

No. 1-15-1111

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

BEAL BANK USA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 2013 CH 09807
)	
LEODEGARIO MERCADO,)	The Honorable
)	Allen P. Walker
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to demonstrate that plaintiff lacked standing to file a foreclosure complaint.

¶ 2 This appeal arises from a foreclosure action filed by plaintiff Beal Bank USA against defendant Leodegario Mercado. On appeal, defendant asserts the circuit court erred by entering judgment in favor of plaintiff because the complaint and its attachments did not show that plaintiff had standing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In 2006, defendant executed a mortgage and promissory note with respect to his property at 2638 West 122nd Street in Blue Island. Homecomings Financial Network, Inc.

(Homecomings) was the lender, and Mortgage Electronic Registration Systems, Inc. (MERS), was the nominee for Homecomings, its successors and its assigns. Plaintiff ultimately filed a foreclosure complaint on April 11, 2013, alleging that while Homecomings was the original lender and MERS was its nominee, plaintiff was now mortgagee under section 15-1208 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1208 (West 2012)).

Plaintiff attached to the complaint a copy of the original mortgage and promissory note executed by defendant.

¶ 5 Seven months later, plaintiff filed motions for default judgment and foreclosure. Plaintiff attached an assignment of mortgage from MERS to LNV Corporation, which was recorded on July 22, 2008. That document also transferred "the note or notes therein described or referred to." Additionally, plaintiff attached an assignment of mortgage from LNV Corporation to plaintiff. The document purported to transfer the mortgage and all related documents and collateral effective December 31, 2012. Furthermore, plaintiff attached two allonges executed with regard to the promissory note. The first allonge was endorsed by Residential Funding Company, LLC, in favor of LNV Corporation while the second was endorsed by LNV Corporation in favor of plaintiff.

¶ 6 Defendant then filed a *pro se* answer and affirmative defenses, essentially asserting that plaintiff lacked standing because the complaint, and the documents attached thereto, did not show that plaintiff was the note holder. Defendant also argued that MERS lacked authority to foreclose on a mortgage or assign mortgage interests. With that said, plaintiff's attorney on appeal represents that he was not aware of defendant's aforementioned pleadings until plaintiff

saw the record on appeal. Additionally, it appears that the circuit court was not made aware of defendant's pleadings, as the court entered a default judgment of foreclosure and sale in favor of plaintiff, finding that defendant had "failed to appear and/or plead."

¶ 7 Shortly thereafter, defendant filed a *pro se* motion to dismiss, again challenging plaintiff's standing to file the complaint. We note that the motion did not argue the circuit court had erred by finding he had failed to appear or plead. On April 15, 2014, the circuit court denied the motion to dismiss without prejudice and notified defendant that the property would be sold at public auction. The record indicates that defendant then obtained counsel and filed an emergency motion to vacate the judgment and stay the sale of the property. That motion, however, is not included in our record on appeal. Following a hearing, the circuit court denied the motion.

¶ 8 Plaintiff purchased the property at a public auction held on February 19, 2015, and moved for an order approving the report of sale and distribution. Defendant did not respond to this motion. On March 20, 2015, the circuit court entered a written order approving the report of sale and distribution, confirming the sale, and ordering possession. Defendant now appeals.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant asks this court to reverse the circuit court's order denying "Defendant's 2-1401 Emergency Motion to Vacate Judgment/Stay Sale," and to reverse the circuit court's order approving the report of sale and distribution, confirming the sale, and ordering possession. Specifically, he contends that plaintiff failed to demonstrate it had standing to file the foreclosure action.

¶ 11 As a threshold matter, we address the incomplete record. Although plaintiff has raised this defect on appeal, defendant offers no response. An appellant has the burden of presenting a complete record on appeal, including a report of proceedings or an appropriate substitute, as

required by Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). *Rock Island County v. Boalbey*, 242 Ill. App. 3d 461, 462 (1993). Absent evidence to the contrary, we will presume the circuit court's order was supported by an adequate factual basis and conformed with the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from the incompleteness of the record must be resolved against the appellant. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 12 As stated, our record does not include defendant's emergency motion to vacate the judgment of foreclosure or stay the sale. Consequently, the record does not reveal what issues defendant brought to the circuit court's attention in that motion or corroborate defendant's representation that the motion was filed under section 2-1401 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)), as opposed to another provision of the Code. See *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27 (a borrower can seek to vacate a default judgment of foreclosure pursuant to section 2-1301(e) of the Code of Civil Procedure up until the plaintiff has moved to confirm the judicial sale). Although defendant has included a copy of the motion in the appendix to his brief, litigants cannot supplement the record in this manner. See *Sceperrek v. Board of Trustees of Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶ 2. Accordingly, we must assume the circuit court correctly denied defendant's motion.

