

No. 1-12-2286

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

PNC MORTGAGE, a Division of PNC Bank, National Association)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	No. 09 CH 10633
v.)	
)	Hon. Jean Prendergast Rooney,
ANDRZEJ MIKOLAJCZYK and)	Judge Presiding
UNKNOWN OWNERS AND)	
NONRECORD CLAIMANTS,)	
)	
Defendants)	
)	
(Alina Mikolajczyk,)	
)	
Defendant-Appellant).)	

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

ORDER

¶ 1 *Held:* The circuit court's denial of mortgagor's motion to vacate a judicial sale is affirmed where mortgagor failed to timely file the motion or otherwise comply with the requirements of section 2-1401 of the Illinois Code of Civil Procedure.

¶ 2 Defendant Alina Mikolajczyk¹ appeals the circuit court's denial of her motion to vacate the circuit court's order confirming the sale of real property. For the reasons stated herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Andrzej Mikolajczyk signed a note dated October 31, 2007, in the principal amount of \$375,000, payable to "National City Mortgage a division of National City Bank," the lender. The note provided for monthly payments in the amount of \$2,401.17. In a mortgage executed on the same date, the Mikolajczyks granted the lender a security interest in real property located at 5181 N. Canfield Avenue in Norridge, Illinois (the Property).

¶ 5 On March 9, 2009, "National City Bank successor by merger to National City Mortgage Company" (NCB), filed a Complaint to Foreclose Mortgage in the circuit court of Cook county against the Mikolajczyks and "unknown owners and non record claimants." The complaint alleged that the Mikolajczyks were in default for the monthly payments due for and after November, 2008. The record on appeal indicates that the Mikolajczyks were served with the complaint on April 2, 2009.

¶ 6 NCB filed a motion for order of default on September 21, 2009. On October 1, 2009, Andrzej filed a *pro se* motion stating that his wife was abroad and asking that the "court date" be

¹Although both Alina and her husband, Andrzej Mikolajczyk, are defendants in the underlying action, only Alina signed the notice of appeal. A notice of appeal must contain the signature and address of each appellant or appellant's attorney. Ill. S. Ct. R. 303(b) (eff. June 4, 2008). See also *People v. Krueger*, 146 Ill. App. 3d 530, 533 (1986). Because the notice of appeal was not signed by Andrzej, we consider the appeal herein to have been taken only by Alina.

1-12-2286

moved to October 28, 2009.

¶ 7 On October 9, 2009, the trial court granted three motions filed by NCB on October 5, 2009: (i) a motion to appoint a selling officer; (ii) a motion seeking entry of a judgment of foreclosure and sale; and (iii) a motion for an order of default.

¶ 8 On October 28, 2009, the court considered the "Defendant's Pro Se Motion for Extension of Time" and entered an order: (i) vacating the judgment of foreclosure and sale; (ii) vacating all "default/orders entered against Movants" on October 9, 2009; and (iii) granting the Mikolajczyks 28 days to answer or otherwise plead.

¶ 9 On November 25, 2009, the Mikolajczyks filed a *pro se* "Verified Answer to Complaint to Foreclosure Mortgage,"² wherein they admitted the allegations in the foreclosure complaint except for two. They denied the allegation in paragraph 3(c) of the complaint that both Andrzej and Alina were the "mortgagors or grantors," stating that Alina was not on the mortgage. They also denied the allegations of paragraph 3(m) of the complaint, which indicated that the present owners of the Property were Andrzej and Alina.³

¶ 10 In their answer, the Mikolajczyks also stated the following, in part, as an "Other affirmative matter":

"* * * We would like to keep the house but due to the high mortgage we have been trying to sell it. It has been on a market/MLS. The bank did not want to cooperate - we were

²Although Andrzej and Alina each signed the answer, neither signed the verification pursuant to 5/1-109 of the Illinois Code of Civil Procedure. 735 ILCS 5/1-109 (West 2010).

³The Mikolajczyks answered that they lacked sufficient information with which to admit or deny the allegation of paragraph 3(l) of the complaint, which addressed the amount of money due to NCB. The answer failed to address certain other paragraphs of the complaint.

1-12-2286

trying to solve it with Nat'l City Mortgage."

