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FIFTH DIVISION
March 11, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---------------------------|---|------------------|
| NATIONSTAR MORTGAGE, LLC, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 13 CH 14647 |
| |) | |
| MARA GONZALEZ, |) | The Honorable |
| |) | Michael F. Otto, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court properly denied defendant's motion to stay the underlying foreclosure proceedings where defendant failed to establish the requisite elements supporting a stay.

¶ 2 *Pro se* defendant, Mara Gonzalez, appeals the denial of her motion to stay the underlying foreclosure proceedings. Defendant seeks the stay of these foreclosure proceedings, filed by plaintiff in the circuit court's chancery division in June 2013, until

the resolution of her appeal of the dismissal of a fraud claim she originally filed in the circuit court law division in April 2013. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On June 28, 2006, Bank of America, N.A. (Bank of America) provided a mortgage loan in the amount of \$150,000 to defendant for the subject property located on Drake Avenue in Chicago, Illinois. The mortgage subsequently was assigned to plaintiff. In April 2012, defendant defaulted on her mortgage loan. As a result, on August 22, 2013, plaintiff filed the underlying amended complaint for, *inter alia*, mortgage foreclosure (count II) against defendant, Aquiles Torres, Citibank (South Dakota) N.A., unknown occupants, and nonrecord claimants.¹

¶ 5 Plaintiff's amended complaint also contained three other causes of action. In order to understand the bases of those causes of action, we provide a brief factual background. On June 28, 2006, defendant attended a real estate closing to purchase the subject property from Aquiles Torres. According to a warranty deed dated February 29, 2004, Torres held title to the subject property. A copy of the warranty deed was recorded in the Cook County Recorder of Deeds' office on May 25, 2004. After defendant submitted a uniform residential loan application in an effort to purchase the subject property from Torres, Bank of America agreed to provide a mortgage loan conditioned on receipt of a first mortgage lien interest and evidence that defendant held title to the subject property. At the June 28, 2006, real estate closing, defendant executed and delivered a promissory note and corresponding mortgage to Bank of America. According to plaintiff's amended complaint, "upon information and belief, a deed *** was produced at the Closing which conveyed title to the [subject property] from [Torres] to

¹Plaintiff's original complaint was filed on June 13, 2013.

[defendant]." In exchange, Bank of America funded the mortgage loan. The mortgage was recorded in the Cook County Recorder of Deeds' office on August 11, 2006.

However, in preparation for filing its complaint, plaintiff, who held the promissory note and mortgage, discovered that the warranty deed transferring title for the subject property from Torres to defendant was "lost and never filed" with the Recorder of Deeds. In count I of its amended complaint, plaintiff requested declaratory relief declaring that defendant had fee simple title to the subject property. In counts III and IV of its amended complaint, plaintiff requested the imposition of an equitable lien and foreclosure of the equitable lien, accordingly.

¶ 6 On September 19, 2013, the warranty deed was located and recorded with the recorder of deeds. Plaintiff subsequently filed a motion to dismiss three counts of its amended complaint: count I seeking declaratory judgment; count III seeking an equitable lien; and count IV seeking foreclosure of the equitable lien. On October 13, 2013, counts I, III, and IV of plaintiff's amended complaint were dismissed. Only count II for mortgage foreclosure remained pending.

¶ 7 On February 6, 2014, plaintiff filed a motion for default judgment. Then, on February 13, 2014, defendant filed her appearance and a motion to dismiss. In response, plaintiff withdrew its motion for default judgment. The circuit court denied defendant's motion to dismiss.

¶ 8 Defendant then filed an "Objection & Answer to Pltf's Foreclosure Complaint." Plaintiff responded by filing a motion to strike defendant's answers to counts I, III, and IV, a motion to strike defendant's affirmative defenses, and a motion for judgment on the pleadings as to the remaining mortgage foreclosure count (count II). Defendant filed

another pleading entitled "Motion Contesting Judgment and Motion for Leave to File a Cross Complaint and to Amend My Answers and Affirmative Defenses Pursuant to 735 ILCS 5/2-616(b)." On December 4, 2014, the circuit court struck defendant's answers to counts I, III, and IV of plaintiff's amended complaint and entered and continued plaintiff's motion for judgment on the pleadings as to the remaining mortgage foreclosure claim.

¶ 9 Thereafter, defendant filed an "Objections & Denials to Pltf's Foreclosure Complaint & Deft's Affirmative Defenses & Counter-Claims." In response, plaintiff filed a motion to strike defendant's answer and to deem the mortgage foreclosure count admitted, to strike defendant's affirmative defenses, and to dismiss defendant's counter-claims. On January 8, 2015, the circuit court granted plaintiff's motion to strike defendant's answer and to deem the mortgage foreclosure count admitted, and struck defendant's affirmative defenses and counter-claims. Also on that date, the circuit court denied defendant's request for Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language.

