2014 IL App (1st) 123757-U

SIXTH DIVISION
March 31, 2014

Nos. 1-12-3757, 1-13-0724 (Cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

EASTWOOD DEVELOPMENT, LLC, Plaintiff-Appellee, v. SLAWEK URGACZ and MIROSLAWA KUDER-URGACZ, Defendants-Appellees and JPMORGAN CHASE BANK, N.A., Intervenor-Appellant. (MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as nominee of IndyMac Bank, FSB, UNKNOWN OWNERS and NONRECORD CLAIMANTS, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 09 CH 6580 Honorable Jean Prendergast Rooney, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶1 *Held*: In two consolidated appeals from the plaintiff's foreclosure of a judgment lien upon an undivided one-half interest in residential property, the appeal by an intervenor lender was dismissed for lack of jurisdiction and, in the appeal brought by defendants who held title to the property at issue, the foreclosure judgment was affirmed.

¶2 These consolidated appeals arise out of an action in the circuit court of Cook County by plaintiff Eastwood Development, LLC (Eastwood), to foreclose a judgment lien recorded against an undivided one-half interest in residential property commonly known as 2420 Hedge Row in Northfield, Illinois (the Property). In appeal number 1-13-0724, defendants Slawek Urgacz (Slawek, Slawomir) and Miroslawa Kuder-Urgacz (Miroslawa) (Urgaczs), who held title to the Property, argue: (1) the circuit court erred in granting summary judgment to Eastwood on the complaint for foreclosure; (2) they should have been permitted to contest the entry of a default judgment against a prior title holder, Cezary Kucbor (Cezary); and (3) Eastwood's lien, if valid, attaches only to the interest of Cezary Kucbor, and not that of Cezary's ex-wife, Ewa Kucbor (Ewa). In appeal number 1-12-3757, intervenor/defendant JPMorgan Chase Bank, N.A. (Chase) appeals the denial of its motion to vacate an order defaulting defendant Mortgage Electronic Registration Systems, Inc. (MERS), as nominee of IndyMac Bank, FSB (IndyMac), a prior mortgagor of the Property. For the following reasons, we affirm the judgment of the circuit court in appeal number 1-13-0724 and dismiss appeal number 1-12-3757 for lack of jurisdiction.

¶3 BACKGROUND

¶4 The records submitted in these consolidated appeals disclose the following facts. On November 13, 2006, Eastwood filed suit against Cezary in the law division of the circuit court (Cezary lawsuit). Ewa was not a party to the Cezary lawsuit.

¶5 On February 1, 2007, in separate litigation, the circuit court entered a judgment of dissolution of the marriage of Ewa and Cezary Kucbor (Kucbors)(divorce action). The judgment

for dissolution of marriage incorporated the Kucbors' marital settlement agreement, which states in part the parties: (1) are joint owners of the Property (2) had entered into a contract for sale of the Property; and (3) anticipated closing on the Property on February 15, 2007. The settlement agreement, as incorporated into the judgment of dissolution, also provided for 80% of the net proceeds of the sale of the property to go to Ewa and 20% to go to Cezary after the payment of certain marital expenses.

¶6 On February 8, 2007, in the Cezary lawsuit, the circuit court entered a default judgment for Eastwood in the amount of $806,374.44 plus costs. Also on February 8, 2007, Eastwood recorded the judgment in the Cezary lawsuit with the office of the Cook County Recorder of Deeds.

¶7 The sale of the Property from the Kucbors to the Urgaczs closed on February 9, 2007. A warranty deed of tenancy by the entirety, transferring title from the Kucbors to the Urgaczs was recorded with the office of the Cook County Recorder of Deeds on April 12, 2007. The warranty deed identifies both of the Kucbors as "divorced and not since remarried."[1]

¶8 On February 10, 2009, Eastwood filed the complaint for foreclosure of judgment at issue in these consolidated appeals. The complaint joins the Urgaczs, MERS as nominee of IndyMac, unknown owners and nonrecord claimants as defendants. The Urgaczs are identified as the current owners of the Property, while the remaining defendants are identified as those whose interest in or lien on the Property is sought to be terminated. The complaint identities Cezary as the judgment debtor. MERS's corporate counsel was served with the complaint on February 24, 2009. The Urgaczs were served with the complaint on March 6, 2009. Eastwood also recorded a *lis pendens* against the Property on February 23, 2009.

[1] The record does not indicate any change in either of the Kuchbors' marital status.

¶9 The Urgaczs filed a motion to dismiss the complaint on June 12, 2009, pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code)(735 ILCS 5/2-619(a)(9) (West 2008)). The Urgaczs argued Eastwood could not foreclose on its judgment lien because the Kucbors were tenants by the entirety on the date Eastwood's judgment was entered. On July 13, 2009, Eastwood filed a response arguing the Kucbors' tenancy by the entirety was severed by the entry of the Kucbors' judgment for dissolution of marriage. On July 27, 2009, the Urgaczs filed a reply, arguing Cezary's interest in the Property had been equitably converted into personal property, to which Eastwood's lien could not attach. On December 11, 2009, the circuit court denied the motion to dismiss. The Urgaczs and Eastwood agree this ruling is not at issue in this appeal.

