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2015 IL App (3d) 130712-U

Order filed April 29, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

RESIDENTIAL CREDIT SOLUTIONS, INC.,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois
	)	
	)	
v.	)	Appeal No. 3-13-0712
	)	Circuit No. 10-CH-275
	)	
ADRIENNE JARRETT,	)	Honorable
	)	Ronald J. Gerts,
Defendant-Appellant.	)	Judge, Presiding.
	)	

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
JUSTICES Lytton and Schmidt concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* (1) Appellate Court's prior determination that mortgagor had forfeited argument that plaintiff lacked standing to bring mortgage foreclosure action was law of the case; (2) plaintiff demonstrated its standing to bring foreclosure action against mortgagor by producing the original mortgage note, indorsed in blank, during a hearing before the trial court; (3) where trial court's judgment of foreclosure provided that it was a final and appealable order and that there was no just cause for delaying the enforcement or appeal of the judgment, mortgagor was barred from filing motions attacking the judgment more than 30 days after it was issued;

(4) the mortgagor's appeal of the trial court's foreclosure judgment divested the trial court of jurisdiction to enter any order which would vacate or modify the foreclosure judgment; (5) under the Illinois Mortgage Foreclosure Law, the plaintiff was not required to attach a copy of a valid mortgage assignment in order to establish its standing to bring a foreclosure action; and (6) mortgagor's motions brought after the trial court confirmed the judicial sale of the foreclosed property which challenged the mortgage foreclosure judgment, sale, and confirmation of sale were untimely and insufficient under the Illinois Mortgage Foreclosure Law.

¶ 2 The plaintiff, Residential Credit Solutions, Inc., filed a complaint to foreclose the mortgage on a property held by the defendant, Adrienne Jarrett. The trial court granted summary judgment in the plaintiff's favor. The defendant appealed the trial court's grant of summary judgment. This court affirmed the trial court's judgment in a Rule 23 Order and remanded the matter to the trial court. *Residential Credit Solutions, Inc. v. Jarrett*, No. 3-12-0007 (Jan. 15, 2003) (unpublished order under Supreme Court Rule 23). A judicial sale was conducted and the sale of the property was confirmed by the trial court. The defendant filed several postjudgment motions with the trial court, including a motion to dismiss for failure to state a cause of action, a motion to dismiss due to defendant's "failure to attach a true copy of the promissory note and assignment to plaintiff's complaint," a motion to vacate and dismiss sale and confirmation of sale and for leave to file an amended answer, and various motions to reconsider. Upon the plaintiff's motion, the trial court struck the defendant's motions to dismiss with prejudice, confirmed the sale of the property, and denied the defendant's remaining postjudgment motions. This appeal followed.

¶ 3 **FACTS**

¶ 4 The plaintiff filed a complaint to foreclose mortgage on a property located in Kankakee, Illinois. The defendant, Adrienne Jarrett, was the mortgagor. The defendant filed a verified answer to the plaintiff's complaint, and the trial court granted summary judgment in the plaintiff's

favor. The defendant appealed. On January 15, 2013, we issued a Rule 23 Order affirming the trial court's judgment and remanding the matter to the trial court for further proceedings.

*Residential Credit Solutions, Inc.*, No. 3-12-0007. In our Order, we held that the defendant had forfeited any challenge to the plaintiff's standing to file the foreclosure action by failing to raise the issue before the trial court. *Id.* ¶¶ 16-19.

¶ 5 On April 18, 2012, (while the defendant's initial appeal was pending), the defendant filed a motion asking the trial court to vacate its judgment and to dismiss the plaintiff's complaint. In that motion, the defendant continued to challenge the plaintiff's standing.

¶ 6 A judicial sale occurred on May 2, 2012, and the plaintiff was the successful bidder. The defendant subsequently filed a motion to vacate the sale and to deny confirmation of the sale. The trial court denied the defendant's motion to vacate the foreclosure judgment as moot because the defendant had appealed the trial court's judgment. However, the court granted the defendant's motion to vacate sale due to inadequate notice of sale. The trial court rejected the defendant's alternative argument that the sale should be vacated because the plaintiff lacked standing. The court noted that, during a hearing, the plaintiff produced the original note, indorsed in blank. Accordingly, the court ruled that the plaintiff was a "holder and a mortgagee" that "ha[d] standing to complete the sale." The defendant filed a motion to reconsider the trial court's denial of her motion to vacate judgment, which the trial court denied.

