2015 IL App (2d) 140414-U
No. 2-14-0414
Order filed June 16, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

U.S. BANK N.A., as Trustee for Citigroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2007-10,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-2034
VINCENT MANGLARDI and BARBARA MANGLARDI,	)	Honorable Mitchell L. Hoffman,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants forfeited their lack of standing defense, and their argument that the trial court erred in granting plaintiff summary judgment on its foreclosure action fails. Moreover, the court did not abuse its discretion in confirming the sale. Affirmed.

¶ 2 This action concerns residential property at 2367 Checker Road in Long Grove. Defendants, Vincent and Barbara Manglardi, defaulted on their mortgage for the property, and plaintiff commenced foreclosure proceedings. Defendants appeal the trial court's orders of

foreclosure, approving the sale and distribution of the property, and confirming the sale. Defendants argue that the court improperly granted plaintiff a summary judgment of foreclosure because plaintiff did not prove that it was the owner of the note and mortgage. Further, defendants argue that the court erred in confirming the sale because the named plaintiff is a non-entity and the report of sale and receipt of sale did not include additional receipts. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Complaint and Answer

¶ 5 On June 10, 2009, "US Bank National Association, as Trustee for CMLTI 2007-10" filed a complaint to foreclose on defendants' property. The complaint alleged that it attached "true and accurate" copies of the mortgage and note. It alleged that the mortgagor was Vincent Manglardi. It further alleged that the mortgagee was "Mortgage Electronic Registration Systems, Inc. [MERS] as Nominee for American Home Mortgage" and that the capacity in which plaintiff brought the foreclosure action was as "mortgagee under 735 ILCS 5/15-1208." The alleged default amount totaled $999,999.80.

¶ 6 The attached mortgage document was dated March 8, 2007. It listed American Home Mortgage as lender. It listed MERS as a nominee for the lender and lender's successors and assigns and, in bold print, stated "MERS is the mortgagee under this security instrument."

¶ 7 Also attached to the complaint was an assignment of mortgage. The assignment reflected that MERS assigned to "US Bank National Association, as Trustee for CMLTI 2007-10 all interests in and under that certain Mortgage dated 3/8/2007 executed by Vincent Manglardi and Barbara Manglardi." It noted that MERS was nominee for American Home Mortgage, described the property, and stated that the assignment *included the note*. The assignment stated that MERS

had the assignment signed by William McAllister, its "authorized signator," on June 3, 2009. A notary public stamped and signed the assignment, certifying:

> "William McAlister who is personally known to me to be the Authorized Signatory of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument. GIVEN under my hand and Seal this 5 day of June, 2009."

¶ 8 The complaint also attached a note, which reflected that American Home Mortgage was the lender and stated that "I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'." On the last page of the note appeared a stamp that said: (1) on the first line "Pay To The Order Of"; (2) the second line is blank; (3) the third and fourth lines say "Without Recourse By American Home Mortgage"; (4) signed by Renee Bury "Asst. Secretary."

¶ 9 In their answer to the complaint, defendants admitted that plaintiff attached documents to the complaint, but asserted that they lacked knowledge as to whether those documents were a mortgage and a note and demanded strict proof thereof. No affidavit was attached to the answer.

¶ 10 B. Summary Judgment

¶ 11 On December 22, 2009, plaintiff moved for summary judgment. Plaintiff asserted that defendants' general denials in their answer did not sufficiently set forth facts and supporting documentation to suggest the existence of a genuine issue of material fact. Plaintiff noted that section 2-610(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-610(b) (West 2008)) provides that every complaint allegation "not explicitly denied is admitted, unless the party states

in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge[.]"

¶ 12 Defendants' sole argument in response to the motion was that an issue of fact existed as to the amount due because, although plaintiff alleged that defendants made no mortgage payments, defendants made one payment in the amount of $4,791.67 in May 2007 (two years before they defaulted) (defendant Vincent Manglardi submitted an affidavit to support this assertion). In reply, plaintiff noted that, in fact, the aforementioned payment was accounted for in its calculations.

