2016 IL App (3d) 150180-U

Order filed March 24, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee for the Certificate holders of the CWALT, Inc., Alternative Loan Trust 2006-OC2 Mortgage Pass-Through Certificates Series 2006-OC2,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	
LEON P. BROWN; ANDREA BROWN,	)	Appeal No. 3-15-0180 Circuit No. 12CH1469
Defendants-Appellants, and	)	
Mortgage Electronic Registration Systems, Inc., as nominee for Intervale Mortgage Corporation; Capital One Bank (USA), N.A.; Willow Brook Estates Community Association Unit 5&6; Unknown Owners-Tenants and Non-Record Claimants,	)	The Honorable Daniel Rippy and Thomas A. Thanas Judges, Presiding.
Defendants.	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendants' affirmative defenses were not steps in procedural progression leading towards judgment and were not replead after having been stricken without prejudice, the defenses were waived and thus are not subject to review by this court. Moreover, where defendants failed to rebut the *prima facie* showing of standing and plaintiff's capacity to bring the cause of action was sufficiently plead and proven, summary judgment is affirmed.

¶ 2 This case involves a foreclosure action brought by plaintiff-appellee, The Bank of New York Mellon f/k/a The Bank of New York (The Bank) against defendants-appellants, Leon P. Brown and Andrea Brown (the Browns), pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq*. (West 2012)). The trial court awarded summary judgment to The Bank and entered an order approving the report of sale and distribution of the foreclosed property after having previously stricken the Browns' affirmative defenses. Those defenses included an allegation that The Bank lacked standing to bring the foreclosure cause of action because (1) it did not attach a copy of the assignment of the mortgage at the time it filed the complaint and (2) the mortgage and promissory note were not properly assigned to it as trustee pursuant to the terms of the Pooling and Servicing Agreement (PSA) between The Bank and two other entities. The Browns argue here on appeal that the trial court erred in striking its affirmative defense of standing which would have impeded The Bank's award of summary judgment. We affirm.

¶ 3 FACTS

¶ 4 On December 21, 2005, Leon Brown entered into a mortgage contract as a married man with mortgagee, Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for lender, Decision One Mortgage Company (Decision One). The mortgage contract was secured by real

property located at 3215 Buried Oak Drive in Crete, Illinois. As part of the mortgage contract, Leon executed a promissory note made payable to Decision One.

¶ 5 On March 22, 2012, The Bank, as trustee for the Certificate Holders of the CWALT, Inc., Alternative Loan Trust 2006-OC2 Mortgage Pass-Through Certificates, Series 2006-OC2 (Holders), filed a complaint to foreclose on the Browns' mortgage, and described its capacity to bring the foreclosure as "legal holder of the mortgage and note." It attached to the complaint a copy of the mortgage agreement, the promissory note, and a written loan modification agreement between Leon and Countrywide Home Loans Servicing LP executed pursuant to Leon's chapter 13 bankruptcy filing in or about 2009. On the third page of the promissory note was an endorsement in blank from Decision One to bearer.

¶ 6 Leon filed an appearance on April 13. On May 17, foreclosure mediation between Leon and The Bank was held resulting in an order issued the same day stating that "criteria not met, mediation is terminated."

¶ 7 On September 5, The Bank filed, among other pleadings, a motion for default and judgment of foreclosure and sale because none of the named defendants had filed an answer or defense contrary to The Bank's assertions. It again attached a copy of the mortgage, the promissory note, and the loan modification agreement. It also attached a copy of an assignment of the mortgage conveying ownership interest in the loan to The Bank as trustee for the Holders, from the original lender, Decision One. The assignment was made by MERS with an execution date of September 19, 2011, and a recording date of October 5, 2011, with the Will County Record's Office.