¶ 13 Moreover, we will not disturb the circuit court's decision to confirm or reject a judicial sale absent an abuse of discretion. *Sewickley, LLC, v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 26. Because defendant has failed to include a report of proceedings, however, we cannot assess how the court exercised its discretion, let alone determine that the court abused its discretion. See *Hye Ra Han v. Holloway*, 408 Ill. App. 3d 387, 396 (2011) (where the issue on

appeal pertains to a hearing, the issue cannot be reviewed absent a report of proceedings). In any event, defendant's challenge to the circuit court's judgment would fail on its merits.

¶ 14 Section 15-1508(b)(iv) allows the circuit court to vacate a judicial sale and underlying judgment in rare cases. *Deutsche Bank National Trust v. Cichosz*, 2014 IL App (1st) 131387,

¶ 13. The party opposing a judicial sale bears the burden of demonstrating that sufficient grounds exist to disapprove the sale. *Id.* Specifically, a borrower must have a meritorious defense to the underlying judgment and demonstrate that justice was not done either due to the lender previously preventing the borrower from raising his meritorious defenses or due to other impediments preventing him from protecting his property interest. *Wells Fargo Bank, N.A.*, 2013 IL 115469, ¶ 26.

¶ 15 After plaintiff moved for an order approving the report of sale and distribution, defendant did not file a response in order to preserve his contention that the court should disapprove the sale. Our record reflects no oral objection either. See *Sewickley, LLC*, 2012 IL App (1st) 112977, ¶¶ 36, 40. Forfeiture aside, defendant lacks a meritorious defense.

¶ 16 Standing requires a party to have a real interest in the action at the time it is filed but foreclosure actions can be filed by a mortgagee, its agent or its successor. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12. Consequently, a plaintiff can maintain a foreclosure action even when another individual holds the beneficial ownership of the note. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). Additionally, a mortgage assignment can be oral, and written assignments may merely memorialize earlier transfers. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶¶ 15, 25.

¶ 17 Attaching the note to the complaint in and of itself constitutes *prima facie* evidence that the plaintiff owns the note. *HSBC Bank, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 21. Conversely, the Foreclosure Law requires a plaintiff to submit no documentation other than the mortgage and the note. *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 40.¹ Furthermore, the defendant, rather than the plaintiff, has the burden of proving the lack of standing as an affirmative defense. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. Stated differently, the borrower must present some evidence that the mortgage and note were not transferred to the plaintiff before the complaint was filed. *Bayview Loan Servicing, LLC*, 2015 IL App (3d) 140412, ¶ 13.

¶ 18 Here, plaintiff attached the mortgage and note to the complaint. This constituted *prima facie* evidence that it owned the note and no more was required. In contrast, defendant has not met its burden of demonstrating that plaintiff lacked standing. This court has previously observed that the purpose of standing is to insure that only parties with a real interest in a controversy raise claims. *Rosestone Investments, LLC*, 2013 IL App (1st) 123422, ¶ 27. Given the documentation provided to the trial court, there can be no question that plaintiff has an interest in this case.

¶ 19 We are unpersuaded by defendant's reliance on *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164. There, the plaintiff bank attached copies of the note and mortgage to the foreclosure complaint. Months later, MERS executed a written assignment of the mortgage to the plaintiff, which represented that it had transferred all interests in the mortgage to the plaintiff "as Trustee" years earlier. The plaintiff then filed an amended complaint, to which the plaintiff attached the written assignment. In response, the defendant argued that this assignment showed the plaintiff lacked standing when it filed the action. The plaintiff

¹ While Illinois Supreme Court Rule 113(b) (eff. May 1, 2013) now requires plaintiffs to attach to the complaint the present copy of the note, as well as all indorsements and allonges, plaintiff here filed its complaint before this rule took effect.

maintained, however, that it had standing when it filed the original complaint because the written assignment had merely memorialized an earlier transfer. *Id.* ¶¶ 5-7.

