

No. 1-12-0060

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

BANKUNITED, FSB,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 09 CH 30164
)	
STEVEN P. KELLY; GLORIA P. KELLY;)	
UNKNOWN OWNERS AND)	
NON RECORD CLAIMANTS,)	Honorable
)	Anthony Kyriakopoulos,
Defendants-Appellants.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *HELD:* Appeal dismissed for lack of jurisdiction where defendant's second post-trial motion did not extend the time for filing the notice of appeal.

¶ 2 Defendant Steven Kelly appeals from an order of the circuit court of Cook County denying his motion to dismiss a foreclosure action for lack of subject matter jurisdiction. On

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appeal, defendant contends that the circuit court erroneously denied his motion where the bank was not a legal entity throughout the proceedings. For the following reasons, we affirm.

¶ 3 The record shows, in relevant part, that on August 26, 2009, plaintiff BankUnited, FSB filed a complaint to foreclose mortgage alleging that defendant and Gloria Kelly were in default of their mortgage loan for the property at 17428 Queen Elizabeth Lane, in Tinley Park. On the motion of plaintiff, the circuit court subsequently entered an order of default and a judgment for foreclosure and sale. On July 12, 2011, the court entered an order approving the report of sale and distribution.¹

¶ 4 On August 9, 2011, defendant filed a motion to reconsider the order approving sale alleging, *inter alia*, that the sale was unconscionable because plaintiff did not exist at the time of the sale. He asserted that plaintiff could not be "the Plaintiff" because it was closed by the federal government on May 21, 2009, and that "[i]t is unconscionable to think an inactive entity closed by the Federal Government prior to the foreclosure being filed would be allowed to credit bid at the sale and still be the named plaintiff in this case."

¶ 5 On October 4, 2011, while his motion to reconsider was pending, defendant also filed a motion to dismiss for lack of subject matter jurisdiction alleging that plaintiff is "neither an individual, corporation, or a partnership." In support, he attached a printout from the website of the Federal Deposit Insurance Corporation (FDIC) showing that plaintiff was inactive as of May 21, 2009, and had been merged with government financial assistance into BankUnited. He also

¹ The report of sale and distribution shows that the property in question was auctioned and sold to BankUnited.

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attached a letter from BankUnited's senior vice president and associate general counsel regarding his mortgage, which stated: "BankUnited, F.S.B. was closed by the Office of Thrift Supervision *** and taken into receivership by the [FDIC] on May 21, 2009. BankUnited, a newly chartered federal savings association *** is the assignee of the FDIC, as receiver for BankUnited, FSB and the current owner and servicer of this mortgage." In his brief supporting the motion, defendant alleged that plaintiff has not existed since May 21, 2009, prior to the filing of the foreclosure complaint, and thus was unable to give the court subject matter jurisdiction.

¶ 6 On November 30, 2011, the circuit court denied defendant's motion to reconsider the order approving sale. On December 22, 2011, the court also denied defendant's motion to dismiss for lack of subject matter jurisdiction, stating:

"Bank United FSB was placed into [FDIC] receivership on May 21, 2009. The FDIC as receiver may 'perform all function [*sic*] of the institution in the name of the institution which are consistent with the appointment as . . . receiver.' 12 U.S.C. § 1821(d)(2)(B)(iii). Maintaining a lawsuit to recover the lost assets of the failed institution is consistent with the functions of a receiver."

On January 5, 2012, defendant filed a notice of appeal from the order entered on December 22, 2011.

¶ 7 Defendant maintains that the circuit court erroneously denied his motion to dismiss for lack of subject matter jurisdiction where the bank was not a legal entity throughout the instant foreclosure proceedings. Plaintiff responds that this court lacks jurisdiction to hear this appeal where defendant's motion to reconsider was denied on November 30, 2011, and defendant did

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not file a notice of appeal until January 5, 2012.

