

No. 1-14-2110

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

| | | |
|--|---|--------------------|
| WEST SUBURBAN BANK, |) | |
| |) | |
| Plaintiff-Appellant, |) | Appeal from the |
| |) | Circuit Court of |
| v. |) | Cook County. |
| |) | |
| ADVANTAGE FINANCIAL PARTNERS, LLC, |) | No. 08 CH 46485 |
| |) | |
| Defendant-Appellee, |) | Honorable |
| |) | Michael T. Mullen, |
| (Unknown Owners and Nonrecord Claimants, |) | Judge Presiding |
| Defendants.) |) | |

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in denying *nunc pro tunc* order to correct order confirming judicial sale of property, which listed incorrect sales price.

¶ 2 In this case, we must decide whether the trial court possessed jurisdiction to correct its order confirming a judicial sale of a property, which, according to plaintiff West Suburban Bank, reflected an incorrect sales price for the property. Plaintiff asked the trial court to correct this error more than three years after the trial court had confirmed the sale. Plaintiff alleged that the sheriff of Cook County had prepared several documents and erroneously listed the high bid at the auction to be \$5 million when, according to plaintiff, it submitted a high bid of only \$125,000.

¶ 3 Plaintiff concedes that it sought to amend the sales price long after the time for filing a postjudgment motion. But, plaintiff argues, the trial court retained the inherent authority to correct the sheriff's documents to properly reflect the judgment. Defendant Advantage Financial Partners, LLC, argues that, because 30 days had passed from final judgment, plaintiff could only seek relief via a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). And, defendant notes, plaintiff filed its motion more than two years after final judgment had been entered, making its section 2-1401 petition untimely.

¶ 4 We agree with plaintiff that the trial court possessed authority to issue a *nunc pro tunc* order at any time, and that *nunc pro tunc* orders may be used to correct ministerial or clerical errors. But we do not agree that a *nunc pro tunc* order was justified here because the record lacked sufficiently clear and definite evidence that the sales price was incorrect. We affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 In 2005, plaintiff extended a \$10 million line of credit to defendant. Defendant provided a mortgage to plaintiff on a property located at 550 North Quentin Road in Palatine, Illinois. According to plaintiff, this property, along with 24 other properties, served as security for the line of credit.

¶ 7 In December 2008, plaintiff filed a complaint in the circuit court of Cook County seeking to foreclose on the mortgage for the property. Plaintiff alleged that defendant was in default and owed plaintiff \$6,079,930.06 under the loan.

¶ 8 After defendant failed to appear to oppose the complaint, the trial court entered an order finding defendant in default. The same day, the trial court entered a judgment of foreclosure, finding the total amount due to plaintiff to be \$5,756,874.26 and ordering the property to be sold.

¶ 9 Plaintiff filed a motion asking the trial court to confirm the sale of the property. The motion said that the sheriff of Cook County conducted the sale on September 2, 2009 and that plaintiff was the successful bidder. Plaintiff sought "a deficiency [j]udgment for the sum of \$145,000.00 which equals the amount of its advance under the mortgage (\$270,000.00) minus the amount realized from the sale (\$125,000.00)." But, according to the sheriff's certificate of sale that plaintiff attached to its motion, the sheriff sold the property to plaintiff for \$5 million.

¶ 10 For reasons unclear from the record, plaintiff filed an amended motion to confirm the sale on November 9, 2009, which said that the sheriff's sale had occurred on September 17, 2009. The motion also said that the judgment of foreclosure "was \$5,936,632.02 as Defendant[] had executed *one* note which [it] secured by *multiple* parcels are [sic] real property." (Emphases in original.) Plaintiff again sought a deficiency judgment of \$145,000, reflecting the difference between the \$270,000 advanced under the mortgage and "the amount realized from the Sale (\$125,000)."

