2015 IL App (2d) 140490-U
No. 2-14-0490
Order filed March 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-4078
	)	
ROBERT F. GRADY and MARY T. GRADY,	)	
	)	
Defendants-Appellants	)	
	)	
(JP Morgan Chase Bank, N.A., Unknown	)	Honorable
Owners, and Non-record Claimants,	)	Margaret A. Marcouiller,
Defendants).	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by granting summary judgment for the plaintiff bank, because there was no genuine issue of material fact that the bank had standing to foreclose. Therefore, we affirmed.

¶ 2 In this foreclosure action, defendants, Robert and Mary Grady, appeal from the trial court's grant of summary judgment in favor of plaintiff, Bank of America, N.A. (BOA). Defendants argue that the trial court should have denied the motion for summary judgment

because there was a genuine issue of material fact as to the bank's right to foreclose the mortgage. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 21, 2009, BAC Home Loans Servicing LP (BAC), formerly known as Countrywide Home Loans Servicing, LP, filed a complaint against defendants to foreclose the mortgage on their home at 3259 Middlesax Drive in Long Grove. BAC alleged that the mortgage was dated October 30, 2002; that defendants had ceased payments in February 2009; and that a balance of $241,136.50 remained. BAC alleged that it was the legal holder of the mortgage and note, which it attached to the complaint. These documents identified E*Trade Mortgage Corporation (E*Trade) as the lender. The mortgage additionally identified Mortgage Electronic Registration Systems, Inc., (MERS) as the nominee for the lender and the mortgagee under the instrument.

¶ 5 Defendants proceeded *pro se* for the majority of the litigation. On April 8, 2010, they filed an answer to the complaint in which they neither admitted nor denied that BAC was the legal holder of the mortgage and note.

¶ 6 BAC filed a motion for summary judgment on August 3, 2010, alleging that defendants' answer had failed to raise a genuine issue of material fact. BAC attached a supplemental affidavit of Angelica Williams, who stated as follows in relevant part. She was employed by BOA, "the servicer of the subject loan" and was an agent duly authorized to make the affidavit on "Plaintiff's" behalf. The mortgage and note were transferred from MERS, as nominee for E*Trade, to BAC. Williams had personally reviewed the payment history from January 9, 2003, to the present, kept by BOA, and it showed that mortgage payments were overdue beginning on February 1, 2009.

¶ 7 Attached to the affidavit was an assignment of mortgage, which stated:

> "For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc. AS NOMINEE FOR E*TRADE MORTGAGE CORPORATION, its successors and/or assigns (hereinafter M.E.R.S., INC.), did hereby assign, transfer, convey without warranties and without recourse; set over and deliver to BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP. (hereinafter called the Assignee), its successors and assigns, prior to 09/15/09, the following described mortgage ***."

The assignment stated that the mortgage was being assigned "[t]ogether with all rights and interest in the same and premises therein described and the note or obligation thereby secured." (Emphasis omitted.). The assignment was signed by Andrew Nelson as the "Certifying Officer" for MERS and was notarized on September 15, 2009. Nelson was employed by Pierce & Associates, P.C., which was listed as preparing the assignment. Pierce & Associates also represented BAC in bringing the complaint. The assignment was recorded on September 22, 2009.

¶ 8 On December 15, 2011, defendants filed a response to BAC's motion for summary judgment. They argued that, *inter alia*, the exhibits BAC attached did not establish that BAC was the legal holder of the mortgage and note. Defendants maintained that the assignment was recorded the day after the lawsuit was filed and contained no exact assignment date, and that there was no indication that E*Trade actually authorized the assignment or that Nelson had the authority to act on E*Trade's behalf.

¶ 9 On July 17, 2012, BAC filed a reply in support of its motion for summary judgment. It argued that although defendants challenged its standing, they had neither admitted nor denied BAC's capacity to bring the suit in their answer to the complaint, and it was therefore deemed admitted. BAC further argued that defendants had forfeited their ability to challenge standing by failing to timely raise the affirmative defense. Finally, BAC argued that its affidavits asserting its standing must be taken as true because defendants did not file any counter-affidavits.

