2017 IL App (2d) 160787-U
No. 2-16-0787
Order filed June 29, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK NATIONAL ASSOCIATION, as Trustee for Holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates Series 2007-E,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-1743
ROBERT C. THOMAS, UNKNOWN OWNERS, and NONRECORD CLAIMANTS,	)	
Defendants	)	Honorable Bonnie M. Wheaton,
(Robert C. Thomas, Defendant-Appellant).	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's foreclosure judgment and confirmation of the judicial sale: defendant did not establish that the note's purported endorsement to a different entity was anything but the scrivener's error that plaintiff claimed, and, having failed to so establish, he failed to establish prejudice as necessary to avert confirmation of the sale.

¶ 2 Defendant, Robert C. Thomas, appeals after the confirmation of the sale in a foreclosure proceeding; he asks us to reverse the grant of summary judgment and the confirmation order. He contends that he adequately demonstrated that plaintiff, Wells Fargo Bank National Association, was not the endorsee of the note (or the assignee of the mortgage) on which it based its foreclosure claim. We are unpersuaded by defendant's arguments, and we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 1, 2009, plaintiff filed a complaint to foreclose a mortgage on a property at 10S381 Madison Street in Hinsdale. It identified itself as "Wells Fargo Bank, NA as Trustee for Mortgage Pass Through Certificates 2007-E," and alleged that defendant—the property owner and borrower—was in default on the note associated with the mortgage. The complaint alleged that the capacity in which it brought the action was "Mortgagee under 735 ILCS 5/15-1208 [(West 2008)]" and that the "mortgagee" was Bank of America N.A. The attached mortgage showed that Bank of America was the original mortgagee. The copy of the note attached to the complaint, dated July 2, 2007, bore no endorsements.

¶ 5 Defendant appeared and moved to dismiss on the basis that the mortgage and note showed that Bank of America, and not plaintiff, had standing to foreclose. The court granted this motion without prejudice.

¶ 6 Plaintiff filed an amended complaint that included a newer copy of the note; it bore an endorsement to "U.S. Bank National Association as trustee for holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates Series 2007-E."

¶ 7 Defendant answered; he denied, among other things, that the note attached to the amended complaint was a true and correct copy of the relevant note. Plaintiff then moved for summary judgment and filed a "Motion to Correct Misnomer." The gist of the second motion

was that both complaints had truncated the description of the capacity in which plaintiff had brought the complaint; plaintiff said that its correct description was "Wells Fargo Bank, NA as trustee for *holders of Banc of America Funding Corporation* Mortgage Pass-Through Certificates, Series 2007-E" (emphasis added), but that the complaints had this as "Wells Fargo Bank, NA as Trustee for Mortgage Pass Through Certificates 2007-E." From here on, we will use "the certificate holders" as shorthand for "holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates Series 2007-E."

¶ 8 Defendant moved again for dismissal or else for summary judgment in his favor. He pointed out that the newer copy of the note was still not endorsed to plaintiff and that nothing else in plaintiff's pleadings or affidavits established its rights in the case. He asked the court to rule that plaintiff's exhibits positively defeated any claim it could have to standing.

¶ 9 Plaintiff responded to this with the assertion that the endorsement's identification of U.S. Bank as the trustee had been a mistake—*it* was the trustee. Furthermore, defendant had forfeited his new lack-of-standing defense by not raising it in an answer and, in any event, it had possession of the note and was entitled to enforce it on that basis alone. It attached a copy of what it identified as the cover page of the "Pooling and Servicing Agreement." This identified U.S. Bank as the "custodian" and servicer of the relevant loans and plaintiff as the trustee.

¶ 10 Defendant replied that plaintiff had failed to state legal principles under which the endorsement to U.S. Bank could be treated as an endorsement to plaintiff.

¶ 11 Plaintiff filed a further reply and, with it, two documents that are central to the dispute in this appeal. First was an assignment of the mortgage to U.S. Bank as trustee for the certificate holders. Second was the affidavit of a person who gave his name as "Jay Martinez" and identified himself as a "Document Execution Specialist" with Nationstar Mortgage, LLC.

Martinez described Nationstar as the servicer of the loan at issue and attorney-in-fact for U.S. Bank, which he described as the trust's "Custodian." Martinez further averred that he had "reviewed and [was] familiar with the business records and the loan file for the Subject Loan" and had reviewed a document log maintained on Nationstar's computers. "The Document Log *** contains an entry which indicates that the Custodian, on behalf of the Plaintiff, obtained possession of the original note for the Subject Loan on October 10, 2007." Moreover:

> "The endorsement on the original Note incorrectly identifies U.S. Bank National Association as trustee for [the certificate holders]. As identified on the first page of the subject-Trust Pooling and Servicing Agreement, U.S. Bank National Association is the Custodian, not the Trustee. The correct trustee for the subject Trust is Wells Fargo Bank, N.A. A true and correct copy of the first page of the subject Trust Pooling and Servicing Agreement is attached hereto as Exhibit 3.
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> *** Further, attached hereto as Exhibit 4 is a true and correct copy of the original Assignment of Mortgage from Bank of America, N.A. to U.S. Bank National Association as trustee for [the certificate holders], executed on August 30, 2007. Exhibit 4 shows the intent of the parties to transfer the subject Note to the subject Trust in 2007, regardless of the improperly identified trustee."

