

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 DISTRICT

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,)	
)	
Plaintiff-Appellee,)	Appeal from the Circuit Court of Cook County.
)	
v.)	No. 10 CH 36072
)	
CLARE M. ZARO and JORDAN P. ZARO,)	The Honorable Anthony Kyriakopoulos,
)	Judge Presiding.
Defendants-Appellants.)	
)	

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* We cannot find that the trial court abused its discretion by not considering the merits of defendants' motion for leave to file a counterclaim and third party complaint where defendants did not provide a transcript or bystander's report of the hearing in which the trial court stated the reasons for denying the motion.

¶ 2 On August 25, 2010, plaintiff Astoria Federal Savings and Loan Association brought a mortgage foreclosure action against defendants Jordan Zaro and Clare Zaro. The trial court granted plaintiff a judgment for foreclosure and set a sale on September 22, 2011, but the

judicial sale was cancelled twice due to automatic stays resulting from two consecutive bankruptcy actions filed by defendant Jordan Zaro in federal court. The judicial sale eventually proceeded on October 16, 2012, despite defendant Jordan Zaro's third bankruptcy filing the day before the sale was to proceed. Plaintiff was the successful bidder at the sale. On April 12, 2013, defendants filed a motion for leave to file a counterclaim and third party complaint, which alleged two counts of fraud in the inducement and breach of fiduciary duty. The trial court denied defendants' motion "for the reasons stated in Court" on May 16, 2013, and entered an order approving the report of sale and distribution, and confirmed the sale and entered an order of possession. The trial court subsequently denied defendants' motion to reconsider and to vacate the order confirming the judicial sale, and defendants appealed.

¶ 3 On appeal, defendants argue that the trial court abused its discretion when it denied defendants' motion for leave to file a counterclaim and third party complaint because it never considered the merits of defendants' motion. However, defendants have not filed a transcript or bystander's report of the May 16, 2013, proceedings in which the trial court stated the reasons for denying defendants' motion. For the following reasons, we affirm.

¶ 4 **BACKGROUND**

¶ 5 In 2007, plaintiff obtained a note and mortgage from defendants on their property located in Chicago, and beginning in February 2010, defendants stopped making mortgage payments. On August 20, 2010, plaintiff filed a complaint to foreclose its mortgage, and defendants were served on August 25, 2010. Plaintiff filed a motion for default judgment on June 9, 2011, because defendants did not answer or otherwise appear. On July 5, 2011, defendants' counsel appeared and was granted 28 days to file an appearance and to answer or otherwise plead. Defense counsel then filed an appearance on July 14, 2011, but defendants never filed

an answer or otherwise pled in the extra time provided, and on August 29, 2011, plaintiff filed another motion for a default judgment. The trial court granted plaintiff's motion for a default judgment and entered a judgment for foreclosure and sale against defendants on September 22, 2011.

¶ 6 Defendants filed a motion to vacate judgment pursuant to section 2-1301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1301 (West 2010)) on October 20, 2011, requesting an opportunity to respond to and for a hearing on plaintiff's motion. The trial court denied defendants' motion on November 9, 2011, and on November 28, 2011, plaintiff mailed to defendants' counsel a notice of sale, which indicated that the judicial sale was to take place on December 27, 2011.

¶ 7 Five days before the scheduled judicial sale, on December 22, 2011, defendant Jordan Zaro filed for bankruptcy, and the judicial sale was cancelled due to an automatic stay imposed by section 362(a) of the United States Code. 11 U.S.C. § 362(a). Defendant's bankruptcy case was dismissed on April 4, 2012.

¶ 8 On May 3, 2012, plaintiff mailed a second notice of sale to defendants' counsel, indicating that the judicial sale was scheduled for June 1, 2012. Defendant Jordan Zaro then filed a second bankruptcy action on May 31, 2012, the day before the scheduled sale, and the judicial sale was again cancelled pursuant to an automatic 30-day stay. Defendant's second bankruptcy case was dismissed on September 10, 2012.

¶ 9 Plaintiff mailed a third notice of sale to defendants' counsel on September 20, 2012, indicating that the judicial sale was scheduled for October 16, 2012. Defendant Jordan Zaro filed for bankruptcy a third time the day before the scheduled sale on October 15, 2012. However, this time the judicial sale proceeded as scheduled and plaintiff was the successful

bidder at the sale in the amount of \$1.1 million, which was \$91,331.38 less than the \$1,191,331.38 owed at the time of the sale.

¶ 10 Plaintiff filed a motion to confirm the sale, and a hearing on plaintiff's motion was set for November 15, 2012. At the hearing, defendants filed an emergency motion to continue the confirmation of the judicial sale, arguing that they executed a \$1.175 million purchase agreement 10 days after the judicial sale occurred and that closing on their sale was scheduled to take place on November 24, 2012. Defendants further claimed that the contract amount was more than the judicial sale amount, which would result in less of a deficiency, and defendants requested 30 days to close on their sale. The trial court set a briefing schedule for plaintiff's motion to confirm sale and scheduled a hearing date for February 13, 2013, but defendants never filed a response to plaintiff's motion to confirm sale prior to the hearing. On November 28, 2012, defendant's third bankruptcy case was dismissed on defendant's oral motion.

¶ 11 At the hearing on February 13, 2013, defendants, through new counsel, filed an emergency motion to set aside the judicial sale, arguing that the judicial sale took place in direct violation of the third bankruptcy's automatic stay. The trial court considered defendants' emergency motion to be their response to plaintiff's motion to confirm sale, and it granted defendants' new counsel leave to file an appearance *instanter*. The hearing was continued to April 16, 2013, to allow plaintiff an opportunity to reply to defendants' response. Plaintiff filed its reply on March 13, 2013, arguing that, pursuant to section 362(c)(4)(A)(i) of the United States Code (11 U.S.C. § 362(c)(4)(A)(i)), no automatic stay existed at the time of the October 16, 2012, judicial sale because it was defendant's third bankruptcy filing within 365 days, and that defendants did not raise a valid reason under

section 15-1508(b) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012)) to deny confirmation of the sale.

