2015 IL App (1st) 142923-U

FIRST DIVISION
NOVEMBER 23, 2015

No. 1-14-2923

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee for the Registered Holders of LSTAR Commercial Mortgage Trust 2011-1, Commercial Mortgage Pass-Through Certificates, Series 2011-1,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No.14 CH 8961
BLUE ISLAND PLAZA, LLC, an Illinois limited liability company; PAUL TSAKIRIS,	)	
Defendants-Appellants	)	
(Unknown Owners and Non-Record Claimants, Defendants).	)	Honorable Allen Price Walker, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the plaintiff mortgagee's request to appoint a receiver over the mortgagor's non-residential property pending foreclosure proceedings. The request for a receiver was supported by a "sworn pleading," as required under section 15-1706(a) of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1706 (West 2012). In addition, the trial court properly found that the

> mortgagee had shown a "reasonable probability" of success in this action, as required under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 5/15-1701(b)(2) (West 2012). The mortgagor's asserted affirmative defenses and counterclaims also did not preclude the appointment of a receiver.

¶ 2 In this mortgage foreclosure action, the defendants-appellants Blue Island Plaza LLC (Blue Island) and Paul Tsakiris (together, the defendants) appeal from an order appointing a receiver over non-residential real property owned by Blue Island.

¶ 3 BACKGROUND

¶ 4 This foreclosure action was initiated in May 2014 by the plaintiff-appellee Wells Fargo Bank, National Association, as Trustee for the Registered Holders of LSTAR Commercial Mortgage Trust 2011-1, Commercial Mortgage Pass-Through Certificates, Series 2011-1 (Wells Fargo). The action is premised upon alleged defaults under three promissory notes and three corresponding mortgages, evidencing loans to three separate entities: Blue Island, 76th & Jeffrey Bldg., LLC (Jeffrey) and Calcity, LLC (Calcity). All of the relevant loan documents were executed on the same day in August 2006 in favor of the original lender, Citibank, FSB (Citibank), who is not a party to this action. Tsakiris signed the loan documents on behalf of each of Blue Island, Jeffrey, and Calcity.

¶ 5 Wells Fargo's complaint attached the loan documents, which evidence the following transactions. On August 3, 2006, Blue Island executed a promissory note in favor of Citibank in the principal amount of $2.15 million (the Blue Island note). The Blue Island note specifies that it is secured by a mortgage "of even date therewith" on property at 12601 S. Western Avenue, Chicago, Illinois[1] (the Blue Island property). An exhibit to the Blue Island note states that it is

[1]The loan documents are inconsistent in stating whether the Blue Island property is in Chicago or Blue Island, Illinois. However, they are consistent in describing the street address as 12601 S. Western Avenue and in identifying the zip code as 60406.

further secured by mortgages made by Jeffrey and Calcity on two additional properties located at 7615-29 S. Jeffrey in Chicago, Illinois (the Jeffrey property) and 1555-77 Sibley Boulevard in Calumet City, Illinois (the Calcity property).

¶ 6 Also on August 3, 2006, Blue Island executed a mortgage in favor of Citibank (the Blue Island mortgage), which encumbered the Blue Island property as security for the Blue Island note. Tsakiris signed the Blue Island mortgage on behalf of Blue Island. Following the signature pages, appended to the Blue Island mortgage is a page entitled "Rider to Mortgage #02-8435984" (the rider), which states:

> "This rider is made this August 3, 2006 and is incorporated into and shall be deemed to amend and supplement the Mortgage of the same date (the 'Mortgage') given by the undersigned (the 'Borrower') to secure the Borrower's note to Citibank Federal Savings Bank, Chicago, Illinois (the 'Lender') of the same date (the 'Note') and covering the property at: 12601 S. Western Avenue[,] Blue Island, IL 60406[.]
>
> In addition to the covenants and agreements made in the Mortgage[,] Borrower and Lender further covenant and agree as follows:
>
> 1. In addition to the Mortgage, the Note is secured by mortgages from 76th & Jeffrey Bldg., LLC and Calcity, LLC to the Lender of the same date described therein and located at:

7615-29 S. Jeffrey, Chicago, IL 60649 [and]

1555-77 Sibley Blvd., Chicago, IL 60409[.]

2. A default or event of default under the Collateral Mortgages shall also be a default under this mortgage."

The rider contains a signature (which resembles the signatures by Tsakiris on other loan documents), but the rider does not indicate the name of the signer or the entity on whose behalf the signature was made.

