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FIRST DIVISION
August 11, 2014

No. 1-13-1671
2014 IL App (1st) 131671-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST)	
COMPANY, AS TRUSTEE FOR)	
IXIS 2006-HB3, ASSIGNEE OF MORTGAGE)	Appeal from the
ELECTRONIC REGISTRATION SYSTEMS,)	Circuit Court of
INC., AS NOMINEE FOR MAXIM MORTGAGE)	Cook County.
CORPORATION,)	
)	
Plaintiff-Appellant,)	
)	No. 08 CH 28317
v.)	
)	
BRENDA P. O'SULLIVAN, et al.,)	Honorable
)	Alfred M. Swanson,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* Circuit court did not have jurisdiction to consider defendants' motion for an order in aid of enforcement of judgment; order vacated.
- ¶ 2 Plaintiff, Deutsche Bank National Trust Company (Deutsche Bank), appeals an order of the circuit court that, in part, ordered plaintiff to execute and deliver a release of a mortgage that

had been granted to defendants, Brenda O'Sullivan and Edward Concannon. For the following reasons, we vacate the circuit court's order.

¶ 3 At the outset, we note that the record does not contain any reports of proceedings, bystander's reports, or an agreed statement of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Orders, pleadings, and other documents filed in this matter reveal the following. On March 3, 2009, Deutsche Bank filed an amended complaint to foreclose a mortgage against defendants, alleging that defendants executed a note in 2006 for \$227,200 that was secured by a mortgage on a property at 9417 South Tulley Avenue in Oak Lawn.¹ Deutsche Bank averred that it was the holder of the note and mortgage either as the originator of the loan or by assignment. Deutsche Bank further alleged that the note was payable with interest at the rate of 9.4% per year and principal and interest were to be paid in monthly installments of \$1,893.87. Additionally, Deutsche Bank stated that defendants defaulted on the note on April 1, 2008 and that as of July 31, 2008, a balance of \$225,262.49 remained. Deutsche Bank also asserted that according to the terms of the note, upon default, "the unpaid balance***shall become accelerated and immediately due and payable." In addition to seeking a judgment or decree of foreclosure, Deutsche Bank requested an accounting of amounts due under the note and mortgage, that the mortgage and amounts due be declared a first lien on the property, and that a judicial sale be held. Deutsche Bank further requested "upon application, entry of a Personal Deficiency Judgment, against all obligors under the note***."

¶ 4 On August 11, 2009, Deutsche Bank moved for summary judgment. Attached to the motion was an affidavit from an officer of the company that serviced the loan for Deutsche Bank. In part, the affidavit contained the amounts due on the note and mortgage. In response, defendants admitted they had defaulted, but moved to strike the affidavit because the affiant

¹ Only defendant O'Sullivan signed the note. Both defendants signed the mortgage.

failed to establish a factual basis for her knowledge or competence to testify. The court subsequently granted Deutsche Bank's motion for summary judgment as to standing and liability only and struck the affidavit without prejudice.

¶ 5 Later, Deutsche Bank filed a second motion for summary judgment with respect to damages and supported it with another affidavit from the same affiant. On March 3, 2010, defendants moved to compel the affiant's deposition after the parties disagreed about whether a court reporter could be present. The court granted the motion to compel and ordered Deutsche Bank to produce the affiant within 21 days.

¶ 6 After the deposition, defendants moved to strike the second affidavit, contending it was no better than the first one. Defendants asserted that the affidavit was "upgraded" by counsel for Deutsche Bank so that it appeared to comply with the required rules and provide a proper evidentiary foundation. Referring to statements made during the deposition, defendants contended that most of the facts in the affidavit came from documents or computer screens that were not attached to the affidavit or "were supplied by [counsel for Deutsche Bank's] office by insertion into the affidavit without any documentation whatsoever." Subsequently, the court struck the affidavit and denied Deutsche Bank's second motion for summary judgment as to damages.

¶ 7 On April 21, 2011, a schedule was set for the next phase of proceedings, including trial. Pretrial discovery was to be completed by July 5, 2011 and trial was set for August 3, 2011. On July 13, 2011, defendants filed a motion for discovery sanctions, stating that Deutsche Bank had not responded to interrogatories or a notice to produce. Defendants contended that sanctions—specifically, barring witnesses and documents—were warranted in light of Deutsche Bank's previous misconduct.

