

NOTICE

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2019 IL App (4th) 190119-U

NO. 4-19-0119

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 11, 2019

Carla Bender

4th District Appellate Court, IL

DITECH FINANCIAL, LLC, f/k/a Green Tree Servicing, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Champaign County
v.)	No. 17CH136
PHILIP L. SELLERS, Unknown Owners and Nonrecord Claimants,)	Honorable
Defendants)	Jason M. Bohm,
(Philip L. Sellers, Defendant-Appellant).)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err by (1) granting summary judgment in favor of plaintiff on its complaint to foreclose mortgage and (2) denying defendant’s motion for sanctions under Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018).
- ¶ 2 In May 2017, plaintiff, Ditech Financial, LLC, formerly known as Green Tree Servicing, LLC, filed a complaint to foreclose mortgage against defendant, Philip L. Sellers, and unknown owners and nonrecord claimants, on the property commonly known as 608 West Clark Street in Champaign, Illinois (hereinafter Clark Street property). In October 2018, plaintiff filed a motion for summary judgment and a motion for entry of judgment for foreclosure and sale. Along with the motions, plaintiff filed (1) a certificate of prove-up of attorney fees and costs, (2) a loss mitigation affidavit, and (3) an affidavit of amounts due and owing. In response, defendant filed *pro se* a document entitled “defense documents one thru four.” After an October

22, 2018, hearing, the Champaign County circuit court entered an order granting summary judgment in favor of plaintiff and against defendant and a judgment for foreclosure and sale for the Clark Street property. In November 2018, defendant filed a motion to vacate the summary judgment and judgment for foreclosure and sale. In the motion, he also asked for sanctions under Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018). At a January 2019 hearing, the court denied defendant's postjudgment motion in its entirety.

¶ 3 Defendant appeals *pro se*, asserting (1) plaintiff's loss mitigation affidavit did not comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), (2) plaintiff's loss mitigation affidavit did not comply with Illinois Supreme Court Rule 114 (eff. Jan. 1, 2018), (3) the circuit court failed to enforce Illinois Supreme Court Rule 273 (eff. Jan. 1, 1967), (4) plaintiff's admission it was not an injured party violated judicial standing requirements, and (5) the case should be dismissed as a sanction under Rule 137 for plaintiff's alleged errors. We affirm.

¶ 4 **BACKGROUND**

¶ 5 Plaintiff attached a copy of the mortgage and note for the Clark Street property to its May 2017 complaint. Both documents listed the lender as First Mid-Illinois Bank and Trust and the borrower as defendant. With the complaint, plaintiff also filed a verification pursuant to section 15-1504.1(a-5)(3) of the Code of Civil Procedure (735 ILCS 5/15-1504.1(a-5)(3) (West 2016)). After the complaint was filed, the parties engaged in mediation. In February 2018, a final mediation report was filed, indicating the parties had not reached an agreement. The document stated loan servicer was present at the mediation but not the servicer's counsel. The report also noted (1) plaintiff had denied defendant's loan modification application and (2) defendant's hardest hit application with the State was still pending. The report was signed by both defendant and plaintiff's counsel.

¶ 6 Defendant filed *pro se* an answer and affirmative defense in March 2018. Plaintiff filed a motion to strike defendant's affirmative defenses. On May 21, 2018, the circuit court held a hearing on plaintiff's motion to strike defendant's affirmative defenses. During the hearing, plaintiff's counsel presented the original note for defendant's loan and allowed defendant to inspect it. After hearing the parties' arguments, the court granted the motion to strike and provided defendant with additional time to file another pleading.

¶ 7 In June 2018, defendant filed a motion for a bill of particulars and an answer and counterclaim. In his answer, defendant challenges plaintiff's standing to bring the cause of action because it was not an injured party. Plaintiff again filed motions to strike the bill of particulars and defendant's counterclaim. After a September 2018 hearing, the court struck defendant's request for a bill of particulars and defendant's counterclaim.

¶ 8 In October 2018, plaintiff filed a motion for entry of a judgment for foreclosure and sale and a motion for summary judgment. Along with the two motions, plaintiff filed (1) a certificate of prove-up of attorney fees and costs, (2) a loss mitigation affidavit, and (3) an affidavit of amounts due and owing. In response, defendant filed *pro se* a document entitled "defense documents one thru four." The documents defendant references are the following: (1) an August 6, 2016, loan modification offer; (2) plaintiff's September 25, 2018, response letter; (3) a January 2016 property inspection report for the Clark Street property; and (4) a 2004 appraisal of the Clark Street property. Defendant seemed to argue in his responsive document plaintiff lacked standing to bring the cause of action and the property inspection report ordered by plaintiff contained false information.