¶ 7 On the same date as the Blue Island note and mortgage, Calcity executed a promissory note in favor of Citibank in the amount of $1 million (the Calcity note). The Calcity note specifies that it is secured by a mortgage encumbering the Calcity property. Also on the same date, a mortgage (the Calcity mortgage) was entered by *both* Calcity and Blue Island, which were together defined as the "Borrower," in favor of Citibank. The Calcity mortgage states that it encumbers both the Calcity property and the Blue Island property.

¶ 8 Also on August 3, 2006, Jeffrey entered into a third promissory note (the Jeffrey note) in favor of Citibank in the amount of $1.325 million. The Jeffrey note states that it is secured by a mortgage encumbering the Jeffrey property. An exhibit to the Jeffrey note also states that it is "further secured" by mortgages made by Calcity and Blue Island on the Calcity and Blue Island properties. On the same date, a third mortgage (the Jeffrey mortgage) was entered into by *both* Jeffrey and Blue Island, which were together defined as the "Borrower." The Jeffrey mortgage specifies that it encumbered both the Jeffrey property and the Blue Island property.[2]

[2]Notably, the Calcity and Jeffrey mortgages appear to inadvertently confuse the notes corresponding to each mortgage. That is, the Calcity mortgage recites that it is made to secure a loan in the amount of $1.325 million (which was the amount of the Jeffrey note). However, the

¶ 9 Wells Fargo's complaint alleges that in 2011 it became the holder of each of the three notes and mortgages originally executed in favor of Citibank, following transactions involving other entities. Specifically, in March 2011, each of the three notes was negotiated from Citibank to another entity, LSREF2 Chalk, LLC, pursuant to an allonge for each note. At the same time, Citibank also assigned each of the three mortgages to LSREF2 Chalk, LLC.

¶ 10 On June 30, 2011, the notes were negotiated, through additional allonges, from LSREF2 Chalk, LLC to a second entity, LSREF2 Chalk Depositor, LLC. On the same date, each of the three mortgages was also assigned to LSREF2 Chalk Depositor, LLC. Finally, additional documents also executed on June 30, 2011, show that the three notes were negotiated from LSREF2 Chalk Depositor, LLC to Wells Fargo through additional allonges. On the same date, the three mortgages were assigned from LSREF2 Chalk Depositor, LLC to Wells Fargo. The exhibits to Wells Fargo's complaint included documents that were alleged to contain true and correct copies of each of these allonges and assignments.

¶ 11 Wells Fargo's complaint alleges that, beginning in February 2013, Jeffrey and Calcity failed to make monthly payments due under their promissory notes, resulting in defaults under the Jeffrey and Calcity mortgages. In turn, Wells Fargo alleged, each of the defaults under the Jeffrey and Calcity mortgages also triggered a default under the Blue Island mortgage. Thus, the complaint alleges that Blue Island "is in default under the Blue Island Note and [Blue Island] mortgage based on the default by Jeffrey and Calcity."

Calcity note is for only $1 million. On the other hand, the Jeffrey mortgage recites that it secures a promissory note in the amount of $1 million (the amount of the Calcity note). However, the parties do not address this apparent error in their briefs.

¶ 12 Wells Fargo alleges that in May 2014, it notified Blue Island that it was exercising its option under the loan documents to declare the entire balance of the Blue Island note immediately due and payable. After Blue Island (and Tsakiris, as Blue Island's guarantor) failed to pay the outstanding balance, Wells Fargo initiated this action by filing its complaint in the circuit court of Cook County on May 28, 2014.

¶ 13 The complaint pleads a count for breach of guaranty against Tsakiris for failing to pay the amounts due from Blue Island under the Blue Island note. The complaint also seeks a judgment of foreclosure and sale of the Blue Island property[3] pursuant to defaults under each of the Blue Island, Calcity, and Jeffrey mortgages. Wells Fargo's prayer for relief also sought "[a]n order placing the mortgagee in possession or appointing a receiver" for the Blue Island property.

¶ 14 Although the complaint is not expressly pleaded as a "verified" complaint, it includes the following notarized statement following the prayer for relief:

> "Monica Knake, being first duly sworn on oath, deposes and says that she is the Assistant Vice President of Hudson Americas LLC, attorney-in-fact for the Plaintiff; that she has read the foregoing complaint; that she has knowledge of the contents thereof and that the same is true."

The statement is signed by Knake, dated May 23, 2014, and notarized by a Texas notary public.

