

No. 1-11-3401

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 JUDICIAL DISTRICT

HSBC BANK USA, N.A., as indenture trustee of the)	Appeal from the Circuit Court
Fieldstone Mortgage Investment Trust, Series 2006-1,)	of Cook County,
)	
Plaintiff-Appellee,)	
)	
v.)	09 CH 26389
)	
AIRRION S. BLAKE,)	Honorable
)	Jean Prendergrast Rooney,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: (1) Where plaintiff properly attached a copy of the mortgage and note to its complaint to foreclose mortgage, subject matter jurisdiction was apparent from the face of the record; (2) Where defendant failed to raise the affirmative defense of standing in a timely manner, the issue was forfeited; and (3) Where defendant filed motions and pleadings before the trial court, he waived any challenge to the court's exercise of jurisdiction over his person.

¶ 2 Plaintiff, HSBC Bank, filed a mortgage foreclosure complaint against defendant Airrion Blake in July 2009. The trial court granted summary judgment against defendant in August 2010 and also entered a judgment for foreclosure and sale at that time. In October 2011, defendant

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filed a motion to vacate a void order pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The trial court dismissed defendant's petition in November 2011. On appeal, defendant contends that: (1) the trial court erred in denying his section 2-1401 petition without giving defendant a hearing or allowing him to correct any deficiencies; and (2) the trial court lacked subject matter jurisdiction because HSBC Bank lacked standing to file its claim. We affirm.

¶ 3 On July 31, 2009, HSBC filed its complaint to foreclose mortgage against defendant Airrion Blake, and other defendants not party to this appeal, pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2008)). The complaint alleged as follows: on March 21, 2006, defendant, as mortgagor, executed a mortgage in the amount of \$143,920 to Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for Fieldstone Mortgage Company," for the property commonly known as 2918 190th Street in Lansing, Illinois (Property). HSBC claimed that it was the trustee for the holder of the Mortgage and Note and that defendant was in default for monthly payments from November 2008 through the present. Ultimately, HSBC requested a judgment of foreclosure and sale.

¶ 4 Copies of the mortgage and the note were attached to the complaint. The mortgage was prepared by the Fieldstone Mortgage Company on March 21, 2006. It defined Airrion Blake as the borrower, Fieldstone as the lender, and MERS as the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns." It also provided that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." The note was endorsed by Aletha L. Clyborn, assistant vice

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president of the Fieldstone Mortgage Company, to be paid to "the order of HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage Investment Trust, Series 2006-1." Both the mortgage and note were signed by defendant and initialed by him on each page.

¶ 5 According to an Affidavit of Special Process Server, filed on August 31, 2009, Airrion Blake was served with summons and a copy of the complaint on August 7, 2009.

¶ 6 On September 25, 2009, defendant filed a notice of motion indicating that he would appear before the trial court on October 25, 2009 to present his "Proof of Claim/Opportunity to Cure." Attached was an "Affidavit of Fact" in which defendant demanded that HSBC provide "proof of claim, original mortgage note with [with wet ink signature] and title page" and an "Affidavit of Negative Averment, Opportunity to Cure, and Counterclaim." On January 13, 2010, the trial court granted HSBC's motion to strike "all pleadings and other papers previously filed" by defendant and gave defendant until February 17, 2010, to file an appearance and answer to HSBC's complaint.

¶ 7 On February 1, 2010, defendant filed a verified answer to HSBC's complaint, "affirmative defenses," and a second answer. HSBC filed a motion to strike defendant's affirmative defenses and second answer on February 11, 2010. The trial court granted HSBC's motion to strike on March 5, 2010, and gave defendant until April 2, 2010, to file affirmative defenses.

