2015 IL App (3d) 130963-U

Order filed May 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

U.S. BANK NATIONAL ASSOCIATION, as Trustee for RASC 2005 AHL 2,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0963 Circuit No. 10-CH-3089
ELIZABETH A. NWOKOBIA,	)	The Honorable Richard J. Siegel, Judge, presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: In a foreclosure case, the circuit court granted summary judgment in favor of the plaintiff. On appeal, the appellate court held that the circuit court did not err when it: (1) denied the defendant's motion to dismiss the complaint; (2) granted summary judgment in favor of the plaintiff; (3) denied the defendant's motions to vacate void orders and to dismiss for lack of subject matter jurisdiction; and (4) denied the defendant's motion to reconsider.

¶ 2 The plaintiff, U.S. Bank National Association, filed a foreclosure action against the defendant, Elizabeth A. Nwokobia. The circuit court granted summary judgment in favor of

U.S. Bank, and Nwokobia appealed. On appeal, Nwokobia argues that the circuit court erred when it: (1) denied her motion to dismiss the complaint; (2) granted summary judgment in favor of U.S. Bank; (3) denied her motions to vacate void orders and to dismiss for lack of subject matter jurisdiction; and (4) denied her motion to reconsider. We affirm.

¶ 3 FACTS

¶ 4 On July 25, 2005, Nwokobia took out a home loan with Accredited Home Lenders, Inc. (Accredited), for $232,050. The loan was secured by a mortgage given to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Accredited. Documents filed in this case included copies of the mortgage, which identified MERS as the mortgagee; the note, which listed Accredited as the "Lender" and also stated that the Lender could transfer the note; and an allonge to the note containing a blank endorsement that stated, "PAY TO THE ORDER OF: _____ WITHOUT RECOURSE[.]" The allonge was signed by an assistant secretary of Accredited.

¶ 5 Other documents filed in this case included a trust prospectus, dated October 21, 2005, in which, *inter alia*, Accredited was listed as the originator, Residential Asset Securities Corporation was listed as the depositor, and U.S. Bank was listed as the trustee. The "Cut-off date" was listed as October 1, 2005, the "Closing date" was listed as "[o]n or about October 25, 2005," and the prospectus stated that "[o]n the closing date, the depositor will deposit the pool of mortgage loans described in this prospectus supplement into the trust." The transfer of these loans into the trust was performed pursuant to a pooling and services agreement (PSA). It is undisputed that Nwokobia's loan was included in this pool of loans.

¶ 6 Also filed in this case was an "Assignment of Mortgage" dated May 18, 2010, and recorded May 26, 2010, in which MERS signed over Nwokobia's mortgage to U.S. Bank, who

was listed as trustee for the trust in which Nwokobia's loan was included. The document was signed by attorney William A. McAlister of Codilis and Associates.

¶ 7 On May 19, 2010, U.S. Bank filed a foreclosure action against Nwokobia. In paragraph 3(N) of the complaint, U.S. Bank claimed that it was "the Mortgagee under 735 ILCS 5/15-1208[.]" The complaint alleged that Nwokobia had not paid on the mortgage since prior to February 2010 and that the amount due was $227,497.22.

¶ 8 Nwokobia's answer of October 19, 2010, admitted almost the entirety of the complaint. With regard to paragraph 3(N), Nwokobia stated: "[d]efendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 3 subsection N of the complaint, and consequently neither admits or denies them, but demands strict proof that the Plaintiff is the proper holder of the indebtedness, pursuant to 735 ILCS 5/15-1506 (b)."

¶ 9 Nwokobia also filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). In the motion, Nwokobia alleged that neither the complaint nor the exhibits attached thereto established that U.S. Bank was the mortgagee, and that U.S. Bank lacked standing to bring the suit. On October 27, 2010, the circuit court denied the motion after a hearing and gave Nwokobia 28 days to file an answer or other pleading.

¶ 10 On November 10, 2011, U.S. Bank filed a motion for summary judgment. U.S. Bank alleged that Nwokobia provided no facts or supporting documentation to indicate that a genuine issue of material fact existed. The same day, Nwokobia filed another answer that was identical to her answer of October 19, 2010.

¶ 11 On December 12, 2011, counsel for Nwokobia filed a response to U.S. Bank's motion for summary judgment, alleging that: (1) genuine issues of material fact existed in whether

Nwokobia was in default and the extent thereof; (2) the mortgagee's affidavit contained nothing to show that the affiant had personal knowledge of the facts; and (3) U.S. Bank failed to include any materials to attest to the veracity and authenticity of the note and mortgage.

