

2014 IL App (2d) 140313-U
No. 2-14-0313
Order filed October 28, 2014

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

BANK OF AMERICA, N.A., as successor)	Appeal from the Circuit Court
by merger to BAC Home Loans Servicing, LP,)	of De Kalb County.
f/k/a Countrywide Home Loans Servicing LP,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CH-302
)	
TIMOTHY BEEMAN and APRIL BEEMAN,)	
)	
Defendants-Appellants)	
)	
(West Suburban Bank, Derby Estates,)	
Derby Estates Unit One, Unknown)	Honorable
Owners and Non-Record Claimants,)	Thomas L. Doherty,
Defendants).)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court properly granted summary judgment in favor of the plaintiff on its foreclosure complaint.

¶ 2 The plaintiff, Bank of America, N.A. (BANA), as successor by merger to BAC Home Loans Servicing, LP (BAC), f/k/a Countrywide Home Loans Servicing, LP, filed a foreclosure suit against the defendants, Timothy and April Beeman, West Suburban Bank, Derby Estates,

Derby Estates Unit One, unknown owners and non-record claimants. The Beemans raised the affirmative defenses that the plaintiff lacked standing and that the plaintiff had failed to send a grace period notice as required by statute. The plaintiff filed a motion for summary judgment. The trial court granted the plaintiff's motion. The Beemans appeal from that order. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On September 29, 2006, the Beemans entered into a home mortgage loan with First Choice Bank. The loan was secured with a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS). On May 14, 2010, BAC filed a foreclosure action against the defendants. In its complaint, it alleged that it was the current holder of the indebtedness. Copies of the note and the mortgage were attached to the complaint as exhibits.

¶ 5 On July 15, 2010, the Beemans filed a motion to dismiss the foreclosure complaint on the basis that they had never received a grace period notice as required by section 15-1502.5(c) of the Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1502.5(c) (West 2010)). Attached to the motion were April and Timothy Beeman's affidavits stating that they never received a grace period notice. On September 15, 2011, the trial court denied the motion to dismiss. On November 10, 2011, the Beemans filed an answer, raising the affirmative defenses of (1) lack of standing and (2) failure of the plaintiff to send a grace period notice as required by statute.

¶ 6 On September 16, 2013, the plaintiff filed an amended combined motion for summary judgment and to dismiss the affirmative defenses. In support of its motion, the plaintiff attached a "Business Records Affidavit" from Walter Holmes, an officer of BANA. In the affidavit, Holmes stated in relevant part:

“1. I am authorized to sign this affidavit on behalf of plaintiff, [BANA], as successor by merger to [BAC,] *** as an officer of BANA.

3. The information in this affidavit is taken from BANA’s business records. I have personal knowledge of BANA’s procedures for creating and maintaining these records. They were (a) made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge, (b) are kept in the course of BANA’s regularly conducted business activities, and (c) created by BANA as regular practice.”

The affidavit further indicated that it was standard business practice for BANA, as successor by merger to BAC, to send a grace period notice on its accelerated loans. Holmes attested that such a grace period notice was sent to the Beemans on December 3, 2009, in a properly addressed envelope with adequate postage. Attached to the affidavit was a copy of the grace period notice that was allegedly sent from BAC to the Beemans.

¶ 7 Additionally, the plaintiff attached an affidavit from Holmes entitled “Affidavit for Motion for Summary Judgment.” This affidavit included the quoted provisions above. Additionally, Holmes stated that BANA had possession of the promissory note, the note had been duly indorsed, and BANA was the beneficiary of the note and mortgage. Attached was an assignment of the mortgage indicating that MERS, as nominee for First Choice Bank, assigned its interest in the subject mortgage to BAC, f/k/a Countrywide, prior to March 25, 2010.

¶ 8 On October 21, 2013, the Beemans filed a response to the motion for summary judgment. The Beemans argued that their affidavits, which had been filed with their motion to dismiss,

indicated that the grace period notice had not been received and that this was sufficient to create a genuine issue of material fact as to whether the grace period notice had ever been sent. They argued that while Holmes attested to the business practices of BANA, his business records affidavit did not attest to the business practices of BAC, the entity that had allegedly sent the grace period notice. Therefore, the Beemans argued that the affidavit did not lay the necessary foundation to overcome the original writing and hearsay rules because it did not speak to the relevant business practices of BAC.

