

FIRST DIVISION
November 16, 2015

No. 1-14-1623

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

FIRST SECURITY TRUST AND SAVINGS BANK, an)	Appeal from the
Illinois Banking Corporation,)	Circuit Court of
)	Cook County,
Plaintiff -Appellee,)	
)	
v.)	No. 10 CH 27011
)	
PHIL CONTURSI,)	Honorable
)	Daniel P. Brennan,
Defendant-Appellant,)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Section 2-1401 petition to vacate the judgment of foreclosure and sale was properly denied where relief sought was barred by section 15-1509(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2012)).

¶ 2 Defendant appeals from the circuit court's denial of his section 2-1401 motion to vacate the judgment of foreclosure and sale (735 ILCS 5/2-1401 (West 2012)) and motion to reconsider.¹ He contends that he was not procedurally barred, under section 15-1509(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2012)) (Foreclosure Law), from bringing a section 2-1401 petition for relief from the August 8, 2011 judgment of

¹ We refer herein to his "motion" as a "petition" for purposes of consistency.

foreclosure and sale after the entry of an order confirming the sale. He claims that he asserted a meritorious defense of fraud; that he was prevented from exercising due diligence in raising this defense in the original proceeding because of the plaintiff's concealment of relevant facts; and that he acted with due diligence in filing his section 2-1401 petition. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On April 18, 2007, First Security Trust and Savings Bank (the Bank) extended a loan in the amount of \$1,350,000 to Cole Taylor Bank, as trustee under trust dated 5/29/98 and known as trust no. 98-8015 (the Trust). Cole Taylor Bank executed a promissory note for the indebtedness in the amount of \$1,350,000 and a mortgage in favor of the Bank on certain commercial real property located at 2155-57 West Hubbard Street in Chicago, Illinois (the Property). As additional security, the Bank received an executed guaranty bearing the purported signatures of Phil Contursi and his former wife, Janine. Chicago Title Land Trust Company (Chicago Title) subsequently became successor trustee of the Trust and owner of the Property.

¶ 5

A. Mortgage Foreclosure Lawsuit

¶ 6 On June 23, 2010, the Bank brought a mortgage foreclosure lawsuit pursuant to section 15-1504 of the Foreclosure Law (735 ILCS 5/15-1504 (West 2010)) against Chicago Title, as successor trustee of the Trust, and against Contursi and Janine, as guarantors on the note. Non-record claimants and unknown owners were also named as party defendants. In count I, the Bank alleged that Chicago Title had defaulted on the note and mortgage beginning January 26, 2008. In count II, the Bank alleged that Contursi and Janine were liable, under the guaranty, for the balance due as a result of Chicago Title's default on the note and mortgage. We set forth only the procedural history that is relevant to this appeal as it pertains to Contursi.

¶ 7 On November 3, 2010, the Bank filed a motion for default judgment against all defendants. Contursi requested, and was given, additional time to appear and answer. On December 28, 2010, Contursi, through counsel, filed an appearance and propounded a Rule 214 request for production to the Bank. The Bank responded to the discovery request. After Contursi failed to answer or otherwise plead to the complaint within the extension period, the Bank again moved for a default judgment against him. On May, 16, 2011, the circuit court granted Contursi another extension of time to answer or otherwise plead. On May 21, 2011, Contursi filed his answer and an affirmative defense. His affirmative defense consisted of the following sentence:

"1. Defendant did not sign any of the loan documents on which this action is based, including but not limited to the mortgage, the note, and the personal guaranty."

¶ 8 After Contursi filed his answer and affirmative defense, the Bank filed a motion for summary judgment against him and requested a judgment of foreclosure and sale. The Bank also moved to strike Contursi's affirmative defense, arguing that it was insufficiently pleaded and conclusory.

¶ 9 Attached to the Bank's motion for summary judgment was the affidavit of Thomas J. Schnell, Senior Vice President of Operations for the Bank. Schnell attested that based on his review of the loan and payment records, he determined that Chicago Title had defaulted on the mortgage and note. Additionally, he stated that the Bank would not have authorized the loan without the executed personal guaranty. The circuit court entered a briefing schedule to allow Contursi time to respond to the motions and scheduled a hearing on August 8, 2011. Contursi did not file a response to the summary judgment motion or the motion to strike, nor did he seek an

extension of time or leave to amend his affirmative defense. Moreover, he did not move to strike Schnell's affidavit, nor did he present any counter-affidavits.

