

No. 1-12-1552

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

THE BANK OF NEW YORK MELLON FORMERLY)	Appeal from the Circuit Court
KNOWN AS THE BANK OF NEW YORK AS)	of Cook County
SUCCESSOR TRUSTEE TO JPMORGAN CHASE)	
BANK, N.A., AS TRUSTEE FOR THE)	
CERTIFICATEHOLDERS OF STRUCTURED ASSET)	
MORTGAGE INVESTMENTS II TRUST 2005-AR7)	
MORTGAGE PASS-THROUGH CERTIFICATES,)	
SERIES 2005-AR7,)	
)	12 M1 705356
Plaintiff-Appellee,)	
)	
v.)	
)	
LIZZIE BUIE, and UNKNOWN OCCUPANTS, if any,)	Honorable
)	Leonard Murray,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: Defendant failed to present a sufficient record for her claim, the claim raised was not germane to a forcible entry and detainer action and the trial court's order for possession was not void.

¶ 2 Plaintiff, the Bank of New York Mellon (Bank), filed a forcible detainer and entry action

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seeking to evict defendant Lizzie Buie from a property subject to foreclosure. Buie failed to appear in the proceeding and the trial court entered an order for possession in favor of the Bank. Buie subsequently filed a notice of appeal and a motion to stay possession and eviction. On appeal, Buie argues that the order of possession is void because of errors in the assignment of the mortgage in the foreclosure proceeding.

¶ 3 The instant forcible entry and detainer action, seeking possession of the property located at 876 North Maple Drive, Chicago Heights, Illinois (the property), was filed by the Bank in March 2012. The Bank alleged that Buie was unlawfully withholding possession. The Bank attached to its complaint an order approving foreclosure report of sale and distribution and order for possession and deed for the property, entered in case number 09 CH 37944 in October 2011. The foreclosure order established that the Bank was the owner and legal title owner of the property.

¶ 4 The sheriff attempted to serve Buie with the summons for trial, but was unable to do so. The Bank filed an affidavit for service by posting and filed a notice requiring Buie's appearance in the instant action. Buie failed to appear in the trial court. On April 26, 2012, the trial court entered an order for possession in favor of the Bank. The court also denied an alleged tenant's motion to intervene in the proceeding.

¶ 5 In May 2012, Buie filed a motion to stay possession and eviction pending appeal and her notice of appeal. In her notice of appeal, Buie asserted that she was "never given 90 day notice according to procedure and statue [*sic*] of Forcible Entry and Detainer action pending against her resident/property."

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¶ 6 On appeal, Buie does not challenge notice, but instead argues that the trial court's orders in the instant proceeding and prior foreclosure action are void under Illinois and New York law. In support of her argument, Buie asks this court to take judicial notice of numerous documents, including the assignment of mortgage for the property at issue in the foreclosure proceeding and the Bank's trust documents.

¶ 7 Courts may take judicial notice of "factual evidence where the facts are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983). "[A] court will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties." *Vulcan Materials*, 96 Ill. 2d at 166 (quoting *Ashland Savings & Loan Association v. Aetna Insurance Co.*, 18 Ill. App. 3d 70, 78 (1974)).

¶ 8 Here, Buie failed to appear before the trial court and now challenges the trial court's order in this case and the foreclosure proceeding as void based on documents that were never presented to the trial court and are not part of the record on appeal. She asserts that the assignment of mortgage does not reflect a correct chain of title as required by the Bank's pooling and servicing agreement, filed with the Securities and Exchange Commission. Neither the assignment of mortgage or the pooling and servicing agreement are in the record and nothing in the record supports her claim. We decline to take judicial notice of critical documents that would be significant to determine the issue of whether the assignment of mortgage was valid.

¶ 9 Further, Buie failed to supplement the record with these documents. Plaintiff, as the

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appellants, bear the burden of providing a sufficiently complete record to support her claim or claims of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubt arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Further, "[t]rial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc.*, 337 Ill. App. 3d 501, 508 (2003) (quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991)).

