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2016 IL App (3d) 140875-U

Order filed March 31, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

U.S. BANK NATIONAL ASSOCIATION,	)	Appeal from the Circuit Court
as Trustee for the GSAMP Trust 2006-NC1	)	of the 13th Judicial Circuit,
Mortgage Pass-Through Certificates,	)	Grundy County, Illinois.
Series 2006-NC1,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
CARMEN HAWKINS a/k/a CARMEN	)	
M. HAWKINS,	)	
	)	
Defendant-Appellant,	)	Appeal No. 3-14-0875
	)	Circuit No. 11-CH-254
and	)	
	)	
CORNELIUS HAWKINS, JR. a/k/a	)	
CORNELIUS HAWKINS; TEXAS	)	
CAPITAL BANK, N.A.; CAPITAL ONE	)	
BANK; LAKEWOOD TRAILS	)	
HOMEOWNERS ASSOCIATION;	)	
ARROW FINANCIAL SERVICES, LLC;	)	
UNKNOWN OWNERS AND	)	
NONRECORD CLAIMANTS,	)	Honorable
	)	Robert C. Marsaglia,
Defendants.	)	Judge, Presiding.

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¶ 6 Carmen Hawkins was served via substitute service, and Cornelius Hawkins was served via personal service, on August 31, 2011, but both failed to appear or file an answer. On November 26, 2012, the Trustee filed a motion for the entry of an order of default and a judgment of foreclosure and sale. Both Hawkins appeared *pro se* at a hearing on December 19, 2012, and were allowed 28 days to answer or otherwise plead. After the Hawkins failed to appear or otherwise plead, the circuit court entered an order of default on January 30, 2013, as well as a judgment for foreclosure and sale.

¶ 7 A notice of sheriff's sale of the property was filed on April 22, 2013, and then again on June 27, 2013. The sheriff's sale eventually took place on September 16, 2013. On September 23, 2013, the Trustee filed a motion for the entry of an order confirming the sale. Thereafter, at the hearing to approve the report of sale and distribution on October 2, 2013, Carmen Hawkins appeared in court. On October 3, 2013, counsel entered an appearance on her behalf and also filed a motion pursuant to section 1508 of the Foreclosure Law (735 ILCS 5/1508 (West 2010)) to vacate the sale. The circuit court granted the parties time to respond to the Trustee's motion to approve sale and Carmen's motion to vacate the sale. On January 10, 2014, the circuit court denied the motion to vacate and approved the sale.

¶ 8 Carmen filed a motion to reconsider the order approving the sale, arguing that the Trustee failed to show that it was entitled to enforce the note. The circuit court denied the motion on March 7, 2014, finding that the complaint was in the proper form and the affirmative defense of standing was not raised in a timely manner. On August 22, 2014, Carmen filed a motion for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/20-1401 (West 2010)), again arguing that the Trustee had not established that it owned the note. The circuit court denied that motion and Carmen appealed the denial of that motion.

¶ 9

## ANALYSIS

¶ 10

In this case, the circuit court entered three orders: (1) the order denying the motion to vacate and approving the sale, entered on January 10, 2014; (2) the order denying the motion to reconsider, entered on March 7, 2014; and (3) the order denying Carmen's motion for relief from those judgments pursuant to section 2-1401 of the Code, entered on October 8, 2014. Carmen's notice of appeal was filed on November 7, 2014, specifically appealing the last order. Since there was no timely notice of appeal filed following the denial of Carmen's motion to reconsider, we lack appellate jurisdiction to review the first two orders. See Ill. S. Ct. R. 303 (eff. June 4, 2008); see also *Sarkissian*, 201 Ill. 2d at 102 (the filing of a petition pursuant to section 2-1401 of the Code is not a timely appeal but a new action in the circuit court to vacate a final judgment). Thus, the only question before us is whether the circuit court properly denied the section 2-1401 petition for relief from judgment.

¶ 11

Carmen argues that the circuit court erred in denying her 2-1401 petition because it did not verify the ownership of the note prior to entering the judgment of foreclosure and sale and erred in denying Carmen's motion to vacate on the issue of standing. The Trustee argues that Carmen's motions were properly denied and, further, that her motion pursuant to 2-1401 of the Code was barred by section 15-1509(c) of the Foreclosure Law (735 ILCS 5/15-1509(c) (West 2010)).

¶ 12

Section 2-1401 petitions provide relief from final orders and judgments after 30 days from entry thereof. 735 ILCS 5/2-1401 (West 2010). A petitioner is entitled to relief under section 2-1401 if the petition sets forth 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. *U.S. Bank Nat. Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 22. Our review of the denial of a section 2-1401 petition is *de novo*. *Id.* ¶ 23.

¶ 13 Carmen argues that she exercised due diligence in that she presented her case to the court once she discovered that the Trustee did not have appropriate documentation to move forward. Of course, that issue was raised for the first time in her motion to vacate the sale and motion to reconsider, after the judgment of foreclosure and after the sheriff's sale. Carmen fails to explain how she acted with due diligence by failing to appeal those orders and then waiting five months to file her 2-1401 petition. Also, we note that the lack of standing is an affirmative defense, which is waived if not raised in a timely fashion. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9. The Trustee's foreclosure complaint complied with the requirements of section 15-1504(a) of the Foreclosure Law (735 ILCS 5/15–1504(a) (West 2008)), alleging that it was the mortgagee and attaching a copy of the mortgage and the note, endorsed in blank. Carmen failed to answer the complaint and was defaulted. By her default, she admitted the well-pleaded allegations of the complaint. Carmen waived any challenge to the Trustee's standing by not raising the issue until after the judicial sale had already taken place.

¶ 14 Whether Carmen exercised due diligence or had a meritorious defense, we find that section 15-1509(c) of the Foreclosure Law bars her claims in her petition under section 2-1401 of the Code. See *U.S. Bank Nat. Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30 ("There is simply no Illinois authority to support the defendant's argument that she can utilize section 2-1401 [of the Code] to circumvent section 15-1509(a) or section 15-1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property."). The report of sale and distribution confirmed that the judicial sale of the property took place on September 13, 2013,

and provided that the deed would issue upon confirmation of the sale. The sale was confirmed on January 9, 2014. Thus, we affirm the denial of the section 2-1401 petition.

¶ 15

#### CONCLUSION

¶ 16

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

¶ 17

Affirmed.