¶ 12 On May 24, 2012, U.S. Bank filed another motion for summary judgment, which was identical to its first motion. Appended to the motion was a new mortgagee's affidavit, which, unlike the prior mortgagee's affidavit, referred to records of transactions related to the loan. Copies of those records were also appended to the motion. On May 30, 2012, the parties appeared before the court on U.S. Bank's motion, and a briefing schedule was set that gave Nwokobia until June 21, 2012, to respond to the motion.

¶ 13 On July 2, 2012, counsel for Nwokobia sought leave to file a motion to strike the mortgagee's affidavit, alleging that "[d]ue to unforeseen delay," he was unable to file a responsive brief by June 21, 2012. The motion to strike alleged that the mortgagee's affidavit was not signed by an individual with personal knowledge of the facts. On July 11, 2012, the circuit court granted the motion for leave to file and then denied the motion to strike.

¶ 14 On July 18, 2012, the circuit court held a hearing on U.S. Bank's motion for summary judgment. The court ruled that Nwokobia's answer did not contain sufficient supporting documentation and did not raise a genuine issue of material fact. Accordingly, the court granted summary judgment in favor of U.S. Bank and entered a judgment for foreclosure and sale.

¶ 15 Counsel for Nwokobia was allowed to withdraw after Nwokobia terminated the representation in November 2012. Nwokobia retained new counsel, who filed an appearance in September 2013. Counsel also filed an emergency motion to stay the sale of the property and motions to vacate void orders and to dismiss for lack of subject matter jurisdiction. In those motions, Nwokobia alleged, *inter alia*, that U.S. Bank was not licensed as a debt collection

agency at the time of the complaint and that the assignment of the loan to the trust was invalid. Nwokobia alleged that both of these problems required a dismissal of the complaint.

¶ 16 On September 11, 2013, the circuit court held a hearing on Nwokobia's emergency motion and her motions to vacate and dismiss. During arguments, in response to counsel for Nwokobia's claim that the assignment violated the terms of the trust, the court discussed *Bank of America National Association v. Bassman FBT, LLC*, 2012 IL App (2d) 110729. The court stated that *Bassman* stood for the proposition that "the mortgagor cannot raise the issue of timing in the placement of assets into a trust as a defense[,]" given that the mortgagor was not a party to the assignment. Thus, the court rejected Nwokobia's claim that the assignment violated the terms of the trust. The court also rejected her other arguments and denied her motions. The next day, the sale was completed; U.S. Bank was the successful bidder.

¶ 17 On October 8, 2013, Nwokobia filed a motion to reconsider the denial of her motions. On October 16, 2013, the circuit court held a hearing on the motion, during which it rejected counsel for Nwokobia's argument that the court misinterpreted *Bassman*. At the close of the hearing, the court denied the motion to reconsider, finding that Nwokobia failed to meet her burden.

¶ 18 Nwokobia appealed.

¶ 19 ANALYSIS

¶ 20 I. THE MOTION TO DISMISS THE COMPLAINT

¶ 21 Nwokobia's first argument on appeal is that the circuit court erred when it denied her motion to dismiss the complaint. Specifically, Nwokobia alleges that U.S. Bank was not the note holder at the time the complaint was filed and that, therefore, U.S. Bank lacked standing to bring the suit.

¶ 22 "The function of the doctrine of standing is to insure that issues are raised only by those parties with a real interest in the outcome of the controversy." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). While determining whether a plaintiff has standing to sue depends on the allegations in the complaint (*Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1101 (2011)), the plaintiff need not allege facts in the complaint that establish standing (*Chicago Teachers Union, Local 1 v. Board of Education*, 189 Ill. 2d 200, 206 (2000)). Rather, a lack of standing is an affirmative defense that is the defendant's burden to plead and prove. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 23 Section 2-610(a) of the Code of Civil Procedure requires that an answer to a complaint contain explicit admissions or denials of every allegation of the pleading from which the answer is filed. 735 ILCS 5/2-610(a) (West 2010). Further, section 2-610(b) provides that any allegation not explicitly denied is admitted, except for three instances, including the following relevant instance: if the answering party states that it lacks knowledge sufficient to form a belief about the allegation *and* it "attaches an affidavit of the truth of the statement of want of knowledge." 735 ILCS 5/2-610(b) (West 2010).

