

No. 1-11-2780

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK TRUST COMPANY, AMERICAS)	Appeal from the
F/K/A BANKER'S TRUST COMPANY, AS TRUSTEE)	Circuit Court of
AND CUSTODIAN BY: SAXON MORTGAGE)	Cook County.
SERVICES, INC., F/K/A MERITECH MORTGAGE)	
SERVICES, INC., AS ITS ATTORNEY IN FACT,)	
ASSIGNEE OF MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS, INC., AS NOMINEE FOR)	
MERCANTILE MORTGAGE COMPANY,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08 CH 6788
)	
NAJIB KANDU)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 HELD: Trial court's dismissal of defendant's 2-1401 petition affirmed; defendant failed to provide a transcript of the hearing on defendant's section 2-1401 petition and we are thus unable to review the factual issues determined by the court.

¶ 2 This appeal arises from the circuit court's denial of defendant Najib Kandu's motion to vacate all orders pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2010)) entered in a mortgage foreclosure action filed by plaintiff Deutsche Bank Trust Company, Americas F/K/A Banker's Trust Company, as Trustee and Custodian by: Saxon Mortgage Services, Inc. F/K/A Meritech Mortgage Services, Inc., as its attorney in fact, assignee of Mortgage Electronic Registration Systems, Inc. as nominee for Mercantile Mortgage Company. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On December 14, 2005, defendant executed a mortgage and note for real property located at 8159 Lincoln Avenue in Skokie, Illinois. Both documents named Mercantile Mortgage Company as the lender. A short time later, Mercantile Mortgage issued an addendum to the note whereby the note was transferred to Saxon Mortgage Services. On November 1, 2007, defendant defaulted on the mortgage payment due under the note. The holder of the note filed the instant action to foreclose the mortgage on February 21, 2008, and later amended the complaint on October 26, 2009. Defendant was served on February 27, 2008. Although defendant was represented by counsel, no answer or defensive pleading was ever filed.

¶ 5 Meanwhile, on April 1, 2008, the mortgage was assigned to Deutsche Bank Trust

1-11-2780

Company, Americas F/K/A Banker's Trust Company, as Trustee and Custodian by: Saxon Mortgage Services, Inc. F/K/A Meritech Mortgage Services, Inc., as its attorney in fact. The trial court entered a default judgment and an order of sale against defendant on June 23, 2008. The judgment of foreclosure and sale was subsequently amended by the court on May 24, 2010.

¶ 6 A sale was held and an order confirming sale of the subject property was entered on February 1, 2011. Defendant filed a motion to vacate for reasons other than the matters set forth on this appeal, which was stricken by the trial court.

¶ 7 On July 20, 2011, defendant filed a motion to vacate all orders in the case pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), which is the subject of this appeal. In his section 2-1401 motion, defendant alleged that the trial court's judgment was void because Saxon was not a registered debt collector and that the judgment must be vacated. Specifically, defendant argued that because plaintiff sued to recover debt owed on an account, plaintiff's actions were those of a collection agency and required registration under the Credit Collection Act (Act) (225 ILCS 425/3 (West 2010)). Defendant's attorney attached his own affidavit indicating that Saxon Mortgage Services, Inc. was not a registered debt collector in the State of Illinois. Also attached were printouts from a computer search of the Illinois Department of Professional Regulation records indicating that "saxon" was not registered.

¶ 8 In response, plaintiff moved for dismissal pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). Plaintiff alleged that defendant failed to exercise due diligence in presenting his claim and filing his 2-1401 petition and that defendant did not have a meritorious defense. Additionally, plaintiff alleged it was exempt from registering under the Act because:

1-11-2780

the statute relied on by defendant does not require it to register as a debt collection agency as the Act specifically excludes banks, fiduciaries, financing and lending institutions as well as loan and finance companies - Saxon as attorney in fact, is considered to have a fiduciary relationship with the beneficiary and is not required to register as a collection agency under section 425/2.03 of the Act; alternatively, plaintiff alleged that even if it were not exempt from registration as a collection agency, defendant admitted that Saxon either purchased or serviced his mortgage loan, thus would be required to register as a residential mortgage licensee, which it was so (exhibit was attached); and the residential mortgage licensee act did not require that a residential mortgage banker would have to obtain additional licensing as a collection agency.

¶ 9 Defendant again alleged in its reply that because plaintiff sued to recover debt owed on an account, even though it was a foreclosure action, whether or not plaintiff acquired the loan and was attempting to collect that debt or was collecting for others, any of those actions were those of a collection agency and required registration. Defendant cited to this court's decision in *LVNV Funding, LLC v. Trice*, 2011 IL App (1st) 092773, ¶ 15 in support of his contention. Defendant again concluded that, because Saxon did not register as a collection agency, any judgment entered was void.

