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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CITIMORTGAGE, INC.,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 10-CH-5365
)	
VICTOR B. PAGE and DAWNE ELAINE)	
PAGE, a/k/a Dawna Elaine Page,)	
)	
Defendants-Appellants)	
)	Honorable
(RBS Citizens, N.A., Unknown Owners, and)	Robert G. Gibson.
Nonrecord Claimants, Defendants).)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) We lacked jurisdiction of the denial of defendants' section 2-1301(e) motion, as the motion, and defendants' appeal as to the denial, were untimely; (2) the trial court properly denied defendants' section 2-1401 petition to vacate a foreclosure judgment and the confirmation of the judicial sale: any relief was available only under section 15-1508(b) of the Mortgage Foreclosure Law, and in any event defendants did not provide a record to support their standing defense.

¶ 2 On September 17, 2010, plaintiff, CitiMortgage, Inc. (CitiMortgage) filed a complaint in the circuit court of Du Page County to foreclose a mortgage granted to defendants Victor B. Page

and Dawne Elaine Page (a/k/a Dawna Elaine Page) on residential real estate. The Pages did not timely appear or respond to the complaint, so the trial court found them to be in default, entered a judgment of foreclosure, and ordered the sale of the property. The Pages still had not appeared in the action when, on July 24, 2012, the trial court entered an order confirming the sale of the property. The Pages subsequently filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) as well as a motion under section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2012)), both of which sought vacatur of the foreclosure judgment and the confirmation order. In this appeal, the Pages seek review of the trial court's orders denying the section 2-1301 motion and the section 2-1401 petition. As explained below, our jurisdiction extends only to the trial court's ruling on the section 2-1401 petition, and that ruling must be affirmed.

¶ 3 In its foreclosure complaint, CitiMortgage alleged that the name of the mortgagee was "Mortgage Electronic Registration Systems, Inc., as Nominee of Taylor, Bean and Whitaker Mortgage Corporation Assigned to CitiMortgage, Inc." As exhibits to the complaint, CitiMortgage attached copies of the mortgage instrument, a written assignment dated August 19, 2010, of the mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) to CitiMortgage, and the promissory note secured by the mortgage. The mortgage instrument and the note were executed on January 25, 2006. Both the mortgage instrument and the note included, parenthetically, the words "Secondary Lien" in their titles. The complaint did not indicate that there was any subsisting lien on the property with priority over the mortgage.

¶ 4 The note was originally payable to Taylor, Bean & Whitaker Mortgage Corporation. However, the following undated endorsement was stamped onto the note:

"Without recourse, pay to the order of

CitiMortgage, Inc.

By: Taylor, Bean & Whitaker Mortgage Corp.”

Underneath the endorsement is what purports to be the signature of “Erla Carter-Shaw, E.V.P.” The assignment purported to “grant, bargain, sell, assign, transfer and set over” to CitiMortgage both the mortgage and the note.

¶ 5 The Pages filed their section 2-1401 petition on September 24, 2012. As relevant here, the Pages alleged that CitiMortgage lacked standing to bring the foreclosure action. As an exhibit to their petition, the Pages attached a written assignment of the mortgage and the note from MERS (as nominee for Taylor, Bean & Whitaker Corp.) to CitiMortgage. Whereas the written assignment attached to the foreclosure complaint was dated August 19, 2010, the one attached to the Pages’ section 2-1401 petition was dated July 6, 2011. In their petition, the Pages contended that CitiMortgage’s standing was predicated on the July 6, 2011, assignment. (The Pages did not mention the August 19, 2010, assignment attached to the foreclosure complaint.) The Pages alleged that “[a]s of Aug[ust] 6, 2009 [Taylor, Bean & Whitaker Corp.] was no longer in business as a lender or servicer.” The Pages maintained that the judgment of foreclosure was “void *ab initio* for fraud” for one or more of the following reasons: (1) because, after Taylor, Bean & Whitaker Corp. “closed” in 2009, MERS “no longer had standing” to be its nominee or agent, such that the July 6, 2011, assignment “would not operate to assign anything” to CitiMortgage; (2) because CitiMortgage lacked standing when the foreclosure complaint was filed (which was about 10 months before the July 6, 2011, assignment); and (3) because MERS had no authority to assign the note to CitiMortgage.

