

No. 1-15-0688

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

WELLS FARGO BANK, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 11 CH 35025
)	
ROBERT COLEMAN and HELEN COLEMAN,)	
)	Honorable
Defendants-Appellants.)	Darryl B. Simko,
)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the judgment of the circuit court of Cook County where defendants' section 2-1401 petition for relief was barred by section 15-1509(c) of the Illinois Mortgage Foreclosure Law and defendants failed to allege they exercised due diligence or have a meritorious defense.

¶ 2 Defendants Robert and Helen Coleman appeal from the circuit court of Cook County's order dismissing their petition brought pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, defendants contend that the circuit court erred in denying their section 2-1401 petition to vacate the order approving the sale and the

judgment of foreclosure. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 This matter commenced as a mortgage foreclosure action pursuant to the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1501 *et seq.* (West 2010)). Plaintiff, Wells Fargo Bank, N.A., filed a complaint on October 7, 2011, alleging defendants were in default for failure to make payments toward the mortgage on the property located at 7726 South Kingston Avenue in Chicago.

¶ 5 Defendants answered the complaint and defendant Robert Coleman filed a *pro se* appearance. Shortly thereafter, defendants' son, Jason Coleman, filed a motion to intervene, which was denied as the circuit court found he had no ownership interest in the property. After defendants filed several motions to dismiss, which were denied, the circuit court entered summary judgment in favor of plaintiff. The judgment of foreclosure was entered on September 24, 2012.

¶ 6 Thereafter, defendants twice attempted, unsuccessfully, to vacate the orders of summary judgment and judgment of foreclosure. Plaintiff moved to confirm the sale in September of 2013. The circuit court set a briefing schedule on the motion to confirm the sale. In response, defendants argued for the first time that they had not received a grace period notice and that they had applied for the federal Home Affordable Modification Program (HAMP) and, therefore, the sale should not be confirmed. In reply, plaintiff asserted defendants had been provided a copy of the grace period notice and attached the notice to its reply. In addition, plaintiff maintained defendants had failed to provide proof of their enrollment in or qualification for HAMP. On November 12, 2013, after hearing the arguments of the parties, the circuit court entered the order confirming the sale of the property. Defendants thereafter filed a notice of direct appeal. On

August 14, 2014, we issued a mandate dismissing the appeal for want of prosecution.

¶ 7 On December 16, 2014, defendants filed a *pro se* petition to vacate pursuant to section 2-1401(f) of the Code (735 ILCS 5/2-1401(f) (West 2014)). In their petition, defendants set forth one-sentence arguments that: (1) plaintiff lacked standing in the foreclosure action; (2) they were not provided a grace period notice; (3) they did not receive notice of the sale of the property; (4) they were not given the information to redeem the property; (5) plaintiff violated the terms of their "consent judgment" by not staying the sale to allow them to obtain a loan modification; (6) the documents plaintiff presented to the circuit court were "substantially different"; and (7) plaintiff did not follow the "strict statutory pleading requirements."

Defendants did not allege they were diligent in presenting their defenses or in filing the petition. Instead, they argued they did not have to assert due diligence because the underlying orders were void.

¶ 8 On February 19, 2015, the circuit court, hearing the arguments of the parties, denied defendants' petition. No reason for the denial of the petition is included in the record. This appeal followed.

¶ 9 ANALYSIS

¶ 10 The standard of review for a section 2-1401 petition depends on whether it presents a factual or legal challenge to a final judgment or order. *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. Where the petition raises a purely legal challenge to a final order, the standard of review is *de novo*. *Id.* ¶ 47. Alternatively, when the petition presents a fact-dependent challenge to a final judgment or order we review the circuit court's determination for an abuse of discretion. *Id.* ¶ 51. In that instance, the standards set forth by our supreme court in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), govern the proceeding.

Walters, 2015 IL 117783, ¶ 51. Under *Airoom*, to be entitled to relief pursuant to section 2-1401, the petitioner must set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Airoom*, 114 Ill. 2d at 220-21. The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Walters*, 2015 IL 117783, ¶ 51. The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry or to challenge a purportedly defective judgment for legal reasons. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). With this in mind, we now turn to consider the merits of the appeal.

