2013 IL App (1st) 13-2337-U
No. 1-13-2337

FIRST DIVISION
FILED: March 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PENNYMAC CORP.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 11 CH 19464
NAUSHAD IMAM, FARIHA MASUD,	)	
Defendants-Appellants.	)	Honorable Darryl B. Simko, Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors, P.J., and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: In this action for foreclosure, we held that 1) we have jurisdiction to review the defendants' affirmative defenses of lack of standing, because the trial court's order striking them was a "step in the procedural progression" leading to the orders from which the defendants appealed; 2) the defendants' brief sufficiently argued the issue of their affirmative defenses so as not to waive the matter for review; and 3) the court did not err in dismissing the affirmative defenses as insufficient at law, where the defendants failed to show that the plaintiff lacked standing at the time suit was filed, and the plaintiff was in possession of a valid promissory note executed in blank by the original mortgagee.

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¶ 3

¶ 4 On May 11, 2011, the plaintiff, PennyMac Corp, filed suit against the defendants, Naushad Imam and Fariha Masud, under the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-

1101 *et seq*. (West 2010)), seeking to foreclose on property owned by the defendants. The defendants filed affirmative defenses, alleging, *inter alia*, that the plaintiff was without standing to bring the foreclosure action because it lacked a valid ownership interest in the property at the time the suit was filed. The trial court entered an order striking the affirmative defenses as insufficient at law (735 ILCS 5/2-615 (West 2010)), and the plaintiff then moved for summary judgment under section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)). Following a hearing, the court issued an order granting summary judgment for the plaintiff and entering a judgment of foreclosure and sale of the property. The defendants now appeal, arguing that genuine issues of material fact remain as to the plaintiff's standing to bring the foreclosure action. We affirm.

¶ 5 The plaintiff sought a judgment of foreclosure and sale of property owned by the defendants, located at 1977 Blue Heron Circle, Bartlett. The complaint alleged that on June 2, 2006, the defendants entered into a mortgage agreement secured by the subject property, naming as "original mortgagees" Mortgage Electronic Registration Systems (MERS), acting as nominee for CitiMortgage, Inc. Attached to the complaint were the mortgage agreement and the promissory note (note) it secured, which similarly named CitiMortgage as lender with MERS as its nominee. In pleading its capacity to bring the foreclosure suit, the plaintiff identified itself as the mortgagee under section 15-1208 of the IMFL (735 ILCS 5/15-1208 (West 2010)), by virtue of an assignment recorded in the office of the recorder of deeds in Cook County as document number 1029308127. The complaint alleged that, as of March 1, 2010, the defendants ceased making the required payments under the note, leaving a remaining principal balance due, plus accrued interest, fees and costs. The plaintiff therefore requested, *inter alia*, a judgment of foreclosure and sale of the property.

¶ 6 The defendants moved to strike the complaint, contending that it lacked particularity as to the nature of the plaintiff's status as a mortgagee under section 15-1208 of the IMFL. Specifically, the defendants alleged that the plaintiff failed to state whether it was a legal holder of the indebtedness, an agent of the legal holder, or a non-holder of the indebtedness with the rights of the holder. See 735 ILCS 5/15-1208 (West 2010). The court granted the defendants' motion to strike, and gave the plaintiff leave to file its amended complaint *instanter*. In the amended complaint, the plaintiff clarified that it was filing in the capacity of investor, and that PennyMac Loan Services was the loan servicer for the plaintiff. On October 18, 2011, the defendants moved to dismiss the amended complaint under section 2-619 of the Code (735 ILCS 5/2-619 (2010)), claiming that the plaintiff lacked standing to bring the foreclosure action because it was "not in possession of a properly negotiated or assigned note." The court granted the motion, and gave the plaintiff leave to file a second amended complaint, which is the subject of this appeal.

¶ 7 In the second amended complaint (complaint), the plaintiff reasserted the same claims and allegations as the prior drafts, again attaching the mortgage and note. This time, however, the plaintiff included a document entitled "Note Allonge" (allonge), which contained the following language:

> ¶ 8 "Statement of Purpose: This Note Allonge is attached to and made part of the Note, for the purpose of Noteholder Endorsements to evidence transfer of interest."

¶ 9 The allonge contained the statement "pay to the order of [blank] without recourse," "CitiMortgage, Inc.," "by M. Arndt, Vice President." The document set forth the loan number and amount, loan date of June 2, 2006, the property description, the defendants as mortgagors, and CitiMortgage as "originator."

¶ 10 When the defendants failed to timely answer the complaint, the plaintiff filed a motion for the entry of an order of default and judgment of foreclosure and sale. Attached to the motion was a notarized "amended assignment of mortgage" dated December 22, 2011, purporting to "replace assignment recorded on 10/20/2007 as document number 1029308127." In this document, MERS assigned to the plaintiff all interest in and rights accruing under the subject mortgage. The amended assignment was recorded on January 11, 2012.

