

2016 IL App (2d) 160188-U
No. 2-16-0188
Order filed December 19, 2016

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

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

BANK OF NEW YORK MELLON)	Appeal from the Circuit Court
TRUST COMPANY, N.A.,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 15-LM-303
)	
AMY NICOSIA and MONICA)	
HERNANDEZ,)	Honorable
)	John F. McAdams,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the substituted plaintiff an order of possession following a mortgage foreclosure: when it filed the complaint for possession, the original plaintiff had title to the property (as its purported conveyance to HUD had been rejected), and thus its subsequent conveyance to the substituted plaintiff was valid.

¶ 2 Defendants, Amy Nicosia and Monica Hernandez, appeal from an order of possession entered in favor of plaintiff, Bank of New York Mellon Trust Company, N.A. (Bank of New York), in a forcible entry and detainer action. Defendants argue that there is “an issue of fact as

to whether [Bank of New York] was a proper party to this action.” For the reasons that follow, we affirm.

¶ 3 On November 9, 2010, GMAC Mortgage, LLC (GMAC), filed a mortgage foreclosure action (case No. 10-CH-1625) against John F. Nicosia and Martha Nicosia (the Nicosias), and Southbury Homeowners’ Association, regarding property commonly known as 842 Preston Lane, Oswego, Illinois, 60543 (the property). On February 27, 2012, the trial court entered a judgment of foreclosure and sale. On July 9, 2012, the court entered an order approving the report of sale and distribution. The court also entered an order of possession, which provided that “GMAC Mortgage, LLC and/or Secretary of Housing and Urban Development is entitled to possession” of the property. Pursuant to the July 9 order, a sheriff’s deed was prepared conveying title of the property to the Secretary of Housing and Urban Development (HUD).

¶ 4 On May 20, 2015, GMAC filed a complaint for forcible entry and detainer against defendants, seeking possession of the property. GMAC attached to the complaint copies of the order approving sale and the sheriff’s deed. GMAC alleged that, on August 7, 2014, it served defendants with its demand for possession and that defendants were unlawfully withholding possession from GMAC.

¶ 5 In response, on November 2, 2015, defendants filed an “Answer and Motion to Dismiss for Lack of Standing.” Defendants argued that GMAC lacked standing because a “[s]ecured party had perfect fixture security interest and it takes priority over any and all subsequent judgment lien or other lien obtained by legal or equitable proceedings.” Defendants argued further that GMAC’s claim of ownership was fraudulent, because it had filed for bankruptcy.

¶ 6 On November 6, 2015, GMAC filed a motion to substitute Bank of New York as plaintiff pursuant to section 2-1008(a) of the Code of Civil Procedure (735 ILCS 5/2-1008(a) (West

2014)). GMAC advised the court that, on August 5, 2015, it had assigned its interest in the certificate of sale to Bank of New York and that, on August 18, 2015, a sheriff's deed conveying the property to Bank of New York was recorded. Copies of the assignment and the sheriff's deed were attached to the motion.

¶ 7 A hearing on the motion to substitute took place on November 12, 2015. At the hearing, defendants essentially argued that GMAC could not bring the action, because GMAC had conveyed the property to HUD and therefore could not have thereafter assigned it to Bank of New York. In response, GMAC explained that “[b]ecause it was an FHA loan[,] the agreement is that GMAC would convey the property to HUD if HUD accepted it.” If HUD wanted the property, it would have to guarantee the loan and pay GMAC. However, HUD rejected the conveyance; the deed was never recorded and the property returned to GMAC. Thereafter, GMAC assigned the certificate of sale to Bank of New York and a sheriff's deed was issued and recorded. Based on this explanation, the trial court allowed Bank of New York to substitute for GMAC.

¶ 8 After granting the motion to substitute plaintiffs, the trial court asked defendants to argue their motion to dismiss for lack of standing. At the close of arguments, the trial court directed the parties to prepare written memorandums to clarify their arguments. Defendants filed their memorandum on December 3, 2015. Defendants claimed that the Nicosias had exercised their rights to redeem the property after the confirmation of sale. According to defendants, the Nicosias executed a promissory note promising to pay \$623,710.15 to an entity identified as Washington National Trust Unincorporated Association (Washington National), with the intent to extinguish the mortgage debt owed to GMAC. The note included language purporting to require GMAC to object to the tender of the promissory note within three dates after receipt. If

GMAC failed to object within three days, the note purported to extinguish the Nicosias' mortgage obligation to GMAC. According to defendants, the promissory note was recorded with the Kendall County recorder on December 7, 2012, and then mailed to GMAC as an offer of payment on the outstanding mortgage debt. When GMAC did not respond to the note, Washington National recorded a "Certificate of Nonresponse Notice of Estoppel by Acquiescence," "Notice of Satisfaction of Mortgage Lien," and "Satisfaction of Mortgage to Secure Debt."

