2015 IL App (2d) 140064-U
No. 2-14-0064
Order filed June 8, 2015

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCWEN LOAN SERVICING, LLC,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CH-92
	)	
GLADYS HERNANDEZ and	)	
SALVADOR GARCIA,	)	Honorable
	)	Bradley J. Waller,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly held that plaintiff bank had both the standing and capacity to maintain the foreclosure action against defendants.

¶ 2 In this appeal, defendants Gladys Hernandez and Salvador Garcia appeal the judgments of the circuit court of Kendall County, allowing OneWest Bank. F.S.B.[1] to foreclose on the subject property and approving the report of sale and distribution of the proceeds. Defendants argue that plaintiff lacked standing and capacity to maintain a foreclosure action. We affirm.

[1]During the pendency of this appeal, this court granted OneWest's motion to substitute Ocwen Loan Servicing, LLC as the party plaintiff-appellee.

¶ 3 As an initial matter, we note that plaintiff contends that we lack jurisdiction to hear this appeal. Plaintiff argues that defendants' motion to reconsider was a successive postjudgment motion that did not toll the time period for filing a notice of appeal. According to plaintiff, defendants' notice of appeal was filed nearly two months after the 30-day window for filing a notice of appeal had lapsed.

¶ 4 Before we may consider the merits of an appeal, we must first consider whether we have jurisdiction over the appeal. *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 693 (2004). On April 22, 2013, the trial court entered an order granting plaintiff's motions to approve the sale of the subject property and for possession. Plaintiff argues that this constituted the final and appealable order in this matter. On May 15, 2013, defendants filed a motion attacking the April 22, 2013, order (a postjudgment motion, according to plaintiff), and, in August 2013, defendants also filed a motion to strike the April 22 order. Additionally, in September 2013, defendants filed a motion for summary judgment. On October 30, 2013, the trial court entered an order: (1) striking the motion for summary judgment; (2) denying defendants' May 15 postjudgment motion; (3) noting that "[p]laintiff has complied with all requirements for the report of sale filed 6/24/12," granting plaintiff's motion for an order approving the report of sale and distribution and for an order of possession; and (4) entering the order confirming the sale and possession of the subject property. On November 15, 2013, defendants filed a motion to reconsider the October 30 order; on December 18, 2013, the trial court denied the motion to reconsider. On January 17, 2014, defendants filed their notice of appeal. According to plaintiff, the May 15 motion was the allowable motion to reconsider, and the November 15 motion was a successive postjudgment motion. We disagree.

¶ 5 While the record is somewhat confusing, on October 30, 2013, the trial court entered two orders. The first order disposed of the then pending motions, the second order was an order confirming the sale of the subject property. It is well settled that it is the order confirming the sale and directing the distribution that operates as the final and appealable order in a foreclosure case. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. The April 22, 2013, order granted plaintiff's motion, but no order confirming the sale was entered at that time. Instead, further motions ensued culminating in the October 30 order confirming the sale, and it is the October 30, 2013, order that is clearly the final and appealable order in the trial court. The November 15, 2013, motion to reconsider, then, is the first postjudgment motion, and it tolled the 30-day period in which defendants could file their notice of appeal. See Ill. S. Ct. 303(a)(1) (eff. Feb. 1, 1994). On December 18, 2013, the trial court resolved the November 15, motion, and within 30 days, defendants timely filed their notice of appeal. Accordingly, we conclude that we have jurisdiction in this matter.

¶ 6 Turning to the merits, defendants argue that plaintiff lacked standing to bring the foreclosure action because it was not the holder of the note at the time the foreclosure complaint was filed. Our standard of review is usually based on the procedural posture of the case. See, *e.g.*, *Glisson v. City of Marion*, 188 Ill. 2d 211, 220-21 (1999) (when the issue of standing is raised on appeal pursuant to a motion to dismiss (735 ILCS 5/2-619 (West 2012)), *de novo* review is appropriate). Here, the matter proceeded under section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2012)) which confers broad discretion on the trial court in approving or disapproving judicial sales. *Mortgage Electronic Registration Systems v. Barnes*, 406 Ill. App. 3d 1, 4 (2010). Accordingly, we review the trial court's decision for an abuse of discretion. *Id.*

¶ 7 Standing is defined as some injury in fact to a legally recognized interest. *Martini v. Netsch*, 272 Ill. App. 3d 693, 695 (1995). In other words, the claimed injury, whether actual or threatened, must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* "Whether the plaintiff has standing to sue is to be determined from the allegations contained in the complaint." *Id.* It is not the plaintiff's burden to prove standing; rather, lack of standing is an affirmative defense that must be proved by the defendant. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24.

¶ 8 Under section 15-1504 of the Foreclosure Law a mortgagee may bring an action to foreclose upon a mortgage. 735 ILCS 5/15-1504 (West 2012). Section 15-1208 of the Foreclosure Law defines a mortgagee as: "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor." 735 ILCS 5/15-1208 (West 2010). Further, "[i]n all cases the evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked, and copies thereof shall be filed with the court." 735 ILCS 5/15-1506(b) (West 2012).

