2017 IL App (2d) 160626-U
No. 2-16-0626
Order filed March 29, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CH-2741
MIRSAD KOVAC, RAZA KOVAC, UNKNOWN OWNERS, and NONRECORD CLAIMANTS,	)	
Defendants	)	Honorable Robert G. Gibson and
(Mirsad Kovac and Raza Kovac, Defendants-Appellants).	)	Robert W. Rohm, Judges, Presiding.

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

ORDER

¶ 1 *Held*: We affirmed the trial court's foreclosure judgment and confirmation of the judicial sale: in light of defendants' failure to provide a complete record including plaintiff's motion for an extension of time to respond to their affirmative defenses, we could not say that the court erred in granting that motion; defendants forfeited, for lack of development, their argument that their standing defense was improperly dismissed; contrary to defendants' claim, plaintiff's records showed that they were in default.

¶ 2 Defendants, Mirsad Kovac and Raza Kovac, appeal after the confirmation of the sale in a foreclosure proceeding. They raise three general claims of error: (1) the court erred in failing to deem that their lack-of-standing defense was admitted when plaintiff, Federal National Mortgage Association (Fannie Mae), failed to timely respond to their answer and affirmative defenses; (2) the court erred in striking one of those defenses under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)); and (3) the court erred in granting summary judgment for Fannie Mae. For the following reasons, we affirm the judgment of foreclosure and the confirmation of sale.

¶ 3 I. BACKGROUND

¶ 4 On September 24, 2013, plaintiff filed a foreclosure complaint relating to the property at 58 West Altgeld Avenue in Glendale Heights, alleging that the mortgage was in default and that plaintiff was the "legal holder of the note, mortgage and indebtedness." It alleged that Mortgage Electronic Registrations Systems, Inc. (MERS), as nominee for CitiMortgage, Inc., was the mortgagee. Defendants, the property owners and borrowers, were the only specifically named defendants.

¶ 5 The attached mortgage listed CitiMortgage as the lender and MERS as the nominee for CitiMortgage and its successors and assigns. The note bore an undated endorsement in blank by CitiMortgage. The endorser was Janet L. Sims, whose title was given as "Vice President." Both the note and the mortgage were dated February 23, 2007, in the body of the text. Also attached to the complaint was an assignment of the mortgage, executed by MERS as nominee for CitiMortgage, to CitiMortgage as assignee. This had an execution date of March 2, 2008, and a recording date of March 31, 2009. A second assignment, dated November 23, 2010, was from CitiMortgage to MERS as nominee for plaintiff. A third assignment, dated August 27, 2013,

was from MERS as nominee for plaintiff to plaintiff. A loan modification agreement between defendants and CitiMortgage/MERS dated September 25, 2009, was also an exhibit.

¶ 6 Defendants appeared and filed a motion to dismiss the complaint under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). They put forward two bases for dismissal. The first, which they later conceded was not viable, was that the mortgage was void because the lender was not properly licensed in Illinois. The second was that plaintiff lacked standing because no evidence existed that plaintiff was the holder or possessor of the note. The court denied this motion without prejudice.

¶ 7 On June 12, 2014, defendants filed an answer that denied that plaintiff had properly stated the amount of the default. It also incorporated the two affirmative defenses already mentioned: lack of licensure and lack of standing. We describe only the lack-of-standing defense. Defendants set out 34 numbered statements, few of which were strictly allegations of fact. The gist of the defense was that, because of irregularities in the documents, plaintiff had never acquired CitiMortgage's interest in the note.

¶ 8 On July 31, 2014, plaintiff filed the affidavit of William Randolph, a foreclosure specialist at its "subservicer" Seterus, Inc., as to the mortgage amount, the default amount, and related figures. It did not then file anything directly responsive to the affirmative defenses.

¶ 9 On February 24, 2015, plaintiff moved for summary judgment. A scheduling order suggests that it also filed a "Motion to Strike" that does not appear in the record on appeal.

¶ 10 Defendants, responding to the motion for summary judgment, argued that their affirmative defenses raised substantive issues of material fact precluding summary judgment. On July 1, 2015, the court denied plaintiff's motion for summary judgment.

¶ 11 On August 12, 2015, the court granted plaintiff leave to file a motion for an extension of time to respond to the affirmative defenses and a motion to strike the affirmative defenses. At this status hearing, defendants withdrew their first affirmative defense, that the lender was unlicensed; they conceded that changes in Illinois law had made that defense nonviable. Plaintiff, however, had already prepared its motion to strike; its motion to strike thus addressed both defenses.

