2020 IL App (2d) 180799-U
No. 2-18-0799
Order filed May 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST TENNESSEE BANK, N.A.	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-2632
	)	
KYLE KINZY and JACKI KINZY,	)	Honorable
	)	Luis A. Berrones,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's petition for relief from judgment was moot in part and barred by *res judicata* in part; additionally, defendants did not present adequate record for appellate court to conduct meaningful review; and defendants' allegations of judicial bias were moot.

¶ 2 I. INTRODUCTION

¶ 3 Defendants, Kyle Kinzy and Jacki Kinzy, appeal an order of the circuit court of Lake County dismissing their petition for relief from judgment (735 ILCS 5/2-1401 (West 2018)) for want of jurisdiction. Defendants also press an issue the trial court did not address after determining it lacked jurisdiction: whether a substitution was necessary due to the trial judge's alleged bias.

Plaintiff, First Tennessee Bank, N.A., moves, *inter alia*, that this appeal be dismissed. For the reasons that follow, we affirm. We also dismiss all outstanding motions.

¶ 4 II. BACKGROUND

¶ 5 The instant case is a collateral attack. The underlying case resulted in an appeal that led to our disposition in *First Tennessee Bank, N.A. v. Kinzy*, 2016 IL App (2d) 160706-U (the 2016 appeal). In that case, defendants attempted to appeal a confirmation order, which had been entered on July 27, 2016, in a foreclosure proceeding initiated against them by plaintiff. We held that the appeal was moot because the property at issue in the foreclosure proceeding had been purchased by a third party. See Illinois Supreme Court Rule 305(k) (eff. July 1, 2004).

¶ 6 Defendants attempted to initiate the current action by filing their petition for relief from judgment on July 26, 2018, the day before the two-year deadline for filing a section 2-1401 petition expired. Defendants state that "[t]he trial court's e-filing system (EFS) rejected that submission because a few of the exhibits exceeded the electronic file size restrictions." They resubmitted the petition the next day—a Friday—and received an email confirmation. However, the following Monday, defendants state, "[T]he Clerk of Court rejected the submission on the basis that certain of the exhibits were attached in landscape rather than portrait format." Later that same day, defendants resubmitted their petition, and it was accepted.

¶ 7 The petition sought the following relief:

> "WHEREFORE, this Court should grant the Kinzys' Motion to Vacate and, pursuant to 5/2-1401, vacate the orders of this Court from Feb. 6, 2015, until the present; grant the Kinzys fourteen (14) days to answer or otherwise plead to the Third Amended Complaint; grant the Kinzys an evidentiary hearing to prove forgery and fraud and such other relief as this Court deems just. In the alternative that this Court deems it necessary

> to preserve the *in rem* judgment against the Property, the Kinzys respectfully request that the judgments be vacated to allow the Kinzys to pursue their *in personam* claims against First Tennessee and third parties.

We note that defendants' notice of appeal, in addition to the trial court's orders dismissing the section 2-1401 petition, also lists a number of orders entered by the trial court in the underlying action, including the confirmation order that was the subject of the previous appeal.

¶ 8 The trial court determined that the petition was not timely filed and that it therefore lacked jurisdiction to entertain the matter. Further, defendants had also filed a motion to disqualify the trial judge. The trial court found that it lacked jurisdiction to consider this motion as well. The report of proceedings from the day this order was entered has not been made a part of the record. Defendants now appeal to this court.

¶ 9 Plaintiff has filed a motion to dismiss this appeal, which we ordered taken with the case. Plaintiff advances three bases for dismissal. First, it asserts that defendants are seeking to reargue issues addressed in this court's disposition of the 2016 appeal. Second, it contends that this appeal, like the last one, is moot. Third, it argues that we lack jurisdiction to review the orders appealed. Plaintiff has also filed a motion to strike the appendix to defendants' response to plaintiffs' motion to dismiss this appeal.

¶ 10 III. ANALYSIS

¶ 11 We will address three main issues here. First, we will consider whether this appeal is barred by various preclusive principles, namely, the mootness doctrine and *res judicata*. Next, we will address the propriety of the trial court's order dismissing defendants' petition. Third, we will address defendants' contention that the trial court should have considered their motion for a substitution of judges before it assessed whether it had jurisdiction.

¶ 12 A. PRECLUSIVE PRINCIPLES

¶ 13 We will first consider the applicability of the doctrines of mootness and *res judicata* to this case. Both doctrines present questions of law subject to *de novo* review. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 43 (*res judicata*); *In re Alfred H.H.*, 233 Ill. 2d 345, 350 (2009) (mootness).

