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2013 IL App (3d) 110879-U
(Consolidated with 120073-U)

Order filed January 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

EASTERN SAVINGS BANK, FSB,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal Nos. 3-11-0879 and 3-12-0073
) Circuit No. 09-CH-2860
DENA KILLACKY, PATRICK KILLACKY,)
and unknown owners, nonrecord claimants,) Honorable
and unknown tenants and occupants,) Richard J. Siegel,
) Judge, Presiding.
Defendants-Appellants.)
)

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The denial of mortgagors' motion to quash service of process was affirmed because they waived any objection to personal jurisdiction by appearing, filing an appearance, and filing a motion vacate, before filing their motion to quash. The denial of a 1401 petition filed by the mortgagors' adult daughter was also upheld because the daughter was served by publication, but failed to intervene prior to the entry of the order affirming sale.
- ¶ 2 The plaintiff, Eastern Savings Bank, FSB (the Bank), filed a complaint to foreclose a

mortgage against the defendants, Dena Killacky, Patrick Killacky, unknown owners, nonrecord claimants, and unknown tenants and occupants. The Killackys filed a motion to quash service, which was denied and the sale was confirmed. The Killackys appeal from the order denying the motion to quash service and the order approving the judicial sale. In the consolidated appeal, Kaitlyn Killacky, the 18-year-old daughter of the Killackys, as an unknown tenant or occupant, appeals the denial of her petition to vacate filed pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)).

¶ 3

FACTS

¶ 4 The Bank filed a complaint to foreclose a mortgage on July 14, 2009, on property located in Homer Glen, Illinois. The complaint alleged that the mortgagor, Dena Killacky, had defaulted on the promissory note. The complaint also named as a defendant Patrick Killacky, the spouse of Dena, and a co-indorser of the note. In addition, the complaint named unknown owners, nonrecord claimants, and unknown tenants and occupants as defendants.

¶ 5 According to court records, personal service was made on Patrick, and substitute service on Dena, on July 23, 2009. The unknown defendants were served by publication. No defendant filed an appearance, answer, or other responsive pleading, so, on January 19, 2010, the Bank filed a combined motion for an order of default and for judgment of foreclosure and sale. The Killackys appeared *pro se* in court on February 2, 2010, so the circuit court continued the Bank's motion, giving the Killackys 28 days to answer or otherwise plead. They failed to do so, and an order of default and a judgment of foreclosure and sale was entered on March 16, 2010.

¶ 6 Pursuant to that judgment, the Bank proceeded to a sale of the property, which occurred on August 24, 2011. Thereafter, the Bank filed a motion for an order approving the sheriff's sale,

and the bidder from the sheriff's sale, DG Enterprises, LLC, also filed a motion for entry of an order approving the sale. The order approving the sheriff's report of sale and distribution was entered by the circuit court on September 27, 2011. The Bank did not appear in the circuit court on September 27; an attorney for DG Enterprises was present.

¶ 7 On October 11, 2011, the Killackys entered an appearance through counsel, and also filed a motion to vacate the order approving sale. The circuit court granted the Killackys' motion, and vacated the order approving the sale. The circuit court gave the Killackys seven days to file an objection to the motion to approve sale. Rather than filing an objection, the Killackys filed a motion to quash service and vacate all orders, contending that Dena was never served. On November 8, 2011, the circuit court denied the motion to quash and entered an order confirming the sale. The Killackys filed an appeal, challenging the order confirming sale and the order denying the motion to quash.

¶ 8 In the consolidated appeal, Kaitlyn Killacky, the 18-year-old daughter of the Killackys, as an unknown tenant or occupant, appeals the denial of her petition filed pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)) on December 29, 2011, to vacate the confirmation of sale and the judgment of foreclosure. The circuit court found that it lacked jurisdiction because the Killackys had already filed their appeal.

¶ 9 ANALYSIS

¶ 10 Dena and Patrick Killacky contend that the circuit court erred in denying their motions to quash service and vacate all orders, arguing that the circuit court lacked personal jurisdiction because of improper service and service by an unauthorized process server. The Bank contends that the trial court properly denied the motion to quash because the Killackys waived the personal

jurisdiction objection by filing an appearance and their motion to vacate prior to filing a motion asserting the jurisdictional objection. In addition, the Bank argues that the assertions in the Killackys' affidavit in support of the motion to quash were insufficient.

