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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ONEWEST BANK, FSB,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	
v.)	No. 09-CH-2497
)	
ANTHONY J. WOS, KRISTIN M. WOS,)	
MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS, INC., and)	
ONEWEST BANK, FSB,)	Honorable
)	Suzanne C. Mangiamele,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Without an official account of the relevant hearings, we could not say that the trial court abused its discretion in denying plaintiff's motion for leave to amend its section 2-1401 petition; in any event, the proposed amendment did not allege diligence in the original action and thus would not have cured the defective pleading.

¶ 2 Plaintiff, Onewest Bank, FSB, appeals the trial court's order denying its motion for leave to amend its petition pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). Plaintiff contends that the court abused its discretion because the

proposed amendment would have cured the defects in the original petition and was otherwise proper. We affirm.

¶ 3 Plaintiff originally sued to foreclose a mortgage on a property in McHenry. On July 26, 2011, the trial court approved the sale of the property to plaintiff.

¶ 4 On May 31, 2013, plaintiff petitioned to vacate the order approving the sale. In July 2013, plaintiff, represented by new attorneys, sought leave to file an amended petition. This motion acknowledged that its original petition did not include the allegations necessary for a proper section 2-1401 petition, and it attached a proposed amended petition.

¶ 5 The proposed amended petition alleged as follows. The court confirmed the sale of the property on July 26, 2011. On October 31, 2011, BMO Harris Bank, NA (Harris) filed a complaint to foreclose a mortgage on the same property. Harris did not notify plaintiff of this proceeding, and plaintiff did not learn of it until about May 2013. Had plaintiff known of another mortgage against the same property, it would have named Harris or its predecessor in interest as a defendant in the foreclosure action. Plaintiff further alleged, on information and belief, that a portion of the funds loaned to the borrowers, Anthony and Kristin Wos, was used to satisfy the debt owed to Harris or its predecessor, giving plaintiff a priority position over Harris for at least a portion of the amount due plaintiff.

¶ 6 Harris sought leave to intervene and opposed plaintiff's motion. Following a hearing, the trial court denied plaintiff's motion for leave to amend and denied Harris leave to intervene. On May 28, 2013, the trial court denied plaintiff's petition to vacate, and plaintiff timely appeals.

¶ 7 Plaintiff contends that the trial court abused its discretion by denying its motion to amend the petition. Plaintiff concedes that, because it was filed more than 30 days after the final judgment, the petition had to be filed under section 2-1401, but that the bare-bones pleading,

filed by its former attorneys, did not allege any of the elements required for a petition under that section. It contends, however, that its proposed amended pleading fulfilled these requirements. Further, because the petition was filed at the first opportunity to do so, and because no one would have been prejudiced by its filing, the trial court should have allowed it.

¶ 8 We first note a couple of preliminary points. First, no one has filed an appellee's brief. However, because the issue is relatively straightforward, we may resolve the issue on the merits without one. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 9 Second, the record on appeal consists of only the common-law record. We do not have transcripts or substitutes of the relevant hearings. The appellant must present a sufficiently complete record of the proceedings at trial to support its claimed error and, in the absence of such a record, we presume that the trial court's order conformed with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Where, as here, the trial court's ruling was discretionary (*Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)), we cannot review the ruling without the benefit of its reasoning.

¶ 10 In any event, the record as it stands supports the ruling. The Code provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms." 735 ILCS 5/2-616(a) (West 2012). We see no reason why a section 2-1401 petition should not be subject to section 2-616(a). See *Romo v. Allin Express Service, Inc.*, 219 Ill. App. 3d 418, 419 (1991) (trial court had authority to grant leave to amend section 2-1401 petition); *In re Marriage of Klebs*, 196 Ill. App. 3d 477, 479 (1990) (section 2-1401 petition is treated like any civil complaint). In deciding whether the trial court properly denied leave to amend, we consider whether (1) the proposed amendment would cure the defective pleading; (2) other parties would

be prejudiced or surprised by the proposed amendment; (3) the proposed amendment was timely; and (4) the plaintiff had previous opportunities to amend the pleading. *Loyola Academy*, 146 Ill. 2d at 273.

¶ 11 Plaintiff sought leave to amend its section 2-1401 petition. That section provides a means to obtain relief from a final judgment more than 30 days after its entry. To obtain relief under section 2-1401 against a judgment, a petitioner must plead and prove: (1) the existence of a meritorious claim; (2) due diligence in presenting the defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition itself. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003).

¶ 12 Plaintiff contends that its proposed amended petition alleged these elements. We disagree. Regardless of whether it adequately alleged the other elements, the proposed amendment failed properly to allege that plaintiff was diligent in presenting its claim to the trial court. On appeal, plaintiff argues that it was diligent in prosecuting the foreclosure action, but it says nothing about its diligence in pursuing its claim for priority against Harris. Indeed, plaintiff's allegations make clear that it was not even aware that Harris continued to claim a mortgage lien on the property until Harris filed its own foreclosure action nearly two years after the sale at issue here. Plaintiff does not argue that Harris's interest did not appear in the chain of title or was otherwise concealed. Thus, plaintiff's failure to discover Harris's prior mortgage and to seek to adjudicate its priority in the original foreclosure action cannot be considered diligence. See *In re Marriage of Himmel*, 285 Ill.App.3d 145, 148 (1996) (a proceeding under section 2-1401 is not intended to give the party a new opportunity to do that which should have been done in an earlier proceeding or to relieve the party of the consequences of his mistake or negligence).

¶ 13 Because this omission is fatal to plaintiff's claim, we need not consider whether it alleged the other elements necessary for section 2-1401 relief or whether the proposed amendment was otherwise proper.

¶ 14 The judgment of the circuit court of McHenry County is affirmed.

¶ 15 Affirmed.