2018 IL App (1st) 17-1866-U

THIRD DIVISION
May 23, 2018

No. 1-17-1866

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HARBOR VIEW MORTGAGE LOAN TRUST 2005-4 MORTGAGE LOAN PASS THROUGH CERTIFICATES, SERIES 2005-4,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division.
Plaintiff-Appellee,	)	No. 16 CH 8327
v.	)	The Honorable Darryl B. Simko,
TCHICAYA ELLIS,	)	Judge Presiding.
Defendant-Appellant,	)	
VINCENT S. ROBERTSON a.k.a. VINCENT ROBERTSON; JP MORGAN CHASE BANK, N.A.; Unknown Owners and Non-Record Claimants.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justices Cobbs concurred in the judgment.
Justice Howse specially concurred in the judgment.

ORDER

¶ 1 *Held*: This appeal is dismissed as moot because, while the appeal was pending, the property that is the subject of the appeal was sold to a third party, who was not a party or nominee of a party to the underlying foreclosure litigation, and the appellant failed to perfect a stay of the trial court proceedings within the time for filing a notice of appeal.

¶ 2 In this mortgage foreclosure suit brought by the plaintiff, Deutsche Bank National Trust Company, as Trustee for Harbor View Mortgage Loan Trust 2005-4 Mortgage Loan Pass-Through Certificates, Series 2005-4 (Deutsche Bank), against, *inter alia*, the defendant Tchicaya Ellis (Ellis), the circuit court entered a default judgment and judgment of foreclosure and sale. Ellis filed a motion to vacate the default judgment on the basis that: (1) she was unable to appear in court because she was out of the country; and (2) the loan servicer admitted to having made an error in calculating the interest rate for the loan, which substantially effected the amounts she allegedly owed to Deutsche Bank. The circuit court denied Ellis's motion to vacate, and the property was subsequently sold to Deutsche Bank at a judicial auction. Over objections from Ellis, the circuit court confirmed the judicial sale and ordered distribution of the sale proceeds according to the report of sale. After Ellis filed her notice of appeal, the property was sold to a third party. Ellis now appeals both from the denial of her motion to vacate the default judgment, and from the order confirming the judicial sale. For the reasons that follow, we dismiss the appeal as moot.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. On June 22, 2016, Deutsche Bank filed a mortgage foreclosure action against, *inter alia*, Ellis, arising from Ellis's failure to make payments on the mortgage she, and her then husband, Vincent Robertson (Robertson), secured from Countrywide Home Loans, Inc. (Countrywide) to purchase the property located at 5125 190th Place, Country Club Hills, Illinois (the property). The original mortgage was made on April 5, 2005, for the amount of $244,000. The complaint alleged that starting in January 1, 2016, Ellis defaulted on the loan and that there remained an outstanding principal balance of $203,962.06 with interest accruing per the terms of the note. The mortgage,

note and assignment were attached to the complaint. The note was endorsed in blank, and Deutsche Bank alleged it was the legal holder of the indebtedness secured by the mortgage.

¶ 5 Ellis was personally served with the complaint on June 27, 2016. On that same date, Robertson was served by substitute service on Ellis. Neither filed an appearance or answered the complaint.

¶ 6 On September 1, 2016, Deutsche Bank filed motions for entry of foreclosure and default judgment against, *inter alia*, Ellis and Robertson. The motions were supported, *inter alia*, by an affidavit from Ryan Cable (Cable), an employee of Nationstar Mortgage L.L.C. (Nationstar), attesting to the amounts due and owing. According to Cable's affidavit, Nationstar serviced the loan on behalf of Deutsche Bank and kept records regarding Ellis's loan. Those records revealed that Ellis defaulted on her loan by failing to make the required payments, and that the amount owed, as of June 24, 2016, totaled $213,509.58, including: (1) $203,962.06 (in principal balance); (2) $3,594.27 (in interest), of which $2,549.55 was for the period between December 1, 2015 to April 30, 2016 (calculated at 3%), and $1,044.72 was for the period between May 1, 2016 to June 24, 2016 (calculated at 3.5%); (3) $5,878.25 (in pre-acceleration late charges) and (4) $75 (for property inspection and/or preservation). Notice of the motion for default judgment and for foreclosure was served on Ellis by way of mail to the address at which she was originally served with the complaint.