¶ 8 On March 4, 2010, HSBC filed its motion for summary judgment against defendant, alleging that it was the owner of the note and mortgage to the Property and that defendant was in default for the monthly payments from November 2008 through the present. HSBC attached the

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assignment of the mortgage to the motion. The assignment states, in pertinent part:

"For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc., M.E.R.S. INC. AS NOMINEE FOR FIELDSTONE MORTGAGE COMPANY its successors and/or assigns *** did hereby assign, transfer, convey without warranties and without recourse; set over and deliver to HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE OF THE FIELDSTONE MORTGAGE INVESTMENT TRUST, SERIES 2006-1 *** prior to 6/24/09, the following mortgage [of the Property]."

The assignment was signed by Jill Rein, a certifying officer for MERS. It was notarized on August 5, 2009, and recorded with the Cook County Recorder of Deeds on August 14, 2009.

¶ 9 On August 2, 2010, the trial court granted HSBC's motion for summary judgment against defendant, found defendant to be in default, and ordered a judgment of foreclosure and sale of the Property. A notice of sale was filed for the Property on June 21, 2011, and the trial court approved the sale on July 22, 2011.

¶ 10 In October 2011, defendant filed a "Petition in the Form of a Motion to Vacate Void Order" pursuant to section 2-1401. In it, defendant alleged that: (1) the trial court lacked subject matter jurisdiction because HSBC bank "never presented the original signed mortgage note which is needed for the right to foreclose"; and (2) the trial court lacked personal jurisdiction

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over defendant because he had not properly been served. The trial court dismissed defendant's petition in November 2011, finding that it did have both personal jurisdiction over defendant and subject matter jurisdiction over the claim.

¶ 11 On appeal, defendant first contends that the trial court erred by not allowing defendant to correct any deficiencies or granting defendant a hearing before dismissing his section 2-1401 petition. We disagree.

¶ 12 Under section 2-1401, a petitioner may request relief from a final judgment if the petition is filed more than 30 days after the entry of the original judgment. 735 ILCS 5/2-1401 (West 2010). Section 2-1401 proceedings are subject to the usual rules of civil procedure and petitions pursuant to the section "are essentially complaints inviting responsive pleadings." *People v. Vincent*, 226 Ill. 2d 1, 8 (2007) (citing *Ostendorf v. International Harvester Company*, 89 Ill. 2d 273, 279 (1982)). Therefore, the trial court may dismiss a petition "upon a challenge that, even taking as true its allegations, it does not state a meritorious defense or diligence under section 2-1401 case law." *Vincent*, 226 Ill. App. 3d at 8. Furthermore, our supreme court has held that "a trial court 'may dismiss a claim *sua sponte* *** without notice where the claimant cannot possibly win relief.' " *Vincent*, 226 Ill. 2d at 13 (quoting *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987)).

¶ 13 First, we observe that in the instant case defendant has failed to cite to any case law in support of his argument that he was entitled to a hearing. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on.")

Moreover, a "*sua sponte* dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts." *Vincent*, 226 Ill. 2d at 13. Upon dismissal of defendant's petition, the trial court filed a written order of dismissal in which it addressed all of defendant's contentions, and ultimately found that defendant failed to show a meritorious defense in his petition and that the record before it established its jurisdiction in the original action and over defendant. Although defendant is *pro se*, such litigants are presumed to know the applicable court rules and are required to comply with the procedures as a litigant represented by counsel would. *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009). Under these circumstances, we find the trial court did not err in dismissing defendant's petition without a hearing.

¶ 14 Defendant next contends that the trial court erred in denying his section 2-1401 petition because it lacked subject matter jurisdiction over the original action, basing his claim on HSBC's alleged lack of standing to bring a foreclosure action against him. He argues that "without a proper assignment establishing standing there was no controversy for the court to rule upon." Defendant concludes that because the court lacked jurisdiction, all of its orders were void.

¶ 15 A section 2-1401 petition seeking relief based on an argument that the underlying judgment is void, is reviewed *de novo*. *Deutsche Bank National Trust Company v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12.

