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No. 1-11-2352

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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FREMONT INVESTMENT AND	)	Appeal from the
LOAN,	)	Circuit Court of
	)	Cook County, Illinois,
Plaintiff-Appellee,	)	Chancery Division.
v.	)	
	)	No. 08 L 014415
LORENZO MARTINEZ,	)	
	)	Honorable
Defendant-Appellant.	)	Jesse Reyes,
	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice LAVIN and Justice STERBA concurred in the judgment.

**ORDER**

¶ 1 *Held:* In the absence of a complete record on appeal, pursuant to *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), we must presume that the circuit court did not abuse its discretion in denying the defendant-appellant's motion to vacate judgment.

¶ 2 This appeal arises from a mortgage foreclosure action instituted by the plaintiff-appellee, Fremont Investment and Loan (hereinafter Fremont) against the defendant-appellant, Lorenzo Martinez (hereinafter Martinez). After the mortgage foreclosure action was voluntarily dismissed by the circuit court pursuant to section 2-1009 of the Code of Civil Procedure (Code)

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(735 ILCS 5/2-61009 (West 2008)), Freemont filed a motion to reinstate and that motion was granted by the circuit court. Martinez filed a motion to stay and vacate the circuit court's order reinstating the foreclosure action, arguing that the circuit court did not have jurisdiction to reinstate the action since the order was filed outside the one year limitation period given as a condition for reinstatement in the court's initial section 2-1009 dismissal order (735 ILCS 5/2-61009 (West 2008)). The circuit court denied Martinez's motion to vacate, and Martinez now appeals. For the reasons that follow, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 Initially, we note that the record provided to us on appeal is sparse, containing no transcript of the proceeding below, and that it reveals only these pertinent facts and procedural history. Freemont originally brought its foreclosure action against Martinez on April 22, 2008.<sup>1</sup> On July 8, 2009, the circuit court apparently entered an order voluntarily dismissing the case pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2008)). The record contains neither a copy of Freemont's motion seeking voluntary dismissal, nor Martinez's response to this motion. The record also contains no transcript of the proceedings on this matter. Instead, the record contains only what appears to be a generic 2009 case management calendar call order with several options available to the circuit court. The circuit court placed a checkmark next to the following statement:

"Dismissed, pursuant to section 2-1009 [of the Code (735 ILCS 5/2-1009 (West 2008))],

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<sup>1</sup>Freemont filed its initial complaint on March 7, 2008, and then its amended complaint on April 22, 2008.

with leave to reinstate upon motion supported by affidavit, filed within one (1) year of this dismissal, if defendant(s) default on the loan modification, repayment plan, or other settlement agreement."

¶ 5 On October 4, 2010,<sup>2</sup> Freemont filed a notice of motion and motion to reinstate the foreclosure action. On October 8, 2010, Freemont filed an affidavit in support of the motion to reinstate, averring that "the foreclosure was put on hold for a voluntary moratorium on July 8, 2009" and "the moratorium ended on August 5, 2010." Freemont also filed a motion for default against Martinez, alleging that it served a copy of the summons and the foreclosure complaint to Martinez but that Martinez had not yet answered or otherwise pleaded to that complaint.<sup>3</sup> On October 8, 2010, the circuit court granted Freemont's motion to reinstate the foreclosure action and entered a default order against Martinez. We are without a transcript of this proceeding as well. On that same date, the circuit court entered a judgment of foreclosure and order of sale and appointed a selling officer for the purpose of selling the foreclosed property at a public auction.

¶ 6 On March 10, 2010, Martinez filed an emergency motion to stay sale, vacate judgment and dismiss. In that motion, Martinez argued that the original dismissal order required that to reinstate the case, Freemont would have to file a motion, supported by an affidavit, within one year of the dismissal. According to Martinez, however, Freemont's motion to reinstate was filed

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<sup>2</sup>The file stamp on the actual motion is illegible, but the date of filing on the notice of motion is October 4. In either event, the parties do not dispute that the motion was filed more than one year after the dismissal of the original action.

<sup>3</sup> This motion for default was filed on August 20, 2010.

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on October 4, 2010, more than one year after the order of dismissal was entered, and was therefore void. In support of this motion, Martinez attached a copy of the July 8, 2009, dismissal order.

¶ 7     Freemont filed its answer to the motion to vacate on March 24, 2010 arguing that Martinez's reliance on the dismissal order was misplaced. According to Freemont the dismissal order entered by the circuit court on July 8, 2009 was a form order required by the court for use during the summer of 2009 when the court reviewed the status of all pending foreclosure cases. According to Freemont, if for any reason, other than a pending bankruptcy, the plaintiff had the foreclosure on hold, the plaintiff was required to dismiss the case by placing a checkmark next to the option used by the circuit court in this case, *i.e.*, dismissing the case pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2008)), with leave to reinstate upon motion supported by affidavit, filed within one year of this dismissal.

