2018 IL App (1st) 171225-U
No. 1-17-1225

SECOND DIVISION
May 22, 2018



---

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

| | | |
|---|---|---|
| THE BANK OF NEW YORK MELLON, as successor to JPMorgan Chase Bank, N.A., as trustee for the certificate holders for the Structured Asset Investments II Inc., Bear Stearns Alt-A Trust, mortgage pass-through certificates, series 2004-13, | ) | Appeal from the Circuit Court of Cook County. |
| Plaintiff-Appellant, | ) | No. 09 CH 22294 |
| v. | ) | The Honorable Darryl B. Simko, Judge Presiding. |
| JOSEPH DANON, JR. aka JOSEPH DANON DR, FIFTH THIRD BANK, 111 EAST CHESTNUT CONDOMINIUM, UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, | ) | |
| Defendants | ) | |
| (Joseph Danon, Jr., Defendant-Appellant). | ) | |

---

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The order approving the judicial sale of the foreclosed property was affirmed where the trial court retained jurisdiction to vacate its dismissal of the complaint for want of prosecution more than 30 days after the dismissal, the defendant lacked standing to contest the

validity of the notice of sale based on a claimed violation of the Human Rights Act, and the defendant failed to demonstrate good cause for an extension of time under Illinois Supreme Court rule 183.

¶ 2 In this mortgage foreclosure action, defendant Joseph Danon, Jr. challenges the order confirming the judicial sale of the property at issue on several grounds. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff, The Bank of New York Mellon, filed its complaint to foreclose the mortgage on defendant's property located at 111 East Chestnut Street, Units 51D and 51G, Chicago, Illinois (the "property"), in July 2009. Plaintiff alleged that defendant had failed to make any payments since September 2008. Defendant responded by filing an answer and affirmative defenses, along with a counterclaim based on alleged violations of the Truth in Lending Act (15 U.S.C §1601 *et seq.* (2006)). Plaintiff moved to dismiss defendant's counterclaim based on sections 2-615 and 2-619(a)(5) of the Illinois Code of Civil Procedure ("Code") (735 ILCS 5/2-615 (West 2010); 735 ILCS 5/2-619(a)(5) (West 2010)), and the trial court granted that motion in January 2011.

¶ 5 In December 2012, the trial court *sua sponte* entered an order dismissing the foreclosure action for want of prosecution ("DWP"). Two months later, plaintiff filed a motion asking that the trial court vacate the DWP, and the trial court agreed. In June 2016, defendant filed a motion to dismiss the action based on a lack of trial court jurisdiction. According to defendant's motion, because plaintiff's motion to vacate the DWP was filed more than 30 days after the entry of the DWP, the trial court lacked jurisdiction to vacate it. The trial court denied defendant's motion to dismiss and instead entered a judgment of foreclosure against defendant and ordered that the property be sold.

¶ 6 Plaintiff filed a notice of sale. That notice contained the following language:

> "You will need a photo identification issued by a government agency (driver's license, passport, etc.) in order to gain entry into our building and the foreclosure sale room in Cook County and the same identification for sales held at other county venues where The Judicial Sales Corporation conducts foreclosure sales."

In response, defendant filed a "Motion to Declare Notice of Sale Defective and to Require Republication." In that motion, defendant argued that the above-quoted language violated section 3-102(F) of the Human Rights Act (775 ILCS 5/3-102(F) (West 2016)), because restricting the sale to only those people who possess government-issued photo identification unlawfully discriminated against undocumented persons based on their citizenship status and national origin.

¶ 7 No action was taken on defendant's motion to declare the notice of sale defective, and the property was sold on January 13, 2017. Plaintiff filed a motion for an order approving the sale, and the trial court set a briefing schedule on the motion. Defendant's response was to be filed on or before March 3, 2017. On March 7, 2017, defendant filed his objections to the confirmation of the sale. Although no report of proceedings were included in the record on appeal, defendant claims in his brief that at the March 24, 2017, hearing on the motion for an order approving the sale, his counsel made an oral motion, pursuant to Illinois Supreme Court Rule 183 (eff. Feb. 16, 2011), to allow the late filing of his objections to the confirmation of the sale. The trial court denied defendant's motion to allow the late filing and granted plaintiff's motion for an order approving the sale of the property.

¶ 8 Following an unsuccessful motion to reconsider, defendant filed this appeal.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant makes the following arguments: (1) the trial court lost jurisdiction over this matter 30 days after the entry of the DWP, and all subsequent orders entered are void; (2) the order approving the sale of the property should be reversed because the notice of sale violated section 3-102(F) of the Human Rights Act; and (3) the trial court abused its discretion when it refused to allow the late filing of defendant's objections to the confirmation of the sale. None of these contentions have merit.