¶ 15 Wells Fargo apparently encountered difficulty in attempting to serve the complaint upon the defendants. On June 12, 2014, Wells Fargo filed a "motion for service upon defendant by

[3]In this case, Wells Fargo seeks to foreclose upon the Blue Island property only. According to the defendants, Wells Fargo has also initiated separate actions seeking to foreclose upon the Jeffrey property and the Calcity property.

special order of court." In that motion, Wells Fargo averred that its process server had been unable to effectuate service despite multiple attempts to serve the defendants at Blue Island's office and at Tsakiris' home address, alleging "a pattern of evasion of service by Tsakiris" at these locations. On June 27, 2014, the trial court granted Wells Fargo leave to serve through mail to Blue Island's office and Tsakiris' home, as well as by leaving a copy of the summons and complaint at Blue Island's office. The record reflects that the defendants were served on July 2, 2014.

¶ 16 On July 15, 2014, Wells Fargo filed a petition for the appointment of a receiver over the Blue Island property. As in the complaint, the petition alleged that a default on the Blue Island mortgage had resulted from defaults on the Calcity and Jeffrey mortgages which, in turn, arose from Calcity and Jeffrey's failure to make payments due under their respective notes.[4] The petition alleged that the Blue Island property consisted of a retail shopping center and that the Blue Island mortgage authorized the appointment of a receiver to "take charge of the Property to collect the rents, issues and profits thereof."

¶ 17 The petition contended that the requirements for appointment of a receiver under the Illinois Mortgage Foreclosure Law (the Foreclosure Law) were met because the Blue Island mortgage specifically authorized the appointment of a receiver upon default, and because there was a "reasonable probability that [Wells Fargo] will prevail on its Complaint upon a final hearing of this cause." The petition stated that "under these circumstances, the law presumes that

[4]Notably, whereas the complaint alleged that Calcity and Jeffrey failed to make payments after February 2013, the petition alleged that they failed to make monthly payments after February *2014*.

the Lender is entitled to possession of the Property, and accordingly, to appointment of a receiver." The petition also identified Wells Fargo's designated receiver and attached his resume.

¶ 18 Similar to the complaint, Wells Fargo's petition for a receiver concluded with the following notarized statement:

> "Monica Knake, being first duly sworn on oath, deposes and says
> that she is the Assistant Vice President of Hudson Americas LLC,
> solely in its authorized capacity as special servicer for Plaintiff;
> that she has read the foregoing petition; that she has knowledge of
> the contents thereof and that the same is true."

¶ 19 On September 2, 2014, the defendants filed their answer to the complaint, as well as affirmative defenses and counterclaims. The defendants' answer admitted that the Blue Island mortgage secured the Blue Island note and that a true and correct copy of the Blue Island mortgage was attached to the complaint. The answer denied substantially all of the remaining allegations, including Wells Fargo's allegations of defaults by Calcity, Jeffrey, and Blue Island.

¶ 20 The defendants pleaded four affirmative defenses, the first of which claimed that Wells Fargo was not the legitimate holder of the Blue Island note. Specifically, the defendants disputed that the Blue Island note had been properly negotiated to Wells Fargo through the three allonges included with the complaint. The first affirmative defense emphasized that the same individual had executed the second and third allonges on the same day, June 30, 2011, and claimed that this individual was "counsel to Hudson Advisors, LLC and/or Hudson Americas, LLC." The defendants alleged that these allonges "were without authority and are void." Thus, the defendants claimed that Wells Fargo was not a holder of, and did not have the right to enforce, the Blue Island note.

¶ 21 As a second affirmative defense, the defendants denied that there had been any default under the Blue Island mortgage. The defendants disputed that a default under either the Calcity mortgage or Jeffrey mortgage also constituted a default under the Blue Island mortgage, claiming that the Blue Island note and mortgage "were not *** cross-collateralized or cross-defaulted with any other indebtedness."

¶ 22 The third and fourth affirmative defenses claimed that the Calcity and Jeffrey mortgages were invalid to the extent they purported to encumber the Blue Island property. The third affirmative defense claimed that the Calcity mortgage was "void" because it "cannot grant a mortgage over the Blue Island Property where Calcity LLC is not the owner of record of said property." Similarly, the fourth affirmative defense claimed that the Jeffrey mortgage was void because "Jeffrey LLC cannot grant a mortgage over the Blue Island property."