¶ 12 Plaintiff's motion to strike cited as authority section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)), which permits motions that seek dismissal under both section 2-619 (affirmative matters) and section 2-615 (failure to state a claim). The section 2-619 portion of the motion pertained only to the lack-of-licensure defense; plaintiff sought to dismiss the lack-of-standing defense under section 2-615. It noted that that defense was premised on the claim that the endorsement was unauthorized or inauthentic. It argued that defendants had failed to set out any specific factual basis in support of that premise, let alone a sufficient factual basis to overcome the presumption that a signature is valid. The court granted plaintiff's motion and struck the affirmative defenses with prejudice.

¶ 13 Plaintiff then filed a new motion for summary judgment. It relied on the prove-up affidavit noted above. In that affidavit, Randolph averred that Seterus had become plaintiff's subservicer on November 1, 2010, that the note was not then in default, and that plaintiff had possession of the note. Further, Randolph was familiar with Seterus's record-keeping system, and the system had produced accurate records as to defendants' payment history. Attached to the affidavit was a printout detailing that history. This showed monthly payments of about $600 made through November 2012, then no payments for a year. A single payment of $663.10, the

last, was made on December 11, 2013; the printout nevertheless showed a "Next Due Date" of "1/1/13."

¶ 14 Defendants responded, arguing that the issue of plaintiff's standing had not been resolved. They also asserted that the records from Seterus failed to show a default.

¶ 15 The court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure. A sheriff's sale took place on June 7, 2016; plaintiff was the successful bidder and it filed a motion for confirmation of the sale that day. The court confirmed the sale on July 7, 2016. Defendants filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 At the outset, we note that, in their statement of jurisdiction, defendants erroneously rely on Illinois Supreme Court Rule 304(b) (eff. March 8, 2016). Rule 304(b) applies to appeals from final judgments that do not dispose of an entire proceeding, but may nevertheless be appealed without a special finding by the trial court. Ill. S. Ct. R. 304(b). Defendants have appealed from the final judgment of the order confirming the judicial sale. See *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 21 ("A mortgage foreclosure judgment is not final and appealable until the circuit court enters an order approving the sale and directing the distribution of the property."). Therefore, we have jurisdiction over the present appeal under Supreme Court Rule 303 (eff. Jan. 1, 2015) (appeals from final judgments in civil cases). Additionally, defendants raise issues regarding the trial court's interlocutory orders. "An appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment. [Citation.] Consequently, a court of review has jurisdiction to review an interlocutory order that constitutes a procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023

(2009). Accordingly, we will review defendants' arguments concerning the interlocutory orders as they constituted a procedural step in the progression leading to the final judgment of the order confirming the judicial sale.

¶ 18 As to the merits, defendants list three claims of error. One, under the rule in *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334 (2007), which concerns a motion for more time to respond to a request to admit facts, the court was required to deem their affirmative defenses to be admitted when plaintiff failed to show good cause for needing more time. Two, the court erred in striking its lack-of-standing defense. Three, "the circuit court improperly constructed [*sic*] the Randolph [prove-up] affidavit when it found that the *** Affidavit showed non-payment prior to the time of filing." As we will discuss, defendants have forfeited the first claim of error by failing to provide a sufficient record on appeal. Next, defendants fail to make any coherent argument as to their second claim. Finally, we hold that the affidavit and its associated attachments unequivocally showed that defendants were in default.

¶ 19 Defendants first assert that the court erred in granting plaintiff's motion for additional time to respond to defendants' affirmative defenses. In particular, they assert that plaintiff's motion for more time to respond did not set out facts showing good cause for the extension. However, the motion on which defendants rely is not a part of the record on appeal. As we cannot see the allegedly inadequate motion, we cannot conclude that it failed to set out good cause for the extension. We thus must presume that the grant of the motion was proper. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 20 Defendants have attempted to correct the record's omission of the motion by including a copy in the appendix to their brief. We must disregard it. With rare exceptions not applicable here, parties cannot not rely on material outside the record to support their positions on appeal.

Keener v. City of Herrin, 235 Ill. 2d 338, 346 (2009). We thus do not consider documents supplied in only the appendices to briefs. See, *e.g.*, *Oruta v. B.E.W.*, 2016 IL App (1st) 152735, ¶ 32 ("if *** materials are not taken from the record, they may not generally be placed before the appellate court in an appendix and will be disregarded"). Defendants could have properly corrected the omission from the record by seeking to supplement the record under Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006), but they failed to do so.

¶ 21 Under *Foutch*, the "appellant has the burden to present a sufficiently complete record of the proceedings *** to support [his or her] claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d 389, 391-92. Given that we have an incomplete record, we must presume that plaintiff's motion for extension of time set out a sufficient basis for the court's order. Thus, the trial court did not abuse its discretion in granting the motion for extension of time.