¶ 13 On October 20, 2010, the trial court denied the summary judgment motion. The order in the record was prepared by defendants' counsel. Although the order initially reflected that an issue of fact existed as to the validity of the assignment attached to plaintiff's complaint, that assertion was crossed out and defendants' counsel's initials appeared next to the revision. No other reason was listed for the denial of the motion, and there is no report of proceedings, bystander's report, or agreed statement of facts in the record. (Thus, although in their brief defendants argue that the court denied the summary judgment motion because it relied on incompetent hearsay, there is no record support for this assertion).

¶ 14 In April 2012, plaintiff renewed its summary judgment motion and attached an updated affidavit from plaintiff's servicing agent for the loan. The court granted the motion, but subsequently vacated its order doing so because the summary judgment motion had been served at defendants' counsel's outdated address. Defendants were granted leave to depose the affiant who supported plaintiff's summary judgment motion (according to plaintiff, defendants did later take the affiant's deposition).

¶ 15 In November 20, 2012, plaintiff again renewed its summary judgment motion. Also, plaintiff moved pursuant to section 2-401 of the Code (735 ILCS 5/2-401 (West 2008)) to correct a misnomer. Specifically, plaintiff alleged that, at the time it filed its complaint, its name did not completely and accurately identify the specific trust that held the subject note and mortgage that were subject to foreclosure. For greater accuracy and specificity, plaintiff wished to correct its name from "US Bank National Association, as Trustee for CMLTI 2007-10" to "U.S. Bank National Association, as Trustee for Citigroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2007-10." Defendants did *not* respond or object to plaintiff's motion to correct the misnomer.

¶ 16 Defendants' response to plaintiff's renewed summary judgment motion challenged the validity of the assignment of the note and mortgage. They argued that the court previously found that plaintiff had nothing but unverified hearsay to claim an interest in the note and mortgage (again, this claim concerning the trial court's alleged finding is not substantiated by the record). Defendants argued that the notarization on the assignment was invalid, the blank endorsement on the note was unverified hearsay, and that there was no proper evidence reflecting that plaintiff acquired any rights to the note and mortgage. Defendants cited caselaw for the proposition that standing must be determined as of the time the suit is filed.

¶ 17 In reply, plaintiff argued that, more than three years after the complaint was filed, defendants were, for the first time, challenging plaintiff's standing. Plaintiff argued that defendants waived the affirmative defense of standing because they did not plead it in their answer. Further, defendants did not, in their answer, explicitly deny plaintiff's allegation that it was the mortgagee. Moreover, plaintiff argued that defendants' arguments failed.

¶ 18 On April 12, 2013, after hearing argument, the court granted plaintiff's summary judgment motion and entered a judgment of foreclosure and sale. There is no report of proceedings. The written order states:

> "The Court finding that standing is an affirmative defense, which has been waived, but Plaintiff's counsel also presenting the original note in Court, which was reviewed by Defendants' counsel and the Court and the Court finding that the note presented appears to be the original of the blankly endorsed note attached to Plaintiff's Complaint."

In addition, the court granted plaintiff's motion to correct a misnomer, changing plaintiff's name to "U.S. Bank National Association, as Trustee for Citigroup Mortgage Loan Trust, Inc., Mortgage Pass-Through Certificates, Series 2007-10."

¶ 19 C. Confirmation of Sale

¶ 20 On July 18, 2013, a sheriff's sale was held. On August 8, 2013, the sheriff's report of sale and distribution was filed, reflecting that "US Bank National Association, as Trustee for CMLTI 2007-10" provided the highest bid of $1,452,202.66. The report provided an itemized list of how the proceeds from the sale were disbursed. The report states "I further report that I have attached hereto and am filing with this report voucher[s] showing that each and all of the foregoing payments have been made." A "receipt upon sale" was filed, wherein the sheriff acknowledged receipt of the full bid amount.

¶ 21 Plaintiff moved to confirm the sale. In response, defendants argued that, even after correcting the alleged misnomer, the newly-named plaintiff was not a recognized legal entity because the trust beneficiaries were certificates. Moreover, defendants noted that the report of

sale and receipt upon sale name the formerly misidentified plaintiff. Finally, defendants asserted that no receipts were attached to the report of sale.