¶ 9 On October 22, 2018, the circuit court held a hearing on plaintiff's motion for summary judgment. Defendant noted Rule 114 and contended it is not known whether plaintiff

complied with loss mitigation programs. Also, plaintiff noted false information had been presented regarding the condition of the property at issue. After hearing the parties' arguments, the court granted summary judgment in favor of plaintiff. That same day, the court entered a written order for summary judgment and a judgment for foreclosure and sale of the Clark Street property. The latter order stated the following: "This is a final and appealable order and there is no just cause for delaying the enforcement of this judgment or appeal therefrom."

¶ 10 In November 2018, defendant filed a timely motion to vacate the summary judgment and judgment for foreclosure and sale, as well as a request for sanctions under Rule 137. In his motion, defendant argued (1) plaintiff's loss mitigation affidavit did not comply with Rule 191, (2) plaintiff's loss mitigation affidavit did not comply with Rule 114, (3) plaintiff's loss mitigation affidavit fails to mention any participation in federal loss mitigation programs, (4) violations of Rules 191 and 114 were grounds for sanctions under Rule 137, (5) the circuit court erred by accepting an erroneous final mediation report, (6) genuine issues of material fact existed with plaintiff's affidavit of amounts due and owing, (7) the court erred by allowing costs and fees associated with mandatory mediation, (8) plaintiff's motion to strike defendant's affirmative defenses was overbroad, (9) plaintiff's motion to strike defendant's bill of particulars contradicts plaintiff's judicial admission Fannie Mae is the investor of the subject loan, (10) plaintiff did not comply with the doctrine of standing, (11) the court erred by striking his counterclaim, (12) the court's striking of his counterclaim operated as an adjudication on the merits under Rule 273, and (13) he was entitled to sanctions under Rule 137. He also filed a document entitled "defense documents five and six." Document five was an assignment of mortgage from First Mid-Illinois to ABN-AMRO, and document six was an assignment of mortgage from CitiMortgage to plaintiff. The court held a hearing on defendant's postjudgment motion on January 22, 2019. After

hearing the parties' arguments, the court denied defendant's postjudgment motion.

¶ 11 On February 19, 2019, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017), and thus this court has jurisdiction under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 12 II. ANALYSIS

¶ 13 A. Forfeiture

¶ 14 Plaintiff argues defendant failed to timely raise a majority of his issues in the circuit court. Our supreme court has noted the two most important tasks of an appellate court panel when beginning the review of a case is to ascertain its own jurisdiction and determine which issue or issues, if any, have been forfeited. *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). Thus, we begin by determining if any of defendant's issues are forfeited.

¶ 15 It is well-established a party who fails to raise an argument in the circuit court forfeits the opportunity to do so on appeal. *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 49, 71 N.E.3d 1. Moreover, "[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal." *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36, 5 N.E.3d 158.

¶ 16 First, we note motions for Rule 137 sanctions may be filed within 30 days of the entry of final judgment. Ill. S. Ct. R. 137(b) (eff. Jan. 1, 2018). Thus, defendant raised his Rule 137 request for sanctions in a timely manner and that issue is not forfeited. In his answer and response to plaintiff's summary judgment motion, defendant raised an objection to plaintiff's standing, contending plaintiff failed to allege any injury and raised. Accordingly, defendant also preserved the standing issue for appellate review.

¶ 17 However, defendant did not raise any issues of noncompliance with Illinois

Supreme Court Rule 191 and Rule 273. Thus, those any issues related to those rules are clearly forfeited. As to defendant's argument regarding compliance with Rule 114, the only issue he raised related to Rule 114 before the court entered summary judgment was his assertion the plaintiff failed to show compliance with loss mitigation programs. Defendant did not point to any specific defects in plaintiff's loss mitigation affidavit. Accordingly, this issue is also forfeited. Regardless, we note Illinois Supreme Court Rule 114(d) (eff. Jan. 1, 2018) gives the circuit court discretion whether to deny entry of a foreclosure judgment based on noncompliance with the requirements of Rule 114. The rule's use of the word "may" indicates courts have "some room for judicial discretion regarding the level of strictness of its enforcement." *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 37, 36 N.E.3d 266. Thus, defendant's argument the circuit court had to strictly enforce Rule 114 is meritless.

