2019 IL App (1st) 181780-U

FIRST DISTRICT,
SECOND DIVISION
September 24, 2019

No. 1-18-1780

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KONCAUR CAPITAL CORPORATION, as Separate Trustee of Matawin Ventures Trust Series 2015-3,	)	
Plaintiff-Appellee,	)	Appeal from the
v.	)	Circuit Court of
	)	Cook County, Illinois.
DERRICK BENNETT, KIMBERLY BENNETT, MIDLAND FUNDING, LLC, UNKNOWN TENANTS, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,	)	No. 16 CH 14266
	)	Honorable
	)	Patricia S. Spratt,
Defendants	)	Judge Presiding.
(Derrick Bennett,	)	
Defendant-Appellant).	)	

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: (i) In foreclosure action, defendant failed to raise any material issues of fact as to plaintiff's standing, and summary judgment for plaintiff was proper. (ii) Defendant lacked standing to move to vacate default entered against co-defendant. (iii) Confirmation of judicial sale was proper.

¶ 2 Plaintiff Kondaur[1] Capital Corp. brought this action under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1501 *et seq.* (West 2016)) to foreclose on a single-family residence located at 14114 South Wabash Avenue in Riverdale and owned by defendants Derrick and Kimberly Bennett. The circuit court granted summary judgment for Kondaur and, on July 17, 2018, entered an order confirming a judicial sale of the property. Derrick now appeals, arguing, among other things, that (i) neither the mortgage nor the note securing the mortgage explicitly granted the holder authority to bring a foreclosure suit; (ii) material issues of fact exist as to whether Kondaur is a bona fide holder of the indebtedness; and (iii) the sale price was unconscionably low. Finding no merit in his claims of error, we affirm.

¶ 3 BACKGROUND

¶ 4 On November 23, 2005, the Bennetts mortgaged the subject property to Mortgage Electronic Registration Systems, Inc. (MERS) as security for a $138,050 loan. The loan was evidenced by a promissory note that the Bennetts executed on the same day.

¶ 5 On July 30, 2010, Wells Fargo Bank, N.A., filed a foreclosure complaint against the Bennetts for the subject property. Wells Fargo Bank v. Bennett, No. 2010-CH-33032 (Cir. Ct. Cook County). After extensive motion practice, Wells Fargo voluntarily dismissed that action on April 13, 2015, for reasons that are not disclosed in the record.

¶ 6 On November 1, 2016, Kondaur filed the foreclosure complaint at issue in this appeal. Kondaur alleged that the Bennetts had been in default on their loan payments since January 1, 2010. Kondaur also asserted that it was the legal holder of their indebtedness and attached the following documents in support, all pertaining to the subject property:

[1] Although the case caption spells plaintiff's name as "Koncaur," that is a typographical error.

- An "Assignment of Mortgage" from MERS to Wells Fargo, executed on August 24, 2010, stating that MERS assigned the subject mortgage to Wells Fargo "prior to 07/28/10";
- An "Assignment of Mortgage and other Loan Documents" from Wells Fargo to the Secretary of Housing and Urban Development in Washington, D.C. (HUD), dated August 28, 2014;
- An "Assignment of Mortgage and other Loan Documents" from HUD to the U.S. Bank Trust National Association in its capacity as owner-trustee for Newlands Asset Holding Trust, dated November 25, 2014; and
- An "Assignment of Mortgage" from the U.S. Bank Trust National Association in its capacity as owner-trustee for Newlands Asset Holding Trust to Kondaur, dated January 4, 2016.

¶ 7 On January 31, 2017, attorney Michael E. Hill filed an appearance and answer to the complaint on behalf of Derrick Bennett. The answer raised an affirmative defense that Kondaur lacked standing to foreclose on the mortgage. The other defendants, Kimberly Bennett and Midland Funding, LLC, did not appear.

¶ 8 On January 17, 2018, Kondaur moved for default against Kimberly and Midland Funding and for summary judgment against Derrick. As to Derrick, Kondaur argued that it was entitled to summary judgment because it presented evidence that it was the holder of the indebtedness and that the Bennetts defaulted on the mortgage agreement. In support of the latter assertion, Kondaur attached the affidavit of Darly Thammagno, a foreclosure specialist for Kondaur, who stated that as of August 31, 2017, the Bennetts owed the sum of $232,102.25.