¶ 11 In a summary judgment motion filed April 1, 2010, National City Bank contended, among other things, that (i) "Defendant has failed to offer a counter-affidavit or any other competent evidence the [*sic*] contradict Plaintiff's *prima facie* basis for recovery" and therefore the bank was entitled to judgment as a matter of law, and (ii) "Defendants' affirmative defense [alleging] that the Plaintiff did not cooperate with Defendants listing or selling the subject property" was an "unsupported conclusory statement" and did not constitute a valid defense.

¶ 12 On April 28, 2010, "PNC Mortgage, a division of PNC Bank, N.A." (PNC) filed a supplemental affidavit stating that the "subject mortgage was transferred from National City Mortgage, a Division of National City Bank to PNC Mortgage, a Division of PNC Bank, N.A." The supplemental affidavit refers to "PNC Mortgage" as the "current servicer" on the account and refers to the "Plaintiff" as the "agent for the holder and owner of" the note and mortgage "originally given as security to National City Mortgage, a Division of National City Bank." The supplemental affidavit refers to the real property given as security as "10489 Dutch Barn Street, Huntley, Illinois 60142."⁴ The note signed by Andrzej and the mortgage signed by the Mikolajczyks were appended as exhibits to the affidavit, as well as a certificate from the Ohio Secretary of State certifying that "National City Mortgage Co." was "merged out of existence." A print out of "payment history *** kept PNC Mortgage [*sic*]" was also appended to the affidavit. The notice of filing and proof of service attached to the affidavit indicates that Andrzej was served at the Property address.

⁴As discussed further herein, the reference to the Huntley property appears to be an error.

1-12-2286

¶ 13 On July 8, 2010, NCB filed a Motion to Substitute Plaintiff Due to Merger, seeking to substitute PNC as plaintiff. The motion provides, in part, that NCB merged with PNC after NCB filed the foreclosure action. On the same date, PNC filed: (i) a motion for judgment for foreclosure and sale; (ii) a motion seeking to dismiss "unknown owners and non record claimants"; and (iii) a motion to appoint a selling officer.

¶ 14 On July 14, 2010, the court entered a scheduling order on the motion for summary judgment, providing that any response to the motion was due on August 18, 2010. No such response is included in the record on appeal. On September 20, 2010, the court granted orders: (i) substituting PNC as plaintiff; (ii) dismissing unknown owners and non-record claimants as defendants; (iii) granting summary judgment in favor of PNC and against the Mikolajczyks; and (iv) appointing a selling officer. The court also entered a judgment for foreclosure and sale which, among other things, authorized a judicial sale of the Property.

¶ 15 On October 20, 2010, the Mikolajczyks were served by mail with a Notice of Sale Pursuant to Judgment of Foreclosure Under Illinois Mortgage Foreclosure Law. The notice of sale provided, among other things, the time, date – November 11, 2010 – and location – of a sale of the Property. On December 20, 2010, the Mikolajczyks were served by mail with another such notice, referencing a January 17, 2011 sale of the Property. On December 20, 2011, the Mikolajczyks were served by mail with another such notice, referencing a January 13, 2012 sale of the Property. The reason for the changing sale dates is not apparent from the record on appeal.

¶ 16 The record indicates that the Mikolajczyks were served by mail on February 9, 2012, with a notice of motion which referenced NCB as the plaintiff in the case caption; an amended notice

1-12-2286

of motion was served by mail on the Mikolajczyks on February 21, 2012 that referenced PNC as the plaintiff. Each notice stated that the plaintiff would "move the Court for the entry of an Order approving the Foreclosure Report of Sale and Distribution and Order for Possession and eviction" on February 28, 2012. The court entered an order on February 28, 2012, approving the foreclosure report of sale and distribution and order for possession and deed.

¶ 17 On May 16, 2012, Alina filed a *pro se* motion to vacate the sale of the Property. In the motion, she stated the following:

"We are requesting to vacate the sale of our house which took place on January 13, 2012. This sale is obviously suspicious and possibly fraudulent: PNC sold my house to PNC for \$503,000. I was there and saw it happen. This house would not sell for more than \$150,000-\$200,000. Do we have the right to ask if they are going to report losses and have them covered by the government? We were not served about the Court on Feb. 28, 2012 when the sale was confirmed. That is why we were absent. As the only legal owners, we never gave them consent to sell it. We bought it, invested our work and hard earned money, took care of it, acted in good faith. We live in it with our children, and seizing it would deprive us of our land and the roof over our heads. Also, the lender breached the contract in 2008 when we were still making regular payments and in fact induced us to stop making payments, so we could discuss possible modification or other relief. We followed their advice and then realized it was a setup with obvious intention to eventually deprive us of our property. Every time we filed for modification, they would refuse in spite of proper and sufficient documentation and in spite of President's bailout

1-12-2286

which we supposed to help people like us. Can they tell us US Citizens where did the bailout money go? Why did the banks benefit, not people? This is a bigger problem than our family's and these practices are destroying our country, ruining people's lives. Many were maneuvered into this situation. There is a federal investigation against PNC and 7 other banks regarding foreclosures. We hope justice will prevail and cruel and fraudulent practices will stop."