¶ 7 On September 22, 2016, the trial court granted Deutsche Bank's motions and entered an order of default and judgment for foreclosure and sale. The judgment of foreclosure found Deutsche Bank was entitled to a lien against Ellis's home in the amount of $218,109.98. The judgment also declared that if that amount was not paid by January 27, 2017, the home would be sold at a

judicial auction. Notice of both judgments was again mailed to Ellis at the address where she was originally served.

¶ 8 Deutsche Bank subsequently scheduled the judicial sale for January 30, 2017, and a notice of that sale was sent to Ellis on December 16, 2016, via United States postal service, to the same address where she was originally served.

¶ 9 On December 21, 2016, represented by counsel, Ellis appeared in court and filed a section 2-1301(e) motion to vacate the default order and judgment of foreclosure (735 ILCS 5/2-1301(e) (West 2016)). In her motion, Ellis sought to vacate the default order on the basis that she was out of the country for work at the time of the default, and therefore could not appear. Ellis asked the trial court to excuse her absence and to permit her to file a responsive pleading to the foreclosure complaint. The motion, however, did not attach the proposed responsive pleading that Ellis intended to file.

¶ 10 Before the motion was decided, on January 30, 2017, the judicial sale was conducted. As the highest bidder at the auction, Deutsche Bank purchased the property for $182,290.04.

¶ 11 On February 2, 2017, after a hearing, the trial court denied Ellis's motion to vacate the default judgment and order of foreclosure. The record before us does not contain a transcript from that proceeding, and the written order denying the motion provides no explanation as to the basis for denial.

¶ 12 On February 3, 2017, Ellis filed a renewed motion to vacate, this time alleging: (1) that she was not provided with proper notice of Deutsche Bank's motion for default judgment; (2) that Deutsche Bank failed to accelerate the underlying debt; and (3) that Deutsche Bank improperly calculated the amounts she owed under the loan. This time the motion attached Ellis's proposed answer and affirmative defenses to the foreclosure action. In support of her last allegation, Ellis

also attached a November 23, 2016, letter sent to her by Deutsche Bank's loan servicer, Nationstar, stating that it informed regulators and auditors that the outstanding loan balance was only $203,962.06 and that its current interest rate was 3%. Ellis argued that when Deutsche Bank moved for default judgment it attached an affidavit from Nationstar stating that the interest rate was 3.5%, and at which the per diem interest rate was ultimately and improperly calculated. Ellis contended that this discrepancy in the interest rates warranted vacatur of the default judgment and the foreclosure orders.

¶ 13 On February 15, 2017, while Ellis's renewed motion to vacate the default orders was pending, Deutsche Bank filed a motion seeking to confirm the January 30, 2017, judicial sale. Deutsch Bank sought a personal deficiency judgment against both Ellis and Robertson in the amount of $45,023.29, and an order of possession. The deficiency amount was calculated based on the report of sale and distribution filed on February 15, 2017, which revealed the following. The amount due under the judgment was $218,109.98, and Deutsche Bank purchased the property at the judicial sale for $182,290.04. Additional expenses charged as part of the deficiency were: (1) the interest from the date of the judgment to the date of the sale ($6,991.47); (2) the publication costs ($575); (3) attorney's fees ($1,150); (4) attorney costs ($71.88); (5) the inspection ($15); and (6) the selling officer's commission ($400).

¶ 14 On March 9, 2017, the trial court denied Ellis's renewed motion to vacate the default orders, but granted Ellis an opportunity to respond to the motion to confirm the judicial sale. Again, we are without a transcript from that proceeding.

¶ 15 On March 23, 2017, Ellis filed an objection to the motion to confirm the sale. In her objection, she challenged Deutsche Bank's compliance with publication requirements pursuant to section 15-1507(c)(2)(i) of the Illinois Mortgage Foreclosure Law (IMFL) (735 ILCS §5/15-

1507(c)(2)(i)(A), (B) (West 2016)). In addition, she objected to the deficiency judgment as inflated. In doing so, Ellis did not renew her argument regarding the inconsistency in the interest rates used by Nationstar to calculate the amounts due and owing on the loan. Rather, she solely argued that the trial court improperly calculated the 9% postjudgment interest (735 ILCS 5/2-1303 (West 2016)) from the date of the foreclosure judgment.

