

2011 IL App (2d) 110046-U  
No. 2-11-0046  
Order filed December 29, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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DEUTSCHE BANK NATIONAL TRUST	)	Appeal from the Circuit Court
CO., as Trustees for Certificate Holders of	)	of Du Page County.
Soundview Home Loan Trust 2005-OPT4,	)	
Asset-Backed Certificates, Series 2005-OPT4,	)	
Assignee of H&R Block Mortgage Corp.,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-3389
	)	
STANLEY K. RHOADS, PAUL MILTON	)	
RHOADS, under UCC Financing Statement	)	
recorded as Documents Number R2007-	)	
082305, NONRECORD CLAIMANTS,	)	
UNKNOWN TENANTS and UNKNOWN	)	
OWNERS,	)	Honorable
	)	Neal W. Cerne,
Defendants-Appellants.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

**ORDER**

*Held:* This court lacked jurisdiction to hear the portion of the appeal attacking the judgment for foreclosure, and order confirming sale must be affirmed. The appellant's motions to strike material appended to the appellee's brief and to supplement the record are granted.

¶ 1

### Background

¶ 2 On August 13, 2009, the plaintiff, Deutsche Bank Trust Co., which is the trustee for a trust that allegedly owns the mortgage and note at issue here, filed a complaint for foreclosure against the defendant, Stanley Rhoads, his father (a co-signer on the loan), and other possible holders of an interest in the mortgaged residential property. The street address of the mortgaged property is 0N012 Evans Avenue in Wheaton. According to an affidavit later filed by a private process server, the defendant was served that same day with the summons and complaint at the address “North 012 Evans Avenue, Wheaton.” The defendant did not timely file an answer or appearance.

¶ 3 On November 3, 2009, the plaintiff sent the defendant a notice of motion, stating that the plaintiff would present its motion for entry of an order of default and for a judgment of foreclosure and sale on November 16, 2009. The proof of service for the notice of motion listed the defendant’s address as “12 N. Evans Avenue” in Wheaton. On November 13, 2009, an attorney, Douglas Drenk, purporting to act on behalf of the defendant, filed a motion for substitution of judge. The motion was never set for hearing. On November 16, 2009, the plaintiff appeared in court. No one appeared on behalf of the defendant. The trial court continued the case until December 11, 2009, for status.

¶ 4 At the December 11, 2009, status hearing, attorney Drenk stepped up, purportedly on behalf of the defendant, when the case was called. The trial court entered an order giving Drenk leave to file his appearance on behalf of the defendant, giving the defendant 28 days to answer or otherwise plead, and setting January 25, 2010, as the next status date. Drenk filed no appearance, however, and the defendant did not file any answer or motion challenging the complaint.

¶ 5 There is some dispute as to whether the defendant was ever notified that the plaintiff planned to again seek the entry of a default and a judgment for foreclosure at the January 25, 2010, court date.

In the “time and task affidavit” filed on January 25, attorney Ira Nevel averred that on December 1 and December 30, 2009, he “[p]repared and mailed notice of motion for hearing” in connection with this case. An affidavit later submitted by an associate at Nevel’s firm, Greg Elsnic, stated that Elsnic signed the notice for the January 25, 2010, hearing on the motion for entry of judgment. Elsnic also explained that such notices are typically mailed in envelopes requesting the correction and return of any incorrectly-addressed or undeliverable mail, and that he had examined their file for the case and no mail had been returned. Elsnic did not state that he placed the notice in the mail, however, and there is no indication in either affidavit as to the address to which such a notice would have been sent. Neither the notice of motion nor any proof of its service appears in the record, and the defendant asserts that he never received any such notice of motion.

¶ 6 The plaintiff filed an array of documents on January 25, 2010. Among them was the time and task affidavit mentioned above; a motion for entry of default that stated that the defendant and his father, Paul Milton, had been served and no appearances had been filed; and a motion for entry of judgment. In addition, the plaintiff filed an affidavit by Kathy Smith. In the body of the affidavit, Smith described herself as “an employee/agent/officer” of American Home Mortgage Servicing, Inc. (hereinafter, AHMSI), which was the “successor in interest to Option One Mortgage Corporation servicing for” the plaintiff. However, in the attestation block at the end of the affidavit, Smith drew a line through the above-stated description of AHMSI’s interest and instead stated in a handwritten note that AHMSI was “an attorney in fact” for the plaintiff. Smith averred that she had personal knowledge of the allegations of the complaint and of the amounts due as principal and interest on the note secured by the mortgage, and the fees and costs recoverable under the applicable laws. She also averred that the mortgage was owned by the plaintiff.

