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FIRST DIVISION
September 12, 2016

NO. 1-15-1862
2016 IL App (1st) 151862-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HOME LOAN MORTGAGE CORPORATION, or its successor or assigns,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
)	Cook County.
)	
v.)	05 CH 19863
)	
PERRY TURNER,)	Honorable
)	Anthony C. Kyriakopoulos,
Petitioner-Appellant.)	Judge Presiding.
)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

Held: Order striking section 2-1401 petition was in error;
reversed and remanded for hearing on petition.

¶ 1 This appeal is from an order striking a petition to vacate a mortgage foreclosure judgment and order confirming sale. Petitioner Perry Turner filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(b) (West 2014)), alleging that his signature had been forged on a deed to his mother, and that the subsequent deed transferring the

subject property from his mother to "John Smiley Jr.," was also fraudulent. The trial court ultimately entered an order striking the petition and finding that it had no jurisdiction to rule on the petition. Turner now alleges that the trial court did not have jurisdiction over him when it entered the judgment of foreclosure and order confirming the sale, that the judgment and order confirming the sale are void, and that Turner was a victim of criminal fraud. For the following reasons, we reverse.

¶ 2

BACKGROUND

¶ 3 On February 7, 2006, a default judgment for foreclosure was entered on the subject property, located at 9130 S. Greenwood Avenue in Chicago. The judicial sale was held on July 7, 2006, and the sale was confirmed on August 8, 2006. Turner filed a motion to intervene, which is not in the record. However, an order striking that motion to intervene, entered on February 27, 2007, is in the record. Thereafter, on March 30, 2007, Turner filed another motion to intervene and vacate the judicial sale. In this motion, Turner claimed that he was an owner and occupant of the subject property. Turner alleged that the mortgage foreclosure proceedings were the result of fraudulent transfers of the property to John Smiley, Jr. Turner alleged that his mother, Georgia Turner, purchased the subject property in December 1984, and that Georgia has resided at the property ever since. Turner alleged that Georgia paid the mortgage in full, and that no other mortgage was placed on the subject property until March 31, 2005. Turner also alleged that Georgia conveyed title to the property to Turner on May 13, 1985, and that the quitclaim deed was recorded with the Cook County recorder of deeds on May 13, 2005. Turner further alleged that he had resided at the subject property since 1994.

¶ 4 Turner alleged that on January 21, 2005, a quit claim deed was fraudulently executed, which conveyed record title to the property from Turner back to his mother, and that

unbeknownst to him or Georgia, a warranty deed was fraudulently executed conveying the property from Georgia to John Smiley, Jr. on March 31, 2005. Turner stated that the deed was recorded with the Cook County recorder of deeds on April 14, 2005. Turner averred that also on March 31, 2005, Smiley granted two mortgages on the subject property to Mortgage Electronic Registration Systems, Inc. (MERS) (plaintiff), as nominee for Home Loan Mortgage Corporation, in exchange for loans of \$77,000 and \$27,500, which were recorded with the Cook County recorder of deeds on April 14, 2005. Smiley apparently did not make any payments on these loans and on November 18, 2005, plaintiff initiated the foreclosure action on the subject property. A judicial sale of the subject property was held and a judicial sale deed was granted to North Star, the successful bidder, on August 20, 2006.

¶ 5 Turner alleged in his motion that Smiley never resided at the property, and Turner had never been named as a party or served with a summons. Turner further stated that he and his mother visited the attorneys for plaintiff in the summer of 2006 and informed them that they still occupied and owned the premises. However, on November 3, 2006, Cook County sheriffs appeared at the subject property to evict Turner and Georgia from the property, and on March 8, 2007, North Star delivered a written demand for possession of the property. Turner requested that the court grant him leave to intervene as a party and to vacate the order of possession and judicial sale of the property. Turner attached his affidavit in support of the motion as well.

