2014 IL App (2d) 130453-U
No. 2-13-0453
Order filed December 26, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

U.S. BANK, NATIONAL ASSOCIATION, as Successor Trustee to Bank of America, N.A., As Trustee for Merrill Lynch First Franklin Mortgage Loan Trust Mortgage Loan Asset-Backed Certificates, Series 2007-4,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-2655
ANN KENNEDY and DUNCAN KENNEDY,	)	Honorable Thomas A. Meyer,
Defendants-Appellants.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment, finding that no genuine issues of material fact existed; the trial court properly denied defendants' motion to reconsider; and defendants' claim that the trial court abused its discretion regarding discovery matters was forfeited.

¶ 2 Defendants, Duncan and Ann Kennedy, appeal the judgment of the circuit court of McHenry County, granting summary judgment in favor of plaintiff, U.S. Bank, National Association, as successor trustee to Bank of America, N.A., as successor by merger to LaSalle Bank, N.A., as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan

Asset-Backed Certificates, Series 2007-4, and against defendants; and denying defendants' motion to reconsider. Defendants argue that the trial court erred in granting summary judgment and in denying their motion to reconsider. Defendants also argue that the trial court abused its discretion regarding the conduct of discovery occurring before it granted plaintiff's motion for summary judgment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This is an all too familiar tale: in May 2007, defendant Duncan Kennedy obtained a mortgage on property located on Candlewood Trail in Cary, Illinois, with his wife signing the note as spouse. Defendants allegedly missed one or more of their mortgage payments and, on December 9, 2009, plaintiff filed a foreclosure action in the circuit court of McHenry County, claiming the missed August 2009 payment as the basis of the default. Defendants proceeded *pro se* in the foreclosure action, and this is where the tale departs from the usual.

¶ 5 On April 6, 2010, defendants (Duncan Kennedy appears to have drafted and filed all of the various pleadings and other papers on behalf of both Duncan and Ann, as well as making all the appearances for both defendants; Ann Kennedy appears to have experienced a number of health issues during the pendency of this action and does not appear to have directly participated in the proceedings before the trial court; nevertheless, we will refer to both Duncan and Ann as "defendants" or by their first names if we need to refer to them individually) filed a motion to dismiss the foreclosure complaint, arguing that plaintiff lacked standing to maintain the action because there were no allegations or exhibits that showed how the note and mortgage came into plaintiff's possession. Defendants' motion was granted without prejudice.

¶ 6 On June 14, 2010, plaintiff filed an amended complaint. In the amended complaint, plaintiff included an allegation referencing the assignment. Plaintiff also attached Exhibit C to

the amended complaint, which was a copy of an instrument dated December 7, 2009, assigning plaintiff the interest in defendants' mortgage on the subject property. Following extensive and fruitless motion practice, on March 2, 2011, defendants filed their second amended answer, affirmative defenses, and counterclaims. In their second amended answer, defendants also raised 10 affirmative defenses and 3 counterclaims. Plaintiff promptly moved to dismiss the affirmative defenses and counterclaims. On July 14, 2011, the trial court granted the motion in part, dismissing certain of the affirmative defenses with prejudice, but dismissing two affirmative defenses and the counterclaims without prejudice, and denying the motion regarding defendants' first (lack of standing) and fourth (failure of condition precedent for failing to provide notice of default or a federal counseling notice) affirmative defenses. Ultimately, defendants pleaded four affirmative defenses (adding accord and satisfaction and unclean hands to the two affirmative defenses allowed to stand, lack of standing and failure of a condition precedent) and two counterclaims (a declaration and injunction preventing plaintiff from foreclosing and a count alleging fraud).

¶ 7 Defendants pursued discovery, and these matters occupied the trial court until on February 2, 2012, plaintiff filed a motion for summary judgment. Plaintiff argued that there existed no issues of material fact, and, specifically, that plaintiff had demonstrated standing as evidenced by a copy of the original note, which was indorsed in blank. Defendants filed a response arguing that standing was still undetermined because the purported original note also showed a number of undated indorsements. Defendants also maintained the arguments of their affirmative defenses and counterclaims, contending: (1) that plaintiff had not demonstrated that it fulfilled the condition precedent of providing defendants with the specific counseling form; (2) that plaintiff had not attached a copy of the purported original note (as well as the mortgage

which had been attached) to the complaint; and (3) that plaintiff's affidavits, purporting to show that defendants had defaulted, were insufficient and constituted inadmissible hearsay.

¶ 8 On August 30, 2012, the trial court granted summary judgment in favor of plaintiff. The trial court held that there was no material issue of fact raised by defendants that would defeat plaintiff's right to summary judgment. There again followed several postjudgment motions until defendants, on November 1, 2012, timely filed their motion to reconsider.

¶ 9 In their motion to reconsider, defendants argued that the trial court should have required the completion of discovery before allowing the hearing on plaintiff's motion for summary judgment, that there still existed issues of material fact sufficient to preclude the entry of summary judgment in favor of plaintiff, and that defendants' pleadings had simply been ignored. Defendants further argued that they had come across newly discovered evidence showing that, as a result of a merger, plaintiff could not be a "successor trustee" so "some other party [had to] be the current holder of the mortgage and note. Defendants also argued that the law had changed necessitating that the summary judgment be reconsidered, because the correct law showed that plaintiff did not have standing to foreclose on the subject property. Similarly, defendants argued that the trial court had not properly applied the applicable law, specifically contending that the trial court erred in not striking the affidavits supporting plaintiff's motion for summary judgment. Plaintiff filed a response contradicting defendants' claims; defendants eventually filed an amended reply, adding arguments that plaintiff lacked standing because it had not proved it was the holder of the note and the underlying mortgage assignment was fraudulent.

¶ 10 On April 4, 2013, the trial court denied defendants' motion to reconsider. On April 25, 2013, defendants filed a motion seeking the addition of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language to make the order granting plaintiff's motion for judgment of

foreclosure immediately appealable. The trial court granted the motion and added the Rule 304(a) language, and defendants timely appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendants continue to proceed *pro se*.[1] Defendants challenge the trial court's judgment along three axes: first, that there remain genuine issues of material fact sufficient to preclude the grant of summary judgment in favor of plaintiff; second, that the trial court erred in denying defendants' motion to reconsider because defendant presented significant and relevant newly discovered evidence that raised sufficient issues of material fact to warrant vacating the summary judgment; and third, that the trial court abused its discretion in ruling on discovery issues before summary judgment had been granted. We consider each of the challenges in turn.

¶ 13 A. Factual Issues and Summary Judgment

¶ 14 Before addressing defendants' various arguments under this heading, we first consider the familiar standard of review. Summary judgment is appropriate where the pleadings, depositions, admissions on file, and affidavits demonstrate that there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012)); *Board of Trustees of the Riverdale Police Pension Fund v. Village of Riverdale*, 2014 IL App (1st) 130416, ¶ 16. Because summary judgment is a drastic means to

[1]In Illinois, when a party dispenses with an attorney and proceeds *pro se*, he or she will be held to the same standards and must comply with the same rules and to the same extent as a licensed attorney. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78. Moreover, the court may not and will not apply a more lenient standard to a *pro se* litigant. *Id.* We necessarily adhere to this standard when evaluating defendants' briefs and arguments.

resolve a controversy, it should only be granted where the moving party's right to it is clear and free from doubt. *Id.* We review *de novo* a trial court's decision granting a motion for summary judgment. *Id.*

¶ 15 Defendants argue first that Stefanie Buchanan's affidavit averring to defendants' purported loan arrearage as of October 3, 2011, is defective in that it does not conform to Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), and the supporting business records on which it relies do not conform to Illinois Supreme Court Rule 236(a) (eff. Aug. 1, 1992). While this does not seem to directly tie into defendants' overall argument that there continue to exist factual issues precluding summary judgment, we interpret the foundational challenge to the affidavit to mean that the trial court could not properly consider the facts established by Buchanan's affidavit in passing upon the motion for summary judgment and, without those facts, the motion fails because the competing allegations show the existence of factual issues. Thus, defendants effectively argue that the trial court should have stricken the affidavit, which is ordinarily reviewed for an abuse of discretion, but, when such a motion is made in conjunction with a motion for summary judgment, we apply *de novo* review. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 18. We note further, that the sufficiency of an affidavit presents a legal question, which is also subject to *de novo* review. *JPMorgan Chase Bank, National Ass'n v. Ivanov*, 2014 IL App (1st) 133553, ¶ 65.

