2013 IL App (1st) 12-2711-U

FIRST DIVISION
FILED: December 30, 2013

No. 1-12-2711

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KONDAUR CAPITAL CORPORATION, Plaintiff-Appellee, v. MICHAEL J. SREENAN, JP MORGAN CHASE BANK, N.A., DRY POWDER EQUITY, INC., UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 10040 Honorable Robert E. Senechalle Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: In this foreclosure action, we held as follows: 1) The circuit court did not err in awarding summary judgment to the plaintiff where the defendant failed to demonstrate that the plaintiff was an unlicensed debt collector under the Collection Agency Act (225 ILCS 425/1 *et seq*. (West 2008)); 2) there was no abuse of discretion in refusing to strike affidavits in support of the plaintiff's

motion for summary judgment where the affidavits were premised upon documents that qualified as "business records" under Supreme Court Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992)); and 3) any error in allowing the plaintiff to respond to the defendant's affirmative defenses in the context of the plaintiff's summary judgment motion was harmless.

¶ 2 The plaintiff, Kondaur Capital Corporation, succeeded to this action under Section 15 of the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/1501 et seq.(West 2006)), seeking to foreclose on property owned by the defendant, Michael J. Sreenan (defendant). The trial court granted summary judgment for Kondaur, and the defendant now appeals raising the following issues: 1) that the judgment of foreclosure was void because, at the time the plaintiff acquired the mortgage, it was operating as an unregistered "debt collection agency" under the Collection Agency Act (Act)(225 ILCS 425/1 *et seq*. (West 2008)); 2) that the trial court erred in denying his motion to strike affidavits in support of the motion for summary judgment on the grounds that they lacked foundation to qualify as "business records" under Supreme Court Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992); and 3) that the trial court erred in allowing the plaintiff to respond to the defendant's affirmative defense in the context of the summary judgment motion.

¶ 3 This action was commenced on March 11, 2010, by PNC Bank against the defendant and various lien holders seeking the foreclosure and sale of a residential building located at 2540 N. Seminary in Chicago. The complaint alleged that on September 12, 2003, the defendant executed a note to Midamerica Bank, secured by a mortgage on the subject property. Midamerica was subsequently acquired by PNC, which, in turn, sold and assigned the note to Kondaur on August 9, 2010. The complaint was later amended to substitute Kondaur (hereinafter the plaintiff) as the plaintiff.

¶ 4 The amended complaint alleged that, under the terms of the note, the defendant agreed to pay the lender the principal sum of $440,000, plus interest, in monthly installments commencing on November 1, 2003. The defendant ceased making payments on the note in November 2009. Thus, the plaintiff requested foreclosure and sale of the property, attorney fees and costs, and an order appointing a receiver. The plaintiff asserted that it was bringing the action in the capacity of current "legal holder of the mortgage and note."

¶ 5 After numerous attempts at service failed, the court held the defendant in default on October 7, 2010, and also entered a judgment of foreclosure and for sale of the property.

¶ 6 On February 18, 2011, the defendant filed his appearance *pro se,* along with a motion to vacate the default order and judgment of foreclosure. The court granted the motion and ordered the defendant to answer the amended complaint on or before July 28, 2011. On August 5, 2011, the defendant filed, without obtaining leave of court, his untimely and unverified answer and affirmative defenses. In his answer, the defendant admitted that the complaint had attached true copies of the mortgage and note which were executed by him, and that he had not paid monthly payments on the note since November of 2009. However, he denied that the plaintiff was the legal holder of the mortgage or had a right to foreclose on it. The defendant's first affirmative defense asserted that the "assignment of the note and mortgage to [the plaintiff] is illegal and void because [the plaintiff] is not a licensed debt collector in the State of Illinois." His second affirmative defense alleged that the plaintiff "is not the owner of the note and mortgage and therefore has no standing to foreclose the Mortgage."

