2018 IL App (2d) 170116-U
No. 2-17-0116
Order filed August 9, 2018

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

WILMINGTON SAVINGS FUND SOCIETY, FSB d/b/a CHRISTIANA TRUST AS TRUSTEE OF RESIDENTIAL CREDIT OPPORTUNITIES TRUST SERIES 2015-1,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CH-523
MARSHAL P. MORRIS and SUSAN G. MORRIS,	)	Honorable Margaret A. Marcouiller,
Defendants-Appellants.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The Appellate Court affirmed the trial court's order confirming the judicial sale of the borrowers' real property where summary judgment in the plaintiff's favor was properly granted; the plaintiff produced the original note, mortgage, and allonges at the summary-judgment hearing, proving its standing to foreclose the borrowers' mortgage; the borrowers' myriad arguments to reverse the judgment were held not to have merit or were forfeited.

¶ 2 Defendants, Marshal P. Morris and Susan G. Morris (borrowers), appeal an order of the Circuit Court of Lake County confirming the judicial sale of their residence following a judgment of foreclosure. We affirm.

¶ 3 I. BACKGROUND

¶ 4 While the borrowers' brief is mired in extraneous facts, we will recite only those necessary to understand our disposition of the issues raised in this appeal. On August 24, 2007, the borrowers executed a note and mortgage on real property located in Highland Park, Illinois (the property), in favor of SGB Corporation, d/b/a WestAmerica Mortgage Company (WestAmerica). WestAmerica assigned the loan to CitiMortgage, Inc. (CitiMortgage), which in turn assigned it to Bayview Loan Servicing, LLC (Bayview). In March 2011, the borrowers defaulted on the loan, and Bayview filed suit to foreclose the mortgage on February 2, 2012. Attached to the complaint were copies of the original note, mortgage, and allonges showing the various assignments. The borrowers filed an unverified answer and then an unverified amended answer and affirmative defenses. On March 11, 2015, Bayview moved for summary judgment. On May 27, 2015, Bayview filed an amended motion for summary judgment. The borrowers argued, *inter alia*, lack of standing and the insufficiency of the prove-up affidavit executed by Ashley Varela, a Bayview employee. The court did not rule on the amended motion for summary judgment, but instead allowed the borrowers to conduct additional discovery.

¶ 5 In the meantime, on November 24, 2015, Bayview assigned the mortgage to plaintiff, Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the Residential Credit Opportunities Trust Series 2015-1 (the bank), which was substituted as the party plaintiff on February 19, 2016. On May 20, 2016, at the hearing on the motion for summary judgment, the bank produced the original note, mortgage, and allonges showing the assignments from

WestAmerica to CitiMortgage, from CitiMortgage to Bayview, and from Bayview to the bank. On July 21, in a written memorandum, the court granted summary judgment in the bank's favor. On August 5, 2016, the borrowers moved for reconsideration, but before the court ruled on that motion, it entered a judgment of foreclosure and sale on August 8, 2016. On August 25, 2016, the borrowers moved to stay the foreclosure and sale on the ground that the court lacked the power to enter judgment while their motion to reconsider was pending. The court denied the motion to stay and the motion to reconsider on November 4, 2016. The bank purchased the property at a sheriff's sale on November 15, 2016, and the bank then moved to confirm the sale. On February 3, 2017, over the borrowers' objection, the court entered an order confirming the sale and deficiency judgment. The borrowers' motion to stay the judgment pending appeal was denied, and they filed a timely notice of appeal on February 9, 2017. We will discuss additional facts as necessary in the Analysis section of this Order.

¶ 6 II. ANALYSIS

¶ 7 The borrowers raise 11 issues, which we consolidate into the following categories: (1) the bank lacked standing, (2) the bank's failure to credit certain funds precluded foreclosure, (3) the bank's prove-up affidavit was deficient, (4) the motion to reconsider automatically stayed further proceedings, (5) genuine issues of material fact precluded summary judgment, and (6) the court did not apply local rules to both sides equally.

