2013 IL App (2d) 120105-U
No. 2-12-0105
Order filed January 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

U.S. BANK NATIONAL ASSOCIATION, Not Individually but Solely as Trustee for the Holders of Bear Stearns Asset Backed Securities I Trust 2006-IM1,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 06-CH-1508
ELIGIO V. GAITAN,	)	
Defendant-Appellee	)	
(Mortgage Electronic Registration Systems, Inc., HSBC Mortgage Services, Unknown Owners, and Non-Record Claimants - Defendants).	)	Honorable Terence M. Sheen, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

Held: The trial court did not err in granting summary judgment for plaintiff and entering a foreclosure judgment in its favor, as: plaintiff had standing to bring the foreclosure suit; the trial court did not abuse its discretion in considering an affidavit attached to plaintiff's amended motion for summary judgment; the failure to provide proper notice of the motion was harmless; and, based on the lack of a transcript of the

proceedings, we had to presume that the trial court could properly consider an affidavit that plaintiff subsequently filed. Therefore, we affirmed.

¶ 1 Defendant, Eligio V. Gaitan, appeals from the trial court's entry of a foreclosure judgment in favor of plaintiff, U.S. Bank National Association, as trustee for the holders of Bear Stearns asset backed securities I trust 2006-IM1. Defendant argues that the trial court erred in granting summary judgment for plaintiff and entering the foreclosure judgment because: (1) plaintiff lacked standing to bring the suit; (2) the affidavit attached to plaintiff's motion for summary judgment was improper; (3) defendant did not receive notice of the motion; and (4) an affidavit plaintiff subsequently filed and relied on was barred by a prior order imposing discovery sanctions. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff filed a foreclosure action against defendant on August 28, 2006. Plaintiff sought to foreclose on real estate located at 4520 W. Washington Street in Downers Grove. The complaint stated that plaintiff was bringing the case in the capacity of "[h]older of the note and mortgage."

¶ 4 Plaintiff obtained a default order, along with a judgment of foreclosure and sale, on October 26, 2006. Before the sale of the property, defendant moved to dismiss on March 28, 2007, on the basis that he did not reside at the subject property and had not been served. On March 30, 2007, the parties agreed to the entry of an order vacating the default order and foreclosure judgment. The agreed order also provided that defendant was submitting to the court's jurisdiction.

¶ 5 On July 30, 2007, defendant moved to dismiss for lack of diligence under Illinois Supreme Court Rule 103 (eff. July 1, 2007), alleging that he did not timely receive the full complaint and had not been served with a summons. The trial court denied the motion on August 27, 2007.

¶ 6 On September 25, 2007, defendant moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2006)). He alleged that plaintiff did not have

legal capacity or standing to sue because the mortgage and note showed Encore Credit Corporation (Encore) as the lender of the sum claimed by plaintiff, and the complaint had no attached assignment or chain of assignments. Defendant also alleged that plaintiff did not provide him with the notice of default and acceleration as required by the mortgage. Defendant attached an affidavit stating that he did not receive a notice of acceleration from plaintiff prior to the suit's filing; the copy of the affidavit in the record is unsigned and unnotarized. The trial court denied defendant's motion to dismiss on January 11, 2008.

¶ 7 Defendant filed an answer to the complaint February 11, 2008. He raised four affirmative defenses, including that plaintiff lacked standing and that plaintiff failed to give him proper notice of default and acceleration. Plaintiff thereafter moved to strike the lack-of-standing defense. On May 9, 2008, the trial court struck that defense without prejudice, giving defendant leave to replead, which he did on May 23, 2008. Plaintiff moved to strike the amended lack-of-standing defense, and the trial court granted the motion "with prejudice" on October 27, 2008. Defendant moved to reconsider the dismissal on November 26, 2008, and the trial court denied the motion January 5, 2009, "for the reasons stated by the Court on the record."

¶ 8 Meanwhile, on October 27, 2008, plaintiff moved for summary judgment. Plaintiff attached to its motion an affidavit from Jamie Padmore. Padmore's title is listed as vice president of loan documentation for Wells Fargo Bank, N.A. (Wells Fargo), plaintiff's "Attorney in Fact." Padmore stated that she had personal knowledge of the facts in the affidavit derived from her review of plaintiff's business records. Padmore attested to the validity of attached documents, namely a mortgage loan payment history and the note and mortgage.