¶ 16 With this understanding, we turn to defendants' particular arguments regarding Buchanan's affidavit. Specifically, defendants contend that there is a discrepancy between the apparent date the supporting business records were generated and the date that Buchanan's affidavit was executed, leading to a question of how Buchanan can have actual personal knowledge regarding the supporting business records. Defendants continue in similar vein,

arguing that the supporting records are neither authenticated nor properly identified; parsing Buchanan's affidavit word-by-word to create uncertainty about the state and acquisition of Buchanan's knowledge and whether various grammatical referents really do refer to the attached records; labeling Buchanan's averment of personal knowledge "self-serving"; purporting to suggest that Buchanan's affidavit was only her understanding (meaning, apparently, that Buchanan's understanding of a process was an assumption and not a fact, citing *Extel Corp. v. Cermetek Microelectronics, Inc.*, 183 Ill. App. 3d 688 (1989)); and questioning the hypothetical issues that may have been present in exchanging records of defendants' loans between or among several institutions that handled the loan for plaintiff. Defendants also argue that various averments in the affidavit were improper hearsay because Buchanan did not refer to predecessor loan servicers in her affidavit. They challenge Buchanan's averment that the "[e]quipment that produced the [attached supporting record] is recognized as standard" as ambiguous and potentially referring only to the printer generating the hard copy of the attached supporting record. Finally, defendants contend that the affidavit and supporting record violate Rule 236(a) because of the purported date-of-generation/date-of-affidavit discrepancy, whence the data compiled in the supporting record originated, and who generated the supporting record.

¶ 17 Plaintiff, for its part, recites pertinent authority regarding how Rules 191(a) and 236(a) work and are interpreted, but ignores any of the substance (to the extent they are, in fact, substantive and not immaterial) of defendants' individual contentions. Instead, plaintiff argues that Buchanan's affidavit was sufficient under Rules 191 and 236 and pertinent controlling authority. With the battle lines drawn, we begin with the Supreme Court Rules.

¶ 18 Rule 191(a) states, pertinently:

> "Affidavits in support of *** a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** 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. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

Consequently, an affidavit pursuant to Rule 191(a) must not contain only conclusions, but it must include the facts upon which the affiant relied. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. This requirement is in place because, during the resolution of the motion for summary judgment, the affidavit substitutes for testimony in open court and should meet the same requirements as competent testimony. *Id.* When considering a motion for summary judgment, the trial court may not consider evidence that would be inadmissible at trial; if, regarding the affidavit as a whole, it appears that the affidavit is based on the affiant's personal knowledge and the trial court can reasonably infer that the affiant could competently testify about the affidavit's contents at trial, then Rule 191 is satisfied. *Id.*

¶ 19 Regarding defendants' foundational challenge to the affidavit, we have carefully considered the Buchanan affidavit and its attached documents. Buchanan averred that she was an employee and officer of Bank of America, National Association, which was the servicer of the subject loan on behalf of plaintiff. She averred that part of her job responsibilities included knowledge and familiarity of the type of records maintained about the subject loan. Buchanan further averred that the documents attached to the affidavit were business records prepared by Bank of America at or near the time of the occurrence of the information captured in the record

and that the information was generated from individuals with personal knowledge of the transactions, the records were kept in the regular course of Bank of America's business activities, and Bank of America, National Association made it a regular practice to make and keep the records. Buchanan also averred that the records were electronic, made and kept on industry-standard equipment, and were both relied upon by the business and generated in a fashion that indicated trustworthiness (being prepared in the regular course of business at or near the time of the transaction indicated on the record). From this information, we conclude that one can reasonably infer that Buchanan had personal knowledge as to the records, how and when they were generated, and could competently testify about them at trial. See *id.* Accordingly, the foundational requirement of Rule 191 is satisfied, and the trial court did not err in making the determination that Buchanan's affidavit was proper and her testimony would have been admissible in a trial.

¶ 20 Defendants question the date on the documents attached to the Buchanan affidavit, February 10, 2010, compared to the date of execution of the affidavit, October 3, 2011. Defendants argue that the discrepancy between the apparent date of generation of the records versus the date of the affidavit lead to questions regarding Buchanan's personal knowledge regarding the information. First, we note that the documents focus on the time of the alleged default on the loan, around August 2009. After the default and the December 2009 initiation of the foreclosure action, it is a reasonable inference that little activity would be occurring on the loan. Indeed, while defendants argue that they made payments through November 2009, they do not argue that they made any payments thereafter, so the date of the documents is after even the last date that defendants suggest any activity on the loan occurred. Thus, if Buchanan looked at computer screens of more recent vintage than February 2010, but they showed the same essential

information as the copies of the documents dated February 2010, we see no inherent problem in her averment that she was familiar with the information and had personal knowledge about how and when it had been generated. Second, and more importantly, the discrepancy between the date of the documents and the date of the affidavit goes to the weight of the testimony, and not its admissibility. Accordingly, because defendants are challenging the admissibility of the affidavit on foundational grounds, the noted discrepancy does not affect admissibility, and so it is not material to their challenge.

¶ 21 Defendants claim that the records are neither authenticated nor properly identified. We disagree. The records refer to the loan on the subject property, and Buchanan laid a proper foundation for their admissibility. Accordingly, we reject defendants' argument on this point.

¶ 22 Defendants argue that Buchanan's affidavit is based on her personal understanding of the Bank of America, National Association's procedures, and not actual facts, citing to *Extel Corp.*, 183 Ill. App. 3d at 691-92. In that case, the court held that an affidavit was improper because it was based on the affiant's "understanding," and not on a recitation of specific facts. *Id.* at 692. As such, and because the affidavit was promulgated in opposition to a motion for summary judgment, it failed to demonstrate the existence of a material factual issue. *Id.* Here, unlike in *Extel Corp.*, Buchanan averred that she had "personal knowledge of [Bank of America's] procedures for creating and maintaining" the records of defendants' loan. She did not aver it was her "understanding" or that she "understood" how the records were created and maintained. Further, we also note that Buchanan's affidavit was in support of the motion for summary judgment, not in opposition, so to that extent, *Extel Corp.* is simply inapposite. Because Buchanan expressly averred that she had personal knowledge, defendants' argument and reliance on *Extel Corp.* is unavailing.

¶ 23 Defendants argue that Buchanan's claim of personal knowledge is "self-serving." As a general matter, such a contention is essentially meaningless because any testimony is "self-serving" to the proponent. For example, a defendant's alibi testimony is self serving, but simply because it is self serving does not mean that it is improper or otherwise inadmissible. Likewise here. Even if the averment of personal knowledge is "self-serving," defendants do not suggest how that self-serving nature should disqualify the averment from our consideration. Additionally, the sobriquet, "self-serving," generally serves as a proxy for a claim that the evidence so labeled is objectionable or unworthy of belief. As noted, "self-serving" is not a proper objection; as to believability, that goes to fact-finding, not admissibility, so again, it is not a proper challenge in the context of a motion for summary judgment. If, perhaps, defendants meant that Buchanan's averment was conclusory and not factual, again, we disagree. She claimed personal knowledge, but also averred that she was employed by and an officer of Bank of America, and her job involved dealing with loan records like defendants' as well as defendants' records specifically. From these averments, we can properly conclude that her personal knowledge averment has factual support. Accordingly, we reject defendants' implied contention that Buchanan's claim of personal knowledge should be ignored or disqualified.

