

2018 IL App (2d) 180149-U
No. 2-18-0149
Order filed October 31, 2018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SPECIALIZED LOAN SERVICING, LLC,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellee,)	
)	
v.)	No. 16-CH-172
)	
SABINA HAMIDOVA, UNKNOWN)	
OWNERS, and NON-RECORD)	
CLAIMANTS,)	
)	
Defendants)	
)	
(Sabina Hamidova, Defendant-Appellant, and)	
The New Owner, an Assumed Name of)	
“...LLC,” an Illinois Limited Liability)	
Company, not Personally, but Solely as Trustee)	
of Trust Agreement, Dated October 21, 2016,)	Honorable
and Known as Trust 16102115334110280000,)	Margaret A. Marcouiller,
Intervenor-Appellant).)	Judge, Presiding.
)	

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* Defendants forfeited their argument that, because New Owner allegedly held a possessory interest in the property, the trial court erred in granting plaintiff’s motion to dismiss New Owner’s counterclaims; New Owner did not raise the issue of a possessory interest in the trial court and did not adequately brief the

issue on appeal. The trial court acted in its discretion in denying Hamidova's motion to vacate the default judgment and in denying her motion to reconsider. Therefore, we affirmed.

¶ 2 In this residential foreclosure case, defendant, Sabina Hamidova and intervenor, The New Owner, an Assumed Name of "...LLC," an Illinois Limited Liability Company, not Personally, but Solely as Trustee of Trust Agreement, Dated October 21, 2016, and Known as Trust 16102115334110280000 (New Owner), appeal from the trial court's rulings (1) granting the motion of plaintiff, Specialized Loan Servicing, LLC (SLS), to dismiss New Owner's counterclaims, (2) denying Hamidova's motion to vacate the default judgment, and (3) denying Hamidova's motion to reconsider. We conclude that New Owner forfeited its argument regarding the dismissal of the counterclaims and that the trial court did not abuse its discretion in denying Hamidova's motion to vacate the default judgment and her motion to reconsider that ruling. Accordingly, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On February 4, 2016, JP Morgan Chase Bank (JP Morgan) filed a complaint against Hamidova, unknown owners, and non-record claimants to foreclose a mortgage on a house located at 102 Lilac Lane in Buffalo Grove. The complaint alleged that the mortgage was dated June 4, 2008, and modified on January 1, 2013; that Hamidova had not made payments beginning in June 2015; and that the principal and balance due was \$275,774.68 plus interest, costs, and fees.

¶ 5 JP Morgan attempted to serve Hamidova at the property on February 11, 2016. The home's occupant said that she was renting the property from Hamidova, who did not reside there. The occupant did not want to provide any information about Hamidova's whereabouts.

According to an affidavit filed by JP Morgan, Hamidova also could not be located after a diligent search of records. Hamidova was therefore served by publication.

¶ 6 On December 28, 2016, JP Morgan moved to substitute SLS as the party plaintiff. Also on December 28, 2016, SLS filed a motion for judgment for foreclosure and sale, and a motion for a default judgment.

¶ 7 On February 3, 2017, New Owner filed a motion to intervene. It alleged that Hamidova executed a quitclaim deed transferring title of the property to it on October 21, 2016. SLS objected to the motion, arguing, among other things, that the motion was deficient in that it did not have a proposed pleading attached. The trial court subsequently gave New Owner until April 18, 2017, to prepare a proposed pleading.

¶ 8 On that date, New Owner filed a three-count counterclaim, alleging as follows. Hamidova's family members previously resided at the property but moved out in early October 2016. After that, New Owner maintained and repaired the property. On about October 12, 2016, JP Morgan forcibly entered the property, changed the locks, and posted signs, all without leave of the court. Because of its actions, the property was flooded, walls were damaged, and a fence was knocked down. The estimated cost of repairs was over \$30,000, and as a result of the damage, New Owner had not been able to maintain or rent out the property. New Owner alleged (1) violation of the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2016)), (2) intentional trespass, and (3) negligence. The trial court granted New Owner's motion to intervene. Also on April 18, 2017, the trial court entered an order of default and judgment for foreclosure and sale against Hamidova. It further granted the motion to substitute SLS as the party plaintiff.

