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SECOND DIVISION
APRIL 26, 2011

1-09-2488

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

D.B. STRUCTURED PRODUCTS, INC., ¹)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CH 6775
)	
JOZETTE GREENFIELD,)	Honorable
)	Mathias W. Delort,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: The defendant, Jozette Greenfield, has forfeited all arguments on appeal before this court because they were not properly preserved in the circuit court. However, forfeiture aside, the circuit court did not err in entering an order of default and a judgment for foreclosure and sale against her.

This appeal in the instant foreclosure action arises from a February 2, 2009 order for default and a “Judgment of Foreclosure and Sale” entered by the circuit court of Cook County against the

¹On February 2, 2009, the circuit court granted D.B. Structured Product, Inc. (DB)’s motion to substitute party-plaintiff (motion to substitute) in the instant cause of action, as a result of DB’s assignment of the mortgage at issue to REO Properties Corporation (REO). Thus, the plaintiff-appellee on appeal before us is REO.

defendant, Jozette Greenfield (Greenfield). On appeal, Greenfield argues that: (1) the circuit court lacked jurisdiction to enter a judgment of foreclosure against her; and (2) a judgment of foreclosure against her was improper because she had satisfied her debt obligation to the lender. For the following reasons, we affirm the judgment of the circuit court of Cook County.

BACKGROUND

In March 2003, Greenfield entered into a loan agreement with Long Beach Mortgage Company (Long Beach) for \$176,800, the terms of which stated that Greenfield would repay the loan over the course of 30 years. The loan agreement was evidenced by a note and secured by a mortgage for a property located at 821 N. Menard Avenue in Chicago. Subsequently, Greenfield defaulted on the loan made by Long Beach. In May 2003, however, Greenfield issued a check to Long Beach in the amount of \$178,000. In October 2003, Long Beach filed a document entitled “satisfaction of mortgage” with the Cook County Recorder of Deeds, discharging Greenfield from the debt obligation. In April 2004, Long Beach filed an affidavit of rescission with the Cook County Recorder of Deeds, stating that the October 2003 release of Greenfield's debt obligation was signed and recorded in error. It was discovered that the \$178,000 check issued by Greenfield was fraudulent.

According to the parties,² Long Beach initiated a foreclosure action against Greenfield, which was later voluntarily dismissed without prejudice.

²This information is not included in the record before us but only attached to the appendix in Greenfield's brief.

Subsequently, Long Beach assigned the note and mortgage at issue to D.B. Structured Products, Inc. (DB). On March 9, 2007, DB instigated a foreclosure action against Greenfield,³ based on Greenfield's failure to make monthly payments due under the note. Greenfield failed to file a responsive pleading to DB's complaint.

On June 14, 2007, DB filed a motion to voluntarily dismiss the complaint without prejudice, which the circuit court granted. However, on August 6, 2007, DB filed a motion to vacate the June 14, 2007 dismissal of the cause of action and to reinstate the matter (motion to vacate), pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code), stating that DB had voluntarily dismissed the case “on information and belief that reinstatement of the subject mortgage was imminent,” and that Greenfield “failed to remit *** funds to [DB] and [Greenfield] remain [sic] in default pursuant to the terms of the subject note and mortgage.” On that same day, August 6, 2007, DB also filed a motion for default, asking the circuit court to enter an order of default against Greenfield because she had failed to either file an appearance before the circuit court or any responsive pleadings to DB's complaint.

On December 3, 2007, DB filed an amended motion to vacate the June 14, 2007 dismissal of the cause of action and to reinstate the matter (amended motion to vacate) because DB had previously failed to file courtesy copies of the August 6, 2007 motion to vacate to the circuit court. On that same day, December 3, 2007, the circuit court reinstated the foreclosure action against

³DB's complaint for foreclosure also named as defendants Cosmopolitan Bank and Trust, as trustee, and other “unknown owners and non-record claimants.” However, these entities and individuals are not before us in the instant appeal.

Greenfield.

On February 27, 2008, DB filed a first amended complaint for foreclosure (amended complaint). The substance of the amended complaint and the original complaint remained largely the same, except that DB named Spathies Construction as an additional defendant to the lawsuit.⁴

On February 2, 2009, DB filed an amended motion for default against Greenfield, stating that “[a]t least 60 days have expired since *** [Greenfield] [was] served ***,” and that Greenfield had not filed any responsive pleadings and was therefore in default. On that same day, February 2, 2009, DB also filed a motion for judgment and a motion to substitute REO Properties Corporation (REO) as a party-plaintiff because DB had assigned the note and mortgage to REO and was no longer the holder of the note secured by the mortgage. On February 2, 2009, the circuit court granted an order for default against Greenfield and all of the defendants who are not parties on appeal before this court. The circuit court also allowed REO to be substituted as party-plaintiff in the cause of action. The circuit court further entered a “Judgment of Foreclosure and Sale” against Greenfield and all other defendants who are not parties on appeal before us.

