2018 IL App (2d) 171005-U
No. 2-17-1005
Order filed July 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NATIONSTAR MORTGAGE, LLC,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-CH-4565
	)	
JOHN GAZDIK, ALTA FERN GAZDIK,	)	
UNKNOWN HEIRS AND LEGATEES OF	)	
JOHN GAZDIK, UNKNOWN OWNERS	)	
And NONRECORD CLAIMANTS,	)	
	)	
Defendants	)	Honorable
	)	James R. Murphy,
(John Gazdik and Alta Fern Gazdik,	)	Susan Clancy Boles,
Defendants-Appellees).	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of summary judgment in favor of defendants was proper because plaintiff's attachments to the foreclosure complaint rebutted plaintiff's allegations about its right and ability to maintain this foreclosure action; likewise, the trial court did not abuse its discretion in imposing a fee award.

¶ 2 Plaintiff, Nationstar Mortgage, LLC, appeals the judgments of the circuit court of Kane County granting summary judgment in favor of defendants, John Gazdik and Alta Fern Gazdik, and awarding attorney fees to defendants. Plaintiff's challenge to the trial court's judgment is

affirmatively rebutted by the documents attached to the complaint and plaintiff, in an agreed order, conceded that the only germane documents were those attached to the complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2006, defendant John Gazdik (along with his mother, who is not a party to this action) sought to purchase a commercial building in Elgin. They obtained a mortgage and note for the purchase from First Magnus Financial Corporation. John was the only signatory on the note (his mother signed the mortgage contract along with John). Beginning in February 2012, John began to miss his payments on the subject property.

¶ 5 On December 18, 2012, plaintiff filed its foreclosure complaint. Relevantly, plaintiff attached a copy of the mortgage and note to the complaint. In addition, plaintiff attached documents showing that First Magnus specially endorsed the note to Residential Funding Company and Residential Funding specially endorsed the note to Deutsche Bank Trust Company Americas as trustee. An allonge attached with the assignment exhibits showed that Deutsche Bank Trust specially endorsed the note to Aurora Loan Services LLC. Another exhibit showed that, effective July 1, 2012, Aurora Bank FSB assigned the mortgage to plaintiff. No other documents bearing on the ownership of the note or the mortgage were attached to the complaint.

¶ 6 In January 2013, defendants initially appeared *pro se* and filed an answer with no affirmative defenses that substantially admitted plaintiff's allegations. On September 15, 2013, plaintiff filed a motion for entry of judgment of foreclosure, which included an assignment of defendants' mortgage from Aurora Loan to Aurora Bank. On the same date, plaintiff also filed a motion for a default order, alleging that neither defendant had appeared and alleging that defendants had not filed an answer to plaintiff's complaint, despite the facts that, in January

2013, defendants filed their *pro se* appearances and answered the complaint. Not surprisingly, plaintiff withdrew the motions the very next day. Unfortunately, no transcript of that hearing was included in the record.

¶ 7 The case languished; plaintiff asserts that, between May 2014 and March 2015, it proceeded under a loss-mitigation hold while regular status hearings occurred during that time. During that period, in August 2014, defendants secured representation and, on August 18, 2014, defendants' attorney filed his appearance. Defendants did not amend or withdraw their answer at the time of their attorney's initial appearance.

¶ 8 On October 26, 2015, plaintiff filed a motion for summary judgment. In an included affidavit, a document execution specialist employed by plaintiff averred that Aurora Bank was the previous servicer of defendant's loan and, when plaintiff became the servicer, it incorporated Aurora Bank's records into its own records-keeping system and relied upon them. The affiant further averred that plaintiff possessed the note associated with the loan at the time of the filing of the foreclosure complaint and the note was made payable to plaintiff. No assignment of the note to plaintiff was attached as an exhibit; likewise, no assignment of the note to plaintiff, as opposed to the mortgage, appears in the record.

¶ 9 In November 2015, a briefing schedule was set for plaintiff's motion for summary judgment, and the hearing on the motion was scheduled for February 8, 2016. On that date, plaintiff's request to continue the hearing was granted, and the hearing was rescheduled to April 4, 2016. On April 4, 2016, plaintiff again requested to continue the hearing on its motion, and its request was granted. The trial court continued the motion for summary judgment to June 6, 2016, and it ordered that: "[the] matter is continued *** for plaintiff to obtain [the] original note and mortgage or an affidavit for lost documents." We thus infer that, up to that date, plaintiff

had not yet presented the original note or mortgage in open court.

¶ 10 On June 6, 2016, plaintiff withdrew its motion for summary judgment and the matter was continued to August and then to October 31. On August 24, 2016, plaintiff filed another motion for summary judgment. In this motion, a different document execution specialist swore an affidavit with substantially the same information as in the earlier affidavit attached to the earlier motion for summary judgment, updating the amount claimed to be due and owing. In September 2016, plaintiff's motion was scheduled for hearing on December 5, 2016. On September 21, 2016, defendants promulgated discovery requests to plaintiff, and on October 17, 2016, plaintiff mailed its responses.