¶ 24 Defendants raise a number of theories as to why there may have been issues between the various accounting systems of plaintiff and its predecessors, and that this may have rendered the information depicted in Buchanan's affidavit unreliable. There are at least two problems with defendants' contention. First, it is speculative. Defendants are surmising, in the absence of any concrete evidence, and they provide no evidence themselves, that, because there were transfers of the subject loan from one institution to another until plaintiff came into possession of the subject loan, there may have been compatibility issues between the various institutions'

accounting systems. We note that, as the moving party on a motion for summary judgment, plaintiff needed to present evidence that, if uncontroverted, would entitle it to judgment as a matter of law. See *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89 (2000). Plaintiff did so with Buchanan's affidavit and attached documents. The burden then shifted to defendants, as the nonmoving party, to present some factual basis that would arguably entitle them to a judgment under the applicable law. *Id.* Defendants provide neither evidence nor a factual basis, only supposition that does not actually controvert the information contained in Buchanan's affidavit; rather, defendants speculate that hypothetical compatibility issues may have rendered the evidence in Buchanan's affidavit unreliable. In other words, defendants essentially demand that, in addition to affirmatively presenting evidence that, if uncontroverted, would entitle plaintiff to a judgment as a matter of law, plaintiff must also present evidence rebutting any possibility that it could be controverted. That is not required under the burden of persuasion.

¶ 25 The second flaw in defendants' reasoning is their citation to *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614 (1994), for the proposition that evidence from predecessor accounting systems is tantamount to hearsay evidence from unknown secondary sources. *Biethman*, actually, does not deal with this issue at all. Instead, defendants were apparently citing to *Farm Credit Bank of St. Louis v. Dorr*, 250 Ill. App. 3d 1, 12 (1993). In that case, the court determined that, after a trial, the trial court's determination that the plaintiff had presented a sufficient basis for calculation of damages was not against the manifest weight of the evidence. *Id.* The passage that inspired defendants' reliance included: "Steinmann testified that exhibit 7 consists of copies of the microfiche from the original accounting system and copies of the payment history in the present accounting system generated by the bank's computer system,"

and "While the trial court struck exhibit 7 as cumulative, exhibits 5 and 6 and Steinmann's testimony presented a reasonable method for computing the damages sustained." *Id.* From these sentences, defendants concluded that *Dorr* held that the trial court "den[ied the admissibility of] copies of microfiche records of the payment history from a previous accounting system." However, the court did not make that holding; instead it held that the trial court's basis of computing damages was reasonable and its damage calculation was not against the manifest weight of the evidence. *Id.* Thus, *Dorr* is procedurally inapposite (coming from a judgment following a trial) and does not stand for the proposition for which it was cited. Accordingly, we reject defendants' contention.

¶ 26 Defendants contend that Buchanan's affidavit is rife with hearsay. Specifically, defendants seem to argue that because Buchanan did not trace the path of the loan from its originator to plaintiff, all of the documents, which are apparently from Bank of America, are hearsay. The reasoning of the argument does not scan; there is a *non sequitur* between the conclusion and the predicate. That aside, the burden of persuasion requires only that plaintiff present evidence to entitle them to a judgment as a matter of law; Buchanan's affidavit fulfills that burden. It now becomes defendants' burden to present a factual basis that would arguably entitle them to a judgment under the applicable law. *Williams*, 316 Ill. App. 3d at 688-89. Defendants present no evidence or argument to suggest why there is or may be a problem with the information presented in Buchanan's affidavit and why the path of acquisitions and mergers leading to plaintiff holding the subject loan is even relevant. Finally, even leaving that aside, the documents attached to Buchanan's affidavit have a proper business-record foundation laid in the affidavit. See Ill. R. Evid. 803(6) (eff. Jan 1, 2011); Ill. S. Ct. R. 236 (eff. Aug. 1, 1992). Thus,

while the documents may be hearsay, they are admissible pursuant to the business-record exception to the rule against hearsay. We reject this contention.

¶ 27 Defendants attempt to create ambiguity in the foundation of Buchanan's affidavit, claiming that her reference to industry-standard equipment being used to generate and store the relevant information may refer only to the printer from which the documents were printed. We believe this to be a tortured and implausible reading and we reject defendants' contention.

¶ 28 Defendants also contend that the documents attached to Buchanan's affidavit violate Supreme Court Rule 236 because of the discrepancy between the date the documents were generated and the date the affidavit was signed, the purported lack of information about the origin of the data, and who actually generated the documents. As to the lack of information about the data's origin, we find that the affidavit sufficiently states that it is from the records created and maintained by Bank of America. We have also resolved the date discrepancy above, and note that it seems that, even under the business records exception, such a discrepancy would go to the weight of the evidence rather than its admissibility, and this is not a proper consideration on summary judgment. Finally, regarding who generated the documents, Rule 236 provides that "[a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). Thus, even if Buchanan did not personally enter and maintain the information contained in the attached documents, such a lack goes to the weight and not the admissibility. Accordingly, we reject this contention too.

¶ 29 Defendants next challenge the details of the affidavit of Karen Finnegan, an employee and officer of Bank of America, N.A., whose duties included overseeing the bank's sending of overdue and acceleration notices to borrowers in default on their loans. Defendants raise similar

challenges to the foundation of the Finnegan affidavit as they did to the Buchanan affidavit. Defendants conclude that the trial court erred by accepting the affidavit and the documents attached to it.

¶ 30 First, defendants engage in an almost word-by-word parsing of the affidavit in hopes of identifying ambiguity and demonstrating that a proper foundation for the admissibility of the attached documents was not laid. Our careful review of the affidavit shows that the foundational requirements for admission of the documents as business records was made; any further challenge to the documents properly goes to their weight and not their admissibility. Ill. R. Evid. 803(6); Ill. S. Ct. R. 236 (eff. Aug. 1, 1992).

¶ 31 Additionally, defendants make the argument that, because Finnegan averred that she was "familiar" with and "involved" with the business practices of Bank of America and its operations, the affidavit did not present facts admissible at trial, but only opinions or the affiant's impressions that were insufficient under Supreme Court Rule 191 (eff. Jan. 4, 2013). This harkens back to the argument made against the Buchanan affidavit that relied upon *Extel Corp.* Effectively, the defendants sought to use *Extel Corp.* for the proposition that an affidavit based on an imprecise word like "understood" is insufficient under Rule 191. See *Extel Corp.*, 183 Ill. App. 3d at 692. This is an overly broad view of *Extel Corp.*, and it also misapprehends the reasoning behind the holding. *Extel Corp.* held that an affidavit giving the affiant's understanding of an agreement was not factual, especially where the affiant had not laid out facts about the agreement like the specifics of each side's performance, or the offer and acceptance terms. *Id.* Unlike *Extel Corp.*, Finnegan's affidavit mentions her employer's business practices which were part of the day-to-day duties of her position with the employer. While she did not append all of the applicable procedure manuals that encompassed those business practices, she

did aver, on personal knowledge, that she was familiar with the practices and employed them as part of her duties for Bank of America. This is a different situation than "understanding" what an agreement meant in the absence of any terms or writing describing the actual agreement, so defendants' contention, seemingly relying upon *Extel Corp.*, remains unavailing.

¶ 32 Next, defendants argue that, in the trial court, they raised as a defense to the foreclosure the claim that they did not receive the required notices apprising them of a default and plaintiff's intention to accelerate the loan. Defendants further claim that Finnegan's affidavit concedes this. We have examined the affidavit and the documents attached to it and conclude it does not support defendants' contention. Nowhere in the affidavit does Finnegan concede that defendants did not receive the notices; quite the contrary, the affidavit was promulgated to show and explains that the documents attached were copies of the required notices. Accordingly, we do not accept defendants' contention.

¶ 33 Next, defendants argue that, as a result of their word-by-word parsing of Finnegan's affidavit, it contains largely conclusory statements and is devoid of sufficient factual averments to pass muster under Rule 191. Again, we have carefully reviewed the affidavit and arguments and conclude that it appears that the affidavit is based on the affiant's personal knowledge and the trial court can reasonably infer that the affiant could competently testify about the affidavit's contents at trial, satisfying the requirements of Rule 191. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. Defendants' arguments, then, actually attack the weight to be given the factual matters encompassed in the affidavit and do not affect the admissibility of the affidavit.