¶ 7 On January 25, 2010, only the attorney for the plaintiff appeared in court. The trial court reviewed the court file and noted the return of service by the process server, and the allegations of the complaint. The trial court then entered an order of default against the defendant and his father and a judgment for foreclosure and sale. The judgment for foreclosure stated that the time for redemption would expire on April 25, 2010, after which the property could be sold by the sheriff, and the amount of the judgment, which included attorney fees and costs recoverable under the applicable law. The judgment also contained a finding pursuant to Supreme Court Rule 304(a) (eff. Jan. 1, 2006) that the judgment was final and appealable, as there was no just reason to delay execution or appeal. The record does not indicate that any copies of the orders entered on January 25 were sent to the defendant.

¶ 8 On April 5, 2010, the plaintiff sent the defendant a notice of sale listing a sale date of April 27, 2005. The notice was sent to the defendant's correct address, 0N012 Evans Avenue. The defendant does not dispute that he received this notice.

¶ 9 On April 22, 2010, the defendant's attorney, Joseph Williams, filed a special and limited appearance. At the same time, he filed an emergency motion to quash service of the summons and complaint. In an affidavit attached to the motion, the defendant averred that he was not at home at the date and time stated in the process server's affidavit, and had not been served. The motion was entered and continued and the sheriff's sale was temporarily stayed. On May 3, 2010, the trial court denied the motion to quash.

¶ 10 Also on May 3, 2010, the defendant filed a motion seeking to vacate the judgment of foreclosure pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)) on the grounds that (1) the plaintiff did not own the mortgage or note and therefore

lacked standing to bring the foreclosure action, and (2) the defendant received no notice of the proposed default judgment because it was sent to the wrong address. On May 24, 2010, after briefing by the parties and oral argument before the court, during which the plaintiff's repeated use of an incorrect address for the defendant was discussed at length, the trial court denied the motion to vacate and lifted the stay. On May 27, 2010, the property was sold by the sheriff to the plaintiff for the amount of the judgment.

¶ 11 On June 14, 2010, the plaintiff filed a notice of motion stating that it would appear before the trial court on June 21, 2010, to seek an order approving the sale and an order for possession. The proof of service for the notice listed an incorrect address for the defendant, 12 N. Evans Avenue. The defendant did not receive it. Despite the appearance filed by the defendant's attorney, the notice was not sent to the attorney. On June 21, 2010, neither party appeared in court, but the following documents were filed: the plaintiff's motion for confirmation of sale (which had not been attached to the June 14 notice of motion), and the sheriff's report of the sale and distribution, along with other documentation relating to the sale. The trial court entered an order confirming the sale.

¶ 12 Thirty days later, the defendant filed two motions. The first was a motion to vacate the order confirming the sale. The motion argued that the sale of the property should not have proceeded because the defendant never received notice of the motion for an order confirming the sale, and making the point that both the alleged notice that the plaintiff would seek a default judgment on January 25, 2010, and the notice regarding the confirmation of sale on June 21, 2010, were sent to the wrong address, although other notices (such as the notice of sale itself) were sent to the correct address, which the plaintiff indisputably knew. The motion also attempted to correct several misstatements made by the plaintiff's attorney during the May 24 oral argument regarding whether

the defendant could be presumed to have received notice of the entry of the judgment of foreclosure (and other notices) through attorney Drenk. Attached to the motion was an affidavit by attorney Drenk, stating that he had never met the defendant, was never authorized to appear on his behalf, and never filed an appearance for the defendant; and that he had never been served with notices for any of the hearings held in the case. The motion was set for hearing in September 2010.