¶ 8 The court granted defendants' motion for sanctions and barred Deutsche Bank from presenting witnesses and documents at trial unless they were disclosed "prior to the entry of this order." Specifically, Deutsche Bank was barred from presenting the following: (1) witnesses and testimony regarding employment; (2) documents that were intended to be used at trial; (3) witnesses with knowledge of the facts concerning loan balance, date of default, accrued interest, and amount of default; (4) documents which establish damages, including attorney fees, costs, principal balance, accrued interest, and other damages; and (5) assignments of the note and mortgage, allonges, the original note, and the original mortgage.

¶ 9 A trial was held on the issue of damages. At the close of Deutsche Bank's case, defendants moved for a directed finding, which the court took under advisement in addition to the evidence Deutsche Bank presented. In Deutsche Bank's post-trial memorandum, Deutsche Bank contended it had met its burden to prove damages. Deutsche Bank urged the court to determine a figure by amortizing the loan and attached an amortization schedule to the memorandum. In their post-trial memorandum, defendants contended that proof of the amount due—a necessary element—had not been admitted into evidence. Defendants further asserted that they were entitled to a judgment in their favor and that "all relief sought by [Deutsche Bank] should be denied."

¶ 10 On February 16, 2012, the court entered a corrected opinion and order.² Recounting the evidence produced at trial, the court noted that the mortgage and note had been admitted to document O'Sullivan's signature on the mortgage and note and the date they were signed. The court found that Deutsche Bank met its burden of proof on standing and capacity to sue and on breach of the note, but failed to produce any competent evidence of the amount defendants owed

² According to a motion filed during the pendency of this appeal, the corrected opinion and order was issued after defendants moved to clarify the court's initial opinion and order which was filed on February 7, 2012.

or a way to calculate it. According to the court, although Deutsche Bank had stated that the court could calculate damages based on defendants' admission of default and the stated interest rate of the note, Deutsche Bank had offered no authority from the evidence admitted at trial that would allow the court to make that calculation. The court also noted that the amortization schedule was neither offered nor admitted into evidence at trial. Further, the court stated that even if it were to consider the amortization table, there was still no competent evidence at trial of the amount owed at the time of default. According to the court, a judgment of foreclosure was not warranted because Deutsche Bank failed to prove damages. The court granted defendants' motion for a directed finding and entered judgment in favor of defendants and against Deutsche Bank.

¶ 11 Deutsche Bank filed a motion to reconsider on March 16, 2012, contending that it had presented sufficient evidence of damages and requesting that the court enter a judgment in Deutsche Bank's favor for \$223,922.92. Deutsche Bank asserted that to calculate the amount owed, the court merely needed to use a simple mathematical formula, which need not be admitted into evidence. Deutsche Bank further contended that the amount due as of the date of default was proven at trial. In response, defendants contended there was no evidence in the record to calculate damages. On May 29, 2012, the court denied Deutsche Bank's motion to reconsider and stated there was no just cause "to delay enforcement or appeal or both of this order pursuant to Supreme Court Rule 304(a)."

¶ 12 Nothing more was filed until January 8, 2013, when defendants filed a motion for an order in aid of enforcement of judgment. After asserting that the order of May 29, 2012 was final and that no appeal was taken, defendants stated that despite the ruling in their favor, Deutsche Bank had not yet released its mortgage. Additionally, defendants asserted that Deutsche Bank would not endorse a check for certain insurance proceeds due to defendants.

Defendants contended that the effect of the judgment in their favor was "to render the mortgage nugatory," and that Deutsche Bank could not enforce the note or the mortgage, "that being the res judicata [effect] of the judgment." Defendants also asserted that Deutsche Bank's failure to release the mortgage or relinquish claims on the insurance proceeds had the effect of allowing Deutsche Bank to ignore the consequences of the court's previous judgment. Defendants also noted that the insurance carrier sought an order that would reflect satisfaction of the mortgage "such that no claim of the mortgagee encumbers the insurance proceeds." Defendants requested "any or all of the following relief": (1) order Deutsche Bank or its loan servicing company to endorse the insurance check or enter an order reflecting that the mortgagee no longer had a claim on the insurance proceeds based on the mortgage being unenforceable by virtue of the judgment for defendants; (2) order Deutsche Bank to deliver a release of the mortgage; (3) enter a supplemental order finding that the mortgage is extinguished; and (4) alternatively, issue a judicial release of the mortgage based on the judgment in favor of defendants.

¶ 13 Deutsche Bank filed a response to the motion for an order in aid of enforcement of judgment. In this response, Deutsche Bank admitted that the order of May 29, 2012 was final and that no appeal was taken. Additionally, Deutsche Bank asserted that the judgment only found that it could not sufficiently prove damages and did not require it to release the mortgage. Deutsche Bank further asserted that a mortgagee may sue on the note and to foreclose the mortgage, and electing to pursue one remedy does not bar the other until the underlying indebtedness is extinguished.