¶ 7 On October 25, 2011, the plaintiff filed its Motion for Summary Judgment and supporting

affidavits, and subsequently filed a Motion to Appoint a Receiver. In the summary judgment motion, the plaintiff asserted that it was the legal holder and in possession of the note at issue pursuant to the assignment from PNC. The motion further stated that, despite a demand for payment under the note, the defendant has remained in default since November of 2009, and has failed to establish that he had made the payments required under the note, or to otherwise contradict any of the material facts alleged by the plaintiff. Attached to the motion were three affidavits of Jason Origer, a foreclosure supervisor employed by the plaintiff, and the affidavit of Jason Holstein, an employee of PNC, with an attached letter informing the defendant of his default and potential loan acceleration. The first two Origer affidavits were entitled "Supplemental Affidavit" and "Business Records Affidavit," and attested to the chain of ownership of the note and mortgage from Midamerica Bank, to National City Bank, to PNC, and finally to the plaintiff. The affidavits and supporting documentation evidenced the defendant's payment history on the note, his subsequent default, and the demand letter sent to the defendant on January 15, 2010. The final Origer affidavit, designated "Affidavit of Prove-Up," was based upon Origer's "examination of the Plaintiff's mass of books and records" regarding the defendant's note file. It included a breakdown of the principal balance on the note, fees, interest, and payments made by the plaintiff from the date of default. According to the affidavit, the final balance due on the note was $452,697.32.

¶ 8 The summary judgment motion further contained the plaintiff's responses to the defendant's affirmative defenses. In response to the allegation that the plaintiff was an unlicensed debt collector and that the assignment of the note was thus void, the plaintiff argued

that the defendant's assertion was unsupported and conclusory. The plaintiff further contended that, even assuming *arguendo* that the court considered the defense sufficiently pled, the plaintiff's status as a debt collector in no way affected the validity of the assignment of the note. Rather, because the plaintiff was in possession of a note endorsed in blank, it was fully negotiable, subject to payment on transfer alone under 810 ILCS 5/3-205(b)(West 2008).

¶ 9 On November 10, 2011, the defendant filed a motion for judgment on the pleadings pursuant to section 2-615(e) of the Illinois Code of Civil Procedure (735 ILCS 5/2-615(e) (West 2010)). In the motion, the defendant alleged that the plaintiff's failure to file a response to the defendant's affirmative defenses rendered those defenses "admitted" by the plaintiff, particularly the defense that the plaintiff was an "unlicensed debt collector." Thus, the defendant requested that the instant action be dismissed.

¶ 10 The defendant filed responses to the plaintiff's motion for summary judgment and for appointment of a receiver, alleging once again that, because the plaintiff never denied or otherwise challenged his affirmative defenses, they were deemed admitted. The defendant further argued that the plaintiff was barred from being the holder of the subject note because it "has committed the crime of debt collection by an unregistered collection agency"; that the plaintiff lacked standing to bring the foreclosure action; and that the plaintiff has not provided evidence to support a prima facie case for foreclosure. The defendant also filed a Motion to Strike the affidavits of Jason Origer and Jason Holstein, arguing, in part, that they were based upon conclusory and hearsay statements and lacked the requisite foundation to qualify as "business records" under Rule 236.

¶ 11 On December 15, 2012, the court granted the defendant leave to file *instanter* the requisite verfication for his answer and affirmative defenses.

¶ 12 On January 10, 2012, the court entered an order Appointing a Receiver for Non-Residential Property. The order also denied the defendant's motion for judgment on the pleadings, and set a schedule for additional briefing on the plaintiff's summary judgment motion.

¶ 13 The defendant subsequently served the plaintiff with his First Set of Requests for Admissions of Facts and Genuineness of Documents. The documents consisted largely of news articles and public records, including news and records from the plaintiff's own website, regarding the nature of the plaintiff's national business. A "licensing" section, purporting to be from the plaintiff's website, provided a list of licenses procured by the plaintiff in each of the fifty States, including licenses for consumer credit, mortgaging, mortgage banking, and in a small minority of States, for debt collection.

¶ 14 On January 24, 2010, the defendant filed his petition to vacate the Order Appointing a Receiver, which was later recast as a Motion to Reconsider the Order Appointing a Receiver. The motion to reconsider was later denied, based on the court's finding that the defendant failed to assert any new evidence not available at the time of entry of the original order.

¶ 15 Following a hearing on March 9, 2010, the court entered an order 1) denying the defendant's motion to strike the affidavits in support of the plaintiff's motion for summary judgment; 2) granting the plaintiff's motion for summary judgment, and 3) entering a judgment of foreclosure. On August 20, 2012, the court entered an order, *inter alia,* approving the sale of the subject property.

