

NOTICE

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2015 IL App (4th) 140619-U

NO. 4-14-0619

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 15, 2015

Carla Bender

4th District Appellate

Court, IL

U.S. BANK NATIONAL ASSOCIATION, as Trustee)	Appeal from
for the Specialty Underwriting and Residential Finance)	Circuit Court of
Mortgage Loan Asset-Certificates Series 2006-AB3,)	McLean County
Plaintiff-Appellee,)	No. 08CH295
v.)	
BRETT SIMMONS, a/k/a BRETT A. SIMMONS,)	Honorable
Defendant-Appellant.)	Rebecca Simmons Foley,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment and order confirming sale in mortgage foreclosure case affirmed where the court did not abuse its discretion in denying defendant's motion to vacate default judgment, because defendant failed to establish any basis, under section 15-1508(b) of the Illinois Mortgage Foreclosure Law, for the court to vacate or deny confirmation of the sale.

¶ 2 Defendant, Brett Simmons, a/k/a Brett A. Simmons, appeals from orders of the circuit court of McLean County denying his motion to vacate a default judgment in a mortgage foreclosure action and confirming the judicial sale. In his motion to vacate, defendant argued that plaintiff, U.S. Bank National Association, as Trustee for the Specialty Underwriting and Residential Finance Mortgage Loan Asset-Certificates Series 2006-AB3, lacked standing to bring and maintain the lawsuit. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On August 12, 2008, plaintiff filed a complaint to foreclose a mortgage originally issued by National City Mortgage and recorded on July 17, 2006. Plaintiff alleged it was the "legal holder, agent or nominee of the legal holder, of the indebtedness" or "the owner, agent or nominee of the owner, of the mortgage given as security." Plaintiff alleged defendant had been in default since May 2008 on payments on the property commonly known as 1010 South Hinshaw Avenue in Bloomington. Plaintiff's attorney executed a lost document affidavit stating the accompanying promissory note was "not in the aforementioned records."

¶ 5 On October 27, 2008, defendant filed a motion to dismiss, challenging plaintiff's standing, claiming plaintiff failed to provide proof it was the legal holder of defendant's indebtedness and mortgage. However, in a response, plaintiff provided a copy of the assignment of the mortgage and promissory note it received from National City Mortgage dated September 18, 2006. Pursuant to the trial court's handwritten order dated November 4, 2008, defendant withdrew his motion to dismiss. The court ordered defendant to answer the complaint before December 10, 2008. Defendant failed to do so.

¶ 6 On January 30, 2009, the trial court entered an order of default due to defendant's "fail[ure] to appear and/or plead." The court also entered a judgment of foreclosure.

¶ 7 In June 2013, defendant's new counsel filed an entry of appearance, and on July 22, 2013, he filed a motion entitled "Defendant's Motion to Dismiss Plaintiff[s] Order Approving the Foreclosure Report of Sale and Distribution and Order for Possession and Eviction," pursuant to section 2-403 of the Code of Civil Procedure (735 ILCS 5/2-403 (West 2012)) (a section governing assignees and subrogees of non-negotiable instruments). Defendant claimed Nationstar Mortgage, an assignee of plaintiff's mortgage dated June 10, 2013, failed to

comply with the statutory procedures of this section. Defendant further claimed plaintiff "no longer has standing to maintain the instant cause of action."

¶ 8 On September 16, 2013, plaintiff filed a reply, claiming defendant mistakenly labeled Nationstar Mortgage as an assignee, rather than a servicer, and no grounds justified dismissing plaintiff's motion to confirm the sale.

¶ 9 On February 28, 2014, the trial court entered orders (1) denying defendant's motion to dismiss and (2) confirming the judicial sale. On March 26, 2014, defendant filed a posttrial motion to dismiss the case with prejudice, claiming plaintiff lacked standing to bring the action due to the apparent "gap or break in the chain of title to the alleged mortgage[.]" On June 9, 2014, the trial court denied defendant's motion.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant claims the trial court's order confirming the foreclosure and judicial sale must be vacated and the foreclosure complaint dismissed with prejudice because plaintiff did not have standing to bring and/or maintain the foreclosure case. Defendant insists plaintiff failed to sufficiently prove it was the true and legal owner of the subject mortgage. We disagree with defendant, finding that ultimately, he forfeited the lack of standing claim by (1) withdrawing his motion to dismiss the complaint, in which he argued a lack of standing, and (2) by failing to answer the complaint within the time proscribed by the court, thereby effectively admitting plaintiff's cause of action.

¶ 13 In our review of the trial court's approval of a judicial sale, we apply an abuse-of-discretion standard. That is, we will not disturb the order confirming the sale unless we find the court abused its discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178-79 (2008).

However, initially, rather than reviewing the propriety of the order approving the sale, we first determine whether defendant has forfeited the only argument he raises on appeal. He insists plaintiff lacked standing to file and pursue the foreclosure complaint.

¶ 14 Defendant claims the mortgage attached to plaintiff's complaint "clearly shows on its face" that plaintiff was not the owner. In other words, defendant claims plaintiff lacked standing to file its complaint to foreclose the mortgage because it failed to allege and prove that title and ownership to the mortgage and note lay with it. According to defendant, plaintiff violated section 2-403 of the Code of Civil Procedure (735 ILCS 5/2-403 (West 2012)) because it had not shown how and from whom it obtained the assignment of the mortgage and note. Defendant also asserts plaintiff violated the statute by not attaching a copy of the assignment to the pleading as an exhibit so the validity of the assignment could be verified under oath. Ultimately, we disagree with defendant that section 2-403 governs this case.

