

No. 1-12-2182

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

BRIDGEVIEW BANK GROUP,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CH 41986
)	
MILLARD MCCANN CORP.,)	Honorable
)	Daniel Patrick Brennan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

ORDER

- ¶ 1 *Held:* Order appointing a receiver in mortgage foreclosure action is vacated where the order was entered in defendant's absence and without proper notice to defendant, and where defendant was prejudiced as a result of the order.
- ¶ 2 Defendant Millard McCann Corp. filed the instant interlocutory appeal following the trial court's appointment of a receiver in a mortgage foreclosure action initiated by plaintiff Bridgeview Bank Group. Defendant contends on appeal that the trial court erred in hearing the motion in its absence where, defendant alleges, it did not receive proper notice of the hearing because the notice defendant received provided that plaintiff's motion to appoint a receiver

would be heard on June 16, 2012, yet the trial court heard the motion in defendant's absence on June 6, 2012. Defendant further contends the trial court erred in denying its motion to set aside the order appointing a receiver.

¶ 3 Plaintiff filed a mortgage foreclosure action on December 7, 2011 against various individuals and entities, including defendant Millard McCann Corp. ("defendant"). On May 11, 2012, plaintiff filed a notice of motion to assign the case and to substitute its attorneys. The motion was set to be heard on June 6, 2012 at 1 p.m. The electronic docket of the circuit court of Cook County shows that a hearing was set for June 6, 2012 at 1 p.m. Similarly, the activity date, showing when the motion was filed, is May 11, 2012. The electronic docket indicates that the court would hear plaintiff's motion to substitute attorney, for default, and another unspecified miscellaneous motion on June 6.

¶ 4 The record shows that on May 23, 2012, plaintiff filed a "re-notice" of its motion for appointment of receiver, setting the motion to be heard on June 7, 2012 at 9:30 a.m. However, the Supplemental Record shows that plaintiff's re-notice set the motion for what appears to be June 16, 2012 at 1 p.m. The parties dispute whether this handwritten re-notice actually reads "June 06" or "June 16." The electronic docket shows that on May 23, 2012, plaintiff's motion to appoint a receiver was scheduled to be heard on June 7, 2012 at 9:30 a.m.

¶ 5 On June 6, 2012, in a written order, the trial court granted plaintiff's motion for appointment of receiver. Defendant was not represented in court when the trial court granted plaintiff's motion. In the same order, the trial court also granted plaintiff's motion to substitute attorneys and granted plaintiff's new attorneys leave to file their substitute appearances. Plaintiff's motion to assign case was withdrawn as moot. While the written order is not file-stamped with a filing date, the parties agree that the trial court appointed a receiver on June 6, 2012.

¶ 6 On June 14, 2012, defendant filed a notice of its motion to set aside the order appointing a receiver. On July 18, 2012, the trial court heard defendant's motion to set aside the appointment of a receiver and subsequently denied the motion. Defendant filed a notice of interlocutory appeal on July 30, 2012, and then an amended notice of interlocutory appeal on July 31, 2012, pursuant to Supreme Court Rule 307 (eff. Feb. 26, 2010). The record on appeal does not include transcripts of the hearings appointing the receiver or denying defendant's motion to set aside the court's order.

¶ 7 On appeal, defendant contends that the trial court erred in granting plaintiff's motion to appoint a receiver because defendant was not properly served with notice of the motion and contends the court further erred in denying its motion to set aside the order appointing a receiver.

¶ 8 Due process requires that interested parties receive notice of legal proceedings and be provided an opportunity to be heard at those proceedings. *Passalino v. City of Zion*, 237 Ill. 2d 118, 124 (2010). This right to notice includes the right "to present evidence and arguments, the right to cross-examine witnesses, and the right to an impartial ruling based upon the evidence presented to the court." *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, ¶ 16. The parties disagree about the standard of review this court should apply. Defendant urges this court to review its claim for clear error, while the plaintiff requests we review it for abuse of discretion. We need not resolve this standard of review dispute in order to resolve the issue of whether defendant received proper notice because even if we reviewed this appeal for an abuse of discretion, the trial court erred in denying defendant's motion to vacate the court's order appointing a receiver because plaintiff's notice of motion was ambiguous.

¶ 9 Notice must be a "reasonable attempt to inform those affected by the proceeding." *Id.* at 156. When examining the sufficiency of notice, "a court may consider the character of the proceedings and the practicalities and peculiarities of the case." *Id.* Further, Cook County Local

Rule 2.1 requires that notice include the time and date for when the motion will be presented. (Cook Co. Cir. Ct. R. 2.1 (Aug. 21, 2000)).

