

No. 1-13-3009

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

U.S. BANK, N.A., as Trustee, as Successor in Interest)	
to Bank of America, N.A., as Successor by Merger to)	
LaSalle Bank, N.A., as Trustee for Certificate Holders)	Appeal from the
of Bear Stearns Asset Backed Securities I LLC,)	Circuit Court of
Asset-Backed Certificates Series 2006-HE5,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 13 M1 708544
)	
CHARLIE JOHNSON,)	
)	
Defendant-Appellant)	Honorable
)	Sheryl A. Pethers,
(SHIRLEY McFARLAND and UNKNOWN)	Judge Presiding.
OCCUPANTS)	
)	
Defendants).)	

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

ORDER

¶ 1 *Held:* Where appellant did not obtain a transcript of the proceedings or a bystander's report in a forcible entry and detainer action, this court lacks the ability to review the trial court's grant of summary judgment and must affirm.

¶ 2 After entering a default judgment against defendant Charlie Johnson,¹ the trial court granted summary judgment in favor of plaintiff U.S. Bank in a forcible entry and detainer action. Defendant subsequently filed a motion to vacate the award of summary judgment, which the trial court denied. Defendant, *pro se*, appeals the trial court's denial of his motion to vacate, arguing: (1) plaintiff did not properly serve him with its demand for possession of the premises; (2) plaintiff's suit was premature because defendant was occupying the premises pursuant to a valid lease at the time; (3) the underlying judicial sale of the property was void; and (4) the trial court denied him his procedural due process rights at the hearing on his motion to vacate. Defendant has not furnished a record of any of the proceedings in the trial court relating to this action. We thus cannot assess defendant's claims and must affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 As mentioned above, no report of proceedings or bystander's report was provided as part of the record on appeal. The following facts have been gleaned from the parties' pleadings and other documents contained in the common law record.

¶ 5 Following foreclosure proceedings, LaSalle Bank obtained title to the property at issue via judicial sale, which was approved by the trial court on October 9, 2008. Defendant, who was not named in the foreclosure proceedings, was a tenant residing at the property.

¶ 6 On February 17, 2010, LaSalle Bank obtained an order of possession for the property in case number 09 M1 719813, listing defendant and all unknown occupants. Defendant was evicted by the Cook County sheriff's department on November 23, 2011.

¹ Although listed as a party below, defendant Shirley McFarland is not a party to this appeal.

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¶ 7 On March 10, 2013, plaintiff, acting as successor-in-interest to LaSalle Bank,² served defendant with a demand for immediate possession of the premises pursuant to section 9-104 of the Code of Civil Procedure (735 ILCS 5/9-104 (West 2012)). In an affidavit, plaintiff's special process server asserted that, on March 10, 2013, he left a copy of the demand for possession with a 52-year-old, African-American man at the property who refused to identify himself.

¶ 8 On April 15, 2013, plaintiff filed a forcible entry and detainer action against defendant, alleging that defendant had improperly "re-taken possession" of the property after he had been evicted pursuant to LaSalle Bank's prior order of possession. An affidavit of service from the Cook County sheriff's department indicates that, on April 18, 2013, a deputy sheriff served "unknown occupants" of the premises with a copy of plaintiff's complaint. The affidavit stated that the deputy left a copy of the complaint with a 55-year-old, African-American man who refused to give his name. According to the affidavit, the man "[a]cknowledged being [a] resident."

¶ 9 On July 30, 2013, the trial court granted summary judgment in favor of plaintiff, finding that defendant was "in default for failing to appear." The trial court entered an order for possession in favor of plaintiff.

² Plaintiff has not included any documentation in the record showing when or how it obtained title to the property. In support of its contention that it is the successor-in-interest to LaSalle Bank, plaintiff merely cites a judicial sales deed that lists LaSalle Bank as grantee. Defendant, however, did not challenge plaintiff's standing to bring a forcible entry and detainer action in the trial court and does not challenge plaintiff's standing in this appeal. Defendant has thus forfeited any challenge to plaintiff's standing in this appeal. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (defendant bears the burden of raising and proving plaintiff's lack of standing; failure to raise a lack of standing in the trial court will result in forfeiture of that contention).

¶ 10 On September 6, 2013, defendant, acting *pro se*, filed a "motion to dismiss-vacate" the trial court's order granting plaintiff summary judgment (motion to vacate). Defendant averred that he had leased the property beginning in July 1, 2007. Defendant said that he signed an amended lease with Shirley McFarland, the former property owner, in 2008 that extended him an option to purchase the property until June 2014.

