2017 IL App (1st) 162262-U
Order filed: June 23, 2017

SIXTH DIVISION

No. 1-16-2262

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANKFINANCIAL, FSB,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CH 31100
	)	
ROSELINE M. BESEKA,	)	
	)	
Defendant-Appellant	)	
	)	
(Eras N. Beseka; U.S. Bank, N.A.; E. Gadpaille,	)	
as Trustee u/t/a dated 11-25-2009 a/k/a Trust Number 9490	)	
Pinnacle Trust; Unknown Others and Nonrecord Claimants,	)	Honorable
	)	Pamela McLean Meyerson,
Defendants).	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the grant of summary judgment for plaintiff on its foreclosure action, finding no genuine issue of material fact regarding plaintiff's capacity to bring the action. We affirmed the dismissal of defendant's counterclaim for recoupment under the Truth in Lending Act, finding it was untimely.

¶ 2 On December 7, 2004, defendant, Roseline Beseka, and her then-husband, Eras Beseka, executed a note and mortgage in favor of Compass Mortgage, Inc. On September 2, 2011, plaintiff, BankFinancial, FSB filed a foreclosure action, alleging it was now the mortgagee of the loan and that defendant and her husband were in default. In response, defendant filed a

counterclaim for recoupment against plaintiff asserting several disclosure violations of the federal Truth in Lending Act (TILA) (15 U.S.C. § 1601 *et seq*. (2012)). The circuit court dismissed the recoupment counterclaim as untimely and granted summary judgment for plaintiff on the foreclosure action. The circuit court entered a judgment of foreclosure against defendant and a judicial sale of the home was conducted and confirmed by the court. Defendant appeals, contending the court erred: (1) in granting summary judgment for plaintiff on the foreclosure action; and (2) in dismissing her recoupment counterclaim. We affirm.

¶ 3 As we discuss each issue, we will set forth those facts pertinent thereto.

¶ 4 First, defendant contends the court erred in granting summary judgment for plaintiff on the foreclosure action. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Epstein for Polchanin v Bochko*, 2017 IL App (1st) 160641, ¶ 12. We review *de novo* the circuit court's entry of summary judgment. *Id*.

¶ 5 Defendant argues that a genuine issue of material fact exists regarding whether plaintiff had the capacity to bring this foreclosure action. Foreclosure proceedings in Illinois are governed by the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1501 *et seq*. (West 2012)) (Foreclosure Law). *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 14. Section 15-1504 of the Foreclosure Law sets forth the pleading requirements to initiate mortgage foreclosure actions. 735 ILCS 5/15-1504 (West 2012). Section 15-1504(a) provides that a "foreclosure complaint may be in substantially the following form," and identifies various types of relevant information that may be included in the complaint, including the "[c]apacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the

indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate.)" 735 ILCS 5/15-1504(a)(3)(N) (West 2012). Plaintiff has the burden of proving its capacity to bring the foreclosure action. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 21.

¶ 6 Plaintiff explicitly stated in its foreclosure complaint that its capacity for bringing the action was as a "[m]ortgagee under 735 ILCS 5/15-1208." Section 15-1208 states that a "mortgagee" means "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor." 735 ILCS 5/15-1208 (West 2012). A mortgagee has capacity to bring a foreclosure action on the note it holds. *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶ 11.

¶ 7 In her answer, defendant stated she had "insufficient information to either admit or deny" plaintiff's allegation that it had capacity to bring the foreclosure action as a mortgagee, "and demands strict proof thereof."

¶ 8 "A proper answer to a [civil] complaint must contain an explicit admission or an explicit denial of each allegation in the complaint. 735 ILCS 5/2-610(a) (West 2010). An allegation not explicitly denied is admitted unless: (1) the allegation is about damages, (2) the party states that it lacks knowledge of the matter sufficient to form a belief *and supports this statement with an affidavit*, or (3) the party has not had the chance to deny the allegation. 735 ILCS 5/2-610(b) (West 2010)." (Emphasis added.) *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 37. " 'The failure of a defendant to explicitly deny a specific allegation in the complaint will be considered a judicial admission and will dispense with the need of submitting proof on the issue.' " *Id*. (quoting *Gowdy v. Richter*, 20 Ill. App. 3d 514, 520 (1974)).

¶ 9 Defendant here did not explicitly deny plaintiff's allegation that it was bringing the foreclosure action in its capacity as a mortgagee. Rather, defendant stated she lacked knowledge to answer plaintiff's allegation, but she did not include the required lack of knowledge affidavit. Accordingly, defendant has judicially admitted the allegation. *Id.* ¶ 38 (holding that defendants who stated they lacked knowledge to answer an allegation, but did not include the required lack of knowledge affidavit, had judicially admitted the allegation).