¶ 9 On February 2, 2018, an order of default was entered against defendants Kimberly and Midland; summary judgment was granted against Derrick; and a Judgment of Foreclosure and Order of Sale was entered against Derrick, Kimberly, and Midland. The order also scheduled a judicial sale of the property on May 3, 2018.

¶ 10 On March 6, Derrick filed a "MOTION TO VACATE ORDER OF DEFAULT AND JUDGMENT OF FORECLOSURE AND SALE" pursuant to section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)). In that motion, Derrick alleged that "on February 2, 2018, an Order of Default and Judgment of Foreclosure and Sale was entered solely against Defendant, KIMBERLY BENNETT." Derrick further alleged that he was in possession of the property and had "a meritorious defense to the action." He requested that the court "vacate the Order of Default [entered against Kimberly] and Judgment of Foreclosure and Sale entered on February 2, 2018." [2] On April 27, 2018, Derrick's motion to vacate was denied.

¶ 11 One day before the pending sale, on May 2, 2018, Derrick moved for leave to file a motion to reconsider the court's granting of summary judgment in favor of Kondaur. While Derrick's motion was still pending, the May 3 judicial sale of the property proceeded as ordered. Kondaur purchased the property for $28,000 and moved to confirm the sale. Meanwhile, on May 22, the trial court granted Derrick leave to file his motion to reconsider and set both motions for hearing on July 17, 2018.

¶ 12 In his motion to reconsider and his response to Kondaur's motion to confirm the sale, Derrick argued that material issues of fact existed as to whether Kondaur was a legal holder of the indebtedness. As noted, in its complaint, Kondaur alleged that the subject mortgage was

[2] Although Derrick claims that he did not learn of the summary judgment order until the April 27 court hearing, the Judgment of Foreclosure and Order of Sale provides, on its face, that "if the Defendants have plead, a Summary Judgment has been entered by separate order."

assigned from MERS to Wells Fargo, then to HUD, then to Newlands Asset Holding Trust, and finally to Kondaur. As shall be discussed in greater detail below, Derrick claimed that Kondaur failed to establish that MERS validly assigned the mortgage to Wells Fargo, which would necessarily render invalid all subsequent assignments.

¶ 13 On July 17, the trial court denied Derrick's motion to reconsider and granted Kondaur's motion to confirm the judicial sale. Derrick now appeals.

¶ 14 ANALYSIS

¶ 15 Derrick argues that the trial court erred (i) in granting Kondaur's motion for summary judgment and denying his motion to reconsider; (ii) in denying his section 2-1301(e) motion to vacate the order of default "entered solely against Defendant, KIMBERLY BENNETT"; and (iii) in confirming the judicial sale. We consider these issues in turn.

¶ 16 Initially, we observe that Derrick has not provided a transcript of the proceedings on his motion to reconsider summary judgment, his motion to vacate, or Kondaur's motion to confirm the judicial sale. Nor has he provided a sufficient substitute, such as a bystander's report or an agreed statement of facts. See Ill. S. Ct. R. 323(c), (d) (eff. July 1, 2017). It is the appellant's duty to present the court with a proper record on appeal so that we have an adequate basis for reviewing the trial court's decision. *Cambridge Engineering v. Mercury Partners*, 378 Ill. App. 3d 437, 445 (2007). Thus, where there is a gap in the record that could impact our decision, we will presume that the missing evidence supported the judgment of the trial court and resolve any doubts against the appellant. *Id.* at 445-46; see also *Young v. Alden Gardens of Waterford*, 2015 IL App (1st) 131887, ¶ 67 ("If we are not provided with a complete record, we must presume that the order entered by the trial court was in conformity with the law and had a sufficient

factual basis"). But where the record contains sufficient grounds for a decision, we will consider Derrick's claims on their merits. *Cambridge Engineering*, 378 Ill. App. 3d at 446.

¶ 17 Summary Judgment

¶ 18 Derrick argues that summary judgment for Kondaur was improper because there were material issues of fact regarding Kondaur's standing to foreclose. Specifically, he argues that (i) neither the mortgage nor the note securing the mortgage explicitly grant Kondaur authority to bring a foreclosure suit, and (ii) in any event, Kondaur was never validly assigned the mortgage.