¶ 14 As a preliminary matter, we note that a portion of this case is moot. In the 2016 (*First Tennessee Bank, N.A.*, 2016 IL App (2d) 160706-U), we held that this case was moot in accordance with Illinois Supreme Court Rule 305(k) (eff. July 1, 2004), as the property that was at issue in the underlying proceeding had been sold to a third party. Defendants point out that we need not follow an earlier decision if we determine it is "palpably erroneous." See *Norris v. National Union Fire Insurance Co.*, 368 Ill. App. 3d 576, 581 (2006). However, defendants then go on to complain that the trial court did not consider the merits of their 2-1401 petition; attack a finding the trial court made regarding their efforts to file the petition; assert that the trial court did not address their motion to disqualify the judge; argue the merits of the underlying case; and complain of the trial court's decision in the underlying case to grant a default judgment against them. None of this has anything to do with our decision in the 2016 appeal that this case became moot when the subject property was sold to a third party. We have no quarrel with the proposition that we could reconsider our decision if we found it palpably erroneous; however, defendants have provided us with no basis to come to such a conclusion.

¶ 15 In the previous appeal, defendants also argued that the case was not moot because "monetary damages would be sufficient and that specific performance is not necessary to make them whole." *Id.* ¶ 24. We rejected this argument because defendants had only appealed the confirmation order and our jurisdiction was limited to reviewing that order. *Id.* Such claims were

not properly before us in the 2016 appeal. However, defendants make no attempt to explain why they could not have been raised at that time.

¶ 16 *Res judicata* applies to claims that were or could have been raised in an earlier proceeding. See *Stolfo v. KinderCare Learning Centers, Inc.*, 2016 IL App (1st) 142396, ¶ 30 ("As the arguments raised in Stolfo's section 2-1401 petition either were or could have been raised in his unsuccessful direct appeal from the November 2011 judgment, we agree with the respondents that dismissal of the section 2-1401petition was warranted by res judicata."). Thus, the mere fact that defendants did not raise these claims in the earlier action does not allow them to escape the preclusive effect of *res judicata*.

¶ 17 The doctrine requires three elements: "(1) that a court of competent jurisdiction rendered a final judgment on the merits; (2) that there is an identity of the parties or their privies; and (3) that there is an identity of cause of action." *Cload v. West*, 328 Ill. App. 3d 946, 949-50 (2002). Clearly, the earlier action resulted in a final judgment and the same parties are involved. Further, there is an identity of cause of action where the claims arise from the same group of operative facts. *Id.* at 950. Here, defendants alleged monetary claims all arise out of the same set of operative facts as the foreclosure action. *Res judicata* applies to matters that could have been asserted in a counterclaim. *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 530-31 (2005).

¶ 18 Defendants assert that the judgment in the underlying case is void. *Res judicata* generally does not apply to void judgments. *In re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 270 (2003). A void judgment is one entered by a court lacking jurisdiction over the subject matter or parties. *Id*. A judgment that is entered by a court of competent jurisdiction is voidable if it is entered erroneously. *Id*. Defendants advance three arguments as to why the judgment may be void. They contend that they were not provided with due process. However, due process violations do not

render a judgment void under Illinois law. See *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 22. Similarly, defendants assert that the failure of both parties to sign the original mortgage renders it void *ab initio* in accordance with section 1c of the Joint Tenancy Act (765 ILCS 1005/1c (West 2008)). However, the failure to follow a statute renders a judgment voidable rather than void. *Hulstrom*, 342 Ill. App. 3d at 270-71. Moreover, we note that the statute, by its own language, states that a mortgage against a tenancy by the entirety is not "effective" rather than it is "void." Finally, defendants assert that the trial court violated the automatic stay of a bankruptcy court. The earliest order identified in defendant's notice of appeal is dated March 19, 2015. The stay in this case (actually, the second stay, as defendants also filed a bankruptcy petition in 2014) was lifted on March 7, 2015. Thus, none of the after-occurring orders are void by virtue of the stay. Hence, defendants have not identified a basis upon which any of the orders they seek to undo are void.

