

No. 1-13-3997

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

DEUTSCHE BANK NATIONAL TRUST)	Appeal from the
COMPANY, as Trustee for LONG BEACH)	Circuit Court of
MORTGAGE LOAN TRUST 2006-1,)	Cook County
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
(Gary Leigh Payton, Tammy Marie Payton, First)	
American Title Insurance Company d/b/a Just)	No. 07 CH 05861
Seconds Investments Loans, LLC, Just Seconds)	
Investments Loans, LLC and Unknown Owners)	
and Nonrecord Claimants,)	
)	
Defendants),)	
)	
MARVIN WATKINS and CARLA WATKINS,)	Honorable
)	Robert E. Senechalle,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

Held: This court does not have jurisdiction to adjudicate this appeal because one of plaintiff's allegations in its complaint remains unresolved by the circuit court. We therefore dismiss this appeal for lack of jurisdiction.

¶ 1 Plaintiff, Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-1, originally brought this mortgage foreclosure action against numerous defendants based on a promissory note executed by Gary Leigh Payton and Tammy Marie Payton and secured by a mortgage on property located at 6437 North Kimball Avenue, in Lincolnwood, Illinois. None of the defendants named in plaintiff's initial complaint are parties to this appeal. Defendants-Appellants, Marvin and Carla Watkins, appeared after plaintiff filed its initial complaint and claimed an interest in the property. Specifically, the Watkinses alleged that they owned the property and that they were victims of mortgage fraud. In response, plaintiff filed an amended single-count mortgage foreclosure complaint in which it added the Watkinses as defendants. Plaintiff later added a second count to its amended complaint, alleging equitable subrogation. Our review of the record shows that the circuit court adjudicated plaintiff's claim for equitable subrogation, as alleged in count II of plaintiff's amended complaint. The record does not show, however, that the circuit court ever resolved count I of plaintiff's amended complaint based on the note and mortgage executed by the Paytons. Accordingly, this court does not have jurisdiction over this matter because issues raised by plaintiff before the circuit court remain unresolved. We therefore dismiss this appeal.

¶ 2 **BACKGROUND**

¶ 3 Defendants Gary Leigh Payton and Tammy Marie Payton executed a promissory note with Long Beach Mortgage Company in the amount of \$450,000 on November 11, 2005. The note was secured by a mortgage on property located at the common address of 6437 North Kimball Avenue, in Lincolnwood, Illinois, 60712. Long Beach Mortgage Company assigned the mortgage and the note to plaintiff.

¶ 4 On March 2, 2007, plaintiff filed a single count complaint to foreclose the mortgage naming the following parties as defendants: Gary Leigh Payton; Tammy Marie Payton; First American Title Insurance Company, doing business as Just Seconds Investments Loans, LLC; Just Seconds Investments Loans, LLC; and unknown owners and non-record claimants. According to plaintiff's complaint, the principal balance due on the note and the mortgage was \$449,296.76, plus interest, costs, advances, and fees. None of the above named defendants are parties to this appeal.

¶ 5 On June 13, 2007, defendant-appellant Carla Watkins filed an appearance, labeling herself an unknown owner and non-record claimant.¹ She also filed a motion to vacate all technical defaults, and for leave to file an answer, affirmative defenses, and counterclaims. The circuit court granted Carla Watkins's motions.

¶ 6 In her subsequently filed answer and affirmative defenses, Carla Watkins alleged that she and her husband, Marvin Watkins, owned and resided at the property. In July of 2005, the property was encumbered by a mortgage with Citimortgage in the amount of \$310,000 and a second mortgage with Countrywide Home Loans (Countrywide) in the amount of \$45,000. In the spring and summer of 2005, the Watkinses experienced financial difficulties, including the initiation of foreclosure proceedings against them. They were approached by a group named "Funding Foreclosures.com," who promised them that their home could be saved by a transaction whereby Funding Foreclosures.com would provide financial assistance while the Watkinses rented the property from Funding Foreclosures.com for a short period of time. Funding Foreclosures.com told the Watkinses that it would hold title to the property, but that it would not transfer the property to a third party. Funding Foreclosures.com agreed to pay off the mortgages

¹ Carla Watkins's husband, Marvin Watkins, did not file his appearance until June 9, 2009. It is unclear why Marvin Watkins filed an appearance so long after his wife filed her appearance. The Watkinses did, however, put forth a unified defense from June 9, 2009, onward.

encumbering the property, and give the Watkinses \$20,000 in cash. The Watkinses executed an "Equity Purchase Agreement," dated July 14, 2005; a grant deed dated July 17, 2005; and a residential lease after sale agreement dated July 17, 2005. According Carla Watkins, Funding Foreclosures.com arranged a "sham transaction" by which she and her husband sold the property to Gary Leigh Payton and Tammy Payton for \$500,000. Carla Watkins denied knowing, meeting, receiving money from, or communicating with the Paytons and denied selling them the property.