¶ 16 On May 26, 2017, the trial court entered an order confirming the sale. A memorandum of judgment was entered on that same date reflecting the $45,023.29 personal deficiency judgment against Ellis and Robertson. Robertson did not participate in the trial court proceedings and is not a party to this appeal.

¶ 17 On June 26, 2017, Ellis filed a notice of appeal in this matter, raising only two issues, namely that the trial court erred: (1) in denying her section 2-1301(e) motion to vacate the default judgment and foreclosure (735 ILCS 5/2-1301(e) (West 2016)); and (2) in confirming the judicial sale, where the IMFL does not permit the distribution of postjudgment interest (735 ILCS 5/2-1303 (West 2016)) for the time period before an order approving the judicial sale is entered.

¶ 18 In doing so, Ellis never sought a stay of judgment pending appeal pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004).

¶ 19 On January 3, 2018, Deutsche Bank filed a motion with this court to dismiss the appeal as moot, arguing that while the appeal was pending, the property had been sold to a third party on December 22, 2017. In support of its motion to dismiss, Deutsche Bank attached an affidavit of its attorney, Rosa M. Tumialan (Tumilian), attesting, *inter alia*, that no stay of the order approving sale was perfected pending the appeal from the order approving sale entered on May 26, 2017, and that while the appeal was pending, the property at issue was sold to "a non-

interested third party on December 22, 2017." The affidavit further attested that "a true and correct copy of the deed documenting th[at] transfer for value and the HUD [s]tatements [wa]s attached" as an exhibit to the affidavit. A copy of the deed documenting the sale of the property from Deutsche Bank to Ernestine J. Brown, and a Cook County property tax and payment information statement for 2017, noting the balance due and "being paid on HUD," were attached to the motion to dismiss.

¶ 20 On January 5, 2018, Ellis filed a response to the motion to dismiss, arguing, *inter alia*, that Deutsche Bank failed in its burden to show that the purported purchaser was not a nominee of any party to the litigation. Ellis argued that the attached documents lacked foundation to show they were genuine, and that regardless, they failed to show that the buyer was a *bona fide* purchaser without an association to any party to the action.

¶ 21 On January 23, 2018, this court denied Deutsche Bank's motion to dismiss the appeal as moot, and permitted Ellis to proceed with her appeal.

¶ 22 II. ANALYSIS

¶ 23 In its brief before this court, Deutsche Bank renews its argument that this appeal is moot because while the appeal in this case was pending, the property was sold to a non-interested third party purchaser. Ellis argues that we should not reconsider our denial of the motion to dismiss because Deutsche Bank does not offer any new argument or evidence that this court did not already consider in denying that motion. In the alternative, Ellis argues that, in the very least, the issues affecting the personal deficiency judgment entered against her, both as part of the default judgment order and later as part of the confirmation of the distribution of sale, are not moot, because they do not impact any possessory rights of a third party. For the reasons that follow, we disagree.

¶ 24 We begin by noting that contrary to Ellis's position, we are well within our authority to reconsider whether an issue is moot, pursuant to our inherent authority to reconsider our prior rulings. See *Horvath v. Loesch*, 87 Ill. App. 3d 615, 621 (1980) (reconsidering previous denial of motion to dismiss on grounds of mootness and granting it); *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 37 ("A court has the inherent authority to reconsider and correct its rulings, and this power extends to interlocutory rulings as well as to final judgments."); *People v. Warren*, 2016 IL App (1st) 090884–C, ¶ 64 (appellate court may reconsider previous ruling).

