

FIRST DISTRICT
NOVEMBER 3, 2014

No. 1-13-2724

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

LAKESIDE BANK,)	
)	
Plaintiff-Appellant,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
GC ENTERPRISES, INC.,)	
)	No. 12 CH 34264
Defendant-Appellee,)	
)	
and)	
)	Honorable
MORTGAGE LENDING SERVICES, INC.,)	Peter Flynn,
)	Judge Presiding.
Defendant.)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court erroneously dismissed with prejudice a claim for declaratory relief brought by assignee of a prior-recorded interest in the mortgaged property, against a subsequent mortgagee of the same property, where the allegations of the complaint stated a cause of action upon which relief may be granted.

¶ 2 This appeal arises from the May 30, 2013 order entered by the circuit court of Cook County, which dismissed with prejudice count II of a first amended complaint initiated by plaintiff Lakeside Bank (Lakeside) against GC Enterprises, Inc. (GC) in a declaratory judgment action over commercial real estate property. This appeal also arises from the circuit court's July 1, 2013 order denying Lakeside's motion to reconsider the court's May 30, 2013 ruling. On appeal, Lakeside argues that the circuit court erred in dismissing with prejudice count II of its first amended complaint. For the following reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 The general underlying facts of this case are not in dispute. On December 11, 2006, Lakeside, a commercial lender, entered into a loan agreement by which it agreed to extend \$6 million of a revolving business line-of-credit (the credit agreement) to borrower Mortgage Lending Services, LLC (MLS)¹ and guarantor Joseph Miles (Miles), for the operation of MLS' business as a private mortgage lender. The loan was structured to enable MLS to periodically draw down on advances made by Lakeside in order to fund mortgage loans to third-party borrowers, which were secured by the third-party borrowers' promissory notes and mortgages on commercial property. MLS, as holder and owner of these third-party loans, would then assign them to Lakeside in order to secure the advances made by Lakeside to MLS pursuant to the credit agreement. On January 11, 2007, a modification to the credit agreement was executed in which Lakeside agreed to increase the loan amount by \$2 million.

¹ It appears from the record that MLS was formerly named Mortgage Banc Services, LLC and the name "Mortgage Banc Services, LLC" appears on the loan documents. For clarity, we address this entity interchangeably as MLS.

¶ 5 Pursuant to a mortgage note dated April 17, 2007, MLS, as lender, issued a \$1,560,000 mortgage loan to a third-party borrower (the Karchmer Loan), which was secured by commercial real estate property located at 1929-33 South Halsted Street in Chicago, Illinois (the property), in favor of MLS. Subsequently, in April 2007, pursuant to the terms of the credit agreement, MLS assigned the mortgage and a promissory note of the Karchmer Loan to Lakeside (the MLS assignment). On April 27, 2007, both the mortgage for the Karchmer Loan, as well as the MLS assignment, were concurrently recorded with the Cook County Recorder of Deeds.

¶ 6 As of June 25, 2010, third-party borrowers who were liable under the Karchmer Loan defaulted on their mortgage payments to MLS. Subsequently, as of July 1, 2010, MLS allegedly defaulted on its payments to Lakeside under the terms of the credit agreement, in connection with the advances used by MLS to fund the Karchmer Loan.

¶ 7 In 2011, as a result of the default on the Karchmer Loan, a foreclosure action for the property was initiated in the circuit court of Cook County (case No. 11 CH 1986) in which MLS asserted priority interest in the promissory note and mortgage of the Karchmer Loan.² Lakeside alleges that it neither received notice of the foreclosure action, nor was it joined as a party in the foreclosure proceedings. Following a foreclosure sale of the mortgaged property, a sheriff's deed to the property was issued in favor of MLS, as the successful bidder. That deed was then recorded with the county recorder on October 7, 2011. On September 26, 2011, MLS entered into a loan agreement with GC by which GC provided a \$650,000 loan to MLS that was secured by a mortgage on the property (the GC mortgage). On October 7, 2011, the GC mortgage was

² No documents relating to the foreclosure action were included in the record on appeal.

recorded with the county recorder, and was later re-recorded on October 27, 2011 to correct the legal description of the property.

¶ 8 On September 10, 2012, after discovering that the property had been deeded to MLS and mortgaged to GC, Lakeside filed a complaint against MLS and GC. In the complaint, Lakeside asserted that it had a "prior recorded interest"—thus, paramount right—to the property, and requested that the court enter a finding "declaring" Lakeside to be the sole legal and equitable owner of the property and "declaring" the GC mortgage to be of "no force or effect whatsoever."

¶ 9 On November 13, 2012, GC filed a motion to dismiss Lakeside's complaint, alleging that it failed to set forth any cause of action that might plausibly give rise to Lakeside's request for relief. On January 25, 2013, the circuit court granted Lakeside leave to file an amended complaint.