¶ 10 On July 24, 2012, BAC filed a motion to substitute BOA as a plaintiff because BAC had merged into BOA effective July 1, 2011. BOA filed an affidavit signed by Yasamin P. Mehri, a BOA Assistant Vice President.[1] The affidavit was dated October 31, 2011. Mehri stated that BOA held the promissory note for the loan and that, according to its business records, defendants owed the sums listed, which totaled $315,149.54. An affidavit by another individual listed attorney fees and expenses totaling $3,419.

¶ 11 The same day (July 24, 2012), the trial court allowed BOA to be substituted as the plaintiff. It further granted summary judgment for BOA and entered a corresponding judgment of foreclosure against defendants.

¶ 12 On August 21, 2012, defendants filed a notice of appeal. Notwithstanding the appeal, on October 23, 2012, defendant filed a motion to reconsider the grant of summary judgment and the judgment of foreclosure. Defendants again challenged BAC's standing to bring the foreclosure action. On October 30, 2012, the trial court struck the motion to reconsider.

[1] In their 2013 reply in support of their motion to reconsider, defendants stated that BAC had given them a copy of the Mehri affidavit at a hearing in November 2011. Defendants alleged that BOA had wrongly tried to indicate that the Mehri affidavit was attached to the original motion for summary judgment.

¶ 13 On November 7, 2012, defendants filed motions to strike the affidavits of Williams and Mehri, arguing that they were insufficient. They also re-filed their motion to reconsider.

¶ 14 On November 16, 2012, this court granted BOA's motion to dismiss the pending appeal. BOA had argued in its motion that a judgment ordering the foreclosure of a mortgage was not final and appealable until the trial court entered an order approving the sale and directing its distribution. See *In re Marriage of Verdung*, 126 Ill. 2d 542, 555 (1989).

¶ 15 On August 6, 2013, the trial court stated that it would consider defendants' motion to reconsider under section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2012)).

¶ 16 BOA filed a response to the motion to reconsider on August 20, 2013. BOA argued that defendants' motion was untimely because it was filed more than 30 days after the entry of summary judgment, and that it also failed to meet the standard for reconsideration because it did not allege any newly-discovered evidence, changes in the law, or errors in the application of existing law. BOA further argued that defendants were judicially estopped from claiming that BAC lacked standing because defendants listed BAC as a creditor in their bankruptcy proceeding.

¶ 17 The trial court heard arguments on the pending motions on October 1, 2013. It issued its ruling in a memorandum order dated October 31, 2013. The trial court stated as follows. In reviewing a motion under section 2-1301(e), the court was to apply a substantial justice standard, which included considerations of diligence, 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. Although defendants contended that there was no evidence that the note was transferred from the original lender to the plaintiff, they discounted the assignment,

which specifically stated that the mortgage was transferred together with the note to plaintiff before September 15, 2009. An assignment must describe the subject matter of the assignment with sufficient particularity such that it can be identified, and the assignment here met this requirement. Once a written instrument is executed, recorded, and acknowledged, it is presumed valid on its face and can be rebutted only by clear and convincing evidence. Defendants challenged the assignment as being "robo-signed," but there was no evidence to support that allegation. Defendants' main contention appeared to be that without an indorsement on the note, the assignee of a mortgage lacks standing to file a mortgage foreclosure action. However, defendants, who had the burden of persuasion, did not cite any specific authority for this proposition. The trial court found no controlling authority on the point, but a Wisconsin case, which the trial court found to be instructive, held that an assignment referencing a prior transfer of the note was sufficient to make a *prima facie* showing of standing to foreclose. Defendants did not offer any evidence to defeat the assignment's *prima facie* showing of standing. Moreover, debtors like defendants generally lack standing to challenge the assignment of their loans because they have no interest in the assignments. Defendants also sought to strike the affidavits of Mehri and Williams on the basis that they falsely stated that plaintiff held the note, but for the reasons discussed, the trial court found that defendants had not shown that the statements were false or inaccurate.

¶ 18 The trial court disagreed with BOA's argument that judicial estoppel applied, because defendants obtained no benefit by identifying BAC as a creditor. That being said, the trial court recognized that defendants had the opportunity to identify BAC as a creditor whose claims were disputed, but they did not do so.

