

No. 1-09-3530

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

DIANE AINSWORTH and AINSWORTH)	
AND ASSOCIATES,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County.
)	
v.)	
)	No. 07 M1 144254
DANIEL OPRONDEK,)	
)	
Defendant.)	
)	
DANIEL OPRONDEK,)	
)	
Counter-Plaintiff/Appellant,)	
)	
v.)	
)	
DIANE AINSWORTH and AINSWORTH)	
AND ASSOCIATES,)	
)	Honorable
Counter-Defendant/Appellee.)	Ronald S. Davis,
)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court. Justices Pucinski and Sterba concurred in the judgment.

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HELD: Trial court properly entered summary judgment in legal malpractice action on the basis of collateral estoppel.

This appeal arises from an order of the circuit court partially granting plaintiffs/counter-defendants Diane Ainsworth and Ainsworth & Associates, PC's (Ainsworth) motion for summary judgment on the basis of collateral estoppel. Defendant/counter-plaintiff Daniel Oprondek contends on appeal that summary judgment was improperly granted because Ainsworth did not prove collateral estoppel. Alternatively, Oprondek contends that even if the elements of collateral estoppel were met, its application would be unfair. For the following reasons, we affirm.

BACKGROUND

On December 22, 2005, Oprondek and Ainsworth entered into an attorney-client relationship. Oprondek retained Ainsworth to represent him in a foreclosure suit that was then currently pending in chancery court regarding commercial real estate located at 2855 S. Archer Avenue (property) in Chicago. To secure Ainsworth's representation, Oprondek signed an Attorney/Client Agreement and deposited a fee and cost retainer of \$25,000.

On April 26, 2006, the trial court in the underlying foreclosure suit entered an order which appointed the bank as mortgagee in possession pursuant to sections 15-1701(b)(2) and 15-1703(a) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1701(b)(2), 5/15-1703(a) (West 2006)). Subsequently, the trial court entered a judgment of foreclosure and sale against the property on October 31, 2006. Ainsworth sent written correspondence to Oprondek on January 11, 2007, to advise him of the redemption period for the property and the date set for judicial sale of the property. Ainsworth sent a second written correspondence to Oprondek which included

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the notice of judicial sale for the property.

Thereafter, on February 13, 2007, Oprondek faxed Ainsworth a letter dated January 31, 2007, which terminated their attorney-client relationship and requested a final bill.

Subsequently, Oprondek filed further *pro se* pleadings in the underlying foreclosure suit under the direction of Attorney Theodore Proud, and an associate from Proud's firm appeared in court with him on subsequent court dates. No information or copies of the pleadings were forwarded to Ainsworth and she took no part in presenting them in court. In his deposition, Oprondek stated that he had no expectation that Ainsworth still represented him after he sent the letter to her.

On March 26, 2007, the property was sold at a judicial sale. The trial court entered orders which approved the foreclosure report of sale and distribution and for possession and deed on April 2, 2007. Possession was then ordered to the certificate holder without further order as provided in section 15-1701 of the Code. Within 30 days, Oprondek retained new counsel (who also represents him on appeal) and filed a motion to vacate the order confirming sale, arguing that it violated section 15-1508(g) of the Code because it granted immediate possession to the purchaser. Ainsworth's appearance in the underlying foreclosure suit was withdrawn on May 10, 2007, without prejudice to her right to recover any amounts owed by Oprondek. Oprondek's motion to vacate was denied on July 11, 2007.

Subsequently, on July 13, 2007, Ainsworth filed a complaint against Oprondek to recover outstanding legal fees on the underlying foreclosure suit. Oprondek responded by filing a counterclaim for legal malpractice on September 12, 2007. The counterclaim alleged that

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Ainsworth committed legal malpractice by failing to appear in court on the underlying foreclosure suit on April 2, 2007, at which time the court entered an “illegal” order confirming sale and awarding immediate possession to the purchaser. The counterclaim further alleged that due to the “illegal” order, Oprondek was prematurely locked out of his home and suffered other damage in excess of \$50,000.