¶ 16 "[A] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally." "

Sarkissian v. Chicago Board of Education, 201 Ill. 2d 95, 103 (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)). " 'It is essential to the validity of a judgment that the court have both jurisdiction of the subject matter of the litigation and jurisdiction over the parties.' " *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910 (2008) (quoting *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986)). A court possesses subject matter jurisdiction if the plaintiff's complaint presents a "justiciable matter", which is a "controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota*, 199 Ill. 2d at 334-35. The question of whether a court has subject matter jurisdiction cannot be forfeited and may be raised at any time. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 333-34 (2002). However, the lack of jurisdiction must appear on the face of the record. *Muslim Community Center v. Village of Morton Grove*, 392 Ill. App. 3d 355, 358 (2009).

¶ 17 The doctrine of standing, in contrast, " '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.' " *Nationwide Advantage Mortgage Company v. Ortiz*, 2012 IL App (1st) 112755, ¶ 24 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)). Lack of standing is an affirmative defense and the defendant's burden to plead and prove. *Ortiz*, 2012 IL App (1st) 112755, ¶ 24. Although a defendant cannot forfeit the question of subject matter jurisdiction, he can forfeit the issue of standing if he failed to raise it before the trial court in a timely manner. *Id.* Notably, our supreme court has stated, "issues of

standing and ripeness do not implicate our subject matter jurisdiction." *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 18 Here, defendant incorrectly characterizes his contention as a lack of subject matter jurisdiction based on a lack of standing when, in fact, subject matter jurisdiction and standing are two separate issues. See *Lebron*, 237 Ill. 2d at 252. Since the question of whether a trial court had subject matter jurisdiction over a claim cannot be forfeited, we will consider that first.

¶ 19 A plaintiff is not required to plead proof of standing for its complaint to foreclose mortgage to be sufficient. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010). A foreclosure complaint will be considered complete when it follows the requirements set forth in section 15-1504(a) of the Foreclosure Law. *Id.* The section provides, in pertinent part, that the plaintiff may identify the "[c]apacity in which plaintiff brings this foreclosure" and attach a copy of the mortgage and the note. 735 ILCS 5/15-1504(a) (West 2008).

¶ 20 HSBC's foreclosure complaint complied with the requirements set forth in Section 15-1504. HSBC alleged it was bringing the suit as "the trustee for the holder of the mortgage and note" and attached to the complaint a copy of the mortgage and note, endorsed to HSBC. Thus the complaint alone set forth a justiciable matter. The controversy presented was a mortgage foreclosure, which involved the legal relations of two parties with adverse legal interests: HSBC, the holder of the mortgage and note, and defendant, the mortgagor in default. Moreover, the record contained a copy of the assignment of the mortgage to HSBC from MERS.

¶ 21 Defendant claims that the mortgage was assigned to HSBC after the complaint was filed,

suggesting that the assignment on record was fraudulent. However, no particular form is required for an assignment to be valid. *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987). It can be oral or written, and need only assign or transfer in whole or in part some debt and must "describe the subject matter of the assignment with sufficient particularity to render it capable of identification." *Id.* Here, the assignment met all the requirements for validity. It transferred the mortgage of the Property in its entirety to HSBC and described both the mortgage and Property in detail. Moreover, defendant never challenged the validity of the assignment before the trial court and has thus waived the issue. See *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000) (an issue that was not raised before the trial court cannot be raised for the first time on appeal and will generally be waived).

¶ 22 Waiver aside, any written instrument, once executed, recorded, and acknowledged, is presumed valid on its face and can only be rebutted by clear and convincing evidence. See *In re Estate of Cuneo*, 334 Ill. App. 3d 594, 598 (2002) (observing that a deed that has been recorded is presumptively valid and effective); *Resolution Trust Corporation v. Hardisty*, 269 Ill. App. 3d 613, 619 (1995) (finding that an executed, acknowledged, and recorded deed carries a presumption of delivery). The assignment shows the mortgage was transferred to HSBC by MERS "prior to 6/24/09" which is before HSBC filed its complaint on July 31, 2009. Reviewing the document as contained in the record, there is nothing on its face to suggest the assignment was not valid.

