

NOTICE
Decision filed 07/18/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150077-U

NO. 5-15-0077

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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| WELLS FARGO BANK, N.A., |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | St. Clair County. |
| |) | |
| v. |) | No. 09-CH-131 |
| |) | |
| JOSEPH NETEMEYER, |) | Honorable |
| |) | Stephen P. McGlynn, |
| Defendant and Counterplaintiff-Appellant. |) | Judge, presiding. |

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly entered summary judgment in favor of bank holding note and mortgage in foreclosure action.

¶ 2 Defendant, Joseph Netemeyer, appeals from the order of summary judgment entered by the circuit court of St. Clair County in favor of plaintiff, Wells Fargo Bank, N.A. (Wells Fargo). We affirm.

¶ 3 On April 16, 2006, Patti Netemeyer executed a promissory note and mortgage with Mortgage Haus, Inc., for a certain piece of property in Fairview Heights, Illinois. Joseph signed the mortgage, but did not sign the note. On or about October 1, 2008, Patti defaulted on the loan, and Wells Fargo filed a complaint for foreclosure of the mortgage.

Attached as exhibits to the complaint were a copy of the note and mortgage executed by Patti. On April 9, 2009, the court entered a default judgment for foreclosure and sale against Joseph. On May 21, 2009, the court vacated that order and granted Joseph time to respond to the complaint. Joseph filed an answer but did not raise any affirmative defenses. Instead, Joseph alleged that he held a superior interest in the property by way of a mechanic's lien recorded against the property in favor of AAA Contracting Services for work allegedly performed on the property between January 1, 2006, and March 31, 2009. Joseph filed a complaint to foreclose the mechanic's lien against Patti and Wells Fargo, which was subsequently consolidated into Wells Fargo's foreclosure action. Wells Fargo moved for partial summary judgment against Joseph contending that the alleged mechanic's lien was defective and inferior to the mortgage because it did not satisfy the requirements of the Mechanics Lien Act (see 770 ILCS 60/1 *et seq.* (West 2008)). The trial court subsequently entered an order of partial summary judgment as to Joseph's mechanic's lien in favor of Wells Fargo.

¶ 4 On April 10, 2014, Wells Fargo moved for summary judgment and judgment of foreclosure and sale and submitted an affidavit of prove-up in support. On July 17, 2014, the trial court entered an order of summary judgment and judgment of foreclosure and sale in favor of Wells Fargo. The property was sold at public auction on November 4, 2014, and the trial court confirmed the sale without objection on January 29, 2015. Joseph now appeals the order approving sale and the order granting summary judgment in favor of Wells Fargo.

¶ 5 Joseph argues on appeal that Wells Fargo failed to establish that it owns any interest in the subject real estate sufficient to foreclose on the original mortgage. He points out that there is no documentation in the record in the form of recorded assignments showing that Wells Fargo obtained ownership of the original mortgage. None of the original lenders, Ohio National Bank, M.E.R.S., Inc., Mortgage Haus, Inc., or American Trust Bank ever sued the Netemeyers, nor were these lenders made parties to the foreclosure action. No mortgage bearing Wells Fargo's name appears in the record, and there is nothing in any of the prove-up affidavits to document Wells Fargo's interest in the mortgage or property. Joseph further argues that because a lawful interest in real estate in Illinois must be in writing to comply with the statute of frauds (see 740 ILCS 80/2 (West 2008)), a mortgagee in a foreclosure action must prove its chain of title of its claimed mortgage in writing.

¶ 6 Joseph also contends that if a contract with an owner of real estate, upon which a mechanic's lien is based, predates the recording of a mortgage lien, the mechanic's lien, properly perfected, will take priority over a mortgage lien. *State Bank of Lake Zurich v. Winnetka Bank*, 245 Ill. App. 3d 984, 614 N.E.2d 862 (1993). According to Joseph, Patti owed the lien holder over \$98,000 for work performed on the property from January 1, 2006, through March 31, 2009. The mechanic's lien covering this work was recorded on April 1, 2009. He further points out that the contract with the owner for the work is dated November 3, 2006, while the original mortgage on the property was recorded in April of 2007. Given the priority of the mechanic's lien and the lack of written proof of Wells Fargo's ownership of the mortgage, Joseph concludes Wells Fargo never proved it had

standing to bring suit in this instance. Wells Fargo counters any possible lack of standing was not raised as an affirmative defense to any of its various motions for summary judgment. Wells Fargo therefore believes Joseph forfeited the right to raise such an issue on appeal. See *U.S. Bank Trust, N.A. v. Colston*, 2015 IL App (5th) 140100, ¶ 20, 37 N.E.3d 850.

