2012 IL App (1st) 113501-U

FOURTH DIVISION
October 4, 2012

No. 1-11-3501

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RESIDENTIAL CREDIT SOLUTIONS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 10 CH 643
TATYANA PENDYUK, THE GLENVIEW REGENCY CONDOMINIUM ASSOCIATION #1, IHOR KHATKOVYY,	)	
	)	Honorable
	)	Laura C. Liu,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court erred in denying defendants' motion to vacate mortgage foreclosure judgment. Defendants failed to adequately show that plaintiff mortgage loan servicer is a debt collector as defined in the Collection Agency Act, which was prerequisite to their claim that plaintiff's failure to register as required by the Act rendered its complaint a nullity and the resulting foreclosure judgment void. However, it is not apparent on this record that defendants could never make such a showing and thus a disposition with prejudice was inappropriate.

¶ 2 Defendants Tatyana Pendyuk and Ihor Khatkovyy appeal from an order of the circuit court denying their motion to vacate a mortgage foreclosure judgment against them and in favor

of plaintiff Residential Credit Solutions, Inc. Defendants contend that the judgment is void because plaintiff is a debt collection agency under the Collection Agency Act (Act) (225 ILCS 425/1 *et seq*. (West 2010)) but not registered as such, and that the motion to vacate the void judgment was proper under section 2-1401(f) of the Code of Civil Procedure. 735 ILCS 5/2-1401(f) (West 2010).

¶ 3 Plaintiff filed the complaint for residential mortgage foreclosure in January 2010. The complaint stated that the mortgagee was "Mortgage Electronic Registration Systems, Inc. as Nominee for BankUnited FSB," and the attached mortgage and note, issued in January 2008, name BankUnited as the lender. However, the complaint also alleged that plaintiff "is the Mortgagee under 735 ILCS 5/15-1208." (That statute defines a mortgagee as the holder of an indebtedness secured by a mortgage "or any person designated or authorized to act on behalf of such holder." 735 ILCS 5/15-1208 (West 2010)) The mortgaged premises are a residential condominium unit, and the mortgage describes defendants as husband and wife.

¶ 4 Defendants were served with process at the mortgaged premises in January 2010, and plaintiff sought a default judgment in March 2010. On June 9, 2010, the court granted a default judgment of foreclosure (for $191,115.12 plus $810 in costs and $1,010 in attorney fees) and sale of the premises. The premises were sold at auction in September 2010 following August 2010 notice to defendants, and plaintiff moved in September for confirmation of the sale.

¶ 5 In November 2010, counsel was given leave to appear for defendants and file a response to the motion to confirm sale. However, there is no indication in the record that either an appearance or response was filed. On December 16, 2010, the court confirmed the sale (for $198,938.88 with no deficiency remaining) and ordered the eviction of defendants from the premises 30 days thereafter.

¶ 6 Defendants appeared in mid-2011 and filed a motion "to vacate all orders in the case" pursuant to section 2-1401, alleging that plaintiff acquired defendants' mortgage loan, is thus a debt collector under the Act, is not registered under the Act, and that a judgment in collection of a debt obtained by an unregistered debt collector is void. The motion was supported by counsel's affidavit that he searched the computerized records of the Department of Financial and Professional Regulation and did not find a collection agency license for plaintiff. Attached in turn to the affidavit was a computer printout indicating that a search of Department records for collection agency licenses in the name of "Residential Credit" showed no such record.

¶ 7 Plaintiff responded, alleging that it obtained the right to service defendants' mortgage loan on March 31, 2009, and that defendants did not become delinquent thereon until August 2009, so that plaintiff "acquired the servicing rights *** when the loan was in good standing." Plaintiff argued that defendants did not explain or show how plaintiff is a debt collector under the Act, noting that the Act excludes from its ambit collection activities directly related to a business other than debt collection, including banks. Plaintiff argued that it is not a debt collector under the Act because its business is servicing "both delinquent and performing mortgage loans" so that the instant foreclosure action was directly related to its ordinary non-collection business. In support of the response, plaintiff's director Romeo Lasam averred that plaintiff services residential mortgage loans in general and was servicing the instant mortgage and note in particular, having "acquired servicing rights" on March 31, 2009. As an ordinary and "directly related" part of plaintiff's business of servicing residential mortgage loans, Lasam averred, plaintiff "will attempt to collect debts of delinquent loans."

