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2018 IL App (3d) 170329-U

Order filed April 30, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

CITIMORTGAGE, INC.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois.
)	
v.)	Appeal No. 3-17-0329
)	Circuit No. 10-CH-2387
HARVEY C. JACKSON, JR.,)	
)	Honorable Cory D. Lund,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly found that plaintiff had standing to file this foreclosure action. (2) Defendant failed to demonstrate that he exercised due diligence in filing his petition under 735 ILCS 5/2-1401 (West 2016). (3) The trial court properly calculated the postjudgment interest.

¶ 2 On April 16, 2010, CitiMortgage, Inc. (CMI), filed its foreclosure complaint. The trial court entered summary judgment in CMI's favor, a judgment of foreclosure, and an order of sale on August 23, 2012. The court subsequently approved the judicial sale and distribution. Defendant, Harvey C. Jackson, Jr., now appeals the court's summary judgment, judgment of

foreclosure, order of sale, and approval of sale and distribution. For the reasons set forth below, we affirm the trial court's judgments.

¶ 3 BACKGROUND

¶ 4 Jackson entered into the subject mortgage contract with Argent Mortgage Company, LLC (Argent), on October 10, 2006. The mortgage contract included a 30-year note. The note's terms provided that Argent agreed to loan Jackson \$192,000 at a 6.85% annual interest rate. The note required Jackson to submit monthly payments covering the prorated principal and interest due on the loan. The mortgage and note identify Argent as the payee.

¶ 5 CMI attached the mortgage, note, and two assignments to its foreclosure complaint. The first assignment from January 2009 showed that Citi Residential Lending, Inc. (Citi Residential), as attorney in fact for Argent, assigned Argent's interest to Mortgage Electronic Registration System (MERS), as nominee for CMI. The parties recorded the assignment on March 3, 2009. Jackson defaulted on the mortgage and note in September 2009. In March 2010, MERS assigned the mortgage to CMI. The parties recorded the assignment on April 1.

¶ 6 Jackson alleged two affirmative defenses; he claimed that CMI lacked standing to foreclose on the mortgage and violated the Illinois Consumer Fraud Act. Jackson also filed several counterclaims against CMI, including fraud in the inducement, common law fraud, negligent misrepresentation, breach of fiduciary duty, and civil conspiracy. The trial court dismissed Jackson's counterclaims and Consumer Fraud Act defense with prejudice; it dismissed Jackson's standing defense without prejudice.

¶ 7 On August 1, 2012, CMI filed a motion for summary judgment and judgment of foreclosure and sale. CMI attached to its motion a prove-up affidavit from Toni Toll, a CMI document control officer. The affidavit stated that CMI was "the holder of the loan." It also

referenced Jackson's payment history, which CMI kept in the normal course of business. The payment history indicated that Jackson owed over \$235,000 in principal, interest, escrow advancements, and other fees. Jackson does not dispute the payment history or claim that he never made payments to CMI.

¶ 8 Soon after the court granted CMI's motion, Jackson filed for bankruptcy. The court stayed this case pending the bankruptcy proceedings. CMI filed notices of sale on August 23, 2013, and January 29, 2014. In February 2014, Jackson moved to vacate the court's August 23, 2012, summary judgment order. He challenged CMI's chain of title for the mortgage and claimed that CMI lacked standing to foreclose. The court denied defendant's motion.

¶ 9 In June 2014, Jackson filed a "Motion to Dismiss," which the court apparently construed as a petition under section 2-1401 of Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). The motion reinstated Jackson's standing defense based on newly discovered evidence—namely, two previously undisclosed transactions regarding the mortgage. Through a securitization audit, Jackson discovered that Argent conveyed the mortgage security to an entity called "Anson Street, LLC" on October 18, 2006. On March 30, 2007, Argent conveyed the security to "CitiGroup Mortgage Loan Trust, Inc., Asset-Backed Pass Through Certificates Series 2007-AMC2, U.S. Bank National Association as Trustee" (CitiGroup Trust). Jackson's title search at the Will County recorder's office uncovered a March 17, 2014, "corrective assignment" from MERS, as nominee for CMI, to U.S. Bank, N.A., as trustee for Citigroup Trust. Based on these assignments, Jackson claimed that Citi Residential possessed no interest to assign MERS; therefore, MERS lacked an interest to assign CMI. Defendant claimed that the chain of title raised a question of fact as to CMI's standing to foreclose on the loan. The court denied Jackson's motion.

¶ 10 Over the next two years, Jackson filed numerous motions and discovery requests. To discourage Jackson’s barrage of motions, CMI moved to correct a “misnomer” of the named plaintiff. CMI proposed to effectively substitute “CitiGroup Mortgage Loan Trust, Inc. Asset-Backed Pass-through Certificates Series 2007-AMC2, U.S. National Bank Association as Trustee” as the plaintiff. The court denied CMI’s motion. It also denied Jackson’s motions and struck his discovery requests.