¶ 24 In this case, U.S. Bank alleged in paragraph 3(N) of the complaint that it was the mortgagee pursuant to section 15-1208 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1208 (West 2010)), which defines "mortgagee" as "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor." In her answer, Nwokobia stated, with regard to paragraph 3(N) of the complaint, that "[d]efendant has no knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 3 subsection N of the complaint, and consequently neither admits or

denies them, but demands strict proof that the Plaintiff is the proper holder of the indebtedness, pursuant to 735 ILCS 5/15-1506 (b)." However, Nwokobia did not attach an affidavit pertaining to the truth of her statement that she lacked such knowledge, as required by section 2-610(b) of the Code of Civil Procedure. Nwokobia's failure to attach that affidavit resulted in her admitting the allegation in paragraph 3(N) of the complaint that U.S. Bank was the mortgagee.[1] *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 38.

¶ 25 Because Nwokobia admitted that U.S. Bank was the mortgagee, and because a mortgagee is entitled to bring a foreclosure action (see 735 ILCS 5/15-1208, 15-1504(a)(3)(N) (West 2010); see also *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010)), we hold that the circuit court did nor err when it denied Nwokobia's motion to dismiss the complaint.

¶ 26 II. THE GRANT OF SUMMARY JUDGMENT

¶ 27 Nwokobia's second argument on appeal is that the circuit court erred when it granted summary judgment in favor of U.S. Bank. Specifically, she claims that genuine issues of

[1] We note that Nwokobia bases her standing argument in large part upon *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, which she cites for the proposition that after she made a *prima facie* showing that U.S. Bank lacked standing, the burden shifted to U.S. Bank to either refute her showing or establish a question of fact. However, Nwokobia's reading of *Triple R Development* is misplaced. *Triple R Development* did not address standing or foreclosure. See *Triple R Development*, 2012 IL App (4th) 100956, ¶¶ 3-6; see also *Rosestone Investments*, 2013 IL App (1st) 123422, ¶ 28 (distinguishing *Triple R Development* and reiterating long-standing supreme court precedent that a defendant has the burden of pleading and proving a lack of standing, as it is an affirmative defense). Like the *Rosestone Investments* court, we decline to adopt the *Triple R Development* approach in the context of this case. *Rosestone Investments*, 2013 IL App (1st) 123422, ¶ 28.

material fact exist with regard to "when U.S. Bank was assigned the note, and whether the assignment occurred prior to commencing legal action."

¶ 28 Summary judgment is an appropriate disposition when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Courts are required to construe these documents strictly against the moving party. *PNC Bank v. Zubel*, 2014 IL App (1st) 130976, ¶ 13. We review a circuit court's summary judgment decision *de novo*. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004).

¶ 29 Nwokobia's argument on this issue is essentially a reassertion of her standing argument. As we held above, Nwokobia admitted that U.S. Bank was the mortgagee, and U.S. Bank had standing to bring this foreclosure action. *Supra* ¶¶ 24-25. Moreover, Nwokobia's claim that U.S. Bank needed to be the note holder at the time the complaint was filed fails because a mortgagee under the Mortgage Foreclosure Law need not be the actual note holder. See 735 ILCS 5/15-1208 (West 2010) (stating that a mortgagee can also include "any person designated or authorized to act on behalf of such holder"). Accordingly, we hold that the circuit court did not err when it granted summary judgment in favor of U.S. Bank.

¶ 30 III. THE MOTIONS TO VACATE AND DISMISS

¶ 31 Nwokobia's third argument on appeal is that the circuit court erred when it denied her motions to vacate void orders and to dismiss for lack of subject matter jurisdiction. Nwokobia's argument on this issue is twofold. First, she contends that the court lacked subject matter jurisdiction because U.S. Bank did not register as a debt collector before filing this action.

Second, she contends that the court lacked subject matter jurisdiction because the assignment of the note to U.S. Bank was invalid.

¶ 32 Subject matter jurisdiction "refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002). With an exception inapplicable to this case, subject matter jurisdiction is conferred entirely by the Illinois Constitution and extends to all justiciable matters. *Id.* "Generally, a 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Id.* Invoking the court's subject matter jurisdiction requires only a petition or complaint that alleges the existence of a justiciable matter. *In re M.W.*, 232 Ill. 2d 408, 426 (2009). Whether the circuit court had subject matter jurisdiction presents a question of law that we review *de novo*. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 503 (2006).

