FIRST DIVISION
December 12, 2016

No. 1-16-0448

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

BEAL BANK SSB,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 2011 CH 1937
	)	
KAREN GALLO, a/k/a KAREN DEMICHAEL,	)	Honorable
	)	Anna M. Loftus,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's grant of summary judgment in favor of plaintiff, and the denial of defendant's motion to reconsider, where plaintiff's possession of the original note, along with the assignment of the mortgage and the note, constituted *prima facie* proof that plaintiff was entitled to foreclose the note and mortgage, and plaintiff attached the mortgage, note, assignments and allonges to its foreclosure complaint.

¶ 2 Defendant, Karen Gallo a/k/a Karen DeMichael, appeals the order of the trial court granting summary judgment and entering a judgment of foreclosure in favor of petitioner, Beal Bank SSB. On appeal, defendant contends the trial court erred in granting summary judgment

where a genuine issue of material fact exists whether plaintiff had standing to bring its foreclosure claim. Defendant also argues that the trial court erred in denying her motion to reconsider because the evidence creates a question of fact whether the assignment of the promissory note to plaintiff was valid. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered its order of summary judgment and judgment of foreclosure on May 27, 2015. The trial court denied defendant's motion to reconsider on February 4, 2016. On that same day, the trial court entered an order approving report of sale and distribution, confirming sale, and possession. Defendant filed a notice of appeal on February 16, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 The following facts are relevant for purposes of this appeal. On May 31, 2007, defendant purchased a single family residence located at 7515 West Roscoe Street in Chicago, Illinois. Defendant executed a mortgage delivered to Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the lender, Senderra Funding LLC (Senderra). Defendant also executed an adjustable rate note in the amount of $408,000 to fund the purchase. Terms of the mortgage provided that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to the Borrower." The note also provided that the lender "may transfer this Note" and "anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the Note Holder." The endorsement line of the note remained blank, and underneath stated "without recourse, Senderra

Funding LLC" signed by Heather McLean, "Custody & Warehouse Mngr." Defendant subsequently defaulted on the note by failing to make the required monthly payments.

¶ 7 As a result of a clerical error, MERS recorded an assignment of the mortgage to Beal Service Corporation on behalf of Senderra on April 16, 2009. Beal Service Corporation filed a foreclosure action against defendant on June 2, 2009, but it voluntarily dismissed the complaint on March 28, 2011. The erroneous assignment was subsequently rescinded.

¶ 8 Meanwhile, on June 18, 2009, MERS properly assigned the mortgage and note to LLP Mortgage Ltd. (LLP) on behalf of Goldman Sachs Mortgage Company (Goldman Sachs). LLP filed a complaint for foreclosure on January 14, 2011, and attached as exhibits copies of the mortgage, the original note with an allonge endorsed in blank, and the assignment of the mortgage to LLP from MERS. LLP had all documents in its possession when it filed the complaint. LLP thereafter assigned the mortgage and note to Beal Nevada Corp. on December 31, 2012, and on that same date Beal Nevada Corp. assigned the documents to Beal Bank, the plaintiff in this appeal. All three assignment documents stated that the assignor "hereby assigns, transfers, sets over and coveys to Assignee *** that certain Mortgage from [plaintiff], dated May 31, 2007" and "that certain Promissory Note dated May 31, 2007, in the original principal amount of $408,000.00, executed by [plaintiff] and payable to the order of Senderra Funding LLC., as modified or amended." The assignments were dated and notarized. Beal Bank was substituted as plaintiff in LLP's foreclosure action on July 25, 2013.

¶ 9 Three "Note Allonge[s]" were also executed during the course of these assignments. Each allonge stated that it "is to be attached and made part of" the note made by defendant "in the original principal amount of $408,000.00" dated May 31, 2007, and "payable to Senderra Funding LLC." The first allonge stated that it was payable to LLP as "Assignee," without

recourse, by Goldman Sachs. The second stated it was payable to Beal Nevada Corp., without recourse, by LLP. The third stated it was payable to Beal Bank, without recourse, by Beal Nevada Corp.

¶ 10 Defendant filed her answer to plaintiff's complaint on May 6, 2014. In her answer, defendant alleged the following affirmative defenses: (1) plaintiff does not possess the original note; (2) plaintiff and/or its predecessors violated various provisions of the Home Ownership Equity Protection Act (HOEPA); (3) plaintiff and/or its predecessors violated provisions of the Truth in Lending Act (TILA); and (4) plaintiff and/or its predecessors violated provisions of the Real Estate Settlement Procedure Act (RESPA).