¶ 16 On appeal, the defendant first urges that this court reverse the grant of summary judgment, because the underlying judgment of foreclosure against him was void due to the plaintiff's status as a debt collection agency and its failure to register as such under the Act. In response, the plaintiff argues that the defendant failed to allege facts or provide case law showing that it qualified as a "debt collector", and alternatively, contends that it was a mortgagee, lawfully seeking to recover its collateral as provided under the IMFL.

¶ 17 Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2 1005(c) (West 2010). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102, 607 N.E.2d 1204 (1992). However, summary judgment also requires that the responding party come forward with the evidence that it has in support of its case. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380 ¶ 14. Where a claim or defense is without the proper factual support, it should be disposed of on summary judgment. *Deutsche Bank National Trust Co. v. Tapla*, 2013 WL 4804855 at *1 (N. D. Ill. Sept. 9, 2013). When considering an appeal from a grant of summary judgment, our review is *de novo*. *Outboard Marine*, 154 Ill.2d at 102.

¶ 18 The purpose of the Act is to "protect consumers against debt collection abuse." 225 ILCS 425/1a (West 2008). It broadly bars any "collection agency" from operating in this State, engaging in the business of debt collection, or exercising its right to collect, without first

registering under the Act. 225 ILCS 425/4 (West 2008). The Act defines a "collection agency" or "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." 225 ILCS 425/2 (West 2008); *Aurora Loan Services v. Kmiecik*, 2013 IL App (1st) 121700 ¶ 28. A "consumer credit transaction" covered under the Act is defined as a "transaction between a natural person and another person in which property, service, or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes." *Id.* The Act does not apply, however, "to persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency," including, but not limited to, "[b]anks, including trust departments, affiliates, and subsidiaries thereof, fiduciaries, and financing and lending institutions (except those who own or operate collection agencies); *** [l]oan and finance companies." 425 ILCS/2.03 (West 2008).

¶ 19 In support of his argument, the defendant posits that the plaintiff "purchases defaulted mortgages and then collects on them through litigation and otherwise". It refers us to the plaintiff's website, public statements by its purported corporate officers, and publications in various news media, indicating that the plaintiff is "one of the nation's largest buyers of troubled mortgages" and is "committed to [its] core business as a leader in the distressed mortgage acquisition and servicing sector." Indeed, the plaintiff itself agrees that, as a component of its nationwide business, it purchases residential mortgages and sues to foreclose on them if in default.

¶ 20 Nonetheless, the defendant fails to articulate exactly how the plaintiff's business qualifies

it as a debt collection agency or how its actions in this case constituted the "collection of a debt" subject to the Act. While his brief contains some references to the Act's broad provisions, it goes on for pages without any citation to authority, and fails to refer us to a single case holding that foreclosing on a mortgage equates to a "debt collection" under the Act. In fact, our research discloses the opposite; that while this issue has not yet been decided in Illinois, the majority view from other jurisdictions is that a mortgage foreclosure is not the collection of a debt. *Aurora Loan Services v. Kmiecik*, 2013 IL App (1st) 121700 ¶ ¶ 30 - 32 (citing cases.); *Odinma v. Aurora Loan Services*, 2010 WL 2232169 *11 - 12 (N. Dist. Cal. June 3, 2010).

¶ 21 It was the defendant's burden in this case to substantiate his claim with concise arguments and citation to applicable authority. A reviewing court is under no obligation to act as an advocate for the appellant or assume the burden of researching his case. *U.S. Bank v. Lindsey*, 397 Ill.App.3d 437, 459 (2009), quoting *Obert v. Saville*, 253 Ill.App.3d 677, 682 (1993); see Supreme Court Rule 341(h)(7)(eff. July 1, 2008). We find that the defendant's brief has fallen short of this requirement, and that there is no basis to disturb trial court's rejection of his argument regarding the plaintiff's status as a debt collector.

¶ 22 We note that the defendant relies very heavily on the case of *LVNV Funding, LLC v. Trice,* 2011 IL App (1st) 092773, in support of its position that a complaint filed by an unregistered collection agency is a nullity and any subsequent judgment thereon is void. However, *Trice* offers no guidance under the facts of this case, in the absence of any authority supporting the proposition that the plaintiff is a debt collector as defined in the Act.

