2017 IL App (2d) 160829-U
No. 2-16-0829
Order filed December 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR INDYMAC INDX MORTGAGE LOAN TRUST 2006-AR6, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-AR6, UNDER THE POOLING AGREEMENT DATED APRIL 1, 2006,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	No. 09-CH-2844
v.	)	
BRUCE KAMPERMAN, JUDY KAMPERMAN	)	Honorable Katherine Moran,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants waived the affirmative defense of standing by failing to assert it in their answer to the original complaint for foreclosure. The trial court did not err in any of its findings articulated in the orders challenged by defendants in this appeal.

¶ 2 Defendants purchased the subject property in this foreclosure action on March 17, 2006. They were loaned $185,000 by IndyMac Bank, F.S.B. to finance the purchase of the property.

As security for the loan amount, a mortgage was granted to Mortgage Electronic Registration Systems, Inc. The terms of the mortgage provided that the unpaid balance would become accelerated and immediately due and payable upon default. Defendants defaulted on their home loan in March 2009. A residential foreclosure action was initiated against them on August 17, 2009, by OneWest Bank F.S.B., as assignee of the Mortgage Electronic Registrations Systems, Inc. One West Bank F.S.B. later assigned the mortgage to the plaintiff in the present case and the trial court entered an order substituting plaintiff in place of OneWest Bank, F.S.B., assignee of Mortgage Electronic Registration Systems, Inc., as nominee for IndyMac Bank, F.S.B.

¶ 3 Following numerous motions filed by defendants to avoid foreclosure, the trial court granted plaintiff's motion for summary judgment regarding their foreclosure claims over defendants' objection that a question of material fact existed regarding plaintiff's standing to bring the mortgage foreclosure complaint. Summary judgment for foreclosure was entered on March 24, 2016, and defendants were left with $320,975.36 due to plaintiff. Defendants, on May 9, 2016, filed a petition for substitution of judge which sought the removal of Judge Katherine Moran from the case as, according to defendants, she "exhibited a partisan zeal for the plaintiff, and openly denied defendant's evidence." Judge Moran denied the petition because she found defendants provided no grounds justifying a substitution, and because the petition was not timely filed.

¶ 4 The subject property was sold at a sheriff's sale on August 4, 2016. Following the sale, plaintiff filed a motion for an order approving a report of sale and distribution. Defendants objected to the motion and claimed there was a discrepancy between the legal description in the deed to the property and the mortgage. Specifically, defendants claimed that the legal description in the deed contained language stating "North 65 degrees" while the mortgage stated

"North 63 degrees," although both descriptions had the same address and PIN numbers. On August 19, 2016, the trial court entered an order confirming the sale and an order of possession. An *in personam* deficiency judgment was entered against the defendants in the amount of "$92,428.64 with statutory interest thereon."

¶ 5 Defendants filed a notice of appeal on September 28, 2016, taking issue with a bevy of trial court orders entered throughout the length of the foreclosure proceedings. We will address each of defendants' arguments regarding these orders in turn. However, before analyzing the arguments defendants make in this appeal regarding those orders, we note that defendants' brief presented to this court does not make arguments concerning the orders May 12, 2010, April 4, 2011, September 27, 2013, and September 8, 2014. Points not argued in an opening brief are waived. Ill. S.Ct. R. 341(h)(7) (West 2016). Therefore, these orders are affirmed.

¶ 6 The central contention to defendants' appeal is the assertion that plaintiff lacked standing to foreclose on the subject property. However, defendants failed to assert the affirmative defense of standing in their original answer to the complaint for foreclosure. "Lack of standing is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). A defendant in a foreclosure action must assert the affirmative defense of lack of standing in the answer to the foreclosure complaint or it will be waived. *Deutche Bank National Trust Company v. Iordanov*, 2016 IL App (1st) 152656, ¶ 34.

¶ 7 Defendants, in the brief presented to this court, argue the issue of standing within the context of the trial court's denial of their November 30, 2011, third motion to dismiss. However, that motion does not assert a lack of standing either. The motion alleges that Mortgage Electronic Registration Systems, Inc. had no right to assign the mortgage, and that the attempted

assignment of the mortgage was fraudulent and without legal effect because the assignment was recorded subsequent to the foreclosure complaint. Defendants' argument in the third motion to dismiss is predicated on whether the mortgagee at the time of assignment had the right to assign the mortgage. This does not implicate standing. As defendants failed to assert standing as an affirmative defense in their original answer to the foreclosure complaint, it cannot be argued on appeal. *Id.* Accordingly, defendants' prayers for reversal of the trial court's order denying defendants' third motion to dismiss is affirmed. And, by extension, the judgment of foreclosure and the order confirming sale are baseless.

