2015 IL App (2d) 140075-U
No. 2-14-0075
Order filed May 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CH-292
	)	
SCOTT ANDREW RUSSELL and	)	
JENNIFER J. RUSSEL,	)	Honorable
	)	Leonard J. Wojtecki,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in declining to vacate the summary judgment in favor of plaintiff, Bank of America, on its complaint to foreclose mortgage. Specifically, the court erred in finding that defendants had no meritorious defense to the foreclosure action. The judgment of foreclosure is vacated, as is the order approving sale, and the cause is remanded for further proceedings.

¶ 2 Defendants, Scott Russell and Jennifer Russell, appeal the trial court's orders (1) granting summary judgment to plaintiff Bank of America, N.A., on its complaint to foreclose mortgage; (2) denying defendants' subsequent motion to vacate the summary judgment; and (3) approving

the report of sale. For the following reasons, we vacate the judgment of foreclosure and the order approving sale, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed its foreclosure complaint on January 30, 2012. Plaintiff alleged that it was bringing suit in its capacity as mortgagee under section 15-1208 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15–1208 (West 2012)). Plaintiff alleged that it was "[s]uccessor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP." Plaintiff attached to its complaint a mortgage (Mortgage) and note (Note). The Mortgage lists defendants as borrowers and mortgagors, E-Loan as lender, and the Mortgage Electronic Recording System (MERS) as mortgagee. The Note likewise lists defendants as borrowers and E-Loan as lender. The final page of the Note bears three stamped endorsements in favor of Countrywide Bank FSB and Countrywide Home Loans, Inc. (collectively, "Countrywide"). One of the stamped signatures was of Michelle Sjolander, identified as executive vice-president of Countrywide Home Loans. None of the endorsements is dated. Plaintiff also attached to its complaint an affidavit from Michael D. Heath, one of plaintiff's officers. Heath averred, consistent with the complaint, that plaintiff was "[s]uccessor by merger to BAC Home Loans Servicing LP, f/k/a Countrywide Home Loans Servicing LP," and that plaintiff "holds the promissory note given for the [l]oan."

¶ 5 Defendants, proceeding *pro se*, filed an answer. Defendants denied plaintiff's allegation that it was the legal holder of the mortgage. Defendants also pled the following as an affirmative defense: "Defendants deny the plaintiff has the capacity to sue for foreclosure unless or until capacity is proven in court."

¶ 6 On March 30, 2012, plaintiff filed a motion for summary judgment. Plaintiff contended that, as it had provided documentary support for its foreclosure claim, defendants could not oppose summary judgment simply by resting on the allegations of their complaint. See *Forsberg v. Edward Hosp. and Health Services*, 389 Ill. App. 3d 434, 441 (2009) ("[A] party may not rely solely on her complaint to oppose a supported motion for summary judgment."). Plaintiff served defendants with notice that its summary judgment motion would be heard on April 5, 2012. The trial court set no briefing schedule, and defendants filed no response to plaintiff's motion. The next order in the record, dated April 5, reflects that defendants' motion was heard that day (the record contains no transcript of the hearing). The order grants summary judgment for plaintiff. Also on April 5, the court entered a judgment of foreclosure and sale.

¶ 7 On July 12, at the instance of both parties, the trial court stayed the sheriff's sale. On September 6, the court cancelled the sale, which had been postponed to September 13.

¶ 8 In the meantime, defendants retained counsel, who filed his appearance on October 5, 2012. Also on that date, defendants filed a motion seeking two-fold relief. First, defendants sought leave to withdraw their *pro se* answer and to file a new answer, or otherwise plead, within 28 days. Defendants noted that, since hiring counsel, they "discovered the presence of certain meritorious defenses and issues that have been overlooked." Second, defendants asked for permission to file their enclosed motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). Defendants' motion to dismiss asserted that plaintiff lacked the legal capacity to sue (see 735 ILCS 5/2-619(a)(2) (West 2012)) because plaintiff was neither the original holder of the Note nor a holder in due course (see 810 ILCS 5/3-302(a) (West 2012)). Defendants claimed specifically that the endorsements on the Note had facial irregularities such as a blank line and an illegible signature.

Defendants also attached to their motion an April 17, 2012, letter from the Federal Home Loan Home Mortgage Corporation (Freddie Mac). In the letter, Freddie Mac states that it is the owner of defendants' mortgage and that plaintiff "services the mortgage on [Freddie Mac's] behalf."