¶ 34 Defendants argue that the affidavit is ambiguous because it does not refer to plaintiff even though it discusses matters that occurred before plaintiff obtained an interest in the loan. We do not see this to be the problem that defendants do. Finnegan clearly avers that she is an

employee of Bank of America, and the factual statements relate to the action undertaken by Bank of America, which was the successor to First Franklin Financial Corporation, the original loan servicer. Additionally, she references the subject loan and avers that Bank of America is now plaintiff's loan servicer, as well as averring that it serviced the loan at the relevant times. We find that it is sufficiently clear to pass muster under Rule 191 and reject defendants' contention.

¶ 35 Defendants next argue that they presented information purportedly contradicting some of the averments in Finnegan's affidavit. Specifically, defendants note that the acceleration notice claims that partial payments will not be accepted, but defendants' bank statements show that monthly payment amounts were accepted in the months of August 2009 through November 2009, contradicting the acceleration notice's words. While defendants' claim creates a factual issue, it is unclear whether it is material. The fact that plaintiff apparently accepted some payments despite cautioning defendants they needed to tender the entire loan amount outstanding suggests an allowance of mitigation and not an abrogation of plaintiff's right to foreclose. Defendants do not argue that the tendered amounts during August through November were supposed to be in satisfaction of the outstanding debt. Even if we concede that there is a factual discrepancy between the notice of acceleration and plaintiff's actions, it does not affect the admissibility of the affidavit, which is actually the point of defendants' argument here. Last, again conceding the existence of a factual discrepancy between plaintiff's actions of accepting monthly payments after the notice informed defendants that only the entire loan amount would be accepted, defendants argue only that it impacts the amount of plaintiff's "claimed injury." Defendants do not close the loop by demonstrating or even arguing that the monthly payments tendered from August to November 2009 were not applied and that plaintiff was overstating the amount due on the loan. Likewise, defendants do not argue how this conceded-for-the-sake-of-

argument discrepancy affects the validity of the foreclosure action. Because no such arguments are made (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived")), we reject defendants' line of argument on this point.

¶ 36 Defendants next argue that the notice of acceleration did not list plaintiff as mortgagee instead of as successor trustee. Defendants claim that section 15-1502.5 of the Illinois Foreclosure Law (735 ILCS 5/15-1502.5 (West 2012)) and section 1701x of Title 12 of the United States Code (12 U.S.C. § 1701x (2010)) require that the acceleration notice prescribed by the two sections require the entity sending the notice to be the mortgagee. We have reviewed the language of both sections and find no such requirement. Further, the notice claimed to be in violation is the acceleration notice, yet the two sections specified by defendants deal with the availability of counseling, and not the acceleration of a loan. As such, defendants provide no proper authority to support their contention, and we thus reject it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 37 Defendants next complain that Finnegan's affidavit does not explain how the exhibits attached to it are on behalf of plaintiff when plaintiff was not assigned the loan until months after the notices were sent to defendants. While this may be true, we believe it to be an immaterial flaw. Finnegan clearly sent the notices on behalf of the party holding the loan, and her affidavit is properly understood in this manner. Accordingly, we reject the notion that this either renders the affidavit improper and subject to being stricken or demonstrates the existence of a genuine issue of material fact that should have precluded summary judgment.

¶ 38 Defendants next argue that, because Finnegan did not give the name of who accessed Bank of America's records and generated the notices purportedly sent to defendants, she demonstrated a lack of personal knowledge about the notices, rendering her affidavit improper.

We have carefully reviewed Finnegan's affidavit, and we determine that it shows that she had personal knowledge of the facts contained in it, notwithstanding her omission of the name of who accessed the records on defendants' loan and generated the notices attached as exhibits to the affidavit. In any event, defendants' objection goes to the weight of the affidavit, and not its admissibility, so we do not accept defendants' contention.

¶ 39 Next, defendants challenge the foundation of the documents attached to Finnegan's affidavit. Defendants claim that the documents are not certified. We have carefully examined Finnegan's affidavit, and we conclude that Finnegan laid a proper foundation for the admissibility of the documents and her affidavit. Accordingly, we conclude that Finnegan's averments satisfy the requirement that the documents be sworn to under Supreme Court Rule 191(a) (eff. Jan. 4, 2013).

¶ 40 Defendants contend that "[t]here is no evidence of '*computer generated records [that] indicate a written grace period notice was sent to the defendants.*' " (Emphasis in original.) Defendants purport to cite to Finnegan's affidavit for the emphasized language in the above-quoted passage. We have examined the affidavit and find no such language in the Finnegan affidavit. Further, the affidavit states that the notice was generated and kept in electronic form after generation as a business record and that it was the regular practice of plaintiff to contemporaneously send a written copy of the notice to a mortgagor and then electronically store a copy of the notice sent. We believe that this sufficiently describes the practice and is sufficient to lay a foundation for admissibility of the attached documents. Accordingly, we reject defendants' contention.

¶ 41 Defendants question whether an adequate foundation for the documents attached to Finnegan's affidavit has been laid under Rule 236(a). Rule 236(a) requires that "[a]ny writing or

record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). Finnegan's affidavit satisfies the foundational requirements, averring that the two notices were made in the regular course of business, it was the regular course of the business to make the notices, and the notices were electronically saved at the same time or reasonably contemporaneously with the mailing to defendants. Accordingly, we reject defendants' foundational challenge.

¶ 42 Defendants next note that the business record itself is the item that is admissible, not any testimony about the business record. Here, Finnegan's affidavit contains averments laying the foundation for the admissibility of the business records attached to the affidavit. The notices are the business records sought to be admitted and are attached to the affidavit. Thus, defendants' seeming contention, that Finnegan's affidavit only described the notices, is belied by the record and the exhibits themselves. Accordingly, defendants' argument is not well taken on this point.

¶ 43 Defendants change their tack slightly and argue that the trial court erred in determining that the affidavits and their attached exhibits were admissible. As we have stated, we have carefully examined both the Buchanan and Finnegan affidavits and attached documents and have concluded that a proper foundation was laid to admit the factual averments contained in the affidavits as well as for the admission of the documents as a business record. Defendants' argument to the contrary remains unavailing.

¶ 44 Defendants last contend that, globally, the affidavits complied with neither Supreme Court Rule 191 nor Rules 803 and 902 of the Illinois Rules of Evidence (Ill. R. Evid. 803, 902 (eff. Jan. 1, 2011)). We have analyzed and rejected defendants' specific arguments attempting to show that the Buchanan and Finnegan affidavits were not in compliance with the relevant supreme court and evidentiary rules; we see no reason to revisit our conclusions, and we reject defendants' global argument.

¶ 45 Defendants' next argument is entitled, "The Allegation of Default." Defendants rehash in brief some of their arguments against the validity of the affidavits. As we have dealt with those arguments at length, we need not revisit them for this portion of defendants' contentions. Defendants' larger argument is that plaintiff's allegation that defendants defaulted on the August 2009 mortgage payment is factually contradicted by defendants' affidavit and attached bank statements covering the August through November 2009 period. We disagree. Although defendants argue that the documents attached to Buchanan's affidavit are confusing and difficult to interpret, we have carefully reviewed them and conclude that they support plaintiff's contentions. The key is that, while defendants may have tendered funds during August through November 2009, those funds were applied to existing mortgage arrearages, leaving the August 2009 amount still owing and due. Thus, plaintiff has provided a *prima facie* case for the default, and defendants' affidavit and bank statement are entirely consistent with plaintiff's explanation and do not contradict it. Accordingly, we reject defendant's contention labeled "The Allegation of Default."

¶ 46 We also address the cases upon which defendants relied in the "Allegation of Default" section of their argument. Defendants cite to *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992), for the proposition that an affidavit that does not include the documents upon

which the affiant relied in making a conclusion is improper under the Supreme Court Rules. We have dealt with this principle extensively regarding the arguments challenging the Buchanan and Finnegan affidavits. *Corrigan* held, precisely, that the affidavit in that case did not lay the proper foundations for the affiant's opinions and did not include the documents that would have been admissible as business records. *Id.* at 129-30. Here, by contrast, we have concluded that the affidavits had the proper foundations for the opinions contained therein, as well as for the admission of the attached documents as business records. *Corrigan*, therefore, is distinguishable.

