2014 IL App (2d) 130262-U
No. 2-13-0262
Order filed May 19, 2014

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

CAPITAL ONE, N.A.	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CH-3799
	)	
KAMAL CHHABRIA and	)	Honorable
HANSA CHHABRIA,	)	Mitchell L. Hoffman,
	)	Luis A. Berrones,
Defendants-Appellants.	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: We lack jurisdiction over all portions of defendants' arguments on appeal concerned with or referring to the validity of the judgment of foreclosure. We affirm the trial court's judgment confirming the sale of the subject property because defendants relied on arguments referring to the validity of the judgment of foreclosure, and they also forfeited this argument for failing to cite pertinent authority. We affirm the trial court's judgment on defendants' motion to supplement because defendants again did not cite to pertinent authority and forfeited this argument on appeal.

¶ 2 Defendants, Kamal and Hansa Chhabria, appeal the judgment of the circuit court of Lake County, confirming the sale of their residence pursuant to a foreclosure action initiated by a predecessor of plaintiff, Capital One, N.A. Defendants raise a number of issues, dealing with the

inadequacy of the foreclosure documentation promulgated by the various plaintiff entities and one issue concerning whether an affidavit describing the conduct of the sheriff's sale should have been allowed into the record. Defendants overlook a number of jurisdictional issues which truncate and limit our review on appeal. The ultimate result is that we dismiss the parts of the appeal over which we lack jurisdiction, and we affirm the judgments of the circuit court of Lake County confirming the sale of the subject property and denying defendants' motion to supplement the record in the trial court.

¶ 3 I. BACKGROUND

¶ 4 This case began on October 8, 2008, when GreenPoint Mortgage Funding, Inc. (GreenPoint) filed an action to foreclose its mortgage on the subject property located on Ridge Road in Lake Forest, Illinois. Defendants retained counsel and, on April 21, 2009, filed an answer to the complaint. In their answer, defendants denied that they defaulted on the mortgage, but they did not deny any of the other allegations in the complaint, and they did not raise any affirmative defenses or counterclaims.

¶ 5 On May 6, 2009, GreenPoint filed a motion for summary judgment. The record does not have a response or other filing from defendants challenging GreenPoint's motion for summary judgment. Eventually, GreenPoint filed an additional motion and some supporting documents, namely a motion to substitute BAC Home Loans Servicing L.P., f/k/a Countrywide Home Loans Servicing L.P. (BAC), as the party-plaintiff, an affidavit prepared by BAC in support of the motion for summary judgment, and a copy of the assignment of the mortgage purporting to transfer GreenPoint's interest in the subject property to BAC.

¶ 6 On March 26, 2010, the trial court heard the motions for summary judgment and substitution. The record shows that defendants original attorney had withdrawn before this

hearing, and that defendant Hansa Chhabria appeared in person at this hearing. There is not a transcript of the hearing in the record, but the hearing resulted in the entry of an order allowing BAC to be substituted as the party plaintiff and granting plaintiff's (GreenPoint/BAC) motion for summary judgment. The trial court also entered an order captioned, "Judgment of Foreclosure and Sale" (judgment of foreclosure) in favor of plaintiff. The judgment of foreclosure included a provision stating, "[t]his is a final and appealable order and there is no just cause for delaying the enforcement of this judgment or appeal therefrom."

¶ 7 Thereafter, on August 12, 2010, a sheriff's sale was conducted on the subject property. GreenPoint was the high bidder.

