2016 IL App (2d) 150632-U
No. 2-15-0632
Order filed August 10, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NATIONSTAR MORTGAGE, LLC, Plaintiff-Appellee, v. WAYNE CANALE, a/k/a Wayne F. Canale, RBS CITIZENS, N.A., SBM CHARTER ONE BANK, N.A., UNKNOWN OWNERS, and NONRECORD CLAIMANTS, Defendants (Wayne Canale, a/k/a Wayne F. Canale, Defendant-Appellant).	)	Appeal from the Circuit Court of Du Page County. No. 11-CH-4285 Honorable Robert G. Gibson, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's section 2-1401 petition: defendant showed no due-process violation that could relax the standards applicable to his claims, and his claims were barred by section 15-1509 of the Code and the law-of-the-case doctrine; (2) we declined to sanction defendant under Rule 375(b): although defendant's arguments were largely frivolous, he was challenging a judgment that was not necessarily valid.

¶ 2 Wayne Canale (defendant), the property owner in a foreclosure action, appeals from the dismissal of his petition for relief from the judgment of foreclosure and confirmation of the judicial sale. He asserts that the trial court lacked jurisdiction to enter the judgment because plaintiff, Nationstar Mortgage, LLC, lacked standing, because the foreclosure complaint did not state a justiciable matter, and because plaintiff's failure to comply with Illinois foreclosure law was a violation of procedural due process. We affirm the dismissal, holding that, to the extent that defendant's claims were not based on voidness, they were barred by section 15-1509(c)(i) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1509(c)(i) (West 2012)) (providing that the vesting of title after a foreclosure sale is a bar to all claims by parties to the foreclosure). We further hold that defendant's voidness claims were barred under the law-of-the-case doctrine. Finally, we decline to award sanctions sought by plaintiff.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff, on September 8, 2011, filed a complaint seeking to foreclose a mortgage on the property at 5S365 Vest Avenue, Naperville. It named defendant, alleging that he was in default on the note at issue. It also named two banks—RBS Citizens, N.A. (RBS), and SBM Charter One Bank, N.A. (SBM)—and unknown owners and nonrecord claimants. The complaint stated that the "mortgagee, trustee or grantee in the Mortgage" was Mortgage Electronic Registration Systems, Inc., as nominee for Silver Mortgage Bancorp, Inc. The attached mortgage was consistent with that allegation. Plaintiff stated that the capacity in which it brought the action was "mortgagee and holder of the note." However, the attached note showed a single endorsement, from Silver Mortgage Bancorp, Inc., to Ohio Savings Bank, "ITS SUCCESSORS AND/OR ASSIGNS." Also part of the record is a mortgage modification agreement between defendant and Amtrust Bank.

¶ 5 RBS and SBM appeared and answered. Defendant did neither. Plaintiff moved for summary judgment against the banks and default judgment against defendant.

¶ 6 The court granted the motion for default and summary judgment. It entered a judgment of foreclosure in favor of plaintiff (which it described as the owner of the mortgage lien), entered judgment for $107,466.04 in favor of plaintiff, and ordered the sale of the property. At the sale, plaintiff bid the judgment indebtedness and was the winning bidder.

¶ 7 When plaintiff moved to confirm the sale, defendant appeared *pro se* and filed an objection in which he asserted that he had been present at the sale and that no public offering of the property had occurred. The court nevertheless confirmed the sale. Defendant moved to vacate the confirmation, asserting for the first time that plaintiff lacked standing to foreclose: he asserted that the original mortgagee had never properly assigned the note and mortgage to plaintiff. The court denied the motion, ruling that defendant had forfeited his defense of lack of standing when he failed to answer the complaint.

¶ 8 Defendant appealed, arguing that plaintiff's lack of standing deprived the trial court of jurisdiction, but we affirmed. We held that plaintiff's failure to plead its standing, or indeed its actual lack of standing, could not deprive the trial court of jurisdiction and that defendant had stated no other basis for vacatur of the judgment. *Nationstar Mortgage, LLC v. Canale*, 2014 IL App (2d) 130676.