¶ 8 Defendants replied in support of their motion, arguing that a mortgage servicing company, such as plaintiff, collects debts for a person or entity other than itself and is thus a debt

collector required by the Act to be registered. Defendants noted that Lasam averred that plaintiff obtained servicing rights, in contrast to being the owner or holder of the mortgage or note.

¶ 9 On October 21, 2011, the court denied the motion to vacate. This appeal timely followed.

¶ 10 On appeal, defendants contend that the foreclosure judgment and sale are void because plaintiff is a debt collection agency under the Act but not registered as such, and that the motion to vacate the void judgment was proper under section 2-1401(f).

¶ 11 Section 2-1401 governs "[r]elief from final orders and judgments, after 30 days from the entry thereof," and paragraph (f) thereof provides that "[n]othing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(a), (f) (West 2010). A petition challenging a judgment as void is not subject to the limitations period or due diligence requirements of section 2-1401, and we review *de novo* the disposition of a section 2-1401 petition. *Parker v. Murdock*, 2011 IL App (1st) 101645, ¶¶ 18, 20.

¶ 12 A section 2-1401 petition commences a new civil proceeding and is treated as an initial civil pleading. *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 206-07 (2010). Thus, a section 2-1401 petition must allege specific facts that support each element of the claim, so that conclusions of law or allegations unsupported by specific facts cannot be considered in determining the sufficiency of the petition. *Id.* at 208. Conversely, even where a section 2-1401 petition was "maximally conclusory," it should be dismissed with prejudice only if it is clearly apparent that no set of facts can be proven that will entitle the petitioner to relief. *Id.* at 208-09.

¶ 13 Under the Act, a "debt collector" or "collection agency" is "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection," which is the collection of consumer debts arising from consumer credit transactions. 225 ILCS 425/2 (West 2010). The Act defines a debt as "money, property, or their equivalent

which is due or owing or alleged to be due or owing from a natural person to another person" and similarly defines consumer debt as "money, property, or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." 225 ILCS 425/2 (West 2010). A person or other entity "acts as a collection agency when he or it either "[e]ngages in the business of collection for others of any account, bill or other indebtedness" [or] "[b]uys accounts, bills or other indebtedness and engages in collecting the same." 225 ILCS 425/3(a), (d) (West 2010). However, the "Act does not apply to persons whose collection activities are confined to and are directly related to the operation of a business other than that of a collection agency," and specifically does not apply to a list of entities including "[b]anks, including trust departments, affiliates, and subsidiaries thereof, fiduciaries, and financing and lending institutions (except those who own or operate collection agencies)" and "[l]oan and finance companies." 225 ILCS 425/2.03 (West 2010).

¶ 14 A collection agency as defined in the Act cannot engage in debt collection without first registering as a collection agency with the Department, and violation of the registration requirement is a Class A misdemeanor and is subject to a civil penalty of up to $5,000 for each offense. 225 ILCS 425/4, 4.5(a), 14 (West 2010). Based on these provisions, this court has held that a complaint filed by an unregistered collection agency is a nullity so that a judgment entered on such a complaint is void. *LVNV Funding, LLC v. Trice*, 2011 IL App (1st) 092773.

¶ 15 Here, we note as a threshold question that plaintiff in its appellate brief raises for the first time the Act's exception to the registration requirement: a debt collector under the Act need not register if it (1) limits its debt-collecting activities in Illinois from Illinois residents to "means of interstate communications," and (2) is licensed in a State that recognizes Illinois registration of debt collectors. 225 ILCS 425/4 (West 2010). Specifically, plaintiff alleges that it is a licensed mortgage servicer in California and attempts to support that allegation with documentation in the

appendix to its brief. However, plaintiff did not, on the record before us, invoke this statutory provision or refer to being licensed or registered in another state, nor did it include in the circuit court record documentation of such a license. *See* Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005) ("appellee's brief may include in a supplementary appendix other materials from the record"). We shall not consider this "evidence" or the argument based thereon.

