

No. 1-12-2859

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

THE BANK OF NEW YORK MELLON, as Successor)	Appeal from the Circuit Court
Trustee Under Novastar Mortgage Funding Trust, Series)	of Cook County,
2005-2,)	
)	
Plaintiff-Appellee,)	
)	10 CH 34180
v.)	
)	
SHERECE THOMPSON and DARREN THOMPSON,)	Honorable
)	Anthony C. Kyriakopoulos,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 HELD: (1) Where a copy of both the mortgage and note were attached to the complaint to foreclose mortgage, the trial court had subject matter jurisdiction over the action; and (2) Where defendants failed to raise the affirmative defense of lack of standing in a timely manner before the trial court, the issue was forfeited on appeal.

¶ 2 Plaintiff, Bank of New York Mellon (Bank), filed a mortgage foreclosure complaint against Sherece Thompson and Darren Thompson in August 2010. Defendants failed to answer the complaint and, in November 2011, the trial court entered an order of default and judgment of

1-12-2859

foreclosure against defendants. Subsequently, defendants filed a motion to vacate the default judgment and objections to the confirmation of sale and order of possession and eviction pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) and section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2010)). In September 2012, the trial court confirmed the judicial foreclosure sale. On appeal, defendants challenge the trial court's judgment as void, arguing that the Bank fraudulently misrepresented that it had an interest in the property at issue and that, because the Bank did not have an interest in the property, the court did not have jurisdiction over the action. We affirm.

¶ 3 On August 9, 2010, the Bank filed its complaint to foreclose mortgage against defendants Sherece and Darren Thompson, and other defendants not party to this appeal, pursuant to the Foreclosure Law. The complaint alleged as follows: on May 27, 2005, defendants, as mortgagors, executed a mortgage in the amount of \$126,000 to Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for Novastar Mortgage, Inc.," for the property commonly known as 14631 Lincoln Avenue in Harvey, Illinois (Property). The Bank claimed it was the trustee for the holder of the mortgage and note and that defendants were in default for not making the monthly payments beginning in April 2010 through the present. The Bank requested that a judgment of foreclosure and sale be entered against them.

¶ 4 Copies of the mortgage and note were attached to the complaint. The mortgage defined Sherece Thompson and Darren Thompson as the borrowers, Novastar as the lender, and MERS as the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns."

1-12-2859

Section 20 of the mortgage also provided that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

The mortgage and the note were both signed by defendants.

¶ 5 According to an affidavit of a special process server, filed on August 26, 2010, Darren Thompson was served with a summons and a copy of the complaint for himself and for Sherece on August 11, 2010. Defendants never filed an answer to the complaint.

¶ 6 On November 10, 2011, the Bank filed two motions: one requesting an order of default against defendants and another requesting an order for judgment of foreclosure and sale. The Bank also filed the assignment of the mortgage on the same day. The assignment states, in pertinent part:

"For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc., its successors and/or assigns (hereinafter M.E.R.S., INC.), did hereby assign, transfer, convey without warranties and without recourse; set over and deliver to THE BANK OF NEW YORK MELLON, AS SUCCESSOR TRUSTEE UNDER NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2005-2 *** prior to 08/04/10, the following described mortgage [of the Property]."

The assignment was signed by Mandy G. Fowler and Angelo Mayfield as vice presidents of MERS. The assignment was notarized on June 16, 2011, and recorded with the Cook County

1-12-2859

recorder of deeds on July 11, 2011.

¶ 7 On November 23, 2011, the trial court entered an order of default against defendants, noting that they had failed to appear or plead, and entered a judgment of foreclosure and sale of the Property. The Bank was the highest bidder at the judicial sale of the Property, which took place on February 27, 2012.

¶ 8 On March 20, 2012, the Bank filed a motion for an order approving the report of sale, and for distribution and possession of the Property.

¶ 9 On June 8, 2012, defendants filed a motion to vacate the default judgment and objections to the confirmation of sale and the order for possession and eviction pursuant to section 2-1401 of the Code of Civil Procedure and section 5-1508(b) of the Foreclosure Law. Defendants argued that the Bank had no standing to bring the suit and no interest in the Property because it failed to provide a properly endorsed note or mortgage, and had not provided "proof of a properly recorded assignment." Defendants concluded that, as a result, the sale of the property was fraudulent. Copies of the mortgage, the note, and the assignment were attached to the motion and objections.