¶ 23 In the same pleading, the defendants also asserted counterclaims against Wells Fargo based on its contention that the Blue Island property could not be encumbered by either the Calcity or Jeffrey mortgages. The defendants noted that, although the Calcity mortgage listed the "Borrower" as *both* "Calcity, LLC and Blue Island Plaza, LLC," the signature block contained only one signature by Tsakiris. The defendants thus claimed that the Calcity mortgage "was executed only on behalf of Calcity LLC" and not by Blue Island. Similarly, the defendants' counterclaims noted that the signature block for the Jeffrey mortgage identifies the "Borrower" as both Jeffrey LLC and Blue Island LLC, but contains only a single signature. Thus, the defendants alleged that the Jeffrey mortgage "was executed only on behalf of Jeffrey LLC."

¶ 24 Accordingly, the defendants asserted that Blue Island had not executed either the Calcity or Jeffrey mortgages, such that they could not encumber the Blue Island property. The counterclaims thus included two counts to "quiet title," seeking a declaration that Wells Fargo

had no right, title or interest in the Blue Island property through either the Calcity or Jeffrey mortgage. Two additional counts similarly alleged "slander of title" against Wells Fargo for "wrongfully" seeking to foreclose on the Calcity and Jeffrey mortgages with respect to the Blue Island property.

¶ 25 Also on September 2, 2014, the defendants filed their opposition to Wells Fargo's petition to appoint a receiver, arguing that certain statutory prerequisites had not been met. First, the defendants claimed that Wells Fargo's petition was not "supported by affidavit or other sworn pleading" as required by section 15-1706 of the Foreclosure Law, (735 ILCS 15-1706 (a) (West 2012)), despite the notarized statements by Knake in the complaint and the petition for a receiver. The defendants argued that, although a corporation may verify pleadings through an officer or agent, Knake was "neither an officer nor an agent of Wells Fargo." The defendants contended that "without knowing more about the relationship between [Wells Fargo], Hudson Americas LLC, and Ms. Knake" the court could not assume that "an 'attorney-in-fact' has any first-hand knowledge regarding the underlying facts," including the alleged defaults. In addition, the defendants argued that the notarized statements were deficient because they did not "substantially comply" with the Code of Civil Procedure's requirements for the content of certifications accompanying a verified pleading or affidavit.

¶ 26 The defendants independently argued that Wells Fargo had failed to establish a "reasonable probability" that it would prevail on a final hearing, as required for a mortgagee to be entitled to possession under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 5/15-1701(b)(2) (West 2012). The defendants contended that Wells Fargo's allegations of default were insufficient to meet this standard, and that the mortgagee must *prove* the default with evidence before a receiver may be appointed. The defendants argued that Wells Fargo's

complaint and petition for a receiver had "failed to offer even a shred of evidence, either in the form of an affidavit or verification, which tends to prove the existence of an actual default."

¶ 27 The defendants further emphasized that the alleged default under the Blue Island mortgage was derivative of defaults under the Calcity and Jeffrey mortgages, and thus was predicated on the single-page rider to the Blue Island mortgage, "which purportedly cross-defaulted and cross-collateralized the Blue Island loan with the Calcity and Jeffrey loans." However, the defendants asserted several defects with the rider, noting that: the rider was not previously referenced in the Blue Island mortgage; the rider did not explicitly refer to "Blue Island LLC"; and that the rider failed to define the term "Collateral Mortgages." Thus, the defendants denied that a default under the Blue Island mortgage had resulted from any default under the Calcity or Jeffrey mortgages. Finally, the defendants argued that it would be premature to appoint a receiver because they had asserted affirmative defenses and counterclaims that had not yet been "adjudicated."

¶ 28 On September 10, 2014, the court entered an order appointing a receiver over the Blue Island property, after noting that the property consisted of a shopping center and was non-residential. The order noted that the Blue Island mortgage provides that the mortgagee may seek appointment of a receiver upon a default, and that the complaint alleged an event of default "pursuant to cross-default provisions in the [Blue Island] Mortgage and Note." The court found that: "Based on the allegations of the Complaint, the terms and provisions of the [Blue Island] Mortgage and Note, and the motion to appoint a receiver, there is a reasonable probability that [Wells Fargo] will prevail on a final hearing" and that "[t]he defendant has not shown good cause why the receiver should not be appointed." The court thus granted the petition and appointed the

receiver designated by Wells Fargo. On the same date, September 10, 2014, Blue Island filed a notice of appeal.

