Illinois Official Reports

Appellate Court

***National Collegiate Student Loan Trust 2007-2 v. Powell*,**
2022 IL App (2d) 210191

Appellate Court Caption	NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2, Plaintiff-Appellant, v. KENNETH D. POWELL, Defendant-Appellee.
District & No.	Second District No. 2-21-0191
Filed	March 31, 2022
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 19-AR-58; the Hon. Kevin T. Busch, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Morgan I. Marcus, of Sessions, Israel & Shartle, LLC, of Chicago, and Nicholas A. Smith, of Kohn Law Firm S.C., of Milwaukee, Wisconsin, for appellant. Alvin L. Catella, of St. Charles, for appellee.

Panel JUSTICE JORGENSEN delivered the judgment of the court, with opinion.
Justice Brennan concurred in the judgment and opinion.
Justice McLaren specially concurred, with opinion.

OPINION

¶ 1 Plaintiff, National Collegiate Student Loan Trust 2007-2, appeals the judgment of the trial court dismissing, for lack of standing, its complaint against defendant, Kenneth D. Powell. Plaintiff contends that it sufficiently pled an enforceable contract and that defendant did not prove his affirmative defense of lack of standing. We reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 On February 5, 2019, plaintiff filed a complaint against defendant to collect a student loan debt, alleging causes of action for account stated, unjust enrichment, and breach of contract. Plaintiff alleged that it was the successor in interest to a lender that entered into a loan agreement with defendant. Plaintiff attached documents to show that it was assigned a loan that defendant had entered into with JPMorgan Chase Bank, N.A. (Chase). Defendant filed a motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2018)), arguing that plaintiff failed to plead and prove standing. Defendant acknowledged that he entered into the loan agreement with Chase. However, he argued that the supporting exhibits did not prove plaintiff's standing to enforce the loan as an assignee of Chase. The trial court dismissed with prejudice the causes of action for account stated and unjust enrichment. In addition, it dismissed without prejudice the claim for breach of contract.

¶ 4 On February 5, 2020, plaintiff filed an amended complaint asserting causes of action for breach of a written and oral contract based on plaintiff's rights as an assignee to enforce the contract. The complaint alleged that plaintiff was "the successor in interest to a lender that entered into a loan agreement[,] with the defendant's account being identified as Account # *********/***-PHEA." Plaintiff alleged (1) in April 2007, defendant entered into the loan agreement with Chase, (2) on June 14, 2007, Chase assigned the loan to National Collegiate Funding, LLC (NCF), and (3) also on June 14, 2007, NCF assigned the loan to plaintiff.

¶ 5 Plaintiff attached an affidavit from Aaron Motin, an employee of Transworld Systems, Inc. (TSI), which Motin averred was the loan subservicer for plaintiff "regarding account number [********/***-PHEA], the educational loan that is the subject of this action." Motin described his job duties as including "reviewing and analyzing records, including those of the educational loan." He had knowledge of the education-loan process and was "competent and authorized to testify regarding this education loan through [his] review of the business records maintained by TSI as custodian of records."

¶ 6 Motin stated that defendant obtained "an educational loan with Lender" assigned to NCF on June 14, 2007, along with other education loans in the loan pool. Motin averred that, on that same date, the loan pool, including defendant's loan, was assigned to plaintiff.

¶ 7 Attached to Motin's affidavits were exhibits A through H. Exhibit A was a document from "U.S. Bank National Association As Special Servicer to the National Collegiate Student Loan

Trust(s)," plaintiff included. The document confirmed that TSI was the subservicer for student loans owned by plaintiff.

¶ 8 Exhibit B consisted of two documents. The first was a nonnegotiable credit agreement between defendant and Chase, signed April 5, 2007. The agreement was for a $30,000 "Education One Undergraduate Loan" to finance defendant's education at Michigan State University for the academic period of August 2007 to May 2008. The agreement, which did not include an account number, stated that Chase could assign the agreement at any time. The second document comprising exhibit B was a "Note Disclosure Statement" to defendant from Chase dated April 10, 2007. At the top of the statement, in the blank designated "Loan No.," were the numbers "04904742." The statement showed a financed amount of $30,000 and a principal amount of $32,085.56.

