

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (1st) 132868-U

FIFTH DIVISION
December 31, 2014

No. 1-13-2868

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
FIRST JUDICIAL DISTRICT

HSBC BANK USA, N.A.,	)	Appeal from the Circuit Court
	)	of Cook County,
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CH 26389
	)	
AIRRION BLAKE,	)	Honorable
	)	John Ehrlich,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Where defendant previously raised the issues of whether the circuit court had subject matter jurisdiction over the foreclosure action and whether the plaintiff bank had standing to bring the foreclosure action, defendant was barred from raising the issues in the present appeal under the law-of-the-case doctrine; and (2) Where defendant raised the question of whether the plaintiff bank filed its foreclosure complaint in violation of an automatic bankruptcy stay for the first time on appeal and the issue was unsupported by the record or by reasoned argument, the issue was forfeited.
- ¶ 2 Plaintiff HSBC Bank filed a mortgage foreclosure complaint against defendant Airrion Blake in July 2009. The trial court granted summary judgment against defendant in August 2010

and also entered a judgment for foreclosure and sale at that time. Defendant now appeals from the dismissal of his January 2013 petition to vacate a void order pursuant to section 2-1401(f) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(f) (West 2012)), arguing that: (1) the circuit court lacked subject matter jurisdiction over the foreclosure complaint because HSBC did not have standing to bring suit against defendant; and (2) the circuit court lacked subject matter jurisdiction over the foreclosure complaint because the complaint was filed in violation of an automatic bankruptcy stay. We affirm.

¶ 3 The following background facts are taken from our previous appellate order. See *HSBC Bank USA, N.A. v. Blake*, 2012 IL App (1st) 113401-U (unpublished order under Supreme Court Rule 23). On July 31, 2009, HSBC filed its complaint to foreclose mortgage against defendant Airrion Blake, and other defendants not party to this appeal, pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2008)). The complaint alleged as follows: on March 21, 2006, defendant, as mortgagor, executed a mortgage in the amount of \$143,920 to Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for Fieldstone Mortgage Company," for the property commonly known as 2918 190th Street in Lansing, Illinois (Property). HSBC claimed that it was the trustee for the holder of the mortgage and note and that defendant was in default for monthly payments from November 2008 through the present. Ultimately, HSBC requested a judgment of foreclosure and sale.

¶ 4 Copies of the mortgage and the note were attached to the complaint. The mortgage was prepared by the Fieldstone Mortgage Company on March 21, 2006. It defined Airrion Blake as the borrower, Fieldstone as the lender, and MERS as the mortgagee "acting solely as a nominee for Lender and Lender's successors and assigns." It also provided that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times

without prior notice to Borrower." The note was endorsed by Aletha L. Clyborn, assistant vice president of the Fieldstone Mortgage Company, to be paid to "the order of HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage Investment Trust, Series 2006-1." Both the mortgage and note were signed by defendant and initialed by him on each page.

¶ 5 On September 25, 2009, defendant filed a notice of motion indicating that he would appear before the trial court on October 25, 2009, to present his "Proof of Claim/Opportunity to Cure." Attached was an "Affidavit of Fact" in which defendant demanded that HSBC provide "proof of claim, original mortgage note with [with wet ink signature] and title page" and an "Affidavit of Negative Averment, Opportunity to Cure, and Counterclaim." On January 13, 2010, the trial court granted HSBC's motion to strike "all pleadings and other papers previously filed" by defendant and gave defendant until February 17, 2010, to file an appearance and answer to HSBC's complaint.

¶ 6 On February 1, 2010, defendant filed a verified answer to HSBC's complaint, "affirmative defenses," and a second answer. HSBC filed a motion to strike defendant's affirmative defenses and second answer on February 11, 2010. The trial court granted HSBC's motion to strike on March 5, 2010, and gave defendant until April 2, 2010, to file affirmative defenses.

¶ 7 On March 4, 2010, HSBC filed its motion for summary judgment against defendant, alleging that it was the owner of the note and mortgage to the Property and that defendant was in default for the monthly payments from November 2008 through the present. HSBC attached the assignment of the mortgage to the motion. The assignment states, in pertinent part:

"For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, Mortgage Electronic Registration Systems, Inc., M.E.R.S. INC. AS NOMINEE FOR FIELDSTONE MORTGAGE COMPANY its successors and/or assigns *** did hereby assign, transfer, convey without warranties and without recourse, set over and deliver to HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE OF THE FIELDSTONE MORTGAGE INVESTMENT TRUST, SERIES 2006-1 *** prior to 6/24/09, the following mortgage [of the Property]."