¶ 7 We initially note that summary judgment should be granted where there is no genuine issue of material fact, such that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The entry of summary judgment is reviewed *de novo*. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 23, 2 N.E.3d 532. In this instance, turning to the issue of the mechanic's lien first, we find that the trial court properly entered summary judgment against Joseph in favor of Wells Fargo. The record reveals that the mechanic's lien was defective, in that it did not satisfy the requirements of the Mechanics Lien Act (Act) (770 ILCS 60/7 (West 2012)). In order to enforce a lien against a creditor, a contractor must comply with the prerequisites in section 7 of the Act, and the Act must be strictly construed with reference to those requirements upon which the right depends. *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill. App. 3d 714, 718-19, 829 N.E.2d 860, 863-64 (2005). Specifically, here, the lien was not recorded within four months after completion of the work, it was not accompanied by an affidavit, and it did not give a description of the contract or identify the parties thereto. See 770 ILCS 60/7 (West 2012). Therefore, the lien had no priority. The lien further violated the Mechanics Lien Act in that the work on the property was commenced in January of 2006, but was not finished until

March 31, 2009, which is outside the three-year limitations period. See 770 ILCS 60/6 (West 2012). In addition to the statutory defects in the lien, Joseph, as the "owner or co-owner of [the] property, may not claim a lien against his *** own property." *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC*, 2013 IL App (5th) 120490, ¶ 8, 995 N.E.2d 1021. See also *Fitzgerald v. Van Buskirk*, 16 Ill. App. 3d 348, 350, 306 N.E.2d 76, 78 (1974).

¶ 8 Turning to the entry of summary judgment and judgment of foreclosure and sale entered by the circuit court in favor of Wells Fargo, again we find no error. Joseph argues that because Wells Fargo did not produce an assignment of the mortgage from the original lender, or any subsequent lender, showing a complete chain of title, Wells Fargo did not offer sufficient proof that it owned an interest in the mortgage. In order to establish a *prima facie* case for foreclosure, Wells Fargo was only required to introduce the note and mortgage. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24, 2 N.E.3d 1052. The assignment of a mortgage, however, is not necessary, as the transfer of the note, or underlying debt, is sufficient to assign the mortgage and preserve the mortgage lien. *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 639, 732 N.E.2d 723, 730 (2000).

¶ 9 Here, Wells Fargo established a *prima facie* case of ownership by attaching a copy of the note and mortgage to its complaint. *Colston*, 2015 IL App (5th) 140100, ¶ 20, 37 N.E.3d 850; *Korzen*, 2013 IL App (1st) 130380, ¶ 24, 2 N.E.3d 1052. The note at issue here contains an allonge bearing an endorsement from the original lender, Mortgage Haus, Inc., to the order of Ohio Savings Bank and a "blank endorsement" made by Ohio

Savings Bank. Under the Uniform Commercial Code, a note is a negotiable instrument, which, when endorsed in blank, becomes payable to bearer, and may be negotiated by transfer of possession alone until it is specifically endorsed. 810 ILCS 5/3-205(b) (West 2014). Since the note contains an endorsement in blank, the note is payable to bearer. *Rosestone Investments*, 2013 IL App (1st) 123422, ¶ 26, 2 N.E.3d 532. Because the copy of the note attached by Wells Fargo displayed a blank endorsement, without any evidence by Joseph to the contrary, Wells Fargo demonstrated its right to enforce the instrument.

¶ 10 In mortgage foreclosure cases "where all the allegations of fact in the complaint have been proved by verification of the complaint or affidavit, the court upon motion supported by an affidavit stating the amount which is due the mortgagee, shall enter a judgment of foreclosure ***." 735 ILCS 5/15-1506(a)(2) (West 2014). Along with producing the note endorsed in blank, Wells Fargo submitted an affidavit with its motion for summary judgment and judgment of foreclosure and sale confirming it was in possession of the note. As a result, Wells Fargo established it was the holder of the indebtedness secured by the mortgage being foreclosed here. *Rosestone Investments*, 2013 IL App (1st) 123422, ¶ 26, 2 N.E.3d 532. As the holder of the note, Wells Fargo had standing to foreclose. Accordingly, the trial court did not err by granting summary judgment in favor of Wells Fargo against Joseph.

¶ 11 For the aforementioned reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 12 Affirmed.