¶ 25 It is well-established that an appeal is moot, when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 527-28 (2001). Our supreme court has held that where the property which is the subject of an appeal is sold to a third party who is not a party to the litigation or a nominee for a party to the litigation, the appeal is moot unless the appellant previously obtained a stay of the trial court's judgment within the time allowed for filing a notice of appeal. *Steinbrecher*, 197 Ill. 2d at 527-28. The failure to obtain a stay pending appeal, in and of itself, does not make an issue moot. *In re Tekela*, 202 Ill. 2d 282, 292 (2002). However, where supervening events make it impossible for a reviewing court to grant relief to any party, the case is rendered moot because an appellate ruling on the issue cannot have any practical legal effect on the controversy. *In re Tekela*, 202 Ill. 2d at 292-93. Accordingly, a reviewing court ordinarily will not decide a moot issue. *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 130 (1994) ("a basic tenant of justiciability holds that '[r]eviewing courts will not decide moot or abstract questions or render advisory opinions. Courts of review ordinarily will not consider issues where they are not essential to the disposition of the cause or where the result will not be

affected regardless of how the issues are decided.' ") (quoting *Barth v. Reagan*, 139 Ill. 2d 399, 419 (1990)).

¶ 26 Moreover, Illinois Supreme Court Rule 305(k) protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal. *Steinbrecher*, 197 Ill. 2d at 523. Rule 305(k) provides in pertinent part:

> "If a stay is not perfected within the time for filing the notice of appeal, or within any extension of the time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final." Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

Accordingly, this rule protects third-party purchasers of a property from "reversal or modification of the judgment" regarding that property if: "(1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceedings; and (3) the litigating party failed to perfect stay of judgment within the time allowed for filing a notice of appeal." *Steinbrecher*, 197 Ill. 2d at 523-24.

¶ 27 In the present case, all three of the aforementioned elements have been satisfied. First, Ellis

does not contest that the title to the property at issue passed pursuant to a final judgment when the trial court issued an order confirming the judicial sale on May 26, 2017,[1] or that she failed to obtain a stay of judgment within the time allowed for filing a notice of appeal, as required under Illinois Supreme Court Rule 305(k) (Ill. S. Ct. R. 305 (k) (eff. July 1, 2004). As such, the only issue that remains is whether the right, title and interest of the property passed to a person or entity that is not part of the proceedings.

¶ 28 Contrary to Ellis's position, we conclude that the answer to this question must be answered in the affirmative. In support of its motion to dismiss this appeal, and again as part of the appendix to its brief, Deutsche Bank submitted the affidavit of attorney, Tumialan, in which Tumialan swore that after the property was purchased by Deutsche Bank at the judicial sale, and that sale was confirmed on May 26, 2017, the property was sold to "a non-interested third party on December 22, 2017." The affidavit further attested that "a true and correct copy of the deed documenting th[at] transfer for value," as well as "HUD [s]tatements" reflecting that transfer, were attached as exhibits to the affidavit. The documents attached to Tumialan's affidavit included a special warranty deed which established that the property was sold by Deutsche Bank to Ernestine J. Brown six months after the confirmation of the judicial sale.

¶ 29 Nothing in the record before us suggest that Brown was either a party to the litigation or Deutsche Bank's nominee. In opposing the motion to dismiss, Ellis did not contest that Brown purchased the property, nor did she assert that Brown was a party to the litigation or Deutsch Bank's nominee. Rather, Ellis simply concluded that the documents attached to the affidavit "lacked foundation to show [they] were genuine," so that Deutsche Bank had "failed in its burden" to establish that the property was purchased by a *bona fide* third party purchaser. Ellis,

[1] See *Margaretten & Co. Inc. v. Martinez*, 193 Ill. App. 3d 223 (1990) (holding that an order approving the sale of foreclosed property is a final judgment).

however, never submitted a counteraffidavit contradicting Tumialan's sworn statement that Brown was a "non-interested third party," or showing that the attached special warranty deed, which Tumialan swore was "a true and correct" copy of the deed documenting the transfer of the property, was "not genuine." As such, we must take Tumialan's averments as true, and conclude that because Ellis failed to obtain a stay of judgment within the time allowed for filing a notice of appeal, the relief sought by Ellis is barred by Rule 305(k) (Ill. S. Ct. R. 305 (k) (eff. July 1, 2004)). *Barber-Colman Co. v. A&K Midwest Insulation Co*., 236 Ill. App. 3d 1065, 1078 (1992) ("When facts alleged in an affidavit are not contradicted, those facts are taken as true."). Accordingly, we agree with Deutsche Bank that this appeal should be dismissed as moot. See S*chwind v. Mattson*, 17 Ill. App. 3d 182, 187 (1974) (finding the appeal moot where a bank foreclosed on property, subsequently bought the property back at a judicial sale and sold the property to a third party, and the appellants failed to perfect a stay of judgment as required by the rule).

