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2016 IL App (3d) 140496-U

Order filed January 20, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

BANK OF AMERICA NATIONAL ASSOCIATION,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-14-0496
)	Circuit No. 10-CH-529
)	
MICHAEL WORD JOHNSON,)	Honorable
)	Thomas A. Thanas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying the defendant's section 2-1401 petition where the defendant failed to establish that he acted with due diligence in presenting the affirmative defense of standing in the foreclosure proceedings.

¶ 2 The defendant, Michael Word Johnson, appeals the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), arguing that his petition presented the meritorious defense that the plaintiff, Bank

of America National Association,¹ lacked standing to bring suit and that the defendant demonstrated due diligence in raising the standing defense and filing the section 2-1401 petition. Because we find that the defendant did not act with due diligence in presenting the standing defense in the foreclosure proceedings, we affirm the judgment of the trial court.

¶ 3

FACTS

¶ 4

On January 27, 2010, the plaintiff filed a complaint for foreclosure and other relief against Lenetta Delacy Johnson seeking foreclosure on a mortgage secured by property at 300 Claridge Circle, Bolingbrook, Illinois (the Property).² The plaintiff named several additional parties as defendants, including Lenetta's "current spouse, if any." In the complaint, the plaintiff described itself as "Bank of America, National Association, as successor by merger to LaSalle Bank National Association, as Indenture Trustee, on behalf of the holders of the Accredited Mortgage Loan Trust 2005-3 Asset Backed Notes" (Bank of America). The plaintiff alleged that it was bringing suit in the capacity of "obligee and legal holder of the indebtedness secured by the Mortgage and evidenced by the Note, by virtue of assignment of the mortgage."

¶ 5

The plaintiff attached a copy of the mortgage and note, which were dated August 5, 2005, and signed by only Lenetta as the mortgagor and borrower. The words "unmarried woman" were handwritten next to Lenetta's name and initialed by Lenetta in the mortgage instrument. The

¹We note that the plaintiff initially described itself in the pleading captions as "Bank of America, National Association" as trustee of the Accredited Mortgage Loan Trust 2005-3 Asset backed notes, but later began describing itself in the captions as "U.S. Bank National Association" as successor trustee of said trust. In this order, we refer to both Bank of America, National Association and U.S. Bank National Association as "the plaintiff."

²The defendant is Lenetta's spouse. Lenetta does not join in this appeal.

mortgage named Accredited Home Lenders, Inc. (AHL) as the lender and Mortgage Electronic Registration Systems, Inc. (MERS), acting as nominee for AHL, as the mortgagee. The legal description of the Property in the mortgage instrument described the property as "Lot 28," with a handwritten notation striking out "Lot 28" in favor of a handwritten note that reads, "Lot 103." This handwritten change was not initialed by the parties and did not bear any date indicating when the handwritten note was added to the document.

¶ 6 Also attached to the complaint was a document entitled "Corporate Assignment of Mortgage," stating that MERS assigned the mortgage to Bank of America "together with the Note or other evidence of indebtedness." The legal description of the Property in the assignment described the property as "Lot 28."

¶ 7 On March 15, 2010, the plaintiff filed an affidavit for service by publication, stating that it was unable to find the following parties upon diligent inquiry: Lenetta; Lenetta's current spouse, if any; unknown owners; and nonrecord claimants. The plaintiff also filed the affidavit of a special process server which stated the process server was unable to serve Lenetta at the Property after attempting service on eight occasions on different days and times. On March 22, 2010, the clerk filed a notice of publication, stating that notice was to be published in a local newspaper on March 31, April 7, and April 14, 2010. The notice listed the default date as April 30, 2010.

¶ 8 Lenetta filed a *pro se* appearance on March 23, 2010, listing the address of the Property as her address. Lenetta filed a *pro se* answer to the complaint. An attorney later entered an appearance for Lenetta and filed an amended answer and affirmative defenses on August 22, 2011. Among the affirmative defenses asserted by Lenetta was that the plaintiff did not have standing to bring suit.

¶ 9 On September 3, 2011, the plaintiff filed a motion to strike Lenetta's affirmative defenses, and a hearing on the plaintiff's motion was set for November 3, 2011. On November 2, 2011, the defendant filed an emergency motion requesting that the court extend Lenetta's time for filing a response to the motion to strike and continue the hearing on the motion to strike. At the hearing the next day, Lenetta did not appear personally or by counsel. The defendant was present. This was the first time the defendant was involved in the foreclosure proceedings. The trial court denied the defendant's emergency motion to continue and granted the plaintiff's motion to strike Lenetta's affirmative defenses.

¶ 10 On March 20, 2012, the circuit court entered: (1) an order for summary judgment against Lenetta; (2) an order for default against all other defendants, including the current spouse of Lenetta; and (3) a judgment of foreclosure and sale.

