2012 IL App (3d) 110663-U

Order filed November 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

ELECMAT REMINGTON, LLC, an Illinois Limited Liability Company, as Successor to Bank of America, National Association, as Successor by merger to LaSalle Bank National Association, as Trustee for the Registered Certificate Holders of Bear Sterns Commercial Mortgage Securities II Inc., Commercial Mortgage Pass-Through Certificates Series 2005-PWR10,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	Appeal No. 3-11-0663 Circuit No. 09-CH-2119
v.	)	
220 REMINGTON COMPANY LLC, an Illinois Limited Liability Company, GURRIE C. RHOADS, an Individual, UNKNOWN OWNERS and NON-RECORD CLAIMANTS,	)	
Defendants-Appellants.	)	Honorable Richard J. Siegel, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in holding defendants' responses to requests to admit amounted to judicial admissions and properly considered those admissions when entering summary judgment in favor of plaintiff.

¶ 2 This foreclosure action began with a predecessor of the plaintiff, Elecmat Remmington, LLC (Elecmat), initiating foreclosure proceedings against defendants, 220 Remington Company and Gurrie Rhoads, individually. Elecmat is a successor to, and assignee of, numerous other parties, which assumed the original lender's rights and duties. The circuit court of Will County entered a judgment of foreclosure and sale "in favor of the plaintiff and against borrower" for $7,295,201.67. Defendants appeal, claiming, *inter alia*, that the trial court erred when interpreting their responses to plaintiff's requests to admit as judicial admissions.

¶ 3 BACKGROUND

¶ 4 The genesis of this mortgage foreclosure action involves a transaction between Wells Fargo Bank, N.A. (Wells Fargo), and 220 Remington Company, LLC (220 Remington). On May 25, 2005, 220 Remington executed a promissory note while borrowing $6,000,000 from Wells Fargo.

¶ 5 Security for the note is a mortgage on a three-story office building with 79,675 rentable square feet located at 220 Remington Boulevard, Bollingbrook, Illinois. As additional security, defendants deposited a letter of credit, issued by Founders Bank, for the amount of $1,000,000. The beneficiary of the letter of credit was originally Wells Fargo. Section 6.22 of the mortgage provides that the "Mortgagee may at any time sell, assign, participate or securitize all or any

portion of the Mortgagee's rights and obligations under the Loan Documents." The mortgage also imposes a duty on 220 Remington, as mortgagor, to execute any documents and perform any acts necessary to perfect an assignment. Similarly, the promissory note indicates Wells Fargo had a right to assign the note, which, upon assignment, was binding on all "successor and assigns of the lender." Numerous parties assumed Wells Fargo's rights and duties during the life of this transaction leaving the current plaintiff as the last to assume rights and duties under the mortgage and promissory note.

¶ 6 The principal tenant of the mortgaged premises was Unicare Life and Health Insurance Company. Section 3.3 of exhibit A to the promissory note mandated that in the event Unicare terminated or failed to renew its lease, 220 Remington "shall deposit *** upon receipt from Tenant Unicare, the amount of termination proceeds payable in accordance with the Tenant Unicare Lease." In April and July of 2007, Unicare notified 220 Remington of its intent to terminate its lease effective January 2, 2008. Unicare paid a lease termination fee of $400,000.

¶ 7 A successor of Wells Fargo and predecessor of Elecmat, issued a letter to 220 Remington demanding that 220 Remington cure all defaults under the mortgage and promissory note. The letter indicates that payments due December 1, 2008, and January 1, 2009, were not received and, as such, the mortgage and note were in default. Defendant, 220 Remington, failed to cure the defaults, leading plaintiff to accelerate the promissory note and exercise its rights under the letter of credit on February 5, 2009.

¶ 8 Ultimately, Founders Bank released the $1,000,000 identified in the letter of credit to

plaintiff's predecessors. The entire $1,000,000 received from Founders Bank has been applied toward the amounts due on the loan and operating expenses on the property.