¶ 6 On August 27, 2014, plaintiff filed a response to Turner's motion to intervene. Plaintiff contended that Turner's motion to intervene, which was filed over seven months after the court confirmed the judicial sale on August 8, 2006, should be treated as a section 2-1401 petition, as the only means to attack a final judgment more than 30 days after judgment. Plaintiff argued that the trial court lacked jurisdiction to hear the petition because notice was not served on it by one

of the proper section 2-1401 methods: summons, prepaid registered mail, or publication. Rather, plaintiff contended that Turner served the "petition" as a motion upon counsel of record via a "notice of motion." Plaintiff also argued that Turner was aware of the sale, and even attended the sale, such that he cannot show that he was diligent in filing the section 2-1401 petition.

¶ 7 Attached to plaintiff's response was a declaration of Angela M. Hare, plaintiff's attorney in the foreclosure action, stating that on November 30, 2005, Turner called her office and faxed a deed to her office that showed that Carrie Lee Henry had sold the subject property to Georgia Turner, Turner's mother, in 1984. Also attached to plaintiff's response were excerpts from Turner's discovery deposition in which he stated that he had been at the auction where North Star purchased the subject property, but he did not know what was going on. He had gotten the information about the auction from plaintiff's attorney. Turner testified that the first time he became aware of the foreclosure case was when a sheriff delivered an envelope to the property and Turner opened it, but it was addressed to "John Smiley." Turner had never heard of John Smiley before that.

¶ 8 Turner filed a reply to plaintiff's response to his motion to intervene, stating that the deed purporting to convey Turner's recorded ownership of the subject property to Georgia was forged and therefore void. Attached was a copy of an affidavit by Diane Marsh, a board certified document examiner, setting forth her analysis and finding that the January 21, 2005, quitclaim deed was not signed by Turner and was a forged document. Marsh averred that it was her opinion to a reasonable degree of scientific certainty that the disputed signature of Turner appearing on the quitclaim deed was not consistent with the known signature of Turner and was not a genuine signature.

¶ 9 A hearing was apparently held on Turner's motion to intervene on October 2, 2014, but there is no transcript of this hearing in the record. Turner avers that at that hearing, the trial court indicated that it would not rule on Turner's motion to intervene, and that Turner had standing to file a section 2-1401 petition without intervening in the case.

¶ 10 Turner then filed a verified section 2-1401 petition on November 18, 2014, making essentially the same allegations that appeared in his motion to intervene: that his name was forged on a quitclaim deed that purported to convey record title from him to his mother, Georgia. Turner alleged that he did not sign that deed and had no knowledge of it. The deed indicates that it was witnessed and notarized by Thelma Holliman, but Turner alleged that he had never met anyone named Thelma Holliman. The deed also indicated that it was prepared by "Andre." Turner claimed that a warranty deed was then fraudulently executed, purporting to convey record title to the subject property from Georgia to John Smiley, Jr., and that page three of this deed indicated that the signatures were witnessed and notarized by Thelma Holliman and the document was prepared by Andre Johnson. Turner claimed that Smiley granted two mortgages to plaintiff in exchange for loans of \$77,000 and \$27,500. Turner further alleged that the closing on the conveyance of title to Smiley and the two mortgages was conducted by Metropolitan Title Company, and Metropolitan's closing documents indicate that Metropolitan paid "Andre Johnson & Associates" attorney fees in the amount of \$945.

¶ 11 On March 17, 2015, the trial court granted Turner a default judgment on his section 2-1401 petition and vacated the foreclosure judgment and order confirming sale of the subject property.

¶ 12 Plaintiff then filed a motion to vacate the March 17, 2015, default order, alleging that its counsel appeared on March 19, 2015, for a status update, but was informed that the matter had

been addressed on March 17, 2015, due to a mix-up with the dates, and that the Turner's section 2-1401 petition had been granted. The trial court granted plaintiff's motion on April 22, 2015.