¶ 10 On September 17, 2012, the trial court entered an order approving the report of sale and distribution, confirming the sale, and permitting the Bank's possession of the Property.

Defendants filed a notice of appeal on September 26, 2012. Although the parties agree that the trial court entered an order denying defendants' motion to vacate and objections, the actual order denying the motion and objections was not included in the record on appeal.

¶ 11 On appeal, defendants first contend that the trial court erred in dismissing their motion to

1-12-2859

vacate the default judgment. Specifically, defendants argue that the trial court did not have jurisdiction over the cause because the Bank did not have an interest in the Property at the time it filed the foreclosure complaint and, as a result, the trial court's dismissal of defendants' motion was void. Defendants have not denied that they were in default on their mortgage.

¶ 12 Section 2-1401 allows a petitioner to request relief from a final judgment if the petition is filed more than 30 days after the entry of the original judgment. 735 ILCS 5/2-1401 (West 2010). Section 2-1401 petitions "are essentially complaints inviting responsive pleadings" and the proceedings are subject to the usual rules of civil procedure. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982)). Therefore, the trial court may generally dismiss a petition "upon a challenge that, even taking as true its allegations, it does not state a meritorious defense or diligence under section 2-1401 case law." *Vincent*, 226 Ill. 2d at 8. However, an "allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). A section 2-1401 petition seeking relief based on an argument that the underlying judgment is void, is reviewed *de novo*. *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12.

¶ 13 "[A] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally." *Sarkissian*, 201 Ill. 2d at 103 (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)). "It is essential to the validity of a judgment that the court have both jurisdiction of the subject matter

1-12-2859

of the litigation and jurisdiction over the parties.' " *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910 (2008) (quoting *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986)). A court possesses subject matter jurisdiction if the plaintiff's complaint presents a "justiciable matter", which is a "controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002). Whether a court has subject matter jurisdiction is an issue that cannot be forfeited and may be raised at any time. *Belleville Toyota*, 199 Ill. 2d at 333-34. The lack of jurisdiction must appear on the face of the record. *Muslim Community Center v. Village of Morton Grove*, 392 Ill. App. 3d 355, 358 (2009).

¶ 14 In contrast, the doctrine of standing " 'is designed to preclude persons who have no interest in a controversy from bringing suit' and 'assures that issues are raised only by those parties with a real interest in the outcome of the controversy.' " *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 24 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)). The defendant has the burden to plead and prove a lack of standing because it is an affirmative defense. *Id.* Although a defendant cannot forfeit the question of subject matter jurisdiction, he can forfeit the issue of standing if he failed to raise it before the trial court in a timely manner. *Id.* Our supreme court has held, "issues of standing and ripeness do not implicate our subject matter jurisdiction." *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 15 Here, although defendants have presented their argument as a lack of jurisdiction based

1-12-2859

on the claim that the Bank misrepresented its interest in the Property, we conclude it is essentially an argument based on a lack of standing. However, because jurisdiction cannot be forfeited, we will first consider the question of whether the trial court had jurisdiction.

¶ 16 Subject matter jurisdiction is "the power of a court to hear and determine cases of the general class to which the proceeding in question belongs" and is conferred entirely by our constitution. *Belleville Toyota*, 199 Ill. 2d at 334. Section IX of the constitution grants the trial court jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9; *Belleville Toyota*, 199 Ill. 2d at 334. Therefore, a plaintiff's case will invoke subject matter jurisdiction if, as framed by the complaint, it presents a justiciable matter. *Belleville Toyota*, 199 Ill. 2d at 334 (citing *People ex rel. Scott v. Janson*, 57 Ill. 2d 451, 459 (1974) (subject matter jurisdiction attaches to a cause if the complaint states a case belonging to a general class over which the court's authority extends); *People v. Western Tire Auto Stores, Inc.*, 32 Ill. 2d 527, 530 (1965) (the question of whether subject matter jurisdiction is present is tested by the nature of the case as presented by the complaint and the relief sought); *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994) (the filing of a complaint invokes the court's subject matter jurisdiction and authority to resolve a justiciable question)).

