2016 IL App (2d) 150557-U
No. 2-15-0557
Order filed April 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CITIBANK, N.A., as Trustee for the Holders of Structured Asset Mortgage Investments II Trust 2007-AR3, Mortgage Pass-Through Certificates, Series 2007-AR3,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-4863
LAWRENCE S. WICK,	)	Honorable Luis A. Berrones,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: On plaintiff's foreclosure complaint, the trial court properly: (1) granted plaintiff bank's summary judgment motion and denied defendant's motion; and (2) confirmed the judicial sale. Affirmed.

¶ 2 Plaintiff, Citibank, N.A., as Trustee for the holders of structured asset mortgage investments II trust 2007-AR3, mortgage pass-through certificates, series 2007-AR3, filed a mortgage foreclosure complaint pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2014)), on defendant's, Lawrence S. Wick's, property

in Lake Bluff. Defendant challenged Citibank's standing by way of affirmative defenses and counterclaims. The trial court granted Citibank's summary judgment motion, denied defendant's summary judgment motion, and, subsequently, confirmed the sale to Citibank. Defendant, *pro se*, appeals, challenging the trial court's judgment of foreclosure and the order confirming the sale. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 23, 2009, Citibank filed its foreclosure complaint on defendant's property at 317 Rothbury Court in Lake Bluff (tax identification No. 12-17-305-005-0000). Citibank alleged that defendant executed a note and mortgage on the property on December 18, 2006, and that he had been in default since October 2008. It listed "M.E.R.S., INC" as the original nominee for Diamond Bank, FSB, the mortgagee/lender. The original indebtedness was for $600,000. Attached to the complaint was a copy of the mortgage and the note. The note contains an endorsement to Countrywide Bank, FSB.

¶ 5 In November 2009 and September 2010, defendant, *pro se*, filed an answer, affirmative defenses, and counterclaims. He challenged Citibank's standing (asserting that it had no right, title, or interest in the mortgage and note) and asserted claims for fraud, unclean hands, mistake, misrepresentation, fraudulent inducement, and various statutory violations. Defendant admitted that his mortgage with Diamond Bank was assigned to Countrywide Bank and then to Bank of America, N.A. (According to defendant, Countrywide Bank merged into Bank of America, and he made payments to Bank of America into 2009.)

¶ 6 Although the document is not contained in the record on appeal, Citibank apparently moved to dismiss. On May 3, 2011, in a document contained in the record, the trial court struck/dismissed the standing and fraud claims without prejudice. The remaining affirmative

defenses (unclean hands, mistake, misrepresentation, and fraudulent inducement) were stricken with prejudice, and the remaining counterclaims (federal debt collection statute and Foreclosure Law claim) were dismissed with prejudice. The court also denied without prejudice defendant's motion for summary judgment and denied his motion for sanctions.

¶ 7 On May 23, 2011, defendant filed amended answers, affirmative defenses (standing and fraud), and counterclaims (fraud, misrepresentation, statutory fraud). He attached the affidavit (prepared for Citibank) of Marcia Kazarian, of BAC Home Loan Servicing, L.P., who averred that BAC provides mortgage loan servicing to Citibank. Kazarian further averred that the subject note was acquired by Citibank from Countrywide Bank (via a blank endorsement as reflected in an attached copy of the note), which, in turn, acquired the note from Diamond Bank. According to Kazarian, the assignment to Citibank occurred on October 19, 2009, (from M.E.R.S., as nominee for Diamond Bank). The trust for which Citibank is trustee was created pursuant to the terms of a pooling service agreement (PSA) dated April 1, 2007, and an exhibit to the PSA contains a schedule of mortgage loans that were delivered to the trustee and includes defendant's loan (a copy of which was attached to the affidavit). Defendant's May 23, 2011, filing contains for the first time in the appellate record a copy of the endorsement page of the subject note that contains (in addition to the endorsement from Diamond Bank to Countrywide Bank) a *blank* endorsement from Countrywide Bank (signed by Laurie Meder, Senior Vice President).

¶ 8 As to his standing affirmative defense, defendant first argued that Citibank lacked standing because the assignment it tendered (exhibit No. 4) was not valid where it referred to a property in Cook County, which is not the location of defendant's property.[1] Second, defendant

[1] The document, entitled "ASSIGNMENT OF MORTGAGE" and prepared by a

argued that a *corrective* assignment that Citibank tendered (exhibit No. 8) was not valid because it was dated more than 15 months after Citibank's filing of its complaint; standing, according to defendant, must be documented by an assignment dated prior to the foreclosure complaint.[2] Third, defendant argued that the blank endorsement (exhibit No. 10) noted above was an invalid assignment because it was not an original, dated, or attested document.

