2016 IL App (1st) 152058

SIXTH DIVISION
August 19, 2016

No. 1-15-2058



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CH 24677 |
| | ) | |
| GENNARD D. BARBER and RISCINDA L. ROGERS, | ) | |
| | ) | Honorable |
| | ) | Michael F. Otto, |
| Defendants-Appellants. | ) | Judge Presiding. |

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

**ORDER**

¶ 1 ***Held*:** After finding there was appellate jurisdiction, we affirmed the order disposing of defendants' Rule 137 motion under Cook County Circuit Court Rule 2.3 where the record on appeal was insufficient and defendants' issues on appeal were forfeited.

¶ 2 Defendants Gennard D. Barber (Gennard) and Riscinda L. Rogers[1] (Riscinda) appeal from an order that granted the motion of JPMorgan Chase Bank, National Association, under

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[1] Defendants consistently listed Riscinda by her maiden name, "Riscinda L. Rogers," on all of the filings in this case from the 2009 foreclosure complaint to Chase's July 1, 2014, motion to vacate the judgments and order confirming sale. In their July 2015 notice of appeal, defendants listed Riscinda by her married name, "Riscinda L. Barber," even though Riscinda was divorced in 2011 and the judgment of dissolution of marriage provided that she

Cook County Circuit Court Rule 2.3 (Cook Co. Cir. Ct. R. 2.3 (eff. July 1, 1976)) (Local Rule 2.3), and disposed of their petition for attorney fees under Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)). We affirm based on defendants' failures to present an adequate appellate record and preserve their issues for appeal.

¶ 3 Chase Home Finance, LLC, brought this foreclosure action against defendants and others relating to a mortgage executed in June 2008 on real property located at 1056 N. Lavergne Avenue in Chicago (property). JPMorgan Chase Bank, National Association (Chase), was later substituted as plaintiff. The complaint identified Gennard, and "Riscinda L. Rogers" as the mortgagors. According to Chase, the mortgage was recorded, as was a power of attorney executed by "Riscinda L. Rogers," which granted Gennard a limited power to act on her behalf. Although the complaint refers to the mortgage as an attached exhibit, a copy of the complaint, which is part of the record on appeal, does not include the mortgage. The note related to the mortgage was signed by Gennard only and is attached to the complaint in the record.

¶ 4 Chase attempted, unsuccessfully, to personally serve defendants at the property and at an address in Newport News, Virginia. They were subsequently served by publication notice.

¶ 5 On May 3, 2012, Chase filed motions for defaults and for the entry of a judgment of foreclosure against defendants. In its pursuit of these motions, Chase filed an affidavit of military service, with status reports from the Department of Defense website, showing that as of April 17, 2012, defendants were not on active military duty.

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has the right to revert to her maiden name. In the caption to this appeal, we refer to Riscinda by her maiden name in accordance with the majority of pleadings filed in this case.

¶ 6 Gennard, but not Riscinda, appeared at the presentation of Chase's motions on May 25, 2012, and he was granted until June 29, 2012, to file an answer or responsive pleading. Gennard did not file an answer or responsive pleading by that date.

¶ 7 Chase filed another affidavit of military service on June 29, 2012, with status reports from the Department of Defense website, showing that as of June 28, 2012, defendants were not on active military duty.

¶ 8 Gennard filed a *pro se* appearance and answer on July 6, 2012. On that date, the circuit court struck defendant Gennard's answer as untimely and entered orders of default and a judgment of foreclosure and sale against defendants.

¶ 9 On August 8, 2012, an attorney filed a motion to vacate the default judgment against Gennard and filed an appearance on his behalf on August 9, 2012. In the motion, Gennard requested an opportunity to be heard and stated that he had been acting *pro se* and was confused as to how to file his answer. The motion did not mention Riscinda or her military service. The court denied Gennard's motion to vacate on August 24, 2012.

¶ 10 The sale of the property took place on October 11, 2012. Chase filed its motion for entry of an order approving the report of sale and for possession on November 28, 2012. At the presentation of the motion, counsel appeared on behalf of Gennard and was given until January 28, 2013, to respond to the motion. The record does not contain any filings by Gennard objecting or responding to Chase's motion to approve the sale. On February 19, 2013, the circuit court entered an order approving the sale and an order of possession.

¶ 11 On June 4, 2014, another attorney filed an appearance on behalf of Gennard and "Riscinda Rogers a/k/a Riscinda Barber."

¶ 12 On July 1, 2014, Chase moved to vacate the foreclosure judgment, rescind the sale, and vacate the order affirming the sale. Chase's motion, supported by affidavit, explained that it had performed active military duty searches for both "Gennard D. Barber," and "Riscinda L. Rogers" prior to obtaining the foreclosure judgment and prior to the order approving sale. The searches indicated that neither Gennard nor Riscinda were on active military duty. Chase later learned that Riscinda used the last name "Barber," and that a search of military service under the name "Riscinda Barber," showed that she was, in fact, on active military duty since August 6, 2007.