¶ 8 In the interim, defendants obtained new counsel. On November 15, 2010, defendants filed a motion, among other things, to vacate, purporting to be pursuant to section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2010)). The motion referred to a default judgment, but the trial court appears to have been amenable to considering the judgment of foreclosure. Eventually,[1] on April 12, 2011, defendants' motion to vacate came to hearing. The

[1]Defendants' motion to vacate was scheduled originally for February 8, 2011. The matter was called and then passed so that the trial court could hear issues in other cases before recalling defendants' motion. While this was ongoing, defendants' counsel left the courtroom before this matter was recalled. Defendants' counsel averred that he informed plaintiff's counsel and the court that he was leaving; the court's memory was simply that counsel left the courtroom without informing anyone. The court thereupon struck defendants' motion to vacate, and counsel once again noticed the motion to vacate before the trial court for an April 1, 2011, hearing. At that hearing, counsel and the court exchanged words, and the court expressed its extreme frustration

trial court denied the motion to vacate, noting, "In reviewing your motion, you do raise a lot of claims, however, *** they're all conclusory allegations that this [or that] didn't happen and there's no factual allegations in here."

¶ 9 On June 21, 2011, BAC filed its motion to confirm the sale of the subject property and to approve of the distribution of funds. On that same day, defendants filed a motion to reconsider the denial of the motion to vacate, and defendants later amended the motion to reconsider. Eventually, on May 8, 2012, the matter came before the court on the pending motions. After a hearing on May 8, 2012, the trial court denied defendants' motion to reconsider. Also, on motion of plaintiff, the court entered an order substituting Capital One, N.A., as the party plaintiff. Also on May 8, 2012, the trial court entered an order confirming the sale of the subject property.

¶ 10 On June 6, 2012, defendants filed another motion to vacate the judgment of foreclosure and to vacate the order confirming the sale. Plaintiff filed a motion to strike defendants' motion to vacate the judgment of foreclosure. Plaintiff also filed a response to defendants' motion to vacate the order confirming the sale of the subject property. On January 31, 2013, the trial court held a hearing on the various open motions. On that date and at the hearing, defendants filed a motion to supplement the record. This motion included an affidavit from defendant Kamal which purported to recount Kamal's conversation with a deputy of the Lake County sheriff's department. The trial court denied defendants' motions, including the motion to supplement and

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and disappointment with counsel, and the trial court then recused itself from the case, assigning the matter to another judge. This matter was eventually scheduled for the April 12, 2011, hearing.

the motions to vacate the judgment of foreclosure and the order confirming the sale. Within 30 days of the January 13, 2013, order denying defendants' motions, defendants filed a notice of appeal purporting to draw jurisdiction from Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008). (We note that the notice of appeal was filed on March 4, 2013, but this is deemed within 30 days as the 30th day fell on a weekend, and March 4, 2013, was the first business day after that weekend.)

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendants raise five issues. First, they argue that the trial court erred in entering the judgment of foreclosure because there were issues about the completeness of the record evidencing the transfer of interest between the various parties plaintiff. Next, defendants contend that the trial court erred in denying their order to vacate the judgment of foreclosure as well as the motion to reconsider based, again, on the insufficiency of the record supporting the actual judgment of foreclosure. Next, defendants argue that the trial court erred in confirming the sheriff's sale of the subject property, once again based on its previous arguments. Penultimately, defendants argue that the trial court erred in denying their motion to vacate the judgment of foreclosure and the order confirming the sheriff's sale (this motion was filed in June 2012, well after the initial motion to vacate the judgment of foreclosure which was filed in November 2010), based, again, on their previous arguments. Finally, defendants argue that the trial court erred in denying their motion to supplement the record with Kamal's affidavit about the conduct of the sheriff's sale, asserting that it contained pertinent information that should be contained in the record. We digress on side issues before we return to consider, insofar as we have jurisdiction, defendants' arguments in turn.