¶ 22 On November 19, 2003, after hearing, the court granted plaintiff's motion to confirm the sale. There is no report of proceedings. The order reflects that the court had considered defendants' objections regarding the receipt of sale and it accepted plaintiff's counsel's representation regarding various payments and, further:

> "The Court, making no specific finding regarding the amount of the post-judgment advances, finds no grounds under 735 ILCS 5/15-1508 to deny confirmation of sale and the judicial sale is confirmed by separate order."

¶ 23 On December 9, 2013, the sheriff executed a sheriff's deed, granting the property to plaintiff. The deed used plaintiff's full name (*i.e.*, the corrected name).

¶ 24 Defendants filed a post-trial motion. On March 27, 2014, after hearing argument, the court denied the motion. There is no report of the proceedings. Defendants appeal.

¶ 25 II. ANALYSIS

¶ 26 A. Summary Judgment

¶ 27 Defendants argue that the trial court erred in granting plaintiff summary judgment because plaintiff failed to offer competent evidence that it was the owner and holder of the note and mortgage. Defendants argue that the assignment of mortgage was not properly verified because the notarization is dated two days after the signature date. Further, they argue that plaintiff lacked standing to bring suit because there is no evidence that the note and mortgage were ever assigned to plaintiff, the note contains only a blank endorsement, and, because MERS did not hold the note, it could not have transferred it. According to defendants, because there is

no evidence that plaintiff acquired any rights to the note and mortgage, it lacked standing at the time the case was filed and summary judgment was improperly granted.

¶ 28 We review *de novo* a trial court's ruling on a summary judgment motion. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2008). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the non-movant, reveal that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). For the following reasons, we reject defendants' arguments.

¶ 29 Collectively, defendants' arguments challenge plaintiff's standing to bring suit, a defense that has been forfeited. Lack of standing is an affirmative defense, and the burden of proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). In their answer to the complaint, defendants did not assert lack of standing as an affirmative defense. See *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 18. Nor did defendants explicitly deny plaintiff's assertion that it possessed capacity to sue as mortgagee. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 37 (answer must explicitly admit or deny each complaint allegation, and the failure to explicitly deny an allegation will be considered a judicial admission). Defendants' arguments challenging standing, which they raised only in their *response* to plaintiff's summary judgment motion, do not salvage the forfeiture. Affirmative defenses may be raised for the first time at summary judgment by the party *moving* for summary judgment, not the party responding to summary judgment. See *Perry*, 2015 IL App (3d) 130673, ¶ 20. The trial court considered at summary judgment defendants' standing arguments, but expressed in its order that it found those arguments waived. Accordingly, as defendants did not raise in their answer to the complaint an affirmative defense

challenging plaintiff's standing, and as they did not file a cross-motion for summary judgment raising the defense, their appellate challenge to standing is forfeited.[1] *Id.*

¶ 30 Defendants' assertion in their reply brief that plaintiff has waived arguments concerning defendants' forfeiture and judicial admissions borders on bizarre. Defendants assert that plaintiff never previously objected to or filed a motion concerning defendants' alleged "pleading defects." First, plaintiff's argument is that defendants, via their answer, made various *admissions* and, critically, did not assert the affirmative defense of standing, not that defendants' pleadings were defective. It is nonsensical to suggest that plaintiff should have filed a motion alleging that defendants' answer was defective because it did not challenge plaintiff's standing and it admitted that plaintiff was, as alleged, the mortgagee. Second, we note that, in all three summary judgment motions, the first of which was filed in 2009, plaintiff asserted that section 2-610 of the Code provides that all allegations not explicitly denied are admitted (and, although not particularly relevant to our disposition, plaintiff also noted that, if a party asserts lack of knowledge, an affidavit of the truth of the statement of lack of knowledge is required), and it argued defendants offered only general, unsupported assertions that they lacked knowledge. Three years passed between that initial motion and the court's entry of judgment, and defendants never amended their answer.