On July 9, 2012, the circuit court denied the motion to vacate "for lack of jurisdiction, as the order approving sale was entered on February 28, 2012."

¶ 18 On August 8, 2012, Alina filed a *pro se* "Motion for Extension of Time to File an Appeal Late with this Court," which this court allowed on August 13, 2012. The late notice of appeal provides that the date of the order being appealed was July 9, 2012. The relief sought is to "[i]nvalidate the order (and vacate foreclosure and sale of my house)."

¶ 19 On September 26, 2012, this court denied Alina's motion for a stay of execution of the eviction order.

¶ 20 ANALYSIS

¶ 21 Before we begin our analysis, we note the state of the appellant's brief. The appellant's brief does not comply with the Illinois Supreme Court rules governing appellate briefs and is otherwise difficult to understand. Specifically, the appellant's opening brief does not contain an appendix which includes a copy of the judgment appealed from, the notice of appeal and a complete table of contents of the record on appeal. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005). The appellant also fails to include, among other things, a statement of jurisdiction or a statement of

1-12-2286

the applicable standard of review. Ill. S. Ct. R. 341(h)(3), (4) (eff. Feb. 6, 2013). The brief makes no reference to the pages in the record on appeal. Ill. S. Ct. R. 341(h)(6), (7) (eff. Feb. 6, 2013).

¶ 22 Although *pro se* litigants are afforded some deference, all litigants must adhere to the rules governing appellate practice. *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010). Where an appellant's brief fails to comply with the rules, this court is within its authority to dismiss the appeal for noncompliance. *Kulhavy v. Burlington Northern Santa Fe Railroad*, 337 Ill. App. 3d 510, 514 (2003). However, because the relevant issues in this appeal can be ascertained from the record and contentions of error can be derived from the appellant's briefs, we will consider this appeal on its merits.

¶ 23 The appellant states in her appellate brief that she is appealing "the judgment of the Circuit Court of Cook County, Illinois of foreclosure, sheriff's sale and eviction, regarding" the Property. Although the precise nature of her arguments is unclear, it appears that she raises a number of key challenges to the order: (a) contending PNC lacked standing; (b) alleging lack of notice of February 28, 2012 hearing; and (c) raising various questions regarding the involvement of MERS – Mortgage Electronic Registration Systems, Inc. – in the "mortgage of 2007, the subject of the foreclosure."

¶ 24 The appellant contends that PNC "never established that it had standing in this matter." She claims that she and Andrzej "denied several allegations in the complaint, and, especially pertinent here, denied that Plaintiff was the holder of the note." The appellant highlights the different ways in which the plaintiff was referenced in the caption of various pleadings, including

1-12-2286

as NCB and PNC. The appellant also points out the reference to another parcel of real property – 10489 Dutch Barn Street in Huntley, Illinois – in the supplemental affidavit filed by the authorized officer of PNC, arguing that "Plaintiff-Appellee has claimed a security interest in a different property than that of the Defendants-Appellants." The appellant contends that "[o]nly bringing forward the full chain of title, with complete assignments, from the land record itself, and the note with all endorsements, might have established the proof of being the holder in due course for the Plaintiff-Appellee."

¶ 25 The appellant also contends on appeal:

"Defendant-Appellants objected to this sale on the premises and sent letters objecting this sale to Pierce & Associates and to the Circuit County Judge Valderrama. An order confirming the sale was entered on February 28, 2012. The Defendants did not receive any notification regarding this date and they were deprived of a chance appear [sic].

Such letters are not included in the record on appeal.

¶ 26 The appellant further asserts that:

"MERS is involved in the mortgage of 2007, the subject of the foreclosure, as evidenced on a document 'RELEASE OF DEED' Document No. 0733306048, which claims MERS as the grantor in the transaction claiming 'on behalf of MORTGAGE ELECTRONIC SYSTEMS INC.'"