¶ 8 We will now address defendants' remaining issues on appeal. Defendants argue that the trial court erred in granting plaintiff's motion to strike defendants' affirmative defenses, as well as dismissing their counterclaims. An affirmative defense is "any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint." 735 ILCS 5/2-613(d) (West 2016). Affirmative defenses must plainly be set forth in the answer or the reply. *Id.* Affirmative defenses admit the legal sufficiency of the plaintiff's cause of action but assert a new matter by which plaintiff's right of recovery is defeated. *Farmer's Automobile Insurance Association v. Neumann*, 2015 IL App (3d) 140026, ¶ 16.

¶ 9 Defendants' first affirmative defense was that the 90-day reinstatement period described in 735 ILCS 5/15-1602 had not expired and "may not begin running until the dispute is resolved." We can find no support for this assertion under Illinois law. Their second affirmative defense was that a notice of acceleration was not served on them. As articulated by the trial court, the notice of acceleration does not have to be served or even received. It only has to be sent. See *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 17. The third affirmative defense asserted by defendants was waiver and breach of a forbearance agreement which

allegedly involved an oral agreement entered into by the defendants and IndyMac Loan Services. However, defendants produced nothing written to reflect the existence of this agreement, only the assertion that a recorded conversation with a servicing agent evidenced such an agreement. The trial court struck this affirmative defense based on the Statute of Frauds. We need not analyze the propriety of the court's reliance on the Statute of Frauds for striking this defense here because defendants admit in their brief presented to this court that they failed to uphold their end of the alleged oral agreement with IndyMac Loan Services by not making three payments as required by the agreement. Their fourth affirmative defense alleges that IndyMac Loan Services lacked the capacity to sue because it was not registered as a foreign corporation licensed to do business in Illinois. The trial court struck this affirmative defense properly as well. IndyMac Loan Services did not file the suit in the present case. And defendant's fifth affirmative defense, that the mortgage should be reformed because of "an elimination of a valuable consideration" for which defendants had bargained, was properly dismissed by the trial court for being insufficiently pled. The trial court found nothing in the facts presented to the court that this asserted defense was proper. Our examination of the record and defendant's pleadings also reveal nothing that would make this affirmative defense proper in this case. Based on the foregoing, we can not find that the trial court erred in striking defendant's affirmative defenses.

¶ 10 That moves us to defendants' argument that the trial erred in dismissing their counterclaims. Defendants' counterclaims sought compensation for emotional distress and inaccurate record keeping. The trial court dismissed the emotional distress claim as it was insufficiently pled. Indeed, our examination of defendants' counterclaim reveals a single sentence listed under the heading "Counter-claim" that states "[c]ompensation for emotional distress." To properly plead a cause of action for intentional infliction of emotional distress, a

plaintiff must allege facts to establish: "(1) that the defendant's conduct was extreme and outrageous; (2) that the defendant knew that there was a high probability that his conduct would cause severe emotional distress; and (3) that the conduct in fact caused severe emotional distress." *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 25 (quoting *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 20 (1992). Defendants' one sentence pleading in this case does not amount to a properly plead cause of action. Neither does defendants' second counterclaim of "inaccurate record keeping." The trial court said, and our research confirms, that "[there's no basis for it in the law[,] [i]t's not a recognizable cause of action under Illinois law and for that reason *** will be dismissed." The trial court did not err in dismissing defendants' counterclaims.

¶ 11 Defendants' next contention is that their motion to reconsider and for leave to amend affirmative defenses and file supplemental affirmative defense of standing following the trial court's November 10, 2014, order was improperly denied. Defendants' motion asserted that plaintiff did not have standing to foreclose on the subject property and that two assignments were fabricated, necessitating dismissal for "fraud upon the court." A motion to reconsider is predicated upon the court being made aware of newly discovered evidence, changes in law, or errors in the court's application of existing law. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008). If the predicate criteria regarding a motion to reconsider is nonexistent, the motion is properly denied. *Id*. The trial court articulated, and our review confirms, defendants did not provide any new evidence, law, or misapplication of existing law in their motion. The motion was properly denied.

