

2013 IL App (2d) 120554-U  
No. 2-12-0554  
Order filed May 8, 2013

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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FIFTH THIRD MORTGAGE COMPANY,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CH-2264
	)	
JUAN SOTO,	)	
	)	
Defendant-Appellant	)	
	)	
(Martin M. Soto, Azucena Esparza,	)	Honorable
Unknown Owners, and Nonrecord	)	Robert G. Gibson,
Claimants, Defendants).	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Hutchinson and Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant forfeited his argument that the trial court erred in striking his section 2-1401 petition: he did not address the court's ruling that it lacked jurisdiction to grant it (which ruling was supported by defendant's failure to serve it properly), and in any event he did not argue that the petition satisfied all of the required elements.

¶ 2 Juan Soto (Soto), a property-owner defendant in a foreclosure action, appeals from an order of the court striking the petition that he filed under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) in which he sought to vacate the confirmation of the

judicial sale. Because Soto fails completely to make a cogent argument for reversal of the striking, we affirm it.

¶ 3

### I. BACKGROUND

¶ 4 On April 21, 2010, plaintiff, Fifth Third Mortgage Company, filed a foreclosure suit relating to the property at 81 West Nevada Avenue in Glendale Heights. It named as defendants the borrowers, who were Soto, Martin M. Soto, and Azucena Esparza, and also unknown owners and nonrecord claimants. The affidavits of the special process server indicate individual service on Soto and Martin Soto, but substituted service on Esparza.

¶ 5 On October 4, 2011, the first attorney in the case filed an appearance and answer for the three named defendants. The answer admitted some of plaintiff's allegations and alleged insufficient knowledge to admit or deny the others. The defendants also set out 12 affirmative defenses and 6 counterclaims.

¶ 6 Plaintiff moved to strike all affirmative defenses and counterclaims. The defendants voluntarily withdrew four defenses and four counterclaims. The court struck two defenses and one counterclaim. This occurred on April 1, 2011. The court set a status date of May 27, 2011. On that day, the court entered an order stating that a loss-mitigation workout was in progress. It set a further status date of September 16, 2011.

¶ 7 On August 30, 2011, plaintiff filed a motion for summary judgment, which was served on all defendants. No defendant responded.

¶ 8 On September 16, 2011, plaintiff filed documents associated with a prove-up of a foreclosure claim, including an affidavit of the total owed. The affidavit was not notarized, but rather had a certification under section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West

2010)). The court dismissed the unnamed defendants: unknown owners and nonrecord claimants. The court granted a summary judgment of foreclosure on September 16, 2011. The judgment did not contain a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) of immediate enforceability or appealability.

¶ 9 On January 24, 2012, plaintiff moved for confirmation of the sale. The certificate of service shows mailing to counsel for defendants on January 17, 2012. The court granted the motion on January 27, 2012. The order approved an *in rem* deficiency judgment of \$216,265.37, close to the original mortgage amount, after a sale for the judgment indebtedness to plaintiff. This order contained language amounting to a finding of immediate appealability and enforceability under Rule 304(a).

¶ 10 On March 14, 2012, the Katz Law Office, Ltd., filed an appearance for Soto only. Counsel that day also filed a “Petition to Vacate Judgment Pursuant to 735 ILCS 5/2-1401.” In the petition, Soto alleged that the court had granted summary judgment “based solely upon Defendant’s failure to appear.” He asserted that he had been diligent and had proper defenses. However, he did not make any argument or allege any facts to support those claims. The legal authority he cited, *W.M. Mold & Tool v. DeRosa*, 251 Ill. App. 3d 433, 439 (1993), gave the standard for vacatur of a default judgment under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 1992)), not section 2-1401. No affidavits or exhibits accompanied the petition.

¶ 11 The certificate of service, which is unsigned and has an unfilled blank for the name of the person doing the mailing, states that counsel served the petition by regular mail. The blank for the mailing date is empty.

¶ 12 The court, on March 29, 2012, struck this petition, “as the court does not have jurisdiction.”

¶ 13 On April 16, 2012, Soto filed a motion asking the court to reconsider its “denial.” The certificate of service was identical to the one included with the section 2-1401 petition, except that a date was present.

¶ 14 In the motion to reconsider, counsel for Soto represented as follows:

“Katz Law Office, Ltd., acquired a copy of the file from DuPage County, which did not contain any Notices sent to a prior attorney nor any documents filed by a prior attorney. Katz Law Office, Ltd. later learned about the former appearance and that affirmative defenses had been filed to the original Complaint.”

In other words, the motion claimed that the court file was missing several relevant documents—ones that are presently in their expected places in the record. Soto further asserted that plaintiff’s affidavit of the amount owed was improper because it was not notarized and that the sale price for the property was unfair and unconscionable because it was just slightly more than half the current value of the property. The motion mentioned in passing that Soto did not receive proper notice of the sale, but did not further explain. Exhibits to the motion are mostly copies of filings already in the record, but do include a Zillow estimate of the value of the property as of the motion date.

¶ 15 On April 26, 2012, the court entered an order stating that the “Emergency Motion to reconsider [was] stricken for the reasons stated on the record.” Soto filed a notice of appeal on May 22, 2012. (Curiously, Soto, through counsel, also filed something captioned as an appellate brief in the trial court on that day. It is not the same brief that Soto filed in this court.) The record does not contain any transcripts of the hearings or substitutes for such transcripts.

¶ 16

## II. ANALYSIS

¶ 17 Soto has forfeited any possible meritorious argument by failing to recognize the procedural facts of the case. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (both stating the proposition that, when a party fails to argue an issue or to provide relevant citations, he or she forfeits it). Counsel, the second attorney who represented Soto, seems to be unfamiliar both with the facts of the case, and with basic principles of civil procedure, such as the distinction between default judgment and summary judgment. While we are fully aware of the limited resources available in most foreclosure defenses, it must be noted that Soto's brief is thoroughly deficient both from a factual and procedural perspective.

