

2012 IL App (1st) 113067-U

THIRD DIVISION
August 29, 2012

Nos. 1-11-3067 and 1-11-3301
(Consolidated)

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

THE BANK OF NEW YORK MELLON, TRUSTEE)	Appeal from the
FOR THE CERTIFICATE HOLDERS CWABS, INC.,)	Circuit Court of
ASSET-BACKED CERTIFICATES 2007-5,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
SHANA BAKER, <i>et al.</i> ,)	No. 07 CH 21431
)	
Defendants,)	
)	
and)	
)	
REGINA FLEMINGS,)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* Appellant, who was not a party to the underlying foreclosure proceeding and failed to intervene during its pendency, was not entitled to relief under section 2-1401 after final judgment.

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¶ 2 This is a consolidated appeal by the appellant, Regina Flemings, from orders of the circuit court of Cook County denying her petition to vacate the judgment of foreclosure and the judicial sale of her property at 12844 South Elizabeth Street in Calumet Park, Illinois, to plaintiff, The Bank of New York (Bank). Flemings contends that the circuit court erred in denying her section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) to vacate alleging that she was the rightful owner of the subject property in the Bank's foreclosure action against defendant Shana Baker and that any prior sale of her property to Baker was fraudulent and therefore void.

¶ 3 The record shows that on August 10, 2007, the Bank filed a mortgage foreclosure complaint against Baker, the then owner and mortgagor of the property. Flemings was not named in the complaint. When Baker failed to answer the complaint or otherwise plead, the circuit court found her in default and entered a judgment of foreclosure and sale of the property on November 15, 2007. The judgment order provided that the redemption period for the property would expire on March 12, 2008, that the property would be sold after that date if it was not redeemed by Baker and, following confirmation of the sale, a deed sufficient to convey title would be issued to the purchaser. The circuit court also entered an order dismissing any unknown owners and non-record claimants as party defendants.

¶ 4 On March 13, 2008, the appointed selling officer, the Judicial Sales Corporation, sold the property at a public auction to the Bank. On March 17, 2008, the Bank filed a motion for the entry of an order approving the report of sale and distribution, confirming the sale and order of possession. The circuit court granted the Bank's motion on April 14, 2008.

¶ 5 Thereafter, the Bank filed a motion to vacate the order approving the sale and to set aside the sale of the property because it was unaware that Baker had filed for chapter 7 bankruptcy on March 3, 2008, and was discharged in bankruptcy. On September 2, 2008, the circuit court granted the Bank's motion and appointed the Intercounty Judicial Sales Corporation as selling officer for the

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public auction of the property. Although the auction was initially scheduled for October 27, 2008, it was postponed to May 4, 2010, at which time the sale was adjourned to May 6, 2010, and the property was sold to the Bank.

¶ 6 On May 20, 2010, the Bank filed a motion for the entry of an order approving the report of sale and distribution and for possession against Baker. On June 25, 2010, the scheduled date for the Bank's motion, the circuit court entered an order continuing the cause to July 30, 2010, noting the presence of Flemings and not Baker. On July 30, 2010, the circuit court entered an order approving the report of sale and distribution, confirming the sale and order of possession.

¶ 7 On August 30, 2010, Flemings's attorney filed an "emergency" motion to vacate the July 30, 2010 order and for leave to file an appearance, answer, and otherwise plead. On September 2, 2010, the circuit court entered an order striking Flemings's "emergency" motion to intervene "based on that ruling, [the] motion to vacate is moot."

¶ 8 On September 29, 2010, Flemings's attorney filed a notice of motion to intervene and attached the respective motion. In her motion, Flemings claimed that she owned the property and has lived there since 1983, and that the warranty deed recorded with the Cook County Record of Deeds showed her unauthorized signature by an "Attorney in Fact." Flemings stated that she "received notice of the foreclosure action on or about June 30, 2010," and obtained an attorney on August 27, 2010. She further stated that she would suffer irrevocable harm if she were evicted from her home which she never authorized anyone to sell, and that her interests have not been represented by any of the parties in the instant matter.

¶ 9 On November 3, 2010, the Bank filed a response to Flemings's motion to intervene. In its response, the Bank questioned the diligence of Flemings in pursuing her claims and their merit based on attached public documents showing that in 2007, a foreclosure action was filed against Flemings and then dismissed around the time that Baker recorded the "forged" warranty deed. The Bank noted

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that on June 25, 2010, Flemings personally appeared before the circuit court, contesting the Bank's motion for the entry of an order approving the report of sale and distribution and for possession against Baker. The Bank added that the circuit court continued the matter to July 30, 2010, for Flemings to retain counsel and file an appearance or otherwise plead, and on the continuance date, the court entered an order approving the report of sale and distribution and confirming the sale and order of possession of the property when Flemings appeared without taking any of the actions for which the continuance was granted. On November 9, 2010, the circuit court entered an order denying Flemings's motion to intervene. Flemings made no attempt to appeal this order.

