

No. 1-12-3593

**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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WELLS FARGO BANK, N.A., et al.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
v.	)	
	)	No. 08 CH 3112
DONALD PRICE SR., TONYA L. HARVEY, et al.,	)	
	)	
Defendants-Appellants.	)	Honorable
	)	David B. Atkins
	)	Judge Presiding.
	)	

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JUSTICE SIMON delivered the judgment of the court.  
Justices Harris and Pierce concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Defendants have forfeited their challenge to the foreclosure judgment by failing to raise that claim before the circuit court, and a relaxation of the forfeiture doctrine is not necessary to achieve a just result or maintain a sound and uniform body of precedent in this case. The court did not abuse its discretion by quashing defendants' subpoenas, as the record does not establish that defendants were seeking permissible discovery. The court did not abuse its discretion by denying defendants' motion to vacate its order approving the judicial sale and/or vacate the default order and foreclosure judgment, as defendants' allegations concerned a separate mortgage that was not at issue in this case.

¶ 2 Defendants, Donald Price and Tonya Harvey, appeal from orders of the circuit court of Cook County related to mortgage foreclosure proceedings initiated by plaintiff, Wells Fargo Bank, N.A. On appeal, defendants contend that the court erred by entering a judgment of foreclosure and sale in favor of plaintiff, granting plaintiff's motion to quash subpoenas issued by defendants, and denying defendants' motion to vacate the court's order approving the judicial sale or, alternatively, to vacate the order of default entered against defendants and the judgment of foreclosure and sale. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 24, 2008, plaintiff filed a complaint to foreclose a mortgage against defendants under the Illinois Mortgage Foreclosure Law (Mortgage Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2006)). Plaintiff asserted that the mortgage, which was executed on November 9, 2006, defined defendants as the mortgagors and Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for BNC Mortgage, Inc. (BNC), as the mortgagee. Plaintiff asserted that it was the legal holder of the underlying indebtedness and the owner of the mortgage and that defendants had stopped making their monthly payments in October 2007 and were in default on the note and mortgage. Plaintiff attached a number of documents to its complaint, including the mortgage and a lost note affidavit. The lost note affidavit related that on November 9, 2006, Price executed a promissory note for \$532,000 that was payable to MERS and secured by the mortgage at issue, that plaintiff was the current assignee of the note and mortgage, that the note had not been paid according to its terms and was in default, and that the original note had been lost, destroyed, or mislaid, and could not be presented to the court at that time despite a

diligent search. The lost note affidavit, however, did not contain the name of the affiant and was not signed or notarized. On May 22, 2008, plaintiff filed a motion for an order of default against defendants, asserting that over 60 days had elapsed since defendants had been served with the complaint and that defendants had not filed a motion or answer.

¶ 5 On June 18, 2008, plaintiff filed motions for a judgment of foreclosure and sale, for the appointment of a selling officer, and for an order of default against defendants. Plaintiff also filed an affidavit of prove-up, in which Clayton Scherf, an authorized agent of plaintiff, averred that the material allegations in the complaint were true and correct, that defendants were in default, and that plaintiff had elected to claim the entire balance due under the terms of the note and mortgage. That same day, the circuit court entered an order of default against defendants for failing to appear and/or plead and an order granting a judgment of foreclosure and sale, in which the court stated that the material allegations of the complaint had been proved "by virtue of the mortgage and the affidavits presented as evidence of indebtedness."

¶ 6 Defendants subsequently retained counsel. The court then granted a number of stays of the sale, but on February 14, 2012, entered an order directing that plaintiff could proceed with the sale without further order of the court. On March 1, 2012, plaintiff filed a motion to approve the report of sale and distribution and for possession of the property. Plaintiff attached a number of documents to the motion, including the report of sale and distribution, which related that the property was sold to plaintiff after it had submitted the highest bid at a public auction conducted on February 15, 2012.