¶ 13 On September 2, 2014, Gennard filed a *pro se* response to Chase's motion to vacate, indicating that he did not oppose the relief requested. Gennard, however, asserted that he had informed Chase that Riscinda used the name "Barber" and was on military duty and had brought documentation to support her military status to court appearances.

¶ 14 On September 5, 2012, the circuit court granted Chase's motion and entered an order vacating the order which approved the sale, rescinding the sale, and vacating the judgment of foreclosure.

¶ 15 Chase asserts that on November 7, 2014, it executed a release of the mortgage on the property which was recorded with the Cook County Record of Deeds on November 17, 2014.

¶ 16 On December 1, 2014, Chase filed a motion to dismiss the foreclosure complaint, without prejudice, indicating that it had "voluntarily elected to stop the foreclosure proceedings." The record contains no response to Chase's motion. The circuit court entered an order noting that Chase had "voluntarily elected to stop the foreclosure proceedings," and dismissed the complaint, without prejudice, on December 11, 2014.

¶ 17 On January 12, 2015, the attorney, who previously had entered an appearance on behalf of Gennard and Riscinda, filed a petition for sanctions under Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 eff. July 1, 2013)) (the petition). The petition argued that Chase's attorneys had been informed that Riscinda was on active military duty and was seeking unspecified attorney fees incurred in the foreclosure proceeding and an eviction proceeding which was based on the order of possession entered in this case. The petition also stated that Chase "was aware that Gennard and Riscinda were married."

¶ 18 On May 5, 2015, after more than 90 days had passed and the petition had not been called for hearing, Chase, pursuant to Illinois Supreme Court Rule 184 (Ill. S. Ct. R. 184 (eff. July 1, 1982)), filed a "motion to strike and deny" the petition under Local Rule 2.3 (Cook Co. Cir. Ct. R. 2.3 (eff. July 1, 1976)). Chase stated in its motion that it had contacted defendants' attorney about the petition and purported factual inaccuracies contained therein, but counsel had not responded to the communication. Attached to Chase's motion was the order which dissolved defendants' marriage on December 16, 2011. The record does not contain a written response to Chase's motion.

¶ 19 Chase presented its motion to the circuit court on June 23, 2015. An order was entered on that date which stated that "a covering attorney" was in court for defendants and the matter was set for hearing on the following day so that defendants' attorney of record could appear.

¶ 20 On June 24, 2015, the circuit court granted Chase's motion and, pursuant to Local Rule 2.3, entered an order granting Chase's motion and striking and denying the petition "by reason of the delay." The record does not include a transcript of the proceedings from that date or any of the other court dates.

¶ 21 On July 16, 2015, defendants filed a notice of appeal from the order striking and denying the petition.

¶ 22 Defendants argue that the circuit court erred as a matter of law by both striking and denying the petition under Local Rule 2.3. Additionally, defendants claim that Chase presented the petition to the circuit court pursuant to Illinois Supreme Court Rule 184 (Ill. S. Ct. R. 184 (eff. July 1, 1982) (which allows any party to call a motion for hearing)) and, therefore, waived the time requirements of Local Rule 2.3. In response, Chase, in part, maintains that defendants cannot show that the circuit court abused its discretion in granting its motion in that "nothing in the record [on appeal] suggests that defendants presented the circuit court with any evidence, explanation, or excuse for their failure to bring the matter for hearing within 90 days."

¶ 23 Although not raised by the parties, we have an independent duty to consider our jurisdiction. *In re Marriage of Waddick*, 373 Ill. App. 3d 703, 705 (2007). The jurisdiction of the appellate court, with certain exceptions not applicable here, is limited to the review of final judgments, orders or decrees. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). "A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChryser Corp*., 356 Ill. App. 3d 760, 765 (2005) (citing *Dubina v. Mesirow Realty Development, Inc*., 178 Ill. 2d 496, 502 (1997), and *Valdovinos v. Luna-Manalac Medical Center, Ltd*., 307 Ill. App. 3d 528, 538 (1999)).

¶ 24 On December 11, 2014, the foreclosure action was voluntarily dismissed, *without prejudice*, upon the motion of Chase. However, "[a]n order granting a plaintiff's motion for a

voluntary dismissal is final and appealable by the defendants [citation], and also by the plaintiff to the extent that it assesses costs against her [citation]." (Internal quotation marks omitted.) *Valdovinos*, 307 Ill. App. 3d at 535. Thus, the order voluntarily dismissing the foreclosure action without prejudice was a final order and appealable by defendants.