¶ 11 Plaintiff filed a motion for summary judgment, attaching copies of the mortgage and note executed by defendant, and of the assignments of the mortgage and note from MERS to LLP, from LLP to Beal Nevada Corporation, and from Beal Nevada Corporation to plaintiff, and the allonges. Plaintiff also attached the "Affidavit of Amounts Due and Owing" of Tracy A. Duck, who was an "Authorized Signer" of plaintiff. Duck stated that she had personal knowledge of the facts contained in the affidavit "by virtue of [her] job duties for [plaintiff] and [her] familiarity with its practices and procedures, with which [she is] involved on a daily basis as a routine function of [her] job duties." She further stated that plaintiff "has possession of the original note that is the subject matter of this cause of action." The affidavit outlined the procedure used by plaintiff to record and track payments, and the records generated by the process which showed that defendant failed to make payments from October 2008 to August 2014, resulting in a total amount due of $678,528.98.

¶ 12 In defendant's answer to the summary judgment motion, she challenged plaintiff's standing to bring the foreclosure action arguing that when Senderra executed the original

mortgage and note it was no longer authorized to do business in Illinois and in fact had merged with another entity (Avelo Mortgage LLC) as of May 31, 2007, and that the allonges contained inconsistencies creating a genuine issue of material fact as to the validity of the assignments. Defendant also argued that she never received a grace period notice as required by statute. Defendant stated that in January 2015, her counsel was allowed to inspect the note, mortgage, and allonges at the office of plaintiff's attorneys after making repeated demands to inspect these documents. The trial court granted summary judgment in favor of plaintiff and entered a judgment of foreclosure and sale in the amount of $683,534.98.

¶ 13 Defendant filed a motion to reconsider, arguing that plaintiff failed "to establish or prove MERS had authority to transfer the mortgage" and "meet its burden of proof in demonstrating that it is the lawful holder and/or assignee of the [note]" and therefore, MERS' assignment of the note "is a nullity." Defendant also argued that the trial court erred in finding that MERS' erroneous assignment to Beal Service Corporation on April 16, 2009, was not relevant to plaintiff's foreclosure action. Defendant stated that she also recently discovered that Tracy Duck was never an employee of plaintiff. In response, plaintiff argued that under Illinois law, possession of the original note endorsed in blank, which plaintiff has shown, is sufficient to confer standing in a foreclosure action and that defendant's evidence about Tracy Duck was not newly discovered evidence. The trial court approved the foreclosure sale on February 4, 2016, and after a hearing on February 9, 2016, it denied defendant's motion to reconsider. Defendant filed this timely appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant contends that the trial court erred in granting summary judgment in favor of plaintiff where the documentary evidence raised a question of material fact as to

whether plaintiff was the rightful note holder. Plaintiff, however, argues that defendant waived the affirmative defense of lack of standing because she failed to raise the issue in her answer to the complaint. Instead, defendant raised the issue for the first time in her answer to plaintiff's motion for summary judgment. Generally, a party must set forth an affirmative defense in its answer to a complaint and failure to do so results in waiver of the defense. *Horwitz ex rel. Gilbert v. Bankers Life and Casualty Co.*, 319 Ill. App. 3d 390, 399 (2001). However, courts have allowed defendants to raise the affirmative defense for the first time in a motion for summary judgment, and have found waiver inappropriate where the party asserting waiver has had time to respond to the defense and has not been unfairly prejudiced. *Id.* Although defendant here raised the issue of standing for the first time in her answer to plaintiff's summary judgment motion, plaintiff was able to file a response to defendant's answer in which plaintiff fully addressed the standing issue. Plaintiff also does not claim prejudice, nor is there any evidence of prejudice since the trial court ultimately granted summary judgment in plaintiff's favor. Therefore, we find waiver of the standing issue in this circumstance inappropriate.

¶ 16 Summary judgment is proper where the pleadings, affidavits, depositions, and admissions on file, viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *US Bank, National Ass'n v. Advic*, 2014 IL App (1st) 121759, ¶ 21. If the moving party alleges facts which, if not contradicted, would entitle the party to judgment as a matter of law, the opposing party cannot rely solely on his pleadings to raise a question of material fact. *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 9. We review an order granting summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 17 Since lack of standing is an affirmative defense, it is defendant's burden to establish that a genuine issue of material fact exists as to plaintiff's standing. *Korzen*, 2013 IL App (1st) 130380, ¶ 24. Defendant argues that the allonges provided by plaintiff raise doubt on plaintiff's claim that it is the rightful note holder and mortgagee. Pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law), an action to foreclose the mortgage may be brought by (1) the legal holder of the indebtedness; (2) any party designated or authorized to act on behalf of the holder; or (3) an agent or successor of a mortgagee. 735 ILCS 5/15-1504(a)(3)(N) (West 2012). However, a *prima facie* case for foreclosure is established if the complaint, with the mortgage and note attached, conforms to the requirements set forth in section 15-1504(a). *Korzen*, 2013 IL App (1st) 130380, ¶ 24. Also, by attaching a copy of the note, plaintiff provides *prima facie* evidence that it owned the note. *Advic*, 2014 IL App (1st) 121759, ¶ 37.