The assignment was signed by Jill Rein, a certifying officer for MERS. It was notarized in Cook County in the state of Illinois on August 5, 2009, and recorded with the Cook County Recorder of Deeds on August 14, 2009 (2009 assignment).

¶ 8 On August 2, 2010, the trial court granted HSBC's motion for summary judgment against defendant, found defendant to be in default, and ordered a judgment of foreclosure and sale of the Property. A notice of sale was filed for the Property on June 21, 2011, and the trial court approved the sale on July 22, 2011.

¶ 9 In October 2011, defendant filed a "Petition in the Form of a Motion to Vacate Void Order" pursuant to section 2-1401. In it, defendant alleged that: (1) the trial court lacked subject matter jurisdiction because HSBC bank "never presented the original signed mortgage note which is needed for the right to foreclose"; and (2) the trial court lacked personal jurisdiction over defendant because he had not properly been served. The trial court dismissed defendant's

petition in November 2011. On appeal, defendant argued, in pertinent part, that the trial court lacked subject matter jurisdiction because HSBC Bank lacked standing to file its claim.

¶ 10 In affirming the circuit court's dismissal of defendant's petition, we noted that "defendant incorrectly characterizes his contention as a lack of subject matter jurisdiction based on a lack of standing when, in fact, subject matter jurisdiction and standing are two separate issues." *Blake*, 2012 IL App (1st) 113401-U, ¶ 18. We went on to find that the court had subject matter jurisdiction over HSBC's foreclosure complaint and that HSBC Bank had standing to bring the complaint before the circuit court. *Id.* ¶¶ 20, 25.

¶ 11 In January 2013, defendant filed a "Verified Petition to Vacate Order as Void Under 735 ILCS 5/2-1401(f)," alleging that HSBC Bank "failed to state a cause of action and committed fraud upon the court." More specifically, defendant claimed that, as an assignee, HSBC Bank failed to allege its status as assignee as required by section 2-403 of the Code. Defendant also argued that HSBC Bank committed fraud upon the court by giving the appearance that it had the right to sue because: (1) Fieldstone, the original lender, was not a party to the trust agreement of which HSBC was the trustee and, therefore, Fieldstone lacked the authority to transfer the note to HSBC; (2) the endorsement on the note did not conform to the endorsement format required by the Mortgage Loan Purchase Agreement (the PSA) that governed the trust; (3) HSBC concealed that Fieldstone had filed for bankruptcy protection and should have alleged whether Fieldstone's bankruptcy trustee permitted the transfer of the note to HSBC; and (4) the written assignment of the mortgage improperly stated the date of the assignment.

¶ 12 In support of his petition, defendant attached the 2009 assignment and approximately nine pages from the PSA. Defendant also attached an official form from the United States Bankruptcy Court for the District of Maryland naming Fieldstone as the debtor and electronically

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signed and dated "11/23/07" by the president and CEO of Fieldstone, Michael J. Sonnenfeld. At the top of each page of the form, there is typed information reading "Case 07-21814," "Doc 1," "Filed 11/23/07." Notably, there is no indication that the document was ever filed; the form does not have an official court filing stamp. Defendant also attached a second assignment which indicates, in pertinent part:

"For and in consideration of Ten Dollars (\$10.00) and other value received, Mortgage Electronic Registration Systems, Inc., AS NOMINEE FOR FIELDSTONE MORTGAGE COMPANY, its successors and/or assigns (hereinafter M.E.R.S., INC.), does hereby assign, transfer, convey without warranties and without recourse; set over and deliver to HSBC BANK USA, NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR FIELDSTONE MORTGAGE INVESTMENT TRUST (FMLT) SERIES 2006-1 (hereinafter called the Assignee), its successors and assigns, on 04/13/07, the following described mortgage [of the Property]."

The assignment was signed by Marti Noriega and Denise Bailey, vice presidents of MERS, and notarized in Harris County in the state of Texas. It was recorded with the Cook County Recorder of Deeds on June 27, 2007 (2007 assignment).

¶ 13 In August 2013, the circuit court denied defendant's petition.