¶ 10 During the hearing on August 8, 2011, the circuit court granted summary judgment to the Bank on both counts, and struck Contursi's affirmative defense with prejudice. The court also entered a judgment of foreclosure and sale and appointed a sales officer. At the judicial sale of the Property on December 13, 2011, the Bank was the high bidder. It filed a motion to confirm the sale and requested a personal deficiency judgment against Contursi. The court entered a briefing schedule for responsive pleadings and set a hearing date on the motion to confirm.² Contursi failed to file any response or objection to the motion and request for personal deficiency judgment.

¶ 11 On March 8, 2012, the circuit court confirmed the sale and entered a personal deficiency judgment in the amount of \$1,374,173.65 against Contursi.

¶ 12 B. Section 2-1401 Proceeding

¶ 13 On August 7, 2013, seventeen months after the confirmation of the sale, Contursi filed a section 2-1401 petition to vacate the August 8, 2011 judgment of foreclosure and sale that had been entered two years preceding the petition. In his petition, Contursi alleged that the judgment of foreclosure and sale should be vacated because: (1) he had meritorious defenses related to circumstances indicating fraud and forgery by an individual who was a Vice-President of the Loan Department for the Bank; (2) his failure to exercise due diligence in defending the original foreclosure lawsuit was the result of an "excusable mistake," because the relevant facts supporting his fraud and forgery defenses "were concealed" by the Bank during the proceeding; and (3) he exercised due diligence in bringing his section 2-1401 petition, given the fact he had

² The Bank also requested a personal deficiency judgment against Janine, which the court granted on March 8, 2011 when it confirmed the sale of the Property.

"only recently become apprised of the fact that mass fraud was being committed within the Bank during the relevant time" when his guaranty was being executed.

¶ 14 As to the merits of his purported defenses, Contursi alleged that his signature on the guaranty had been forged as a result of fraudulent activities perpetrated by Jeffrey Gonsiewski, the Vice-President of the Loan Department at the Bank at the time the guaranty was signed. Contursi pointed out in his petition that Gonsiewski had pleaded guilty to federal bank fraud charges in August 2010. Referencing a copy of the plea agreement that was attached to his section 2-1401 petition, Contursi noted that Gonsiewski admitted that he had "prepared and submitted documents to [the Bank] that contained false information *** which included material false information related to collateral, forged and photocopied signatures" during the period from 2004 to 2009. According to Contursi, the Bank had knowledge of "the fraudulent activity within its Loan Department" and charges against Gonsiewski during the pendency of the foreclosure proceeding, but had concealed the information from the court and the parties. Contursi also alleged that he did not discover the fraud until after the judgment had been entered against him.

¶ 15 As additional support for his section 2-1401 petition, Contursi submitted his own affidavit, averring that: he did not sign the guaranty; he was unable to plead his defense in the foreclosure suit "with sufficient particularity" because the Bank had "withheld and concealed evidence" related to his defense; the newly discovered evidence, i.e., Gonsiewski's fraudulent activities, "supports and establishes" his defense regarding fraud and forgery; and he "only recently" become aware of said fraudulent activities.

¶ 16 On October 30, 2013, the circuit court denied the section 2-1401 petition with prejudice.³

³ The order is silent as to grounds for the court's decision and there is no transcript of the proceeding or a certified bystander's report contained in the record on appeal.

Contursi filed a motion to reconsider, arguing that the court had erred when it determined that his section 2-1401 petition was barred by section 15-1509(c) of the Foreclosure Law. He argued that, contrary to the circuit court's analysis, his case was distinguishable from *U.S. Bank National Ass'n v. Prabhakaran* (2013 IL App (1st) 111224). He further pointed out that appellate courts have declined to apply section 15-1509(c) as a bar to relief under section 2-1401 where the challenge involves a void judgment or a dispute over the proceeds of a judicial sale. On November 15, 2013, the circuit court denied the motion to reconsider and stated, in its order, that Contursi's section 2-1401 petition "does not fit within the narrow exception carved out in *BAC Home Loans Servicing, LP v. Mitchell*, 2013 IL App (1st) 121713-U and *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077."