¶ 11 Section 15-1509(c) of the Foreclosure Law

¶ 12 Plaintiff initially urges this court to affirm the circuit court's denial of defendants' section 2-1401 petition based on section 15-1509(c) of the Foreclosure Law (735 ILCS 5/15-1509(c) (West 2010)). Plaintiff acknowledges the circuit court did not deny defendants' petition on this basis, but contends that we may affirm on any basis present in the record. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18. Plaintiff maintains that defendants' section 2-1401 petition was properly denied because section 15-1509(c) of the Foreclosure Law bars all claims of parties to the foreclosure once title in a foreclosed property vests through the issuance of a deed. Plaintiff asserts the deed was issued and subsequently recorded on December 16, 2013, and therefore defendants cannot now attack the underlying foreclosure action. Plaintiff recognizes that the deed is not included in the record on appeal; however, we will take judicial notice of the deed as it is a public record and aids in the disposition of the matter. See *Village of Riverwoods v. BG Limited Partnership*, 276 Ill. App. 3d 720, 724 (1995) (noting that "[j]udicial

notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case").

¶ 13 Section 15-1509 of the Foreclosure Law provides that a deed shall be promptly executed to the holder of the certificate of sale upon their request after the confirmation of the sale and payment of amounts owed. 735 ILCS 5/15-1509(a) (West 2010). "Delivery of the deed executed on the sale of the real estate *** shall be sufficient to pass the title thereto." 735 ILCS 5/15-1509(b) (West 2010). Any vesting of title by deed pursuant to section 15-1509(b), 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 *** notwithstanding the provisions of subsection (g) of Section 2-1301 to the contrary." 735 ILCS 5/15-1509(c) (West 2010). Any person seeking relief from judgment entered in the foreclosure action pursuant to subsection (g) of section 2-1301 of the Code may claim only an interest in the proceeds of the sale. *Id.*

¶ 14 The matter before us is similar to what occurred in *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017. In that case, defendant filed a section 2-1401 petition seeking to vacate a foreclosure judgment and the order confirming the judicial sale of the property 14 months after the sale of the property had been confirmed and six months after the property had been sold to a third party. *Id.* ¶¶ 28-30. The reviewing court held that section 15-1509(c) of the Foreclosure Law applied to the matter and barred defendant's section 2-1401 petition. *Id.* ¶ 48.

¶ 15 In so holding, the *Harris* court relied on this court's opinion in *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224. There, the prior owner filed a section 2-1401 petition to vacate the underlying judgment of foreclosure and order confirming the sale after the selling officer had delivered the deed to plaintiff following the confirmation of the sale.

Id. ¶¶ 1, 26. This court found "[t]here is simply no Illinois authority to support the defendant's argument that she can utilize section 2-1401 to circumvent *** section 15-1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property." *Id.* ¶ 30. We concluded that "[t]he clear and unambiguous language of section 15-1509(c) of the Foreclosure Law bars the defendant's claims in her section 2-1401 petition and is dispositive." *Id.*

¶ 16 In this cause, the deed was recorded prior to the filing of defendants' section 2-1401 petition, thus barring defendants' claims. See 735 ILCS 5/15-1509(c) (West 2010); *Harris*, 2015 IL App (1st) 133017, ¶ 48; *Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30. Moreover, as we noted in *Prabhakaran*, defendants were parties to the foreclosure from its inception and "cannot rely upon section 2-1401 as an alternative remedy once the circuit court confirmed the sale of the property." *Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30. The only exception to the ban on claims under section 15-1509(c) is if there is a dispute involving the surplus proceeds from the sale. 735 ILCS 5/15-1509(c) (West 2010). No such dispute exists in this matter. Moreover, defendants did not bring their motion pursuant to section 2-1301(g) of the Code. See *id.* Accordingly, section 15-1509(c) of the Foreclosure Law applies in this case to bar defendants' section 2-1401 petition.

¶ 17 Lack of Due Diligence

¶ 18 Even if section 15-1509(c) does not bar defendants' section 2-1401 petition, we would nevertheless affirm the circuit court's dismissal based on their lack of due diligence. Defendants contend they are not required to assert due diligence where they are attacking a void order or judgment and brought their petition pursuant to section 2-1401(f).

