FIRST DIVISION
MARCH 21, 2016

No. 1-15-0175

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK, N.A., as successor trustee to BANK OF AMERICA, N.A., as successor to LASALLE BANK, N.A., as trustee for the CERTIFICATEHOLDERS OF LEHMAN XS 2007-14H,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 12 CH 15375
ZOFIA BLACHANIEC and GRZEGORZ BLACHANIEC,	)	
Defendants-Appellants	)	
(Purgloss View Condominium Association; Unknown Owners and Nonrecord Claimants, Defendants).	)	Honorable Allen P. Walker, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted summary judgment to the plaintiff in its foreclosure action against the defendants pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2014). Notwithstanding the defendants' pleading of an affirmative defense that the plaintiff lacked standing, the defendants failed to raise any genuine issue of material fact, particularly because they failed to submit any counteraffidavit contradicting the affidavit

> submitted in support of the plaintiff's motion for summary judgment. Further, that affidavit also supported judgment in the plaintiff's favor pursuant to section 15-1506 of the Mortgage Foreclosure Law (735 ILCS 5/15-1506 (West 2014)).

¶ 2 Defendants-appellants Zofia and Grzegorz Blachaniec (the defendants) appeal from the circuit court's July 2014 order granting summary judgment in this mortgage foreclosure action, as well as from the December 2014 order approving the resulting sale of the mortgaged property. For the reasons set forth below, we affirm the orders of the circuit court.

¶ 3 BACKGROUND

¶ 4 On April 25, 2012, the plaintiff[1] filed its foreclosure complaint against the defendants as well as certain other parties (a condominium association and "unknown owners and nonrecord claimants,") who are not parties in this appeal. The complaint alleged that the defendants had entered into a mortgage encumbering real property commonly known as 6252 S. Newland Avenue, Unit #22S in Chicago (the property) to secure an original indebtedness in the amount of $190,000. As an exhibit, the complaint attached a corresponding mortgage dated March 2, 2007 (the mortgage), which identifies both defendants as the "Borrower," and GreenPoint Mortgage Funding, Inc. (GreenPoint) as the "Lender." The mortgage indicates that it encumbered the property as security for the repayment of a promissory note in the principal amount of $190,000.

[1] The initial complaint identified the plaintiff as "U.S. Bank N.A, as successor Trustee to Bank of America, N.A, as successor to LaSalle Bank, N.A, as Trustee for the Certificateholders of Lehman XS 2007-14H." On October 15, 2013, the plaintiff filed a "motion to correct misnomer" which stated that the complaint "did not completely and accurately identify the merger information for the trust which holds the subject note and mortgage being foreclosed," and thus sought to correct the plaintiff's name to "U.S. Bank National Association, successor trustee to Wilmington Trust Company as successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank, National Association as trustee for the holders of the LXS 2007-14H Trust Fund." On November 22, 2013, the court entered an order reflecting this correction.

¶ 5 As a separate exhibit, the complaint also attached an "adjustable rate note" dated March 2, 2007 (the note), in which Zofia Blachaniec, who signed the note as "Borrower," promised to repay a principal loan amount of $190,000, plus interest, to GreenPoint. Following the signature page signed by Zofia Blachaniec is a page that is blank, except for the language: "WITHOUT RECOURSE PAY TO THE ORDER OF: GreenPoint Mortgage Funding, Inc." Beneath that language is a signature followed by "Thomas K. Mitchell [,] Vice President." The note attached to the complaint does not include any endorsement of the note from GreenPoint to the plaintiff or to any other party, and does not otherwise reference the plaintiff. However, with respect to the "Capacity in which Plaintiff brings this foreclosure," the foreclosure complaint alleged that the plaintiff was "the Mortgagee under 735 ILCS 5/15-1208."

¶ 6 The complaint further alleged that the defendants were in default under the note and mortgage because they "have not paid the monthly installments of [p]rincipal, taxes, [i]nterest and insurance for 10/01/2011, through the present." The complaint alleged that the principal balance due on the note and mortgage was $177,079.08, "plus [i]nterest, costs, advances and fees," and alleged that interest continued to "accrue[] pursuant to the Note.""