¶ 23 Similarly, relegated to the defendant's reply brief, is the case of *Wilson v. Draper &*

Goldberg, P.L.L.C., 443 F. 3d 373, (4th Cir. 2006), again apparently for the proposition that we should hold a mortgage foreclosure to universally constitute debt collection under the Act. We disagree, because in that case, unlike like the one at bar, there were facts establishing the collection of a debt. In *Wilson*, a bank retained a law firm to foreclose on a mortgage in default, and the homeowner contended that the firm had violated the Fair Debt Collection Practices Act. In reversing summary judgment for the defendant law firm, the court observed that, prior to filing any action, the firm had engaged in correspondence with the mortgagor stating that it was "attempt[ing] to collect a debt" under the "provisions of the Fair Debt Collection Practices Act." The firm had also sent the plaintiff a "validation of debt notice" under the Act, which gave specific information concerning "the amount of the debt," the "creditor to whom the debt is owed," and the "procedure for validating the debt." *Wilson,* 443 F.3d at 374-75. The firm argued that, when it initiated foreclosure proceedings, the plaintiff's debt ceased to be a "debt." The court disagreed, finding that the firm's actions surrounding the foreclosure proceeding were attempts to collect on a debt, and the foreclosure action did not operate to transform these actions. *Wilson*, 443 F.3d at 376; accord, *Glazer v. Chase Home Finance LLC,* 704 F.3d 453 (6th Cir. 2013)(decision premised upon extensive analysis of Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692 *et seq.*).

¶ 24 We now turn to the issue of whether the court properly granted summary judgment in favor of the plaintiff. The IMFA provides that a foreclosure action may be brought by the legal holder of an indebtedness secured by a mortgage, or by an agent or successor of a mortgagee. *See Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill.App.3d 1, 7, 940 N.E.2d 118

(2010); 735 ILCS 5/15-1503, 15-1504(a)(3)(N) (West 2010). A *prima facie* case for foreclosure is established with the introduction of the mortgage and note, after which the burden shifts to the mortgagor to prove any affirmative defenses. *Farm Credit Bank v. Biethman*, 262 Ill. App. 3d 614, 634 N.E.2d 1312 (1994).

¶ 25 Under the Uniform Commercial Code, a person entitled to enforce a note includes its holder or a nonholder in possession of the instrument who has the rights of the holder. See 810 ILCS 5/3-301 (West 2010). If a note is "indorsed in blank," it becomes payable to whomever is the bearer, and may be negotiated by transfer of possession alone until it is specially indorsed. *Deutsche Bank* , 2013 WL 4804855 at *1 (N. D. Ill. Sept. 9, 2013), citing 810 ILCS 5/3-205(b) (West 2010). A person in possession of a note payable to bearer is deemed the holder of the instrument and is entitled to enforce the instrument. See 810 ILCS 5/3-201 (b)(21)(A) (West 2010).

¶ 26 Here, the record establishes that, at the time the plaintiff was substituted into this action by court order, it had been assigned the note and mortgage by PNC. Attached to the motion for summary judgment is the note endorsed in blank by PNC, with the defendant's signature appearing clearly as the maker of the document. The affidavit of Jason Origer avers that the plaintiff is the holder of the note. The plaintiff has thus established standing to bring this foreclosure action. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 262, 807 N.E.2d 439 (2004) Further, there is no dispute that the defendant was the maker of the note and the mortgagor, and that he ceased making payments on the note as of November 2009.

¶ 27 The defendant next contends that the trial court abused its discretion in denying his

motion to strike three affidavits of the plaintiff's loan supervisor, Jason Origer, in support of the plaintiff's summary judgment motion. The defendant argues that these affidavits are supported by documents that lack the foundational requirements to qualify as business records under Supreme Court Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992), and that they do not support the statements in the affidavits. We disagree.

¶ 28 In order to be admitted as business records, documents must conform with Rule 236, which provides as follows:

> "Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind." Ill. S. Ct. R. 236 (eff. Aug. 1, 1992).

¶ 29 The affidavits at issue were used to evidence the chain of ownership of the mortgage and

note from Midamerica to the plaintiff, and the payments made on the note from its inception in September 2003, until the default in November 2009. Origer's "Affidavit of Prove-Up" summarized the amount due under the note as of October 12, 2011, just prior to the date of the summary judgment motion. The gist of the defendant's argument here is that the records were promulgated by the predecessor owners of the mortgage rather than the plaintiff, and thus could not be relied upon by the plaintiff when it was assigned the note. However, the law in Illinois holds to the contrary.