¶ 9 "A foreclosure complaint is deemed sufficient if it contains the statements and requests called for by the form set forth in section 15-1504(a) of the Foreclosure Law." (Citation omitted.) *Barnes*, 406 Ill. App. 3d at 6. A copy of a note attached to the plaintiff's complaint is *prima facie* evidence that the plaintiff owns the note. *Korzen*, 2013 IL App (1st) 130380, ¶ 24. A plaintiff's production of a note endorsed in blank shows that the plaintiff has an interest in the mortgage. *Rosestone Investments., LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26.

¶ 10 Section 15-1508 of the Foreclosure Law sets out the various obligations on courts in confirming judicial sales. See *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). The obligations are not triggered until a motion to confirm the sale is filed by one of the parties. *Id.* Under the Foreclosure Law, "a court *** has mandatory obligations to (a) conduct a hearing on confirmation of a judicial sale where a motion to confirm has been made and notice has been given, and, (b) following the hearing, to confirm the sale unless it finds that any of the four specified exceptions are present." *Id.* However, "[t]he exercise of discretion in applying section 15-1508(b) is necessary only when the requirements of that law have become operative. Under the terms of the statute, they do not become operative until they have been invoked by a motion requesting confirmation of the sale." *Id.* at 179. Therefore, a judicial sale is not final until it is confirmed by the trial court, after a hearing following a motion for such a hearing. See *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 300 (1995).

¶ 11 With these principles in mind, we hold that defendants' argument that plaintiff lacked standing to sue is without merit. Here, plaintiff established that it had standing to sue when, at defendant's request, it presented in court the original note endorsed in blank. Thus, plaintiff refuted defendants' claims that the copy of the note attached to the complaint was insufficient to establish authenticity. Because plaintiff proved that it was the holder of the note, plaintiff demonstrated that it had standing to foreclose under the Foreclosure Law. *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 11.

¶ 12 We note that defendants did not argue at trial, and they do not argue on appeal that plaintiff failed to meet any of the requirements set forth in section 15-1508 of the Foreclosure Law. The trial court acknowledged the narrow scope of defendants' argument in confirming the judicial sale, stating that it could not "see anywhere in the filings [that] defendants have raised an

objection pursuant to the provisions of 15-1508(b)." Accordingly, we need consider only the issue of plaintiff's standing.

¶ 13 We note that, during the pendency of this appeal, defendants filed a motion to cite *Aurora Bank v. Perry* 2015 IL App (3d) 130673, as additional authority, which we granted. However, defendants' reliance on *Perry* is misplaced. There, in its complaint for foreclosure, the plaintiff attached a copy of the mortgage, a corporate assignment agreement, and the note, blank but endorsed. *Id.* ¶ 3. After a hearing on the plaintiff's motion for summary judgment, the trial court held that the defendants had waived their right to argue whether the plaintiff lacked capacity because it was an affirmative defense which should have been asserted in their answer. *Id.* ¶ 8. The trial court granted the plaintiff's motion for summary judgment and entered a judgment of foreclosure against the defendants. *Id.* ¶ 9. The trial court entered an order approving the sale of the property, and the defendants appealed. *Id.* ¶¶ 11-12.

¶ 14 On appeal, the defendants argued that, despite their failure to raise the affirmative defense of lack of standing in their answer to the plaintiff's foreclosure complaint, it was the plaintiff's burden to prove that it had the capacity to foreclose the mortgage because the defendants' answer denied this allegation. *Id.* ¶ 15. The appellate court stated that the defendants' denial of the plaintiff's capacity to bring the suit was "erroneously deemed synonymous with their waived affirmative defense of lack of standing," and that "[a]n allegation of capacity as the mortgagee in a foreclosure proceeding (citation) is a material fact (citation) and must be proved whether admitted or denied by the defendant." *Id.* ¶ 21. Nevertheless, the appellate court affirmed the trial court because "[the plaintiff] proved [its] capacity [to sue] as the holder of the indebtedness by being the bearer of the note and through its supporting affidavit," in conformity with section 15-1504 of the Foreclosure Law. *Id.* ¶ 25.

¶ 15 Defendants rely on *Perry* for the proposition that the trial court erroneously treated the affirmative defense of standing and the legal capacity to sue under the Foreclosure Law as the same principles. Here, while the trial court, in denying defendants' motion for summary judgment, noted that lack of standing is an affirmative defense, it also determined that plaintiff was the holder of the note, and the trial court expressly held that plaintiff had standing to "initiate and prosecute the case before this court." While it is clear that the trial court held that plaintiff had standing to sue, it is unclear whether the trial court also held that plaintiff had the legal capacity to sue. We are not stymied by this ambiguity, because we may affirm the trial court's judgment on any basis supported in the record, regardless of whether the trial court actually relied on that basis or whether its reasoning was correct. *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 48. Similar to *Perry*, it is evident that plaintiff had the legal capacity to sue. Plaintiff proved its capacity to sue as the holder of indebtedness by being the bearer of the note and through its supporting affidavit, in accordance with the requirements of section 15-1504 of the Foreclosure Law. Therefore, we hold that plaintiff had the legal capacity to sue. Accordingly, *Perry* does not compel a different result.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County.

¶ 17 Affirmed.