¶ 19 In applying section 2-1301(e)'s substantial justice standard, the trial court agreed with BOA that defendants' failure to file specific affirmative defenses with their answer showed some lack of diligence, even for *pro se* litigants. Defendants also did not have a meritorious defense. Weighing the relative hardships also favored BOA, for while the foreclosure would cause hardship to defendants, the loan had been in default for more than four years, and there would be no *in personam* judgment given defendants' bankruptcy discharge. Therefore, the trial court denied defendants' motion to reconsider and their motions to strike the affidavits of Mehri and Williams.

¶ 20 On January 16, 2014, defendants filed a motion seeking leave to amend their answer to include the affirmative defense related to standing. The trial court denied the motion on January 23, 2014, on the bases that: defendants had not attached a proposed answer for review; defendants did not present any affirmative matters which would warrant an amended answer other than the issue of standing, which had previously been addressed; and allowing an amended answer could greatly prejudice BOA, who had a judgment in its favor since July 2012.

¶ 21 The judicial sale was scheduled for February 27, 2014. The day before, on February 26, 2014, attorney Patrick Williams filed a motion for leave to file his appearance, *instanter*, on defendants' behalf. He also sought leave to file an amended answer and affirmative defense, *instanter*. Last, he filed a motion to reconsider and stay the sheriff's sale under section 2-1301(e), arguing that the trial court misapplied the law to the facts of the case with respect to BAC's standing to bring the action.

¶ 22 The same day, the trial court allowed attorney Williams to enter his appearance. The trial court denied both the motion for leave to file an amended answer and affirmative defense and the motion to reconsider and stay the sheriff's sale. The trial court orally stated that it did not think

that there was a genuine issue of fact regarding BAC's standing. It stated that, even otherwise, defendants already had the opportunity to raise the issue of standing on several occasions, specifically as an affirmative defense, through their briefing on the motion for summary judgment, and through the briefing on the first motion to reconsider. Therefore, the issue was "waived," and defendants could not raise it again. The trial court stated that while pleadings could be amended to conform to the proofs, they could not be amended to include issues which were "waived."

¶ 23 On May 15, 2014, the trial court entered an order approving the judicial sale. Defendants timely appealed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendants contend that the trial court erred in granting summary judgment for BOA because there was a genuine issue of material fact as to the bank's right to foreclose the mortgage. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). We review *de novo* a grant of summary judgment. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 17.

¶ 26 Defendants argue as follows. Both the note and mortgage identified E*Trade as the lender. Therefore, E*Trade was the holder of the note and the only entity entitled to enforce it. The mortgage also identified MERS as the nominee for the lender and mortgagee under the document. However, the complaint did not offer any facts or documents establishing how BAC became the legal holder of the mortgage and note. BAC attempted to prove its legal status

through the affidavits of Williams and Mehri and the mortgage assignment. However, these documents were inconsistent, conflicting and/or violated Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). The affidavits did not provide admissible evidence that BAC was the legal holder of the note and mortgage. Rather, they contained conclusory and conflicting statements that "Plaintiff is the legal holder of the note and mortgage originally granted to" MERS, that the "subject mortgage and note were transferred from" MERS to BAC, and that BOA "holds the promissory note given for the Loan." The affidavits failed to outline any facts as to how and when the "Plaintiff" and/or BOA came to be the legal holder of the note and mortgage from E*Trade. Therefore, under Rule 191, they should be disregarded.

¶ 27 Defendants argue that on its face, the assignment lacks evidentiary value because it fails to identify the date the alleged assignment occurred. Instead, it states that MERS "did" assign the mortgage to BAC "prior to 9/15/09" but that the assignment "is made without recourse and without representation or warranty by Assignor, express or implied." Defendants argue that the assignment is vague and inherently inconsistent as to the actual date of the purported assignment or conveyance, as to whether the assignment constituted the vehicle for achieving the conveyance or transfer, and as to whether the assignment was evidence of some prior conveyance or transfer before the lawsuit was filed. Defendants maintain that the assignment's evidentiary value is further undermined because it was signed by Nelson as the "Certifying Officer" of MERS, but Nelson was an attorney for the firm representing the bank in the suit. Defendants maintain that Nelson failed to explain what his title or role for MERS meant and did not offer facts to support his representation that an assignment actually occurred.