¶ 10 However, even if we took judicial notice of these documents, Buie's argument is not germane to the limited purpose of a forcible entry and detainer action. "The purpose of the Forcible Entry and Detainer Act is to provide a speedy remedy to allow a person who is entitled to the possession of certain real property to be restored to possession." *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, at ¶ 14 (citing *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 251 (1970)). "Forcible entry actions are summary, statutory proceedings, and '[a] court hearing a forcible entry and detainer claim is considered "a court of special and limited jurisdiction." [Citation.]' " *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 861 (2004) (quoting *Yale Tavern, Inc. v. Cosmopolitan National Bank*, 259 Ill. App. 3d 965, 971 (1994)). " 'Matters not germane to the issue of possession may not be litigated in a forcible entry and detainer action.' " *Avenaim*, 347 Ill. App. 3d at 861 (quoting *Yale Tavern*, 259 Ill. App. 3d at 971). "[T]he only factual questions which need be answered in such a proceeding are which party is entitled to immediate possession

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and whether a defense which is germane to the distinctive purpose of the action defeats plaintiff's asserted right to possession." *First Illinois Bank & Trust v. Galuska*, 255 Ill. App. 3d 86, 90 (1993). " "Claims which are germane to the issue of possession generally fall into one of four categories: (1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; and (4) claims questioning the plaintiff's motivation for bringing the action." [Citation.] " *Avenaim*, 347 Ill. App. 3d at 862 (quoting *American National Bank by Metroplex, Inc. v. Powell*, 293 Ill. App. 3d 1033, 1044 (1997)). Serious title disputes cannot be raised in a forcible entry and detainer action. *Avenaim*, 347 Ill. App. 3d at 862. "An action for mortgage foreclosure and an action for forcible entry and detainer are separate and distinct," with each proceeding "upon different facts, involv[ing] different parties and issues and provid[ing] different relief." *Norwest Mortgage, Inc. v. Ozuna*, 302 Ill. App. 3d 674, 680 (1998).

¶ 11 The Third District in *Watson* affirmed the trial court's grant of summary judgment in a forcible entry and detainer action. *Watson*, 2012 IL App (3d) 110930. There, the defendant asserted that "genuine issues of material fact remain as to whether plaintiff had legal standing to file the mortgage foreclosure complaint in the foreclosure action and whether plaintiff obtained the mortgage foreclosure judgment by committing fraud on the court." *Watson*, 2012 IL App (3d) 110930, at ¶ 12. The reviewing court concluded that this challenge was not germane to an action under the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2010)). "The matters asserted by defendant in opposition to plaintiff's motion for summary judgment

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were not germane to the issue of possession but, rather, constituted a collateral attack on the mortgage foreclosure judgment." *Watson*, 2012 IL App (3d) 110930, at ¶ 16.

¶ 12 The same is true in this case. Buie has not raised any challenge to the Bank's right to possession. Rather, she has raised a title dispute, contending that the mortgage foreclosure order was void because of an error in the chain of title in the assignment of the mortgage. This is not germane to the limited question of possession and is a collateral attack on the prior foreclosure action. Buie contends that the orders are void and a void order may be attacked at any time. We disagree.

¶ 13 "[A] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002) (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)). Here, the trial court had jurisdiction over the subject matter and parties as well as the power to enter the order of possession. Once the complaint was filed and Buie was served by posting, the trial court had jurisdiction over the subject matter and the parties. As we previously stated, a court hearing a forcible entry and detainer action has special and limited jurisdiction. *Avenaim*, 347 Ill. App. 3d at 861.

"Moreover, because a forcible entry and detainer action is in derogation of the common law, the party bringing such an action must comply with the requirements of the Act, especially those relating to jurisdiction." *Russell v. Howe*, 293 Ill. App. 3d 293, 297 (1997). "If the party bringing the action fails to comply with the Act's jurisdictional requirements, the trial court lacks

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jurisdiction over the dispute and is powerless to award possession." *Russell*, 293 Ill. App. 3d at 297.

¶ 14 The record on appeal establishes that the Bank complied with the Act's jurisdictional requirements. The Bank served a notice to vacate in December 2011, containing a demand for possession and a notice of intent to file an action under the Act. See 735 ILCS 5/9-104, The Bank filed its complaint under the Act in March 2012. When the sheriff was unable to serve Buie in person, the Bank effectuated service by posting, pursuant to section 9-107 of the Act. 735 ILCS 5/9-107 (West 2010). Section 9-107 allows for constructive service by posting if service was unable to be made in person and the plaintiff or its attorney filed an affidavit, attesting that process could not be made. 735 ILCS 5/9-107 (West 2010). The Bank filed an affidavit for service by posting and the notice requiring appearance in pending action. Buie failed to appear. Since the trial court had both subject matter and personal jurisdiction as well as the authority to enter an order for possession, no void order was entered in this case. Buie's argument on appeal is a collateral attack on her prior foreclosure proceeding and does not involve a void order. Buie has failed to raise an issue germane to the Act and, therefore, we affirm the order for possession entered by the trial court.

¶ 15 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 16 Affirmed.