¶ 9 As of April 30, 2009, the total amounts due under the promissory note, including default interest, accrued interest and late fees totaled $5,996,042.73. On May 8, 2009, Bank of America as a successor to Wells Fargo, filed a two-count complaint for foreclosure of mortgage (count I) and breach of a written guaranty signed by defendant Rhoads (count II). On July 16, 2009, defendants filed their answer and affirmative defense. Defendants' singular affirmative defense alleges:

> "On or about December 10, 2008, defendant, Gurrie C. Rhoads, sought to get Wells Fargo to consider a loan modification, due to the world wide real estate market conditions. All attempts to discuss the loan modification were rebuffed as the 'loan was not yet in default.' The only way any modification would be discussed would be for the loan to go into default so that 'conversations could take place with the special servicer.' Thus, the plaintiffs encouraged the defendant to go into default, thereby causing additional interest, attorney fees and penalties to be unnecessarily incurred."

¶ 10 Plaintiff moved to strike the affirmative defense and, on October 27, 2009, the trial court granted plaintiff's motion, but gave defendants 21 days to replead. Defendants failed to replead any affirmative defense.

¶ 11 On December 17, 2009, Bank of America served its first request for admission of fact pursuant to Supreme Court Rule 216 on defendants. Ill. S. Ct. R. 216 (eff. May 30, 2008). Plaintiff's submission includes 44 requests. Requests Nos. 1 through 39 ask defendants to admit the failure to make monthly payments due from December of 2008 through December of 2009. These 39 requests utilized the following format:

> "1. Admit that the monthly payment for December 2008 was not received by the plaintiff before December 5, 2008.
>
> 2. Admit that the monthly payment for December 2008 was not sent by you before December 5, 2008.
>
> 3. Admit that the monthly payment for December 2008 has not been made.
>
> 4. Admit that the monthly payment for January 2009 was not received by the plaintiff before January 5, 2009.
>
> 5. Admit that the monthly payment for January 2009 was not sent by you before January 5, 2009.
>
> 6. Admit that the monthly payment for January 2009 has not been made."

¶ 12 Request No. 40 asked defendants to admit that no payment had been made on the loan since November 2008. Request Nos. 41 and 42 asked defendants to admit they received a letter dated February 5, 2009, discussing the acceleration of the loan. Request Nos. 43 and 44 asked

defendants to admit that one of Wells Fargo's assigns "is the Special Servicer" for the plaintiff and, as such, "has the power and authority to administer the loan for plaintiff and to enforce" its terms.

¶ 13 On January 22, 2010, defendants filed a motion to extend time to answer plaintiff's request for admission of facts. No certificate of service or notice of filing is included with defendants' January 22, 2010, motion. The record indicates that defendants filed their notice of filing of the motion to extend time on April 5, 2010. The notice of filing indicates that defendants did not serve the motion upon plaintiff until April 1, 2010. The notice of filing did not indicate a date on which defendants intended to present their motion to extend time to the trial court.

¶ 14 On April 22, 2010, plaintiff filed its motion for summary judgment, scheduling the original hearing on the motion for May 11, 2010. The motion incorporated its request for admissions and alleged that no timely objections or response had been served in compliance with Rule 216(c). Ill. S. Ct. R. 216(c) (eff. May 30, 2008). Bank officer Jeffrey Row's affidavit supported the motion setting forth the extent of defaults and calculation of the balance due.

¶ 15 Following a change of counsel, defendants filed a motion on June 8, 2010, acknowledging that defendants never responded to plaintiff's request to admit. Defendants' motion alleges that prior counsel did not give defendants the requests to admit. The motion further claims that prior counsel "discovered that he inadvertently had missed the response time." The motion notes that while counsel filed a motion to extend the time to answer the requests on

January 22, 2010, "he apparently did not mail out a notice of motion to counsel for the plaintiff and the notice was not sent out until April 1, 2010." Defendants claimed their attorney's failure to file a timely response to the requests to admit amounted to "good cause" to excuse their failure to comply file answers thereto within 28 days as mandated by Supreme Court Rule 216 (Ill. S. Ct. Rule 216 (eff. Jan 1, 2011)) and, as such, requested that they be granted an extension of time in which to answer the requests.

