

NOTICE

Decision filed 08/30/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 090519-U  
NO. 5-09-0519  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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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ALLIANCE SAVINGS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 08-CH-305
	)	
JERRY R. WILSON and DEUTSCHE BANK	)	
NATIONAL TRUST COMPANY, as Trustee of	)	
Argent Mortgage Securities, Inc., Asset-Backed	)	
Pass-Through Certificates, Series 2006-W2 Under	)	
the Pooling and Servicing Agreement Dated	)	
February 1, 2006, Without Recourse, Assignee of	)	
Argent Mortgage Company, L.L.C.,	)	Honorable
	)	Keith Jensen,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE DONOVAN delivered the judgment of the court.  
Justices Welch and Spomer concurred in the judgment.

**ORDER**

- ¶ 1           *Held:* The circuit court erred in vacating the default judgment of foreclosure and orders subsequent thereto where the defendant failed to show that it acted with due diligence to protect its rights and interests.
- ¶ 2           The plaintiff, Alliance Savings (Alliance), filed a petition to foreclose a judgment in the circuit court of Madison County, and it joined the defendants, Jerry Wilson and Deutsche Bank National Trust Company, as the trustee of Argent Mortgage Securities, Inc., asset- backed pass-through certificates, series 2006-W2 under the pooling and servicing agreement dated February 1, 2006, without recourse, assignee of Argent Mortgage Company, L.L.C. (Deutsche Bank). Neither defendant answered or otherwise appeared. The circuit court entered a default order of

foreclosure in favor of Alliance and thereafter issued a judgment of foreclosure and judicial sale, a confirmation of the judicial sale, and a judicial deed. Deutsche Bank filed a petition to vacate pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)). After considering the pleadings and arguments, the circuit court granted Deutsche Bank's motion, vacated the default order, the judgment of foreclosure and sale, and the order confirming sale, and voided the judicial deed. On appeal, Alliance asserts that the circuit court erred in granting Deutsche Bank's motion to vacate because Deutsche Bank failed to establish due diligence in asserting its claims in the original action, failed to establish due diligence in moving to vacate the default judgment, and failed to establish a meritorious defense or claim to the original action. We reverse.

¶ 3 This case involves real estate (the Property) located in Granite City, Illinois. The pleadings and memoranda, and attachments thereto, contained in the common law record document the following proceedings relevant to the disposition of this appeal.

¶ 4 On February 17, 2004, Jerry Wilson and Barbara Wilson executed a quitclaim deed and transferred title to the Property from themselves as tenants in common to themselves as tenants by the entirety. The quitclaim deed was recorded on February 23, 2004.

¶ 5 In December 2004, Alliance obtained a judgment in the sum of \$33,678.50 against Jerry Wilson, individually, and Jerry Wilson, Inc., doing business as Magnolia's Restaurant. On August 31, 2005, Alliance recorded its memorandum of judgment against the Property.

¶ 6 On September 6, 2005, Jerry Wilson and Barbara Wilson obtained a nonpurchase money mortgage on the Property in the sum of \$253,800 from Argent

Mortgage Company, L.L.C. (Argent). The mortgage was recorded on October 12, 2005. Sometime thereafter, Argent assigned the mortgage to Deutsche Bank. Jerry Wilson and Barbara Wilson subsequently defaulted on the mortgage.

¶ 7 On May 4, 2007, Deutsche Bank filed a foreclosure action on the Property in the circuit court of Madison County and joined Jerry Wilson and Barbara Wilson as defendants (case number 07-CH-477). Jerry Wilson and Barbara Wilson were served by publication. Deutsche Bank did not name Alliance as an interested party and did not serve Alliance with a copy of the summons and complaint. On July 26, 2007, a default judgment of foreclosure was entered in favor of Deutsche Bank and against Jerry Wilson and Barbara Wilson. On January 16, 2008, the Property was auctioned during a foreclosure sale and Deutsche Bank was the highest bidder. On the same day, Alliance filed a motion to intervene in the case. Alliance sought to establish the priority of its judgment over Deutsche Bank's mortgage and to be recognized at the judicial foreclosure sale. On March 5, 2008, Alliance notified the court that it was withdrawing its motion to intervene in No. 07-CH-477.

