

2016 IL App (1st) 150265-U

FIRST DIVISION
MARCH 14, 2016

Nos. 1-15-0265 and 1-15-0564

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

KATE PAPADOPOULOS ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 14 M1 717756
BRANISLAV PETROVIC and UNKNOWN)	
OCCUPANTS,)	
)	Honorable
Defendant-Appellant.)	Cynthia Y. Cobbs and
)	Eve M. Reilly,
(Natalija Petrovic, Proposed Intervening Defendant-Appellant).)	Judges Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Circuit court properly denied defendant's section 2-1401 petition to vacate an order for possession of property, and properly denied proposed intervenor's motion to join the section 2-1401 petition, where the record on appeal was insufficient to support a claim of error, and the section 2-1401 petition failed to set forth any factual allegations of due diligence.
- ¶ 2 Defendant Branislav Petrovic (Branislav) appeals from the January 26, 2015 order entered by the circuit court of Cook County, which denied his section 2-1401 petition to vacate

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(section 2-1401 petition) (735 ILCS 5/2-1401 (West 2014)) the circuit court's October 1, 2014 order granting possession of a residential property to plaintiff Kate Papadopoulos (Kate), in an eviction action. Proposed intervening defendant Natalija Petrovic (Natalija) also appeals from this court's January 26, 2015 order denying her emergency motion to intervene and join Branislav's section 2-1401 petition. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 In 2011, a mortgage foreclosure action (case No. 11 CH 19907) commenced against Branislav as the owner of the mortgaged real estate located at 4827 North Winchester Avenue, Chicago, Illinois (the property). On January 10, 2014, a judicial sale deed conveying title to the property was granted to Astoria Federal Savings and Loan Association (Astoria Federal), as the highest bidder in the judicial sale of the property. Thereafter, the judicial sale was approved by the court and the mortgage foreclosure proceedings terminated. Branislav did not surrender possession of the property and continued residing in Unit 1 (the first floor unit) of the property.

¶ 5 On June 25, 2014, Astoria Federal sold the property to Kate, George Papadopoulos (George), and Konstantinos Papadopoulos (Konstantinos), and conveyed title to them by a special warranty deed, which was recorded on September 12, 2014.

¶ 6 On July 29, 2014, as verified by the affidavit of a special process server, V. Lawson (Lawson) of Midwest Investigations, Inc., Lawson served notice on Branislav and "unknown occupants" by leaving a copy of a demand for possession with "John Doe" at the property. The demand for possession asked that Branislav and all unknown occupants immediately vacate and surrender possession of the premises. However, Branislav continued to remain on the premises.

¶ 7 On August 7, 2014, Kate, as bona fide purchaser of the property, filed the instant forcible entry and detainer action to evict Branislav and all "unknown occupants," claiming that Branislav, as former mortgagor of the property, wrongfully withheld possession from Kate as the owner of the property. On August 12, 2014, the summons and complaint were served by substitute service on Natalija, who is Branislav's grandmother, at the property.

¶ 8 On September 10, 2014, Branislav filed a *pro se* response to the complaint, claiming that he was never properly served with the "pre-suit" notice or summons and complaint, and setting forth several affirmative defenses—including that Kate lacked standing to bring the action; that she was not the real party in interest who was ultimately entitled to possession; that she was not a good-faith third-party purchaser of the property; that he was not the "former mortgagor" of the property; that the complaint failed to state a claim upon which relief can be granted; and that the action was barred by judicial estoppel. On September 22, 2014, Branislav filed a supplemental response to the complaint, which added an affirmative defense claiming that the circuit court lacked jurisdiction over the action and was not the proper venue for resolving "disputed title" to the property. Thereafter, the parties engaged in discovery. Documents that Branislav acknowledges receiving from Kate during discovery included the January 10, 2014 judicial sale deed; the notice of judicial sale; and a title insurance company's owner's policy for the property.

¶ 9 On October 1, 2014, counsel for Natalija, who was not named as a party in the action, made an oral motion to intervene, which was denied without prejudice by the circuit court on that same day. On October 1, 2014, following a pretrial conference, the circuit court¹ entered an order of possession in favor of Kate, thus, entitling her to the possession of the premises.

¹ Presided over by Judge Cynthia Y. Cobbs.

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Enforcement of the order of possession was stayed until January 5, 2015. On November 25, 2014, the circuit court granted Kate's motion to extend enforcement of the order of possession to March 25, 2015.

¶ 10 On January 20, 2015, Branislav filed a *pro se* section 2-1401 petition to vacate the court's October 1, 2014 order of possession, arguing that the order was void since the court lacked jurisdiction to enter it because the notice of demand for possession, which was served by Lawson on July 29, 2014, was improper under the statutory requirements governing foreclosed property. Thus, he argued, the instant eviction action was prematurely filed and the circuit court was without jurisdiction over the matter.

¶ 11 On January 26, 2015, Natalija filed an emergency motion to intervene and join Branislav's section 2-1401 petition (emergency motion to intervene), alleging that she lived in the first-floor unit of the property with Branislav, that the foreclosure action never terminated her interests in the property because she was never given proper notice or named in that action, and that she was a "non-record claimant" who had an equity interest in the property.