¶ 16 The trial court granted defendants' motion, allowing them leave to file responses to plaintiff's request to admit. Defendants admitted that the monthly payment for December 2008 was not received by plaintiff before December 5, 2008, and that they did not send the payment prior to December 5, 2008. Defendants further admitted they neither sent, nor did plaintiff receive, the payment for January of 2009 prior to January 5, 2009. Defendants neither admitted nor denied the remaining requests, instead replying "We do not admit" for all other requests save Nos. 42, 43 and 44.

¶ 17 Request No. 42 asked defendants to acknowledge that the plaintiff accelerated the loan via letter dated February 5, 2009. Defendants responded that the "letter speaks for itself," neither admitting nor denying the request. Request Nos. 43 and 44 ask defendants to admit that an assignee of Wells Fargo "is the Special Servicer" for plaintiff and, as such, "has the power and authority to administer the loan for plaintiff and to enforce the terms of the loan documents." Defendants claimed not to "know if this is true or false" and "therefore decline to admit" either request.

¶ 18 Plaintiff filed a motion requesting that the trial court deem defendants' responses as admissions of each request due to the failure of defendants to file an objection or answer which complied with Rule 216(c). Defendants filed no response to plaintiff's motion. On January 3, 2011, the trial court granted plaintiff's "motion to deem admitted certain requests to admit." In doing so, the trial court commented on the lengthy time period between the filing of the requests and the answering of the requests.

¶ 19 The trial court specifically noted:

> "A review of these proposed answers of the defendant are replete with the response 'We do not admit.' This response is not in compliance with Supreme Court Rule 216(c) which requires a sworn statement specifically denying the matters to which admission is requested or a detailed reason why a specific admission or denial is not possible. Also, no objections to the Requests were found by the Court. Neither has Defendant chosen to file a written response to the motion to deem admitted. Therefore the requests to admit are deemed to be judicial admissions by the defendant which effectively take these issues out of controversy."

¶ 20 The parties "briefed the issue of the interplay between defendant's judicial admissions and the defendants' later particular sworn assertions." After considering the parties' submissions and evidence presented, the trial court granted plaintiff's motion for summary judgment in a "decision and judgment order" dated March 25, 2011.

¶ 21 On May 24, 2011, defendants filed a motion to reconsider the court's granting of plaintiff's motion for summary judgment. The trial court denied defendants' motion to reconsider on June 17, 2011. On August 5, 2011, plaintiff filed a motion for entry of judgment of foreclosure and sale. An affidavit attached to the motion indicated that the amounts due under the loan totaled $7,286.035.85, which included all property protection advances and attorney's fees. On August 16, 2011, the trial court entered its judgment of foreclosure and sale, including a money judgment of $7,295.201.67. The judgment included language pursuant to Supreme Court Rule 304(a) noting there was no just cause for delay in enforcement of the judgment or appeal.

¶ 22 Defendants filed a notice of appeal on September 14, 2011, indicating an intent to "appeal from the judgment of foreclosure and sale entered on August 16, 2011." This appeal followed.

¶ 23 ANALYSIS

¶ 24 Defendants ask us to "reverse the judgment of foreclosure granted in favor of plaintiff." Defendants' arguments, however, are directed against prior rulings and not the judgment of foreclosure entered on August 16, 2011, itself. Specifically, defendants claim the trial court "erred in ruling that defendants' answers of 'We do not admit' (to some of plaintiff's Rule 216 requests to admit) constituted a judicial admission in each instance." This claim of defendants attacks the trial court's January 3, 2011, order.

¶ 25 Defendants also claim that the trial court erred "in granting the plaintiff summary judgment on the issue of foreclosure when defendants alleged facts showing that plaintiff was not acting in good faith under the terms of its own note and mortgage." This claim on appeal

seemingly attacks the trial court's March 25, 2011.