¶ 9 Citibank moved to dismiss, a copy of which is not included in the record. Defendant submitted a declaration in response. On September 20, 2011, the trial court struck/dismissed with prejudice defendant's fraud affirmative defense and his fraud counterclaims. The court struck/dismissed without prejudice defendant's standing affirmative defense.

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certifying officer of M.E.R.S. (Diana Athanasopoulos, whom defendant asserted was also an attorney at Citibank's counsel's firm, Pierce & Associates, P.C., at the time), states that M.E.R.S., as nominee for Diamond Bank, assigned to Citibank as trustee, "prior to 10/19/09" defendant's mortgage. It describes the mortgage as being recorded in Lake County, but the legal description of the property states that it is located in Cook County. The document was signed on October 19, 2009, and is notarized.

[2] The document, entitled "CORRECTIVE ASSIGNMENT OF MORTGAGE," is similar to the previous document prepared by M.E.R.S. that purports to document the assignment of defendant's mortgage to Citibank, but references Lake County in the legal description of defendant's property. It also states that the assignment occurred prior to September 3, 2009. (Citibank's complaint was filed on October 23, 2009.) The document was signed on February 8, 2011, and is notarized.

¶ 10 On January 3, 2012, defendant filed an amended answer and second amended affirmative defenses, challenging Citibank's standing. He did *not* re-plead any of his previously-dismissed fraud claims.

¶ 11 On January 31, 2013, defendant moved for summary judgment on the standing issue. Citibank also filed a summary judgment motion, which is not contained in the record (nor are Citibanks's response briefs).

¶ 12 On June 6, 2013, the trial court conducted a hearing on the motions. Citibank tendered the note with the blank endorsement, which the trial court read into the record. Citibank argued that its possession of bearer paper alone established its standing. It also noted that two affidavits supported its position, but the trial court disagreed, questioning their foundation. The court also rejected defendant's argument that his loan was not contained in the PSA, noting that the loan was listed in a schedule to the PSA. Returning to Citibank's affidavits, the court determined that they lacked the foundation to permit the court to accept the supporting documents that authenticated the documents evidencing defendant's loan was part of the PSA. The court granted Citibank leave to file supplemental affidavits to support its summary judgment motion, and the summary judgment motions were entered and continued. (Subsequently, Citibank filed supplemental affidavits, which we address in detail in our analysis.)

¶ 13 On August 9, 2013, the trial court conducted a hearing on the continued summary judgment motions. The court granted Citibank's summary judgment motion and denied defendant's summary judgment motion and multiple motions to strike. It continued the matter to August 23, 2013, for entry of a judgment of foreclosure and ordered Citibank to provide defendant a copy of the proposed order by August 15, 2013.

¶ 14 On August 19, 2013, defendant filed his objections to the entry of a foreclosure judgment, arguing that opposing counsel failed to mail to him a copy of Citibank's proposed order; Citibank had falsified multiple documents; and that Citibank concealed facts that it had not proved succession or that defendant's mortgage and note were in Citibank's PSA by the time it filed its complaint.

¶ 15 At the August 23, 2013, court date, defendant did not appear. An order entered that date continued the case to September 6, 2013, and overruled defendant's objections. (Defendant claims that Citibank never sent him a copy of the August 23, 2013, order.)

¶ 16 On September 6, 2013, the trial court entered the judgment of foreclosure, and it overruled defendant's objections. Defendant did not appear.

¶ 17 On November 4, 2014, the subject property was sold at a judicial sale. Citibank sought an order approving the sale, and defendant objected, claiming that there were defects in the publication notice and improper valuation of the property. On December 16, 2014, defendant filed objections to Citibank's motion for confirmation of sale and he requested a telephone hearing. Defendant requested that the court disapprove the sale because Citibank's own winning bid (about $750,000) was significantly lower than the current fair market value of the property (about $900,000, according to defendant) and because Citibank had engaged in significant prejudicial conduct against defendant.

¶ 18 On December 18, 2014, the trial court entered an order approving the sale. Defendant was not present in court. Subsequently, on January 29, 2015, the court vacated the approval upon the granting of defendant's motion to reconsider (on the basis that he did not receive a copy of the certificate of publication and notice).

¶ 19 On February 19, 2015, defendant filed amended objections to confirmation of sale (pursuant to section 15-1508(b) of the Illinois Mortgage Foreclosure Law), arguing that the sale should not be confirmed (and he moved to vacate the September 6, 2013, order) because: Citibank lacked standing; defendant did not have notice; the publication certificates were defective; the bid amount was unreasonable; and the cumulative effect of Citibank's conduct required denying confirmation. Defendant attached his declaration and various exhibits, including price comparables.

¶ 20 On March 31, 2015, Citibank filed a reply in support of its motion to approve the sale, along with affidavits and exhibits, but the filing is not contained in the appellate record.