¶ 28 Defendants argue that the assignment also fails to establish that the note was assigned, conveyed, or transferred to BAC. Defendants argue that the only reference to the note is the

assignment's statement that the mortgage was conveyed "[t]ogether with all rights and interest in the same and premises therein described and the note or obligation thereby secured." Defendants contend that there was no evidence establishing that MERS had the authority to convey the note from E*Trade to BAC. Instead, argue defendants, the note and mortgage establish only that MERS was the mortgagee, as the nominee of E*Trade, and not the holder of the note. Defendants argue that when the assignment is viewed in conjunction with the lack of indorsement on the note, the evidence strongly suggests that E*Trade remains the note's holder, thereby precluding BAC from foreclosing the mortgage.

¶ 29 Defendants argue that, accordingly, the documentary evidence created a genuine issue of material fact about the legal holder of the note and/or mortgage, meaning that they established *prima facie* evidence of lack of standing. Defendants argue that BOA did not offer any additional competent evidence to rebut their challenge to standing, so summary judgment in the bank's favor must be reversed.

¶ 30 Defendants cite *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, in support. There, the assignment did not explicitly state when the mortgage was assigned to the plaintiff bank. *Id.* ¶ 18. The bank relied on an affidavit which stated that the assignment occurred on November 1, 2005, but the affiant did not state how he knew that the assignment occurred on that date, and he did not attach any supporting documentation. *Id.* ¶ 19. This court therefore stated that his assertion about the date did not comply with Rule 191(a) and could be disregarded. *Id.* ¶ 20. We further stated that the defendant's evidence, which included an assignment executed after the date of the suit's filing, constituted *prima facie* evidence of the bank's lack of standing. *Id.* ¶ 21. We stated that the bank did not present any competent evidence rebutting the defendant's *prima facie* evidence, so the defendant was entitled to

summary judgment in his favor. *Id.* Defendants argue that here, as in *Gilbert*, neither affidavit provided admissible evidence showing that BAC was the legal holder of the note and mortgage at the time the lawsuit was filed.

¶ 31 Defendants additionally argue that they preserved their right to challenge the bank's standing. Defendants argue that although lack of standing is an affirmative defense that usually must be set forth in a defendant's answer to a complaint, case law provides that a party may raise affirmative defenses for the first time at the summary judgment stage. See *Falcon Funding, LLC, v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2010) (a party may assert affirmative defenses in a summary judgment motion, even if it did not assert them in an answer, without forfeiture concerns); *Medrano v. Production Engineering Co.*, 332 Ill. App. 3d 562, 570 (2002) ("because a party may file a motion for summary judgment at any time, even before filing an answer, the party may well assert a limitations period defense in its summary judgment motion even though it did not raise it first in an answer").

¶ 32 Defendants note that their answer neither admitted nor denied BAC's contention that it was the legal holder of the note and mortgage. They also point out that in their response to BAC's motion for summary judgment, they asserted defects with the documents and affidavits provided by BAC, contesting BAC's standing. Defendants further point to their series of post-judgment motions challenging BAC's standing.

¶ 33 Defendants also note that in January 2014, they sought to amend their answer to include the affirmative defense of lack of standing. Defendants state that after being confronted with their error in not attaching the proposed amended pleading, they retained counsel, who sought leave to file an amended answer. Defendants argue that, to the extent allowed, they fully preserved their right to challenge BAC's standing as the legal holder of the note and mortgage,

and the trial court abused its discretion in not allowing them to file an affirmative defense, which would have negated any possible contention of forfeiture.

¶ 34 BOA responds that under section 15-1504 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504 (West 2008)), it was required only to introduce evidence of the mortgage and promissory note to establish a *prima faci*e case of foreclosure (see *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994)), at which time the burden of proof shifted to defendants to prove any affirmative defense. BOA argues that by failing to plead an affirmative defense of lack of standing, defendants forfeited the argument that the bank lacked standing to foreclose.

