

No. 1-15-0010

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREEN TREE SERVICING, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CH 37528
)	
JANITA SIMPKINS,)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in awarding plaintiff summary judgment, where no genuine issue of material fact existed as to plaintiff's capacity to pursue mortgage foreclosure action.

¶ 2 Defendant Janita Simpkins, acting *pro se*, appeals from the trial court's order granting plaintiff Green Tree Servicing, LLC (Green Tree) summary judgment in Green Tree's mortgage foreclosure suit. Defendant argues that the trial court erred in granting Green Tree summary judgment because a genuine issue of material fact existed regarding Green Tree's standing to pursue the foreclosure suit.

¶ 3 We affirm the judgment of the trial court. Defendant submitted no evidence to support her affirmative defense that Green Tree lacked standing, and Green Tree demonstrated that it had

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standing, where it possessed the mortgage and note and attached assignments showing that it had obtained the right to pursue the foreclosure suit.

¶ 4

I. BACKGROUND

¶ 5 On August 31, 2006, defendants entered into a home mortgage loan with America's Wholesale Lender. The loan was secured with a mortgage listing Mortgage Electronic Registration Systems, Inc. (MERS) as mortgagee.

¶ 6 On August 30, 2010, BAC Home Loans Servicing, LP, (BAC) filed a complaint to foreclose on the mortgage. The complaint listed MERS as the mortgagee but asserted that BAC had the capacity to seek foreclosure as "the legal holder of the Mortgage and Note." BAC attached copies of the mortgage and note to its complaint. The copy of the note attached to the complaint was not endorsed to BAC or in blank.

¶ 7 Defendant answered the complaint and, in that answer, challenged BAC's standing to bring suit. Specifically, defendant argued that BAC had failed to allege any facts showing that the note or mortgage had been assigned to BAC by MERS.

¶ 8 On February 4, 2013, BAC moved to substitute Bank of America, N.A., (Bank of America) as the plaintiff in the case because BAC had merged with Bank of America. The trial court granted the motion to substitute.

¶ 9 On May 12, 2014, Bank of America moved to substitute Green Tree as the plaintiff in the case, because it had assigned the mortgage and note to Green Tree. As evidence of the assignment, Bank of America attached a written assignment of mortgage dated December 30, 2013. The trial court granted the substitution without objection from defendant.

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¶ 10 Green Tree then filed the motion for summary judgment at issue in this appeal. The motion included an affidavit from an officer of Green Tree, attesting to the veracity of documents showing that defendant had defaulted on the note.

¶ 11 Defendant filed a response to the motion for summary judgment, alleging that a genuine issue of material fact existed as to Green Tree's standing. Defendant argued that there was "no indication that the note and mortgage were ever assigned by [MERS] to *** BAC" and that "there was no copy of the original note attached to the complaint" filed by BAC. In support of her response, defendant provided her own affidavit, which said, "I do not owe the Plaintiff the [amount] it is dem[a]nding from me." The affidavit was not notarized and did not contain a verification pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2014)).

¶ 12 In its reply in support of the motion for summary judgment, Green Tree argued, among other things, that defendant had waived her standing defense because, although she did argue the lack of standing in her answer, she "fail[ed to] separately designate is [*sic*] as an affirmative defense." Green Tree also argued that there was no genuine issue of material fact as to its standing, because defendant did not present any evidence to prove lack of standing. To the contrary, Green Tree argued, the evidence showed that it was the proper holder of the note and mortgage. Finally, Green Tree argued that defendant's affidavit failed to comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002).

¶ 13 In support of that reply, Green Tree attached a copy of an assignment of the mortgage from MERS to BAC dated August 17, 2010. The assignment was recorded on October 22, 2010. Green Tree also attached a certificate of the merger of BAC and Bank of America, dated June 28, 2011, from the Texas Secretary of State; the assignment of the mortgage from Bank of

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America to Green Tree; and the trial court's order granting Bank of America's motion to substitute Green Tree as the plaintiff. Finally, Green Tree attached a copy of the note that had been endorsed in blank by the original lender, America's Wholesale Lender.

¶ 14 The trial court granted Green Tree's motion for summary judgment. In its written order, the trial court added, "No one in court for [defendant]." Defendant moved to vacate the order awarding Green Tree summary judgment due to her absence, but the trial court denied that motion.

¶ 15 The trial court entered a judgment for foreclosure and sale of the property. The court subsequently entered an order approving Green Tree's report of the sale of the property. Defendant appeals.

¶ 16

II. ANALYSIS

¶ 17 Defendant claims that a genuine issue of material fact existed regarding Green Tree's standing to pursue the foreclosure action. When a plaintiff lacks standing in a foreclosure action (*i.e.*, is not the proper party to pursue the foreclosure), summary judgment in favor of the plaintiff is improper as a matter of law. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 61. In a civil case, lack of standing is an affirmative defense and, consequently, the defendant bears the burden to plead and prove it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010); *Adeyiga*, 2014 IL App (1st) 131252, ¶ 61. It is not plaintiff's burden to prove that it possesses standing. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24; *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill.App.3d 1, 7 (2010).

¶ 18 Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment

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as a matter of law. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). We review a grant of summary judgment *de novo*. *Id.*

¶ 19 At the outset, we reject Green Tree's argument that defendant forfeited her lack-of-standing defense by failing to plead it as an affirmative defense. Defendant's answer stated:

"The Defendant denies that the Plaintiff has the capacity to bring this suit. Plaintiff has alleged no facts that support this conclusion. The note and mortgage dated August 31, 2006 that are attached to the complaint are for America's Wholesale Lenders with [MERS] as its nominee. There is no indication that this note and mortgage were ever assigned by [MERS] to *** BAC. Therefore, BAC lacks the standing to bring this suit."