¶ 11 On October 3, 2016, defendants filed a motion for substitution of judge, arguing that the trial court had not made any substantive rulings at that point. On October 14, 2016, the case was assigned to a new judge and the briefing schedule on plaintiff's motion for summary judgment was revised, with the hearing set for December 20, 2016. On December 20, plaintiff sought to continue the hearing. Plaintiff's request was granted and the hearing was stayed pending plaintiff's responses to defendants' discovery requests, which were ordered to be completed by January 20, 2017. On February 14, 2017, plaintiff requested another continuance, and defendants agreed. The parties entered an agreed order with status on discovery scheduled for April 18, 2017; defendants' pending response to plaintiff's motion for summary judgment remained stayed until discovery had been sorted out.

¶ 12 In spite of the February 14, 2017, agreed order, on February 17, 2017, defendants filed a petition for a rule to show cause, alleging that plaintiff had been stonewalling their discovery requests, beginning at least when defendants retained counsel. Defendants specifically alleged that, in September 2016, they propounded discovery requests to plaintiff and plaintiff did not

respond to the requests despite the series of court orders requiring plaintiff to comply with the discovery requests recounted above.

¶ 13 Defendants described the precise circumstances that led to their petition:

"[O]n February 13, 2017, at 3:58 p.m. (less than one day before a hearing was to be heard before this court), Plaintiff's counsel e-mailed to [defendants' counsel] a purported response to Defendants' discovery. Said production requests sought documents that relate to *inter-alia* [*sic*], the purported assignments, loan committee documents, loan accounts dealing with the defendants, documents related to the mortgage, documents related to any assignment of the Note, documents that relate to any denial of any request to admit.

9. Plaintiffs' [*sic*] counsel spoke by phone to [defendants' counsel] on February 13, 2017[,] at or about 4:00[p.m.] where he informed [defendants' counsel] that the 'answers' [to discovery] were just sent and both counsel agreed that Plaintiff's counsel would inform the court that the discovery answers were sent on [February 13, 2017,] and Defendants' counsel would not appear on the date of the scheduled court appearance of [February 14, 2017.]

10. Upon returning to [his] office, [defendants' counsel] observed the purported answers [to discovery] were grossly incomplete and totally non-responsive. For instance, as it relates to Request #1, Plaintiff indicated that the documents sought were attached. However, no such documents were attached. Plaintiff objected to all remaining request[s]. Plaintiff did however attach to the response the mortgage, and some assignments which were attached to the original complaint.

11. The crux of Defendants['] defense is that Plaintiff is not owed any money by

Defendants, rather Plaintiff has alleged a promise was made to pay others money. To avoid the surprise of additional documents raining down at the 11th hour, Defense counsel merely sought the full scope of documents that reflect the full and complete assignment chain of the Note and the Mortgage. Yet, the Plaintiff is unwilling to state that there are no other documents and doesn't [*sic*] produce the documents.

12. As part of the 201(k) conference [(Ill. S. Ct. R. 201(k) (eff. July 1, 2014)], Plaintiff's counsel has represented that not only will he not produce the documents requested in document request #1, his attempt at resolution was that he would not produce the documents that the response indicates he would produce, but would also raise additional objections that have not been made to providing the requested material.

13. On February 13, 2017, [defendants' counsel] dispatched a 201(k) letter seeking a 201(k) conference, even though at this point the discovery had been ordered and not responded to. This is a classic example of an attorney or a litigant that is abusing the system. We have a case that has gone on for FIVE YEARS! It should be simple enough for a national mortgage company to say 'here is everything we have related to the note and mortgages.' This is not a trade secret, nor is it Top Secret!

***

18. It was clearly understood by all parties on October 14, 2016[,] that Defendants' response to Plaintiff's Motion for Summary Judgment required the production of the discovery documents requested in the previously propounded discovery.

19. The crux of defendant's discovery is that there are items missing from the assignment chain in the Plaintiff's motion and in the case file. Defendants wish to

foreclose the idea that additional documents will be forthcoming. Nevertheless, Plaintiff will neither commit to a lack of other documents or [*sic*] produce the other documents.

20. Nevertheless, on November 4, 2016, Plaintiff failed to respond to Defendants' discovery as ordered. Again, on December 20, 2016[,] Plaintiff again appeared in open court without responses to Defendants' discovery.

21. The court admonished Plaintiff to provide all outstanding discovery no later than January 20, 2017.

22. Once again, in complete disregard to the Court's order, Plaintiff again failed to respond to Defendants' discovery.

23. It should not be lost on this Court, this cause of action was filed in 2012 and the reason for the continuances for over five years have been because Plaintiff needed to obtain a complete chain of assignments before filing its recent Motion for Summary Judgment.