¶ 8     Freemont pointed out that at the time the dismissal order was entered the foreclosure of Martinez's home had been unilaterally placed on hold by Freemont as a result of flooding in the Chicago area the previous fall. Freemont had placed all of its properties then in foreclosure on hold to determine if any of the properties had been affected by the flood and if the homeowners would receive some form of disaster-relief assistance. Following that hold, Freemont put all of its foreclosures on hold pursuant to a voluntary moratorium<sup>4</sup> on foreclosures to allow itself a

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<sup>4</sup>Freemont argues in its brief on appeal, that this was a "City-wide moratorium," but provides us with no citation to legislative enactment, regulation or executive order establishing such a moratorium.

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greater opportunity to attempt resolution with homeowners, such as Martinez, short of foreclosure decrees.

¶ 9 In its response to Martinez's motion to vacate the reinstatement order, Freemont further argued that according to the voluntary dismissal order the conditions placed upon its right to reinstate the foreclosure (*i.e.*, that it be reinstated upon a motion, supported by an affidavit and within one year of the dismissal) apply only to instances in which a homeowner, like Martinez, and Freemont agreed to a repayment plan or trial modification of the terms of the loan.

According to Freemont, Martinez nowhere in its motion to vacate alleged that he had entered into a repayment agreement, a loan modification, or any other form of agreement with the plaintiff that would resolve the foreclosure. Freemont further argued that since the conditions of the dismissal order call for Freemont to file and present its motion to reinstate within one year of a default on such an agreement those restrictions do not apply. In support of its response, Martinez too attached and relied upon a copy of the circuit court's order of voluntary dismissal entered on July 8, 2009.

¶ 10 On April 13, 2011, Martinez filed a reply to Freemont's response with respect to the motion to vacate. In that reply, Martinez reiterated that under the language of the voluntary dismissal order entered on July 8, 2009, Freemont could reinstate its original foreclosure action only within the prescribed one year period of limitation. According to Martinez after that one year period of limitation expired, the circuit court lost jurisdiction to reinstate the case.

¶ 11 In his reply, Martinez further pointed out that instead of seeking reinstatement of its original foreclosure action, Freemont could and should have filed a new foreclosure lawsuit.

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According to Martinez, Fremont instead consciously chose to file the motion to reinstate in order to avoid paying the court filing fee and in order to expedite the foreclosure process by not giving Martinez an opportunity to be served with the new lawsuit, and to have time to respond and to complete discovery.

¶ 12 Apparently after hearing arguments by both parties on the aforementioned issue, on May 6, 2011, the circuit court denied Martinez's motion to vacate.<sup>5</sup> In its handwritten order denying Martinez's motion to vacate, the circuit court explained that it denied the motion "for the reasons stated in open court."<sup>6</sup> An order confirming the sale of property was entered on July 15, 2011. Martinez now appeals.

¶ 13 **II. ANALYSIS**

¶ 14 On appeal, Martinez contends that the circuit court erred in denying its motion to vacate because Fremont's motion to reinstate the foreclosure action was not filed within the one year limitation period prescribed in the circuit court's July 8, 2009, dismissal order.

¶ 15 Fremont responds that the motion to vacate was properly denied because despite the language of the July 8, 2009, "voluntary dismissal" order, the voluntary dismissal was, in fact, an "agreed-upon" dismissal by the parties. According to Fremont, the "actual reason" for the voluntary dismissal was "a city-wide moratorium, which was not an option in the form order the court used," and it was the "intent and purpose" of the parties that Fremont would be free to

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<sup>5</sup>The court also lifted the stay of sale it had imposed on March 18, 2011, while it considered the arguments of the parties.

<sup>6</sup>We, however, are without a transcript of the proceedings below.

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reinstate the case when and if the moratorium ended. Therefore, the one year limitation period would not be triggered until the lifting of the moratorium and could not be applied. In addition, Freemont argues that the circuit court properly denied Martinez's motion to vacate judgment because the July 8, 2009, dismissal order was not a final order since it was conditioned upon a default by Martinez on "a modification, repayment plan, or other settlement agreement." Finally, in the alternative, Freemont contends that even if this court concludes that the July 8, 2010, order was final, we should nevertheless construe the motion to reinstate as a petition for relief from final judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)) and affirm the circuit court's denial of Martinez's motion to vacate.

