

No. 1- 13-2114

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
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A., Successor by Merger to)	Appeal from the
BAC Home Loans Servicing, LP, f/k/a Countrywide)	Circuit Court of
Home Loans Servicing LP,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11 CH 30627
)	
818-820 WEBSTER CONDOMINIUM ASSOCIATION,)	
)	
Defendant-Appellant)	
)	
(Emily Kalnanithi, a/k/a Emily Costello; Unknown Heirs)	
and Legatees of Barry Costello, if any; William Butcher,)	
Court-Appointed Special Representative; Unknown)	
Others; and Non-Record Claimants,)	
)	
Defendants,)	
)	
and)	
)	
Simple Rental, LLC, Judicial Sale Purchaser,)	Honorable
)	Darryl B. Simko,
Intervenor-Appellee).)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Lamarkin and Reyes concurred in the judgment.

ORDER

¶ 1 **Held:** In this mortgage foreclosure action, the circuit court did not abuse its discretion by denying defaulted defendant's request for turnover of surplus funds after the confirmation of the judicial sale of the property.

¶ 2 In August 30, 2011, plaintiff-appellee, Bank of America, N.A., a successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing LP (BAC), filed suit to foreclose on a mortgage executed by Barry Costello and secured by a condominium located at 820 West Webster Avenue, Unit 2W, Chicago, Illinois (property). The complaint alleged that BAC was owed \$250,192.65, plus interest, costs, and fees. At the time the suit was filed, Mr. Costello was deceased. The complaint named as defendants: 818-820 Webster Condominium Association (Webster), Mr. Costello's daughter, Emily Kalanithi, a/k/a Emily Costello, unknown heirs and legatees of Mr. Costello, and unknown owners and non-record claimants. BAC further alleged Webster, as the condominium association for the building in which the property was located, "may have some interest" in the property "by virtue of unpaid assessments." BAC alleged that any interest Webster may have in the property would be inferior to its mortgage lien. BAC sought a judgment of foreclosure and sale of the property.

¶ 3 The circuit court later granted a motion to appoint William Butcher as a special representative for the estate of Barry Costello and gave BAC leave to file an amended complaint adding Mr. Butcher as a defendant in his capacity as special representative.

¶ 4 Webster was served by publication on September 23, 30, and October 7, 2011, and filed an appearance on December 8, 2011. Webster did not file an answer or any pleading seeking to enforce an interest in the property. However, on December 9, 2011, Webster recorded a lien on the property for unpaid assessments and charges totaling \$10,468.08.

¶ 5 On December 16, 2011, Mr. Butcher filed a report of special representative and motion for discharge. In his report, Mr. Butcher stated that no probate estate had been opened, all possible heirs of Mr. Costello had been notified of the suit, and none had expressed a desire to prove heirship or present a defense to the foreclosure suit. Mr. Butcher also opined that there

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was no viable defense to the foreclosure action, and the case should proceed as a "default matter."

¶ 6 On September 12, 2012, BAC moved for an order of default against Webster, Ms. Kalanithi, all unknown heirs, and all unknown owners and non-record claimants. On that date, BAC also moved for an entry of judgment for foreclosure and sale, and an order appointing a selling officer. The motions, noticed for hearing on October 9, 2012, were served on Webster and its counsel of record. On October 9, 2012, the circuit court entered an order of default as to all defendants, including Webster.

¶ 7 On that date, the circuit court also entered a judgment of foreclosure and sale which stated it was "fully dispositive of the interests of all defendants." The circuit court found BAC had a valid lien on the property which was superior to any liens or interests of all defendants and \$288,410 was owed to BAC pursuant to the mortgage. The order further stated:

"That there is due and owing to the following Defendants the lien extinguished the sums set forth, as a lien(s) upon the subject premises, subordinate and inferior to the lien and interest of the Plaintiff, pursuant to the responsive pleadings/documents filed herein:

NONE"

Finally, the foreclosure judgment ordered the property to be sold, and that proceeds from the sale were to be distributed first, to satisfy the expenses related to the sale, and then, to satisfy the amount of money owed BAC pursuant to the mortgage.