¶ 9 On January 22, 2009, attorney Roger Clark filed a motion to allow the appearance of John Koziel as substitute counsel for defendant. The trial court granted the motion the next day.

¶ 10 On April 15, 2009, defendant moved to compel outstanding discovery requests. The trial court denied the motion on November 18, 2009, on the basis that defendant failed to attach copies of the allegedly defective responses. The trial court further ordered plaintiff to file an amended motion for summary judgment in compliance with local court rules.

¶ 11 Plaintiff filed its amended motion for summary judgment the next day, which again included Padmore's affidavit. Plaintiff argued that it was entitled to the entry of a judgment of foreclosure and sale because it possessed an original endorsed note and mortgage bearing defendant's signature. Plaintiff argued that under Illinois law, a note endorsed in blank is payable to the bearer and may be negotiated by transfer of possession alone, giving the transferee the right to enforce the note and mortgage by which the note was secured. Plaintiff further argued that its affidavit established defendant's failure to make payment on the note when due and also established the current balance due. Plaintiff mailed notice of the motion to attorney Clark instead of attorney Koziel.

¶ 12 On January 20, 2010, the trial court entered and continued plaintiff's amended motion for summary judgment.

¶ 13 On February 3, 2010, defendant moved to strike plaintiff's amended motion for summary judgment. He argued that plaintiff failed to call the motion for a hearing within 60 days as required by local court rules. Defendant also filed a motion to compel discovery.

¶ 14 On April 26, 2010, the trial court ordered plaintiff to comply with certain discovery requests. On December 14, 2010, defendant moved for sanctions based on plaintiff's failure to comply with discovery orders. The trial court entered an order on February 1, 2011, reflecting that plaintiff was standing on its previous production and responses. The trial court granted defendant's motion for sanctions and ruled that plaintiff could not rely on any documents or testimony that it had not previously produced.

¶ 15 On April, 28, 2011, defendant filed a cross-motion for summary judgment. He argued that plaintiff had failed to produce any evidence that it was the holder of the note by assignment and had not produced any notices of default or acceleration.

¶ 16 Defendant filed a response to plaintiff's motion for summary judgment on May 11, 2011. He argued that the motion was not properly before the court because it was served on attorney Clark after he had withdrawn, instead of attorney Koziel. Defendant also argued that plaintiff's affidavit was made by an employee of Wells Fargo, a stranger to the case, and that plaintiff lacked standing. Defendant again asserted that he did not receive notice of default or acceleration.

¶ 17 On June 22, 2011, plaintiff filed a reply in support of its amended summary judgment motion and a separate response to defendant's cross-motion for summary judgment. Plaintiff argued that defendant inexplicably continued to repeat his lack of standing argument even though that argument had already been stricken with prejudice due in part to plaintiff's presentation of the note and mortgage in open court, which were not found to be deficient. Plaintiff further argued that defendant did not offer any counter-affidavit to plaintiff's affidavit and therefore could not contest all well-pleaded, uncontradicted facts. Plaintiff argued that the affidavit was based upon the affiant's personal knowledge and included copies of the payment history, indorsed note, and mortgage on which she relied. Plaintiff also argued that although defendant claimed that he did not receive required notices of default and acceleration, he did not allege that the notices were not sent.

¶ 18 On June 28, 2011, defendant filed a reply to plaintiff's response to his cross-motion for summary judgment, reiterating his arguments.

¶ 19 On July 29, 2011, plaintiff filed a supplemental affidavit in support of its amended motion for summary judgment. The affidavit was from Lindsay Andersen, who stated that she was the vice president of loan documentation at Wells Fargo, America's Servicing Company, the service agent

for plaintiff. She attested that currently and prior to the commencement of the action, Wells Fargo serviced defendant's loan, and business records showed that demand letters were mailed to defendant on June 19, 2006. Andersen stated that a true and accurate copy of the demand letter was attached. The letter states that defendant's loan was in default, and unless he could make the necessary payments on his loan, his mortgage note would be accelerated.