¶ 6 In their section 2-1401 petition, the Pages also challenged the validity of the endorsement of the note. They alleged, on information and belief, that “the rubber stamped [e]ndorsement

was *not* prior in time to the Assignment dated, 07/06/11.” (Emphasis in original.) (The Pages did not explain how this could be the case, given that the endorsement appeared on the copy of the note filed with the foreclosure complaint in September 2010.) The Pages also contended that, in order for the endorsement to be valid, it “would necessarily need [*sic*] to be actually personally signed by *Eria Carter Shaw* [*sic*], Executive Vice President of [Taylor, Bean & Whitaker Corp.], rather than by facsimile signature as a component part of the rubber stamp rather than an original ‘wet ink’ signature.” (Emphasis in original.) The Pages alleged that the endorsement was “a fraud and/or a forgery.” Finally, the Pages alleged that there was a subsisting first mortgage on the property and that what appeared to be a recorded satisfaction of the mortgage was, in fact, a forgery.

¶ 7 On December 7, 2012, the Pages filed a motion pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)) that likewise sought vacatur of the foreclosure judgment and the confirmation order and raised essentially the same arguments as the section 2-1401 petition. On February 27, 2013, the trial court entered an order stating that “[the Pages’] motion pursuant to 735 ILCS 5/2-1301(e)/petition to vacate judgment is denied for the reasons stated on the record.” On June 3, 2013, the Pages filed an emergency motion for a hearing on their section 2-1401 “motion.” On June 11, 2013, the trial court entered an order denying the emergency motion. The order additionally stated, “[The Pages’ section] 2-1401(e) [*sic*] petition to vacate judgment is denied for the reasons stated on the record in open court.” On July 3, 2013, the Pages moved for reconsideration of the June 11, 2013, order. The trial court denied the motion on July 9, 2013. Two days later, the Pages filed their notice of appeal.

¶ 8 We first consider our jurisdiction to review the denial of the Pages’ section 2-1301(e) motion to vacate the foreclosure judgment and the order confirming the sale of the property.

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 5/2-13-1(e) (West 2012). The July 24, 2012, order confirming the sale was the final judgment in the underlying foreclosure proceeding. *JP Morgan Chase Bank v. Funkhouser*, 383 Ill. App. 3d 254, 260 (2008). Accordingly, the time for filing a motion under section 2-1301(e) expired 30 days thereafter. The Pages’ section 2-1301(e) motion, which was filed on December 7, 2012, was untimely. It is well established that, if no motion is filed within the statutory 30-day period following entry of final judgment (which, in this case, was the July 24, 2012, confirmation order), the trial court’s jurisdiction to vacate the judgment lapses. *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 206 (2010); *Ruttenberg v. Red Plastic Co.*, 68 Ill. App. 3d 728, 730-31 (1979). After the trial court’s jurisdiction has lapsed, a ruling *on the merits* of a motion to modify the judgment is void. *Cf. People v. Flowers*, 208 Ill. 2d 291, 306 (2003) (trial court’s ruling on motion to reconsider sentence that was filed after the trial court lost jurisdiction was void). “A void order does not cloak the appellate court with jurisdiction to consider the merits of an appeal.” *Id.* at 307. Rather, we must vacate the order and strike the motion. *People v. Bailey*, 2014 IL 115459, ¶¶ 28-29.

¶ 9 In any event, even if the trial court’s jurisdiction had been proper, appellate jurisdiction would still be lacking. Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008) provides, in pertinent part, “The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or

order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions.” Accordingly, even if the trial court’s jurisdiction in the underlying foreclosure action had not lapsed before the section 2-1301(e) motion was filed, the Pages’ notice of appeal in the underlying foreclosure action would have been due within 30 days after the entry of the December 7, 2012, order denying the section 2-1301(e) motion. The Pages did not file a notice of appeal within that timeframe.