¶ 7 After a second judicial sale was conducted, the defendant brought a series of motions, including a motion to dismiss for failure to state a cause of action, a motion to dismiss for "failure to attach a true copy of the promissory note and assignment to plaintiff's complaint," a motion to vacate and dismiss sale and confirmation of sale and for leave to file an amended

answer, and various motions to reconsider. In some of these motions, the defendant continued to challenge the plaintiff's standing. Upon the plaintiff's motion, the trial court struck the defendant's motions to dismiss with prejudice, confirmed the sale of the property, and denied the defendant's remaining postjudgment motions. This appeal followed.

¶ 8

## ANALYSIS

¶ 9

### 1. The Plaintiff's Standing to Bring a Foreclosure Action

¶ 10 In this appeal, the defendant argues that the trial court erred in granting summary judgment for the plaintiff and abused its discretion by denying the defendant's subsequent motions to vacate judgment and to dismiss the complaint because the plaintiff lacked standing to bring a foreclosure action. These arguments fail, for several reasons.

¶ 11 As an initial matter, the issue of the plaintiff's standing was resolved in the prior appeal and is now the law of the case. The law of the case doctrine bars relitigation of an issue that has already been decided in the same case. *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006). The resolution of an issue presented in a prior appeal is binding and will control upon remand in the circuit court and in a subsequent appeal before the appellate court. *American Service Ins. Co. v. China Ocean Shipping Co. (Americas) Inc.*, 2014 IL App (1st) 121895, ¶ 17. The law of the case doctrine "applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication." *Id.*

¶ 12 In the prior appeal in this case, our appellate court held that, "since the trial court was not asked to deny the [plaintiff's] motion for summary judgment based on [the plaintiff's] lack of standing, \*\*\* this issue has been forfeited for purposes of appeal." *Residential Credit Solutions*, 2013 IL App (3d) 120007–U, ¶ 19. In support of this holding, our appellate court noted that the

defendant's answer to the plaintiff's complaint "did not deny [the plaintiff's] allegation that it was the 'mortgagee' with capacity to foreclose on the property" and that the defendant "did not file an affirmative defense challenging [the plaintiff's] standing." *Id.* ¶ 18. Our appellate court's prior finding that the defendant has forfeited the right to challenge the plaintiff's standing to bring this foreclosure action remains binding and may not be relitigated in this appeal. *Krautsack*, 223 Ill. 2d at 552; see also *Reich v. Gendreau*, 308 Ill. App. 3d 825, 829 (1999) (prior determination by appellate court that plaintiff's failure to include *res ipsa loquitur* claim in amended complaint had waived any such claim on appeal was law of the case, barring the plaintiff from asserting any such claim on remand); *Pekin Insurance Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64, 68-70 (2003) (ruling on appeal in prior declaratory judgment action that insurer waived its right to contest its duty to defend was law of the case and precluded relitigation of the duty to defend issue in a subsequent action).

¶ 13 However, even if the defendant could relitigate the standing issue in this appeal, we would reach the same conclusion that our appellate court reached in the prior appeal. A defendant has the burden of pleading and proving that the plaintiff lacks standing. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). Standing is an affirmative defense, which the defendant forfeits if it is not pleaded in a timely fashion. *Id.* at 252-53; see also *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 28; *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010). In this case, the defendant did not plead lack of standing as an affirmative defense before the trial court granted summary judgment to the plaintiff. The defendant has therefore forfeited the argument that the plaintiff lacks standing.

¶ 14 But even if the defendant had not waived the right to challenge the plaintiff's standing to bring this foreclosure action, any such challenge would fail. The record reflects that the plaintiff demonstrated its standing by producing the original note, indorsed in blank, during a hearing before the trial court. A note indorsed in blank is "an instrument payable to bearer and may be negotiated by transfer of possession alone." 810 ILCS 5/3-205(b) (West 2010). Under the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15–1101 et seq. (West 2010)), a "mortgagee" is the "holder of indebtedness or obligee of a non-monetary obligation by a mortgage." 735 ILCS 5/15-1208 (West 2010). The plaintiff's production of the note showed that it had an interest in the mortgage, and therefore had standing to bring the foreclosure action. See, e.g., *Rosestone Investments LLC*, 2013 IL App (1st) 123422, ¶26; *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 15 2. The Defendant's Remaining Postjudgment Motions