¶ 30 A report generated by a third party has been held to be admissible as a business record when it was commissioned in the regular course of business by the party seeking to introduce it. *Argueta v. Baltimore & Ohio Chicago Terminal Railroad Co.*, 224 Ill. App. 3d 11, 21, 586 N.E.2d 386 (1991). The theory behind this rule is that because the purpose of these records is to aid in the proper transaction of the business, and "they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify nonexistent." *Kimble v. Earle M. Jorgenson*, 358 Ill. App. 3d 400, 414, 830 N.E.2d 814 (2005), quoting Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th ed. 1999); accord *Krawczyk v. Centurion Capital Corp.,* 2009 WL 395458 (N. D. Ill. Feb. 18, 2009). It therefore makes no difference whether the records were kept by the party or by a third party authorized by the business to generate the record on their behalf. *Bank of America v. Land*, 2013 IL App (5th) 120283 ¶ 13. The test is the authority of the third party to act on the business' behalf. *Argueta*, 224 Ill. App. 3d at 21. In order to establish the proper foundation, Rule 236 mandates only that the tendering party show, based upon personal knowledge, 1) that

the record was made in the ordinary course of business, and 2) at or near the time of the event or occurrence. *Kimble*, 358 Ill. App. 3d at 414.

¶ 31 Here, Origer averred in his affidavits that he had access to the loan records for and relating to the loan at issue and that he made the affidavits based upon personal knowledge of how the records are kept and maintained. He further stated that the plaintiff maintained the records in the course of its regularly conducted business activities at or near the time of the event, and that the records were transmitted by a person with knowledge. Although the records necessarily were kept by the banks previously owning the note, it was in those owners' interest to maintain them with care and accuracy. *Krawczyk,* 2009 WL 395458 at *4. We agree with the court in *Krawczyk*, which recognized the problems inherent to mortgage lenders and financial institutions attempting to prove a debt which has been assigned several times. *Id.* (citing *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 831 N.E.2d 909, (2005)). Following *Beal*, the court reasoned that a bank should not be required to provide testimony from a witness with personal knowledge of the prior bank's loan records, because the bank's reliance on these types of records maintained by others rendered the records tantamount to the bank's own records. *Krawczyk*, 2009 WL 395458 at *4, citing *Beal*, 444 Mass. 813. Thus, we find no abuse of discretion in admitting the loan documents here as business records. See *Bank of America*, 2013 IL App (5th) 120283.

¶ 32 Last, the defendant argues that the court committed procedural error in allowing the plaintiff to attack his affirmative defenses, specifically the defense asserting that the plaintiff was an unlicensed debt collector, in the context of the plaintiff's summary judgment motion. The

defendant argues that because the plaintiff never filed a response to his affirmative defenses, they were deemed admitted (see 735 ILCS 5/2-610(b) (West 2010), and that he relied upon this alleged admission in proceeding with his case. Accordingly, he was prejudiced when the plaintiff denied the defense for the first time on summary judgment.

¶ 33 We hold that, to the extent any error did occur on this issue, it was harmless. Affirmative defenses must be pleaded with the same factual specificity as other pleadings, and are subject to the same attacks as other pleadings for factual deficiencies. *Betts v. Manville Pers. Injury Settlement Trust*, 225 Ill. App. 3d 882, 929, 588 N.E.2d 1193, 1223 (1992). Further, if an affirmative defense amounts to nothing more than a legal conclusion without any factual support, the failure to respond to it does not constitute an admission by the plaintiff. *Crerar Clinch Coal Co. v. Board of Education of the City of Chicago*, 13 Ill. App. 2d 208, 141 N.E.2d 293 (1957).

¶ 34 Here, the majority of the defendant's affirmative defenses were conclusory attacks on a foreclosure action and were unsupported by facts. Further, they had no bearing on the court's disposition of this case. The one affirmative defense at issue, that the assignment of the note and mortgage was void because the plaintiff was not a licensed debt collector, was also a legal conclusion, containing no facts subject to a binding admission. Accordingly, was see no prejudice to the defendant on this issue.

¶ 35 For the foregoing reasons, the judgment of the circuit court granting summary judgment for the plaintiff and entering a judgment of foreclosure is affirmed.

¶ 36 Affirmed.