2015 IL App (2d) 150311-U
No. 2-15-0311
Order filed November 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PHH MORTGAGE CORPORATION,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 2010-CH-449
	)	
JONATHAN EASH and MARLA EASH,	)	Honorable
	)	J. Edward Prochaska,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of summary judgment in plaintiff's favor was affirmed where defendants' response to the motion for summary judgment failed to raise a genuine issue of material fact regarding plaintiff's standing to foreclose.

¶ 2 Defendants, Jonathan Eash and Marla Eash, appeal from an order of the circuit court of Winnebago County granting plaintiff's motion for summary judgment. We affirm. Defendants' response to plaintiff's motion for summary judgment did not contain counteraffidavits or other proper materials to sufficiently contradict the materials submitted by plaintiff.

¶ 3 I. BACKGROUND

¶ 4 On March 5, 2010, plaintiff, also known as PHH Mortgage Services, filed a complaint to

foreclose defendants' mortgage on property commonly known as 1280 S. Weldon Road, Rockford, Illinois. Plaintiff alleged that defendants defaulted on the mortgage, which defendants admitted in their answer. Plaintiff further alleged that it brought the foreclosure in the capacity as "mortgagee." Attached as an exhibit to the complaint were copies of a note and mortgage executed by defendants in favor of Amcore Bank N.A. (Amcore). Also attached as an exhibit to the complaint was a copy of Amcore's assignment of the mortgage to "PHH Mortgage Services." In their answer, defendants admitted that copies of the above documents were attached to the complaint but stated that "a mere copy of the note is insufficient" and stated further that plaintiff "must produce the original note." Defendants denied the allegation that plaintiff had capacity to bring the foreclosure as a mortgagee. Defendants also filed an affirmative defense in which they alleged that "it is believed that subsequent to signing the note and mortgage, [Amcore] endorsed the note to Freddie Mac[1] and [plaintiff] is not the current holder of the indebtedness." Further, defendants alleged that plaintiff had the obligation to produce the original note. In support of their affirmative defense, defendants attached two pages from Freddie Mac's website indicating that defendants had done an online "self-service lookup" of their mortgage and obtained the response: "Yes. Our records show that Freddie Mac is the owner of your mortgage."

¶ 5 Following the court's denial of plaintiff's motion to strike the affirmative defense, plaintiff moved for summary judgment on the basis that it was the mortgagee by virtue of being the holder of the indebtedness and the servicer of the loan. Plaintiff also argued that the affirmative defense was "conclusory" and failed to set forth facts or supporting documents that created a genuine issue of material fact. Plaintiff further maintained that it was not required to

[1] "Freddie Mac" is the commonly used nickname for the Federal Home Loan Mortgage Corporation (FHLMC).

produce the original note. With regard to the note, plaintiff attached an "affidavit of lost note" in which the affiant, an assistant vice president of plaintiff, averred that the note was "lost or destroyed," because after a diligent search its whereabouts could not be determined and it could not be located in "any place the note is normally stored." The affiant attached a copy of the note to her affidavit. Plaintiff attached a second affidavit in which the affiant, another assistant vice president, averred that plaintiff "currently services a loan on behalf of the plaintiff." Copies of documents showing that plaintiff handled the loan transactions were attached to the affidavit. The second affidavit also contained averments as to the default and the current amount owed.

¶ 6 Defendants' response to the motion for summary judgment was a memorandum of law in which they contended that (1) a genuine issue of material fact existed as to whether plaintiff or Freddie Mac was the holder of the indebtedness; (2) assuming that Freddie Mac owned the indebtedness, there was a genuine issue of material fact as to whether plaintiff was authorized to act on Freddie Mac's behalf; and (3) in asserting that it was the loan servicer, plaintiff departed from the allegation in its complaint that it was the owner of the mortgage via the assignment from Amcore. Defendants did not attach any counteraffidavits or documents in support of their response. Instead, they referenced an exhibit that was attached to their October 17, 2011, response to plaintiff's motion to strike the affirmative defense. The exhibit was a copy of defendants' answer and affirmative defense minus the Internet printout.

¶ 7 In its reply to defendants' response to the motion for summary judgment, plaintiff asserted that it had standing as Amcore's assignee and that defendants failed to provide any "specific facts" or other evidence to demonstrate plaintiff's lack of standing. Plaintiff indicated that Freddie Mac produced documents to defendants showing that plaintiff was the servicer of the loan.