¶ 11 The defendants moved for additional time to answer or otherwise plead to the complaint, which the trial court granted. The defendants subsequently filed a combined motion to dismiss the complaint under section 2-619.1 of the Code, again alleging grounds under sections 2-619(a)(2) and 2-615 directed to the plaintiff's lack of standing to bring the foreclosure action. The court denied both motions, and the defendants filed their answer and affirmative defenses.

¶ 12 In their affirmative defenses, the defendants asserted, in relevant part, that the plaintiff lacks standing on the basis that 1) it admitted in its complaint that it is not the holder of the note; 2) it claims to be only the servicer of the loan, which does not confer a legal interest in the mortgage; and 3) the allonge was invalid and unauthorized, because it was created after the filing of the lawsuit, and prepared by M. Arndt, a "robo-signer" who was not a vice-president of CitiMortgage, and lacked authority to endorse the note on its behalf. Attached to the affirmative defenses was the affidavit of Phil Schlichting, an attorney for the defendants. In his affidavit, which misnamed the proper defendants, Schlichting averred that he conducted research into an "M. Arndt," and obtained a profile identifying him as a document specialist for Orion Group, Inc., and as a "robo-signer" of bulk mortgage assignments.

¶ 13 The plaintiff moved to strike the defendants' affirmative defenses on the basis that they are insufficient as a matter of law. On September 18, 2012, the trial court granted the plaintiff's

motion and entered an order striking the affirmative defenses, with prejudice. On September 25, 2012, the plaintiff filed its motion for summary judgment under section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2012)), seeking a judgment of foreclosure and sale of the property. In support of the motion was the affidavit of Javier Huancas, an employee of the plaintiff's loan servicer, attesting to the specific amounts of remaining principal due on the mortgage, plus expenses incurred to date. Although the defendants apparently filed a response to this motion, it was not included in the record on appeal.

¶ 14 On October 21, 2012, the court entered an order granting summary judgment for the plaintiff, along with a judgment of foreclosure and sale. The defendants subsequently filed a motion to reconsider the judgment, essentially reiterating their arguments as to the plaintiff's lack of standing to bring the action for foreclosure. On March 1, 2013, the court denied the defendant's motion to reconsider, noting that, at the hearing on the motion, the plaintiff produced the original note with the original allonge. The court thereafter entered an order confirming the sale of the subject property, and this timely appeal followed.

¶ 15 On appeal, the defendants argue that summary judgment was improper because genuine issues of material fact remain as to whether the plaintiff had standing to bring the foreclosure action at the time suit was filed. In particular, they assert that the plaintiff failed to establish that it possessed a valid interest in the note when it filed the original complaint, and that, for the first time in its second amended complaint, it attempts to rely upon an undated allonge, which was unauthorized, and manufactured solely to cure the plaintiff's lack of ownership of the note at the inception of this action.

¶ 16 In response, the plaintiff first asserts that the defendants have "waived" any argument based upon their affirmative defense of lack of standing, because their notice of appeal fails to

reference the order of September 18, 2013, in which the court struck the affirmative defenses with prejudice. The plaintiff further contends that the defendants have waived their arguments as to standing under Rule 341(h)(7) (eff. February 6, 2013), because their brief similarly omits any challenge addressed to the September 18 order. We disagree.

¶ 17 A proper notice of appeal is the jurisdictional step which initiates appellate review, and without a complete notice, we must dismiss the appeal for lack of jurisdiction. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176, 950 N.E.2d 1136 (2011). Rule 303(b)(2) (eff. June 4, 2008) requires that the notice of appeal specify the judgment, part of a judgment, or other orders appealed from, and the relief sought from this court. When an appeal is taken from a specific judgment, this court is without jurisdiction to review any other orders not specified in or inferred from the notice of appeal. *Id.* There is an exception to this rule, however, where a nonspecified judgment is a "step in the procedural progression" leading to the judgment in the notice of appeal; in that instance, the nonspecified judgment is reviewable because it can be said to relate back to the judgment specified in the notice of appeal. *McGill v. Garza*, 378 Ill. App. 3d 73, 75, 881 N.E.2d 419 (2007).