¶ 31 We note that, after the court in *Perry* found the defendants' standing defense "waived," it distinguished between the defense of standing, which falls under section 2-619(a)(9) of the Code

[1] Moreover, we note that, despite defendants' suggestion to the contrary, an alleged lack of standing does not implicate jurisdiction, such that it can be raised at any time. See *JP Morgan Chase Bank, N.A. v. Ontiveros*, 2015 IL App (2d) 140145, ¶ 22; *Nationstar Mortgage, LLC, v. Canale*, 2014 IL App (2d) 130676, ¶ 18.

(735 ILCS 5/2-619(a)(9) (West 2010)), and a defense challenging a plaintiff's "legal capacity to sue," which falls under section 2-619(a)(2) (West 2010)). *Perry*, 2015 IL App (3d) 130673, ¶ 17. The *Perry* court determined that the defendants had *not* waived their challenge to the plaintiff's legal capacity to sue because, in their answer, they had expressly denied the plaintiff's complaint allegation that it was the mortgagee. *Id.* at ¶¶ 18, 21. The court then addressed and rejected on the merits the "capacity to sue" challenge, concluding that the plaintiff had proved its capacity to sue by being the bearer of the note (which, we note, had been endorsed several times, but ended with a final *blank* endorsement) and a supporting affidavit.[2] *Id.* at ¶¶ 21-31.

¶ 32 Here, defendants do not expressly frame their arguments as challenging "capacity to sue" under section 2-619(a)(2). Moreover, even if they had framed their arguments as such, we would reject that challenge as also forfeited because, unlike the defendants in *Perry*, defendants here did *not* in their answer expressly deny plaintiff's complaint allegation that it was "mortgagee under 735 ILCS 5/15-1208." Further, we are not necessarily convinced that, even if not forfeited, it would be fair to characterize defendants' arguments as constituting a challenge to plaintiff's "capacity to sue" under section 2-619(a)(2), as that section is actually aimed at addressing concerns such as "incompetence, infancy, and the like." *Phillips Construction Co. v. Muscarello*, 42 Ill. App. 3d 151, 154 (1976).

[2] Also, in *Perry*, like here, the defendants challenged the plaintiff's claim that it was mortgagee by virtue of an assignment from MERS, the original mortgagee, and it attached to the complaint a copy of the mortgage agreement, which authorized MERS as nominee for the lender. The court held that the assignment gave the plaintiff standing (even though the defendants waived any challenge to standing), and its possession of the note gave it capacity to sue. *Perry*, 2015 IL App (3d) 130673, ¶¶ 24-25.

¶ 33 In sum, defendants' challenges to standing and "capacity to sue" are forfeited. However, we briefly note that, even if we did consider defendants' arguments, we would reject them. Plaintiff alleged that its capacity to bring suit was that of mortgagee. The Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1501 *et seq.* (West 2010)) defines a mortgagee as including a holder of an indebtedness (735 ILCS 5/15-1208 (West 2010)). A plaintiff may establish it is the holder of the indebtedness by showing it is the bearer of the note: "the mere attachment of a note to a complaint is *prima facie* evidence that plaintiff owns the note." *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26. Further, a "note endorsed in blank is payable to the bearer." *Id.*; see also 810 ILCS 5/3-205(b) (West 2010) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement'. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated *by transfer of possession alone* until specially indorsed.") (emphasis added.).

¶ 34 Here, plaintiff proved it was the mortgagee: it proved it was the holder of the indebtedness as bearer of the note. Plaintiff attached the note to the complaint, and it produced the original note in open court. As noted above, that the note is endorsed in blank does not defeat plaintiff's status as the holder of the note; rather, it simply renders it payable to plaintiff. Thus, regardless of defendants' arguments concerning the notarization on the assignment (we note that an invalid notarization does not likely defeat an assignment, as courts have long held that a valid assignment may even be oral (see *Rosestone*, 2013 IL App (1st) 123422, ¶ 25)) or other similar alleged defects, plaintiff's proof, by virtue of its physical possession and production of the note, its affidavit in support of summary judgment, its allegation that it was mortgagee, and its attachment of the mortgage, note, and assignment to the complaint (in compliance with section 15-1506(b) of the Foreclosure Law (735 ILCS 5/15-1506(b) (West 2010))), was

unrebutted by any contrary evidence or affidavit and was sufficient for the trial court to find that plaintiff was entitled to judgment as a matter of law. In sum, defendants' arguments are forfeited and otherwise fail.