¶ 21 On April 7, 2015, the trial court held a hearing on Citibank's motion to confirm and defendant's objections. The court took the matter under advisement.

¶ 22 On May 11, 2015, the trial court issued orders: (1) confirming the sale; and (2) separately, overruling defendant's objections. The court found that there was no defect in the publication notice, where Citibank's supplemental affidavit reflected that the publication was placed for three consecutive weeks in a secular newspaper of general circulation in Lake County (specifically, Lake County Suburban Life). It also found that the sale price was not unreasonable, nor was there fraud or mistake, because the Zillow information upon which defendant relied was not an estimate and, even if it was, the Zillow price was less than the sale price (*i.e.*, $747,000 in November 2014) and this did not shock the conscience. The court also determined that defendant failed to establish that justice was not otherwise done to the extent that he relied on lack of notice of the September 6, 2013, hearing; defendant had actual notice following the August 9, 2013, hearing that the case was continued to August 23, 2013, and he failed to appear on that date when the case was continued to September 6, 2013; and defendant

failed to show prejudice, such as an inability to address a particular argument, which did not occur in this case. Finally, the court found that there was nothing unfair about the entry of a personal deficiency judgment, and it ordered that Citibank would be entitled to possession on July 1, 2015. Defendant appeals.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant, *pro se,* challenges the trial court's summary judgment ruling and other aspects of the proceedings below. He asserts that Citibank did not have standing to bring the foreclosure complaint; his fraud affirmative defenses and counterclaims were erroneously dismissed; he was denied due process with respect to the September 6, 2013, hearing; and other aspects of the proceedings constituted violations of statute and the constitution. For the following reasons, we reject his claims.

¶ 25 A. Standards of Review

¶ 26 Summary judgment is appropriate where the pleadings, depositions, admissions on file, and affidavits demonstrate that there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of fact exists where the material relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Because summary judgment is a drastic means to resolve a controversy, it should only be granted where the moving party's right to it is clear and free from doubt. *Id.* We review *de novo* a trial court's ruling on a motion for summary

judgment. *Citimortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 17. The issue of standing presents a question of law and is also subject to *de novo* review. *Malec v. City of Belleville*, 384 Ill. App. 3d 465, 468 (2008).

¶ 27 We review an order confirming a judicial sale for an abuse of discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). Similarly, the determination that records are admissible as business records rests within the sound discretion of the trial court. *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600 (2003). An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court. *Schwartz v. Corelloni*, 177 Ill. 2d 166, 176 (1997).

¶ 28 B. Supplemental Affidavits

¶ 29 Defendant's primary argument on appeal is his assertion that Citibank lacked standing to bring the foreclosure complaint. That argument, in turn, is based primarily on his argument that Citibank's supplemental affidavits, some of which were belatedly added to the record on appeal, constitute hearsay and are inadmissible. He contends that three of the the affidavits (Kazarian's, Jesse Ford's, and Hunter Robinson's) cannot authenticate the original lender's mortgage data and, thus, summary judgment in Citibank's favor was improper. For the following reasons, we find unavailing defendant's challenge to the supplemental affidavits.

¶ 30 Illinois Supreme Court Rule 191 provides, in relevant part:

> "Affidavits in support of *** a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense 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).

¶ 31 A Rule 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relied. *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 63 (2001). "[T]he affidavit is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony." *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). The trial court may not consider "evidence that would be inadmissible at trial" when assessing a motion for summary judgment. *Id.* " '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.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)).

¶ 32 In addition, to admit business records into evidence as an exception to the general rule excluding hearsay, the proponent must lay a proper foundation by showing that the records were "made (1) in the regular course of business, and (2) at or near the time of the event or occurrence." *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27; Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). Similarly, Illinois Rule of Evidence 803(6) (eff. Jan. 1, 2011) provides for the admission of "records of regularly conducted activity" where the records consist of:

> "A memorandum, report, record, or data compilation, in any form, of acts [or] events *** made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or

data compilation, all as shown by the testimony of the custodian or other qualified witness ***."

¶ 33 "The theory upon which entries made in the regular course of business are admissible as an exception to the hearsay rule is that 'since their purpose is to aid in the proper transaction of the business and they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify nonexistent.' " *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005) (quoting Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th ed. 1999)). Further, business reports generated by third parties are admissible when commissioned in the regular course of the business of the party seeking to introduce it. *Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 224 Ill. App. 3d 11, 21 (1991) (noting that the key consideration is the third party's authority to act on the business's behalf).