¶ 8 Webster was given notice that the property would be sold at a public auction to the highest bidder on January 11, 2013. Although not raised as an issue by any party, we note that with respect to the issue of any unpaid condominium assessments, the notice of sale fully

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complied with the requirements of section 1507(c)(1)(H-1), (c)(1)(H-2) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1507(c)(1)(H-1), (c)(1)(H-2) (West 2010)) and section 605/9(g)(5) of the Illinois Condominium Property Act (765 ILCS 605/9(g)(5) (West 2010)). At the judicial sale, intervenor-appellee, Simple Rental, LLC (SRL), was the successful bidder. The selling officer's report of sale and distribution provided that SRL made a bid of \$321,500 for the property and, based on that bid, upon confirmation of the sale and approval of the distributions to BAC pursuant to the foreclosure judgment, there would be a surplus of \$18,561.27. A receipt of sale confirmed SRL provided full payment to the selling officer.

¶ 9 On January 22, 2013, SRL filed a petition to intervene in the suit and a motion for an order approving the report of sale and distribution. Later, BAC also moved for an order approving the report of sale and distribution. After being served with notice of these matters, Webster filed a response to the motions to confirm the sale. Webster's response sought a "modification" of the report of sale which would provide for a distribution of the entire surplus to Webster. Webster, in its response, claimed an uncontested junior lien of unpaid assessments, costs, and fees which exceeded the surplus amount and filed exhibits in support thereof. Webster explained its failure to participate in the foreclosure proceedings as follows:

"[Webster] deferred the cost of prove up of the amount of its junior lien, as it was highly unlikely there would be a bid other than the plaintiff[s] *** or more than one third party bidder [at the judicial sale]. However, fortuitously two third parties appeared, participated and competitively bid resulting in the \$18,561.25 surplus."

In the response's prayer for relief, Webster requested an order approving the report of sale and distribution, providing for a distribution of the surplus to Webster, and vacating "any technical defaults" against it.

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¶ 10 On February 19, 2013, the circuit court allowed SRL to intervene in the foreclosure action and entered an order approving the selling officer's report of sale and distribution without the modification suggested by Webster in its response. The order approving the sale does not specifically refer to Webster's response, nor its request for the surplus. As to the surplus, the order stated:

"That the proceeds of the Judicial Sale were more than sufficient to satisfy Plaintiff's Judgment of Foreclosure and Sale and there remains a surplus of \$18,561.27. Said surplus will be turned over to the Clerk of the Circuit Court of Cook County, Illinois, immediately after the entry of this Order and held by the clerk pending further court order. That a copy of this Order shall be sent to all defendants and to the City of Chicago, care of the Office of the City Clerk, 121 North LaSalle Street, Room 107, Chicago, Illinois, 60602, within seven (7) days from the entry of this Order. When mailing a copy of the Order Approving Report of Sale and Distribution, counsel for SIMPLE RENTAL LLC, an Illinois series limited liability company, shall notify the mortgagor, in a cover letter, of the surplus, specifying that the funds may be obtained by petition and notifying the mortgagor(s) as to the procedures for doing so. Counsel must include the Official Court Surplus Request form with the notification."

The circuit court did not enter a separate order specifically addressing the response of Webster, or its requests for relief. The record does not include a transcript of the proceedings from this date.

¶ 11 On March 12, 2013, Webster filed a petition for a turnover of the surplus funds and noticed the petition for hearing on April 4, 2013, before the presiding judge of the Chancery Division of the circuit court (presiding judge). In its petition, Webster asked that the entire

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surplus be turned over to it. The petition included exhibits which had been filed with Webster's response to the motions to confirm sale, including affidavits in support of Webster's claim that it was owed \$16,692.12 in unpaid assessments and late charges, and \$4,720.25 in attorney fees incurred relating to "this matter," beginning in May 2011 (before the foreclosure action was filed), for a total of \$21,412.37. The petition also included a copy of the lien on the property which had been filed by Webster with the Cook County Recorder of Deeds on December 9, 2011. On April 4, 2013, the presiding judge entered an order denying Webster's petition without prejudice.

¶ 12 On April 29, 2013, Webster noticed for hearing on June 6, 2013, before the circuit court, a pleading entitled "Motion by defendant 810-820 Webster to reset hearing on its motion for adjudication and inclusion of its junior lien, or alternatively for relief from final judgment under section 2-1401." In this motion, Webster asserted that its previous request for distribution of the surplus had been presented on February 19, 2013, at the hearing on the motions to confirm the sale. According to Webster, at that time, the circuit court stated a request for distribution of surplus must be presented to the presiding judge of the chancery division pursuant to Administrative Order 2003-03 (Cook Co. Cir. Ct. G.A.O. 2003-03 (eff. Aug. 4, 2003)), and, therefore, Webster filed its petition for turnover of the surplus before the presiding judge. According to Webster, the presiding judge informed Webster that because there had been no adjudication of its lien during the foreclosure proceedings, it must be presented to the court which had heard the mortgage foreclosure case (referred to throughout as circuit court). Webster contended the circuit court continued to have jurisdiction over its previously timely-filed motion for turnover of the surplus which was part of its response to the motions to confirm the judicial sale. Webster, in essence, claimed its request for the surplus contained in the response was a