¶ 10 On March 7, 2013, Lakeside filed a two-count "first amended complaint"³ against MLS and GC, alleging that, as a result of MLS' "impermissible conduct," the court should "declare" Lakeside to be the rightful owner of the property and direct MLS to convey title to Lakeside (count I). The first amended complaint further alleged that GC knew or should have known that Lakeside was the owner and holder of the MLS assignment, and requested that the court "declare" the GC mortgage as being subject to Lakeside's interest in the property (count II).

¶ 11 On April 4, 2013, GC filed a section 2-615 motion to dismiss the first amended complaint (motion to dismiss), arguing that Lakeside had failed to correct the substantial problems that had doomed its original complaint. The motion to dismiss alleged that the first amended complaint "failed to set forth any cause of action that might plausibly give rise to [the] requested relief,"

³ The record reveals that Lakeside filed a "first amended complaint"; thus, no "amended complaint" exists.

and the facts alleged by Lakeside were deficient even under a "generous construction." Further, the motion to dismiss argued that the first amended complaint failed to "contain such information as reasonably informs the opposite party of the nature of the claim"; failed to label its purported legal claims; and that no nexus existed between GC and the facts alleged in the pleading. On May 3, 2013, Lakeside filed a response to the motion to dismiss, clarifying that its first amended complaint had alleged a declaratory judgment action against GC. Thereafter, GC filed a reply in support of its motion to dismiss.

¶ 12 On May 30, 2013, the circuit court dismissed with prejudice count II of the first amended complaint and, after finding that no cause of action remained against GC, dismissed GC as a party defendant.

¶ 13 On July 1, 2013, Lakeside filed a motion for reconsideration of the court's May 30, 2013 ruling (motion to reconsider), which the circuit court denied on July 18, 2013.

¶ 14 On August 16, 2013, Lakeside filed a timely notice of appeal.

¶ 15 ANALYSIS

¶ 16 The sole issue on appeal before us is whether the circuit court erred in dismissing with prejudice count II of Lakeside's first amended complaint.

¶ 17 As a preliminary matter, we address the threshold issue of jurisdiction. See *County of Cook v. Philip Morris, Inc.*, 353 Ill. App. 3d 55, 58 (2004) (a reviewing court has a duty to consider *sua sponte* its jurisdiction). Under Supreme Court Rule 304(a), "[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). Our examination of the record shows that, in its

May 30, 2013 order, the circuit court dismissed with prejudice count II of the first amended complaint, which was the sole count directed against GC in the pleading. In the May 30, 2013 written order, the circuit court expressly found that there was "no cause to delay enforcement or appeal of this order." Therefore, because the court's ruling was a final judgment as to GC's involvement in the action and contained the requisite Rule 304(a) express finding, we have proper jurisdiction over this appeal.

¶ 18 Before turning to the issue before us, we note that both parties' briefs on appeal contain serious deficiencies in violation of our supreme court's rules. The "statement of facts" and "argument" sections of Lakeside's opening brief lack proper citations to the record, in violation of Supreme Court Rule 314(h)(6),(h)(7) (eff. July 1, 2008). Although Lakeside's opening and reply briefs contain citations such as "(A6-A10)," those "citations" do not correspond in any way whatsoever to the bates stamps on the pages of the record before us. While "(A6-A10)" or "(A25)" could very well have been references to the pages of an appendix, such an appendix is nonexistent in Lakeside's opening brief, in violation of Rule 341(h)(9) and Rule 342. See Ill. S. Ct. R. 341(h) (eff. July 1, 2008); R. 342 (eff. Jan. 1, 2005). Likewise, GC's brief, which makes no attempt to cite to the record at all, fares no better. We caution the parties that our supreme court rules governing appellate practice are mandatory, not merely suggestive. See *Travaglini v. Ingalls Health System*, 396 Ill. App. 3d 387, 405 (2009). Litigants may not treat this court as a repository for facts and arguments that are not supported by specific and accurate record citations. *Id.* It is not the responsibility of this court to scour the record in search of facts that support the argument being advanced by a party. *Id.* Notwithstanding this caution, in light of the fact that the record here is not unduly long and the parties' briefs are correspondingly short, we will overlook the violations in resolving this appeal.

¶ 19 Turning to the merits of the appeal, we determine whether the circuit court erred in dismissing with prejudice count II of Lakeside's first amended complaint, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14.