¶ 8 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. *U.S. Bank Trust National Association, as Owner Trustee for Queen's Park Oval Asset Holding Trust v. Hernandez*, 2017 IL App (2d) 160850, ¶ 14. The purpose of summary judgment is not to try a question of fact, but

to determine whether a genuine issue of material fact exists. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. In making that determination, a court construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. A triable issue of fact exists where the material facts are disputed or where reasonable persons might draw different inferences from undisputed facts. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. Summary judgment is appropriate only where the movant's right is clear and free from doubt. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14. Our review of a summary-judgment ruling is *de novo*. *Hernandez*, 2017 IL App (2d) 160850, ¶ 14.

¶ 9 We first consider the borrowers' contention that the bank lacked standing to foreclose. Standing is a doctrine designed to preclude persons with no interest in a controversy from bringing suit. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15. A party's standing to sue is determined as of the time suit is filed. *Gilbert*, 2012 IL App (2d) 120164, ¶ 15. A suit to foreclose a mortgage can be brought by the holder of an indebtedness secured by a mortgage, or by an agent or successor of such mortgagee. *Gilbert*, 2012 IL App (2d) 120164, ¶ 15. Lack of standing is an affirmative defense, and the burden of proving it is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 10 The borrowers assert that the bank's predecessor was "Bayview Opportunity Fund Asset Trust," which never possessed legal title to the mortgage, and, thus, lacked standing to file suit to foreclose it. The borrowers reason that, because "Bayview Opportunity Fund Asset Trust" did not own the mortgage, its purported assignment of the mortgage to the bank was a nullity.

¶ 11 Contrary to the borrowers' argument, the record shows that the original plaintiff was "Bayview Loan Servicing, LLC, as Servicer for Bayview Opportunity Fund Asset Trust." The complaint alleged that "Bayview Loan Servicing, LLC" brought suit in the capacity of "legal

holder of the indebtedness." Attached as an exhibit to the complaint was an assignment of the note and mortgage from CitiMortgage to "Bayview Loan Servicing, LLC." Thus, the original plaintiff was the holder of the indebtedness, and, as such, was entitled to bring the foreclosure action. See *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 35 (a foreclosure action may be pursued by the legal holder of the indebtedness).

¶ 12 The borrowers claim that the assignment from CitiMortgage to Bayview was defective because CitiMortgage's assignor was the Mortgage Electronic Registration System (MERS) and not WestAmerica. The borrowers reason that because MERS did not own the mortgage, CitiMortgage did not receive ownership of the mortgage, and it could not convey ownership to Bayview. However, the record shows that MERS was acting "solely as nominee" for WestAmerica. A "nominee" is either a "person designated to act in place of another" or a "party who holds bare legal title for the benefit of others." *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 41. Thus, there is no genuine issue of material fact as to whether CitiMortgage was properly assigned the mortgage.

¶ 13 Moreover, Bayview attached a copy of the note to the complaint, which was itself *prima facie* evidence that Bayview owned the note. See *Avdic*, 2014 IL App (1st) 121759, ¶ 37 (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). Furthermore, as we discuss more fully below, the borrowers admitted the allegations of both the execution and the assignments of the mortgage by filing an unverified answer and amended answer to the verified complaint. See 735 ILCS 5/2-605(b) (West 2016) (the allegation of the execution or assignment of any written instrument is admitted unless denied in a pleading verified by oath).

¶ 14 Documents attached to the motion to substitute the bank as the party plaintiff show that "Bayview Loan Servicing, LLC" assigned the mortgage to "Bayview Dispositions, LLC," which, in turn, assigned it to the bank. The borrowers argue that the assignment from "Bayview Loan Servicing, LLC" to "Bayview Dispositions, LLC" is defective on its face and a "nullity" because it was "improperly executed." As they do not elaborate on this argument or cite authority, we deem it forfeited. It is the appellant's duty to present a clear statement of its contentions on appeal, and contentions that are ill-defined and insufficiently presented violate Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017); *Helia Healthcare of Belleville, LLC v. Norwood*, 2017 IL App (1st) 152755, ¶ 20.

¶ 15 In any event, the bank produced the original note at the hearing on the amended motion for summary judgment. The bank, as the holder of the note, had the right to maintain the foreclosure action. In *Joslyn v. Joslyn*, 386 Ill. 387, 395 (1944), our supreme court held that the holder of a note can foreclose a mortgage securing such note, even if the holder has no beneficial interest in the note. For this reason, the borrowers' remaining arguments regarding standing also fail. In challenging the bank's standing, the borrowers had the obligation to present evidence that a party other than the bank was the rightful owner, which they failed to do. See *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 12 (where the plaintiff presented the original note to the court, it was the defendants' burden to present evidence that some person or entity other than the plaintiff was the holder of the note).