¶ 13 The second motion filed by the defendant on July 21, 2010, was a “combined \*\*\* postjudgment motion to vacate” both the January 25, 2010, judgment of foreclosure and the June 21, 2010, order confirming the sale, pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2008)). This motion argued that the judgment for foreclosure was “void *ab initio*” because the plaintiff was not the owner of the note and mortgage and therefore lacked standing to bring the suit. The motion asserted that the chain of title was defective, in that there was a recorded assignment of the mortgage and note from the original mortgagee, H&R Block Mortgage Corporation, to Option One Mortgage Corporation, and a second recorded assignment (of the mortgage only, for some reason) from AHMSI (“as successor in interest to” Option One) to the plaintiff, but no indication that AHMSI was in fact a successor in interest to Option One or that mortgages and debts owned by Option One had been transferred in any manner to AHMSI. In connection with this argument, the defendant noted that AHMSI had been identified (in the Smith affidavit submitted in connection with the motion for the judgment of foreclosure) both as a successor in interest to Option One and as *not* being a successor in interest to Option One but rather an “attorney in fact” for the plaintiff. The defendant also attached documentation suggesting that the signatures on the assignment from AHMSI to the plaintiff were forgeries, in that they bore the names of persons who had been identified publicly as “robo-signers” who lacked authority to execute

such assignments, and the alleged signatures of these persons on various mortgage-related documents that differed greatly in appearance from the signatures on the assignments at issue. Finally, the defendant raised the lack of notice to him regarding the entry of the judgment for foreclosure and the entry of the order confirming the sale as a reason to vacate those orders, characterizing the misstatements of the plaintiff's attorney during the May 24 oral argument as fraud upon the court. The motion was filed without initially being set for hearing.

¶ 14 On August 31, 2010, the defendant filed yet another motion directed at the order confirming the sale, which repeated substantially the same arguments. The defendant later characterized this motion as an "amendment" to his July 21 postjudgment motion, and on appeal he states that the motion was filed in order to avert his eviction from the property while the postjudgment motion was pending.

¶ 15 During the fall of 2010, the three pending motions were brought before different judges than the judge who had initially presided over the case, but those judges stated that they viewed the motions as being in essence motions for reconsideration that should be heard by the original judge. On December 10, 2010, the original judge heard all of the motions together, treating them as a single postjudgment motion. The trial court denied the "motion to reconsider this court's rulings of January 25, 2010, May 24, 2010 and June 21, 2010," and lifted the stay of possession. On January 10, 2011, the defendant filed a notice of appeal, appealing from the judgment of foreclosure entered on January 25, the order confirming sale entered on June 21, and the denial of his "postjudgment motion" on December 10, 2010.

¶ 16

Jurisdiction

¶ 17 It is a familiar principle that an appellate court must ensure that it has jurisdiction to hear the appeal before the merits of the appeal may be considered. *In re Marriage of Link*, 362 Ill. App. 3d 191, 192 (2005). The plaintiff argues that we have no jurisdiction to review the judgment of foreclosure entered on January 25, 2010, because it was not timely appealed. The plaintiff notes that the judgment contained a finding pursuant to Supreme Court Rule 304(a) that the judgment was immediately appealable or enforceable, but the judgment was not directly appealed within the 30 days required under Supreme Court Rule 303 (eff. May 1, 2007). The defendant did eventually file a collateral attack on the judgment: the motion to vacate filed by the defendant on May 3, 2010, which must be viewed as a petition under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)).<sup>1</sup> However, the defendant did not timely file any appeal of the trial court's denial of that motion. See *In re Marriage of Tzoumas*, 187 Ill. App. 3d 723, 728 (1989). Accordingly, the plaintiff argues, the defendant has forfeited any review of the judgment of foreclosure, and may only appeal (1) the June 21, 2010, order confirming the sale and (2) the December 10, 2010, order denying of the defendant's postjudgment motion, insofar as that motion attacked the order confirming the sale.

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<sup>1</sup>We leave aside, for purposes of this analysis, the plaintiff's argument that the motion to quash could also be seen as a collateral attack on the judgment for foreclosure and thus should also be treated as a section 2-1401 motion under *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002). The facts in *Sarkissian* are somewhat different (there, the entire proceeding had been concluded, whereas here, a portion of the foreclosure proceeding was still before the trial court at the time the motion to quash was filed). As our ultimate resolution of the jurisdictional issue would be the same regardless of how we view the motion to quash, we need not resolve it here.