¶ 8 On September 11, 2012, Leon was granted an additional 28 days to answer or otherwise plead to the complaint, and the matter was continued to October 30. On October 9 Leon filed *pro se* an answer and several affirmative defenses. While admitting and denying the allegations in The Bank's complaint, Leon's affirmative defenses argued that The Bank lacked standing because there was no assignment of the mortgage attached to the complaint directly transferring beneficial interest in the loan to The Bank. Leon's affirmative defenses also charged The Bank with unclean hands, misrepresentation, unjust enrichment, and alleged that the trial court lacked jurisdiction. He further noted that because The Bank was suing as trustee for the Holders it could not rely on an alleged endorsement in blank to evince a transfer of the mortgage and promissory note. He attached an affidavit where he averred terms of a PSA that governed the mortgage and discussed the purported process for assignment of the mortgage and promissory note. He asserted that pursuant to the PSA neither the blank endorsement of the promissory note included with The Bank's complaint nor the assignment included with The Bank's motion for default and judgment of foreclosure and sale were adequate to demonstrate The Bank's standing to sue. Parties to that PSA included the trust depositor, CWALT, Inc., the trust master servicer, Countrywide Home Loans Servicing LP, and the trustee, The Bank. Leon did not attach a copy of the PSA to the filing.

¶ 9 On October 30 the trial court granted The Bank 28 days to respond to Leon's affirmative defenses. On December 4 the matter was continued for another 28 days. On January 3 The Bank filed a motion to strike and dismiss Leon's affirmative defenses pursuant to section 2-615 of the Illinois Code of Civil Procedure. (735 ILCS 5/2-615 (West 2010))

¶ 10 The Bank's motion charged that each of Leon's six affirmative defenses was insufficient as a matter of law, lacking any kind of specificity and alleging only conclusions. In response to

the central claim made by Leon that The Bank lacked standing because it did not hold the note, The Bank's motion noted that its complaint pleads that it is the holder of the note and the owner of the indebtedness and as such, the defense attacked an allegation of the complaint and could not be considered an affirmative defense.

¶ 11 On January 8, 2013, the trial court allowed Leon 28 days to respond to The Bank's motion, gave The Bank 14 days thereafter to reply, and scheduled a hearing on the motion for March 5. The court granted Leon a continuance and the hearing was scheduled for March 26.

¶ 12 On March 26 the trial court granted The Bank's motion to strike and dismiss Leon's affirmative defenses and gave Leon 28 days to file amended affirmative defenses. On May 7, Leon moved to file his amended affirmative defenses *instanter*, but in light of a chapter 7 bankruptcy proceeding related to the loan, the matter was continued to June 25 for status. On June 25, upon motion, the Bank was given a continuance to August 20.

¶ 13 On July 13 The Bank sought and was granted leave on August 20 to file an amended complaint to reflect the interests of HSBC Mortgage Services, Inc. in the loan as a new defendant and to dismiss MERS as a defendant. It did not seek nor did it attach to the amended complaint the assignment of the mortgage it included with its motions for default and judgment of foreclosure and sale.

¶ 14 On April 24, 2014, The Bank moved again for default and judgment of foreclosure and sale noting the Browns were in default of the loan agreement. In addition to attaching copies of the mortgage and promissory note it had previously attached to its complaint, The Bank included a copy of the assignment of mortgage. It also moved to dismiss the unknown defendants and for summary judgment. In its motion for summary judgment it noted the Browns were in default on

repayment of the loan and that the trial court had stricken Leon's affirmative defenses. It attached a copy of Leon's filed answer with affirmative defenses and the court's order striking it.

¶ 15 On May 19 the trial court granted the Leon's request for 28 days to respond to The Bank's motions and allowed The Bank seven days thereafter to file a reply. On June 23, Leon filed *pro se* a first set of requests for The Bank to admit specific allegations regarding the PSA. On June 30 it was stricken for being untimely and the court granted the Browns an additional 21 days to file their summary judgment response. The matter was continued for a hearing on July 28. On July 22, the Browns, through counsel, filed a response to The Bank's summary judgment motion.