¶ 13 Plaintiff then filed a motion to dismiss Turner's section 2-1401 petition on May 20, 2015, alleging that section 2-1401 is preempted by section 15-1509(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2014)), which bars any challenge to a foreclosure judgment once the circuit court confirms the sale of the property. Plaintiff further alleged that because the property had been deeded to a *bona fide* third party purchaser, Turner could not seek the relief of vacatur. Alternatively, plaintiff argued that the trial court lacked jurisdiction to hear the section 2-1401 petition because Turner failed to appeal from the trial court's rejection of Turner's "second post-judgment motion" within 30 days.

¶ 14 On June 9, 2015, Turner filed a response to plaintiff's motion to dismiss his section 2-1401 petition, arguing that section 15-1509(c) applies only to parties to the underlying foreclosure action against whom judgment was entered, but the trial court lacked personal jurisdiction over Turner at the time it entered the foreclosure judgment and order confirming the sale since Turner was not a party to the underlying case.

¶ 15 The trial court entered an order on June 9, 2015. We do not see a copy of this order in the record, and the copy attached to Turner's brief is difficult to read. The last line appears to say that the court found it had no jurisdiction to rule on Turner's section 2-1401 petition and that the petition was stricken. No reasons were stated as to the basis for the court's finding of lack of jurisdiction.

¶ 16 Turner now appeals the trial court's order striking his section 2-1401 petition and finding that it had no jurisdiction to rule on it.

¶ 17

ANALYSIS

¶ 18 On appeal, Turner contends that the trial court had jurisdiction to hear his section 2-1401 petition to vacate the mortgage foreclosure judgment and order confirming the sale. Turner contends that his section 2-1401 petition argued that the orders entered in the foreclosure action were void for lack of personal jurisdiction, which was a proper argument for a section 2-1401 petition. Turner also contends that because he was never named as a party to the foreclosure action, despite the fact that he informed plaintiff's attorney that he was the valid owner, any order entered in the underlying foreclosure action must therefore be void as the trial court had no jurisdiction over Turner, the true owner of the property. Turner argues that he is entitled to a hearing on the merits of his section 2-1401 petition, and we agree.

¶ 19 North Star, the successful bidder at the judicial sale of the subject property, also agrees. North Star filed an intervenor response brief, stating that it had reviewed Turner's section 2-1401 petition and that the petition "on its face demonstrates that Turner was the victim of criminal fraud and North Star does not wish to be an after-the-fact participant in any such conduct." North Star stated that it had no objection to Turner's request to reverse the trial court's striking of Turner's section 2-1401 petition and to remand for further proceedings.

¶ 20 Plaintiff, however, maintains that we do not have jurisdiction to hear Turner's appeal because his notice of appeal was filed more than 30 days after the circuit court struck his "first" section 2-1401 petition. In the alternative, plaintiff argues that we lack jurisdiction to hear Turner's appeal because his notice of appeal was filed more than 30 days after the circuit court "refused to rule" on his "second" section 2-1401 petition.

¶ 21 Plaintiff's contention that Turner had 30 days from the order striking his "first [section] 2-1401 petition" to file an appeal, depends on the assumptions that Turner's motion to intervene was actually a section 2-1401 petition, and that the court's order striking the "petition" was a

final appealable order. Plaintiff contends that a motion seeking to vacate a sale is regarded as a petition under section 2-1401, regardless of its label, and that the striking of such petition is deemed to be a denial of a section 2-1401 petition.