¶ 14 On May 21, 2013, the court entered an order that stated as follows:

"1. Based upon the Corrected Opinion of February 16, 2012, the court notes that Plaintiff sought originally to foreclose and recover the entire note balance which had been accelerated.

2. Upon Plaintiff's inability to prove its damages and the entry of the final order of February 16, 2012, both the note and mortgage were extinguished by the judgment in favor of Defendants, and are no longer enforceable."

The court further ordered that:

"A. On or before May 31, 2013, Plaintiff shall execute and deliver a release of the mortgage to Plaintiff's counsel.

B. On or before May 31, 2013, Plaintiff shall undertake to release any claims it has on any insurance proceeds and to allow payments of pending claims directly to the Defendants. Documentation of same shall be provided to Defendants' counsel.***"

¶ 15 On May 28, 2013, Deutsche Bank filed a notice of appeal that stated it was appealing the order entered on May 21, 2013 and sought a "[r]eversal of order nullifying and canceling Plaintiff's note and mortgage and dismissal of [the] case."

¶ 16 On appeal, Deutsche Bank challenges the court's finding that it failed to prove damages and contends that the court improperly extinguished both the note and mortgage. Defendants, however, have raised a challenge to our jurisdiction, which we must address. See *Dus v. Provena St. Mary's Hospital*, 2012 IL App (3d) 091064, ¶ 9 (a court has a duty to consider its jurisdiction before proceeding to the merits of the case); *Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 765 (2009) (a court has an independent obligation to consider its jurisdiction and dismiss the appeal if jurisdiction is lacking). Defendants contend that the court's February

16, 2012 order was final or became final as a result of the May 29, 2012 order that denied Deutsche Bank's motion to reconsider and included a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). According to defendants, Deutsche Bank thus had to file a notice of appeal within 30 days of May 29, 2012, but did not, rendering Deutsche Bank's actual notice of appeal untimely. Defendants further assert that the court's order of May 21, 2013 cannot be appealed. In response, Deutsche Bank contends that defendants' motion for an order in aid of enforcement of judgment was a postjudgment motion that tolled the time for filing a notice of appeal. While this matter was pending on appeal, we denied defendants' motion to dismiss for lack of jurisdiction. After reviewing the entire record, we now vacate the circuit court's order entered May 21, 2013.

¶ 17 To the extent that Deutsche Bank attempts to relitigate the circuit court's finding in its February 16, 2012 order that Deutsche Bank failed to prove damages, Deutsche Bank has forfeited its right to appeal that issue. To confer jurisdiction on the appellate court, a party must file a notice of appeal within 30 days of the entry of the final judgment appealed from, or within 30 days of the entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303(a) (eff. June 4, 2008). A final judgment fixes absolutely and finally the rights of the parties in the lawsuit. *In re Rogan M.*, 2014 IL App (1st) 132765, ¶ 9. Additionally, to be final, a judgment must dispose of the litigation or some definite part of it. *Id.* Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010) provides an alternative route to an appeal where a party seeks to appeal a final judgment that addresses fewer than all of the parties or claims at issue. In that situation, an appeal may be taken only if the trial court makes an express written finding that there is no just reason to delay either enforcement or appeal or both.

Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The time for filing a notice of appeal pursuant to Rule 304(a) is the same as for appeals pursuant to Rule 303. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 18 Deutsche Bank could have appealed after the judgment entered on February 16, 2012, or after the order denying its motion to reconsider was entered on May 29, 2012. In the February 16, 2012 corrected memorandum opinion and order, the court found that Deutsche Bank failed to meet its burden to prove damages, granted defendants' motion for a directed finding, and entered judgment in favor of defendants and against Deutsche Bank. This order disposed of "the rights of the parties either upon the entire controversy or upon some definite and separate part thereof" and was therefore final. (Internal quotation marks omitted.) *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1043 (2000).

¶ 19 After this order was entered, Deutsche Bank timely filed a motion to reconsider, which tolled the time for filing a notice of appeal until the motion to reconsider was denied on May 29, 2012. See Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). This order included a finding pursuant to Rule 304(a) (eff. Feb. 26, 2010) that there was no just cause to delay enforcement or appeal or both. Additionally, the parties agree that the May 29, 2012 order was final. In their motion for an order in aid of enforcement of judgment, defendants stated that the May 29, 2012 order "was final and no appeal was ever taken"—a statement that Deutsche Bank admitted in its response. Deutsche Bank failed to file a timely notice of appeal within 30 days of the May 29, 2012 order (See Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008)), and has therefore forfeited its right to appeal the circuit court's finding regarding damages.

