IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

MTGLQ INVESTORS, L.P., *Plaintiff,* *v.* AMOBI EKWUEME; SUNNY OKORO; CITY OF CHICAGO, *Defendant.*	Case Number: 2023-CH-4428 Calendar 60 Honorable William B. Sullivan Judge Presiding Property Address 5257 W. Fulton Street Chicago, IL 60644

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Plaintiff MTGLQ INVESTORS, L.P.'s ("MTGLQ") Motion to Strike Defendant SUNNY OKORO's ("Sunny") Affirmative Defenses and Sunny's Motion to Strike Affidavit of Anna Milan ("Mailing Affidavit"). For the following reasons, Plaintiff's Motion to Strike Sunny's Affirmative Defenses is hereby GRANTED and Defendant's Motion to Strike the Mailing Affidavit is hereby DENIED.

I. BACKGROUND

On May 15, 2006, Defendant Amobi Ekwueme ("Amobi") solely executed a promissory note ("Note") in the amount of $337,500.00 secured by a mortgage

("Mortgage") also only signed by Amobi on the property located at 5357 West Fulton Street in Chicago, Illinois ("the Property").

On March 22, 2009, Amobi quitclaimed title to the Property to herself and Defendant Sunny Okoro; however, Sunny signed neither the Note nor the Mortgage encumbering the property. Shortly thereafter, on August 7, 2009, Amobi signed a Loan Modification Agreement ("Modification Agreement") that adjusted the unpaid principal balance, interest to be charged, and the monthly payment amount. In signing the agreement, Amobi, as the Borrower, promised to pay the unpaid principal balance, plus interest, to the order of the Lender. Sunny's signature also appears on the Modification Agreement; however, he is not listed or named as a Borrower, nor are there any written reasons provided as to why Sunny signed the Modification Agreement.

The Note allegedly went into default for a missed payment on June 1, 2014. Defendant allegedly missed payments thereafter as well. Pursuant to Paragraph 22 of the Mortgage, MTGLQ was required to deliver proper notice to Borrower to inform her of her various rights that exist under the Mortgage.

Nearly a decade later, Shellpoint Mortgage Servicing, the servicer of the loan who acted behalf of MTGLQ, in a letter dated March 28, 2023, sent Amobi presuit notice of default and intent to accelerate with an amount due of $388,412.92. The letter explicitly declares that if the default was not cured on or before May 2, 2023, Amobi's ownership of the property may be terminated.

On May 4, 2023, Plaintiff filed its initial Complaint to foreclose on the property. Both Amobi and Sunny were named as defendants in the lawsuit. The Complaint alleges that Defendant failed to pay the monthly installment due on June 1, 2013, and the installments thereafter. The Complaint further alleges that the total due for Principal and Interest is $550,871.84. Plaintiff attached as exhibits to its Complaint a copy of the Mortgage, Note, and Loan Modification Agreement.

On March 28, 2024, Sunny filed his Answer and Affirmative Defenses. Shortly after, on April 2, 2024, Plaintiff filed its Motion to Strike Sunny's Affirmative Defenses. Defendant timely responded to this Motion on May 20, 2024, and Plaintiff timely filed its Reply in Support of the Motion on June 5, 2024.

On the same day he filed his Response, Sunny filed a Motion to Strike the Mailing Affidavit. Plaintiff timely responded to that Motion on May 22, 2024, and Defendant timely filed his Reply on June 20, 2024.

The Court having reviewed the pleadings and having read both sets of Motions, Responses, and Replies, entered an Order on July 11, 2024, taking both instant Motions under advisement for the issuance of a written opinion. The Court's ruling follows.

II. LEGAL STANDARD

Motion to Strike

MTGLQ now moves this Court to Strike the Affirmative Defenses of Sunny Okoro pursuant to 735 ILCS 5/2-615 and 2-619. Section 2-619.1 permits a combined motion under 2-615 and 2-619. *Walworth Investments-LG, LLC v. Mu Migman, Inc.*,

2022 IL 127177, ¶ 26. A 735 ILCS 5/2-615 motion to dismiss "challenges the legal sufficiency of the (***) claim;" however, a motion to dismiss under 735 ILCS 5/2-619.1 "admits the legal sufficiency of the claim but asserts defenses or defects outside the pleading to defeat the claim." *Kopf v. Kelly*, 2024 IL 127464, ¶ 63. Filing under either section requires the court to construe the pleadings and other supporting documents in the most favorable light for the nonmoving party, as the motion "admits as true all well pleaded facts and all reasonable inferences from those facts." *Id.*

"A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim" *Jackson v. Hehner*, 2021 IL App (1st) 192441, ¶ 25 (*quoting DeLuna v. Burciaga*, 223 Ill. 2d 49, 59). "[T]he movant is essentially saying "'Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim."'" *Jackson*, 2021 IL App (1st) 192441, ¶ 25 (*quoting Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31).