¶ 34 Here, the supplemental affidavits contain sufficient factual detail to satisfy the requirements of the foregoing rules. As to Kazarian, who worked for BAC Home Loans Servicing, she averred that she had personal knowledge of her company's business records and the manner of their creation. According to Kazarian, BAC is providing mortgage loan servicing to Citibank, which is entitled to enforce the note for the loan at issue, which Citibank acquired from Countrywide Bank, which, in turn, acquired it from Diamond Bank. She also noted that the note is endorsed in blank from Countrywide Bank (she states that she attached a copy of the note and endorsements and the mortgage to her affidavit). Kazarian further averred that an assignment transferring the mortgage from M.E.R.S., Diamond Bank's nominee, to Citibank was prepared by Athanasopoulos pursuant to the agreement for signing authority between M.E.R.S., BAC, and Pierce Associates (and further noted that copies of the assignment and signing

agreement were attached to her affidavit). Referring to the PSA, which she noted was over 1,300 pages long and for which she provided a website address, Kazarian further averred that she was able to identify defendant's note from its loan sequence number, address, principal and current balances, and maturity date. Finally, she noted that she attached a copy of defendant's payment history.

¶ 35 Next, the Ford affidavit states that Ford, an assistant vice president operations team manager for Bank of America, N.A. (BANA), was a litigation specialist and mortgage team specialist with BANA or its predecessor, BAC Home Loans (formerly known as Countrywide Home Loans Servicing, L.P.) from October 2009 to June 2013. Ford averred that he was trained in and familiar with BANA's business practices and policies for servicing mortgage loans, including two computer systems: the AS400 and Iportal, the latter of which is a digital imaging library of original mortgage documents. He used these systems to research and analyze loan data and documents for validity and to view payment histories and other loan servicing documentation. The AS400 data is kept as a regular business practice and in the ordinary course of BANA's business and, thus, Ford trusts the information therein, though he always reviews it for accuracy by cross-referencing screens within it against each other and with documents in Iportal. He was trained that data/documents, which are true and correct copies of the original documents, in Iportal are verified as they are inputted into the system and by persons with knowledge of the activity or transaction reflected in the document. Such input takes place at or near the time of the origination of the document or subsequent assignment.

¶ 36 Ford further averred that he is familiar with BANA's Fastrieve document management system, which is similar to Iportal, but maintains images of corporate and bank history

documents, including corporate merger documents and powers of attorney. Similar to the other systems, he addressed the input and verification practices of Fastrieve.

¶ 37 Addressing defendant's loan, Ford averred that he used the aforementioned systems to access defendant's loan data, the PSA, including confirmation the authenticity of the PSA by comparing its information with information in the AS400 and documents in Iportal and Fastrieve, such as the limited power of attorney that designated BANA as power of attorney for Citibank for purposes of the trust at issue. Ford stated that he confirmed that the PSA was authentic. He reviewed images of the note, adjustable rate rider, and mortgage against copies from Bryan Cave LLP, the current custodian, and confirmed their authenticity against information in the AS400.

¶ 38 Most relevant to this appeal, Ford averred similarly with respect to the *corrective* assignment of mortgage, which documents the transfer of defendant's mortgage to Citibank prior to the filing to Citibank's complaint, comparing it to documents in Iportal and the AS400 (*i.e.*, borrower name, property address, loan originator, original principal amount, investor information, and date of assignment). He also compared documents in Fastrieve concerning Countrywide's and BANA's merger documents, confirming their authenticity. Ford also stated that he reviewed the payment history in the AS400 and cross-referenced it against that in Iportal. Finally, he stated that he reviewed the current servicing status of defendant's loan, noting that the AS400 reflected that the sub-servicing rights of the loan had been transferred on October 31, 2012, from BANA to Specialized Loan Servicing, LLC. He confirmed this by referencing documents in Iportal (*i.e.*, correspondence to defendant, referencing the service transfer).

¶ 39 We turn next to Hunter Robinson's affidavit. Robinson, vice president default administration for Specialized Loans Servicing, averred that he oversees SLS's foreclosure,

bankruptcy, and property inspection teams and he was trained in SLS's business practices and computer systems. He addressed the Fiserv system, which maintains payment history and other information related to the servicing of loans. Robinson averred that information is verified by the appropriate department as it is input into the system. The person inputting the information has knowledge of the transaction reflected in the data and such input takes place at or near the time of the event that is being documented. The accuracy of payment information in Fiserv is ensured by housing the cash management department in a secure building and not allowing other departments to have access to computer systems necessary to make changes to homeowners' payment history. Robinson views data in Fiserv as trustworthy, though he does cross-reference it with multiple screens to ensure its accuracy.

¶ 40 As to defendant's loan, after logging into the Fiserv system, Robinson accessed various screens and confirmed, by cross-references, that, on October 31, 2012, the subservicing rights to defendant's loan had been transferred from Bank of America, N.A., to SLS. Also using Fiserv, Robinson confirmed this information by reviewing the payment history screen, which showed when SLS began maintaining its own records (despite never having received a payment from defendant).