¶ 20 The next question is how to construe what happened next. On January 8, 2013, defendants filed a motion for an order in aid of enforcement of judgment. Deutsche Bank asserts that this document was a postjudgment motion that tolled the time for appeal because it

requested the additional relief of releasing the mortgage on the property and an order extinguishing the mortgage. Deutsche Bank additionally argues that the court's subsequent May 21, 2013 order significantly modified the previous judgment by extinguishing the mortgage and note. In contrast, defendants contend that their motion merely sought to enforce rights that had been fully and finally litigated, and so the subsequent May 21, 2013 order was not appealable.

¶ 21 To qualify as a postjudgment motion, one or more of the types of relief specified in section 2-1203 of the Code of Civil Procedure (Code) must be requested: rehearing, retrial, modification of the judgment, vacation of the judgment, or other relief. 735 ILCS 5/2-1203 (West 2012); *County of Cook v. Illinois Fraternal Order of Police Labor Council*, 358 Ill. App. 3d 667, 672 (2005). Importantly, a postjudgment motion must be filed within 30 days of the judgment it is directed against. 735 ILCS 5/2-1203 (West 2012). We also note that when analyzing a pleading, we look to the content of the pleading rather than its label. *Padilla v. Vazquez*, 223 Ill. App. 3d 1018, 1023 (1991).

¶ 22 Here, beyond seeking to enforce the prior judgment, defendants' motion for an order in aid of enforcement of judgment requested a modification of the prior judgment by releasing and extinguishing the mortgage—an action that does not necessarily follow from the prior order that merely found that Deutsche Bank could not proceed with the foreclosure action based on delinquencies that had accrued up to that point. Regardless, the motion was untimely, and as a result, the circuit court did not have jurisdiction to consider it. A trial court loses jurisdiction after 30 days from the time the final judgment is entered when (1) a posttrial motion directed against the judgment is not filed; (2) 30 days pass from the time the trial court disposes of a timely filed posttrial motion; or (3) a notice of appeal is timely filed. *Won v. Grant Park 2, L.L.C.*, 2013 IL App (1st) 122523, ¶ 20. Here, when defendants filed their motion for an order in

aid of enforcement of judgment, well over 30 days had passed since the court had ruled on Deutsche Bank's motion to reconsider. Once 30 days have passed from a final judgment, a trial court is without jurisdiction to change, alter, or amend a final judgment unless a petition has been filed sufficient to warrant relief under section 2-1401 of the Code (*Burnidge Corp. v. Stelford*, 309 Ill. App. 3d 576, 579 (2000)), which neither party asserts occurred here. Moreover, defendants' motion does not establish any other basis for the court's jurisdiction. The motion cited *In re Marriage of Adamson & Cosner*, 308 Ill. App. 3d 759, 764 (1999), which concerned a dissolution proceeding, for the proposition that a trial court retains jurisdiction to enforce its orders past 30 days when the judgment orders or contemplates future performance by the parties. However, *In re Marriage of Adamson & Cosner* also noted that in a dissolution action, a trial court retains "extraordinary continuing jurisdiction not applicable to civil cases generally" and that a trial court's jurisdiction to enforce a dissolution judgment does not include the jurisdiction "to engraft new obligations onto the judgment." (Internal quotation marks omitted.) *Id.*

¶ 23 Every act of a court beyond its jurisdiction is void. *Diaz v. Provena Hospitals*, 352 Ill. App. 3d 1165, 1173 (2004). Thus, as a consequence of the court's lack of jurisdiction to consider defendants' motion, its subsequent order entered on May 21, 2013 was void. See *Application of County Treasurer*, 208 Ill. App. 3d 561, 564 (1990) (because the trial court was divested of jurisdiction, the order entered by the trial court in response to an untimely motion was void). We therefore vacate the circuit court's May 21, 2013 order. Additionally, we order that defendants' motion for an order in aid of enforcement of judgment be dismissed. See *People v. Bailey*, 2014 IL 115459, ¶ 29 (after concluding that the trial court had lacked jurisdiction to address the merits of a motion to vacate, proper action was for the reviewing court to vacate the trial court's judgment and order that the motion be dismissed).

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¶ 24 For the foregoing reasons, the judgment of the circuit court is vacated.

¶ 25 Vacated.