¶ 11 Plaintiff attached the sheriff's receipt from the sale and the sheriff's report of sale and distribution. Like the certificate of sale, both documents indicated that plaintiff offered the high bid of \$5 million. The report of sale calculated that defendant owed plaintiff a total of \$5,936,632.02, including interest, attorney fees, publication costs, and the sheriff's fees. The report of sale noted that, after taking into account the \$5 million sales price, plaintiff was entitled to a deficiency of \$936,623.02.

¶ 12 On November 24, 2009, the trial court entered an order approving the sheriff's report of sale and awarding plaintiff possession of the property. The order stated, "The Sheriff's report of Sale and Distribution is approved and the sale is confirmed. The distribution of proceeds as outlined in the Sheriff's Report of Sale and Distribution is approved and confirmed." The order further said that plaintiff was "entitled to a deficiency judgment, in rem only, in the amount of \$936,632.02."

¶ 13 Over three years later, on April 15, 2013, plaintiff filed a motion asking the trial court to direct the sheriff "to correct the Sheriff's Report of Sale and Distribution, Certificate of Sale and Receipt Upon Sale to reflect the actual sale price of \$125,000.00." Plaintiff also asked the trial court to amend its order confirming the sheriff's report of sale to reflect the correct sales price. Plaintiff argued that the \$5 million sales price listed by the sheriff was incorrect and that plaintiff's attorneys had "failed to notice the error contained in the Sheriff's documents." Plaintiff said that "[t]he judicial sale was proper in all respects except the scrivener's error contained in the Sheriff's documents." Plaintiff attached an affidavit from its attorney stating that she attended the judicial sale "[o]n September 17, 2009" and that plaintiff purchased the property for \$125,000.

¶ 14 A few weeks later, plaintiff filed a second motion asking the trial court to compel the sheriff to correct the documents. This motion was identical to the first motion, but included a February 11, 2009 appraisal for the property stating that it was a single-family ranch home with an estimated market value of \$145,000.

¶ 15 Plaintiff filed a third motion seeking to amend the sale price on March 26, 2014. This motion contained additional information surrounding the other parcels that had secured plaintiff's loan to defendant. According to plaintiff, defendants sought to vacate the judgments of

foreclosure relating to the other 24 properties in the circuit court of DuPage County, and that this case was "the only one of the 25 cases" where defendant did not seek to vacate the judgment. Plaintiff alleged that, in the DuPage County proceedings, defendant tried to use the erroneous \$5 million sales price as a basis "for its Motion for Satisfaction of Judgment seeking an alleged 'surplus.' " In other words, plaintiff argued, defendant attempted to argue that the \$5 million sales price proved that defendant had satisfied more of the debt than it actually had and, consequently, that defendant was due a refund. Plaintiff called upon the trial court's equitable jurisdiction "to correct the mistake of a county ministerial officer."

¶ 16 Plaintiff's third motion included a copy of one of defendant's motions in the DuPage County case, which listed the sale price of the property at issue in this case as \$5 million. Using that figure, defendant argued that plaintiff had "sold properties well in excess of the balance of the Note and judgment" and that "the judgment has been paid in full."

¶ 17 Plaintiff's third motion also included a transcript of a hearing on defendant's DuPage County motion, where the trial court noted that defendant claimed that the judgment had been satisfied, and that "the only way that contention would be correct would be if in fact there was a \$5 million bid on this one residential property ***." The court declined to take judicial notice of the \$5 million sales prices, stating, "[T]here's significant other evidence as to the value of that property, as to what the actual bid was." The court ruled that defendant did not make "a sufficient showing *** that the judgment has been satisfied. The preponderance of the evidence is such that the judgments have not been satisfied." The court also noted that the error regarding the sales price would likely be corrected by the circuit court of Cook County.

¶ 18 In response to plaintiff's motions in this action, defendant argued that plaintiff's motions, which defendant characterized as petitions for relief from judgment pursuant to section 2-1401 of

the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), were untimely and that section 15-1509 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509 (West 2012)) barred plaintiff's motions. Defendant also argued that the allegedly erroneous documents had been prepared by plaintiff, not the sheriff, and that all of the documents in the record consistently showed "that [\$5 million] was the bid" at the judicial sale.