¶ 19 Defendants make numerous assertions that they are being denied due process and an opportunity to be heard. However, they had ample opportunity to present their substantive claims. Following plaintiff's filing of their third amended complaint, a date was set for defendants to respond. Instead of answering the complaint, defendants moved for and received an extension to file their answer. On the extended date, again, instead of answering, they sought another extension. The trial court denied this request; it was not required to grant it (*Miller v. Consolidated Rail Corp.*, 173 Ill. 2d 252, 260 (1996)). It was at this point in the proceedings below that defendants had the opportunity to advance their claims but did not do so as required.

¶ 20 Defendants argue that *res judicata* does not apply because the very purpose of a section 2-1401 petition is to undo a final judgment. While true, there must be a legitimate basis for undoing the judgment. Matters that were or could have been argued in the underlying proceeding do not constitute such a basis, as explained above. See *Stolfo*, 2016 IL App (1st) 142396, ¶ 30.

Defendants have failed to identify a basis upon which the trial court's earlier judgment could be disturbed.

¶ 21 In sum, we hold that defendants' claims are moot as they pertain to the subject property and are otherwise barred by *res judicata*.

¶ 22 B. DISMISSAL

¶ 23 The trial court dismissed defendants' petition for relief from judgment because it found the petition untimely. By affidavit, defendant (Kyle Kinzy) avers that defendants initially attempted to file their petition on July 26, 2018, but it was rejected by the electronic filing system because it was too big. The petition was resubmitted on July 27, 2018 (the day it was due), and defendants learned on July 30, 2018, that it was again rejected because some of the exhibits were in landscape rather than portrait format. They successfully resubmitted the petition the same day. Defendant further avers that he spoke with the clerk of court, who informed him that "the exhibits could not be submitted in landscape format because the efile system would rotate them into portrait format and cause them to go beyond the margins of the page." The trial court held that the petition was untimely and dismissed it.

¶ 24 Illinois Supreme Court Rule 9 (eff. January 1, 2018) governs electronic filings in the circuit courts. The rule provides two savings provisions for petitions that were not timely filed. A party may seek relief where the untimely filing was caused by "any court-approved electronic filing system technical failure" or for "good cause shown." *Id*. The former encompasses " 'a malfunction of the e-filing provider's or the Court's hardware, software, and or telecommunications facility which results in the inability of a registered user to submit a document electronically. It does not include the failure of a user's equipment.' " *Peraino v. County of Winnebago*, 2018 IL App (2d) 170368, ¶ 22 (quoting Ill. S. Ct., M.R. § 2(h) (eff. Feb. 3, 2014)).

¶ 25 Here, defendants assert that it was a technical failure of the electronic filing system to rotate documents to a portrait orientation. It is unclear to us whether this is a technical failure at all. It is common knowledge that court records (both common law records and reports of proceedings) are stored in a portrait orientation. Thus, the trial court could have determined that this was something defendants should have been aware of and accounted for when they filed their petition. It further could have determined that this was a failing of defendants rather than the electronic filing system.

¶ 26 However, we do not know what the trial court determined because a transcript of the hearing during which the trial court dismissed defendants' 2-1401 petition has not been made a part of the record. It is the appellant's burden to provide a complete record. *In re Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004). Where the record is lacking, we must presume the trial court's ruling conformed with the law and had an adequate factual basis. *Id.* This provides an alternate basis to affirm the trial court's judgment.

¶ 27 C. MOTION TO DISQUALIFY

¶ 28 Defendants also contend that the trial judge should have addressed their recusal motion before considering its jurisdiction. This issue is moot. The first issues we addressed (mootness and *res judicata*) present questions of law and are subject to *de novo* review. The second issue was resolved in reliance on a presumption rather than on any finding of the trial court. In similar circumstances, the Fifth District explained:

> "Lastly, although nothing suggests that the trial court's judgments were improperly influenced, because all of the issues raised in the plaintiff's present appeals are reviewed *de novo*, "we perform the same analysis a trial court would perform and give no deference to the judge's conclusions or specific rationale.' *Bituminous Casualty Corp. v. Iles*, 2013

> IL App (5th) 120485, ¶ 19. 'The term "*de novo*" means that the court reviews the matter anew-the same as if the case had not been heard before and as if no decision had been rendered previously.' *Ryan v. Yarbrough*, 355 Ill.App.3d 342, 346 (2005)."

Thus, assuming, *arguendo*, defendants' motion is well founded, defendants have suffered no prejudice as we have resolved this appeal independently.

¶ 29 IV. CONCLUSION

¶ 30 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed. All outstanding motions are dismissed.

¶ 31 Affirmed.