Illinois, as a fact pleading jurisdiction, requires a pleading to allege ultimate facts that satisfy each element of the cause of action or affirmative defenses. *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 668 (1st Dist. 1996). In accordance with this standard, a pleading should only be dismissed when it appears a party "cannot recover under any set of facts. *Kilburg v. Mohiddin*, 2013 IL App (1st) 113408, ¶ 20. "A cause of action should not be dismissed on the pleadings unless it clearly appears

that no set of facts can be proved *under the pleadings* which will entitle the plaintiff to recover." *Van Horne v. Muller*, 705 N.E.2d 898, 902 (Ill. 1998) (emphasis added). The court shall construe "all well-pleaded facts and reasonable inferences therefrom" as true when ruling on pleadings. *Id.*

Illinois Supreme Court Rule 191(a)

Defendants move the Court to strike the Mailing Affidavit for non-compliance with Illinois Supreme Court Court Rule 191(a). When a court rules on a motion to strike, "only the tainted portions" of an affidavit should be stricken and any portions that comply with Rule 191(a) should be preserved. *Murphy v. Urso*, 88 Ill. 2d 444, 463 (1981). Strict compliance with Rule 191(a) is necessary to ensure that the Court is presented with valid evidentiary facts upon which to make a decision. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 338-39 (2002). It follows that "unsupported assertions, opinions, and self-serving or conclusory statements do not comply with Rule 191(a)." *Jones v. Dettro*, 308 Ill. App. 3d 494, 499 (1999). The language of Rule 191(a) asserts that all documents supporting an affidavit must be attached and the failure to attach the document is fatal. *Preze v. Borden Chem., Inc., 336* Ill. App 3d 52, 57 (2002).

III. ANALYSIS

Before the Court is a question of whether Plaintiff or Defendants are entitled to ruling in their favor as to their respective Motions to Strike. The Court will analyze each motion in turn.

A. Plaintiff's Motion to Strike

Plaintiff filed its Motion to Strike Affirmative Defenses, supported by its Reply. Plaintiff asserts that all notices of acceleration and default were proper and also addresses Defendant's two Affirmative Defenses.

Defendant's First Affirmative Defense asserts that Plaintiff lacks a valid Mortgage, which Plaintiff moves to strike on the grounds that this assertion is legally and factually deficient pursuant to 735 ILCS 5/2-615. Defendant argues that because the Note was executed solely by Amobi, and because the Modification Agreement does not name the Defendant (Sunny Okoro) or explicitly bind him by its terms, "[a]ccordingly, the mortgage encumbers, at best, the 50% interest in the property held by Amobi at the time the Mortgage and Note were modified." Def.'s Answer, ¶ 14.

Plaintiff contends that since Amobi was the sole owner of the property at the time of execution of the Mortgage in 2006, the Mortgage does, in fact, encumber the entire property. The Modification Agreement did not change the encumbrance on the property, it only modified the unpaid principal balance, the interest to be charged, and the monthly payment amount. Pl.'s Compl. Ex. F, ¶¶ 1-2. Plaintiff asserts that Defendant's first Affirmative Defense does not allege any facts that would change the encumbrance of the Mortgage and is, therefore, legally and factually insufficient. As a result, Plaintiff avers that Defendant's First Affirmative Defense should be stricken pursuant to 735 ILCS 5/2-615.

In Sunny's Second Affirmative Defense, he asserts that he was not served with proper pre-suit notice and that such notice failed to meet the conditions precedent established by the Paragraphs 15 and 22 of the Mortgage. Def.'s Answer, ¶ 20. Additionally, he argues that he is entitled to proper notice as a "successor in interest" after acquiring 50% interest in the property after the execution of the Quitclaim Deed to Amobi and Sunny in 2009 as tenants in common. Def.'s Answer, ¶ 18.

