2015 IL App (3d) 130896-U

Order filed February 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

SCHAUMBURG BANK & TRUST COMPANY, N.A., formerly known as ADVANTAGE NATIONAL BANK GROUP, a successor in interest to THE BANK OF COMMERCE, an Illinois banking corporation,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0896 Circuit No. 11-CH-5683
BELLONY REAL ESTATE AND DEVELOPMENT, LLC-PSM JOINT VENTURE; SERGIO SALINAS; and VINCENT MARRONE,	)	Honorable Joseph C. Polito,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendants failed to prove its affirmative defense that plaintiff lacked standing to file this cause; and (2) the affidavit in support of plaintiff's motion for summary judgment was sufficient.

¶ 2 Plaintiff, Schaumburg Bank & Trust Company, N.A. (Schaumburg Bank), sued defendants, Bellony Real Estate and Development, LLC–PSM Joint Venture (Bellony); Sergio Salinas; and Vincent Marrone, for breach of contract on a promissory note and individual guaranties. The trial court granted summary judgment in favor of plaintiff. On appeal, defendants argue the trial court erred in entering summary judgment because: (1) plaintiff failed to properly allege its standing to enforce the promissory note; and (2) plaintiff's affidavit in support of its motion for summary judgment was insufficient. We affirm.

¶ 3 FACTS

¶ 4 On September 7, 2007, Bellony entered into a construction loan agreement with The Bank of Commerce for $1,043,800 to build a home at 1007 Caroline Court in Naperville, Illinois (the property). The construction loan agreement was signed by co-operating managers of Bellony—Anthony Pendolino, Salinas, and Marrone. The parties also executed a construction mortgage, an assignment of rents, and a promissory note in regard to the property. The promissory note had a maturity date of September 7, 2008, and listed the property's "1st Mortgage and Assignment of Rents" as collateral. Individually, Marrone and Salinas each executed commercial guaranties.

¶ 5 On September 7, 2008, the parties executed a subsequent promissory note with a maturity date of September 7, 2009, which listed the property's "1st Mortgage and Assignment of Rents dated 09/07/07" as collateral. On April 7, 2010, a promissory note was executed by only Marrone and Salinas as co-operating managers of Bellony in the amount of $1,042,780.91, with the property's "Construction Mortgage and Assignment of Rents dated 9/7/07" listed as collateral.

¶ 6 Pleadings

¶ 7 On November 30, 2011, plaintiff filed a complaint against defendants to foreclose on the property and for actions of breach of contract and breaches of guaranties. Plaintiff amended its complaint, on January 24, 2012, and again on March 19, 2012. Defendants moved to dismiss the complaint, alleging that plaintiff lacked standing and failed to allege a cause of action against Salinas and Marrone as individual guarantors. On October 25, 2012, the trial court denied defendants' motion to dismiss and allowed plaintiff leave to file a third amended complaint.

¶ 8 On October 29, 2012, plaintiff filed its third amended complaint, alleging the following four counts: (I) right to foreclosure; (II) breach of promissory note by Bellony; (III) breach of a commercial guaranty by Salinas; and (IV) breach of a commercial guaranty by Marrone. Schaumburg Bank alleged that it was formerly known as Advantage National Bank Group, which was a successor in interest to The Bank of Commerce. Schaumburg Bank claimed that it was "the legal holder of the Mortgage and of the indebtedness." Specifically, Schaumburg Bank alleged the Federal Deposit Insurance Corporation (FDIC), as receiver, was the legal successor of the failed Bank of Commerce and entered into a purchase and assumption agreement (the PAA) on March 25, 2011, with Schaumburg Bank. Under the PAA, Schaumburg Bank purchased the note from the FDIC and now possessed all rights and remedies under the loan documents that previously belonged to The Bank of Commerce. On March 14, 2013, defendants filed their answer and affirmative defenses alleging, *inter alia*, that plaintiff lacked standing and was not in privity of contract with defendants to the agreements attached to complaint.

¶ 9 Motion for Summary Judgment

¶ 10 On March 22, 2013, plaintiff filed a motion for summary judgment. In support of the motion, plaintiff attached the affidavit of one of its bank officers, Ryan Bormet. Bormet stated

that the FDIC was the legal successor of the assets of The Bank of Commerce and sold the loan documents at issue to Schaumburg Bank via the PAA on March 25, 2011. Bormet's affidavit also indicated the outstanding amount due from defendants.