¶ 13 A. Plaintiff's Motion to Dismiss for Want of Prosecution

¶ 14 As an initial matter, we note that, on September 6, 2013, plaintiff filed a motion to dismiss the appeal, arguing that defendants had been too dilatory in prosecuting the appeal. On October 16, 2013, we ordered that this motion be taken with the case. As we read the motion today, we note that plaintiff's contentions are not without merit. This matter began in 2008, when plaintiff (at least, a predecessor entity to Capital One that occupied the position of the party plaintiff) sought to foreclose defendants' mortgage. The matter dragged out for three-and-a-half years until the final order confirming the sale of the subject property was entered. After a more than 30-day wait (which, fortuitously enough, was within the applicable time limit), on March 4, 2013, defendants filed a notice of appeal. The initial schedule for the appeal called for defendants to file their appellate brief on or before June 10, 2013, but defendants neither filed their appellate brief nor filed a motion requesting to extend the time in which to file their brief. We entered an order, on our own motion, resetting the deadline to July 5, 2013, for defendants to file their appellate brief, and warning defendants that the appeal could be dismissed without further notice. Once again defendants neither filed a brief by the deadline nor filed a motion for an extension before the deadline. Instead, on July 10, 2013, defendants filed a motion requesting an extension until July 31, 2013, in which to file their brief. We granted defendants' motion and, once again, were treated to the same conduct as before: defendants filed neither a brief nor a motion on or before July 31, 2013. Once again and on our own motion, on August 14, 2013, we gave defendants another extension, this time until August 24, 2013, in which to file their brief and once again warning that failure to comply could result in the dismissal of the appeal without further notice. Once again, defendants did not file a brief or a motion by the August 24, 2013 deadline. Instead, on August 26, 2013, defendants filed a motion requesting an extension until August 30, 2013, in which to file their appellate brief. August 30 passed with no submission,

and, on September 6, 2013, plaintiff filed its motion to dismiss the appeal for want of prosecution. On September 26, despite the pending motion to dismiss, defendants sought and received leave to file their appellate brief *instanter*. On October 16, 2013, this court ordered that the motion to dismiss be taken with the case.

¶ 15 It is evident that this court dropped the ball in ruling on plaintiff's motion. Either the motion for leave to file the appellate brief *instanter* was improvidently granted, or the motion to dismiss for want of prosecution was improperly deferred. The grant of leave to file *instanter* contradicts the deferral of the motion to dismiss and, in fact, cannot coexist with the grant of leave to file *instanter*.

¶ 16 Were we to have a blank slate to consider the motion to dismiss, we might very well grant it. It appears that defendants were dilatory and heedless of our orders and instructions, if they were not deliberately and cavalierly flouting our orders and instructions. Defendants missed at least five deadlines set for the appellate briefing; defendants did not timely communicate with the court when they were missing the deadlines and, in fact, appeared to have little interest in submitting an appellate brief. The delay due to defendants' conduct is about three-and-a-half months, which amounts to less than one-sixteenth of the time it took to bring this case to final judgment. Plaintiff insinuates that the four-year plus time period required to bring this case to a final order in the trial court is due to defendants' foot-dragging, and plaintiff's motion to dismiss is fairly persuasive (and we note defendants did not file a response to the motion). That said, we do not have a blank slate, and to do anything other than deny plaintiff's motion to dismiss as moot at this stage would be extremely perverse (although this *should* have been done in October 2013, when the court deferred ruling on it in favor of the actual panel hearing this case). Accordingly, because any ruling we might give on the merits of the motion to dismiss was

effectively mooted by allowing defendants to file *instanter* their appellate brief, we deny plaintiff's motion to dismiss the appeal.

¶ 17 B. Contours of Appellate Jurisdiction

¶ 18 The next preliminary matter we must address is jurisdiction. Plaintiff contends that jurisdiction over the judgment of foreclosure is lacking because it was made a final and appealable order by the inclusion of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language, and defendants did not timely appeal the judgment of foreclosure, thereby depriving us of jurisdiction over issues related to the judgment of foreclosure for the purposes of this appeal. Regardless of whether a party raises the issue, we have an independent duty to consider our jurisdiction over an appeal and to dismiss the appeal where jurisdiction is lacking. *John T. Doyle Trust v. Country Mutual Insurance Co.*, 2014 IL App (2d) 121238, ¶ 25. Thus, we turn our attention to Rule 304(a) and its application to foreclosure cases.