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"motion" for such relief filed before the judgment of foreclosure became final, and that motion was never ruled upon. In the alternative, Webster contended that the circuit court would have the authority to grant its requested relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), and, thus, it was "attempting to also obtain service of this motion in accord with section 2-1401."

¶ 13 On June 6, 2013, the circuit court entered an order stating Webster's "motion to reset hearing on its motion for adjudication and inclusion of its junior lien, or alternatively, for relief from final judgment under section 2-1401 was denied for reasons stated on the record." At the hearing, the circuit court, in denying Webster's motion, first stated that Webster's response to the motions to confirm sale did not seek to vacate the default judgment of foreclosure, and Webster had never filed proper pleadings which would have allowed for the adjudication of its lien during the proceedings. As to Webster's request in the alternative pursuant to the section 2-1401 petition, the circuit court found Webster had failed to show diligence and "sat on [its] rights until the case was over." Counsel for BAC and SRL were present at that hearing, but made no oral statements nor arguments. Webster filed a notice of appeal from the June 6, 2013, order only, in response to which BAC has filed an appellee's brief. While SRL did file an appearance, neither it nor any of the other defendants have otherwise participated in this appeal.

¶ 14 On appeal, Webster argues that: (1) established common law allows a junior lien holder to seek initial adjudication of its lien and recover any surplus after the judicial sale; (2) the circuit court continued to have jurisdiction to hear its request for an order directing a turnover of the surplus on June 6, 2013; and (3) the circuit court erred in refusing to hear and grant its request for the surplus. Webster argues, in the alternative, that the circuit court had the authority, under section 2-1401 of the Code, to grant its request for the turnover of the surplus. BAC, in its two-

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page response brief, asserts there is no reason to vacate the foreclosure judgment pursuant to section 2-1401. BAC, however, further states it has no objection to Webster receiving the surplus funds.

¶ 15 Before considering Webster's specific arguments, we find an examination of the relevant portions of the Foreclosure Law (735 ILCS 5/15-1101, *et seq.* (West 2010)), together with the procedural history of this case, would be helpful to our analysis of the issues.

¶ 16 BAC brought this suit pursuant to the Foreclosure Law, seeking enforcement of its mortgage, a judicial determination as to the superiority of its interests in the property, and a termination of the rights of any other subordinate interests in the property. Webster was named as a defendant in order to adjudicate any interests it may have had in the property as to any unpaid assessments or charges. Webster filed an appearance, but did not file an answer, a counterclaim, or cross claim asserting its interests. See 735 ILCS 5/15-1501(f) (West 2012); 735 ILCS 5/15-1504(h) (West 2012). The circuit court found Webster in default and entered a judgment of foreclosure which acted to terminate Webster's interests in the property. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11 (recognizing that "a judgment of foreclosure is final as to the matters it adjudicates").

¶ 17 The judgment of foreclosure, however, was not final and appealable until the circuit court entered the order confirming the sale of the property and approving the distribution of the proceeds. *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 21. After the judicial sale of the property, BAC, as the plaintiff-mortgagee, and SRL, as the successful bidder, moved to confirm the sale. Section 15-1508(b) of the Foreclosure Law governs the confirmation of a judicial sale, and provides in relevant part:

"Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale." 735 ILCS 5/15-1508(b) (West 2012).

A court has broad discretion in its determination of whether to approve or disapprove the judicial sale. *Fleet Mortgage Corp. v. Deale*, 287 Ill. App. 3d 385, 388 (1997).

¶ 18 Webster filed a "response" to the motions to confirm the sale, but did not object to an order confirming the sale. Webster instead requested: (1) that the report of the sale be confirmed, but modified to show a distribution of the surplus to Webster; (2) that any "technical" defaults against it be vacated; and (3) the entry of an order directing a turnover of the surplus funds to Webster.