¶ 16 The borrowers next argue, without citation to authority, that Bayview's failure to reduce the amount owed by approximately $2,000 held in a suspense account when it filed the complaint rendered the proceedings void. A "suspense account" is an account for the temporary entry of charges or credits pending determination of their ultimate disposition, often used in

cases of doubtful accounts receivable. Webster's Third New World Dictionary 2303 (1993). While the borrowers acknowledge that the bank ultimately credited them with the monies held in the suspense account, they contend that Bayview's calculations in the complaint were incorrect, invalidating the entire foreclosure. Specifically, the borrowers contend that the plain language of section 15-1504(3)(J) of the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1504(3)(J) (West 2012)) requires a plaintiff to plead correct information concerning the amount of the default. The borrowers also contend that the application of the funds in the suspense account to reduce the principal balance owed was a condition precedent in the mortgage contract to filing a suit to foreclose the mortgage.

¶ 17 Section 15-1504 prescribes the form of complaint to be used in mortgage foreclosure actions. 735 ILCS 5/15-1504 (West 2012). The borrowers cite no authority for the proposition that pleading an incorrect mortgage balance voids the entire proceedings, and that issue is deemed forfeited. *Norwood*, 2017 IL App (1st) 152755, ¶ 20.

¶ 18 With respect to the argument that application of the funds was a condition precedent in the mortgage contract that had to be fulfilled before Bayview could file the foreclosure action, the borrowers cite paragraph 1 of the Uniform Covenants section of the mortgage, which provides that the lender will apply such funds "immediately prior to foreclosure." A "condition precedent" is one that must be performed before a contract becomes effective or which is to be performed before the other party is obligated to perform. *John J. Calnan Co. v. Talsma Builders, Inc.*, 77 Ill. App. 3d 221, 225 (1979). Nothing in the mortgage document requires the funds to be applied before filing suit. This argument is without merit.

¶ 19 The borrowers next contend that the Varela affidavit in support of the bank's amended motion for summary judgment was defective because the documents attached to the affidavit

were not "sworn or certified," and the affidavit was not based on the affiant's personal knowledge. Varela averred that she was a foreclosure supervisor for Bayview Loan Servicing, LLC, and that she was familiar with the business and its mode of operation. She also averred that she was familiar with the business records, kept in the ordinary course of business, pertaining to the servicing of mortgage loans, the collection of payments, and pursuing delinquencies. Varela further attested that Bayview was in possession of the original note and that its records were made contemporaneously with the transactions recorded by people with personal knowledge of those transactions. Varela described the software that Bayview used to record and track mortgage payments, and she averred that the documents attached to her affidavit were true and correct. Varela then supplied the specific amounts due on the loan. Varela signed the affidavit, which was notarized.

¶ 20 Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) governs the form and content of affidavits in support of, or in opposition to, summary judgment motions. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 334 (2002). Such affidavits cannot consist of conclusions, but must set forth evidentiary facts, as an affidavit submitted in the summary judgment context serves as a substitute for trial testimony. *Robidoux*, 201 Ill. 2d at 335. Specifically, Rule 191(a) provides that an affidavit shall be made on the personal knowledge of the affiant, shall set forth the facts with particularity, shall have attached sworn or certified copies of all documents upon which the affiant relies, and shall affirmatively show that the affiant, if called as a witness, can competently testify to those matters set forth in the affidavit.

¶ 21 In the mortgage foreclosure context, an affidavit by an employee of the lender that she is familiar with the business process and that the records were made in the regular course of business is admissible and supports summary judgment. *Bayview Loan Servicing, LLC v.*

Cornejo, 2015 IL App (3d) 140412, ¶ 19. In *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 43, this court held that an affidavit was sufficient where the affiant averred that she had access to the plaintiff's records as a vice-president with the plaintiff, she reviewed the loan records and had personal knowledge that they were kept in the ordinary course of business, the records were made at or near the time of the event by a person with knowledge, it was the regular practice to keep such records in the ordinary course of the plaintiff's business, and the affidavit provided specific amounts due and owing.