¶ 29 ANALYSIS

¶ 30 We note that we have appellate jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(2), which permits interlocutory appeals from orders granting the appointment of a receiver. Ill. S. Ct. R. 307(a)(2) (eff. March 20, 2009).

¶ 31 The applicable standard of review upon appointment of a receiver was discussed by our court in *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158 (2010). In that case, we explained that our standard of review is *de novo*, at least when the trial court has not made findings of fact following an evidentiary hearing. See *id.* at 165 ("although we apply a *de novo* standard of review in the instant case, it is foreseeable that in a case in which a trial court has held a full evidentiary hearing on a motion to appoint a receiver, this court could find that an abuse of discretion standard or a manifest weight of the evidence standard would be appropriate to review the lower court's judgmental decision."). As there is no indication that the trial court held such an evidentiary hearing in this case, we review its order *de novo.*

¶ 32 The defendants' appeal largely reiterates the arguments raised in their opposition to Wells Fargo's petition to appoint a receiver.

¶ 33 First, the defendants argue that Wells Fargo did not comply with section 15-1706 of the Foreclosure Law, which states: "A request that the mortgagee be placed in possession or that a receiver be appointed may be made by motion, whether or not such request is included in the complaint or other pleading. Any such request shall be supported by affidavit or other sworn pleading." 735 ILCS 5/15-1706(a) (West 2012). The defendants contend that the notarized

statements accompanying the complaint and the petition for appointment of a receiver fail to satisfy the requirement of an "affidavit or other sworn pleading."

¶ 34 Specifically, the defendants assert a number of deficiencies in the notarized statements. Among these, they contend that the statements violate the Code of Civil Procedure (the Code), which states: "Corporations may verify by the oath of any officer or agent having knowledge of the facts." 735 ILCS 5/2-605 (West 2012). The defendants argue that: "Without knowing more about the relationship between [Wells Fargo], Hudson Americas LLC, and Ms. Knake, the Trial Court should not have assumed that an 'attorney-in-fact' has any first-hand knowledge regarding the underlying facts," including the alleged defaults in this case. The defendants further claim that without a copy of the power of attorney, "there was no basis for the Trial Court to determine how much weight it should give" the allegations of the complaint.

¶ 35 The defendants also contend that the notarized statements do not comply with section 1-109 of the Code. 735 ILCS 5/1-109 (West 2012). That provision, regarding "verification by certification," requires:

> "The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be true on information and belief and as to such matters the undersigned

> certifies as aforesaid that he verily believes the same to be true."
>
> 735 ILCS 5/1-109 (West 2012).

The defendants contend that the language used in Knake's notarized statements failed to "substantially comply" with this provision.

¶ 36 We are not persuaded by the defendants' attacks on the sufficiency of Knake's notarized statements. The Foreclosure Law simply requires that a request for a receiver "shall be supported by affidavit *or other sworn pleading*." (Emphasis added.) 735 ILCS 5/15-1706(a) (West 2012). Although the defendants did not submit an affidavit, the complaint and petition for a receiver included notarized statements in which Knake swore that she had personal knowledge of the truth of the allegations. Thus, we find that the "sworn pleading" requirement was met.

¶ 37 Specifically, we find that the defendants' reliance on the Code's requirement that a corporate verification must be "by oath of an officer or agent having knowledge of the facts" is unavailing. 735 ILCS 5/2-605(a) (West 2012). Assuming that this Code provision applies to requests for the appointment of a receiver, it was nonetheless satisfied because Knake's sworn statements indicated that she was, in fact, an agent of Wells Fargo "having knowledge of the facts." In particular, Knake's statement accompanying the complaint stated that she was an officer of Hudson America LLC, Wells Fargo's "attorney-in-fact," and the statement accompanying the petition for a receiver stated that Hudson America LLC was acting "in its authorized capacity as special servicer for Plaintiff." These statements clearly indicate that Hudson America LLC was an agent of Wells Fargo.

¶ 38 The defendants suggest that the court needed to "know[] more about the relationship" between Wells Fargo and Hudson Americas LLC, or that Wells Fargo should have "attach[ed] a copy of the power of attorney." However, they cite no authority suggesting that a corporation

must set forth evidence to *prove* the nature of the agency relationship asserted in such a verification. As Wells Fargo's appellate brief notes, such a requirement would upset longstanding pleading practices, and we decline to impose such an unprecedented burden.

¶ 39 We also decline to find that Knake's notarized statements were rendered defective by section 1-109 of the Code. That provision requires certifications to be in

> "substantially the following form: Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be true on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true." 735 ILCS 5/1-109 (West 2012).