¶ 10 Here, plaintiff filed a notice on May 11, 2012, setting a hearing for June 6. The June 6 hearing was in relation to plaintiff's uncontested motions to substitute its counsel and to appoint a trial judge. Plaintiff then filed a "re-notice" on May 23, 2012, setting a hearing for its motion to appoint a receiver. There are three documents in the record referring to this subsequent hearing. First, the Common Law Record shows plaintiff's re-notice set the hearing for June 7, 2012 at 9:30 a.m. Second, the parties dispute whether the handwritten re-notice contained in the Supplemental Record actually reads "June 06" or "June 16," and this court finds the re-notice to be ambiguous. It is unclear whether the re-notice sets the hearing for June 06 or June 16. Third, the electronic docket shows that on May 23, 2012, plaintiff's motion was scheduled to be heard on June 7, 2012 at 9:30 a.m. The trial court's order indicates that it heard not only plaintiff's initial uncontested motion to substitute counsel, but also, unbeknownst to defendant, it also heard plaintiff's motion to appoint a receiver.

¶ 11 It is reasonable to interpret plaintiff's re-notice as superseding the initial notice setting the hearing for June 6. Further, the record shows that two different hearing dates were noticed for the plaintiff's motion to appoint a receiver: June 7 and 16, yet the court decided the motion in defendant's absence on June 6. Due to these conflicting and confusing dates, the notice to defendant was not a reasonable attempt to inform defendant of the proceeding. *People v. \$30,700.00 U.S. Currency*, 199 Ill. 2d 142, 156 (2002). Therefore, when the trial court heard plaintiff's contested motion to appoint a receiver on June 6 without defendant's presence, it violated defendant's due process right to be present and contest the motion, and it erred in failing to vacate its order appointing a receiver *ex parte*. See *Iczek v. Iczek*, 42 Ill. App. 2d 241 (1963) (finding the trial court erred in failing to set aside the order of default when notice of motion was

improper).

¶ 12 Plaintiff argues that even if the notice was improper, this is no basis to vacate the trial court's order appointing a receiver because lack of notice does not render the trial court's judgment void. We find this argument unavailing. Although plaintiff is correct that *Mortimer v. River Oaks Toyota, Inc.*, 278 Ill. App. 3d 597, 602 (1996), provides that "only orders entered by a court lacking jurisdiction over the person of a party or the subject matter of the litigation are 'void,'" *Mortimer* is distinguishable from the present case because at issue in *Mortimer* was whether the trial court had jurisdiction over the plaintiffs. Here, it is undisputed that the trial court had jurisdiction over defendant. Rather, the issue is whether plaintiff served proper notice to defendant regarding the hearing on the motion to appoint a receiver.

¶ 13 Moreover, plaintiff's other cited cases also fall short of lending support to plaintiff's argument that lack of notice is not a basis to vacate the trial court's order. *Government Employees Insurance Co., v. Hersey*, 397 Ill. App. 3d 551, 554 (2010), is factually distinguishable because in that case the court concluded that the judgment was not void because the trial court had jurisdiction over the nonmoving party where that party received proper notice since service was proper and the party filed an appearance on the case. *Matter of American Mutual Reinsurance Co.*, 238 Ill. App. 3d 1, 9-10 (1992), is also factually distinguishable because while the court concluded in that case that the nonmoving party did not receive notice and did not participate in the hearing at issue, the party nevertheless was not harmed or prejudiced by the lack of notice or the hearing being conducted *ex parte*. *Savage v. Pho*, 312 Ill. App. 3d 553, 560 (2000), makes a similar legal distinction between voiding a judgment where a party has not received proper notice and where that party was harmed or prejudiced by the lack of notice. The court ruled in *Savage* that the nonmoving party was not prejudiced by the lack of notice and the *ex parte* hearing on the plaintiff's motion for leave to amend its complaint. *Id.* at

559. Here, defendant was prejudiced by the lack of notice because the trial court appointed a receiver in its absence and without defendant having an opportunity to be heard on the motion. Defendant was further prejudiced where, according to plaintiff's proposed order that was signed by the trial court, the appointment of the receiver resulted in the condition that defendant pay certain fees to the receiver for the execution of the receiver's duties.

¶ 14 Therefore, the trial court erred in appointing a receiver in defendant's absence and without proper notice to defendant where such appointment resulted in prejudice to defendant and a denial of defendant's procedural due process rights. The trial court further erred in denying defendant's motion to set aside the order appointing a receiver.

¶ 15 Based on the foregoing, we vacate the order of the circuit court of Cook County appointing a receiver.

¶ 16 Order vacated.