¶ 8 On March 4, 2008, Alliance filed a complaint to foreclose its judgment lien on the Property in the circuit court of Madison County (case number 08-CH-305). Jerry Wilson and Deutsche Bank were joined as party defendants. Deutsche Bank was served on April 3, 2008. Jerry Wilson was served on April 10, 2008. Neither Deutsche Bank nor Wilson filed an answer or other responsive pleading. On September 12, 2008, the circuit court entered a default order against Deutsche Bank. On the same day, Alliance mailed a notice of default, along with a copy of the default order, to Deutsche Bank. On November 13, 2008, a judgment of foreclosure and sale was entered. In the judgment, the court noted that all title holders and lien claimants had defaulted, and it declared that they had no interest in the Property foreclosed. The

court directed that the Property be sold at a public auction on December 11, 2008. Alliance mailed a copy of the notice of sale to Deutsche Bank on December 2, 2008. The notice of sale was published in a newspaper of general circulation from November 20, 2008, through December 4, 2008. On December 11, 2008, a foreclosure sale was held and Alliance was the highest bidder. On December 18, 2008, the circuit court issued an order in which it confirmed the sale to Alliance and awarded immediate possession of the Property to Alliance. Alliance recorded the judicial deed on December 23, 2008.

¶ 9 On March 18, 2009, Deutsche Bank filed a motion to vacate the default order, the judgment of foreclosure and sale, the order confirming judicial sale, and the judicial deed, pursuant to section 2-1401 of the Code. Therein, Deutsche Bank alleged that it had meritorious defenses to Alliance's foreclosure complaint. Deutsche Bank claimed that it was the record owner of the Property as of January 16, 2008, and that it had purchased the Property a few months prior to the date Alliance filed its foreclosure action. Deutsche Bank also argued that Alliance could not have legally foreclosed against the Property because Alliance's judgment was against Jerry Wilson and the Property was held by Jerry Wilson and Barbara Wilson as tenants in the entirety. Deutsche Bank further alleged that it exercised due diligence in presenting its defenses in the original action and in filing the motion to vacate. Deutsche Bank claimed that it had no record of being served with Alliance's foreclosure complaint. Deutsche Bank claimed that if it had been served, it must have inadvertently misdirected the complaint because its attorney never received a copy and that it came to court once it learned that a deed had been recorded by Alliance.

¶ 10 Alliance filed a response and asked the court to deny Deutsche Bank's motion to vacate. Alliance pointed out that Deutsche Bank filed its motion to vacate more

than 11 months after the original foreclosure action had been served on Deutsche Bank, about 6 months after the notice of the default judgment had been mailed to Deutsche Bank, and more than 3 months after the notice of sale had been mailed to Deutsche Bank. Alliance argued that Deutsche Bank did not act with due diligence in seeking relief from the judgment. Alliance also argued that Deutsche Bank did not act with due diligence in presenting its claims and defenses in the original foreclosure action and that it failed to offer an excusable mistake for its failure to act in the original proceeding.

¶ 11 Following the presentation of oral arguments and written memoranda, the circuit court granted Deutsche Bank's motion to vacate. The court found that Deutsche Bank had a meritorious defense, that it exercised due diligence in presenting defenses in the original action, and that it exercised due diligence in filing its section 2-1401 petition for relief. The court further stated, in the alternative, that even if the court would find that Deutsche Bank did not exercise due diligence, Alliance could assert a right to foreclose its lien only against Jerry Wilson's one-half interest in the Property, that the entry of the default judgment in favor of Alliance improperly covered the entire property, and that it should not have awarded Alliance more relief than that to which it could possibly be entitled. The court vacated the default order dated September 12, 2008, the judgment of foreclosure and sale dated November 13, 2008, and the order confirming the foreclosure sale dated December 18, 2008. The court also voided the judicial sale and the deed to the Property.