¶ 9 The Beemans further argued that the motion for summary judgment was also deficient as to their affirmative defense of lack of standing. The Beemans argued that the note was not endorsed in blank but was specifically endorsed to “First Choice Bank,” making an assignment of the note necessary by First Choice to another holder. The Beemans acknowledged the assignment of mortgage attached to the plaintiff’s motion, but argued that there was no assignment of the note. They argued that while an assignment of the note would necessarily carry with it an assignment of the mortgage, the opposite was not true.

¶ 10 On November 1, 2013, the plaintiff filed a reply. The plaintiff argued that the Beeman affidavits failed to raise a genuine issue of material fact as to whether the grace period notice was sent because the affidavits indicated only that the notice was not received. The plaintiff pointed out that the Foreclosure Law did not require that the grace period notice be received, only that it be sent. The plaintiff further argued that BANA was the same entity as BAC, as a result of the merger, and that Holmes’ business records affidavit was sufficient to establish that the grace period notice was sent. As to standing, the plaintiff argued that it would present in open court the original note and mortgage, thereby establishing its standing to seek foreclosure.

¶ 11 On December 2, 2013, the plaintiff filed a motion to substitute party plaintiff. BAC stated that it had filed the present foreclosure action. Subsequently, after the case was filed, BANA, as successor by merger to BAC, became the holder of the note secured by the mortgage being foreclosed. The plaintiff requested that an order be entered substituting BANA as the party plaintiff in place of BAC. The trial court entered an order substituting BANA, as successor by merger to BAC, as the party plaintiff. On that same day, the trial court entered an order finding the defendants, West Suburban Bank, Derby Estates, Derby Estates Unit One, and unknown owners and non-record claimants in default for failure to appear or plead.

¶ 12 On December 5, 2013, a hearing was held on the plaintiff's combined motion for summary judgment and to dismiss the Beemans' affirmative defenses. The Beemans argued that if the trial court found their affirmative defenses to be insufficient, the court should allow them an opportunity to amend the affirmative defenses. The Beemans further argued that Holmes' business records affidavit was insufficient to establish that the grace period notice had been sent because Holmes did not attest that he was familiar with BAC's business practices. As to lack of standing, the Beemans argued that the subject note was not endorsed in blank, it was endorsed to a specific party which required an assignment. Although MERS was a nominee to the mortgage, it never had an interest in the promissory note. Thus, MERS could not have effectively executed an assignment of the mortgage and note to BAC.

¶ 13 As to standing, the plaintiff stated that it had the original note and mortgage, and that it was endorsed to Countrywide. No assignment was necessary because Countrywide was suing as a successor by merger, meaning that the merging companies are one and the same. The plaintiff also argued that Holmes could attest to the business records of BAC because BAC had merged into BANA. The plaintiff presented the original note and mortgage to the trial court.

¶ 14 Following argument, the trial court granted the plaintiff's motion for summary judgment. The trial court found that Holmes' business records affidavit was sufficient to show that the grace period notice was sent because he was an employee of the subsidiary to BAC. The trial court also found that since the plaintiff presented the original note and mortgage, it had standing. The Beemans requested that the trial court stay the entry of the motion for summary judgment and allow them an opportunity to replead their affirmative defenses. The trial court stated that the Beemans should file a motion to reconsider and that it would give their arguments full consideration. The trial court entered a written order granting the motion for summary judgment and an order of judgment for foreclosure and sale.

¶ 15 On January 3, 2014, the Beemans filed a motion to reconsider, essentially reiterating their original arguments. On March 6, 2014, a hearing was held on the motion to reconsider. Following argument, the trial court denied the motion.

¶ 16 On April 4, 2014, the Beemans filed a notice of appeal. On May 1, 2014, the plaintiff filed a notice of sale pursuant to judgment of foreclosure. On May 27, 2014, the plaintiff filed a motion for an order approving the report of sale and distribution, and for possession. The court docket included in the record indicates that the trial court entered an order on June 5, 2014, confirming the sale.

¶ 17 **II. ANALYSIS**

¶ 18 On appeal, the Beemans argue that the trial court erred in granting summary judgment in favor of the plaintiff. Specifically, they argue that Holmes' business records affidavit did not lay the proper foundation and that their own affidavits raised a genuine question of material fact that precluded summary judgment. Additionally, the Beemans argue that the trial court erred in failing to allow them an opportunity to amend their affirmative defenses.