¶ 16 The Browns argued that a genuine issue of material fact existed with respect to The Bank's standing to bring the foreclosure suit. Specifically, the Browns claimed that The Bank had not conclusively met the requirements to be considered either a holder of the promissory note or a non-holder in possession with the right of a holder. The Browns noted that The Bank had in no way affirmed that the promissory note affixed to the complaint was a true and original version, and reiterated the assertions Leon had made in his *pro se* filed answer and affirmative defenses. This included the assertion that since The Bank was suing the Browns as trustee for the Holders, transfer of ownership and beneficial interest of the subject loan could only be governed by the terms of the PSA. The Browns asserted that, pursuant to the PSA, neither the affixed copy of the blank endorsed promissory note nor the assignment of mortgage was sufficient to evince a proper transfer. Additionally, the Browns argued that The Bank's failure to include the mortgage assignment in the original complaint also served to undermine its evidence of transfer. Lastly, the Browns noted that MERS lacked the authority to effect or oversee the transfer of beneficial interests in residential loans, and thus the assignment had no merit.

¶ 17 On July 25 The Bank filed a reply arguing that the Browns failed to come forward with evidence establishing a genuine issue of material fact and further noted that, regardless of the Brown's assertions concerning the terms of the PSA or the efficacy of the assignment of the mortgage provided, the mere fact that a copy of the promissory note was attached to its complaint was itself *prima facie* evidence that The Bank owned it. The Bank further argued that the Browns lacked standing, as borrowers, to dispute the validity of assignments under the PSA because they were not parties to the PSA. On July 28, the trial court entered orders granting The Bank's motions for summary judgment and default and judgment of foreclosure and sale.

¶ 18 In accordance with the orders, a judicial foreclosure sale was scheduled for December 4. The Browns, through counsel, filed a motion to stay the proceedings on November 13 reiterating their previous arguments in their response to The Bank's granted motion for summary judgment and also arguing that they were attempting a short sale of the property and requested additional time to effectuate the sale.

¶ 19 On November 24 the trial court stayed the sale 35 days and continued the motion to December 22, 2014. The motion hearing was removed from the call and the judicial sale rescheduled for January 8, 2015. On February 11, 2015, The Bank filed a motion for order approving report of sale and distribution, confirming sale and for possession. The trial court granted the motion on February 23, 2015.

¶ 20 The Browns timely appealed.

¶ 21 ANALYSIS

¶ 22 Here on appeal, the Browns argue that the trial court erred in granting The Bank's motion for summary judgment and judgment of foreclosure and sale as well as the order confirming the sale of the subject property because The Bank lacked standing to bring the cause of action. As an initial matter, they assert that they did not waive their right to appeal their stricken affirmative defense of standing. They claim that though Leon did not replead the stricken affirmative defenses asserted in his answer to The Bank's complaint as instructed by the trial court, the court's striking of the affirmative defenses was a "'step in the procedural progression leading to the judgment specified in the notice of appeal.'" *U.S. Bank National Ass'n v. Luckett*, 2013 Ill. App. (1st) 113678, ¶ 13 (quoting *Burtell v. First Charter Serv. Corp.*, 76 Ill. 2d 427, 435 (1979)). Thus upon a liberal reading of the notice of appeal, the Browns assert that this appeal should allow for review of all of the stricken defenses, specifically, the affirmative defense of standing. They further assert that they did make a separate motion for leave to file amended affirmative defenses *instanter*. However, in light of a chapter 7 bankruptcy proceeding, the matter was continued. According to the Browns, by the time "active litigation" resumed, The Bank had moved and been granted leave to amend allegedly material aspects of their complaint that "went to the heart of [the Browns'] affirmative defenses." Thus they note that review of their affirmative defenses is warranted.

¶ 23 We do not find the Browns' arguments against their waiver of their affirmative defense persuasive.[1] Primarily, "[a] notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *Gen. Motors Corp. v.*

[1] We take note of the fact that because Leon filed *pro se* his answer that included his affirmative defenses the asserted defenses do not transfer to other named appellants, as he could only represent himself. *Lake Shore Management Co. v. Blum*, 92 Ill. App. 2d 47, 51 (1968). This factor, however, has no bearing on our decision.

