

THIRD DIVISION  
March 31, 2016

No. 1-12-1708

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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COUNTRYWIDE HOME LOANS SERVICING, LP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 08 CH 30367
ALVARO ZEPEDA; UNKNOWN HEIRS AND	)	
LEGATEES OF ALVARO ZEPEDA, IF ANY;	)	
UNKNOWN OWNERS AND NON-RECORD	)	
CLAIMANTS,	)	Honorable
	)	Robert E. Senechalle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant has waived any argument related to standing because standing is an affirmative defense that must be raised prior to the entry of judgment and defendant first raised plaintiff's alleged lack of standing following the entry of judgment. The trial court did not abuse its discretion in denying defendant's motion to vacate the order approving sale when the record reflects that plaintiff complied with Supreme Court Rules 11 (eff. Dec. 29, 2009), and 12 (eff. Dec. 29, 2009).

¶ 2 In 2008, plaintiff Countrywide Home Loans (Countrywide)<sup>1</sup> filed a mortgage foreclosure complaint against defendant Alvaro Zepeda.<sup>2</sup> The trial court later granted Countrywide's motion for summary judgment and entered a judgment for foreclosure and sale. The property was subsequently sold, and the trial court entered an order approving sale. Defendant then filed a motion to vacate the order approving sale, which the trial court denied.

¶ 3 Defendant now appeals, contending that the trial court abused its discretion when it denied defendant's motion to vacate the order to approve sale because Countrywide lacks standing as it no longer holds the note and mortgage, and because Countrywide failed to give defendant and his attorney notice of the motion to approve sale. We affirm.

¶ 4 In August 2008, Countrywide filed a complaint to foreclose mortgage against defendant. The complaint alleged that on November 19, 2007, defendant, as mortgagor, executed a mortgage in the amount of \$291,800 for a property located at 2424 North Menard Avenue (2424 North Menard) in Chicago. The complaint stated that defendant had not made the monthly payments since April 2008. Attached to the complaint were copies of the mortgage and note.

¶ 5 In September 2008, defendant filed a *pro se* appearance listing 2424 North Menard as his address and his spouse as Esperanza Garcia.

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<sup>1</sup> Although the plaintiff on appeal is Countrywide Home Loans Servicing, LP, defendant originally entered into a mortgage with Countrywide Bank FSB. In January 2009, Countrywide Home Loans filed a motion to substitute Countrywide Home Loans Servicing, LP as plaintiff in the instant case based upon the sale and assignment of the instant mortgage. The trial court granted this motion.

<sup>2</sup> The complaint also named the unknown heirs and legatees of Alvaro Zepeda if any, and all unknown owners and nonrecord claimants. Upon Countrywide's motion, the trial court entered an order dismissing the unknown heirs and legatees of Alvaro Zepeda if any, and all unknown owners and nonrecord claimants as parties on January 22, 2009.

¶ 6 In December 2008, Countrywide filed a motion for summary judgment. Countrywide then filed a motion for judgment of foreclosure and sale. On January 22, 2009, the trial court granted Countrywide's motion for summary judgment and entered a judgment for foreclosure and sale. The record indicates that a judgment sale was held in September 2010. Countrywide then filed a motion for an order approving report of sale and distribution and for possession.

¶ 7 On April 21, 2011, attorney Robert Habib filed an appearance for defendant.

¶ 8 On September 19, 2011, Countrywide filed a notice of motion stating that on October 12, 2011, Countrywide's counsel would appear before the trial court to move for the entry of an order approving the report of sale and distribution and for possession and eviction. The notice of motion stated that it was mailed to Esperanza Garcia at 2424 North Menard and attorney Habib at his business address. The notice of motion further stated that:

"I, Adriana Zavala, non-attorney, shall serve this notice by mailing a copy to the above-entitled addresses at the above-entitled addresses and depositing the same in the U.S. Mail at 1 North Dearborn, Chicago, Illinois, 60602, with proper postage prepaid."

¶ 9 On September 26, 2011, Countrywide filed another notice of motion stating that on October 12, 2011, counsel for Countrywide would move the trial court to enter an order approving the foreclosure report of sale and distribution and order for possession and eviction. This notice was mailed to defendant, Esperanza Garcia, "unknown occupants," and defendant's "unknown heirs and legatees" at 2424 North Menard Avenue. An amended notice of motion was filed on October 3, 2011 which added attorney Habib at his business address. The amended notice of motion contained a "Proof of Service by Mail" stating:

"I, Andrew D. Schusteff, an attorney with Intercounty Judicial Sales Corporation, certify that I served this Notice of Motion and Motion for Order Approving Report of Sale and Distribution and Possession by causing to be mailed a copy to the above named parties at the addresses listed above by depositing the same in the U.S. mail, with proper postage prepaid at 120 West Madison Street, Chicago, Illinois 60602, at 5:00 p.m. October 3, 2011."