¶ 16 After she appealed the trial court's foreclosure judgment, the defendant filed several additional motions in the trial court. Some of these motions attacked the trial court's foreclosure judgment,<sup>1</sup> while other motions were directed at the subsequent sale of the property. Each of

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<sup>1</sup> For example, while her appeal of the trial court's foreclosure judgment was pending, the defendant filed a "Motion to Vacate Judgement & Dismiss Plaintiff's Complaint," and subsequent motions to reconsider the trial court's denial of this motion and for leave to file an amended answer. After these motions were denied, and approximately six months after our appellate court affirmed the trial court's foreclosure judgment, the defendant filed additional motions to dismiss for "failure to state a cause of action" and for the plaintiff's failure to attach a copy of the promissory note and assignment to its complaint. Upon motion of the defendant, the

these motions was properly denied or stricken.

¶ 17 Under section 2–1203 of the Code of Civil Procedure (Code), a motion attacking a judgment must be filed within 30 days after the challenged judgment is entered. 735 ILCS 5/2–1203 (West 2010). If no such motion is filed, the trial court loses jurisdiction to modify or vacate the final order 30 days after the order is entered. *Lajato v. AT & T, Inc.*, 283 Ill. App. 3d 126, 131 (1996). In this case, the defendant filed several motions which asked the trial court to vacate its foreclosure judgment or to dismiss the plaintiff's foreclosure claim. Each of these motions attacked the trial court's judgment of foreclosure, and each was filed more than 30 days after the judgment. Accordingly, each of these motions were properly denied or stricken as untimely.<sup>2</sup>

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trial court struck these motions as successive postjudgment motions filed without leave of court.

<sup>2</sup> We acknowledge that "in the absence of a Supreme Court Rule 304(a) finding in the judgment of foreclosure, it is the order confirming the sale, rather than the judgment of foreclosure, that operates as the final and appealable order in a foreclosure case." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 12 (2013). Accordingly, a motion to vacate a judgment of foreclosure that does not contain Rule 304(a) language is timely if the motion is brought "before the order confirming the sale or within 30 days thereafter." *Id.*; see also *Bank of America, N.A. v. Higgin*, 2014 IL App (2d) 131302, ¶ 20 (ruling that a foreclosure judgment that "lacks a finding of immediate appealability under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)) is an interlocutory order that therefore remains modifiable by the trial court until the final judgment, which is the confirmation of the sale"). However, the foreclosure judgment in this case contained a Rule 304(a) finding. The judgment order expressly provided that it was "a final and appealable order" and that "there [was] no just cause delaying the enforcement of this judgment

¶ 18 Moreover, the defendant filed each of these motions after she had appealed the trial court's foreclosure judgment. The filing of a notice of appeal divested the trial court of jurisdiction to enter any order which would vacate or modify the foreclosure judgment that was the subject of the appeal. *In re Marriage of Sawyer*, 264 Ill. App. 3d 839, 850 (1994); *Williamsburg Village Owners' Ass'n, Inc. v. Lauder Associates*, 200 Ill. App. 3d 474, 481 (1990).

¶ 19 In any event, the defendant's motions attacking the foreclosure judgment fail on their merits. In her motions, the defendant argued that the plaintiff lacked standing to bring an action for foreclosure. For example, the defendant argued that the plaintiff lacked standing because it failed to attach a copy of any assignment to its complaint and because the "Assignment of Mortgage" ultimately produced by the plaintiff did not establish that the purported assignor had the authority to assign the mortgage to the plaintiff. As noted above, however, the plaintiff demonstrated its standing by producing the original note, indorsed in blank. See, e.g., *Rosestone Investments LLC*, 2013 IL App (1st) 123422, ¶28. Contrary to the defendant's argument, the plaintiff was not required to attach a copy of a valid mortgage assignment in order to establish standing. The IMFL does not require any documents to be attached to a mortgage foreclosure complaint except for the mortgage and the note. See 735 ILCS 5/15-1504(a)(2) (2010). By producing the original note indorsed in blank, the plaintiff presented a *prima facie* case that it was the holder of the indebtedness at issue and, as such, had the capacity and the standing to file a foreclosure action to enforce the note. *Rosestone Investments, LLC*, 2013 IL App (1st) 123422, ¶26; *Parkway Bank and Trust Co.*, 2013 IL App (1st) 130380, ¶ 24; see also 810 ILCS 5/3–  

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or appeal therefrom." Accordingly, the foreclosure judgment in this case could not be challenged or modified more than 30 days after it was issued.