¶ 20 On October 11, 2011, the trial court denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment "for reasons stated on record." On December 27, 2011, the trial court entered a judgment of foreclosure and sale in plaintiff's favor. The order contained an Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding that there was no reason to delay the enforcement or appeal of the order. Defendant timely appealed.

¶ 21 II. ANALYSIS

¶ 22 A. Brief

¶ 23 We begin by noting that defendant's brief seems to largely consist of an amalgamation of paragraphs, taken from pleadings, that have not been joined in an entirely coherent manner. Appellants are required to clearly define issues and support them with pertinent authority and cohesive arguments, and the failure to develop an argument results in forfeiture. *Sexton v. City of Chicago*, 2012 IL App (1st) 100010, ¶ 79. We will therefore address the issues defendant explicitly raises and deem forfeited any others to which he may be alluding.

¶ 24 B. Standing

¶ 25 Turning to the merits, defendant first argues that plaintiff lacked standing to bring the foreclosure complaint. Defendant maintains that plaintiff has no legally-recognized interest in the note that is the subject of the suit. Defendant argues that the note is not bearer paper and that plaintiff produced no evidence of transfer or negotiation of the note.

¶ 26 Plaintiff argues that defendant has forfeited this argument by failing to challenge the trial court's ruling striking, with prejudice, his affirmative defense of lack of standing. We agree. The trial court initially struck defendant's lack-of-standing defense without prejudice in May 2008, and defendant replead the affirmative defense. However, plaintiff moved to strike the amended lack of standing defense, and the trial court granted the motion "with prejudice" on October 27, 2008. Although defendant thereafter moved to reconsider the dismissal, the trial court denied the motion January 5, 2009, "for the reasons stated by the Court on the record." On appeal, defendant has not argued that the trial court erred in striking his amended affirmative defense of lack of standing, thereby forfeiting the issue for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (points not argued are forfeited).

¶ 27 Even otherwise, defendant's argument lacks merit. We agree with plaintiff's analysis on this issue and summarize it here. Under section 3-104(a) of the Uniform Commercial Code (Commercial Code) (810 ILCS 5/3-104(a) (West 2004)) a paper is a negotiable instrument if: it contains an unconditional promise or order to pay a fixed amount of money; it is payable to bearer or to order when it is first issued or first comes into a holder's possession; it is payable on demand or at a definite time; and it does not contain any additional requirements other than the payment of money. An instrument is payable to "bearer" if it states that it is payable to bearer or cash or if it does not state a payee, and it is payable to "order" if it is payable to an identified person.[1] 810 ILCS 5/3-109 (West 2004).

¶ 28 The adjustable rate note here shows an unconditional promise by defendant to pay a fixed amount of money, $268,000, at a fixed time, that being a December 1, 2035, maturity date. The note

[1]The Commercial Code's definition of "person" included an individual or organization. 810 ILCS 5/1-201(b)(30) (West 2004).

is also payable to order because it is payable to a particular entity, that being Encore. As such, the note is a negotiable instrument. See also *Krilich v. Millikin Mortgage Co.*, 196 Ill. App. 3d 554, 563 (1990) (adjustable rate note subject to mortgage agreement and rider was a negotiable instrument).

¶ 29 A "holder" of a negotiable instrument is the person possessing the negotiable instrument if the instrument is payable either to bearer or to that person. 810 ILCS 5/1-201(20) (West 2004). As the note here was payable to Encore, Encore was the holder. An instrument may be transferred by being delivered by a person other than its issuer for the purpose of giving the recipient the right to enforce the instrument. 810 ILCS 5/3-203(a) (West 2004). Transfer of the instrument, by negotiation or otherwise, gives the recipient any right of the transferor to enforce the instrument. 810 ILCS 5/3-203(b) (West 2004). An instrument is negotiated by indorsement. 810 ILCS 5/3-204, 3-205 (West 2004). If a holder's indorsement identifies a person to whom the instrument is payable, it is a " 'special indorsement,' " and the instrument becomes payable to that person and may be negotiated only by indorsement of that person. 810 ILCS 5/3-205(a) (West 2004). If the holder indorses the instrument and does not make a special indorsement, it is a " 'blank indorsement.' " 810 ILCS 5/3-205(b) (West 2004). In such a scenario, the instrument becomes payable to bearer and may be negotiated by transfer or possession alone until specially indorsed. *Id.* This type of instrument can be labeled as "bearer paper," which is defined as "[a]n instrument payable to the person who holds it rather than to the order of a specific person." Black's Law Dictionary 1135 (7th ed. 1999).