¶ 16 Our review of the circuit court's decision to grant or deny a motion to vacate judgment is for an abuse of discretion. See *Sunderland v. Future Investments, Inc.*, 120 Ill. App. 2d 361 (1970); see also *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516 ¶ 8 ("A trial court's decision to deny a motion to vacate is reviewed for an abuse of discretion); see also *Larson v. Pedersen*, 349 Ill. App.3d 203, 207 (2004). "The moving party has the burden of establishing sufficient grounds for vacating the judgment." *Larson*, 349 Ill. App.3d at 207. The reviewing court must determine whether the trial court's ruling denying the motion to vacate " 'was a fair and just result, which did not deny [the moving party] substantial justice.' " *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 5(2006) (citing *Mann v. The Upjohn Co.*, 324 Ill. App. 3d 367, 377(2001)). An abuse of discretion occurs where the trial court "acts arbitrarily without the employment of conscientious judgment or its decision exceeds the bounds of reason and ignores principles of law such that substantial injustice results." (Internal quotation marks

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omitted.) *Mann*, 324 Ill. App. 3d at 377. "If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion."

*Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930 (1997).

¶ 17 In the present case, we note from the outset that Martinez has failed to provide us a sufficient record on appeal from which to determine whether the circuit court abused its discretion in denying his motion to vacate judgment. The record does not contain a transcript of the hearing on Martinez's motion to voluntarily dismiss the foreclosure action. Nor does it contain a transcript of the hearing on Martinez's motion to reinstate the action. We are also without the benefit of the proceedings and oral arguments of the parties regarding Martinez's motion to vacate the circuit court's order reinstating that foreclosure action. The record below only contains the common-law record, including the parties' pleadings and the circuit court's written orders. What is more, the circuit court's written order, denying Martinez's motion to stay and vacate the reinstatement of the foreclosure action, from which Martinez now appeals, specifically states that the motion was denied "for the reasons stated in open court," the benefit of which, we are without.

¶ 18 Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal.

*Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984); see also *Dargis v. Paradise Park, Inc.*, 354 Ill. App.3d 171, 176 (2004). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there

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was the error claimed by the appellant." *Foutch*, 99 Ill.2d at 391. Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill.2d at 157; *Webster*, 195 Ill.2d at 432; *Foutch*, 99 Ill.2d at 392. Accordingly, in the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record \*\*\* against the appellant." *Foutch*, 99 Ill.2d at 392.

¶ 19 In this case, the parties disagree as to: (1) the factual basis for the circuit court's order voluntarily dismissing the foreclosure action; (2) the basis for the circuit court's order permitting its reinstatement, and (3) the circuit court's rationale for denying Martinez's motion to vacate that judgment. As already elaborated above, while Martinez contends that Fremont voluntarily dismissed its original foreclosure action, and the circuit court granted it leave to reinstate the action only within one year of that dismissal, Fremont explains that the original foreclosure action was a dismissal "agreed upon" by the parties, and based upon a "City-wide moratorium" on foreclosures. Fremont further argues that the circuit court used the language of voluntary dismissal only because it was confined by the case management order form it was using and that the court and the parties were all aware that the moratorium would not expire until the one year limitation period had expired, so that it was never the intent of the parties to hold Fremont to that one year limitation period. Fremont points out that this is the reason for the circuit court's reinstatement of the foreclosure action and its denial of Martinez's motion to vacate judgment.

¶ 20 However, without access to the transcripts of the proceedings below, we have no basis upon which to review any of these arguments, as they all necessarily depend upon the circuit

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court's rationale, which would have been articulated at the hearing on the motion to vacate the reinstatement order. Consequently, without the benefit of the transcripts of the proceedings below, we can only speculate as to the reasons for the circuit court's denial of Martinez's motion to vacate its reinstatement of Freemont's foreclosure actions. Such speculation is not an adequate basis upon which we may conclude that the circuit court abused its discretion. In addition, we point out that it is unclear from the record below, which documents the trial court reviewed in coming to its decision to deny Martinez's motion to vacate the reinstatement order. All that appears before us, are bits and pieces of the common-law record, which often refer to events (such as the City-wide moratorium), that the parties claim were relevant to the underlying action, but many of which, as already noted above, do not appear before us in the record below. The circuit court's written order itself provides little insight into which documents were considered by the court in coming to its decision, as that order merely states that the motion to vacate judgment is denied "for the reasons stated in open court." Moreover, without the benefit of the transcript of the hearing on the motion to vacate, we cannot presume that counsels did not alter the result of the trial court's decision during the course of their oral arguments to the court. Accordingly, under the circumstances of this case, we must presume that the trial court's ruling had a sufficient factual basis and was in conformity with the law. See *Corral*, 217 Ill. 2d at 156 (holding that absent an adequate record preserving the claimed error, a reviewing court will presume that the circuit court's ruling was in conformity with the law and had a sufficient factual basis, and any doubts arising from the incompleteness of the record will be resolved against the appellant, and the order of the circuit court will be affirmed); see also *In re marriage of*

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*Hofstetter*, 102 Ill. App. 3d 392, 396 (1981) ("[i]t is not the obligation of the appellate court to search the record for evidence supporting reversal of the circuit court. \*\*\* When portions of the record are lacking, it will be presumed that the trial court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"); see also *Foutch*, 99 Ill. 2d at 392. For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.