¶ 18 Here, the notice of appeal specified that appeal was being taken from, *inter alia*, the order granting summary judgment for the plaintiff, the March 1, 2013, order denying the defendants' motion to reconsider, and "any order incorporated therein." In the motion to reconsider, the defendants reiterated the same arguments regarding lack of standing that had formed the basis for their affirmative defenses and for their response to the plaintiff's motion to strike. It is clear that the order striking the affirmative defenses was a step in the procedural progression leading to the grant of summary judgment and to the denial of the motion to reconsider, both of which were specified in the notice of appeal. Accordingly, we have

jurisdiction to consider the defendants' argument on appeal. For similar reasons, we reject the contention that the defendants have waived their arguments regarding standing under Rule 341(h)(7). The plaintiff is of course correct in that the defendants should have directed their contentions on appeal to the court's order striking their affirmative defenses. Nonetheless, their arguments relate directly to that order, and are sufficiently defined and supported by citation to pertinent authority so as to satisfy Rule 341(h)(7).

¶ 19 Proceeding to the merits of this appeal, we first note that the defendants do not dispute the allegations underlying the plaintiff's motion for summary judgment, including the defendants' default on the note and the amounts remaining outstanding, as averred in the affidavit of Javier Huancas. We therefore address this as an appeal from the order striking the defendants' affirmative defenses, which lead to the summary judgment entered in favor of the plaintiff.

¶ 20 A motion to dismiss under section 2–615 admits all well-pleaded facts and attacks the legal sufficiency of a pleading. *La Salle National Bank v. City Suites, Inc*., 325 Ill. App. 3d 780, 790, 758 N.E.2d 382 (2001). We review an order granting a motion to dismiss under section 2–615 *de novo*. *Illinois Non–Profit Risk Management Ass'n v. Human Service Center of Southern Metro–East*, 378 Ill. App. 3d 713, 719, 884 N.E.2d 700 (2008).

¶ 21 The doctrine of standing is intended to prevent 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." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221, 720 N.E.2d 1034 (1999)*; Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, 975 N.E.2d 178. Our supreme court has held that, in civil cases, the lack of standing is an affirmative defense, and as such, must be pleaded and proven by the defendant. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252–53, 930 N.E.2d 895 (2010)*; Greer v. Illinois*

Housing Development Authority, 122 Ill. 2d 462, 508, 524 N.E.2d 561 (1988). The plaintiff is not required to plead facts to establish standing in a foreclosure case. *Rosestone Investments, LLC v. Garner,* 2013 IL App (1st) 1234223, 2 N.E.3d 532*; Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380 ¶ 24.

¶ 22 Under the IMFA, a foreclosure action may be brought by 1) the legal holder of an indebtedness secured by a mortgage; 2) any person designated or authorized to act on behalf of such holder; or 3) an agent or successor of a mortgagee. 735 ILCS 5/15-1503; *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7, 940 N.E.2d 118 (2010); 735 ILCS 5/15-1503, 15-1504(a)(3)(N) (West 2010). A prima facie case for foreclosure is established if the complaint conforms to requirements set forth in section 15–1504(a) of the IMFL (735 ILCS 5/15–1504(a)); *Barnes,* 406 Ill. App. 3d at 7), and the note and mortgage are attached; at this point the burden shifts to the mortgagor to prove lack of standing. *Korzen*, 2013 IL App (1st) 130380 ¶ 24; *Farm Credit Bank v. Biethman*, 262 Ill. App. 3d 614, 634 N.E.2d 1312 (1994).

¶ 23 Under the Uniform Commercial Code, persons entitled to enforce a note include its holder or a nonholder in possession of the instrument who has the rights of the holder. See 810 ILCS 5/3-301 (West 2010). A negotiable instrument may be transferred by delivery to another entity for the purpose of giving that entity the right to enforce the instrument. 810 ILCS 5/3–203(a) (West 2010). If a note is "[e]ndorsed in blank," it becomes payable to whomever is the bearer, and may be negotiated by transfer of possession alone until it is specially endorsed. *Deutsche Bank National Trust Co. v. Tapla*, 2013 WL 4804855 *2 (N. D. Ill. Sept. 9, 2013), citing 810 ILCS 5/3-205(b) (West 2010). A person in possession of a note payable to bearer is

deemed the holder of the instrument and is entitled to enforce the instrument. See 810 ILCS 5/3-201 (b)(21)(A) (West 2010).

¶ 24 Before the trial court, the plaintiff produced the original version of both the note and the allonge, which was endorsed in blank by CitiMortgage, and made part of the note for the express purpose of "evidenc[ing] transfer of interest" in the note to the bearer. The terms of the note were incorporated into the allonge, and copies of both were attached to the complaint. This was sufficient to establish that the plaintiff was the legal holder of an indebtedness secured by a mortgage under the IMFL. 735 ILCS 5/15-1503*; Rosestone Investments,* 2013 IL App (1st) 1234223; *Barnes,* 406 Ill. App. 3d at 7.