¶ 19 The trial court denied plaintiff's request to amend the documents in a written order. The trial court found that it lacked jurisdiction to grant plaintiff's motion. The court found that, because plaintiff did not seek to amend the confirmation order within 30 days, "the only avenue left for [plaintiff] to seek an amendment of the *** order was a [section 2-1401] Petition ***." But, the court noted, plaintiff had not filed its motions within two years of the judgment as required by section 2-1401. The court said that, at the oral argument on the motion—which we do not have a transcript of—plaintiff's counsel said that the court could correct the order pursuant to its "inherent equitable powers," which the court could exercise at any time. The court rejected the notion that it possessed such authority.

¶ 20 The court also found that plaintiff had acted negligently in failing to do anything about the incorrect documents. The court noted that each of the documents that plaintiff sought to amend—the certificate of sale, receipt of sale, and report of sale—clearly listed the winning bid as \$5 million. The court found it "difficult to understand why it took [plaintiff] over three years to discover this significant discrepancy." The court found that plaintiff had "obviously failed to thoroughly review (if at all) the documents" and that, had plaintiff reviewed them, "the mistake could have been easily remedied at that time." The court also noted that plaintiff had 30 days following confirmation of the sale to discover the error, and another two years after that to file a section 2-1401 petition. Thus, the court stated that, even if it did have the equitable power to

amend the documents, "it would not do so in light of [plaintiff's] conduct, the passage of time, and the potential remedy that [plaintiff] may have available to make it whole." Plaintiff appeals.

¶ 21

II. ANALYSIS

¶ 22 At the outset, we must resolve the parties' conflict regarding how we should characterize plaintiff's motion. Defendant claims that plaintiff's motion should be characterized as a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) because, once 30 days have elapsed following a final judgment, a party may only seek relief pursuant to section 2-1401. Defendant further argues that plaintiff's section 2-1401 petition was untimely because it was filed more than two years after final judgment and did not raise a challenge to the trial court's jurisdiction in issuing the final order. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103-04 (2002) (section 2-1401 petitions must be filed within two years of final judgment unless they allege that judgment is void for lack of jurisdiction).

¶ 23 Plaintiff maintains that it did not file its petition pursuant to section 2-1401. Instead, plaintiff contends that it asked the court to invoke its "inherent jurisdiction to correct and amend errors of record."

¶ 24 We reject defendant's claim that plaintiff could only seek relief via a section 2-1401 motion. Section 2-1401 is not the only avenue to seek relief from a final judgment once 30 days have elapsed. *First Bank of Oak Park v. Rezek*, 179 Ill. App. 3d 956, 958 (1989). One of these avenues is to seek a *nunc pro tunc* order (*id.*), which is an exercise of a trial court's "inherent power" to correct the clerk's records so that they reflect the actual judgment rendered by the court. *In re Young's Estate*, 414 Ill. 525, 534 (1953); see also *Roach v. Coastal Gas Station*, 363 Ill. App. 3d 674, 678 (2006) ("A trial court has the inherent authority to enter a *nunc pro tunc*

order to correct clerical errors or matters of form in a prior order or other written record of judgment to ensure that the record conforms to the judgment actually rendered by the court."). A *nunc pro tunc* order may be entered at any time. *Beck v. Stepp*, 144 Ill. 2d 232, 238 (1991), *overruled on other grounds by Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24, 30-33 (2002); *Rezek*, 179 Ill. App. 3d at 959.

¶ 25 Here, plaintiff sought relief that was not available under section 2-1401. It called on the trial court to exercise its "inherent jurisdiction" to correct what plaintiff characterized as a clerical error in the sheriff's documents. Plaintiff did not ask the trial court to vacate the order or seek other relief that would have been appropriate under a section 2-1401 petition. In substance, plaintiff sought a *nunc pro tunc* order, and it should be characterized as such. See *Sarkissian*, 201 Ill. 2d at 102 (character of pleading should be determined by contents, not label). Because a party may seek a *nunc pro tunc* order at any time, the trial court may have had the authority to correct the record via a *nunc pro tunc* order, despite the fact that plaintiff filed its motion more than three years after final judgment had been entered.