¶10 On January 29, 2010, the Urgaczs filed their answer and affirmative defenses. On April 29, 2010, the circuit court granted the Urgaczs leave to file an amended answer and affirmative defenses, which the Urgaczs filed on May 27, 2010.[2] In their amended first affirmative defense, the Urgaczs reasserted their claim that Cezary's interest in the Property had been equitably converted into personal property. In their amended second affirmative defense, the Urgaczs asserted conventional or equitable subrogation entitled them to assert their priority position of the mortgage granted the Kucbors, as the Urgaczs were mortgagors and not lenders. On August 13, 2010, Eastwood moved to dismiss the Urgaczs' affirmative defenses. On November 19, 2010, following briefing by the parties, the circuit court granted the motion to dismiss. The circuit court permitted the Urgaczs until December 13, 2010, to file a second amended pleading,

[2] Eastwood had filed a motion to strike and dismiss the Urgaczs' original answer and affirmative defenses. The circuit court mooted Eastwood's motion when it granted leave to file an amended pleading.

but the parties to this appeal identify no such pleading in the record.

¶11 On January 19, 2011, Eastwood filed a motion for summary judgment, pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). Eastwood argued the denials in the Urgaczs' answer all concerned matters of public record. Eastwood also argued the amount of the default judgment against Cezary, delinquency, accrued interest, charges and expenses were mathematical computations which did not give rise to a genuine issue of material fact.

¶12 On March 21, 2011, the Urgaczs filed a response arguing genuine issues of material fact existed regarding whether Eastwood and Cezary conspired to defraud the Urgaczs and whether Cezary had an interest in the Property when Eastwood recorded its default judgment against him. The opposition to the motion for summary judgment was supported by an affidavit by Miroslawa, stating: (1) she was married to Slawomir and they were the owners of the Property; (2) prior to February 1, 2007, the Urgaczs entered into a contract with the Kucbors for the sale of the Property; and (3) the purchase of the Property closed on February 9, 2007.

¶13 On April 5, 2011, while Eastwood's motion for summary judgment was pending before the circuit court, the Urgaczs filed a motion to conduct discovery under Illinois Supreme Court Rule 191(b) (eff. July 1, 2002). On April 15, 2011, the Urgaczs issued interrogatories and document requests to Eastwood. On June 20, 2011, Eastwood filed a motion to strike the discovery requests. On June 28, 2011, the circuit court entered an order denying Eastwood's motion for summary judgment without prejudice. In the same order, the circuit court also granted in part Eastwood's motion to strike discovery requests as to certain interrogatories and request to produce.[3]

[3] The Urgaczs' brief asserts the circuit court "struck certain interrogatories and requests to produce that it considered relevant only for the purpose of a collateral attack on Eastwood's

¶14 On July 20, 2011, Eastwood filed a second motion for summary judgment against the Urgaczs. In its motion, Eastwood argued the facts denied by the Urgaczs were based on public documents not only attached to the pleadings, but also subject to judicial notice, and thus could not raise a genuine issue of material fact. Eastwood also argued the amount of default, delinquency, accrued interest, and charges and expenses were a matter of mathematical computation and did not raise a genuine issue of material fact.

¶15 On August 11, 2011, the Urgaczs filed a motion to reconsider the order striking certain of their discovery requests, as well as a motion seeking additional discovery regarding their assertion of potential fraud. On October 11, 2011, the circuit court entered an order denying both motions. On October 21, 2011, the Urgaczs filed a second motion to reconsider, arguing a void judgment or a judgment obtained through fraud is subject to collateral attack.

¶16 On January 12, 2012, the circuit court entered an order denying the Urgaczs' second motion to reconsider and granting Eastwood's motion for summary judgment against the Urgaczs. On February 9, 2012, the Urgaczs filed a motion for clarification and reconsideration. On March 7, 2012, the circuit court entered an order clarifying that summary judgment was granted to Eastwood on the issue of liability only.

¶17 On February 22, 2012, Eastwood filed a motion entitled "motion for default and judgment of foreclosure and sale" against MERS, unknown owners and nonrecord claimants. On April 4, 2012, the Urgaczs fled a response, arguing Eastwood had yet to establish the amount it was entitled to recover. On April 16, 2012, Eastwood filed a reply in support of its motion, claiming it was entitled to the entry of a judgment of foreclosure for the entire amount of its judgment against Cezary, plus interest. Eastwood's reply requested judgment be entered in its

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underlying judgment."

favor and against the Urgaczs, despite the fact Eastwood's motion sought to default MERS, unknown owners and nonrecord claimants. Eastwood's reply also requested it be awarded $807,408.24, plus statutory interest from the date of the default judgment against Cezary, for a total award of $1,193,806.78. On June 27, 2012, the circuit court entered an order granting Eastwood's "motion for a judgment of foreclosure." In the same order, the court found the Urgaczs were not entitled to step into the shoes of the prior senior encumbrancers[4] and Eastwood was entitled to recover the full amount of its judgment lien plus statutory interest.

¶18 On July 11, 2012, the Urgaczs filed a motion petitioning the circuit court to find, pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), there was no reason to delay enforcement or appeal of the June 27, 2012, order. The Urgaczs argued the sale of the Property to a third party below market value could deprive them of any equity in the Property and leave them at risk for a deficiency from their lender. On August 23, 2012, the circuit court denied the motion for a Rule 304(a) finding.

¶19 On September 12, 2012, Chase filed an emergency motion to intervene in the case. Chase asserted it gained an interest in the Property through a purchase money mortgage[5] granted to the Urgaczs by NovaStar in 2007, which was refinanced by IndyMac in August 2007, which

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[4] The order does not identify the prior senior encumbrancers. The Urgaczs' amended answer and affirmative defenses claimed "funds acquired by the Urgaczs were used to pay off Cezary and Ewa Kucbor's mortgage" and refers to a check issued to NovaStar mortgage.