¶ 19 The request to vacate the default included in Webster's response to the motions to confirm sale must be viewed in light of our supreme court's recent decision in *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469. In *McCluskey*, our supreme court established the procedures to be followed when a party seeks to vacate a default judgment in a foreclosure suit, either before or after the filing of a motion to confirm sale. Our supreme court held:

"Accordingly, we hold that up 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). Traditional considerations of due diligence and whether there is a meritorious defense will remain relevant in the court's consideration of whether

substantial justice has been done between the parties and whether it is reasonable to vacate the default. However, after a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a default judgment of foreclosure may only do so by filing objections to the confirmation of the sale under the provisions of section 15-1508(b)." *McCluskey*, 2013 IL 115469, ¶ 27.

Thus, *McCluskey* holds that after a motion to confirm sale has been filed, the defaulted party must present a meritorious defense and show, under section 15-1508(b)(iv) of the Foreclosure Law (735 ILCS 5/15-1508(b)(iv) (West 2013)), that justice was not otherwise done because the lender, either through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower had equitable defenses which revealed he was otherwise prevented from protecting his property interests. *McCluskey*, 2013 IL 115469, ¶ 26.

¶ 20 Although *McClusky* involved a default judgment against the borrower, we see no reason not to apply its holding to other defendants to a foreclosure action. Thus, in order to vacate the default judgment entered against it after the filing of the motions to confirm sale, Webster would have been required to proceed under section 15-1508(b) of the Foreclosure Law. 735 ILCS 5/15-1508(b) (West 2012). Webster did not follow this procedure and made a request only to vacate the default, not the default judgment, in its response to the motions to confirm the sale.

¶ 21 As to the request for turnover of the surplus contained in Webster's response, section 15-1512 of the Foreclosure Law governs distribution of proceeds from a judicial sale, including any surplus, and provides:

"The proceeds resulting from a sale of real estate under this Article shall be applied in the following order:

(a) the reasonable expenses of sale;

(b) the reasonable expenses of securing possession before sale, holding, maintaining, and preparing the real estate for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, receiver's and management fees, and, to the extent provided for in the mortgage or other recorded agreement and not prohibited by law, reasonable attorneys' fees, payments made pursuant to Section 15-1505 and other legal expenses incurred by the mortgagee;

(c) if the sale was pursuant to judicial foreclosure, satisfaction of claims in the order of priority adjudicated in the judgment of foreclosure or order confirming the sale; and

(d) remittance of any surplus to be held by the person appointed by the court to conduct the sale until further order of the court. If there is a surplus, such person conducting the sale shall send written notice to all parties to the proceeding advising them of the amount of the surplus, and that the surplus shall be held until a party obtains a court order for its distribution or until, in the absence of an order, the surplus is forfeited to the State." 735 ILCS 5/15-1512 (West 2012)).

Pursuant to Administrative Order 2003-03 of the chancery division of the circuit court of Cook County (Cook Co. Cir. Ct. G.A.O. 2003-03 (eff. Aug. 4, 2003)), motions for the turnover of surplus funds must be presented to the presiding judge of the chancery division. A decision of the circuit court as to a distribution of the surplus "will not be

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disturbed on appeal absent a showing of an abuse of discretion." *Members Equity Credit Union v. Duefel*, 295 Ill. App. 3d 336, 337 (1998).

¶ 22 With this framework in mind, we turn to Webster's argument as to the circuit court's June 6, 2013, denial of its request for the surplus.

¶ 23 As an initial matter, we observe that Webster listed only the June 6, 2013, order of the circuit court in its notice of appeal, and did not include the order confirming the judicial sale, nor the order of the presiding judge, which denied its petition for turnover of the surplus, without prejudice, in its notice of appeal. "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). Although we may have jurisdiction to review the orders confirming sale and denying the turnover of the surplus without prejudice as these orders were " 'step[s] in the procedural progression leading' " to the entry of the order on appeal (*In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23 (quoting *Burtell v. First Charter Service Corp.* 76 Ill. 2d 427, 435 (1979)), Webster did not present any arguments in its briefs as to these orders and, thus, has forfeited review. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Insofar as these orders may be relevant to our final determination, we observe they were not entered in error. First, the circuit court properly confirmed the sale where no party, including Webster, made objections to the sale's confirmation pursuant to section 15-1508(b). Indeed, in its response to the motions to confirm the sale, Webster maintained the sale should be confirmed.

