2013 IL App (1st) 121312-U

SECOND DIVISION
May 14, 2013

No. 1-12-1312

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIFTH THIRD MORTGAGE COMPANY, Plaintiff-Appellee, v. DENIS MICHELSON, et al., Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 10 CH 53726 Honorable Mathias W. Delort, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

***Held*:** Defendant's claim that section 15-1505.6 of the Code of Civil Procedure is unconstitutional is forfeit where he failed to notify the Attorney General's Office of his claim, pursuant to Supreme Court Rule 19.

¶ 1 This action began when Fifth Third Mortgage Company (Fifth Third), filed a complaint to

foreclose mortgage against defendant Denis Michelson (defendant), for failure to make payments on the subject residential property according to the terms of a promissory note. Defendant filed a *pro se* appearance, and later obtained counsel who filed an appearance. The trial court entered a default judgment against defendant for failing to answer or file a responsive pleading to Fifth Third's complaint. Two days before the scheduled judicial sale of the subject property, defendant filed a motion to quash service of process. The trial court denied the motion as untimely pursuant to section 15-1505.6 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1505.6) (West 2011)). The trial court denied defendant's motion to reconsider, and this appeal followed.

¶ 2 I. BACKGROUND

¶ 3 Fifth Third filed its complaint to foreclose mortgage on the subject property on December 10, 2010. Thereafter, Fifth Third made nine separate attempts to serve defendant at the subject property. According to a case management order from February 18, 2011, defendant was in court but had not yet been served and had not submitted to the court's jurisdiction by his appearance. Thereafter, Fifth Third made seven more attempts to serve defendant at the subject property.

¶ 4 On March 15, 2011, an affidavit for service by publication was filed. A notice of service by publication was mailed to defendant on March 22, 2011. The notice was published on March 18, 2011, March 25, 2011, and April 1, 2011.

¶ 5 On March 30, 2011, defendant filed a *pro se* appearance.

¶ 6 On July 12, 2011, Fifth Third mailed defendant its notice of motion for default and judgment, which was set for July 19, 2011.

¶ 7 On July 19, 2011, defendant appeared in court and obtained an order granting him until

August 16, 2011, to answer or otherwise plead. Fifth Third's motion was continued until August 23, 2011.

¶ 8 Defendant obtained counsel sometime thereafter, and on August 23, 2011, defendant was granted leave to file an appearance and answer or otherwise plead by August 30, 2011. Fifth Third's motion was entered and continued to September 6, 2011.

¶ 9 On September 6, 2011, no one appeared on behalf of defendant, and Fifth Third's motion was entered and continued in order to confirm that an answer was not filed by defendant.

¶ 10 On September 20, 2011, the trial court granted defendant leave to file a substitute appearance for new counsel. New counsel orally requested additional time to file a responsive pleading, which was denied. The trial court then entered an order of default, an order appointing a foreclosure sale officer, and a judgment for foreclosure and sale.

¶ 11 On November 23, 2011, the notice of sale was mailed to defendant, defendant's initial attorney, and defendant's substitute attorney. The judicial sale was scheduled to take place on December 22, 2011.

¶ 12 On December 20, 2011, defendant filed a motion to quash service of process, arguing that Fifth Third failed to sufficiently attempt personal service on defendant before serving him by publication. Defendant contended in his motion that he was disabled and at home most days and evenings, yet no personal service was ever made on him, although on or about December 22, 2010, defendant's neighbor was given a copy of the summons and complaint. Defendant argued that at the January 10, 2011, case management date the trial court told defendant he had not been properly served and that Fifth Third would have to make personal service before the case could

continue. Defendant contended that thereafter, no personal service was ever made on defendant before service of publication. Defendant argued that service by publication was improper, and that the motion to quash should be granted so that defendant could have an opportunity to properly defend the foreclosure action.

¶ 13 In Fifth Third's response to defendant's motion to quash, it argued that it attempted to serve defendant at the subject property on 16 different occasions over a two-month period. Fifth Third attached the service returns, which were also part of its affidavit for service by publication. Additionally, Fifth Third argued that defendant had waived any potential objections to the court's jurisdiction over the matter. Fifth Third cited section 15-1506.6(a) of the Code, which states that in any residential foreclosure action, the deadline for filing a motion to quash service of process is 60 days after the earlier of two events: (1) the date that the moving party filed an appearance, or (2) the date that the moving party participated in a hearing without filing an appearance. Fifth Third argued that the motion to quash should be denied because defendant had not filed in the appropriate time frame.