¶ 11 The mortgaged property sold at a judicial sale on November 17, 2016. CMI filed a motion to confirm the sale on December 15. Jackson unsuccessfully challenged the sale; the court approved the sale and distribution on March 14, 2017. After the court denied Jackson’s postjudgment motions, Jackson filed this appeal. We now affirm the trial court’s judgments.

¶ 12 ANALYSIS

¶ 13 On appeal, Jackson primarily challenges CMI’s standing to file this foreclosure action. He argues that fact issues in CMI’s chain of title precluded summary judgment in CMI’s favor. He also claims that he “demonstrated due diligence in raising meritorious defenses and in filing a 2-1401 petition.” Finally, he contends that the trial court erred when it calculated postjudgment interest from the foreclosure judgment, rather than from the order approving the sale and distribution.

¶ 14 I. Standing

¶ 15 Jackson claims that the trial court erred in granting summary judgment because he raised genuine issues of material fact regarding CMI’s title to the mortgage. We review trial courts’ orders granting summary judgment *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Summary judgment is appropriate when the pleadings and evidence in the record show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

law. 735 ILCS 5/2-1005 (West 2016); *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228 (2007). We may affirm the trial court’s judgment on any basis supported by the record. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 16 To have standing, a party must have a real interest in the lawsuit and its outcome. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). A party’s lack of standing is an affirmative defense; the defendant asserting it bears the burden of proof. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). If the defendant proves that the plaintiff lacked standing, the court must dismiss the case. *Wexler*, 211 Ill. 2d at 22.

¶ 17 It is undisputed that MERS assigned the mortgage to CMI in March 2010, before CMI filed this suit in April. However, Jackson doubts the assignment’s validity on two grounds. First, he claims that the prior transactions unveiled in the securitization audit left MERS with nothing to assign CMI. Alternatively, he claims that MERS lacked authority to transfer beneficial interests in the note because the mortgage contract granted MERS rights in the property interest only. The mortgage contract and note are separate instruments that grant distinct rights; the note does not grant MERS nominee rights to the mortgage’s financial interest. Neither argument, even if true, undermines CMI’s standing.

¶ 18 A foreclosure action may be filed by a mortgagee, or by the mortgagee’s agent or successor. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 11. A foreclosure plaintiff establishes *prima facie* evidence of its standing by attaching a copy of the mortgage and note to the complaint. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 19 CMI clearly established its *prima facie* case for standing. CMI attached Jackson’s mortgage, note, and two assignments to the complaint. The fact that CMI did not attach the “undisclosed” securitization records to the initial complaint is irrelevant; neither the Illinois

Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2016)) nor Supreme Court Rule 113 requires plaintiffs to attach these documents. See *Deutsche Bank National Trust Co. v. Jordanov*, 2016 IL App (1st) 152656, ¶ 37; *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 13; *Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 20 Jackson claims that CMI’s “contradictory” chain of title defeats its *prima facie* showing. He argues that the chain of title demonstrates that CitiGroup Trust, not CMI, is the proper plaintiff. We disagree.

¶ 21 A foreclosure plaintiff need not establish clear title to have standing. See *Deutsche Bank National Trust Co. v. Payton*, 2017 IL App (1st) 160305, ¶¶ 24-28. The property interest’s chain of title is not necessarily dispositive, or even relevant, to standing in foreclosure cases. The Seventh Circuit has held that the Illinois Conveyances Act (765 ILCS 5/28 (West 2016)) does not require a note holder to record its interest because the note is a financial interest in the borrower’s debt; the mortgage is the property interest that must be recorded. *Macon County v. MERSCORP, Inc.*, 742 F.3d 711, 712 (7th Cir. 2014). What matters in a foreclosure case is who holds, or is authorized to enforce, the debtor’s financial obligations, not who holds the recorded property interest.

¶ 22 The Foreclosure Law defines “mortgagee” as “(i) the holder of an indebtedness *** secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor.” 735 ILCS 5/15-1208 (West 2016)). CMI possessed standing to file this suit if it held the debt *or* acted as the holder’s authorized agent.

¶ 23 Even if we assume that CitiGroup Trust held the debt when CMI filed the complaint, nothing in the chain of title disputes that CMI serviced the loan or served as the debt holder’s

authorized agent. A CMI employee provided the prove-up affidavit, which contained a payment history showing that Jackson made monthly mortgage payments to CMI. Jackson does not dispute the payment history. Nor does he present any evidence that CMI lacked authority from the note holder to service the loan and file this action. CMI had access to Jackson's payment history, accepted his payments, and tracked the loan balance. We also note that CMI and CitiGroup Trust appear to be subsidiaries of the same parent company.

¶ 24 This record sufficiently demonstrates CMI's authority to act on the note holder's behalf if, in fact, CMI was not the holder when it filed this action. Under the Foreclosure Law, this authority establishes CMI's standing. Jackson made no allegation and presented no evidence in his plethora of trial court motions that suggested CMI lacked authority from the debt holder to enforce the note.