¶ 9 On May 24, 2017, SLS filed a motion to dismiss New Owner's counterclaims. It argued that the counterclaims should be dismissed under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). It argued that the Forcible Entry and Detainer Act was not relevant because the instant case was brought under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2016)). For the intentional trespass count, it argued that there was no legal basis or set of facts for New Owner to obtain relief because the trespass purportedly occurred on October 12, 2016, but New Owner did not allegedly gain a possessory interest until October 21, 2016. Regarding the negligence count, SLS argued that the Criminal Code specifically prohibited a civil action for negligence in connection with a mortgagee entering, securing, or maintaining abandoned residential property. SLS further argued that New Owner failed to state a cause of action for common law negligence because New Owner had no interest in the property on October 12, 2016, so SLS owed it no duty of care, meaning that there could not have been a breach of that duty.

¶ 10 Similarly, SLS argued that the counterclaims should be dismissed under section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2016)) because they were barred by an affirmative matter, in that New Owner lacked standing. SLS argued that New Owner obtained its interest in the property subsequent to the conduct alleged, thereby taking its interest subject to any of the purported damaged that occurred on October 12, 2016.

¶ 11 On August 28, 2017, Hamidova filed a motion to vacate the order of default entered against her on April 18, 2017. She argued that the threshold to vacate a default judgment was low; she had not defended the case on the merits; and she had meritorious defenses. Hamidova did not specify what those defenses were.

¶ 12 On September 1, 2017, the trial court granted SLS’s motion to dismiss New Owner’s counterclaims with prejudice. The order stated: “Intervenor acknowledged the deed post-dates the alleged trespass and provided no other information suggesting that the counterclaim could be re-plead to state a cognizable claim.”

¶ 13 The trial court denied Hamidova’s motion to vacate on September 27, 2017. She filed a motion to reconsider on October 27, 2017. Hamidova argued that if New Owner could not pursue its counterclaims because it did not have title to the property, she should be able to pursue them. She also argued that she had an affirmative defense, in that the mortgagee did not send a notice of acceleration before foreclosing on the property. The trial court denied the motion to reconsider on January 26, 2018, “for the reasons stated in open court.”

¶ 14 In the meantime, on November 7, 2017, SLS filed a motion for an order approving the report of sale and distribution and an order for possession and an *in rem* deficiency. The trial court granted the motion on November 17, 2017.

¶ 15 Hamidova and New Owner (collectively defendants) timely appealed and have filed a joint brief.

¶ 16 **II. ANALYSIS**

¶ 17 Defendants first argue that the trial court erred in granting SLS’s motion to dismiss New Owner’s counterclaims. SLS brought its motion to dismiss pursuant to both section 2-615 and 2-619. Defendants note that the trial court did not specify under which section it was granting the motion, and they argue that its statement that the “counterclaim could [not] be re-plead to state a cognizable claim” indicates that it was granting the motion under 2-619. We concur with defendants’ assessment.

¶ 18 A section 2-619 motion admits the legal sufficiency of a claim but asserts certain external defects or defenses that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). In ruling on a section 2-619 motion, the court must interpret the pleadings in the light most favorable to the nonmoving party and grant the motion only if the nonmoving party can prove no set of facts that would support a cause of action. *Grant v. Illinois*, 2018 IL 170920, ¶ 13. While a motion to dismiss under 2-619 admits well-pleaded facts, it does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts. *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121114, ¶ 21. We review *de novo* the grant of a motion to dismiss under section 2-619. *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 11.

¶ 19 Defendants acknowledge that the deed to the trust was executed on October 21, 2016, which was after the date of the alleged conduct leading to the counterclaims. However, they argue that New Owner alleged that it had maintained and repaired the property in early October 2016, and that taking this allegation in the light most favorable to New Owner, “it is completely conceivable and reasonable that [New Owner] held a possessory interest in the Property on October 12, 2016.”

¶ 20 SLS argues that New Owner never asserted in the trial court that it had a possessory interest, and that it fails to cite any authority in support of its contentions on appeal. We agree. In SLS’s motion to dismiss the counterclaims, it argued that New Owner failed to allege any possessory or ownership in the property on October 12, 2016. In New Owner’s response, it did not argue that it had a possessory interest on that date, but rather that Hamidova assigned it any counterclaims that she had.¹ Further, we do not have a transcript of the hearing at which the trial

¹ New Owner does not reassert this position on appeal.

court dismissed the counterclaim, so we must assume that New Owner did not raise the issue there, either. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (the appellant has the burden to provide a sufficiently complete record of the trial proceedings to support his claims of error, and we must resolve any doubts arising from the lack of a complete record against him or her). New Owner's failure to raise the issue in the trial court results in forfeiture on review. *Gorman-Dahm v. BMO Harris Bank, N.A.*, 2018 IL App (2d) 170082, ¶ 44.