¶ 9 Exhibit C was a "2007-2 Pool Supplement" from Chase, dated June 14, 2007. The supplement stated that it formed part of an agreement between "The First Marblehead Corporation" (FMC) and Chase, "successor by merger to Bank One., N.A. (Columbus, Ohio) (the 'Program Lender')." According to the supplement, the "Program Lender" transferred to NCF the student loans from schedule 1, collectively designated the " 'Transferred Bank One Loans.' " NCF would in turn sell the "Transferred Bank One Loans" to plaintiff. The supplement was signed by a representative of Chase "as successor by merger to BANK ONE, N.A." Under the signatures on the supplement was a heading: "Schedule 1 [Transferred JPMorgan Chase Bank Loans]." However, there was nothing below the heading and no second page to the supplement.

¶ 10 The final page of exhibit C was labeled "Roster: Chase Bank" (Chase Bank Roster), which apparently was an entry for a single loan, with multiple boxes designated for various information. The "Lender" was identified as "Chase Bank," the "Loan Product" as "DTC - Ed One—Undergraduate," the "GUARREF" as "4904742," and the "Total Outstanding Gross Principal" as $32,085.56. Motin's affidavit described the Chase Bank Roster as "a redacted excerpt of the Schedule of the Loan Pool described within the Pool Supplement showing that [d]efendant's loan was part of the Loan Pool."

¶ 11 Exhibit D was a "Deposit and Sale Agreement—The National Collegiate Student Loan Trust 2007-2." The agreement was between NCF as "Seller" and plaintiff as "Purchaser," and it set forth "the terms under which the Seller is selling and the Purchaser is purchasing the student loans listed on Schedule 1 or Schedule 2 to each of the Pool Supplements set forth on Schedule A attached hereto." Section 3.02, entitled "Assignment of Rights," stated:

> "The Seller hereby assigns to the Purchaser and the Purchaser hereby accepts all of the Seller's rights and interests under each of the Pool Supplements listed on Schedule A attached hereto and the related Student Loan Purchase Agreements listed on Schedule B."

¶ 12 Schedules A and B were both attached to the sale agreement. Schedule A stated in relevant part:

> "Each of the following Pool Supplements was entered into by and among [FMC], [NCF] and:
>
> * * *
>
> JPMorgan Chase Bank, N.A. (successor to Bank One, N.A.) dated June 14, 2007, for loans that were originated under Bank One's CORPORATE ADVANTAGE

Loan Program, EDUCATION ONE Loan Program, and Campus One Loan Program."

¶ 13 Schedule B stated in relevant part:

"Each of the Note Purchase Agreements, as amended or supplemented, was entered into by and between [FMC] and:

* * *

JPMorgan Chase Bank, N.A. (successor to Bank One, N.A.) dated May 1, 2002, for loans that were originated under Bank One's CORPORATE ADVANTAGE Loan Program, EDUCATION ONE Loan Program, and Campus One Loan Program."

¶ 14 Exhibits E through G were statements showing various loan transactions, which listed defendant as the borrower but specified no lender. However, Motin averred that exhibits E through G pertained to defendant's education loan that is the subject of the lawsuit.

¶ 15 Exhibit H was a loan payment history report with a redacted account number, except for "-PHEA." This report lists defendant as the borrower, but no lender is specified. However, Motin averred that exhibit H, too, concerned defendant's education loan that is the subject of the lawsuit.

¶ 16 We note that the record does not include schedule 1 or schedule 2, which exhibits C and D reference. In its brief—and its counsel confirmed at oral argument—plaintiff states that the schedules contain personal identification information for thousands of borrowers. Plaintiff asserts, generally consistent with Motin's affidavit, that the Chase Bank Roster in exhibit C is a redacted excerpt of schedule 1 showing defendant's loan. Plaintiff further states that it maintains a list of loans transferred to it from Chase, which includes defendant's loan. Plaintiff claims that it offered this list to the trial court for *in camera* inspection. However, that list is not in the record, nor does the record show that the court accepted or viewed the list. At oral argument, plaintiff's counsel stated that the trial court did not accept the document.

¶ 17 We also note that the record contains a nearly identical affidavit from Motin and similar documents regarding an entirely different borrower or lawsuit.

¶ 18 Defendant moved under section 2-619 to dismiss the amended complaint, arguing that plaintiff again failed to establish standing. Defendant noted that the complaint alleged that he obtained a loan from Chase that was assigned first to NCF and then to plaintiff, but the "2007-2 Pool Supplement" listed Bank One, not plaintiff, as the "Program Lender" that transferred the loans listed in schedule 1. Defendant argued that plaintiff had not produced documents to show (1) a loan between Bank One and defendant or (2) a clear assignment of the loan to plaintiff. Defendant included an affidavit averring that he did not enter into a contract with plaintiff.

