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FIRST DIVISION
May 11, 2015

No. 1-13-3363
2015 IL App (1st) 133363-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GMAC MORTGAGE, LLC,)	
)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County
v.)	
)	No. 10 CH 14981
LORI LAPPAS,)	
)	The Honorable
)	Jesse G. Reyes and
)	Allen Price Walker,
Defendant-Appellant.)	Judges Presiding.
)	
)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

Held: Where GMAC had standing to bring mortgage foreclosure claim as both the holder of the note and the servicer of the loan, defendant's claims on appeal must fail.

¶ 1 Plaintiff GMAC Mortgage, LLC (GMAC), filed a complaint to foreclose mortgage against Lori and Tex Lapas in April 2010. On June 13, 2012, the trial court entered summary

judgment in favor of GMAC for the foreclosure and sale of the subject property. On April 5, 2013, the order was entered approving sale and distribution and giving GMAC possession of the subject property. On May 6, 2013, defendant Lori Lapas filed a motion to reconsider the order entered on April 5, 2013, as well as the order denying her motion for sanctions against GMAC's attorney. Defendant's motion to reconsider was denied, and she now appeals. On appeal, defendant contends that GMAC's motion for summary judgment should not have been granted and that defendant's motion for sanctions should not have been denied. For the following reasons, we affirm the judgment of the trial court.

¶ 2

BACKGROUND

¶ 3 In April 2010, GMAC filed a complaint to foreclose mortgage against defendant and her husband, alleging that Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Homecomings Financial, LLC, was the mortgagee. The complaint alleged that the mortgagors had not paid the monthly installments of principal, taxes, interest, and insurance for April 1, 2009, through the present. The principal balance due on the note and mortgage was \$406,945.40, plus interest, costs, advances, and fees. In paragraph 3(N) of the complaint, GMAC stated that it had the capacity to bring this foreclosure action as the mortgagee pursuant to section 15-1208 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1208) (West 2006)). Attached to the complaint were copies of the note and mortgage at issue.

¶ 4 Defendant answered the complaint, but did not allege any affirmative defenses. On July 28, 2011, GMAC filed a motion for summary judgment. In the motion, GMAC alleged that under the Illinois Mortgage Foreclosure Law, summary judgment was proper because defendant's responsive pleading failed to raise a material issue of fact and failed to identify any authority or present any evidence to preclude entry of summary judgment. GMAC argued that it

was well established that a mortgagee may foreclose its interest in real property upon default, and that a lender's possession and production of evidence which establishes a default is a *prima facie* basis for recovery in favor of the holder. GMAC contended that in order to establish a *prima facie* case of foreclosure, the mortgagee only needed to submit into evidence the mortgage and the note, and that the burden of proof then shifted to the mortgagor to prove payment or to establish a defense. GMAC argued that it, as the mortgagee, had presented the note and mortgage and established a *prima facie* case for foreclosure. It further argued that defendant failed to prove payment under the terms of the mortgage, and failed to allege any affirmative defenses. It argued that denials without support by any evidence did not raise genuine issues of material fact.

¶ 5 Defendant responded, arguing that there was no appropriate documentation attached to the motion sustaining the right of GMAC to proceed as the plaintiff in this foreclosure action. Defendant noted that there was a purported assignment to GMAC reflected in the note, but there was no other reference to GMAC other than in paragraph 1 where GMAC was referred to as the "Servicer."

¶ 6 In reply, GMAC filed a business records affidavit of Albert Gruber, an authorized officer of GMAC. Gruber stated in his affidavit that GMAC currently serviced a loan made by Homecomings Financial, LLC to defendant on June 27, 2007, in the original amount of \$414,000 that is secured by the subject property.

¶ 7 Defendant filed a sur-response, alleging that no certified copies of any relevant documents were presented by GMAC, and that no documentation of any kind sustaining the right of GMAC to proceed as plaintiff had been presented thus far. Defendant's sur-response stated that "it is not a question as to whether or not [defendant] made payments pursuant to the

Mortgage and Note attached. The question is whether [GMAC] has established minimally, much less sufficiently to support a [motion for summary judgment], by appropriate documentation and representation, the right of GMAC [] to proceed on a Mortgage that it did not make, especially when the Assignment depicted on the copy of the Note is referenced nowhere in any Affidavit."