[5] "A purchase-money mortgage is given concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price." *Application of Busse*, 124 Ill. App. 3d 433, 440 (1984).

was then refinanced by Chase in April 2011.[6] Chase argued it should have been named as a party defendant and was entitled to be equitably subrogated to the lien position of MERS as nominee of IndyMac. On October 4, 2012, following briefing by the parties, the circuit court granted Chase's motion to intervene.

¶20 On October 19, 2012, Chase filed a motion to vacate the June 27, 2012 order granting Eastwood's motion for a judgment of foreclosure, pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)). Chase argued no "previous mortgagor [sic]" was named a party to the action and Chase was not so named, despite its mortgage being a matter of public record. Chase again argued equitable subrogation gave its mortgage priority over Eastwood's judgment lien.

¶21 On October 24, 2012, Eastwood filed a response in opposition to Chase's motion to vacate. Eastwood argued it had no obligation to name Chase as a party, where Chase's purported interest in the Property did not arise until years after Eastwood filed its complaint. Eastwood also asserted that Chase's interest in the Property was not of record in this proceeding. Eastwood further argued Chase was not entitled to subrogation rights through a defaulted third party, MERS as nominee of IndyMac.

¶22 On November 20, 2012, the circuit court entered an order denying Chase's motion to vacate the June 27, 2012, order. The order further stated it was "a final and appealable order pursuant to Rule 304(a)."

¶23 On November 21, 2012, the circuit court entered the judgment of foreclosure and sale. The judgment found in part: (1) the named defendants were duly and properly served; (2) MERS as nominee of IndyMac, unknown owners and nonrecord claimants failed to appear and an order

[6] The parties to this appeal identified no objection to this chain of assignments.

of default was entered against them; and (3) the Urgaczs appeared and answered, and an order of summary judgment was entered against them. The judgment also contained the legal description of the Property and calculated the specific sums owed to Eastwood in the total amount of $1,228,994.28. The judgment further ordered a judicial public sale of the Property to the highest bidder. Although the foreclosure proceedings continued in the circuit court, Chase filed a notice of appeal to this court regarding the denial of the motion to vacate on December 19, 2012.

¶24 On January 18, 2013, the circuit court entered an order denying a motion by the Urgaczs seeking reconsideration of the circuit court's denial of a Rule 304(a) finding as to them. The same order denied a motion by Chase to stay the judicial sale of the Property.[7] On January 25, 2013, this court entered an order denying Chase's emergency motion for a stay.

¶25 On February 15, 2013, the circuit court entered an order approving the report of sale and distribution and confirming the sale of the Property to Eastwood. On February 28, 2013, the Urgaczs filed their notice of appeal to this court.

¶26 DISCUSSION

¶27 In appeal number 1-12-3757, intervenor JPMorgan Chase Bank, N.A. (Chase) appeals the denial of its motion to vacate the June 27, 2012, order granting Eastwood's "motion for a judgment of foreclosure." In appeal number 1-13-0724, the Urgaczs argue: (1) the circuit court erred in granting summary judgment to Eastwood on the complaint for foreclosure; (2) they should have been permitted to contest the entry of a default judgment in the Cezary lawsuit; and

[7] The order does not indicate the date of the judicial sale and the Urgaczs' motion does not appear in the record on appeal. Accordingly, the record does not establish whether the Urgaczs continued to seek a Rule 304(a) finding for the June 27, 2012, order, or a subsequent order, such as the judgment of foreclosure and sale.

(3) Eastwood's lien, if valid, attaches only to the interest of Cezary Kucbor. We address the appeals in turn.

¶28 Chase's Appeal

¶29 At the outset, Eastwood argues this court lacks jurisdiction over Chase's appeal from the November 20, 2012, order denying Chase's motion to vacate the June 27, 2012, order. The order entered on November 20, 2012, stated it was "a final and appealable order pursuant to Rule 304(a)." This court has the duty to consider the issue and dismiss the appeal where our jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011); *In re Marriage of Mardjetko*, 369 Ill. App. 3d 934, 935 (2007). Illinois Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as a matter of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); see *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997). Once the trial court enters a judgment disposing of all the issues as to all the parties, such an order becomes both final and appealable, and a party has 30 days either to file a notice of appeal or a postjudgment motion. See *Kral v. Fredhill Press Co.*, 304 Ill. App. 3d 988, 994 (1999); Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). Conversely, "[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Without a Rule 304(a) finding, a final order disposing of fewer than all of the claims in an action is not instantly appealable. *Dubina*, 178 Ill. 2d at 502-03.

¶30 Eastwood contends[8] the June 27, 2012, order was not a final order. Accordingly,

[8] Although Eastwood does not question the form of the Rule 304(a) finding, we initially note

Eastwood argues, the November 20, 2012, order denying the motion to vacate the June 27, 2012, order is also not a final order and thus cannot be made appealable by a Rule 304(a) finding. Eastwood further argues Chase's December 19, 2012 notice of appeal was filed prior to the order confirming the judicial sale of the Property—the actual final judgment in this matter—and thus was prematurely filed and does not confer jurisdiction on this court as to the June 27, 2012, order and November 20, 2012, orders..