¶ 30 However, for the sake of completeness, we note that, if we were to address the merits of Ellis's appeal, we would affirm the trial court's denial of Ellis's section 2-1301(e) motion to vacate the default judgment and foreclosure (735 ILCS 5/2-1301(e) (West 2016)), as well as its order confirming the judicial sale.

¶ 31 With respect to the motion to vacate, we note that section 2-1301(e) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2016)) sets forth the terms under which the court may exercise its discretion to set aside any default:

> "The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2016).

It is well-settled that under this provision, the party seeking vacatur " 'need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. [Citation.] Rather, the overriding consideration is simply whether or not *substantial justice* is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits.' " (Emphasis added.) *Draper and Kramer, Inc., v. King*, 2014 IL App (1st) 132073, ¶ 23 (quoting *In re Haley D.*, 2011 IL 110886, ¶ 57); see also *Wells Fargo Bank, N.A. v. McCluseky*, 2013 IL 115469, ¶ 16. In deciding whether substantial justice requires vacatur, the trial court must "consider all events leading up to the judgment." *Draper and Kramer, Inc., v. King*, 2014 IL App (1st) 132073, ¶ 23 (quoting *In re Haley D.*, 2011 IL 110886, ¶ 60. " 'What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome. [Citation.]' " *In re Haley D.*, 2011 IL 110886 ¶ 69 (quoting *Mann v. The Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001)); see also *Jackson v. Bailey*, 384 Ill. App. 3d 546, 549 (2008) ("Whether substantial justice is being achieved by vacating a judgment or order is not subject to precise definition") (citing *Mann*, 324 Ill. App. 3d at 377)). Relevant considerations in this analysis include: (1) diligence or the lack thereof; (2) the existence of a meritorious defense; (3) the severity of the penalty resulting from the order or judgment; and (4) the relative hardships on the parties from granting or denying vacatur. *Jackson*, 384 Ill. App. 3d at 549 (citing *Mann*, 324 Ill. App. 3d at 377); see also *Northern Trust Co. v. American National Bank & Trust Co. of Chicago*, 265 Ill. App. 3d 406, 412 (1994).

¶ 32 We review the trial court's denial of a motion to vacate for abuse of discretion. *Wells*

Fargo Bank, N.A. v. Hansen, 2016 IL App (1st) 143720, ¶ 14. A trial court abuses its discretion when its ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23; see also *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999) (A trial court abuses its discretion when it "acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.")

¶ 33 In the present case, Ellis contends that the trial court abused its discretion because not vacating the default judgment denied her the opportunity to dispute the amount of the personal deficiency judgment entered against her. We disagree.

¶ 34 First, in making this argument, Ellis overlooks that the amount of a deficiency judgment is not litigated unless or until there is a deficiency, which fact is not known until after the judicial sale is conducted. The trial court could not have abused its discretion in denying a motion to vacate a default judgment of foreclosure entered four months before the sale of the property was conducted which resulted in the deficiency.

¶ 35 In addition, contrary to Ellis's position, the record establishes that she was not denied the opportunity to litigate the amount of the deficiency judgment entered against her. After denying her renewed motion to vacate the default orders, the trial court granted Ellis time to file her objections to the motion to confirm the judicial sale. Ellis exercised that right and in her objections to the confirmation of the sale, among other things, challenged the amounts due and owing, this time arguing that the "personal deficiency" was "inflated" based on an improper calculation of postjudgment interest.