Although defendant did not explicitly use the words "affirmative defense," we must liberally construe pleadings "with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c) (West 2012). Defendant's answer clearly apprised Green Tree of defendant's intent to challenge Green Tree's standing, and Green Tree does not allege that it suffered any prejudice by defendant's failure to use the magical words "affirmative defense." We find that defendant has not forfeited her lack-of-standing defense. See, *e.g.*, *Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 63-64 (defendant in mortgage foreclosure suit adequately pleaded lack of standing, where he argued that plaintiff lacked standing, even though he did not clearly plead it as affirmative defense).

¶ 20 We now turn to the merits of defendant's argument. First, defendant argues that Green Tree failed to show that it was the proper holder of the note and mortgage, where Green Tree did not produce the original note. But section 15-504 of the Illinois Mortgage Foreclosure Law does not require that the original note be attached to the complaint; it only references "a *copy* of the mortgage" and "a *copy* of the note secured thereby." (Emphases added.) 735 ILCS 5/15-1504(a)(2) (West 2010). The fact that Green Tree did not have the original note or mortgage

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attached to the complaint does not render the complaint defective. See *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 26 ("For over 25 years, the Foreclosure Law has been interpreted as *not* requiring plaintiffs' production of the original note, nor any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint.") (Emphasis in original.)). Nor does defendant explain how, even if we found the complaint to be defective, this would demonstrate Green Tree's lack of standing.¹

¶ 21 Second, defendant argues that the copy of the note attached to the complaint was not endorsed in blank and, consequently, Green Tree failed to establish that it was the proper holder of the note. But Green Tree produced a copy of the note, endorsed in blank, in support of its motion for summary judgment. A note endorsed in blank is payable to the bearer and "may be negotiated by transfer of possession alone." 810 ILCS 5/3-205(b) (West 2010); see also *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26 ("[T]he mere attachment of a note to a [foreclosure] complaint is *prima facie* evidence that plaintiff owns the note."); *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 24 (same).

¶ 22 Defendant submitted no counteraffidavits or other evidence to contradict or undermine the notion that Green Tree was the proper payee under the note. Her mere assertions that Green Tree was not a proper party are insufficient to create a genuine issue of material fact. See *Purtill*

¹ This case does not implicate Supreme Court Rule 113 (eff. May 1, 2013), which supplements the Mortgage Foreclosure Law with additional requirements regarding the note that is attached to the complaint. Rule 113 applies "only to those foreclosure actions filed on or after the effective date of May 1, 2013" (Supreme Court Rule 113(a) (eff. May 1, 2013)), and this complaint was filed several years before that date. See *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 26 n.4 (Rule 113 does not apply to complaints filed before effective date of rule).

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v. Hess, 111 Ill. 2d 229, 241 (1986) (party opposing motion for summary judgment "cannot rely on his pleadings alone to raise issues of material fact").

¶ 23 We recognize that the complaint filed by BAC did not have the endorsed copy of the note attached to it. That does not change the fact that Green Tree ultimately did produce the note, endorsed in blank, establishing that it was the proper holder of the note. Even if defendant could somehow persuade us that BAC did not have possession of the endorsed note—and defendant has done nothing to do so—Green Tree clearly is in possession of the note now.

¶ 24 Moreover, along with the note itself, Green Tree presented evidence establishing the chain of possession of the mortgage from MERS, the original mortgagee, to Green Tree. An assignment of mortgage dated August 17, 2010 (13 days before BAC filed the complaint) evidenced the previous transfer of the mortgage from MERS to BAC. BAC and Bank of America then merged, leading the trial court to grant BAC's motion to substitute Bank of America as the plaintiff in the case. Green Tree attached another assignment of mortgage dated December 30, 2013, showing the transfer of the mortgage from Bank of America to Green Tree. Defendant presented no evidence to counter any of the evidence demonstrating the assignments of the mortgage or suggesting that Green Tree had not been assigned the mortgage. As lack of standing was an affirmative defense, it was defendant's burden to do so.

¶ 25 Green Tree thus established that it was the current holder of both the note and the mortgage, making it a proper party to pursue the foreclosure.

¶ 26 Defendant cites *Bayview Loan Servicing, LLC v. Nelson*, 382 Ill. App. 3d 1184 (2008), but, in that case, the evidence firmly established that the plaintiff had never been assigned the mortgage. In *Nelson*, Bayview Loan Servicing, LLC filed the mortgage foreclosure complaint but attached an assignment showing that the original mortgagee had assigned its interest to

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Bayview Financial Trading Group, L.P., which was a separate legal entity. *Id.* 1185-87. And at oral argument, counsel for the plaintiff conceded that Bayview Loan Servicing, LLC was "not the correct plaintiff to have filed the complaint to foreclose the mortgage." *Id.* at 1187. As we have detailed above, this case is clearly different. Green Tree established its possession of both the mortgage and the note, and defendant has failed to carry her burden of proving otherwise or even raising a question of fact on the issue of standing.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated above, we affirm the circuit court's order granting summary judgment in Green Tree's favor. Defendant did not create any genuine issue of material fact as to Green Tree's standing, as she presented no evidence to contradict Green Tree's evidence that it possessed standing.

¶ 29 Affirmed.