

2013 IL App (2d) 130026-U  
No. 2-13-0026  
Order filed August 21, 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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

WELLS FARGO BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-2432
	)	
ROBERT JACZEWSKI, and ANNA	)	
JACZEWSKI,	)	
	)	
Defendants-Appellants	)	
	)	
(National City Bank, White Oaks	)	Honorable
Homeowners Association, Unknown Owners,	)	Leonard J. Wojtecki,
and Nonrecord Claimants, Defendants).	)	Judge, Presiding.

---

JUSTICE JORGENSEN delivered the judgment of the court.  
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendants' notice of appeal was untimely: their proof of mailing, which did not mention the place of mailing, the address to which it was sent, and the payment of postage, was insufficient to satisfy Rules 12(b)(3) and 373.

¶ 2 Defendants, Robert and Anna Jaczewski, the property owners in a foreclosure action, appeal the court's confirmation of the judicial sale of the property. We dismiss the appeal, as defendants did not timely file their notice of appeal. Specifically, the clerk received the notice outside the 30-

day period for timely filing, and defendants did not provide proof of timely mailing sufficient to allow them to take advantage of the mailbox rule for notices of appeal under Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009).

¶ 3

### I. BACKGROUND

¶ 4 On July 23, 2009, plaintiff, Wells Fargo Bank, N.A., filed a foreclosure complaint concerning the property at 487 Oakhurst Lane, Carpentersville, and listing defendants as the mortgagors and property owners. Other named defendants were possible subordinate lienholders; one of these timely answered. The court later entered a default judgment of foreclosure against defendants.

¶ 5 The court vacated the default on defendants' motion, but entered a new default judgment of foreclosure when defendants failed to file a new answer in the allowed time. The court denied defendant's motion to vacate the default, but we lack any record of the court's rationale. The court confirmed the sheriff's sale on December 3, 2012.

¶ 6 The court received defendants' notice of appeal on January 3, 2013, which was a Thursday, and which was 31 days after entry of the confirmation order. Accompanying the notice was a "Notice of Filing of Notice of Appeal." Following a case caption, that notice contained the following text:

#### "NOTICE OF FILING NOTICE OF APPEAL

To:

- Pierce and Associates, 1 N. Dearborn, Suite 1300, Chicago, IL 60602
- Weltman Weinberg & Reis Co., LPA c/o Michael Bablo, 180 N. La Salle Street #2400, Chicago, IL 60601
- White Oaks Homeowners Association, 487 Oakhurst Lane, Carpentersville, IL 60110

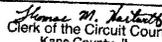
PLEASE TAKE NOTICE that on Jan. 2, 2013, the Defendants Robert Jaczewski & Anna Jaczewski will mail for filing with the Clerk of the Circuit Court of Kane County their NOTICE OF APPEAL, a copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of this document to be served upon the party listed above as indicated, by sending a true and correct copy of same by US Mail, on the day it was filed.”

A signature line with the signature of defendants’ attorney followed. The entirety of the document appears in Figure 1 below.

IN THE CIRCUIT COURT SIXTEENTH JUDICIAL CIRCUIT  
KANE COUNTY, ILLINOIS

Wells Fargo Bank NA,	)		
	Plaintiff,	)	
	Appellee,	)	
v.	)	Case No. 09-CH-2432	
Robert Jaczewski, Anna Jaczewski, National City Bank, White Oaks Homeowners Association, Unknown Owners & Non-Record Claimants,	)		<div style="text-align: center;">             Clerk of the Circuit Court            Kane County, IL              JAN - 3 2013              FILED 075            ENTERED         </div>
	Defendants,	)	
Mr. & Mrs. Jaczewski, Appellants	)		
	)		

NOTICE OF FILING NOTICE OF APPEAL

To:

- Pierce and Associates, 1 N. Dearborn, Suite 1300, Chicago, IL 60602
- Weltman Weinberg & Reis Co., LPA c/o Michael Bablo, 180 N. LaSalle Street #2400, Chicago, IL 60601
- White Oaks Homeowners Association, 487 Oakhurst Lane, Carpentersville, IL 60110

PLEASE TAKE NOTICE that on Jan. 2, 2013, the Defendants Robert Jaczewski & Anna Jaczewski will mail for filing with the Clerk of the Circuit Court of Kane County their NOTICE OF APPEAL, a copy of which is hereby served upon you.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of this document to be served upon the party listed above as indicated, by sending a true and correct copy of same by US Mail, on the day it was filed.

  
 Charles Silverman  
 Attorney for Kaplan Silverman LLC

Arnold G. Kaplan (IL ARDC # 6190143)  
 Charles A. Silverman (IL ARDC # 6291982)  
 KAPLAN SILVERMAN LLC  
 20 North Clark Street, Suite 1725  
 Chicago, Illinois 60602  
 (312) 443-1667

Figure 1

¶ 7

## II. ANALYSIS

¶ 8 On appeal, defendants assert that the court abused its discretion when it refused to vacate the second default.