¶ 19 Section 2-1401(f) essentially allows a litigant to bring such a petition at any time to attack a void order or judgment. 735 ILCS 5/2-1401(f) (West 2014); see *Sarkissian v. Chicago*

Board of Education, 201 Ill. 2d 95, 104 (2002). The character of a petition, however, is determined by its substance, not its form. *Id.* at 102. The content of defendants' petition merely states the judgment is void and presents no argument whatsoever on this issue. Furthermore, the affidavits defendants attached in support of their petition do not address the voidness issue, but instead merely address their lack of receipt of certain notices. On appeal, defendants again never set forth an argument as to why the circuit court's order is void or lacks jurisdiction. In their reply brief, however, defendants clarify their argument, stating that it is plaintiff's lack of standing which renders the orders entered in the foreclosure action void.

¶ 20 In Illinois, lack of standing is not a jurisdictional defect that can be raised at anytime. Lack of standing is, instead, an affirmative defense that must be pled and proven by the defendants. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010); *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6-7 (2010). Thus, contrary to the argument of defendants to this court, defendants have not asserted a sufficient basis that the circuit court's orders are void.

¶ 21 Because defendants' petition fails to properly attack the underlying orders as void, defendants were required to assert in their section 2-1401 petition: (1) a meritorious defense; (2) due diligence in presenting this defense; and (3) due diligence in filing the section 2-1401 petition for relief. *Airoom*, 114 Ill. 2d at 220-21. Thus, we review the circuit court's denial of defendant's petition not under the *de novo* standard as defendants suggest, but for an abuse of discretion. *Walters*, 2015 IL 117783, ¶ 51.

¶ 22 A review of the section 2-1401 petition reveals that defendants failed to present any argument regarding their due diligence in the underlying action or in filing the petition. On appeal, defendants again do not articulate any argument regarding their diligence in either

regard. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires an appellant to include in its brief an "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." It is well settled that a contention that is supported by some argument, but does not cite any authority, does not satisfy the requirements of Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal. *Bank of America, N.A. v. Kulesza*, 2014 IL App (1st) 132075, ¶ 18.

¶ 23 As previously discussed, it is defendants' burden to prove by a preponderance of the evidence the allegations of the petition, including that they were diligent. See *Airoom*, 114 Ill. 2d at 223. We have repeatedly held that failure to demonstrate due diligence in both the original action and in the section 2-1401 proceeding justifies denial of relief under section 2-1401. See *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 264 Ill. App. 3d 633, 643 (1994) (and cases cited therein). We further note that "[t]his court is not a depository in which the burden of research and argument may be dumped." *Board of Education of Rich Township High School District No. 227 v. Illinois State Board of Education*, 2011 IL App (1st) 110182, ¶ 108.

Consequently, we will not search the record for evidence of defendants' due diligence where they have neglected to even allege this point. Because defendants have failed to set forth *any* allegations regarding their due diligence, we conclude the circuit court did not abuse its discretion in denying their section 2-1401 petition. See *In re Marriage of Harnack and Fanady*, 2014 IL App (1st) 121424, ¶ 56 (section 2-1401 petition failed to allege due diligence in presenting defenses or in filing the petition and was thus properly denied); see also *Cavitt v. Repel*, 2015 IL App (1st) 133382, ¶ 53 (section 2-1401 petition properly denied where it demonstrated on its face that the petitioner was not entitled to relief).

¶ 24 We briefly address defendants' contention that the circuit court erred in declining to hold an evidentiary hearing on their section 2-1401 petition. Defendants did not request an evidentiary hearing in their petition; accordingly, such a hearing was waived and the circuit court appropriately based its determination on the pleadings and affidavits. See *Airoom*, 114 Ill. 2d at 223; *Cunningham v. Miller's General Insurance Co.*, 188 Ill. App. 3d 689, 693 (1989).

¶ 25 No Meritorious Defense

¶ 26 Even assuming defendants could set forth due diligence, the section 2-1401 petition does not set forth a meritorious defense. Defendants maintain they did not receive a grace period notice as required under section 1502.5 of the Foreclosure Law (735 ILCS 5/15-1502.5 (West 2010)) nor did they receive a notice of the sale as required by section 15-1507(c)(3) of the Foreclosure Law (735 ILCS 5/15-1507(c)(3) (West 2010)). Defendants further contend their property was sold in violation of section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2010)), as they had applied for assistance under HAMP, and that the circuit court abused its discretion when it did not provide them with an evidentiary hearing on this issue. Lastly, defendants assert the trial court erred in its denial of their son Jason's motion to intervene. For the following reasons, each argument fails.