¶ 10 On October 12, 2011, the trial court entered an order approving the foreclosure report of sale and distribution and for possession and deed (the order approving sale). The order stated, in pertinent part, that a deed shall be issued by the office conducting the sale immediately following entry of the order and after full payment of the bid amount "to the successful bidder COUNTRYWIDE HOME LOANS SERVICING LP, or assignee FEDERAL NATIONAL MORTGAGE ASSOCIATION" conveying title.

¶ 11 On October 25, 2011, defendant filed a motion to vacate the order approving sale. The motion alleged that neither defendant nor his attorney was given notice of the motion to approve sale. The motion further alleged that as of July 1, 2011, the "server" of the mortgage loan at issue was Bank of America and the owner of the mortgage was FNMA AA MSTR/SVB CW rather than Countrywide, and, therefore Countrywide lacked standing.

¶ 12 In its response to defendant's motion to vacate the order approving sale, Countrywide alleged that the proof of service on the October 3, 2011 amended notice of motion complied with Supreme Court Rule 12(b) (eff. Dec. 29, 2009). The motion further alleged that lack of standing is an affirmative defense which must be pleaded and proved prior to the entry of judgment, and, because summary judgment was entered against defendant in January 2009, any defenses

relating to standing were inapplicable. The trial court denied the motion to vacate the order approving sale on May 11, 2012.

¶ 13 Section 15-1508(b) of the Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2008)), confers broad discretion on circuit courts to approve or disapprove judicial sales. We review the exercise of that discretion under an abuse of discretion standard. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 116. Section 15-508(b) of the Foreclosure Law states that the court shall enter an order confirming the sale unless the court finds that: (i) notice of the sale was not given in accordance with section 15-1507(c) of the Foreclosure Law, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done. See 735 ILCS 5/15-1508(b) (West 2008).

¶ 14 We first address defendant's contention that Countrywide lacked standing. Defendant contends that because the owner of the mortgage as of July 2011 was FMNA AA MSTR/SUL CW BANK REC, Countrywide has no interest in 2424 North Menard and, therefore, no standing.

¶ 15 Countrywide responds that standing was an issue that should have been raised prior to the entry of the order approving sale, and that defendant has waived this argument by waiting until after the trial court entered a final order. Countrywide notes that the trial court's order approving the report of sale grants relief to "the successful bidder COUNTRYWIDE HOME LOANS SERVICING LP, or Assignee FEDERAL NATIONAL MORTGAGE ASSOCIATION," referencing the transfer to "FNMA." Countrywide also asks this court to take judicial notice of the fact that Countrywide was acquired by Bank of America in 2008. See *Finish Line Express*,

*Inc. v. City of Chicago*, 72 Ill. 2d 131, 136 (1978) (judicial notice may be taken of public records).

¶ 16 Lack of standing is an affirmative defense (*Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004)), and therefore must be specifically and expressly pled (see 735 ILCS 5/2-613(d) (West 2008)). A plaintiff does not need to allege facts establishing that he has standing to proceed; rather, it is a defendant's burden to plead and prove the lack of standing. *Wexler*, 211 Ill. 2d at 22. The defense of standing will be forfeited if not raised in a timely fashion before the trial court. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010). When the plaintiff has moved for confirmation of the sale, it is too late for a defendant to raise a standing defense. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9.

¶ 17 In this case, Countrywide's foreclosure complaint complied with the requirements of section 15-1504(a) of the Foreclosure Law (735 ILCS 5/15-1504(a) (West 2008)), in that it alleged, in pertinent part, that Countrywide was the legal holder of the indebtedness or the servicing agent for the legal holder of the indebtedness, and copies of the note and mortgage were attached. See *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15, *as modified on denial of reh'g* (Dec. 28, 2012) (standing is determined as of the time the suit is filed).