The appellant then states: "two known 'robo-signers' *** M.L. MARCUM, alleged Vice-President of MERS, and JOAN COOK, alleged Secretary of MERS, (Flint, Michigan), having endorsed this documents with fraud in granting title to Defendants- Appellants."

1-12-2286

Citing Rule 65 of the Federal Rules of Civil Procedure regarding injunctions and restraining orders, the appellant appears to ask this Court to enjoin any conveyance of the Property "until such time as can be adjudicated by lawful title thereof, and by virtue of verified and validated wet ink signature authorized transactions ***."

¶ 27 PNC, citing Illinois Supreme Court Rule 303, contends that "Defendants did not appeal the February 28, 2012 Order Confirming Sale within thirty [days] of its entry, and for the same reason the Circuit Court lacked jurisdiction to consider the Defendants' May 2012 motion, this Court lacks jurisdiction to entertain this appeal." PNC argues that even though this court granted the appellant's motion for an extension of time to file their appeal, such an order does not cure the appellant's failure to file her appeal of the February 28, 2012, order within 30 days.

¶ 28 In addition, PNC contends that even if the appellant's May 16, 2012, motion were "construed as a motion to vacate the Order Confirming Sale pursuant to 735 ILCS 5/2-1401, it fails to meet the requirements for a 2-1401 petition, and the Circuit Court properly denied it." See 735 ILCS 5/2-1401 (West 2010). PNC also contends that "Defendants' appellate issues were never presented to the Circuit Court and are consequently waived." Specifically, PNC argues that "Defendants did not allege a lack of standing at the trial court level and therefore the issue has been waived." PNC further counters the appellant's standing argument, arguing that: (a) the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2010)) (the IMFL) defines a mortgagee to include "any person claiming through a mortgagee as successor"; (b) the Mikolajczyks failed to object to the Motion to Substitute Plaintiff; and (c) PNC submitted evidence "beyond the arguments of counsel" supporting its standing. Finally, PNC contends that

1-12-2286

allegations relating to MERS have no basis in the record and thus cannot be considered on appeal.

¶ 29 Whether a circuit court or appellate court has jurisdiction is reviewed *de novo*. *Gardner v. Mullins*, 234 Ill. 2d 503, 508 (2009). When a circuit court denies a section 2-1401 petition, the standard of review to be applied is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 30 Timing and Jurisdiction Issues

¶ 31 PNC argues that the motion attacking the sale, filed on May 16, 2012, was filed more than thirty days after the Order Confirming Sale and thus the circuit court correctly held that it lacks jurisdiction to hear the motion. Because the Mikolajczyks did not appeal the February 28, 2012 Order Confirming Sale within thirty days of its entry, PNC contends that this court, like the circuit court, lacks jurisdiction.

¶ 32 "The general rule is that a trial court loses jurisdiction over a case and has no authority to vacate or modify a final judgment once 30 days have elapsed, unless a timely postjudgment motion had been filed." *Jones v. Unknown Heirs of Legatees of Maymee C. Fox*, 313 Ill. App. 3d 249, 252 (2000); see also *Kulhavy*, 337 Ill. App. 3d at 515. Section 2-1301 allows the court to vacate a final order or judgment upon motion filed within 30 days of its entry and "upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2010). Since the motion to vacate was filed in this case more than 30 days after the order approving sale, the trial court concluded that it lost jurisdiction to vacate its judgment.

¶ 33 Illinois Supreme Court Rule 303 provides, in part:

"(1) The notice of appeal must be filed with the clerk of the circuit court within 30 days

1-12-2286

after 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, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions. ***" Ill. S. Ct. R. 303(a) (eff. June 4, 2008).

Here, because the appellant did not file "a *timely* posttrial motion directed at the judgment" (emphasis added), any appeal arguably would have to be filed no more than 30 days after the February 28, 2012 order. Some appellate courts have ended the inquiry there, dismissing the appeal because a party failed to file a timely postjudgment motion and thus the notice of appeal was filed more than 30 days after entry of the final judgment, *i.e.*, the appeal was untimely. See *Baca v. Trejo*, 388 Ill. App. 3d 193, 198-99 (2009).

¶ 34 A party who fails to file an appeal within the requisite 30-day time period has an additional 30-day window to file a motion for an extension of time to file an appeal. Ill. S. Ct. R. 303(d) (eff. June 4, 2008). A litigant must provide a "reasonable excuse" for the failure to timely file the notice of appeal. *Id.* In this case, the appellate court allowed the appellant's "Motion for Extension of Time to File an Appeal Late with this Court," presumably based on the appellant's representation in the late notice of appeal that the date of the order being appealed was July 9, 2012. As discussed below, to the extent that the motion to vacate would be deemed a section 2-1401 petition, the July 9, 2012 filing date would be the operative date for purposes of calculating the applicable appeal period. See Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010).