¶ 24 Additionally, the circuit court's confirmation of the sale without requiring the turnover of the surplus to Webster was not in error. Although Webster's response sought

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an order vacating any "technical defaults," Webster failed to acknowledge the true state of the record; *i.e.*, that in October of 2012, over 4 months prior to the filing of the motions to confirm the sale, a default judgment of foreclosure was entered which terminated its interests in the property. Because any interest Webster may have had in the property had been terminated by the foreclosure judgment, the circuit court did not abuse its discretion in not granting a distribution of the surplus to Webster when confirming the sale. For these same reasons, the presiding judge did not abuse its discretion in denying, without prejudice, Webster's petition for turnover of the surplus.

¶ 25 We now consider Webster's specific challenges to the June 6, 2013, order of the circuit court. By this order, the circuit court denied Webster's request for turnover of the surplus, both pursuant to its original request included in its response to the motions to confirm the sale and, in the alternative, pursuant to its newly-raised petition under section 2-1401. Webster first maintains the circuit court continued to have jurisdiction to hear its request for turnover of the surplus funds without resort to section 2-1401. We agree.

¶ 26 The order confirming the sale directed the selling officer to turn over the surplus to the clerk of the circuit court. The order further stated the clerk of the circuit court should hold those surplus funds until further order of the court. This retention of jurisdiction to resolve claims for the surplus in the order confirming sale was consistent with section 15-15012(d) of the Foreclosure Law. 735 ILCS 5/15-15012(d) (West 2012). Therefore, the circuit court continued to have jurisdiction to consider claims as to Webster's request for the distribution of the surplus funds. The question here is whether the circuit court abused its discretion by denying Webster's claim to the surplus where an adverse default foreclosure judgment had been entered against Webster and the sale and distribution of

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the proceeds had been confirmed. An abuse of discretion occurs when no reasonable person could take the view adopted by the trial court. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 21.

¶ 27 Webster argues that, under these circumstances, its request for a turnover of the surplus was proper and should have been granted. In making this argument, Webster relies upon *Kankakee Federal Savings & Loan Ass'n v. Mueller*, 134 Ill. App. 3d 943 (1985), and the cases cited therein (*Ellis v. Southwell*, 29 Ill. 549 (1863), and *Illinois National Bank of Springfield v. Gwinn*, 348 Ill. App. 9 (1952)). In *Mueller*, the bank filed a foreclosure suit against the Muellers, its mortgagors, and Municipal Trust & Savings Bank (Municipal), which held a junior mortgage holder. *Mueller*, 134 Ill. App. 3d at 944. The Muellers appeared and, in their answer, admitted to Municipal's junior mortgage lien. Municipal did not appear and was defaulted. The foreclosed property was sold at public sale and Municipal was the successful bidder. The selling officer, thereafter, moved for confirmation of the sale and an order directing the disbursement of the surplus. Municipal filed an appearance with a verified petition showing the outstanding balance on its junior mortgage. The court affirmed the sale and, over the Muellers' objection, directed that Municipal receive the surplus. The Muellers appealed. *Id.*

¶ 28 The appellate court, in reviewing whether the Muellers were entitled to the surplus, recognized that under early common law, a junior lien holder's rights to any surplus could be adjudicated after the foreclosure sale. *Id.* at 945 (citing *Ellis*, 29 Ill. at 552, and *Gwinn*, 348 Ill. App. at 9). In rejecting the Muellers' argument that, by failing to appear and being defaulted, Municipal could not assert its lien by way of an answer after the judicial sale, the appellate court held:

"While there is no question that the preferred and better procedure would be for those persons asserting liens against the property, who wish to preserve their liens, to assert them by way of answer in the original foreclosure proceeding, nevertheless, a foreclosure action is one in equity. In the instant case, where there is no dispute as to the lien of Municipal Trust, which was admitted by way of answer by the Muellers, and where the court clearly contemplated distribution of surplus proceeds, in a manner to be determined by it after the sale, in the original judgment order, we find no error in the court's determination, upon subsequent proof of a remaining balance on the junior mortgage, in ordering distribution of the surplus proceeds to Municipal Trust." *Mueller*, 134 Ill. App. 3d at 946.

The court made clear its decision was "applicable specifically to the factual situation" in that case. *Id.*

¶ 29 In this case, BAC, in its complaint, alleged only on information and belief that Webster may have an interest in the property. Although no party has objected to Webster's claim to the surplus, there was no admission by any party as to the actual existence and extent of Webster's interest in the property at any time during the foreclosure proceeding. Furthermore, Webster did not follow "the preferred and better procedure" as Webster failed to answer or litigate its lien during the foreclosure proceedings. Webster was defaulted and a judgment was entered against it. Webster never properly sought to vacate that judgment under the Foreclosure Law. Webster admitted to not acting expeditiously to protect its lien until it was "surprised" by SRL's purchase that resulted in a surplus. We cannot say the circuit court abused its discretion in refusing to turn over the surplus to Webster based on these facts.