¶ 7 In September 2012, the defendants moved to dismiss the foreclosure complaint, arguing that its allegations regarding the nature of default were "conclusory" and insufficiently specific, such that they were "unsure as to what the Plaintiff is alleging in its statement of default and cannot properly answer the complaint based on the given information." On December 14, 2012, the trial court denied that motion and directed the defendants to answer the complaint.

¶ 8 On January 15, 2013, the defendants filed their answer to the complaint (which was not verified), as well as a single affirmative defense. In their answer, the defendants admitted that the documents attached to the complaint were correct copies of the original note and mortgage,

but claimed defendants "lack[ed] sufficient information to admit or deny" "any alteration, alleged endorsement, note or other change since Defendant[s] signed" the original note and mortgage. The defendants also claimed they were "without sufficient information to admit or deny the allegations *** regarding default" as well as the plaintiff's allegations regarding its "capacity" to bring the action.

¶ 9 At the same time, the defendants pleaded a single affirmative defense of "standing." That affirmative defense suggested that the note's failure to specify an endorsement to the plaintiff indicated that the plaintiff was not a proper holder of the note. The affirmative defense alleged that, as plaintiff was "not the original lender of the mortgage," the plaintiff's standing "relies on an endorsement in blank of the Note." After reciting the contents of the last page of the note (which are mostly blank), the defendants claimed: "There is no endorsement on the Note itself even though there is room for an endorsement." The affirmative defense thus claimed: "The Plaintiff relies on an endorsement allonge that is ultra vires," and hence the plaintiff "lacks standing to foreclose on the mortgage because of a void endorsement."

¶ 10 On October 15, 2013, the plaintiff filed a "Motion for Summary Judgment Pursuant to 735 ILCS 5/2-1005 or, in alternative, for judgment pursuant to 735 ILCS 5/15-1506." That motion stated that the plaintiff was submitting a supporting affidavit "setting forth facts that establish the borrower is in default and the amounts that remain due on this account" and contended that the defendants' pleadings and affirmative defense had failed to establish a genuine issue of material fact.

¶ 11 At the same time, the plaintiff submitted a signed and notarized affidavit of Whitney Eckert dated September 17, 2013. In that affidavit, Eckert attested that she was an officer of

Bank of America, National Association (BANA), that BANA was the "plaintiff's servicing agent for the subject loan," and that she was authorized to sign the affidavit on behalf of the plaintiff.

¶ 12 Eckert attested that as part of her job responsibilities for BANA, she was familiar with the records maintained by BANA in connection with the loan to the defendants and that the information in the affidavit was derived from BANA's business records. She further attested that she had "personal knowledge of BANA's procedures for creating and maintaining these records" and that the records were: "(a) made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information ***; (b) are kept in the course of BANA's regularly conducted business activities; and (c) created by BANA as a regular practice."

¶ 13 Attached to the Eckert affidavit were BANA account statements, listing Zofia Blachaniec as "Borrower" and referencing the property, reflecting activity on the loan as of August 28, 2013. Those statements reflected that the last "regular payment" toward the loan had been made in September 2011, and that an outstanding "principal balance" of $177,079.08 remained. Eckert attested that she had reviewed the documents attached to the affidavit and that they were true and correct copies of BANA business records.

¶ 14 Eckert's affidavit further stated that the plaintiff "directly or through an agent, has possession of the promissory note" and that "[t]he promissory note has been duly indorsed." Eckert also averred that "[t]he attached business records show that Zofia Blachaniec defaulted by failing to make required payments, and as of 10/09/2013 the amount of the default is $197,057.21, ***." Eckert's affidavit proceeded to itemize the principal balance of $177,079.08, as well as interest, taxes, and other costs, totaling $197,057.21.

¶ 15 On January 6, 2014, the defendants filed a brief "response to summary judgment motion." That submission consisted solely of general statements of law regarding the standard for

deciding a motion for summary judgment, the requirements for affidavits supporting summary judgment pursuant to Illinois Supreme Court Rule 191, and the requirements for admissibility of business records. However, the defendant's submission did not attempt to apply any of these principles to assert any particular deficiencies in Eckert's affidavit or the attached documents.

¶ 16 Moreover, although the defendants' response to the summary judgment motion generally stated that "plaintiff needs to prove that no genuine issue of material fact exists" and "Defendant[s] do[] not have to prove that there is one," the defendants' response did not discuss any of the factual contentions in the plaintiff's submissions and did not attempt to identify any genuine issue of fact. Furthermore, the defendants did *not* submit any counteraffidavit to challenge any of the assertions in Eckert's affidavit or the documents attached thereto.