¶ 30 Here, Encore indorsed the note in blank, making it payable to the bearer who could negotiate it by simple transfer of possession. See 810 ILCS 5/3-205(b) (West 2004). Thus, the note became bearer paper. See also *Stevenson v. Bank of America*, 359 S.W. 3d 466, 470 (K.Y. App. 2011) (where note for mortgage was indorsed in blank, it became a bearer instrument, and mere possession of the original note was sufficient to enforce the note).

¶ 31 In his reply brief, defendant disputes the authenticity of the photocopies of the indorsements on the note. However, plaintiff stated in several pleadings that it brought the original note to court. As the appellant, defendant has the burden to provide a sufficiently complete record of trial proceedings to support his claims of error, and the reviewing court will resolve any doubts that arise from the incompleteness of the record against him. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). As defendant did not provide any transcripts of the hearings, we must assume that the trial court was able to examine the original note and did not find it defective.

¶ 32 The holder of bearer paper can convert a blank indorsement into a special indorsement by writing above the signature line words identifying the person to whom the instrument is made payable. 810 ILCS 5/3-205(c) (West 2004). Here, the words "IMPAC FUNDING CORPORATION" (Impac) appear above Encore's signature, changing the blank indorsement into a special indorsement and making Impac the instrument's holder. See 810 ILCS 5/1-201(20)(West 2004). Impac then indorsed the note in blank, once again making the instrument bearer paper enforceable by the party in possession. See 810 ILCS 5/3-205(b) (West 2004). As we must assume that plaintiff did bring the original note to court, it showed such possession. "The rule is 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); see *In re Miller*, 666 F.3d 1255, 1264 (10th Cir. 2012) (physical possession of bearer paper such as note constitutes proof of ownership and right to payment); see also *Duncan v. National Bank of Decatur*, 285 Ill. App. 305, 309 (1936) ("It is further a presumption of law that every holder of a negotiable instrument is presumed to be a holder in due course, and that, in the absence of evidence to the contrary, every indorsement appearing upon a bill or note will be presumed valid."). Thus, as plaintiff showed

possession of the note indorsed in blank, it was the holder of the note and was entitled to enforce the note.

¶ 33 "The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured." *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill. App. 3d 631, 635 (2000). Thus, as the note's holder, plaintiff also became holder of the mortgage. The legal holder of an indebtedness may file a foreclosure. 735 ILCS 5/15-1504(a)(3)(N) (West 2006); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). Plaintiff therefore provided unrebutted evidence that it had standing to bring this suit.

¶ 34 C. Affidavits

¶ 35 Defendant additionally argues that plaintiff did not support its amended motion for summary judgment with an affidavit of an employee, but rather an employee of Wells Fargo. Defendant argues that the affidavit contained no foundation as to personal knowledge, "aside from the evidence used not being produced prior to the sanction order."

¶ 36 Defendant seems to contest the affidavit of Jamie Padmore. Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) provides the requirements of affidavits in support of or in opposition to a motion for summary judgment. Specifically, such affidavits must be made on the personal knowledge of the affiant; set forth the facts upon which the claim, counterclaim, or defense is based; shall have attached sworn or certified copies of all papers on which the affiant relies; shall consist of facts admissible in evidence rather than conclusions; and shall affirmatively show that the affiant could testify competently thereto. Ill. S. Ct. R. 191(a).

¶ 37 The decision to strike a Rule 191 affidavit is generally within the trial court's sound discretion. *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 33. We note that while defendant did not move to strike the affidavit in question, he did discuss the affidavit's

alleged deficiencies in his responses to plaintiff's motion for summary judgment, thereby arguably preserving the issue for review. *Cf. Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 623 (1995) (where the plaintiff did not object to an affidavit by motion to strike "or otherwise," it forfeited any error). However, given the deference afforded to the trial court in deciding whether to strike a Rule 191 affidavit, we likewise will review the trial court's apparent consideration of the affidavit under an abuse-of-discretion standard.