Plaintiff asserts that Sunny's Second Affirmative Defense must be stricken pursuant to both ILCS 5/2-615 and 2-619. Defendant contends that he did not receive proper notice, but does not allege any deficiencies; however, his Affirmative Defense lacks any facts and Illinois is a fact-pleading jurisdiction. By this standard, Sunny must provide more than a mere allegation that he did not receive the notice. Moreover, the Mortgage states that "any notice to Borrower (***) shall be deemed to have been given to Borrower by first class mail." Pl.'s Compl. Ex. A, ¶ 15. Plaintiff emphasizes that Defendant has overlooked the fact that the Mortgage does not require proof of receipt of Notice because it merely requires delivery by First Class Mail, which is a reflection of the "mailbox rule." Seeing as the Affidavit of Mailing was filed contemporaneously with the Complaint, there is *prima facie* proof that the Notice was sent to Borrower advising her of the default, acceleration, and possibility of foreclosure; therefore, Defendant's Affirmative Defense should be stricken pursuant to 735 ILCS 5/2-619.

1. *First Affirmative Defense*

Plaintiff moves to strike Sunny Okoro's Affirmative Defenses. In his First Affirmative Defense, Sunny alleges that because the Note was executed solely by Amobi, and because the Loan Modification Agreement does not name him as a party, the Mortgage may encumber, at best, 50% of the property.

Property rights are commonly described as a "bundle of sticks" – "a collection of individual rights, which in certain combinations, constitute property. *United States v. Craft*, 535 U.S. 274 (2002); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). This is part of the very foundation of property law, which is taught in every law school class across the country, often during a student's very first year. The "bundle of sticks analogy" is used to describe the ability to give a mortgage interest to a lender, which is just one stick within this bundle. Pursuant to the legal maxim *nemo dat qui non habet* ("*nemo dat*"), a property owner that has already given a mortgage interest to a lender can thereafter *only* convey the "sticks" that remain in their bundle, which *must* exclude the "stick" they have already given to the lender. Black's Law Dictionary 935 (5th ed. 1979) ("He who hath not cannot give.").

A mortgage is an encumbrance that runs with the land. 755 ILCS 5/1-2.07. Pursuant to 765 ILCS 5/28, "Deeds, *mortgages*, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated (***)." 765 ILCS 5/28 (LexisNexis) (emphasis added). Additionally, so long as a mortgage, or other instrument relating to title or real estate, is recorded, subsequent purchasers,

creditors, *etc.* are not entitled to notice, as recording alone is deemed constructive notice. 765 ILCS 5/30; 765 ILCS 5/31.95; *First National Bank of Chicago v. Paris*, 358 Ill. 378, 385 (1934) ("[The] Recording act gives notice to the public of encumbrances against real estate and the ownership of the encumbrance thereon, and the public has the right to rely on and be protected by such record (***) strangers to the title who are interested in the real estate have the right to rely upon the title as shown by the record.").

In the event that a property subject to a mortgage is conveyed to another party, "[a] transfer of mortgaged property subject to the mortgage passes title to the purchaser in equity in all particulars as mortgaged, and the mortgaged property constitutes the primary fund for payment of the mortgaged indebtedness." 27A I.L.P. *Mortgages* § 122 (2017). Moreover, "[t]he grantees of mortgaged property taking under a deed specifying that the property is subject to a mortgage take title subject to the mortgage and to the mortgagee's prior rights to rents and profits pledged in the mortgage." *Id.* Although it is clear that a mortgage will run with the land even if it is conveyed to another party, "[a] deed that is merely made subject to a mortgage does not render the grantee personally liable for the mortgage debt. In order to impose personal liability on the grantee, there must be language of clear import that he or she assumes the mortgage debt." 27A I.L.P. *Mortgages* § 123 (2017).

Another means of conveying property interest is via a quitclaim deed. A quitclaim deed is "[a] deed of conveyance operating by way of release; that is,

intended to pass any title, interest or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title." Black's Law Dictionary, 1126 (5th Ed. 1979). A quitclaim deed is equally as effective in passing title as a warranty deed with covenants; however, because quitclaim deeds are without warranty, the grantor need not disclose to the grantee specific liens, encumbrances, limitations, or other interests to which the the conveyance is subject. *Favata v. Mercer*, 409 Ill. 271, 276-277 (1951); *Groupe v. Hill* (In re Hill), 156 B.R. 998, 101 (N.D. Ill. Bankr. 1993); 3 Illinois Real Property Law and Practices § 4.3 (2024). By this standard, since quitclaim deeds, like any other deed, transfer the totality of the grantor's interest, they will also convey to the grantee the grantor's interest subject to any previously recorded title encumbrances, including mortgages, attached to the property pursuant to the Conveyances Act. 765 ILCS 5/30 ("All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice.").