¶ 17 On February 28, 2014, the plaintiff filed a reply brief which noted that defendants did not state any genuine issue of fact and did not dispute plaintiff's "calculation of the default and damages." The reply brief noted that the defendants' "attack on the [Eckert] affidavit ultimately consists of nothing more than a recitation of law without argument, leaving Plaintiff to guess as [to] what Defendants' specific issue with the affidavit may be." The plaintiff argued that in any event, the Eckert affidavit and the attached business records established a *prima facie* case of foreclosure, and summary judgment should be granted since the defendants failed to file a counteraffidavit.

¶ 18 The plaintiff's reply brief additionally urged that, apart from summary judgment pursuant to section 2-1005 of the Code, the plaintiff was independently entitled to judgment pursuant to section 15-1506 of the Mortgage Foreclosure Law (735 ILCS 5/15-1506 (a)(1) (West 2014)). The plaintiff urged that under this provision, "Plaintiff's affidavit as to its damages was sufficient for Plaintiff to prove the allegation of its damage" without further evidence.

¶ 19 On April 4, 2014, the trial court entered an order granting summary judgment to plaintiff "as to liability," directing the plaintiff to submit an affidavit to prove its damages, and scheduling a "damages hearing." On May 23, 2014, the plaintiff's servicing agent submitted an affidavit stating that the total amount due and owing under the note as of May 2014 was $200,433.74. The plaintiff's counsel later submitted a "Supplemental Certificate of Prove-Up of Attorney Fees and Costs" stating that an additional $3,944 in such costs should be assessed against the defendants pursuant to the terms of the mortgage and note.

¶ 20 On July 11, 2014, the trial court entered a written "Order for Summary Judgment" stating it had reviewed the defendants' "Affirmative Defense(s) and determin[ed] that said Affirmative Defense(s) as pleaded without sufficient supporting documentation, do not raise a genuine issue of material fact sufficient to preclude the entry of Summary Judgment in favor of Plaintiff." On the same date, the court entered a "Judgment for Foreclosure and Sale" finding that the defendants owed the sum of $205,687.38 pursuant to the mortgage and note, and ordered a judicial sale of the property by public auction.

¶ 21 A judicial sale was held on October 14, 2014, at which the plaintiff purchased the property. On December 17, 2014, the court entered an order approving and confirming the sale.

¶ 22 On January 14, 2015, the defendants filed a notice of appeal from the July 11, 2014 orders granting summary judgment and entering judgment of foreclosure and sale, as well as from the December 17, 2014 order approving the judicial sale of the property.

¶ 23 ANALYSIS

¶ 24 We note that we have jurisdiction because the defendants filed a notice of appeal within 30 days of the final judgment confirming the judicial sale of the property. See Ill. S. Ct. R. 303(a) (eff. May 30, 2008).

¶ 25 We note the applicable respective standards of review for: (1) the order granting summary judgment, which resulted in an order of foreclosure and sale; and (2) the order confirming the judicial sale of the property.

¶ 26 "The purpose of summary judgment is not to try an issue of fact, but to determine whether a triable issue of fact exists. [Citations.] Although a plaintiff is not required to prove his [or her] case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 54. Summary judgment is proper "only 'if 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 a judgment as a matter of law.' " *Id.* ¶ 55 (quoting 735 ILSC 5/2-1005(c) (West 2010)).

¶ 27 "Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is clear and free from doubt. [Citation.] Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. [Citation.] However, summary judgment requires the responding party to come forward with the evidence that it has ***. [Citations.] We review a trial court's decision on a motion for summary judgment *de novo*." (Internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14.

¶ 28 With respect to standard of review applicable to an order confirming judicial sale, our court has noted that "section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508(b) (West 2010) grants broad discretion to courts in approving or disapproving judicial sales." *Parkway*

Bank & Trust Co., 2013 IL App (1st) 130380, ¶ 15. Thus, "[w]e review approval of judicial sales for abuse of discretion." *Id.*

¶ 29 With these standards in mind, we address the defendant's argument on appeal, which is limited to the contention that its affirmative defense of lack of standing precluded summary judgment or judgment of foreclosure. The defendants argue that there is a "possible issue with respect to standing," as they assert "a possible issue with the assignment of the mortgage and note" calling into question whether the plaintiff was the legal holder of those instruments.