¶31 Eastwood relies on *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 14, in which our supreme court held Rule 304(a) findings did not bestow appellate jurisdiction on an order denying an emergency motion to vacate a judgment of foreclosure brought pursuant to 2-1401(a) of the Code (735 ILCS 5/2-1401(a) (West 2010)), and an order denying reconsideration of the

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the November 20, 2012, order contains no reference to the justness of delaying enforcement or appealability, or to the propriety of immediate appeal. "Our supreme court does not require that a circuit court parrot Rule 304(a) exactly in order to invoke it." *Palmolive Tower Condominiums, LLC*, 409 Ill. App. 3d at 543. Yet our supreme court has "stopped short of indicating that Rule 304(a) does not require some reference to immediate enforcement or appealability or the justness of delaying enforcement or appealability." See *id*. (and cases cited therein). This court has held that an order lacking these references, but stating the order is appealable pursuant to Supreme Court Rule 304(a) satisfies the requirements of Rule 304(a), based on the express reference to the rule. *Abrams v. City of Chicago*, 338 Ill. App. 3d 179, 185 (2003), *rev'd on other grounds*, 211 Ill. 2d 251 (2004). Accordingly, we conclude the form of the Rule 304(a) finding is sufficient in this case. *Id*. Insofar as such orders are often drafted by counsel, we observe that including an express finding referring to immediate enforcement or appealability or the justness of delaying enforcement or appealability avoids raising this issue.

prior ruling. These motions were submitted by Barbara Kemp, the mortgagor of the property at issue. Fundamentally, *EMC Mortgage Corp* is an application of the rule that, "absent a supreme court rule, the appellate court is without jurisdiction to review judgments, orders or decrees which are not final." *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 9 (citing *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)). The *EMC Mortgage Corp.* court first reasoned Kemp sought relief from the judgment of foreclosure under section 2-1401(a) of the Code, which provides relief from final orders only, but it is the order confirming the sale, rather than the judgment of foreclosure, that operates as the final and appealable order in a foreclosure case. *EMC Mortgage Corp.*, 2012 IL 113419, ¶¶ 10-11. The court next reasoned Kemp did not seek to make the underlying judgment of foreclosure appealable under Rule 304(a). *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 12. The court further observed "the orders Kemp seeks review of—the denial of a motion to vacate based upon an inapplicable section of the Code of Civil Procedure and the denial of its reconsideration—are neither final nor appealable." *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 13. The court then rejected Kemp's reliance on the Rule 304(a) findings because " 'the inclusion of the special finding in the trial court's order cannot confer appellate jurisdiction if the order is in fact not final.' " *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 14 (quoting *Crane Paper Stock Co. v. Chicago & Northwestern Ry. Co.*, 63 Ill. 2d 61, 66 (1976)).

¶32 In this case, Chase sought to vacate the circuit court's June 27, 2012, order. The text of that order states that it grants Eastwood's "motion for a judgment of foreclosure," but the motion sought to default MERS and enter a judgment of foreclosure on the ground that all defendants were in default. "[T]he caption of a motion is not controlling; the character of the pleading is determined from its content, not its label." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) (citing *Barnes v. Southern Ry. Co.*, 116 Ill. 2d 236, 244 (1987)). The June 27,

2012, order does not include the elements of a judgment of foreclosure and sale, including the last date for redemption and does not consider or determine each request for relief set forth in the complaint, as required for judgments of foreclosure pursuant to the Mortgage Foreclosure Act. See 735 ILCS 5/15-1506(e) (West 2012). The order also lacks any of the special matters which may be included in a judgment of foreclosure. See 735 ILCS 5/15-1506(f) (West 2012). Indeed, the June 27, 2012, order continued the matter and set forth a briefing schedule on the issue of whether Rule 304(a) language should be included. The circuit court did not enter the actual judgment of foreclosure and sale, ruling on each request for relief Eastwood sought in its complaint, setting forth the specific amounts owed to Eastwood, and ordering the judicial sale of the Property, until November 21, 2012.[9]

¶33 Moreover, the June 27, 2012, order cannot be considered a default judgment. "A default order and a default judgment are two different things." *American Service Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769, 778 (2010). If a defendant is served with process and fails to enter an appearance, file pleadings or make any other response to plaintiff's complaint, the plaintiff may move for entry of a default judgment pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2012)).[10] If the trial court grants the motion, it typically will first enter an order of default in favor of plaintiff and against defendant. See *Saichek v. Lupa*, 204 Ill. 2d 127,

[9] As in *EMC Mortgage Corp.*, The judgment of foreclosure and sale in this case also lacked a Rule 304(a) finding.

[10] Chase's section 2-1301(e) motion, unlike the section 2-1401 motion in *EMC Mortgage Corp,*, was timely filed. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 12. The timeliness of the motion, however, does not eliminate the jurisdictional issue, for the reasons stated in this order.

129 (2003). After a default order is entered, the trial court may hold a " 'prove-up' hearing," which may result in a default judgment. *Id*. at 129-30. An order of default is an interlocutory order that precludes the defaulting party from making any additional defenses to liability, but it is not a final judgment or an interlocutory order appealable as of right because it does not dispose of the case and determine the rights of the parties. *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 211 (2007) (and cases cited therein). It is the entry of a default judgment which terminates the litigation and decides the dispute. *Id*. (citing *Wilson v. TelOptic Cable Construction Co*., 314 Ill. App. 3d 107, 111-12 (2000)).