¶ 18 The defendant argues that, despite the Rule 304(a) finding in the judgment for foreclosure, that judgment was not truly a “final” order which could be made appealable by such a finding. The defendant notes that the mere inclusion of a Rule 304(a) finding is not sufficient to make a nonfinal order into a final and appealable one (*Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 395 Ill. App. 3d 501, 506 (2009)), and cites federal case law for the proposition that when an order determines a party’s liability but the amount of damages has not been fixed, the order is not final. The defendant argues that the judgment for foreclosure was not final because the trial court retained jurisdiction to expand the judgment to include additional attorney fees accrued between the judgment for foreclosure and the actual sale, and to impose a deficiency judgment against the defendant in the event that the sale proceeds were not sufficient to cover the total judgment.

¶ 19 We must reject this argument. “A final order is one that ‘disposes of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.’ ” *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1069 (2008), quoting *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1103 (1991). Here, the judgment for foreclosure resolved the parties’ rights with respect to the existence and amount of the defendant’s debt, the plaintiff’s ownership of that debt and right to foreclose upon the mortgaged property, and various other matters pled in the complaint. Moreover, as we noted in *Yucis*, 382 Ill. App. 3d at 1069, the supreme court has held that, despite the fact that it does not terminate the entire foreclosure proceeding and therefore is not final and appealable in the absence of a Rule 304(a) finding, a judgment for foreclosure may be made final and appealable by the inclusion of such a finding. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555 (1989). Accordingly, we must agree with the plaintiff that the defendant did not timely appeal the denial of his section 2-1401 motion with respect to the judgment for foreclosure, and we thus have

no jurisdiction to hear the portion of this appeal that attacks the judgment for foreclosure and may hear only the portion attacking the entry of the order confirming the sale.

¶ 20 Before leaving the issue of jurisdiction, we pause to note that, although neither party raised the issue of the trial court's personal jurisdiction over the defendant at the time it entered the default judgment for foreclosure, we were initially concerned enough about that issue to ask the parties to file supplemental briefs on it. We then reviewed the supplemental briefs, the record, and the transcript of the May 3, 2010, hearing on the motion to quash (a transcript with which the defendant moved to supplement the record on appeal, a motion that we hereby grant). Our review confirms that the issue is not properly before us at this point and that, even if it were, the trial court correctly decided this matter when it denied the defendant's motion to quash (a decision never challenged by the defendant).

¶ 21 **The Order Confirming Sale**

¶ 22 In his notice of appeal, the defendant identifies the June 21, 2010, order confirming sale as one of the orders he wishes to appeal. The entry of an order of sale in a foreclosure proceeding is governed by section 15-1508 of the Code (735 ILCS 5/15-1508 (West 2008)). Section 15-1508 provides that, upon a proper application, a trial court must enter an order confirming the sale unless it finds that at least one of four enumerated situations is present. 735 ILCS 5/15-1508(b) (West 2008). Neither in his postjudgment motions below, nor in his appeal, has the defendant argued that any of these four situations is present. We therefore affirm the trial court's entry of the order confirming sale.

¶ 23 **Remaining Matters**

¶ 24 Finally, the defendant filed a motion to strike material which the plaintiff appended to its brief on appeal in an apparent attempt to supplement the record on appeal. It is improper to include matter not contained in the record in an appendix to an appellate brief (*In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001)), and we therefore grant the defendant's motion to strike.

¶ 25 CONCLUSION

¶ 26 We lack jurisdiction over the portion of the appeal attacking the trial court's entry of the judgment for foreclosure on January 25, 2010, and therefore dismiss that portion of the appeal. The remainder of the judgment of the circuit court of Du Page County, specifically the orders entered on June 21, 2010, confirming the sale and on December 10, 2010, denying the motion to reconsider, is affirmed. The defendant's motions to supplement the record on appeal and to strike material improperly appended to the plaintiff's brief are granted.

¶ 27 Appeal dismissed in part; judgment affirmed.