¶ 7 Defendants then issued a number of subpoenas, and plaintiff filed a motion to quash the

subpoenas in which it asserted that defendants were attempting to challenge its standing to bring its claim and that any discovery regarding that issue was improper because defendants admitted that plaintiff had standing by failing to raise the issue prior to the entry of the default judgment. Plaintiff attached a number of documents to its motion, including an assignment of the mortgage at issue from MERS to plaintiff, which was recorded on March 7, 2008. Plaintiff also attached a copy of the original note underlying the mortgage, which was signed by Price and under which Price promised to pay \$532,000, plus interest, to BNC in return for a loan he had received. Price then filed a response to plaintiff's motion to approve the report of sale in which he asserted that the court should not approve the sale because the assignment of the mortgage from MERS to plaintiff had no legal effect. On August 9, 2012, the court entered an order granting plaintiff's motions to approve the sale and quash the subpoenas issued by defendants.

¶ 8 On September 10, 2012, defendants filed a motion to reconsider and vacate the order approving the sale or, alternatively, to vacate the order of default and judgment of foreclosure and sale. Defendants asserted that they had a valid defense because Price did not sign a mortgage with plaintiff that was recorded on June 29, 2006, or authorize anyone to sign that document on his behalf. Defendants attached a copy of a mortgage which was recorded on June 29, 2006, and bore Price's signature and which defined Price as the borrower and mortgagor, MERS as the mortgagee, and plaintiff as the lender. Defendants also attached a signed affidavit from Price in which he averred that he only signed one mortgage agreement regarding the property at issue and that the agreement was with BNC and was executed in November 2006. On October 31, 2012, the court denied defendants' motion to reconsider and vacate.

¶ 9

ANALYSIS

¶ 10 Defendants contend that the circuit court erred by entering a judgment of foreclosure and sale because plaintiff did not provide the court with a copy of the debt instrument secured by the mortgage prior to the entry of that judgment. Plaintiff responds that defendants have forfeited this claim by failing to raise it in Price's response to plaintiff's motion to approve the report of sale and distribution or in defendants' motion to reconsider and vacate the order approving the sale and/or to vacate the default order and foreclosure judgment.

¶ 11 Issues not raised before the circuit court are deemed forfeited and may not be raised for the first time on appeal. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 29. Price asserted in his response to plaintiff's motion to approve the report of sale that the court should not approve the sale because the assignment of mortgage from MERS to plaintiff had no legal effect and defendants asserted in their motion to reconsider and vacate that they had a valid defense to plaintiff's claim because Price's signature on a separate mortgage dated June 19, 2006, was forged. Accordingly, defendants have forfeited their challenge to the foreclosure judgment on the basis of plaintiff's failure to produce a copy of the underlying note in a timely manner by failing to raise it before the circuit court and may not now raise that claim for the first time in this appeal.

¶ 12 Defendants reply that the doctrines of waiver and forfeiture do not limit the court's ability to review issues even if they have been forfeited by the appellant. While an issue that has been waived or forfeited generally may not be raised for the first time on appeal, the doctrines of waiver and forfeiture serve as admonitions to the parties, rather than limitations on the court, and

"courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 33. For the reasons that follow, we determine that a relaxation of the forfeiture doctrine is not warranted in this case because doing so is not necessary to achieve a just result or maintain a sound and uniform body of precedent.

¶ 13 The Mortgage Foreclosure Law provides that in all cases, "evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked, and copies thereof shall be filed with the court." 735 ILCS 5/15-1506(b) (West 2006). Defendants assert that under this provision, plaintiff was required to provide the court with a copy of the note at issue in order to obtain a foreclosure judgment in its favor and that plaintiff violated that portion of the Mortgage Foreclosure Law by failing to provide the court with that document in a timely manner. The statute, however, only requires that evidence of the debt instrument be exhibited to the court, and does not require that the instrument itself be presented to the court. Here, plaintiff presented the court with the mortgage, a lost note affidavit, and an affidavit of prove-up prior to the entry of the foreclosure judgment. While the lost note affidavit does not tend to prove the existence of the underlying debt because it does not include the name of the affiant and was not signed or notarized, the mortgage and affidavit of prove-up do tend to establish the existence of the relevant note. The mortgage, which was signed by defendants, provides that it is a security instrument which exists to secure the repayment of a loan for \$532,000 evidenced by the note signed on November 9, 2006, and Scherf averred in the affidavit of prove-up that the allegations

in the complaint were true and correct and that defendants had defaulted on the note. As such, plaintiff provided the court with some evidence showing that the note existed prior to the entry of the foreclosure judgment and did not violate the procedural requirement in section 15-1506(b) of the Mortgage Foreclosure Law that evidence of the indebtedness be presented to the court. To the extent defendants may assert that the evidence presented by plaintiff was insufficient to substantively establish the existence of the note, defendants admitted the allegations in plaintiff's complaint regarding the existence of the note when they defaulted by failing to answer or plead. *Universal Casualty Co. v. Lopez*, 376 Ill. App. 3d 459, 464 (2007).