¶ 22 A party shall be permitted to intervene in a case when the application is timely and "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a) (West 2012). This paragraph is to be liberally construed. *Winders v. People*, 2015 IL App (3d) 140798, ¶ 13. With regard to timeliness, "[w]hile a person may not normally seek intervention after the rights of the original parties have been determined and a final decree entered [citation], a motion to intervene may be filed even after dismissal of the case and still be timely where necessary to protect the interests of the intervenor." *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 298 (1995). A party that seeks to intervene after a judgment has been entered must explain its failure to seek intervention prior to the judgment being entered, and intervention may be allowed at the court's discretion if the party lacked knowledge of the action prior to the judgment being entered. *Winders*, 2015 IL App (3d) 140798, ¶ 14. Intervention may be allowed after a judgment has been entered if doing so is the only way to protect the rights of the party seeking to intervene. *Id.*

¶ 23 Our review of the record in this case reveals that Turner's petition to intervene was timely on these facts. However, in an order dated February 27, 2007, the trial court stated that Turner's motion to intervene was "stricken." There were no reasons listed in a written order, and we do not have the transcript of this hearing, but the order indicates that the motion was not stricken with prejudice. On March 30, 2007, Turner filed a second motion to intervene and vacate the sale, brought pursuant to section 2-1401 of the Code. Plaintiff failed to answer the second

motion to intervene until October 2014. Thereafter, a hearing was purportedly held on Turner's motion, at which point the trial court allegedly indicated that Turner did not have to intervene, but rather could file a section 2-1401 petition, which is what Turner did. The trial court never ruled on Turner's motion to intervene. We acknowledge that we do not have the transcript from this proceeding, nor do we have a written order from the trial court explaining why it did not rule on Turner's motion to intervene. Plaintiff contends that the trial court's "refusal" to enter an order on Turner's second motion to intervene triggered the 30-day deadline for the filing of a notice of appeal. Plaintiff's reasoning is that the trial court's refusal to enter an order was tantamount to a denial of the second motion to intervene. However, plaintiff has forfeited this argument by failing to cite to any authority in support of this proposition. See Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016); *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 ("A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue.")

¶ 24 Turner then filed a section 2-1401 petition and plaintiff responded to it. The trial court *sua sponte* entered an order striking Turner's section 2-1401 petition and finding that it had no jurisdiction to rule on the petition. It did not set out its reasoning for this finding of lack of jurisdiction. We find that the trial court's striking of Turner's section 2-1401 petition for lack of jurisdiction was in error.

¶ 25 Section 2-1401 states that after 30 days from the entry of a final order or judgment, relief "may be had upon petition as provided by this Section." 735 ILCS 5/2-1401(a) (West 2012). Turner filed his section 2-1401 petition well after 30 days from the order confirming the sale. A petitioner is entitled to relief under section 2-1401 if the petition sets for specific factual allegations supporting each of the following elements: "(1) the existence of a meritorious defense

or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Fiala v.*

Schulenberg, 256 Ill. App. 3d 922, 929 (1993). Our supreme court has held that when a circuit court denies a section 2-1401 petition, the standard of review on appeal is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 26 Here, Turner met all the requirements for a section 2-1401 petition, and thus the trial court's decision to strike the petition was in error, and we can see no basis for which the trial court could have found jurisdiction to be lacking. In the limited portions of Turner's deposition that we can see, he states that while he attended the judicial sale of the subject property, he did not know what he was witnessing, and he did not understand what was happening with his property. He contacted plaintiff's counsel and subsequently attempted to intervene in the case. We are aware that portions of the record appear to be missing, and that where the record on appeal is incomplete, any doubts arising from the incompleteness will be construed against the appellant and every reasonable presumption will be taken in favor of the judgment below. *People v. Fernandez*, 344 Ill. App. 3d 152, 160 (2003). However, it is apparent to us from the record that fraudulent activity took place with regards to the underlying deeds of the subject property. This proposition is supported by North Star's brief, the successful bidder at the judicial sale of the subject property, in which it agrees entirely with Turner's position that fraud occurred. Accordingly, we find that fundamental fairness and justice requires reversal in this case, and we order the circuit court to vacate its order striking Turner's section 2-1401 petition, and to consider Turner's petition on the merits. See *Rodriguez v. Owaynat*, 137 Ill. App. 3d 1017, 1020 (1985).

¶ 27

CONCLUSION

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¶ 28 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for a hearing in accordance with this order.

¶ 29 Reversed and remanded.