¶ 10 Even if defendant had not judicially admitted plaintiff's allegation that it brought the foreclosure action in its capacity as a mortgagee, we would find no genuine issue of material fact regarding plaintiff's capacity to bring such an action.

¶ 11 Plaintiff's capacity to bring the foreclosure action was established, not only by its uncontradicted allegation that it was bringing the foreclosure action in its capacity as a mortgagee, but also by its attachment to the complaint of a copy of the note containing a blank endorsement from Compass Mortgage. "A note is a negotiable instrument as defined by section 3-104 of the Uniform Commercial Code [UCC], as adopted by Illinois. 810 ILCS 5/3-104 (West 2010). A negotiable instrument is an unconditional promise to pay a fixed amount of money; it is 'payable to bearer or to order at the time it is issued or first comes into possession of a holder.' 810 ILCS 5/3-104(a)(1) (West 2010)." *HSBC Bank USA, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 21. A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." 810 ILCS 5/1-201(b)(21) (West 2012). "Section 3-205 of the [UCC] states that '[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.' 810 ILCS 5/3-205(b) (West 2010). Further, it is a longstanding rule that 'possession of bearer paper is *prima facie* evidence of title thereto, [citation] and sufficient

to entitle the plaintiff to a decree of foreclosure.' *Joslyn v. Joslyn*, 386 Ill. 387, 395 (1944). Attachment of the note to the complaint is *prima facie* evidence that the plaintiff owns the note. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26." *Rowe*, 2015 IL App (3d) 140553, ¶ 21.

¶ 12 Thus, in the present case, plaintiff's attachment to its complaint of a copy of the note with the blank endorsement from Compass Mortgage was *prima facie* evidence that plaintiff was the holder of the note and had the capacity to file suit thereon. Also, in its sworn responses to defendant's interrogatories, plaintiff stated that it was the holder of the note. Plaintiff's sworn statement was, in and of itself, sufficient to prove capacity and support its motion for summary judgment. See *Perry*, 2015 IL App (3d) 130673, ¶ 26.

¶ 13 In addition, plaintiff produced the original note twice in court, once at the hearing on the summary judgment motion, and the other time at the hearing on the motion for entry of judgment of foreclosure, thereby further establishing it was the holder of the note and had the capacity to file suit thereon. See *Citimortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 11 (holding that where Citimortgage produced the original note in open court, it established itself as the holder of the note and was entitled to file a foreclosure action).

¶ 14 Defendant argues, though, that the record contains two other, different versions of the note produced by plaintiff, raising a question of material fact regarding whether plaintiff had capacity to bring its foreclosure action. One such note was produced by plaintiff in response to discovery, and it contains two blank indorsements, one from Compass Mortgage and the other from plaintiff. "The possession of a note indorsed in blank remains payable to the bearer." *Rowe*, 2015 IL App (3d) 140553, ¶ 22 (citing 810 ILCS 5/3-205 (West 2010)). As plaintiff was in possession, *i.e.*, was the holder of this note indorsed in blank, it had the capacity to file a

foreclosure action thereon. See 735 ILCS 5/15-1504(a)(3)(N) (West 2012) (providing that a party who is the legal holder of indebtedness has the capacity to bring a foreclosure action).

¶ 15 The third version of the note found in the record contains a separate page entitled "Allonge" that indicates the note was specially indorsed from Compass Mortgage to plaintiff. Under this version of the note, ownership thereof was explicitly transferred to plaintiff, thereby giving it the capacity to bring a foreclosure action. *Id*.

¶ 16 Thus, under any version of the note contained in the record, plaintiff had the capacity to file its foreclosure action. Accordingly, we find no genuine issue of material fact regarding plaintiff's capacity to file its foreclosure action, and therefore affirm the grant of summary judgment in plaintiff's favor.

¶ 17 Next, defendant contends the court erred by granting plaintiff's section 2-619 motion to dismiss her counterclaim for recoupment against plaintiff. "Under Illinois law, recoupment is a cross-action in which a defendant alleges that it has been injured by a breach by plaintiff of another part of the contract on which the action is founded. *Cox v. Doctor's Associates, Inc.*, 245 Ill. App. 3d 186, 199 (1993); 735 ILCS 5/2-608 (West 2008) (a claim by a defendant against a plaintiff in the nature of recoupment may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim)." (Internal quotation marks and asterisks omitted). *Wells Fargo Bank, N.A. v. Terry*, 401 Ill. App. 3d 18, 21 (2010). Defendant's recoupment counterclaim here asserted several disclosure violations of TILA. 15 U.S.C. § 1601 *et seq*. (2012). The court found that defendant's recoupment counterclaim was untimely. Our review is *de novo*. *Beneficial Illinois, Inc. v. Parker*, 2016 IL App (1st) 160186, ¶ 13.