¶ 35 BOA maintains that after it established its *prima facie* case of foreclosure, it submitted the Williams affidavit, in which Williams stated that she was employed by BOA, the loan's servicer, and was authorized to make the affidavit on BAC's behalf, and that BAC was the legal holder of the note and mortgage. BOA argues that, taken together, the Williams affidavit, the note, the mortgage, and the assignment established that BAC had standing to foreclose and was entitled to summary judgment in its favor. BOA argues that the burden then shifted to defendants to refute the evidence by counter-affidavit or other evidence, which they failed to do.

¶ 36 BOA argues that although defendants now contend that the affidavits it submitted should be discounted because they violated Rule 191 by not outlining how and when plaintiff became the legal holder of the note and mortgage, the affidavits were in full compliance with the rule. BOA further argues that defendants' allegation that there was no evidence that the note was transferred from the original lender to BAC not only ignores the affidavits, but it also ignores and discounts the assignment. BOA argues that in the assignment, MERS, as nominee for the original lender E*Trade, assigned, transferred, and conveyed the mortgage "[t]ogether with all

rights and interest in the same and the premises therein described and the note or obligation thereby secured" to BAC prior to September 15, 2009, which was prior to the September 21, 2009, filing date of the complaint. The assignment was recorded on September 22, 2009. BOA argues that once an assignment is executed, recorded, and acknowledged, it is presumed valid on its face and can be rebutted only by clear and convincing evidence, which was not present here. BOA contends that defendants even lack standing to challenge the validity of the assignment because they are not parties to the assignment. Relatedly, BOA argues that the trial court properly denied defendants' motion for leave to amend their answer because the proposed amendment would not have cured a defect, in that defendants did not and could not provide evidence to defeat the assignment.

¶ 37 We first look at the question of forfeiture. As stated, in their answer, defendants neither admitted nor denied BAC's assertion that it was the legal holder of the mortgage and note. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 37 (a proper answer must contain an explicit admission or denial of each allegation in the complaint, and the failure to explicitly deny an allegation will be considered a judicial admission). Defendants also did not assert any affirmative defenses. Lack of standing is an affirmative defense that must be plead in the answer or responsive pleading, and it will be forfeited if it is not raised in a timely fashion. *Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶ 39; see also *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 38 (the defendant's answer functioned as a judicial admission that the bank had standing to bring the foreclosure complaint); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010) (homeowner forfeited challenge to the bank's standing because she failed to answer complaint and was defaulted). Defendants rely on *Falcon*, 399 Ill. App. 3d at 156, and *Medrano*, 332 Ill. App. 3d at 570, for the proposition that

they could raise the affirmative defense of lack of standing for the first time during the summary judgment stage. However, these cases state that a party may assert an affirmative defense for the first time in a motion for summary judgment (see *id.*); they do not state that a party may raise an affirmative defense for the first time in a *reply* to a motion for summary judgment. See *Bank of America, N.A. v. Basile*, 2014 IL App (3d) 130204, ¶ 24 (similarly distinguishing the same principle).

¶ 38 We need not definitely resolve the forfeiture issue, however, because we conclude that even if defendants preserved their argument regarding BAC's standing, there was no genuine issue of material fact regarding BAC's standing to warrant denying summary judgment. As BOA points out, to establish a *prima facie* case of foreclosure under section 15-1504, the plaintiff must introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant to prove any affirmative defenses. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 67; see also *Korzen*, 2013 IL App (1st) 130380, ¶ 24 (the mere fact that a copy of the note is attached to the complaint is *prima facie* evidence that the plaintiff owns the note). Standing is an affirmative defense, so it is the defendant's burden to prove that the plaintiff does not have standing, and the plaintiff does not have the burden of proving that it does have standing. *Korzen*, 2013 IL App (1st) 130380, ¶ 24. The owner of the note is not required to file the foreclosure action under section 15-1504, but rather the legal holder of the indebtedness, a pledge, an agent, or a trustee may file the lawsuit. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 67. If the bank files a motion for summary judgment with sufficient supporting affidavits, the burden then shifts to the homeowners to prove that there was no genuine issue of material fact. See *id.* ¶ 69. Facts contained in an affidavit in support of a motion for summary judgment must be taken as true for purposes of that motion if they are not

contradicted by counteraffidavit. *1010 Lake Shore Ass'n v. Deutsch Bank National Trust Co.*, 2014 IL App (1st) 130962, ¶ 19.