¶ 33 Nwokobia states in her brief that "[a]lthough [she] agrees that the Circuit Court generally has subject-matter jurisdiction to hear foreclosure actions, in this case it did not have proper subject-matter jurisdiction because [U.S. Bank's] complaint states no cognizable cause of action against [her]." This claim is flawed. Illinois jurisprudence is clear that the circuit court's subject matter jurisdiction does not depend upon the legal sufficiency of a pleading. *In re Luis R.*, 239 Ill. 2d 295, 302 (2010); see also *Nationstar Mortgage, LLC v. Canale*, 2014 IL App (2d) 130676, ¶ 14 (holding that foreclosure actions are unquestionably actions over which the circuit court has subject matter jurisdiction); *JPMorgan Chase Bank, N.A. v. Ontiveros*, 2015 IL App (2d) 140145, ¶ 22 (same). Thus, Nwokobia's subject matter jurisdiction claims are without merit.

¶ 34 Further, with regard to Nwokobia's claim questioning the propriety of the assignment of the note and mortgage to U.S. Bank, we find the Second District's decision in *Bassman* to be instructive. In *Bassman*, the circuit court granted summary judgment in favor of the plaintiff bank in a foreclosure action against the defendants. *Bassman*, 2012 IL App (2d) 110729, ¶ 2. The plaintiff bank derived its authority to foreclose on two mortgages pursuant to a PSA, which created a trust that named the plaintiff bank's predecessor as trustee. *Id.* at ¶ 4. The *Bassman* court assumed for the purposes of the appeal that the two mortgages were not transferred to the trust in accord with the PSA's provisions. *Id.* Then, after discussing the PSA's choice of law provision and determining that New York law would apply to the question of whether the mortgages were validly transferred to the trust (*id.* at ¶¶ 7-11), the *Bassman* court addressed the parties' standing claims: the plaintiffs argued that even if the mortgages were improperly transferred to the trust, the defendants lacked standing to challenge those transfers because they were not a party to the transfers; the defendants argued that the mortgages were improperly transferred to the trust, thereby rendering those transfers void and depriving the plaintiffs of standing to bring the foreclosure action (*id.* at ¶ 14).

¶ 35 First, the *Bassman* court determined that absent third-party beneficiary status, an individual or entity cannot challenge an assignment to which that individual or entity is not a party. *Id.* at ¶ 15. However, the court also acknowledged that an exception to that rule exists if a borrower can "raise a defense to an assignment that would render it *** void." *Id.* The court then examined "whether noncompliance with the PSA rendered the assignment of the mortgages void or voidable." *Id.* at ¶ 17. After noting that New York conflicted on the void-or-voidable question, the *Bassman* court concluded that because a line of those cases has held that a beneficiary can ratify a trustee's *ultra vires* act, such acts are voidable, as opposed to void. *Id.* at

¶¶ 18-21. Thus, the court also concluded that the defendants could not challenge the validity of the transfers because that challenge was one of voidability, rather than voidness. *Id.* at ¶ 21.

¶ 36 Second, the *Bassman* court addressed the defendants' argument that breaches of the PSA precluded summary judgment. *Id.* at ¶ 25. In analyzing this issue, the court concluded that the defendants did not show that the parties to the PSA intended to make the defendants third-party beneficiaries. *Id.* at ¶ 28. Thus, the court ruled that the defendants were not entitled to the protection of the PSA and affirmed the grant of summary judgment in favor of the plaintiff. *Id.* at ¶¶ 28-32.

¶ 37 We agree with the *Bassman* court's analysis and hold that it negates Nwokobia's claim that U.S. Bank lacked standing to bring the foreclosure action due to the allegedly invalid assignment. Nwokobia was certainly not a party to the assignment, and there is nothing in the record to indicate that she was a third-party beneficiary of the assignment (*id.* at ¶ 28). Further, even if she could be said to be a third-party beneficiary of the assignment, her argument would be rejected because it is one of voidability, not voidness. *Id.* at ¶ 21.

¶ 38 With regard to Nwokobia's claim that U.S. Bank had to register as a debt collector before filing this foreclosure action, that claim also fails for multiple reasons. First, section 2.03 of the Collection Agency Act provides that:

> "This Act does not apply to persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency, and specifically does not include the following:
>
> 1. Banks, including trust departments, affiliates, and subsidiaries thereof, fiduciaries, and financing and lending

> institutions (except those who own or operate collection agencies)[.]" 225 ILCS 425/2.03 (West 2010).

