

No. 1-17-1571

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
FIRST DISTRICT

DITECH FINANCIAL, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	
VaSHAN KYLES a/k/a VaSHAN FRANCENE KYLES)	
a/k/a VaSHAN F. KYLES a/k/a V.F. KYLES a/k/a V.)	No. 11 CH 35040
KYLES a/k/a KYLES VaSHAN VaSHAN a/k/a)	
VaSHAN FRANCENE KYLES-EL a/k/a VaSHAN)	
KYLES-EL and UNKNOWN OWNERS AND)	
NONRECORD CLAIMANTS,)	
)	
Defendants)	The Honorable
)	Anna M. Loftus
(VaShan Kyles, Defendant-Appellant).)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s judgment is affirmed. Defendant failed to produce any evidence to create a genuine issue of material fact as to plaintiff’s standing, failed to demonstrate that the circuit court abused its discretion by confirming the judicial sale, and forfeited her fraud arguments by failing to advance those arguments in the circuit court.

¶ 2 Ocwen Loan Servicing, LLC (Ocwen) initiated this action to foreclose on defendant VaShan Kyles’s mortgage based on an alleged default. Numerous entities were substituted as the party plaintiff during the proceedings. The circuit court ultimately granted summary judgment in favor of Ocwen’s successor, denied defendant’s cross-motion for summary judgment, and entered a judgment of foreclosure and sale. The circuit court ultimately allowed Ditech Financial, LLC (Ditech) to substitute as the party plaintiff, and entered an order approving the report of sale, confirming the judicial sale, and awarding possession to a third-party purchaser. Defendant appeals. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017) requires an appellant to set forth, in relevant part, “the facts necessary to an understanding of the case.” Here, defendant’s *pro se* appellant’s brief provides virtually no explanation of the relevant facts. The following statement of facts, therefore, is based on the record on appeal and the facts set forth in plaintiff’s appellee’s brief.

¶ 5 In September 2007, defendant executed a promissory note in favor of Taylor, Bean & Whitaker Mortgage Corp. (Taylor Bean), secured by a mortgage on defendant’s home. Taylor Bean was identified as the “Lender” in both the mortgage and the note, and the mortgage identified Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee, “acting solely as a nominee for Lender and Lender’s successors and assigns.”

¶ 6 In October 2011, Ocwen initiated this mortgage foreclosure action by filing a complaint that substantially followed the form complaint in section 15-1504(a) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504(a) (West 2010)). Ocwen alleged that defendant was in default by having “not paid the monthly installments of principal, taxes, interest and insurance

for 07/01/2011, through the present.” Ocwen asserted that it was bringing suit in its capacity as the mortgagee. Attached to the complaint were copies of the mortgage and the note. The copy of the note bore a blank indorsement from Taylor Bean.

¶ 7 Defendant filed a *pro se* appearance, a motion to quash service of process, and a notice of removal to federal court. The federal district court, however, remanded the case back to the circuit court, where defendant’s motion to quash was denied. Defendant filed an answer, affirmative defenses, and counterclaims. On Ocwen’s motion, the circuit court dismissed defendant’s counterclaims and struck defendant’s affirmative defenses, all without prejudice.

¶ 8 Defendant obtained counsel and filed an amended affirmative defense asserting that Ocwen lacked standing based on Taylor Bean’s transfer of defendant’s loan to Ocwen during Taylor Bean’s bankruptcy proceedings. Ocwen filed a combined motion pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)), to strike and dismiss defendant’s affirmative defense. Ocwen argued that defendant failed to allege sufficient facts to assert an affirmative defense of standing. Alternatively, Ocwen asserted that the federal bankruptcy court permitted Taylor Bean to sell its assets, expressly approved an agreement between Taylor Bean and the Federal Home Loan Mortgage Corporation (Freddie Mac) to resolve issues related to Taylor Bean’s servicing of Freddie Mac’s loans, and permitted Taylor Bean to transfer the servicing rights to numerous loans, including defendant’s loan, to Ocwen. The motion to dismiss was supported by various documents from the bankruptcy court as well as an assignment of mortgage recorded in the Cook County Recorder of Deeds’ office in December 2009, reflecting that MERS, on behalf of Taylor Bean, assigned defendant’s mortgage to Ocwen. During briefing on Ocwen’s motion to dismiss, Ocwen moved to substitute Nationstar Mortgage LLC (Nationstar) as the proper party plaintiff, and the motion was supported by an assignment of

mortgage, recorded in June 2013, from Ocwen to Nationstar. The circuit court granted Ocwen's motion to strike and dismiss defendant's affirmative defense, and allowed Nationstar to substitute as the party plaintiff.