¶ 9 Plaintiff asserts that defendants' notice of appeal was late, so that this court lacks jurisdiction. It argues that the "Notice of Filing Notice of Appeal" is insufficient as a certificate of mailing to the clerk, such that defendants cannot take advantage of the mailbox rule as to make their appeal timely. Among other things, it points out that the "Notice" says that defendants "*will* mail [their notice of appeal] for filing with the Clerk" (emphasis added), and not that they *did* mail the notice.

¶ 10 Defendants' reply addresses plaintiff's specific argument, but does not otherwise address the sufficiency of the proof of mailing.

¶ 11 Plaintiff is correct that the "Notice of Filing Notice of Appeal" cannot serve as a proof of timely mailing to the clerk, although the bases it suggests are not the ones that persuade us that this is so. (We are not limited to plaintiff's objections, as a "reviewing court must ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue" (*Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009))).

¶ 12 The timeliness of this filing is, as it happens, a more complex issue than the merits of the appeal. In *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-94 (1984), on almost identical facts,<sup>1</sup> the supreme court held that, because the record lacked anything to show the trial court's reasons for denying a motion to vacate a default, the reviewing court had to presume that the trial court's reasons were

---

<sup>1</sup>In *Foutch*, the denial order implied that the court heard evidence at the motion hearing; here the denial order is silent on the nature of the hearing. Because, in any event, we do not have a record of the trial court's rationale, the difference in facts here is immaterial.

proper. Thus, the deficiency of defendants' claim of error is patent. Nevertheless, the untimeliness of the appeal is also clear.

¶ 13 “The timely filing of a notice of appeal is both jurisdictional and mandatory.” *Secura Insurance*, 232 Ill. 2d at 213 (citing, *inter alia*, Ill. S. Ct. R. 301 (eff. Feb. 1, 1994)). The appellant must file the notice of appeal “within 30 days after the 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.” Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). Under Illinois Supreme Court Rule 373 (eff. Dec. 29, 2009), if a notice of appeal is “received after the due date, [then] the time of mailing, or the time of delivery to a third-party commercial carrier for delivery to the clerk within three business days, shall be deemed the time of filing.” However, “[p]roof of mailing or delivery to a third-party commercial carrier shall be as provided in Rule 12(b)(3).” Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). “[W]hile Rule 373 relaxes the requirement of timely filing where a party takes advantage of the convenience of mailing a document, a party can only take advantage of Rule 373 if it files proper proof of mailing as required by Rule 12(b)(3).” *Secura Insurance*, 232 Ill. 2d at 216.

¶ 14 The applicable version of Illinois Supreme Court Rule 12(b)(3) (eff. Jan. 1, 2013) provided:  
“Service is proved:

\* \* \*

(3) in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail or delivered the paper to a third-party commercial carrier, stating the time

and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid[.]”<sup>2</sup>

¶ 15 In *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987), we held that “proof of proper service by mail must be made in substantial compliance with the requirements of Supreme Court Rule 12,” but “minor defects will be excused.” In *Ingrassia*, in which counsel had not filed any proof of service, we first held that that failure precluded application of the mailbox rule. More to the point here, we alternatively held:

“Assuming *arguendo* that a statement by an attorney in open court could ever substitute for the certificate he is required to file under Rule 12 [citations], the statement of [the] attorney \*\*\* would be insufficient for failure to contain substantially the information required in an attorney’s certificate. His statement included the time of mailing, albeit somewhat vaguely, and some nonspecific reference to where it had been sent. It did not state the place of mailing (beyond the reference to a mailbox) or ‘the complete address which appeared on the envelope, and the fact that proper postage was prepaid.’ [Citation.] Thus, there was no proper proof that plaintiff was served with a copy of the petition by mail \*\*\*.” *Ingrassia*, 156 Ill. App. 3d at 502.

In other words, form aside, when information on the place of mailing, the address to which the party mailed the document, and an indication of the payment of postage were all lacking, there was no substantial compliance with the rule.

---

<sup>2</sup>This version of Rule 12(b) was in effect only between January 1, 2013, and January 4, 2013. The only difference between this version and the current version is that the word “paper” is replaced with the word “document.”

¶ 16 By this standard, the proof of mailing here is insufficient to establish Rule 12 compliance. The clerk's address is absent, as is any statement of postage and of place of mailing. With no Rule 12 compliance, the mailbox rule does not apply, and the notice of appeal was untimely. We therefore must dismiss the appeal.

¶ 17

### III. CONCLUSION

¶ 18 For the reasons stated, we dismiss the appeal for lack of jurisdiction.

¶ 19 Appeal dismissed.