¶ 7 On September 28, 2007, plaintiff motioned the circuit court for leave to file an amended complaint, which the circuit court allowed. Plaintiff added both Carla Watkins and Marvin Watkins as defendants in their single-count amended complaint. The amended complaint alleged that the Watkinses had an interest or lien on the mortgaged real estate that plaintiff sought to terminate, and that the Watkinses' interest was subordinate and inferior to its claim under the mortgage.

¶ 8 On November 4, 2009, plaintiff filed a motion for summary judgment. Relevant here, plaintiff alleged that its predecessor in interest, Long Beach Mortgage Company, provided the funds that paid off the remaining balances of the mortgages the Watkinses entered into with Citimortgage and Countrywide. Plaintiff further alleged that the Watkinses failed to put forth any allegations linking it to the alleged foreclosure rescue scam. According to plaintiff, its rights were subrogated to the rights of Citimortgage, in the amount of \$321,000, and Countrywide, in the amount of \$45,000, based on its predecessor in interest, Long Beach Mortgage Company, paying off those mortgages. In response, the Watkinses argued that plaintiff was seeking to foreclose on a sham transaction and alleged that the transaction between Funding Foreclosures.com and the Watkinses was an equitable mortgage. On March 12, 2010, the circuit court denied plaintiff's motion for summary judgment, finding "that a fact question exists at this time."

¶ 9 Plaintiff subsequently filed a motion for leave to file an amendment to its amended complaint, which the circuit court allowed on May 27, 2010. On July, 13, 2010, plaintiff filed a verified "Amendment to Its Complaint to Foreclose." In its amendment, plaintiff added a second count titled "Equitable Subrogation Foreclosure-Alternative to Complaint to Foreclose." Under Count II, plaintiff asserted that it "realleges and reasserts all of the allegations set forth in Count I of the Complaint to Foreclose as though fully set forth in paragraph 1 herein." Plaintiff alleged, in the event that the circuit court finds that the Watkinses were victims of a mortgage rescue fraud, that: the Watkinses were unjustly enriched because plaintiff's loan to the Paytons paid off their indebtedness to Citimortgage and Countrywide; and that based on the principle of equitable subrogation, it should have a right to foreclose to the extent of the Watkinses' indebtedness of \$371,833.90 to Citimortgage and Countrywide, plus interest, costs, and fees.

¶ 10 The Watkinses filed a verified answer to count II of the complaint. Relevant here, the Watkinses admitted that plaintiff's predecessor in interest provided the funds to pay off the \$371,833.90 they owed to Citimortgage and Countrywide. The Watkinses, however, maintained that it was done through "a fraudulent sham transaction" perpetrated by Funding Foreclosures.com. The Watkinses also alleged, as affirmative defenses, that plaintiff failed to state a cause of action; failed to join a real party in interest; that there was a lack of equity in the property; and that plaintiff did not have any subrogation rights.

¶ 11 On March 22, 2011, plaintiff filed a motion for partial summary judgment on the issue of equitable subrogation as stated in count II of its amended complaint. In a footnote, plaintiff stressed that "[t]his motion is limited to the issue of the establishment of equitable subrogation that occurred as a result of [plaintiff] paying in full two mortgages on the subject property. The issues of the eventual assignment to Plaintiff and Count I regarding foreclosure on the entire amount of

money lent by [plaintiff] are not part of this motion." Plaintiff proceeded to explain, with supporting documentation, how its predecessor in interest provided the funds for the Watkinses to pay off the two outstanding mortgage loans, which amounted to \$371,833.90. Plaintiff also pointed out that the Watkinses admitted in their answer that their prior mortgages with Citimortgage and Countrywide were paid off by funds issued from plaintiff's predecessor. Accordingly, plaintiff asserted that it was equitably subrogated to the rights of Citimortgage and Countrywide and had a first lien on the property to the extent of \$371,833.90.²

¶ 12 On May 24, 2011, the circuit court granted plaintiff's motion for partial summary judgment as to count II of its complaint, and included the following findings in its order:

"It is hereby found that the discovery and [the] Watkins[es]' answer to the plaintiff's amended complaint (count II) admits that their previously delinquent mortgages to Citimortgage and Countrywide were paid off in the sum of \$371,833.90 in conjunction with the alleged mortgage rescue fraud perpetrated upon them in and around July, 2005;

It is further found that \$371,833.90 of the proceeds of the mortgage of [plaintiff] being foreclosed herein by plaintiff was used to pay off the aforesaid mortgages of [the]Watkins[es] to Citimortgage and Countrywide;

² It does not appear in the record that the Watkinses responded to plaintiff's March 22, 2011, motion for partial summary judgment. Shortly after plaintiff filed its motion for partial summary judgment, the Watkinses' attorney withdrew. The Watkinses subsequently obtained new representation.

It is further found that the subject mortgage of [plaintiff] being foreclosed herein by plaintiff shows an intent to be a first lien on the property."

Accordingly, the circuit court ordered the entry of partial summary judgment in plaintiff's favor "as against the mortgage rescue fraud claims *** of [the]Watkins[es] and the interests of [the] Watkins[es] are subject and subordinate to the interests of [plaintiff's] mortgage being foreclosed herein by plaintiff to the extent of \$371,833.90."

¶ 13 On September 28, 2012, plaintiff filed another motion for summary judgment against the Watkinses. On November 8, 2012, plaintiff supplemented its September 28, 2012, motion for summary judgment and explained that the motion addressed "Count I of its amended complaint." In response, the Watkinses argued that there was a genuine issue of material fact as to whether plaintiff is the current holder of the note and mortgage at issue. The Watkinses alleged that the documents pertaining to their alleged conveyance of the property contained forged signatures. The Watkinses further asserted that the affidavits plaintiff provided were insufficient.

¶ 14 On March 25, 2013, the circuit court denied plaintiff's motion for summary judgment "as to count I." In its order, the court noted that it found "genuine issues of material fact as to the enforceability of the mortgage." The circuit court did, however, allow plaintiff time to file a motion for summary judgment as to count II of its amended complaint.

¶ 15 Plaintiff subsequently filed a motion for summary judgment "on count II of plaintiff's amendment to [its] complaint to foreclose filed on July 13, 2010, *** or, in [the] alternative, pursuant to 735 ILCS 5/15-1506, against the equitable ownership claims of the intervenors, Carla

Watkins and Marvin Watkins."³ In its motion, plaintiff asked that summary judgment be entered in its favor and that an entry of judgment of foreclosure and sale in the amount of \$371,833.90 be entered on count II. Plaintiff argued that the Watkinses failed to put forth any issues of material fact in connection with the entry of partial summary judgment on May 24, 2011.

¶ 16 In response, the Watkinses argued that summary judgment as to count II of plaintiff's complaint was improper because there were genuine issues of material fact concerning whether plaintiff had standing to bring the foreclosure action and whether plaintiff was ever the legal title holder to the property. The Watkinses realleged that their conveyance of the property contained forged signatures which were used in a sham transaction. The Watkinses maintained that the circuit court's prior entry of partial summary judgment as to count II of plaintiff's complaint did not affect its standing argument and pointed out that no written mortgage existed between plaintiff and the Watkinses.

¶ 17 In reply, plaintiff argued that the Watkinses failed to present clear, convincing, or satisfactory proof of a forged signature. Plaintiff further asserted that it had standing, pursuant to the principles of equitable subrogation, because it discharged the Watkinses' mortgage loan debt to Citimortgage and Countrywide.

¶ 18 On June 5, 2013, plaintiff filed an amended motion for entry of an order of default and judgment of foreclosure and sale. Amongst other documents, plaintiff attached an affidavit indicating that \$804,030.69 remained due and owing to plaintiff according to the loan documents.

³ The date on the file stamp to plaintiff's motion is illegible in the record.

¶ 19 On June 11, 2013, the circuit court entered an order of default against defendants Gary Leigh Payton; Tammy Marie Payton; First American Title Insurance Company, doing business as Just Seconds Investments Loans, LLC; Just Seconds Investments Loans, LLC; and unknown owners and nonrecord claimants. On that same day, the circuit court granted plaintiff's motion for summary judgment against the Watkinses "as to count II of plaintiff's complaint." In the order, the circuit court also ordered that a judgment of foreclosure and sale be entered in favor of plaintiff against the Watkinses.⁴ The Judgment itself is titled "Judgment of foreclosure and Sale (Equitable Subrogation)" and notes that the "cause having been duly heard by this court upon the record herein on the merits of Count II of the complaint for foreclosure filed by the plaintiff and on plaintiff's motion for entry of judgment of foreclosure and sale." The court found "the evidence of indebtedness equitably secured is referred to in Count II of the Complaint is a valid subsisting lien on the Property" in the amount of \$371,833.90. The court ordered that a judgment of foreclosure and sale be entered and that the property be sold at auction.