¶ 19 It is well established that the judgment of foreclosure is not a final and appealable order until the trial court enters an order approving the sale and directing the distribution of the funds. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. However, while a judgment of foreclosure is a final order as to the matters specifically adjudicated therein, it only becomes immediately appealable with the addition of Rule 304(a) language. *Id.*, ¶¶ 11, 12. In this case, the judgment of foreclosure was entered containing Rule 304(a) language, making it immediately appealable upon its March 26, 2010, entry. Defendants, however, did not appeal the judgment of foreclosure within the 30-day time period (Ill. S. Ct. R. 303 (eff. May 30, 2008)). Instead, in November 2010, defendants filed the first of their motions to vacate the judgment of foreclosure. (While the basis for the motions to vacate is challenged by plaintiff and is confusing in the record, it need not concern us further, as we shall see.) The notice of appeal in this case was

finally filed on March 4, 2013, nearly three years after the order for the judgment of foreclosure was entered. The question now becomes, what is the effect of failing to appeal an order made immediately appealable due to the inclusion of Rule 304(a) language?

¶ 20 The effect of failing to appeal an order made immediately appealable is to lose the ability to challenge the issues resolved by that order subsequently. In other words, when an order includes Rule 304(a) language making it immediately appealable, the party must timely file a notice of appeal or the right to challenge the ruling is lost. *American National Bank & Trust Co. v. Bentley Builders, Inc.*, 308 Ill. App. 3d 246, 254 (1999). See also, *Pines v. Pines*, 262 Ill. App. 3d 923, 928 (1994) (abrogated on other grounds, *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6 (1998)) ("[w]hen an order includes a Rule 304(a) finding, it must be timely appealed or the right to challenge the ruling is lost"); *City National Bank of Murphysboro v. Vancloostere*, 230 Ill. App. 3d 723, 724-25 (1992) (same); *Stroud v. News Group Chicago, Inc.*, 215 Ill. App. 3d, 1006, 1012 (1991) (the failure to timely appeal an order with Rule 304(a) language means that the order is "no longer subject to review" in a subsequent appeal).

¶ 21 As an illustration of the foregoing principles, we look to *U.S. Bank National Ass'n v. DeCicco*, 2013 IL App (3d) 120272-U.[2] In *DeCicco*, the plaintiff obtained a judgment of

[2]Illinois Supreme Court Rule 23(e) (eff. July 1, 2011) provides that an unpublished order entered under Rule 23 "is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel, or law of the case." We further note that neither trial courts (*People v. Petty*, 311 Ill. App. 3d 301, 303 (2000)) nor appellate courts (*People v. Pinkonsly*, 207 Ill. 2d 555, 560 n.1 (2003)) may rely on unpublished dispositions or portions of unpublished dispositions. Our purpose for citing *DeCicco*, however,

foreclosure that included Rule 304(a) language. *Id.*, ¶ 7. The defendant attempted to work out the loan and her problems repaying it with the plaintiff, but was ultimately unsuccessful. *Id.*, ¶¶ 8-10. When the plaintiff appealed, her main argument concerned the judgment of foreclosure. *Id.*, ¶ 21. The court noted that the Rule 304(a) language made the judgment of foreclosure immediately appealable and held that the defendant was required to timely appeal it within 30 days of the entry of the judgment of foreclosure or the denial of any timely postjudgment motions. *Id.*, ¶ 26. When the defendant failed to bring an appeal within that time, she lost her ability to appeal the judgment of foreclosure. *Id.*, ¶27, 29. That is exactly the situation in the case at bar.

