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2015 IL App (3d) 140389-U

Order filed April 30, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

CITIMORTGAGE, INC.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-14-0389
	)	Circuit No. 10-CH-2758
BRYANT HARRISON,	)	
	)	The Honorable
Defendant-Appellant,	)	Thomas A. Thanas,
	)	Judge, Presiding.
and	)	
	)	
CHERYL McINTYRE,	)	
	)	
Defendant.	)	
	)	

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

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**ORDER**

¶ 1       *Held:* Summary judgment was appropriate and the denials of defendant's motions to dismiss and vacate were proper. The trial court did not make statements misrepresenting the standards of the court or effectively bar defendant from court.

¶ 2 This case involves a foreclosure action brought by plaintiff-appellee, CitiMortgage, Inc. (CMI) against *pro se* defendant-appellant, Bryant Harrison, pursuant to the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1101 *et seq.* (West 2012)). The trial court awarded summary judgment to CMI and denied Harrison's subsequent motions to dismiss and vacate. On appeal, Harrison argues summary judgment was erroneous because CMI lacked standing and violated the Fair Debt Collection Practices Act (Collection Practices Act) (15 U.S.C. § 1692e (10) (2006)) by way of fraud and failure to mitigate his debt. He further asserts that the trial court erred in denying his motions to dismiss due to CMI's alleged fraudulent acts and improprieties and in denying his motion to vacate summary judgment. Lastly, he contends that the trial court abused its discretion with certain statements during a hearing on his motion to dismiss for common law fraud. We affirm.

¶ 3 FACTS

¶ 4 CMI filed a complaint for foreclosure on May 4, 2010, against Harrison. It attached a copy of the mortgage assignment to the complaint, as well as a specially endorsed note from American National Bank of Dekalb County (American National) to Principal Residential Mortgage, Inc. (PRM). Harrison initially filed a *pro se* appearance, but shortly thereafter retained counsel. Through counsel, he filed an answer with affirmative defenses. He claimed CMI failed to address his request for a modification and therefore violated the Collection Practices Act. He also alleged it lacked standing. He was granted leave to file his first amended answer to which he attached a copy of his loan modification application.

¶ 5 On October 13, Harrison filed a second amended answer with four affirmative defenses. He alleged that: (1) CMI violated the Collection Practices Act by not responding to his loan modification request in order to mitigate his debt and it lacked standing because there was no

assignment of the mortgage to CMI, (2) the loan originator, American National, had unclean hands, (3) CMI never provided him with a notice of default, and (4) CMI violated the Illinois Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 510/2 (West 2010)) because American National misrepresented the terms of the loan.

¶ 6 A hearing on the matter was set for October 20, 2011, but it was stricken from the call that day at CMI's request. The court's minute entries noted defendant was not present.

¶ 7 CMI responded to Harrison's second amended answer on March 3, 2012. It explained in its reply that Harrison's loan modification request was his second request. It argued that it had no legal obligation to mitigate Harrison's damages by providing a second modification particularly after he had received and defaulted on a first. To establish standing, CMI attached an affidavit and a copy of a note containing special endorsements ending in an endorsement from PRM to CMI. With regard to the other two affirmative defenses, CMI noted that Harrison did not allege that CMI knew or should have known of any of the purported inappropriate conduct by American National, thus unclean hands should not apply; and it attached an affidavit showing that a notice of default had been sent to Harrison.

¶ 8 On April 4, 2013, CMI moved for summary judgment attaching the same copy of a specially endorsed note it had attached to its response to Harrison's affirmative defenses. A hearing on the matter was set for April 11, 2013. CMI sent notice of the motion and hearing to Harrison's attorney. Harrison did not appear at the hearing in person or by counsel. The trial court granted summary judgment. CMI then noticed a sale of the property.

¶ 9 Five months after summary judgment was entered and two weeks prior to the scheduled date of the sale, Harrison, through counsel, filed an emergency motion to vacate and for leave to file a response to CMI's motion for summary judgment. After oral arguments, Harrison's motion

was denied. The judicial sale was stayed, however, for 28 days on equitable grounds. Harrison filed for bankruptcy right before the second scheduled sale and the resultant automatic stay halted the sale.

¶ 10 After the automatic stay was lifted, Harrison filed, *pro se*, a motion to dismiss the foreclosure action with prejudice, alleging common law fraud. He argued that CMI was not the holder of the note and that the assignment of the mortgage contained evidence of fraud. The motion was denied. Harrison's attorney's motion for leave to withdraw on the basis of differing defense strategies was granted. Harrison proceeded *pro se*.