Plaintiff attached as an exhibit to its reply a cover letter purportedly signed by an associate general counsel of Freddie Mac that accompanied a response to a document subpoena issued by defendants.[2]

¶ 8 On April 26, 2012, the court granted the motion for summary judgment. We have no report of proceedings containing the court's reasoning. The written order provided that "the court having reviewed said affirmative defenses(s) and determining that said affirmative defense(s), as pleaded without sufficient supporting documentation, do not raise a genuine issue of material fact sufficient to preclude entry of summary judgment in favor of plaintiff, *** plaintiff's motion for summary judgment is granted." However, because defendants' counsel was not served with the order, the court vacated the judgment. Thereafter, plaintiff reset the motion for hearing, and the court again granted summary judgment in plaintiff's favor on January 16, 2014. On that date, the court also entered judgment for foreclosure and sale. The judicial sale occurred on October 27, 2014. Thereafter, the court entered an order confirming the sale, and defendants filed a timely notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 Defendants contend that the court erred in entering summary judgment in plaintiff's favor for two reasons: (1) there is a genuine issue of material fact as to whether plaintiff has standing to foreclose, because if the note was in the rightful possession of Freddie Mac, plaintiff was not the legal holder of the indebtedness and could not enforce a lost note; and (2) plaintiff cannot

[2] The letter stated that Freddie Mac produced documents responsive to defendants' subpoena resulting from a search of its selling and "servicing" systems, but it did not name plaintiff as the servicer.

establish in what capacity—holder of the indebtedness or authorized servicer of Freddie Mac's loan—it brought the foreclosure.

¶ 11 Summary judgment is proper when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 13. The court construes the pleadings, depositions, admissions, and affidavits strictly against the movant to determine whether a genuine issue of material fact exists. *Zubel*, 2014 IL App (1st) 130976, ¶ 13. A genuine issue of fact exists where the material relevant facts are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Zubel*, 2014 IL App (1st) 130976, ¶ 13. Summary judgment, while drastic, nevertheless is appropriate to expeditiously dispose of litigation when the moving party's right to judgment is clear and free from doubt. *Zubel*, 2014 IL App (1st) 130976, ¶ 13. We review the grant or denial of summary judgment *de novo*. *Zubel*, 2014 IL App (1st) 130976, ¶ 13.

¶ 12 The doctrine of standing requires that a party, either as an individual or a representative, have a real interest in the action and its outcome, whereas legal capacity to sue or be sued generally refers to a party's status. *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 17. Thus, standing and legal capacity to sue or be sued are not synonymous. *Perry*, 2015 IL App (3d) 130673, ¶ 17. Lack of standing is an affirmative defense, and the burden of pleading and proving it is on the party asserting it (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010)), whereas, to comply with the Illinois Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1501 *et seq.* (West 2010)), the plaintiff must allege the capacity in which it brings suit. 735

ILCS 5/15-1504(a) (West 2010); *Perry*, 2015 IL App (3d) 130673, ¶¶ 22, 25 (plaintiff must allege and prove the capacity in which it seeks to foreclose).

¶ 13 We first dispense with defendants' contention that plaintiff failed to show the capacity in which it brought suit as required by section 15-1504(a)(3)(N) of the Foreclosure Law. Plaintiff alleged in its complaint that it brought suit in the capacity of "mortgagee." "Mortgagee" is defined as (1) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage; or (2) any person designated or authorized to act on behalf of such holder; and (3) any person claiming through a mortgagee as successor. 735 ILCS 5/15-1208 (West 2010). Defendants argue that the allegation that plaintiff was a mortgagee was insufficient, because section 15-1504(a)(3)(N) requires plaintiff to plead specifically whether it is the holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed, or in what other capacity it acts. Section 15-1504 sets forth the pleading requirements to initiate foreclosure actions. *Zubel*, 2014 IL App (1st) 130976, ¶ 14. Subsection (a) provides that a complaint *may* be in substantially the form prescribed by statute, and subsection (a)(3)(N) requires the plaintiff to state the capacity in which it brings the foreclosure. Then in parentheses it suggests the alternatives of legal holder of the indebtedness, pledgee, agent, trustee under a trust deed "or otherwise, as appropriate." 735 ILCS 5/15-1504(a)(3)(N) (West 2010). Alleging that the plaintiff's capacity is "mortgagee" complies with the statutory pleading requirements. *HSBC Bank USA, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 18.

¶ 14 Further, by attaching copies of the note, mortgage, and assignment of mortgage to the complaint, plaintiff pleaded that it was bringing suit in the capacity of legal holder of the indebtedness. Defendants assert that plaintiff "moved away" from that position when it stated in the motion for summary judgment that it was the "servicer" of the loan. Defendants argue that

plaintiff was not entitled to summary judgment, because it "cannot figure out in what capacity it is bringing *its own* foreclosure lawsuit." (Emphasis in original). Defendants rely on *Perry* for the proposition that plaintiff has the burden of proving in what capacity it brought the foreclosure. A plaintiff can have capacity as either a holder of the indebtedness or as a servicer. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9. Plaintiff's affidavits and documents showed that it was both. Plaintiff produced copies of the note, mortgage, and mortgage assignment as well as an affidavit that it serviced the loan, backed up with copies of documents detailing that it collected payments and applied them to principal and interest. Consequently, defendants' argument lacks merit.