¶34 As discussed, this order was not a judgment of foreclosure and sale. The June 27, 2012, order merely states Eastwood's "motion for a judgment of foreclosure" is granted, without any reference to which defendants were the object of the motion. The substance of Eastwood's motion sought to default MERS, unknown owners and nonrecord claimants, although Eastwood's reply claimed to seek judgment against the Urgaczs. Given that the November 21, 2012, judgment of foreclosure and sale specifically found MERS, unknown owners and nonrecord claimants were previously defaulted, while the Urgaczs were the subject of an order entering summary judgment, the most logical interpretation of the June 27, 2012, order is that it merely served to default MERS, unknown owners and nonrecord claimants.

¶35 The June 27, 2012, order also found that the Urgaczs were not entitled to step into the shoes of the prior senior encumbrancers[11] and that Eastwood was entitled to recover the full amount of its judgment lien plus statutory interest. The order, however, contains no specific

[11] As noted previously, the order does not specify any prior senior encumbrancers, but the Urgaczs argued they were subrogated to the Kucbors' mortgagor, NovaStar.

amounts or figures. Accordingly, the June 27, 2012, order was at most a nonfinal order of default against MERS, unknown owners and nonrecord claimants—not a default judgment of any sort. Thus, the circuit court correctly denied the Urgaczs' petition for a Rule 304(a) finding on the June 27, 2012, order, as that finding could not confer appellate jurisdiction. *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 14.

¶36 It follows that the November 20, 2012, order denying Chase's motion to vacate the June 27, 2012, order was not a final order which could be made appealable by a Rule 304(a) finding. *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 14. Chase argues that, as a "secondary party" to the litigation, the November 20, 2012 order left it without remedies. An order is final and appealable if it " 'terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof.' " *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008) (quoting *R.W. Dunteman Co. v.. C/G Enterprises, Inc*., 181 Ill. 2d 153, 159 (1998)). In this case, the June 27, 2012, default order precluded MERS from making any additional defenses to liability, but it did not dispose of the case and determine the rights of the parties. *Fidelity National Title Insurance Co. of New York*, 386 Ill. App. 3d at 211. Indeed, the record in this case establishes Chase continued to participate in the litigation after November 20, 2012, including its motion to stay the judicial sale of the property.[12] For these

[12] Chase asserts it was prohibited by the circuit court from filing responsive pleadings and was granted leave to file only one motion in the circuit court. The October 4, 2012, order granting Chase's petition to intervene also sets a briefing schedule for "its motion," but the order does not expressly bar Chase from otherwise participating. Even assuming for the sake of argument that the circuit court orally restricted Chase to filing a single motion when it initially granted leave to intervene, Chase ultimately was not precluded from subsequently filing motions in the litigation.

reasons, Chase's notice of appeal was prematurely filed, albeit for reasons different from those in *EMC Mortgage Corp.* The December 19, 2012, notice of appeal, being premature, was ineffective in conferring appellate jurisdiction upon this court. See, *e.g.*, *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 469 (1990). Thus, we are required to dismiss Chase's appeal for lack of jurisdiction.

¶37 The Urgaczs' Appeal

¶38 The Urgaczs argue the circuit court erred in granting summary judgment against them. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). In summary judgment proceedings, the purpose of affidavits is to show whether the issues raised are genuine and whether each party has competent evidence to support its position. *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). An affidavit substitutes for trial testimony and therefore must meet the same requirements as competent testimony. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 338 (2002). Any evidence that would be inadmissible at trial cannot be considered in a summary judgment proceeding. *Harris Bank*, 235 Ill. App. 3d at 1025. If an affidavit is filed in support of a motion for summary judgment, it must strictly comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). *Robidoux*, 201 Ill. 2d at 336. In pertinent part, this rule requires:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified

> copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

Affidavits which do not strictly comply with Rule 191(a) must be stricken. *Robidoux*, 201 Ill. 2d at 335.

¶39 The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of triable fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). In determining whether a question of triable fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Although the plaintiff need not prove his case at the summary judgment stage, he must present sufficient evidence to create a genuine issue of material fact. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 292 (2008). "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). We review grants of summary judgment *de novo*. *Id*. Accordingly, the reviewing court "must independently examine the evidence presented in support of and in opposition to a motion for summary judgment" to determine whether a genuine issue of material fact exists. *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1006 (1996).

¶40 Subrogation

¶41 The Urgaczs' primary argument is that their interest in the Property is subrogated to the Kucbors' prior mortgage, taking priority over Eastwood's judgment lien. The general rule with recorded liens, including mortgages, is that a lien recorded first in time has priority and is entitled to prior satisfaction of the property it binds. *Aames Capital Corp. v. Interstate Bank of*

Oak Forest, 315 Ill. App. 3d 700, 703 (2000) (citing *Cole Taylor Bank v. Cole Taylor Bank*, 224 Ill. App. 3d 696, 704 (1992)). Yet "blind adherence to the first in time, first in right doctrine is sometimes insufficient to determine lien priority." *Id*. at 705.

¶42 The concept of subrogation is an exception to the "first in time, first in right" rule. Subrogation is a method by which one party involuntarily pays a debt of another and succeeds to the rights of the other with respect to the debt paid. *Id*. (citing *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319 (1992)). Subrogation applies in the context of lien priority in that one party is subrogated to the lien priority of another. *Id*.

¶43 There are two types of subrogation: conventional and equitable. *Id*. at 706 (citing *Schultz v. Gotlund*, 138 Ill. 2d 171, 173 (1990)). The Urgaczs contend both types of subrogation exist in this case. We address the claims in turn.