¶ 26 But whether the trial court should have exercised that authority is a separate question. "*Nunc pro tunc* literally means, 'now for then.' " *Gagliano v. 714 Sheridan Venture*, 144 Ill. App. 3d 854, 856 (1986). The purpose of such an order is to make the record " 'speak now for what was actually done then.' " *Id.* (quoting *Kooyenga v. Hertz Equipment Rentals, Inc.*, 79 Ill. App. 3d 1051, 1055 (1979)). The trial court's authority to issue a *nunc pro tunc* order comes from two sources: the court's authority "to do justice to every suitor," and the court's power to control its own records and ensure that they reflect the truth. *Kooyenga*, 79 Ill. App. 3d at 1056; see also *Knefel v. People*, 187 Ill. 212, 215 (1900).

¶ 27 Because the purpose of such an order is simply to clarify and enforce an order already given, a *nunc pro tunc* order should be used only to correct the record of judgment to conform with the judgment in fact rendered by the court, not to change the court's actual judgment. *Beck*, 144 Ill. 2d at 238; *Rezek*, 179 Ill. App. 3d at 959. A *nunc pro tunc* order should not be used to correct judicial errors under the pretense of correcting clerical errors, or to cure jurisdictional defects. *Beck*, 144 Ill. 2d at 238. A *nunc pro tunc* order can only be based on definite and precise evidence in the record, not anyone's memory (including the trial judge's), or a party's postjudgment affidavits or testimony. *Id.* at 239; *Kingbrook*, 202 Ill. 2d at 32 n.3.

¶ 28 Plaintiff's main evidence supporting the issuance of a *nunc pro tunc* order was its attorney's affidavit saying that the property sold for \$125,000 and the appraisal valuing the property at \$145,000. But these are precisely the types of evidence that the trial court may *not* consider when issuing a *nunc pro tunc* order, as both rely on information existing outside of the record. Thus, the trial court did not err in refusing to amend the confirmation order based on that evidence.

¶ 29 Nor do we see any additional evidence in the record on which the trial court could base a *nunc pro tunc* order. The sheriff's receipt of sale, certificate of sale, and report of sale all list the sale price as \$5 million. The confirmation order entered by the trial court in 2009 affirmed the sheriff's documents without making any changes. While plaintiff said that the sale price was \$125,000 in its motion seeking confirmation of the sheriff's report of sale, that motion conflicted with the sheriff's assertion that the sales price was \$5 million. Notably, the order confirming the sale stated that it confirmed the sheriff's report, which of course contained the \$5 million sales price. Plaintiff has supplied no transcripts of the initial foreclosure proceedings to indicate that the sales price was \$125,000. There is simply nothing conclusive in the record—other than

plaintiff's postjudgment affidavit and the appraisal, which was not before the court at the time it confirmed the sheriff's report of sale—to show that the \$5 million sales price was incorrect. Granting the *nunc pro tunc* order sought by plaintiff's would not "make the record 'speak now for what was actually done then' " (*Gagliano*, 144 Ill. App. 3d at 856 (quoting *Kooyenga*, 79 Ill. App. 3d at 1055 (1979))), but instead would make the record *change* what was done then.

¶ 30 Other cases considering the propriety of *nunc pro tunc* orders support our conclusion. In *Rezek*, the trial court granted the plaintiff's request to amend a judgment of foreclosure *nunc pro tunc*. *Rezek*, 179 Ill. App. 3d at 957. The trial court deleted two parcels listed in the judgment because the plaintiff had previously dismissed its foreclosure suit relating to those parcels, and the court also corrected typographical errors in the legal descriptions for the parcels. *Id.* This court held that the trial court properly entered the *nunc pro tunc* order because correcting the judgment of foreclosure "did not involve the consideration of any facts not of record[,] nor did it involve correction of a judicial error." *Id.* at 960. Rather, the trial court simply "amended the written judgment to conform with the judgment in fact rendered by the court." *Id.*