¶ 22 Here, the borrowers claim that the amounts due and owing were wrong, as Varela did not apply the monies in the suspension fund. However, that the borrowers disputed the correctness of her calculations does not affect the sufficiency of the affidavit. Applying *Cornejo* and *Szpara* to our case, it is clear that Varela's affidavit met the requirements of Rule 191.

¶ 23 The borrowers' reliance on *Doe v. Coe*, 2017 IL App (2d) 160875, is misplaced. In *Doe*, this court held that certain affidavits supporting the defendant's section 2-619 motion to dismiss the complaint were defective because the documents upon which the affiants relied were not attached to the affidavits. *Doe*, 2017 IL App (2d) 160875, ¶ 18. Here, the loan history documents were attached to Varela's affidavit, and she swore in her affidavit that the attached documents were "true and correct copies."

¶ 24 Next, the borrowers argue that the court deprived them of due process when it entered the judgment of foreclosure before it ruled on their motion to reconsider the grant of summary judgment in favor of the bank. The borrowers assert that the pendency of the motion to reconsider automatically stayed all further proceedings and that the court effectively denied the motion without considering it. The borrowers maintain that they were prejudiced because the court did not enlarge the period of redemption.

¶ 25 The borrowers timely filed a motion for reconsideration of the grant of summary judgment pursuant to section 2-1203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2016)), in which they asked the court to vacate the summary judgment. Then, on August 26, 2016, the borrowers filed another timely motion pursuant to section 2-1203 to vacate the order of judgment and sale, contending that the court entered that order in violation of the automatic stay in effect due to the pendency of the first section 2-1203 motion.

¶ 26 Section 2-1203(a) of the Code provides that in all cases tried without a jury, any party may, within 30 days after entry of the judgment, file a motion for a rehearing, retrial, modification of the judgment, or to vacate the judgment. 735 ILCS 5/2-1203(a) (West 2016); *Illinois Service Federal Savings & Loan Ass'n v. Manley*, 2015 IL App (1st) 143089, ¶ 29. A trial court's ruling on a motion for reconsideration will not be reversed absent an abuse of discretion. *Manley*, 2015 IL App (1st) 143089, ¶ 29.

¶ 27 Section 2-1203(b) of the Code provides that a motion filed pursuant to section 2-1203(a) stays enforcement of the judgment. 735 ILCS 5/2-1203(b) (West 2016). The borrowers assert that the court violated this section when it entered the judgment of foreclosure prior to ruling on the motion to reconsider the grant of summary judgment. The bank argues that section 2-1203(b) is inapplicable in mortgage foreclosure proceedings, but the cases they cite for that proposition do not so hold. The question is—assuming, without deciding, the applicability of the automatic-stay provision—how it affected the borrowers. Section 15-1603(b) of the IMFL governs redemptions. 735 ILCS 5/15-1603(b) (West 2016); *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 30. Generally, the redemption period extends three months from the date of entry of a judgment of foreclosure. *Rosestone*, 2013 IL App (1st) 123422, ¶ 30. Here, the

borrowers argue that the motion for reconsideration tolled the commencement of the redemption period until after the court disposed of the motion.

¶ 28 The court's grant of summary judgment in the bank's favor determined that the bank had the right to foreclose the mortgage. The court's order provided that the bank could present a judgment of foreclosure containing the amounts due and owing as set forth in the Varela affidavit. The court further ordered that the judgment could include the bank's fees and costs. Thus, the order granting summary judgment in the bank's favor was not an order capable of immediate execution, and the only thing to be stayed was the entry of a judgment of foreclosure. A judgment of foreclosure determines fewer than all the rights and liabilities in issue, because the court still has to enter a subsequent order approving the foreclosure sale and directing distribution. *Marion Metal & Roofing Co. v. Mark Twain Marine Industries, Inc.*, 114 Ill. App. 3d 33, 35 (1983). Even then, the borrowers' exercise of either the right of reinstatement or redemption could undo the foreclosure. See *HSBC Bank USA, N.A. v. Townsend*, 793 F.3d 771, 775 (7th Cir. 2015). In that event, there would be no execution upon the judgment. *Townsend*, 793 F.3d at 775. Thus, entry of the judgment of foreclosure had no effect on the pending motion for reconsideration. If the court had granted the motion, the court simply would have vacated the judgment of foreclosure.