The attached assignment is the same one we described above in which U.S. Bank, as trustee for the certificate holders, was the assignee.

¶ 12 Defendant then began seeking either to depose Martinez or to compel his testimony, but the court ruled that all of these attempts were procedurally improper. Defendant also filed a sur-reply in which he argued that, because Martinez had not claimed to have first-hand knowledge of any of the matters critical to establishing plaintiff's standing, Martinez's affidavit was not proper

support for a summary-judgment motion. To this, plaintiff responded that Martinez's source of knowledge went to the weight of the evidence, not to its evidentiary acceptability.

¶ 13 The hearing on pending matters took place on March 11, 2015. Defendant reported having served a subpoena on Martinez, who was not present. Plaintiff's counsel represented that he had the original note with him in court. The court granted summary judgment for plaintiff, ruling that "[plaintiff's counsel's] explanation and supporting documentations clearly show that the proper party is the plaintiff in issue [*sic*] before the Court." The court then entered a judgment for foreclosure and sale and granted plaintiff's motion to correct the misnomer. Defendant immediately sought a finding of appealability under Illinois Supreme Court Rule 304(a), but the court denied one on the basis that "this is not a final and appealable order." Defendant later moved unsuccessfully for reconsideration of the foreclosure judgment.

¶ 14 The sheriff's sale took place on February 18, 2016, and plaintiff was the successful bidder. On February 22, 2016, plaintiff filed a motion asking the court to confirm the sale.

¶ 15 Defendant responded to plaintiff's motion by filing an objection to confirmation. He also sought leave to file a "supplemental" affidavit in support of the objection. The new affidavit was made by "Jair M. Martinez," who said he was the same person as the "Jay Martinez" of plaintiff's affidavit in support of summary judgment. Jair Martinez averred that his legal first name was in fact "Jair," that he did not go by "Jay" in any context, and that he did not ordinarily sign his name "Jay Martinez," but that his employer had told him to sign affidavits that way. Further, he had not appeared before the named notary public to attest to the original affidavit. He had "not review[ed] any business records and [had] not read or examine[d] the documents that were given to [him] for signing." Further, he "did not examine, review, or have personal knowledge of any [of the] documents" that he had mentioned in his first affidavit.

¶ 16 At a hearing addressing the matter, defendant gave an explanation of how he had come to file the second affidavit:

> "Now, on the basis of [Martinez's original] affidavit, Your Honor entered a summary judgment, and I have been pursuing that affidavit ever since; and I employed a private detective, who spoke to the human resources at Nationstar, and he was informed that there was no Jay Martinez who worked there.
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> ***
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> I have gotten information on a Mr. Martinez, who was the man who executed the affidavit; so I've obtained phone numbers, addresses, and a friend of mine and associate of mine went to Texas, located Mr. Martinez, and served him with a subpoena and a mileage check to be here today.
>
> I didn't really expect him to do it, but he was also shown an affidavit that refuted every allegation in their original affidavit, which he read and he executed, and he executed it under oath.
>
> He *** was not the agent of Wells Fargo. He was not an attorney, in fact. He *** had no personal knowledge. He did not review any records."

Defendant argued that the new affidavit showed that the first affidavit was the product of fraud. Alternatively, he argued that, questions of Martinez's truthfulness aside, plaintiff had still failed to show its connection to the note. Plaintiff argued that everything had been resolved when the court granted summary judgment and that defendant had raised nothing new. The court stated that, because defendant had raised nothing relating to the sale itself, it would exercise its discretion to confirm the sale.

¶ 17 On June 7, 2016, the court confirmed the sale and granted an order of possession to plaintiff. Defendant filed a motion for reconsideration on June 16, 2016. The court denied defendant's motion for reconsideration on September 7, 2016. Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant asks that we reverse the grant of summary judgment and the confirmation order. He lists three primary contentions in his brief: (1) that the court improperly based the foreclosure judgment on the perjured affidavit of Martinez; (2) that the Uniform Commercial Code (U.C.C.) (810 ILCS 5/1-101 *et seq*. (West 2006)) provides that a note that bears a special endorsement can be enforced only by the note's endorsee; and (3) that the U.C.C. has no provision that permits a party who is not the endorsee of a specially-endorsed note to enforce a specially-endorsed note as the endorsee. The combined import of his second two contentions is that, under U.C.C. principles, U.S. Bank, as the entity named in the note's endorsement, was the only possible endorsee of the note, regardless of whether plaintiff was in fact the trustee.