¶ 14 On appeal, defendant first contends that the circuit court lacked subject matter jurisdiction over the foreclosure because HSBC committed fraud upon the court by misrepresenting or concealing facts concerning its standing to bring suit to foreclose mortgage

against defendant. Specifically, defendant alleges that the note and assignments included in the record were fraudulent because they failed to comply with the endorsement requirements in the PSA and that HSBC created the fraudulent documents to create the appearance that it had standing to bring the action and that the circuit court had subject matter jurisdiction over the action.

¶ 15 Under section 2-1401, a petitioner may request relief from a final judgment if the petition is filed more than 30 days after the entry of the original judgment. 735 ILCS 5/2-1401 (West 2012). In order to prevail on a section 2-1401 petition, a petition must show that the grounds he is asserting for relief would have prevented the entry of the judgment against him had they been known at trial and that the failure to discover or present the grounds for relief was not the result of the petitioner's own lack of due diligence. *Clay v. Huntley*, 338 Ill. App. 3d 68, 74 (2003); *Malek by Malek v. Lederle Laboratories*, 152 Ill. App. 3d 493 (1987).

¶ 16 In response to defendant's allegations, HSBC first argues that his contentions are barred by the law-of-the-case doctrine. Under the law-of-the-case doctrine, "no question which was raised or could have been raised in a prior appeal on the merits can be urged on subsequent appeal and those not raised are considered waived." *In re Estate of Feinberg*, 2014 IL App (1st) 112219, ¶ 27 (quoting *Preferred Personnel Services, Inc. v. Meltzer, Purtill & Stelle, LLC*, 387 Ill. App. 3d 933, 947 (2009)). In addition, issues that were previously decided in a prior appeal "are binding and will control in the circuit court on remand, as well as the appellate court in a subsequent appeal, unless the facts presented are so different as to require a different interpretation." *Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 47 (1998).

¶ 17 In the prior appeal, defendant argued that HSBC lacked standing to bring the suit and that, as a result, the circuit court lacked subject matter jurisdiction. Defendant suggested that the

assignment on record was fraudulent and concluded, "without a proper assignment establishing standing there was no controversy for the court to rule upon." See *Blake*, 2012 IL App (1st) 113401-U, ¶¶ 2, 14. Defendant is making almost precisely the same argument in the present appeal. In the prior appeal, we noted that "defendant incorrectly characterized his contention as a lack of subject matter jurisdiction based on a lack of standing when, in fact, subject matter jurisdiction and standing are two separate issues." *Id.* ¶ 17. We first considered whether the court had subject matter jurisdiction over the case. As we explained, a court has subject matter jurisdiction over a case "if the plaintiff's complaint presents a 'justiciable matter', which is a 'controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.'" *Blake*, 2012 IL App (1st) 113401-U, ¶ 16 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 333-34 (2002)). We found:

"HSBC's foreclosure complaint alone *** set forth a justiciable matter. The controversy presented was a mortgage foreclosure, which involved the legal relations of two parties with adverse legal interests: HSBC, the holder of the mortgage and note, and defendant, the mortgagor in default. Moreover, the record contained a copy of the assignment of the mortgage to HSBC from MERS." (Internal quotation marks omitted). *Blake*, 2012 IL App (1st) 113401-U, ¶¶ 16, 19-20.

We have already concluded that the circuit court had subject matter jurisdiction over HSBC's foreclosure complaint based on the complaint filed and the assignment included in the record. Therefore, pursuant to the law-of-the-case doctrine, defendant may not now relitigate the issue.

¶ 18 We also considered whether HSBC had standing to bring the foreclosure complaint against defendant in the prior appeal. As we stated previously, the doctrine of standing "is designed to preclude persons who have no interest in a controversy from bringing suit and assures that issues are raised only by those with a real interest in the outcome of the controversy. [Citation.]" (Internal quotation marks omitted.) *Blake*, 2012 IL App (1st) 113401-U, ¶ 17. We rejected defendant's standing arguments on two grounds: first, that he had forfeited any challenge to standing by failing to timely raise the issue and second, that the record showed HSBC had standing to bring the foreclosure action against defendant. *Blake*, 2012 IL App (1st) 113401-U, ¶¶ 24-25. Accordingly, we have also made findings of law and fact as to HSBC's standing to foreclose on the Property and we decline to permit defendant to relitigate the issue of standing now.