¶ 11 On June 12, 2012, the plaintiff filed a notice of sheriff sale. For the first time, the plaintiff described the "plaintiff" in the caption as "U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle National Association, as Indenture Trustee for the holders of the Accredited Mortgage Loan Trust 200[5-3 Asset Backed Notes]" (U.S. Bank).³ The sheriff's sale was initially set for July 11, 2012, but was rescheduled twice. On June 18, 2013, the plaintiff filed a notice of sheriff sale setting the sale for July 17, 2013.

¶ 12 On July 15, 2013, approximately 17 months after the judgment of default was entered against him, the defendant filed a *pro se* "Motion for Leave to Present Intervening Petition for

³The plaintiff's name on the notice of sheriff sale ends at "Accredited Mortgage Loan Trust 200." Presumably, this is a typo as subsequent documents filed by the plaintiff list the name of the trust as "Accredited Mortgage Loan Trust 2005-3 Asset Backed Notes."

Permanent Injunction and Damages" and an "Emergency Petition for Permanent Injunction and Damages." In his motions, the defendant alleged that he had been married to Lenetta since November 21, 1989. In his "Emergency Petition for Permanent Injunction and Damages," the defendant argued that neither Bank of America nor U.S. Bank had standing to file suit. The defendant attached a document to his emergency petition purporting to be a second corporate assignment of mortgage by which MERS transferred the Property to U.S. Bank. Said assignment was dated March 17, 2011, and recorded on January 4, 2012. The second assignment described the Property as "Lot 103." Lenetta filed a similar *pro se* emergency petition for permanent injunction and damages.

¶ 13 The defendant filed a subsequent motion asking that he be allowed to file an affirmative defense and counterclaim arguing that Bank of America and U.S. Bank lacked standing. Lenetta filed a similar motion.

¶ 14 On August 7, 2013, the trial court entered an order: (1) granting the defendant leave to file his appearance; (2) denying the defendant's and Lenetta's petitions for permanent injunction and damages; (3) denying the defendant's motion to intervene; and (4) denying the defendant's and Lenetta's motions for leave to file a counterclaim.

¶ 15 On August 28, 2013, the plaintiff filed a notice of sheriff's sale stating that a sheriff's sale was scheduled for September 5, 2013. On September 3, 2013, the defendant and Lenetta filed a "Motion Challenging the Constitutionality, Construction, and Application of the Illinois Mortgage Foreclosure Law [(IMFL)], 735 ILCS 5/15-1504(N) and Challenging the Constitutionality of the Court's Decision that MERS has Standing to Prosecute a Complaint to Foreclose a Mortgage." The trial court denied the motion the next day, and a judicial sale of the Property was held on September 5.

¶ 16 On September 10, 2013, Lenetta filed a notice of appeal, which stated that she and the defendant were appealing the trial court's ruling of September 4 denying the motion challenging the constitutionality, construction, and application of the IMFL. On November 8, 2013, this court dismissed the defendant's and Lenetta's appeal for lack of an appealable order. Our mandate issued January 16, 2014.

¶ 17 On February 27, 2014, the plaintiff filed a motion for approval of report of judicial sale and distribution and for confirmation of judicial sale. On May 8, 2014, the trial court entered an order approving report of sale and distribution, confirming sale, and order for possession. The defendant filed a motion to vacate the order on the basis that he had filed for bankruptcy the day before the order was entered. The trial court denied the defendant's motion to vacate, as the United States Bankruptcy Court for the Northern District of Illinois had previously ordered that the plaintiff be granted relief from the automatic stay in a prior bankruptcy proceeding filed by Lenetta and in any future bankruptcies affecting the Property. The defendant filed a motion to reconsider, which was denied.

¶ 18 On June 3, 2014, the defendant filed a "Motion to Dismiss Pursuant to 735 ILCS 5/2-1401." The section 2-1401 motion alleged that: (1) the two MERS assignments the defendant previously filed "supposedly evidencing" that the plaintiff is the legal holder of the indebtedness in the instant case were void as a matter of law; (2) MERS lacked authority to transfer the loan and note to U.S. Bank after transferring it to Bank of America; (3) inconsistencies and defects in the MERS assignments challenge the plaintiff's standing to foreclose; and (4) the adjustable rate note attached to the foreclosure complaint was "ineffective, invalid, or otherwise void as a matter of law" because it was not endorsed. The motion alleged that the defendant timely raised the standing defense in his amended answer and affirmative defenses. In the prayer for relief, the

defendant asked that the court: (1) dismiss the foreclosure action with prejudice; (2) order the plaintiff to prepare and deliver a release of mortgage to the defendant; and (3) discharge the mortgage lien on the Property.