¶ 18 The argument in the brief is based on a distorted history. The statement of facts seems to conflate summary judgment and default judgment, then goes on to describe later events as following a default judgment, rather than a summary judgment. Moreover, the statement elides the confirmation of the sheriff's sale. It also misstates what happened to the petition and the motion to reconsider; it says that the court denied, rather than struck, the petition and motion to reconsider. The inaccuracies create two problems for Soto. First, the brief never addresses the reason the court gave for rejecting the petition and the motion to reconsider—its lack of jurisdiction. Second, the brief never argues the petition's merits as a section 2-1401 petition. After discussing the nature of a section 2-1401 petition, we address those problems in order.

¶ 19 A section 2-1401 petition starts a new proceeding, one that is tied to the record of the original proceeding, but is jurisdictionally distinct. See *Washington Mutual Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427, 430 (2008) (describing these characteristics). A natural consequence of this separation is that the court's personal jurisdiction does not carry over from the underlying proceedings to the section 2-1401 proceedings; separate service is necessary (Ill. S. Ct. R. 106 (eff.

Aug. 1, 1985)). Appeal is also separate. Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010); *Archer Bank*, 385 Ill. App. 3d at 430. Section 2-1401 petitions come in at least three types. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 15. The type at issue here is that described in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986):

“To be entitled to relief under section 2-1401, the petitioner must affirmatively 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 to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.”

¶ 20 To be clear, Soto’s petition was plainly a section 2-1401. Not only is that what counsel labeled it, but it also came well beyond the 30 days in which the court retains jurisdiction after the final judgment and in which a party can file a proper postjudgment motion. See *Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995) (stating the jurisdictional time limit). Moreover, had this been the appeal after a motion to reconsider the denial of a motion to vacate a default judgment (as Soto claims it is), this court would lack jurisdiction. In *Deckard v. Joiner*, 44 Ill. 2d 412, 418-19 (1970), and its progeny, the supreme court has consistently held that only the first postjudgment motion stays the time in which to appeal. Thus, were Soto’s filing of March 14, 2012, a postjudgment motion, he would have had 30 days after the March 29, 2012, denial to file the notice of appeal. The May 22, 2012, notice of appeal was therefore too late as anything but the appeal of a ruling on a section 2-1401 petition.

¶ 21 We now examine the first of the two problems we listed, the failure to address the basis that the court gave for rejecting the petition and motion. According to the orders of March 29, 2012, and

April 26, 2012, the court struck the petition and motion for lack of jurisdiction. The record, in the form that it comes to us, supports the validity that ruling. Under Illinois Supreme Court Rule 106 (which incorporates by reference Illinois Supreme Court Rule 105 (eff. Jan 1, 1989)), a party filing a section 2-1401 petition must serve it by registered or certified mail at least. (Methods proper for serving a summons are also acceptable.) Soto’s certificates of mailing show service by regular mail only. Therefore, the service of the petition was insufficient to reestablish jurisdiction over plaintiff. Moreover, plaintiff did not file an answer or a motion—filings that, under section 2-301(a-5) of the Code (735 ILCS 5/2-301(a-5) (West 2010)) would have waived any objection to service. Therefore, the record is consistent with the court’s ruling that it lacked personal jurisdiction of plaintiff for both the petition and the motion and could not have granted either.

¶ 22 Why the court chose to strike, rather than, for instance, quash service, is not a part of the record, requiring this court to assume that it did so for proper reason. The record does suggest that the court explained its choice on April 26, 2012: the motion to reconsider was “stricken for the reasons stated on the record.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984), states that, absent a “sufficiently complete record of the proceedings at trial to support a claim of error,” a reviewing court “will \*\*\* presume[] that the order entered by the trial court was in conformity with law and had a sufficient factual basis.” Thus, based on that principle, we must assume that the order was proper.

¶ 23 We also note that the same absence of a record would have been fatal to this appeal had Soto taken it after the denial of a motion to vacate a default judgment. The specific holding of *Foutch* was that, when a party files a motion to vacate under section 2-1301(e), that motion invokes the court’s discretion, and that, absent a proper record of the court’s reason for the denial, the court’s use of its

discretion is presumptively correct. *Foutch*, 99 Ill. 2d at 392. Here, without a transcript of the relevant hearings (or a proper substitute for a transcript (see Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)), the trial court's discretionary decision would have to stand.

¶ 24 Turning to the second of the problems we listed, we observe that counsel for Soto has also failed to argue that the petition had merit as a section 2-1401 petition; this is scarcely surprising, given that the only reference to section 2-1401 in the entire original brief occurs in the brief's prayer for relief. The brief implies the existence of a meritorious defense, as required by the *Airoom* standard quoted above. In particular, the brief suggests that the sale price was unconscionable and that notice was defective in some way. But the brief does not attempt to address the diligence elements. As noted, the result is a forfeiture on appeal. Further, "[a]n initial pleading[, specifically including a section 2-1401 petition,] must allege specific facts that support each element of the cause of action; conclusions of law or allegations unsupported by specific facts cannot be considered in deciding the pleading's sufficiency." *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 208 (2010). In the petition here, even when it is considered as combined with the motion to reconsider, there was no attempt to allege facts to satisfy *Airoom*'s two diligence elements; it stated only a bare conclusion that Soto had been diligent. Therefore, forfeiture aside, the petition itself was insufficient on its face.

¶ 25

### III. CONCLUSION

¶ 26 For the reasons stated, we affirm the striking of Soto's section 2-1401 petition.

¶ 27 Affirmed.