¶44 Conventional Subrogation

¶45 Conventional subrogation occurs when there is an express agreement between the parties to the effect that the party paying the debts on behalf of the third party will be able to assert the rights of the original creditor. *Id*. By paying the debt, the subrogee is entitled to the benefit of the security he satisfied with an expectation of receiving equal priority in terms of a lien. *Id*. (citing *Home Savings Bank v. Bierstadt*, 168 Ill. 618, 624 (1897)). In addition to the requirement of an express agreement, the lender seeking the benefits of conventional subrogation must prove that the loan proceeds were used to refinance the mortgage for which the lender seeks to be subrogated, that no harm will come to an innocent party if priority is granted to the lender, and that there has been no gross negligence. *Home Savings Bank*, 168 Ill. at 624-25.

¶46 The Urgaczs' argument regarding conventional subrogation relies in substantial part on *Decaro v. M. Felix, Inc.*, 371 Ill. App. 3d 1103 (2007). A close reading of the *Decaro* decision,

however, establishes the case addressed equitable subrogation. See *id*. at 1109. Accordingly, we will address *Decaro* in our discussion of equitable subrogation.

¶47 The remainder of the Urgaczs' argument regarding conventional subrogation relies upon *LaSalle Bank, N.I. v. First American Bank*, 316 Ill. App. 3d 515 (2000). In that case, there was no dispute that a portion of the proceeds of a loan issued by LaSalle Bank, N.I. (LaSalle) were used to discharge a prior mortgage recorded by Parkway Bank and Trust Company. *Id*. at 522. The parties also agreed the Parkway mortgage had priority over any subsequent lien claimed by Daniel Lopez, who had signed a purchase contract on the subject premises and had advanced a sum of money to the now bankrupt legal owner. *Id*. at 517, 522. This court agreed with LaSalle that the construction loan agreement between LaSalle and the owner, as well as the LaSalle mortgage both contained language expressing an intent to give LaSalle a first and prior mortgage on the subject premises. *Id*. at 522. Accordingly, the *LaSalle Bank, N.I.* court concluded the trial court properly applied the doctrine of conventional subrogation in finding that LaSalle was subrogated to the position of Parkway and therefore had a first and priority lien. *Id*.

¶48 The Urgaczs maintain the language of their mortgage contains the type of express agreement required to establish conventional subrogation. Even assuming this to be true, Eastwood argues the Urgaczs failed to establish *they* paid the Kucbors' prior mortgage. Eastwood notes the Urgaczs' response to the motion for summary judgment states "MERS made a loan that discharged the Kucbors' prior mortgage."[13] Although the Urgaczs' mortgage actually

[13] We note the Urgaczs' statement on this point also refers to documents purporting to be the Kucbors' letter of direction to the title company and the title company's disbursement sheet, both of which were exhibits to the Urgaczs' affirmative defenses. Eastwood asserts the affirmative defenses were stricken by the circuit court. In their reply brief, the Urgaczs' contend the circuit

identifies American Brokers Conduit, not MERS as the lender, the statement may be construed as an admission that the Urgaczs were not the parties who paid the prior debt. See *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 41. The Urgaczs cite no cases holding conventional subrogation extends to a nonpaying mortgagor in addition to the paying mortgagee.

¶49 Equitable Subrogation

¶50 In contrast to conventional subrogation, equitable subrogation is a creature of chancery utilized to prevent unjust enrichment. *Aames Capital Corp.*, 315 Ill. App. 3d at 706 (citing *LaFramboise*, 149 Ill. 2d at 319). The application of the doctrine of equitable subrogation does not depend upon any particular set of circumstances but depends upon the equities of each individual case. *Id.*

¶51 The Urgaczs' argument in their brief regarding the application of equitable subrogation here relies upon *Cochran v. Cutler*, 39 Ill. App. 3d 602 (1976). In *Cochran*, on March 10, 1972, judgment creditors recorded a memorandum of judgment against the judgment debtors' property. *Id*. at 605. On March 28, 1972, the judgment debtors sold the property to the third-party buyers.

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court erred in striking their affirmative defenses. "[A]n appellant's arguments must be made in the appellant's opening brief and cannot be raised for the first time in the appellate court by a reply brief." *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29 (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.")). Moreover, even assuming for the sake of argument this court would consider exhibits to a pleading stricken by the circuit court, the documents are not certified copies as required by Supreme Court Rule 191(a) and the Urgaczs' affidavit in support of summary judgment does not discuss or explain the significance of the exhibits, or lay a foundation for the admission of the exhibits.

Id. The third-party buyers paid off an existing vendor's lien that was prior in time and superior to the judgment lien and also paid off county real estate taxes. *Id*. The third-party buyers further executed a mortgage in favor of their lender. *Id*. The judgment creditors brought suit against the third-party buyers and their mortgagee, seeking to have the judgment lien declared superior to the mortgage. *Id*. at 604. The *Cochran* court stated that to the extent the third-party buyers and their mortgagee paid off the liens and encumbrances incurred by the judgment debtors prior to the filing of the judgment lien, "they would be equitably entitled to be subrogated to the rights of the original vendor and tax lienor and to assert those rights in the distribution of the proceeds of any sale." *Id*. at 609 (citing *Young v. Morgan*, 89 Ill. 199 (1878)).

¶52 As with the claim of conventional subrogation, the equitable subrogation found in *Cochran* extended to the mortgagor because the third party buyers/mortgagors paid a prior existing vendor's lien, as well as county real estate taxes. *Id*. at 609. Indeed, the third party buyers/mortgagors apparently did so prior to the filing of the judgment lien. *Id*. Absent evidence the Urgaczs paid money to discharge the Kucbors' mortgage, the Urgaczs cannot claim equitable subrogation under *Cochran*.

