2014 IL App (1st) 133797-U
No. 1-13-3797
March 31, 2015

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CITIMORTGAGE, INC., assignee of Mortgage Electronic Registration Systems, Inc., as nominee for Guaranteed Rate, Inc.,	)	Appeal from the Circuit Court Of Cook County.
Plaintiff-Appellee,	)	No. 10 CH 46547
v.	)	The Honorable Robert Senechalle,
VANESSA COBBINS,	)	Judge Presiding.
Defendant-Appellant.	)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: A plaintiff who acts only as a servicer of a mortgage-backed loan, holding neither the note nor the mortgage, has standing to sue to foreclose the mortgage.

¶ 2 CitiMortgage sued to foreclose a mortgage that Vanessa Cobbins gave to Guaranteed Rate, Inc., when Guaranteed Rate loaned her money. CitMortgage filed a motion for summary judgment and supported the motion with the affidavit of its document control officer, who identified an attached computer printout as Cobbins's loan repayment history.

Cobbins filed her affidavit, in which she presented evidence that an agent of CitiMortgage admitted that CitiMortgage did not hold the note, and acted only as servicer for the loan. The circuit court granted CitiMortgage's motion for summary judgment.

¶ 3 In this appeal, we find that Cobbins's affidavit does not create an issue of material fact, because CitiMortgage, either as servicer of the loan or as holder of the note, had standing to sue for foreclosure and for a deficiency judgment. We also find that the affidavit CitiMortgage attached to its motion for summary judgment complied with Illinois Supreme Court Rule 191 (Ill. Sup. Ct. R. 191 (eff. January 4, 2013)), and supports the circuit court's judgment. Accordingly, we affirm.

¶ 4 BACKGROUND

¶ 5 On July 16, 2007, Guaranteed Rate loaned Cobbins $520,000 in exchange for Cobbins's promise to repay the loan with interest, secured by a mortgage on property Cobbins owned in La Grange, Illinois. The mortgage names as mortgagee Guaranteed Rate's nominee, Mortgage Electronic Registration Systems, Inc. (MERS). In October 2010, CitiMortgage filed a complaint to foreclose the mortgage and for a judgment against Cobbins for the amount due on the loan. CitiMortgage attached to its complaint the note recording Cobbins's debt to Guaranteed Rate, the mortgage, a document entitled "Endorsement Allonge," and a document entitled "Assignment of Mortgage." According to the allonge, Guaranteed Rate transferred its interest in the note to CitiMortgage on July 16, 2007. MERS, as Guaranteed Rate's nominee, purported to transfer its interest in the mortgage and the note to CitiMortgage on October 15, 2010.

¶ 6 The mortgage foreclosure summons from CitiMortgage, addressed to Cobbins, advised her to call 1-800-283-7918 to work out alternatives to foreclosure. On December 26, 2012, CitiMortgage filed a motion for summary judgment on its complaint. CitiMortgage supported the motion with an affidavit of Jemmy Beckstead, CitiMortgage's document control officer, who said that according to CitiMortgage's computerized banking records, Cobbins owed more than $700,000 on the note. Beckstead attached to the affidavit a computer printout which, according to Beckstead, showed Cobbins's payment history.

¶ 7 In opposition to the motion for summary judgment, Cobbins presented her affidavit, in which she said, "On or about April 1, 2013 I contacted the servicer for this loan via telephone number (800) 283-7918 and I was informed that Citimortgage Inc. is not the holder of my note and mortgage." She added that CitiMortgage's agent informed her that "the actual holder of [the] Note and Mortgage is Washington Mutual and that Citimortgage, Inc. is only the servicer for [the] loan."

¶ 8 The circuit court granted the motion for summary judgment and entered a judgment of foreclosure and order for sale of the property. At the judicial sale, held on August 8, 2013, CitiMortgage purchased the property for $175,900. The circuit court confirmed the sale and entered a judgment holding Cobbins liable for a deficiency balance of $568,107.83. Cobbins now appeals.