¶ 10 No further action was taken by Flemings until September 7, 2011, when her attorney filed the instant section 2-1401 petition to vacate "the foreclosure judgment in this matter and order confirming sale on grounds that the orders are void." In her petition to vacate, Flemings argued that she had a meritorious claim because she was the true owner of the property and that she was diligent in pursuing her claim because she tried countless times to explain to the Bank that she never sold her home. She also claimed that the Bank denied her necessary information regarding the alleged sale of her home and noted that she was being evicted by the Bank in case number 11 M1 703356. Accordingly, Flemings sought to vacate the judgment of foreclosure and subsequent order confirming the sale of the property as void. On September 15, 2011, the circuit court entered an order denying Flemings's petition to vacate. That order specifically stated that arguments were heard on the petition and the court was fully advised in the premises.

¶ 11 Flemings's attorney filed a notice of appeal from the September 15, 2011, order in case number 1-11-3067, and Flemings filed a *pro se* notice of appeal, in case number 1-11-3301, from an order entered on September 19, 2011, which does not appear in the common law record. As noted, we consolidated these appeals on the motion of Flemings's attorney, stating that the appeals

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concern the same issues regarding whether the circuit court erred in failing to allow Flemings to intervene and to vacate an order confirming the foreclosure sale.

¶ 12 In this court, Flemings contends that the circuit court erred in denying her section 2-1401 petition to vacate because she proved that the sale of her home was fraudulent based on a forged warranty deed. She argues that a forged deed is void and conveys no title, thereby rendering the subject foreclosure judgment and sale void. She also contends that she asserted a meritorious defense to the validity of the deed and exercised due diligence in presenting it to the circuit court.

¶ 13 Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) provides a comprehensive procedure by which final orders and judgments may be vacated or modified more than 30 days after their entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). A section 2-1401 proceeding is commenced by the filing of a petition supported by affidavit or other appropriate showing as to matters outside the record. *Paul*, 223 Ill. 2d at 94 (citing 735 ILCS 5/2-1401(b) (West 2008)). Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a claim or defense that would have precluded entry of judgment in the original action and diligence in discovering the claim or defense and presenting the petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007) (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986)). While the purpose of a section 2-1401 petition is to bring facts, not appearing in the record, to the attention of the trial court which, if known at the time of judgment, would have precluded its entry, a section 2-1401 petition may also be used to challenge an allegedly defective judgment for legal reasons. *Paul*, 223 Ill. 2d at 94. We conduct *de novo* review of a section 2-1401 petition dismissed without an evidentiary hearing. *Vincent*, 226 Ill. 2d at 18; *LVNV Funding, LLC v. Trice*, 2011 IL App (1st) 092773, ¶ 8.

¶ 14 This court has held that section 2-1401 relief is only available to the parties to an action. *People ex rel. Village of Lake Bluff v. City of North Chicago*, 224 Ill. App. 3d 866, 873 (1992). Leave to intervene in a suit must be sought during its pendency. *In re Reemts' Estate*, 383 Ill. 447,

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452 (1943). Once a motion to intervene is denied, the petitioner is deemed never to have been a party. *Matter of Veatch's Estate*, 93 Ill. App. 3d 413, 415 (1981). A section 2-1401 petition is not intended to permit a person, who is not a party to an action, to intervene after final judgment and reopen the suit so as to permit a new claim to be filed. *People ex rel. Village of Lake Bluff*, 224 Ill. App. 3d at 874.

¶ 15 Flemings's attempt to intervene in this case was denied by the circuit court, and she did not appeal from that order. In any event, section 2-1401 does not excuse her failure to intervene before final judgment was entered in the underlying action. *Stallworth v. Thomas*, 83 Ill. App. 3d 747, 751 (1980). We recognize that intervention may be allowed after final judgment where it is necessary to protect the intervenor's rights (*Anundson v. City of Chicago*, 44 Ill. 2d 491, 497 (1970)), but the relief sought by Flemings concerned matters that developed long before the foreclosure judgment and sale, namely the "forged" warranty deed recorded by Baker in 2007. By filing her section 2-1401 petition, Flemings sought to challenge the judgment of foreclosure and sale of property for which she no longer possessed an interest (*In re Cook County Treasurer*, 185 Ill. 2d 428, 433 (1998)), in the context of a foreclosure proceeding in which she was not a party. Although a nonparty may seek section 2-1401 relief under certain exceptions (*Hulbert v. Brewer*, 386 Ill. App. 3d 1096, 1102 (2008)), Flemings's use of section 2-1401 in a manner for which it was not intended, renders her petition insufficient at law. *In re County Treasurer and Ex-Officio County Collector of Cook County*, 386 Ill. App. 3d 906, 911 (2008).

¶ 16 Even if Flemings were allowed to intervene, she did not support her section 2-1401 petition with sufficient argument and evidence which would demonstrate fraud or unconscionable behavior on the part of the circuit court or the litigants, nor any indications that the Bank was deceptive in obtaining the judgment of foreclosure and sale of the subject property. *Stallworth*, 83 Ill. App. 3d at 752. Aside from her conclusory statements regarding the validity of the warranty deed, Flemings

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has presented an inadequate argument regarding fraud or forgery, and we need not consider it further.

Rodriguez v. Du Page County Sheriff's Merit Commission, 328 Ill. App. 3d 899, 906 (2002).

¶ 17 For the reasons stated, we affirm the judgment of the circuit court of Cook County denying Flemings's petition to vacate.

¶ 18 Affirmed.