¶ 19 Summary judgment is appropriate where "there is no genuine issue as to any material fact and *** the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). We review the trial court's grant of summary judgment *de novo*, construing the record strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)). To prevail, the nonmoving party must present some evidence that would arguably entitle him to judgment in his favor. *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976, ¶ 13.

¶ 20 Foreclosure actions in Illinois are governed by the Foreclosure Law (735 ILCS 5/15-1501 *et seq.* (West 2016)). A *prima facie* case for foreclosure is established if the complaint conforms to the requirements of section 15-1504(a) (735 ILCS 5/15-1504(a) (West 2016)) and a copy of the mortgage and note are attached. *PNC Bank*, 2014 IL App (1st) 130976, ¶ 18. The burden of proof then shifts to the borrower to prove any affirmative defense, such as the plaintiff's lack of standing. *Id.*; see *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24 (because standing is an affirmative defense, the borrower has the burden to prove the plaintiff's lack of standing). To have standing, a party must suffer an injury that is "distinct and palpable," traceable to the other party's actions, and likely to be redressed by the relief sought. *Northbrook*

Bank and Trust Co. v. 300 Level, Inc., 2015 IL App (1st) 142288, ¶ 21. A party's standing to sue is determined as of the time the suit is filed. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (2d) 140412, ¶ 12.

¶ 21 Derrick claims that Kondaur lacks standing because neither the mortgage nor the note securing the mortgage explicitly grants the holder authority to bring a foreclosure suit. Even a cursory reading of the mortgage readily disproves this allegation. Paragraph 9 of the mortgage states that the lender may require immediate payment in full in the event of a default, defined as a failure to pay any monthly payment in full by the due date of the next monthly payment. Paragraph 18 provides: "Foreclosure Procedure. If Lender requires immediate payment in full under paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding."

¶ 22 Derrick next claims that there are material issues of fact as to whether MERS validly assigned the mortgage to Wells Fargo. If the assignment to Wells Fargo was invalid, then the subsequent assignment to Kondaur would also be invalid, because an assignee stands in the shoes of the assignor and can obtain no greater right than what was possessed by the assignor. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 779 (2009). On this issue, Derrick raises two arguments, both related to the "Assignment of Mortgage" from MERS to Wells Fargo. As noted, the document was executed on August 24, 2010, and states that MERS assigned the subject mortgage to Wells Fargo "prior to" July 28, 2010.

¶ 23 First, Derrick argues that Wells Fargo lacked standing to file its foreclosure action on July 30, 2010, because the suit was filed before the "Assignment of Mortgage" was executed. In this regard, he argues the case is analogous to *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 17, where the plaintiff lacked standing to bring a foreclosure action since it was not assigned the subject mortgage until after it filed the action. Derrick also cites *Allis-*

Chalmers Credit Corp. v. McCormick, 30 Ill. App. 3d 423, 424 (1975), for the proposition that "an assignee of a contract takes it subject to the defenses which existed against the assignor at the time of the assignment." Derrick asserts that because Wells Fargo lacked standing to bring the 2010 suit, Kondaur also lacked standing to bring the present suit.

¶ 24 We disagree. On its face, the "Assignment of Mortgage" document indicates that Wells Fargo *did* have standing to bring the 2010 suit, because it states that MERS assigned the mortgage to Wells Fargo before July 28, 2010, *i.e.*, before Wells Fargo filed suit on July 30. Thus, *Gilbert* is inapposite. In this regard, *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, is instructive. *Rosestone* explained that a mortgage assignment may be oral or written, and even where a written assignment exists, "it may be a mere memorialization of an earlier transfer of interest." *Id.* ¶ 25. If a plaintiff is orally assigned the mortgage prior to filing a foreclosure suit, then the plaintiff has standing, even if the transfer is only later memorialized in writing. *Id.*

