FIFTH DIVISION
September 20, 2013

No. 1-11-3037

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HARRIS N.A.,	)	Circuit Court of
	)	Cook County, Illinois
Plaintiff-Appellee,	)	
	)	No. 2008 P 5511
v.	)	
	)	Honorable
	)	Darryl B. Simko
NORTH STAR TRUST COMPANY, et al.,	)	Judge Presiding
	)	
Defendant-Appellant	)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Without a transcript or bystander's report of the hearing on a defendant's motion to deem facts admitted, there was no basis for holding trial court abused its discretion in denying that motion; and (2) in reference to defendant's allegations of trial counsel's negligence, issues not raised in the trial court cannot be raised for

the first time on appeal.

¶ 2 In this mortgage foreclosure action, defendants North Star Trust Company (North Star), Erdogan Tufekcioglu, and Diversey-Moody Inc. appeal from the trial court's grant of summary judgment for plaintiff Harris Bank N.A., on its motion for foreclosure and judicial sale while denying Tufekcioglu's motion to admit.

¶ 3 BACKGROUND

¶ 4 On October 6, 2009, plaintiff filed a complaint of mortgage foreclosure against North Star, Tufekcioglu, Diversey-Moody, the City of Chicago, and unknown others and non-record claimants. (Only North Star, Tufekcioglu, and Diversey-Moody have joined in the instant appeal.) The complaint contained two counts. Count I was for foreclosure of a mortgage executed on March 11, 2008, by defendant North Star, not personally, but as successor trustee on behalf of Independent Trust Company Trust No. 20338 dated February 22, 1994 in favor of plaintiff. The mortgage was recorded on March 19, 2008 with the recorder of deeds of Cook County. The mortgage secured a loan in the amount of $1,000,000 evidenced by a promissory note executed by defendant Tufekcioglu on March 11, 2008. Count II of the complaint alleged a breach of contract based upon North Star and Tufekciogla's defaults under the terms of the mortgage, note and business loan agreement.

¶ 5 Plaintiff alleged North Star and Tufekcioglu defaulted under the terms of their agreements due to their failure to (1) provide plaintiff with copies of the certificate of insurance for the property, (2) provide tax returns for the year 2008, and (3) pay the monthly principal and interest payment when due for the period April 2009 and thereafter.

¶ 6 On June 30, 2010, Tufekcioglu filed an answer admitting the validity of the mortgage, note and business loan agreement but made a general denial of any defaults under the mortgage, note and business loan agreement.

¶ 7 On August 17, 2010, plaintiff filed its motion for summary judgment and motion for judgment of foreclosure and judicial sale.

¶ 8 On September 7, 2010, the Chicagoland & Suburban Law Firm, P.C. ("Chicagoland"), a law firm which had not originally appeared on behalf of defendants and which had no appearance of record at any time in the litigation, filed a first request to deem facts admitted on behalf of Tufekcioglu. Plaintiff filed and mailed its response on October 12, 2010.

¶ 9 On October 28, 2010, Tufekcioglu filed a motion to deem allegations of the request to admit, admitted. The motion alleged that plaintiff failed to respond within the time allowed under Illinois Supreme Court Rule 216. Rule 216 provides, in pertinent part:

> "(a) Request for admission of fact. A party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request.
>
> * * *
>
> (c) Admission in the absence of denial. Each of the matters of fact * * * of which admission is requested is admitted unless, within 28 days of service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot

truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part." S. Ct. R. 216 (eff. May 1, 2013).

¶ 10 On October 29, 2010, the circuit court entered a written order denying the motion and continuing plaintiff's motion for summary judgment, judgment of foreclosure and judicial sale.

¶ 11 On April 26, 2011, after being fully briefed on plaintiff's motion for summary judgment, the circuit court granted the motion for summary judgment and judgment of foreclosure, and it entered an order of foreclosure and sale.

¶ 12 A judicial sale occurred on June 20, 2011, at which time plaintiff was the successful bidder. On August 5, 2011 plaintiff filed a motion to confirm the sale. On August 15, 2011, the court set a briefing schedule on the motion and set a hearing for September 12, 2011. Defendants had until August 29, 2011 to file a response. Defendants did not timely file a response and on September 12, 2011, the court granted the motion to confirm the sale.

¶ 13 ANALYSIS

¶ 14 From that order, on appeal, North Star argues the circuit court erred in denying Tufekcioglu's motion to deem facts admitted and that the order confirming the judicial sale should be overturned due to the negligence of Tufekcioglu's prior counsel in failing to respond to plaintiff's motion to confirm the sale.[1]

[1] Although defendants North Star, Tufekcioglu, and Diversey-Moody all joined in the instant appeal, North Star is the only one to have filed a brief in this matter.

¶ 15 These issues are reviewed under an abuse of discretion standard. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 345 (2007); *Mortgage Electronic Registration Systems Inc. v. Thompson,* 368 Ill. App. 3d 1035, 1039 (2006). A circuit court has abused its discretion when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted. *Id.* (citing *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930 (1997)). If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion. *Id*. (citing *Merchants,* 292 Ill. App. 3d at 930).