¶ 47 Defendants also cite again to *Biethman*, 262 Ill. App. 3d 614, for the proposition that an unrebutted affidavit establishes the existence of facts in a motion for summary judgment. We have reviewed *Biethman* and are unable to find this contention supported in the text of the case. It is, however, similar to defendant's contention using *Biethman* as support to challenge Buchanan's affidavit above. We noted that defendants miscited *Biethman* for *Dorr*, a case with a similar caption. *Dorr*, 250 Ill. App. 3d 1. We have no quarrel with defendants' proposition (other than defendants fail to provide a pertinent citation to support it as required by Rule 341(h)(7)), and believe it to be a correct statement of legal principle. That said, *Biethman* and *Dorr*, even if they fully support the proposition, are inapplicable, because, as we noted above, the fact that defendants made payments in August 2009 does not mean that the payments were applied *for* August 2009, as explained by plaintiff. Accordingly, defendants' affidavit does not contradict plaintiff's "allegation of default," as it is explained by plaintiff and supported by Buchanan's affidavit and attached documents.

¶ 48 Defendants cite *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 246 (2007), for the proposition that summary judgment should only be granted where the moving party's right to it is clear and free from doubt. This is a correct statement of the law. As of yet, however,

defendants have not demonstrated the existence of a genuine issue of material fact or the applicability of any legal principles that would defeat plaintiff's right to summary judgment. Thus, even though *Murray* is correctly cited for a principle of law, that principle is not applicable to this case. Accordingly, defendants' reliance on *Murray* is unavailing.

¶ 49 Defendants cite to *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 252 (1991), for the proposition that, if facts exist that may reasonably be given two different inferences, one favorable to the movant, and one unfavorable to the movant, a motion for summary judgment must be denied due to the existence of a genuine factual issue. Again, this is a correct proposition of law. Defendants seek to use it in conjunction with their claim that factual issues (namely, their August through November 2009 payments to plaintiff on the subject mortgage) exist that should have precluded summary judgment. However, as we have discussed above, defendants' payments are still consistent with an August default, so there is no factual issue to preclude summary judgment, and *Gardner* is inapposite. Accordingly, the authority on which defendants rely is distinguishable.

¶ 50 Next, defendants contend that the "assignment is a sham, the judgment is void." Defendants make several arguments under the claim of a sham assignment.

¶ 51 First, defendants argue that, because the mortgage note was assigned two days before plaintiff filed its original complaint, the grace-period notice and the acceleration notice are invalid because they predate the assignment and First Franklin Loan Services could not have mailed the notices on behalf of the plaintiff, who acquired its interest in the subject mortgage note some time after the two notices had been sent. We see no difficulty here. The notices were sent to defendants on behalf of the then-holder of the subject mortgage and note, and this interest was acquired by plaintiff after the notices had been sent, but before the instant action was

initiated. The notices notified defendants of their rights under the law and plaintiff acquired the mortgage after defendants had already defaulted and the notification process had been undertaken by its predecessor. Plaintiff acquired the note as well as all of the actions undertaken to enforce the note up to that time, so there is no invalidation of the notices that had been sent on behalf of plaintiff's predecessor. We further note that defendants cite no authority for the proposition that acquiring a mortgage and note somehow invalidates all efforts to enforce it that occurred before the acquisition, running afoul of Supreme Court Rule 341(h)(7). Additionally, we note that, effectively, defendants suggest that, any time a mortgage is transferred, the enforcement and foreclosure process must start completely anew, but defendants cite no authority to support this suggestion. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 52 Defendants also fixate on the recordation of the transfer of the mortgage from the predecessor to plaintiff, seeming to believe that the recording of the transfer is required to finally accomplish the transfer. The significance of the recordation is the perfection of the security interest in the mortgage for purposes of precedence (see *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 704 (2000) (first mortgage recorded is presumed to have priority; recordation is to protect and give notice to subsequent purchasers against unrecorded instruments)); it does not affect the validity of the transfer.

¶ 53 Defendants next attack the assignment as being made in contemplation of litigation and, therefore, not a business record. In support of this contention, defendants cite *Kelly v. HCI Heinz Construction Co.*, 282 Ill. App. 3d 36, 41 (1996). First, it is a curious argument to claim that a bank in the business of buying and selling mortgages is not keeping records on those bought and sold mortgages as part of its regular course of business. We have reviewed the assignment and it appears to be in order and effective as an instrument to accomplish the transfer of the note from

the predecessor to plaintiff. Accordingly, we reject the basic premise that the assignment is not a business record, especially as it is central to plaintiff's business operations.

¶ 54 Second, *Kelly* is inapposite. In that case, the trial court excluded opinions of doctors presented in the guise of medical records. *Id.* at 41-42. Here, by contrast, the assignment does not embody an expert's opinion that would be better-presented through live testimony; rather it is an instrument central and essential to plaintiff's business and business model. Accordingly, *Kelly* is distinguishable and its abjuration is inapplicable to the facts of this case.

¶ 55 Defendants also contend that the preparer of the assignment was not authorized to maintain the assignment in its regular course of business because there appears to be nothing on the face of the document to connect the preparer, Security Connections, Inc., with plaintiff, First Franklin, or Mortgage Electronic Registration System (MERS), or any other party involved in the chain of possession of the subject mortgage. Plaintiff, who keeps these records and produced the assignment as a business record, is the proper party to consider here, not the preparer of the instrument, Security Connections, Inc. It was not Security Connections who kept the record as a business record; rather, Security Connections prepared the assignment. Thus, defendants' objection is not well taken.

¶ 56 Defendants next contend that, because they denied the validity of the assignment of the mortgage to plaintiff in a verified affidavit pursuant to section 2-605(b) of the Code of Civil Procedure (735 ILCS 5/2-605(b) (West 2012)), and because plaintiff did not provide a counteraffidavit challenging the denial, defendants' denial is established factually and the trial court erred in not giving weight to the denial either by concluding a factual issue had been established, or in denying the fact of the assignment of the mortgage. We disagree as to the effect of the denial.

¶ 57 By affidavit attached to defendants' second amended answer, Duncan averred, on information and belief, that the assignment of the mortgage which was included as Exhibit C of plaintiff's amended complaint, "[was] a fraudulent and unreliable instrument, and I hereby deny it and all its contents pursuant to [section 2-605(b) of the Code of Civil Procedure (]735 ILCS 5/2-605(b) [(West 2012))]." According to defendants, this denial, because it was not controverted in a counteraffidavit by plaintiff, "should have been admitted as true." A reading of section 2-605 undermines defendants' conclusion.

¶ 58 Section 2-605 provides:

> "(a) Any pleading, although not required to be sworn to, may be verified by the oath of the party filing it or of any other person or persons having knowledge of the facts pleaded. *** Verified allegations do not constitute evidence except by way of admission.
>
> (b) The allegation of the execution or assignment of any written instrument is admitted unless denied in a pleading verified by oath, except in cases in which verification is excused by the court. If the party making the denial is not the person alleged to have executed or assigned the instrument, the denial may be made on the information and belief of that party." 735 ILCS 5/2-605 (West 2012).

¶ 59 We first note that a verified allegation, such as Duncan's denial of the assignment of the subject mortgage to plaintiff, is not evidence. 735 ILCS 5/2-605(a) (West 2012). As such, it is not "factual," but only a denial of an allegation sufficient to place an issue into controversy for resolution by the trial court. This is also demonstrated in another fashion. Affidavits, to be accepted, require factual averments. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. Duncan's denial is not factual, but, at best, a conclusion or even Duncan's unsupported opinion. Because it is not

supported by facts showing why Duncan concluded that the assignment was fraudulent or unreliable, the affidavit need not be given accepted. *Id.* Section 2-605 deals with verified pleadings and the requisites to create triable issues for the trial court. While defendants properly cite the provision, they do not properly utilize it in their argument. Accordingly, we reject the contention.