¶ 41 Finally, an affidavit by Melissa Tijerina (Saucedo), a mortgage resolution team specialist with BANA who was trained in the same computer systems, avers similar to Robinson's affidavit that defendant's mortgage loan was transferred from BAC Home Loans Servicing to BANA and addressed the PSA's applicability to defendant's mortgage loan.

¶ 42 In summary, contrary to defendant's assertions, the statements by Kazarian, Ford, Robinson, and Tijerina clearly constituted facts based on the affiants' personal knowledge and not mere conclusions. The trial court did not err in admitting them. There is no requirement that

affiants be familiar with the record before litigation arose or have personally made the entries into a computer system. *U.S. Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, ¶ 23. Notably, lack of personal knowledge by the maker may affect the weight afforded the evidence, but not its admissibility. *Id.* Under Rule 236, "it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible." *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992).

¶ 43 We reject defendant's argument that Kazarian's affidavit lacked adequate foundation. He complains first that there were no exhibits attached to her affidavit. We find this claim unavailing because the trial court expressly referred (and Kazarian's affidavit itself refers to numerous exhibits) to having reviewed the affidavits and their exhibits in finding that the supplemental affidavits cured any deficiencies in the affiants' initial affidavits: "The affidavits, evidence that was presented with respect to the affidavits, being the exhibits that are attached to the affidavits for which an appropriate foundation has been laid by the affiants, is sufficient to establish that the note and mortgage signed by [defendant] with respect to his residence was within the [PSA], that was transferred into the [PSA] for which Citibank is a Trustee; and therefore, Citibank has standing to bring this lawsuit to foreclose on the property." Further, to the extent defendant complains that the exhibits are not attached to the copies of the affidavits in the appellate record, we note that is the appellant's duty to provide on appeal a sufficiently complete record of the lower court proceedings to support his or her claims of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003). "[I]n the absence of such a record on appeal, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis [citations.] The court will resolve any

doubts arising from the incompleteness of the record against the appellant." *Id.* Here, we resolve them against defendant.

¶ 44 Next, defendant contends that Kazarian's affidavit (and, to a certain extent, the others) contains conclusory statements concerning the trustworthiness of documents that were provided to her by other parties. This argument, too, fails because it has been rejected. "It [makes] no difference if business records were those of the bank or a third party, so long as the person authenticating the records was their custodian or other person familiar with the business and its mode of operations." *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13 (further holding that affidavit sufficiently laid a foundation for admission of bank's accounting records); see also *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 49 (rejecting the defendants' argument that bank's summary judgment affidavit was insufficient because it was not prepared by an employee of the predecessor bank).

¶ 45 We conclude that the trial court did not err in admitting the supplemental affidavits.

¶ 46 C. Standing

¶ 47 We turn next to defendant's argument that Citibank lacked standing to bring the foreclosure complaint. Pursuant to Illinois law, a mortgagee may foreclose its interest in real property upon "either the debt's maturity or a default of a condition in the instrument." *Heritage Pullman Bank v. American National Bank & Trust Co. of Chicago*, 164 Ill. App. 3d 680, 685 (1987). A mortgagee establishes a *prima facie* case for foreclosure with the introduction of the mortgage and note, after which the burden of proof shifts to the mortgagor/defendant to prove any applicable affirmative defense. *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (1994); *Rago v. Cosmopolitan National Bank*, 89 Ill. App. 2d 12, 19 (1967).

¶ 48 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. *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 1188 (2008). "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit" and "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). "[S]tanding requires some injury in fact to a legally cognizable interest * * *." *Id.* Our supreme court has stated that the "lack of standing in a civil case is an affirmative defense, which will be forfeited if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). As an affirmative defense, the lack of standing is the defendant's burden to plead and prove. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010).

¶ 49 In *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, upon which defendant relies, the document evidencing the assignment of the defendant's mortgage to the plaintiff was created *after* the plaintiff filed its initial complaint (and before its amended complaint). *Id.* ¶¶ 5-6. The document stated that the mortgage was assigned and transferred to the plaintiff as trustee under a pooling and servicing agreement dated prior to the date of its initial complaint. The defendant raised standing as an affirmative defense, arguing that the assignment showed that the plaintiff did not own the debt when it originally filed its complaint. On cross-motions for summary judgment, the trial court initially ruled in the defendant's favor, but, upon reconsideration, reversed and ruled in the plaintiff's favor.