¶ 8 GMAC then filed a sur-reply in support of its motion for summary judgment, arguing that lack of standing is an affirmative defense under section 2-613 of the Illinois Code of Civil Procedure (735 ILCS 5/2-613 (West 2010)), and must have been plead timely and with specificity in the answer to the complaint.

¶ 9 On June 13, 2012, GMAC's motion for summary judgment was granted, and judgment of foreclosure and sale was entered. The record does not contain a transcript, report of proceedings, or a bystander's report from the June 13 hearing. However, on June 18, 2012, defendant filed a motion for reconsideration of her motion for extension of time to respond to GMAC's motion for judgment for foreclosure and sale and to vacate the order of June 13, 2012. In her motion, defendant argued that on June 13, 2012, defendant requested the court for time to respond to GMAC's motion for judgment of foreclosure and sale, but that the court denied the motion "because defendant's previous attorney did not withdraw his appearance on file." Defendant's motion for reconsideration was stricken on July 25, 2012, because it was improperly filed without leave of court.

¶ 10 On July 30, 2012, defendant filed an emergency motion for leave to file a motion for reconsideration of her motion for an extension of time to respond to plaintiff's motion for judgment and to vacate the court's order of June 13, 2012. The trial court denied defendant's motion.

¶ 11 On August 23, 2012, the subject property was sold at a duly-noticed judicial sale. GMAC was the successful bidder and moved to confirm the sale. Defendant responded, again contending that GMAC did not have standing, and that its representation that it was the holder of the note was fraudulent. The trial court confirmed the sale on April 5, 2013.

¶ 12 On May 15, 2013, defendant filed a motion to reconsider the order confirming the sale, as well as a motion for sanctions against GMAC's attorneys pursuant to Supreme Court Rule 137. In her Rule 137 motion for sanctions, defendant alleged that paragraph 3(N) of GMAC's complaint alleging that it was the mortgagee. Defendant contended that such allegation was false because GMAC was not the mortgagee, and that the attorneys for GMAC knew that Freddie Mac owned the entire interest in defendant's note and mortgage, and that GMAC was only the servicer for defendant's loan. Defendant alleged that GMAC's attorneys knew that the documents submitted in support of GMAC's complaint were fabricated.

¶ 13 GMAC responded to the motion for sanctions by stating that on July 17, 2007, the subject note was endorsed from the original lender to GMAC and that subsequently the note was endorsed in blank. GMAC submitted an affidavit of Peter Knapp, which attested that GMAC was both the holder of the note and the servicer of the loan at all relevant times until it assigned the note and servicing rights to Ocwen on February 15, 2013.

¶ 14 On September 27, 2013, the trial court denied defendant's motion for reconsideration and for sanctions. Defendant now appeals.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant contends that (1) the trial court erred in granting GMAC's motion for summary judgment where GMAC did not have standing to bring the foreclosure action because Freddie Mac was the holder of the note and mortgage, (2) the trial court abused its

discretion in approving the judicial sale of the subject property where GMAC did not have standing to bring the foreclosure action because Freddie Mac was the holder of the note and mortgage, and (3) the trial court abused its discretion in denying defendant's request for sanctions based on GMAC's allegedly fraudulent representation that it was the mortgagee in its complaint for foreclosure, when Freddie Mac was the true holder of the note and mortgage. GMAC maintains that it had standing to bring the foreclosure action against defendant, regardless of Freddie Mac's ownership of the note, and thus all three arguments are without merit.

¶ 17 As an initial matter, GMAC claims that defendant waived the issue of standing because it was not raised in her answer to GMAC's complaint. As GMAC notes, " 'lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court.' " *MERS v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (quoting *Greer v Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)). Section 2-613(d) of the Code of Civil Procedure (Code) states that the facts alleging an affirmative defense must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (West 2012). Here, in response to GMAC's assertion in its complaint that it was the mortgagee, defendant stated that she had no knowledge sufficient to form a belief as to the truth of the allegations.

¶ 18 Defendant's waiver notwithstanding, the record establishes that GMAC had standing to bring this foreclosure action. "A foreclosure complaint is deemed sufficient if it contains the statements and requests called for by the form set forth in section 15-1504(a) of the Mortgage Foreclosure Law (735 ILCS 5/15-1504(a) (West 2008))." *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 20. A foreclosure action may be pursued by "the legal holder of the indebtedness, a pledgee, an agent, or a trustee," and "[a] plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person." *Mortgage Electronic*

Registration Systems, Inc. v. Barnes, 406 Ill. App. 3d 1, 7 (2010). A "mortgagee" is defined as: (i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as a successor. 735 ILCS 5/15-1208 (West 2012).