¶ 8 The record shows that defendant filed his notice of appeal pursuant to Illinois Supreme Court Rule 303 (eff. Jun. 4, 2008). Rule 303 provides that a "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." Ill. S. Ct. R. 303(a)(1). A timely posttrial motion in a non-jury case must be filed within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof. 735 ILCS 5/2-1203(a) (West 2010). "A motion not filed within 30 days after the judgment (or any extension allowed) is not 'timely' within the meaning of that word as used in Rule 303(a); and an untimely motion, or one not directed against the judgment, neither stays the judgment nor extends the time for appeal." *Sears v. Sears*, 85 Ill. 2d 253, 259 (1981). "[C]ompliance with the deadlines for appeals under Rule 303 is jurisdictional, and this court therefore is without jurisdiction to review an appeal that was not filed in a timely manner." *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 23.

¶ 9 The final judgment in this foreclosure action was the circuit court's order approving the report of sale and distribution, entered on July 12, 2011. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555 (1989). The only post-trial motion filed by defendant within 30 days of that order, and thus the only timely posttrial motion, was his motion to reconsider filed on August 9, 2011. 735 ILCS 5/2-1203(a) (West 2010); *Sears*, 85 Ill. 2d at 259. When that motion was denied on November 30, 2011, defendant had 30 days, *i.e.*, until December 30, 2011, to file a notice of

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appeal. He did not do so, however, until January 5, 2012. His notice of appeal was therefore untimely (Ill. S. Ct. R. 303(a)(1)), and, as a result, this court lacks jurisdiction to hear the instant appeal (*Tunca*, 2012 IL App (1st) 093384, ¶ 23).

¶ 10 Defendant nonetheless maintains that he is not appealing the denial of the motion for reconsideration, but rather, the order denying his motion to dismiss for lack of subject matter jurisdiction entered on December 22, 2011. He therefore claims that his notice of appeal was timely. We disagree.

¶ 11 In *Sears*, 85 Ill. 2d at 256, the supreme court addressed whether the circuit court can allow a successive post-judgment motion which merely repeats what was set forth or could have been set forth in the first post-judgment motion, and whether filing such a motion extends the time for appeal. The supreme court noted that it had previously held in *Deckard v. Joiner*, 44 Ill. 2d 412 (1970) that "a second post-judgment motion, filed more than 30 days after judgment but within 30 days of the denial of the first motion, that only repeats what was in the first motion or raises points that could have been raised the first time does not extend the time for appeal," and, further, that the circuit court could not allow such a motion. *Sears*, 85 Ill. 2d at 258. Citing the "interests of finality, and of certainty and ease of administration in determining when the time for appeal begins to run," the supreme court reaffirmed the rule of *Deckard* that "successive post-judgment motions are impermissible when the second motion is filed more than 30 days after the judgment or any extension of time allowed for the filing of the post-judgment motion." *Sears*, 85 Ill. 2d at 259. The supreme court further held that the filing of post-judgment motions is limited by the time constraints of the civil practice law. *Sears*, 85 Ill. 2d at 259.

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¶ 12 Here, defendant could have raised the circuit court's alleged lack of subject matter jurisdiction in his timely filed motion to reconsider, but did not do so, and instead filed a separate motion to dismiss outside the 30-day window for filing a posttrial motion. Under the supreme court's holding in *Sears*, the filing of this untimely motion did not extend the time for filing an appeal. *Sears*, 85 Ill. 2d at 258-59. We acknowledge, as defendant points out, that a judgment or order entered by a court without subject matter jurisdiction is void and may be challenged at any time or in any court. *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002)). However, this does not mean that the time for filing a notice of appeal can be extended by an untimely posttrial motion alleging lack of subject matter jurisdiction. It also does not mean that this court can consider the issue of lack of subject matter jurisdiction without jurisdiction of our own. As the supreme court has stated:

"Although a void order may be attacked at any time, the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts. If a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void.

The reason is obvious. Absent jurisdiction, an order directed at the void judgment would itself be void and of no effect." *People v. Flowers*, 208 Ill. 2d 291, 308 (2003).

We therefore reject defendant's claim and dismiss this appeal for lack of jurisdiction.

¶ 13 Appeal dismissed.