¶ 10 Our jurisdiction, which arises from the denial of the Pages’ section 2-1401 petition, does not extend to the underlying foreclosure proceeding as such. It is firmly established that “[t]he filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one.” *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). In *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007), our supreme court observed as follows:

“Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. [Citation.] While the remedy in the statute does have its roots in common law equity, the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition. [Citations.] Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. [Citation.] The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. [Citation.] *** Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.”

We note that although a section 2-1401 petition may be used to challenge a void judgment regardless of the existence of a meritorious defense or diligence on the petitioner's part (*Pekin Insurance Co. v. Rada Development, LLC*, 2014 IL App (1st) 133947, ¶ 19), the Pages do not argue on appeal that the foreclosure judgment is void.

¶ 11 The Pages argue that they “did in fact *** state defenses to be raised, including allegations of [CitiMortgage's] lack of capacity and standing, which the trial court was not entitled to reject, absent [the Pages'] ability to answer and defend the allegations of the complaint with the contemporaneous right to conduct discovery regarding the allegations of the complaint, specifically, allegations of standing and capacity to bring suit Not [*sic*] properly alleged by [CitiMortgage] and wholly unsustainable on this record.” For several reasons, we disagree.

¶ 12 First, as explained below, even assuming, for the sake of argument, that the Pages' section 2-1401 petition advanced a legally viable lack-of-standing defense, the defense would not be cognizable in a section 2-1401 proceeding commenced after the confirmation of the foreclosure sale. In *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010), MERS obtained a judgment of foreclosure, by default, and purchased the property at the foreclosure sale. After MERS moved for confirmation of the sale, the mortgagor, Jessie Barnes, filed a section 2-1401 petition to vacate the foreclosure judgment and the sale. Barnes argued that the foreclosure judgment was void because MERS had no interest in the debt secured by the mortgage. *Id.* at 3. The *Barnes* court observed that, because the sale had not yet been confirmed when Barnes filed her section 2-1401 petition, the petition was premature. *Id.* at 4. In addition, the *Barnes* court concluded that no relief was available to Barnes under section 2-1301. *Id.* Noting that the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2012))

“governs the mode of procedure for mortgage foreclosures in Illinois [citation], and ‘any inconsistent statutory provisions shall not be applicable’ [citation]” (*id.*), the *Barnes* court reasoned as follows:

“Section 15-1508(b) of the [Illinois Mortgage] Foreclosure Law provides that, after the foreclosure judgment and judicial sale, the circuit court shall confirm the sale unless the court finds that (i) a required notice was not given, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) that justice was otherwise not done. [Citation.] Because section 15-1508(b) limits the court’s discretion to refuse confirmation of the sale to those four specified grounds, it is more restrictive than and, thus, inconsistent with section 2-1301(e) of the Code. If section 15-1508(b) of the Foreclosure Law did not prevail over section 2-1301(e) of the Code, then the latter would eviscerate the former because parties could thwart section 15-1508(b) by filing petitions to vacate nonfinal judgments even after foreclosure sales have been held. Such a practice would undermine the sale process because bidders would have no confidence that sales would be confirmed. Therefore, defendant could not utilize section 2-1301(e) of the Code to circumvent section 15-1508(b) of the Foreclosure Law after MERS filed its motion to approve the sale.” *Id.* at 4-5.

In *U.S. Bank, National Ass’n v. Prabhakaran*, 2013 IL App (1st) 111224, the court relied, in part, on *Barnes* to hold that relief under section 2-1401 was unavailable to the mortgagor after the confirmation of the sale. After discussing *Barnes* at some length, the *Prabhakaran* court explained that “[i]f there is no relief available to the defendant under section 2-1301(e), it follows logically that there can be no relief under section 2-1401.” *Id.* ¶ 30.