¶ 26 A. Jurisdiction

¶ 27 The fact that defendants did not file their notice of appeal until September 14, 2011, yet seem to only attack orders dated January 3, 2011, and March 25, 2011, has led the plaintiff to question our jurisdiction. Plaintiff notes that defendants' notice of appeal states they "appeal from the judgment of foreclosure and sale entered on August 16, 2011" and fails to identify any other order. Moreover, plaintiff claims the manner in which defendants have framed their arguments on appeal illustrate that the January 3, 2011, and March 25, 2011, orders are independent of the judgment of foreclosure from which defendants appeal.

¶ 28 Generally, a judgment ordering the foreclosure of a mortgage is not final and appealable until the trial court enters an order approving the sale and directing the distribution. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 260 (2008) (citing *In re Marriage of Verdung*, 126 Ill. 2d. 542 (1989)). This is so since orders prior to the order approving the sale and directing the distribution do not dispose of all the issues between the parties and do not terminate the litigation. *Fankhauser*, 383 Ill. App. 3d at 260. However, "a judgment of foreclosure is final and immediately appealable where it contains language pursuant to Rule 304(a) [citation] that there is no just reason for delaying enforcement or appeal." *Id*.

¶ 29 In the case at bar, the trial court's judgment of foreclosure dated August 16, 2011, contains Rule 304(a) language and therefore is an appealable order. The defendants' notice of appeal properly invoked the jurisdiction of this court.

¶ 30 It is true, as plaintiff notes, that a "notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts thereof specified in the notice of appeal." *In re Marriage of King*, 336 Ill. App. 3d 83, 86 (2002). It is also true that a "notice of appeal is to be liberally construed and an appeal from a subsequent final judgment will draw into question all prior nonfinal rulings and final but nonappealable orders that produced the judgment." *Id.*; see also *American Federation of State, County & Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 326 (1996); *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979).

¶ 31 Plaintiff claims that the ruling on its motions to admit facts and summary judgment did not "produce the judgment" of foreclosure. However, it cites no authority to support that conclusion. It bases that assertion on the fact that defendants treat each ruling separately in their arguments to this court. An order not specified in the notice of appeal is "reviewable if it is a step in the procedural progression to the judgment specified in the notice of appeal." (Internal quotation marks omitted.) *In re Marriage of King*, 336 Ill. App. 3d at 87. Undoubtedly, the trial court's orders of January 3, 2011, and March 25, 2011, while not final and appealable in and of themselves, are reviewable as they were steps in the procedural progression leading to the judgment of foreclosure. The January 3 order admitted certain facts given defendants' failure to comply with Rule 216. The March 25 order held that, given the admissions, plaintiff was entitled to foreclose as a matter of law. We hold we have jurisdiction to review these orders as they were steps in the procedural progression to the judgment of foreclosure.

¶ 32 B. Rule 216, Summary Judgment and Judgment of Foreclosure

¶ 33 Turning to the merits of this appeal, defendants claim the trial court erred as a matter of law when determining that their answers of "We do not admit" amounted to judicial admissions. To support this contention, defendants recite hornbook language regarding judicial admissions. That is, judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). For a statement to constitute a judicial admission, it must be clear, unequivocal and uniquely within the party's personal knowledge. *Serrano*, 406 Ill. App. 3d 900, 907 (2011). The statement must also be an intentional statement which relates to concrete facts and not an inference or unclear summary. *Id.*

¶ 34 Defendants posit that their answers of "we do not admit" are insufficiently definitive to constitute judicial admissions. In concluding that the trial court erred when treating their answers as judicial admissions, defendants contrast their equivocating answers against the axiom that a statement "must be clear, unequivocal, and uniquely within the party's personal knowledge" to constitute a judicial admission. Defendants' analysis fails to comprehend the effect of their equivocation.

¶ 35 Supreme Court Rule 216(c) states:

> "Admission in the Absence of Denial. Each of the matters of fact *** which admission is requested is admitted unless *** the party

> to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the matter is otherwise improper in whole or in part." Ill. S. Ct. R. 216(c) (eff. May 30, 2008).

¶ 36 The trial court very specifically, in its January 3, 2011, order explained that the answers "we do not admit" fail to comply "with Rule 216(c), which requires a sworn statement specifically denying the matters to which admission is requested or a detailed reason why a specific admission or denial is not possible." The trial court's assessment is correct.