¶ 9 Plaintiff filed no response to the October 5 motion. The record does not reflect any disposition of the motion, but evidently, as defendants claim, the trial court denied it.

¶ 10 On November 15, 2012, defendants filed a combined motion (1) to vacate the April 5, 2012, summary judgment and judgment of foreclosure; (2) for leave to withdraw their *pro se* answer; and (3) for leave to file their enclosed motion to dismiss *instanter* or, alternatively, an amended answer within 28 days. In support of the motion to vacate, defendants claimed that, as shown in their motion to dismiss, there were genuine issues of material fact to preclude summary judgment. The attached motion to dismiss, like the previous version attached to defendants' October 5 motion, asserted that plaintiff lacked the capacity to sue on the Note. As they did previously, defendants cited irregularities in the endorsements and attached the Freddie Mac letter.

¶ 11 Also, for the first time, defendants attached the deposition of Sjolander, which was taken in connection with federal litigation in Mississippi. Sjolander testified that she was formerly one of Countrywide's officers, and, when that company merged with plaintiff, she became and remains one of plaintiff's officers. According to Sjolander, Countrywide had a "collateral processing center" where Sjolander's signature was stamped *en masse* on loan documents. Sjolander did not have access to the processing center and did not witness the stamping. Defendants concluded from Sjolander's testimony that "what purports to be [her] signature on the purported copy of the alleged [Note] *** is in fact a rubber stamp, affixed by a person without personal knowledge or authority." Therefore, defendants asserted, the Note "bears

evidence of forgery or alteration and is otherwise irregular or incomplete[,] calling into question its authenticity."

¶ 12 Plaintiff filed no response to the motion. There is no indication in the record that the November 15 motion was brought to hearing. On December 5, 2012, the trial court entered a written order denying the motion, "the court finding that plaintiff has standing by producing [the] original note at judgment."

¶ 13 Almost a year had passed when, on November 13, 2013, plaintiff filed a notice of sheriff's sale to be held on December 12. Plaintiff purchased the property at the sale. On December 17, plaintiff moved for an order approving the report of sale and distribution. On December 23, defendants filed their response, attaching a document entitled "Cooperative Short Sale Acknowledgement of Interest" (Acknowledgment) which plaintiff prepared and defendants signed in April 2012. Defendants claimed that the foreclosure violated the terms of the Acknowledgment. The same day as defendants filed their response, the court entered an order confirming the sale.

¶ 14 Defendants filed this timely appeal.

¶ 15 II. ANALYSIS

¶ 16 Defendants challenge both the denial of their motion to vacate and the order confirming the sale.

¶ 17 Defendants' first contention is that the entry of summary judgment was inequitable because they were not permitted to file a response to plaintiff's motion. Defendants infer from the absence of a briefing schedule that the court would not permit a response to the motion. We need not decide whether this inference is reasonable, for defendants presented adequate grounds for vacating the judgment apart from its procedural fairness.

¶ 18 Section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)) sets the following time constraints on postjudgment motions:

> "(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable."

Though defendants' November 15, 2012, motion seeking vacatur of the summary judgment was not filed within 30 days of that judgment, defendants' challenge was not untimely. The final judgment in a mortgage foreclosure action is the order confirming the sale and ordering the distribution of proceeds. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. Therefore, the entry of summary judgment did not trigger section 2-1301(e)'s 30-day postjudgment deadline. See *In re Haley D.*, 2011 IL 110886, ¶ 66 (default judgment in termination of parental rights action was not a final judgment for purposes of section 2-1301(e)).

¶ 19 The overarching criterion under section 2-1301(e) is whether vacatur would promote substantial justice. *Id.* ¶ 57. "Whether substantial justice is being achieved by vacating a judgment or order is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties from granting or denying vacatur." *Jackson v. Bailey*, 384 Ill. App. 3d 546, 549 (2008). The trial court's resolution of a motion to vacate is reviewed for abuse of discretion. 735 ILCS 5/2-1301(e) (West 2012); *Bailey*, 384 Ill. App. 3d at 548. "A circuit court abuses its discretion when its ruling rests on an error of law or where no reasonable person would take the view adopted by the circuit court." *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57.