When Amobi first executed the Mortgage in 2006, she, as a property owner, gave away one of her "sticks." With that in mind, and based off of the legal maxim *nemo dat*, when Amobi quitclaimed the property to herself and Sunny in 2009, she could only convey to him the "sticks" that she had left, which necessarily excludes the one that remains with Plaintiff. Applying this standard, despite Amobi

conveying 50% property interest as tenants in common to Sunny, Plaintiff's mortgage interest over 100% of the property is still intact.

Amobi quitclaimed the property to Sunny only *after* encumbering the property with the Mortgage. A quitclaim deed *does not* extinguish a mortgage, because it is an encumbrance that runs with the land. 765 ILCS 5.0.01. Additionally, where a mortgage is recorded, the conveyee cannot assert a defense to extinguish the mortgage because they are not a borrower, as a simple title search would notify them of any encumbrances or liens that exist against the property. 765 ILCS 5/30; 765 ILCS 5/31.95; *First National Bank of Chicago*, 358 Ill. 378, 385 (1934). This simple standard deflates Sunny's argument that the Mortgage may only encumber 50% of the property, and continuing to uphold said standard serves as a safeguard from individuals evading foreclosure by simply executing a quitclaim deed to an individual who is not a party to the mortgage.

Based on the evidence and a thorough analysis, this Court finds that Sunny's 50% interest *is* encumbered by the prior Mortgage executed by Amobi, and, therefore, the Court strikes Defendant's First Affirmative Defense with prejudice.

2. *Second Affirmative Defense*

In Defendant's Second Affirmative Defense, he asserts that he was not served with proper pre-suit notice and that such notice failed to meet the conditions precedent established by the Paragraphs 15 and 22 of the Mortgage; however, he argues that he is entitled to proper notice as a "successor in interest" after acquiring

50% interest in the property after the execution of the Quitclaim Deed to Amobi and himself in 2009.

Privity is defined as "[m]utual or successive relationship to the same rights of property (***) or such an identification of interest of one person with another as to represent the same legal right (***) thus the executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor," *etc.* Black's Law Dictionary, 1078 (5th Ed. 1979). Similarly, there is privity between a lender and borrower. Such privity is to be considered *privity of contract,* which is a "connection or relationship which exists between two or more contracting parties." Black's Law Dictionary, 1080 (5th Ed. 1979). It should be noted that there is no privity of contract between a lender and a third party, unless that third party promises to pay the debt. 735 ILCS 5/9-101.

Illinois has historically enforced strict compliance for conditions precedent in a mortgage with which a lender must comply in order for them to have grounds to file an action upon which the lender hopes to recover. *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 26 (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. __, __, (2016); *People v. Pomykala*, 203 Ill. 2d 205-206 (2003)). A "condition precedent" is an act that must be performed or an event that must occur before a contract becomes effective or before a party is required to perform. *Id.* "[S]trict compliance with the presuit notice is required," and a plaintiff's failure to strictly comply with such a condition precedent warrants dismissal of their complaint. *Scott v. City of Chicago*, 2015 IL App (1st) 140570, ¶¶ 30, 32.

A contract may be amended and conditions precedent may change where a novation is implemented. A novation is a:

> "Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties (***) The substitution [is] by mutual agreement (***) The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one." Black's Law Dictionary, 959 (5th Ed. 1979).

Novations may also be used to substitute parties to a contract, which also requires mutual agreement of contracting parties. It is important to note that a novation, where an obligation of one of the parties is *explicitly* amended or changed, the previous obligation is entirely extinguished and substituted. *Pielet v. Pielet*, 407 Ill. App. 474 (2010).

Reasonably, individuals that are in privity with one another, likely have standing to sue if contractual obligations are not met. Standing to sue means that, a:

> "party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Standing is a concept utilized to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court. The requirement of 'standing' is satisfied if it can be said that the [party] has a legally protectable and tangible interest at stake in the litigation." Black's Law Dictionary, 1260 (5th Ed. 1979) (internal citations omitted).

