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FIRST DIVISION
November 18, 2013

No. 1-13-0163
2013 IL App (1st) 130163-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK TRUST COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CH 09535
)	
DELBERT BLAIR,)	Honorable
)	Daniel Patrick Brennan,
Defendant-Appellant)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

Held: Where defendant filed petition to vacate mortgage foreclosure judgment and sale under 735 ILCS 5/2-1401 (West 2010), petition was properly denied because Mortgage Foreclosure Law precludes use of section 2-1401 petitions to challenge judgments of foreclosure and subsequent sales.

¶ 1 Plaintiff Deutsche Bank Trust Company won a judgment of foreclosure against defendant Delbert Blair. A year after the circuit court approved the sale of the property, defendant filed a petition to vacate the judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS

5/2-1401 (West 2010)), arguing that plaintiff lacked standing to foreclose the mortgage because it did not own the underlying note. The circuit court denied the petition. We affirm.

¶ 2 Plaintiff filed a residential mortgage foreclosure complaint against defendant on March 4, 2009. Defendant appeared *pro se* on August 12, 2009, and he moved to dismiss the complaint on the ground of lack of standing on September 14, 2009. The circuit court ordered plaintiff to file an amended complaint addressing the standing issue and denied defendant's motion as moot.

¶ 3 Plaintiff filed its amended complaint, but defendant never answered the complaint. The circuit court entered an order of default and a judgment of foreclosure against defendant on March 31, 2010. The property was sold at auction on December 7, 2010. The circuit court approved the sale on January 10, 2010, but later vacated the sale on August 1, 2011, when it learned that defendant had filed for bankruptcy on the date of the sale. The court rescheduled the sale for September 22, 2011, and approved the sale on November 15, 2011.

¶ 4 Nearly a year later, on August 13, 2012, defendant filed a petition to vacate the judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The petition argued that the judgment should be vacated because plaintiff did not own the note and therefore lacked standing. The circuit court denied the petition without opinion on December 11, 2012, and this appeal followed.

¶ 5 We review denial of a section 2-1401 petition *de novo*. See *U.S. National Bank Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 23. Section 2-1401 is the "procedure by which final orders and judgments may be vacated or modified more than 30 days after their entry." *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). "Although a section 2-1401 petition is ordinarily used to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded its entry [citation], a section 2-1401

petition may also be used to challenge a purportedly defective judgment for legal reasons.” *Id.* In *Prabhakaran*, however, we held that section 2-1401 petitions are not an available form of relief from judgment in mortgage foreclosure actions. See *Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30. We noted that section 15-1509(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2010)) bars any challenge to a foreclosure judgment by any of the parties to the case once the circuit court confirms the sale of the property. See *id.* With this provision in mind, we held that the only method of reviewing the circuit court’s judgment in this context is via direct appeal. See *id.* ¶¶ 27-28. Because a section 2-1401 petition is a collateral action rather than a continuation of the underlying case, it is therefore barred by section 15-1509(c). See *id.* ¶ 30; *cf. Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010) (reaching the same conclusion regarding motions to vacate a default judgment under section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2010))). But see *Wells Fargo Bank, N.A. v. McCluskey*, 2012 IL App (2d) 110961 (disagreeing with *Barnes* and holding that section 2-1301(e) motions are not precluded by the Mortgage Foreclosure Law), *petition for leave to appeal allowed*, 368 Ill. Dec. 738 (March 27, 2013).

¶ 6 *Prabhakaran* is directly on point here, and defendant has offered no persuasive reason why it should not be followed. Defendant’s only argument is that lack of standing is a jurisdictional defect that renders the circuit court’s judgment void and thus subject to challenge under section 2-1401. It is true that we have recognized exceptions to *Prabhakaran*’s holding where a section 2-1401 petition alleges a jurisdictional defect such as lack of personal jurisdiction due to improper service. See *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 12 n.1; *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 17 n.3. But that is not the case here. In Illinois, lack of standing is an affirmative defense that must

be pled and proven by the defendant, rather than a jurisdictional defect that can be raised at any time. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 253 (2010); *Barnes*, 406 Ill. App. 3d at 6-7.

¶ 7 Because section 2-1401 petitions cannot be used to challenge a mortgage foreclosure judgment and defendant has not identified any jurisdictional defects in the judgment, the circuit court was correct to deny defendant's petition.

¶ 8 Affirmed.