¶ 9 Nationstar filed motions for summary judgment and for a judgment of foreclosure and sale. Nationstar's motion for a judgment of foreclosure and sale was supported by an affidavit of amounts due and owing. Defendant filed a cross-motion for summary judgment. Defendant's attorney was then allowed to withdraw, and defendant filed a *pro se* amended cross-motion for summary judgment. The amended cross-motion for summary judgment asserted, in relevant part, that Ocwen was a registered debt collector, and that Taylor Bean assigned the mortgage to Ocwen during Taylor Bean's bankruptcy. Defendant asserted that neither Ocwen nor Nationstar were "the owner" of the note. Defendant argued that the complaint did not set forth factual allegations regarding the assignment of the mortgage and note to a debt collector. Defendant further argued that Ocwen and Nationstar failed to produce any evidence that those entities were the holder of the note. The cross-motions for summary judgment were fully briefed. During briefing, Nationstar filed a motion to substitute Residential Credit Solutions, Inc (RCS) as the party plaintiff, which the circuit court granted. The circuit court then held a hearing on the cross-motions for summary judgment, after which it granted summary judgment in favor of RCS, denied defendant's cross-motion for summary judgment, and entered a judgment of foreclosure and sale.

¶ 10 Prior to the judicial sale, defendant filed a chapter 7 bankruptcy, triggering an automatic stay. Defendant subsequently obtained a discharge in bankruptcy and the automatic stay was lifted. RCS then sold the property pursuant to the judgment of foreclosure and sale. A third party was the successful bidder at a judicial sale.

¶ 11 After the judicial sale, defendant filed a motion to vacate the circuit court’s judgment of foreclosure and sale, and sought leave to file a motion to dismiss. Defendant’s motion to vacate and motion to dismiss both asserted that, prior to the judicial sale but after her bankruptcy discharge, she filed an adversary proceeding in the bankruptcy court “to determine the validity, priority and extent of any liens alleged by [p]laintiff.” Defendant asserted—without citation to any authority—that the circuit court lacked jurisdiction due to the adversary proceeding in the bankruptcy court. Defendant did not present any order from the bankruptcy court imposing a stay and RCS was not named as a defendant in the adversary proceeding. The circuit court denied defendant’s motion to dismiss and subsequently denied defendant’s motion to vacate.

¶ 12 RCS filed a motion to substitute Ditech as the party plaintiff, as well as a motion for an order approving the report of sale and distribution. Both motions were fully briefed. On June 1, 2017, following a hearing, the circuit court granted RCS’s motion to substitute Ditech as the party plaintiff, and entered an order approving the report of sale and distribution, confirming the judicial sale, and awarding possession of the property to the third-party purchaser. Defendant filed a timely notice of appeal, which only identified the circuit court’s June 1, 2017, order approving the report of sale and distribution, confirming the sale, and awarding possession.¹

¹We note that at no point did defendant seek a stay of the circuit court’s judgment under Supreme Court Rule 305(k) (eff. July 1, 2004), which provides, in relevant part, that absent a stay, “the reversal or modification of the judgment does not affect the right, title or interest of any person who is not a party to the action or to any real *** property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed.”

Here, it is undisputed that the property was sold to a third party that never participated in the foreclosure action, and that no stay was perfected. Additionally, defendant’s bankruptcy discharge precluded plaintiff from seeking a money judgment against defendant in the form of an *in personam* deficiency, and thus this case does not involve any money judgment. Under these circumstances, defendant’s appeal is in all likelihood moot, since even if we were to reverse the circuit court’s judgment, the third-party purchaser’s rights in the property could not be altered and defendant’s rights in the property would remain extinguished. Plaintiff, however, does not advance any argument on appeal that this case is moot. Regardless, our disposition results in the same outcome as if we were to dismiss this appeal.