¶ 27 Regarding the grace period notice, defendants raised this issue before the circuit court in response to the motion to confirm the sale. Plaintiff, in response to defendants' claims, provided the grace period notice. We further note that defendants failed to deny the allegations regarding the grace period notice in their answer to the complaint, essentially admitting the grace period notice was sent in compliance with section 15-1502.5 of the Foreclosure Law. See 735 ILCS 5/2-610(b) (West 2010) ("[e]very allegation, except allegations of damages, not explicitly denied is admitted"); *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 37.

¶ 28 Defendant's argument regarding their lack of receipt of the notice of sale similarly fails. The notice of sale appears in the record along with a notarized proof of mailing the notice of sale. The proof of the notice of sale complies with the requirements of Illinois Supreme Court Rules 11 and 12 and receipt of the notice of sale is not required under these rules. See Ill. S. Ct. Rs. 11, 12 (eff. Dec. 29, 2009); *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶¶ 40-41.

¶ 29 Defendants further contend that justice was not otherwise done in the judicial sale of the property in contravention of section 15-1508(b)(iv) of the Foreclosure Law (735 ILCS 5/15-1508(b)(iv) (West 2010)) and that their property was sold in violation of section 15-1508(d-5) of the Foreclosure Law (735 ILCS 5/15-1508(d-5) (West 2010)) as they had applied for assistance under HAMP. We agree with plaintiff that an argument regarding section 15-1508(b)(iv) was not raised in defendants' section 2-1401 petition and, therefore, is waived. See *Airoom*, 114 Ill. 2d at 229 ("It is well established that matters not presented to or ruled upon by the trial court may not be raised for the first time on appeal."). Additionally, in order to make a claim under section 15-1508(d-5), defendants were required to demonstrate they had submitted a completed HAMP application. See *CitiMortgage v. Bermudez*, 2014 IL App (1st) 122824, ¶¶ 67-69. Here, defendants did not attach such an application to their response to the motion to confirm the sale nor did they provide an affidavit attesting to the filing of a completed HAMP application. Accordingly, there was no proof that defendants submitted "the documentation required by the servicer to determine the borrower's eligibility and verify his or her income." *Lewis*, 2014 IL App (1st) 131272, ¶ 47.

¶ 30 Defendants also maintain they were entitled to an evidentiary hearing on the motion to confirm the sale pursuant to section 15-1508 of the Foreclosure Law (735 ILCS 5/15-1508 (West 2010)). The provisions of section 15-1508 of the Foreclosure Law have been construed as

conferring on circuit courts broad discretion in approving or disapproving judicial sales.

Household Bank, FSB, 229 Ill. 2d at 178. "While the provision provides for a hearing, the extent of the hearing afforded a mortgagor is left to the sound discretion of the circuit court." *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 6 (2006) (citing *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 115 (1993)). The party opposing the foreclosure sale bears the burden of proving that sufficient grounds exist to disprove the sale. *Bayview Loan Servicing, LLC v. 2010 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 32. As previously discussed, defendants did not set forth sufficient grounds to disapprove the sale. Further, defendants responded to the motion to confirm the sale and a hearing was held on the motion. The circuit court, in its discretion, determined no evidentiary hearing was warranted based on the arguments and evidence presented. Our review of the record reveals that the circuit court's decision was reasonable and, therefore, the circuit court did not abuse its discretion when it declined to hold an evidentiary hearing.

¶ 31 Lastly, defendants argue the circuit court erred in its denial of their son Jason's motion to intervene. This argument was not raised in their section 2-1401 petition. In addition, defendants made no argument on this point in their opening brief on appeal to this court. As previously discussed, bare contentions that fail to cite any authority do not merit consideration on appeal. *Kulesza*, 2014 IL App (1st) 132075, ¶ 18. Accordingly, we find this argument to be waived. See *Airoom*, 114 Ill. 2d at 229.

¶ 32 CONCLUSION

¶ 33 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.