¶ 19 Plaintiff responded that the documents it produced identified Chase as the lender and the successor in interest by merger with Bank One. Plaintiff included with its response an affidavit from Bradley Luke, another employee of TSI, averring to his qualifications and his review of TSI's records. Luke averred that Bank One and Chase merged in July 2004 and that Chase, as successor in interest, continued to offer undergraduate education loans through the Bank One Undergraduate Loan Program. Further, Luke averred that, in April 2007, Chase granted defendant a Bank One Education One loan and that, on June 14, 2007, Chase assigned the loan to NCF. That same day NCF assigned the loan to plaintiff. Attached to Luke's affidavit was a

document announcing the July 1, 2004, merger of Chase and Bank One. Defendant replied that plaintiff's supporting documentation failed to show that his loan with Chase was one of the loans transferred to plaintiff.

¶ 20 On August 25, 2020, the trial court held a hearing on the motion to dismiss. The record contains no report of proceedings of the hearing. The trial court's written order granted the motion to dismiss with prejudice, stating that (1) neither exhibit C nor exhibit D "sufficiently identifies the loan entered into between the defendant and [Chase]" and (2) "Exhibit 'B' is not a note, and as such plaintiff is not a holder in due course." Accordingly, the court found that plaintiff lacked standing to enforce the loan.

¶ 21 Plaintiff filed a motion to reconsider, arguing that (1) it sufficiently pled its standing and (2) the trial court erred in determining that the Uniform Commercial Code (UCC) governed the contract such that "holder in due course" principles applied. Plaintiff noted that defendant had not argued for application of the UCC.

¶ 22 The trial court held a hearing on plaintiff's motion, but the record contains no report of proceedings of that hearing. The court's written order denying the motion stated that the exhibits attached to plaintiff's complaint controlled the question of standing. The court found that the exhibits did not show (1) an enforceable contract or note between plaintiff and defendant or (2) an assignment of rights to plaintiff.

¶ 23 Plaintiff filed this timely appeal.

¶ 24 II. ANALYSIS

¶ 25 Plaintiff contends that the trial court erred in granting the motion to dismiss. Plaintiff argues that it sufficiently pled how it obtained the loan and, through the exhibits, demonstrated the assignment of the loan from Chase to NCF and then to plaintiff. In response, defendant argues, with little analysis, that plaintiff failed to show that it held a note, originally or by assignment, that it could enforce against defendant. According to defendant, the record shows that plaintiff acquired Bank One loans but not his specific Chase loan.

¶ 26 A section 2-619 motion to dismiss admits a complaint's legal sufficiency but asserts an affirmative matter outside the complaint that defeats the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. "A complaint is insufficient if it states mere conclusions of fact or law, and it must, at a minimum, allege facts sufficient to set forth the essential elements of a cause of action." *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 27. "Nevertheless, a complaint should not be dismissed for failing to state a cause of action unless it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief." *Id.*

¶ 27 The doctrine of standing (1) precludes parties who have no interest in a particular controversy from filing suit and (2) ensures that issues are raised and argued only by parties with a real interest in the controversy's outcome. See *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). To have the requisite standing to maintain an action, a plaintiff must complain of some injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). The alleged injury must be (1) distinct and palpable, (2) fairly traceable to the defendant's actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93.

¶ 28 In Illinois, it is the defendant's burden to plead and prove lack of standing. *International Union of Operating Engineers, Local 148 v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 45 (2005). Thus, a plaintiff is not required to allege facts to establish standing. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). If a plaintiff does not have standing, the court must dismiss the action because the lack of standing negates the plaintiff's cause of action. *Id.*

¶ 29 "Where standing is challenged by way of a motion to dismiss, a court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor." *U.S. Bank National Ass'n v. Sauer*, 392 Ill. App. 3d 942, 946 (2009). "Exhibits attached to the complaint become part of the pleadings, and the facts stated in such exhibits are considered the same as having been alleged in the complaint." *Outboard Marine Corp. v. James Chisholm & Sons, Inc.*, 133 Ill. App. 3d 238, 245 (1985).