¶ 60 Defendants rely on two cases in support of their contention that an uncontroverted averment from an affidavit must be accepted as true. First, defendants cite to *Motz v. Central National Bank*, 119 Ill. App. 3d 601, 605 (1983), for the proposition that "[f]acts in an affidavit which are not contradicted by a counter-affidavit will be taken as true despite contrary averments in the pleadings." (Emphasis omitted.) What defendants fail to realize is that *Motz* is discussing the use of affidavits to establish evidentiary facts, and not the simple contravention of an allegation in a pleading. *Id.* Importantly, *Motz* states that, "where the movant [in a motion for summary judgment] seeks to establish evidentiary facts by way of affidavit, Supreme Court Rule 191 requires that the affidavits relied upon consist of facts admissible in evidence, not mere conclusions." *Id.* Duncan's averment is a conclusion or opinion and is unsupported by any facts that would tend to demonstrate why the assignment was fraudulent or unreliable. Thus, while *Motz* does note that an uncontradicted averment in an affidavit will be deemed true for purposes of resolving a motion for summary judgment, this principle does not apply here, because Duncan's averment is not factual but only a conclusion or opinion that need not be accepted as true. See *Avdic*, 2014 IL App (1st) 121759, ¶ 22.

¶ 61 Defendants also rely upon *Kutner v. De Massa*, 96 Ill. App. 3d 243, 248 (1981), for the proposition that, "where well alleged facts within an affidavit are not contradicted by counter-affidavit, they must be taken as true notwithstanding the existence of contrary averments in the

adverse party's pleadings." *Kutner*'s own language defeats defendants' application to this case: the "well alleged facts within an affidavit" are taken as true if they are not contradicted by a counteraffidavit. While plaintiff did not provide a counteraffidavit, that is of no moment where Duncan's averments were not facts but only conclusions. Accordingly, *Kutner* is likewise inapposite.

¶ 62 Defendants also complain that the assignment is not properly admissible under the business records exception to the rule against hearsay. Defendants argue that no foundation for the admission of the document was laid because there was no affidavit from someone familiar with the subject matter of the assignment averring the elements of the foundation. Defendants' argument is off target.

¶ 63 Under section 2-606 of the Code of Civil Procedure, a copy of an instrument upon which a claim is based must be attached to the complaint. 735 ILCS 5/2-606 (West 2012). Plaintiff was required to attach the assignment to demonstrate that it had the actionable interest in the subject foreclosure, and thus, the assignment was attached to the amended complaint pursuant to section 2-606. When an instrument is attached to a pleading as an exhibit, it constitutes a part of the exhibit for all purposes. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 33. "Under section 2-606, exhibits attached to the complaint become part of the pleading and are not even required to be introduced into evidence to be considered." *Id.* Because the assignment to plaintiff was required to be attached and was attached to the complaint, it was part of the pleading and did not have to be introduced into evidence in order for the trial court to consider it. See *id.* Thus, defendants' contentions about the admissibility of the assignment pursuant to the business record exception to the rule against hearsay (either under the Rules of Evidence or the Supreme Court Rules) are wholly misplaced.

¶ 64 This dovetails with the preceding argument about defendants' denial of the allegation of the assignment. As noted, pursuant to section 2-605 (735 ILCS 5/2-605 (West 2012)), in order to avoid admitting that the assignment occurred or was effective, defendants were required to file a verified denial of the assignment. That, however, simply placed it into issue, it did not establish, as a fact, that the assignment had not occurred (especially because defendants were strangers to the transaction, albeit parties to the mortgage that had been assigned). Likewise, because the assignment was required to be attached to the complaint (and was attached to the complaint), it became a part of the pleading and did not have to be introduced into evidence as an independent exhibit. Further, defendants offered no facts contradicting the veracity of the assignment, that it was made, or otherwise supporting their allegation that it was "fraudulent and unreliable."

¶ 65 Defendants challenge the assignment on the ground that Natalie Simmons, the Assistant Secretary for Assignments, did not have apparent or actual authority to indorse the document effecting the assignment of the subject mortgage. Defendants reason that, because Security Connections prepared the assignment document, Natalie Simmons must have been an employee of Security Connections. The signature block of the assignment, however, states that it was signed on behalf of MERS by Simmons in her capacity as Assistant Secretary for Assignments. Defendants' argument is contradicted by the terms of the assignment itself, and we reject it.

¶ 66 Defendants also persist in demanding that the assignment satisfy the business records exception to the rule against hearsay, arguing that the assignment skips the steps from the mortgage originator to plaintiff's immediate predecessor and only effects a transfer between the immediate predecessor to plaintiff, leaving the question of what rights were being transferred, and questioning what rights First Franklin had to transfer. First Franklin, however, was the

servicer for the loan and retained that position throughout the life of the mortgage, notwithstanding what entity held the liability for the mortgage. Thus, First Franklin acted as nominee of the mortgage holder. Further, we have decided the issue of whether the assignment is subject to the business record exception and need not further address defendants' arguments invoking the requirement of the business record exception.

¶ 67 Defendants again question the timing of the assignment, this time wondering how a *lis pendens* could be recorded before the assignment itself. The *lis pendens* was, like the recording of the assignment, made to protect third-party purchasers from buying a property with unknown encumbrances. The *lis pendens* simply served to notify those third parties that a mortgage on the property was being foreclosed. The mortgage had been recorded; the purpose of recording the assignment to plaintiff was to perfect plaintiff's security interest in the property. See *Aames Capital Corp.*, 315 Ill. App. 3d at 704 (first mortgage recorded is presumed to have priority; recordation is to protect and give notice to subsequent purchasers against unrecorded instruments).

¶ 68 Defendants next make the nonsensical argument that plaintiff was not the note holder and that the assignment of the mortgage was ineffective to transfer any interest, citing to *Elvin v. Wuchetich*, 326 Ill. 285 (1927). However, plaintiff attached a copy of the note to the complaint; manifestly, it was the holder of the note and had received the note through a transfer. Defendants also suggest that plaintiff was not a note holder under the terms of the note, quoting the provision that stated, "lender or anyone who takes this Note by transfer and is entitled to receive payments under the Note is called the 'Note Holder." Apparently, defendants believe that, because the assignment was made two days before the foreclosure action was filed, plaintiff never had the right to receive payments under the note. We disagree. While plaintiff was trustee

to the note holder (and mortgage holder), and thus did not have the right to receive payments, nevertheless, once the note had been transferred to plaintiff, it became entitled to receive the payments on its beneficiary's behalf, even if it filed the foreclosure action before it actually received any payments. We reject defendants' contentions.

¶ 69 Defendants make an argument that MERS is not a proper party to any of the transactions leading to plaintiff's acquisition of the note and mortgage. We discern no merit in the argument; defendants did not cite pertinent authority to support the argument (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); accordingly, we reject the contention.

¶ 70 Defendants also argue that the language of the assignment is convoluted and devoid of rational meaning. While this may be a proper canard against legal instruments in general, we have carefully reviewed the assignment and are able to discern the intent of the parties and the meaning of the document. Accordingly, we reject defendants' point.

¶ 71 Defendants next launch an attack against the note, a copy of which was attached to plaintiff's complaint and amended complaint as Exhibit B. Defendants first argue that defects in the note demonstrate that plaintiff did not have standing to file the foreclosure action. Defendants argue that the note bears no indication that it was ever transferred or assigned. According to defendants, the note's failure to mention plaintiff shows that a material factual issue existed and that plaintiff thus had the burden to provide evidence showing that it had come into possession of the note in some proper fashion.

¶ 72 In support of their argument, defendants rely on *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164. Defendants interpret *Gilbert* to hold that the mortgage and note must indicate the party that holds them in order for a foreclosure suit to be properly initiated. *Id.* ¶ 16. In fact, under the Mortgage Foreclosure Law, a party properly and

sufficiently pleads a cause of action for foreclosure if it alleges that it hales the mortgage and attaches a copy of the note and the mortgage to the complaint. *Id.* ¶ 21, citing *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010). Plaintiff here fulfilled those requirements, and *Gilbert*, therefore, is inapposite.