¶ 19 Defendant also challenges the validity of the assignments on the record. Defendant has not previously challenged the validity of the 2007 assignment and we will address that contention later in this order. However, defendant challenged the validity of the 2009 assignment in his prior appeal. There, we found that defendant had forfeited his argument by failing to challenge the validity of the assignment before the circuit court and that, regardless, the assignment was valid. *Blake*, 2012 IL App (1st) 113401-U, ¶¶ 21-22. Therefore, the validity of the 2009 assignment falls under the law-of-the-case doctrine and cannot now be challenged.

¶ 20 Furthermore, the facts as currently presented are not so different as to require a different interpretation. In the present case, defendant claims that his argument that the note and assignment were created fraudulently is supported by "newly discovered evidence," consisting of the PSA which governs the Fieldstone Mortgage Investment Trust, Series 2006-1. Defendant states that he obtained the PSA from the United States Securities and Exchange Commission

(SEC). Defendant then argues that neither the note nor the assignments included in the record follow the endorsement requirements of the PSA and concludes that the note and assignments were fraudulently created to give the appearance that HSBC had a justiciable matter and that the court had subject matter jurisdiction over that matter. However, we note that section 2-1401 requires that newly discovered facts presented in the petition "could not reasonably have been discovered at the time of, or prior to, the entry of judgment from which relief is sought." *Klose v. Mende*, 378 Ill. App. 3d 942, 950 (2008). Defendant has given no explanation for why he could not have reasonably discovered or obtained the PSA when HSBC originally filed the foreclosure complaint and no argument for why the failure to present this argument previously is not due to his lack of due diligence. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). We conclude that the law-of-the-case doctrine applies under these circumstances.

¶ 21 In addition, defendant has not alleged how he would have standing to challenge the PSA. See *Bank of America National Ass'n v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶¶ 15, 20-21 (finding that the defendant lacked standing to challenge the transfer of mortgages under a PSA to which it was not a party and noncompliance with the PSA did not render the transfer void). He does not claim to be a party to or an intended third-party beneficiary of the PSA and does not provide any relevant legal authority to support his argument that a mortgage transfer that did not comply with PSA would be void. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Mere contentions, without argument or citation of authority, do not merit consideration on appeal and are forfeited. *First National Bank of La Grange v. Lowrey*, 375 Ill. App. 3d 181, 207 (2007). We also note that defendant has only included a few pages of the PSA in the record, despite the

complete document appearing to have contained at least 50 pages, so any doubts which arise from the lack of a complete PSA will be resolved against defendant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (the appellant has the burden to present a sufficiently complete record on appeal in support of his claim of error and "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant"). Taking the above into consideration, we find defendant has waived any challenge to whether the mortgage transfer complied with the PSA.

¶ 22 In the present appeal, defendant also challenges the validity of the 2007 assignment, which indicates that the mortgage on the Property was transferred to HSBC "on 04/13/07." We again note that section 2-1401 requires that newly discovered facts presented in the petition "could not reasonably have been discovered at the time of, or prior to, the entry of judgment from which relief is sought." *Klose*, 378 Ill. App. 3d at 950. The 2007 assignment was not before the circuit court at the time it originally considered HSBC's foreclosure complaint and defendant has failed to present any reason that he could not have reasonably discovered this assignment sooner.

¶ 23 Nonetheless, no particular form is required for an assignment to be valid. *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987). It can be oral or written, and need only assign or transfer in whole or in part some debt and must "describe the subject matter of the assignment with sufficient particularity to render it capable of identification." *Id.* The 2007 assignment met all the requirements for validity. It transferred the mortgage of the Property in its entirety to HSBC and described both the mortgage and Property in detail. Therefore, the 2007 assignment is valid.

¶ 24 Defendant next argues that the circuit court lacked jurisdiction because the filing of HSBC's foreclosure action violated an automatic stay imposed under section 362 of the Bankruptcy Code. 11 U.S.C. § 362. Defendant alleges that on November 23, 2007, Fieldstone, the originating lender of the loan, filed a petition for bankruptcy protection in the United States District Court for the District of Maryland.

¶ 25 Defendant has forfeited his argument. First, defendant did not make this argument before the circuit court and arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Parikh v. Division of Professional Regulation of the Department of Financial & Professional Regulation*, 2012 IL App (1st) 121226, ¶ 28. In his section 2-1401 petition, defendant alleged that HSBC "intentionally withheld" that Fieldstone had filed a bankruptcy petition and that "the [circuit] court should have known if Fieldstone *** was permitted by the United States Trustee to sale [*sic*], transfer, or distribute property to HSBC Bank as Indenture Trustee before entering summary judgment." However, it is only here, for the first time on appeal, that defendant contends the foreclosure complaint was filed in violation of an automatic bankruptcy stay and, thus, defendant has forfeited the argument.

