FIRST DIVISION
January 20, 2015

Nos. 1-13-1443 & 1-13-1444
2015 IL App (1st) 131443-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK, N.A., as Trustee for the Structured Asset Investment Loan Trust No. 2006-03,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 09 CH 6389
MARK TOBIS and ANNETTE TOBIS,	)	Honorable Jean Prendergast Rooney,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

Held: Defendants waived objections to personal jurisdiction; plaintiff had standing as holder of the note; the trial court's simultaneous ruling on a defendant's motion to dismiss and plaintiff's motion for summary judgment was not improper when the motion to dismiss raised the same concerns as defendant's response to plaintiff's motion for summary judgment and there were prior opportunities to answer the complaint; trial court's ruling granting summary judgment in favor of plaintiff and against defendants is affirmed.

¶ 1 On March 20, 2006, defendants Mark Tobis and Annette Tobis entered into a loan agreement with BNC Mortgage, Inc. (BNC). On February 13, 2009 plaintiff U.S. Bank, as trustee for the Structured Asset Investment Trust 2006-03, filed this mortgage foreclosure action

against both defendants noting that defendants were in default. The complaint sought to foreclose the mortgage for the property located at 1195 Sanders Road in Northbrook, Illinois (Northbrook property). After motion practice from both sides, the trial court granted summary judgment in favor of plaintiff and against defendants. Both defendants timely appealed the trial court's order confirming the foreclosure sale and their appeals were consolidated.

¶ 2 I. BACKGROUND

¶ 3 When plaintiff filed this action, it attached a copy of the mortgage and note as well as an assignment of interest in the note from BNC to Mortgage Electronic Registration Systems (MERS), a nominee for the lender, BNC. Plaintiff attempted to serve the complaint and summons on defendants on at least three occasions via special process server. The record on appeal contains plaintiff's motion seeking appointment of Excel Innovations, Inc. as the special process server; it does not include any other motions or an order appointing a special process server.

¶ 4 Plaintiff claimed to have personally served Annette and to have served Mark by substitute service on April 2, 2009. The affidavit supporting service of process indicates that the special process server on this date was "Amicus" and that service of the complaint and summons was successful.

¶ 5 On July 7, 2009, Mark entered his appearance *pro se* and filed a motion to quash the April 2, 2009, service of process. Annette did not file an appearance at this time. Before the hearing on Mark's motion, plaintiff claimed to have personally served Annette and Mark, which was supported by an affidavit stating that service of the complaint and summons was successful on July 26, 2009 by the special process server "Amicus." Mark's reply brief to his motion to quash was supported with affidavits from both him and Annette disputing the service of process

on July 26. Plaintiff maintained that these affidavits were an admission that defendants was served on July 26 as Mark's affidavit stated that the special process server "pushed papers into my hand." At the hearing, the trial court granted Mark's motion to quash service of process. It seems that this order addressed the service of process that occurred on April 2, 2009, but did not address service of process on July 26. On September 9, 2009, plaintiff attempted to serve process by a special process server, “Firefly,” but was not successful.

¶ 6 In November 2009, plaintiff presented a motion for default against both defendants. In response to that motion, Mark filed a motion to quash the service of September 9, 2009. In December 2009, plaintiff conceded that it had not completed service in September and the trial court denied Mark's motion. Its order stated that the ruling was "without prejudice as to Plaintiff's service returns dated July 26, 2009" and despite plaintiff's position that the affidavit filed with Mark's reply brief on the earlier motion to quash was an admission that Mark was personally served on July 26, 2009.

¶ 7 In January 2010, plaintiff again moved for default against both defendants, noting specifically that defendant Annette had not yet appeared or answered the complaint. The trial court's order entered and continued plaintiff's motion for default until March 4, 2010, and granted defendants until February 25, 2010, to "file their Motion to Quash Service."

¶ 8 In February 2010, Mark filed a motion to dismiss for insufficient service of process on July 26, 2009.[1] After briefing, the trial court denied Mark's motion to dismiss. The order of April 13, 2010, stated "(1) Defendant's Motion to dismiss for Insufficiency of Service [on July 26, 2009] is denied. (2) Defendant is granted until May 11, 2010 to file his Answer or otherwise

[1] In each of his three motions challenging service of process, Mark acknowledged section 2-301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301(West 2008)) which governs the order of motions in which a party must file objections to jurisdiction.

plead in response to Complaint." This order uses "defendant" in the singular, presumably referring only to Mark.