205(b) (West 2010) ("When indorsed in blank, an instrument becomes payable to [the] bearer.").

¶ 20 The defendant's motions challenging the sale and the confirmation of sale were also properly denied. On August 21, 2013, the same day that the trial court issued an order confirming the sale, the defendant filed a "Motion to Vacate and Dismiss Sale and Confirmation of Sale and Grant [*sic*] Defendant's Motion For Leave of Court To File an Amended Answer." The motion was brought pursuant to section 1508(d-5) of the IMFL (735 ILCS 5/15-1508(d-5) (West 2010)). Section 1508(d-5) provides that a trial court "shall set aside" a judicial sale of a foreclosed property "upon motion of the mortgagor *at any time prior to the confirmation of the sale*" if the mortgagor proves by a preponderance of the evidence that: "(i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale." (Emphasis added.) 735 ILCS 5/1508(d-5) (West 2010). The defendant's motion alleged that the plaintiff violated the Making Home Affordable Program by failing to evaluate the defendant's eligibility for the program and by failing to "offer a trial modification before proceeding to sale." However, the defendant filed her motion *after* the trial court had confirmed the sale; her motion acknowledged that a confirmation order existed and sought relief from that order. A motion to vacate a sale under 735 ILCS 5/1508(d-5) may be granted only if it is brought "*prior to the confirmation of the sale.*" 735 ILCS 5/1508(d-5). Thus, the claimant's motion was untimely.

¶ 21 Following the confirmation of sale, the defendant filed another motion asking the trial

court to reconsider its prior rulings. In this motion, the defendant continued to challenge the plaintiff standing to bring the foreclosure action. For example, the claimant argued that the mortgage assignment to the plaintiff was invalid or defective in various respects, including the fact that the "MERS" entity identified in the Mortgage is not the same "MERS" entity named as the assignor in the Assignment of Mortgage. However, for the reasons discussed above, the claimant could not challenge the plaintiff's standing after our appellate court found that issue forfeited in the first appeal.

¶ 22 Regardless, the defendant's arguments after the confirmation of sale fail for an additional reason. After a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a judgment of foreclosure may only do so by filing objections to the confirmation of the sale under the provisions of section 15–1508(b) of IMFL (735 ILCS 5/15-1508(b) (West 2010)). *McCluskey*, 2013 IL 11546927, ¶ 27. "To vacate both the sale and the underlying default judgment of foreclosure, the borrower must not only have a meritorious defense to the underlying judgment, but must establish under section 15–1508(b)(iv) that 'justice was not otherwise done' because either the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests." *Id.* ¶ 26. "After a motion to confirm the sale has been filed, it is not sufficient under section 15–1508(b)(iv) to merely raise a meritorious defense to the complaint." *Id.*; see also, e.g., *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9 (holding that it was far too late to assert the defense of standing where the plaintiff had already moved for confirmation of the judicial sale).

¶ 23 The arguments the defendant raised in her post-confirmation motion to reconsider did not satisfy this exacting standard. None of the defendant's arguments established that the plaintiff prevented her from raising meritorious defenses to the complaint earlier through fraud or misrepresentation. In her reply brief on appeal, the claimant suggests that the allegedly different MERS entities identified in the Mortgage and the Assignment, and the fact that the assignment was recorded after the foreclosure complaint was filed, demonstrate that the plaintiff "committed perjury or fraud upon the court" by falsely representing that it had standing to bring a foreclosure action. As noted above, however, the plaintiff established standing by producing the Note indorsed in blank and it was not required to produce a valid mortgage assignment to establish standing. Moreover, "in Illinois, an assignment can validly document a transfer that occurred prior to the date the assignment was executed." *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 24. Thus, the defendant's standing arguments were not meritorious, and they did not demonstrate fraud or misrepresentation by the plaintiff. Nor did the defendant establish any "equitable defenses that reveal [s]he was otherwise prevented from protecting h[er] property interests." *McCluskey*, 2013 IL 11546927, ¶ 26. The defendant's post-confirmation arguments were therefore untimely and insufficient under section 15–1508(b)(iv).

¶ 24 We have considered the defendant's remaining arguments and find them meritless.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 26 Affirmed.