¶ 26 Moreover, as we noted above, Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Where a party does not comply with Rule 341(h)(7) by failing to make reasoned argument and failing to provide citations to authority, that party forfeits review of the argument. *Lowrey*, 375 Ill. App. 3d at 207. Defendant's only citation to the record in support of this argument is to the United States Bankruptcy Court, District of Maryland form with Fieldstone listed as the debtor. However, this form is insufficient to support defendant's contention that

Fieldstone filed for bankruptcy on November 23, 2007, because the filing has no official date stamp. There is no indication elsewhere in the record that Fieldstone ever filed its bankruptcy petition and no other indication that an automatic stay was in place when HSBC filed its foreclosure complaint against defendant. See *Foutch*, 99 Ill. 2d at 391-92 (the appellant has the burden to present a sufficiently complete record on appeal in support of his claim of error and "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant"). In addition, defendant fails to provide reasoned argument and citations to relevant authority showing why this automatic stay should apply to bar the present foreclosure action, thereby forfeiting review of his claim.

¶ 27 Although we acknowledge that defendant cites authority for general bankruptcy principles, the cases cited are not relevant to the present case. As even defendant indicates in his brief, pursuant to section 362 of the Bankruptcy Code "a bankruptcy filing automatically stays the commencement or continuation of any proceedings *against the debtor*." (Emphasis added.) Section 362 specifically provides that the filing of a bankruptcy petition operates as a stay of, in relevant part, "the commencement or continuation *** of a judicial, administrative, or other action or proceeding *against the debtor* *** or to recover a claim *against the debtor* that arose before the commencement of the case under this title." (Emphasis added.) 11 U.S.C. § 362(a)(1). Therefore, the automatic stay entered in connection with any bankruptcy Fieldstone may have filed would have only barred actions against Fieldstone, not actions on its behalf or actions against those who owed a debt to Fieldstone. None of the cases cited by defendant stand for the proposition that a bankruptcy stay prevents a foreclosure proceeding on a mortgage owned by the bankruptcy debtor against a third-party. See *Garbe Iron Works, Inc. v. Priester*, 99

Ill. 2d 84 (1983); *Cohen v. Salata*, 303 Ill. App. 3d 1060 (1999); *Sarno v. Thermen*, 239 Ill. App. 3d 1034 (1992).

¶ 28 Forfeiture aside, the record shows that the mortgage on defendant's property was transferred prior to the time that Fieldstone allegedly filed its bankruptcy petition and therefore would not have been a part of the bankruptcy estate. An automatic stay under the Bankruptcy Code takes effect the moment the bankruptcy petition is filed. *Townsend v. Magic Graphics, Inc.*, 169 Ill. App. 3d 73, 76 (1988). The stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

¶ 29 Even if Fieldstone had filed a bankruptcy petition, the record shows that the mortgage on the Property was transferred to HSBC before the alleged November 2007 filing date. The record contains two assignments: the 2007 assignment indicates that the mortgage on the Property was transferred to HSBC on April 13, 2007, and the 2009 assignment indicates that it was transferred prior to June 24, 2009. Neither assignment contradicts that the mortgage was transferred before Fieldstone allegedly filed its bankruptcy petition in November 2007 and the 2007 assignment affirmatively shows that the mortgage was transferred more than six months before any bankruptcy petition was filed. Therefore, any automatic stay would not have applied to the mortgage on the Property.

¶ 30 As a final matter, HSBC has requested that sanctions be entered against defendant pursuant to Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994). According to rule 375(b), if a reviewing court determines that an appeal is frivolous, or that it was not taken in good faith or for a proper purpose, an appropriate sanction may be imposed on the party. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). The decision whether to impose sanctions is a matter left strictly to the

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discretion of the reviewing court. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011). In the present appeal, defendant has raised the issue of the bankruptcy for the first time and we have concluded that that issue has been forfeited for multiple reasons and is without merit. Defendant has also raised multiple issues that we had already resolved in a prior appeal. In our discretion, we choose not to impose sanctions on defendant at this time; however, were defendant to again raise any of the issues that have now been resolved against him by this court, we will not hesitate to sanction defendant accordingly.

¶ 31 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.