24. Originally, Plaintiff filed a Motion for Summary Judgment in 2013 before Judge Wojtecki. Plaintiff withdrew its Original Motion for Summary Judgment because the Plaintiff failed to have continuity of the assignment chain as articulated from the bench.

25. However, it was clear to Plaintiff that it could not prevail on its motion and [it] withdrew its original Motion for Summary Judgment on September 16, 2013. Three years later no new documents and Plaintiff remains committed to this case and committed to obstructing the Defendants from obtaining discovery documents related to the core of the dispute."

¶ 14 For its part, plaintiff blandly states that it responded to defendants' requests for

discovery: on October 24, 2016, it responded to defendants' requests to admit facts and on February 13, 2017, it responded to defendants' document production requests. Plaintiff highlights its objections to the requests to admit, pointing out that certain of the requests to admit were vague, ambiguous, and irrelevant. Plaintiff also specifically notes that it denied defendants' request to admit No. 3 that "all records and documents related to the loan that is the subject of the Note attached to Plaintiff's Complaint" were not provided. In other words, by denying the request to admit, plaintiff apparently was confirming that it had produced all "records and documents" related to the note and mortgage it was seeking to foreclose.

¶ 15 Also on February 17, 2017, defendants filed a motion for leave to file an amended answer to the foreclosure complaint, attaching, as is proper, their proposed amended answer. Plaintiff notes that the amended answer significantly differed from the original *pro se* answer by denying the allegations that the true copies of the mortgage and note were attached to the complaint, the amount of defendants' indebtedness, the alleged default, Alta Fern Gazdik's interest in the property, and plaintiff's standing to maintain the action. Plaintiff further notes that defendants admitted that there was a recorded assignment of the mortgage and that defendants raised no affirmative defenses in the proposed answer.

¶ 16 On March 22, 2017, the parties entered an agreed order to dispose of defendants' petition for rule to show cause and the motion for leave to file an amended answer. The agreed order provided:

> "1) On Defendant's [*sic*] oral motion, the pending Petition for Rule to Show Cause is withdrawn.
>
> 2) Plaintiff represents to this court and to the Defendants that no other document exists related to the assignment of the Note except for those documents attached to the

Complaint in this case or documents that have been provided in Plaintiff's discovery responses.

3) Plaintiff represents to this Court and to the Defendants that no other document exists related to the assignment of the Mortgage except for those documents attached to the Complaint in this case or documents that have been provided in Plaintiff's discovery responses prior to entry of this order.

4) Plaintiff is barred from introducing any document not attached to the Complaint and not provided in Plaintiff's discovery responses in this cause to establish the assignment of either the Note or the Mortgage prior to the date of this order, provided that the free transferability of the Note and mortgage [*sic*], as provided by law, are not hindered and/or restricted.

5) Defendants are granted leave to file their amended answer *instanter*.

6) Plaintiff withdraws all of its motions filed on August 24, 2016 [(relevantly, the motion for summary judgment)].

7) All written discovery is closed."

The balance of the order set the oral discovery schedule and the deadlines for filing dispositive motions.

¶ 17 In compliance with the March 22, 2017, order, on April 19, 2017, plaintiff filed another motion for summary judgment. Plaintiff included an affidavit from a document execution specialist that was substantially similar to the ones it had attached to its previous motions for summary judgment, updated to reflect the amounts due and owing as of February 2017.

¶ 18 On May 1, 2017, defendants filed their cross-motion for summary judgment. Defendants argued that the chains of assignments of the note and the mortgage reflected in the documents

attached to the complaint were incomplete, thereby defeating plaintiff's claim that it properly possessed the note at the time the complaint was filed. On May 8, 2017, defendants filed their response to plaintiff's motion for summary judgment which made similar arguments as to those raised in defendants' motion for summary judgment, namely, that the assignments of the note and mortgage showed gaps which affirmatively rebutted plaintiff's claim that it owned the note and mortgage when the complaint was filed.

¶ 19 On June 5, 2017, plaintiff filed its response to defendants' motion for summary judgment. Plaintiff challenged defendants' arguments, contending that the gaps in the chains of assignment for the note and mortgage were irrelevant. It also attached a copy of the assignments of the mortgage from Mortgage Electronic Registration Systems as nominee for First Magnus to Aurora Loan, from Aurora Loan to Aurora Bank, and from Aurora Bank to plaintiff. Plaintiff also attached a copy of the power of attorney from Deutsche Bank Trust appointing Aurora Loan as the servicer of the loan. Plaintiff argued that the mortgage assignments were all recorded documents of which the trial court could take judicial notice, notwithstanding the fact that the assignment of the mortgage from Aurora Loan to Aurora Bank had not been attached to the complaint or produced in any of plaintiff's discovery responses. Plaintiff also argued that the power of attorney was not required to be produced as it had never been the object of a specific discovery request and was not needed to establish plaintiff's standing to maintain the foreclosure action.