¶ 19 On June 18, 2014, the defendant filed a "Motion for Leave to Supplement the Motion to Dismiss Pursuant to 735 ILCS 5/2-1401, and Request to Continue the Hearing on the Pending 1401 Motion," which argued that the transfers effectuated by MERS were invalid because AHL lost its mortgage license in 2010.

¶ 20 On June 19, 2014, the trial court entered an order denying the defendant's section 2-1401 petition. The defendant filed a timely notice of appeal appealing this order.

¶ 21 ANALYSIS

¶ 22 On appeal, the defendant argues that his section 2-1401 petition was improperly denied because he brought the petition with due diligence and presented a meritorious defense to the foreclosure proceedings, namely that the plaintiff lacked standing to bring suit. In the petition, the defendant makes several different, specific arguments regarding the plaintiff's lack of standing. Because we find that the defendant forfeited the issue of standing by not raising it in a timely manner in the foreclosure proceedings, we affirm the judgment of the trial court.⁴

¶ 23 Section 2-1401 of the Code provides a statutory procedure for vacatur of final orders, judgments, and decrees after 30 days from their entry. 735 ILCS 5/2-1401 (West 2012).⁵ "To be

⁴While this consideration did not factor in to our disposition in the instant case, we note that the defendant was not named as a mortgagor in the mortgage instrument and it is unclear what interest, if any, he has in the Property.

⁵In foreclosure cases, the order confirming the sale rather than the judgment of foreclosure operates as a final and appealable order. *EMC Mortgage Corp. v. Kemp*, 2012 IL

entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (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." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). See also *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 22. To demonstrate that he is entitled to relief under section 2-1401, "the petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently, when he failed to initially resist the judgment." *Smith*, 114 Ill. 2d at 222. "A petition which fails to allege facts showing diligence and that the dismissal order was a result of excusable mistake renders the petition insufficient as a matter of law." *Windmon v. Banks*, 31 Ill. App. 3d 870, 873 (1975).

¶ 24 Where, as here, a section 2-1401 petition presents a fact-dependent challenge to a final judgment, we review the trial court's judgment for abuse of discretion. *Warren County Soil &*

113419, ¶ 11. In this case, the "Motion to Dismiss Pursuant to 735 ILCS 5/2-1401" was filed less than 30 days after the order confirming the sale was entered. However, because defendant had already filed a motion to vacate the order confirming the sale prior to the filing of the "Motion to Dismiss Pursuant to 735 ILCS 5/2-1401," we will treat the "Motion to Dismiss Pursuant to 735 ILCS 5/2-1401" as a section 2-1401 petition. See *Slavick v. Michael Reese Hospital & Medical Center*, 92 Ill. App. 3d 161, 165 (1980) (holding that after the first postjudgment motion attacking the validity of the judgment is disposed of, a party may not file a second postjudgment motion unless it conforms to the requirements of section 2-1401 (formerly section 72 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, ¶ 72))).

Water Conservation District v. Walters, 2015 IL 117783, ¶ 51. As the defendant failed to furnish the report of proceedings, the trial court's reasoning for its denial of the defendant's petition is not contained in the record on appeal. It was the defendant's burden as the appellant to present a "sufficiently complete record *** to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We resolve any doubts arising from the incompleteness of the record against the appellant. *Id.* at 392. Additionally, we may affirm the judgment of the trial court on any basis supported by the record. *Lulay v. Parvin*, 359 Ill. App. 3d 653, 656 (2005).

¶ 25 Lack of standing is an affirmative defense and therefore must be specifically and expressly pled. 735 ILCS 5/2-613(d) (West 2010). "A plaintiff need not allege facts establishing that he has standing to proceed. Rather, it is the defendant's burden to plead and prove lack of standing." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). The defense of standing will be forfeited if not raised in a timely fashion in the trial court. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010).

¶ 26 We find that the defendant forfeited the issue of the plaintiff's standing by failing to timely raise it in the trial court. The defendant was properly served with the foreclosure complaint by publication, but did not appear or answer the complaint. Consequently, on March 20, 2012, the trial court entered a judgment of default against the defendant as the spouse of Lenetta, as well as a judgment of foreclosure. We additionally note that on November 2, 2011—4½ months prior to the entry of the judgments of default and foreclosure—the defendant filed a motion requesting that the court extend Lenetta's time for filing a response to the plaintiff's motion to strike her affirmative defenses. On said motion, the defendant listed the address of the

Property as his address. The defendant was also present in court on November 3, 2011, at the hearing on the plaintiff's motion to strike Lenetta's affirmative defenses.