¶ 35 Section 2-1401

1-12-2286

¶ 36 Illinois courts have repeatedly held that, because 2-1401 is the only vehicle by which a civil litigant can attack a final judgment more than 30 days after its entry, trial and appellate courts must treat a filing that is too late to be a postjudgment motion as a section 2-1401 petition." *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902, 906 (2009); see also *Protein Partners, LLP v. Lincoln Provision, Inc.*, 407 Ill. App. 3d 709, 715 (2010) (noting that "[o]ur courts have repeatedly held that an untimely postjudgment motion must be viewed as a section 2-1401 motion by the appellate court because it is the only vehicle that a party may use once the 30 days has expired"); *In re J.D.*, 317 Ill. App. 3d 445, 448 (2000) (stating that "[w]hen a motion to vacate a judgment is brought more than 30 days after the entry of a final judgment, that motion will ordinarily be construed as a petition for relief from a final judgment under section 2-1401 of the Code"); *In re Marriage of Stufflebeam*, 283 Ill. App. 3d 923, 928 (1996) (noting that "a motion to vacate filed more than 30 days after the entry of an order *must* be construed as a section 2-1401 petition" (emphasis in original)); *Padilla v. Vazquez*, 223 Ill. App. 3d 1018, 1023 (1991) (same). PNC contends that even if the May 16, 2012 motion to vacate the order confirming sale were construed as a petition filed pursuant to section 2-1401, it does not comply with the requirements for such a petition and should be denied.

¶ 37 As a threshold matter, we note that there is at least one recent decision of this court that calls into question whether 2-1401 relief is available in certain actions under IMFL. In *U.S. Bank v. Prabhakaran*, 2013 IL App (1st) 111224, the defendant in a foreclosure action filed a motion to vacate judgment pursuant to section 2-1401 more than four months after the circuit court confirmed the judicial sale and the appointed selling officer executed a judicial sale deed to the

1-12-2286

plaintiff bank. *Id.*, ¶¶ 9, 14. On appeal from the circuit court's denial of the petition, the court considered section 15-1509(c) of the IMFL, which provides, in part: "Any vesting of title *** by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure ***." 735 ILCS 5/15-1509 (West 2008). *Id.* at ¶ 26. The court concluded that "[t]here is simply no Illinois authority to support the defendant's argument that she can utilize section 2-1401 to circumvent section 15-1509(a) or section 15-1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property." *Id.*, ¶ 30.

¶ 38 However, other cases have applied section 2-1401 analysis in the foreclosure context. In *Margaretten & Company, Inc. v. Martinez*, 193 Ill. App. 3d 223 (1990), the defendants appealed from the denial of their motions to vacate an order approving the sale of their home pursuant to a foreclosure decree and for an injunction to stay their evictions from the home. *Id.* at 225. The defendants alleged in the motions, among other things, that one of the defendants was not properly served. *Id.* The motion to vacate was filed 47 days after entry of the order approving sale. *Id.* at 228. On appeal, the court noted that the "only statutory provision authorizing collateral attacks upon final orders or judgments in civil cases more than 30 days after their entry is section 2-1401 of the Code." *Id.* The appellate court thus construed the motion to vacate as a section 2-1401 petition and affirmed, concluding that the "defendants had no possibility of success on their section 2-1401 petition." *Id.* at 230.

¶ 39 Even if we were to assume that (a) section 2-1401 is available to the appellant and (b) the circuit court should have treated her motion to vacate as a petition under such statutory section,

1-12-2286

the motion nonetheless fails to comply with the requirements of section 2-1401. To present a claim for relief under section 2-1401, a petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim in the original action; and (3) due diligence in filing the petition for relief under section 2-1401. See *Smith v. Airoom*, 114 Ill. 2d 209, 220-21 (1986); see also *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 723 (2004). A petitioner must also support a claim with "an affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2010). Such evidence "must be a sufficient and competent affidavit *** made by a person with first-hand knowledge of the factual allegations." *People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994). The appellant's petition consisted of unsworn statements and conclusory allegations insufficient for purposes of section 2-1401. Even assuming *arguendo* the petition contained adequate evidentiary support, the appellant failed to present a meritorious defense or evidence of due diligence.