¶ 37 Defendants' answers neither deny the requests to admit nor do they set forth in detail reasons why defendants cannot truthfully admit or deny those matters. Moreover, despite having months to do so, defendants filed no written objections to the requests.

¶ 38 In *Banks v. United Insurance Co. of America*, 28 Ill. App. 3d 60 (1975), the court found a party's response failed to properly deny requests to admit. *Id.* at 62. The court noted the party's "reply was deficient" for failing "to specifically deny the matters requested or to adequately explain her refusal" to deny the requests. *Id.* *Banks* involved a suit brought by a beneficiary of life insurance policies. *Id.* at 61. The beneficiary was the daughter of the decedent seeking payment on the policies. *Id.* The insurance company denied payment based on decedent's failure

to disclose serious preexisting conditions. *Id.* The insurance company served requests to admit on the daughter/beneficiary asking that she admit the decedent died from an illness for which the decedent had been hospitalized repeatedly prior to the date the policy issued. *Id.* at 62. The daughter responded that "she has no knowledge of the exact dates, but demands strict proof thereof." *Id.* at 62. The *Banks* court found that the daughter's "patently evasive responses contravened Rule 216 ***." *Id.*

¶ 39 Similarly, defendants' patently evasive answers contravene the rule. Defendants know full well whether they sent their monthly payments and, if they did, on which date they mailed them. Nevertheless, defendants answered the requests in the following manner:

> " 20. Admit the monthly payment for June 2009 was not sent by you before June 5, 2009.
>
> Answer: We do not admit."

¶ 40 Defendants' answers do not equate to a "sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or [a] written objection[] on the ground that some or all of the requested admissions are privileged or irrelevant" as required by Rule 216(c). Ill. S. Ct. R. 216(c) (eff. May 30, 2008). As such, we hold the trial court properly found that defendants' answers to the requests to admit did not comply with Rule 216(c) and, therefore, admitted the facts contained within the requests. Again, defendants confuse the equivocation of their answers with the effect of the facts admitted.

¶ 41 The facts admitted by defendants, given their failure to properly deny or object to them, show that none of the monthly payments from December of 2008 through December of 2009 had "been made." Correspondingly, the admissions further show that plaintiff had "not received" the monthly payments from December of 2008 through December of 2009 and that "no payments have been made on this loan since November 2008." These admissions are unequivocal statements. They are not a matter of opinion, estimate, inference or uncertain summary. As such, they qualify as a judicial admission and we find the trial court committed no error when treating them as such.

¶ 42 Defendants argue that even should we find that they admitted the facts contained within the requests to admit, the trial court still erred in preventing them from further exploring the issue of whether the "loan was continuing in default." Defendants argue that none of the requested admissions "were so plenary as to render other evidence wholly needless." To support this contention, defendants discuss three cases involving judicial admissions: *Serrano v. Rotman*, 406 Ill. App. 3d 900 (2011); *Smith v. Pavlovich*, 394 Ill. App. 3d 458 (2009); and *Rath v. Carbondale Nursing & Rehabilitation Center, Inc*., 374 Ill. App. 3d 536 (2007).

¶ 43 The three cases cited by defendants support the contention that even when facts are admitted by a party, further explanation regarding what effect those facts have on the ultimate issues in the litigation is not always precluded. In *Smith v. Pavlovich*, 394 Ill. App. 3d 458 (2009), defendant answered a complaint admitting "the paragraph alleging that at all relevant times he had undertaken to provide diagnosis, care, and treatment to" the decedent. *Id*. at 467.