¶ 25 II. Due Diligence

¶ 26 On August 11, 2014—nearly two years after the trial court entered judgment of foreclosure and sale—Jackson filed what the court and parties construed as a section 2-1401 petition. Litigants most commonly file these petitions to “bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry.” *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). A successful section 2-1401 petition must establish a meritorious claim or defense, demonstrate that the petitioner exercised due diligence in presenting the claim or defense in the original action, and demonstrate that the petitioner exercised due diligence in filing the petition. *Smith v. Airloom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). We reject Jackson's standing defense above; he cannot establish a meritorious claim or defense.

¶ 27 Assuming, *arguendo*, that Jackson satisfied the first element, he nonetheless failed to exercise due diligence in presenting the petition’s “new facts” during the original action. These new facts included the “undisclosed” transactions that Jackson discovered through a securitization audit. Jackson filed his section 2-1401 petition more than four years after CMI filed its foreclosure complaint in March 2010. He could have performed the securitization audit and discovered the “new facts” anytime after CMI filed the complaint—the “new” transactions occurred in 2006 and 2007, several years before this suit began.

¶ 28 Jackson neither states in his petition nor argues on appeal that the securitization audit information was unavailable or unobtainable before the court granted CMI summary judgment in August 2012. Instead, he attributes the long delay to his *pro se* representation and lack of “a full working knowledge of the numerous procedural guidelines laid down by Illinois Law.” Jackson’s legal education (or lack thereof) has no bearing on his ability to obtain a securitization audit or otherwise investigate the status of his mortgage. We find that he failed to exercise due diligence in presenting the securitization audit information during the original action—prior to the trial court’s summary judgment order.

¶ 29 **III. Postjudgment Interest Calculation**

¶ 30 Finally, Jackson claims that the trial court “abused its discretion” by calculating 9% statutory postjudgment interest (735 ILCS 5/2-1303 (West 2016)) from the date of its foreclosure judgment (summary judgment) rather than the date it approved the sale and distribution. We first note that Jackson states the wrong standard of review. The trial court has no discretion to determine postjudgment interest. *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1039 (2001). If and when postjudgment interest accrues is determined by statute. See *id.* We review postjudgment interest challenges *de novo*. See *Allegis Realty Investors v. Novak*, 223 Ill.

2d 318, 330 (2006) (holding that appellate courts review the meaning and effect of statutory provisions *de novo*).

¶ 31 Jackson argues that the order approving the sale and distribution is the final judgment in mortgage foreclosure cases that triggers the statutory interest. He further argues that calculating postjudgment interest from the foreclosure judgment forward is unjust under the Foreclosure Law (735 ILCS 5/15-1508(b)(iv) (West 2016)). For these reasons, Jackson claims that the appellate court wrongly decided *BAC Home Loans Servicing, LP v. Popa*, 2015 IL App (1st) 142053.

¶ 32 In *Popa*, the appellate court held that the legislature’s use of the word “judgment” in the Foreclosure Law (735 ILCS 5/15-1504(e) (West 2016)) “clearly refers to the foreclosure judgment *** not the order confirming the sale.” *Popa*, 2015 IL App (1st) 142053, ¶ 35. The court also recognized that the longstanding “merger doctrine” entirely merges a contract (like a mortgage or note) into a court’s judgment based on the contract, and the contract loses its binding effect after the court issues the judgment. *Id.* ¶ 36 (citing *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414 (2006)). Based on its analyses of the Foreclosure Law and the merger doctrine, the court held that foreclosure judgments trigger the statutory postjudgment interest rate.

¶ 33 Jackson claims that adopting *Popa*’s holding would impose unjust burdens on mortgagors because foreclosure judgments are not appealable final orders. We disagree with Jackson’s position and agree with *Popa*. Under the merger doctrine, a foreclosure judgment adjudicates and effectively replaces the relevant loan contracts. After the court issues a foreclosure judgment, the judgment binds the parties and supersedes the contracts’ binding effect. If the foreclosure judgment did not trigger the statutory postjudgment interest rate, then the judgment would release the debtor/mortgagor from paying *any* further interest.

¶ 34 In addition to its legal validity, *Popa*'s holding imposes no "unjust" burdens upon mortgagors. Mortgagors' inability to immediately appeal a foreclosure judgment as of right does not make the application of statutory postjudgment interest unjust. If an appellate court subsequently reverses the foreclosure judgment, then the mortgagor is not obligated to pay the judgment or the accrued postjudgment interest. The reversal voids the foreclosure judgment and reinstates the contracts' binding effect.

¶ 35 We also note that interest on the debt (whether contractual or statutory) continues accruing until the creditor is compensated through repayment or the conclusion of legal proceedings. If the statutory rate is less than the contract rate, imposing it is a benefit rather than a burden to the debtor. We decline to deem statutory postjudgment interest an "unjust burden" simply because its rate is higher than the contract rate in this case.

¶ 36 We find that the trial court properly calculated the postjudgment interest. For the reasons stated above, we affirm the court's summary judgment order, foreclosure judgment, and order approving the sale and distribution.

¶ 37 **CONCLUSION**

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 39 Affirmed.