¶ 29 Most important, the borrowers' redemption rights were not compromised. Courts take a dim view of any attempt to limit or extinguish the mortgagors' equitable right of redemption. *First Illinois National Bank v. Hans*, 143 Ill. App. 3d 1033, 1037 (1986). Thus, the borrowers suffered no harm by the entry of the judgment of foreclosure prior to the disposition of the motion for reconsideration. It appears that the borrowers' true complaint is that the court did not allow them to use the motions for reconsideration to buy more time.

¶ 30 The borrowers next contend that nine genuine issues of material fact precluded summary judgment. Seven issues relate to standing, one relates to the failure to apply the funds in the suspense account prior to Bayview filing suit, and one relates to the sufficiency of the Varela affidavit. We have already disposed of all but two of the issues raised in this argument.

¶ 31 The borrowers question the genuineness of the signatures of one Robert G. Hall on the allonges. They argue that his signatures appear not to match. However, Hall testified at his deposition that he signed the documents in question, and the borrowers have produced no evidence to the contrary.

¶ 32 The borrowers also contend that summary judgment was improper, because, according to certain deposition testimony, the allonges were not affixed to the note, in violation of section 3-204(a) of the Uniform Commercial Code. 810 ILCS 5/3-204(a) (West 2016). Section 3-204(a) defines "indorsement," and is inapposite. The borrowers also cite *Adams v. Madison Realty & Development, Inc.*, 853 F.2d 163 (3d Cir. 1988). That case is inapposite, as it concerned whether a good-faith purchaser was a holder in due course. *Adams*, 853 F.2d at 164. We strike this entire argument for the following reasons. Instead of citing to the relevant pages of the pertinent depositions in the record in accordance with Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017), which requires citation to the "pages of the record relied on," the borrowers cite their own pleadings in which they refer to those depositions, necessitating our combing the voluminous record to find the appropriate passages, which we decline to do. Moreover, to support their "argument," the borrowers cite inapposite authority. Further, in violation of Illinois Supreme Court Rule 6 (eff. July 1, 2011), they did not cite the National Reporter System when citing the *Adams* case, but instead cited journals that must have referenced that case. Where an appellant's

brief violates the requirements of our supreme court rules, we have the discretion to disregard the appellant's arguments. *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12.

¶ 33 Additionally, we note the following. Bayview filed the verified complaint in conformity with section 15-1504 of the IMFL. Under subsections (c), (d), and (e), the allegations of the complaint are deemed to include 12 more statutorily specified allegations, including that the obligor of the indebtedness was justly indebted in the amount of the indicated original indebtedness and that the exhibits attached are true and correct copies of the mortgage and note. 735 ILCS 5/15-1504(c) (West 2012); *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 42. If a defendant wishes to deny the authenticity of a mortgage or note, he must do so under oath. 735 ILCS 5/2-605(b) (West 2016); *Korzen*, 2013 IL App (1st) 130380, ¶ 41 (allegation of the execution or assignment of any written instrument is admitted unless denied in a pleading verified by oath).

¶ 34 Here, the borrowers filed an unverified answer. Then, after what the trial court deemed "protracted litigation involving discovery," the borrowers filed an unverified amended answer with affirmative defenses. Under section 2-605(b) of the Code and *Korzen*, the borrowers admitted both the execution of the mortgage and its various assignments. Also, once a pleading is verified, all subsequent pleadings must be verified, unless verification is excused. 735 ILCS 5/2-605(a) (West 2016); *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 39. Here, there is no indication that the trial court excused verification. Consequently, the borrowers' unverified answers are treated as nullities, the well-pleaded facts in the complaint are deemed admitted, and it was appropriate for the court to enter summary judgment and the judgment of foreclosure. See *Northbrook*, 2015 IL App (1st) 133426, ¶¶ 39, 40.

¶ 35 Lastly, the borrowers assert that the judgment must be reversed because the court treated them unfairly when it denied them leave to exceed the page limitations of a local rule. The borrowers do not spell out any prejudice. Therefore, we reject this argument.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 38 Affirmed.