¶ 36 More importantly, the record irrefutably establishes Ellis's lack of diligence. Ellis was

defaulted despite being personally served with the foreclosure complaint only five days after that complaint was filed in the trial court, and after she was given notice of Deutsche Bank's motion seeking default judgments. The record further reveals that Ellis did not retain an attorney and did not appear in court to raise her alleged pleading defense even after the default orders were entered, and notices of those orders were mailed to her. Instead, she waited until after she received notice of the judicial sale to appear in court and contest the foreclosure. In doing so, the only argument she offered for her failure to appear earlier, was that she was out of the country, a position that is bellied by the fact that she was in the country long enough to be personally served with the complaint. Under this record, Ellis cannot establish that the trial court abused its discretion in denying her motion to vacate the default orders. *McCluskey*, 2013 IL 115469, ¶ 31.

¶ 37 In that respect, we further note that it was Ellis's burden, as the appellant, to provide us with a sufficiently complete record to support her claims of error, and that in the absence of such a record we must presume that the trial court's order conformed to the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Here, Ellis has provided neither a report of proceedings of the hearing on her motion to vacate nor a sufficient substitute, such as a bystander's report or an agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). As such, we do not know whether the trial court heard evidence on the motion to vacate, what the parties argued, or--most importantly--the basis for the court's decision. Without this information, we must presume that the trial court did not act arbitrarily but within the bounds of reason, keeping in mind relevant legal principles. See *Foutch*, 99 Ill. 2d at 392 (absent transcript of hearing on motion to vacate, no basis for holding trial court abused discretion); see also *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (appellate court unable to "divine the trial court's reasoning" behind its decision in absence of report of proceedings and

thus could not determine whether decision constituted an abuse of discretion); see also *Hansen*, 2016 IL App (1st) 143720, ¶ 14.

¶ 38 Turning to Ellis's second contention on appeal, seeking the reversal of the order confirming the judicial sale and distribution of proceeds, Ellis solely contends that the trial court erred in awarding Deutsche Bank postjudgment interest (735 ILCS 5/2-1301 (West 2016)) from the date of the foreclosure judgment. In that respect, Ellis argues that because the foreclosure judgment is not a "final judgment" in a foreclosure proceeding, postjudgment interest does not begin to accrue until the order approving the sale is entered. Ellis also asserts that imposing postjudgment interest before entry of the order approving the sale is contrary to the language of the IMFL and overlooks that a foreclosure judgment is not a money judgment. For the reasons that follow, we disagree.

¶ 39 This appellate court has already addressed these same arguments in *BAC Home Loan Servicing LP v. Popa*, 2015 IL App (1st) 142053, ¶ 34, and held that a plaintiff is "entitled to the statutory interest rate from the date of the foreclosure judgment." In doing so, in *Popa*, we first analyzed the language of the IMFL to determine whether imposing the statutory interest rate from the date of the foreclosure judgment was consistent with its terms. *Popa*, 2015 IL App (1st) 142053, ¶¶ 34-25. We noted that the "statutory judgment rate" referenced in section 15-1220 of the IMFL (735 ILCS 5/15-1220 (West 2012)) was the rate of interest (*i.e.*, 9%) specified in section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2012)). *Popa*, 2015 IL App (1st) 142053, ¶ 34. We then noted that section 2-1303 of the Code was not limited to final judgments, but rather applied to judgments in general. See *Popa*, 2015 IL App (1st) 142053, ¶ 34 (noting that section 2-1303 does not require that a judgment be "final and appealable" but rather only that it be "recovered in any court.") (citing 735 ILCS 5/2-1303 (West 2012)). We observed that

section 15-1504(e)(3) of the IMFL (735 ILCS 5/15-1504(e)(3) (West 2012)), which governs the form of a foreclosure complaint, specifically provides that a plaintiff seeking foreclosure is deemed to seek a sale of the real estate to satisfy the amount due to the plaintiff " 'as set forth in the judgment, together with the interest thereon at the statutory judgment rate from the date of the judgment.' " *Popa*, 2015 IL App (1st) 142053, ¶ 35 (quoting 735 ILCS 5/15-1504(e)(3) (West 2012)).