Standing, generally, is used to determine and designate guidelines for those with, and without, rights to sue. Furthermore, a claimant without standing, "is one who is owed no duty by the defendant, that is, one who has no right to sue them under the substantive law." 1 Illinois Civil Procedure § 4.05 (2024). Similarly, an

individual who lacks standing may not file motions or other court actions, as a lack of standing is sufficient to dismiss the pleading. *Progressive Insurance Co. v. Williams*, 379 Ill. App. 735, 338 (1st Dist. 2008); *People v. Johnson*, 2021 IL 125738, ¶ 72.

It is commonly understood that a plaintiff must have standing in order to partake in a lawsuit, and it could be reasonably inferred that the same standard must apply to all parties to a lawsuit, specifically named defendants. It goes without saying that without a "contractual nexus," a party cannot have standing to plead defenses in a lawsuit related to that contract. 735 ILCS 5/2-619; *Deutsche Bank National Trust Co. v. Payton*, 2017 IL APP (1st) 160305, ¶ 26. Other states throughout the nation have held the same to be true. *See generally Clay County Land Trust #08-04-25-0078-014-27 v. JPMorgan Chase Bank*, 39 Fla. L. Weekly 2433 (Dist. Ct. App. 2014) ("A borrower is the only party who can plead nonperformance of notice of default and opportunity to cure conditions precedent of a mortgage").

Amobi is in privity of contract with Plaintiff, as they are the sole parties to the Mortgage. On the other hand, Amobi and Sunny are in privity of contract with one another after the property was quitclaimed in 2009 and they became tenants in common. Although Amobi is in privity of contract with both parties, Plaintiff and Sunny are *not* in privity with one another, as there is no contractual relationship that exists between them, despite sharing some property interest in the same real

estate. 735 ILCS 5/9-101. Sunny—at no point—explicitly took on the responsibility of the debt, and the Modification Agreement does not change this simple fact. *Id.*

Privity requires compliance with obligations set by the contract and also "requires that the party suing has some contractual relationship with the one sued." *1400 Museum Park Condominium Association v. Kenny Construction Company*, 2021 IL App (1st) 192167, ¶ 38. It may be inferred that where there is privity, the parties are obligated to strictly comply with express conditions precedent, including, but not limited to, Plaintiff's duty to provide notice and opportunity to cure the default before acceleration of the loan. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32; *Associates Asset Management, LLC v. Cruz*, 2019 IL App (1st) 182678, ¶ 1. Furthermore, where there is no privity, there may be no contractual obligations or rights, and as the record shows, there is no privity between Plaintiff and Sunny; therefore, Plaintiff is not bound by any contractual obligation to provide Sunny with notice of the defaulted loan.

Defendant Sunny Okoro's role is clearly defined by the Mortgage as "Successor in Interest of Borrower (***) [which is] any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument." Pl.'s Compl. Ex. A, at 3. Sunny has asserted that he was not served with proper notice pursuant to Paragraph 15 of the Mortgage, as there was no letter addressed to him to notify him of the defaulted loan. Def's Resp., Ex. A. Mortgage ¶ 15. Defendant's argument is flawed, as the language of the Mortgage clearly states in Paragraph 15, "Notice to any one

Borrower shall constitute notice to *all Borrowers* unless Applicable Law expressly requires otherwise." Pl.'s Compl. Ex. A,¶ 15 (emphasis added). Regardless of this, the Mortgage in Paragraph 15 specifically gives reference to "Borrowers," *not* "Successor[s] in Interest of Borrower;" therefore, there is no condition precedent obligating Plaintiff to address Sunny in its presuit notice. *Id.*

Moreover, Defendant's Second Affirmative Defense fails on multiple fronts because Plaintiff is only required to deliver notice to one Borrower; therefore, there is no obligation to address both Amobi *and* Sunny. Additionally, in synthesizing *Bank of America v. Luca* and *Aurora Loan Services, LLC v. Pajor*, Defendant's argument falls short because of his failure to allege that the notice prejudiced him in some way, shape, or form, and did not allege any other deficiencies. 2012 IL App (2012) 110899, ¶ 27; 2013 IL App (3d) 120601, ¶ 17. Similarly to *Luca,* where Plaintiff erroneously failed to address one of the borrowers, Elena Luca, in its presuit notice, but Defendants could make no claim that Elena Luca was unaware of the notice and its contents, Defendant Sunny cannot assert that he was not sufficiently put on notice. *Luca,* 2013 IL App (3d) 120601, ¶ 17.