¶ 9 Having lost his appeal, defendant filed a petition for relief from judgment under section 2-1401 of the Code (730 ILCS 5/2-1401 (West 2014)). As background to describing the petition, we note that Illinois law "recognizes at least three primary types of section 2-1401 petitions." *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 15. The classic type of petition is that based on "new facts"—a petition that pleads the existence of facts unknown to the

trial court at the time of judgment, which, if known to the court, would have prevented the entry of that judgment. Such petitions are exemplified by *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), and are derived from petitions for writs of *coram nobis*. *Pajor*, 2012 IL App (2d) 110899, ¶ 16. The second is the petition to vacate a judgment as void, as authorized in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), which is also familiar. *Pajor*, 2012 IL App (2d) 110899, ¶ 15. A third type, now somewhat unusual, is described in *Collins v. Collins*, 14 Ill. 2d 178 (1958); it allows relief from errors of law that are apparent on the face of the record. *Pajor*, 2012 IL App (2d) 110899, ¶ 15. Defendant's petition was structured as both a new-facts, *coram-nobis*-type petition and a void-judgment-type petition. It reiterated defendant's claim that plaintiff had not documented its ownership of the mortgage, raising this both as a conventional defense to the judgment and as a claim that the judgment was void.

¶ 10 Plaintiff responded, noting that the petition restated issues that defendant had already raised. The court struck the petition for failure to provide courtesy copies. Defendant refiled a similar petition, which plaintiff moved to dismiss on the grounds that the petition was barred by the original judgment. Further, plaintiff asked the court to impose sanctions on defendant for repetitious filings. The court granted plaintiff's motion to dismiss, ruling that defendant did not exercise due diligence in the original action and in bringing the petition and, further, that the issues he raised lacked merit. It declined to impose sanctions, but did so "without prejudice—particularly if any additional filings are filed by [defendant]." Defendant filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant first asserts that, because plaintiff lacked standing and because standing is a necessary condition for jurisdiction, the trial court lacked jurisdiction to enter the

foreclosure judgment. In so arguing, he explicitly rejects our supreme court's holding in *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217 (2010). Next, defendant argues that the complaint in this case did not state a justiciable matter. He claims that the "legislature is exclusively endowed with the duty to decided what is justiciable," and that defects in the complaint made it nonjusticiable. He also makes the related claim that this court erred in the prior appeal when it held that the complaint was sufficient to place a justiciable matter before the trial court. Finally, defendant asserts that entry of judgment in spite of plaintiff's failure to comply with Illinois foreclosure law was a violation of procedural due process.

¶ 13 Plaintiff responds first that defendant's petition failed to satisfy the standards for a new-facts section 2-1401 petition. It further argues that several of defendant's claims are barred by the application of *res judicata* or collateral estoppel and that all of his claims are barred by section 15-1509(c)(i) of the Code, which provides that the vesting of title after a foreclosure sale is a bar to all claims by parties to the foreclosure. It notes an almost total absence in defendant's brief of citations to any Illinois law that supports his positions. For this reason and because of the repetition in defendant's filings, it suggests that the appeal is frivolous. It thus requests sanctions against defendant.

¶ 14 Defendant has replied. He argues that the standing doctrine as we previously set it out allows strangers to the mortgage to, in effect, usurp the true mortgagee's rights.

¶ 15 We hold that the court did not err in dismissing defendant's petition. To the extent that defendant's claims were not based on voidness, they were barred by section 15-1509(c)(i). Further, defendant's voidness claims were barred under the law-of-the-case doctrine—though not under the doctrine of *res judicata* or collateral estoppel. Finally, we decline to award sanctions.

¶ 16 We begin by explaining why defendant has failed to show that his procedural due-process rights were violated. This is our starting point because a due-process violation is a potential basis for the relaxation of several of the standards we will later discuss. See, *e.g.*, *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 393-94 (2001) ("The doctrine of *res judicata* need not be applied in a manner inconsistent with fundamental fairness.").

¶ 17 The phrase "procedural due process" refers to '[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments." Black's Law Dictionary 539 (8th ed. 2004). These minimal requirements include a requirement for procedure sufficient to give a defendant the opportunity to respond to a claim. See, *e.g.*, *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, ¶ 16 (describing procedural due-process requirements in a context in which an evidentiary hearing or trial might be required). Thus, at its core, procedural due process requires that the person whose rights are at risk have a fair opportunity to protect those rights.