¶ 50 On appeal, this court reversed on the standing issue, holding that the trial court's initial ruling in the defendant's favor was correct. *Id.* ¶ 34. As to the assignment document, the court noted, and the plaintiff conceded on appeal, that it did *not* clearly state on what date the

mortgage was transferred to the plaintiff, and, thus, the document had no evidentiary value. *Id.* ¶ 18. The plaintiff had also submitted an affidavit in support of its summary judgment motion. This court similarly held that the affidavit of an employee of the plaintiff's loan servicing company was of no evidentiary value because the affiant did not set out sufficient facts to support his claim that the assignment occurred prior to the date of the initial complaint, nor did he attach supporting documentation for his assertion. *Id.* ¶ 20. Thus, his statement was not admissible because it was unsupported by any foundation. *Id.* ¶ 19. This court summarized that, although an assignment can document a transfer that occurs prior to the date the assignment was executed, where, as in *Gilbert*, the plaintiff failed to produce competent evidence to rebut the defendant's showing of lack of standing at the time the initial complaint was filed, the action must be dismissed. *Id.* ¶ 24.

¶ *51* This court also noted that, generally, the defendant bears the burden of proving that the plaintiff did not have standing on the date it filed the foreclosure complaint, but that the defendant's documentary evidence in this case (the mortgage, note, assignment, none of which showed an assignment prior to the date of filing) constituted *prima facie* evidence of *lack* of standing.[3] *Id.* ¶ 21. Furthermore, this court addressed the plaintiff's argument that its complaint

[3] This aspect of our holding has been criticized. See *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶¶ 25-28 (arguing that *Gilbert* misplaced the burden of proof in holding that, after the defendant had made a *prima facie* showing the burden shifted to the plaintiff, who had failed to rebut the defendant's evidence; *Rosestone* noted that lack of standing is an affirmative defense, which the defendant alone has the burden to plead and prove; noted that it was unclear what result *Gilbert* would have reached had it required the defendant to bear the ultimate burden, because neither party in that case showed precisely when the plaintiff

established standing. *Id.* We rejected this claim, holding that the attached note and mortgage negated the inconsistent complaint allegations. *Id.* Accordingly, because the plaintiff produced no competent evidence to rebut the defendant's *prima facie* showing of lack of standing, the defendant was entitled to summary judgment in his favor. *Id.*

¶ 52 In *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, which we find more instructive, the court affirmed summary judgment for the plaintiff, holding that the bank had standing to bring the foreclosure suit. In that case, the defendants argued that the bank did not establish a claimed interest in the note at the time it filed its complaint and, therefore, lacked standing. It was undisputed that the note that the bank filed with its complaint did not contain an endorsement to the bank. However, the bank argued that it made a *prima facie* showing at that point and, later, further established its standing by producing the original note, which also contained a blank endorsement, in open court. The court agreed, holding that the original note was *prima facie* evidence that the bank owned the note, even though it lacked the blank endorsement. *Id.* ¶ 13. It noted that the burden was on the defendants to produce evidence that the bank lacked standing at the time of filing, such as that the transfer did not occur before the complaint was filed. *Id.* The court rejected the defendants' argument that the fact that the bank

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acquired interest in the property; the *Garner* court held that, in the case before it, assignment of a mortgage dated four days after complaint was filed was not sufficient to establish that the plaintiff lacked standing on the date the complaint was filed when the plaintiff attached a copy of the note to the complaint and later produced the original note with a blank endorsement; the plaintiff's production of the note with blank endorsement "showed that it had an interest in the mortage"; the defendant "failed to show that the mortgage assignment he produced was not a mere memorialization of a previous transfer").

did not attach the note with the endorsement to the original complaint or to its initial motion to strike the defendants' affirmative defenses was not evidence that the bank did not hold the mortgage and note at the time the complaint was filed in 2011.[4] *Id.* ¶ 14. Thus, the defendants failed to meet their burden to show that the endorsement was not made before the complaint was filed. *Id.*

¶ 53 This case is more like *Cornejo*, where the bank ultimately produced a note with a blank endorsement, than *Gilbert*, where the evidence appeared to reflect that the transfer occurred after the complaint was filed. The evidence of standing here consisted of the note endorsed in blank, along with many[5] affidavits (original and supplemental) and exhibits, which the trial court admitted, attesting to Citibank's ownership of the note before it filed its complaint. Specifically, Citibank produced the document with the blank endorsement from Countrywide Bank. This was *prima facie* evidence that it was the holder of defendant's mortgage before it filed its complaint. A plaintiff may establish it is the holder of a mortgage indebtedness by showing it is the bearer of the note: "the mere attachment of a note to a complaint is *prima facie* evidence that plaintiff owns the note." *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26. Further, a "note endorsed in blank is payable to the bearer." *Id.*; see also 810 ILCS 5/3-205(b) (West 2010) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement'. When indorsed in blank, an instrument becomes

[4] Further noting that, now, Illinois Supreme Court Rule 113(b) (eff. May 1, 2013) requires that the copy of the note attached to the plaintiff's complaint must be a copy of the note as it currently exists, together with endorsements and allonges. *Id.* ¶ 14.

[5] The record on appeal contains only a handful.

payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").