¶ 9 On May 4, 2010, Mark filed a motion to dismiss for lack of standing which he later withdrew.

¶ 10 On June 4, 2010, plaintiff was granted leave to file an amended complaint with a properly endorsed note, or allonge. On that date, the trial court's order stated "Mr. & Mrs. Tobis are granted until July 2, 2010 to Answer or otherwise plead to the 1st amended Complaint." On June 14, 2010, plaintiff again unsuccessfully attempted to serve process on defendants.

¶ 11 On July 2, 2010, Mark filed a motion to strike plaintiff's motion to amend the complaint. On August 9, plaintiff filed a motion for summary judgment against both Mark and Annette. On August 10, Mark filed a motion to strike plaintiff's motion for summary judgment and a second motion to strike plaintiff's motion to amend the complaint.

¶ 12 On August 16, 2010, an attorney filed his appearance on behalf of Annette only and moved to vacate any technical defaults and for additional time to appear and to respond or otherwise plead to the amended complaint. An order entered two days later ordered Annette to appear, "[sic] thru counsel, and answer [and plaintiff's] motion for [judgment]" by September 15, 2010. The rest of Annette's filings were done through counsel.

¶ 13 On September 15, 2010, Annette filed a motion to dismiss the amended complaint. This motion argued that the amended complaint, unlike the original, did not include an assignment of the mortgage from MERS to plaintiff (assignment). Annette also complained that the amended complaint's undated allonge endorsed in blank was contrary to the assignment in the original complaint and that the amended complaint should include the original note with a dated allonge from the original mortgagee, BNC, to MERS. One of the final paragraphs of the motion stated,

"As a condition precedent to proceeding, the Plaintiff should have to produce the original note in open Court and provide a dated assignment, in blank or otherwise." The trial court did not rule on this motion.

¶ 14 On November 8, 2010, Annette filed an amended motion to dismiss, "due to a demonstrable lack of standing by this Plaintiff due to conflicting documents attached to the complaint and amended complaint in this case." The motion alleged that the mortgage and note were assigned to plaintiff at different times; that the allonge was not firmly affixed to the note; that the assignment from MERS to plaintiff was suspiciously dated four days before the complaint was filed and without a date of its purportedly earlier transfer; and that the assignment was not valid because MERS had no ownership interest in the note or mortgage, and because the signature of the BNC employee who endorsed the note was different than it appeared in another foreclosure case. Although the motion did not contain a prayer for relief, one of the final paragraphs stated: "As a condition precedent to proceeding, the Plaintiff should have to produce the original note in open court, and before a defense expert as part of the authentication process, and provide a dated indorsement, in blank or otherwise, to demonstrate its proper standing." The motion was 14 pages long. There is no ruling on this motion in the record on appeal.

¶ 15 Also on November 8, 2010, Mark filed a *pro se* motion to dismiss for lack of standing, asserting that plaintiff must "identify the creditor/holder in due course."

¶ 16 On December 3, 2010, Annette filed a motion to reconsider the trial court's finding of personal jurisdiction without referring to a specific trial court order.[2] The motion described that Annette had failed to argue at "one or more hearings" as to personal jurisdiction because she was unrepresented by counsel and "in deference to her husband did not argue on her own behalf." The motion to reconsider also argued that "[i]n addition to whether a process server touched one

[2] In her brief on appeal, Annette states that this motion referred to the court's order of June 4, 2010.

or both Defendants with papers," any attempt to serve process outside the requirements of the Illinois service statute (735 ILCS 5/2-202 (West 2008)) was ineffective. An order dated December 8, 2010, states that Annette's motion to reconsider was "stricken."

¶ 17 On December 17, 2010, Annette filed an amended motion to dismiss the amended complaint that mirrored the November 8, 2010, amended motion to dismiss the amended complaint. The trial court set a hearing on Annette's amended motion and Mark's November 8 motion to dismiss for lack of standing.

¶ 18 On February 8, 2011, and before the hearing on the motions in the previous paragraph, Annette filed another motion to reconsider the trial court's finding of personal jurisdiction naming specifically the April 13, 2010 trial court order. That motion asked the court to reconsider the finding of personal jurisdiction because the service statute requires that “process be served by a sheriff” (735 ILCS 5/2-202 (West 2008)) and because, even if a special process server did not contravene the service statute, plaintiff only sought to have Excel appointed as a special process server and that entity was never actually appointed. The court's order denied Annette's February 8 motion to reconsider without prejudice "inasmuch as [the April 13, 2010] order only ordered Mark Tobis to answer or otherwise plead" and ordered Annette to answer or otherwise plead "or to address any service issues" by May 25, 2011.