¶ 17 Contursi filed a timely notice of appeal. This court has jurisdiction to hear this appeal pursuant to Supreme Court Rule 303. Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 18 **II. ANALYSIS**

¶ 19 Contursi argues that the circuit court erred in dismissing his section 2-1401 petition as a matter of law under section 15-1509(c) of the Foreclosure Law and denying his motion to reconsider, where: (1) the relief that he purportedly seeks is to vacate the personal deficiency judgment against him, as opposed to the judgment of foreclosure and sale; and (2) he sufficiently alleged a meritorious defense of fraud and forgery, was prevented from exercised due diligence in presenting his defense in the original foreclosure suit because of the bank's alleged concealment of fraud, and exercised due diligence in bringing his section 2-1401 petition.

¶ 20 Section 2-1401 allows a petitioner to request relief from a final judgment or order more than 30 days after the entry of the judgment or order. 735 ILCS 5/2-1401(a) (West 2012). Furthermore, unless the relief requested falls within one of the specific exceptions listed under

subsection (c) of section 2-1401, "the petition must be filed not later than 2 years after the date of the order or judgment." 735 ILCS 5/22-1401(c) (West 2012). In a foreclosure action, the judgment of foreclosure and sale is not a final judgment until the circuit court has confirmed the sale of the Property. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56 (1989).

¶ 21 While "a section 2-1401 petition [that] presents a fact-dependent challenge to a final judgment or order" is subject to an abuse of discretion standard, the denial of a section 2-1401 petition based on a statutory bar, in this case section 15-1509(c) of the Foreclosure Law, raises a purely legal question of statutory interpretation which must be reviewed *de novo*. *Warren County Coil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51; see also *People v. Vincent*, 226 Ill. 2d 1, 19 (2007) (where the circuit court disposes of a section 2-1401 petition on the pleadings, our review is *de novo*). Having established the standard of review, we consider first whether Contursi is barred, as a matter of law, from asserting a section 2-1401 petition based on the language set forth in section 15-1509(c).

¶ 22 A. Section 15-1509(c) of the Foreclosure Law

¶ 23 Section 15-1509(c) provides in relevant part as follows:

"Claims Barred. Any vesting of title by a consent foreclosure pursuant to Section 15-1402 or by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure in accordance with paragraph (2) of subsection (c) of Section 15-1502, notwithstanding the provisions of subsection (g) of Section 2-1301 to the contrary. Any person seeking relief from any

judgment or order entered in the foreclosure in accordance with subsection (g) of Section 2-1301 of the Code of Civil Procedure may claim only an interest in the proceeds of sale." 735 ILCS 5/15-1509(c) (West 2012).

Under section 15-1509(b), "[d]elivery of the deed executed on the sale of the real estate, even if the purchaser or holder of the certificate of sale is a party to the foreclosure, shall be sufficient to pass the title thereto." 735 ILCS 5/15-1509(b) (West 2012).

¶ 24 In *Prabhakaran*, our court held that a section 2-1401 petition cannot be brought to vacate an order confirming the sale of a property following a judgment of foreclosure and sale. 2013 IL App (1st) 111224, ¶ 30. The petitioner in that case, a mortgagor, filed a section 2-1401 petition seeking to vacate the judgment of foreclosure more than 30 days after the court had confirmed the sale of the property and the judicial deed had issued to the mortgagee, the successful bidder at the sale. *Id.* at ¶ 1. The mortgagee maintained that section 15-1509(c) of the Foreclosure Law barred the section 2-1401 petition "as a matter of law because the selling officer had already delivered a deed to [the mortgagee as the purchaser] following the circuit court's order confirming the sale of the property." *Id.* at ¶ 26. The circuit court denied the petition. On appeal, our court held that a defendant who was a party to a foreclosure proceeding under the Foreclosure Law may not "circumvent" the statute's requirements by bringing a petition under section 2-1401 after the sale of the property has been confirmed. *Id.* at ¶ 30. Finding section 15-1509(c) to be dispositive as a bar to the petitioner's claim for relief, the *Prabhakaran* court declined to reach the issue of whether the petition raised a meritorious defense.