¶ 25 "A trial court retains jurisdiction to consider judgments and orders within 30 days of entry of said judgments and orders." *Won v. Grant Park 2, L.L.C.*, 2013 Il App (1st) 122523, ¶ 24 (citing *Workman v. St. Therese Medical Center*, 266 Ill. App. 3d 286, 291-92 (1994)). Further "[a]lthough a Supreme Court Rule 137 motion is not considered a post-trial motion, it is considered to be a claim for relief within the underlying action." *Valdovinos*, 307 Ill. App. 3d at 537 (citing *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464-68 (1990)). Accordingly, the circuit court retained jurisdiction to hear the petition for 30 days after the foreclosure suit was voluntarily dismissed. The petition was timely filed, therefore, we would have jurisdiction to review the June 24, 2015, order as to the petition if that order is itself a final order. The order states that the petition was both struck and denied and its meaning must be construed to determine its finality.

¶ 26 Our interpretation of court orders must be made in light of the record including the pleadings, issues, and motions which were before the court when the order was entered. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 512 (2001). An order should be "construed in a reasonable manner that gives effect to the apparent intention of the trial court." *Garcia v. Gutierrez*, 331 Ill. App. 3d 127, 129 (2002).

¶ 27 The June 24, 2015, order granted Chase's motion to strike or deny the petition which was brought under Local Rule 2.3. Local Rule 2.3 provides: "The burden of calling for hearing any

motion previously filed is on the party making the motion. If any such motion is not called for hearing within 90 days from the date it is filed, the court may enter an order overruling or denying the motion by reason of the delay." Cook Co. Cir. Ct. R. 2.3 (eff. July 1, 1976). Thus, Local Rule 2.3 allows a court to dispose of the merits of any motion for a violation of its time requirement.

¶ 28 An order which simply strikes a motion may not dispose of the merits of the stricken motion. See *Belluomini v. Lancome*, 207 Ill. App. 3d 583, 586 (1990). However an order striking a motion with prejudice has been considered a final determination. See *B-G Associates, Inc v. Giron*, 194 Ill. App. 3d 52, 59 (1990).

¶ 29 The June 24, 2015, order states that the petition was stricken but, also, expresses that it was denied "by reason of the delay." At that time, the underlying suit had been dismissed and no other issue remained unresolved. When we consider the reasons for Chase's motion and the fact that it was seeking relief under Local Rule 2.3 which allows a motion to be overruled or denied for not being timely called for hearing, we interpret the language of the circuit court's order as having finally disposed of the petition. Therefore, this court has jurisdiction, and we will consider defendants' appeal from that order.

¶ 30 Local Rule 2.3 grants the circuit court the discretion to overrule or deny a motion which has not been called for hearing within 90 days of its filing. "A reviewing court will not disturb the trial court's denial of motions for failure to comply with Local Rule 2.3 unless that decision constitutes an abuse of discretion." *Givot v. Orr*, 321 Ill. App. 3d 78, 91 (2001) (citing *In re Marriage of Izzo*, 264 Ill. App. 3d 790, 792 (1994)).

¶ 31 As stated above, the record on appeal is without a transcript of the proceedings before the circuit court, including the proceedings on June 24, 2015, when the court considered Chase's motion seeking relief under Local Rule 2.3. Therefore, we are without a record of the nature or the extent of any arguments, any evidence presented and considered by the circuit court at that hearing, nor whether the court provided reasons or findings in reaching its decision to grant the motion during the hearing. Defendants, as the appellants, had the duty of providing this court with a sufficiently complete record of the proceedings below to support their claim of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Having failed to do this, we presume the circuit court's order complied with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. For this reason alone, we would affirm the circuit court's order granting Chase's motion.

¶ 32 Further, defendants did not respond to Chase's motion in writing and, as discussed, we are without a transcript of the proceedings on the date the circuit court decided the motion. Therefore, we are without record support as to what arguments against the motion defendant may have made or explanations defendants may have given for their failure to call the petition for a timely hearing. Defendants were required to present their challenges or points of opposition to Chase's motion to the trial court to preserve those issues for review. *Witte Brothers Exchange Inc. v. Department of Revenue*, 2013 IL App (1st) 120850, ¶ 37 (quoting *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975) (" 'It has frequently been held that the theory upon which a case is tried in the lower court cannot be changed on review, and that an issue not presented to or considered by the trial court cannot be raised for the first time on review.' ")). In that defendants failed to respond to Chase's motion in writing and failed to provide a sufficient record to

establish what arguments they may have made to the circuit court at the June 24 hearing on the motion, we must find that defendants' issues on appeal have not been preserved.

¶ 33 In light of defendants' failures to present a sufficient record on appeal and to preserve the issues for appeal, we affirm the order of the circuit court denying the petition pursuant to Chase's motion pursuant to Local Rule 2.3.

¶ 34 Affirmed.