¶ 12 On April 12, 2013, defendants filed a motion for leave to file a counterclaim and third party complaint. The proposed counterclaim alleged that plaintiff and its servicer, Dovenmuehle Mortgage, Inc., acted improperly during the short sale negotiations and that the judicial sale occurred in violation of a bankruptcy stay. The complaint alleged two counts of fraud in the inducement and one count of a breach of fiduciary duty.

¶ 13 On April 16, 2013, the trial court continued the matter to May 16, 2013, "pending status on defendant's reinstatement." On that date, the trial court granted plaintiff's motion to confirm the sale, and it denied defendants' motion for leave to file counterclaim and third party complaint "for the reasons stated in Court." Defendants have not provided this court with a transcript of proceedings or a bystander's report, so the appellate record is silent as to the trial court's stated reasons for denying defendants' motion.

¶ 14 On June 14, 2013, defendants' original counsel filed a motion to vacate the order confirming the sale and a motion to reconsider the denial of their motion to file a counterclaim and third party complaint, requesting that the order confirming the judicial sale be vacated because defendants had access to funds sufficient to reinstate the loan. The trial court denied defendants' motion on September 3, 2013, and defendants filed a notice of appeal on October 2, 2013.

¶ 15 ANALYSIS

¶ 16 On appeal, defendants argue that the trial court abused its discretion when it denied defendants' motion for leave to file a third a counterclaim and third party complaint. For the following reasons, we affirm.

¶ 17 Amendments to pleadings are governed by section 2-616(c) of the Illinois Code of Civil Procedure (735 ILCS 5/2-616(c) (West 2006)), which provides: "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim." Whether to allow an amendment to pleadings is within the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of an abuse of discretion. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008) (citing *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 842 (2000)). A trial court abuses its discretion if " 'no reasonable person would take the view adopted by the trial court.' " *DeLapaz v. SelectBuild Construction, Inc.*, 394 Ill. App. 3d 969, 972 (2009) (quoting *In re Marriage of Heroy*, 385 Ill. App.3 d 640, 651 (2008)).

¶ 18 In the instant case, defendants argue that the trial court abused its discretion when it denied their motion for leave to file a counterclaim and third party complaint. Defendants quote *Enblom v. Milwaukee Golf Development*, 227 Ill. App. 3d 623, 629 (1992), which found that "leave to amend should not be denied solely because of delay in seeking such leave, and that the trial court's failure to consider the merits of the proposed amended complaint constituted an abuse of discretion." Defendants claim that they raised a "compelling" counterclaim and that "the trial court did not even attempt to analyze whether the counterclaim could be allowed consistent with the requirements of Section 2-616."

Defendants conclude that the trial court abused its discretion when it denied defendants' motion for leave to file a counterclaim and third party complaint since "there is no indication anywhere that the trial court gave any consideration whatsoever to factors other than inconvenience to plaintiff occasioned by delay." This is defendants' sole argument, which covers two pages in their brief.

¶ 19 However, the lack of evidence of the trial court's reasoning is a problem of defendants' own making. As stated, the trial court, being "advised in the premises," denied defendants' motion for leave to file a counterclaim and third party complaint on May 16, 2013, "for the reasons stated in Court," but on appeal, defendants never filed a transcript or a bystander's report of the trial court proceedings, so we do not know the trial court's reasons for denying the motion. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005) (permitting an appellant to serve a proposed bystander's report within 28 days after the notice of appeal if no verbatim transcript of the evidence of proceedings is obtainable). Further, there is no agreed statement of facts concerning the trial court's reasoning for denying defendants' motion. Although plaintiff pointed out several months ago in its response brief that the record was not sufficiently complete to determine whether the trial court abused its discretion, defendants never followed up to supplement the record, nor did they file a reply brief addressing the omission.

¶ 20 "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005) (citing *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001)). "[W]here an issue on appeal relates to the conduct of a hearing or proceeding, the issue will not be reviewed absent a report of the proceedings or at least a bystander's report or agreed statement of facts if no transcript exists." *People v. Bell*, 2013 IL App (3d) 120328,

¶ 10 (citing *People v. Toft*, 355 Ill. App. 3d 1102, 1105 (2005)). In the absence of an adequate record preserving the claimed error, a reviewing court must presume the trial court had a sufficient factual basis for its holding and that its order conforms with the law. *Corral*, 217 Ill. 2d at 157 (citing *Webster*, 195 Ill. 2d at 432). " 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' " *Corral*, 217 Ill. 2d at 157 (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)).

¶ 21 Since there is no transcript, bystander's report, or agreed statement of facts concerning the trial court proceedings of May 16, 2013, we must presume that the trial court followed the law and did not abuse its discretion when it denied defendants' motion for leave to file a counterclaim and third party complaint. As a result, we affirm the trial court's denial of defendant's motion.

¶ 22 Furthermore, we note that defendants' argument in their brief is only 10 sentences and does not analyze the merits of their motion for leave to file a counterclaim and third party complaint or their motion to reconsider and vacate judgment. " 'A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 854-55 (2007) (quoting *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995)). General statements without reasoned argument or analysis are insufficient to satisfy the requirements of Illinois Supreme Court Rule 341(h)(7). *Town of Cicero v. Metropolitan Water Reclamation District*, 2012 IL App (1st) 112164, ¶ 42 (citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)).

¶ 23

CONCLUSION

¶ 24

For the foregoing reasons, we affirm.

¶ 25

Affirmed.