¶ 17 In Illinois, foreclosure proceedings are governed by the Foreclosure Law. 735 ILCS 5/15-1501 *et seq.* (West 2010). However, the Foreclosure Law does not affect the right of a mortgagee to foreclose its mortgage by a common law strict foreclosure. 735 ILCS 5/15-1403 (West 2010). Foreclosure proceedings will also be governed by provisions of the Code of Civil Procedure, unless the provisions are inconsistent with the Foreclosure Law. 735 ILCS 5/15-1107

1-12-2859

(West 2010). The Foreclosure Law defines a "mortgage" as "any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation." 735 ILCS 5/15-1207 (West 2010). Section 15-1203 of the Foreclosure Law provides that "to foreclose" means "to terminate legal and equitable interests in real estate pursuant to a foreclosure." 735 ILCS 5/15-1203 (West 2010). Section 15-1504 sets out the pleading requirements for foreclosure complaints. 735 ILCS 5/15-1504 (West 2010).

¶ 18 A foreclosure complaint will be considered legally and factually sufficient for purposes of the Foreclosure Law if the complaint complies with the requirements of section 15-1504.

Mortgage Electronic Registration Systems, Inc. v. Barnes, 406 Ill. App. 3d 1, 6 (2010) (citing 735 ILCS 5/15-1504(a), (b) (West 2008)). Section 15-1504(a) provides that the plaintiff may, in pertinent part, identify the "[c]apacity in which plaintiff brings this foreclosure," and may attach a copy of the mortgage and the note to the complaint. 735 ILCS 5/15-1504(a)(3)(N) (West 2010).

¶ 19 Here, the Bank alleged it was bringing the suit as "the trustee for the holder of the Mortgage and Note" and attached a copy of both the mortgage and the note to the complaint. The complaint adequately presented a controversy, the mortgage foreclosure, involving the legal relations of two parties with adverse legal interests: the Bank, the holder of the mortgage and note, and defendants, the mortgagors in default. The circuit court in the instant case had the power to hear and determine the foreclosure action which is within the general class of cases to which this proceeding belongs. Therefore, once the Bank filed the complaint, the court had subject matter jurisdiction. *Belleville Toyota*, 199 Ill. 2d at 334.

¶ 20 We next turn to the question of whether the Bank had standing, specifically, whether the

1-12-2859

Bank had an interest in the Property at the time the complaint was filed. We find instruction from *Barnes*, 406 Ill. App. 3d 1. The defendant in *Barnes* did not file an answer to the foreclosure complaint filed by MERS, and an order of default and a judgment of foreclosure were entered against her. *Id.* at 3. Three months later, the defendant filed an appearance and the court granted her motion to stay the sale of the property. *Id.* After the property was sold, the defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure, seeking to vacate the foreclosure judgment and sale, arguing that the judgment was void because MERS had no interest in the mortgage on the property, which was denied by the trial court. *Id.*

¶ 21 On appeal, in response to Barnes' claim that MERS had no interest in the property that was foreclosed, the court found that the defendant's claim was, in essence, a standing issue. It further held that since the standing issue had not been raised in a timely manner, it was forfeited. *Id.* at 6 (" 'lack of standing in a civil case is an affirmative defense which will be forfeited if not raised in a timely fashion in the trial court' ") (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)). The court also held that by failing to answer the complaint, the defendant "admitted the well-pleaded allegations of the complaint when she was held in default, including the allegations that MERS held in an interest in the subject property." *Id.* at 7.

¶ 22 Similarly here, defendants were properly served but never filed an answer to the Bank's complaint. Never denying defaulting on their payments, defendants actively participated in the proceedings only after the court found them to be in default and the Property was sold. Therefore, defendants "forfeited the standing issue through [their] default" and, by failing to

1-12-2859

answer the complaint, defendants also admitted the well-pleaded allegation in the complaint that the Bank had an interest in the property. *Id.*; see also *Ortiz*, 2012 IL App (1st) 112755, ¶¶ 25, 37 (following *Barnes* to find the defendant forfeited the affirmative defense of lack of standing).