¶ 23 Defendant also suggests that the assignment on record was actually recorded after the complaint was filed, thereby divesting the trial court of jurisdiction. We first note that the

purpose behind the recording of instruments affecting title to real estate, such as an assignment of mortgage, is to provide third parties with a way to see the status of the property. *Federal National Mortgage Association v. Kuipers*, 314 Ill. App. 3d 631, 634 (2000). Moreover, in the instant case, the copy of the note attached to the complaint showed the note was endorsed to HSBC by a representative of Fieldstone Mortgage Company. Therefore, regardless of when the assignment was recorded, the note demonstrated that HSBC had an interest in defendant's debt at the time the complaint was filed.

¶ 24 Nonetheless, defendant claims that because HSBC did not attach the assignment to the complaint, HSBC did not have standing to bring the claim. However, defendant failed to raise the issue of standing in a timely manner. See *Barnes*, 406 Ill. App. 3d at 6 (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)) (" 'lack of standing in a civil case is an affirmative defense, which will be forfeited if not raised in a timely fashion in the trial court.' "); *Ortiz*, 2012 IL App (1st) 112755, ¶¶ 25, 37 (following *Barnes* to find that the defendant forfeited the lack of standing defense). In fact, defendant never raised the question of standing before the trial court, despite filing multiple motions and pleadings before the court. The first time defendant specifically challenged HSBC's standing was on appeal from the dismissal of his section 2-1401 petition. See *Parks*, 193 Ill. 2d at 180. Therefore, defendant has forfeited consideration of the issue.

¶ 25 Forfeiture aside, the record before us shows that HSBC had standing to bring the foreclosure action against defendant. As we noted previously, the Foreclosure Law only requires a plaintiff to attach a copy of the mortgage and note to the complaint, and HSBC complied with

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that requirement. Notably, the note is endorsed to HSBC by a representative of the Fieldstone Mortgage Company. Furthermore, "possession of a negotiable instrument is *prima facie* evidence that the possessor is the owner." *Leopold v. Halleck*, 106 Ill. App. 3d 386, 389 (1982). Only after a defendant has presented "some evidence" challenging the instrument will proof of holder status be required. *Leopold*, 106 Ill. App. 3d at 390. Here, defendant failed to present any evidence challenging the status of HSBC as holder of the note and mortgage. Moreover, the record also contains the assignment of the mortgage from MERS to HSBC. As this court observed in *Barnes*, the definition of "mortgagee" as defined in the Foreclosure Law, "goes beyond just note holders to also encompass 'any person designated or authorized to act on behalf of such holder.'" *Barnes*, 406 Ill. App. 3d at 7 (quoting 735 ILCS 5/15-1208 (West 2008)). Here, the mortgage clearly shows that MERS was designated the mortgagee, giving MERS authorization to act on behalf of the Fieldstone Mortgage Company. Under these circumstances, we find that HSBC had standing to bring the complaint to foreclose mortgage against defendant. Therefore, the trial court properly denied defendant's section 2-1401 petition.

¶ 26 As a final matter, we acknowledge that in his reply brief defendant claimed that the trial court lacked personal jurisdiction over him. However, defendant failed to address the issue of personal jurisdiction in his initial appellate brief and has therefore waived the issue on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of an appellant's brief "shall contain the contentions of the appellant ***. Points not argued are waived and shall not be raised in the reply brief ***").

¶ 27 Furthermore, according to section 2-301(a-5) of the Code of Civil Procedure, when a

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party files a responsive pleading or motion with the court, that party waives its objection to whether the court has jurisdiction over it. (735 ILCS 5/2-301(a-5) (West 2008)). Here, defendant filed his first notice of motion with the trial court in September 2009 and filed numerous motions throughout the proceedings. As such, defendant accepted the jurisdiction of the trial court and "waive[d] all objections to the court's jurisdiction" over his person. 735 ILCS 5/2-301(a-5) (West 2008).

¶ 28 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 29 Affirmed.