

No. 1-13-3956

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

E*TRADE BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CH 7407
)	
NICK VLAD and MIHAELA VLAD,)	Honorable
)	Michael F. Otto
Defendants-Appellants.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in awarding plaintiff summary judgment where affidavit attached in favor of plaintiff's motion complied with Illinois Supreme Court Rule 191 and no genuine issue of material fact existed as to plaintiff's standing to pursue mortgage foreclosure action.

¶ 2 Defendants Nick and Mihaela Vlad appeal from the trial court's order granting plaintiff E*Trade Bank summary judgment in plaintiff's mortgage foreclosure suit. Defendants argue that the trial court erred in granting plaintiff summary judgment because the affidavit plaintiff attached in support of its motion for summary judgment did not comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002), and because a genuine issue of material fact existed regarding plaintiff's standing to pursue the foreclosure suit.

¶ 3 We affirm the judgment of the trial court. The affidavit in support of plaintiff's motion for summary judgment demonstrated that the affiant possessed sufficient personal knowledge and laid the necessary foundation for the admission of business records. Plaintiff demonstrated that it had standing where it possessed the mortgage and note, and attached two assignments showing that it had obtained the right to pursue the foreclosure suit. Defendants submitted no evidence to support its affirmative defense that plaintiff lacked standing, which they bore the burden of proving.

¶ 4 I. BACKGROUND

¶ 5 On October 5, 2006, defendants entered into a home mortgage loan with American Home Mortgage. The loan was secured with a mortgage listing Mortgage Electronic Registration Systems, Inc. (MERS) as mortgagee. American Home Mortgage endorsed the note in blank.

¶ 6 In the summer of 2009, defendants entered into a loan modification agreement with MERS and Saxon Mortgage Services, Inc. (Saxon). The modification agreement listed Saxon as the " 'Borrower' " and MERS as the "Mortgagee." While the record is unclear as to when or how Saxon obtained American Home Mortgage's interest in the loan, the parties agree that, as of 2009, Saxon was the holder of the note.

¶ 7 On February 28, 2011, FV-1, Inc. (FV-1), acting as trustee for Morgan Stanley Mortgage Capital Holdings, LLC (Morgan Stanley), filed the mortgage foreclosure complaint at issue. The complaint asserted that FV-1 had capacity to bring the suit as "the trustee for the holder of the Mortgage and Note," Morgan Stanley. FV-1 attached copies of the mortgage and note to its complaint.

¶ 8 On August 19, 2011, FV-1 moved to substitute plaintiff (with Bayview Loan Servicing, LLC, (Bayview) as plaintiff's loan servicing agent) in the foreclosure proceedings. In its motion,

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FV-1 asserted that it had "filed the *** foreclosure as holder/servicer of the subject mortgage," but that, "[s]ubsequently, the subject mortgage or servicing rights to [the] mortgage were sold and assigned to" plaintiff. FV-1 attached a document entitled, "Assignment of Mortgage," which stated that FV-1 assigned "all beneficial interest" under the mortgage to plaintiff.

¶ 9 On September 22, 2011, defendants filed an answer to the complaint, listing as an affirmative defense that FV-1 lacked standing to seek foreclosure. The answer stated that, while the note had been endorsed in blank by American Home Mortgage, "there is no showing of a transfer of ownership since the loan modification in 2009, which was done with Saxon."

¶ 10 On September 30, 2011, the trial court granted FV-1's motion to substitute. The trial court substituted "BAYVIEW LOAN SERVICING, LLC, *** AS SERVICER FOR E*TRADE BANK" as the plaintiff in the case.

¶ 11 On December 13, 2012, plaintiff filed the motion for summary judgment at issue in this appeal. Plaintiff argued that it was entitled to judgment on its foreclosure complaint, as well as on defendants' affirmative defense. With regard to defendants' claim that plaintiff lacked standing, plaintiff cited two assignments attached to its motion, which, according to plaintiff, "evidence[d] the prior transfer of the Mortgage." Plaintiff also pointed out that the note had been endorsed in blank, converting it to bearer paper. Plaintiff thus claimed that its possession of the note, coupled with the assignments of the mortgage, demonstrated that it possessed standing.