¶ 19 On May 25, 2011, Annette again filed a motion to reconsider the court’s finding of proper service, explicitly referring to the orders of April 27, 2011, and June 4, 2010. Like the previous motion to reconsider, this motion argued that the sheriff should have had the opportunity to serve the complaint before a special process server and that there was no order appointing Amicus as the special process server in this case. While an order addressing Annette's

second motion to reconsider is not in the record, both parties seem to agree that it was denied in June 2011.

¶ 20 Also on May 25, 2011, Mark filed a motion to reconsider the court's finding of personal jurisdiction over him. In this motion, Mark complained that there was no order appointing Amicus as the special process server in this case. He requested that the trial court invalidate the orders of April 13, 2010 and June 4, 2010. The trial court denied Mark's motion to reconsider and Mark was ordered to answer or otherwise respond to the amended complaint by July 14, 2011.

¶ 21 On September 15, 2011, Mark filed another motion to dismiss for lack of standing which was denied with prejudice in November 2011.

¶ 22 On March 1, 2012, plaintiff filed a motion for summary judgment against both Annette and Mark, and the parties entered a briefing schedule and set a hearing date on the motion for June 13, 2012. On May 25, 2012, Annette filed a motion to dismiss based on plaintiff's lack of standing. The trial court entered a briefing schedule on Annette's motion to dismiss on June 12, 2012. Also on May 25, 2012, Annette filed a response to plaintiff's motion for summary judgment. Mark filed a response to plaintiff's motion arguing that plaintiff had not produced an endorsed note from the original lender to plaintiff nor had the plaintiff produced the trust agreement.

¶ 23 On August 29, 2012, the court entered a written order denying Annette's motion to dismiss for lack of standing and granting plaintiff's motion for summary judgment.[3] The trial court noted that Annette's motion failed to list the subsection of section 2-619 of the Code (735 ILCS 5/2-619) (West 2008)) under which it was brought, and that plaintiff had standing as the holder of a note endorsed in blank (735 ILCS 5/15-1208 (West 2008)). The court granted

[3] This order is stamped August 29, 2012, on page one but dated August 30, 2012 on page six.

summary judgment in favor of plaintiff because plaintiff's affidavit set forth the amounts owed under the mortgage and because neither defendant presented evidence to dispute plaintiff's evidence that they were in default.

¶ 24 On September 14, 2012, the court entered a judgment of foreclosure and sale. At the sale of the Northbrook property, plaintiff was the successful bidder. On April 11, 2013, the sale of the property was confirmed, and defendants filed timely notices of appeal.

¶ 25 II. ANALYSIS

¶ 26 A. Mark's Appeal

¶ 27 As a preliminary matter, we address plaintiff's motion to dismiss Mark's appeal. Mark was not represented by counsel below nor is he represented by counsel on appeal. He did not file an opening brief nor a motion for an extension of time. After extensions, Annette filed her opening brief on July 3, 2014. Plaintiff filed its response brief on August 21, 2014, as well as a motion to dismiss Mark's appeal for failure to file a brief and for want of prosecution. On September 3, 2014, Mark filed a motion to adopt the opening brief of Annette as his own. Neither he nor Annette filed a reply brief. We allowed Mark's motion to adopt Annette's opening brief and plaintiff's motion to dismiss Mark's appeal was taken with the case.

¶ 28 Having allowed Mark’s motion to adopt the brief of Annette as his own, and because the record is not long and the issues straightforward, we choose to address the merits of Mark’s appeal as those arguments are articulated in the opening brief of his co-defendant, Annette.

¶ 29 B. Arguments on Appeal

¶ 30 Defendants raise three arguments on appeal. First, defendants contend that the trial court erred in denying their motions based on failure of service of process because General Administrative Order 2007-03 (GAO), allowing for special process servers instead of a sheriff,

contravenes the Illinois statute governing service of process (735 ILCS 5/2-202 (West 2008)) and because a special process server was not properly appointed in this case. Second, defendants assert that the trial court erred in denying Annette's motion to dismiss based on plaintiff's lack of standing. Third, defendants contend that the trial court erred in granting plaintiff's motion for summary judgment in the same order in which it denied Annette's motion to dismiss and that the trial court failed to recognize material issues precluding a finding of summary judgment.