Additionally, in Defendant Sunny's Response to Plaintiff's Motion, he raises the point that he is a Mortgagor pursuant to 735 ILCS 5/15-1209. ("the person whose interest in the real estate is subject of the mortgage and (***) any person claiming through a mortgagor as successor."). As addressed previously, Sunny also fits the definition of a "Successor in Interest to the Borrower;" however, Sunny *does not* fit the definition of a Borrower, which is "the person obligated under the

mortgage loan." 765 ILCS 910/2. The Mortgage, Note, and Loan Modification agreement explicitly addresses the "Borrower(s)," which is a title bestowed exclusively upon Amobi.

Borrowers, among other terms of an agreement, may be amended or changed by a novation. *Pielet,* 407 ILL App, 474 (2010). The Loan Modification Agreement, which, in its recital, noted *only* Amobi as the borrower, explicitly changed three aspects of the agreement: the unpaid principal balance, interest to be charged, and the monthly payment amount. Pl.'s Compl. Ex. F at 1. Although Sunny's "signature" appears at the end of the document, in no way does the Modification Agreement expressly or implicitly add Sunny as a Borrower, and in order to impose personal liability upon Sunny, "there must be language of clear import that he or she assumes the mortgage debt" 27A I.L.P. *Mortgages* § 123 (2017). By this standard, Sunny is not a Borrower and Plaintiff does not owe him any duty, nor is Sunny entitled to the rights or bound by the obligations of a Borrower.

It is well established that there is no contractual relationship between Plaintiff and Defendant Sunny; therefore, Sunny lacks standing to assert defenses against Plaintiff. 1 Illinois Civil Procedure § 4.05 (2024). Sunny is not a party to the Mortgage and the novation did not change this fact, thus as he lacks standing, he cannot assert his Second Affirmative Defense. Defendant's arguments regarding his Second Affirmative Defense have no leg on which to stand, and as Defendant's pleading does not raise a justiciable issue before this Court in the first instance, the Court need not even turn to its merits.

Based on this information and thorough analysis, Sunny has failed to raise a justiciable pleading sufficient to make its way through the doors of this Court's courtroom. Accordingly, Sunny's Second Affirmative Defense is stricken with prejudice because he lacks standing to assert such a defense.

B. Defendant's Motion to Strike

Defendant Sunny filed his Motion to Strike the Affidavit of Anna Milan, supported by its Reply, in which he argues Milan's testimony omits crucial information regarding mailing practices.

Milan's Affidavit confirms that the Notice was sent to Borrower's address through first class mail; however, Defendant asserts that her testimony omits crucial information regarding the general practice of generating and sending notices. She neither confirms nor denies that notices are *always* generated and sent on the same day. Additionally, she fails to provide information surrounding protocol if such notices are sent at a date later than their generation.

Sunny argues that the attached Notice that is dated March 28, 2023, is not sufficient to prove the actual date it was sent and/or whether it was even mailed that day. Milan provides no evidence that the Notice in question was mailed on this particular day, such as by providing an envelope with adequate postage affixed that is also addressed to Borrower, Amobi. Moreover, Sunny argues that the affidavit does not comply with Supreme Court Rule 191(a) and must be stricken.

1. *Applicable Law*

As it has already been established, the Mortgagee has an obligation to abide by the conditions precedent established by the Mortgage. *Accetturo*, 2016 IL App (1st) 152783, ¶ 32; *Cruz*, 2019 IL App (1st) 182678, ¶ 1. This includes the Mortgage's requirement of *how* presuit notice shall be sent, and *what* it should contain, which may vary from mortgage to mortgage.

A mortgage that states notice shall be deemed given if sent via First Class Mail reflects the "mailbox rule, where properly addressed letters sent via regular mail carry a presumption of delivery when they are deposited in the mail with postage prepaid." *Deutsche Bank National Trust Company v. Roonseang*, 2019 IL App (1st) 180948, ¶ 30 (citing *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st)). It is because of this that a defendant's mere denial that they have received presuit notice "is insufficient to create a genuine issue of material fact." *Roonseang,* 2019 IL App (1st) 180948, ¶ 17. However, in order for a plaintiff to receive the benefit of the presumption of receipt, "there must be proof that the item was contained in the properly addressed envelope with adequate postage affixed and that it was deposited in the mail." *Credit Union 1 v. Carrasco*, 2018 IL App (1st) 172535, ¶ 17 (citing *Tabor & Co. v. Gorenz*, 43 Ill. App. 3d 124, 356 (1976)).