¶ 21 Even if, *arguendo*, New Owner sufficiently raised the issue in the trial court, we would conclude that New Owner forfeited the issue on appeal by failing to sufficiently argue the issue and cite authority in its brief. That is, New Owner offers no explanation of what factors are used to determine whether a party has a possessory interest, and whether and under what circumstances such an interest would give a party standing to raise the counterclaims New Owner asserted below. See Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) (argument in the appellant's brief shall state the appellant's contentions "and the reasons therefor, with citation of the authorities *** relied on"); *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18 (a reviewing court is not a repository into which an appellant may dump the burden of argument and research, and the failure to clearly define issues and support them with authority results in forfeiture of the argument).

¶ 22 Based on our determination that New Owner has forfeited its argument that it had a possessory interest in the property prior to October 12, 2016, there is no basis to conclude that it had standing to assert its counterclaims. We therefore do not address its additional contention that it alleged adequate facts in those counterclaims for which relief could be granted, and we affirm the trial court's grant of SLS's motion to dismiss.

¶ 23 Defendants next argue that the trial court erred in denying Hamidova’s motion to vacate the default judgment, and in denying her motion to reconsider the denial. Hamidova brought the motion to vacate pursuant to section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)). Section 2-1301(e) provides:

“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).

“[U]p until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e).” *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27. There is a liberal policy regarding vacating default judgments under section 2-1301(e). *Id.* ¶ 16. The overriding consideration in ruling on such a motion is whether substantial justice has been done between the litigants and whether it is reasonable to compel the other party to go to trial on the merits. *Id.* In determining whether substantial justice will be achieved, considerations can include a party’s diligence or lack thereof, whether the party has a meritorious defense, the severity of the resulting penalty, and the relative hardships on the parties. *Draper & Kramer, Inc., v. King*, 2014 IL App (1st) 132073, ¶ 23. “Although relevant, the party need not necessarily show a meritorious defense and a reasonable excuse for failing to timely assert such defense.” *McCluskey*, 2013 IL 115469, ¶ 16. The appropriate considerations depend on the facts of each case. *Id.* Whether to grant or deny a motion to vacate a default judgment is within the trial court’s discretion. 735 ILCS 5/2-1301(e) (West 2016); *Glover v. Fitch*, 2015 IL App (1st) 130827, ¶ 29. We similarly review a trial court’s ruling on a motion to reconsider for an abuse of discretion. *In re Miroslava P.*, 2016 IL

App (2d) 141022, ¶ 7. A trial court abuses its discretion only where no reasonable person would take the trial court's view, meaning that the trial court acted arbitrarily or ignored recognized principles of law. *Glover*, 2015 IL App (1st) 130827, ¶ 29

¶ 24 Hamidova argues that the trial court should have granted her motion to vacate the default judgment under the substantial justice standard. She argues that although she did not need to show the existence of a meritorious defense, she had potential counterclaims based on the trial court's ruling that New Owner could not bring the counterclaims. According to Hamidova, the trial court's grant of SLS's motion to dismiss implied that the counterclaims were hers to bring. She also argues that her motion to reconsider was "inextricably tied to her motion to vacate" and therefore should have granted.

¶ 25 We cannot say that the trial court abused its discretion in denying Hamidova's motion to vacate the default judgment. Her motion was bare bones and did not address whether substantial justice required that the default judgment be vacated, other than stating that she had not defended the case and that she had unspecified meritorious defenses. Hamidova also showed no diligence in defending the case, which is something the trial court could consider. See *Draper & Kramer, Inc.*, 2014 IL App (1st) 132073, ¶ 23. Hamidova was clearly aware of the foreclosure action by the time she transferred her interest in the property on October 21, 2016, but the default judgment was entered in April 2017, and she did not file her motion to vacate that judgment until August 2017.

¶ 26 Additionally, in her motion to vacate, Hamidova did not mention any potential counterclaims, as New Owner was still pursuing them at the time. Even looking at the counterclaims, considerations of the severity of the resulting penalty and relative hardships on the parties do not strongly favor Hamidova. As SLS points out in its brief, counterclaims are not

the same as defenses to the underlying action. Further, according to the record, Hamidova's family members lived at the property until early October 2017. The alleged damage occurred on October 12, 2017, but she transferred her interest in the property to New Owner on October 21, 2017. Thus, she owned the property in its allegedly damaged condition for only nine days, and she did not assert that the damage decreased any consideration given to her by New Owner.

¶ 27 In sum, the circumstances of this case provide no basis to conclude that the trial court abused its discretion in denying Hamidova's motion to vacate the default judgment, or in denying her motion to reconsider that ruling.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 30 Affirmed.