¶ 73 Additionally, *Gilbert* held that, because Deutsche Bank could provide no evidence that it held both the mortgage and note until some months after the foreclosure action had been filed and not at the time of filing the action, Deutsche Bank did not have standing to promulgate the foreclosure action. *Id.* ¶ 17. Here, by contrast, the assignment of the mortgage was executed two days before the foreclosure action was filed. The note appears to have been indorsed in blank (a copy of which was attached to plaintiff's response to defendants' combined motion to dismiss), but, because it is not necessary in Illinois that the assignment memorializing the transfer also be executed before the initiation of the foreclosure action (*id.* ¶ 24), plaintiff has provided sufficient evidence that it held the mortgage and note at the time of the filing of the foreclosure action. Accordingly, we reject defendants' contention.

¶ 74 Defendants next contend that the trial court erred in accepting plaintiff's response to defendants' request for admission of the genuineness of the note attached as Exhibit B to the amended complaint. Specifically, defendants generated a list of 18 requests for admissions of fact and for admissions of the genuineness of the note and, on August 23, 2011, mailed it to plaintiff. Plaintiff did not file a response within the 28 days mandated by Rule 216 (Ill. S. Ct. R. 216(c) (eff. Jan. 1, 2011)). On September 30, 2011, defendants filed a motion for sanctions, asking the court to deem admitted all of the Rule 216 requests. Defendants attached a copy of the requests promulgated to plaintiff, along with certified mail receipts purporting to show that the requests were received by plaintiff. At an October 13, 2011, hearing, plaintiff denied

receiving the requests, but filed *instanter* a response to the requests. There is no transcript or bystander's report of the October 13, 2011, hearing in the record.

¶ 75 Defendants effectively argue that the trial court abused its discretion in allowing plaintiff to file a late response to their Rule 216 requests for admissions and requests for admission of the genuineness of the note attached as Exhibit B to the amended complaint. Our supreme court has held that a trial court must determine whether good cause exists to allow a late response to Rule 216 requests, and that this determination rests within the sound discretion of the trial court. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353 (2007). Here, defendants, as appellants, had the burden to produce a complete record from which we could decide the issues in controversy on appeal. Defendants did not provide a transcript or bystander's report of the October 13, 2011, hearing at which the issue of allowing plaintiff's late response to their Rule 216 requests to admit was decided. Accordingly, we do not have a complete or sufficient record to determine whether the trial court abused its discretion in allowing the late response and, instead, we must presume that the trial court had a sufficient factual basis to allow the late filing. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 76 Defendants next challenge the indorsed-in-blank note attached to plaintiff's response to defendants' combined motion to dismiss. Defendants purport to question every aspect of the indorsement of the note and the efficacy of the indorsement. We believe these arguments to be a rehash of the standing arguments that we discussed and disposed above. Defendants provide nothing new for our consideration and we decline to comment further on these essentially repetitive arguments.

¶ 77 Defendants argue that the change to Supreme Court Rule 113 (eff. May 1, 2013) would require a foreclosing party to produce all transfer and chain-of-title documentation. While

defendants do not actually close the loop, defendants nevertheless complain that the trial court "said [it] would not retrospectively apply the new Rules that would set aside his judgment." We find no error in the trial court's refusal to apply the new Rule 113 and require, after the fact, plaintiff to attach the transfer and chain-of-title documentation to its complaint. The terms of the rule state that it is "applicable only to those foreclosure actions filed on or after the effective date of May 1, 2013." Ill. S. Ct. R. 113(a) (eff. May 1, 2013). This action was filed in 2009, so the rule, by its express terms, is inapplicable and the trial court did not err in refusing to apply its requirements to plaintiff's complaint or amended complaint in this matter.

¶ 78 Defendants next contend that plaintiff was not the note holder because, under the terms of the note, a note holder was defined as "anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' " Defendants argue that plaintiff referred to itself as trustee in the amended complaint and neither suggested that it was entitled to payments under the note nor requested payment from defendants. This contention misses the point entirely. A mortgage foreclosure action may be maintained by "the legal holder of the indebtedness, a pledge, an agent, or a trustee." *Barnes*, 406 Ill. App. 3d at 7. Thus, whether plaintiff is the note holder pursuant to the terms of the note itself has no effect on its ability to bring this foreclosure action, where it is the trustee for the holder of the mortgage and the note. *Id.*

¶ 79 Defendants question whether the note could be assigned. First, the note states that it can be transferred and assigned. Defendants also question whether MERS was competent to effect a transfer. MERS, as nominee for the lender, assigned and transferred the note. Thus, while MERS may not have been able to transfer the note under its own auspices, it could, as the

lender's nominee, transfer the note on behalf of the lender. It is the lender, not MERS, who is acting, albeit through a nominee and not directly. We reject defendants' contention.

¶ 80 Defendants suggest that, because the subject mortgage does not define "nominee," this renders it ambiguous when a nominee has acted to transfer the mortgage to another party. "Nominee" is a well-defined and well understood term (see *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 41 (defining nominee)), and its lack of an express definition renders neither the mortgage ambiguous nor the transfer invalid or suspect. Accordingly, we reject defendants' contentions that the note or the mortgage cannot be construed in the absence of the term nominee, and cannot be enforced because plaintiff is not mentioned on the face of the note or mortgage (because both were transferred to plaintiff at some time after the instruments were prepared and executed).

¶ 81 Defendants argue that, " 'absent assignment or delivery of the note, the assignment of the mortgage is a nullity,' " purporting to quote *Kluge v. Fugazy*, 536 N.Y.S.2d 92 (1988). (Emphasis omitted.) Defendants do not actually quote *Kluge*, but this is a minor quibble. The law in New York is different than that in Illinois, which recognizes the validity of a foreclosure action brought by party not holding the note and mortgage (*Barnes*, 406 Ill. App. 3d at 7), and, in any event, plaintiff provided sufficient evidence to demonstrate that the note and mortgage had both been transferred. Accordingly, we reject defendant's contention.

¶ 82 Next, defendants turn expressly to plaintiff's standing to bring the instant foreclosure action. However, defendants rehash their preceding arguments, although in summary, and acknowledge that "[a]ll of these lack[-]of[-]standing matters have been argued extensively in the preceding paragraphs about the [a]ssignment and [n]ote, and will not be repeated here. As we have painstakingly detailed defendants' contentions and our reasons for rejecting them above,

and as defendants concede that they are only summarily repeating their arguments, we need not engage in what could only be a rehash of our deeper analysis above.

¶ 83 B. Motion to Reconsider

¶ 84 Defendants next contend that the trial court erred in denying their motion to reconsider. Defendants argue that they produced new evidence that should have been recognized and resulted in the vacation of the summary judgment in favor of plaintiff.

¶ 85 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or errors in the court's application of the existing law to the facts at hand. *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 55. Generally, the review of a trial court's decision on a motion to reconsider is for abuse of discretion; however, where the motion to reconsider is based on whether the trial court misapplied the existing law, our review is *de novo*. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 259 (2008). Defendants argue that their motion to reconsider was based on both newly discovered evidence which was not properly considered by the trial court, and this would be reviewed under the abuse-of-discretion standard (see *id.*), and on the court's misapplication of the existing law, and this would be reviewed *de novo* (see *id.*). We address defendants' specific contentions in turn.

¶ 86 Defendants first contend that the court misapprehended the factual record regarding the mortgage and the note, and that it failed to properly apply the law, because the factual record showed that plaintiff was a stranger to the transaction and did not "own" the note. Defendants maintain that the transfer of the mortgage without the transfer of the note was ineffective to confer the right to foreclose upon a property.

¶ 87 Factually, we discern no error in the trial court's apprehension of the material in the record. The mortgage stated that First Franklin was the lender and that MERS was the nominee of the lender. The note indicated that First Franklin was the lender and that the lender could transfer the note. Finally, plaintiff produced a copy of the note indorsed in blank, and plaintiff alleged that the note had been transferred to it along with the mortgage, as evidenced by the assignment. The assignment and the complaint identified plaintiff as trustee for the mortgage and note holder. The trial court properly concluded from that record that plaintiff had been transferred the note and the mortgage and was a proper party to maintain a foreclosure action.