¶ 16 As another threshold matter, we conclude that defendants adequately showed in the circuit court that plaintiff is not registered as a debt collection agency under the Act. Defendants presented a copy of their counsel's search of the computerized records of the Department, showing no debt collection agency registration for "Residential Credit," and this court has confirmed the same. See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 47 (this court may take judicial notice of the computerized public records of a State department or agency). The conclusion that plaintiff is not a registered debt collector is merely reinforced by the fact that it did not claim in the circuit court, and has not claimed herein, to be a registered debt collection agency in Illinois. The remaining issue is whether defendants sufficiently showed that plaintiff is a debt collection agency required to be registered under the Act.

¶ 17 Reading the language of the Act as a whole, it becomes apparent that a debt collector or collection agency under the Act is an entity that, regularly and in the ordinary course of business, engages in debt collection for itself or others, unless its collection activities are confined to and are directly related to the operation of a business other than debt collection. In short, a debt collector is an entity whose primary business is debt collection. Defendants as movants were required to show in the circuit court that plaintiff was such an entity.

¶ 18 We conclude that defendants failed to do so. Their motion alleged essentially *ipse dixit* that because plaintiff "acquired the loan" its attempts to collect upon it fell under the Act in general and *LVNV Funding* in particular. However, this is not necessarily so. While plaintiff

effectively admitted in its response that it routinely collects upon mortgage loans, it firmly disputed the other portion of the definition: whether its collection efforts are merely adjunct to a broader business than debt collection. Defendants' reply was to allege in conclusory language that "a mortgage servicing company" is "required to be registered" under the Act because it "is engaged in the act of collecting debt for others, not themselves." Again, that is not necessarily so, as even collecting debt on behalf of others – admittedly a hallmark of debt collection as that term is used outside the law in general usage – may be adjunct to a broader business than debt collection. Depending on what a mortgage servicer does other than elicit and receive routine or timely mortgage payments and attempt to collect delinquent payments, it may or may not be a debt collector under the Act. However, the record is virtually silent on this point, so that dismissal of the petition was appropriate.

¶ 19 Conversely, we conclude that dismissal with prejudice was inappropriate. As just stated, plaintiff may or may not be a debt collector under the Act depending on what a mortgage servicer does other than elicit and receive routine or timely mortgage payments and attempt to collect delinquent payments. We state the law thus because the Act's definitions of a debt and a consumer debt do not distinguish between performing and delinquent debt, so that both eliciting, receiving, and processing timely loan payments and attempting to collect upon delinquent loans are both debt collection activity under the Act. Our conclusion is supported by the fact that the federal equivalent of the Act, the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 *et seq.*), carves out an express exception from its definition of a debt collector for "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity *** concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). See *Obi v. Chase Home Finance*, No. 11 CV 3993, 2012 WL 1802450 (N. D. Ill. 2012)("FDCPA excludes loan servicers from the definition

of a debt collector" through the not-in-default-at-the-time provision); *Wisniewski v. Asset Acceptance Capital Corp.*, No. 08 CV 2793, 2009 WL 212155 (N. D. Ill. 2009)(FDCPA and Act intended by our legislature to address similar issues and to be harmonized with each other). The Act, by contrast, does not include such an exception, and this court is obligated in interpreting and applying a statute to not create or add conditions or exceptions not provided by the statutory language. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 506 (2011).

¶ 20 Thus, while defendants failed to show that plaintiff was a debt collector under the Act, plaintiff may indeed be a debt collector under the Act depending on what it as a mortgage servicer does other than collect routine mortgage payments and attempt to collect delinquent payments. Defendants should have an opportunity to amend their section 2-1401 petition to address this refined or narrowed version of the issue. "Neither we nor the trial court has any basis to decide what the circumstances would have been had [defendants] faced the need to seek leave to amend, so to effectively deny such leave is premature. On remand, to avoid the matter falling into a limbo, the trial court must set a deadline for [defendants] to seek leave to amend their petition." *Blazyk*, 406 Ill. App. 3d at 209.

¶ 21 Accordingly, the judgment of the circuit court denying section 2-1401 relief is vacated and this cause is remanded for further proceedings consistent with this order.

¶ 22 Vacated and remanded with directions.