¶ 11 Trial Court Jurisdiction

¶ 12 Defendant first argues that the trial court lost jurisdiction over this matter 30 days after it entered the DWP and, thus, all orders entered after the DWP were void. We review *de novo* the trial court's determination that it retained subject matter jurisdiction at the time it vacated the DWP. See *Court of Northbrook Condominium Association v. Bhutani*, 2014 IL App (1st) 130417, ¶ 25.

¶ 13 Generally, the trial court retains jurisdiction over a cause for 30 days after the entry of a final order or judgment. *Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995). It is well established that a dismissal for want of prosecution is not a final order until the expiration of the refiling period under section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)). See *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 502 (1998); *Jackson v. Hooker*, 397 Ill. App. 3d 614, 618 (2010). Until the expiration of the refiling period, the trial court retains jurisdiction over the matter and may vacate the DWP pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)). *Jackson*, 397 Ill. App. 3d at 618.

¶ 14 In the present case, the DWP order was entered on October 23, 2012. Under section 13-217 of the Code, plaintiffs had one year or until the expiration of the applicable statute of

limitations, whichever was longer, to refile their claim against defendant. 735 ILCS 5/13-217. Until that time expired, the trial court retained jurisdiction over the matter and maintained its authority to vacate the DWP. Plaintiffs filed their motion to vacate on December 6, 2012, less than two months after the entry of the DWP, and defendant does not contend that the statute of limitations had run on plaintiffs' claim against him. Accordingly, because the time for refiling and the statute of limitations had not expired, the DWP had not become a final order, and the trial court had jurisdiction to vacate it upon plaintiffs' motion.

¶ 15 Nevertheless, defendant argues that the order dismissing his counterclaim with prejudice acted to make the subsequent DWP order final. In support, defendant relies on *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008), for the proposition that the dismissal of his counterclaim with prejudice in January 2011 rendered the subsequent October 2012 DWP final where it would not otherwise be. His logic then continues that because the DWP was a final order, the trial court lost jurisdiction over the matter after 30 days and plaintiffs' only recourse was to file a petition pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). Defendant misunderstands the import of *Hudson*.

¶ 16 In *Hudson*, the plaintiffs filed a two count complaint, alleging negligence in one count and willful and wanton misconduct in the other. 228 Ill. 2d at 465-66. The plaintiffs' negligence claim was dismissed with prejudice on the defendants' motion. *Id.* at 466. Two years later, the plaintiffs voluntarily dismissed the willful and wanton count. *Id.* Nearly one year after that, the plaintiffs refiled their willful and wanton misconduct claim against the defendants in a new action. *Id.* The defendants sought to dismiss the plaintiffs' refiled complaint on the basis that it was barred by *res judicata*. *Id.* The trial court agreed and dismissed the plaintiffs' refiled complaint. *Id.* On appeal from the appellate court's affirmance, our supreme court held that

because the involuntary dismissal of the plaintiffs' negligence count in their initial complaint constituted an adjudication on the merits and because the willful and wanton misconduct count could have been litigated and resolved in the initial action, the plaintiffs were barred by *res judicata* from raising the same claims a second time. *Id.* at 473-74.

¶ 17 *Hudson* does not, as defendant contends, stand for the proposition that a previous dismissal with prejudice will somehow render a subsequent non-final order final. The issue in *Hudson* was the application of *res judicata*, not the finality of any of the orders. *Id.* at 467. Moreover, even if the finality of orders had been at issue, the dismissal in *Hudson* was a voluntary dismissal, not a DWP. A voluntary dismissal, unlike a DWP until expiration of the refiling period, is a final order. *Swisher v. Duffy*, 117 Ill. 2d 376, 379 (1987). Thus, the *Hudson* court had no occasion to address whether the voluntary dismissal of the willful and wanton misconduct count was rendered final by the earlier dismissal with prejudice of the negligence count, as the voluntary dismissal was automatically final. Accordingly, defendant's contention that *Hudson* dictates a conclusion that the earlier dismissal of his counterclaim made the subsequent DWP final where it would not otherwise be is incorrect.

¶ 18 Defendant also implies that because the DWP was entered while plaintiffs' counsel was present at the hearing, this DWP is distinguishable from other, non-final DWPs. Defendant does not, however, explain how this fact enters into the analysis of whether the DWP was final, nor does he cite any authority for the proposition that the finality of a DWP is dependent on the presence of plaintiffs' attorney. Accordingly, any contention that defendant intended to make in this respect is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (providing that an appellant's brief must contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on");

*CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue.").

¶ 19 In sum, because DWPs are not final until the expiration of the refiling period and because that period had not expired in this case, the trial court retained jurisdiction to entertain and grant plaintiffs' motion to vacate the DWP.

