

HOW DO I ANSWER A FORECLOSURE COMPLAINT IN ILLINOIS?

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Many homeowners defending foreclosure are left with the inevitable choice of answering the foreclosure complaint without assistance from an attorney. Representing oneself in a legal case is otherwise known as proceeding “pro se”. A mortgage foreclosure complaint contains legal language that may be difficult for a non-attorney to understand. A foreclosure defendant that lacks a legal background may, despite his or her best efforts, not answer the complaint properly by either failing to admit or deny an allegations contained in the complaint or by not properly pleading a defense or counterclaim. A defendant to foreclosure should sit down with the complaint, read each paragraph, and answer each paragraph in the complaint by stating that they either (a) admit (agree), (d) deny (disagree), (c) have insufficient information to admit or deny the allegations contained in that paragraph. If a defendant fails to answer the complaint or sufficiently answer the complaint, the bank will likely obtain a judgment foreclosure by default or pursuant to summary judgment.

To avoid improperly answering a complaint, it is important to understand what a bank is required to plead in a foreclosure complaint. A complaint is presumed sufficiently pled if it contains all of the statements and requests outlined in the Illinois Mortgage Foreclosure Law (“IMFL”), 735 ILCS 5/15-1501 *et seq. Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill.App.3d 1, 6-7 (1st Dist. 2010). In fact, the legislature provided a short form complaint in the IMFL that almost every foreclosure complaint follows. 735 ILCS 5/15-1504(a). According to IMFL the foreclosure complaint “need contain only such statements and requests

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called for by the form,” such as attachment of the mortgage and note. 735 ILCS 5/15-1504(b). *Farm Credit Bank of St. Louis v. Biethman*, 262 Ill. App. 3d 614, 622 (5th Dist. 1994). By using the model form, a bank’s complaint will generally be protected from attack for insufficient form, but use of the model form is not required to foreclose. 735 ILCS 5/15-1504(a), 5/15-1105(a). *See, e.g., Land of Lincoln Savings & Loan v. Michigan Avenue National Bank of Chicago*, 103 Ill.App.3d 1095, 1099 (3d Dist. 1982).

Despite the use of the model form, a defendant may still be able to challenge the factual allegations and inferences contained in the complaint. Generally, a bank will be considered to have proved its case for foreclosure if it (1) properly introduces the mortgage and note, (2) and proves an actionable default under the mortgage. *Biethman, supra*. The first step to proving ownership is to attach a “true and correct” copy of the mortgage and note to the complaint. 735 ILCS 5/15-1504(a)(2). This requirement is inferred from the language of the IMFL that the short-form complaint is deemed to include allegations that the exhibits attached are “true and correct copies of the mortgage and note and are incorporated and made a part of the complaint of foreclosure by express reference.” 735 ILCS 5/15-1504(c)(2).

The court will generally consider the copies attached to the complaint to be true and correct copies so long as the defendant does not object to their authenticity. *See U.S. Bank National Ass’n v. Sauer*, 392 Ill. App. 3d 942, 946 (2d Dist. 2009) (stating that it is defendant’s burden to prove lack of standing). The defendant must present a valid dispute that the copies attached are true and correct copies in order to shift the burden back to the plaintiff to prove its case. *See id.* “Plaintiffs normally bear the burden of proving the elements of their claims.” *Cogswell v. Citifinancial Mortgage Company, Inc.*, 624 F.3d 395, 401 (7th Cir. 2010), citing *TAS Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625, 633 (7th Cir.2007); *Midland Hotel*

Corp. v. Reuben H. Donnelley Corp., 118 Ill. 2d 306, 315-16 (1987); *Dyduch v. Crystal Green Corp.*, 221 Ill. App. 3d 474, 477-78 (2d Dist. 1991). True and correct copies of the mortgage and note are arguably copies of those documents as they appeared at the time that the bank filed foreclosure.