¶ 31 Plaintiff's response brief is directed only at Annette's arguments. But, because Mark raises the exact issues as Annette by adopting her brief, we extend plaintiff's brief to be responsive to both parties. First, plaintiff argues that defendants waived objections to the court's jurisdiction. In the alternative, plaintiff argues that defendants were in fact served on July 26, 2009, and that the GAO does not contravene the statute governing service of process. Plaintiff also argues that it has standing as it is the holder of the note endorsed in blank. Plaintiff contends that, because standing is an affirmative defense, plaintiff need not demonstrate that the transfer of the mortgage was done in accordance with its Trust Agreement, nor have defendants provided any evidence that they were third-party beneficiaries of the trust giving them standing to raise such an argument. Finally, plaintiff contends that the trial court properly denied Annette's motion to dismiss and granted plaintiff's motion for summary judgment based on defendants' failure to file a Rule 191(b) affidavit. Ill. S. Ct. R. 191(b) (eff. July 1, 2002).

¶ 32 1. Personal Jurisdiction

¶ 33 Our review of whether the circuit court obtained personal jurisdiction is *de novo*. *In re Detention of Hardin,* 238 Ill. 2d 33, 39 (2010). Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311 (2014),

¶ 18 (citing *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989)). A judgment which is obtained without proper service of process is void. *Deutsche Bank National Trust Co. v. Akbulut*, 2012 Ill App (1st) 112978, ¶ 4.

¶ 34 This court has already addressed defendants' first basis for objecting to the trial court's jurisdiction, namely that the GAO allowing a mortgagee's law firm to serve process in foreclosure cases by a special process server, rather than by a sheriff, is prohibited by section 2-202 (735 ILCS 5/2-202 (West 2008)). See *U.S. Bank v. Dzis*, 2011 IL App (1st) 102812 ¶¶ 20, 27. In *Dzis*, we found that Illinois Supreme Court Rule 21(c) (eff. Dec. 1, 2008) allows the chief judge of the circuit court to delegate his or her authority under that rule to issue general orders, such as the GAO, to the presiding judges in the divisions of the circuit court. *Id.*; *OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶¶ 13-15. Defendants' arguments do not persuade us otherwise.

¶ 35 We now turn to defendants' second basis for objecting to the trial court's jurisdiction over them namely, that Amicus was not properly appointed as the special process server in this case because there was no order appointing Amicus in the record. We find that Annette and Mark waived their objections to personal jurisdiction on this second ground.

¶ 36 The statute governing the order in which a party may file objections to jurisdiction over a person states as follows:

> "Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action

> involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, but the parts of a combined motion must be identified in the manner described in Section 2-619.1." 735 ILCS 5/2-301(a) (West 2008).

That statute goes on to describe when a party waives a jurisdiction objection:

> "If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." *Id.* at (a-5).

For the purposes of this subsection, a "pleading" is a party's formal allegation of a party's claims or defenses, and a "motion" is " 'an application to the court for a ruling or an order in a pending case.' " *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593, 597 (2006) (quoting *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005)).

¶ 37 Finally, subsection (c) of the statute states that an "error in ruling against the objecting party on the objection is waived by the party's taking part in further proceedings unless the objection is on the ground that the party is not amenable to process issued by a court of this State." 735 ILCS 5/2-301(c) (West 2008).

¶ 38 Turning first to Annette's objections, we find that her filing of the two motions to dismiss *prior to filing a motion objecting to personal jurisdiction*, resulted in waiver of all objections to the court's jurisdiction over her. 735 ILCS 5/2-301(a-5) (West 2008). Neither of Annette's motions—filed on September 15, 2010 and November 8, 2010—was in compliance with subsection (a) of the statute. 735 ILCS 5/2-301(a) (West 2008)(requiring a party's first filing to object to process by a court of this State or insufficiency of process or insufficiency of service of

process). In her September 15, 2010, motion, Annette questioned the propriety of the undated allonge attached to the amended complaint and whether the note became bearer paper. The November 8, 2010, motion challenged plaintiff's standing based on an undated allonge, the signature on the allonge, a severed note and mortgage, and requested that the court order plaintiff to produce the original note with a dated endorsement. A lack of standing, as Annette alleged in her November 8, 2010 motion, is an affirmative defense, and as such, must be pleaded and proven by the defendant. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010); *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). Her November motion was a 14-page, detailed account of the case and Annette's defenses. As far as the record reveals, the trial court did not rule on either motion.