¶ 30 The defendants do not identify any evidence that affirmatively supports this claim, but rely on the fact that the note does not contain an explicit endorsement to the plaintiff. They argue that "there is room on the note for the assignment to have been made on the face of note," but no assignment to the plaintiff appears on that document. They contend that the absence of such an assignment may violate an unidentified contract: "If the parties were governed by a standard pooling and servicing agreement[], it is possible that the agreement requires assignment to be evidenced on the face of the note, unless there was not enough room to do so on the face." The defendants thus suggest that since the note attached to the complaint did not include an explicit endorsement to the plaintiff, the plaintiff may lack standing. The defendants also complain that they "were not able to take discovery on that matter" before summary judgment was entered.

¶ 31 As set forth below, we conclude that this claim of lack of standing does not present a genuine issue of material fact to defeat the motion for summary judgment, particularly in light of Eckert's uncontroverted affidavit and supporting documents.

¶ 32 "When a plaintiff lacks standing in a foreclosure action, the trial court's entry of summary judgment and orders of foreclosure and sale are improper as a matter of law." *Bank of America,*

N.A, 2014 IL App (1st) 131252, ¶ 60. However, we have made clear that "[s]tanding is an affirmative defense and, as such, it is the defendant's burden to prove that the plaintiff does *not* have standing. [Citation.] It is not the plaintiff's burden to prove it does have standing." (Emphasis in original.) *Parkway Bank & Trust Co.*, 2013 IL App (1st) 130380, ¶ 24.

¶ 33 "To establish a *prima facie* case of foreclosure in accordance with section 15-1504 [of the Foreclosure Law], a plaintiff is required to introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant to prove any affirmative defenses. [Citations.] Section 15-504 does not require that a foreclosure be filed by the *owner* of the note and mortgage, and instead states that the legal *holder* of the indebtedness, a pledge, an agent, or a trustee may file the lawsuit. 735 ILCS 5/15-1504(a)(3)(N) (West 2010))." (Emphasis in original.) *Bank of America, N.A*, 2014 IL App (1st) 131252, ¶ 67. Moreover, "[t]he mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note [Citation.]" *Parkway Bank & Trust Co.*, 2013 IL App (1st) 130380, ¶ 24.

¶ 34 In this case, the defendants' answer *admitted* that the plaintiff attached the original note and mortgage to the complaint (notwithstanding their claim that they lacked information or belief as to any subsequent alterations thereto). This established a *prima facie* case that the plaintiff owned the note and had standing.

¶ 35 Moreover, Eckert's affidavit submitted in support of the plaintiff's summary judgment motion additionally stated that the plaintiff "has possession of the promissory note" and that the note "has been duly indorsed." Thus, the "burden then shifted to [defendants] to prove that the [plaintiff] did not have standing." *Bank of America, N.A.*, 2014 IL App (1st) 131252, ¶ 73 (explaining that burden to prove affirmative defense of lack of standing shifted to defendant after

the plaintiff bank submitted an affidavit of a bank officer averring that the bank held the promissory note and the assignment of the mortgage).

¶ 36 Notably, although the defendants' brief in the trial court suggested that the Eckert affidavit did not comply with Supreme Court Rule 191(a) (eff. Jan. 4, 2013)[2], the defendants' argument on appeal asserts no challenge to the propriety of the Eckert affidavit. Indeed, their reply brief admits that their argument in the trial court as to the "sufficiency of the affidavit" has been "abandoned on appeal." Thus, the defendants forfeited any challenge to the affidavit. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in the appellant's brief] are waived").

¶ 37 In any case, our review of Eckert's affidavit indicates that it satisfies Rule 191, as it indicated that, based on her personal knowledge, Eckert could competently testify that the plaintiff was the holder of the note and that the business records maintained in connection with the loan evidenced a default. See *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22 ("If, from the document as a whole it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.").

¶ 38 Further, in opposition to the motion for summary judgment, the defendants failed to submit any counteraffidavit, or to otherwise identify any evidence contradicting Eckert's affidavit. As a result, the statements in Eckert's affidavit must be taken as true. " 'When

[2] In relevant part, the rule requires that affidavits in support of a motion for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon with the claim *** 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." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

affidavits presented in support of summary judgment are not contradicted by counter-affidavits, they must be taken as true, even though the adverse party's pleadings allege contrary facts.' " *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 53; see also *Parkway Bank & Trust Co.*, 2013 IL App (1st) 130380, ¶ 50 (Where "the party opposing the [summary judgment] motion files no counteraffidavits, the material facts set forth in the movant's affidavits stand as admitted. [Citation.] The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact. [Citation.]").