¶ 20 The court's only stated reason for denying the November 15 motion to vacate was that it was "finding that plaintiff has standing by producing [the] original note at judgment." We construe this, naturally, as a statement on the substantive merits of defendants' challenge to standing. It is also fair to presume that the court made this pronouncement after considering, for what it was worth, the material that defendants produced in their motion to vacate, which they claimed demonstrated the existence of a genuine issue of material fact. See 735 ILCS 5/2-1005(c) (West 2012) (summary judgment is appropriate "if 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."). Therefore, given the procedural context, we construe the court's implied finding that defendants lacked a meritorious defense as equivalent to a finding that defendants demonstrated no genuine issue of material fact. On this particular point, we owe the trial court no deference. See *Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 30 (existence of a genuine issue of material fact is a question of law reviewed *de novo*); *Bermudez*, 2014 IL App (1st) 122824, ¶ 57 (court abuses its discretion when it commits an error of law). While several factors determine whether vacatur would promote substantial justice (*Bailey*, 384 Ill. App. 3d at 549), the trial court evidently considered it decisive that defendants lacked a meritorious defense.

¶ 21 The governing substantive law here is the doctrine of standing, which is designed to preclude persons who have no interest in a controversy from bringing suit. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15. Standing is determined as of the commencement of the action. *Id.* An action to foreclose upon a mortgage may be filed by a "mortgagee," defined by statute as "(i) the holder of an indebtedness or obligee or 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 successor." 735 ILCS 5/15-1208 (West 2012). Lack of standing is an affirmative defense, and the burden of proving the defense is on the party asserting it. *Gilbert*, 2012 IL App (2d) 120164, ¶ 15.

¶ 22 Defendants contend that a material question of fact exists as to standing, specifically, on whether plaintiff owned the loan when it instituted foreclosure proceedings in January 2012. In Illinois, assignment of the mortgage note carries with it the assignment of the mortgage. *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 635 (2000); *Moore v. Lewis*, 51 Ill. App. 3d 388, 391-92 (1977).

¶ 23 We agree, based on the materials that defendants submitted with their motion to vacate, that a material question of fact exists as to standing. Guiding us here is our decision in *Gilbert*, which also involved a challenge to a plaintiff's standing to bring a foreclosure complaint. In *Gilbert*, Deutsche Bank National Trust Company (Deutsche Bank) filed for foreclosure in March 2008. Deutsche Bank alleged that it was the mortgagee and thus entitled to bring the action. Deutsche Bank attached to its complaint a mortgage and note indicating that the loan, which was held by WMC Mortgage Corporation, was secured by a mortgage held by MEARS. Deutsche Bank was not named in the mortgage or the note. Deutsche Bank also attached a written assignment (Assignment) by which MEARS purported to assign the mortgage to Deutsche Bank as trustee under a trust agreement dated November 2, 2005. The Assignment was dated August 25, 2008 (several months after the foreclosure suit was filed). The parties filed cross-motions for summary judgment. In support of its motion, Deutsche Bank produced an affidavit from William F. Loch, an employee of a company that serviced loans for Deutsche Bank. Loch averred that, based on his review of " 'the documents contained in the Gilbert loan file,' " MERS

assigned its interest to Deutsche Bank on November 1, 2005. Loch, however, neither stated how he knew the assignment occurred on that date nor attached any documentation evidence supporting that date. The trial court initially granted summary judgment for the defendant, but on rehearing vacated that ruling and entered judgment for Deutsche Bank. *Id.* ¶¶ 8-9.

¶ 24 This court reversed and directed that summary judgment be entered for the defendant. We noted that the mortgage and note, neither of which named Deutsche Bank as mortgagee, rebutted its allegation that it was the mortgagee. Thus, we found that the defendant, who had the burden of proving lack of standing as an affirmative defense, made a *prima facie* case contesting standing, shifting the burden to Deutsche Bank. *Id.* ¶¶ 16-17. Deutsche Bank did not meet that burden, we held. First, Deutsche Bank conceded, and we agreed, that the Assignment "[did] not establish anything about when [Deutsche Bank] obtained its interest in the subject loan.' " *Id.* ¶ 18. We said:

> "Although the Assignment contains two dates—the date of the trust for which Deutsche Bank is trustee, and the date on which the Assignment was executed and notarized—it does not explicitly state when the mortgage was assigned to Deutsche Bank. All that can be known about when the assignment took place is that it was no later than the date on which the Assignment was executed." *Id.*

(Notably, we did not find that the Assignment, which was executed in 2008, disproved that Deutsche Bank had standing in 2005 when the complaint was filed; rather, we found that the Assignment revealed nothing pertinent to the issue of standing.)

