

2012 IL App (2d) 110707-U
No. 2-11-0707
Order filed September 24, 2012

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

DEUTSCHE BANK NATIONAL TRUST)	Appeal from the Circuit Court
COMPANY, as Trustee, in trust for the)	of Du Page County.
registered holders of Argent Securities Inc.,)	
asset-backed pass-through certificates,)	
Series 2004-W-1,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CH-3329
)	
RONALD D. SCHIERER a/k/a Ronald)	
DeWayne Schierer, Jr., TINA SCHIERER)	
a/k/a Tina Marie Schierer,)	
)	
Defendants-Appellants)	
)	Honorable
(Unknown Owners and Non-Record Claimants,)	Robert G. Gibson,
Defendants).)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The trial court did not err in granting the plaintiff's motion for summary judgment on its complaint to foreclose a residential mortgage.

¶ 1 On August 29, 2008, the plaintiff, Deutsche Bank National Trust Company (Deutsche Bank), filed a complaint to foreclose a residential mortgage against the defendants, Ronald and Tina Schierer. On March 1, 2011, the trial court entered summary judgment in favor of Deutsche Bank. On May 17, 2011, the trial court denied the Schierers' motion to reconsider. On June 21, 2011, the trial court confirmed the sale of the residence. The Schierers appeal from these orders. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On December 24, 2003, Argent Mortgage Company, LLC, loaned the Schierers \$356,250 in exchange for a mortgage on the Schierers' home at 399 Cardinal Drive in Bloomingdale. In March 2008, and thereafter, the Schierers failed to make their monthly mortgage payments. On August 29, 2008, Deutsche Bank filed a complaint against the Schierers and those with any interest in the property, seeking to foreclose the mortgage. In its complaint, Deutsche Bank alleged that it was the legal holder or the agent or nominee of the legal holder of the indebtedness. Copies of the note and mortgage were attached to the complaint as exhibits.

¶ 4 On October 10, 2008, the Schierers filed a *pro se* answer stating that loss of household income was the reason for their default and that they wished to exercise their right of reinstatement or their right of redemption. The Schierers also filed a *pro se* counter-complaint alleging violations of the federal Truth in Lending Act (TILA) (15 U.S.C. § 1601 *et seq.* (2006)), arguing that certain terms of the loan were unfair and that certain disclosures were not made, and seeking damages.

¶ 5 On November 13, 2008, Deutsche Bank filed an answer to the counter-complaint, arguing that the Schierers' cause of action, if any, was against the loan originator. Deutsche Bank stated that it was an assignee of the mortgage loan, not the loan originator, and was therefore only liable for violations appearing on the face of the mortgage. Deutsche Bank noted that the counterclaim did not allege that the TILA violations were apparent on the face of the mortgage.

¶ 6 On December 9, 2008, Deutsche Bank moved for entry of a judgment for foreclosure and sale. Deutsche Bank also filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1005 (West 2008)). Deutsche Bank argued that the Schierers' pleadings failed to raise a material issue of fact and that it was therefore entitled to summary judgment. On that same day, the trial court entered an order for summary judgment in favor of Deutsche Bank, entered a judgment for foreclosure and sale, and entered an order dismissing the Schierers' counter-complaint.

¶ 7 On January 5, 2009, the Schierers filed a *pro se* motion to vacate the judgment for foreclosure and sale. The Schierers alleged that when they appeared in court on October 28, 2008, they were given a handwritten continuance order continuing the case to December 9, 2008. On December 3, 2008, they received a notice from the Clerk of the 18th Judicial Circuit Court, notifying them that the case was set for status review on December 29, 2008. Based on that notice, they did not attend court on December 9. They went to court on December 29, 2008, and learned that this case was not on the court call. They subsequently filed their motion to vacate. On February 17, 2009, the trial court granted the Schierers' motion to vacate. The case was continued several times for "loss mitigation activity." On August 10, 2010, the Schierers were granted 28 days to respond to Deutsche Bank's motion for summary judgment.

¶ 8 On August 31, 2010, the Schierers, represented by counsel, filed a motion, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)), to dismiss Deutsche Bank's complaint for foreclosure on the basis that Deutsche Bank lacked standing. Specifically, the Schierers noted that the mortgage attached to the complaint indicated that the lender was Argent Mortgage Company, LLC. Paragraph 3(j) of the complaint to foreclose stated only that:

“Capacity in which [Deutsche Bank] brings this suit: [Deutsche Bank] is the legal holder, agent or nominee of the legal holder, of the indebtedness. [Deutsche Bank] is the owner, agent or nominee of the owner, of the Mortgage given as security.”

The Schierers argued that the foregoing statement did not satisfy the requirement, pursuant to section 1504(a)(3)(N) of the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/1504(a)(3)(N) (West 2008)), that a plaintiff state the capacity in which it brings the suit because Deutsche Bank never stated whether it was the legal holder, or the agent or nominee of the legal holder, of the indebtedness.