¶ 25 Subsequently, this court has also found *Prabhakaran* controlling in a section 2-1401 petition brought after a court has confirmed the sale in a foreclosure case. See, e.g., *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017, ¶ 47. In fact, the only instances in which our courts

have departed from *Prabhakaran's* holding that section 15-1509(c) bars a party to a foreclosure suit from seeking section 2-1401 relief following confirmation of a sale have been limited to cases in which the petitioner challenged the court's judgment as void based on the court's lack of personal jurisdiction (see, e.g., *BAC Home Loans Servicing, LP v. Mitchell*, 2013 IL App (1st) 121713, ¶ 45 (holding that "[a] judgment entered by a court without personal jurisdiction is void and may be challenged at any time"); *MB Fin. Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 19 (holding that a "jurisdictional challenge to the trial court's judgment-even though the property had been sold-was not barred"); *Deutsche Bank v. Brewer*, 2012 IL App (1st) 111213, ¶ 15 (holding that "nothing in section 15-1509 indicates that the legislature sought to make foreclosure judgments take effect and deprive owners of their properties when the trial court lacked personal jurisdiction over the owners")) or a dispute involving the surplus proceeds from a sale (see *CitiMortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107).

¶ 26 Here, the parties do not dispute that the personal deficiency judgment against Contursi is based on his alleged liability under the personal guaranty for amounts owed as a result of Chicago Title's default on the loan and subsequent judgment of foreclosure and sale. The parties further do not dispute that Contursi did not file his section 2-1401 petition until after the confirmation sale and delivery of the deed to the Bank. Finally, the parties do not dispute that Contursi cannot challenge the court's jurisdiction in the foreclosure case, as he voluntarily appeared through counsel and has waived any objection to jurisdiction.

¶ 27 There is nothing in the record indicating any dispute about the fact that Contursi neither contested, or otherwise objected to, the entry of the personal deficiency judgment against him on that date. At no time did Contursi challenge the manner in which the sale was conducted or the bid amount accepted by the selling officer at the sale. There are no alleged procedural defects

concerning the sale of the Property or the report of sale itself. We are bound by "[t]he clear and unambiguous language of section 15-1509(c) of the Foreclosure Law" and cannot grant Contursi the relief he seeks. *Prabhakaran*, 2013 IL (1st) 111224, ¶ 30. We apply the rule in *Prabhakaran* that because "[Contursi] was a party to the foreclosure from its inception [he] cannot rely upon section 2-1401 as an alternative remedy once the circuit court confirmed the sale of the property." *Id.*

¶ 28 Notwithstanding the relief he specifically requested in his section 2-1401 petition, Contursi raised his argument, for the first time in his motion to reconsider and now before this court on appeal, that he is not barred by section 15-1509(c) or *Prabhakaran* because his petition seeks to vacate the *personal deficiency* judgment of \$1,374,173.65, *not* the judgment of foreclosure and sale. As support, Contursi cites the holdings in *BAC Home Loans Servicing, LP v. Mitchell*, 2013 IL App (1st) 121713, *MB Fin. Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, *CitiMortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107, and *Mass Realty LLC v. Five Mile Capital SPE A LLC*, 2014 IL App (1st) 133871-U. We are not persuaded.

¶ 29 First, we note that Contursi's section 2-1401 petition, entitled "Section 2-1401 Motion to Vacate Judgment for Foreclosure and Sale entered August 8, 2011," specifically requests, in its prayer for relief, that the circuit court "[s]et aside and vacate *the judgment of foreclosure and sale* entered on August 8, 2011 *** [and] [a]ll other relief this court deems just and reasonable." (Emphasis added.) Contursi specifically requests in his section 2-1401 petition—at least three times within the pleading—that the court vacate the judgment of foreclosure and sale. Nowhere in the section 2-1401 petition does Contursi assert that the relief he requests is to vacate the personal deficiency judgment or to *limit* his relief to such vacatur, nor does he purport to claim any interest in the proceeds of the sale. In fact, the first time he indicated that he was seeking

only to vacate the personal deficiency judgment was in his motion to reconsider, in tandem with his effort to distinguish *Prabhakaran*.