¶ 39 Moreover, nothing in Annette's November 8, 2010 motion can be construed as a combined motion under section 2-301 of the Code. 735 ILCS 5/2-301(a) (West 2008) (a motion objecting to jurisdiction "may be made singly or included with others in a combined motion, but the parts of a combined motion must be identified in the manner described in [section 2-619 of the Code 735 ILCS 5/2-619 (West 2008)]"). Annette solely relied on section 2-619 for her November 8 motion. 735 ILCS 5/2-619 (West 2008). Only on December 3, 2010 did Annette question the sufficiency of service of process. To the extent that the trial court overlooked Annette's filing of two motions to dismiss prior to any objection to personal jurisdiction, we reverse that ruling.[4]

[4] The finding that Annette waived any objection to the trial court's jurisdiction is consistent with our recent holding in *Greenpoint Mortgage Funding, Inc. v. Poniewozik*, 2014 IL App (1st) 132864 which found that the statute requiring objections to jurisdiction in residential foreclosure actions to be made within 60 days of filing an appearance, 735 ILCS 5/15-1505.6 (West 2012), applies retroactively. In this case, an attorney filed an appearance on Annette's behalf on August 16, 2010 at which time the attorney requested an extension for time to appear and answer until September 15, 2010. From that day, defendant had 60 days—or until November 15, 2010—within which to object to the court's jurisdiction over her. Annette did not file her motion to quash service of process until December 3, 2010 and thus waived her objections to jurisdiction pursuant to 735 ILCS 5/15-1505.6 (West 2012).

¶ 40 We now turn to Mark's argument that the trial court lacked jurisdiction over him based on the fact that Amicus was not a properly appointed special process server in this case. Because Mark took part in further proceedings following those motions to quash, any error in the trial court's finding of personal jurisdiction was waived.

¶ 41 The statute governing objections to jurisdiction provides that an error in the court's ruling on jurisdiction is waived when the objecting party takes part in further proceedings unless the objection was that the party was not amenable to process issued by a court of this state. 735 ILCS 5/2–301(c) (West 2008). In other words,

> if the objection is that defendant has not been properly served, that objection is waived by taking part in the proceedings. If the objection is that defendant could never be properly served, that objection is not waived by taking part in the proceedings. Where the objection is not waived it may be raised in an appeal ***.

Cameron v. Owens-Corning Fiberglas Corp., 296 Ill. App. 3d 978, 989-90 (1998) (J. Cook, specially concurring). This subsection was unchanged when the statute eliminated special appearances in 2000. Keith Beyler, *The Death of Special Appearances*, 88 Ill. B.J. 30, 32 (2000).

¶ 42 Mark did not object to jurisdiction on the grounds that he could never be properly served by process issued by an Illinois court. He also participated in further proceedings over the course of more than a year by filing various motions. In this way, Mark's conduct was quite different than the defendants in *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353. In that case, the defendants did not waive their objections to jurisdiction under subsection (c) when they filed a motion to quash and soon thereafter filed a response to plaintiff's motion to confirm sale of property in which they solely maintained that service must be quashed. 2012 IL App (1st)

112353, ¶ 12. Unlike *Kamaruali*, Mark's objection to jurisdiction was waived by his participation in further proceedings. 735 ILCS 5/2-301(c) (2008).

¶ 43 Moreover, while we acknowledge that the record does not contain a standing order appointing Amicus as special process server, we are unaware of any precedent requiring that a copy of a standing order appointing a special process server pursuant to the GAO be attached to plaintiff's filings as defendants suggest. In fact, such a standing order, potentially covering thousands of cases, may have remained with the Supervising Judge to whom it was originally presented or with the Clerk of the Court who is required to keep the originals of all standing orders on file. GAO 2007-03. Certainly, it would be helpful for law firms to include a copy of the standing order appointing special process servers to each of their cases, but nothing yet requires such thoroughness and in the absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Notably, nothing in the GAO requires an attorney to file a second motion for the appointment of a special process server after the case was filed and a standing order was entered pursuant to the GAO. See *Markowicz*, 2012 IL App (1st) 111187, ¶ 4. We cannot conclude that Amicus was improperly appointed based on the absence of a standing order in the record.

¶ 44 2. Lack of Standing[5]

¶ 45 The trial court did not err in denying Annette's motion to dismiss for lack of standing. Defendants complain that plaintiff lacks standing because (1) the mortgage was severed from the note; (2) the mortgage was not transferred in accordance with plaintiff's Trust Agreement; and

[5] In their opening brief on this issue, defendants refer to Annette's "June 12, 2012 Motion to Dismiss based on a lack of standing." The motions to dismiss filed around this time period are file stamped May 25, 2012 and July 26, 2012. Because the July motion was not given a briefing schedule and because the trial court addressed only the May motion and the arguments contained therein, we presume defendants intended to refer to the May 2012 motion.