Plaintiff asserted this admission constituted an unrebuttable acknowledgment that a physician-patient relationship existed between defendant and the decedent "during her visits to the Carbondale Clinic." *Id.* at 468. The *Smith* court held:

> "In the circumstances of this case we cannot conclude that the circuit court abused its discretion in ruling that [defendant's] answer did not constitute a binding judicial admission that a physician-patient relationship existed during [decedent's] visits to the Carbondale Clinic. The only relevant date mentioned in the plaintiff's complaint was the date of [decedent's] death as a result of infection. At the time, [defendant] was actually [decedent's] physician; he had been called to the emergency room of the hospital when [decedent] was brought in suffering from the infection that claimed her life. Accordingly, he admitted that he did undertake to diagnose, care for, and treat [decedent]. He had never before seen, examined, or treated [decedent]. The complaint made no mention of any other dates, nor did it refer to [decedent's] visits to the Carbondale Clinic. Before a statement can be held to be a binding judicial admission, it must be given a meaning consistent with the context in which it was found [citation], and it must be considered in relation to the other testimony and evidence

presented." *Id.* at 468-69.

¶ 44 The next case cited by defendants, *Serrano,* involved a defendant doctor who admitted one of plaintiff's requests. *Serrano*, 406 Ill. App. 3d at 907. The court found that the "Rule 216 request to admit at issue was neither clear nor unequivocal. Rather, it was ambiguous. As such, the trial court opted to treat the statement as an evidentiary admission rather than a judicial admission, allowing [defendant] to explain the basis for his admission." *Id.* at 907. The admitted fact indicated the doctor " 'elected not to administer Factor IX' " to the patient. *Id.* The trial court admitted the fact into evidence then allowed the doctor to explain that he "had no knowledge that it existed, nor that plaintiff was Factor IX deficient" at the time of treatment. *Id.*

¶ 45 Finally, in *Rath*, a defendant nursing home "admitted numerous negligent acts" in response to plaintiff's requests to admit. *Rath*, 374 Ill. App. 3d at 537. The *Rath* court did not detail the actual wording of either the requests to admit or defendant's answers thereto. *Id.* The court noted, however, that while admitting to engaging in certain negligent acts, defendant "flatly denied both direct and proximate cause." *Id.* at 540. Therefore, the court noted that "[d]espite the admission of negligent conduct, a discussion of the care rendered to [plaintiff] was still necessary to determine the merits of plaintiff's claim. In other words, the admissions were limited in scope." *Id.* at 539. Therefore, the *Rath* court held that despite the admission of certain negligent acts, the "trial court did not abuse its discretion by allowing testimony describing the treatment of [the plaintiff]." *Id.* at 542.

¶ 46 Undoubtedly, the defendants herein are correct. Even though facts are deemed admitted

by operation of Rule 216, admission of those facts does not always preclude a party from discussing what effect the facts have on the ultimate issues in the litigation.

¶ 47 In the case at bar, the facts admitted include acknowledgment that "no payments have been made on this loan since November 2008." Defendants also admitted, by application of their responses to the requests to admit, that plaintiff "had accelerated the loan" by "letter dated February 5, 2009" and that an assignee of Wells Fargo had "the power and authority to administer the loan for plaintiff and to enforce" its terms. As these facts were properly admitted by the trial court, they had "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). Defendants argue that even though facts were admitted showing they made no payments after November 2008 and the loan was accelerated, sufficient evidence existed to create a question of material fact as whether the loan was, in fact, in default. We disagree.

¶ 48 As noted by the very cases cited by defendants, these facts must be viewed in the "context in which" they are found. *Smith*, 394 Ill. App. 3d at 468-69. Section 7.1(a)(i) of the mortgage expressly provides that a default occurs when the "Borrower shall fail to (aa) pay when due any sums which by their express terms require immediate payment without any grace period or sums which are payable on the Maturity Date, or (bb) pay within 5 days when due any other sums payable under the Note, this Mortgage or any of the other Loan Documents, including without limitation, monthly payment due under the Note." Moreover, section 7.6 states that one cannot

cure a default by "the application of any collected sum to any Secured Obligation ***." The facts admitted unequivocally show the loan was in default.

¶ 49 While defendants argue facts exist to show that drawing down the letter of credit "cured" any alleged default, section 7.6 of the mortgage expressly states that "the application of any collected sum to any secured obligation" cannot be used to "cure or waive any default ***." The facts admitted show that defendants failed to make timely payments for more than a year, the loan was in default and that plaintiff properly accelerated the note as was its right. As such, we find the trial court did not err in finding defendants defaulted on the loan and, therefore, entering summary judgment in favor of plaintiff.