¶ 40 We acknowledge that Knake's notarized statements did not include portions of the model language set forth in section 1-109 of the Code. For example, they did not recite that the statements were made "under penalties as provided by law pursuant" to the Code, and did not include any language regarding statements made "on information and belief" (which is not surprising, as Wells Fargo did not assert any allegations "on information and belief.") However, we conclude that the notarized statements nonetheless complied with the main objective of section 1-109: they provided sworn verification that Knake had personal knowledge of the truth of the facts alleged. In both the complaint and petition for a receiver, Knake, "being first duly sworn on oath," stated that she read and had personal knowledge of the truth of the allegations therein. We believe that Knake's statements accomplished "substantial" compliance with the language of section 1-109, which is all that the Code requires.

¶ 41 We next address the defendants' contention that Wells Fargo failed to satisfy the "reasonable probability" requirement entitling it to possession under section 15-1701(b)(2) of the Foreclosure Law. 735 ILCS 15-1701(b)(2) (West 2012). Under the Foreclosure Law, before a mortgagee's request for a receiver may be granted, the court must first find that the mortgagee is entitled to possession. 735 ILCS 5/15-1702 (West 2012) ("Whenever a mortgagee entitled to possession so requests, the court shall appoint a receiver.").

¶ 42 Section 15-1701 of the Foreclosure Law "govern[s] the right to possession of the mortgaged real estate during foreclosure." 735 ILCS 5/15-1701(a) (West 2012). Pursuant to section 15-1701(b)(2), "in mortgage foreclosure cases involving nonresidential real estate, a mortgagee is entitled to be placed in possession of the property prior to the entry of a judgment of foreclosure upon request, provided that the mortgagee shows (1) that the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. However, if the mortgagor objects and demonstrates 'good cause,' the court shall allow the mortgagor to remain in possession." *Bank of America v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 164 (2010) (quoting 735 ILCS 5/15-1701(b)(2) (West 2006)). The Foreclosure Law thus "creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding [citations], and a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so." *Id.*

¶ 43 In this case, the defendants argue that Wells Fargo failed to prove a "reasonable probability" that it will ultimately prevail in this action, and thus is not entitled to possession of the Blue Island property or the appointment of a receiver. The defendants rely largely on statements by our court that "a proven default establishes a reasonable probability of succeeding

in the mortgage foreclosure action." (Citations omitted.) *Id.* at 166 (holding that the "reasonable probability" requirement was satisfied where the mortgagor had entered into letter agreements expressly admitting events of default); see also *CenterPoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392 (2010) ("[B]ecause a proven default establishes a reasonable probability of success in a mortgage foreclosure action [citations] and [defendant] has admittedly defaulted on its note, there is a 'reasonable probability' that [plaintiff] will prevail on a final hearing in this case.").

¶ 44 The defendants contend that Wells Fargo's allegations of default are insufficient, because Wells Fargo failed to *prove* a "reasonable probability" of success through an affidavit or other evidence. They complain that the petition to appoint a receiver did not attach "any affidavit *** laying foundation or supporting the factual assertions therein," and that there are "no sworn statements *** to substantiate [Wells Fargo's] theory of default" against Blue Island.

¶ 45 The defendants' argument on the "reasonable probability" requirement reiterate their previous contentions that Knake's notarized statements were defective. The defendants further argue that even if the allegations in Wells Fargo's complaint and petition are treated as verified pleadings, they nonetheless cannot *prove* an event of default because the Code provides that "[v]erified allegations do not constitute *evidence* except by way of admission." (Emphasis added.) 735 ILCS 5/2-605 (West 2012).

¶ 46 As a further basis to find that the "reasonable probability" requirement was not met, the defendants additionally attack Wells Fargo's theory that Blue Island's default arose from the defaults under the Calcity and Jeffrey mortgages. They claim that the count of the complaint seeking foreclosure of the Blue Island mortgage is "devoid of any specific factual allegations regarding the purported cross-defaults under the Calcity Note or the Jeffrey Note." Further, they

argue that the rider to the Blue Island mortgage——which states that "[a] default or event of default under the Collateral Mortgages shall also be a default under this mortgage"—is insufficient to effect a default under the Blue Island mortgage. The defendants conclude that Wells Fargo "failed to demonstrate a reasonable probability" of succeeding "because no evidence was introduced proving the existence of a default."