¶ 9 ANALYSIS

¶ 10 Cobbins argues that the trial court should not have granted CitiMortgage's motion for summary judgment. We review the order granting summary judgment *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). The trial court should grant

summary judgment only if the pleadings, depositions, admissions and affidavits leave no unresolved issue of material fact and warrant the award of judgment to the moving party. *Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 805 (2010).

¶ 11 CitiMortgage points out that the record on appeal does not include a transcript of the hearing on the motion for summary judgment. But the record includes all of the evidence the circuit court considered when it decided to grant the motion for summary judgment. "Because the issue on appeal is solely a question of law and does not involve evidentiary issues, the absence of a transcript of the proceedings in the trial court does not bar review by this court." *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 628 (1991).

¶ 12 CitiMortgage appended to its complaint the note Cobbins signed and the endorsement allonge, which purportedly transferred the note from Guaranteed Rate to CitiMortgage on July 16, 2007. The allonge does not show whether CitiMortgage subsequently transferred its interest in the note. Cobbins, in her affidavit, swore that she called the phone number CitiMortgage provided as the number for property owners in default to call to work out alternatives to foreclosure. According to Cobbins, the person who answered the telephone at that number told Cobbins that CitiMortgage held neither the mortgage nor the note, and CitiMortgage acted only as servicer for the loan.

¶ 13 Cobbins argues that she laid a proper foundation to make her testimony about the telephone call admissible. We find that precedent supports her argument. In *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488 (2007), Hammond, a rehabilitation consultant, looked up First Assist's telephone number in a directory, and called the number he found. The person who answered the telephone purported to speak on behalf of First

Assist. The *First Assist* court said, "The fact that Hammond did not recognize the voice of the person to whom he spoke and does not even know his full name does not render the evidence inadmissible. It is sufficient that Hammond called First Assist's business phone number which he obtained from a phone directory and spoke to an individual regarding First Assist's business activities." *First Assist, Inc.*, 371 Ill. App. 3d at 496. We see no significant distinction between the foundation for testimony about the call to First Assist and Cobbins's testimony about the call to CitiMortgage. We agree with Cobbins that she laid a sufficient foundation to make her affidavit qualify as evidence of what an agent of CitiMortgage said to her.

¶ 14 Testimony about the call would also survive a hearsay objection. The *First Assist* court said, "we note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. [Citation.] When, as in this case, the statement has been made by an employee of a party, the test for the application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." *First Assist, Inc.*, 371 Ill. App. 3d at 496. The circumstantial evidence here, that a person answered a call to CitiMortgage's phone number and purported to speak on behalf of CitiMortgage about records showing CitiMortgage's interest in a note and mortgage, sufficiently supports an inference that the speaker acted as CitiMortgage's agent and had authority to discuss CitiMortgage's interest in the loan. See *FDL Foods, Inc. v. Kokesch Trucking, Inc.*, 233 Ill. App. 3d 245, 257 (1992).

¶ 15 Thus, for purposes of this appeal, we assume that CitiMortgage's agent told Cobbins that CitiMortgage acted only as servicer for the loan, and held neither the loan nor the mortgage.

As servicer of the loan, CitiMortgage had standing to sue to foreclose the mortgage and for a deficiency judgment. See *Bankers Trust (Delaware) v. 236 Beltway Investment*, 865 F. Supp. 1186, 1191 (E.D. Va. 1994); *In re Neals*, 459 B.R. 612, 617 (D.S.C. 2011). Cobbins's affidavit creates an issue of fact concerning CitiMortgage's allegation that it held the mortgage and the note; however, the issue does not involve a material fact, because even if CitiMortgage holds neither the mortgage nor the note, it has standing, as servicer of the loan, to foreclose the mortgage and obtain a deficiency judgment against Cobbins.