¶ 35 B. Confirmation of Sale

¶ 36 Defendants argue next that the trial court erred in confirming the sale because the named plaintiff, a bank acting as trustee for "certificates," is a non-entity as a matter of law, rendering the report of sale and receipt upon sale a nullity. Further, defendants argue that, although the report of sale included a receipt of sale, it did not attach any other receipts and, therefore, the sale should not have been confirmed.

¶ 37 First, as to defendants' allegations concerning plaintiff's name, we again find those arguments forfeited. Plaintiff filed its complaint in 2009. Defendant never argued that plaintiff was a non-entity. When, in late 2012, plaintiff moved to correct its alleged misnomer, defendants did not respond. The trial court granted the motion, and defendants did not object. See *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986) (it is well-settled that arguments not presented to the trial court are deemed waived on appeal).

¶ 38 Second, we review for an abuse of discretion a trial court's approval of a judicial sale. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57. An abuse of discretion occurs where no reasonable person would take the trial court's view. *Id.* Here, the court held a hearing before it confirmed the sale. Defendants fail to present a hearing transcript, bystander's report, or agreed statement of facts from that hearing. Accordingly, without a transcript, bystander's report, or agreed statement of facts by which we could review the arguments, evidence presented, and, further, the court's reasoning for its ruling, we cannot assess whether it abused its discretion and we presume the court's decision was correct. See *Rosestone*, 2013 IL App (1st)

123422, ¶ 31; see also *In re Marriage of Gulla*, 234 Ill.2d 414, 422 (2009) ("Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law"). Indeed, defendants first raised allegations concerning plaintiff's name after the court granted the motion to correct the misnomer and after plaintiff moved to confirm the judicial sale. The court's order confirming the sale reflects that it considered defendant's objections but, after a hearing, rejected them. We presume the court's order conformed to both the law and facts of the case.

¶ 39 We further note that, under section 15-1508(b) of the Foreclosure Law, once a plaintiff moves for confirmation, the trial court *must* confirm a judicial sale unless it finds one of the following: (1) a required notice was not given; (2) the terms of the sale were unconscionable; (3) the sale was fraudulently conducted; or (4) justice was not otherwise done. 735 ILCS 5/15-1508(b) (West 2010). "The interested party *opposing* the sale bears the burden of proving that grounds exist sufficient for the trial court to *not* enter an order approving the sale." *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 35.

¶ 40 Here, the court's order reflects that, despite defendants' arguments, it found no basis under section 15-1508 to refuse to confirm the sale. Indeed, defendants' arguments do not implicate section 15-1508's grounds for refusing to confirm a sale. Setting aside the specious merit of defendants' arguments, the abbreviated form of plaintiff's name on the report of sale and receipt of sale (but not, we note, the sheriff's deed), whether plaintiff's name reflects it is a non-entity (we note that U.S. Bank is an entity, and the name of the trust could be corrected at any time. See, *e.g.*, *Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 791, 805-08 (2009)), and the absence of specific receipts reflecting that plaintiff was paid, do not justify vacating the sale under section 15-1508's terms. For example, defendants do not allege under section 15-1508(b)(i) that they

did not receive required notices. They incorrectly assert that plaintiff's name implicates an unconscionability analysis under section 15-1508(b)(ii), under which the court generally considers, for example, whether the terms of sale are unconscionable because the amount bid is "so grossly inadequate that it shocks the conscience" of the court. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 264 (2008). And, to set aside a sale under sections 1508(b)(iii) and 1508(b)(iv), defendants must show that either: (1) fraud or misrepresentation prevented them from raising their *meritorious* defenses, or (2) an equitable defense reveals they were prevented from protecting their property interests. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 121-23. Defendants fail to make those showings here. In any event, because we have no transcript or other record from the hearing, we cannot find that the court abused its broad discretion in concluding that grounds did not exist under section 1508(b) to refuse confirmation of the sale.

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 43 Affirmed.