FOURTH DIVISION
March 22, 2018

Nos. 1-16-0739

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

J.P. MORGAN CHASE BANK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CH 22496
	)	
JOSE A. OLIVA and MARIO A. OLIVA,	)	Honorable
	)	Pamela McLean Meyerson
Defendants-Appellants.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment affirmed. Defendants failed to show that trial court abused its discretion in denying motion to vacate summary judgment, default judgment, and judgment of foreclosure. Record on appeal contained no copy of motion to vacate and no transcript of hearing on motion. By failing to raise affirmative defense of lack of standing in trial court, defendants forfeited argument that plaintiff lacked standing to pursue mortgage foreclosure suit.

¶ 2 This appeal concerns a 2012 mortgage foreclosure action by plaintiff, J.P. Morgan Chase Bank (Chase), against defendants, Jose A. Oliva (Jose) and Mario A. Oliva (Mario). Defendants appeal the judgment of foreclosure and sale entered in favor of Chase, claiming that Chase failed to send the required grace period notice and that Chase lacked standing. Chase argues that the

record contains no evidence that these arguments were presented to the trial court, and that they are also meritless.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 On June 15, 2007, Washington Mutual Bank, FA (WAMU) gave defendants a loan for $465,405. Defendants executed a note promising to repay the principal of the loan and the interest. The note was secured by a mortgage on the property commonly known as 2813 South Hillock Avenue in Chicago.

¶ 6 After WAMU was closed by the Federal Deposit Insurance Corporation (FDIC), Chase succeeded to WAMU's interests and rights in the mortgage and note by entering into a purchase and assumption agreement with the FDIC on September 25, 2008. The record contains a copy of that agreement.

¶ 7 On February 1, 2012, defendants defaulted on the mortgage. On June 18, 2012, Chase filed this mortgage foreclosure action against defendants, seeking to foreclose on the property. Chase alleged it was the legal holder of the indebtedness secured by the mortgage being foreclosed, and attached a copy of the mortgage and the note to its complaint.

¶ 8 There is no dispute that both defendants were personally served and neither defendant appeared or filed an answer. On August 12, 2013, Chase filed a motion for default. An attorney appeared for Jose and filed an answer on October 8, 2013.

¶ 9 After the trial court denied Chase's motion for summary judgment, Chase again moved for summary judgment against Jose and for a default against Mario. Neither defendant responded.

¶ 10 On June 26, 2015, the trial court entered summary judgment against Jose, an order of default against Mario, and a judgment of foreclosure and sale. The court also appointed Kallen Realty Services as the selling officer. On August 28, 2015, the appointed selling officer, Kallen Realty Services, sent notice to Jose's counsel, and several parties, that the judicial sale of the property was scheduled for September 29, 2015, at 12:30 p.m.

¶ 11 On September 28, 2015, the eve of the judicial sale and three months after the judgment of foreclosure and sale was entered, a new attorney filed an emergency motion on behalf of both defendants, seeking to vacate the three orders entered on June 26, 2015, and to stay the judicial sale. (Jose's original counsel did not withdraw.) This emergency motion also references an "enclosed" motion to vacate. On the same day, the attorney filed a motion to exceed the 15-page limit regarding the "enclosed" motion to vacate, and stated that this motion to vacate was 17 pages and that it contained an argument that the endorsement on the note was invalid. The record on appeal contains no copy of the motion to vacate. And, although Chase pointed this out in its response brief, defendants have not filed a reply brief or a motion to supplement the record on appeal.

¶ 12 On September 29, 2015, the trial court held a hearing on defendants' motions. But the record contains no report of proceedings or bystander report. Again, Chase pointed this out in its response brief. The record contains only the written order entered by the trial court, in which it denied the motion to stay the sale of the property and denied defendants' motion to vacate the three orders entered on June 26, 2015. The court reasoned that "substantial justice was done when the summary judgment and judgment of foreclosure and sale were entered."

¶ 13 Later that afternoon, the property was sold for $420,000 to Chase, the highest bidder, leaving a deficiency of $158,695.52.

¶ 14 On October 5, 2015, Chase filed a motion to confirm the sale; requested an order of possession; and requested an *in personam* deficiency judgment be entered against Jose. Defendants filed objections. They argued that Jose had never received notice of the sale and that the report from the selling officer, Kallen Realty Services, was not signed. Chase replied and attached the notice of foreclosure sale that had been sent to Jose's attorney on August 28, 2015. Chase also noted that section 15-1508(b) of the Illinois Mortgage Foreclosure Law states: "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." (Emphasis added.) 735 ILCS 5/15-1508(b) (West 2012). Chase contended that defendants had failed to allege any of these defects.

¶ 15 After a hearing on February 5, 2016, the court entered an order finding that the notice of sale was properly sent, and continued the motion to February 9, 2016, for Chase to provide a signed report of sale. The record contains no transcript of this hearing.

¶ 16 On February 9, 2016, Chase filed the signed report of sale. The trial court entered orders confirming the sale, entitling Chase to possession of the property, and allowing an *in personam* deficiency judgment of $158,695.52 against Jose.

¶ 17 Defendants now appeal.

¶ 18 II. ANALYSIS

¶ 19 Defendants first challenge the orders entered by the trial court on September 29, 2015, denying defendants' motion to vacate the three orders entered on June 26, 2015—namely, the order granting summary judgment against Jose, the order of default against Mario, and the judgment of foreclosure and sale.