Pappas, 242 Ill. 2d 163, 176 (2011) (citing *People v. Lewis*, 234 Ill.2d 32, 37 (2009)). However, the *Burtell* court held that a notice of appeal need not specify a particular order to confer jurisdiction if the order specified in the notice of appeal directly relates back to the judgment or order sought to be reviewed. *Burtell*, 76 Ill. 2d at 434. The unspecified judgment is reviewable if it is a " 'step in the procedural progression leading' " to the judgment specified in the notice of appeal. *Id*. at 435 (quoting *Elfman Motors, Inc. v. Chrysler Corp*., 567 F.2d 1252, 1254 (1977)).

¶ 24 In *Burtell*, the earlier order sought to be reviewed that was not mentioned in the notice of appeal was an order for an accounting, and the notice of appeal referred to a judgment that was based on the accounting. *Id*. at 435-36. The court found the unspecified order a procedural step related to the specified order in the notice of appeal and that appellate review was proper. *Id*. at 436.

¶ 25 The present case is distinguishable from *Burtell* in that the earlier order striking Leon's affirmative defenses but allowing for him to replead them was not a step in the procedural progression leading to the summary judgment order but merely a failed and subsequently, and presumably intentionally uncorrected defensive strategy. The fact of the matter is the Browns failed to timely replead their affirmative defenses as allowed by the trial court. Though they did seek leave to file amended affirmative defenses *instanter*, which the court continued due to a separate chapter 7 proceeding related to subject property, they did not renew their motion for leave to replead their affirmative defenses *instanter* and to argue the issue of standing when the matter had recommenced. The Browns present no case law supporting an assertion that the trial court was somehow obligated to delay proceedings until they decided to replead their affirmative defenses prior to entry of summary judgment in favor of The Bank. Thus, the summary judgment

order does not directly relate back to the striking, without prejudice of Leon's affirmative defenses and *Burtell* is not controlling in this case.

¶ 26 Further, the Browns fail to show that The Bank's amendment to its complaint affected their ability to replead their affirmative defenses. Their argument asserted here on appeal as well as in their reply to The Bank's motion for summary judgment has nothing to do with the entity added as a new defendant. Though the party removed, MERS, is the nominee for original lender, Decision One, it is not a party to the PSA on which the Browns' argument regarding The Bank's lack of standing hinges. Thus any argument concerning the dismissal of the affirmative defenses is waived and forfeited. *Larkin v. Sanelli,* 213 Ill.App.3d 597, 602 (1991); *Bank of America, N.A. v. Basile,* 2014 IL App (3d) 130204, ¶ 25.

¶ 27 Even if they were not waived, we find the Browns' assertions regarding The Bank's lack of standing to be without merit. A party's standing to sue must be determined as of the time the suit is filed. *Deutsche Bank National Trust Company v. Gilbert*, 2012 IL App (2d) 120164, ¶ 3. A plaintiff's lack of standing negates his cause of action and requires dismissal of the proceedings. *Wexler v. Wirtz, Corp.*, 211 Ill. 2d 18, 22 (2004). However, a party is not required to prove standing in its pleadings, nor allege facts in support of its standing in its pleading. *In re Estate of Levi Schlenker*, 209 Ill. 2d 456, 461 (2004). Under the Foreclosure Law, the plaintiff is only required to submit a copy of the mortgage and note with the complaint evidencing a *prima facie* showing of the right to foreclose on the mortgage. (735 ILCS 5/15-1101 et seq. (West 2010)) After a *prima facie* showing of standing is made, it is up to the opposing party to rebut that showing with admissible evidence. *Gilbert*, 2012 IL App (2d) 120164, ¶ 3.