¶ 11 CMI then re-noticed the sale of the property. Harrison filed a notice of appeal. He also filed another motion to dismiss, alleging that the affidavit supporting CMI's claim of standing was insufficient. Additionally, he filed an emergency motion to stay the sale pending his appeal. The trial court denied both motions. At the judicial sale, the property was sold to CMI.

¶ 12 When CMI moved to confirm the sale, Harrison filed another motion to dismiss, this time seeking to dismiss the motion to confirm pending his appeal. He also moved for sanctions. The trial court denied both motions and entered an order confirming the sale. Harrison's first appeal was dismissed for lack of jurisdiction.

¶ 13 Shortly thereafter, Harrison filed a motion challenging the constitutionality, construction, and application of the IMFL, which was denied.

¶ 14 Harrison timely appealed.

¶ 15 ANALYSIS

¶ 16 As an initial matter, we address CMI's request that Harrison's appellate brief be stricken for want of clarity and judgment affirmed. We note, however, that Harrison is *pro se* and documents filed by such parties are liberally construed. See *People v. Krueger*, 146 Ill. App. 3d

530, 534 (1986). Though we are aware of our ability to strike briefs that do not substantially conform to our supreme court's rules (*Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7), we do not deem Harrison's brief to be that deficient.

¶ 17 On appeal, Harrison argues summary judgment was erroneously awarded because CMI lacked standing and violated the Collection Practices Act due to fraud and failure to mitigate his debt by granting his loan modification request. He asserts that the trial court also erred in denying his motions to dismiss because CMI committed additional fraudulent acts and had improper notarizations for the mortgage note assignment. He further contends that it erred in denying his motion to vacate summary judgment. Lastly, he claims that the trial court abused its discretion when it made certain statements during the hearing on his motion to dismiss for common law fraud. We consider each issue in turn.

¶ 18 We first assess Harrison's arguments regarding summary judgment. Summary judgment is appropriate where after review of the "the pleadings, depositions, and admissions on file, together with the affidavits, if any," the trial court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2012). Where material facts are disputed, summary judgment is precluded. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review a trial court's award of summary judgment *de novo*. *Id.*

¶ 19 Harrison argues that summary judgment was not appropriate because CMI lacked standing due to its fraudulent acts. However, his argument centers not on the trial court's ruling against his timely argued defense of lack of standing, but on whether CMI had capacity to bring the suit. He asserts CMI was not the legal holder of the indebtedness, the capacity which it pled in its complaint. He notes this is evidenced by the copy of a specially endorsed note from

American National to PRM that CMI attached to its complaint, which differed from the copy of a specially endorsed note from PRM to CMI attached to the affidavit supporting its motion for summary judgment and used in Harrison's bankruptcy proceedings. Harrison contends that this action was fraudulent and, therefore, summary judgment was not appropriate as CMI did not have capacity to foreclose on the note. CMI argues that it did have capacity because prior to this action, it had merged with PRM, the assignee of the note from American National. Thus, all of PRM rights were now CMI's. We agree.

¶ 20 A party has standing if it possesses a legal interest in the action brought and its outcome. *In re Estate of Wellman*, 174 Ill. 2d 335, 345 (1996). However, a party's legal capacity refers to its status. See *Patterson Heating & Air Conditioning Corp. v. Durable Construction Co.*, 3 Ill. App. 3d 444, 446 (1972). Now "[t]he mere attachment of the note to a complaint is *prima facie* evidence that plaintiff owns the note." *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶26. But further as a matter of law, upon merger "all of the rights, franchises, and interest of each of the merging associations in and to every kind of property, real, personal, or mixed, shall vest automatically in the continuing association, without any deed or other transfer." *Land of Lincoln Savings and Loan v. Michigan Avenue Nat'l Bank of Chicago*, 103 Ill. App. 3d 1095, 1106 (1982).

¶ 21 Though CMI attached a copy of a specially endorsed note to its complaint, it is the merger of PRM and CMI that negates Harrison's contentions of fraud and resultant lack of capacity.<sup>1</sup> American National, the loan originator, assigned the note in this case to PRM in 2003.

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<sup>1</sup> We grant the motion presented to this court and taken with this appeal to take judicial notice of CMI's certificate of merger with PRM, which occurred in 2005, as it is a public record. See *Union Elec. Co. v. Department of Revenue*, 136 Ill. 2d 385, 399 (1990).