¶ 19 At the outset, we note that the plaintiff argues that we lack jurisdiction to address this appeal because the December 5, 2013, order granting summary judgment was not a final and appealable order. The plaintiff contends that the final order was the June 5, 2014, order confirming the sale. Although the record on appeal does not include a copy of the June 5, 2014, order, the plaintiff acknowledges, and the court docket indicates, that such an order was filed. In the context of a mortgage foreclosure proceeding, it is well settled that in the absence of a Supreme Court Rule 304(a) finding in the judgment of foreclosure, “it is the order confirming the sale, rather than the judgment of foreclosure, that operates as the final and appealable order in a foreclosure case.” *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. Accordingly, the notice of appeal filed on April 4, 2014, was premature. However, this appeal is still timely under Illinois Supreme Court Rule 303(a)(2) (eff. May 30, 2008), which makes a notice of appeal filed before the disposition of the last pending claim effective upon the disposition of that last claim. As such, the Beemans’ notice of appeal became effective upon confirmation of the foreclosure sale and we have jurisdiction to address this appeal.

¶ 20 Turning to the merits, the Beemans first argue that the affidavit of Holmes did not lay the foundation necessary to overcome the original writing and hearsay rules because it did not speak to the business records of the relevant entity, BAC, which generated and allegedly sent the grace period notice. The Beemans argue that Holmes’ business records affidavit makes no mention of the business practices of BAC and fails to establish that he had personal knowledge of BAC’s business practices. Accordingly, the contention is that Holmes’ affidavit did not demonstrate that the grace period notice had been sent or that BANA was entitled to judgment as a matter of law.

¶ 21 Section 1502.5(c) of the Foreclosure Law provides that “if a mortgage secured by residential real estate becomes delinquent by more than 30 days the mortgagee shall send via U.S. mail a [grace period] notice advising the mortgagor that he or she may wish to seek approved housing counseling.” 735 ILCS 5/15-1502.5(c) (West 2010). The statute specifies the form and content of the notice and requires that “[n]o foreclosure action *** shall be instituted on a mortgage secured by residential real estate before mailing the [grace period] notice.” *Id.*

¶ 22 In resolving whether Holmes’ business records affidavit sufficiently established that a grace period notice had been sent, *Bank of America, N.A., v. Land*, 2013 IL App (5th) 120283, is instructive. In *Land*, the plaintiff, Bank of America, N.A. (BANA), filed a motion for summary judgment on its foreclosure complaint against the defendants, George and Eunice Land. *Land*, ¶ 2. In support of its motion, BANA submitted an affidavit from one of its assistant vice presidents, which included a record of all the payments made by the Lands on the mortgage and the total amount of default. *Id.* at ¶ 5. The trial court granted BANA’s motion. *Id.* at ¶ 6.

¶ 23 On appeal, the Lands argued that BANA’s affidavit was insufficient to support summary judgment because other entities had assumed the mortgage prior to BANA and BANA’s employee could not testify as to records kept by another company. *Id.* at ¶ 11. The reviewing court noted that Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992), which codified the business records exception to the hearsay rule, expressly provided that lack of personal knowledge by an affiant may affect the weight of the evidence but not its admissibility. *Id.* at ¶ 12. The reviewing court further noted that, in the affidavit, BANA’s employee attested that:

“she was personally familiar with [BANA’s] procedures for creating and maintaining its business records and that its records pertaining to the Lands’ mortgage were ‘made at or near the time of the occurrence of the matters set forth therein by persons with personal

knowledge of the information in the business record.’ She further attested that the records were kept in the course of [BANA’s] regularly conducted business activities and that it was [BANA’s] regular practice to make and keep such records.” *Id.* at ¶ 14.

The reviewing court held that the affidavit was thus admissible pursuant to Rule 236 and provided a sufficient basis upon which to conclude that BANA was entitled to judgment as a matter of law. *Id.*

¶ 24 The determination in *Land* is directly on point to the issue in the present case. In this case, similar to the affidavit in *Land*, Holmes attested in his affidavit that he was familiar with the types of records maintained by BANA in connection with the note, he had personal knowledge of BANA’s procedures for creating and maintaining these records, the records were “made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information in the business record,” the records were kept in the course of BANA’s regularly conducted business activities, and were created by BANA as a regular practice. He further attested that, BANA, as successor by merger to BAC, had sent a grace period notice to the Beemans on December 3, 2009. A copy of the notice that was sent was attached to the affidavit. As the affidavit in *Land* was sufficient to support summary judgment, Holmes affidavit is sufficient to support summary judgment in this case as it establishes that a grace period notice had been sent. *Id.*, citing *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 950 (2004) (“business records offered in support of motion for summary judgment properly considered where affidavits established that the records were made in the regular course of business and that it was the regular course of business to prepare such records”).