¶ 16 Next, Cobbins argues that a conflict between the allonge and the assignment of the mortgage creates an issue of material fact. In the allonge, Guaranteed Rate purportedly transferred its interest in the note to CitiMortgage on July 16, 2007. In the mortgage assignment, MERS purportedly transferred its interest in the note and mortgage to CitiMortgage on October 15, 2010. We find that the documents do not create an issue of material fact. On its face, the allonge gives CitiMortgage all of Guaranteed Rate's interest in the note. MERS apparently had no interest in the note to transfer to CitiMortgage when it assigned the mortgage to CitiMortgage. Cobbins has not cited any authority to support her claim that the assignment of the mortgage contradicts the prior facially valid transfer of the note or that the 2010 assignment renders the 2007 transfer of the note invalid.

¶ 17 Cobbins also argues that Beckstead's affidavit does not comply with Supreme Court Rule 191 (Ill. Sup. Ct. R. 191 (eff. Jan. 4, 2013)), and therefore the circuit court should not have considered it as evidence when deciding the motion for summary judgment. According to Rule 191, affidavits presented on motions for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the

claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. Sup. Ct. R. 191 (eff. Jan. 4, 2013).

¶ 18 In the affidavit, Beckstead said:

"I am employed as a Document Control Officer of CITIMORTGAGE, INC, Plaintiff, the holder of the note[.]

* * *

*** In my capacity as a Document Control Officer, I have access to the business records of CITIMORTGAGE, INC, including the business records for and relating to the loan[.] I make this affidavit based upon my review of those records relating to the loan and from my own personal knowledge of how they are kept and maintained[.] The loan records are maintained by CITIMORTGAGE, INC in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge[.] It is the regular practice to keep such records in the ordinary course of a regularly conducted business activity[.]

*** The Payment Histories for the loan, attached to this Affidavit as Exhibit 1, are computer-generated records [.] I have personal knowledge that it is now, and was on the date of the entries, the regular course of business of the CITIMORTGAGE, INC that the entries on the Payment Histories are made at or near the time of the occurrence and made in the ordinary course of business[.]" (Emphasis in original).

¶ 19 The computer printout attached to the affidavit shows a series of entries dated from September 14, 2007, to December 4, 2012, with amounts shown as payments on the loan and interest added to the loan.

¶ 20 We find that *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, provides useful guidance. In *JPMorgan*, the bank sought a judgment on its complaint to recover amounts it loaned to East-West. The bank presented the affidavit of Brenda Pawlak, an analyst, who said she was "responsible for coordinating process changes affecting the servicing of commercial loans." *JPMorgan*, 2014 IL App (1st) 121111, ¶ 87. She also worked "as a quality assurance analyst, *** performing sample testing on processes and controls." *JPMorgan*, 2014 IL App (1st) 121111, ¶ 87.

¶ 21 The *JPMorgan* court added:

> "Ms. Pawlak had access to and was generally familiar with Chase Bank's commercial bank business records maintained in the regular course of business, including the business records relating to East-West and its indebtedness to the plaintiff. Her affidavit was based on her review of Chase Bank's records relating to the loan to East-West including, but not limited to, the payoff calculation document, and her own personal knowledge of how Chase Bank's records were maintained.
>
> Ms. Pawlak stated that the loan records and the payoff calculation document were maintained by Chase Bank in the course of its regularly conducted business activities. Chase Bank maintained its loan records by logging in entries at or near the time of a recordable event by a person with knowledge or from information

transmitted from a person with knowledge of the event." *JPMorgan*, 2014 IL App (1st) 121111, ¶¶ 88-89.