¶ 28 The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note. *Rosestone Investments, LLC v. Garner,* 2013 IL App (1st) 123422, ¶ 24 (citing *Parkway Bank & Trust Co. v. Korzen,* 2013 IL App (1st) 130380, ¶ 24). Absent evidence showing that the assignment took place after the complaint was filed, the opposing party fails to meet their burden of showing that the endorsement was not made before the complaint was filed and thus effectively rebut the party's *prima facie* showing of standing. *Bayview Loan Servicing, LLC v. Cornejo,* 2015 IL App (3d) 140412, ¶ 14.

¶ 29 It is also well settled that acquiring the status as the holder of a negotiable instrument such as a note requires proper negotiation. (810 ILCS 5/3-201 (West 2010)) An endorsement is a signature which purports to negotiate the instrument. 810 ILCS 5/3-204 (West 2010). Possession of a note containing a blank endorsement would be sufficient to demonstrate standing because when endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specifically endorsed. 810 ILCS 5/3-205(b) (West 2010). "[P]ossession of a promissory note whether it be by the payee or an endorsee, is *prima facie* evidence of ownership, even if endorsed in blank." *Spiller v. Riva*, 278 Ill. App. 334 (1935).

¶ 30 The Bank filed its complaint with a copy of the mortgage and the note. The note is endorsed in blank and thus would be sufficient to establish a *prima facie* case of standing that the Browns would have to provide evidence to rebut. However, the record is devoid of any such evidence.

¶ 31 The Browns merely assert that The Bank failed to attach a copy of the mortgage assignment to their complaint and that the note was not properly negotiated pursuant to the PSA. However, unlike *Gilbert,* on which the Browns seem to rely, the record shows that the mortgage

assignment was executed and recorded several months prior to The Bank filing the foreclosure cause of action. *C.f. Gilbert*, 2012 IL App (2d) 120164, ¶ 23. The Browns do not provide any case law supporting the assertion that a party lacks standing when a mortgage assignment executed prior to the party's filing of a foreclosure cause of action is evidenced in a pleading subsequent to the initial complaint filing. *Id*.

¶ 32 The Browns' claims regarding the PSA fail as well. As a primary matter, the Browns seem to conflate The Bank's pleading capacity as the legal holder of the note with their affirmative defense of standing. "The doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996). In contrast, the "legal capacity to sue or be sued" generally refers to the status of the party, *e.g.*, incompetent, infant (*Patterson Heating & Air Conditioning Corp. v. Durable Construction Co.*, 3 Ill. App. 3d 444, 446 (1972)), or unincorporated association (*American Federation of Technical Engineers, Local 144 v. La Jeunesse*, 63 Ill. 2d 263, 266 (1976)). Thus standing is not the same as legal capacity to sue or be sued.

¶ 33 Lack of standing is an affirmative defense that, as we have already discussed, the Browns have waived by not repleading it as allowed by the trial court. See *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999). An allegation of capacity as the mortgagee in a foreclosure proceeding (735 ILCS 5/15-1208, 15-1504 (a)(3)(N) (West 2010)) is a material fact (735 ILCS 5/15-1506(b) (West 2010)) and must be proved whether admitted or denied by the defendant (*Wilson v. Kinney*, 14 Ill. 2d 27, 28 (1852)). Having alleged capacity in their complaint, it is incumbent upon The Bank to prove capacity notwithstanding the Browns' waiver of their right to argue standing.

¶ 34 Summary judgment requires adequate proof of the matters alleged in the complaint by evidence that can either be alleged in open court or through affidavit. *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505(1960) (in every civil case, the right to relief must be adequately alleged and proved); *Plaza Bank v. Kappel*, 334 Ill. App. 3d 847, 850 (2002); 735 ILCS 5/15-1506(a)(2) (West 2010). We find that The Bank did prove its claim of capacity and we affirm the trial court's ruling. Having attached a copy of the promissory note endorsed in blank, it evinced that it was the holder of the indebtedness as it claimed in its complaint. Though the record shows and The Bank does not deny that it may not have followed the proper procedures required of it in the PSA to gain possession of the note, the fact remains that the Browns are not a party to that agreement and have no standing to assert its requirements.

¶ 35 CONCLUSION

¶ 36 For the forgoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 37 Affirmed.