¶ 11 In response to plaintiff's motion for summary judgment, defendants argued the promissory note attached to the complaint was payable to The Bank of Commerce and was not indorsed to plaintiff or in blank. Additionally, defendants argued that the affidavits attached to plaintiff's motion for summary judgment were insufficient and failed to comply with the requirements of Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) for affidavits offered in support of motions for summary judgment.

¶ 12 In reply and in support of its motion for summary judgment, plaintiff argued that it had standing because the PAA proved that plaintiff had been assigned the loan prior to the filing of the complaint. Plaintiff also contended its affidavit complied with Rule 191. Plaintiff attached, *inter alia*, a letter from the comptroller of the currency acknowledging plaintiff's corporate name change from Advantage National Bank Group to "Schaumburg Bank & Trust Company, National Association," effective July 15, 2011.

¶ 13 Motion to Strike Affirmative Defenses

¶ 14 Also on March 22, 2013, plaintiff filed a motion to strike defendants' affirmative defenses. Plaintiff argued it had standing as "the legal holder of the Note" and had privity of contract due to the assignment of the loan via the PAA. Plaintiff attached a copy of the PAA, which indicated that on March 25, 2011, Advantage National Bank Group, as the assuming institution, agreed to purchase certain assets and assume certain liabilities of the failed bank, The Bank of Commerce. Under the PAA, Advantage National Bank Group purchased from the FDIC, and the FDIC sold, assigned, transferred, conveyed, and delivered to Advantage National

Bank Group, all rights, title and interest of the FDIC to all the assets of The Bank of Commerce. Advantage National Bank Group submitted to the FDIC "an Asset (discount) bid of ($23,400,000)" and agreed the assets would be purchased at "Book Value."

¶ 15 In response to the motion to strike their affirmative defenses, defendants reiterated that the attached note and mortgage refuted plaintiff's claim of standing and privity of contract. Defendants also argued that plaintiff could not pursue a promissory note or mortgage deficiency against Salinas and Marrone because neither signed the promissory note or mortgage in their individual capacity.

¶ 16 In its reply, plaintiff argued it had standing and privity of contract as the legal "holder" of the loan documents because the loan at issue was assigned to it via the PAA. Plaintiff attached the letter from the comptroller acknowledging plaintiff's name change to Schaumburg Bank.

¶ 17 Trial Court Proceedings

¶ 18 On July 17, 2013, plaintiff and Bellony entered an agreed partial dismissal order, wherein plaintiff agreed to dismiss count I for foreclosure. The trial court also entered summary judgment in favor of plaintiff on the remaining three counts. Defendants filed a motion to vacate the order. The trial court vacated the order, finding the affidavit in support of plaintiff's motion for summary judgment was insufficient. The matter was reinstated, and plaintiff was ordered to file an amended affidavit.

¶ 19 On September 24, 2013, the parties appeared before the court. Defendants argued that plaintiff lacked standing because plaintiff was not a holder of the note as alleged in the complaint. The following colloquy took place:

"THE COURT: Do they have possession of the note?

[Defendants' counsel]: Well, if they do, they haven't shown the original note.

THE COURT: Do you have possession of the note?

[Plaintiff's counsel]: We do.

THE COURT: That gives them standing, doesn't it, essentially?

[Defendants' counsel]: It does not. The note still has to be properly endorsed."

The trial court found that plaintiff showed standing and struck defendants' affirmative defenses. The trial court also allowed plaintiff leave of court to file an amended affidavit.