¶ 9 On October 21, 2010, Deutsche Bank responded to the Schierers’ motion to dismiss. Deutsche Bank argued that Schierers had the burden to plead and prove lack of standing and that the Schierers had failed to provide evidence that anyone other than Deutsche Bank had the right to enforce the mortgage and note. Alternatively, Deutsche Bank argued that it had complied with the pleading requirements of the IMFL and, further, that Illinois law did not require an assignee-plaintiff in a foreclosure action to provide evidence to support its allegations of capacity. Finally, Deutsche Bank noted that it had recorded a written Assignment of Mortgage (Assignment #1) that showed the transfer of the subject loan to it. Deutsche Bank attached Assignment #1 to its response. Assignment #1 indicated that, for certain consideration, Argent Mortgage Company, LLC “did hereby assign, transfer, [and] convey” the subject mortgage to “Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-W1 *** prior to August 29, 2008.” Assignment #1 was notarized on October 20, 2008, and was recorded with the Du Page County Recorder on November 4, 2008.

¶ 10 On February 1, 2011, the trial court set March 1, 2011, as the hearing date on the motion for summary judgment and motion to dismiss. The trial court further directed Deutsche Bank to bring the original note to that hearing. Finally, the trial court granted the Schierers an additional 14 days to supplement their motion to dismiss.

¶ 11 On February 15, 2011, the Schierers filed a reply to Deutsche Bank's response to their motion to dismiss. The Schierers requested that the court require Deutsche Bank to answer their discovery requests. One such request was that Deutsche Bank produce the original mortgage and note. The Schierers argued that Deutsche Bank did not have the right to enforce the mortgage prior to the time it recorded Assignment #1. The Schierers attached two other assignments (Assignment #2 and Assignment #3), which occurred subsequent to Assignment #1. The Schierers argued that Assignments #2 and #3 were fraudulent and post-dated the filing of the foreclosure action.

¶ 12 Assignment #2 transferred the interest in the subject mortgage from "Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11" to "Deutsche Bank National Trust Company, as Trustee in trust for the benefit of the Certificateholders for Argent Securities Trust 2004-W1, Asset-Backed Pass-Through Certificates, Series 2004-W1." Assignment #2 indicated that the "effective date" was March 20, 2009. It was executed on April 8, 2009 and recorded on April 14, 2009.

¶ 13 Assignment #3 was titled "Corrective Assignment of Mortgage." Assignment #3 stated that "Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-W1" transferred the subject mortgage to "Deutsche Bank National Trust Company, as Trustee, for the nemeft (sic) of the Certificateholders for Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-

W1.” The assignment indicated that the transfer took place “prior to August 29, 2008.” The assignment was notarized on August 2, 2010, and recorded on February 28, 2011.

¶ 14 On March 1, 2011, following a hearing, the trial court granted Deutsche Bank’s motion for summary judgment. Deutsche Bank presented the original note at the hearing. The trial court found that Deutsche Bank was holding the original promissory note and that there was an assignment of the mortgage to Deutsche Bank. The trial court entered a judgment for foreclosure and sale on that same day.

¶ 15 On March 31, 2011, the Schierers filed a motion to reconsider the trial court’s entry of summary judgment. The Schierers argued that they had raised a genuine issue of material fact as to whether Deutsche Bank had standing to foreclose on the mortgage. The Schierers also argued that they were entitled to discovery prior to the trial court’s ruling on the motion for summary judgment.

¶ 16 On April 14, 2011, Deutsche Bank filed a Sheriff’s sale publication notice. On May 16, 2011, the Schierers filed an affidavit of “Lynn S. Szymoniak, Esq.” In that affidavit, Szymoniak opined that Assignment #2 and Assignment #3 were forged and fraudulent. On May 17, 2011, following a hearing, the trial court denied the Schierers’ motion to reconsider, finding that no new matter was presented that would support reconsideration. On June 21, 2011, the trial court approved the sale to Deutsche Bank in the amount of \$178,400.00, resulting in a deficiency of \$284,124.61. On July 20, 2011, the Schierers filed a notice of appeal. On March 6, 2012, the trial court granted Deutsche Bank’s motion to supplement the record with a copy of the original note that was presented at the March 1 hearing.

¶ 17

II. ANALYSIS

¶ 18 On appeal, the Schierers argue that the trial court erred in granting summary judgment in favor of Deutsche Bank because there were genuine issues of material fact as to whether Deutsche

Bank had standing on the date it filed this foreclosure action. The Schierers argue that Assignment #1 was not valid because, up until April 9, 2009, the date Assignment #2 was executed, the holder of the note was the assignor listed on Assignment #2, namely, “Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2004-W11.” Therefore, Argent Mortgage Company LLC could not have assigned the note and mortgage to Deutsche Bank pursuant to Assignment #1 because it was not the owner of the note and mortgage. Rather, they argue the assignor in Assignment #2 was the owner. The Schierers further argue that Assignment #1 was fraudulent because it was purportedly corrected by Assignment #3, which was fraudulent pursuant to the Szymoniak affidavit. The Schierers argue that Assignment #3 is evidence of Deutsche Bank’s motive to commit fraud. Finally, the Schierers argue that the trial court erred in refusing to allow them to obtain discovery.