¶ 88 Defendants complain that the trial court incorrectly placed upon them the burden to prove plaintiff's lack of standing. Standing, in a foreclosure, and any other, matter, is an affirmative defense, and it is the defendant's burden to plead and prove it. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 61. The trial court did not misapply the law in requiring that defendants prove (and by "prove" in a summary judgment context, we mean demonstrate the existence of an issue of fact regarding plaintiff's standing) that plaintiff lacked standing.

¶ 89 Defendants argue that their denials in their answer and allegations in their affirmative defense, along with their affidavits sufficiently demonstrated a *prima facie* case that plaintiff lacked standing. We disagree. As we have noted above, Duncan's "denial" of the efficacy of the transfer was required so as not to admit that the transfer had occurred. We carefully analyzed the issue above, and need not repeat our points of analysis here. Suffice to say that the denial for purposes of pleading did not result in the establishment, as a matter of fact, that the transfer had not occurred, especially in light of the production of the note indorsed in blank and the assignment of the mortgage. These constituted a *prima facie* case that plaintiff did indeed have

standing, and defendant had the burden to rebut this demonstration of plaintiff's proper standing to bring the instant foreclosure action.

¶ 90 Defendants next contend that they presented newly discovered evidence in their reply to plaintiff's response to their motion to reconsider. Because a motion to reconsider is retrospective in nature, when a party bases a motion to reconsider on grounds of newly discovered evidence, the party must provide a reasonable explanation for why the evidence was not available at the time of the original hearing. *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1141 (2004). The rationale behind the rule is to prevent a party from standing mute before the court, losing a motion or hearing, and then frantically gathering evidentiary material to show that the court's ruling was in error because the interests of finality and judicial efficiency require that trial courts not consider such late-tendered material no matter what that material may be. *Id.*, quoting *Gardner,* 213 Ill. App. 3d at 248-49. In order to present newly discovered evidence, a party must show that the newly discovered evidence existed before the hearing but had not yet been discovered or was unobtainable, that the party exercised due diligence in discovering the evidence, and that justice had not been done. *Id.*

¶ 91 Defendants state that this newly discovered evidence consisted of information looked up on a website and information gleaned from a presentation to shareholders. Defendants fail to explain why they could not have "looked up ownership of their [n]ote" and discovered this information at any time during the pendency of this case. Likewise, defendants fail to explain why the information purportedly from a shareholder presentation was only available after the original judgment. As in *Stringer*, defendants have not presented a sufficient reason for submitting the late evidence. *Id.* ("PCA has made no showing why Hover's affidavit could not

have been discovered and provided to the trial court in support of PCS's original motions"). The trial court did not abuse its discretion in refusing to accept the newly discovered evidence.

¶ 92 Defendants also raise debt validation letters received from Bank of America and other letters seeking payments as the loan servicer on behalf of the note holder and mortgage holder, all of which were received after the initiation of the foreclosure action but before the trial court rendered its judgment on the motion for summary judgment. Again, defendants do not explain why these letters were not presented to the trial court before its judgment was rendered. It appears that defendants had the letters in their possession well before the judgment, so the letters cannot properly be characterized as newly discovered evidence.

¶ 93 Defendants next point to *Gilbert* as changing the law regarding what they term "memorial assignments" and regarding Rule 191 and the requirements for affidavits. Regarding "memorial assignments," our reading of *Gilbert* indicates that the matter of standing was the primary issue, and particularly, the plaintiff's standing to foreclose at the time the foreclosure action is initiated. *Gilbert*, 2012 IL App (2d) 120164, ¶ 14. We do not discern a thread of analysis regarding, as defendants term it, assignments "purposely crafted to facilitate foreclosure;" rather the case dealt with the particular transaction before it and did not attempt to globally comment on putative ills in the banking and mortgage systems. As such, *Gilbert* represents an incremental development of the laws surrounding foreclosure actions, and we further discern no specific arguments raised by defendants explaining how *Gilbert* should have changed the trial court's decision with respect to "memorial assignments."

¶ 94 We also note that defendants' second point about *Gilbert*, that it interpreted Rule 191 and the necessary requirements concerning affidavits submitted in support of summary judgment, is clearly borne out by its text. *Id.* ¶¶ 19-21. Defendants argue that *Gilbert* strictly required that

affidavits in support of a motion for summary judgment be made on the affiant's personal knowledge about which the affiant could competently testify, the facts contained in the affidavits must be stated with particularity and be admissible if testified to, and the affiant must attach copies of the documents he or she relied upon. *Id.* ¶ 20. Defendants argue that *Gilbert*'s analysis of the Loch affidavit illustrates how the trial court erred in analyzing the Buchanan and Finnegan affidavits, especially as regards the elements of personal knowledge and copies of documents.

¶ 95 We have extensively analyzed the Buchanan and Finnegan affidavits above. Defendants particularly attacked the affidavits about the affiants' personal knowledge and the supporting documentation. Our analysis adequately dealt with defendants' arguments above, and we need not repeat it here. Further, we held above that the affidavits passed muster under Rule 191 and the applicable authority, and we reiterate this holding, noting that the affidavits also comply with the requisites spelled out in *Gilbert*. Accordingly, we reject defendants' arguments concerning *Gilbert* as a game changer for the trial court.

¶ 96 Next, defendants contend that the record demonstrates that the trial court shifted the field during the course of the proceedings concerning the proof of default presented by plaintiff. Specifically, defendants argue that there was no change between the proofs presented by plaintiff during the first motion for summary judgment, which plaintiff withdrew, and the second motion for summary judgment, which the trial court granted. According to defendants, the court's improper shifting of the field is evidenced by the trial court's statement, "Had I ruled on [the first motion for summary judgment] because of the issue with respect to the dates, I would have denied the motion for summary judgment with leave to file another one."

¶ 97 The trial court's reference to "the issue with respect to the dates" arose because plaintiff believed it had alleged an incorrect date for the default. The trial court explained that a denial of

the motion for summary judgment did not mean that plaintiff would never have been entitled for summary judgment, and the court's statement was not meant to comment on or to be binding on consideration of a future motion for summary judgment. In fact, when plaintiff explained the proof of default in the hearing on the second motion for summary judgment, it noted that the monies applied from defendants' payments left the months August 2009 through November 2009 with payments still owing, and it assigned the default to August 2009. We have examined these circumstances above, as well as defendants' argument here and conclude that plaintiff provided a consistent explanation of the default, as well as sufficiently supported its contention in the record. Accordingly, we reject defendants' argument on this point. Accordingly, we conclude that the trial court did not err in denying defendants' motion to reconsider.

¶ 98 C. Discovery

¶ 99 Defendants next argue that the trial court abused its discretion in not allowing them to take and complete discovery before plaintiff's motion for summary judgment was decided. Defendants contend that plaintiff only stonewalled their discovery requests and that the court was uninterested in allowing defendants to complete any discovery that, according to defendants, would have shed light on the issue of the actual note and mortgage holder and would have disproved plaintiff's standing to bring the foreclosure action. Defendants further direct our attention to their motion to reconsider, to which was attached a "complete and concise chronology of the discovery requests and their status." The trial court is vested with broad discretion in supervising the conduct of discovery. *Haas*, 226 Ill. 2d at 345. We review a trial court's decisions on the course and conduct of discovery for an abuse of discretion. *Rathje v. Horlbeck Capital Management, LLC*, 2014 IL App (2d) 140682, ¶ 30.

¶ 100 Defendants do not indicate any specific trial court rulings on discovery that they believe to constitute an abuse of discretion. In the absence of such, defendants' argument is unreviewable. However, defendants also seem to suggest that the trial court abdicated its role in effectively overseeing the discovery process.

¶ 101 Even if we were to characterize defendants' argument in this manner, defendants fail to cite pertinent (or any) authority to support their contentions about the conduct of discovery. Because defendants have not cited proper authority, their argument on this point is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36.

¶ 102 III. CONCLUSION

¶ 103 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 104 Affirmed.