¶ 20 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. *Id.*; see 735 ILCS 5/2-615 (West 2012). "In reviewing a section 2-615 dismissal motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Duffy*, 2012 IL App (1st) 113577, ¶ 14. A section 2-615 motion to dismiss is granted where "no set of facts can be proved entitling the plaintiff to recovery." *Id.* However, a plaintiff "may not rely on factual or legal conclusions that are not supported by factual allegations." *Id.* We may affirm the circuit court's decision on any basis supported by the record. *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 21 Lakeside argues that the circuit court erred in dismissing count II of the first amended complaint, by claiming that because Lakeside was not given notice of the foreclosure action, its interest in the property as the assignee of the Karchmer Loan remained unaffected by the judgment in the foreclosure proceedings, the judicial sale, the issuance of the sheriff's deed, or the mortgage foreclosure court's confirmation of the judicial sale. Specifically, Lakeside contends that mortgage foreclosure actions are *quasi in rem* proceedings, and that the circuit court in the case at bar, in finding that the confirmation of the judicial sale in the foreclosure action effectively barred Lakeside from asserting that its prior-recorded mortgage was effective against subsequent interest holders in the property, essentially treated the underlying foreclosure action as an *in rem*, rather than a *quasi in rem*, proceeding. Lakeside argues that, because it did

not receive notice about the foreclosure action and thus, was not given an opportunity to assert its priority interest in the property in the foreclosure proceedings, it could not be bound by the foreclosure judgment. Thus, Lakeside maintains, it may assert its priority interest in the property against GC, which acquired its interest in the property after the foreclosure sale of the property. Lakeside further argues that GC's mortgage loan on the property must be subject to Lakeside's prior lien, where GC "could have searched the title records to the [p]roperty and readily discovered Lakeside's interest before GC originated its mortgage loan" to MLS.

¶ 22 GC⁴ counters that count II of the first amended complaint was properly dismissed, where it failed to plead any facts to state a cause of action for declaratory judgment. GC argues that Lakeside's claim is not the type of controversy that could be decided by declaratory judgment. GC contends that, even if Lakeside's claim against GC was not characterized as an action for declaratory judgment, it still fails because it is deficient as a matter of law. Specifically, GC argues that Lakeside's arguments that Lakeside's interest in the property remained unaffected by the foreclosure judgment were persuasive as to MLS, but were inapplicable to GC as an innocent third-party to this action. GC argues that because the title to the property was effectively "cleared" by the foreclosure action, it acquired first priority on its loan to MLS, which was secured by a mortgage on the property following the entry of the foreclosure judgment and confirmation of sale by the foreclosure court. GC contends that it had a right to rely on the title record as it existed when it made a mortgage loan to MLS, which showed that MLS had free and clear ownership of the property. GC further argues that, because there was no apparent jurisdictional defect on the face of the sheriff's deed and its rights in the property as first

⁴ Neither MLS nor Miles, as guarantor of the credit agreement between MLS and Lakeside, are parties on appeal before us. As noted, Lakeside's claim against MLS (count I) remains pending in the circuit court.

mortgagee attached long before Lakeside filed its complaint, Lakeside's claim against GC must fail.

¶ 23 Under the section in the first amended complaint labeled "facts common to each count" Lakeside's allegations pertained to the December 11, 2006 credit agreement between Lakeside and MLS; the purpose of the credit agreement; the April 17, 2007 Karchmer Loan between MLS and a third-party borrower; the April 2007 MLS assignment of the Karchmer Loan to Lakeside and the subsequent recording of the MLS assignment with the county recorder; MLS' default under the credit agreement; the third-party borrower's default under the Karchmer Loan; the underlying foreclosure action of which MLS was a party; and MLS' alleged failure to provide Lakeside any notice of the foreclosure action. Under count II, the only count against GC, Lakeside alleged the following additional paragraphs:

"10. MLS further and without authority of any kind whatsoever executed and delivered a mortgage of the [p]roperty to GC in the amount of \$650,000.00 dated September 26, 2011, and rerecorded October [2]7, 2011, a Document No. 1130044098 (the "GC mortgage"), such action being contrary to, and subject to Lakeside's paramount right under, the aforesaid MLS [a]ssignment, a true copy of the GC [m]ortgage being attached hereto as Exhibit D.

11. At that time, GC knew of the fact, or is chargeable with the knowledge thereof since the same was a matter of public record, that Lakeside was the owner and holder of the MLS

[a]ssignment, and accordingly the GC [m]ortgage is subject to Lakeside's interest in the [p]roperty.

WHEREFORE, [LAKESIDE] prays that the [c]ourt declare the GC [m]ortgage as being subject to Lakeside's interest."