¶ 25 Second, Loch's affidavit was not competent evidence, as it failed to comply with Supreme Court Rule 191(a) (eff. Jan. 4, 2013) governing the use of affidavits on motions for summary judgment. Loch did not explain how he knew that the assignment occurred in

November 2005 and did not attach documentation supporting that assertion. We concluded that, as Deutsche Bank produced no competent, pertinent evidence rebutting the defendant's *prima case* that Deutsche Bank lacked standing, the defendant was entitled to summary judgment in his favor. *Id.* ¶¶ 20-22.

¶ 26 *Gilbert* has notable parallels to the present case. In its foreclosure complaint, plaintiff alleged that it was the mortgagee under the loan in default. Plaintiff attached the Mortgage and Note, neither of which, however, identified plaintiff as lender or mortgagee. Rather, like Deutsche Bank in *Gilbert*, plaintiff sought foreclosure based on successorship. In *Gilbert*, Deutsche Bank produced the assignment as proof of its succession to the loan. The assignment, however, did not specify when the transfer occurred; the most that could be inferred was that the transfer took place no later than the date the document was executed. Deutsche Bank relied also on Loch's affidavit, but we found his averments as to the date of the assignment conclusory and, therefore, incompetent as evidence. *Id.* ¶¶ 18-20.

¶ 27 Here, plaintiff relied on similar proof of succession. Plaintiff attached to its complaint Heath's affidavit. However, Heath's averment that plaintiff was holder of the loan was, like Loch's averments in *Gilbert*, conclusory and, therefore, incompetent in a summary judgment proceeding. *Gilbert*, 2012 IL App (2d) 120164, ¶ 20; Ill. S. Ct. R. 191(a) (eff. Jan. 1, 2013). Plaintiff also attached the Note with its stamped endorsements in favor of Countrywide (which, it is undisputed, later became plaintiff by merger). Evidently, the trial court believed that the endorsements were adequate to prove that, at the time of filing, plaintiff owned the debt. The matter was complicated, however, by the April 2012 letter to defendants in which Freddie Mac stated that it owned the mortgage and that plaintiff was servicing it on Freddie Mac's behalf. Taking the letter at its word, plaintiff was, at least as of four months after the action was filed,

not the owner of the mortgage. There is also no indication in that letter, or elsewhere in the record, that Freddie Mac (whenever it became owner of the mortgage) authorized plaintiff to bring foreclosure proceedings on its behalf. See *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 1188 (2008) (mere servicer of mortgage not entitled to bring foreclosure proceedings). We find that the documentary evidence before the court when it ruled on the motion to vacate left uncertainty as to when and for how long plaintiff (and its predecessor Countrywide) held the loan.

¶ 28 Apparently, plaintiff offered in the court below no explanation of Freddie Mac's position in the succession of interests. On appeal, plaintiff continues not to discuss the substance of the Freddie Mac letter. Rather, plaintiff implicitly dismisses the letter's evidentiary competency, noting that, in their motion to vacate, defendants "submitted no counteraffidavits or other admissible evidence for the circuit court to consider ***." Plaintiff cites no authority on this point. In fact, as this court has noted, summary judgment may be opposed by documents other than counteraffidavits. See *Rumford v. Countrywide Funding Corp.*, 287 Ill. App. 3d 330, 336 (1997) (in action against mortgage company for charging unreasonable fees, plaintiff resisted summary judgment by submitting documents (the mortgage contract and payoff letter) that contradicted affidavit submitted in support of summary judgment).

¶ 29 We hold, contrary to the trial court's implied holding, that defendants demonstrated a meritorious defense by showing the existence of a genuine issue of material fact on the issue of standing. A trial court has overall discretion in deciding a section 2-1301(e) motion to vacate (*Bailey*, 384 Ill. App. 3d at 548), but we owe the court no deference on whether a material question of fact exists (*Feliciano*, 2014 IL App (1st) 130269, ¶ 30). While there are other factors governing whether vacatur of a judgment would promote substantial justice (see *Bailey*, 384 Ill.

App. 3d at 549), the court referenced (again, implicitly) only whether defendants had a meritorious defense to the foreclosure. As this was evidently a decisive factor for the court, we presume that the court would not have ruled as it did if the factor did not weigh in plaintiff's favor.

¶ 30 Having denied the motion to vacate, the trial court did not reach that part of the November 15 motion in which defendants requested leave to withdraw their *pro se* answer and to file their enclosed motion to dismiss *instanter* or, alternatively, file an answer within 28 days. The trial court should address these matters on remand.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we vacate the judgment of foreclosure and the order confirming the sale, and remand this case for further proceedings consistent with this order.

¶ 33 Vacated and remanded.