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¶ 30 We also note that, in *Mueller*, Municipal was the successful bidder at the judicial sale and, therefore, it was Municipal's purchase of the foreclosed property and its payment of the purchase price which created the surplus funds, which Municipal then claimed. This type of equitable consideration is not present here.

¶ 31 Equitable considerations were also central to the decision in *BCGS, L.L.C. v. Jaster*, 299 Ill. App. 3d 208 (1998). The plaintiff in *Jaster* foreclosed on property owned by Leonard Jaster, the mortgagor. The action named, *inter alia*, Jaster and Elizabeth Krueger, P.C., as defendants. Krueger, a law firm, held a junior lien on the foreclosed property based on its representation of Jaster's former spouse during their dissolution proceedings. Krueger filed an answer to the foreclosure action which asserted its rights and requested an accounting as to the amounts which were due and owing to her. Jaster had acquired full title to the property after the divorce. *Id.* at 210.

¶ 32 Jaster filed a counterclaim in the foreclosure action challenging Krueger's lien as void. A judgment of foreclosure was entered after summary judgment was entered against Krueger and Jaster. Jaster bought the property at the judicial sale. Krueger moved to set aside the sale and affirm its lien. The trial court confirmed the sale. Both Krueger and Jaster subsequently filed motions seeking to receive the sale's surplus. The trial court distributed the surplus of the sale to Jaster after finding Krueger's lien had been extinguished by the judgment of foreclosure. *Id.* at 211-12.

¶ 33 On appeal, the appellate court first held the trial court properly confirmed the sale without first considering Krueger's motion to affirm her lien. The appellate court held there was no provision in the Foreclosure Law "mandating the order of resolution of a confirmation of sale and a motion to affirm a lien." *Id.* at 217. Thus, this holding in

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Jaster supports the circuit court's decision in this instant case to confirm the sale without considering Webster's request for the turnover of the surplus, particularly where Webster's interests had been extinguished by the default foreclosure judgment.

¶ 34 As to the distribution of the surplus to Jaster without considering Kreuger's interests, the appellate court, citing *Mueller*, held:

"A foreclosure is an equitable proceeding [citation], and we believe it was unfair for the court to wait until after the confirmation of the sale to determine the distribution of the surplus and then deny Krueger any interest in the surplus based on the fact that the confirmation of the sale had extinguished its lien. [Citation.]"

Id. at 218. The matter was remanded to the circuit court for a determination as to "whether Krueger was entitled to the surplus based on the lien it possessed at the time of the foreclosure." *Id.*

¶ 35 Krueger, unlike Webster, had participated in the foreclosure proceedings and had asserted its lien rights throughout those proceedings. Further, there were equitable considerations which favored Krueger over Jaster as to the distribution of the surplus. Jaster, as the mortgagee, had allowed the property to go into foreclosure. Jaster did not redeem the property but, instead purchased the property at the judicial sale. Jaster "admitted that his goal" in proceeding in that manner was to remove liens, including Krueger's lien, from the property so that he could own the property without encumbrances. *Id.* at 214.

¶ 36 These same equitable considerations do not exist here. Plaintiff named Webster as a defendant in this case and provided Webster with the opportunity to assert and protect its lien during the foreclosure action. Plaintiffs did not act with improper motives to

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deprive Webster of an interest in the property as Jaster did to Krueger. Webster failed to protect its interest during the foreclosure action and came forward only after the judicial sale to a third party resulted in a surplus. Only then did Webster present evidence to support the nature and extent of its asserted lien, including attorney fees relating to this matter.

¶ 37 Under these particular facts and circumstances, we cannot find the circuit court abused its discretion in denying Webster's renewed claim for a distribution of the surplus in its June 6, 2013, order when the main equitable consideration asserted by Webster is, simply, that no other party has objected to its claim. Webster failed to assert and protect its interests in the property during the mortgage foreclosure action and, when it finally came forward to assert its rights to the surplus, Webster disregarded the orderly procedures of the Foreclosure Law. We, therefore, affirm the circuit court's denial of Webster's claim.

¶ 38 Finally, because we find the circuit court had retained jurisdiction to determine Webster's claim as to the surplus, we need not address Webster's arguments as to its section 2-1401 petition.

¶ 39 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 40 Affirmed.