¶ 20 Plaintiff made similar arguments in its June 5, 2017, reply in support of its motion for summary judgment. Plaintiff recharacterized defendants' contention as one of standing and argued that the assignments and power of attorney attached to its response to defendants' cross-motion for summary judgment had no effect on the court's consideration of standing, which had

been established when it attached a copy of the note and mortgage to the complaint. Plaintiff also argued that it was the successor in interest to the note and mortgage because it acquired the assets (and the rights) of Aurora Bank and Aurora Loan, the acquisition of which entities were matters of public record subject to judicial notice.

¶ 21 On June 13, 2017, plaintiff also filed a motion for leave to supplement its discovery responses with the power of attorney and the assignment of the mortgage from Aurora Loan to Aurora Bank. On June 28, 2017, defendants filed a motion to strike the exhibits to plaintiff's response to defendants' cross-motion for summary judgment and plaintiff's reply in support of its motion for summary judgment. Defendants premised their argument on the March 22, 2017, agreed order in which plaintiff represented that it would rely on only the documents attached to its complaint or produced in discovery. Plaintiff responded to the motion to strike arguing that defendants had not requested in discovery the power of attorney and that the power of attorney was not barred by the March 22 order.

¶ 22 On August 8, 2017, the trial court denied plaintiff's motion to supplement and granted defendants' motion to strike. In light of its ruling, the trial court allowed additional briefing to occur. In its supplemental brief, plaintiff again characterized defendants' argument as purely one of standing and contended that defendants had forfeited the argument by not pleading it as an affirmative defense. Plaintiff further argued that defendants had failed to meet their burden of proof where plaintiff had attached the note and mortgage to the foreclosure complaint. Defendants argued in their supplemental brief that, where the plaintiff could not prove its case, they were not required to plead standing as an affirmative defense.

¶ 23 On September 20, 2017, the trial court ruled on the pending motions for summary judgment. The trial court granted defendants' motion for summary judgment and held that

plaintiff's motion for summary judgment was moot "on [the] basis that plaintiff is unable to establish a complete assignment of [the] note or mortgage."

¶ 24 On September 27, 2017, defendants filed a petition seeking attorney fees in the amount of $36,172.50. Defendants contended that Alta Gazdik was inexplicably named as a party defendant and plaintiff failed to articulate what, if any interest, she possessed in the subject party, beyond the "information and belief" allegation in the original complaint. Defendants also contended that plaintiff's conduct of this foreclosure action was dilatory and vexatious, culminating in plaintiff's inability to demonstrate that it properly held the note or mortgage at issue. Plaintiff countered that defendants' attorney entered the case after two years had elapsed, during the time immediately after defendants' counsel appeared there were ongoing mitigation efforts, and the billing records counsel submitted were suspect. Plaintiff contended that a fee award of $15,000 would be more reasonable.

¶ 25 On October 20, 2017, plaintiff filed a motion to reconsider the grant of summary judgment in defendants' favor. The parties advanced the same arguments that they had raised during the briefing and hearing the motions for summary judgment.

¶ 26 On November 14, 2017, the trial court held a hearing on the motion to reconsider and the petition for attorney fees. The trial court dispensed with oral argument on plaintiff's motion to reconsider and pronounced the following judgment:

> "The Motion to Reconsider is based upon plaintiff's argument that it had standing to bring this case based on the attached Exhibits to the original complaint and or that questions of fact exist as to the existence of certain documents related to the chain of assignment in this case.
>
> First, defendant's [*sic*] original Motion for Summary Judgment is not based upon

nor do they argue that plaintiff lacks standing to bring this case. In fact, the word standing does not even appear once in the defendant's [*sic*] Motion for Summary Judgment. The standing issue was raised by plaintiff's counsel in its response brief to defendant's [*sic*] motion. Plaintiff's attempt to reframe a narrow defense argument does not change the fact that the defendant[s] sought summary judgment based upon the plaintiff's inability to prove a perfected chain of Assignment of the Note and Mortgage.

The Court granted the Defense Motion for Summary Judgment because the documents relied upon by plaintiff and presented in opposition to the Motion for Summary Judgment do not show nor can those documents show a complete or perfected chain of assignment. Plaintiff argues that a question of fact exists with respect to the existence of documents which show a complete chain. But, as the Court has already ruled and as plaintiff's counsel agreed to in the March 22nd [*sic*], 2017[,] agreed order, 'Plaintiff represents to this Court and to the defendants that no other document exists related to the Assignment of the Note and Mortgage except for those documents attached to the complaint in this case or the documents that have been provided in plaintiff's discovery responses.'