On April 21, 2009, Greenfield filed a *pro se* appearance before the circuit court, and filed, pursuant to section 2-619 of the Code, a motion to strike and dismiss (motion to dismiss) the foreclosure complaint against her. Greenfield's motion to dismiss did not state any factual basis for the relief sought. On that same day, the circuit court entered an order staying the foreclosure sale of the property at issue until June 1, 2009.

⁴Spathies Construction is not a party on appeal before this court.

On June 3, 2009, the circuit court denied Greenfield's motion to dismiss, stating that a judicial sale of the property at issue may proceed.

On June 10, 2009, Greenfield filed a motion to stay sale of the property at issue (motion to stay sale), arguing that the “plaintiff has never had a valid lien, possessed a valid mortgage or note on this property, and never had a valid assignment.”⁵ On that same day, June 10, 2009, Greenfield, pursuant to section 2-1401 of the Code, filed a petition to vacate judgment against her (petition to vacate), arguing, *inter alia*, that Long Beach had already release her from her mortgage obligation in 2003. However, Greenfield's petition to vacate acknowledged that the check she had tendered to Long Beach in 2003 had “no bank name or routing numbers” and that it had “no wording relating to being redeemable at any bank,” but that it was the responsibility of Long Beach's counsel to determine “the difference between a transaction involving offer and acceptance and fraud.”

Subsequently, the circuit court denied⁶ Greenfield's petition to vacate and motion to stay sale. On September 14, 2009, the circuit court entered an order “approving report of sale and distribution, confirming sale, and order for possession” of the property at issue.

On September 22, 2009, Greenfield filed a notice of appeal before this court.

ANALYSIS

On appeal before this court, Greenfield raises arguments and issues which have been forfeited

⁵The “plaintiff” in Greenfield's motion to stay sale can be presumed to be REO, rather than DB, because the circuit court, in February 2009, had allowed REO to be substituted as the named party-plaintiff in the cause of action.

⁶The circuit court's order was not made part of the record on appeal.

because they were not properly preserved in the circuit court. See *Jackson v. Hooker*, 397 Ill. App. 3d 614, 617, 922 N.E.2d 1229, 1232 (2010) (questions not raised in the lower court are forfeited and may not be raised for the first time on appeal); *Severino v. Freedom Woods, Inc.*, ___ Ill. App. 3d ___, ___, 941 N.E.2d 180, 190 (2010) (errors not raised in the trial court and raised for the first time on appeal are forfeited).

First, Greenfield argues that the circuit court “lacked jurisdiction” to enter a judgment against her because DB did not seek to vacate the circuit court’s June 14, 2007 order dismissing the cause of action without prejudice until “well over thirty days after its entry,” as required by section 2-2103(a) of the Code. 735 ILCS 5/2-1203(a) (West 2008). REO, as the assignee of the note and mortgage at issue in the instant action, argues that Greenfield forfeited all of her arguments on appeal before this court. We agree. We hold that Greenfield has forfeited this argument on appeal because she never challenged DB’s August 6, 2007 motion to vacate or DB’s December 3, 2007 amended motion to vacate in the circuit court on this basis.

The record shows that Greenfield did not file an appearance before the circuit court until April 2009, which was over a year after the circuit court’s reinstatement of the foreclosure action against Greenfield in December 2007. Further, Greenfield’s subsequent motion to dismiss DB’s foreclosure complaint against her failed to state any factual basis for the relief sought. We find that Greenfield did not advance this argument as a basis for relief in any of her pleadings filed before the circuit court. Thus, Greenfield’s argument that DB did not seek to vacate the circuit court’s June 14, 2007 dismissal order until “well over thirty days” after entry of the dismissal order has been forfeited.

Forfeiture aside, we find that the substance of this argument has no merit. In seeking to vacate the circuit court's June 14, 2007 dismissal order, DB filed its August 6, 2007 motion to vacate and December 3, 2007 amended motion to vacate pursuant to section 2-1401 of the Code, rather than section 2-1203(a) of the Code. Section 2-1203(a) states that in all cases tried without a jury, "any party may, within 30 days after the entry of the judgment ***, file a motion *** to vacate the judgment." 735 ILCS 5/1203(a) (West 2008). However, Section 2-1401 of the Code permits petitions for relief to be filed after 30 days from the entry of a court's final orders and judgments. 735 ILCS 5/2-1401(a) (West 2006). A section 2-1401 petition for relief must be filed no later than 2 years after the entry of the order or judgment by the court. 735 ILCS 5/2-1401(c) (West 2006). In Illinois, "all dismissals, be they with or without prejudice, become final and unalterable judgments under Illinois law after 30 days unless a party takes some action." *Director of Insurance of the State of Illinois v. A and A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 726, 891 N.E.2d 500, 505 (2008). In the case at bar, the circuit court's June 14, 2007 order dismissing the cause of action without prejudice became final after 30 days—on July 14, 2007. Thus, it was proper for DB to seek to vacate the dismissal order under section 2-1401 of the Code, rather than section 2-1203, after the 30-day period had passed following the circuit court's entry of judgment. Therefore, the circuit court had authority to vacate the voluntary dismissal of the cause of action and reinstate the foreclosure action.