¶ 47 We disagree. To the extent that the defendants suggest that the submission of evidence is required to establish a "reasonable probability" for purposes of section 15-1701(b)(2), we find no such requirement in the Foreclosure Law beyond the "affidavit or sworn pleading" that must accompany the request for a receiver pursuant to section 15-1706. As discussed above, we have determined that the "sworn pleading" requirement was met in this case.

¶ 48 Although our court has stated that "a proven default establishes a reasonable probability of success" for purposes of section 15-1701(b)(2), we have *not* held that the "reasonable probability" threshold requires the submission of any evidence *beyond* sworn allegations and the applicable mortgage documents—both of which were submitted by Wells Fargo in this case. Significantly, our court has held that an affidavit from a mortgagee is sufficient to establish a "reasonable probability of success" in a foreclosure action. *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 265 Ill. App. 3d 859, 869 (1993). That decision recognized that "a proven default establishes a reasonable probability of success," but proceeded to hold that the affidavit of a bank officer describing the events of default under the mortgage established the requisite "reasonable probability of success" supporting the bank's right to possession. *Id.*

¶ 49 We find that this case is analogous to *Mellon Bank*. Although Wells Fargo did not present an affidavit, it did present sworn pleadings in which Knake, as Wells Fargo's agent, verified that she had personal knowledge of the facts underlying Blue Island's alleged default.

Contrary to the defendants' argument, Wells Fargo's allegations did set forth the underlying payment defaults by Calcity and Jeffrey under their respective notes and mortgages and how those defaults, in turn, constituted defaults under the Blue Island mortgage. Moreover, the pleadings also attached the relevant documents — including the Blue Island mortgage and the rider thereto — that support Wells Fargo's allegations.

¶ 50 The defendants offer several purported reasons why the rider to the Blue Island mortgage "does not do that which [Wells Fargo] alleges," and claim that the rider is insufficient to support a default by Blue Island resulting from Jeffrey and Calcity's defaults. However, the defendants' arguments as to why the rider "failed to cross-default or collateralize the loans" are, at best, tenuous. We do not find that the defendants' arguments with respect to the rider are sufficient to preclude the finding that Wells Fargo has at least a "reasonable probability" of prevailing in this foreclosure action.

¶ 51 First, the defendants note that the Blue Island mortgage does not contain an express reference to the rider, relying upon the principle that "[p]arties may not incorporate another agreement into a contract without an express reference demonstrating an intent to incorporate the other agreement into the contract." *Peterson v. Residential Alternatives of Illinois, Inc.*, 402 Ill. App. 3d 240 (2010). *Peterson* held that two separate documents, even if executed on the same date by the same parties, would not be construed as one contract "when *neither* document clearly refers to or expressly incorporates the other document." (Emphasis added.) *Id.* at 245.

¶ 52 However, that is not the situation here. Although the Blue Island mortgage may not refer to the rider, the rider clearly and explicitly refers to the Blue Island mortgage. As acknowledged in the defendants' brief, the rider is entitled: "Rider to Mortgage #02-8435984." The first page of the Blue Island mortgage states that it is "Loan No.: 02-8435984." In fact, the same loan number

appears in the lower right-hand corner of each of the 23 pages of the Blue Island mortgage preceding the rider. Moreover, the rider states that it "is incorporated into and shall be deemed to amend and supplement the Mortgage of the same date *** covering the property at: 12601 S. Western Avenue[,] Blue Island, IL 60406." Although the mortgage elsewhere states the address of the Blue Island property as "12601 S. Western Ave., *Chicago*, IL 60406," the use of the same street address and zip code leaves little doubt that the rider refers to the Blue Island mortgage. For the same reasons, the defendants' contention that the rider "makes no reference to Blue Island Plaza, LLC" is also unpersuasive. Although the rider does not specifically name the Blue Island entity, it certainly refers to the Blue Island mortgage.

¶ 53 Moreover, while the defendants argue that the rider does not "contain any signature or acknowledgment by Blue Island Plaza, LLC," they are mistaken as the rider does contain a signature. Although no individual or entity is explicitly identified as the signer, it appears to be very similar to Tsakiris' signatures appearing on the numerous other loan documents that he executed on the same date on behalf of Blue Island, Calcity, and Jeffrey. Thus, it is at least reasonably probable that Wells Fargo will be able to establish that Tsakiris executed the rider on behalf of Blue Island.