¶ 40 *No meritorious defense*

¶ 41 First, the appellant's petition did not present any meritorious defense. "To prove the existence of a meritorious defense or claim, a petitioner must allege facts that would have prevented the entry of judgment if they had been known by the trial court." *Blutcher v. EHS Trinity Hosp.*, 321 Ill. App. 3d 131, 136 (2001). The appellant claims she and Andrzej did not have notice of the February 28, 2012 hearing on the motion to confirm the sale. The record indicates, however, that the Mikolajczyks were served by regular mail directed to the Property on at least two separate dates regarding the February 28, 2012 hearing. Furthermore, section

1-12-2286

1508(b) of the IMFL provides that, after the foreclosure judgment and judicial sale, the circuit court shall confirm the sale unless it finds that (a) a notice required to be given in accordance with section 15-1507(c)⁵ of the IMFL was not given, (b) the terms of the sale were unconscionable, (c) the sale was conducted fraudulently, or (d) justice was not otherwise done. 735 ILCS 5/15-1508(b) (West 2010). The allegations in the appellant's motion, *e.g.*, the amount paid for the property was too high, would not have constituted grounds for vacating the sale.

¶ 42 Furthermore, the appellant's allegations that "we never gave [PNC] consent to sell" the Property are not meritorious. The mortgage expressly provides for "foreclosure by judicial proceeding and sale of the Property" under specified circumstances. In addition, the Judgment for Foreclosure and Sale entered on September 20, 2010, does not condition sale of the Property on the Mikolajczyks' consent and authorizes the sale of the Property to satisfy the amounts due by the Mikolajczyks.

¶ 43 The remainder of the contentions in the motion to vacate the sale consist of commentary about the use of government "bailout money" and unsupported allegations of fraudulent practices. Simply put, none of the allegations in the motion amount to a meritorious defense that would have prevented entry of the order confirming the sale. See *Blutcher*, 321 Ill. App. 3d at 136.

¶ 44 *Lack of due diligence*

⁵Section 15-1507(c) addresses notice of the sale. We note that nothing in the motion to vacate indicates that appellant did not have notice of the sale; she instead contends that she did not receive notice of the hearing on the motion confirming the sale. In fact, in the motion to vacate, Alina stated that she was present at the January 13, 2012 sale.

1-12-2286

¶ 45 To present a claim for relief under section 2-1401, a petitioner must also set forth specific factual allegations supporting "due diligence in presenting this defense or claim to the circuit court in the original action" and "due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom*, 114 Ill. 2d at 220-21. "Specifically, the petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently, when he failed to initially resist the judgment." *Id.* at 222.

¶ 46 The appellant failed to make such a showing. The Mikolajczyks filed an answer to the foreclosure complaint in November, 2009, and they were continually being served with pleadings in the action. Based on a review of the record, the Mikolajczyks did not file a response to the summary judgment motion or to the motion to confirm sale. The appellant averred in the motion to vacate that she and her husband "were not served about the Court on Feb. 28, 2012 when the sale was confirmed," and "[t]hat is why [they] were absent." However, as noted above, it does appear that the Mikolajczyks were served with notice of the hearing. In any event, it is "well settled that failure to receive notice alone is an inadequate basis for granting relief under section 2-1401." *Gayton v. Levi*, 146 Ill. App. 3d 142, 152 (1986). The motion also did not indicate why Alina failed to respond to prior rulings leading up to the confirmation of the foreclosure sale or why she waited two and half months after the order confirming sale to seek relief. A litigant has the obligation to follow the progress of his case, and "the inadvertent failure to do so is not a ground for relief." *Genesis & Sons, Ltd. v. Theodosopoulos*, 223 Ill. App. 3d 276, 280 (1991). Moreover, the appellant's status as a *pro se* litigant does not excuse her failure to present their

1-12-2286

defense in the original action. See *Fiallo v. Lee*, 356 Ill. App. 3d 649, 657 (2005).

¶ 47 Accordingly, even if their motion to vacate were treated as a section 2-1401 petition, the Mikolajczyks failed to show the requisite due diligence.

¶ 48 PNC's Standing

¶ 49 As PNC correctly notes, the Mikolajczyks did not object in the circuit court to the bank's standing. "Under Illinois law, a plaintiff need not allege facts establishing standing."