¶ 12 On January 26, 2015, the circuit court² denied both Branislav's section 2-1401 petition and Natalija's emergency motion to intervene.

¶ 13 On January 27, 2015, Branislav filed a timely notice of appeal, appealing the circuit court's January 26, 2015 ruling denying his section 2-1401 petition (case No. 1-15-0265).³ On February 25, 2015, Natalija filed a timely notice of appeal, appealing from the court's January

² Presided over by Judge Eve M. Reilly.

³ Branislav continues to be *pro se* on appeal.

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26, 2015 ruling denying her emergency motion to intervene (case No. 1-15-0564).⁴ Thus, this court has jurisdiction over this appeal. On May 7, 2015, this court consolidated the two appeals.

¶ 14

ANALYSIS

¶ 15 On appeal, we determine whether the circuit court erred in denying Branislav's section 2-1401 petition to vacate the court's October 1, 2014 order of possession, and in denying Natalija's emergency motion to intervene.

¶ 16 At the outset, we note that Kate's brief on appeal indicates that when the Cook County Sheriff attempted to enforce the court's October 1, 2014 order of possession at the property on June 15, 2015, it was discovered that the premises was vacant and it appeared that Branislav and Natalija had moved out. In Branislav's reply brief, he acknowledges that "[d]efendant(s) vacated the premises prior to the Sheriff's arrival on June 15, 2015." Because the parties represent that Branislav and Natalija had voluntarily vacated the premises following the filing of their briefs on appeal, the question of possession, which is the subject of this appeal, is no longer an issue. Additionally, Branislav failed to obtain a stay of eviction before this court. Thus, we hold that this appeal is moot. See *Wheeler v. Aetna Casualty & Surety Co.*, 57 Ill. 2d 184, 189 (1974) ("court of review will not ordinarily dispose of an appeal on its merits where the court has notice of facts that demonstrate that no actual rights or interests of the parties will be affected thereby"; finding that subsequent developments have rendered case moot).

¶ 17 Branislav argues that this appeal is not moot, claiming that the circuit court was without jurisdiction to enter the October 1, 2014 order of possession on the basis that Kate's "invalid" notice of demand for possession and special process server Lawson's "defective" affidavit could

⁴ Natalija continues to be represented by counsel on appeal.

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not have "established" the court's jurisdiction. We reject this argument as it does not explain how that affected Branislav and Natalija's decision to voluntarily vacate the property before the Cook County Sheriff attempted to enforce the court's order on June 15, 2015.

¶ 18 Mootness aside, however, we find that neither Branislav nor Natalija is entitled to the relief sought on appeal. Branislav argues that the circuit court erred in denying his section 2-1401 petition to vacate the October 1, 2014 order of possession, claiming that the order was void because the court lacked jurisdiction to enter it since the notice for the demand for possession, which was served by Lawson on July 29, 2014, was improper under the statutory requirements governing foreclosed property and the eviction action was premature. Kate counters that the circuit court properly denied Branislav's section 2-1401 petition, arguing that no statutory requirements needed to be met in order to establish the court's jurisdiction in the eviction action.

¶ 19 Section 2-1401 of the Illinois Code of Civil Procedure (Code) provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2010). A petition brought under this provision is not a continuation of the original proceeding, but a commencement of a new cause of action, subject to the rules of civil procedure, with the purpose of bringing to the attention of the circuit court facts not of record which, if known by the court at the time judgment was entered, would have prevented its rendition. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 30; *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000). A section 2-1401 petitioner bears the burden to allege and prove facts sufficient to justify relief. *In re Marriage of Buck*, 318 Ill. App. 3d at 493. To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a

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meritorious claim or defense; (2) due diligence in presenting that claim or defense in the original action; and (3) due diligence in presenting the section 2-1401 petition. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 30. A section 2-1401 petition must be filed within two years of entry of the relevant final judgment. 735 ILCS 5/2-1401(c) (West 2010). However, petitions seeking relief from judgment on voidness grounds need not be brought within the two-year period and need not allege a meritorious defense or due diligence. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002); 735 ILCS 5/1401(f) (West 2010). An order is void if it was entered by a court which lacked jurisdiction. *Sarkissian*, 201 Ill. 2d at 103. A void order may be attacked at any time, either directly or collaterally. *Id.*

¶ 20 In arguing that the October 1, 2014 order of possession was void, Branislav claims that the circuit court lacked jurisdiction to enter it by pointing to the July 29, 2014 notice of demand for possession, which he argues was "improper" because it was served "mid-term" on July 29 rather than at the end of the month on July 31, 2014. Claiming that the notice failed to satisfy "any of the legal requirements for the termination of the tenancy of an occupant and/or prior owner of a foreclosed property," Branislav cites to various statutory provisions under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2014)) and the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2014)). From there, he argues that Kate's eviction action, which was brought only 9 days after the notice was served, was "premature" and failed to establish the court's jurisdiction.