¶ 40 We reasoned that this reference to the term "judgment" in section 15-1504(e)(3) of the IMFL (735 ILCS 5/15-1504(e)(3) (West 2012)) referred to the foreclosure judgment itself and not to the order approving the sale. We found that this was consistent with section 15-1504(d)(3) of the IMFL (735 ILCS 5/15-1504(d)(3) (West 2012)) which concerns fees, costs and expenses and permits interest on these at either the mortgage rate, if such is provided for in the mortgage, or the statutory rate, if no mortgage rate for advances is included. *Popa*, 2015 IL App (1st) 142053, ¶ 35 (citing735 ILCS 5/15-1504(d)(3) (West 2012)). We reasoned that, because the IMFL provides for imposition of interest to advances at either the mortgage or statutory interest rate at the time of the foreclosure judgment, the statutory postjudgment interest is also properly applied to the foreclosure judgment from the entry of that judgment. *Popa*, 2015 IL App (1st) 142053, ¶ 35. We concluded that if the legislature intended a different result, it would have used different language in the statue, such as an express declaration that postjudgment statutory interest could not accrue until after the entry of the order approving the sale. *Popa*, 2015 IL App (1st) 142053, ¶ 35.

¶ 41 We therefore held that when read together, sections 2-1303 of the Code (735 ILCS 5/2-

1303 (West 2012)) and 15-1504 of the IMFL (735 ILCS 5/15-1504 (West 2012)) provide for the recovery of interest upon the entry of the foreclosure judgment. *Popa*, 2015 IL App (1st) 142053, ¶ 35.

¶ 42 In addition, in coming to this conclusion, we noted that:

> "Illinois courts have long held that, upon the entry of a foreclosure judgment, the mortgage merges into the judgment and eliminates the contract, and therefore the judgment is controlled by statute, not the contract. *Aldrich v. Sharp*, 4 Ill. 260, 263 (1841); see also *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414 *** (2006) (observing that the "merger doctrine" provides that when a judgment is obtained based on a contract, the contract "becomes entirely merged into the judgment" and the contract "ceases to bind the parties to its execution"); *Carson v. Rebhan*, 294 Ill. App. 180, 183 *** (1938) (concluding that the interest should have been calculated at the statutory rate after the date of the foreclosure decree, "it then becoming in effect a judgment")." *Popa*, 2015 IL App (1st) 142053, ¶ 36.

¶ 43 We continue to adhere to the sound reasoning of *Popa*, and decline Ellis's invitation to revisit that decision. In doing so, we find Ellis's citation to *ABN AMRO Mortg. v. McGahan*, 237 Ill. 2d 526 (2010), *Standard Bank & Trust Co. v. Callaghan*, 215 Ill. App. 3d 76 (1991), and *CitiMortgage v. Sharlow*, 2014 IL App (3d) 130107 misplaced.

¶ 44 Contrary to Ellis's position, *McGahan* nowhere addressed the question of when postjudgment interest applies in foreclosure proceedings. Rather, in that case, our supreme court was asked to determine whether the personal representative of a deceased mortgagor must be named as a defendant in the foreclosure complaint, and it found that because a foreclosure proceeding is a *quasi in rem* proceeding, the mortgagor was a necessary party. See *McGahan*, 237 Ill. 2d 534-38.

¶ 45 *Callaghan* is similarly irrelevant to the present analysis. While Ellis is correct that in that case, the Second District of the Appellate Court rejected a mortgagee's claim for statutory postjudgment interest under section 2-1303 of the Code, it did so based upon a prior version of the Illinois mortgage law, which permitted for the entering of a conditional judgment of balance when a deficiency existed. See *Callaghan*, 215 Ill. App. 3d at 81 (quoting Ill. Rev. Stat.1983, ch. 95, par. 56). According to *Callaghan*, such a conditional judgment was not considered to be a judgment for which the borrower was personally liable, but rather, was to be interpreted as an alternative decree as to the amount the borrower had to pay to avoid a foreclosure sale of the property. *Callaghan*, 215 Ill. App. 3d at 81. The holding of *Callaghan* has no application in the present case where there is no conditional judgment and where section 15-1504(e)(3) of the current IMFL (735 ILCS 5/15-1504(e)(3) (West 2016)) expressly authorizes the imposition of interest on the judgment at its entry.