¶ 39 It is undisputed that the mortgage and note identified E*Trade as the lender and that the mortgage identified MERS as the nominee for E*Trade and the mortgagee under the document. These documents did not refer to BAC, the party bringing the foreclosure action. Therefore, the central question is whether the affidavits and assignment submitted by BAC sufficiently prove its standing, to the extent BAC was required to do so. "A party's standing to sue must be determined as of the time the suit is filed." *Gilbert*, 2012 IL App (2d) 120164, ¶ 15.

¶ 40 A party opposing a motion for summary judgment must bring to the trial court's attention any objections the party has to the sufficiency of an affidavit filed by the moving party. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 15. While defendants here did not move to strike the affidavits *before* the grant of motion for summary judgment, they did discuss the Williams affidavit's alleged deficiencies in their response to the motion, thereby preserving the issue for review. *Cf. Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 623 (1995) (where the plaintiff did not object to an affidavit by motion to strike "or otherwise," it forfeited any error).

¶ 41 Rule 191 is satisfied if, looking at the affidavit as a whole, it appears that the affidavit is based on the affiant's personal knowledge and there is a reasonable inference that the affiant could competently testify to its contents at trial. *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009). In this case, the Mehri affidavit was filed the day summary judgment was granted, without the opportunity for defendants to respond to it, and it largely related to the amount of money defendants owed on the property, which they do not contest. As to the subject of standing, it contains the sole sentence, "BANK OF AMERICA, N.A. holds the promissory

note given for the loan," without any additional factual support for this statement. This does not mean that the affidavit should be stricken, as it does have factual support for the amount of money due, but it is largely irrelevant to the question of proof of standing.

¶ 42 That brings us to the subject of the Williams affidavit, which was dated June 22, 2010. Williams stated in relevant part that she was employed by BOA, "the servicer of the subject loan" and was an agent duly authorized to make the affidavit on "Plaintiff's" behalf. She stated that "Plaintiff" was the legal holder of the note and mortgage, as they were transferred from MERS, as nominee for E*Trade, to BAC. The mortgage, note, and assignment were referenced in and attached to the affidavit as exhibits. The affidavit was signed by Williams, with her title listed as "Servicing Agent," and was notarized.

¶ 43 Contrary to defendants' assertion, we believe it is clear that the "plaintiff" Williams refers to in the affidavit is BAC, as BAC is listed in the caption of the affidavit as the plaintiff, and Williams distinguishes "Plaintiff" from BOA.[2] The affidavit indicates that Williams was employed by BOA, the loan's servicer, as a servicing agent, and that her assertion that the mortgage and note were transferred to BAC was based on the original loan documents and the assignment. Therefore, we agree with BOA that the affidavit sufficiently complies with Rule 191.

¶ 44 Of course, Williams's averment that the note and mortgage were transferred to BAC via the assignment would have little weight if the assignment was insufficient. Defendants argue that the assignment does not identify the date on which the assignment occurred. However, the

[2] We also find no contradiction between Williams's statement that BAC held the note and mortgage and Mehri's statement that BOA held the promissory note, as Mehri's affidavit was dated October 31, 2011, which was after BAC had merged into BOA.