¶ 15 We now address whether there is a genuine issue of material fact as to plaintiff's standing. Initially, we dispel defendants' erroneous assumption that they could defeat summary judgment by relying solely on their answer and affirmative defense. We first review the general rules with respect to the burdens of persuasion and production at the summary judgment stage.

¶ 16 On all motions for summary judgment, the movant has the burden of persuasion and the initial burden of production. Richard A. Michael, *Civil Procedure Before Trial*, § 40:3 (2d ed. 2011). The burden of persuasion never shifts, although the burden of production shifts to the respondent, where the movant successfully carries its burden of production. Richard A. Michael, *Civil Procedure Before Trial*, § 40:3 (2d ed. 2011). The respondent then must produce counteraffidavits or other proper materials that sufficiently contradict the materials submitted by the movant in order to create a genuine issue of material fact. Richard A. Michael, *Civil Procedure Before Trial*, § 40:3 (2d ed. 2011). "[I]f the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to judgment as a matter of law, the opposing party cannot rely on his or her complaint or answer alone to raise genuine

issues of material fact." *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 819 (1981). However, if the respondent produces some relevant contradictory matter, the focus shifts to whether that matter creates a genuine issue of material fact. Richard A. Michael, *Civil Procedure Before Trial*, § 40:3 (2d ed. 2011). When the party moving for summary judgment files its motion with supporting affidavits, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant's affidavits are admitted, and the opposing party cannot stand on his or her pleadings to create a genuine issue of material fact. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49.

¶ 17 Here, while plaintiff's motion is not a model of clarity, defendants' failure to file any counteraffidavits or documents in response is fatal. "The mere suggestion that a genuine issue of material fact exists, without supporting documentation, does not create an issue of material fact precluding summary judgment." *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (1995).

¶ 18 Defendants relied solely on their answer and affirmative defense in opposing summary judgment. Defendants pleaded in their affirmative defense only that they believed that Amcore endorsed the note to Freddie Mac and that plaintiff had to produce the original note. If it was not crystal clear before *Korzen* that a foreclosure plaintiff does not have to produce the original note, *Korzen* removed any doubt. *Korzen*, 2013 IL App (1st) 130380, ¶ 26 ("For over 25 years, the Foreclosure Law has been interpreted as *not* requiring plaintiffs' production of the original note.") (Emphasis in original). Not only did plaintiff *not* have to produce the original note, defendants failed to support their "belief" that Amcore endorsed the note to Freddie Mac with anything other than an Internet printout showing that they did a "self-service lookup" on Freddie Mac's website and received the electronic response: "Yes. Our records show that Freddie Mac is the owner of your mortgage."

¶ 19 In responding to the motion for summary judgment, defendants did not obtain an affidavit from Freddie Mac attesting to the fact that it owned the mortgage. The record indicates that defendants subpoenaed Freddie Mac's records and received responsive documents, but defendant did not attach any of those documents to their response. The letter accompanying the document production indicated that Freddie Mac owned the mortgage, but the letter is not notarized or otherwise verified, and, in any event, defendants did not rely on it. Defendants merely referenced a copy of their answer and affirmative defense that was attached to a prior filing. That copy did not include the Internet printout. Nor could the Internet printout raise more than a "mere suggestion" of lack of standing (see *Palacios*, 275 Ill. App. 3d at 568)), because, as we explain below, it was not competent evidence. As stated earlier, defendants cannot defeat summary judgment by relying on their pleadings.

¶ 20 Moreover, the facts to be considered by the court on summary judgment motions are evidentiary facts. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). The Internet printout does not meet the standards for affidavits in summary judgment proceedings. Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) requires that affidavits be made on the personal knowledge of the affiant; set forth with particularity the facts upon which the defense is based; have attached sworn or certified copies of all papers on which the affiant relies; consist of facts admissible in evidence; and affirmatively show that the affiant, if sworn as a witness, can testify competently to those facts. The Internet printout is hearsay. It ostensibly provided information about the mortgage, but it is not a business record, a public record, or a document purporting to establish or affect an interest in property that would permit its introduction into evidence at trial under Illinois Rules of Evidence 803(6) (eff. Jan. 1, 2011) (business records), 803(8) (eff. Jan. 1, 2011) (public records and reports), or 803(14) (eff. Jan. 1, 2011) (records of

documents affecting an interest in property). Hearsay, which is inadmissible at trial, is not admissible in support of or opposition to a motion for summary judgment. *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47.