¶ 14 Alternatively, Fifth Third contended that it had met its statutory requirements of service by publication because defendant could not be found, and personal service could not be made on him. Fifth Third also contended that defendant did not meet his burden in challenging service by publication as he did not argue that he could have been found by due inquiry.

¶ 15 Defendant, in his reply in support of his motion to quash, argued that section 15-1505.6 of the Code is ambiguous and, as applied to defendant, is unconstitutional. Defendant further argued that the service affidavits were not available in the official record when he originally filed

his motion to quash, and that he has had no further opportunity to depose or determine the veracity of the affidavits' truthfulness.

¶ 16 On February 10, 2012, the trial court denied defendant's motion to quash, finding section 1505.6 of the Code to be operative. A hearing was allegedly held on the motion, but a transcript of that hearing does not appear in the record.

¶ 17 On March 9, 2012, defendant filed a motion to reconsider. In his motion, defendant argued that there exists a significant ambiguity between the "expansive" rights guaranteed litigants under section 2-310 of the Code and the "highly restricted" rights under section 15-1506.6(a). Defendant contended that the General Assembly's authority must be exercised within certain constitutional bounds, and that the legislature's attempt to limit a foreclosure defendant's ability to challenge the court's personal jurisdiction "runs counter to the largely unrestrained ability to do so elsewhere in the law." Defendant further argued that the statute violated equal protection.

¶ 18 The trial court denied defendant's motion to reconsider. On March 30, 2012, defendant filed an objection to confirmation of sale and request for removal of certain fixtures, arguing that the sale price was too low. The trial court entered an order approving the sale on April 12, 2012.

¶ 19 On May 8, 2012, defendant filed a notice of appeal challenging the final order entered on April 12, 2012, and the order denying defendant's motion to quash.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant presents only one issue for review: whether section 15-1505.6 of the Code, "which limits the ability of mortgage foreclosure defendants to seek a Motion to

Quash, does so in violation of the Illinois Constitution." The complained-of statute, in its entirety, reads:

> "(a) in any residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process that objects to the court's jurisdiction over the person, unless extended by the court for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance.
>
> (b) In any residential foreclosure action, if the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/15-1505.6 (West 2010)

¶ 22 Defendant claims that this statute violates the Illinois constitution in three ways: (1) it violates equal protection guarantees, (2) it violates the ban on special legislation, and (3) it is unconstitutionally vague.

¶ 23 Fifth Third initially responds that defendant has waived his arguments of unconstitutionality on appeal for failing to raise them until his motion to reconsider, and that alternatively, defendant has waived his constitutional arguments by failing to comply with Illinois Supreme Court Rule 19.

¶ 24 We first address Fifth Third's Rule 19 argument. Fifth Third contends that defendant waived his constitutional arguments on appeal by failing to give notice to the Attorney General as soon as the issues were raised, as required by Illinois Supreme Court Rule 19. Rule 19 provides:

> "(a) Notice Required. In any cause or proceeding in which the constitutionality or preemption by federal law of a statute, ordinance, administrative regulation, or other law affecting the public interest is raised, and to which action or proceeding the State or the political subdivision, agency, or officer affected is not already a party, the litigant raising the constitutional or preemption issue shall serve an appropriate notice thereof on the Attorney General, State's Attorney, municipal counsel or agency attorney, as the case may be.
>
> (b) Contents and Time for Filing Notice. The notice shall identify the particular statute, ordinance, regulation, or other law, and shall briefly describe the nature of the constitutional or preemption challenge. The notice shall be served at the time of suit, answer or counterclaim, if the challenge is raised at that level, or promptly after the constitutional or preemption question arises as a result of a circuit or reviewing court ruling or judgment.
>
> (c) Purpose of Notice. The purpose of such notice shall be to afford the State, political subdivision, agency or officer, as the case may

> be, the opportunity, but not the obligation, to intervene in the cause or proceeding for the purpose of defending the law or regulation challenged. The election to intervene shall be subject to applicable provisions of law governing intervention or impleading of interested parties." Ill. S. Ct. R. 19 (eff. Sept. 1, 2006).

¶ 25 The purpose of Rule 19, requiring a party challenging the constitutionality of a state statute to notify the Attorney General of the challenge, is so that the Attorney General may enter an appearance and represent the interests of the state in the action. *Vailas v. Vailas*, 406 Ill. App. 3d 32, 42 (2010). Supreme Court rules are "not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). This court has specifically found that "[f]ailure to comply with Rule 19 results in forfeiture of the issue." *Vailas*, 406 Ill. App. 3d at 42. "While we have discretion to excuse late compliance with Rule 19, we will not excuse noncompliance." *Id*. (internal citations omitted).