¶ 18 The record reflects that in January 2009, the trial court granted Countrywide's motion for summary judgment and entered a judgment for foreclosure and sale. On October 12, 2011, the trial court entered an order approving the sale. Defendant did not raise a standing argument until he filed the motion to vacate the order approving sale. By this point in the proceedings, defendant's assertion of the defense of lack of standing was untimely. See *Wells Fargo Bank*,

*N.A. v. McCluskey*, 2013 IL 115469, ¶ 26 (after the filing of a motion to confirm the sale, "it is not sufficient \*\*\* to merely raise a meritorious defense to the complaint"). Therefore, defendant has waived the issue of Countrywide's standing by failing to raise the issue in a timely manner. See *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010) (finding the defendant failed to timely raise the standing issue and, as a result, forfeited it).

Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion to vacate the order approving sale on that basis. See *Adeyiga*, 2014 IL App (1st) 131252, ¶ 116.

¶ 19 Defendant next contends that the trial court abused its discretion in denying his motion to vacate the sale because neither he nor his attorney received notice of the motion to approve sale.

¶ 20 Section 15-1508(b)(i) of the Foreclosure Law provides that the circuit court shall confirm the foreclosure sale unless the court finds that the notice required by section 15-1507(c) was not given. 735 ILCS 5/15-1508(b)(i) (West 2008). Two types of notice are required by section 15-1507(c), public notice and individual notice to all parties in the action who have appeared and have not been found in default. 735 ILCS 5/15-1507(c)(2), (3) (West 2008).

¶ 21 The applicable rules of the court for service of papers other than process and the complaint are Supreme Court Rules 11 (eff. Dec. 29, 2009), and 12 (eff. Dec. 29, 2009). Supreme Court Rule 11 sets forth multiple means of effectuating proper service. See Ill. S. Ct. R. 11 (eff. Dec. 29, 2009). The portion of Rule 11 relevant to this appeal provides that documents shall be served "by depositing them in a United States post office or post office box, enclosed in an envelope, plainly addressed to the attorney at the attorney's business address, or to the party at

the party's business address or residence, with postage fully prepaid." Ill. S. Ct. R. 11(b)(3) (eff. Dec. 29, 2009). Supreme Court Rule 12 provides that service is proved:

"in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail or delivered the paper to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

¶ 22 "There is a presumption of delivery if [a notice was] sent by regular mail directed to a proper address. Where the rules provide for that method of service, notice is thus satisfied by use of regular mail." *In re Marriage of Betts*, 159 Ill. App. 3d 327, 332 (1987). "If the proper giving of the notice can now be frustrated by the mere allegation of the defendant that he did not receive it, then the giving of notice by mail cannot be relied upon even though the rules specify such a method." *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957). Although minor defects are excused, proof of "proper service" by mail must be effected in substantial compliance with Supreme Court Rule 12. *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987). In other words:

"[s]ervice is complete when all the required acts are done. So, if all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and the fact that he does not thereafter personally receive the papers which were so served or that he receives them at a later date ordinarily does not affect the validity of the service." *French v. French*, 43 Ill. App. 2d 29, 36 (1963), quoting 72 *C.J.S. Process* § 43, at 1054.



¶ 23 Here, defendant challenges the notices of motion filed by Countrywide. Although defendant argues that the September 19, 2011 notice of motion was signed by a non-attorney, and the September 26, 2011 notice failed to include his attorney, he acknowledges that the October 3, 2011 amended notice of motion was sent to his attorney by another attorney. Although each notice of motion also listed 2424 North Menard, defendant "affirmatively" denies that either he or his attorney received any notice of the motion to approve sale.

¶ 24 Defendant's argument must fail because the record reveals that Countrywide complied with Supreme Court Rules 11 and 12. The proof of service by mail attached to the amended notice of motion, dated October 3, 2011, stated that an attorney "served this Notice of Motion and Motion for Order Approving Report of Sale and Distribution and Possession by causing to be mailed a copy to the above named parties at the addresses listed above by depositing the same in the U.S. mail, with proper postage prepaid." Both defendant's address, 2424 North Menard, and attorney Habib's business address were listed. Based upon the record before this court, Countrywide's proof of service complied with Supreme Court Rules 11 and 12. See *Ingrassia*, 156 Ill. App. 3d at 502. Defendant's assertion on appeal that neither he nor his attorney actually received a copy of the notice of motion is insufficient to justify any suggestion that the sale must be vacated. See *Bernier*, 11 Ill. 2d at 529; *French*, 43 Ill. App. 2d at 36. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion to vacate the order approving sale on this basis. See *Adeyiga*, 2014 IL App (1st) 131252, ¶ 116.

¶ 25 Based on the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.