¶ 12 On appeal, Alliance contends that the circuit court erred in granting Deutsche Bank's motion to vacate because Deutsche Bank failed to establish the existence of a meritorious defense and due diligence. Alliance argues that Deutsche Bank did not establish that its failure to defend against the foreclosure action was the result of an

excusable mistake, that Deutsche Bank did not present the existence of a meritorious defense or claim to the original action, and that Deutsche Bank offered no reasons why it failed to appear after being served in No. 08-CH-305 and why it waited 184 days after it had been served with a copy of the default order and 103 days after receiving notice of the judicial sale to file its motion to vacate.

¶ 13 To be entitled to relief from final orders and judgments, after 30 days from the entry thereof, the petitioner must set forth specific factual allegations supporting the following elements: (1) the existence of a meritorious defense or claim, (2) due diligence in presenting this defense or claim to the circuit court in the original action, and (3) due diligence in filing the section 2-1401 petition for relief. 735 ILCS 5/2-1401 (West 2006); *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986). Section 2-1401(b) requires that the petition be filed in the same proceeding in which the order or judgment was entered, even though it is not a continuation of the original action. 735 ILCS 5/2-1401(b) (West 2006). Section 2-1401(b) also requires that the petition be supported by affidavit or other appropriate showing regarding matters not of record. 735 ILCS 5/2-1401(b) (West 2006).

¶ 14 Relief under section 2-1401 is predicated upon proof, by a preponderance of the evidence, of a defense or claim that would have precluded the entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. *Smith*, 114 Ill. 2d 209, 499 N.E.2d 1381. Due diligence requires the petitioner to show a reasonable excuse for failing to act within the appropriate time. *Smith*, 114 Ill. 2d at 222, 499 N.E.2d at 1386. The petitioner must show that its failure to defend was the result of an excusable mistake and that under the circumstances it acted reasonably, and not negligently, when it failed to initially resist the judgment. *Smith*, 114 Ill. 2d at 222, 499 N.E.2d at 1386.

¶ 15 The dispositions available in a section 2-1401 action are borrowed from Illinois civil practice and pleadings rules, and therefore the applicable standard of review depends on the manner of the disposition. *People v. Vincent*, 226 Ill. 2d 1, 16-17, 871 N.E.2d 17, 27-28 (2007). For example, a *de novo* standard of review has been applied where a trial court enters a judgment on the pleadings or dismisses a section 2-1401 petition for the failure to state a cause of action. *Vincent*, 226 N.E.2d at 18, 871 N.E.2d at 28. A manifest-weight-of-the-evidence standard has been applied where the circuit court grants or denies a section 2-1401 petition after conducting an evidentiary hearing and making certain findings of fact. *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 440, 934 N.E.2d 1, 12 (2010).

¶ 16 In order to determine the proper standard of review here, we must determine the manner in which the trial court disposed of Deutsche Bank's section 2-1401 petition. The record shows that Deutsche Bank filed a petition to vacate and a memorandum in support, with some documents and the declaration of one of its attorneys, and that Alliance submitted a response in opposition with attachments. The circuit court granted Deutsche Bank's section 2-1401 petition after considering the petition, the memoranda of law with attachments, and the arguments of counsel. The court did not hold an evidentiary hearing, and there is no indication that either party requested one. In this case, both parties claimed that they were entitled to a judgment based on pleadings and supporting documentation. The disposition would be akin to the disposition of a motion for a summary judgment. The review of a summary judgment is *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315, 821 N.E.2d 269, 275 (2004).