¶ 38 In her affidavit, Padmore stated that: she was authorized to execute the affidavit on plaintiff's behalf; she had personal knowledge of the facts in the affidavit derived from her review of plaintiff's business records; plaintiff had possession of the note; an attached exhibit showed all payments and charges for the note; and the exhibit was created and stored in the normal course of plaintiff's business. Padmore signed the affidavit under the title of vice president of loan documentation, and above her name appears the words "Wells Fargo Bank, N.A. Attorney in Fact." We conclude that the trial court did not abuse its discretion in allowing the affidavit to stand, as it recited the basis of Padmore's knowledge and stated that she was authorized to execute the affidavit on plaintiff's behalf.

¶ 39 D. Notice of Amended Motion for Summary Judgment

¶ 40 Defendant also argues that the trial court's order granting summary judgment should be vacated because he was not served with notice of the motion, as required by Illinois Supreme Court Rules 11 (eff. Dec. 29, 2009) and 12 (eff. Dec. 29, 2009).

¶ 41 Plaintiff admits that it mistakenly served defendant's prior attorney but argues that any error is harmless under the facts of this case. We agree. The failure to provide notice of a motion makes the trial court's resulting order voidable rather than void. *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 983 (2008). Whether such an order should be vacated is not determined by the

lack of notice, but rather whether the nonmoving party suffered any resulting harm or prejudice. *Id.* The prejudice must be actual, not just possible. *Id.* at 984.

¶ 42 Defendant argues that he was prejudiced because summary judgment was entered in plaintiff's favor, and he will lose his property to foreclosure. However, the prejudice must result from not timely receiving notice of the motion, rather than the result of the ruling on the motion itself. In *Marzano*, this court found that the defendant did not show prejudice where she did "not explain with any particularity how her preparation was compromised by the inadequate notice." *Id.* This is all the more true here, where defendant was clearly aware of the motion when he moved to strike it in February 2010; the briefing schedule spanned many months in the following year; the trial court did not rule on the motion until October 2011; and defendant's attorney appeared and presumably argued against the motion in open court at that time.

¶ 43 E. Improper Evidence

¶ 44 Last, defendant argues that plaintiff did not produce any admissible notice of default or acceleration, whereas he stated in his affidavit that he did not receive such notice. Defendant maintains that plaintiff used barred material in support of showing notice and that he "properly complained of the use of barred material but the Trial Court in error allowed said barred evidence."

¶ 45 Plaintiff argues that defendant's affidavit is inadmissible to support or rebut a motion for summary judgment because it is unsigned. See *Kohls v. Maryland Casualty Co.*, 144 Ill. App. 3d 642, 645 (1986) (unsigned, unsworn affidavit failed as an affidavit). Defendant counters that plaintiff did not protest this point in the trial court and that an executed copy of the affidavit was "discussed at the hearing on the motion."

¶ 46 Plaintiff argues that assuming the affidavit was signed, the defense itself was insufficient as a matter of law. Plaintiff argues that it was required only to mail defendant the notice of acceleration

and default (the mortgage states that all notices "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means"), and defendant's statement that he did not receive the notice is not evidence that it was not mailed.

¶ 47 Plaintiff further argues that even otherwise, it produced affirmative evidence, in the form of Andersen's affidavit, that it mailed the notice. We agree with this argument. As mentioned, Andersen averred that she was a vice president of loan documentation for Wells Fargo; that Wells Fargo serviced defendant's loan; and business records showed that a demand letter was mailed to defendant in June 2006. She attached a copy of the letter, which stated that defendant's loan was in default, and his mortgage would be accelerated if he did not make the necessary payments on his loan.

¶ 48 Although defendant argues that the trial court improperly considered this affidavit in light of the February 2011 sanction order barring plaintiff from producing any new evidence, the lack of a transcript of the summary judgment proceeding hinders our review of this issue. Without the transcript, we are unable to review the trial court's rationale for allowing the affidavit to determine whether it acted within its discretion in doing so. As we must resolve any doubts arising from the incompleteness of the record against defendant (*Foutch*, 99 Ill. 2d at 391-92), we must assume that the trial court did not abuse its discretion in considering Andersen's affidavit. Correspondingly, we must conclude that plaintiff produced sufficient evidence that it sent a notice of default and acceleration.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 51 Affirmed.