¶ 46 We similarly find no merit in Ellis's reliance on *Sharlow*. In that case, the Third District of the Appellate Court held that postjudgment interest at the statuary rate should be computed form the date of the judgment of foreclosure where Illinois Supreme Court Rule 304(a) language is included in the judgment, rendering the judgment of foreclosure a final, appealable judgment, but refused to decide whether that would be the case if no Rule 304(a) language was present. *Sharlow*, 2014 IL App (3d) 130107, ¶¶ 19-20. In deciding *Popa*, and finding that postjudgment interest should be computed from the date of the foreclosure judgment even without Rule 304(a) language, we already distinguished *Sharlow*, noting that section 2-1303 of the Code, which permits the imposition of the postjudgment interest, does not require that a judgment be final and

appealable, but rather only that a judgment be "recovered in any court."[2] *Popa*, 2015 IL App (1st) 142053, ¶ 34 (citing 735 ILCS 5/2-1303 (West 2012)). We continue to agree with this rational, and as such, find *Sharlow* inapposite.

¶ 47 III. CONCLUSION

¶ 48 For all of the aforementioned reasons, we dismiss the appeal as moot.

¶ 49 Appeal dismissed.

¶ 50 JUSTICE HOWSE, specially concurring:

¶ 51 I agree with the majority's conclusion that, considering the merits of Ellis's appeal, the trial court's denial of Ellis's section 2-1301(e) motion to vacate the default judgment and foreclosure, and the trial court's order confirming the sale, must be affirmed. *Supra*, ¶ 30. Ellis failed to provide a sufficiently complete record to sustain her burden to establish the trial court abused its discretion in denying her motion to vacate the default judgment and foreclosure. *Supra*, ¶¶ 35-37. Further, under *Popa*, 2015 IL App (1st) 142053, ¶ 34, Deutsche Bank is entitled to postjudgment interest from the date of the foreclosure judgment (*supra*, ¶¶ 38-43) and plaintiff's authorities do not warrant revisiting that decision (*supra*, ¶¶ 44-46). I write separately because I do not agree with the majority's conclusion that Ellis's appeal should be dismissed as moot. *Supra*, ¶ 29.

¶ 52 The majority concludes Ellis's appeal should be dismissed as moot because "the relief sought by Ellis is barred by Rule 305(k) (Ill. S. Ct. R. 305(k) (eff. July 1, 2004)) as all of the elements of the rule have been satisfied." *Supra* ¶¶ 26-27. I agree that on this record, the evidence establishes all of the elements of the rule, including that "the right, title and interest of the property passed to a person or entity who is not part of the proceedings." *Supra*, ¶ 26

[2] Section 2-1303 provides in relevant part that "[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied." 735 ILCS 5/2-1303 (West 2012).

(quoting *Steinbrecher*, 197 Ill. 2d at 523-24). However, Ellis also argued "that, in the very least, the issues affecting the personal deficiency judgment entered against her *** are not moot, because they do not impact any possessory rights of a third party." I agree. "[I]n the absence of a stay, an appeal is moot if a specific property, *possession or ownership of which is the relief being sought on appeal*, has been conveyed to third parties. [Citation.]" (Internal quotation marks omitted.) *Cosmopolitan National Bank of Chicago v. Nunez*, 265 Ill. App. 3d 1012, 1015 (1994) (quoting *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (1989)). Ellis's appeal seeks more than "possession or ownership" of the property; she also raised an issue concerning the deficiency judgment against her. In her opening brief, Ellis argued she had a meritorious defense to the foreclosure action in that she "produced documentary evidence showing the amounts alleged by Deutsche Bank to be owed" were erroneous and as a result the amount sought in the complaint was inflated. Thus, Ellis argued, she at minimum "was in a position to challenge Deutsche Bank's request for a deficiency." "The failure to obtain a stay pending appeal, in and of itself, does not make an issue moot. *In re Tekela*, 202 Ill. 2d 282, 292 (2002). However, where supervening events make it impossible for a reviewing court to grant relief to any party, the case is rendered moot because an appellate ruling on the issue cannot have any practical legal effect on the controversy. *In re Tekela*, 202 Ill. 2d at 292-93." *Supra*, ¶ 25. Here, it is not *impossible* to grant effectual relief to Ellis as to the personal deficiency judgment against her. I would find that the appeal is not moot. Nonetheless, based on Ellis's arguments on appeal, she is not entitled to the relief she seeks.