Nwokobia has alleged that U.S. Bank was operating as a collection agency in this case, but she provides no proof of her claim. While she cites a federal district court case in Ohio for the proposition that "[a]n entity is a debt collector when it acquires the debt after default," her claim is based on her belief that U.S. Bank acquired her loan after she defaulted on loan—February 1, 2010, as stated in the complaint. Nwokobia claims the assignment took place on May 18, 2010, as evidenced by the "Assignment of Mortgage" document that MERS executed on that date. However, documents related to the trust in which Nwokobia's loan belongs indicate that her *loan* was transferred into the trust by October 25, 2005. Thus, U.S. Bank did not acquire her loan after she defaulted.

¶ 39 Second, Nwokobia's claim fails because even if U.S. Bank had to register as a debt collector prior to filing this foreclosure action, its failure to do so would not have nullified the complaint and subsequent judgments thereon. *Deutsche Bank National Trust v. Cichosz*, 2014 IL App (1st) 131387, ¶ 17 (applying *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, ¶ 30); see also *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶¶ 32-36 (noting in dicta that the majority view from courts across the country is that foreclosing on a mortgage is not considered debt collection).

¶ 40 For all of the above reasons, we hold that the circuit court properly denied Nwokobia's motions to vacate void orders and to dismiss for lack of subject matter jurisdiction.

¶ 41 IV. THE MOTION TO RECONSIDER

¶ 42 Nwokobia's fourth argument on appeal is that the circuit court erred when it denied her motion to reconsider. Nwokobia asserts that the court misapplied the law in that it incorrectly

interpreted *Bassman*; in this regard she reasserts her argument that the assignment violated the terms of the trust and was therefore void. She also asserts that she court should have found that the assignment was fraudulently performed.

¶ 43 Typically, a circuit court's ruling on a motion for reconsideration is subject to abuse of discretion review. *Lederer v. Executive Construction, Inc.*, 2014 IL App (1st) 123170, ¶ 46. However, if the motion requested the circuit court only to re-examine its application of the law, the court's ruling is subject to *de novo* review. *Id.*

¶ 44 As discussed above, we agree with the *Bassman* analysis and have applied it to this case. *Supra* ¶ 37. Our review of the record reveals that the circuit court properly interpreted *Bassman* and properly applied it to this case. Accordingly, we hold that the court did not err when it rejected Nwokobia's argument on this point when ruling on her motion for reconsideration.

¶ 45 With regard to Nwokobia's fraudulent assignment claim, we agree with the circuit court that her claim is without merit. Her claim is premised on her belief that the May 18, 2010, "Assignment of Mortgage" was contrary to the terms of the trust, but this focus is misplaced. The May 18, 2010, "assignment" of the mortgage was not the date on which U.S. Bank obtained Nwokobia's loan, as we stated above (*supra* ¶ 38). Rather, that "assignment" served as the recordation of the lien, which is not the same as the assignment of the debt from which the mortgage stems. See *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 635 (2000) (holding that "[t]he assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured"); *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987) (holding that "[a]n assignment, oral or written, occurs when there is a transfer of some identifiable interest from the assignor to the assignee"); *Moore v. Lewis*, 51 Ill. App. 3d

388, 392 (1977) (holding that a mortgage is incident to a debt and may not be assigned at law, and that the transfer of the debt carries with it the mortgage security).

¶ 46 Even if she were correct that the May 18, 2010, "assignment" was improper, Nwokobia's fraud claim would fail, as it constitutes nothing more than an unsubstantiated, inferential leap. She claims that the plaintiff produced no evidence of attorney McAlister's personal knowledge that the assignment occurred, which she concludes is evidence that attorney McAlister's firm, Codilis and Associates, "created an assignment that was fraudulent and did not comply with the Trust. The misrepresentation throughout this foreclosure case amounts to fraud upon the court, and an abuse of process." She has not produced even a modicum of evidence to suggest that anything untoward occurred with regard to attorney McAlister's signing of the May 18, 2010, "assignment"—certainly not enough to establish that the circuit court erred when it denied her motion to reconsider.

¶ 47 For the above-stated reasons, we hold that the circuit court properly denied Nwokobia's motion to reconsider.

¶ 48 CONCLUSION

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

¶ 50 Affirmed.