¶ 54 Citibank acknowledges that its name is not on the note and mortgage attached to the initial complaint. However, contrary to defendant's assertion, at the time it filed its complaint, Citibank's name need not have been on the initial documents. Citibank later established its standing when it produced the note with the blank endorsement, along with affidavits (originals, found lacking, and supplemental, found to cure the foundational defects of the originals), attesting to Citibank's ownership of the note before the complaint was filed. The trial court found that the documents reflected that Citibank has possession of the note at the time it filed the complaint and, therefore, that it had standing. This finding was not erroneous.

¶ 55 Defendant's primary complaint is that there are no documents reflecting *when* the transfer to Citibank occurred. We disagree. In his supplemental affidavit, Ford addresses the *corrective* assignment document prepared by M.E.R.S., which purports to document the assignment of defendant's mortgage to Citibank and states that the assignment occurred prior to September 3, 2009. The corrective assignment is dated February 8, 2011, and is signed by Diana Athanasopoulos as M.E.R.S.'s certifying officer.[6] It specifies defendant as the mortgagor, the initial indebtedness amount, the property's tax identification number, its legal description, and its common address. Ford's affidavit statements, properly admitted by the trial court, as we concluded above, reflect that defendant's mortgage was assigned to Citibank before Citibank

[6] Kazarian's affidavit purports to authenticate the *initial* assignment document signed by Athanasopoulos. Because there is a subsequent, corrective, assignment document, we find the portion of her affidavit addressing the first assignment document to be of little evidentiary value.

filed its complaint. We reject defendant's argument that the fact that the corrective assignment was executed over 15 months after the complaint was filed renders it "void." The execution date is not the proper focus here. Rather, the substantive information in the document is the relevant information. Accordingly, we find unavailing defendant's contention that he made a *prima facie* showing of lack of standing.

¶ 56 D. Fraud Claims

¶ 57 Next, defendant argues that the trial court erred in dismissing, with prejudice, his fraud affirmative defenses and counterclaims. We find this argument forfeited.

¶ 58 Defendant relies on fraud affirmative defenses and counterclaims that he raised in an amended answer filed on May 23, 2011. On September 20, 2011, the trial court struck/dismissed these claims, with prejudice. On January 3, 2012, defendant filed an amended answer and second amended affirmative defenses, challenging Citibanks standing, but *not* re-pleading any of his previously-dismissed fraud claims. Our supreme court "has clearly and consistently explained that 'a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints,' and " '[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." ' " *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983), quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). Further, as this court has noted:

> "A party has three methods available to it for avoiding waiver and preserving dismissed claims for appellate review. [Citations.] First, a party can stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the

> matter at the appellate level. [Citation.] Second, a party can file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts. [Citation.] A 'simple paragraph or footnote' is sufficient for this purpose. [Citation.] Third, a party can perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts. [Citation.]" *Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 36.

"[W]here a party has failed to employ one of the above methods for avoiding waiver, 'ongoing objections' to a dismissal order will not be sufficient to preserve the issue for appeal. *Id.* Here, defendant's January 3, 2012, pleading did not refer to his fraud defenses or counterclaims. Accordingly, his argument is forfeited.

¶ 59 E. September 6, 2013, Hearing

¶ 60 Defendant's next argument is that he was denied procedural due process when plaintiff failed to serve him copies of the trial court's August 23 and September 6, 2013, orders and failed to serve him notice of the September 6, 2013, hearing, resulting in his failure to be heard at the hearing where the foreclosure judgment was entered. He contends that the judgment of foreclosure should be vacated. For the following reasons, we reject his argument.

¶ 61 On August 9, 2013, the trial court conducted a continued hearing on the parties' summary judgment motions and defendant was present. At this hearing, the court announced that it was granting Citibank's summary judgment motion and noted that it intended to enter a foreclosure judgment. The court then set the matter to August 23, 2013, for entry of judgment of foreclosure. It instructed Citibank to provide defendant a copy of the order by August 15, 2013, and informed defendant that he had until August 19, 2013, to submit any objections. Defendant did file objections on August 19, 2013.

¶ 62 On August 23, 2013, however, defendant did not appear in court. The trial court entered an order, overruling defendant's objections and continued the case to September 6, 2013. On September 6, 2013, defendant did not appear and the court entered the foreclosure judgment.