¶ 17 In considering the section 2-1401 petition, the circuit court was required to decide whether Deutsche Bank established the existence of a meritorious defense and

whether Deutsche Bank established due diligence. The question of the existence of a meritorious defense is a question of law. The question of due diligence may be decided as a matter of law where the pertinent facts underlying a party's failure to act are uncontested and reasonable minds would not differ on the inferences to be drawn from the facts. If, however, there are material issues of fact regarding the issue of due diligence, a summary judgment is precluded and the trial court is required to hold an evidentiary hearing before ruling on the section 2-1401 petition.

¶ 18 Based on the record here, the pertinent facts underlying Deutsche Bank's failure to act are largely uncontested. The affidavit of the process server states that the registered agent for Deutsche Bank was personally served in California with a copy of the summons and complaint in No. 08-CH-305. Deutsche Bank has not directly challenged the affidavit. Deutsche Bank has not presented any evidence to show that the person served was not its employee or registered agent. Certainly that information was within Deutsche Bank's control. Deutsche Bank merely stated that it has no record of the service. It speculated that if it had been served, then it inadvertently failed to send the papers to its attorney. The record also shows that Alliance mailed to Deutsche Bank copies of the notice of the entry of a default order and default order, the judgment of foreclosure and sale, and the notice of the foreclosure sale. Deutsche Bank has not claimed that it did not receive copies of the documents. Deutsche Bank did nothing to assert its claims and defenses before the foreclosure sale was completed, before the court confirmed the judicial sale and issued the deed, or before Alliance recorded the deed. Deutsche Bank has not shown that its failure to defend in the original action was the result of an excusable mistake or that its inaction was reasonable under the circumstances. Additionally, the record shows that Deutsche Bank filed its section 2-1401 petition approximately three

months after the order confirming the sale of the Property, and it offered no explanation for that delay. Simply stated, the record does not support the trial court's determination that Deutsche Bank exercised due diligence in presenting its defenses in the original action and that Deutsche Bank exercised due diligence in filing its section 2-1401 petition.

¶ 19 In its order, the circuit court set forth an alternative basis for vacating the order of default, the judgment of foreclosure, and the order confirming foreclosure sale and for voiding the judicial sale and deed to the Property. The court stated that Alliance had a right to foreclose its lien only against Jerry Wilson's one-half interest in the Property, that the complaint, the judgment, and the resulting deed improperly encompassed the entire Property, and that its judgment granted Alliance more relief than that to which it could be entitled.

¶ 20 The circuit court did not provide the underlying basis for the alternative disposition. It appears that the circuit court invoked its equitable powers in order to prevent the enforcement of a judgment that it deemed unfair, unjust, or unconscionable, but the court made no finding on whether Alliance, in its foreclosure complaint and throughout the foreclosure proceedings, purposefully and fraudulently concealed or misrepresented the type of tenancy under which the Property was held by Jerry Wilson and Barbara Wilson and the extent to which it could foreclose on the Property. Further, there appears to be genuine factual disputes regarding whether and when Jerry Wilson and Barbara Wilson abandoned the Property for another marital residence and whether and when the tenancy by the entirety was extinguished. We note that Alliance has repeatedly referred to an affidavit of Deutsche Bank's process server in No. 07-CH-477 as proof that the tenancy by the entirety had terminated. Alliance stated that the affidavit states that the process server attempted to serve the

Wilson's at their residence on May 4, 2007, and that he observed that the residence was vacant and the utilities were turned off. We have searched the common law record and have not located the affidavit. Neither party presented any evidence to establish whether and when the Wilson's' tenancy by the entirety was abandoned. In the absence of any finding that the judgment was obtained by some unjust or unconscionable conduct, we conclude that any error in the trial court's judgment of foreclosure and sale and subsequent orders could have and should have been addressed in a direct appeal and that the alternative ruling by the trial court is manifestly erroneous and an abuse of its discretion.

¶ 21           Accordingly, the decision of the circuit court's order to grant Deutsche Bank's section 2-1401 petition for relief from judgment is reversed.

¶ 22           Reversed.