¶ 12 Defendants next contend that the trial court's order on March 24, 2016, granting summary judgment in favor of plaintiff for foreclosure was improper. In its order, the trial court

stated that no genuine issue of material fact was presented to preclude summary judgement in plaintiff's favor. Summary judgment will be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue [of] material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993). We review *de novo* the trial court's summary judgment ruling. *Barba v. Village of Bensenville*, 2015 IL App 2d 140337, ¶ 31.

¶ 13 Plaintiff in the present case was in possession of the original promissory note and presented it to the trial court. The note was indorsed in blank. "When indorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially indorsed." 810 ILCS 5/3–205(b) (West 2016). It is well settled that possession of bearer paper is *prima facie* evidence of title thereto, and is sufficient to entitle the plaintiff to a judgment of foreclosure. *HSBC Bank, USA, National Ass'n v. Rowe*, 2015 IL App (3d) 140553, ¶ 21. Attaching the note to the complaint is *prima facie* evidence that the plaintiff owns the note. *Id.* There is nothing in the record to suggest that defendants could present any genuine issue of material fact to preclude the trial court from granting summary judgment in favor of plaintiff for foreclosure, therefore we affirm that grant.

¶ 14 Defendants' next contention is that the trial court erred in denying their motion for substitution of Judge Moran. A petition for substitution of judge shall set forth the specific cause for substitution and be verified by affidavit of the applicant. 735 ILCS 5/2-1001(a)(3)(ii) (West 2016). To meet the statute's threshold requirements, such a petition must allege grounds that, if true, would justify granting substitution for cause. *In re Estate of Mary Ann Wilson*, 238 Ill. 2d

519, 554 (2010). Where bias or prejudice is invoked as the basis for seeking substitution, it must normally stem from an extrajudicial source, *i.e.*, from a source other than from what the judge learned from her participation in the case before her. *Id.* "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* If a petition for substitution does not meet the statutory threshold—and "[a] judge's previous rulings almost never constitute a valid basis for a claim of judicial bias"—then there is no obligation to refer the petition to another judge for a hearing. *Id.*

¶ 15 Defendants here, in their petition for substitution of judge, alleged as the basis for cause that Judge Moran denied defendants' request to file a supplemental affidavit they wanted to attach to their response to plaintiff's motion for summary judgment. Defendants asserted that the trial court "realized the legal description in the mortgage documents was incorrect and kindly corrected the documents for plaintiff, thus showing bias." Further, defendants alleged in their petition that Judge Moran "openly exhibited a partisan zeal for the plaintiff, and openly denied defendants' evidence." Defendants' affidavits attached to the petition attested that the trial court denied their request for an extension of time to file an affidavit and that the trial court "corrected documents for the plaintiff."

¶ 16 Aside from defendants' obvious displeasure with the rulings of Judge Moran throughout the course of this litigation, their petition makes no allegations of any extrajudicial source of bias. The judgment for foreclosure and sale entered on March 24, 2016, was made by the trial court following oral argument on plaintiff's motion for summary judgment. The trial court's judgment reflects the decision to reduce attorney fees awarded to plaintiff, as well as make

correction in the legal description of the subject property. The judgment was reviewed and signed in open court in the presence of both parties. The denial of defendant's request to file a supplemental affidavit was made in open court in the presence of both parties. It is impossible for this court to see how these actions could rise to the level of "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. The trial court was correct to deny defendants' motion for substitution of judge as their allegations, even if taken as totally true, do not establish cause for substitution within the meaning of section 2-1001(a)(3).

¶ 17 We note in closing that defendants' contention that plaintiff lacked standing to foreclose on the subject property is waived due to their failure to assert it as an affirmative defense in their answer to the original complaint. That waiver aside, we will briefly address defendants' final argument that the trial court abused its discretion by entering the order approving sale and order of possession as this argument would fail even if standing were not waived.

¶ 18 Confirmation of judicial sales is governed by section 15–1508 of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15–1508 (West 2016). Subsection (b) of that statute provides:

> "Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15–1507 [735 ILCS 5/15–1507] was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) that justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15–1508(b) (West 2004).

Under the terms of the statute, a court therefore 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. The provisions of section 15–1508 have been construed as conferring on circuit courts broad discretion in approving or disapproving judicial sales. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008). A court's decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion. *Id.*

¶ 19 Defendants in the present case do not argue in their brief that any of the grounds exist in which the court could have come to any conclusion but to confirm the sale. No evidence in the record exists that any of these grounds could have been raised by defendants either. The trial court’s order confirming the sale and order of possession were done in lock step with the requirements of section 15-1508. There was no abuse of discretion in entering those orders.

¶ 20 III.CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 22 Affirmed.