Ainsworth responded with a motion for summary judgment and sanctions on March 5, 2009. In her motion for summary judgment, Ainsworth alleged that: (1) she was not Oprondek’s attorney at the time the April 2, 2007, order was entered and (2) Oprondek’s allegation that the April 2, 2007, order was “illegal” was barred by the doctrine of collateral estoppel.

The trial court denied Ainsworth’s summary judgment motion on the existence of an attorney-client relationship between her and Oprondek, finding that there was a material issue of fact as to that issue. The trial court did, however, grant Ainsworth’s summary judgment motion on the affirmative defense of collateral estoppel on August 21, 2009, finding that all of the requirements were met. Specifically, the court found that when the judge in the underlying foreclosure case denied Oprondek’s motion to vacate the “illegal” sale, it was tantamount to a decision that the foreclosure sale was not “illegal” and it was a final determination on the merits.

Oprondek’s motion to reconsider was denied on an order containing 304(a) language, and this timely appeal followed.

DISCUSSION

On appeal, Oprondek contends that summary judgment was improperly granted because

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Ainsworth did not prove collateral estoppel. While Oprondek acknowledges that there is no transcript from the proceedings held on his motion to vacate the order confirming the sale in the underlying foreclosure case, he argues that the trial judge in that case “acknowledged that ordering immediate possession of the property to the holder of the Certificate of Sale and Deed was contrary to the law,” but refused to vacate the order because Oprondek had no defense to the underlying foreclosure case.

Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Koczur v. Melnyk*, 407 Ill. App. 3d 994, ___, 348 Ill. Dec. 392, 396-97 (2011). We review cases involving summary judgment *de novo*. *Koczur*, 407 Ill. App. 3d at ___, 348 Ill. Dec. at 397.

Collateral estoppel is an equitable doctrine (*Sarno v. Akkeron*, 292 Ill. App. 3d 80, 85 (1997)), which precludes parties and their privies from relitigating facts in one action that were litigated in a prior action (*Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 812 (1986)). In order to operate as an estoppel, the facts sought to be relitigated must have been specifically litigated and necessarily decided. *Gelsomino*, 149 Ill. App. 3d at 812. In order for the doctrine to apply, the party invoking it must establish: (1) that the issue decided in the prior adjudication was identical to the one presented in the suit in question; (2) that there was a final judgment on the merits in the prior adjudication; (3) that the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) that the factual issue against which the

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doctrine is interposed has actually and necessarily been decided in the prior action. *Sarno*, 292 Ill. App. 3d at 85. Even if the above elements are found to be proven, collateral estoppel will not be applied if unfairness or manifest injustice would result. *Sarno*, 292 Ill. App. 3d at 85.

Here, in the underlying foreclosure suit, an order was entered on April 2, 2007, confirming the March 26, 2007, judicial sale of the property, which conferred immediate possession to the purchaser. Previously, the trial court in the underlying foreclosure suit granted prejudgment possession to the mortgagee on April 26, 2006, pursuant to section 15-1701(b)(2) (735 ILCS 5/15-1701(b)(2) (West 2006)) as the property was nonresidential real estate. Additionally, the trial court in the underlying foreclosure action entered a judgment of foreclosure and sale of the property on October 31, 2006, which specifically provided for immediate possession once the sale of the property was confirmed.