¶ 19 We review the grant of summary judgment *de novo*. *Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008). “The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit.” *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). A party’s standing must be determined as of the time the suit is filed. *Village of Kildeer v. Village of Lake Zurich*, 167 Ill. App. 783, 786 (1988). “[A] party either has standing at the time the suit is brought or it does not.” *Id.* An action to foreclose upon a mortgage may be filed by a mortgagee, *i.e.*, the holder of an indebtedness secured by a mortgage, or by an agent or successor of a mortgage. See *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010); 735 ILCS 5/15-1208, 5/15-1504(a)(3)(N) (West 2008). Lack of standing to bring an action is an affirmative defense, and the burden of proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 20 In the present case, the trial court did not err in granting Deutsche Bank’s motion for summary judgment. To support their argument that Deutsche Bank lacked standing to sue, the Schierers, in their motion to dismiss, pointed to the note and mortgage attached to the complaint, both of which identify the mortgagee as Argent Mortgage Company LLC—not Deutsche Bank. This evidence met the Schierers’ burden to show that Deutsche Bank lacked standing at the time the suit was filed, and the burden then shifted to the Deutsche Bank to refute this evidence or demonstrate a question of fact. *Triple R Development, L.L.C. v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 12; *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 366 (2008) (“[a] “*prima facie*” defense is sufficient at law unless and until rebutted by other evidence”) (quoting *Darling & Co. v. Pollution Control Board*, 28 Ill. App. 3d 258, 264 (1975)).

¶ 21 Deutsche Bank refuted the Schierers’ allegation that it lacked standing. In its response to the motion to dismiss, Deutsche Bank provided Assignment #1, which indicated that at some date prior to the filing of this suit, Argent Mortgage Company, LLC, transferred its interest in the subject note and mortgage to Deutsche Bank. In addition, at the hearing on the motion for summary judgment, Deutsche Bank presented the original note to the trial court. The note was reviewed by the Schierers’ attorney who stated that it “look[ed] okay.” The note contained an endorsement from the original lender, Argent Mortgage Company, to Ameriquest Mortgage Company, and a subsequent endorsement in blank by Ameriquest. It is well settled that possession of bearer paper is *prima facie* evidence of title and sufficient to entitle a plaintiff to a decree of foreclosure. *Joslyn v. Joslyn*, 386 Ill. 387, 395 (1944).

¶ 22 In an attempt to rebut Deutsche Bank’s evidence that it was the owner of the note and mortgage, the Schierers presented Assignments #2 and #3 and argued that those assignments somehow invalidated Assignment #1. However, their argument rested on the proposition that

Assignments #2 and #3 were fraudulent. The Schierers also filed the Szymoniak affidavit. In that affidavit, Szymoniak opined that Assignment #2 and Assignment #3 were forged and fraudulent. However, Szymoniak did not opine that Assignment #1 was forged or fraudulent. Accordingly, Assignments #2 and #3 were insufficient to rebut Deutsche Bank's evidence of standing. On appeal, the Schierers argue that the original note did not provide sufficient evidence of ownership because the first endorsement was from "Argent Mortgage Company" to Ameriquest Mortgage Company. The Schierers argue that Argent Mortgage Company is not the same entity as Argent Mortgage Company, LLC, and, therefore, Argent Mortgage Company had no authority to endorse the note to Ameriquest Mortgage Company. However, this argument is forfeited as the Schierers have failed to provide any authority or citation to the record in support of this contention. *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 201 (2003).

¶ 23 The Schierers argue that the trial court erred in not granting their full requests for discovery. The Schierers cite *Yuretich v. Sole*, 259 Ill. App. 3d 311, 314 (1994), for the proposition that motions for summary judgment may only be granted after discovery is taken. However, the *Yuretich* court also stated that "the trial court has the power to limit initial discovery to an issue which may be dispositive." *Id.* In the present case, the trial court ordered Deutsche Bank to bring the original note to the March 1 hearing on the parties' motions. Assignment #1 and the original note were dispositive as to the issue of standing and, therefore, the trial court did not err by failing to allow further discovery.

¶ 24 Finally, the Schierers argue that the trial court erred in failing to follow the holding in *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (2008). In *Bayview*, the reviewing court reversed the trial court's entry of summary judgment in favor of Bayview on a complaint to foreclose a residential mortgage. *Id.* at 1185. The record in that case included an assignment from

the original mortgagee to Bayview Financial Trading Group, L.P. (the Partnership). *Id.* at 1186. Bayview's counsel acknowledged that Bayview was a legal entity separate and distinct from the Partnership, that the Partnership was the correct legal entity to which the original mortgagee assigned the mortgage and note, and that Bayview was not the correct plaintiff to have filed the complaint to foreclose the mortgage. *Id.* at 1187. *Bayview* is distinguishable from the present case. In the present case, Deutsche Bank never stated that it did not have standing to bring this suit and it provided an assignment and the original note which demonstrated that it was the holder of the note and mortgage.

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of circuit court of Du Page County.

¶ 27 Affirmed.