¶ 20 On October 15, 2013, the property was sold at public auction. The report of sale and distribution indicated that "[t]he amount due under judgment" to be \$371,833.90, but that the total amount due after taking into account interest and various costs and fees, to be \$391,023.28. The report listed the total proceeds of the sale as \$371,833.90, leaving a deficiency of \$19,189.38.

¶ 21 On November 7, 2013, the circuit court entered an order approving the report of sale and distribution, confirming the sale and order of possession. The order indicated that an *in rem* deficiency judgment be entered against the subject property in the amount of \$19,189.38.

⁴ The actual judgment of foreclosure and sale, however, was not entered by the circuit court until July 12, 2013.

¶ 22 On December 6, 2013, the Watkinses filed their notice of appeal.

¶ 23 ANALYSIS

¶ 24 The Watkinses argue before this court that the circuit court erred when it entered summary judgment in plaintiff's favor because issues of material fact concerning plaintiff's standing and status as the legal holder of the title to the property preclude the entry of summary judgment. According to their jurisdictional statement, the Watkinses claim that this court has jurisdiction pursuant to Illinois Supreme Court Rule 303, which governs appeals from final judgments entered in the circuit court. Ill. S. Ct. R. 303 (eff. May 30, 2008). In their opening brief, the Watkinses did not specify which of the summary judgment rulings made by the circuit court they were challenging. Rather, they generally argued that summary judgment is not appropriate in this matter.

¶ 25 In response, plaintiff argues that this court may only consider the circuit court's November 7, 2013, order approving the sale of the property, not the circuit court's entry of summary judgment; that the Watkinses have failed to allege any errors on the confirmation of the sale; that the Watkinses have failed to properly challenge the circuit court's entry of summary judgment; and that the Watkinses failed to plead lack of standing. Plaintiff maintained it had standing to bring the foreclosure action and that the record is insufficient to establish the presence of forged documents.

¶ 26 Although neither party challenged the jurisdiction of this court, we must consider our jurisdiction even though the issue was not raised by the parties. *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 24. Under the Illinois constitution, this court has jurisdiction to hear appeals from final judgments of the circuit court. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 9 (citing Ill. Const. 1970, art. VI, § 6). "A final

judgment has been defined as a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). This court can only review nonfinal orders or judgments if our supreme court allows us to do so under its rules. *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 9; see Illinois Supreme Court Rules 304, 306, 307, and 308. Ill. S. Ct. R. 304 (eff. Feb. 26, 2010); R. 306 (eff. July 1, 2014); R. 307 (eff. Feb. 26, 2010); R. 308 (eff. Jan. 1, 2015). We must dismiss an appeal on our own motion if we do not have jurisdiction. *North Community Bank*, 2015 IL App (1st) 133672, ¶ 24.

¶ 27 Plaintiff initiated these proceedings in March of 2007 when it filed its single-count complaint to foreclose the mortgage its predecessor in interest entered into with the Paytons. Once defendant Carla Watkins intervened in the action, alleging mortgage fraud, plaintiff filed an amended single-count complaint adding the Watkinses as additional defendants. In July of 2010, plaintiff added count II as an "amendment" to its amended complaint and titled the count "Equitable Subrogation Foreclosure-Alternative to Complaint to Foreclose." As the above recitation of the facts of this case show, plaintiff put forth two theories of recovery. Under count I, plaintiff sought to foreclose the mortgage its predecessor in interest entered into with the Paytons. At the time of the filing of the original complaint, plaintiff alleged that the balance due on the note and mortgage entered into with the Paytons was \$449,296.76, plus interest, costs, and fees.⁵ Under count II, plaintiff argued that the principle of equitable subrogation required that their interest have first lien priority over the Watkinses' claims in the amount of \$371,833.90, plus interest, fees, and costs. This amount represented the funds plaintiff's predecessor in interest provided to pay off the Watkinses' outstanding mortgage loan debt to

⁵ In June of 2013, plaintiff alleged that the balance due had risen to over \$800,000.

Citimortgage and Countrywide. Accordingly, plaintiff litigated this matter under two different theories of recovery. Count I sought relief based on contract principles due to the note and mortgage with the Paytons. Under count II, however, plaintiff sought equitable relief based on the Watkinses' admission that plaintiff's funds paid off their outstanding mortgage debt.