International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security, 215 Ill. 2d 37, 45 (2005). "Rather, it is the defendant's burden to prove and plead lack of standing." *Id.* Lack of standing is an affirmative defense; the burden of proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). A defendant forfeits the defense by failing to timely raise it in the trial court. *Id.* at 252; see also *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010); *Deutsche Bank National Trust Company v. Snick*, 2011 IL App (3d) 100436 (noting that lack of standing "is an affirmative defense, which is waived if not raised in a timely fashion" and finding that the defendant "waived the issue of the Bank's standing by failing to raise the issue while, at the same time, participating and accepting the benefits of the court proceedings"). Based on our review of the record, the Mikolajczyks did not object to the motion to substitute plaintiff. Alina also failed to raise any standing challenges in the motion to vacate. As a result, she has forfeited such arguments on appeal.

1-12-2286

¶ 50 However, even if we were to consider the challenges to PNC's standing,⁶ we find them to be without merit. For example, the appellant cites *Wells Fargo Bank, National Association v. Byrd*, 897 N.E. 2d 722 (Ohio Ct. App. 2008), for the proposition that "[i]f plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law." However, the bank in *Byrd* filed a foreclosure complaint claiming that it was the holder of a note and mortgage but later admitted that it was not the real party in interest at the time it filed the suit. *Id.* at 727. Similarly, in *Indymac Bank, FSB v. Bethley*, 2009 WL 279304 (N.Y. Sup. Ct.), an unreported decision, the plaintiff bank lacked standing to foreclose on a mortgage and note when the foreclosure action was commenced; the court rejected the bank's attempt to retroactively predate an assignment to a date prior to the suit. *Id.* at *3. See also *Wells Fargo Bank, N.A. v. Burrows*, 2012 WL 6628870 (Ohio Ct. App.) (holding that bank was not entitled to summary judgment where it failed to demonstrate that it had standing at the time it filed its foreclosure complaint). *Id.* at *3. We recognize that Illinois courts, such as the Second District in *Deutsche Bank National Trust Company v. Gilbert*, 2012 IL App (2d) 120164, ¶ 15, similarly have stated that "[a] party's standing to sue must be determined as of the time the suit is filed." However, the plaintiff bank in *Gilbert* that originally filed the foreclosure action was not assigned the mortgage at issue until more than five months after the initiation of the suit. *Id.*, ¶ 5-6. In the instant case, there is no evidence that NCB was not the

⁶The lender listed on both the mortgage and note was "National City Mortgage a division of National City Bank"; the foreclosure action was initiated by "National City Bank successor by merger to National City Mortgage Company." As discussed further herein, any standing challenge has been forfeited by the appellant due to her failure to raise the issue in the circuit court.

1-12-2286

proper party to initiate the foreclosure action, nor is there any evidence that PNC was improperly substituted as plaintiff when NCB merged into PNC.

¶ 51 Furthermore, the Illinois Mortgage Foreclosure Act defines a "Mortgagee" as "(i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder and (ii) any person claiming through a mortgagee as successor." 735 ILCS 5/15-1208 (West 2010); see also *Ocwen Loan Servicing LLC v. Kroening*, 2011 WL 5130357, *5 (N.D. Ill. Oct. 28, 2011) (noting the "broad definition of 'mortgagee' under Illinois foreclosure law"). In this case, PNC is the successor to NCB.

¶ 52 In *Standard Bank and Trust Company v. Madonia*, 2011 IL App (1st) 103516, the original mortgagee bank merged with a second bank, which in turn changed its name and merged with a third bank. The third bank brought a foreclosure against the mortgagors. *Id.*, ¶ 3. The mortgagors filed a verified answer, which challenged the bank's standing to bring the action. *Id.*, ¶ 4. The circuit court granted summary judgment to the bank and denied the mortgagors' subsequent motion to vacate under section 5/2-1301. *Id.*, ¶ 5. The mortgagors argued on appeal that a plaintiff who is not the originating lender must show how the plaintiff obtained the note and mortgage by attaching to the complaint a copy of the assignment or a copy of the note endorsed to the plaintiff. *Id.*, ¶ 9. In reply, the plaintiff bank asserted that it produced documents which established that it had become the successor in interest to the original mortgagee, making it the legal holder to rights under the note and mortgage and thus it had standing to bring the foreclosure action. *Id.*, ¶ 10. The bank cited the Illinois Banking Act (205 ILCS 5/28 (West

1-12-2286

2008)⁷) for the proposition that a state bank resulting from the merger of other banks enjoys all of the "property, rights, powers, duties, and obligations of each merging bank." Distinguishing between cases where a bank assigns a mortgage and note to another bank and cases where a bank merges into another bank, the court found that because the original mortgagee merged with a bank that ultimately merged with the plaintiff bank, the plaintiff bank succeeded to the mortgage rights possessed by the original mortgagee as a matter of law. *Id.*, ¶ 19. See also *Newalliance Bank v. Schaeppi*, 54 A.3d 1058, 1060 (Conn. App. Ct. 2012) (noting that, pursuant to the Connecticut statute addressing corporate and other mergers, all contract rights possessed by the original bank were vesting in the resulting bank following a merger).