¶ 30 Second, even if we were to accept Contursi's assertion that the relief he seeks is somehow qualitatively different from a vacatur of the judgment of foreclosure or the order confirming the sale, we still find that section 15-1509(c) applies to bar his request for relief from the personal deficiency judgment alone. Section 15-1509(c) provides a complete bar as to *all* claims, except for claims related to the proceeds of the sale pursuant to section 2-1301(g) of the Code of Civil Procedure, once title has vested with the purchaser of the property subject to foreclosure. 735 ILCS 5/15-1509(c) (West 2012); 735 ILCS 5/2-1301(g) (West 2008). The statute does not distinguish between parts or portions of the relief awarded in a foreclosure case. For instance, it is irrelevant whether a party in a foreclosure suit who seeks to vacate only the accrued interest or the attorneys fees related to a judgment of foreclosure, or the amount of the successful bid at the judicial sale, or the sales officer commission or fees from the sale. Furthermore, Contursi has no relief under the only exception contained in section 15-1509(c), regarding potentially exempt claims related to the proceeds of the sale, because a petitioner seeking relief under section 2-1301(g) of the Code must bring his or her petition for relief "90 days after notice in writing given him or her of the judgment, or within 1 year after the judgment, if no notice has been given." (Emphasis added.) 735 ILCS 5/2-1301(g) (West 2008). Contursi did not bring a petition for relief pursuant to section 2-1301, nor did he bring his petition within 90 days after he had written notice of the judgment, in this case the order confirming the sale.

¶ 31 Third, we find the cases cited by Contursi as support for his argument inapposite and distinguishable. In support of his argument that section 2-1401 relief may be granted after the confirmation of a sale in a foreclosure proceeding, Contursi cites to *BAC Home Loans Servicing*,

LP v. Mitchell, 2013 IL App (1st) 121713, *MB Fin. Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, *CitiMortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107, and *Mass Realty LLC v. Five Mile Capital SPE A LLC*, 2014 IL App (1st) 133871-U. As a preliminary matter, we strongly caution *both* parties in this appeal to refrain from citing unpublished decisions in their briefs absent specific circumstances permitted under Supreme Court Rule 23(e)(1) (eff. July 11, 2013). That matter aside, we find that the foregoing cases present situations entirely distinguishable from that presented here. Both *BAC Home Loans Servicing, LP v. Mitchell* and *MB Fin. Bank, N.A. v. Ted & Paul* involve the petitioners' respective challenges to the court's jurisdiction over the parties, which may be asserted at any time under section 2-1401. *CitiMortgage, Inc. v. Sharlow* involves a challenge to the court's disposition of the proceeds from the sale, which is specifically permitted under section 15-1509(c).⁴ Lastly, we give no consideration to *Mass Realty LLC v. Five Mile Capital SPE A LLC*, for the reason already explained.

¶ 32 We find that the challenge asserted by Contursi in his section 2-1401 petition does not involve an alleged lack of jurisdiction or other grounds for concluding that the court entered a void judgment. Furthermore, for the reasons discussed, he does not satisfy section 2-1301(g) for purposes of a challenge to the proceeds of the sale. Therefore, section 15-1509(c) applies to bar his claim. Our resolution of the question concerning the propriety of the denial of Contursi's motion to reconsider is based on the same analysis. We find no error in the court's order denying

⁴ While we distinguish the *Sharlow* decision, we note that the case involve a defendant who brought a section 2-1401 petition, as opposed to a 2-1301 petition, more than one year after the entry of the final judgment. Our reference to *Sharlow* should not be construed as an agreement with the analysis in *Sharlow* regarding the applicability of the exclusion in section 15-1509(c) for claims brought under section 2-1401, as opposed to section 2-1301(g), for the proceeds of a sale.

his section 2-1401 petition for relief from the judgment of foreclosure and sale or the court's order denying his motion to reconsider.

¶ 33 Having determined that *Prabhakaran* is applicable to this case and that Contursi is barred by section 15-1509(c) from presenting his section 2-1401 petition to vacate the judgment of foreclosure and sale as a matter of law, we need not reach the merits of whether Contursi's petition satisfies the requirements concerning a meritorious defense and due diligence.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.