(3) the undated allonge does not satisfy New York trust law, which requires that the transfer of the mortgage and note designate a particular trust and beneficiary.

¶ 46 Defendants' arguments are without merit because lack of standing to bring a foreclosure action is an affirmative defense (*Lebron*, 237 Ill. 2d at 252), and defendants did not satisfy their burden of proving the defense. The record in this case does not reveal that a severance of the mortgage and note occurred, and plaintiff need not explain why the mortgage and note in this were *not* severed as that burden is on defendant. *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 739 (2008). Also, there is no basis for the argument that New York trust law applies here. Even if plaintiff's Trust Agreement calls for New York trust law to apply, which we cannot confirm because no copy of the Trust Agreement is in the record, defendants had the burden to show that they were a party to or a third-party beneficiary of the Trust Agreement in order to have standing to argue that the mortgage was transferred in contravention of that Agreement. *Boyd v. U.S. Bank*, 787 F. Supp. 2d 747, 757 (N.D. Ill. 2011); *Bank of America N.A. v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶ 9. Defendants did not take steps to establish these facts and did not satisfy their burden to plead and prove plaintiff's lack of standing. Notwithstanding these arguments, we briefly discuss plaintiff's standing below.

¶ 47 Under the Illinois Mortgage Foreclosure Law (Law) (735 ILCS 5/15-1101, *et seq.*, (West 2008)), a foreclosure action may be brought by (1) the legal holder of an indebtedness secured by a mortgage; (2) any person designated or authorized to act on behalf of such holder; or (3) an agent or successor of a mortgagee. 735 ILCS 5/15-1504(a)(3)(N) (West 2008); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). A *prima facie* case for foreclosure is established if the complaint conforms to requirements set forth in section 15–

1504(a) of the Law (735 ILCS 5/15–1504(a) (West 2008); *Barnes*, 406 Ill. App. 3d at 7), including that the note and mortgage must be attached to the complaint. 735 ILCS 5/15-1504(a)(2) (West 2008); *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994). Production of the original note in open court, rather than simply relying on the copy attached to the complaint, is not a required element of proof in a foreclosure case. *First Federal Savings & Loan Ass'n v. Chicago Title & Trust Co.*, 155 Ill. App. 3d 664, 665 (1987); Ill. R. Evid. 1003 (eff. Jan. 1, 2011).

¶ 48 Plaintiff filed this lawsuit on February 13, 2009 as "mortgagee," or the legal holder of indebtedness secured by a mortgage. 735 ILCS 5/15-1208, 15-1504(a)(3)(N) (West 2008). Plaintiff's complaint had a copy of the mortgage and note at issue attached. Plaintiff's amended complaint included a copy of the mortgage and note with a blank endorsement that identified Mark Tobis as the borrower and the Northbrook property as the subject property. Finally, attached to plaintiff's motion for summary judgment was an affidavit from an employee of the servicing agent for plaintiff, attesting to the amounts owed under the note. As these documents demonstrate, plaintiff was in possession of the note and was entitled to enforce it. 810 ILCS 5/3-301 (West 2008).

¶ 49 3. Trial Court's Simultaneous Ruling

¶ 50 Defendants complain that the trial court improperly addressed Annette’s May 2012 motion to dismiss and plaintiff's motion for summary judgment simultaneously. The Illinois Supreme Court has held that a trial court must first rule on the question of whether a pleading states a cause of action and if and only if that question is answered in the affirmative should the court entertain a summary judgment motion. *Janes v. First Federal Savings & Loan Ass'n of Berwyn*, 57 Ill. 2d 398, 406 (1974). Yet, by statute, a plaintiff may move for summary judgment

"any time after the opposite party has appeared or after the time within which he or she is required to appear has expired." 735 ILCS 5/2-1005(a) (West 2008). While nothing in the statute requires that the nonmoving party file an answer before the court may consider a motion for summary judgment, the nonmoving party must be given an opportunity to file some timely response to the legal sufficiency of or factual allegations in the complaint to ensure "that the factual matters at issue are properly joined for consideration by the trial court." *Miller v. Smith*, 137 Ill. App. 3d 192, 199 (1985). This objective "may be accomplished not only through the filing of an answer, but also by way of such motions as those to strike and to dismiss under sections [2-615[6] or 2-619[7] of the Code] *** or through a cross-motion for summary judgment." *Id.*