¶ 15 Standing is established by demonstrating an injury to a legally cognizable interest. *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419 (2005).

"The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit. The doctrine assures that issues are raised only by those parties with a real interest in the outcome of the controversy. [Citation.] This court has set forth the general principle that standing requires some injury in fact to a legally cognizable interest in *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). The claimed injury may be actual or threatened, and it must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions;

and (3) substantially likely to be prevented or redressed by the grant of the requested relief. [Citation.]" *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999).

¶ 16 The question of whether a plaintiff has standing to sue is determined from the allegations contained in the complaint. *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1101 (2011). A plaintiff need not allege facts establishing standing, as it is the defendant's burden to both plead and prove the plaintiff's lack of standing. *Chicago Teachers Union, Local 1 v. Board of Education*, 189 Ill. 2d 200, 206 (2000)). Our supreme court has held, "lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer*, 122 Ill. 2d at 508.

¶ 17 Defendant's argument that plaintiff lacked standing was forfeited when, on November 4, 2008, he withdrew his motion to dismiss in which he had raised plaintiff's lack of standing as grounds. The withdrawal of his motion effectively abandoned this affirmative defense. See *Chand v. Schlimme*, 138 Ill. 2d 469, 480 (1990).

¶ 18 Further, defendant failed to answer the complaint when ordered by the trial court to do so. As a result, the court entered a default judgment against defendant. Defendant acknowledges his procedural default, but requests this court vacate the default judgment in the interest of "justice and good conscience." In support, defendant cites *City National Bank of Hoopston v. Langley*, 161 Ill. App. 3d 266, 277 (1987), where this court vacated the default judgment, finding it void when the trial court lacked subject matter jurisdiction due to pleading deficiencies and plaintiff's failure to comply with section 15-108 of the Illinois Mortgage Foreclosure Law (Mortgage Foreclosure Law) (judicial foreclosure procedures currently governed by 735 ILCS 5/15-1501 to 15-1512 (West 2012)). However, we find the *Langley*

decision does not reflect the most current law with respect to a trial court's subject matter jurisdiction. See *Belleville Toyota, Inc.v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 340 (2002) (the court clarified that our present constitution supports the principle that the legal sufficiency of a plaintiff's pleading does not determine whether the trial court has subject matter jurisdiction). Rather, we find our supreme court's decision in *Wells Fargo Bank, N.A., v. McCluskey*, 2013 IL 115469, reflects the current law on this issue.

¶ 19 In *McCluskey*, our supreme court held that "up until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e) [(735 ILCS 5/2-1301(e) (West 2012))]." *McCluskey*, 2013 IL 115469, ¶ 27. "However, after a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a default 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 the Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012))]." *McCluskey*, 2013 IL 115469, ¶ 27.

¶ 20 Plaintiff filed its motion to confirm the sale in July 2013. Three days before the hearing on plaintiff's motion, defendant filed a "motion to dismiss" plaintiff's "order approving sale," which we consider as a motion filed pursuant to section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2012)), motion to vacate the default judgment. Under *McCluskey*, once plaintiff filed its motion to confirm the sale, defendant's request for relief from the sale and any default judgment was limited to the grounds set forth in section 15-1508(b) of the Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012)). We therefore address whether there is a basis to deny confirmation under this section.

¶ 21 Section 15-1508(b) of the Mortgage Foreclosure Law provides, in relevant part:

"Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2012).

¶ 22 It is clear from the plain language of this section the court is required to confirm a sale upon a hearing unless it finds at least one of the foregoing four grounds for denial exists. Accordingly, the party seeking to avoid confirmation of the sale has the burden of showing why the circumstances of the case fall within section 15-1508(b). *McCluskey*, 2013 IL 115469, ¶ 27.

¶ 23 Here, defendant did not offer the trial court any evidence demonstrating plaintiff failed to give requisite notice of the sale under section 15-1507, that the terms of the sale were unconscionable, or that the sale was conducted fraudulently, pursuant to section 15-1508(b)(i), (ii), and (iii). See 735 ILCS 5/15-1508(b) (West 2012). Instead, in response to the motion to confirm, defendant alleges, based upon the notice received from Nationstar Mortgage, plaintiff "no longer has standing to maintain the instant cause of action." We therefore consider defendant's argument within the framework of section 15-1508(b)(iv) only, which requires a showing that "justice was not otherwise done." See 735 ILCS 5/15-1508(b)(iv) (West 2012).

¶ 24 Our supreme court has explained, once a motion to confirm has been filed, a borrower seeking relief from a default judgment and sale pursuant to section 15-1508(b)(iv) must

demonstrate "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." *McCluskey*, 2013 IL 115469, ¶ 26.

¶ 25 Here, defendant abandoned his standing claim when he withdrew his motion to dismiss the foreclosure complaint. Additionally, he did not raise standing as an affirmative defense to the complaint, in that he defaulted without answering. Finally, in his motion to avoid the order confirming the sale, defendant did not attempt to demonstrate plaintiff, through fraud or misrepresentation, prevented him from timely raising the defense. As such, defendant is precluded from raising his claim at a point deemed untimely without complying with the provisions of section 15-1508(b) governing possible exceptions to the confirmation of judicial sales. See 735 ILCS 5/5-1508(b) (West 2012). Defendant forfeited his standing claim and, further was unable to demonstrate any justification for setting aside the judicial sale. Accordingly, the trial court did not abuse its discretion in confirming the sale pursuant to section 15-1508(b) of the Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012)).

¶ 26

III. CONCLUSION

¶ 27

For the reasons stated, we affirm the trial court's judgment.

¶ 28

Affirmed.