¶ 20 Notice of Sale

¶ 21 Defendant's second contention is that the order confirming the sale should be reversed because the notice of sale violated section 3-102(F) of the Human Rights Act. Under section 15-1508(b) of the Code (735 ILCS 5/15-1508(b) (West 2016)), upon proper notice and motion, the trial court must confirm the judicial sale of a property unless it finds one of the following: "(i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done." According to defendant, the requirement that persons desiring to bid present photo identification from a government agency rendered the sale unconscionable or justice was not otherwise done, because the photo identification requirement violated section 3-102(F) of the Human Rights Act by unlawfully discriminating against individuals based on national origin. The trial court's confirmation of a sale is subject to an abuse-of-discretion standard of review. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 22 Section 3-102(F) of the Human Rights Act states that it is a civil rights violation for any person engaging in a real estate transaction to, because of unlawful discrimination:

> "[m]ake, print, circulate, post, mail, publish or cause to be made, printed, circulated, posted, mailed, or published any notice, statement, advertisement or sign, or use a form

> of application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, that indicates any preference, limitation, or discrimination based on unlawful discrimination or unlawful discrimination based on familial status, or an intention to make any such preference, limitation, or discrimination."

775 ILCS 5/3-102(F). Defendant's theory is that the photo identification requirement represented unlawful discrimination based on national origin, because people who have entered the United States without proper documentation are unable to obtain government issued photo identification. Defendant contends that he was injured by this discrimination in that 11 million potential bidders were excluded from the sale of the property, implying that the sale price would have been higher had they been permitted into the sale.

¶ 23 This issue was directly addressed by this district in the case of *Deutsche Bank National Trust v. Peters*, 2017 IL App (1st) 161466, where the defendant made precisely the same argument with respect to an identical provision in the notice of sale in his case. This district held that the defendant lacked standing to make the argument that the notice of sale violated the Human Rights Act, because he failed to identify a single person who went to the sale with adequate funds to purchase the property but was not allowed to participate due to not having government-issued identification. *Id.* at ¶ 15. He also failed to identify any individual who was discouraged from bidding at the sale because of his or her undocumented status. *Id.* Accordingly, because the defendant was unable to demonstrate a distinct and palpable injury fairly traceable to the notice of sale, any injury to him was speculative and he lacked standing. *Id.*

¶ 24 Defendant here attempts to avoid the effect of the holding in *Deutsche Bank* by arguing that (1) standing is an affirmative defense that plaintiff failed to prove, (2) he was actually injured by the publication of the violating notice of sale, and (3) the trial court did not afford him the opportunity to present any evidence on the issue of standing. All three arguments fail. First, although standing might be an affirmative defense to a complaint, the burden to demonstrate that a sale should not be confirmed falls on defendant. *Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶ 28. If defendant chooses to base his contention of unconscionability on a violation of the Human Rights Act, he must also establish that he is in a position to make such a claim. Moreover, we may affirm the trial court's decision on any basis found in the record, and here the record demonstrates a lack of standing by defendant. *Yugoslav-American Cultural Center, Inc. v. Parkway Bank and Trust Co.*, 289 Ill. App. 3d 728, 738 (1997). Second, despite repeatedly claiming that he was somehow injured by the publication of the notice of sale, defendant does not actually point to any evidence that the result of the sale would have been any different had the notice of sale not contained the offending provision. Finally, defendant's claim that the trial court did not afford him an opportunity to present evidence of standing fails, because defendant did not include any reports of proceedings in the appellate record, so we are unable to assess the veracity of defendant's contention. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial 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. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.").

¶ 25 Accordingly, because defendant has failed to demonstrate any cognizable injury resulting from the allegedly discriminatory notice of sale, we conclude that defendant lacked standing to make this argument and that the trial court did not abuse its discretion in confirming the judicial sale.

¶ 26 Late Filing of Objections

¶ 27 Finally, defendant contends that the trial court abused its discretion when it refused, under Illinois Supreme Court Rule 183, to allow defendant to file his objections to the confirmation of the judicial sale four days late. Supreme Court Rule 183 provides as follows: "The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." To be entitled to an extension of time under Supreme Court Rule 183, defendant was required to show good cause for the extension. In fact, the trial court did not even have discretion to grant an extension until defendant made such a showing. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 344 (2007).

¶ 28 Here, defendant failed to make that showing. Defendant argues that the trial court's denial of his request that his late filing be allowed was an abuse of discretion for two reasons: (1) the scheduling order setting the deadline for his filing was illegible, such that his counsel believed the response due on March 8, 2017, instead of March 3, and (2) there is a general public policy to resolve issues on their merits rather than technicalities. Neither of these constitutes good cause.

¶ 29 First, defendant's claim that the scheduling order was illegible is baseless. The order clearly states that defendant's response is due on March 3, 2017. There is no mistaking the 3 for an 8 in any copy of the order we have seen, including the one included in defendant's appendix

on appeal. Second, if the general policy of deciding issues on their merit rather than technicalities was, by itself, sufficient to satisfy the good cause burden of Supreme Court Rule 183, it would swallow the good cause requirement in its entirety, as every party asking for an extension could make that argument.

¶ 30 In light of the above, we conclude that the trial court did not abuse its discretion in denying defendant's late filing.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 33 Affirmed.