Based on the fact that this agreed order and entry by the Court of same came after nearly five years of litigation, this court has held plaintiff to its representation and has barred production of any further documents related to the Assignment of the Note or Mortgage since March 22nd [*sic*], 2017. Thus, the existence of alleged documents related to the chain of assignment do [*sic*] not create a question of fact because they have been barred. Since they are barred, plaintiff cannot[,] based on the documents it had produced as of March 22nd [*sic*], 2017, show a perfected chain. It is for this reason that

> no question of fact exists and this case at this stage can and should be decided as a matter of law. Nothing has changed nor has any new evidence come to light. The Motion to Reconsider is denied."

¶ 27 The court then proceeded to hear defendants' petition for attorney fees. The trial court agreed with defendants' contentions and granted the petition, emphasizing that plaintiff had not been diligent, had filed at least two motions for summary judgment and then withdrawn them, and had forced defendants to incur fees when it failed to follow court deadlines. The trial court held that the sum of $25,000 was a reasonable amount of fees.

¶ 28 Plaintiff timely appeals.

¶ 29 II. ANALYSIS

¶ 30 On appeal, plaintiff argues that defendants failed to rebut its *prima facie* case. Specifically, plaintiff contends that possession of the note and mortgage was sufficient to demonstrate its ability to maintain the foreclosure action. Plaintiff also argues that defendants' challenge to the chain of assignment of the note and mortgage was really an unsuccessfully disguised attempt to raise the affirmative defense of standing, which defendants failed to plead, thereby forfeiting the defense, or, if not forfeited, then insufficiently supported to rebut plaintiff's *prima facie* case. Plaintiff also contends that the trial court flipped the burden of proof from defendants to prove lack of standing to plaintiff to affirmatively demonstrate standing. Plaintiff finally contends that the attorney fee award should be vacated or reduced. We address the issues in turn, as necessary.

¶ 31 A. Standard of Review

¶ 32 We begin by considering our standard of review. This matter comes before us on the grant of defendants' motion for summary judgment. The purpose of a motion for summary

judgment is to allow the court to determine whether a genuine issue of material fact exists. *Coleman v. Provena Hospitals*, 2018 IL App (2d) 170313, ¶ 15. A motion for summary judgment should be granted only when the pleadings, depositions, admissions, and affidavits in the record show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). In considering a motion for summary judgment, the court must construe the record strictly against the moving party and liberally in favor of the nonmoving party. *Coleman*, 2018 IL App (2d) 170313, ¶ 15. The trial court's grant of summary judgment should be reversed if the evidence demonstrates the existence of a genuine issue of material fact or if the judgment is incorrect as a matter of law, and we review *de novo* the trial court's judgment on a motion for summary judgment. *Id.*

¶ 33 B. Standing and Forfeiture

¶ 34 Plaintiff first argues that defendants' contentions all boil down to standing: regardless of how defendants couch their arguments, each argument is a different way of effectively disputing plaintiff's standing in this matter. Plaintiff argues that, because standing is an affirmative defense, it must be raised in the answer to the complaint. Plaintiff urges that, because defendants did not raise standing as an affirmative defense in either their answer or their amended answer, they forfeited all of their standing-related arguments. Plaintiff reasons that, because all of defendants' contentions are, in fact, about standing, once the contentions are properly forfeited, defendants are left with nothing, and we must conclude that the trial court's grant of summary judgment in favor of defendants was improper. We disagree.

¶ 35 Generally under Illinois law, lack of standing is an affirmative defense that the defendant must plead and prove, and the defense may be forfeited if it is not raised in a timely manner in the trial court. *Knox v. Chicago Transit Authority*, 2018 IL App (1st) 162265, ¶ 19. However, a

party may assert, without forfeiture concerns, an affirmative defense in a motion for summary judgment, even if the party did not raise the defense in the answer to the complaint. *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 156 (2010).

¶ 36 Plaintiff attempts to evade the rule in *Falcon Funding* in two related ways. First, plaintiff divines a countervailing rule that the *Falcon Funding* rule does not apply if the affirmative defense is first raised in a response to a motion for summary judgment. See *Bank of America, N.A. v. Basile*, 2014 IL App (3d) 130204, ¶ 24 (where the defendants did not file a motion for summary judgment, they could not rely on cases stating that an affirmative defense may be raised in a motion for summary judgment in the absence of a filed answer). To complete its chain of reasoning, plaintiff then posits that defendants did not raise their presumed affirmative defense of standing in a motion for summary judgment, but only in a response to plaintiff's motion for summary judgment, thereby falling under the sway of the *Falcon Funding* rule. Plaintiff's contention fails.