¶ 18 Defendant argues that "[f]ailing to apply, construe or follow the foreclosure law is a violation of Constitutional procedural due process," and that "[a] foreclosure action that proceeds to judgment without compliance *** does not constitute constitutionally adequate proceedings." In this, defendant fails to make the needed distinction between procedural errors with effects so serious that they constitute due-process violations and errors that have lesser or no effect on the defendant's ability to protect his or her rights. For a procedural due-process violation to exist, a denial of fairness must occur. Defendant has failed to show how the process here deprived him of any chance to defend his rights. In particular, defendant's claim that plaintiff failed to plead its standing is a claim derived from the complaint. Defendant has never explained his delay in raising that defense.

¶ 19 Defendant argues that our law of standing allows a stranger to a mortgage to file and, in effect, misappropriate the mortgagee's interests, a circumstance that defendant suggests is fundamentally unfair. He raises this argument only in his reply brief; it is therefore forfeited, and we need not address it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29. Moreover, defendant has not developed his assertions of unfairness *as a legal argument*; he has thus forfeited the argument on this basis as well. See *BMO Harris Bank N.A. v. Towers*, 2015 IL App (1st) 133351, ¶ 45 (noting that arguments inadequately presented on appeal are forfeited); see also *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 401 (1987).

¶ 20 In any event, a plaintiff cannot usurp a mortgagee's rights in the way that defendant implies. Our law is clear that, unless a court has personal jurisdiction of a party, any judgment is void at least as to that party. See, *e.g.*, *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 27 (recognizing that a judgment is void as to a party over whom the court lacks personal jurisdiction). Thus, a true mortgagee's interests—notably including its right to sue on the note—are not subject to adjudication in foreclosure proceedings unless the true mortgagee has been served, has waived service, or is itself the plaintiff.

¶ 21 We note that the implication of this seems to be that, should the existence of the usurped true mortgagee prove to be more than hypothetical, the judgment could not survive. We have held that due-process considerations mandate that any judgment entered by a court that lacks jurisdiction over a necessary party be wholly void. *E.g.*, *Victor Township Drainage District 1 v. Lundeen Family Farm Partnership*, 2014 IL App (2d) 140009, ¶ 39. A necessary party is " 'one whose presence in a lawsuit is required for any of three reasons: (1) to protect an interest which

the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) to reach a decision to protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy.' " *Lundeen Family Farm Partnership*, 2014 IL App (2d) 140009, ¶ 39 (quoting *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 940 (2008)). This rule poses an obvious challenge to the validity of a foreclosure judgment entered without the true mortgagee as a party.

¶ 22 We now turn to consideration of defendant's section 2-1401 claims. To the extent that defendant's claims were not grounded in the judgment's voidness—that is, the trial court's lack of jurisdiction—they were barred by section 15-1509. Under section 15-1509(c)(i), "[a]ny vesting of title *** by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure." 735 ILCS 5/15-1509(c)(i) (West 2012). We agree with the holding of *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 27, that the section, by its plain meaning, bars any post-deed-recording attack on the judgment; that bar necessarily extends to attacks under section 2-1401. However, we agree with the qualification to *Prabhakaran* noted in *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 17 and n.3: section 15-1509(c)(i) cannot correct a lack of jurisdiction and thus is not a defense to a voidness claim.

¶ 23 Next, we agree with plaintiff that the issue of jurisdiction and standing has already been decided. This is not a matter of *res judicata* or collateral estoppel as such. Both *res judicata* and collateral estoppel apply only when there has been a final judgment. *Nowak*, 197 Ill. 2d at 390-91. But the entire purpose of section 2-1401 is to *undo* a final judgment. See *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998) (noting that section 2-1401 relief is available *only* from final judgments). If a party is seeking the undoing of a judgment in

this way, any bar that judgment creates through *res judicata* or collateral estoppel is beside the point. Nevertheless, the arguments in question are barred. The relevant preclusion doctrine is that of law of the case, which bars "taking two bites out of the same appellate apple." *People v. Partee*, 125 Ill. 2d 24, 37 (1988). "The law of the case doctrine bars relitigation of an issue that has already been decided in the same case [citation] such that the resolution of an issue presented in a prior appeal is binding and will control upon remand in the circuit court and in a subsequent appeal before the appellate court [citation]." *American Service Insurance Co. v. China Ocean Shipping Co. (Americas), Inc.*, 2014 IL App (1st) 121895, ¶ 17.