¶ 20 We review a trial court's decision to deny a motion to vacate for an abuse of discretion. *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 14. "A trial court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted." (Internal quotation marks omitted.) *Id*.

¶ 21 Defendants tell us that the motion to vacate was primarily based on neither defendant receiving the required "Grace Period Notice" from Chase at least 30 days before Chase filed the present foreclosure suit. Defendants claim that the trial court committed reversible error in denying the motion, because defendants "sufficiently demonstrated from an evidentiary standpoint" that Chase failed to send the required notice. But there is no copy of the motion to vacate in the record, nor does the record contain a report of proceedings or bystander report of the September 29, 2015 hearing where the motion to vacate was heard. Defendants cite a "supplemental record" but, as Chase notes, there is no supplemental record in this appeal. When Chase pointed out all of these deficiencies in its brief, defendants did not file a reply brief or move to supplement the record.

¶ 22 "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 392; accord *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757 (2006) ("In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption

favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985))).

¶ 23 In *Foutch*, the court held that there was no basis for holding that the trial court abused its discretion in denying a motion to vacate because there was no transcript of the hearing on the motion. *Id*. More generally, this court has repeatedly recognized the difficulty of reviewing a discretionary decision in the absence of a record of the trial court's reasoning. See, *e.g.*, *Hansen*, 2016 IL App (1st) 143720, ¶¶ 14-15 (absent record of hearing on motion to vacate judgment, appellate court could not determine if trial court abused discretion because appellate court did "not know whether the trial court heard evidence on the motion, what the parties argued, or—most importantly—the basis for the court's decision"); *In re Marriage of Golden*, 358 Ill. App. 3d 464, 473 (2005) (affirming discretionary decision on review of maintenance payments because record lacked "a report of proceedings or a sufficient substitute," and thus court was "unable to determine what evidence was presented to the trial court or how the trial court weighed the various relevant factors").

¶ 24 As the appellants, defendants had the burden of providing this court with a sufficiently complete record of the proceedings at trial to support their claim of error. Because defendants failed to include a copy of their motion to vacate and the transcript of the hearing on their motion, they have failed to meet their burden. Thus, we must presume the trial court's decision "was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392.

¶ 25 Defendants' next argument appears to be that Chase lacked standing to bring this foreclosure suit. Relying on a Michigan Supreme Court case, defendants argue that Chase did not acquire WAMU's assets by operation of law. Thus, defendants claim that Chase does not qualify as a holder of the note because the payee of the note is WAMU.

¶ 26 "The function of the doctrine of standing is to insure that issues are raised only by those parties with a real interest in the outcome of the controversy." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). A lack of standing negates a plaintiff's cause of action and the proceedings must be dismissed. *Wexler*, 211 Ill. 2d at 22. It is not the plaintiff's burden to establish it has standing. *Id*. Lack of standing is an affirmative defense that is forfeited if not raised in a timely manner in the trial court. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 237 (2000).

¶ 27 Chase attached the mortgage and note to its complaint. A mortgagee establishes a *prima facie* case for foreclosure by introducing the mortgage and the note. *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 18. " 'The mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note.' " *Olive Portfolio Alpha, LLC v. 116 W. Hubbard St., LLC*, 2017 IL App (1st) 160357, ¶ 31 (quoting *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24). Once Chase established its *prima facie* case for foreclosure, the burden of proof then shifted to defendants to prove any applicable affirmative defenses. *Zubel*, 2014 IL App (1st) 130976, ¶ 18.

¶ 28 According to the record, neither defendant raised Chase's standing as an affirmative defense in the trial court. Mario failed to appear and never filed an answer or affirmative defense. Jose answered but did not file any affirmative defenses. He denied the allegations in the complaint pertaining to Chase's interest in the mortgage and note, but a defendant's denial of an allegation in a complaint does not rise to the level of an affirmative defense. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008); *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 18 (in foreclosure action, "even though the [defendants] denied [the bank's] allegation of capacity in their answer, they did not adequately raise the affirmative defense of standing.").

And, although Jose filed a response to Chase's first motion for summary judgment, he did not raise any argument that Chase lacked standing. Thus, we must conclude that the standing issue is forfeited.

¶ 29 In view of our disposition of this case, we need not address Chase's arguments that defendants' claims regarding the grace period notice and standing are meritless. We conclude that the trial court did not abuse its discretion in denying defendants' motion to vacate.

¶ 30 In this appeal, defendants also request that this court reverse the trial court's February 9, 2016 orders confirming the sale, entitling Chase to possession of the property, and allowing an *in personam* deficiency judgment of $158,695.52 against Jose. But defendants have presented no argument on any of these issues.

¶ 31 As noted earlier, under section 15-1508(b) of the Illinois Mortgage Foreclosure Law, "[u]nless 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." (Emphasis added.) 735 ILCS 5/15-1508(b) (West 2012). Defendants have failed to identify any error in the trial court's February 9, 2016 orders. Thus, we decline defendants' request that we reverse those orders.

¶ 32 III. CONCLUSION

¶ 33 Defendants have failed to show that the trial court abused its discretion in denying their motion to vacate. They have forfeited the issue that Chase lacked standing to pursue the mortgage foreclosure action, as defendants did not raise standing as an affirmative defense in the trial court. Accordingly, we affirm the judgment of the trial court in all respects.

¶ 34 Affirmed.