¶ 51 While we do not condone the trial court's simultaneous ruling on both a motion to dismiss and a motion for summary judgment, we find that the simultaneous ruling was not prejudicial to defendants. See *Lane v. City of Harvey*, 178 Ill. App. 3d 270, 273 (1988). Because Annette had prior opportunities to answer the complaint and because she raised similar issues in her motion to dismiss and in her response to plaintiff's motion for summary judgment, the court was apprised of all factual matters at issue when it ruled on plaintiff's motion for summary judgment.

¶ 52 Here, plaintiff filed its motion for summary judgment seeking a judgment of foreclosure and sale of the property on March 1, 2012, three years after the lawsuit was filed. Plaintiff had also filed a motion for default in January 2010, and a motion for summary judgment in August 2010, naming both Annette and Mark in each motion. Moreover, before the motion for summary

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[6] A motion to dismiss filed pursuant to section 2-615 of the Code is based on pleadings, not underlying facts, and the question presented by that motion is whether sufficient facts are contained in the pleadings that, if proved, would entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991).

[7] A motion to dismiss filed pursuant to section 2-619 of the Code "admits the legal sufficiency of the complaint, but raises defects, defenses or other affirmative matter apparent on the face of the complaint." *Nessler v. Nessler*, 387 Ill. App. 3d 1103, 1109 (2008).

judgment was filed, Annette was ordered to answer the amended complaint on at least two occasions. Only after the trial court entered a briefing schedule on plaintiff's motion for summary judgment and set a hearing date, did Annette file her last motion to dismiss. Nothing in the record indicates that she sought leave to do so. Therefore, unlike the nonmoving party in *Miller* who was "unable to file any response" prior to the movant's filing of a motion for summary judgment, Annette had ample opportunity to apprise the court of objections to allegations in plaintiff's summary judgment motion. It cannot be said that plaintiff's motion for summary judgment on March 1, 2012, took Annette by surprise.

¶ 53 The May 25, 2012 motion to dismiss raised the same three concerns—albeit in different words—as Annette's response to plaintiff's motion for summary judgment indicating the court was apprised of all factual matters at issue in its simultaneous ruling. In her motion to dismiss, Annette essentially argued the following: plaintiff did not show that the mortgage was transferred in compliance with the terms or the funding deadline of plaintiff's Trust Agreement; the allonge was improperly attached to the note; and the purported assignment of mortgage was not transferred along with the note.

¶ 54 Annette's response to the motion for summary judgment, also filed on May 25, 2012, incorporated the standing arguments from her motion to dismiss. It also spelled out three areas of factual inquiry: "one, whether the allonge to this note is an original; two, whether this 2006 mortgage could possibly have found its way into [plaintiff's trust]; and three, whether [the assignment attached to the complaint] would serve to convey property into the trust in light of the specific requirements of Section 2.01 of the Trust Agreement, and existing New York trust law." These areas of factual inquiry—whether the assignment of the mortgage was in compliance with the Trust Agreement; whether the undated allonge not affixed to the note was proper;

whether the mortgage and note were transferred together and whether the transfer was consistent with the funding deadline of the plaintiff's trust—raise the same concerns as were raised in the motion to dismiss.

¶ 55 Moreover, the trial court's simultaneous ruling does not cause the same confusion that the supreme court in *Janes* was concerned about. *Janes*, 57 Ill. 2d at 406. The rationale for supreme court's suggested bifurcated rulings was that a "combined disposition may create confusion among both the litigants and the reviewing court." *Miller*, 137 Ill. App. 3d at 200 (citing *Janes*, 57 Ill. 2d at 406). There is no confusion in the instant scenario because Annette's motion to dismiss did not raise any new arguments that were not included in her response to plaintiff's motion for summary judgment. Thus, the trial court was apprised of all factual contentions before granting summary judgment in favor of plaintiff.

¶ 56 In addition to a general argument against the trial court's simultaneous ruling, defendants seem to argue that there are material facts that preclude the granting of summary judgment. Those material facts include the "varying" signatures of the BNC employee on the allonge, that the allonge was not affixed to the note, and that the purported assignment of the mortgage happened at some unknown prior date and separate from the assignment of the note.[8] Defendants contend that discovery would have shown that the allonge was fraudulent or that the transfer of the mortgage did not make it into plaintiff's trust that had a funding deadline shortly after defendants' mortgage was executed.