¶ 63 Based on the foregoing, we cannot conclude that defendant lacked notice and was denied an opportunity to be heard. On August 9, 2013, the court instructed him that it was going to be entering a foreclosure judgment on August 23, 2013. Defendant filed objections to the proposed order, but did not appear on August 23, 2013. Although the matter was continued to September 6, 2013, for entry of judgment, defendant did have the opportunity to be heard when he filed his objections to the order. His actions otherwise reflect a lack of diligence with respect to prosecution of his case, not a denial of due process. See *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 244 (2006) (due process is granted when, during an orderly proceeding, "a person is served with notice, actual or constructive, and has an opportunity to be heard to enforce and protect his [or her] rights"). Defendant did not appear at the August 23, 2013, hearing, of which he was informed at the August 9, 2013, hearing. Had he appeared, he would have learned that the foreclosure judgment, which he was *aware* was going to be entered when the court ruled on the parties' summary judgment motions, would be entered on September 6, 2013. Under the circumstances here, defendant was not denied procedural due process. *In re Rehabilitation of American Mutual Reinsurance Co.*, 238 Ill. App. 3d 1, 11 (1992) (lack of notice renders order voidable and the determining factor is whether nonmoving party suffered any harm or prejudice).

¶ 64 F. Miscellaneous Claims

¶ 65 Defendant's final arguments concern the overruling of his objections to Citibank's motions for an order approving sale. He argues that: (1) Citibank failed to comply with the

publication notice requirements in section 15-1507(c) of the Foreclosure Law (735 ILCS 5/15-1507(c) (West 2014)); (2) he was entitled to an evidentiary hearing on his objections to the foreclosure sale; and (3) "justice was not otherwise done." For the following reasons, we reject these claims.

¶ 66 In its May 11, 2015, 12-page order confirming the sale, the trial court also addressed and overruled defendant's numerous objections. As to his argument concerning publication, the court found that a supplemental affidavit from Kate Weber attested that the publication was placed for three consecutive weeks in a circular known as *Lake County Suburban Life*, a secular newspaper of general circulation in Lake County that had been in continuous circulation for the 50 weeks preceding publication. See 735 ILCS 5/15-1507(c)(2) (West 2014). Defendant, the court found, had not established that there was any defect in publication.

¶ 67 Defendant has not included in the record on appeal Citibank's reply argument or the foregoing affidavit. Given the absence of these documents, we must presume that the court's ruling is correct. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 68 Turning to his claim that he was entitled to an evidentiary hearing, defendant argues that the trial court denied him an opportunity at the April 7, 2015, hearing to present witnesses and documentary evidence concerning primarily the valuation of his property. We reject this argument.

¶ 69 Section 15-1508(b) of the Foreclosure Law allows a limited level of inquiry into the propriety of the foreclosure sale. See *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 114 (1993). Although an extended evidentiary hearing after a foreclosure sale is not required, an evidentiary hearing *may* be conducted when the defendant presents allegations and evidence that

establish the sale was not in conformity with section 15-1508 of the Foreclosure Law.[7] *Id.* at 115 (the defendant was entitled to an evidentiary hearing concerning whether the sales price of the property was unconscionable).

¶ 70 In its May 11, 2015, ruling, the trial court found that the fact that Citibank's bid was 55% of the judgment was not relevant and that the relevant comparison was to fair market value. It acknowledged that property does not bring fair market value at a judicial sale, but that a sale will not be set aside for inadequacy of price unless the inadequacy be so great as to shock the conscience. Defendant's estimate that his property was worth over $1.1 million was based on 2005 and 2006 appraisals, information from the Zillow website as to alleged comparables, defendant's personal knowledge, and non-quantifiable factors. Addressing Zillow, the court found that, if the Zillow data was to be considered, the court should recognize the "Zestimate" for the property—$747,000 in November 2014—which was less than Citibank's winning bid of $750,523; thus, the bid did not shock the conscience. The court also noted that there was no allegation of error or violation of duty by the judicial sales officer.

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[7] Section 15-1508(b) of the 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 2014).

¶ 71 We cannot conclude that the trial court's findings were erroneous. The evidence defendant offered did not tend to show that the sales price was unconscionable or otherwise did not conform to the Foreclosure Law. The court's findings concerning Zillow were not unreasonable. Also, defendant's reliance on appraisals from 2005 and 2006 is misplaced because these valuations pre-date the real estate market crash. The 2006 appraisal, for example, was for $900,000. Furthermore, as Citibank notes, it filed a reply in support of its motion to approve the sale, which filing was supported by affidavits and other evidence of property value. The record on appeal does not contain these filings, and, thus, we must again presume that the trial court's findings were correct. *Foutch*, 99 Ill. 2d at 391-92.

¶ 72 Finally, we turn to defendant's argument that justice was not otherwise done. The Foreclosure Law does not define the concept. 735 ILCS 5/15-1508(b)(iv) (West 2014). However, the supreme court has stated that courts retain the power to vacate a foreclosure sale "where unfairness is shown that is prejudicial to an interested party," but that, in the absence of fraud or irregularity, courts will not refuse to confirm a judicial sale merely to protect a party from his or her own negligence. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 19. Here, defendant merely re-asserts arguments that we have found unavailing. Accordingly, we reject his claim and a related cumulative-error argument.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 75 Affirmed.