¶ 11 Defendant further asserted that, in late 2009, he was serving with the military in Afghanistan. When he returned in October 2011, he received notice from LaSalle Bank that there would be a hearing regarding his eviction in case number 09 M1 719813. Defendant asserted that, at that hearing, the trial court said that "the case could not be heard because of [j]urisdiction." Defendant stated that, on November 24, 2011, he returned home to find that the locks at his home had been changed. He received a new set of keys from McFarland six days later. Defendant averred that, on September 5, 2013, McFarland told him that he was a named defendant in the instant case.

¶ 12 Defendant attached a copy of his lease agreement with McFarland to his motion to vacate. The lease ran from July 1, 2008 to June 30, 2014 and granted defendant an option to purchase the property within three years in exchange for an additional \$100 per month in rent.

¶ 13 On September 20, 2013, the trial court denied defendant's motion to dismiss-vacate "for the reasons stated in open court." The trial court further ordered that its July 30, 2013 order would remain in full force and effect. Defendant appeals.

¶ 14

II. ANALYSIS

¶ 15 Defendant argues that the trial court erred in denying his motion to vacate because he was not served with plaintiff's demand for possession of the premises, he was entitled to possess the premises pursuant his lease agreement with the former owner of the property, the foreclosure and

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sale of the property was void, and he was denied his due process right to a hearing on his motion to vacate. Plaintiff alleges that defendant forfeited his challenge to service and that it was entitled to possess the premises because defendant was a mere trespasser.

¶ 16 As an initial matter, we must characterize defendant's motion to vacate in order to properly contextualize our review. In order to attack a default judgment more than 30 days after it is entered, a party must file a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401(a) (West 2012); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 101-02 (2002); cf. 735 ILCS 5/2-1301(e) (West 2012) (providing for the procedure to attack default judgments within 30 days of their entry). Regardless of the title of a pleading, an attack upon a default judgment brought more than 30 days after the judgment will be construed as a petition brought under section 2-1401. *Sarkissian*, 201 Ill. 2d at 102. Here, defendant filed his motion to vacate on September 6, 2013, 38 days after the court found defendant to be in default and granted plaintiff's motion for summary judgment. Regardless of the title of defendant's motion, it was, in substance, a petition brought under section 2-1401.

¶ 17 The standard of review applicable to section 2-1401 proceedings varies depending upon the nature of the trial court's disposition of the petition and the defendant's allegations. In *People v. Vincent*, 226 Ill. 2d 1, 18 (2007), the Illinois Supreme Court held that a *de novo* standard of review was appropriate where the trial court denied a section 2-1401 petition solely upon the pleadings. The *Vincent* court suggested that the manner in which a trial court disposes of a section 2-1401 petition should govern the standard of review on appeal. *Id.* at 17; see also *Mills v. McDuffa*, 393 Ill. App. 3d 940, 946 (2009) ("The *Vincent* court essentially held that the standard by which we should review the trial court's disposition of a section 2-1401 petition depends upon the manner in which it was disposed."). For example, where the trial court

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conducts an evidentiary hearing on the petition, this court has applied a manifest weight of the evidence standard of review. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35. By contrast, this court has applied an abuse of discretion standard where the petition does not challenge the judgment as being void. *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10. In this case, however, we need not decide what standard of review applies, as the lack of any report of the proceedings below would compel us to affirm the trial court's decision under any standard of review.

¶ 18 Illinois Supreme Court Rule 323 requires an appellant to prepare and file a transcript or bystander's report of the proceedings in the trial court. Ill. S. Ct. R. 323(a), (c). "[A]n appellant has the burden to present a sufficiently complete record of the proceedings *** to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* While we hold *pro se* litigants to a lesser standard in complying with supreme court rules, they must meet the minimum standard of providing this court with a record sufficient to adequately review the lower court's decision. *Rock Island County v. Boalbey*, 242 Ill. App. 3d 461, 462 (1993).

¶ 19 In this case, defendant has not furnished a transcript or bystander's report of any of the proceedings in trial court. We must presume, therefore, that the trial court acted in accord with the law and had a sufficient factual basis in denying defendant's motion to vacate. We cannot find that any of defendant's contentions of error require reversal based upon the limited record before us.