¶ 39 In this case, the defendants cannot merely stand on their pleading of a purported lack of standing to avoid summary judgment. At most, the defendants' argument suggests a "possible issue" as to whether the note was properly assigned to the plaintiff, under hypothetical terms of an unidentified pooling and servicing agreement: "If the parties were governed by a standard pooling and servicing agreement[s] it is possible that the agreement required assignment to be evidenced on the face of the note." However, "[m]ere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment." *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584 (2007); see also *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (1995) ("The mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment.").

¶ 40 Further, the defendants cannot avoid summary judgment at this late stage by claiming that they must be allowed discovery to find support for their claim of lack of standing. Our court has explained that defendants "who contend that crucial evidence necessary to oppose the [summary judgment] motion is in the hands of the movant or other adverse parties, who have not responded to a discovery request" may submit an affidavit pursuant to Supreme Court Rule

191(b) (eff. Jan. 4, 2013)[3] seeking relief from the trial court. *Parkway Bank & Trust Co.*, 2013 IL App (1st) 130380, ¶ 48. However, "parties who fail to file Rule 191(b) affidavits cannot complain that the 'discovery process was insufficient or limited.' " *Id.*

¶ 41 The plaintiff's pleadings, supporting affidavit and the attachments thereto established its *prima facie* right to foreclosure of the mortgage, and the defendants failed to establish any genuine issue of material fact to doubt the plaintiff's standing. Thus, we conclude that the trial court correctly granted summary judgment. In turn, as the defendants raise no other claim of error with respect to the trial court's order approving the judicial sale of the property, we have no difficulty in concluding that the court did not abuse its discretion in entering that order.

¶ 42 Separate from our conclusion that the plaintiff was entitled to summary judgment due to the lack of a genuine issue of material fact, we also agree with the plaintiff's secondary argument that judgment in its favor was *independently* warranted under section 15-1506(a)(1) of the Foreclosure Law, which provides:

> "In the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court, except:
>
> (1) where an allegation of fact in the complaint is not denied by a party's verified answer or verified

[3] Rule 191(b) provides that: "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure *** naming the person and showing why their affidavit cannot be procured and what affiant believes they would testify to if sworn *** the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof." Ill. S. Ct. R. 191 (b) (eff. Jan. 4, 2013).

> counterclaim, or where a party pursuant to subsection (b) of Section 2-610 of the Code of Civil Procedure states, or is deemed to have stated, in its pleading that it has no knowledge of such allegations sufficient to form a belief and attaches the required affidavit, a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required." 735 ILCS 5/15-1506(a)(1) (West 2014).

Although not relied upon by the trial court (and not necessary to affirm summary judgment in plaintiff's favor), this Foreclosure Law provision also supported judgment for the plaintiff.

¶ 43 Specifically, the defendants' answer to the foreclosure complaint pleaded that they had no knowledge to admit or deny key allegations of the complaint —including the alleged payment default under the note, and the plaintiff's capacity to bring the foreclosure action. Moreover, we note that the defendants' answer was not verified and also did not comply with the requirement that a party pleading insufficient knowledge to admit or deny an allegation must "attach[] an affidavit of the truth of the statement of want of knowledge." 735 ILCS 5/2-610(b) (West 2012). Thus, those allegations were essentially admitted. See *id.* ("Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states *** that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny.") Thereafter, the plaintiff submitted the Eckert affidavit, which provided evidence of the default and the plaintiff's standing. Thus, for purposes of section 15-1506(a)(1) of the Foreclosure Law,

the Eckert affidavit constituted "a separate affidavit setting forth such fact[s]," such that "no further evidence of such fact[s] [was] required." 735 ILCS 5/15-1506(a)(1) (West 2014). Thus, the uncontroverted Eckert affidavit not only supported summary judgment pursuant to section 2-1005 of the Code, it also supported the plaintiff's entitlement to a judgment of foreclosure under section 15-1506 of the Foreclosure Law.

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.