¶ 9 Following a hearing on January 12, 2016, the trial court denied the motion to dismiss and a subsequent motion for reconsideration. The matter was continued for trial. Following trial, the court entered an order awarding possession to Bank of New York. The court found that, although GMAC had attached to its complaint a sheriff's deed showing conveyance of the property to HUD, that deed was never recorded. The court noted that GMAC subsequently assigned the certificate of sale to Bank of New York. The court further noted that Bank of New York presented a certified copy of the sheriff's deed that was ultimately recorded on August 18, 2015, conveying the property to Bank of New York. The court found that Bank of New York had a right to possession of the property because it was the title holder and thus established its *prima facie* case. The court considered whether defendants met their burden to show an affirmative defense. The court found that, contrary to defendants' claim, the Nicosias had no special right of redemption. In addition, the court rejected defendants' arguments regarding the claimed promissory note.

¶ 10 Defendants appeal, contending that the trial court erred when it granted Bank of New York possession of the property. Defendants argue that there was no evidence that GMAC "had the capacity to Demand for Forcible Entry action on the subject property on the date the action

was filed. There was undoubtedly an issue of fact as to whether [Bank of New York] was a proper party to this action.” In response, Bank of New York argues that defendants’ brief should be stricken because it violates several provisions of Illinois Supreme Court Rule 341(h) (eff. Jan. 1, 2016). On the merits, Bank of New York argues that defendants failed to show that GMAC lacked standing when it filed the action.

¶ 11 We begin with Bank of New York’s request that we strike defendants’ brief. To be sure, defendants’ brief violates Rule 341(h) in several respects. For example, it does not contain a proper “[p]oints and [a]uthorities” section (Ill. S. Ct. R. 341(h)(1) (eff. Jan. 1, 2016)), a statement of the standard of review as to each issue (Ill. S. Ct. R. 341(h)(3) (eff. Jan. 1, 2016)), a verbatim recitation of the pertinent parts of the various statutory provisions relied on (Ill. S. Ct. R. 341(h)(5) (eff. Jan. 1, 2016)), or an argument section that contains citations to the record (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)). Although compliance with Rule 341 is mandatory, we have wide discretion as to whether to strike an appellant’s brief and dismiss an appeal for violating the rule. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 77. We typically will not do so where a lack of compliance does not hinder our review. *In re Marriage of Levinson*, 2013 IL App (1st) 121696, ¶ 26. Because defendants’ failure to comply with Rule 341(h) does not seriously hinder our review, we deny the request to strike defendants’ brief. However, we admonish defendants that the rules concerning appellate briefs are not mere suggestions. See *id.*

¶ 12 We turn now to the merits. Section 15-1701(d) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1701(d) (West 2014)) provides that, 30 days after an order confirming the sale of mortgaged real estate is entered, the holder of the certificate of sale or the deed issued pursuant to that certificate is entitled to proceed under the provisions of the Forcible Entry and

Detainer Act (the Act) (735 ILCS 5/9-101 *et seq.* (West 2014)) against occupants of the mortgaged real estate who were not made parties to the foreclosure.

¶ 13 A suit brought pursuant to the Act is a “limited and distinct proceeding that determines who is entitled to immediate possession of real property.” *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. The only questions relevant to such a suit are whether the party seeking to obtain possession is entitled to it and whether the defendant has a defense that would defeat the asserted right to possession. *Id.* An order approving a judicial sale naming the plaintiff as the new owner of the foreclosed property is sufficient evidence to establish the plaintiff’s right to possession in a forcible entry and detainer proceeding. See, *e.g., id.* ¶¶ 6, 15-16.

¶ 14 In determining whether the trial court erred in entering a judgment in favor of the plaintiff in an action brought under the Act, the standard of review is whether the ruling was against the manifest weight of the evidence. *S & D Service, Inc. v. 915-925 W. Schubert Condominium Ass’n*, 132 Ill. App. 3d 1019, 1021 (1985). For a finding to be against the manifest weight of the evidence, it must appear from the record that the “ ‘opposite conclusion is clearly evident’ ” or the findings of fact are “ ‘unreasonable, arbitrary and not based upon any of the evidence.’ ” *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992) (quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990)). The role of a reviewing court is not to reinterpret the evidence, but to determine only whether the evidence on the record supports the lower court’s judgment. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003).