¶ 22 East-West argued that the circuit court should have stricken Pawlak's affidavit and the attached documents for lack of an adequate foundation. Illinois Rules of Evidence 803(6), which governs the admissibility of business records, provides that the hearsay rule does not require exclusion of "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness *** unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

¶ 23 The *JPMorgan* court said, "Rule 803(6) did not require Ms. Pawlak to name each individual who input information into the computer and to provide the source of that person's information Ms. Pawlak averred that the loan records and the payoff calculation document were maintained by Chase Bank in the course of its regularly conducted business activities. Chase Bank maintained its loan records by logging in entries at or near the time of a recordable event by a person with knowledge or from information transmitted from a person with knowledge of the event. Ms. Pawlak's averments in this regard satisfied Rule 803(6)." *JPMorgan*, 2014 IL App (1st) 121111, ¶ 102.

¶ 24 The *JPMorgan* court concluded that Pawlak's affidavit provided the necessary foundation for the computer printout of the loan payment history. *JPMorgan*, 2014 IL App (1st) 121111, ¶ 105; see also *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 14.

¶ 25 Following *JPMorgan*, we find that Beckstead's affidavit provided an adequate foundation for the computer printout of Cobbins's loan payment history, and the court properly considered the affidavit as evidence pertinent to the motion for summary judgment.

¶ 26 Cobbins also claims that other affidavits CitiMortgage presented conflict with Beckstead's affidavit and create issues of material fact. Another employee of CitiMortgage signed an affidavit on which the employee checked a box to indicate that CitiMortgage sued as holder of the note; the affiant did not check a different box, which would have indicated that CitiMortgage sued as servicer of the loan. Any conflict between the affidavit and other evidence concerning CitiMortgage's interest in the loan does not create an issue of material fact, because CitiMortgage had standing to sue, either as holder of the note or as servicer of the loan.

¶ 27 A computer printout attached to another affidavit includes the line, "ASSN - MERS TO LENDER *** STATUS DATE 08/02/11." Cobbins asks us to interpret the line to mean that MERS assigned the mortgage to CitiMortgage on August 2, 2011, well after CitiMortgage filed its complaint. We find that the line cannot bear the burden Cobbins places on it. The affiant did not interpret this line, which appears to signify only that sometime before August 2, 2011, MERS assigned its interest in the mortgage to CitiMortgage. The line does not contradict the assertion in the complaint that MERS assigned the mortgage to CitiMortgage on October 15, 2010. Even if MERS had not assigned its interest in the mortgage to

CitiMortgage by the time CitiMortgage filed its complaint, CitiMortgage had standing to sue as servicer of the loan.

¶ 28 Finally, Cobbins argues that section 15-506 of the Code of Civil Procedure (735 ILCS 5/15-1506 (West 2012)) requires a trial whenever the defendant in a foreclosure action files an answer denying the material allegations of the complaint. Section 15-1506 provides, "In the trial of a foreclosure, the evidence to support the allegations of the complaint shall be taken in open court, [with exceptions not relevant here; and] where all the allegations of fact in the complaint have been proved by verification of the complaint or affidavit, the court upon motion supported by an affidavit stating the amount which is due the mortgagee, shall enter a judgment of foreclosure as requested in the complaint." 735 ILCS 5/15-1506(a)(2) (West 2012).

¶ 29 The circuit court here found the complaint's allegations of material fact proved by verification or affidavit, and Cobbins failed to raise any issue of material fact concerning CitiMortgage's right to a judgment. The circuit court correctly applied section 15-1506 when it granted CitiMortgage's motion for summary judgment.

¶ 30 CONCLUSION

¶ 31 Although Cobbins laid a foundation for her affidavit concerning her phone call to CitiMortgage, and the affidavit contradicted an allegation in the complaint, the affidavit does not create an issue of material fact, because CitiMortgage had standing to sue to foreclose the mortgage and to request a deficiency judgment either as a servicer of the loan or as holder of the note. The affidavits and computer printouts do not create issues of material fact.

Beckstead's affidavit complies with Rule 191 and supports the entry of summary judgment in favor of CitiMortgage. Accordingly, we affirm the circuit court's judgment.

¶ 32 Affirmed.