¶ 27 Despite the service by publication and the defendant's apparent knowledge of the foreclosure proceedings, the defendant failed to answer the complaint or file an appearance before a judgment of default was entered against him. The defendant did not raise the issue of standing until July 15, 2013—approximately 17 months after the judgment of default was entered and two days before a sheriff's sale of the Property was scheduled. The defendant forfeited the issue of standing through his default. See *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010).⁶

¶ 28 In coming to this conclusion, we reject any reliance the defendant has made upon the fact that Lenetta previously raised the defense of standing. Lenetta is not a party to this appeal. Additionally, Lenetta's affirmative defenses were stricken when she failed to appear. The fact remains that the defendant did not raise the defense of standing until 17 months after the judgments of default and foreclosure were entered.

¶ 29 Even if we were to excuse the defendant's forfeiture, we note that his section 2-1401 petition fails to provide any explanation for his delay in raising the affirmative defense of standing which would render the delay as the result of an excusable mistake. The defendant's

⁶Additionally, the defendant argues for the first time on appeal that MERS violated the License Act by conducting residential mortgage business in Illinois without obtaining a license and, thus, the transfers are void against public policy and unenforceable. Because this argument was not raised in the trial court, we also deem it forfeited. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15.

section 2-1401 petition is therefore legally insufficient. See *Smith*, 114 Ill. 2d at 220-22; *Windmon*, 31 Ill. App. 3d at 873.

¶ 30 We also note that the defendant makes a generic argument that the mortgage instrument was unenforceable as a matter of public policy. The defendant contends that AHL lost its mortgage license in 2010 and, consequently, a transfer MERS made on behalf of AHL in 2011 was void as a matter of public policy and resulted in an unenforceable contract. The defendant did not include this argument in his section 2-1401 petition but raised it for the first time in his motion for leave to supplement his section 2-1401 petition, which was filed the day before the hearing.

¶ 31 The order entered on the section 2-1401 petition states "defendant's motion to dismiss pursuant to 735 ILCS 5/2-1401 is denied." As the report of proceedings was not provided on appeal, it is unclear whether the motion for leave to supplement was ever ruled upon. Any doubts arising from the incompleteness of the record are resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Consequently, as it is unclear whether this issue was ever properly before the trial court, we deem the issue forfeited. *Mabry*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal.").

¶ 32 Finally, we would be remiss if we failed to note the numerous errors and discrepancies we found in reviewing the trial record. Initially, we note that the lot number in the legal descriptions of the Property varied between the mortgage instrument itself and the two corporate assignments of the mortgage. The legal description of the Property in the mortgage instrument attached to plaintiff's complaint describes the property as "Lot 28," which is stricken out in favor of the handwritten notation "Lot 103." In the first corporate assignment of the mortgage, which

was attached to the complaint and dated January 15, 2010, MERS purported to transfer its interest in "Lot 28" to Bank of America. In the second corporate assignment of the mortgage, which defendant attached to his emergency petition, MERS purported to transfer "Lot 103" to U.S. Bank. At oral arguments, the plaintiff's counsel conceded that the second assignment of the mortgage was a "nullity" because MERS had no remaining interest in the Property to transfer after the first corporate assignment of the mortgage.

¶ 33 Additionally, we note that the plaintiff began referring to itself as "U.S. Bank National Association" in its headings without ever seeking leave of court to substitute U.S. Bank as the party plaintiff. The plaintiff referred to itself as "U.S. Bank" throughout its appellate brief and claimed in its brief that the relabeling of its headings in the trial court was a "non-issue" on appeal because only the trustee had changed and not the "actual party-in-interest." During oral arguments, however, the plaintiff took the position that the relabeling of the headings was a "scrivener's error." The plaintiff contended that Bank of America was always the proper plaintiff because (1) the mortgage was never properly assigned to U.S. Bank, and (2) Bank of America never filed a motion to change the case caption.

¶ 34 We find the discrepancies regarding the lot numbers of the Property and the identity of the plaintiff, as well as the invalid 2011 assignment to U.S. Bank to be extremely troubling. Said errors appear to be the result of a lack of basic lawyering in the trial court. However, we are not able to reach said errors on review. Any error regarding the discrepancies in the lot numbers was forfeited because it was not raised by the defendant in the trial court or on review. *Mabry*, 2012 IL App (1st) 111464, ¶ 15. To the extent that the errors regarding the invalid 2011 assignment and the discrepancies in the identity of the plaintiff were raised in the trial court and in the defendant's section 2-1401 petition, we find that they were not raised with due diligence in the

trial court and, consequently, relief is unavailable under section 2-1401. See *Smith*, 114 Ill. 2d at 220-22.

¶ 35

CONCLUSION

¶ 36

The judgment of the circuit court of Will County is affirmed.

¶ 37

Affirmed.