¶ 24 At issue in the prior appeal was whether the trial court had subject-matter jurisdiction to enter the foreclosure judgment. Defendant asserted that, because the complaint pointed to an entity other than plaintiff being the mortgagee and because the complaint stated that plaintiff brought the complaint in the capacity of mortgagee, plaintiff lacked standing, and the court lacked subject-matter jurisdiction. Following our supreme court's holding in *Lebron*, 237 Ill. 2d at 252-54, we held that standing is not an element of jurisdiction in Illinois courts. We then addressed whether the complaint presented a justiciable matter, holding that it did: "here, plaintiff's claim, even if defectively stated, presented a justiciable matter, invoking the trial court's subject matter jurisdiction." *Canale*, 2014 IL App (2d) 130676, ¶ 14. We need not repeat the process.

¶ 25 We recognize that we may deviate from the law of the case where it is palpably erroneous. See *Norris v. National Union Fire Insurance Co. of Pittsburgh*, 368 Ill. App. 3d 576, 581 (2006). However, we generally do so in the face of a new and cogent argument. Here we have already addressed the cogent portions of defendant's claims; defendant's new arguments relating to standing are entirely without merit. Defendant disagrees with our supreme court's

holding in *Lebron*. As defendant is surely aware, we cannot overrule our supreme court. *E.g.*, *People v. Artis*, 232 Ill. 2d 156, 164 (2009). Defendant asserts that this court failed to consider that " 'to invoke the subject matter jurisdiction of the circuit court, a plaintiff's case, *as framed by the complaint* or petition, must *** present a justiciable matter.' " (Emphasis added.) *Canale*, 2014 IL App (2d) 130676, ¶ 12 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002)). Defendant is incorrect. We specifically observed that principle, but we were guided by our supreme court when we held that, despite its defects, the complaint was sufficient to invoke the trial court's subject-matter jurisdiction. *Canale*, 2014 IL App (2d) 130676, ¶ 12 (citing *In re Luis R.*, 239 Ill. 2d 295, 301 (2010)). Beyond that, defendant's new arguments are a morass of confusion over constitutional doctrine, both Illinois and federal. As to Illinois doctrine, defendant fails to recognize the scope of our constitution's grant of subject-matter jurisdiction. See Ill. Const. 1970, art. VI, § 9; *Belleville Toyota*, 199 Ill. 2d at 334. As to federal doctrine, defendant misunderstands how a federal system functions. That misunderstanding leads him to attempt to apply article III of the United States Constitution (U.S. Const., art. III), which institutes the federal courts, to the state courts, which are instituted under the constitutions of the various states (*e.g.*, Ill. Const. 1970, art. VI). Article III no more sets the jurisdiction of Illinois's courts than article I (U.S. Const., art. I) sets the terms of our General Assembly. None of this merits an exception to bar by law of the case.

¶ 26 It remains only to address plaintiff's request that we award sanctions in its favor. We decline to do so. Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) permits imposition of sanctions for the prosecuting of a frivolous appeal. "An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Ill. S. Ct. R.

375(b) (eff. Feb. 1, 1994). The imposition of Rule 375 sanctions is entirely within our discretion. *E.g., Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 87. Defendant's arguments, and in particular those based on the application of article III of the United States Constitution to state courts, are patently frivolous. Defendant should have recognized that his notion of article III applying to state courts had a fatal flaw when, despite the great volume of cases discussing the applicability of the United States Constitution to the states, he was unable to cite a case suggesting the applicability of article III. That said, although defendant's claims here are largely frivolous, his continued testing of the judgment is not *necessarily* so. We do not wish to normalize the judgment that we affirmed in the original appeal. The first time this matter was before us, we explicitly noted that "in light of the apparent discrepancy between plaintiff's complaint and the attached documents, plaintiff's standing is much in doubt." *Canale*, 2014 IL App (2d) 130676, ¶ 18. Moreover, as we noted, we lack confidence as to the viability of the judgment if a true mortgagee other than plaintiff should seek to vindicate its rights in the trial court. In short, critical matters remain in doubt, so we do not wish defendant to understand that *any* new filing would be sanctionable. Nevertheless, we caution defendant that his current approach is not within the bounds of proper advocacy; if he wishes to raise any further issues in this case *pro se*, he must take much greater care to learn the applicable law. In a further appeal of no more merit than this one, we would be receptive to a request for sanctions in spite of the reservations we have just expressed.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the dismissal of defendant's petition under section 2-1401 of the Code.

¶ 29 Affirmed.