assignment clearly states that it occurred "prior to 09/15/09," which was before the complaint was filed. In this manner, this case is readily distinguishable from *Gilbert*, where the assignment did not state when the mortgage was assigned to the plaintiff bank, so it was impossible to tell if the assignment took place before the complaint's filing. *Gilbert*, 2012 IL App (2d) 120164, ¶ 18. We recognize that the assignment here does not state on which specific date the transfer occurred, but defendants cite no authority for the proposition that an exact date was necessary. We further recognize that the assignment was recorded on September 22, 2009, after the complaint was filed, but the actual assignment occurs when there is a transfer of an identifiable interest from the assignor to the assignee (*Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987)), whereas the recording serves to establish a lien and give third parties the opportunity to determine the status of the property's title (*Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 634 (2000)). Therefore, the timing of the assignment was not problematic. Defendants also challenge Nelson's ability to sign on behalf of MERS, but the signature on an instrument is generally presumed to be authentic and authorized (810 ILCS 5/3-308(a) (West 2008)), and defendants did not present any evidence to the contrary. *Cf. Adeyiga*, 2014 IL App (1st) 131252 (the defendant did not present any evidence that attorney for the plaintiff bank was also not an authorized signatory for MERS).

¶ 45 As to whether the assignment sufficiently indicated that the note was assigned, we answer this question in the affirmative, as the assignment specifically stated that the mortgage was being assigned "with all rights and interest in the same and premises therein described *and the note* or obligation thereby secured." (Emphasis added.). To be effective, an assignment only needs to assign or transfer the whole or part of something that is described with sufficient particularity to make it identifiable. *Klehm*, 164 Ill. App. 3d at 616. Moreover, an assignment does not have to

have a particular form, but rather, any document evidencing the assignor's intent to vest ownership of the interest in the assignee is sufficient to effect an assignment. *Hollywood Boulevard Cinema, LLC, v. FPC Funding II, LLC*, 2014 IL App (2d) 131165, ¶ 33. Here, the assignment clearly indicates that it is assigning both the note and mortgage to BAC.

¶ 46 Defendants additionally argue that there was no evidence to establish that MERS had the authority to convey the note from E*Trade to BAC, as MERS was the mortgagee and E*Trade's nominee, and not the holder of the note. The defendants in *Adeyiga* raised this exact same argument; *i.e.* that MERS could not assign the debt instrument from the original lender because MERS never received title to the promissory note. *Adeyiga*, 2014 IL App (1st) 131252, ¶ 72. The appellate court reasoned that because the bank had an affidavit from a bank officer who stated that it held the promissory note, and a copy of the assignment from MERS to the bank which was signed and notarized before the lawsuit, the burden then shifted to the defendants to prove that the bank did not have standing, which they failed to do. *Id.* ¶ 73. The same analysis applies here.

¶ 47 In sum, even if, *arguendo*, defendants did not forfeit their ability to challenge BAC's standing, the Williams affidavit and the assignment, when viewed in conjunction with the mortgage and note, constituted *prima facie* proof that BAC had standing to bring its foreclosure action. In light of these documents, defendants did not meet their burden of showing that there was a genuine issue of material fact that BAC lacked standing. Accordingly, the trial court did not err in granting summary judgment for BAC. *Cf. Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 25 (where the defendant failed to produce evidence that would call the plaintiff's standing into doubt, and there was no attempt to obtain any other documents via discovery, he failed to meet his burden of proof of showing lack of standing).

¶ 48 Correspondingly, the trial court did not abuse its discretion by not allowing defendants to amend their answer to assert lack of standing as an affirmative defense. In determining whether to grant a motion to amend, the court is to examine: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would be prejudiced or surprised by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Country Mutual Insurance Co. v. D & M Tile, Inc.*, 394 Ill. App. 3d 729, 737 (2009). Most notably in the instant case, the amendment would not cure a defect, as we have determined that even if defendants had preserved their assertion that BAC lacked standing, there was no genuine issue of material fact that BAC had standing, and the bank was entitled to summary judgment. Moreover, the proposed amendment was untimely, as defendants first sought to amend their pleadings about 1½ years after the grant of summary judgment. Therefore, the trial court acted well within its discretion by denying defendants' motion to amend their answer. *Cf. id.* (where the proposed amendment would not have cured the defendants' answers or rendered summary judgment inappropriate, the trial court did not abuse its discretion by not allowing the defendants to file amended answers); see also *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 24 (trial court did not abuse its discretion in denying the defendants' motion for leave to amend their answer where, among other things, the court had considered the ultimate efficacy of the claims and rejected them).

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 51 Affirmed.