¶ 10 On June 9, 2015, plaintiff filed a motion to substitute party plaintiff, seeking to substitute Residential Credit Solutions, Inc. (RCS) as plaintiff because RCS began servicing the subject loan. On June 17, 2015, plaintiff filed, *inter alia*, a motion for default and for summary judgment of its remaining foreclosure claim, as well as a motion for entry of judgment for foreclosure and sale.

¶ 11 Meanwhile, prior to the filing of plaintiff's amended complaint for mortgage foreclosure, on April 22, 2013, defendant filed in a separate action in the law division a fraud complaint against Kathryn Wordlaw, Fidelity National Title Insurance Co. f/k/a

Ticor Title Insurance Co., and Bank of America (the fraud case defendants).² In her complaint, defendant alleged that the fraud case defendants committed fraud because the warranty deed transferring the subject property from Torres to defendant was not recorded at the same time as the mortgage. Plaintiff subsequently was granted leave to intervene as a party-defendant where it held the promissory note and mortgage to the subject property. On February 5, 2014, the circuit court dismissed defendant's second amended complaint. Defendant has appealed that ruling, which is currently under advisement with this court.³

¶ 12 Then, on July 15, 2015, defendant filed a motion to stay the underlying foreclosure proceedings. Following a hearing, defendant's motion was denied on July 17, 2015. Defendant was provided time to respond to plaintiff's outstanding motions. Defendant instead filed her notice of interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) on July 21, 2015.

¶ 13 ANALYSIS

¶ 14 Defendant contends the circuit court erred in denying her motion to stay the underlying foreclosure proceedings.

¶ 15 We first turn to the question of this court's jurisdiction to review defendant's appeal. This court has jurisdiction to review appeals from final judgments only, unless jurisdiction is provided by a supreme court rule or statute. *Marzouki v. Najjar-Marzouki*, 2014 IL App (1st) 132841, ¶ 8. Defendant filed her appeal pursuant to Supreme Court Rule 307(a)(1) which provides that "[a]n appeal may be taken to the Appellate Court from an interlocutory order of the court *** granting, modifying, refusing, dissolving, or

² Case number 13 L 674.

³ *Gonzalez v. Wordlaw, Fidelity National Title Insurance Co. f/k/a Ticor Title Insurance Co., Bank of America, N.A., and Nationstar Mortgage LLC*, 2016 IL App (1st) 1140502.

refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010).

This court has held that a stay is injunctive in nature; therefore, a stay order is immediately appealable pursuant to Rule 307(a)(1). *Marzouki*, 2014 IL App (1st) 132841, ¶ 8. Accordingly, we have jurisdiction to consider the circuit court's July 17, 2015, order denying defendant's request to stay the underlying foreclosure proceedings.

¶ 16 " 'An appeal under Rule 307 does not open the door to a general review of all orders entered by the trial court up to the date of the order that is appealed;' thus, the scope of this appeal is limited to 'consideration of only the propriety of the order appealed from.' " *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 372 (2009) (quoting *Discipline Investment Advisors, Inc. v. Schweih*, 272 Ill. App. 3d 681, 691 (1995)). A circuit court's decision to deny a motion to stay will not be overturned absent an abuse of discretion. *Id.* at 372. An abuse of discretion will be found only where the circuit court " 'acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted.' " *Id.* (quoting *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 67 (2007)).

¶ 17 Section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2012)) provides that a defendant may move for dismissal of an action "or other appropriate relief" if "there is another action pending between the same parties for the same cause." The grounds supporting dismissal must appear on the face of the pleading attacked or in an affidavit. 735 ILCS 5/2-619(a)(3) (West 2012). A party seeking a stay bears the burden of providing adequate justification for the stay. *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill. App. 3d 242, 246 (1999). The

movant must justify the stay by clear and convincing circumstances outweighing the potential harm to the opposing party. *Id.* In doing so, the movant "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.

[Citations.]" (Internal quotation marks omitted.) *Id.* at 246-47.

¶ 18 The purpose of section 2-619(a)(3) is to avoid duplicative litigation; however, even when the "same parties" and "same cause" requirements have been met, a circuit court is not automatically required to dismiss or stay a proceeding under the statute. *Marzouki*, 2014 IL App (1st), 132841, ¶ 16. "The legislature did not intend that a section 2-619(a)(3) motion would always prevent two separate actions concerning the same subject matter from proceeding simultaneously." *May*, 304 Ill. App. 3d at 247. Rather, in exercising its discretion, a circuit court must weigh the prejudice resulting to the nonmovant against the public policy of avoiding duplicative litigation. *Id.* at 246.