¶ 25 More importantly, Wells Fargo's standing to bring the 2010 action is not dispositive of Kondaur's standing to bring the present action. As Derrick acknowledges in his briefs, a party's standing to sue is determined as of the time the suit is filed. *Cornejo*, 2015 IL App (2d) 140412, ¶ 12. Even assuming *arguendo* that the assignment from MERS to Wells Fargo took effect on August 24, 2010, that assignment (as well as all the other assignments) occurred before Kondaur filed the present suit on November 1, 2016. Thus, Kondaur had standing to bring its suit. See *id.* ¶ 14 (in foreclosure case, defendants' standing argument was properly rejected where they presented no evidence to show that the assignment took place after the complaint was filed). This does not contradict the principle that "an assignee of a contract takes it subject to the defenses which existed against the assignor *at the time of the assignment*" (emphasis added)

(*Allis-Chalmers*, 30 Ill. App. 3d at 424), because, here, Wells Fargo's lack of standing is a defense that existed against Wells Fargo solely *before* the time of the assignment.

¶ 26 Derrick's second argument is that there are material issues of fact as to the "authenticity, veracity and trustworthiness" of the "Assignment of Mortgage" from MERS to Wells Fargo. Although his brief is less than clear on this issue, he appears to assert that when Wells Fargo filed its complaint on July 30, 2010, it attached a copy of the assignment executed on August 24, 2010, several weeks in the future. As a result, Derrick argues the assignment must be a forgery. But our review of the record does not reflect that the assignment was attached to Wells Fargo's 2010 complaint. In fact, we do not know what, if anything, Wells Fargo attached to its complaint beyond a copy of the mortgage and the note. Rather, the August 24, 2010 assignment appears as an attachment to Kondaur's complaint, and, as such, Derrick has raised no material issue of fact as to its veracity.

¶ 27 Finally, for the first time in his reply brief, Derrick argues that the assignment of the mortgage from Newlands Asset Holding Trust to Kondaur was invalid. Derrick did not raise this argument in the trial court or in his opening brief, and it is therefore forfeited. *In re County Collector of Du Page County for Judgment for Taxes for Year 1999*, 397 Ill. App. 3d 301, 309 (2009) ("Arguments raised for the first time on appeal are deemed forfeited, even when the appeal is from an order granting summary judgment"); Ill. S. Ct. R. 341(h)(7) (eff. May 5, 2018) ("Points not argued are forfeited and shall not be raised in the reply brief"). Accordingly, the trial court did not err in granting summary judgment for Kondaur and in denying Derrick's motion to reconsider the grant of summary judgment.

¶ 28 Motion to Vacate

¶ 29 Derrick next argues that the trial court erred in denying his section 2-1301(e) motion to vacate the "Order of Default and Judgment of Foreclosure and Sale [that] was entered solely against Defendant, KIMBERLY BENNETT," since Derrick had a meritorious defense to the action.[3]

¶ 30 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); see also *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27 (in a foreclosure action, a borrower may seek to vacate a default judgment of foreclosure under section 2-1301(e) at any time until a motion to confirm the judicial sale is filed).

¶ 31 But here, Derrick does not seek to vacate a default entered against himself, but one entered against his co-defendant Kimberly. Derrick's counsel—the same counsel who represented him in the trial court—does not offer this court any explanation of his standing to challenge an order not entered against his client, but against a party whom he does not represent. It is well established that a party lacks standing to contest an order that solely affects the interests of other parties. See *Schranz v. I.L. Grossman, Inc.*, 90 Ill. App. 3d 507, 512 (1980) (defendants lacked standing to contest court's entry of judgment against co-defendants); *Northbrook Bank and Trust Co. v. 300 Level, Inc.*, 2015 IL App (1st) 142288, ¶ 21 (movant lacked standing to challenge orders regarding real property in which it had no cognizable interest); *Trzop v. Hudson*, 2015 IL App (1st) 150419, ¶¶ 76-77 (intervenor lacked standing to move to dismiss

[3] Confusingly, this section of Derrick's brief is titled "The Trial Court Erred in Denying Defendant's Motion [to] Vacate the *Order of Summary Judgment* and Judgment of Foreclosure and Judicial Sale." (Emphasis added.) Derrick never filed such a motion. It is apparent from the content of this section that Derrick is challenging the denial of his motion to vacate the default against Kimberly, because he cites only law pertaining to section 2-1301(e) motions to vacate defaults.

claims because dismissal would not have affected his interests). Derrick was not prejudiced by Kimberly's default; thus, the only party who could challenge that default was Kimberly herself.