¶ 50 B. Illinois Mortgage Foreclosure Law

¶ 51 Defendants assert summary judgment is inappropriate in this matter as a question of fact exists as to whether or not plaintiff complied with section 15-1504 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1504 (West 2010)) when filing the complaint. Specifically, defendants claim section 15-1504 mandates that "a plaintiff mortgagee must state the capacity in which plaintiff brings this foreclosure" and failure to do so "is material to plaintiff's right to a judgment of foreclosure." Given this perceived fundamental flaw in the complaint, defendants posit that summary judgment was inappropriate. The sole authority cited by defendant for this proposition is the statute itself which reads:

> "(a) Form of Complaint. A foreclosure complaint may be in substantially the following form:

* * *

(3) Information containing the mortgage:

* * *

(N) Capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate): ***" 735 ILCS 5/15-1504(a)(3)(N) (West 2010).

¶ 52 These same arguments were leveled against the plaintiff in *Mortgage Electronic Registration System, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010) (*MERS*). In *MERS*, the court noted defendant did "not contest whether MERS had the right to file the lawsuit as the mortgagee or nominee of the real party in interest. Rather, defendant – noting that MERS did not sue in the capacity of an agent of a principle–contends that MERS failed to comply with section 15-1504(a)(3)(N) *** which provides that a plaintiff's foreclosure complaint may indicate the capacity in which the plaintiff brings the action. *** Defendant, without citation to any relevant authority, claims that the Foreclosure Law requires a plaintiff to identify the capacity in which it prosecutes it lawsuit and this 'rule' is the basis for the court's subject matter jurisdiction." *Id.* at 6.

¶ 53 Although the *MERS* court held defendant waived the issue, it also found defendant's argument without merit where the record established that MERS had "beneficial ownership of

the note" and that "Illinois does not require that a foreclosure be filed by the owner of the note and mortgage. [Citations]." *Id.* at 7.

¶ 54 Similarly, the record before us establishes that each of the various plaintiffs had a beneficial interest in the note and mortgage. The statute does not say that a plaintiff *must*, as defendants assert, identify the capacity in which they bring the action, only that they *may* do so. 735 ILCS 5/15-1504(a)(3)(N) (West 2010). When "the substantive requirements" of the statute are met, "a technical defect *** does not require dismissal of the foreclosure action." *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 25.

¶ 55 The record reflects that the note at issue in this matter was executed in favor of Wells Fargo Bank, National Association and states that it was secured by a mortgage on certain property in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Wells Fargo Bank. Simultaneous with the execution of the promissory note, on May 25, 2005, defendant executed a mortgage, absolute assignment of rents and leases and security agreement in favor of MERS. On April 9, 2009, MERS, as nominee for Wells Fargo, assigned the note and mortgage to Bank of America and recorded that assignment with the Will County Recorder on April 27, 2009. Bank of America filed the foreclosure action on May 8, 2009.

¶ 56 Footnote one of the complaint indicates that pursuant to the "merger of Bank of America, N.A. and LaSalle Bank, N.A., Bank of America, N.A. is now the Trustee for this Loan." The record supports plaintiff's contention that Bank of America possessed a beneficial ownership of the note. As such, we find defendants' argument, that the trial court erred in entering summary

judgment in favor of plaintiff given the failure to properly identify the capacity in which the suit was brought, is without merit.

¶ 57 We also disagree with defendants' assertion that the affidavit of Gurrie Rhoads, filed on July 8, 2010, creates a triable question of fact regarding plaintiff's capacity to bring the foreclosure action. Defendants argue that paragraph 25 of the affidavit "clearly disputes the validity of the conveyances." However, in paragraph 25, Rhoads acknowledges that, "There is a conveyance to Plaintiff in the PSA [Pooling and Servicing Agreement] ***." While paragraph 25 continues by noting that the "PSA does not appear to say how and when the Depositor may have acquired" its rights, defendants have failed to supply any authority indicating that such an assertion renders a complaint invalid for violating section 15-1504 of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1504 (West 2010).