¶ 22 Defendants next assert that the trial court erred when it struck their affirmative defense of lack of standing. However, they fail to present a cogent legal argument to support their claim. The appellant has the burden of establishing error by the trial court. *Flynn v. Vancil*, 41 Ill. 2d 236, 241 (1968); *Chicago Title & Trust Co. v. First Arlington National Bank*, 118 Ill. App. 3d 401, 413 (1983). As we frequently note, "[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *Pecora v. Szabo*, 109 Ill. App. 3d 824, 825-26 (1982). Further, under Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), appellants must support the points that they raise with argument and citation to proper authority; if they fail to provide such support, they forfeit review of those points. Forfeiture occurred here

because defendants have failed to provide a clear explanation, supported by citation to appropriate authority, of why their lack-of-standing defense should have survived the motion to dismiss.

¶ 23 Forfeiture aside, "the mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note." *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24. Here, plaintiff attached the note and mortgage to its complaint, as well as the clear chain of assignment of the mortgage. Indeed, defendants essentially concede that the exhibits to the complaint *prima facie* established plaintiff's standing and that they were simply hoping to develop their lack-of-standing defense later. They state: "Fannie Mae is entitled to a *prima facie* evidentiary presumption that it possessed the Note at the time of filing." However, instead of arguing that they rebutted that presumption, they then state: "[*P*]*rima facie* evidentiary presumptions can be rebutted and are often rebutted through the course of litigation." We note that it is a defendant's burden to *plead* an affirmative defense, not just to state that they intend to raise the defense. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 12; see also *Korzen*, 2013 IL App (1st) 130380, ¶ 24 ("Standing is an affirmative defense and, as such, it is the defendant's burden to prove that the plaintiff does not have standing."). A defendant's statement that he or she *expects to* rebut a claim is thus a concession that he or she has failed to do so already.

¶ 24 Moreover, the court did not err in dismissing the affirmative defense of lack of standing under section 2-615. In analyzing a section 2-615 motion to dismiss, "a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them [citation], but a court cannot accept as true mere conclusions unsupported by specific facts." See *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Here, defendants suggest in their

reply brief that they adequately pled three matters to "overcome" a section 2-615 motion to dismiss: "(1) The Note was not made payable to Fannie Mae, (2) The Note was not assigned to Fannie Mae, [and] (3) Fannie Mae was not in possession of the Note at the time of the filing of the Complaint." The three "facts" defendants rely on are simply legal conclusions. Indeed, they are citing their *own* pleadings as "facts," without any evidence to support those assertions. Hence, the court was not required to take these "facts" as true. Additionally, and most important, plaintiff attached the mortgage and note endorsed in blank to its complaint, as well as the clear chain of assignment of the mortgage. "A mortgage assignee has standing to bring a foreclosure action" and a note endorsed in blank is payable to the bearer. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶¶ 24, 26. Thus, defendants' affirmative defense of lack of standing was insufficient as a matter of law.

¶ 25 Defendants last assert that the "court improperly constructed [*sic*] the Randolph affidavit when it found that the *** affidavit showed non-payment prior to the time of filing," and that, when the records attached to the affidavit are considered, the "affidavit does not prove the allegations of fact in the complaint." Defendants do not challenge the veracity of the affidavit, and the attachments to the affidavit support the foreclosure judgment and do not support defendants' claim of error. Defendants concede that they did not file a counter-affidavit and accordingly that the facts in the affidavit "are deemed true because they are unopposed."

¶ 26 Nevertheless, defendants try to argue that plaintiff's acceptance of payments in November 2013 and December 2013 is inconsistent with the loan's being in default and that certain wording in the attachments shows that plaintiff was then treating the loan as current. That is not correct. As plaintiff notes, the attached affidavit and records clearly show that plaintiff acquired the mortgage in November 2010 when the loan was current. Defendants made

payments on the mortgage in November and December 2010, each month of 2011, and each month from January 2012 through November 2012. The affidavit and records also show that defendants did not make any further payments until November 2013. Defendants thus went into default in December 2012. Additionally, the records and affidavit show that defendants made two payments in November 2013, both of which were held in "suspense" and not applied to the loan (one was reversed for insufficient funds). Defendants also made a final payment in December 2013, which was applied to the December 2012 overdue payment, the first month for which the mortgage was overdue and owing. Based on the above, the single payment applied toward the mortgage did not cure the default, and the mere fact that the servicer's records continued to show a next due date for a payment does not negate the existence of a default that the records clearly showed.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the confirmation of sale and its predicate foreclosure judgment.

¶ 29 Affirmed.