An affidavit satisfies the requirements of Supreme Court Rule 191(a) "if from the document as a whole it appears the affidavit is based on the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents." (Internal quotation marks omitted.) *Madden v. F.H Paschen,*

S.N. Nielson, Inc., 395 Ill. App. 3d 362, 386 (2009). Rule 191(a) is also construed to require production of all documents and materials necessary to support an affidavit, which includes proof of mailing. *Preze, 336* Ill. App 3d 52, 57 (2002); *Tabor & Co.*, 43 Ill. App. 3d at 129 (1976). It has been established that where a mailing affidavit does not include an attachment of an envelope or proof of mailing, there is a lack of "proof that the item was contained in the properly addressed envelope with adequate postage affixed and that it was deposited in the mail." *Tabor & Co.*, 43 Ill. App. 3d at 129 (1976). A plaintiff cannot be entitled to presumption of receipt where they have wholly failed to comply with this requirement. *Carrasco*, 2018 IL App (1st) 172535, ¶ 18.

2. Discussion

Although the Mailing Affidavit states that after the Notice "was placed in the United States Mail, First Class, in an envelope with adequate postage affixed and addressed to the Defendant, Amobi Ekueme," Plaintiff does not provide proof of mailing such as by an envelope or by other means. Milan Aff. ¶ 10.

Plaintiff's failure to provide such documentation is fatal to their argument, as it is clear that they have not abided by Supreme Court Rule 191(a). *Preze, 336* Ill. App 3d 52, 57 (2002). While Defendant's assertion that they have not received notice alone is insufficient on its face, Plaintiff did not provide the requisite information required by 191(a). *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 17. This information would typically be sufficient for this Court to strike the Mailing Affidavit here.

Similarly to the "bundle of sticks" analogy and property law, justiciability is the basis of every Constitutional Law class around the country. Justiciability refers to whether or not a court can hear a case and provides limitations as to their judicial authority. Black's Law Dictionary, 777 (5th Ed. 1979). This matter before the Court is not justiciable because Sunny Okoro does not have standing to assert this argument, and therefore, this Court cannot, in good faith, strike the Mailing Affidavit. It has already been established that Sunny does not have standing to assert his Affirmative Defenses as a non-Borrower, and the same is true here. Although this is likely a meritorious argument, Plaintiff does not owe a duty to Sunny, who is not bound by the conditions set by the Mortgage; and, therefore, Sunny cannot assert an argument based upon a contractual obligation to which they are a non-party. *Williams*, 379 Ill. App 735, 338 (1st Dist. 2008); *Johnson*, 2021 Il 125738, ¶ 72; 1 Illinois Civil Procedure § 5.04 (2024).

Conclusively, Sunny's Motion to Strike the Mailing Affidavit is denied with prejudice because of his lack of standing to argue such a point as a non-Borrower.

IV. CONCLUSION

For all the reasons mentioned herein, Plaintiff's Motion for to Strike Sunny Okoro's Affirmative Defenses is hereby GRANTED. Consequently, both of Sunny's affirmative defenses are hereby STRICKEN WITH PREJUDICE. Finally, Sunny's Motion to Strike the Mailing Affidavit is hereby DENIED WITH PREJUDICE.

THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) Plaintiff's Motion to Strike Sunny Okoro's First Affirmative Defense is hereby GRANTED and Sunny Okoro's First Affirmative Defense is hereby STRICKEN WITH PREJUDICE;

(2) Plaintiff's Motion to Strike Sunny Okoro's Second Affirmative Defense is hereby GRANTED and Sunny Okoro's Second Affirmative Defense is hereby STRICKEN WITH PREJUDICE; and

(3) Defendant's Motion to Strike the Mailing Affidavit is hereby DENIED WITH PREJUDICE.

IT IS SO ORDERED.

Date: July 18, 2024

ENTERED:

ENTERED
Judge William B Sullivan-2142
JUL 18 2024
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

Honorable William B. Sullivan
Cook County Circuit Judge

ORDER PREPARED BY THE COURT
ccc.mfmlcalendar60@cookcountyil.gov
(312) 603-3894