¶ 12 Plaintiff attached an affidavit from Ken Castillo, the assistant vice president of Bayview, who said that Bayview was "the authorized servicing agent" for plaintiff, and that plaintiff authorized him to make the statements in his affidavit. Castillo stated that, in his capacity with Bayview, he had access to its business records, including the records of defendants' loan. He asserted that the loan records were "maintained *** in the course of *** regularly conducted

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business activities and *** made at or near the time of the event, by or from information transmitted by a person with knowledge." He also said that it was regular practice to keep such records in the ordinary course of regularly conducted business activity, and that the payment history attached to the motion accurately reflected the payment history associated with the loan.

¶ 13 Castillo also attested that plaintiff was the owner and holder of the note and mortgage. Castillo stated that MERS served as nominee for American Home Mortgage on the original mortgage, and that MERS transferred the mortgage to FV-1, which transferred it to plaintiff.

¶ 14 Plaintiff also attached copies of the note and mortgage to its motion for summary judgment, as well as two assignments of the mortgage, and a history of payments made on the loan. The first assignment, dated August 3, 2011, stated that MERS granted FV-1 "all beneficial interest" under the mortgage. The second assignment, dated August 4, 2011, stated that FV-1 granted "all beneficial interest" under the mortgage to plaintiff.

¶ 15 Defendants' response to plaintiff's motion for summary judgment contained no counter-affidavits or other evidence. Defendants claimed that there was "no evidence anywhere that the note was assigned or is owned by [FV-1] or Bayview." Defendants noted that Castillo's affidavit only mentioned the transfers of the mortgage, not the transfers of the note. Defendants also argued that Castillo's affidavit did not comply with Supreme Court Rule 191(a) because it did not state how much defendants owed.

¶ 16 On April 23, 2013, the trial court granted summary judgment in plaintiff's favor and entered a judgment for foreclosure and sale of the property. On December 6, 2013, the court entered an order approving plaintiff's report of the sale of the property. Defendants appeal.

¶ 17

II. ANALYSIS

¶ 18 Defendants raise two challenges to the trial court's decision to award plaintiff summary judgment. First, defendants claim that Ken Castillo's affidavit, attached in support of plaintiff's motion for summary judgment, did not comply with Supreme Court Rule 191(a). Second, defendants assert that plaintiff failed to establish that it had standing to pursue the foreclosure suit because it did not present evidence showing that the mortgage and note had been properly assigned to plaintiff.

¶ 19 "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). "The standard of review for the entry of summary judgment is *de novo*." *Id.*

¶ 20 A. Rule 191(a)

¶ 21 Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) sets out requirements for affidavits used to support a motion for summary judgment, including that the affidavit must affirmatively show that the affiant can competently testify to the facts asserted in the affidavit, and that the affiant has personal knowledge of those facts. Defendants argue that Castillo's affidavit did not comply with Rule 191(a) because it did not explicitly state that Castillo could testify competently and that Castillo lacked personal knowledge of the contents of the documents submitted with the motion for summary judgment.

¶ 22 Defendants' first point is inaccurate. Castillo's affidavit stated that he was "over the age of 18 and competent to testify as to the matters contained herein." In any event, courts look to the content of an affidavit to determine whether the affiant is qualified to testify at trial; an express

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statement that the affiant is qualified to testify is unnecessary. *Rinchich v. Village of Bridgeview*, 235 Ill. App. 3d 614, 623 (1992).

¶ 23 We also reject defendants' claim that Castillo lacked personal knowledge sufficient to support the motion. Castillo attested that, as the assistant vice president of plaintiff's loan servicing agent, he possessed access to the records relating to the loan, that he was familiar with how those records were made and maintained, that the loan documents attached to the motion for summary judgment were created in the regular course of business, and that it was part of the regular course of the company's business to make and keep such documents. He further attested that the loan documents are made "at or around the time of the transactions" by someone with direct knowledge of each of the transactions. These statements laid the necessary foundation for the admission of the loan documents under the business-records exception to the rule against hearsay. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Jan. 1, 2011); *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27 (under business-records exception, documents must be made in regular course of business, at or near time of the event or occurrence). Castillo was not required to have personal knowledge of the underlying transaction in order to justify admission of the loan documents. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); *US Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 29 (lack of personal knowledge of information in business record affects its weight, not its admissibility). Similarly, the mere fact that other entities had held the note and mortgage prior to plaintiff does not render Castillo's affidavit invalid. *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶¶ 13-14.

¶ 24 Defendants submitted no counteraffidavits or other evidence to contradict or undermine Castillo's assertions regarding his personal knowledge. Consequently, we must take his assertions as true. *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). Based upon the assertions in

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Castillo's affidavit, Castillo possessed sufficient personal knowledge to justify the admission of the loan documents as business records in this case. Therefore, Castillo's affidavit satisfied the necessary elements of Rule 191(a).

¶ 25 Finally, we reject defendants' contention that plaintiff improperly cited section 15-1506 of the Code of Civil Procedure (735 ILCS 5/15-1506 (West 2012)) as a basis for summary judgment. In its motion for summary judgment, plaintiff indicated that it was bringing its motion "pursuant to 735 ILCS 2-1005," the section of the Code of Civil Procedure governing summary judgment, and began its argument by writing that "[s]ummary judgment is proper per 2-1005." See 735 ILCS 5/2-1005 (West 2012). Plaintiff then proceeded to argue why it was entitled to judgment as a matter of law pursuant to section 15-1506 of the Code of Civil Procedure, which governs the entry of a judgment of foreclosure and sale. See 735 ILCS 5/15-1506 (West 2012). Plaintiff thus identified the correct procedural statute for the bringing of its motion (section 2-1005) as well as the statute under which it was entitled to substantive relief as a matter of law (section 15-506). We would further note that Subsection 15-1506(c) expressly states that, in a foreclosure proceeding, a party is not foreclosed from seeking a motion for summary judgment under Article II of the Code of Civil Procedure. 735 ILCS 5/15-1506(c) (West 2012). We find no error here.

¶ 26

B. Standing

¶ 27 Defendants next contend that a genuine issue of material fact existed regarding whether plaintiff had standing to pursue the foreclosure action. Defendants argue that plaintiff never obtained standing to pursue the suit because FV-1, the entity that originally filed the foreclosure suit, never had standing to file the suit in the first place. Defendants claim that FV-1 lacked

standing because there was evidence that FV-1 had been assigned the mortgage after the lawsuit had been filed.

¶ 28 Defendants cite *Deutsche Bank National Trust Company v. Gilbert*, 2012 IL App (2d) 120164, in support of their contention. In *Gilbert*, the trial court awarded the plaintiff summary judgment in its mortgage foreclosure suit, over the defendant's contention that the plaintiff lacked standing to pursue the foreclosure suit. *Id.* ¶ 1. On appeal, the court found that the defendant had "made out a *prima facie* showing that [plaintiff] lacked standing" because an assignment of the mortgage that the plaintiff had attached to its motion for summary judgment was dated after the amended complaint was filed. *Id.* ¶ 17. According to the court, because of this evidence, the burden shifted to the plaintiff to prove it had standing. *Id.* The court rejected the plaintiff's contention that an affidavit from the employee of its servicing agent, which stated that MERS assigned its interest to the plaintiff before the complaint was filed, showed its standing because "it was unsupported by any foundation." *Id.* ¶ 19. Thus, the court reversed the award of summary judgment. *Id.* ¶ 24.

¶ 29 We recognize that *Gilbert* is similar to this case. However, this court rejected *Gilbert's* interpretation of the lack-of-standing affirmative defense in *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 28. Like *Gilbert* and this case, *Garner* involved an award of summary judgment to the plaintiff in a foreclosure proceeding. *Id.* ¶ 4. The plaintiff alleged in its complaint that it was the original mortgagee's assignee, and it presented a copy of the note. *Id.* ¶ 24. Like *Gilbert* and this case, the assignment of mortgage in *Garner* was dated after the plaintiff had filed the foreclosure complaint. *Id.* ¶ 22. In addressing whether a genuine issue of material fact existed regarding the plaintiff's standing, the court in *Garner* held that, by attaching a copy of the note to the complaint, the plaintiff had presented sufficient evidence to make a

prima facie case that it had standing. *Id.* The court further held that the date of the assignment did not undermine the plaintiff's *prima facie* evidence because a written assignment "may be a mere memorialization of an earlier transfer of interest." *Id.* ¶ 25.