¶ 37 First, accepting plaintiff's view for the sake of argument, *Falcon Funding* was in the precise procedural posture that *Basile* purportedly prohibits: the defendants initially raised their affirmative defense when they responded to the plaintiff's motion for summary judgment. *Falcon Funding*, 399 Ill. App. 3d at 156 (noting that the defendants "challenged the [plaintiff's] pleading of equitable estoppel when it responded to the [plaintiff's] summary judgment cross-motion"). Far more importantly, however, defendants actually filed a motion for summary judgment raising the arguments that plaintiff deems to be standing. Plaintiff argues that defendants' response to plaintiff's motion for summary judgment is substantially similar to the arguments raised in defendants' motion for summary judgment and concludes that we should consider defendants' cross-motion for summary judgment as entirely equivalent to their response

to plaintiff's motion for summary judgment. We disagree. On May 1, 2017, defendants filed their cross-motion for summary judgment, and on May 8, 2017, defendants filed their response to plaintiff's motion for summary judgment. Thus, even if we were inclined to view the documents as essentially the same thing, it would be more logical to view the response as being equivalent to the earlier filed motion, not the other way around. Nevertheless, the simple fact remains: defendants *did* file a separate cross-motion for summary judgment, raising what plaintiff views to be arguments directed against plaintiff's standing. Plaintiff's attempt to distinguish *Falcon Funding* is unpersuasive.

¶ 38 In our view, then, to the extent that defendants' contentions invoke standing, they were raised in defendants' cross-motion for summary judgment and are thus outside of the rule in *Basile*. Further, defendants' contentions are permitted to be raised for the first time in a motion for summary judgment. *Falcon Funding*, 399 Ill. App. 3d at 156. Accordingly, we hold that, to the extent that they may be deemed to invoke standing, defendants did not forfeit their contentions.

¶ 39 C. Invalidity of the Complaint

¶ 40 Defendants argue that the complaint, on its face, indicates that plaintiff cannot maintain its foreclosure action due to the gap in the assignments, as demonstrated by the exhibits attached to the complaint. We agree.

¶ 41 Plaintiff properly attached copies of the note and mortgage to the complaint, together with some of the assignments of those documents. The note indicated that First Magnus, the originator of the note, assigned it to Residential Funding. Next, Residential Funding assigned the note to Deutsche Bank Trust. An allonge attached to the note indicated that Deutsche Bank assigned the note to Aurora Loan. The next assignment indicated that Aurora Bank assigned the

mortgage to plaintiff. Thus, the exhibits demonstrate that there is no assignment from any entity to Aurora Bank, and all the assignments were by way of special endorsements, so only the named party had the authority to negotiate the note. This conflicts with the allegations of the complaint. It is axiomatic that, where the allegations of the complaint conflict with exhibits attached to the complaint, the exhibits control. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 1502868, ¶ 24. Thus, the face of the complaint shows that plaintiff cannot maintain its foreclosure action in this case.

¶ 42 Plaintiff resorts to the argument that it established "a *prima facie* case of foreclosure" simply by attaching the note and the mortgage to the complaint, thereby establishing its possession. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24 (the singular fact, even standing alone, that a copy of the note is attached to the complaint is *prima facie* evidence that the plaintiff owns the note). What plaintiff misses, however, is that the assignment chain associated with the note (and attached to the complaint as a part of the note) does not confirm plaintiff's unadulterated and clear right to hold the note. As noted, all of the assignments are made by special endorsements which are liable to be negotiated only by the named party. All of the assignment documents evidence a gap in the chain of assignments, and these attachments to the complaint, on their face, rebut plaintiff's claimed "*prima facie* case of foreclosure." Plaintiff's claim of an unrebutted "*prima facie* case of foreclosure," therefore, is unavailing.

¶ 43 Plaintiff maintains that the type of endorsement on the note is immaterial, citing *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶ 13 ("The note attached to the original foreclosure complaint is *prima facie* evidence that JPMorgan Chase owned the note, even though it lacked the indorsement in blank."). This argument misses the point for two

reasons. First, it does not address the issue of the assignment gap illuminated by all of the special endorsements. Second, it does not accurately portray the reasoning employed in *Cornejo*. There, the copy of the note attached to the complaint did not exhibit an endorsement in blank, but the note produced in open court was endorsed in blank. *Id.* ¶ 11. The court held, under those circumstances, the copy of the note that was not endorsed evidenced ownership of the note, "even though it lacked the indorsement in blank." *Id.* ¶ 13. In addition, the court was resolving the issue of whether the defendant had produced evidence to support his affirmative defense of lack of standing which was based on the claim that the transfer of the note did not occur before the filing of the complaint. Here, by contrast, the issue is the gap in the chain of assignments evidenced by the exhibits attached to the complaint. Thus, plaintiff's reliance on *Cornejo* is misplaced.