¶ 14 In addition, defendants have not established that a relaxation of the forfeiture doctrine is necessary to achieve a just result, as evidence presented subsequent to the foreclosure judgment and prior to the order denying defendants' motion to reconsider and vacate confirm the existence of the note. Plaintiff attached a note for a loan of \$532,000 from BNC to Price to its motion to quash the subpoenas issued by defendants, which is dated November 9, 2006, and is signed and initialed by Price. In addition, defendants attached a signed affidavit from Price to their motion to reconsider and vacate in which Price averred that he received a loan from BNC in November 2006. As such, the record leaves little doubt as to whether the note at issue existed, and the application of the forfeiture doctrine to defendants' claim that the foreclosure judgment was improper due to plaintiff's failure to present the court with a copy of the note prior to judgment will not result in an unjust outcome.

¶ 15 Defendants next contend that the court erred by quashing the subpoenas they issued following the judicial sale and plaintiff's motion to approve the sale because defendants were

entitled to seek discovery as to whether plaintiff obtained an interest in the underlying loan to support their claim that plaintiff did not have standing to bring the foreclosure action. The circuit court is afforded wide latitude in determining the permissible scope of discovery, and its rulings on such matters will not be reversed unless the court has abused its discretion. *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 13.

¶ 16 Defendants, as the appellants, bear the burden of presenting a sufficiently complete record to support their claims of error on appeal and, absent a complete record, we will presume that the circuit court's order is in conformity with the law and has a sufficient basis in fact. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). Here, the record only contains the notices of the issuance of the subpoenas, and not the subpoenas themselves. As the record does not disclose the content of the discovery being sought by defendants, we cannot determine that the circuit court abused its discretion by quashing the subpoenas and must instead presume that the court's order conformed with the law and had a sufficient basis in fact. Moreover, by failing to appear and/or plead prior the entry of the default order, defendants forfeited their challenge to plaintiff's standing to bring this foreclosure action and admitted the allegations in the complaint regarding plaintiff's interest in the loan and mortgage. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010).<sup>1</sup> Further, plaintiff attached a copy of the assignment of mortgage from

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<sup>1</sup> Although defendants maintain that this court's decision in *Barnes* has been called into question by the Second District's decision in *Wells Fargo Bank, N.A. v. McCluskey*, 2012 IL App (2d) 110961, which is currently on appeal before our supreme court (No. 115469), the *McCluskey* court's disagreement with *Barnes* concerned whether a party may bring a motion under section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2010)) following a judicial sale. While defendants did not cite any statutory authority in their motion to reconsider and vacate, the result of this appeal does not change regardless of whether we interpret the motion as having been brought under section 2-1301(e) of the Code of Civil Procedure or section 15-1508(b) of the Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2010)), and the *McCluskey* decision, therefore, does not have any bearing on the



MERS to plaintiff, dated January 22, 2008, and a copy of the original note, which was signed by Price, to its motion to quash the subpoenas. Accordingly, defendants have not established that the circuit court abused its discretion by granting plaintiff's motion to quash their subpoenas.

¶ 17 Defendants further contend that the court erred by denying their motion to reconsider and vacate the order approving the sale or, alternatively, to vacate the default order and judgment of foreclosure and sale. The circuit court has broad discretion in approving judicial sales, and its decision to do so will not be disturbed absent an abuse of that discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). While defendants asserted in their motion that Price did not sign a mortgage with plaintiff, which was recorded on June 29, 2006, or authorize anyone to sign it on his behalf, that mortgage is not being foreclosed upon in this case and the court did not abuse its discretion by denying defendants' motion on the basis of that separate mortgage.

¶ 18 CONCLUSION

¶ 19 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.