¶ 18 TILA's statute of limitations provides in pertinent part:

> "[A]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation ***. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." 15 U.S.C. § 1640(e) (2012).

¶ 19 The circuit court determined that the one-year TILA statute of limitations set forth in section 1640(e) (15 U.S.C. §1640(e) (2012)), applied to complaints brought by plaintiffs under TILA, but that no express limitation period was provided for counterclaims asserting the defense of recoupment. Accordingly, the court found that such counterclaims are subject to the five-year limitations period set forth in section 13-205 of the Code of Civil Procedure (Code) for "civil actions not otherwise provided for." 735 ILCS 5/13-205 (West 2012). The circuit court then determined that the five-year limitations period began to run from the date the loan closed, December 7, 2004, and ran out on December 7, 2009. Defendant failed to file her recoupment counterclaim until March 2012, after the five-year limitations period had passed, and therefore the court found it was untimely.

¶ 20 The circuit court further found that defendant's recoupment counterclaim was not saved under section 13-207 of the Code, which provides:

> "A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise." 735 ILCS 5/13-207 (West 2012).

¶ 21 "Illinois courts view section 13-207 to allow a defendant to file a counterclaim even if the claim would have been time-barred if brought as a separate action. [Citation.] However, in order to bring a time-barred counterclaim pursuant to section 13-207, the counterclaim must not have been time barred when the cause of action forming the basis of the primary complaint [accrued]." *Parker*, 2016 IL App (1st) 160186, ¶ 19. A cause of action accrues when facts exist authorizing the bringing of the cause of action. *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 52.

¶ 22 The circuit court found that under section 13-207, defendant's TILA recoupment counterclaim would have been saved only if plaintiff's foreclosure action accrued before the five-year limitations period ran out on December 7, 2009. But the foreclosure action accrued when defendant allegedly stopped making the loan payments on January 1, 2011, over one year after the expiration of the limitations period. Accordingly, the court found that defendant's recoupment counterclaim was not saved by section 13-207.

¶ 23 Defendant argues that the circuit court's analysis was flawed, as section 1640(e) did not fail to set forth a limitation period for counterclaims asserting the defense of recoupment; rather, section 1640(e) set forth an *unlimited* statute of limitations for recoupment counterclaims, "except as otherwise provided by State law." 15 U.S.C. § 1640(e) (2012). Defendant contends that Illinois has enacted no laws governing the time to file TILA recoupment counterclaims and, therefore, under section 1640(e), no limitations period applies.

¶ 24 The circuit court's analysis, and defendant's argument on appeal, both run counter to *Parker*. In *Parker*, defendant Parker refinanced his home loan mortgage with plaintiff, Beneficial Mortgage Company of Illinois (Beneficial) in July 2007. *Parker*, 2016 IL App (1st) 160186, ¶ 1. In October 2008, Parker stopped making the required payments. *Id.* Beneficial

instituted a foreclosure proceeding in October 2009. *Id.* In September 2010, Parker filed a counterclaim seeking damages for Beneficial's making improper disclosures when the loan closed. *Id.* ¶ 8. The circuit court dismissed that counterclaim as time-barred under the one-year TILA statute of limitations. *Id.* ¶ 9. Parker appealed. *Id.* ¶ 1.

¶ 25 The appellate court began its analysis by noting that "TILA allows for an untimely TILA claim if it is brought as a defense recoupment or set-off, 'except as otherwise provided by State law.' [Citation.] Illinois courts have interpreted this to mean a damages claim may be brought beyond TILA's statute of limitations if it is brought as a defense in recoupment under Illinois law. [Citations.] Illinois law does not have a provision directly addressing a TILA recoupment claim, but Illinois courts have allowed them when brought pursuant to section 13-207 of the Code. [Citations.] However, such a recoupment claim must meet the requirements of section 13-207." *Id.* ¶ 18.