¶ 20 Plaintiff argues in response that—among other things—it established that the endorsement to U.S. Bank was a scrivener's error and that *it* was the intended endorsee. It further argues that, under the rule in *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, defendant's attempt to challenge the foreclosure judgment with the second Martinez affidavit was untimely.

¶ 21 Defendant replies that the rules for correction of a scrivener's error do not permit a court to change the endorsee of a note. He further replies that the second Martinez affidavit shows fraud by plaintiff and that, under the rule in *McCluskey*, such a fraud is a proper basis for a court to refuse to confirm a sale.

¶ 22 Defendant fails to persuade us that the court erred either in granting summary judgment or in confirming the sale. We discuss the propriety of each of those rulings in turn.

¶ 23 A trial court should grant a motion for summary judgment only if there are 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 2014).

> "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. [Citation.] Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. [Citation.] In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in favor of the opponent." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48.

Our review of a grant of summary judgment is *de novo*. *Schweihs*, 2016 IL 120041, ¶ 48.

¶ 24 Defendant has failed to provide a cogent argument for why the grant of summary judgment was error. Much of defendant's challenge to the summary judgment rests on his claim that the first Martinez affidavit was perjured. But anything that defendant brought forward *after* the summary judgment—including the second Martinez affidavit—could be relevant only to whether the court should have vacated that judgment, not to whether it should have entered it in the first place. Thus, we consider the second Martinez affidavit when we address the propriety of the confirmation but not the propriety of the summary judgment. Beyond that, defendant argues that the summary judgment was inconsistent with U.C.C. principles, but (as we next explain) he fails to make the necessary case.

¶ 25 Defendant argues that, when a note has a special endorsement, only the special endorsee can be the holder of the note, but defendant fails to consider that the special endorsee's identity can be ambiguous. On this point, defendant appears to recognize (at least for the sake of argument) that the pooling agreement might in fact have been set as plaintiff described: with plaintiff as the trustee for the certificate holders and U.S. Bank as the custodian. He implies that, were this true, it would not matter. But his argument on the point has a fatal flaw in that he assumes the very thing that he needs to prove. Specifically, he assumes that, under U.C.C. principles, only the proper name of an instrument's special endorsee matters and any description of capacity is unimportant. His argument requires us to assume that, if someone endorses an instrument to "John Doe as Treasurer of Fund," but the real treasurer of that fund is James Roe, we nevertheless must read the endorsement as being to John Doe despite the conflicting capacity description. This assumption is illogical and is likely to cause unjust results. An instrument endorsed to anyone as "Treasurer of Fund" is unmistakably intended for the fund, so we cannot accept an unsupported assumption that John Doe becomes the instrument's holder in those circumstances. So too here; defendant does not persuade us that plaintiff (in the capacity of trustee) could not be the true endorsee.

¶ 26 Defendant has also failed to persuade us that the court erred in confirming the sale. The sale of a foreclosed property is not complete until the court has confirmed the sale, but the court has only limited discretion to refuse to do so. Section 15-1508(b) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1508(b) (West 2014)) lists the specific conditions under which refusing to confirm is proper: "Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall

then enter an order confirming the sale." A court that refuses to confirm on a basis not listed in section 15-1508(b) has abused its discretion. *BMO Harris Bank, N.A. v. Wolverine Properties, LLC*, 2015 IL App (2d) 140921, ¶ 26. Defendant suggests that the catchall fourth condition, "justice [was] not otherwise done" (735 ILCS 5/15-1508(b)(iv) (West 2014)), permitted the court to refuse to confirm this sale. The suggestion fails because defendant has not explained how he suffered prejudicial unfairness, a showing that we require before allowing a court to deny confirmation under the catchall condition. See *Wolverine Properties*, 2015 IL App (2d) 140921, ¶ 26 (holding that a showing of prejudicial unfairness is required under section 15-1508(b)(iv)). Defendant's objection was nothing but an attack on Martinez's first affidavit, and that attack provides no positive evidence that plaintiff was not the trustee for the certificate holders. In other words, it fails to suggest that a lack-of-standing defense could have succeeded. Moreover, defendant does not try to show that striking the first Martinez affidavit would have done anything more than delay the foreclosure until plaintiff brought in better evidence that it was the trustee. He has not explained how he suffered unfair prejudice; he thus has failed to show that the court abused its discretion when it confirmed the sale.

¶ 27 III. CONCLUSION

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

¶ 29 Affirmed.