¶ 20 On October 22, 2013, the parties appeared before the trial court. In plaintiff's revised affidavit, Bormet indicated that he was "a Bank Officer of Schaumburg Bank & Trust Company, N.A." who was familiar with Schaumburg Bank and its mode of operations. He indicated that, if called to testify, he could competently attest that: (1) he monitors the loans of the bank, including the one at issue, and ensures all loan records are kept accurately and timely; (2) he has personal knowledge of the loan documents executed in this case and the "payments made pursuant to the Loan Documents from the date of their execution through their present state" and of all other stated facts; (3) Schaumburg Bank "owns and maintains" the loan documents at issue; (4) on March 25, 2011, Schaumburg Bank entered into the PAA with the FDIC, who was the receiver of The Bank of Commerce, and Schaumburg Bank purchased the loan documents at issue and now possesses all rights and remedies under the loan documents that previously belonged to The Bank of Commerce; (5) the loan documents are maintained accurately and timely; (6) he personally reviewed all documents "relevant to the fee transactions relating to the Defendants"; (7) the allegations in the complaint are true and within Bormet's own personal knowledge; (8)

defendants failed to pay in accordance with the terms of the loan; (9) the amount due was based on his review of a payoff statement and accompanying documents attached to the affidavit; (10) the payoff statement was made in the regular course of Schaumburg Bank's business; and (11) on July 9, 2013, the property securing the note was sold via short sale and the remaining amount due on the loan was $278,774.51. Bormet averred that the documents attached to his affidavit were: (1) a payoff statement; (2) a payment history of the loan since its inception through Schaumburg Bank's acquisition of the loan; (3) a payment history of the loan since Schaumburg Bank acquired the loan; and (4) an itemization of expenses, excluding attorney fees.

¶ 21 In his affidavit, Bormet also described the accounting system used by Schaumburg Bank to automatically record and track mortgage payments, which was standard in "the industry." He indicated that the amount and date of a mortgage payment is entered into the system within one day of the receipt of payment and a record of the payment is made within the regular course of Schaumburg Bank's business. He stated, " [T]he entries reflecting the Defendants' payments were made at or near the time that the payment was received" and the expenses were recorded in the regular course of business at or near the time the expenses were incurred.

¶ 22 Arguing against summary judgment, defendants' counsel again contended that plaintiff was not a "holder" of the promissory note because the note was payable to The Bank of Commerce and lacked any blank or special indorsement. The following colloquy took place:

> "THE COURT: Do they allege they have possession of the note?
>
> [Plaintiff's counsel]: Yes
>
> [Defendants' counsel]: I think they are, yeah, they haven't produced it, but they are alleging they have possession.
>
> THE COURT: Okay. They have possession. So they showed it to you.

> [Plaintiff's counsel]: We also produced a purchase and assumption agreement where–that details the acquisition of the agreement between our bank and the FDIC.
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> ***
>
> [Defendants' counsel]: *** They are alleging that they own the note, that they are the holder, but they are producing a note which says they are not the holder under [Uniform Commercial Code] (UCC) law because in order to be a holder by definition, the note has to be endorsed to that entity or endorsed in blank."

¶ 23 The trial court entered summary judgment in favor of plaintiff for $278,774.51. Defendants appealed.

¶ 24 On November 20, 2013, defendants filed a motion to reconsider, arguing that plaintiff did not have standing and Bormet's affidavit was insufficient to support the entry of summary judgment. Defendants argued that Schaumburg Bank was not a "legal holder" entitled to enforce the note because the note was never presented to show possession and, even if there was possession, Schaumburg Bank did not have standing because the note was not properly indorsed. In its response, plaintiff argued that an indorsement was not required on the note because it could enforce the note as a "nonholder transferee." In their reply, defendants argued, as a transferee, plaintiff was required to prove delivery of the note to it with an interest to pass title, which plaintiff failed to do, and plaintiff failed to allege its status as a "nonholder transferee" in the complaint.

¶ 25 On December 16, 2013, this court stayed the appeal pending the trial court's ruling on defendants' motion to reconsider. On February 21, 2014, the trial court denied defendants'

motion to reconsider and reiterated that count I for foreclosure was dismissed pursuant to the parties' short sale agreement and summary judgment was entered on count II against Bellony, count III against Salinas, and count IV against Marrone.

¶ 26 ANALYSIS

¶ 27 On appeal, defendants argue the trial court erred in entering summary judgment for plaintiff because: (1) plaintiff did not have standing; and (2) the affidavit in support of the motion for summary judgment was insufficient.

¶ 28 Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012); *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83 (2010). Our review of the circuit court's grant of summary judgment is *de novo. Lazenby*, 236 Ill. 2d 83. We review the judgment of the circuit court and not its reasoning, and we may affirm on any grounds in the record. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759.

