15-1504(a)(3)(N) (West 2010).

¶ 25 Section 15-1208 of the Foreclosure Law 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." 735 ILCS 5/15-1208 (West 2010). The Foreclosure Law further requires, "[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 2010).

¶ 26 A foreclosure complaint is sufficient "if it contains the statements and requests called for by

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the form set forth in section 15-1504(a)." *Barnes*, 406 Ill. App. at 6. Here plaintiff alleged defendants had executed both the mortgage and note at issue, attached the mortgage, and alleged plaintiff was the owner of the note and mortgage. The note was not attached to the complaint, but was described in the mortgage and in the complaint. Furthermore, the mortgage document reflects that RESMAE was the original lender, MERS was the lender's nominee and the mortgagee, and the rights of RESMAE as the lender were assignable, including the right to foreclose on the mortgage.

¶ 27 Defendants did not raise the issue of standing in response to the complaint. Defendants admitted certain allegations of the complaint that plaintiff was the owner of the mortgage and the note, and failed to raise an affirmative defense as to standing. Defendants never responded to or raised standing issues as to plaintiff's motions, including those motions where plaintiff was identified as HSBC BANK USA, N.A. Plaintiff's motions for summary judgment, default, appointment of a selling officer, and the entry of the judgment for foreclosure, were decided without responses and without objections as to standing. Defendants raised the lack of standing, for the first time, in their motion to vacate the order granting summary judgment. The motion to vacate was filed two months after the sale of the property and failed to present any evidence as to plaintiff's lack of standing. Defendants waived all claims of error as to standing.

¶ 28 In seeking to vacate the order granting plaintiff summary judgment, defendants argued that a question of fact existed as to standing because the note and assignment of the mortgage were not attached to the complaint, and there were alleged defects in the affidavit of Regina Alexander. Defendants have not made these arguments on appeal and, in fact, have not challenged the trial court's decisions to grant plaintiff's motion for summary judgment and to deny defendant's motion

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to vacate the entry of summary judgment. Defendants have forfeited these arguments and any errors as to these orders. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 29 On appeal, defendants argue that "HSBC" was not a party and had not properly intervened in the foreclosure suit. However, HSBC BANK USA, N.A. was identified in the captions and bodies of the complaint and the various motions as an entity with interest in the suit by RESMAE's assignment through its nominee, MERS.

¶ 30 Plaintiff asserts it presented the trial court with proper and sufficient proof as to the interests of HSBC BANK USA, N.A. in this litigation, including the applicable assignment. The judgment for foreclosure, which identifies HSBC BANK USA, N.A. as the plaintiff, does reflect the trial court examined the relevant files, records, the note, and the mortgage/trust deed, and found plaintiff was entitled to the judgment.

¶ 31 As appellants, defendants had "the burden of presenting a sufficiently complete record of the proceedings to support a claim of error." *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In the absence of a complete record, a reviewing court presumes an order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.'" *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)).

¶ 32 Defendants failed to include, in the record on appeal, transcripts from the hearings relating

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to the dispositive motions. Specifically, we are without a transcript as to the motions: (1) for summary judgment; (2) for default; (3) to appoint a selling officer; (4) to vacate summary judgment; and (5) to confirm sale and without a transcript as to the entry of the judgment of foreclosure. Defendants also failed to submit a bystander's report or an agreed statement of facts as to these proceedings. Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005). We do not have a record of the issues that were addressed, or the arguments and evidence that were presented or considered by the trial court in deciding these matters. We are without a complete record of the evidence presented as to standing. In the absence of a complete record, we will presume the orders of the trial court were proper.

¶ 33 Other grounds exist to affirm the order confirming the sale of the property. Section 15-1508(b) of the Foreclosure Law requires a circuit court to confirm a foreclosure sale unless the court finds: (1) there has been a failure to give proper notice under section 15-1507(c) of the Foreclosure Law (735 ILCS 5/15-1507(c) (West 2010)); (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2010). An order confirming a sale, under section 15-1508, is reviewed under an abuse-of-discretion standard. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 34 Defendants filed a response to the motion for confirmation of the sale, but they did not contend therein that the trial court should make any of the findings required by section 15-1508(b) to refuse confirmation. Defendants argued only that HSBC BANK USA, N.A. lacked standing to bring the motion because it was not a party to this lawsuit. As discussed above, defendants waived all claims of error as to standing by raising the issue for the first time in their motion to vacate the

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order granting summary judgment. As defendants did not give the trial court any basis to refuse confirmation of the sale under section 15-1508(b), we find the trial court did not abuse its discretion in entering the order confirming the foreclosure sale.

¶ 35 Affirmed.