¶ 18 Here, plaintiff attached a copy of the mortgage and note to the foreclosure complaint. Plaintiff also attached copies of the assignments of the mortgage and note, including the assignment of the documents to plaintiff from Beal Nevada Corp., and the allonges. Furthermore, defendant acknowledged that plaintiff had the note in its possession, stating in her answer to plaintiff's summary judgment motion that in January 2015, her counsel was allowed to inspect the note, mortgage, and allonges at the office of plaintiff's attorneys. Plaintiff's possession of the original note, along with the assignment of the mortgage and the note, "is *prima facie* proof that it is entitled to foreclose the note and mortgage." *Sconyers*, 2014 IL App (1st) 130023, ¶ 11.

¶ 19 Defendant argues, however, that she brought to the trial court's attention information about the allonges, pointing out that the allonge "purportedly executed by Goldman Sachs is undated, without the name of the person signing it, and in what capacity he or she signed it." Therefore, this "allonge relied upon by the Plaintiff in transfer of the promissory note was

without proper authentication and identification and was not proved to be what it purports to be." Plaintiff is not required to plead or prove facts to establish standing in a foreclosure case. *Korzen*, 2013 IL App (1st) 130380, ¶ 24. Further, section 3-308(a) of the Uniform Commercial Code (Code) provides that the signature on a negotiable instrument is presumed to be authentic and authorized, and the burden rests with the party challenging the validity of the signature to produce evidence to overcome this presumption. 810 ILCS 5/3-308(a) (West 2012).

¶ 20 In a supplemental brief to her motion to reconsider, defendant states that as part of a complaint she has recently filed, she spoke to Mr. Robert Reid at Goldman Sachs who told her that the allonge purportedly signed by Goldman Sachs was "not from Goldman Sachs." Defendant alleges that she asked Mr. Reid to confirm his statements in writing but he refused. Defendant has not established, through discovery or otherwise, that the Goldman Sachs signature was not authorized. We reiterate that when the moving party alleges facts which, if not contradicted, would entitle the party to judgment as a matter of law, the opposing party cannot rely solely on her pleadings to raise a question of material fact. *Sconyers*, 2014 IL App (1st) 130023, ¶ 9. As discussed above, plaintiff attached copies of the mortgage, the note, and the assignments to the foreclosure complaint, which constitute *prima facie* proof that plaintiff is entitled to foreclose the note and mortgage. Defendant has not alleged sufficient facts to the contrary. The trial court did not err in granting summary judgment in favor of plaintiff.

¶ 21 Defendant also argues that she discovered after summary judgment was granted that Tracy Duck was not an employee of Beal Bank as she stated in her affidavit, and Duck also improperly stated that Beal Bank acquired the servicing rights to defendant's loan from Bank of America/Countrywide, although no documentary evidence existed to support her statement. Defendant argues that such an affidavit raises questions of material fact, and the trial court erred

in denying her motion to reconsider. The purpose of a motion to reconsider is to bring the court's attention to newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 987 (1987). Newly discovered evidence is evidence that was not available prior to the hearing and in the absence of a reasonable explanation as to why it was not previously available, the trial court has no obligation to consider the evidence. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 30.

¶ 22 First, it is unclear from her affidavit whether Duck stated she was an employee of Beal Bank, or whether she performed work for them as an employee of another company. If Duck was not an employee of Beal Bank, that information could have been known to defendant prior to the hearing and defendant has not offered a reasonable explanation why she did not have that information at the time. We further note that this statement alone, if improper, does not necessarily render Duck's entire affidavit invalid. Defendant does not contend that Duck's affidavit otherwise fails to comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), which governs the form of affidavits used in connection with motions for summary judgment. If only portions of the affidavit are improper under Rule 191(a), "a trial court should only strike the improper portions of the affidavit." *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003).

¶ 23 Defendant makes similar arguments regarding Denise Bailey, who signed the assignments on behalf of MERS but who defendant now argues was not employed by MERS nor did she have the authority to sign for MERS. Again, assuming the truth of defendant's argument, this information could have been discovered prior to the hearing. Also, defendant does not provide evidence to overcome the presumption that Bailey's signature was authorized, or cite authority in support of her arguments. For these reasons, the trial court was under no obligation

to consider the "new" evidence concerning Duck and Bailey, and we affirm the denial of defendant's motion to reconsider.

¶ 24 Finally, we note that defendant's failure to cite any authority to support her contentions, or her reasoning, is in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) (argument in a brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). This violation generally constitutes a waiver of those issues on appeal. See *Universal Casualty Co. v. Lopez*, 376 Ill. App. 3d 459, 465 (2007) (arguments not supported by relevant authority and coherent legal argument are waived). A reviewing court is not a repository into which an appellant may "dump the burden of argument and research" nor is the court obliged to seek error in the record. *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). Waiver, however, is a limitation on the parties rather than on the court. *People v. Hoskins*, 101 Ill. 2d 209, 219 (1984). Although we chose to address the merits of this appeal, we urge counsel to be mindful of Rule 341(h)(7) when preparing future briefs for appeal.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.