By the time this action was brought in 2010, PRM had long since merged with CMI in 2005, vesting all rights in CMI. Thus, the copy of a specially endorsed note from PRM to CMI presented with the affidavit for summary judgment was superfluous because the copy of the note presented with the complaint was sufficient to show CMI was the rightful holder of the note. Therefore, CMI had the challenged *capacity*, though erroneously characterized as *standing*, to bring the foreclosure action against Harrison.

¶ 22 Harrison's next assertion against summary judgment—that CMI violated the Collection Practices Act by not responding to Harrison's mortgage modification request—also fails. We have already determined that there was no fraud. Thus, we find under the Collection Practices Act CMI did not use "any false representations or deceptive means to collect or attempt to collect any debt." 15 U.S.C. § 1692(e)(10) (2006).

¶ 23 Harrison's last argument against summary judgment also fails because he has not provided this court with any case law or statute supporting his contention that a lender must grant a loan modification at any time requested. We agree with CMI that a lender is surely not required to provide a second modification to satisfy an alleged statutorily-imposed mitigation requirement after the borrower has defaulted on a previous modification. Thus summary judgment was appropriate as CMI was the legal holder of the note and did not violate the Collection Practices Act.

¶ 24 Moving now to Harrison's second issue on appeal, we initially note that his motions to dismiss that the trial court denied were technically filed pursuant to section 2-619 of the Illinois Code of Civil Procedure. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994) ("reviewing courts typically review the nondesignated motion according to its grounds, its requests, or its treatment by the parties and the trial court"); 735 ILCS 5/2-619(2) (West 2012).

Such motions are reviewed *de novo*. *In re Chicago Flood Litigation*, 176 Ill.2d 179, 189 (1997).

However, we agree with CMI that Harrison's motions to dismiss are more properly viewed as motions to reconsider because they were filed after the court entered summary judgment. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994) ("[n]ormally, a motion to dismiss is required to be made within the time for pleading"). Also, they asked the trial court to reassess its previous rulings based on the underlying the law. *People v. \$280,020 U.S. Currency*, 372 Ill. App. 3d 785, 791 (2007) ("the purpose of a motion to reconsider is to bring to the court's attention to \*\*\* an error in the court's previous application of existing law"). Our standard of review for Harrison's restyled motions to reconsider is, however, still *de novo*. *Id.*

¶ 25 In his motions seeking reconsideration by the trial court, Harrison argued that CMI committed fraudulent acts in that the assignment of the mortgage and the notarization of the assignment of the note was a violation of the Act. There are no particular requirements for an assignment to be valid. *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987). A party need only assign in whole or in part some obligation and must "describe the subject matter of the assignment with sufficient particularity to render it capable of identification." *Id.* The record clearly shows that the mortgage was assigned to CMI from American National. Thus, the assignment was proper. Additionally, the Act does not require—nor has Harrison provided any case law supporting his contention—that the notary has to be of the same state where the document it notarizes is to be enforced. Thus the notarization of the note was proper. Those motions were properly denied.

¶ 26 Harrison's third issue on appeal is that his motion to vacate summary judgment was improperly denied. We review the trial court's ruling on a motion to vacate for an abuse of discretion. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). However, because the record on



appeal does not contain a transcript of the evidentiary hearing, there is no basis for us to conclude that the trial court abused its discretion. *Id.* Therefore, we reject Harrison's contention.

¶ 27 Finally, Harrison's fourth issue on appeal is that the trial court abused its discretion with certain statements made to him during the hearing on his motion to dismiss the foreclosure for common law fraud. He alleges that the trial court misrepresented the standards of the court, but he fails to identify any specific statements of misrepresentation. Further, his argument that he was barred from the court due to the trial court's statements is without support or merit. Our review of the transcript of that hearing—which is included in the record—shows the trial court advised Harrison, upon request, that he could file a motion to reconsider that would be heard and decided in that same court, but it was unlikely that the court's decision to deny his motion to dismiss would change. The court noted that it had reviewed the record, all points of contention had been covered, and Harrison had had many days in court since the case commenced in 2010. While the court's statements can be read as discouragement to Harrison, they were not preclusive and, therefore, were not erroneous.

## ¶ 28 CONCLUSION

¶ 29 We find summary judgment was appropriate because CMI did not lack standing or violate the Collection Practices Act. The denials of Harrison's motions to dismiss were proper as there was a valid assignment of the mortgage and the Act does not require a notary to be licensed in the same state where the documents notarized will be enforced. We also find no abuse of discretion in the denial of the motion to vacate. Nor do we find that the trial court made statements that misrepresented the standards of the court or effectively barred Harrison from court during his hearing on his motion to dismiss on the basis of common law fraud.

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

¶ 31 Affirmed