¶ 25 Nonetheless, relying on the case of *Deutsche Bank v. Gilbert*, 2012 IL App (2d) 120164, the defendants argue that the allonge, which is undated, is insufficient to prove standing. In *Gilbert*, the defendant-mortgagor produced dated documents showing that the plaintiff, Deutsche Bank, was not assigned the mortgage until more than five months after it initiated the foreclosure action. Id. ¶ 23-24. The court found that the defendant had made a *prima facie* showing of the plaintiff's lack of standing, then shifted the burden to the plaintiff to show that it had acquired the requisite possessory interest prior to the suit. *Id.* This district has declined to follow *Gilbert*, finding that the shifting of the burden to the plaintiff to prove standing was in contravention of the decisions of our supreme court. See *Rosestone Investments,* 2013 IL App (1st) 1234223 ¶ 28; see also *Lebron*, 237 Ill. 2d at 252–53; *Greer*, 122 Ill. 2d at 508.

We need not take a position as to the validity of *Gilbert,* because we find that the defendants have failed to make even a *prima facie* showing that the plaintiff lacked a possessory interest in the note at the time it filed suit. In the original complaint, the plaintiff alleged that it is the "mortgagee" pursuant to an assignment that was publicly recorded with the recorder of deeds. In

its motion for default judgment after the first amended complaint, the plaintiff attached an amended assignment which further evidenced a transfer of interest in the note from MERS to the plaintiff.[*] We recognize that the amended assignment is dated December 22, 2011, several months after the original complaint was filed. However, we do not find this to be an issue under the facts of this case. It is well-established that a written assignment can document a transfer that actually occurred on an earlier date. *Rosestone Investments,* 2013 IL App (1st) 1234223 ¶ 28; *Gilbert*, 2012 IL App (2d) 120164. The defendants do not challenge the validity of this assignment, and offer no evidence, other than their own assertions, to contradict the fact that the plaintiff had an assigned interest in the mortgage and note as of the filing of the original complaint.

¶ 26

The defendants also challenge the validity of the allonge. Specifically, they argue that there is "considerable doubt" that "M. Arndt," the endorser of the note, ever had the authority to execute the instrument on behalf of CitiMortgage, or that he was employed by CitiMortgage in any capacity. We disagree.

¶ 27 Under the Uniform Commercial Code, the signature on a negotiable instrument is presumed to be authentic and authorized. 810 ILCS 5/3-308(a)(West 2010). The burden rests

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[*] ¶ 1 For the first time in its brief on appeal, the plaintiff attaches an assignment dated October 19, 2010, prior to the original complaint, recorded as document 1029308127, transferring all interest in the subject mortgage from CitiMortgage to the plaintiff. The plaintiff asks that we now take judicial notice of this recorded document, even though it apparently has been available for over three years. We decline this request.

with the defendant to produce evidence to overcome this presumption, and in the absence of such evidence, the presumption stands. See *Bethune Plaza, Inc. v. State Dept. of Pub. Aid,* 90 Ill. App. 3d 1133 (1980); *Burkett v. Finger Lake Development Corp.,* 32 Ill. App. 3d 396, 402, 336 N.E.2d 628 (1975).

¶ 28 In support of their argument, the defendants rely solely upon the affidavit of Schlichting, one of their attorneys, who averred that he obtained a computer profile of an "M. Arndt," which depicted him as a document specialist for Orion Group rather than an employee of CitiMortgage. The affidavit further averred that "M. Arndt" was a "robo-signer" of bulk mortgage assignments based upon a purported publication entitled Fraud Digest. Thus, he could not have been employed by CitiMortgage or had any authority to transfer their interest in the mortgage.

¶ 29 The unauthenticated printouts accompanying the affidavit, however, are far from adequate to rebut the presumption that the Arndt's signature was valid and authorized. Even assuming that the Arndt in these documents is the same person as the individual making the note, the defendants have made no effort to establish, through discovery or otherwise, that he was not acting as an agent for CitiMortgage or that he lacked authority to execute the allonge. Similarly, the Fraud Digest report, containing nothing more than a list of "top mortgage document signers," provides no real support for the broad assertion that the allonge in this case was ficititious or that it was executed after the suit was filed.

¶ 30 Last, the defendants claim that, because the complaint alleges that the plaintiff was a servicer of the mortgage, it cannot have standing. This contention was raised and rejected below and is without merit. In fact, the complaint asserts that the plaintiff is bringing suit in the capacity of an "investor," with PennyMac Loan Services, Inc. as the servicer for the plaintiff. As

stated above, the plaintiff was shown to be the holder in possession of the note securing the mortgage, and the defendants' affirmative defenses fail as a matter of law.

¶ 31 For the foregoing reasons, the order of the circuit court granting summary judgment for the plaintiff and entering a judgment of foreclosure and sale is affirmed.

¶ 32 Affirmed.