¶ 29 I. Standing

¶ 30 Defendants contend that plaintiff lacked standing to bring an action based on the promissory note. Lack of standing is an affirmative defense. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). A plaintiff need not allege facts establishing standing to proceed. *Id.* Rather, the defendant has the burden to plead and prove lack of standing. See *id.*; *Lebron v. Gottlieb, Memorial Hospital*, 237 Ill. 2d 217, 252 (2010); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010) (lack of standing is an affirmative defense that will be waived if not raised in a timely fashion).

¶ 31 Here, defendants argue that plaintiff lacked standing because plaintiff was not a "holder" entitled to enforce the note as alleged in the complaint. Defendant contends that plaintiff could not be a "holder" because the promissory note was not indorsed in blank or specifically indorsed to plaintiff as required by article 3 of the UCC. See 810 ILCS 5/1-101 *et seq.* (West 2012).

¶ 32 Under article 3 of the UCC, a "person entitled to enforce" an instrument includes: (1) the "holder" of the instrument; and (2) "a nonholder in possession of the instrument who has the rights of a holder"; or (3) a person not in possession of the instrument who is entitled to enforce the instrument as a person enforcing a lost or stolen instrument or a person from whom a mistaken payment has been recovered and may enforce the instrument as if it had been dishonored. 810 ILCS 5/3-301 (West 2012). [1] A "holder" is defined as a person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession. 810 ILCS 5/1-201(b)(21) (West 2012). In this case, the promissory note was not indorsed in blank or specifically to Schaumburg Bank. Therefore, Schaumburg Bank could not be a "holder" entitled to enforce the note under Article 3 of the UCC.

¶ 33 However, plaintiff contends that it could enforce the note as a transferee and "need only show delivery from the FDIC to it with the intent to pass title." Transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument. 810 ILCS 5/3-203(b) (West 2012). An instrument is transferred by delivery of the instrument by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. 810 ILCS 5/3-203(a) (West 2012). The transfer of an instrument allowing the

[1] Article 3 of the UCC applies only to negotiable instruments. 810 ILCS 5/3-102 (West 2012). On appeal, the parties do not dispute the applicability of article 3 of the UCC to the note at issue.

transferee to become a holder is a "negotiation" that requires a transfer of possession of the instrument. 810 ILCS 5/3-201 (West 2012); *Federal Deposit Insurance Corp. v. Linn*, 671 F.Supp. 547 (N.D.Ill. 1987) (a transferee may enforce a note without an indorsement from the transferor so long as the transferee proves delivery to it with an interest to pass title).

¶ 34 In this case, Schaumburg Bank asserted its ownership of the note via the PAA but did not show that possession of the note was transferred to it.[2] Nonetheless, plaintiff was not required to allege facts establishing its standing because the burden was on the defendants to prove their affirmative defense that plaintiff lacked standing.

¶ 35 In the trial court, defendants failed to plead and prove that plaintiff was not in possession of the note. Rather, defendants' argument in the trial court was that plaintiff lacked standing because the note was not properly indorsed. Defendants did not argue the issue of plaintiff's possession of the note until the time of their motion to reconsider summary judgment. The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 19. Arguments raised for the first time in a motion to reconsider in the trial court are forfeited on appeal. *Id.* Here, plaintiff's possession of the note, or lack thereof, cannot be considered newly discovered evidence, a change in law, or error in the application of the law. Consequently,

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[2] A "person entitled to enforce" a note is not synonymous with the "owner" of the note. See *Locks v. North Towne National Bank of Rockford*, 115 Ill. App. 3d 729 (1983) (while a holder with no beneficial interest in a negotiable instrument could maintain a suit upon it, the owner of solely a beneficial interest in the instrument cannot sue to enforce payment on the instrument without possession).

defendants' argument that plaintiff lacked standing because plaintiff was not in possession of the note was forfeited.

¶ 36 II. Affidavit

¶ 37 On appeal, defendants additionally argue that the trial court erred in entering summary judgment for plaintiff because the affidavit in support of plaintiff's motion for summary judgment was insufficient.