Greenfield next argues that DB was prohibited from commencing a "third action against [her] for the same purported debt obligation" because section 13-217 of the Code "expressly prohibits more than one refiling" of a cause of action. 735 ILCS 5/13-217 (West 2008). Specifically,

Greenfield asserts that “Long Beach’s dismissal [of its foreclosure action against Greenfield in 2003] *** constitutes the first dismissal.” We find that none of the pleadings filed by Greenfield in the circuit court advanced this particular argument. Thus, we hold that Greenfield’s argument that section 13-217 of the Code barred reinstatement of DB’s cause of action in December 2007, the rights of which were later assigned to REO as the assignee of the note and mortgage at issue, has been forfeited.

Even if this issue were not forfeited, we find that we are unable to find in favor of Greenfield because the record is incomplete as to Long Beach’s 2003 foreclosure lawsuit against her. The record is devoid of any pleadings or information relating to the circumstances under which Long Beach filed a foreclosure lawsuit against Greenfield, and which it later voluntarily dismissed without prejudice. Rather, Greenfield has only attached pleadings relating to Long Beach’s foreclosure action against her to the appendix of her brief before us. We find that copies of these documents, attached to the back of Greenfield’s brief before this court, are not properly before us and cannot be used to supplement the record. See *Denny v. Haas*, 197 Ill. App. 3d 427, 430, 554 N.E.2d 727, 729 (1990). Thus, we hold that even if this claim were not forfeited, Greenfield is still not entitled to relief because the record is incomplete as to the cause of action filed by Long Beach, and any doubts arising from an incomplete record must be resolved against Greenfield. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984).

Next, Greenfield argues that she had “paid off her obligation” because, in October 2003, Long Beach filed a document entitled “satisfaction of mortgage” with the Cook County Recorder of Deeds, which discharged Greenfield’s mortgage obligation. Greenfield contends that “[e]ven if

there was some legitimate dispute as to the merits of [her] accord and satisfaction defense,” she was entitled to a trial on the merits.

We hold that this argument, similar to those as discussed, has also been forfeited on appeal. Section 2-613 of the Code states in pertinent part that “facts constituting any affirmative defense, such as payment, release, satisfaction, discharge ***, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d) (West 2008). In the case at bar, on April 21, 2009, Greenfield filed a *pro se* appearance before the circuit court and a motion to dismiss the foreclosure complaint, over two months after the circuit court entered an order for default against her in the foreclosure lawsuit. In the motion to dismiss, Greenfield failed to state any factual basis for the relief sought and made no mention of the purported satisfaction and release of her debt obligation. Rather, it was not until Greenfield’s June 10, 2009 petition to vacate judgment against her that she argued that Long Beach had already released her from her mortgage obligation in 2003. Thus, Greenfield’s argument that she had “paid off her obligation” is not properly before us on review because she failed to state the facts constituting the purported release, satisfaction and discharge of her debt obligation in the answer or reply to the complaint. See *Avery v. Sabbia*, 301 Ill. App. 3d 839, 848, 704 N.E.2d 750, 756 (1998) (a defendant who seeks to assert an affirmative defense at trial or on *review* must specifically *plead* it, as required by section 2-613(d) of the Code).

Even if Greenfield had properly pled this defense in an answer or reply to the foreclosure complaint in the circuit court, we find that she would not have been entitled to a trial on the merits on this basis. In the June 2009 petition to vacate, Greenfield acknowledged that the check that she had tendered to Long Beach in 2003, in the amount of \$178,000, had “no bank name or routing

number” and that it had “no wording relating to being redeemable at any bank.” After receiving this admittedly fraudulent check in 2003, Long Beach filed an affidavit of rescission with the Cook County Record of Deeds, stating that the October 2003 release of Greenfield’s debt obligation was signed and recorded in error. Based on these undisputed facts, we find that the circuit court did not abuse its discretion in denying Greenfield’s June 10, 2009 petition to vacate and Greenfield is not entitled to a trial on the merits on this issue. See *Glavinskis v. William L. Dawson Nursing Center, Inc.*, 392 Ill. App. 3d 347, 353, 912 N.E.2d 675, 680 (2008) (“[w]hether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending on the facts and equities presented, and its ruling will not be disturbed absent an abuse of discretion”); see generally *Phil Dressler & Associates, Inc. v. Old Oak Brook Investment Corp.*, 192 Ill. App. 3d 577, 584, 548 N.E.2d 1343, 1347 (1989) (“[i]n order to constitute fraud in the inducement, the defendant must have made a false representation of a material fact knowing or believing it to be false and doing it for the purpose of inducing the plaintiff to act”).

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.