¶ 21 Defendants argue that the lost note affidavit in support of the motion for summary judgment did not meet the requirements of Rule 191(a), because it was conclusory and no documents were attached. Defendants did not question the affidavit's sufficiency in the trial court, so the issue is forfeited. *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 24 (issues not raised in the trial court generally are forfeited and cannot be raised for the first time on appeal). Forfeiture aside, we disagree that the affidavit was conclusory. The affiant was an assistant vice president of plaintiff. She averred that the whereabouts of the note were unknown, that a diligent search had been made, and that it was not in any place that notes were normally stored. She stated that a copy of the note was attached as an exhibit and that the note remained unsatisfied. She further stated that the note's loss was not due to a lawful seizure and that the loan was in default. A copy of the note was attached to the affidavit, contrary to defendants' assertion that no documents were attached. An affidavit that sets forth the affiant's employment and a search for a lost note is sufficient. *First Federal Savings & Loan Ass'n of Chicago v. Chicago Title & Trust Co.*, 155 Ill. App. 3d 664, 666 (1987).

¶ 22 Defendants further maintain that the lost note affidavit does "little to help" plaintiff. Defendants rely on *Cogswell v. CitiFinancial Mortgage Co.*, 624 F.3d 395 (7th Cir. 2010). *Cogswell*, although applying Illinois law, is, at most, persuasive authority. *Rockford Police Beneovlent & Protective Ass'n , Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 153 (2010). It is also distinguishable. In *Cogswell*, the plaintiff purchased a note and mortgage from the defendant who never delivered the original or a copy of the note, because it possessed neither.

Cogswell, 624 F.3d at 396. A gap in the recorded ownership of the mortgage prohibited the plaintiff from showing that it was a mortgagee. *Cogswell*, 624 F.3d at 397. As a consequence, the plaintiff could not foreclose, and it sued the defendant for breach of contract, alleging that the defendant was contractually bound to deliver the note and failed to do so. *Cogswell*, 624 F.3d at 397. In defending the breach-of-contract action, the defendant suggested that its failure to deliver the original or a copy of the note did not cause the plaintiff's damages, because the plaintiff could have established its ownership of the indebtedness through a lost note affidavit. *Cogswell*, 624 F.3d at 402. The Seventh Circuit Court of Appeals disagreed, saying that a lost note affidavit, under those circumstances and by itself, would not prove ownership of the debt. *Cogswell*, 624 F.3d at 402-03. However, the court also acknowledged that a lost note affidavit that has copies of the note and mortgage attached has been held to be sufficient to prove the debt. *Cogswell*, 624 F.3d at 403.

¶ 23 Here, plaintiff attached a copy of the note, mortgage, and assignment of mortgage to the complaint, thus establishing a *prima facie* case of foreclosure. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶¶ 67, 68 (the bank met the requirements to maintain a foreclosure action because it filed copies of the mortgage and note attached to the complaint.) Defendants argue that plaintiff had to attach an endorsed copy of the note rather than a copy of the original note. That argument is without merit. The Foreclosure Law does not require the plaintiff to provide any specific documentation demonstrating that it owns the note or the right to foreclose other than the copy of the mortgage and note attached to the complaint. *Korzen*, 2013 IL App (1st) 130380, ¶ 26.

¶ 24 Defendants have engaged in gamesmanship regarding the note. First, they maintained that plaintiff had to produce the original note, not a copy, which is contrary to longstanding

Illinois law (*Korzen*, 2013 IL App (1st) 130380, ¶ 26); now they complain that plaintiff furnished a copy of the *original* note, not a later version. The fuss is trivial, because defendants never questioned the authenticity of the copies of the note and mortgage attached to the complaint. They alleged only that they believed that Freddie Mac became the owner.

¶ 25 However, even if Freddie Mac were the owner, that would not demonstrate plaintiff's lack of standing. Illinois does not require that a foreclosure be filed by the owner of the note and mortgage. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). A mortgagee can be "any person designated or authorized to act on behalf of" the holder of the indebtedness. 735 ILCS 5/15-1208 (West 2010). Plaintiff's uncontradicted evidence showed that it was the assignee and that it had serviced the loan since its inception on November 22, 2004. It was defendants' burden, not plaintiff's, to produce evidence that plaintiff was not authorized to do so. See *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184, 1185-88 (2008) (summary judgment was improperly granted in the plaintiff's favor where the defendant showed that the plaintiff was not the assignee of the mortgage).

¶ 26 Because plaintiff's motion for summary judgment established a *prima facie* case of foreclosure, defendants were required to produce credible evidence in the form of counteraffidavits to establish their affirmative defense of lack of standing. A party opposing a motion for summary judgment can rely solely on his pleadings to create a genuine issue of material fact until the movant supplies facts that entitle him to judgment as a matter of law. *Kimbrough*, 92 Ill. App. 3d at 819. Once plaintiff presented a *prima facie* case, defendants were no longer entitled to rely on their answer and affirmative defense. Accordingly, the trial court properly granted plaintiff's motion.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 29 Affirmed.