¶ 15 In this case, as the trial court noted, Bank of New York presented evidence showing that GMAC held the certificate of sale of the property when it filed the complaint against defendants. Although an unrecorded deed conveying the property to HUD was also attached to the complaint, GMAC explained that deed was not recorded, as HUD rejected the conveyance.

GMAC presented evidence that it subsequently assigned the certificate of sale to Bank of New York and that the sheriff conveyed the deed to the property to Bank of New York. Taken together, this evidence clearly established Bank of New York's right to possess the property.

¶ 16 Defendants do not seem to dispute that GMAC was the successful purchaser at the foreclosure sale, as demonstrated by the order confirming the sale. Instead, defendants challenge whether GMAC was still the holder of the certificate of sale when it filed the complaint.

¶ 17 “Under Illinois law, lack of standing is an affirmative defense. A plaintiff need not allege facts establishing that he [or she] has standing to proceed. Rather, it is the defendant's burden to plead and prove lack of standing.” *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). “Where a plaintiff has no standing, the proceedings must be dismissed. That is so because lack of standing negates a plaintiff's cause of action.” *Id.* The issue of a plaintiff's standing presents a question of law, which we review *de novo*. *Id.* at 23.

¶ 18 Each of defendants' arguments has no merit. First, defendants argue that, when GMAC filed the complaint, the property had been deeded to HUD and therefore GMAC could not bring the action. However, the record makes clear that plaintiff explained the reasoning for the preparation of that deed, which was ultimately never recorded, and advised the court that HUD rejected the conveyance. See *In re Estate of Williams*, 146 Ill. App. 3d 445, 450 (1986) (“In order to constitute a valid conveyance of real estate, there must be not only a delivery of a deed by the grantor but also an acceptance by the grantee and it must affirmatively appear that the grantor's intention was that the deed should pass title at the time of delivery and that grantor should lose all control of it.”). Thus, defendants' argument fails.

¶ 19 Second, defendants argue that “Secured Party Washington National Trust a private bank trust is the true owner of property.” This argument is premised on defendants' claim that the

Nicosias exercised their special right of redemption by virtue of a promissory note and thereby conveyed the property to Washington National. However, defendants' argument overlooks the fact that, assuming *arguendo* that the Nicosias had a special right to redeem, section 1604(a) of the Illinois Mortgage Foreclosure Law permits the exercise of a special right to redeem only within 30 days after the confirmation of sale. See 735 ILCS 5/15-1604(a) (West 2014). Therefore, even if the alleged promissory note was valid, because it was executed on September 27, 2012, well over 30 days after the July 9, 2012, order confirming sale, this argument fails.

¶ 20 Defendants next argue that GMAC did not have authority to assign any rights to Bank of New York, because GMAC was in bankruptcy. According to defendants, on February 15, 2013, Ocwen Financial Corporation "purchased all of GMAC assets." In support, defendants refer generally to a "Form 8-K" contained in the record; however, it indicates only that Ocwen Financial Corporation acquired "certain Purchased Assets." Defendants have not provided us with a citation to the record that supports this claim or shows that GMAC was not the owner of the certificate of sale when it assigned the certificate of sale to Bank of New York. We are not required to search the record to find a reason to reverse a trial court's rulings. *Mitchell v. Toledo, Peoria & Western R.R. Co.*, 4 Ill. App. 3d 1, 3 (1972) ("[o]n appeal all reasonable presumptions are in favor of the judgment of the trial court, and although the entire record is available, the reviewing court is not required to search the record to find reason to reverse").

¶ 21 Finally, we note that defendants' reliance on *Bayview Loan Service, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (2008), and *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, is misplaced. In *Bayview*, the reviewing court found that the plaintiff was not the correct party to bring a mortgage foreclosure action, because nothing in the record showed that the plaintiff held the mortgage and note. *Bayview*, 382 Ill. App. 3d at 1188. Here, as noted, GMAC

was the holder of the certificate when the action was filed. In *Deutsche Bank*, this court found that the plaintiff, an assignee of the mortgagee, was not the proper party to bring a mortgage foreclosure action against the mortgagor where the assignment occurred after the action was filed. *Deutsche Bank*, 2012 IL App (2d) 120164, ¶ 21. The present case is not like *Deutsche Bank*, because Bank of New York is not the party who filed suit. GMAC filed suit and subsequently assigned the certificate of sale to Bank of New York. Thereafter, the trial court properly permitted GMAC to substitute plaintiffs. See 735 ILCS 5/2-1008(a) (West 2014).

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Kendall County.

¶ 23 Affirmed.