¶ 31 In *Gagliano*, 144 Ill. App. 3d at 856, the trial court entered a *nunc pro tunc* order to clarify that, when it awarded the two plaintiffs (*Gagliano* and *Rees*) summary judgment, each plaintiff was entitled to receive an individual judgment of \$70,400. This court upheld the *nunc pro tunc* order, noting that the trial court's award of summary judgment said that the plaintiffs should be awarded " 'in an amount of \$70,400.00 for both *Gagliano* and *Rees*, individually.' " *Id.* at 858. The clear language of this order—along with the transcripts of the summary judgment hearing—showed that, when the court awarded the plaintiffs summary judgment, it intended for each of them to receive \$70,400. *Id.* Thus, the *nunc pro tunc* did not alter the trial court's

judgment in any way but merely corrected it to reflect what the trial judge had originally, in fact, done—awarded \$70,400 to each plaintiff, not to the two of them collectively.

¶ 32 By contrast, *Beck*, 144 Ill. 2d at 238-39, offers an example of when a *nunc pro tunc* order is inappropriate. In *Beck*, the trial court entered an order granting the defendant's motion for summary judgment. *Id.* at 236. A few days later, the plaintiff, by letter, drew the court's attention to the order, indicating that the plaintiff thought the court had *denied* the motion for summary judgment. *Id.* Ultimately, the trial court entered an order purportedly amending the order *nunc pro tunc*, ruling this time that the defendant's motion for summary judgment was denied. *Id.* at 237. The supreme court held that the trial court erred in issuing the *nunc pro tunc* order, because nothing in the record showed that the initial judgment was incorrect. *Id.* at 238-39. To the contrary, the three orders entered on the date of the initial judgment showed that the trial court had granted the summary judgment motion. *Id.* at 238. The court noted that *nunc pro tunc* orders must be based on "definite and certain evidence in the record" and "without reliance upon the memory or the judge or any other person," and that they "cannot be based on *ex parte* affidavits or testimony." *Id.* at 239.¹

¹ As we recognized in our previous full citation of the case, *Beck* was overruled in part on other grounds by *Kingbrook*, 202 Ill. 2d 24. The issue on which the supreme court in *Kingbrook* departed from its previous decision in *Beck* was the degree of specificity required for a post-trial motion. See *id.* at 29-33. Yet *Kingbrook*, in a footnote, cited *Beck* favorably for its discussion of *nunc pro tunc* orders and *Beck*'s holding that the *nunc pro tunc* order there should have been denied "because of a lack of record evidence showing that the initial order was a mistake." *Id.* at 32 n.3. *Kingbrook* reiterated that "*nunc pro tunc* orders cannot be entered unless they are 'based upon definite and precise evidence *in the record*,' and their accuracy cannot rest 'upon the memory of the judge or any other person.' " (Emphasis in original). *Id.* (quoting *Beck*, 144 Ill. 2d at 239). *Beck* thus remains unquestionably good law on the proposition for which we cite it.

¶ 33 Here, there is no evidence in the record similar to *Rezek* or *Gagliano* which would assure the trial court that the \$5 million sales price was incorrect. Like *Beck*, the record in this case is devoid of evidence—other than the evidence supplied by plaintiff after the fact—that the \$5 million sales price was incorrect. Instead, the sheriff's documents all listed the sales price as \$5 million, the report of sale calculated the deficiency based upon a \$5-million sales price, the trial court confirmed the report of sale, and the trial court awarded plaintiff the same deficiency as the one listed in the report of sale. In sum, the trial court lacked any definite and certain evidence as to which price correctly reflected the sales price of the property. We recognize that, given the valuation of the property in the appraisal submitted by plaintiff, the \$5 million sales price likely was incorrect, but we cannot say that the trial court erred in not awarding plaintiff a *nunc pro tunc* order in the absence of *definitive record evidence* that its confirmation order was incorrect.