¶ 13

ANALYSIS

¶ 14 On appeal, defendant argues that Ocwen lacked standing to initiate the foreclosure action; that there were genuine issues of material fact that precluded the entry of summary judgment in favor of RCS; that the circuit court abused its discretion in confirming the judicial sale; and that RCS committed fraud.

¶ 15 As an initial matter, Ditech argues that defendant forfeited review of any order other than the order confirming the judicial sale because defendant failed to identify any other order in her notice of appeal. We disagree. In *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, we found that, in a mortgage foreclosure action, where the defendant's notice of appeal identified only the order approving the judicial sale, the circuit court's orders dismissing the defendant's affirmative defenses and granting summary judgment in favor of the plaintiff were steps in the procedural progression leading to the order confirming the judicial sale, and were therefore reviewable. *Id.* ¶¶ 7-10; see also *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 13 (same). In light of *2120 Division* and *Bukowski*, and in light of the fact that forfeiture is a limitation on the parties, not on this court, we find that we are not confined to only reviewing the circuit court's order approving the judicial sale.

¶ 16 Next, we observe that defendant's appellant's brief—in addition to violating Supreme Court Rule 341(h)(6) (see *supra* ¶ 4)—also violates Supreme Court Rule 341(h)(7). Defendant's argument section contains only one citation to the record in support of her contentions on appeal, and she regularly fails to cite any relevant authority to support her arguments. Defendant's *pro se* status does not relieve her of her obligation to comply with our supreme court's rules, and her violations of those rules are severe. We decline, however, to strike her brief or dismiss her appeal, as the issues on appeal are straightforward and we have the benefit of plaintiff's thorough

and cogent brief. Defendant is advised that future violations of our supreme court's rules may result in forfeiture of her arguments on appeal, her brief being stricken, or her appeal being dismissed.

¶ 17 Finally, defendant forfeited her argument that RCS committed fraud. She fails to cite to any portion of the record on appeal that shows that she raised this argument in the circuit court, and thus we cannot discern how her arguments relate to the judgments under review. Furthermore, her argument on appeal does not identify any particular fraudulent conduct by RCS or any other entity, and is not supported by citations to the record or to relevant authority. Defendant's fraud argument is forfeited and warrants no further consideration. Ill. S. Ct. R. 341(h)(7).

¶ 18 Turning to the merits of defendant's appeal, she first argues that Ocwen lacked standing to initiate the foreclosure action. Defendant's argument on this issue is poorly framed and difficult to follow. She argues that the "complaint and subsequent pleadings should have been inadmissible and were erroneously entered in the court record by plaintiff's counsel which were not facts but hearsay and may not be relied on in the court's rulings and determinations." She argues that, in the circuit court, she requested that Ocwen "produce the original wet ink signature note for viewing for authenticity," but fails to cite to the record to support this contention. She concludes that the circuit court erred when it granted summary judgment in favor of plaintiff "under the presumption that they [*sic*] had standing at all times."

¶ 19 The circuit court ultimately granted summary judgment in favor of Nationstar and denied defendant's cross-motion for summary judgment. Summary judgment is appropriate where the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2016). We review a circuit court’s summary judgment order *de novo*. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 56.

¶ 20 To the extent that defendant’s argument can be construed as an argument that either Ocwen failed to prove that it had standing or that there was a genuine issue of material fact as to Ocwen’s standing at the time it initiated this action, we disagree on both fronts. This court has regularly stated that standing is an affirmative defense that a defendant must plead and prove. *Id.* ¶ 61. Here, under any measure, defendant failed to meet that burden. Ocwen attached a copy of the promissory note to its complaint that was indorsed in blank. “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 payable to bearer ***.” 810 ILCS 5/3-205(b) (West 2016). It is well settled that “possession of bearer paper is *prima facie* evidence of title thereto” and is sufficient “to entitle the plaintiff to a decree of foreclosure.” *Joslyn v. Joslyn*, 386 Ill. 387, 395 (1944). Furthermore, 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. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 21 Here, Ocwen was under no obligation to attach the original note to the complaint, and neither Ocwen nor the successor party plaintiffs were obligated to introduce the original note into evidence or to produce the original note in open court. *Id.* ¶ 32. The attachment of a copy of the note to the complaint was sufficient to establish that Ocwen had a right to enforce the note and seek to foreclose on the mortgage (*Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010), and it was incumbent upon defendant to come forward with some evidence to show that Ocwen lacked standing at the time it filed the foreclosure complaint. In the