¶53 We observe the *Cochran* decision relies upon the *Young* decision, which allowed a purchaser subrogation to a prior lien under a deed of trust. *Young*, 89 Ill. at 203. Yet in *Young*, the purchaser personally paid upon and discharged the deed of trust. *Id*. at 200. Thus, *Young* does not aid the Urgaczs' argument in this case.

¶54 In addition, as noted previously, the Urgaczs also relied upon the *Decaro* decision, which in turn relied upon *Young* and *Cochran*. *Decaro*, 371 Ill. App. 3d at 1107-09. As *Young* and *Cochran* do not aid the Urgaczs, *Decaro* similarly fails to establish equitable subrogation exists in this case. Indeed, *Decaro* allowed equitable subrogation by a mortgagee, not a nonpaying

mortgagor. See *id*. at 1109.

¶55 In short, for all of the aforementioned reasons, the Urgaczs' conventional and equitable subrogation fail.

¶56 Collateral Attack on Eastwood's Judgment

¶57 The Urgaczs also argue the circuit court erred in granting summary judgment against them because the judgment in the Cezary lawsuit is void. The Urgaczs thus seek to collaterally attack the judgment Eastwood obtained against Cezary in the Cezary lawsuit. Generally, a final judgment can only be attacked by direct appeal or in traditional collateral proceedings defined by statute. *Malone v. Cosentino*, 99 Ill. 2d 29, 32-33 (1983). Once a judgment is final, issues that could have been raised are barred in subsequent proceedings. *Malone*, 99 Ill. 2d at 33. A void judgment, however, generally may be attacked at any time or in any court, either directly or collaterally. *Sarkissian*, 201 Ill. 2d at 103. A void judgment is one that is entered by a court lacking jurisdiction over the parties or the subject matter, or lacking the inherent power to enter the judgment, or where the order was produced by fraud. *Miller v. Balfour*, 303 Ill. App. 3d 209, 215 (1999). The Urgaczs rely upon *Shapiro v. DiGuilio*, 95 Ill. App. 2d 184 (1968), which states "that when a judgment is procured through fraud and collusion for the purpose of defrauding some third person, the third person may show the fraud and collusion collaterally and escape the burdens and injuries thus thrust upon him." *Id*. at 189-90 (citing *Wing v. Little*, 267 Ill. 20 (1915)).

¶58 The Urgaczs assert, based solely on the fact Eastwood obtained and recorded its judgment on the day prior to the sale of the Property to the Urgaczs, a genuine issue of material fact exists regarding whether Cezary and Eastwood colluded in the entry of the default judgment to defraud the Urgaczs. Eastwood asserts voidness is an affirmative defense the Urgaczs failed

to raise prior to their response to the motion for summary judgment. The Urgaczs, however, were entitled to raise voidness at that time. *Sarkissian*, 201 Ill. 2d at 103. Nevertheless, the Urgaczs' claim of fraudulent collusion was unsupported by any evidence aside from the timing of the entry of judgment in the Cezary lawsuit, which the Urgaczs admit could be coincidental. The Urgaczs' speculation is insufficient to create a genuine issue of material fact regarding their claim of fraudulent collusion. *Sorce*, 309 Ill. App. 3d at 328.

¶59 The Urgaczs also assert—in a single sentence of their opening brief—that they needed to conduct discovery in support of their voidness claim and the circuit court "stymied" them by partially granting Eastwood's motion to strike discovery requests as to certain interrogatories and request to produce, as well as denying their motion to conduct additional discovery. As a general matter, the Urgaczs merely assert these rulings denied the Urgaczs due process of law, without relevant citation to authority. Moreover, regarding the Urgaczs' request for additional discovery, Illinois Supreme Court Rule 191(b) (eff. July 1, 2002), specifies the procedure to be followed where additional discovery is needed in regard to summary judgment proceedings and defeats an objection on appeal that insufficient time for discovery was allowed. *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 455-56 (2000). The Urgaczs do not discuss the requirements of Rule 191(b), let alone establish they complied with the rule's requirements. Accordingly, the Urgaczs forfeited these arguments on appeal. See, *e.g.*, *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010) (court may find argument forfeited where it is undeveloped and where party provides no citation to relevant authority); see also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶60 Furthermore, in more broadly asserting the rules regarding collateral attack should not apply in this case because the rules would operate to deny the Urgaczs due process of law, the

Urgaczs rely on *Shimkus v. Board of Review*, 117 Ill. App. 3d 826, 830 (1983), in which this court stated "a person's rights cannot be precluded by litigation to which it is a stranger." The *Shimkus* court, however, was discussing collateral estoppel, not collateral attack. *Id*. This court has subsequently noted that *Shimkus* is inapposite in the context of collateral attack. *Board of Trustees of Community College District No. 508 v. Rosewell*, 262 Ill. App. 3d 938, 962 (1992).

¶61 The Urgaczs lastly assert in passing that courts will not enforce a default judgment which is surrounded by unfair, unjust or unconscionable circumstances. The Urgaczs rely upon *M.L.C. Corp., Inc. v. Pallas*, 59 Ill. App. 3d 504, 513 (1978). In that case, Pallas sought to vacate an order of default and a decree of foreclosure entered against her in an action to foreclose a trust deed which secured a promissory note. *Id*. at 506. In ruling the motion should have been granted, this court noted the case did not involve third parties. *Id*. at 513. The Urgaczs would have been a third party to the Cezary lawsuit. Perhaps more importantly, the Urgaczs did not file a petition to vacate Eastwood's judgment in the Cezary lawsuit, let alone support it regarding matters not of record. See 735 ILCS 5/2-1401(b) (2008).[14] Accordingly, *Pallas* is inapposite here. See *Malone*, 99 Ill. 2d at 32-33.