¶ 54 The defendants additionally attack the effectiveness of the rider because the term "Collateral Mortgages" is not defined in conjunction with its statement that a default "under the Collateral Mortgages shall also be a default under this mortgage." However, the immediately preceding sentence in the rider refers to the "mortgages from 76th & Jeffrey Bldg., LLC and Calcity, LLC *** to the Lender of the same date described therein and located at 7615-29 S. Jeffrey, Chicago IL 60649 & 1555-77 Sibley Blvd., Chicago, IL 60409." As the rider clearly

references the Calcity and Jeffrey mortgages, the defendants' contention that the term "Collateral Mortgages" "remains unclear" is, at least, highly questionable.

¶ 55 In any event, although the parties may continue to dispute the meaning of the rider's language in subsequent proceedings, at this stage of the case, the trial court did not need to conclusively determine the effect of the rider before appointing a receiver. Rather, the court needed only to find a "reasonable probability" that Wells Fargo would prevail in a final hearing of the cause. Contrary to the defendants' suggestion that Wells Fargo had to *prove* the existence of a default, the Foreclosure Law simply does not impose such an evidentiary burden.

¶ 56 The drafters of the Foreclosure Law could have easily specified that, in order to be entitled to possession pending foreclosure, the mortgagee must prove that its likelihood of success in the action is "probable," or could have used even more demanding language. Instead, the statute requires only that the court find "a reasonable probability" of the mortgagee's eventual success. 735 ILCS 5/15-1701(b)(2) (West 2012). If so, "the mortgagee shall upon request be placed in possession" unless the mortgagor can "show good cause." *Id.*

¶ 57 In this case, we agree with the trial court that the loan documents, as well as Wells Fargo's sworn allegations, established at least a "reasonable probability" that Wells Fargo would ultimately prevail in this foreclosure action, and that the defendants failed to demonstrate "good cause" as to why a receiver should not be appointed. We thus reject the defendants' claim that appointment of a receiver was erroneous due to any failure to comply with section 15-1701(b)(2) of the Foreclosure Law.

¶ 58 Finally, we address the defendants' separate argument that the trial court erred in appointing a receiver because the defendants had pending affirmative defenses and counterclaims which denied the existence of any default and claimed that Wells Fargo lacked

"standing" to bring this action. The defendants urge that it was premature to appoint a receiver because the trial court had "not yet adjudicated the Affirmative Defenses and [Wells Fargo] had not yet responded to same."

¶ 59 Tellingly, the defendants cite no provision of the Foreclosure Law suggesting that a receiver may not be appointed simply because the mortgagor has pleaded affirmative defenses or otherwise denies a default. To the contrary, "the Foreclosure Law creates a presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding," and "a mortgagor can retain possession only if it can show 'good cause' for permitting it to do so." *108 N. State Retail LLC*, 401 Ill. App. 3d at 164; 735 ILCS 5/15-1701(b)(2) (West 2012).

¶ 60 The defendants cite only one case as support for their suggestion that the mortgagor's assertion of affirmative defenses may preclude the appointment of a receiver. However, that case is plainly inapplicable, as it concerned affirmative defenses that were deemed *admitted*. See *First Federal Savings and Loan Ass'n of Chicago v. National Boulevard Bank of Chicago*, 104 Ill. App. 3d 1061 (1982). In that foreclosure case, the mortgagee moved for possession but failed to respond to the mortgagor's pending affirmative defenses, which included breach of contract, unclean hands and fraud. *Id.* at 1062. Our court affirmed the trial court's denial of the mortgagee's request to be placed in possession, as the mortgagee had "admitted the truth of affirmative defenses raised in the foreclosure action" through its failure to respond. *Id.* at 1063 (noting that "there is more than a likelihood that defendants will succeed on the merits since plaintiff has admitted the truth of the affirmative defenses").

¶ 61 In this case, there is no indication that Wells Fargo had failed to timely respond to, or otherwise admitted, any portion of the defendants' affirmative defenses or counterclaims. In fact,

only eight days had passed from the defendants' filing of those claims and defenses on September 2, 2014 to the appointment of the receiver on September 10, 2014. Especially as the petition for appointment of a receiver had been pending since July 15, 2014, we decline to find that the pendency of the defendants' recently-filed affirmative defenses and counterclaims rebutted the "presumption in favor of the mortgagee's right to possession of nonresidential property during the pendency of a mortgage foreclosure proceeding." *108 N. State Retail LLC,* 401 Ill. App. 3d at 164. Thus, for the reasons discussed, we do not find any error in the trial court's appointment of a receiver for the Blue Island property.

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

¶ 63 Affirmed.