¶ 22 Here, on March 26, 2010, the judgment of foreclosure, with the Rule 304(a) language, was filed. Because the judgment of foreclosure was a final order and it was rendered immediately appealable by the Rule 304(a) language, defendants had 30 days from that date in which to file a notice of appeal challenging that particular order. Defendants did not file a motion that tolled the time period or a notice of appeal within the requisite time; instead, on March 4, 2013, defendants filed a notice of appeal for the first time, and this notice included the March 26, 2010, judgment of foreclosure as one of the orders being challenged on appeal. Defendants' notice of appeal, coming nearly three years after the entry of the judgment of foreclosure with the Rule 304(a) language, is untimely. Because the notice of appeal is untimely,

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is not to derive the proper rule to apply in this case, and thus, we are not relying on it. Instead, we use *DiCicco* illustratively to show how those rules might be applied to a fact pattern that is on all fours with the facts of this case. Thus, our description of the facts and ruling in *DeCicco* does not violate the purposes of Rule 23 or the proscriptions of *Petty* and *Pinkonsly*.

we do not have jurisdiction over the portion of the appeal involving a challenge to the judgment of foreclosure. *Bentley Builders*, 308 Ill. App. 3d at 254; also *Pines*, 262 Ill. App. 3d at 928; *Vancloostere*, 230 Ill. App. 3d at 724-25; *Stroud*, 215 Ill. App. 3d at 1012. Accordingly, we dismiss the portions of defendants' appeal specifically challenging the judgment of foreclosure.

¶ 23 After dismissing those portions of the appeal dealing with the judgment of foreclosure, we must take stock and determine what portions of defendants' appeal survive. The first three issues deal solely with the judgment of foreclosure; because we lack jurisdiction to consider issues connected with the judgment of foreclosure, we cannot consider these arguments on appeal. Defendants' fourth argument is concerned with the denial of their June 2012 motion to vacate, seeking to vacate the judgment of foreclosure and the confirmation of the sale of the subject property. We lack jurisdiction to consider that part of the argument dealing with the judgment of foreclosure, but we may consider, as is possible, the arguments concerning the order confirming the sale of the subject property. Defendants' fifth and final argument on appeal concerns the trial court's denial of their motion to supplement the record. Insofar as it does not involve issues connected to the judgment of foreclosure, we may consider it.

¶ 24 C. Surviving Issues on Appeal

¶ 25 In the surviving portion of their penultimate issue, defendants contend that the trial court erred in denying their June 2012 motion to vacate the order affirming the sale of the subject property (the portion referring to the judgment of foreclosure is dismissed). Defendants' argument, however, expressly refers to its arguments challenging the judgment of foreclosure, and asserts that the trial court erred "[f]or the same reasons discussed" in the sections challenging the judgment of foreclosure. Further, our examination of defendants' arguments shows that they focus on the judgment of foreclosure and not on the order affirming the sale of

the subject property. In addition, we note that a portion of defendants' third argument on appeal purports to challenge the order affirming the sale. Even if defendant's third and fourth arguments on appeal do raise challenges that are not based on the underlying judgment of foreclosure, defendants do not offer any citations to pertinent authority or to the record in either argument. Accordingly, even if we have jurisdiction to consider those portions of defendants' arguments, they still fail because they did not comply with the requirements of Rule 341(h)(7) (eff. Feb. 6, 2013). *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 57. Accordingly, we do not address the merits of defendants' challenges to the order affirming the sale of the subject property, because we lack jurisdiction over the portions of the argument expressly claiming to rely on the arguments attacking the judgment of foreclosure, and because the arguments are forfeited for failing to properly cite to authority or to the record.

¶ 26 Defendants' final contention on appeal, that the trial court erred in denying their motion to supplement the record with Kamal's affidavit regarding the conduct of the sheriff's sale, fares no better. While we have jurisdiction to consider this argument, defendants again failed to cite to any authority or to the record to support any of their contentions on this point. Once again, we must hold that defendants forfeited their argument on appeal for failing to cite authority. Ill. S. Ct. R. 347(h)(7); *JPMorgan Chase Bank*, 2014 IL App (1st) 121111, ¶ 57. Accordingly, we do not consider their final argument on appeal.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, the appeal in this matter is dismissed in part and the judgment of the circuit court of Lake County is affirmed in part.

¶ 29 Dismissed in part and affirmed in part.