¶ 30 The record here contains no reports of proceedings for the hearings on the motions. Normally, the appellant has the burden to present a sufficiently complete record of the circuit court proceedings to support a claim of error. In the absence of such a record on appeal, we presume that the circuit court's order conformed to the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. However, notwithstanding *Foutch*, a record of the proceedings in the lower court may be unnecessary when an appeal raises solely a question of law, which we review *de novo*. *Watkins v. Office of the State Appellate Defender*, 2012 IL App (1st) 111756, ¶ 19. The propriety of a section 2-619 dismissal for lack of standing is a question of law. *Id.* ¶¶ 19-20. Under the *de novo* review standard, we owe no deference to the trial court. *Trzop v. Hudson*, 2015 IL App (1st) 150419, ¶ 63. The record here is sufficient for us to undertake a *de novo* review.

¶ 31 The parties have not cited, nor have we located, any on-point Illinois cases regarding the amount of evidence a student loan trust must present to survive a motion to dismiss based on lack of standing to enforce an allegedly assigned loan. However, we find two helpful cases from other jurisdictions.

¶ 32 *National Collegiate Student Loan Trust 2006-4 v. Meyer*, 265 So. 3d 715 (Fla. Dist. Ct. App. 2019), is particularly on point. There, the plaintiff loan trust brought an action to enforce a student loan, and the trial court dismissed the action for failure to state a claim and lack of standing. The plaintiff produced documents, similar to those here, showing assignment of the loan from (1) Bank of America, N.A., and FMC to NCF and (2) from NCF to the plaintiff. The pool supplement stated that the Bank of America loans were transferred to NCF, which would in turn transfer them to the plaintiff. A single-page roster identified the loan in question by (1) a loan number that matched the loan number on other loan documents, (2) disbursement date, (3) amount, and (4) loan product. *Id.* at 717-18. The appellate court reversed the dismissal, holding that nothing on the face of the complaint suggested that the plaintiff lacked standing such that the affirmative defense should have been decided by a motion to dismiss. *Id.* at 718. The court noted that the plaintiff sufficiently alleged that it was owed the debt; the defendant had the burden of proving its affirmative defense of lack of standing. The documents that the plaintiff attached to its complaint supported its allegation of ownership and were sufficient to overcome a motion to dismiss based on lack of standing. *Id.* at 718-19. However, the court noted that the plaintiff's documentation might not be sufficient to survive later motions such as summary judgment or at trial. *Id.* at 719.

¶ 33 In *National Collegiate Student Loan Trust 2005-3 v. Dunlap*, 2018-Ohio-2701, 115 N.E.3d 689, ¶¶ 1, 14, the defendant appealed a summary judgment against him. He argued that the trial court erred in denying both his motion for summary judgment and his motion to dismiss based on the plaintiff loan trust's lack of standing. *Id.* ¶ 1. The plaintiff had submitted the affidavit of an employee of the loan's subservicer. He averred that the defendant opened an education loan with the original lender and that the lender assigned the loan to NCF, which in turn assigned the loan to the plaintiff. *Id.* ¶ 2. Records attached to the affidavit included (1) the nonnegotiable credit agreement, (2) the pool supplement agreement, (3) schedules to the pool supplement agreement referencing the various note purchase agreements, (4) a schedule referencing the defendant's loan, and (5) documents relating to the financial activity and payment history. *Id.* ¶ 21. The appellate court, affirming the summary judgment in favor of the plaintiff, noted that the documentation included a specific reference to the defendant's loan in the pool agreement and an explicit reference to it being transferred. *Id.* ¶ 23. Of particular interest here, the court also found challenges to the affidavit to be meritless. *Id.* ¶ 24.

¶ 34 Similarly, we have previously found that servicing agent employees who conduct a thorough review of loan documentation can be deemed competent to provide testimony about the loan status. See *Sauer*, 392 Ill. App. 3d at 946-47. In *Sauer*, we specifically found that standing to enforce an assigned mortgage was shown through an affidavit that provided a copy of the assignment. Once the plaintiff presented admissible evidence and the defendant presented no affidavits or other evidence to contradict it, there was no basis in the record to find that the plaintiff lacked standing. *Id.* at 946. Affidavits submitted with plaintiff's reply may also be considered. See *In re Estate of Krpan*, 2013 IL App (2d) 121424, ¶¶ 10, 22 (considering affidavit submitted with party's reply in conjunction with its motion to dismiss).