¶ 20 First, defendant avers that plaintiff failed to serve him with its demand for possession pursuant to section 9-104 of the Code of Civil Procedure. 735 ILCS 5/9-104 (West 2012). Section 9-104 provides that a party pursuing a forcible entry and detainer action must first serve a demand for possession upon the tenant. *Id.* The plaintiff may serve the tenant with the demand "by leaving *** a copy with some person of the age of 13 years or upwards, residing on, or being in charge of, the premises." *Id.*

¶ 21 In the absence of any report of proceedings, we must presume that the trial court possessed an adequate legal and factual basis for finding that defendant was properly served with plaintiff's demand. *Foutch*, 99 Ill. 2d at 391. The common law record does not rebut that presumption. An affidavit prepared by plaintiff's special process server states that he left a copy of the demand with a 52-year-old man at the property who refused to identify himself. This supports plaintiff's contention that it properly served defendant under section 9-104. By contrast, defendant's motion to vacate lacked any affidavits showing he was not served. See 735 ILCS 5/2-1401(b) (West 2012) ("The petition must be supported by affidavit or other appropriate showing as to matters not of record."). Rather, defendant's motion to vacate merely asserted that he did not know of the action until he spoke to his former landlord on September 5, 2013. Defendant's uncorroborated assertion that he did not know of the pending action does not overcome the affidavit from plaintiff's special process server. See *Paul v. Ware*, 258 Ill. App. 3d 614, 617-18 (1994) ("An uncorroborated defendant's affidavit merely stating that he had not been personally served *** is insufficient to overcome the presumption favoring the affidavit of service."). Although defendant raises additional facts regarding the service of the demand in his brief on appeal, nothing in the record supports those assertions. This absence of support in the record must be construed against defendant. *Foutch*, 99 Ill. 2d at 391. Given the lack of support

for defendant's position in the record, we must conclude that the trial court did not err in finding that he was properly served.³

¶ 22 Second, defendant contends that "[p]laintiff acted prematurely in filing its action for a Forcible Entry and Detainer *** prior to the expiration of the lease." Plaintiff asserts that defendant was not occupying the premises as a *bona fide* tenant; rather, plaintiff maintains that defendant acted as a trespasser by reentering the property after he was first evicted in case number 09 M1 719813. We recognize that, where a forcible entry or detainer action is filed prior to the expiration of a lease, such an action may be premature. See, *e.g.*, *Fifth Third Mortgage Co. v. Foster*, 2013 IL App (1st) 121361, ¶¶ 12-13. In this case, however, defendant has not furnished this court with a transcript or bystander's report of the hearing on his motion to vacate. We cannot ascertain whether the trial court considered evidence regarding the proceedings in case number 09 M1 719813 or the validity of defendant's tenancy. We again construe the absence of the transcript against the defendant and presume that the trial court had an adequate legal and factual basis to find that plaintiff's action was not premature. *Foutch*, 99 Ill. 2d at 391.

³ While defendant's motion to vacate also challenged the validity of service in the first forcible entry and detainer action, filed by LaSalle Bank in case number 09 M1 719813, that case is not before us. Our jurisdiction is limited to the circuit court's judgment in the instant case, from which defendant filed his notice of appeal. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008) ("a notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal"). We lack the authority to address defendant's claims regarding the prior eviction proceedings.

¶ 23 Third, defendant contends that the underlying mortgage foreclosure was void. In a forcible entry and detainer proceeding, the sole question is who is entitled to immediate possession of the property at issue. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. A party may not attack an underlying foreclosure sale in a forcible entry and detainer proceeding. *Id.* ¶ 16. Leaving aside the absence of a report of proceedings supporting defendant's claim, defendant cannot contest the validity of the underlying foreclosure in the context of this forcible entry and detainer action.

¶ 24 Finally, defendant avers that the trial court denied him his right to due process at the hearing on his motion to vacate because he was only "allowed [one] minute *** to speak" and was not allowed to present any evidence. In the absence of any transcripts or bystander's report, however, we cannot assess the adequacy of the hearing. We must presume that the trial court afforded defendant an adequate opportunity to be heard. *Foutch*, 99 Ill. 2d at 391.

¶ 25 As defendant did not furnish this court with a report of proceedings, we cannot properly address his contentions of error on appeal. We presume that the trial court possessed an adequate legal and factual basis in denying his motion to vacate. We affirm the trial court's judgment.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated above, we affirm the circuit court's order denying defendant's motion to vacate its award of summary judgment in favor of plaintiff.

¶ 28 Affirmed.