¶ 16 North Star contends that the trial court abused its discretion when it denied Tufekcioglu's motion to deem facts admitted in its order dated October 29, 2010. However, the appellant has not provided us with a sufficient record of the proceedings below to permit us to properly evaluate the merits of this issue, much less decide this issue in their favor. See *Loll Coal. Co. v. Bellario*, 30 Ill. App. 3d 384, 385 (1975); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Our supreme court held in *Foutch*, 99 Ill. 2d at 392, that an appellant has the burden to present a sufficiently complete record of the proceedings at the trial level to support a claim of error by the court. Moreover, 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 the law and had a sufficient factual basis, and any doubts which may arise from incompleteness of the record will be resolved against the appellant. *Id.* In that case, since appellant did not provide a transcript or bystander's report of the hearing on a motion to vacate, there was no basis for holding that the trial court committed an error in denying the motion. *Id*; *Corral v. Mervis Industries Inc.*, 217 Ill. 2d 144, 156 (2005)

(holding that absent an adequate record preserving the claimed error, any doubts arising from the incompleteness of the record will be resolved against the appellant, and the order of the circuit court will be affirmed); *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 685 (2003) ("Without the transcript, we are unable to discern the trial court's reasoning and whether it abused its discretion."); *Coleman v. Windy City Balloon Port, Ltd*, 164 Ill. App. 3d 408, 419 (1987) (citing *Mileke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 48-49 (1984)); *In re Marriage of Hofstetter*,102 Ill. App. 3d 392, 396 (1981) ("[i]t is not the obligation of the appellate court to search the record for evidence supporting reversal of the circuit court. *** When portions of the record are lacking, it will be presumed that the trial court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"); but see *Walker v. Iowa Marine Repair Corp*., 132 Ill. App. 3d 621, 625 (1985) (reviewing court properly reached the merits of the case in the absence of a transcript where it was clear from the circuit court's order that its ruling could only be based on the pleadings and affidavits in the record presented).

¶ 17 In the case at bar, appellant has not included a transcript of the October 29, 2010, hearing. See S. Ct. R. 323(a) (eff. Dec. 13, 2005) (report of the proceedings "may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal"). Nor is there a bystander's report which is authorized under Illinois Supreme Court Rule 323(c) (see S. Ct. R. 323 (c) (eff. Dec. 13, 2005) ("[i]f no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the

best available sources, including recollection") nor is there any agreed statement of facts filed by the parties which is authorized by Rule 323(d) (see S. Ct. R. 323 (d) (eff. Dec. 13, 2005) ("[t]he parties by written stipulation may agree upon a statement of facts material to the controversy and file it without certification in lieu of and within the time for filing a report of proceedings"). Although a copy of the October 29, 2010 order is contained in the record, it does not include the trial court's reasoning or indicate what issues were raised at the hearing. We do not know what evidence or arguments were presented at that hearing. We do not know the basis for the trial court's decision. As such, without a record of the proceedings, we can only speculate as to the reasons for the circuit court's findings. Such speculation is not an adequate basis upon which we may conclude that the circuit court erred in entering judgment in plaintiff's favor. Therefore, under these circumstances, we must presume that the circuit court's ruling has a sufficient factual basis and was in conformity with the law. See *Corral,* 217 Ill. App. 3d at 156; see also *Foutch,* 99 Ill. 2d at 392; *Coleman*, 160 Ill. App. 3d at 419.

¶ 18 Further, we find that Tufekcioglu's request to admit and motion to deem facts admitted were not properly filed. The record before us does not include an appearance or a leave of court to file an appearance on behalf of Chicagoland. Illinois Supreme Court Rule 137 requires all pleadings and documents to be signed by the attorney of record. S. Ct. R. 137 (amended Dec. 17, 1993, eff. Feb 1, 1994; eff. Jan. 4, 2013) (see *National Wrecking Co. v. Midwest Terminal Corp*., 234 Ill. App. 3d 750, 768 (1992)) (Rule 137 Applies to discovery requests). Thus, plaintiff had no obligation to respond to a motion filed by an attorney without an appearance on file.

¶ 19 Next, we turn to North Star's argument, which it contends for the first time on appeal, that

defendant should not be bound by the negligence of Tufekcioglu's attorney in failing to timely file a response to plaintiff's motion to confirm the judicial sale. " 'It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.' " *Mortgage*, 368 Ill. App.3d at 336 (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d. 525, 536 (1996)). In *Daniels*, our supreme court reiterated that " 'the theory upon which a case is tried in the lower court cannot be changed on review, and * * * an issue not presented to or considered by the trial court cannot be raised for the first time on review.' " *Mortgage*, 368 Ill. App. 3d at 336; see *Daniels v. Anderson*, 162 Ill 2d. 47, 58-59, (1994) (citing *Kravis v. Smith Marine, Inc.* 60 Ill. 2d 141, 147 (1975)) (allowing new theory for the first time on appeal would weaken the adversarial process, our system of appellate jurisdiction, and cause prejudice, since opponents may have been able to present evidence to discredit the theory had it been raised in the trial court). Thus, we hold that defendant has waived this issue and may not raise it for the first time on appeal.

¶ 20 Moreover, a litigant is not relieved of the consequences of his own mistakes or the mistakes or negligence of his trial attorney, and he is generally bound by the negligence of his legal counsel which resulted in the entry of a default judgment. *R. M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955 ¶ 18 (citing *Ameritech Publishers of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 60 (2005)). Therefore, Tufekcioglu is bound by his previous attorney's failure to timely file a response to plaintiff's motion to confirm sale.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons we hold that the circuit court did not abuse its discretion in

denying Tufekcioglu's motion to deem facts admitted and in granting plaintiff's motion for summary judgment.

¶ 23 Affirmed.