¶ 19 As stated, a defendant first must demonstrate that the other pending action involves the "same parties" and "same cause" in order to support a motion for stay. 735 ILCS 5/2-619(a)(3) (West 2012). In *May*, this court instructed:

" 'Same parties' does not mean that the parties to both litigations have to be identical, for even if the litigants differ in name or number, the 'same parties' requirement is met if the litigants' interests are sufficiently similar. [Citation.] The 'same cause' requirement does not mean the 'same cause of action' or the same legal theories, but it means that the relief sought is requested on the same set of facts." *May*, 304 Ill. App. 3d at 247.

¶ 20 Here, defendant failed to establish the "same parties" and "same cause" between the fraud action and the underlying mortgage foreclosure action. In fact, defendant failed to clearly recognize either element of a motion to stay. Nevertheless, as a *pro se* defendant, she seemingly blended the requirements by contending that plaintiff impermissibly inserted itself into defendant's fraud action and then filed the underlying mortgage foreclosure action where, in both causes of action, plaintiff lacked standing because the property transfer from Torres to defendant was invalid where the warranty deed was not filed simultaneous to the mortgage. In other words, defendant argues that, because the assignment of the mortgage from Bank of America to Nationstar was invalid, Nationstar lacked standing to plead into defendant's fraud action and to bring the underlying foreclosure claim. Accordingly, defendant seemingly argues that she and plaintiff satisfy the "same parties" requirement and the invalid mortgage satisfies the "same cause" requirement. We disagree.

¶ 21 Turning first to the "same parties" requirement, while both defendant and plaintiff are parties in both actions, the fraud action additionally includes Kathryn Wordlaw, Fidelity National Title Insurance Co. f/k/a Ticor Title Insurance Co., and Bank of America as party defendants. In fact, as stated, plaintiff originally was not named as a party defendant. Plaintiff was granted leave to intervene as a party defendant because it had been assigned the promissory note and mortgage from Bank of America. The other named party defendants in the fraud suit were involved in the closing of the subject property and purportedly committed the "fraud" of failing to contemporaneously record the warranty deed and mortgage. In comparison, the named defendants in the underlying lawsuit originally were defendant, Aquiles Torres, Citibank (South Dakota) N.A.,

unknown occupants, and nonrecord claimants, all of which other than defendant were dismissed in conjunction with the dismissal of plaintiff's claims related to the "unfiled and lost" warranty deed. Once the warranty deed was found and filed and plaintiff dismissed the other three claims, the other party defendants were dismissed from the suit. Moreover, plaintiff and defendant do not have sufficiently similar interests across the lawsuits to satisfy the "same parties" requirement. See *May*, 304 Ill. App. 3d at 247. In the fraud lawsuit, plaintiff sought dismissal of the suit because the failure to record the warranty deed contemporaneous with the mortgage did not invalidate the property transfer from Torres to defendant. In comparison, in the mortgage foreclosure suit, plaintiff sought to foreclose on the subject property due to defendant's failure to comply with the terms of the mortgage loan. That determination brings us to the additional conclusion that defendant could not establish the "same cause" across the suits. The relief sought in each suit—invalidation of the property transfer and foreclosure of the mortgage—were not based on the same facts. See *id.* The fraud suit was based on facts related to the property closing, while the foreclosure suit was based on facts related to defendant's payment, or default, of her mortgage loan. We, therefore, find defendant failed to establish the requisite elements of a stay.

¶ 22 Notwithstanding, defendant contends the circuit court abused its discretion in denying her motion to stay as demonstrated by the court's admission that the results of the appeal of the fraud case could impact the foreclosure case. However, even assuming, *arguendo*, plaintiff established the requisite elements for her stay request, the circuit court still had discretion to deny the motion and allow both cases to proceed. See *id.* at 246. The circuit court was required to weigh the prejudice resulting to the nonmovant against

the public policy of avoiding duplicative litigation. *Id.* We would be remiss if we failed to acknowledge that defendant freely participated in the underlying proceedings for over two years prior to filing her stay motion, all while the fraud case was proceeding separately in the law division. Defendant did not file her stay request until plaintiff filed its motion for default and for summary judgment, as well as its motion for entry of judgment for foreclosure and sale of the subject property. In fact, defendant did not file her motion for stay until six months after the circuit court deemed plaintiff's mortgage foreclosure claim to be admitted. We, therefore, conclude that defendant did not justify the stay by clear and convincing evidence. See *May*, 304 Ill. App. 3d at 246. Rather, it was within the circuit court's discretion to deny defendant's motion to stay.

¶ 23 Finally, we note that defendant has requested a "bright line rule" that warranty deeds be filed contemporaneously with the recordation of mortgages. This court has no authority to do so. Our review is limited to the propriety of the denial of the motion to stay the foreclosure case. *TIG Insurance Co.*, 389 Ill. App. 3d at 372.

¶ 24 CONCLUSION

¶ 25 We affirm the judgment of the circuit court denying defendant's motion to stay the underlying proceedings.

¶ 26 Affirmed.