¶ 26 The *Parker* court proceeded to examine whether the recoupment counterclaim was timely under section 1640(e) of TILA and section 13-207 of the Code, noting the improper disclosures were made on July 9, 2007, so Parker would have one year under section 1640(e), until July 9, 2008, to file a complaint for damages. *Id.* ¶ 20. Parker filed no such complaint, instead waiting until September 2010 to file his recoupment counterclaim in Beneficial's foreclosure action. *Id.* ¶ 1. Parker's recoupment counterclaim, brought after the one-year limitations period set forth in section 1640(e), was subject to dismissal for being untimely and could only be saved under section 13-207 if Beneficial's foreclosure action accrued before the one-year limitations period ran out on July 9, 2008. *Id.* ¶ 20. However, Beneficial's foreclosure action did not accrue until October 2008, when Parker failed to make the required monthly payment. *Id.* At this point,

Parker's claim for damages related to the disclosures was already time-barred. *Id.* Accordingly, his recoupment counterclaim could not be saved by section 13-207. *Id.*

¶ 27 Utilizing the *Parker* analysis, we find that defendant's recoupment counterclaim relating to the improper disclosures under TILA is time-barred. Defendant claimed the original lender violated TILA by: not providing the correct number of copies of the right to cancel notice; providing the notice in an improper format; not providing her with a complete Truth In Lending Disclosure Statement; and not providing her a variable rate mortgage program disclosure. Each of these claimed violations would have occurred, at the latest, at the loan's closing on December 7, 2004. Under section 1640(e), defendant had one year, until December 7, 2005, to bring her claim for damages based on the allegedly improper TILA disclosures. See 15 U.S.C. § 1640(e) (2012). However, defendant did not bring any such claim until March 2012, more than six years too late, when she filed her counterclaim for recoupment in plaintiff's foreclosure action, asserting the alleged disclosure violations under TILA.

¶ 28 Under section 13-207, defendant's counterclaim for recoupment would have been saved only if plaintiff's foreclosure action accrued before the one-year limitations period ran out on December 7, 2005. But the foreclosure action accrued when defendant stopped making the loan payments on January 1, 2011, over five years *after* the expiration of the limitations period. Accordingly, defendant's untimely recoupment counterclaim was not saved by section 13-207.

¶ 29 Defendant argues we should not follow the *Parker* analysis regarding the interplay between section 1640(e) of TILA and section 13-207 of the Code, contending that it runs counter to the Illinois Supreme Court's decision in *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435 (2005). In *Barragan*, the supreme court held that section 13-207 is a saving provision "that allows a counterclaim to proceed despite the failure to comply with the appropriate statute of

limitations period. [Citation.] This saving clause opens the door and exposes the initiating party to otherwise stale claims by sacrificing the protection of the statute of limitations." *Id*. at 446. Defendant argues that the supreme court's reasoning in *Barragan* is that section 13-207 is only applicable when a "door" needs to be opened. In other words, defendant contends "if a party already has the ability to bring a counterclaim, then section 13-207 is not applicable. In the present case, section 1640(e) has already opened the 'door' [by providing for the filing of a recoupment counterclaim after the expiration of the one-year limitations period] and section 13-207 cannot be used to slam it shut."

¶ 30 Defendant's argument is unavailing, as *Parker* effectively held that section 1640(e) "shuts the door" to TILA claims after the one-year limitations period has passed, but provides that the "door" may be opened for TILA recoupment counterclaims that meet the requirements of the State saving statute, section 13-207. *Parker*, 2016 IL App (1st) 160186, ¶ 18. *Parker*'s analysis of section 13-207 as a saving statute was consistent with *Barragan*. In *Barragan*, the Casco Design Corporation (Casco) filed a counterclaim for contribution against the Osman Construction Corporation (Osman), and Osman later filed a responsive counterclaim for contribution against Casco. *Id*. at 437. The issue was whether section 13-207 of the Code should have been applied to save Osman's responsive counterclaim for contribution that was admittedly time-barred by the two-year statute of limitations set forth in section 13-204 of the Code. *Id*. Casco argued that section 13-204 preempted all other statutes of limitation, evidencing a legislative intent to override section 13-207. *Id*. at 447. The supreme court disagreed, noting that "[t]he linchpin of Casco's argument is the erroneous premise that section 13-207 is a statute of limitations." *Id*. at 448. Whereas a statute of limitations bars a claim after a specified period, section 13-207 does the opposite, as it saves otherwise barred claims. *Id*. at 449. As in *Parker*,

the supreme court examined whether Osman's otherwise time-barred claim was saved under section 13-207, and found that it was because Casco's counterclaim—the one that Osman countered—accrued before Osman's counterclaim was barred. *Id*. at 445-46.

¶ 31 *Parker* analyzed *Barragan* and found nothing therein conflicting with its holding that a TILA recoupment counterclaim filed after the expiration of the federal one-year TILA limitations period is subject to dismissal for being untimely unless it is saved by section 13-207. *Id*. ¶¶ 23, 25. We adhere to *Parker* and hold that defendant's TILA recoupment counterclaim was untimely filed under section 1640(e) and was not saved under section 13-207 and, therefore, we affirm the dismissal order.

¶ 32 Affirmed.