¶ 21 We find Branislav's reliance on the various statutory provisions under the Forcible Entry and Detainer Act and the Illinois Mortgage Foreclosure Law to be completely misplaced. Those provisions govern and protect tenants and lawful occupants of foreclosed landlords, of which

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Branislav is neither. The record shows that Branislav was the former mortgagor whose interest in the property terminated at the close of the foreclosure proceedings in 2014, but that instead of surrendering possession of the property, he unilaterally chose to remain on the premises without permission. Kate was not the mortgagee who foreclosed on the property, but rather a subsequent bona fide purchaser of the property whose interest in the property was conveyed by special warranty deed by former mortgagee, Astoria Federal, on June 25, 2014, which was then later recorded on September 12, 2014. Nothing establishes Branislav's right to possession of the property subsequent to the foreclosure proceedings, and he is not a lawful tenant or occupant within the meaning of the law. There had never been a landlord-tenant relationship between Branislav and Kate, nor was Branislav a lease tenant of Astoria Federal. We find that nothing in either the Forcible Entry and Detainer Act, or the Illinois Mortgage Foreclosure Law, sets forth any notice requirements for a subsequent purchaser of foreclosed property seeking to recover possession from a former mortgagor whose interests in the property have been previously terminated by foreclosure proceedings. In support of his arguments, Branislav cites *Fifth Third Mortgage Co. v. Foster*, 2013 IL App (1st) 121361, in which the reviewing court held that the circuit court lacked jurisdiction over the forcible entry and detainer action where the plaintiff, who obtained ownership rights to the property as a result of foreclosure proceedings, served notice and filed the action against lease tenant defendant prematurely prior to the expiration of defendant's lease term, in violation of section 9-102(a)(4) of the Forcible Entry and Detainer Act. *Id.* ¶¶ 2, 3, 12, 13. *Foster* is distinguishable because, unlike the *Foster* defendant, Branislav is *not* a lease tenant with legitimate rights to reside on the premises. Accordingly, we reject Branislav's arguments that he was protected by the various laws governing tenants of foreclosed

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landlords, and that the notice of demand for possession was "defective" such that the eviction action was "premature" and deprived the court of jurisdiction to enter the order of possession.

¶ 22 Because Branislav cannot establish that the October 1, 2014 order of possession was void or that the circuit court lacked jurisdiction to enter it, he must satisfy the enumerated factors under section 2-1401 of the Code. We look no further than Branislav's failure to set forth any factual allegations regarding his due diligence in presenting his claims and defenses in the original action. All of the defenses asserted by Branislav in his section 2-1401 petition could have easily been brought at the time the circuit court made the determination to enter the October 1, 2014 order of possession in favor of Kate. We note that the record before us contains no transcript of the proceedings or a bystander's report in lieu thereof under Supreme Court Rule 321(c) (eff. Feb. 1, 1994). Any doubts which may arise from the incompleteness of the record must be resolved against Branislav, as the appellant on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (absent a sufficiently complete record of the proceedings to support a claim of error on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis). Thus, we find that Branislav is not entitled to the relief requested where his section 2-1401 petition failed to demonstrate that he acted with due diligence in timely presenting his claims in the circuit court.

¶ 23 Moreover, contrary to Branislav's assertions, the circuit court was not required to conduct an evidentiary hearing in denying his section 2-1401 petition on January 26, 2015, if the petition manifestly lacks legal merit. See *People v. Vincent*, 226 Ill. 2d 1, 9 (2007) (holding that the court can dismiss a section 2-1401 petition on the pleadings alone). Branislav does not provide transcripts or a bystander's report of the hearing on the section 2-1401 petition and thus, cannot

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show that the circuit court committed any error in denying his section 2-1401 petition. See *Foutch*, 99 Ill. 2d at 391-92.

¶ 24 Likewise, we reject Natalija's arguments on appeal that the circuit court erred in denying her emergency motion to intervene and join Branislav's section 2-1401 petition, on the basis that she had an equity interest in the property as a "non-record claimant" pursuant to section 15-1210 of the Mortgage Foreclosure Law.⁵ As discussed, because no transcript of the proceedings in which the circuit court denied Branislav's section 2-1401 petition and Natalija's emergency motion to intervene was included in the record on appeal, we must presume the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Moreover, we further reject as forfeited Natalija's additional arguments that the circuit court erred in granting the October 1, 2014 order of possession on the bases that the court lacked jurisdiction and Kate attempted "to circumvent the law with respect to foreclosed properties," where she fails to cite to the record or to any legal authority and largely summarizes Branislav's arguments on appeal. See Ill. S. Ct. Rule 341(h)(7) (eff. July 1, 2008) (appellant's brief must contain contentions along with citations to the authorities and pages in the record relied upon); *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 (violations of Rule 341 can cause a party to forfeit the issue on appeal). Accordingly, we hold that the circuit court did not err in denying Branislav's section 2-1401 petition and Natalija's emergency motion to intervene.

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

¶ 26 Affirmed.

⁵ We also take judicial notice that Natalija filed a quiet title lawsuit against Kate and Astoria Federal in the circuit court (case No. 14 CH 13881), which was voluntarily dismissed by agreement on September 9, 2015.