Section 15-1701 of the Code addresses the right to possession during foreclosure. 735 ILCS 5/15-1701 (West 2006). Subsection (a) of section 15-1701 states that “possession under this Article includes physical possession of the mortgaged real estate to the same extent to which the mortgagor, absent the foreclosure, would have been entitled to physical possession.” 735 ILCS 5/1701(a) (West 2006). Subsection (b) refers to pre-judgment possession, and delineates between residential and nonresidential real estate. 735 ILCS 5/1701(b) (West 2006). Subsection (c), which governs possession after entry of a foreclosure judgment and through the 30th day after a foreclosure sale is confirmed, provides as follows:

“(c) Judgment Through 30 Days After Sale Confirmation. After the entry of a judgment of foreclosure and through the 30th day

after a foreclosure sale is confirmed:

(1) Subsection (b) of Section 15-1701 shall be applicable, regardless of the provisions of the mortgage or other instrument, except that after a sale pursuant to the judgment of the holder of the certificate of sale (or, if none, the purchaser at the sale) shall have the mortgagee's right to be placed in possession, with all rights and duties of a mortgagee in possession under this Article.

(2) Notwithstanding paragraph (1) of subsection (b) and paragraph (1) of subsection (c) of Section 15-1701, upon request of the mortgagee, a mortgagor of residential real estate shall not be allowed to remain in possession between the expiration of the redemption period and through the 30th day after sale confirmation unless * * *.” 735 ILCS 5/15-1701(c) (West 2008).

Thus, according to the above-referenced section, after the entry of the foreclosure judgment and through the 30th day after confirmation of a foreclosure sale, the purchaser at the sale has the mortgagee's right to be placed in possession for nonresidential real estate. However, section 15-1508(g) (735 ILCS 5/15-1508(g) (West 2008)) of the Code states, in pertinent part:

“(g) The order confirming the sale shall include, notwithstanding any previous orders awarding possession during the pendency of the foreclosure, an award to the purchaser of possession of the mortgaged real estate, as of the date 30 days after the entry of the

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order, against the parties to the foreclosure whose interests have been terminated.”

Here, Oprondek argues that the order confirming the sale was not in accordance with the above-quoted language from section 15-1508 and that it was therefore “illegal.” However, according to section 15-1508, a trial court shall confirm a judicial sale unless: (1) there has been a failure to give proper notice; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. 735 ILCS 5/1508(b) (West 2008); *Grubert v. Cosmopolitan Nat’l Bank*, 269 Ill. App. 3d 408, 411 (1995). None of those situations have been argued here. Moreover, Oprondek does not cite, nor have we found, any authority supporting his contention. The record indicates that Oprondek unsuccessfully challenged the legality of the order confirming sale before the trial court in the underlying foreclosure action, however, the record does not contain a report of proceedings or bystander’s report from that hearing. Oprondek, as the appellant, has the burden of providing a sufficiently complete record to support his claim of error, and in the absence of such 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, 91-92 (1984); *Koczur*, 407 Ill. App. 3d at ___, 348 Ill. Dec. At 400. Accordingly, we are unable to review the trial court’s reasoning for not granting Oprondek’s requested relief in the underlying foreclosure action, and conclude that the court’s order settled all issues concerning the legality of the confirmation order.

Having so concluded, we agree with the trial court in the legal malpractice suit that collateral estoppel applies as a final judgment was entered on the merits of the “illegal”

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confirmation order by the trial court in the underlying foreclosure action. We conclude that summary judgment was properly entered in Ainsworth's favor on this basis.

Alternatively, Oprondek contends that even if the elements of collateral estoppel were met, its application would be unfair. Specifically, he argues, without citation to authority, that it would be against public policy to allow an attorney to claim that collateral estoppel precludes a malpractice suit when the attorney "allowed an order to be entered in direct violation of a specific statute."

We first note that the trial court denied summary judgment on Ainsworth's contention that she was not his attorney when the order confirming sale was entered and that such matter remains pending in the trial court. As such, we decline to address Oprondek's allegations as to what Ainsworth "allowed" during her representation of him. Moreover, we note that the failure to cite to supporting authority waives review on appeal. Ill. S. Ct. 341(h)(7) (eff. Jul. 1, 2008); *Vancura v. Katris*, 238 Ill. 2d 352, 368 (2010).

CONCLUSION

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

Affirmed.