¶ 58 C. Good Faith and Fair Dealing

¶ 59 Defendants' final argument is that the trial court erred in granting plaintiff's motion for summary judgment thereby improperly prohibiting defendants from litigating "essential" factual questions concerning the "implied covenant of good faith." Plaintiff argues defendants failed to properly present this argument below and, therefore it is waived. Defendants counter that they did raise the issue below, identifying two places in the record on appeal where their assertion of the issue can be found.

¶ 60 In a "sur-response" to plaintiff's motion for summary judgment, defendants asserted that every "contract in the State of Illinois is subject to good faith and fair dealing. Each party is to

exercise good faith in dealing with the other party. The affidavit of Rhoads clearly indicates plaintiffs failed in this respect. They have failed to give Rhoads notices regarding assignments. They have failed to give Rhoads notices of optional or discretionary declarations of default by the lender." Then, in defendants' response to plaintiff's motion to strike Rhoads' affidavit, they again state that "contracts in Illinois are governed by a covenant of good faith and fair dealing. [Citations.] All of these cases state that where a bank has discretion, it cannot exercise that discretion in bad faith." Clearly, defendants asserted below that failure to give notice of the assignments breached the covenant of good faith and fair dealing.

¶ 61 Nevertheless, we find defendants have failed to provide authority for their specific argument to this court and, as such, find it forfeited. See Ill. S. Ct. Rule 341(h)(7) (eff. July 1, 2008). Defendants specifically argue that Rhoads' affidavit establishes a question of fact as to whether they were ever notified of assignment of the note and mortgage. While every "contract contains an implied covenant of good faith and fair dealing, *** [t]he covenant of good faith requires that a party vested with contractual discretion exercise that discretion reasonably, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties." *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). "Parties to a contract, however, are entitled to enforce the terms of the contract to the letter and an implied covenant of good faith cannot overrule or modify the express terms of the contract." *Id.*

¶ 62 Section 6.22 of the mortgage allows for assignment "at any time *** all or any portion of

the mortgagee's right and obligations under the loan documents." Defendants have failed to identify any provision mandating notice to them of such an assignment. Defendants cite to *Resolution Trust Corp. v. Hotlzman*, 248 Ill. App. 3d 105 (1993), claiming it supports the assertion that failure to give notice amounted to a breach of the covenant of good faith and fair dealing.

¶ 63 The *Resolution Trust* court found the trial court committed no error in "denying defendants leave to file an amended affirmative defense and counterclaim alleging plaintiff's breach of a duty of good faith and fair dealing." *Id.* at 108. The *Resolution Trust* defendants asked the plaintiff to "recast" the loan by releasing its security interest in the property so that plaintiff could turn the apartments into condominiums. *Id.* at 109. Failing to do so, defendants claimed, amounted to a breach of a duty of good faith and fair dealing. *Id*. The court disagreed, finding "nothing in the mortgage documents requires a lender to soften its position or its heart. When the terms of a contract are clear and unambiguous, they must be enforced as written and no court can rewrite a contract to provide a better bargain to suit one of the parties." *Id*. at 112. The court went on to note that parties "are entitled to enforce the terms of negotiated contracts to the letter without being mulcted for lack of good faith." *Id*. at 113. As nothing in the loan documents required the lender to release its security interest before being paid in full, no colorable affirmative defense for breaching the covenant of good faith and fair dealing existed. *Id.*

¶ 64 Similarly, defendants acknowledge nothing in the loan documents requires the lender, its

agents or assigns to notify the borrower of an assignment. The loan documents clearly give the lender, its agents and assigns the ability to assign their rights without notice to or consent of the borrower. Defendants have provided no authority to this court supporting their contention that exercising that right forms a colorable claim for breach of the covenant of good faith and fair dealing. Therefore, we find the argument forfeited.

¶ 65 CONCLUSION

¶ 66 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 67 Affirmed.