¶ 23 Forfeiture aside, a written instrument that has been executed, recorded, and acknowledged, is presumed valid on its face and can only be rebutted by clear and convincing evidence. See *In re Estate of Cuneo*, 334 Ill. App. 3d 594, 598 (2002) (observing that a recorded deed is presumptively valid and effective); *Resolution Trust Corp. v. Hardisty*, 269 Ill. App. 3d 613, 619 (1995) (finding that an executed, acknowledged, and recorded deed carries a presumption of delivery). The assignment shows that MERS assigned, transferred, and conveyed the property to the Bank "prior to 8/4/10" and therefore prior to the filing of the foreclosure complaint. A review of the assignment shows nothing on the face of the document to suggest it was invalid. Therefore, the Bank had a sufficient interest in the Property to file its complaint for foreclosure.

¶ 24 Nonetheless, defendants argue that the assignment is insufficient to show the Bank had an interest in the Property because "the bank did not execute an assignment until 11 months after the complaint was filed." However, there is nothing in the record to show that the assignment was executed 11 months after the complaint was filed. In fact, on its face, the assignment states that the mortgage was assigned "for good and valuable consideration *** prior to 8/4/10." No particular form is required for an assignment to be valid. *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987). An assignment can be oral or written and, to be effective, an assignment need only assign or transfer in whole or in part some debt and must "describe the

1-12-2859

subject matter of the assignment with sufficient particularity to render it capable of identification." *Id.* "[T]he rule has invariably been that no particular form of the assignment is required, any document which sufficiently 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 in equity." *Id.* (quoting *Evangelical Slovak Women's Union v. Papanek*, 8 Ill. App. 2d 298, 304 (1956)). Based upon our review of the assignment in the record, we find it was effective because it transferred an identifiable interest in the Property from the assignor to the assignee.

¶ 25 Moreover, the notarization date and the recording date do not affect the validity of the assignment. Although the notarization occurred several months after the complaint was filed, that notarization does not control when the execution of the assignment took place. The notarization merely indicates that the signatories appeared before the notary and acknowledged their signatures to the document that day. Even though the notarization occurred on June 16, 2011, the notarization does not purport to create June 16, 2011, as the execution date for the actual assignment. As pointed out above, the assignment was given prior to August 4, 2010, and we will not construe the execution date otherwise.

¶ 26 Nor does the recording date control the execution of the assignment; it simply indicates when the assignment was actually recorded. The purpose behind the recording of instruments affecting title to real estate, such as an assignment of mortgage, is to provide third parties with a way to see the status of the property. *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 634 (2000). There is no requirement that an assignment be recorded to be effective because the recording does not create the interest, only the assignment does. See *Klehm*, 164 Ill.

1-12-2859

App. 3d at 616. The assignment here complied with the requirements for validity by transferring the mortgage from MERS to the Bank, which included a description of the mortgage and the Property.

¶ 27 The cases defendants cite in support of their argument that the Bank did not have an interest in the Property are distinguishable from the instant case. See *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164; *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (2008). In *Gilbert*, the defendant entered into a home mortgage loan with WMC Mortgage Corporation and secured the loan with a mortgage to MERS. *Gilbert*, 2012 IL App (2d) 120164, ¶ 3. Deutsche Bank filed a complaint to foreclose the mortgage and, three months after the complaint was filed, MERS executed an assignment transferring all interest in the defendant's mortgage to Deutsche Bank. *Id.* ¶¶ 5, 6. The defendant filed an answer, raising the affirmative defense that Deutsche Bank lacked standing. *Id.* at ¶ 6. Both parties filed motions for summary judgment, which the trial court ultimately granted to Deutsche Bank. *Id.* at ¶ 9. The court then entered a judgment of foreclosure against the defendant. *Id.* On appeal, the court reversed the judgment of foreclosure and dismissed the foreclosure action. *Id.* ¶ 34. The court noted that the assignment did "not explicitly state when the mortgage was assigned to Deutsche Bank" and therefore all that could be known "about when the assignment took place is that it was no later than the date on which the Assignment was executed," which was after the complaint was filed. *Id.* ¶ 18. Ultimately, the court held that when a defendant shows that the plaintiff lacked standing at the time the foreclosure action was filed, if the plaintiff fails to produce competent evidence rebutting that showing, "the action must be dismissed." *Id.* ¶ 24.