¶ 30 The court in *Garner* expressly rejected the burden-shifting approach to the lack-of-standing affirmative defense taken by the court in *Gilbert*. *Id.* ¶ 28. The court in *Garner* noted that *Gilbert* had cited no relevant authority in support of that approach, and that the Illinois Supreme Court has repeatedly held that a defendant alone bears the burden of proving a lack of standing. *Id.* The court noted that the defendant had offered no evidence, such as depositions or interrogatories, to prove that the assignment was effectuated after the complaint had been filed, and affirmed the award of summary judgment. *Id.*

¶ 31 We find *Garner* to be well-reasoned. The Illinois Supreme Court has long held that lack of standing is an affirmative defense, and the burden of proving that defense remains on defendant throughout the proceedings. See *id.* (citing cases); *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010); *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 32 Applying that standard, like the court in *Garner*, we hold that defendants failed to create a genuine issue of material fact regarding plaintiff's standing. In the complaint, FV-1 alleged that it had standing as the trustee for Morgan Stanley, who was the holder of the note. See 735 ILCS 5/15-1504(a)(3)(N) (West 2010); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 5 (2010) (trustee of mortgagee may bring foreclosure suit on mortgagee's behalf). FV-1 attached the note, which had been endorsed in blank, to the complaint, establishing a *prima facie* case that it had standing. See 810 ILCS 5/3-205(b) (West 2006) (note endorsed in blank is bearer paper and may be negotiated by transfer of possession alone); *Parkway Bank & Trust Co.*

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v. Korzen, 2013 IL App (1st) 130380, ¶ 24 (attaching note to complaint is *prima facie* evidence that plaintiff owns note).

¶ 33 Then, when plaintiff moved for summary judgment, plaintiff attached a copy of the note, establishing that plaintiff was the holder of the note, as well as Castillo's affidavit attesting that plaintiff was the holder of the note. Plaintiff also presented two assignments showing that MERS had transferred its interest under the mortgage to FV-1, and that FV-1 had transferred its interest to plaintiff. As shown by *Garner*, the mere fact that the assignment to FV-1 bore a later date than the date the complaint was filed does not mean that FV-1 lacked standing to file the complaint, as the assignment may have been the memorialization of a prior transfer. Defendants presented no evidence that FV-1 obtained its interest in the mortgage after the complaint was filed. For example, defendants offered no affidavits or depositions that would support the notion that FV-1 filed the complaint before obtaining an interest in the mortgage.

¶ 34 Moreover, FV-1's assignment of the mortgage to plaintiff while the lawsuit was pending creates no issue regarding plaintiff's standing. After assigning the mortgage to plaintiff, FV-1 moved to substitute plaintiff, through its servicing agent Bayview, as the foreclosing party in the suit. Defendants did not contest FV-1's motion to substitute. By failing to challenge this motion in the trial court, defendants have forfeited any argument that plaintiff was not the proper party to assume FV-1's place in the lawsuit. See *Farm Credit Bank of St. Louis v. Dorr*, 250 Ill. App. 3d 1, 3 (1993) (defendants forfeited challenge to trial court's order substituting mortgagee's successor-in-interest as plaintiff in foreclosure suit by failing to raise objection to substitution in trial court). No genuine issue of material fact existed as to plaintiff's standing.

¶ 35

III. CONCLUSION

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¶ 36 For the reasons stated above, we affirm the circuit court's order granting summary judgment in plaintiff's favor. The affidavit supporting plaintiff's summary judgment motion met the requirements of Rule 191(a), and defendants did not create any genuine issue of material fact as to plaintiff's standing because they presented no evidence to contradict plaintiff's *prima facie* evidence that it possessed standing.

¶ 37 Affirmed.