¶ 10 After a hearing, the trial court denied defendant's section 2-1401 petition on August 31, 2011. This timely appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant contends that: 1) he alleged sufficient grounds to vacate all orders entered in favor of plaintiff under section 2-1401, and 2) plaintiff's failure to register as a

1-11-2780

collection agency nullifies its complaint and voids the resulting judgments from proceedings under the complaint.

¶ 13 There are five types of final dispositions available for section 2-1401 litigation: the trial court may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny the petition after holding an evidentiary hearing at which it resolves factual differences. *People v. Vincent*, 226 Ill. 2d 1, 9 (2007). The supreme court held that when a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 14 Here, the record only reflects that a draft order prepared by defendant's attorney was entered denying defendant's motion to vacate pursuant to section 2-1401. The draft order was silent as to whether or not an evidentiary hearing was held on defendant's motion, although it does indicate that pleadings were filed by both parties and that both parties were represented by counsel. As such, our review is *de novo*.

¶ 15 Section 2-1401 establishes a statutory procedure that allows for the vacatur of a judgment older than 30 days. 735 ILCS 5/2-1401 (West 2010). Section 2-1401(b) provides that the petition must be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action (735 ILCS 5/2-1401(b) (West 2010)); it is a new cause of action (*Mills v. McDuffa*, 393 Ill. App. 3d 940, 946 (2009)). The statute requires the petitioner to support the petition with affidavits or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2010). The purpose of a section 2-1401 petition is to alert the

1-11-2780

circuit court to facts that, if they had been known at the time, would have precluded entry of judgment. *Lofendo v. Ozog*, 118 Ill. App. 3d 237, 241 (1983). A petition seeking relief from a final judgment or order under this section is not intended to relieve a party from the consequences of his or her own mistake or negligence. *Hirsch v. Otima, Inc.*, 397 Ill. App. 3d 102, 110 (2009).

¶ 16 To state a claim for relief under section 2-1401, the petitioner must affirmatively set forth specific facts supporting each of 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. *Smith v. Airoom Inc.*, 114 Ill. 2d 209, 220-21 (1986). The proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Smith*, 114 Ill. 2d at 221.

¶ 17 However, our supreme court has held that a void order may be challenged at any time and the allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002).

¶ 18 In the instant case, defendant filed a section 2-1401 motion alleging that the trial court's order was void because Saxon Mortgage Services, Inc. was not a registered debt collector under section 425/3 of the Act and that the judgment must be vacated. That section provides, in pertinent part:

"§3. A person, association, partnership, corporation, or other legal entity acts as a collection agency when he or it:

1-11-2780

(a) Engages in the business of collection for others of any account, bill or other indebtedness;

(b) Receives, by assignment or otherwise, accounts, bills, or other indebtedness from any person owning or controlling 20% or more of the business receiving the assignment, with the purpose of collecting monies due on such account, bill or other indebtedness;

* * *." 225 ILCS 425/3 (West 2010).

¶ 19 In response, plaintiff filed a section 2-619 motion for dismissal contending that the statute specifically excludes banks, fiduciaries, financing and lending institutions as well as loan and finance companies under section 2.03. Section 2.03 of the Act states, in pertinent part:

"§2.03. This 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 include the following:

1. Banks, including trust departments, affiliates, and subsidiaries thereof, fiduciaries, and financing and lending institutions (except those who own or operate collection agencies); * * *

8. Loan and finance companies; * * *." 225 ILCS 425/2.03 (West 2010).

Plaintiff alleged that as attorney in fact for the lender, it is considered to have a fiduciary relationship with the beneficiary and was not required to register as a debt collector.

1-11-2780

Alternatively, plaintiff contended that it was registered under the residential mortgage licensee act and was not required to obtain additional licensing as a collection agency.

¶ 20 Defendant argues on appeal that prior to ruling on his section 2-1401 petition, the trial court should have held an evidentiary hearing before ruling because the determination of whether plaintiff was a collection agency raised a factual question. Specifically, defendant argues that there is no evidence in the record concerning the nature of plaintiff's primary business activities to show that it met the requirements for exemption from registration. However, we note that defendant has failed to include in the record a report of proceedings or bystander's report of the August 31, 2011, hearing on his section 2-1401 motion and plaintiff's section 2-619 motion. Appellant has the burden of presenting the reviewing court with a sufficiently complete record of the circuit court proceedings to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 264 Ill. App. 3d 633, 639 (1994). Absent such a record, reviewing courts presume that the trial court's order comported with the law and was supported by the facts, and any doubts must be resolved against the appellant. *Foutch*, 99 Ill. 2d at 391-92, *Cruz*, 264 Ill. App. 3d at 639. Thus, to the extent that the trial court based its ruling on factual determinations, we are unable to review the trial court's findings. We must presume that the trial court's denial of defendant's section 2-1401 motion was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. (Any doubts arising from an incomplete record will be resolved against the appellant).

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

1-11-2780

¶ 23 Affirmed.