¶62 In sum, for all of the aforementioned reasons, the Urgaczs' attempted collateral attacks on the judgment in the Cezary lawsuit fail.

¶63 Eastwood's Interest

¶64 Lastly, the Urgaczs contend that even if Eastwood has a valid and perfected lien which can be assessed against the Property, the lien may only attach to Cezary's interest in the Property

[14] To the extent the Urgaczs claim the judgment in the Cezary lawsuit is void *ab initio*, they could have attempted to attack the order as persons affected by the judgment. See *Muslim Community Center v. Village of Morton Grove*, 392 Ill. App. 3d 355, 359 (2009).

at the time of the sale. In general, a judgment lien extends only to the actual interest a judgment debtor has in the property at the time the judgment lien is issued. *Banco Popular v. Beneficial Systems, Inc.*, 335 Ill. App. 3d 196, 203 (2002) (citing *East St. Louis Lumber Co. v. Schnipper*, 310 Ill. 150, 156 (1923)).

¶65 The Urgaczs contend Eastwood's judgment lien is limited by the Kucbors' judgment of dissolution of marriage. Section 1c of the Joint Tenancy Act provides in part that:

> "upon a judgment of dissolution of marriage or of declaration of invalidity of marriage, the estate shall, by operation of law, become a tenancy in common until and unless the court directs otherwise." 765 ILCS 1005/1c (West 2006).

Generally, the creation of a tenancy in common would result in the two parties each having an undivided one-half interest in the property. See, *e.g.*, *Simon v. Wilson*, 291 Ill. App. 3d 495, 505 (1997). The judgment of foreclosure and sale in this matter refers to an undivided one-half interest in the Property, as does the order approving the sale. The Urgaczs' rely on the Kucbors' settlement agreement, as incorporated into the judgment of dissolution, which provided for 80% of the net proceeds of the sale of the property to go to Ewa and 20% to go to Cezary after the payment of certain marital expenses. Eastwood argues the judgment of dissolution created a tenancy in common by operation of the Joint Tenancy Act and the language of the settlement did not direct otherwise.

¶66 A marital settlement agreement incorporated into a judgment of dissolution of marriage generally merges into the judgment. *E.g.*, *In re Marriage of Bolte*, 2012 IL App (3d) 110791, ¶ 17. "A marital settlement agreement is construed as any other contract; the court must ascertain the parties' intent from the language of the agreement." *Bolte*, 2012 IL App (3d) 110791, ¶ 17 (citing *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009)). Our standard of review is *de novo*. *Bolte*,

2012 IL App (3d) 110791, ¶ 17.

¶67 The language of the marital settlement agreement incorporated into the judgment of dissolution of the Kucbors' marriages provides in part:

> "The parties are joint owners of improved real estate commonly known as 242 Hedge Row, Northfield, Illinois ***. The parties have entered into a Contract of Sale of said Real Estate and anticipate closing on or before February 15, 2007. Upon closing of the sale, the parties shall pay the following from the general proceeds of the sale: the balance of the first mortgage to Sun Trust; the balance of the home equity loan to Hartford Financial Services, Inc.; and all customary seller closing charges (i.e., title insurance, survey, real estate brokers [sic] commission, real estate attorneys [sic] fees, revenue stamps, tax pro-rations). From the remaining proceeds, the parties shall pay the following marital debts: [items omitted]. All remaining net proceeds shall be assigned as follows: Eighty (80%) percent to EWA and twenty (20%) percent to CEZARY."

This language makes no reference to the tenancy to be held by the parties. Tenants in common may be entitled to a particular share of sale proceeds for a variety of reasons. See, *e.g.*, *Maloney v. Pihera*, 215 Ill. App. 3d 30, 47-48 (1991). Thus, the division of proceeds agreed upon by the parties and incorporated into the judgment of dissolution does not establish an intent contrary to the creation of a tenancy in common pursuant to the Joint Tenancy Act.

¶68 The Urgaczs also maintain the circuit court did not account for Cezary's purported homestead exemption, and that the maximum interest Eastwood could receive would be half of the amount the Kucbors actually received in disbursement proceeds. The Urgaczs failed to raise either of these arguments in their answer and affirmative defenses, or in opposition to the motion for summary judgment. An appellant may not raise an issue for the first time on appeal. See

Jones v. Chicago HMO Ltd. of Illinois, 191 Ill. 2d 278, 306 (2000). The Urgaczs did argue in opposition to the motion for summary judgment that Cezary's only interest was in the sale proceeds under the principle of equitable conversion, but they do not raise that argument in their appellate brief. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) states in relevant part, "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Accordingly, the Urgaczs forfeited any claim regarding equitable conversion.

¶69 In short, the Urgaczs have failed to show the circuit court erred in determining Eastwood's lien attached to an undivided one-half interest in the Property.

¶70 CONCLUSION

¶71 In sum, in these two consolidated cases, this court lacks jurisdiction over appeal number 1-12-3757, in which Chase sought to appeal from the order denying their motion to vacate the circuit court's June 27, 2012, order of default. In appeal number 1-13-0724, for all of the aforementioned reasons, the judgment of the circuit court is affirmed.

¶72 Dismissed in part; affirmed in part.