¶ 38 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) provides the requirements for affidavits in support of motions for summary judgment, stating:

> "[the affidavits] shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

Rule 191 is satisfied if, taken as a whole, the affidavit appears to be based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify as to its contents at trial. *Avdic*, 2014 IL App (1st) 121759, ¶ 21. Affidavits are a substitute for testimony taken in open court and should meet the same requisites as competent testimony. *Id.* ¶ 22. The circuit court may not consider evidence in an affidavit that would be inadmissible at trial. *Id.*

¶ 39 Business records are admissible evidence, as an exception to the rule against hearsay evidence, since their purpose is to aid in the proper transaction of business and the records would be useless for that purpose unless they were accurate. *Id.* ¶ 24. Because the purpose of business

records is to aid in the proper transaction of business, the motive for following a routine of accuracy when creating and maintaining business records is great while the motive to falsify a business record is nonexistent. *Bank of America, N.A., v. Land*, 2013 IL App (5th) 120283, ¶ 13.

¶ 40 Illinois Rule of Evidence 803(6) (eff. Apr. 26, 2012) provides for the admission into evidence of any of the following:

> "a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness."

¶ 41 Similarly, Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992) governs the admission of business records in civil cases and provides:

> "Any writing or record *** made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility."

Determining whether records are admissible as a business record is within the discretion of the trial court. *Land*, 2013 IL App (5th) 120283, ¶ 13.

¶ 42 In his affidavit, Bormet attested that the recording of payments and expenses was done in the regular course of business, with each entry made at or near the time the payment was made or the expense was incurred, and that it was the regular course of Schaumburg Bank's business to make records of such payments and expenses. Thus, the payment history of the loan was admissible as a business records exception. See *id.* ¶ 14 (affidavit of the successor bank's officer to entire payment history of the loan, which included records kept by a prior bank, was admissible as a business record pursuant to Rule 236, where the affiant attested she was personally familiar with the successor bank's procedures for creating and maintaining its business records, the records at issue were made at or near the time of occurrence by persons with personal knowledge of the information in the business record, and the records were kept in the regular course of the successor bank's business activities and it was its regular practice to make such records).

¶ 43 Lack of Bormet's personal knowledge of defendants' payment to The Bank of Commerce affects the weight and not the admissibility of the records. See Ill. S. Ct. R. 236 (eff. Aug. 1, 1992). A bank is not required to provide testimony of a witness with personal knowledge regarding the maintenance of a predecessor's business records because the bank's reliance on this type of recordkeeping by others renders the records the equivalent of the bank's own records. See *Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, at *4 (N.D.Ill. Feb. 18, 2009). Therefore, Bormet was not required to attest to his personal knowledge of defendants' payments to the predecessor bank.

¶ 44 Defendants argue that Bormet's affidavit was insufficient under Rule 191(a) because the

attached payment history records were not sworn to or certified. Bormet's references to the documents within the affidavit sufficiently attested to the documents' truth and accuracy. See *Ragen v. Wolfner*, 43 Ill. App. 2d 70 (1963) (although exhibits attached to the affidavit were not separately sworn to as true copies of their originals, the references in the text of the affidavit were such to render the exhibits verified copies); *LaMonte v. City of Belleville*, 41 Ill. App. 3d 697 (1976) (supporting documents need not be sworn to or certified since the documents were incorporated by reference into the sworn affidavit that attested that the facts therein were true). Here, Bormet attested to the accuracy of the loan records in his affidavit. Therefore, the loan documents were incorporated into his sworn affidavit.

¶ 45 Defendants also argue that Bormet's affidavit was insufficient because the payment history he relied upon was incomplete where the loan was entered into on September 7, 2007, and the alleged loan history did not begin until January 24, 2008. However, defendants do not offer a counteraffidavit to suggest there was any payment activity on the loan prior to January 24, 2008. See *Avdic*, 2014 IL App (1st) 121759, ¶ 31 (facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for the purposes of the motion). Consequently, there is nothing in the record to support defendants' contention that the payment history was incomplete.

¶ 46 Taking Bormet's affidavit as a whole, we can reasonably infer that he could competently testify to its contents at trial. The affidavit and attached documents were sufficient to establish defendants' default and the amount owed. The trial court did not err in entering summary judgment in favor of plaintiff.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Will County is affirmed.

¶ 49 Affirmed.