¶ 20 The reviewing court found that even if the burden of proof was on the defendant, he had shown that the plaintiff lacked standing. *Id.* ¶ 16. Specifically, the reviewing court found the defendant demonstrated the plaintiff's lack of standing because the documents attached to the complaint did not identify the plaintiff as the mortgagee and the written assignment to the plaintiff was executed after the complaint was filed. *Id.* ¶ 17. The court reasoned that the defendant made a *prima facie* showing that the plaintiff lacked standing and thus, the burden shifted to the plaintiff, who failed to even create a question of fact. *Id.* The assignment established when the plaintiff became trustee, but it did not establish when the plaintiff acquired an interest in the mortgage. *Id.* ¶ 18. Furthermore, the reviewing court determined that an affidavit supplied by the plaintiff, which alleged that the transfer occurred before the complaint was filed, lacked foundation. *Id.* ¶ 19.

¶ 21 The first district of this court has already determined that *Gilbert* misplaced the burden of proof, as a defendant alone bears the burden of proving a lack of standing. *Rosestone Investments, LLC*, 2013 IL App (1st) 123422, ¶ 28. We also find *Gilbert* failed to correctly apply the principle that attaching the note to the complaint in and of itself constitutes *prima facie* evidence that the plaintiff owns it. As stated, it is the borrower who must present some evidence that the mortgage and note were not transferred to the plaintiff before the complaint was filed. *Cf. Bayview Loan Servicing, LLC, v. Nelson*, 382 Ill. App. 3d 1184, 1187 (2008) (the defendant was entitled to relief where the plaintiff conceded it was the wrong party to file the foreclosure action). Accordingly, we once again decline to follow *Gilbert*.

¶ 22 Moreover, *Gilbert* is distinguishable from the present case. Unlike the plaintiff in *Gilbert*, here, plaintiff provided the circuit court with a written mortgage document, executed prior to the filing of the complaint, which transferred to plaintiff the mortgage and all related documents. Related documents clearly include the note. See also *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 635 (2000) (observing that a mortgage note assignment carries an equitable assignment of the mortgage by which it was secured and the assignee stands in the assignor-mortgagee's shoes regarding the rights under the note and mortgage). Although defendant argues that plaintiff failed to produce the documentation assigning plaintiff its interest until several months after filing the complaint, *Gilbert* focused on when an assignment was executed, not when it was produced. Whether documentation of the assignment was attached to the complaint has no bearing on plaintiff's standing.

¶ 23 To the extent defendant argues that MERS could not enforce the note, we observe that MERS is not the party attempting to do so here. See also *Mortgage Electronic Registration Systems, Inc.*, 406 Ill. App. 3d at 6-7 (rejecting the defendant's assertion that MERS lacked standing because no documents showed MERS was assigned the note). Additionally, the mortgage specified that MERS was the mortgagee under the security instrument and had the right to exercise interests granted in that security instrument. The mortgage also specified that the note could be sold. Thus, even though the note did not identify MERS as a note holder, it appears that MERS could nonetheless sell the note. MERS's involvement in the mortgage and note does not entitle defendant to relief.

¶ 24 We further reject defendant's assertion that the mortgage was improperly transferred without the underlying debt, as defendant made no record to prove his contention. Finally, defendant's reliance on case law from other jurisdictions is unavailing. Such cases are not

binding on this court. *U.S. Residential Management & Development, LLC v. Head*, 397 Ill. App. 3d 156, 164 (2009).

¶ 25

III. CONCLUSION

¶ 26 Having reviewed the parties' contentions and the incomplete record, the circuit court properly found in plaintiff's favor. Defendant did not affirmatively demonstrate that plaintiff lacked standing but instead, attempted to shift the burden to plaintiff. Additionally, the record amply supports plaintiff's contention that it had an interest in the mortgage and the note.

¶ 27 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 28 Affirmed.