¶ 44 Plaintiff contends that defendants were effectively attempting to shift the burden of proof, arguing what was essentially an affirmative defense without the requirement that they provide evidence to support their contentions. We disagree. As we have noted, defendants' argument, while perhaps adjacent to standing, is rather that the exhibits attached to the complaint contradict the allegations in the complaint. Thus, defendants' argument is not an affirmative defense, but is instead the recognition of a deficiency in plaintiff's pleading. Plaintiff's reliance on *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 12, remains unavailing. There, the defendant attempted to raise an affirmative defense but was unable to produce any evidence that would support his defense. *Id.* Here, by contrast, defendants pointed out the gap in assignments and demonstrated that the exhibits attached to plaintiff's complaint contradicted the allegations in the complaint. *Sconyers*, therefore, is inapposite, and we reject plaintiff's contention.

¶ 45 Plaintiff next contends that defendants did not dispute the averments in the affidavit supporting its motion for summary judgment. Plaintiff argues that because the averment that it was the successor servicer of the loan was uncontradicted, it demonstrated an interest sufficient to maintain its foreclosure action. Plaintiff's argument, however, overlooks the fact that the affidavit does not address the gap in the assignments. Thus, even though the averments are uncontradicted, they do not address the central issue of the gap in the chain of assignments. Because the gap is not shored up by the affidavit, plaintiff's argument fails.

¶ 46 Plaintiff next argues that Aurora Bank's assignment of the mortgage to plaintiff demonstrates its ability to maintain the foreclosure action. Plaintiff reasons that it became the successor in interest to the note because Aurora Loan is a wholly owned subsidiary of Aurora Bank, so plaintiff acceded to all of the assets of Aurora Loan by virtue of purchasing or merging with Aurora Bank. Plaintiff cites *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 38, for the proposition that Illinois courts have taken judicial notice that Aurora Loan is the wholly owned subsidiary of Aurora Bank. Plaintiff does not, however, cite any authority for the proposition that we may ignore the independent corporate status of Aurora Loan, Aurora Bank, and plaintiff for purposes of negotiating a specially endorsed instrument or under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2016)). (Indeed, the corporate assignments from Aurora Loan to Aurora Bank, and from Aurora Bank to plaintiff belie plaintiff's argument: if they were unnecessary, why were they executed?) By not completing and supporting its argument with relevant authority, plaintiff has forfeited the contention. Ill. S. Ct. R. 347(h)(7) (eff. Nov. 1, 2017).

¶ 47 Plaintiff also insists that defendants' contention is solely one of standing. We disagree. Defendants did not argue that plaintiff lacked standing; rather, defendants argued that plaintiff

could not demonstrate its right and ability to maintain this foreclosure action because the documents properly attached to the complaint affirmatively demonstrated that plaintiff could not maintain the action. While this argument may involve concepts that are similar to those in an affirmative defense of standing, such as assignments, endorsements, and rightful possession of the instruments on which the action is based, the central point is the conflict between the exhibits attached to the complaint and the allegations of the complaint. It is plaintiff who has characterized defendants' contentions as a *de facto* affirmative defense of standing, with all of the procedural requirements entailed. *1002 E. 87th Street LLC v. Midway Broadcasting Corp.*, 2018 IL App (1st) 171691, ¶ 16 (ordinarily, a defendant must plead and prove the affirmative defense of lack of standing). We do not accept plaintiff's attempt to recharacterize defendants' arguments; plaintiff has simply set up a straw man only to knock it down on procedural grounds without addressing the actual substance of defendants' contentions. Accordingly we reject plaintiff's contention.

¶ 48 This rejection extends to plaintiff's complaint that the trial court shifted the burden of proof. Plaintiff argues that, because defendants' raised a *de facto* standing challenge, it was defendants' burden to offer evidence demonstrating plaintiff's purported lack of standing. This argument, however, does not get off the ground because there is no lack-of-standing challenge in this case. Without such an argument, the burden remained on plaintiff to explain why, in light of the conflicting exhibits, it could maintain this foreclosure action. The burden, therefore, was always properly on plaintiff in light of defendants' actual contention, and not plaintiff's attempt to erect and topple the lack-of-standing straw man.

¶ 49 Reluctantly departing from its *idée fixe*, plaintiff argues that the trial court could and should have taken judicial notice of the corporate mortgage assignment between Aurora Loan

and Aurora Bank. We disagree. The mortgage assignment between Aurora Loan and Aurora Bank is the kind of document that is susceptible to judicial notice. *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983) ("judicial notice may be taken of factual evidence where the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy"). However, plaintiff agreed in the March 22, 2017, order that only the documents produced in discovery and attached to the complaint (which at the time of the order were exactly the same documents) had any bearing upon the ownership and possession of the note and mortgage at issue in this case. Conspicuously absent was the mortgage assignment between Aurora Loan Services and Aurora Bank, *despite the fact that, on September 5, 2013, plaintiff attached the assignment as an exhibit to a motion, but then withdrew it.* Despite having once attached the assignment as an exhibit to a motion, plaintiff evidently did not believe that it was germane to the proceedings, never producing the assignment in discovery and only formally acknowledging the existence of the assignment by requesting judicial notice of it in its July 5, 2017, response to defendants' motion for summary judgment. The trial court implicitly denied plaintiff's request for judicial notice when it granted defendants' motion for summary judgment. A court should not take judicial notice of critical evidentiary material not produced in the court below. *Id.* We shall not do so in this court, because the assignment was never properly before the trial court. See *id.*