¶ 13 Although in *Wells Fargo Bank, N.A. v. McCluskey*, 2012 IL App (2d) 110961, *rev'd*, 2013 IL 115469, we rejected the *Barnes* court's reasoning (*id.* ¶ 13), our supreme court held that we misconstrued *Barnes*. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 28. Citing *Barnes*, among other decisions, our supreme court stated as follows in *McCluskey*:

“[O]nce a motion to confirm the sale *** has been filed, the court has discretion to see that justice has been done, but the balance of interests has shifted between the parties. At this stage of the proceedings, objections to the confirmation *** cannot be based simply on a meritorious pleading defense to the underlying foreclosure complaint. To allow the borrower to utilize the standards of a section 2-1301(e) motion to both set aside the judicial sale and also unravel the underlying foreclosure judgment—after being given ample statutory opportunity to respond to the allegations of the complaint, and after being fully informed of the court process—would indeed be inconsistent with the need to establish stability in the judicial sale process. ***

To vacate both the sale and the underlying default judgment of foreclosure, the borrower must not only have a meritorious defense to the underlying judgment, but must establish under section 15-1508(b)(iv) that justice was not otherwise done because either the lender, 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 has equitable defenses that reveal he was otherwise prevented from protecting his property interests. After a motion to confirm the sale has been filed, it is not sufficient under section 15-1508(b)(iv) to merely raise a meritorious defense to the complaint. [Citations.] This interpretation is consistent with the legislative policy of balancing the competing objectives of efficiency and stability in the sale process and

fairness in protecting the borrower's equity in the property and preserving the integrity of the sale. [Citation.]

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).*" (Emphasis added.) *Id.* ¶¶ 25-27.

¶ 14 Even if these decisions did not preclude relief under section 2-1401 based on a lack-of-standing defense, the record on appeal would not warrant reversal of the trial court's decision. At the June 11, 2013, hearing on the Pages' emergency motion for a hearing on their section 2-1401 "motion," CitiMortgage's attorney advised the trial court that the section 2-1401 petition was essentially the same as the 2-1301(e) motion that had been denied following a hearing on February 27, 2013. CitiMortgage's attorney added that, when the trial court denied the section 2-1301(e) motion, it "indicated that such a petition brought under 1401 would also be denied for those same reasons." The trial court observed that the Pages "have not exercised any diligence on top of not having a meritorious defense." The trial court noted that the Pages' attorney "does not appear at all for court appearances or appears late" and that "[o]n one occasion, he had a non-lawyer associated with him appear and suggest he is deceased." The trial court further stated as follows:

“[The Pages’ attorney] chose to abandon his 2-1401 petition to vacate and filed what was labeled a 2-1301 motion to vacate, which was in error, and now that this motion was denied, seeks to go back to the original petition.

The original motion was flawed for the same reasons as the 2-1301 petition, lack of diligence and lack of a meritorious defense.

Consequently, the 2-1401 petition is denied.”

The record on appeal contains no report of proceedings for the hearing at which the trial court considered and denied the section 2-1301(e) petition. Indeed, the record on appeal contains no report of proceedings for any hearing except the June 11, 2013, hearing discussed above and the hearing on the Pages’ motion to reconsider the denial of the section 2-1401 petition. As it stands, the record does not include evidence in support of the major factual allegations of the petition. For instance, there is no evidence bearing on the legal status of the original mortgagee or MERS’s status as nominee when the mortgage was assigned to CitiMortgage. Nor does the record contain any evidence to support the allegation that the endorsement of the note was a forgery. It is not enough merely to *allege* these things. Rather, as noted above, “Relief under section 2-1401 is predicated upon *proof, by a preponderance of evidence*, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.” *Vincent*, 226 Ill. 2d at 7-8.

¶ 15 It is axiomatic that “[r]eviewing courts must determine the issues before them on appeal solely on the basis of the record made in the trial court.” *Lake v. State*, 401 Ill. App. 3d 350, 352 (2010). As a result, arguments based on facts that are not substantiated by the record on appeal are not subject to appellate review. Thus, our supreme court has held that “an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of

error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). Under *Foutch*, “[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Id.* at 392.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Du Page County denying the Pages’ section 2-1401 petition is affirmed. The order denying the Pages’ section 2-1301(e) motion is vacated and the motion is stricken.

¶ 17 Affirmed; order vacated and motion stricken.