The Plaintiff needs to show ownership of the note as evidence that it holder the indebtedness in order to foreclose. By attaching true and correct copies of the note, in particular, the bank supports that it is the holder of the indebtedness and entitled to foreclose. *Cogswell*, 624 F.3d at 402 (“Generally speaking, only a mortgagee can foreclose on property, and a mortgagee must [] be ‘the holder of an indebtedness ... secured by a mortgage.’”). “Under the *Uniform Commercial Code*, which Illinois has adopted, 810 ILCS 5/1-101 *et seq.*, a key requirement to being a holder is physical possession of the note secured by the mortgage.” *Id.* citing 810 ILCS 5/1-201(b)(21)(A). Sometimes a plaintiff bank tries to show that it holds the note by bringing the original note to court. To prove holder status via possession of the original note it must be either endorsed in blank (containing a blank space, or endorsement to “bearer”) or directly to the foreclosing party via single, or multiple specific endorsements, or a combination of both. 810 ILCS 5/1-201(b)(21)(A) (defining a holder as “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.”). Both the copy of the note attached to the complaint and the original copy should include all of the same endorsements. If the copy of the note attached to the complaint does not appear to be a true and correct copy, the defendant may argue that the bank was not a holder of the note at the time that it filed the complaint.

If a defendant wishes to dispute whether the bank is a true holder of the note in order to foreclose, the defendant may be in a position to “deny” paragraph 3(N) of the complaint, or its

equivalent. Paragraph 3(N) of the short-form complaint reads: “(N) Capacity in which plaintiff brings this foreclosure: plaintiff is the legal holder of the indebtedness.” Also, if the defendant disagrees with the allegation that the plaintiff is the holder of the note, the defendant may dispute whether the plaintiff is a “mortgagee.” Under the IMFL, “mortgagee” is defined as “the holder of the indebtedness.” If the defendant disagrees that that the plaintiff is the mortgagee, the defendant may choose to deny paragraph 3(D) of the complaint, or its equivalent, which normally reads: “(D) Name of mortgagee: [plaintiff inserts its own name, or occasionally the name of the original lender.”

Sometimes the plaintiff claims that it can foreclose as the mortgage holder’s agent, and therefore falls within the IMFL definition of “mortgagee.” If so, the agent or servicer of the mortgagee must allege its capacity to foreclose in the complaint. If the plaintiff fails to do so, it may not have sufficiently alleged standing to foreclose in the complaint. 735 ILCS 5/15-1504(a)(3)(N). *See Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill.App.3d 1184, 1187-88 (5th Dist. 2008). If that is the case, the defendant may choose to deny paragraphs 3(D) or 3(N) pertaining to capacity to foreclose and status as a “mortgagee.”

Holder status, standing and capacity to foreclose are among the important allegations to consider denying when answering the complaint. A borrower should also scrutinize the amounts that the bank alleges the borrower owes or has failed to pay. These “default” amounts are normally set forth in paragraphs 3(J) and 3(K) of the complaint. If the borrower disputes that he or she is in default or the amount of default, the borrower may choose to deny the paragraph pertaining to default in the complaint.

A pro se litigant should not be afraid to deny the allegations in a foreclosure complaint if he or she has reason to believe that they are not true. Especially considering the burden of proof

standards set forth by the IMFL. Under the IMFL, the foreclosing bank is entitled to what is known as “summary judgment,” essentially judgment for foreclosure, where the material allegations in the complaint are not denied via a verified answer or the borrower states that he or she has insufficient information to admit or deny the material allegations contained in the complaint. 735 ILCS 5/15-1506(a)(1). Stated otherwise, the bank will be entitled to a judgment of foreclosure where the borrower only admits or states that he or she has insufficient information to admit or deny the allegations in an unverified answer (an answer that is not signed under oath). *See First Federal Savings & Loan Association of Ottawa v. Chapman*, 116 Ill. App. 3d 950, 953-54 (3d Dist. 1983) (stating that an answer to a verified foreclosure complaint should itself be signed under oath or supported by affidavit).

Overall, a borrower should be very careful to read, and understand what each paragraph of the complaint says and to determine whether or not he or she can admit or deny the allegations contained therein. It is important to be honest when answering the complaint, but a borrower should only admit those paragraphs that he or she truly believes to be true, and deny those that he or she has reason to believe are not true.