circuit court, defendant argued that Ocwen did not properly acquire the note from Taylor Bean, but defendant has not pursued that argument on appeal. Defendant advances no other argument on appeal that there was a genuine issue of material fact as to Ocwen's standing or any other matter that was before the circuit court. Based on the record before us, Ocwen presented *prima facie* evidence of its right to foreclose on the mortgage and defendant failed to establish any question as to Ocwen's standing. The circuit court's order granting summary judgment in favor of Nationstar is therefore affirmed.

¶ 22 Defendant next contends that the circuit court erred by denying her cross-motion for summary judgment. Defendant's argument on this point is incoherent. She argues,

“The essential terms of the contracts were not disclosed to [her] which is a violation of [her] inalienable god given rights. *** The contracts failed to disclose that the mortgage/security agreement created a trust and there were parts of the trust that need to be identified. It raises the question of who is the creditor/grantor, beneficiary and trustee in the transaction and trust.”

Defendant does not explain which “contracts” she is referring to, and we ultimately fail to understand the significance of her argument. Ocwen initiated this foreclosure action based on defendant's alleged default under the terms of the mortgage and the note she executed in favor of Taylor Bean. Ocwen attached to its complaint copies of the mortgage and the note indorsed in blank. At no point in the circuit court did defendant argue that she failed to understand the terms of the mortgage and note, or that any of the terms of those instruments were “not disclosed” to her. Defendant fails to explain what “trust” she believes is involved or was created, or what “parts of the trust” need to be identified. In the circuit court, defendant argued that Ocwen

obtained the note during Taylor Bean's bankruptcy. Ocwen, however, presented evidence that the acquisition was specifically permitted by the bankruptcy court.

¶ 23 Defendant further contended that neither Ocwen nor Nationstar were the owner of the note, but defendant's bare contention is belied by the fact that a copy of the note indorsed in blank was attached to the complaint. Finally, defendant argued that Ocwen was a debt collector and failed to plead in its complaint how it obtained the mortgage and note. Ocwen, however, alleged in the complaint that it was the mortgagee, and subsequently confirmed this by producing a recorded assignment in its favor from Taylor Bean. Defendant's arguments in the circuit court—which she forfeited by failing to pursue on appeal—did not create any genuine issue of material fact as to Ocwen's standing to initiate the foreclosure action, or as to any other issue germane to the foreclosure judgment. As defendant has failed to develop or advance any meaningful argument with respect to the circuit court's denial of her cross-motion for summary judgment, we have no basis from which we might conclude that her cross-motion for summary judgment should have been granted, or that it created any genuine issue of material fact that would defeat plaintiff's motion for summary judgment. We therefore affirm the circuit court's denial of defendant's cross-motion for summary judgment.

¶ 24 Finally, defendant argues that the circuit court abused its discretion in confirming the judicial sale. Her argument on this point consists of three sentences:

“At the time of the sale, the [circuit] court was made aware that there was an adversary proceeding going on the [sic] Northern District of Illinois Bankruptcy court. In an attempt to have a fresh start, the filing of bankruptcy was also to request the true creditor to provide the evidence of the claim. The [circuit] court was made aware that [defendant] made the request for the true creditor with rights, title and interest authorized

to conduct the sale to provide evidence of such a claim to the bankruptcy court and that matter was continued at the time of the alleged sale.”

Defendant, however, fails to explain how the adversary proceeding—filed after she obtained her discharge in bankruptcy and after the automatic stay was lifted—has any bearing on the judicial sale or the circuit court’s confirmation of that sale. Defendant’s failure to develop an argument on this point and to support her contentions on appeal with citations to authority results in forfeiture of her argument. Ill. S. Ct. R. 341(h)(7). We have been provided no basis from which to conclude that the circuit court abused its discretion in confirming the judicial sale and therefore affirm the circuit court’s judgment.

¶ 25

CONCLUSION

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

¶ 27 Affirmed.