¶ 18

B. Standing

¶ 19 Defendant contends plaintiff lacked standing to bring its mortgage foreclosure complaint because it was not an injured party. Plaintiff contends it did have standing to file the action. Section 1005(c) of the Code of Civil Procedure (735 ILCS 5/2-1005(c) (West 2018)) provides summary judgment is proper when 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." We review *de novo* a circuit court's grant of a party's summary judgment motion. *CF SBC Pledgor I 2012-1 Trust v. Clark/School, LLC*, 2016 IL App (4th) 150568, ¶ 21, 78 N.E.3d 381.

¶ 20 "The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit and assures that issues are raised only by those parties with a real interest in the outcome of the controversy." (Internal quotation marks omitted.) *Deutsche*

Bank National Trust Co. v. Jordanov, 2016 IL App (1st) 152656, ¶ 34, 64 N.E.3d 147 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221, 720 N.E.2d 1034, 1039 (1999)). Illinois courts determine a party's standing to sue "as of the time the suit is filed." *Deutsche Bank*, 2016 IL App (1st) 152656, ¶ 34. "An action to foreclose upon a mortgage may be filed by a mortgagee or by an agent or successor of a mortgagee." *Deutsche Bank*, 2016 IL App (1st) 152656, ¶ 34. Also, "Illinois law allows servicers and agents to be foreclosure plaintiffs on behalf of the actual mortgage holder." *Citimortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 41, 29 N.E.3d 50. Moreover, "[t]he attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note." *Deutsche Bank*, 2016 IL App (1st) 152656, ¶ 34. "Under section 3-301 of the Uniform Commercial Code (810 ILCS 5/3-301 (West 2010)), the party holding the note is presumed to own it." *Citimortgage, Inc.*, 2014 IL App (1st) 132430, ¶ 40. Defendant bore the burden of pleading and proving a lack of standing. See *Deutsche Bank*, 2016 IL App (1st) 152656, ¶ 34.

¶ 21 In this case, plaintiff attached a copy of the mortgage and note to its complaint. It also noted in the affidavit of amounts due and owing, it had acquired the servicing rights for defendant's loan in September 2014. Additionally, plaintiff presented the original note in open court on May 21, 2018, for defendant's inspection. See *Citimortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 11, 16 N.E.3d 124 (finding since plaintiff produced the original note in open court, it was the holder of the note). Defendant never presented any evidence rebutting the aforementioned evidence of plaintiff's standing. Defendant continues to argue plaintiff never suffered a cognizable personal injury. However, this case involves a mortgage foreclosure and not a personal injury.

¶ 22 Defendant failed to prove plaintiff lacked standing. His standing challenge to the

summary judgment order is the only one defendant preserved for review. Since we have found defendant failed to establish plaintiff lacked standing, we find the circuit court did not err by granting summary judgment.

¶ 23

C. Rule 137 Sanctions

¶ 24 Defendant also contends the circuit court erred by denying his motion for sanctions under Rule 137. Plaintiff contends the court did not err. “An order denying Rule 137 sanctions will not be disturbed on review absent an abuse of discretion.” *Clark v. Gannett Co.*, 2018 IL App (1st) 172041, ¶ 71, 122 N.E.3d 376. A court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable. *Lee v. Berkshire Nursing & Rehab Center, LLC*, 2018 IL App (1st) 171344, ¶ 12, 117 N.E.3d 1172.

¶ 25

Rule 137(a) provides, in pertinent part, the following:

“Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record ***. *** The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*** If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable

expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee.” Ill. S. Ct. R. 137(a) (eff. Jan. 1, 2018).

The rule aims “to discourage frivolous filings, not to punish parties for making losing arguments.” *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 15, 39 N.E.3d 992.

¶ 26 In his motion for Rule 137 sanctions, defendant referenced his other arguments and asserted plaintiff and its attorneys “created conflicts of law, interfered with the Court’s duties, disregarded genuine issues of material fact, shifted the burden of proof, failed their burden of proof, failed to show candor toward the tribunal and fairness to opposing counsel.” His argument on appeal is convoluted and difficult to understand. Defendant appears to take issue with the final mediation report, alleging it was fraudulent. However, that document was signed by both plaintiff and defendant. Defendant also seems to contend Rule 137 sanctions were warranted based on violations of Rules 191 and 114. However, defendant did not raise any objections to the loss mitigation affidavit before the final judgment and thus failed to preserve those arguments for review. Moreover, even if the loss mitigation affidavit violated those supreme court rules, he does not explain how the violation constituted a violation of Rule 137. Accordingly, we find the circuit court did not abuse its discretion by denying sanctions under Rule 137.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the Champaign County circuit court’s judgment.

¶ 29 Affirmed.