¶ 50 There are at least two good reasons supporting our decision. First, plaintiff was given ample opportunity to produce the assignment. Apparently recognizing its importance in the early stages of the case, plaintiff attached the assignment to its September 5, 2013, motion for judgment of foreclosure. That motion, however, was withdrawn and plaintiff did not produce the assignment in discovery. Second, plaintiff and defendants entered an agreed order on the subject

stating that plaintiff was "barred from introducing any document not attached to the Complaint and not provided in Plaintiff's discovery responses in this cause to establish the assignment of either the Note or the Mortgage prior to the date of this order." Further, plaintiff represented, in the agreed order "that no other document exists related to the assignment of the Note except for those documents attached to the Complaint in this case or documents that have been provided in Plaintiff's discovery responses," and "that no other document exists related to the assignment of the Mortgage except for those documents attached to the Complaint in this case or documents that have been provided in Plaintiff's discovery responses prior to entry of this order." Agreed orders are not judicial determinations of parties' rights, but rather are agreements between the parties and subject to the rules of contract interpretation. *In re Marriage of Tworek*, 2017 IL App (3d) 160188, ¶ 14. In spite of plaintiff's clear demonstration of its knowledge of the import of the assignment by virtue of its attachment to the withdrawn September 5, 2013, motion for judgment of foreclosure, plaintiff agreed that it had produced in discovery or attached to the complaint all relevant documents describing all of the assignments of the note and mortgage at issue in this case. Plaintiff further agreed that it would be barred from producing any documents outside of those it had produced on or before March 22, 2017, or attached to the complaint. We hold plaintiff to its bargain and hold that the trial court did not abuse its discretion in refusing to take judicial notice of the mortgage assignment from Aurora Loan Services to Aurora Bank.

¶ 51 Plaintiff argues that the assignment was not subject to discovery and was not identified in defendants' discovery requests. It is inconceivable that the mortgage assignment was not "related to the assignment of the Mortgage" and is not covered by the March 22, 2017, agreed order. Additionally, plaintiff argues that defendants did not specifically request the assignment. We disagree. Defendants requested all documents and records related to the mortgage attached

to the complaint and all documents and records relating to any and all assignments of the note attached to the complaint. Again, it is inconceivable that the mortgage assignment could reasonably be considered to be outside the scope of these requests, especially since plaintiff evidently recognized the centrality of the assignment to its claim in attaching it to the withdrawn September 5, 2013, motion for judgment of foreclosure.

¶ 52 Plaintiff argues that "[d]isputes should be resolved on the merits as opposed to technicalities" (citing *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 352 (2007)). We agree with the general principle. However, we recognize that it is plaintiff's actions alone that placed this case into its distinct procedural posture. Plaintiff made its bed and cannot now complain about lying in it.

¶ 53 D. Attorney Fees

¶ 54 Plaintiff argues that the award of attorney fees should be vacated, but only in relation to prevailing on the issue of the grant of summary judgment in favor of defendants. We have affirmed the trial court's judgment with respect to summary judgment in favor of defendants; we therefore do not consider any further plaintiff's argument to vacate the award of attorney fees.

¶ 55 Plaintiff alternatively argues that the award of attorney fees should be reduced. In ruling on defendants' fee petition, the trial court acknowledged that it had not presided over the entirety of the proceedings, but it also noted that it had reviewed the entire file to determine what had happened during the case. The court held that plaintiff's dilatory tactics required defendants' attorney to make unnecessary trips to court, but flatly stated that it was not awarding any fees for any of the time before defendants' counsel appeared. The trial court rejected defendants' full request of $36,172.50 and reduced it to $25,000. Plaintiff argues that the trial court should have further reduced the fee award to $15,000.

¶ 56 The trial court has broad discretion in awarding attorney fees and its decision will not be disturbed unless the court abused its discretion. *U.S. Bank National Ass'n v. Randhurst Crossing LLC*, 2018 IL App (1st) 170348, ¶ 78. Plaintiff does not contest any of defendants' specific billing records as unreasonable, only claiming that the records provided in general were incomplete and insufficiently detailed. We have carefully reviewed the record and discern no abuse of the trial court's discretion in its award of attorney fees. Accordingly, we reject plaintiff's contention.

¶ 57 III. CONCLUSION

¶ 58 For all of the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 59 Affirmed.