¶ 34 Plaintiff cites *Davis v. Stramaglio*, 209 Ill. App. 3d 611 (1991), to support its claim that the trial court should have corrected the sheriff's documents in this case. In *Davis*, the city of Chicago filed suit to foreclose a lien against lots 27 and 28 of a subdivision. The trial court entered judgment in the city's favor and ordered that the property be sold at a judicial sale. *Id.* at 612. The sheriff did so, and an order confirming the sheriff's report was entered. *Id.* at 612-13. But when the sheriff issued the deed to the city, the property was erroneously described as lots 27 and 26, not lots 27 and 28. *Id.* at 613. Eleven years later, the city filed a section 2-1401 petition, asking the trial court to vacate the sale and direct the sheriff to conduct a new sale. *Id.* The trial court granted the city's request. *Id.*

¶ 35 We recognized that the city could not file a section 2-1401 petition 11 years after the judgment had been entered but nevertheless affirmed the trial court's decision to order that a new deed be issued. *Id.* at 614-15. We so held because the trial court retained authority to enforce its

own orders. *Id.* at 615. Because the trial court's order directed the sheriff to sell lots 27 and 28, not lots 26 and 27, the trial court could compel the sheriff to issue a new deed in compliance with its original orders. *Id.* at 615.

¶ 36 *Davis* differs from this case because there, the trial court merely relied on its inherent authority to enforce its previous orders. The trial court's subsequent order did not change its initial orders in any way. There was nothing wrong with the court's original orders. It was the sheriff's mistake on the deed, which clearly contradicted the trial court's orders, that created the problem. As we noted, it was "abundantly clear" that the subsequent order "merely *enforced* the court's prior judgments." (Emphasis added.) *Id.* Here, in stark contrast, plaintiff did not ask the trial court to *enforce* its confirmation order but rather to substantively alter it. Further, as we highlighted above, there is no evidence that the sheriff failed to carry out the trial court's directions during the judicial sale. Nor is there evidence—other than plaintiff's counsel's affidavit and the appraisal of the property—that the sheriff listed an incorrect bid. *Davis* does not persuade us that a *nunc pro tunc* order would be appropriate in this case.

¶ 37 Plaintiff also appeals to equity, noting that defendant has sought a refund from plaintiff in the circuit court of DuPage County based on the erroneous \$5 million sales price. Plaintiff argues that, unless we direct the trial court to correct the confirmation order, defendant could improperly obtain a surplus by relying on the incorrect price. Initially, we note that fairness alone is insufficient to confer jurisdiction on the trial court. While equity may provide a reason to relax the due-diligence requirement of section 2-1401 (*Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51), plaintiff has steadfastly maintained that it did not seek relief under section 2-1401 and, in any event, the circumstances of this case would not excuse plaintiff's failure to file a section 2-1401 petition within two years. See 735 ILCS 5/2-

1401(c) (West 2012) (requiring petition to be filed within two years, excluding only period where party "is under legal disability or duress or the ground for relief is fraudulently concealed"); *People v. Baskin*, 213 Ill. App. 3d 477, 485 (1991) ("Fraudulent concealment under section 2-1401(c) *** contemplates affirmative actions by one's opponent or by the court, not one's own attorney.").

¶ 38 Finally, we note that plaintiff's concern appears to be premature. Defendant failed to persuade the circuit court of DuPage County that it was entitled to a surplus. The DuPage County court clearly saw through defendant's attempt to use the incorrect sales price to its advantage. And we see no reason why plaintiff cannot continue to use its persuasive evidence of the property's actual sales price and fair market value to counter defendant's future attempts to reap a windfall. In any event, in the case before us, the trial court had no authority to issue the *nunc pro tunc* order requested by plaintiff, and we affirm the trial court's judgment.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's decision to deny a *nunc pro tunc* order. The record lacked sufficiently certain and definite evidence to change the order confirming the sheriff's report of sale.

¶ 41 Affirmed.