¶ 28 Our review of the record shows that the circuit court apparently resolved plaintiff's claim for equitable relief under count II. Specifically, the circuit court granted partial summary judgment on count II in May of 2011. In June of 2013, the circuit court granted plaintiff's second motion for summary judgment addressing count II. That order specified that the court granted "[s]ummary judgment as to count II of plaintiff's complaint." The order further provided that a judgment of foreclosure and sale be entered in favor of plaintiff and against the Watkinses. The judgment of foreclosure and sale also indicated that its entry was based on the allegations contained in count II of plaintiff's amended complaint. Specifically, the judgment was titled "Judgment of foreclosure and sale (Equitable Subrogation)" and provided that the judgment was based "on the merits of Count II of the complaint for foreclosure." The circuit court found, as stated in the judgment, that "the evidence of indebtedness equitably secured is referred to in Count II of the Complaint is a valid subsisting lien on the Property" in the amount of \$371,833.90. The circuit court later entered an order approving the sale of the property, noting that the amount due under the judgment, prior to the imposition of fees and interest, to be \$371,833.90, *i.e.*, the amount plaintiff claimed it was owed under count II of its amended complaint. Accordingly, the record shows that the circuit court adjudicated plaintiff's claim for relief based on equitable subrogation as stated in count II of plaintiff's complaint.

¶ 29 The circuit court, however, had not yet fully resolved plaintiff's claims under count I when the Watkinses filed their notice of appeal. Plaintiff filed two summary judgment motions

addressing count I of its amended complaint, both of which were denied by the circuit court. In denying plaintiff's second summary judgment motion pertaining to count I, the circuit court found "genuine issues of material fact as to the enforceability of the mortgage." The denial of a motion for summary judgment, barring certain exceptions not present here, is not a final and appealable order. *In re Estate of Funk*, 221 Ill. 2d 30, 85 (2006). All subsequent pleadings and orders in the record after this second denial of plaintiff's motion for summary judgment as to count I, including the judgment of foreclosure and sale and the order approving sale, only refer to plaintiff's claim under count II for equitable subrogation. The record does not show that the circuit court struck or dismissed count I. It also does not show that plaintiff abandoned or waived count I. In fact, plaintiff noted, when it added count II to its amended complaint that it "realleges and reasserts all of the allegations set forth in Count I of the Complaint to Foreclose." Plaintiff also clearly marked its subsequent motions for summary judgment to indicate which count the motion at issue was addressing. In its March 2011 motion for partial summary judgment on count II of its amended complaint, plaintiff specifically noted that the "motion is limited to the issue of the establishment of equitable subrogation that occurred as a result of [plaintiff] paying in full two mortgages on the subject property. The issues of the eventual assignment to Plaintiff and Count I regarding foreclosure on the entire amount of money lent by [plaintiff] are not part of this motion." Therefore, the record shows that the circuit court never resolved count I of plaintiff's amended complaint addressing plaintiff's claims under the mortgage and note it entered into with the Paytons.

¶ 30 It is well-established that we can only review final judgments of the circuit court unless allowed to do so by our supreme court's rules. *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 9. Our supreme court has defined a final judgment "as a determination by the court on the issues

presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Flores*, 91 Ill. 2d at 112. In this case, plaintiff sought relief pursuant to a note and mortgage it entered into with the Paytons under count I of its amended complaint. The circuit court, however, never resolved this claim. Therefore, plaintiff's rights under the note and mortgage were never ascertained or fixed "absolutely and finally." *Id.* After the denial of plaintiff's motion for summary judgment in March of 2013, the record does not contain any orders entered by the circuit court resolving count I. We further note the record does not show that any of our supreme court's rules applicable to interlocutory appeals to this court apply in this matter. See Illinois Supreme Court Rules 304, 306, 307, and 308. Ill. S. Ct. R. 304 (eff. Feb. 26, 2010); R. 306 (eff. July 1, 2014); R. 307 (eff. Feb. 26, 2010); R. 308 (eff. Jan. 1, 2015). We, therefore, do not have jurisdiction to entertain this appeal because the circuit court never determined plaintiff's claims under the mortgage and the note that plaintiff relied on to initiate the proceedings, as stated in count I of plaintiff's amended complaint. Accordingly, we dismiss the appeal for lack of jurisdiction.

¶ 31

CONCLUSION

¶ 32 Appeal dismissed.