¶ 57 Our review of an order granting summary judgment is *de novo. Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment should be

[8] Mark's response to plaintiff's motion for summary judgment below argued that the plaintiff did not produce an endorsed note indicating it had been transferred from the original lender to the plaintiff and that the plaintiff did not produce the Trust Agreement. Both of these arguments challenge plaintiff's standing and were addressed in Section II(B)(2).

granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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 (West 2008). When considering a summary judgment motion, a court must construe the evidence strictly against the movant and liberally in favor of the nonmoving party. *LaBolle v. Metropolitan Sanitary District*, 253 Ill. App. 3d 269, 273 (1992). Issues of fact raised by the non-moving party must be material. *Whitman v. Lopatkiewicz*, 152 Ill. App. 3d 332, 337 (1987). Issues that do not matter to the result are immaterial and will not preclude summary judgment. *Id.* Accordingly, in order to defeat a motion for summary judgment, the respondent "must show, through affidavits or other proper materials, that a material issue of evidentiary fact exists." *Extel Corp. v. Cermetek Microelectronics, Inc.*, 183 Ill. App. 3d 688, 691 (1989).

¶ 58 First of all, there was sufficient evidence to establish plaintiff's case. Plaintiff had standing as described above, its complaint satisfied section 5/1504(a) of the Law and included a copy of the mortgage and note endorsed in blank. Plaintiff had possession of the note. Finally, an employee of the servicer of the mortgage loan submitted an affidavit based on personal knowledge, and after examining the business records of the mortgage, attested to the history of the mortgage loan as well as the amounts owed.

¶ 59 While alleging that discovery was necessary, defendants failed to file a Rule 191(b) affidavit that, if proper, would have informed the court of unavailable affiants and what they would testify to. Ill. S. Ct. R. 191(b) (eff. Mar. 28, 2002). Failure to comply with Rule 191(b) defeats an objection on appeal that insufficient time for discovery was allowed. *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064 (1992) (citing *Schultz v. Hennessy Industries, Inc.*, 222 Ill. App. 3d 532, 543 (1991)).

¶ 60 Time and again, defendants complain of the authenticity of the allonge. However, the UCC indicates that an endorsement on an allonge is valid even if there is sufficient space on an instrument. UCC § 3-204(a). The example of the mortgagee's signature on one other case, with apparent similarities with the signature at issue, is not sufficient to withstand otherwise uncontroverted evidence. Defendants have provided no facts supporting its contention that the mortgage could not have become part of the plaintiff's trust because of the trust's funding deadline shortly after the mortgage in this case was executed. It is not an improbable scenario that a mortgage dated March 20, 2006, was properly transferred into a trust whose funding deadline was May 1, 2006. Such a transfer is especially feasible in light of the fact that, newer mortgages often replaced older mortgages within the trust after the funding deadline, a fact defendants acknowledge. Merely alleging that discovery would show the allonge to be fraudulent and that the mortgage at issue did not become a part of plaintiff's trust, is not sufficient to defeat plaintiff's motion for summary judgment.

¶ 61 Defendants allege that the mortgage and the note were assigned at different times because only the original complaint included evidence of an assignment. In Illinois, the mortgage follows the note and not vice versa. *Moore v. Lewis*, 51 Ill. App. 3d 388, 391-92 (1977). In other words, it is the transfer of the note that carries with it the mortgage security. *Id.* Furthermore, the Law is silent on whether assignments need to be attached to a complaint. 735 ILCS 5/15-1504(b) (West 2008). Therefore, the fact that plaintiff attached an assignment of the mortgage from MERS to plaintiff in the original complaint, but did not include the same attachment in the amended complaint is of little consequence, as the plaintiff in this case was the holder of the negotiable instrument, or note, endorsed in blank, whose possession of the note was *prima facie* evidence of

the right to enforce the note. 810 ILCS 5/3-205(b) (West 2008); 735 ILCS 5/3-301 (West 2008); *Barnes*, 406 Ill. App. 3d at 7.

¶ 62 Finally, defendants failed to file a counter-affidavit to plaintiff's motion for summary judgment. Therefore, the material facts set forth in the movant's affidavits stand as admitted. See *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993). Defendants may not stand on their pleadings in order to create a genuine issue of material fact. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49.

¶ 63 For the foregoing reasons, we affirm the finding of summary judgment in favor of plaintiff and against defendants.

¶ 64 Affirmed.