¶ 53 We note that the plaintiff bank in *Madonia* filed a copy of the relevant merger documents. PNC also argues that, contrary to the appellant's assertions, it submitted evidence beyond the arguments of counsel supporting its standing, such a Supplemental Affidavit of Kaycee M. Kleehamer, filed on April 28, 2010, and a subsequent Affidavit of Prove-Up by Laura Cauper, filed September 20, 2010, in support of its summary judgment motion. Simply stated, the

⁷ This statutory section provides, in part:

"§ 28. Continuation of corporate entity. A resulting State bank, national bank, or *** out-of-state bank shall be considered the same business and corporate entity as each merging bank *** with all the property, rights, power, duties, and obligations of each merging bank *** except as affected by the State law in the case of a resulting State bank or out-of-state bank or by the national law in the case of a resulting national bank ***. A resulting bank shall be liable for all liabilities of the merging banks *** and all the rights, franchises and interests of the merging banks *** in and to every species of property, real, personal and mixed, and chooses [*sic*] in action thereunto belonging, shall be deemed to be transferred to and vested in the resulting bank without any deed or other transfer, and the resulting bank, without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests ***." 205 ILCS 5/28 (West 2010).

1-12-2286

Kleehamer affidavit is not particularly illuminating. It references PNC Mortgage as the "current servicer on the account" and as the "agent for the holder and owner of the note." The affidavit also indicates that the subject mortgage was transferred to PNC. The "merger document" included as an exhibit to the affidavit appears to relate to "National City Mortgage Co." being "merged out of existence" and "National City Bank" being the "surviving entity" as of October 1, 2008 – prior to the initiation of the foreclosure suit. The merger document does not appear to relate to the merger of NCB into PNC. Furthermore, the Kleehamer affidavit references the incorrect property – in Huntley, Illinois – although the exhibits thereto and the other documents included in the record all reference the Property in Norridge, Illinois.

¶ 54 This single affidavit filed in the course of litigation that spanned more than three years does not create ambiguity where none legitimately exists, particularly where such error was not challenged by the opposing party in the lower court. See, e.g., *Moller v. Lipov*, 368 Ill. App. 3d 333, 342 (2006) (noting that "[a] primary purpose of the waiver rule is to ensure that the trial court has the opportunity to correct the error").

¶ 55 The appellant forfeited her standing objections by failing to timely raise them in the circuit court. Even if we were to consider such objections, we do not find them to be meritorious.

¶ 56 MERS Issues

¶ 57 The appellant has attached documents to her appellate brief in support of her contention that Mortgage Electronic Systems, Inc., known as MERS, "is involved in the mortgage of 2007, the subject of the foreclosure." The documents supporting the appellant's MERS-related

1-12-2286

allegations are attached to their appellate brief but are not part of the record on appeal. Facts that have no basis in the record will not be considered on appeal. *Eyman v. McDonough District Hospital*, 245 Ill. App. 3d 394, 397 (1993); see also *Standard Bank and Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 23 (noting that "[i]t is well settled that this court will not consider attachments to briefs that have not been provided to the trial court and made part of the record on appeal"). Even assuming *arguendo* that we were permitted to consider the documents appended to the appellant's brief, such documents have no apparent connection to the note and mortgage that are the subject of this litigation. Instead, the documents relate to a prior note apparently executed by the Mikolajczyks in 2004 – not the 2007 note discussed herein.

¶ 58 CONCLUSION

¶ 59 For the reasons stated above, we affirm the denial of appellant's motion to vacate. Even assuming *arguendo* that the motion to vacate were deemed a 2-1401 petition, such petition would not satisfy the requirements of that statutory section. Furthermore, for the reasons stated herein, we reject the appellant's arguments concerning PNC's standing and the alleged involvement of MERS.

¶ 60 Affirmed.