¶ 35 Here, plaintiff included documents showing that defendant entered into an "Education One" loan agreement with Chase, that the loan number was 0490472, and that the loan could be assigned at any time. Based on the affidavits, Chase had previously merged with Bank One but continued to offer Bank One Education One loans. The 2007-2 pool supplement showed that Chase, as successor in interest to Bank One, assigned certain Bank One education loans to NCF, which would assign the loans to plaintiff. While the full specific schedule listing defendant's loan was not included, plaintiff submitted, like the plaintiff in *Meyer*, a single-page roster, which in this case showed Chase as the lender for a loan that was the same loan product as defendant's loan and also had the same account number ("GUAREFF") and loan amount. Schedules attached to the sales agreement between NCF and plaintiff specifically referenced loans subject to the 2007-2 pool supplement. Motin's and Luke's affidavits further tied the documents together. In particular, Luke's affidavit explained the chain of assignments. However, the trial court did not appear to credit the affidavits.

¶ 36 Other than an affidavit stating that he did not enter into a contract with plaintiff, defendant did not present any evidence proving that plaintiff lacked standing. Defendant has also not challenged the admissibility of the affidavits or documents attached to the pleadings. While defendant asserts that the documents are insufficient to establish standing, it was not plaintiff's burden to establish its standing. See *Sauer*, 392 Ill. App. 3d at 946. To the extent that the documents leave any doubt as to standing, we accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor. Here, at a minimum, the inferences drawn from the documents are that defendant took out a Bank One education loan through Chase that was later assigned to NCF, who then assigned it to

plaintiff. Therefore, we conclude that, when viewed in the light most favorable to plaintiff, the pleadings, affidavits, and exhibits on file do not establish that plaintiff lacked standing.

¶ 37 Defendant also argues that we may affirm the trial court's judgment on any basis presented in the record. See *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶ 26. Defendant then states without analysis that the trial court was correct in finding that exhibit B was not an enforceable contract or note. However, exhibit B and the other exhibits show both a contract entered into between defendant and Chase and a breach of that contract. See *Antaal*, 2012 IL App (2d) 110904, ¶ 30 ("The elements of a breach-of-contract cause of action include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant damages or injury to the plaintiff."). Indeed, defendant admits that he entered into an agreement with Chase.

¶ 38 Defendant's argument appears to be that the contract does not show plaintiff as a party or show an assignment of the contract, but as previously explained, the record as a whole sufficiently shows the assignment, at least for purposes of the pleadings stage. If something else about the contract makes it unenforceable, defendant did not identify it in his motion to dismiss or present it on appeal.

¶ 39 Notably, the record, which contains no report of proceedings, does not indicate if the parties argued the applicability of the UCC or if, rather, the trial court invoked it *sua sponte*. Certainly, defendant did not raise the UCC in his motion to dismiss. The parties do not argue its applicability, so we need not consider the matter.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the judgment of the circuit court of Kane County and remand the cause for further proceedings.

¶ 42 Reversed and remanded.

¶ 43 JUSTICE McLAREN, specially concurring:

¶ 44 I write to comment on some of the mixed messages contained in this disposition.

¶ 45 The majority refers to lack of standing as an affirmative defense pursuant to section 2-619 but then suggests that it is plaintiff that has presented sufficient evidence of standing, citing two cases for the proposition that the plaintiff actually must present sufficient facts to establish standing. See *supra* ¶ 31 ("The parties have not cited, nor have we located, any on-point Illinois cases *regarding the amount of evidence a student loan trust must present to survive a motion to dismiss* based on lack of standing to enforce an allegedly assigned loan. However, we find two helpful cases from other jurisdictions." (Emphasis added.)).

¶ 46 Although the term "standing" is used 29 times, the disposition never affirmatively states that standing was established by plaintiff consistent with the cases referenced. To the contrary, and in the negative, the disposition relates, "we conclude that, when viewed in the light most favorable to plaintiff, the pleadings, affidavits, and exhibits on file *do not establish that plaintiff lacked standing*." (Emphasis added.) *Supra* ¶ 36.

¶ 47 Although defendant had the burden of going forward and the burden of proof, defendant presented little in support of his claim of lack of standing. "Other than an affidavit stating that

he did not enter into a contract with plaintiff, defendant did not present any evidence proving that plaintiff lacked standing." *Supra* ¶ 36.

¶ 48 I submit that defendant's argument to this court has attempted to flip the burden of proof to plaintiff, claiming that the plaintiff failed to establish standing. It appears that the trial court adopted that perspective. However, the disposition determines that, for these purposes, plaintiff established standing without affirmatively acknowledging that achievement. Accordingly, I affirm that plaintiff established standing to proceed further on its complaint despite the burden of defendant to prove the negative.