1-12-2859

¶ 28 In *Bayview*, Bayview Loan Servicing, L.L.C., filed a complaint to foreclose mortgage against the defendant. *Bayview*, 382 Ill. App. 3d at 1185. The defendant filed an amended answer in which he argued that Bayview was not the proper party to the proceedings because it did not provide the defendant with any assignment from the original holder of the mortgage. *Id.* Bayview attached the assignment to an amended motion for summary judgment, which showed that interest in the subject mortgage was assigned to "Bayview Financial Trading Group, L.P." (the Partnership). *Id.* at 1186. The court entered an order of summary judgment for Bayview, and then entered a judgment of foreclosure and order of sale. *Id.* at 1186-87. On appeal, the court noted that at oral argument, Bayview acknowledged that the Partnership was a "legal entity separate and distinct" from Bayview. *Id.* at 1187. The court concluded that because there was no evidence that Bayview ever obtained an interest in the subject property, the entry of summary judgment and the orders of foreclosure and sale were improper. *Id.* at 1187-88. The court reversed the summary judgment, the judgment of foreclosure, and the order of sale, and remanded for further proceedings. *Id.* at 1188.

¶ 29 Unlike the defendant in *Gilbert*, defendants here have not shown that the Bank lacked an interest in the Property at the time the foreclosure complaint was filed. In addition, whereas in *Bayview* the assignment showed a transfer of the mortgage to a legal entity separate from the entity that filed the foreclosure action, here the assignment shows that MERS transferred its interest in the Property to the Bank. Moreover, the defendants in *Gilbert* and *Bayview* participated in the proceedings by answering the complaints filed against them, while in the present case defendants filed no answer and were found to be in default. The assignment in the

1-12-2859

record clearly shows that the Bank had standing to file its foreclosure complaint.

¶ 30 Defendants also claim the Bank lacked an interest in the Property because there was no effective transfer of the assignment of the mortgage and note into the Bank's trust according to the applicable mortgage loan purchase agreement. However, defendants raise this argument for the first time on appeal and therefore have waived the issue. See *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000) (an issue that was not raised before the trial court cannot be raised for the first time on appeal and will generally be waived).

¶ 31 Defendants next contend the trial court erred in denying their objections to the foreclosure sale and the order of possession because the "sale was conducted fraudulently and justice was not otherwise done."

¶ 32 We will not disturb a trial court's decision to confirm a judicial sale held pursuant to the Foreclosure Law absent an abuse of discretion. *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 26 (citing *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 179 (2008)). Section 15-1508(b) of the Foreclosure Law provides that the trial court "shall" enter an order confirming a judicial sale unless it finds that, in pertinent part, "(iii) the sale was conducted fraudulently, or (iv) that justice was not otherwise done." 735 ILCS 5/15-1508(b) (West 2010).

¶ 33 Here, defendants argue that the sale of the Property was conducted fraudulently because the Bank lacked an interest in the Property at the time the complaint was filed. However, as discussed above, defendants forfeited any argument about the Bank's lack of standing through their default. See *Barnes*, 406 Ill. App. 3d at 8. Moreover, by failing to answer the Bank's complaint, defendants actually admitted the Bank's well-pleaded allegation that it had standing to

1-12-2859

file as the trustee for the holder of the mortgage and note. *Id.* at 7. Finally, our review of the record demonstrates that the Bank as assignee of the note and mortgage had a sufficient interest in the foreclosure action so that the trial court properly denied defendants' objections to the confirmation of sale and order of possession.

¶ 34 As a final matter, defendants also claim that "the Cook County Mortgage Foreclosure Courtroom Procedures II B (2) requires that 'any and all assignments or other documents (as applicable) demonstrating the movant's standing to foreclose' be delivered to the court," citing *Bayview*, 382 Ill. App. 3d 1184. We are unable to find any reference in *Bayview* to the Cook County Mortgage Foreclosure Procedures. Defendants provide no other explanation or case law to support this particular argument so we find they have waived the issue. See Ill. A. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on). Waiver aside, the record affirmatively shows the assignment was executed prior to the mortgage foreclosure complaint being filed and was filed in the trial court.

¶ 35 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 36 Affirmed.