¶ 32 Although Derrick's lack of standing is *ipso facto* sufficient reasoning for the court's denial of Derrick's motion to vacate, we additionally note that the trial court considered Derrick's *instanter* motion to reconsider summary judgment and found his defenses not to be meritorious. Accordingly, we do not find that the trial court's denial of Derrick's motion was an abuse of discretion or a denial of substantial justice (see *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548-49 (2008) (we will not disturb the trial court's ruling on a section 2-1301(e) motion absent an abuse of discretion or a denial of substantial justice)) and, therefore, we affirm the trial court's ruling.

¶ 33 Confirmation of Sale

¶ 34 Finally, Derrick argues that the trial court erred in confirming the judicial sale of the property because (i) the sale price was unconscionably low and (ii) the trial court erred in denying his motion to vacate the default and his motion to reconsider.

¶ 35 Once a judicial sale has occurred and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by section 15-1508(b) of the Foreclosure Law, which provides: "Unless the court finds that (i) a notice [of the sale] *** was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2016). The trial court has broad discretion in determining whether any of these conditions have been met, and its decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion. *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 178 (2008).

¶ 36 Derrick first claims that the terms of sale were unconscionable. He points out that in 2005, he and Kimberly mortgaged their residence as security for a $138,050 loan, and by August 31, 2017, their debt had grown to $232,102.25. But Kondaur purchased the residence at the judicial sale for only $28,000.

¶ 37 Under section 15-1508(b) of the Foreclosure Law, the trial court has discretion to disapprove a judicial sale " 'where the amount bid is so grossly inadequate that it shocks the conscience of a court of equity.' " *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 113 (1993) (quoting *Levy v. Broadway-Carmen Building Corp.*, 366 Ill. 279, 288 (1937)). But "[i]t is well recognized that it is unusual for land to bring its full, fair market value at a forced sale." *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 18. It is also Illinois policy to promote the stability and permanency of judicial sales. *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 264 (2008). Thus, it is not required that sales be "commercially reasonable" or that the borrower receive "a reasonable equivalent value" for the property. (Internal quotation marks omitted.) *Holtzman*, 248 Ill. App. 3d at 114 (citing *Glanz v. Taken*, 293 Ill. App. 74 (1937) (affirming the approval of a judicial sale where the property was sold at less than 33% of its appraised value)).

¶ 38 When a borrower challenges a judicial sale on grounds of unconscionability, an evidentiary hearing is not always required. This court has explained:

> " 'To determine the extent of the hearing to be afforded the mortgagor, the court should look to the defendant's petition or motion and if there is an allegation of a current appraisal or other current indicia of value which is so measurably different than the sales price as to be unconscionable, then a hearing should be afforded the defendant. On the other hand, if the allegation of unconscionability rests on an appraisal rendered remote in

time, the requisite of a formal hearing is not required ***.' " *Fankhauser*, 383 Ill. App. 3d at 264 (quoting *Holtzman*, 248 Ill. App. 3d at 115).

¶ 39 Here, Derrick has not presented any appraisal of the subject property. To the extent that the amount of the 2005 loan can be construed as an indicator of value, it is "remote in time" and therefore insufficient to require an evidentiary hearing. Moreover, Derrick does not present any evidence of unconscionability aside from the sale price. See *Commercial Credit Loans, Inc. v. Espinoza*, 293 Ill. App. 3d 915, 928 (1997) (courts are reluctant to find unconscionability solely on the basis of inadequate sale price without other irregularities in the foreclosure sale). Thus, we do not find that the court abused its discretion in rejecting Derrick's claim of unconscionability without an evidentiary hearing.

¶ 40 Derrick also argues that "justice was otherwise not done" (735 ILCS 5/15-1508(b) (West 2016)) because the trial court erred in denying his motions to vacate the default and to reconsider summary judgment. For the reasons discussed above, we find no error in these rulings. Accordingly, the trial court properly confirmed the judicial sale.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we find that (i) the trial court did not err in granting summary judgment for Kondaur or in denying Derrick's motion to reconsider; (ii) the trial court did not abuse its discretion in denying Derrick's motion to vacate the default judgment against Kimberly; and (iii) the trial court properly confirmed the judicial sale of the property under section 15-1508(b) of the Foreclosure Law.

¶ 43 Affirmed.