¶ 25 The Beemans argue that the affidavit was insufficient because Holmes did not attest to the business practices of BAC or attest that BAC's records were relied upon by BANA in its day-to-day operations. However, as stated in *Land*, it ““makes no difference whether the records are those of a party or of a third person authorized by the business to generate the record on the business's behalf.”” *Id.* at ¶ 13, quoting *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005). This is because banks have an interest in maintaining their records with care and accuracy. *Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, 2009 WL 395458, at *4 (N.D. Ill. Feb. 18, 2009). Accordingly, a bank is not required to provide testimony from a witness with personal knowledge regarding the maintenance of a predecessors' business records because the bank's reliance on this type of record keeping by others renders the records the equivalent of the bank's own records. *Id.* Moreover, when business records pass from a predecessor bank to a successor bank under a merger, the successor bank is able to authenticate the business records of its predecessor. See *FirstMerit Bank, N.A. v. Balin*, No. 11 C 8809, 2012 WL 4017948, *3 (N. D. Ill. Sept. 11, 2012), citing *United States v. Jakobetz*, 955 F. 2d 786, 801 (2nd Cir.1992) (“stating that ‘[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity’”). As such, because BANA can rely on BAC's records as either a successor-in-interest or as a successor by merger, Holmes' affidavit was sufficient to establish a foundation for admitting BAC's business records.

¶ 26 The Beemans also argue that their affidavits, stating that the grace period notice was never received, were sufficient to create a genuine question of material fact as to whether the notice was sent and thus precluded summary judgment. We disagree. Section 15-1502.5(c) requires only that the grace period notice be sent. Holmes attests in his affidavit that the grace

period notice was sent to the Beemans on December 3, 2009, by U.S. mail in a properly addressed envelope with postage prepaid. The Beemans' affidavits, stating that the notice was never received, fail to overcome the affidavit attesting that it was sent. The Beemans cite *Van C. Argiris Co. v. Caine Steel Co.*, 20 Ill. App. 3d 315, 320 (1974), for the proposition that testimony showing that a letter was mailed and a denial that it was received raises a question to be resolved by the trier of the fact. While this may be true, at issue in that case was whether certain letters were both mailed and received. *Id.* Receipt is not at issue in this case. As the Foreclosure Law requires only that the grace period notice be sent, *Van C. Argiris* is inapposite.

¶ 27 Finally, the Beemans argue that they should have been granted leave to amend their affirmative defenses related to the grace period notice and lack of standing. The right to amend pleadings is not absolute, and a trial court's decision to allow such amendments is within its discretion and will not be disturbed absent an abuse of that discretion. *Land*, ¶ 21. The relevant factors considered in determining whether to allow amendment of pleadings are: (1) whether the proposed amendment would cure the defective pleadings, (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) whether the proposed amendment is timely, and (4) whether previous opportunities to amend the pleadings could be identified. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 28 In this case, we cannot say the trial court abused its discretion in denying the Beemans' oral motion to amend their affirmative defenses. Here, the Holmes affidavit was sufficient to show that a grace period notice had been sent. *Land*, ¶ 14. Additionally, at the hearing on the motion for summary judgment, BANA produced the original note and mortgage. It is well settled that possession of bearer paper is *prima facie* evidence of title (and, therefore, standing to sue) and sufficient to entitle a plaintiff to a decree of foreclosure. *Joslyn v. Joslyn*, 386 Ill. 387,

395 (1944). When the Beemans made their oral motion to amend, they did not specify what further allegations could be included in the pleadings to cure the defects. “ ‘Where the party seeking to amend does not attach a proposed amended pleading to its motion or otherwise specify the new allegations that it would include, a trial court has no basis on which to consider whether the amendment would cure the defects in the current pleading,’ which is always a ‘primary’ factor to consider.” *Land*, ¶ 24, quoting *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 128 (2010). Moreover, the Beemans had ample opportunity to replead the affirmative defenses. Over two years had passed between the time the Beemans first pled their affirmative defenses and the hearing on BANA’s motion for summary judgment.

¶ 29

III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 31 Affirmed.