¶ 19 Here, GMAC pled that it was the mortgagee and also attached the note and mortgage, thereby establishing that it was the holder of the note. Based on the complaint and the attached note and mortgage, GMAC complied with section 15-1504(a) in its complaint and set forth the required information. *U.S. Bank, National Association v. Avdic*, 2014 IL App. (1st) 121759, ¶ 37. The Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2012)) does not require the plaintiff to submit any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint. *CitiMortgage, Inc. v Moran*, 2014 IL App (1st) 132430, ¶ 40. Under section 3-301 of the Uniform Commercial Code (810 ILCS 5/3-301 (West 2012)), the party holding the note is presumed to own it. *Id.* Here, the mere attachment of the note and mortgage to the complaint was *prima facie* evidence that GMAC had the right to foreclose on the mortgage.

¶ 20 Further, the note provided that the lender was Homecomings Financial, LLC, and that the borrower "understand[s] that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note holder.'" At the end of the note there was an endorsement to GMAC, which reads "Without Recourse Pay to the Order of GMAC Mortgage, LLC." The mortgage provided that the lender was Homecomings Financial, LLC, and that the note and mortgage could "be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity

(known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument ***."

¶ 21 Moreover, GMAC also submitted the Gruber affidavit with its motion for summary judgment, in which Gruber swore to the authenticity of the note. Gruber averred that GMAC was the servicer of the loan, and therefore could foreclose on the mortgage. Illinois law allows servicers and agents to be foreclosure plaintiffs on behalf of the actual mortgage holder.

Deutsche Bank National Trust Co. v. Gilbert, 2012 IL App (2d) 120164, ¶ 15. A plaintiff can maintain a lawsuit although the beneficial owner of the note is another person. *Barnes*, 406 Ill. 2d at 6. Illinois does not require that a foreclosure be filed by the owner of the note and mortgage. *Id.* Accordingly, GMAC had standing to pursue foreclosure in this case as both the holder of the note and the servicer of the loan. Accordingly, GMAC's complaint was legally and factually sufficient and included allegations related to standing.

¶ 22 To the extent that defendant contends that Gruber's affidavit did not comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), we disagree. Rule 191 states that affidavits in support of a motion for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

Accordingly, a Rule 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relies. *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 63 (2001).

¶ 23 In addition, to admit business records into evidence as an exception to the general rule excluding hearsay, the proponent must lay a proper foundation by showing that the records were "made (1) in the regular course of business and (2) at or near the time of the event or occurrence." *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27. Where computer-generated records are involved, the proponent must show that "the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonable near the happening of the event recorded and the sources of information, method, and time of preparation were such to indicate their trustworthiness and to justify their admission. *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 829 (1990).

¶ 24 Here, Gruber's affidavit contained sufficient factual detail to satisfy the requirements of Rule 191. Gruber stated that he was an authorized officer of GMAC, and his duties included "reviewing and analyzing the business and loan records for loans that the [GMAC] services. I am familiar with [GMAC]'s books and records including records concerning loans [GMAC] services." He further averred that GMAC maintained business records and a loan file for each loan that it served, which contained a loan payment history, computer generated records, and copies of origination documents. He stated that he reviewed and was familiar with the business records and the loan file for the loan in question. Gruber further averred that the payment history records are computer-generated records, the entries of which are made at or near the time of occurrence regarding the subject account and in the regular and ordinary course of business of GMAC, and that said records are not made in anticipation of litigation.

¶ 25 In particular, Gruber averred that he reviewed the business records and loan file for the loan at issue in the case. The mortgage, note, and payment histories upon which he relied were

attached to the affidavit. After establishing the basis for his knowledge of the loan at issue, Gruber described the specific amounts owed by defendant under the note. These statements clearly constituted facts based on Gruber's personal knowledge, and not mere conclusions. Moreover, Gruber swore in his affidavit that the attached documents were "true and correct." Gruber signed the affidavit. We find that the Gruber affidavit conformed to Rule 191 and the business records related to the mortgage and note were properly admissible. See *Avdic*, 2014 IL App (1st) 121759, ¶ 26-32.

¶ 26 Because all three of defendant's arguments on appeal rely on the proposition that GMAC did not have standing to bring this mortgage foreclosure action, we find that all three arguments must fail.

¶ 27 **CONCLUSION**

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.