¶ 11 We review *de novo* the circuit court's decision denying the motion to quash. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26 (2006). A court acquires personal jurisdiction over a party either through a summons or a voluntary appearance. *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2008). Section 2-301 of the Code provides that a party waives all objections to personal jurisdiction by filing a responsive pleading or a motion, other than a motion for an extension of time, prior to filing a motion objecting to jurisdiction. 735 ILCS 5/2-301(a-5)(West 2010). In this case, the Killackys appeared *pro se* in the circuit court, filed their appearance, and filed a motion vacate, all prior to filing a motion challenging personal jurisdiction. Thus, we agree with the Bank that the Killackys waived any objection to personal jurisdiction, and the circuit court appropriately denied the motion to quash.

¶ 12 In the consolidated appeal, Kaitlyn Killacky contends that the circuit court erred in denying her motion to vacate. The Bank argues that the circuit court was correct in finding that the notice of appeal divested it of jurisdiction over Kaitlyn's petition. The Bank also argues that Kaitlyn lacked standing and her petition was facially insufficient.

¶ 13 Section 2-1401 of the Code provides an avenue for a party seeking to vacate a final judgment that is more than 30 days old. 735 ILCS 5/2-1401 (West 2010); *People v. Vincent*, 226 Ill. 2d 1 (2007). Our review of the denial of such a motion on the pleadings is *de novo*. *Vincent*, 226 Ill. 2d at 13. It is true that the filing of a notice of appeal ordinarily divests a circuit court of jurisdiction to proceed. *R.W. Dunteman Co. v. C/G Enterprises*, 181 Ill. 2d 153 (1998).

However, a section 2-1401 petition is a separate action that can be pursued while an appeal of the original action is pending. *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 264 Ill. App. 3d 633, 649 (1994). Thus, the circuit court erred in concluding that it lacked jurisdiction on the basis of the notice of appeal.

¶ 14 The Bank argues that the denial of Kaitlyn’s section 1401 petition should still be affirmed because Kaitlyn lacked standing to file the petition. Kaitlyn never filed a petition to intervene, and she did not inject herself into the proceedings until after the order confirming sale. The Bank contends that Kaitlyn’s interests were terminated as an unknown owner after the order confirming sale was entered. Kaitlyn counters that the Bank could not sue “unknown tenants” under the mortgage act, so the order confirming sale was void as against the unknown tenants.

¶ 15 A judgment by a court that lacked personal jurisdiction is void and can be attacked at any time by that party. *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909 (2008). The methods of service of process, by which a court acquires personal jurisdiction, are prescribed by statute. *C.T.A.S.S.&U. Federal Credit Union*, 383 Ill. App. 3d at 910. Whether or not the Bank could name unknown tenants, section 15-1501 of the Code provides that unknown owners may be made a party in accordance with section 2-413 of the Code. 735 ILCS 5/15-1501(c) (West 2010). At most, Kaitlyn, as an adult child residing with the mortgagors, was a tenant in possession. Tenants in possession are considered unknown owners for purposes of judicial foreclosure proceedings. *Applegate Apartments Ltd. Partnership v. Commercial Coin Laundry Systems*, 276 Ill. App. 3d 433 (1995). Kaitlyn acknowledges that the unknown owners were served by publication.

¶ 16 Kaitlyn argues, however, that the affidavit for service by publication was ineffective

because it was notarized four days prior to the case being filed. However, the affidavit for service was filed on the same day as the complaint, in compliance with section 2-206 of the Code. 735 ILCS 5/2-206(a) (West 2010); cf. *Lakin v. Wood*, 343 Ill. App. 372 (1951)(publication notice of a defendant was ineffective because the affidavit of nonresidence was filed several days before the case was filed, so there was no suit pending).

¶ 17 We find that Kaitlyn was not entitled to relief under section 1401 of the Code. Normally, a person cannot intervene after the rights of the original parties have been determined in a final judgment. *In re Estate of Reilly*, 68 Ill. App. 3d 906 (1979); see also *Elmhurst National Bank v. Novak*, 137 Ill. App. 3d 904 (1985) (successful bidder at the sheriff's sale was not entitled to relief under section 2-1401 because it was not a party to the foreclosure proceedings, and it only sought to intervene after final judgment). The time for Kaitlyn's intervention was prior to the entry of the order affirming sale. See 735 ILCS 5/15-1501(e) (West 2010). Thus, we affirm the circuit court's denial of Kaitlyn's petition.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Will County is affirmed.

¶ 20 No. 3-11-0879, affirmed.

¶ 21 No. 3-12-0073, affirmed.