¶ 26 Here, defendant failed to notify the Attorney General of his intent to challenge the constitutionality of section 15-1505.6. Defendant, in his reply brief, admits that "no separate notice was sent [to the Attorney General] in accord with [Rule 19]," but that "copies of the Notice of Appeal and Docketing Statement were sent to [the Attorney General] at the time the appeal was originally filed." Defendant contends that the notice of appeal and docketing statement provided "the essence of the Rule 19 requirements" because it identified the statute in question and "presented a short statement as to why the statute was allegedly unconstitutional."

Defendant does not cite to any authority which states that a notice of appeal and a docketing statement can constitute proper notice under Rule 19, and we have not found any. Moreover, Rule 19 requires that notice be sent to the interested agency as soon as the issue of unconstitutionality was raised in the trial court, which would have been at the time of defendant's reply to the Fifth Third's response to defendant's motion to quash was filed, not at the time the notice of appeal or docketing statement was filed. Ill. S. Ct. R. 19 (eff. Sept. 1, 2006).

¶ 27 Defendant contends, relying on *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106 (2004), that this court can still consider this case, despite a failure to provide notice in compliance with Rule 19, if the purpose of the rule has been served. In *Stokovich*, the circuit court found a building to be unsafe and ordered demolition. On appeal, the property owners argued that the section of the Code that permits demolitions of unsafe buildings violates due process. The appellate court found the statute unconstitutional. On appeal to the supreme court, the village argued that the property owners' constitutional challenge should not be heard because they failed to comply with Rule 19 when they failed to alert the Attorney General of their constitutional challenge to the statute. *Stokovich*, 211 Ill. 2d at 113-14.

¶ 28 The property owners had first raised the constitutional challenge to the statute in their motion to dismiss the village's complaint for demolition. The property owners raised the issue again on appeal and the village responded that the constitutional claim was barred for failure to comply with Rule 19. Thereafter, the property owners sought leave from the appellate court to comply with Rule 19. The appellate court granted leave to comply. The Attorney General then responded in a letter advising the property owners that it declined to intervene in the matter. The

appellate court declined to address the constitutional challenge to the statute. *Id*. at 114.

¶ 29 The property owners then filed a petition for leave to appeal to the supreme court, which was denied. However, the supreme court entered a supervisory order directing the appellate court to vacate its affirmance of the demolition order and address the property owners' claim of unconstitutionality. *Id*. at 114. When the village again argued that the property owners' constitutional claim was barred by failure to comply with Rule 19, the appellate court concluded that because the property owners had, by that time, complied with Rule 19, their constitutional claim was not barred. *Id*. The appellate court ultimately found the section of the Code in question to be unconstitutional.

¶ 30 Our supreme court allowed the appeal. The village argued that the matter had not been properly before the appellate court because of the property owners' failure to satisfy the requirements of Rule 19, and thus should not be considered on appeal. The property owners argued that it was within the discretion of the appellate court to permit late compliance with Rule 19, notwithstanding the requirement that "notice shall be served at the time of suit, answer or counterclaim, if constitutionality is raised at that level." Ill. S. Ct. R. 19(b) (eff. Sept. 1, 2006).

¶ 31 Our supreme court concluded that while a party's failure to timely comply with Rule 19 does not deprive the court of jurisdiction to consider the constitutional issue, failure to strictly comply with the rule may result in waiver. *Id*. at 118-19. The court found in that case that the appellate court did not abuse its discretion by permitting late compliance with Rule 19 since the purpose of Rule 19 was fulfilled when the Attorney General was offered and declined an opportunity to participate. *Id*. at 119.

¶ 32 In the case at bar, the Attorney General was never offered an opportunity to participate, and was never given the opportunity to decline participation. Accordingly, we find that the facts of *Stokovich*, where there was late compliance with Rule 19, to be different from the facts of our case, where there was no compliance. Because a failure to comply with Rule 19 is considered to be equivalent to forfeiture, defendant's only issue on appeal has been forfeited. See *Villareal v. Peebles*, 299 Ill. App. 3d 556, 561 (1998) (failure to raise constitutional issue in trial court and late compliance with Rule 19 not excused); *Serafin v. Seith*, 284 Ill. App. 3d 577, 587 (1996) (issue waived for failure to comply with Rule 19); *Witt v. Jones & Jones Law Offices, P.C.*, 269 Ill. App. 3d 540, 545 (1995) (constitutional arguments waived for failure to raise them in trial court and failure to comply with Rule 19); *Pappas v. Calumet City Municipal Officers' Electoral Board*, 288 Ill. App. 3d 787, 791 (1997).

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.