¶ 24 On April 4, 2013, GC filed a section 2-615 motion to dismiss the first amended complaint. On May 30, 2013, the circuit court dismissed with prejudice, count II of the first amended complaint and after finding that no cause of action remained against GC, dismissed GC as a party defendant. The record before us contains a Supreme Court Rule 323(c) bystander's report (Ill. S. Ct. R. 323 (eff. Feb. 1, 1994), which details the circuit court's oral ruling on GC's motion to dismiss. The bystander's report states that the circuit court, in granting GC's motion to dismiss, found that Lakeside had not stated "a viable cause of action against GC, whether for declaratory judgment or otherwise;" that Lakeside was not entitled to the relief sought because the mortgage on the property had been "eliminated from title via the mechanism of a foreclosure, judicial sale, and [s]heriff's [d]eed"; that Lakeside's assertion that GC had "notice" of Lakeside's mortgage because it had been recorded against the property prior to the judicial sale and sheriff's deed, was an "insufficient basis on which to allege that GC had notice of and/or should be subject to such mortgage"; that the issuance of the sheriff's deed and confirmation of sale had the effect of conferring clean title on the holder of that deed; that GC's taking of a security interest in the property after the conveyance of the sheriff's deed could not be subject to Lakeside's mortgage that was "on title before issuance of the [s]heriff's [d]eed"; and that there was no set of facts alleged in the first amended complaint or Lakeside's response to the motion to dismiss that would entitle Lakeside to the relief sought.

¶ 25 The bystander's report also details the circuit court's findings in denying Lakeside's motion to reconsider the dismissal. The circuit court found, after a hearing, that Lakeside had failed to present a sufficient reason to overturn the court's previous ruling; that the "real culprit" was MLS; that Lakeside could not assert a viable cause of action against GC because the judicial sale and sheriff's deed effectively barred Lakeside from asserting that GC's recorded security interest in the property after the issuance of the sheriff's deed was subject to Lakeside's prior-recorded mortgage; that confirmation of the judicial sale barred Lakeside from "asserting that its prior-recorded mortgage [was] effective against subsequent interest-holders in the property except for [MLS]"; and that Lakeside failed to set forth any additional facts or circumstances that could form the basis of a viable cause of action against GC.

¶ 26 We find that the circuit court improperly dismissed with prejudice count II of the first amended complaint, where Lakeside's allegations in the complaint, construed in a light most favorable to Lakeside, were sufficient to state a cause of action upon which relief may be granted. While we recognize that it is unusual for a prior mortgagee, such as Lakeside in this case, to seek declaratory relief against a subsequent mortgagee rather than simply filing a foreclosure action on its own, nevertheless, Lakeside is by no means precluded from seeking the requested relief before the circuit court and subsequently this court. Although no documents relating to the foreclosure action were included in the record before us, it is undisputed by the parties that the circuit court in the underlying foreclosure action (case No. 11 CH 1986) had entered a judgment of foreclosure, had confirmed the judicial sale of the property, and that a sheriff's deed conveying title to MLS, as the successful bidder at the judicial sale, was issued and recorded in 2011. The record shows that on September 26, 2011, GC provided a \$650,000 loan to MLS that was secured by a mortgage on the property. On October 7, 2011, the GC mortgage

was recorded with the county recorder, and was later re-recorded on October 27, 2011, to correct the legal description of the property.

¶ 27 Section 15-1501(a) of the Illinois Mortgage Foreclosure Law (IMFL) expressly states that any disposition of the mortgaged real estate in a foreclosure action "shall be subject to (i) the interests of all persons not made a party or (ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure." 735 ILCS 5/15-1501(a) (West 2012).

¶ 28 Section 15-1509(c) of the IMFL provides that the delivery of a deed executed on the judicial foreclosure sale of the property "shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any *nonrecord* claimants who is given notice of the foreclosure ***." (Emphasis added.) 735 ILCS 5/15-1509(c) (West 2012).

¶ 29 Taking as true, as we must, Lakeside's allegation in the first amended complaint that it was never notified by MLS of the foreclosure action, we find that Lakeside *was not a party* to the foreclosure suit. Because Lakeside had a prior recorded mortgage interest in the property, Lakeside was a "*record*" rather than a "*nonrecord*" claimant. Thus, we hold that, under the plain language of sections 15-1501(a) and 15-1509(c), the disposition of the mortgaged real estate in the foreclosure action and the subsequent delivery of the deed to MLS did not bar Lakeside from asserting its prior recorded interest in the property. See generally *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010) (holding that mortgage foreclosure proceedings are *quasi in rem* actions such that they do not bind the whole world).

¶ 30 GC, however, argues that because the title to the property was effectively "cleared" by the foreclosure action, it was an innocent third party which acquired first priority on its loan to MLS. GC asserts that it had a right to rely on the title record as it existed when it made a mortgage loan to MLS, which showed that MLS had free and clear ownership of the property.

GC further argues that, because there was no apparent jurisdictional defect on the face of the sheriff's deed, Lakeside's claim against GC must fail. We reject GC's arguments.

¶ 31 An action to foreclose a junior mortgage can cut off only rights or claims of interest *subsequent* to the interest asserted. (Emphasis in original.) *Heritage Federal Credit Union v. Giampa*, 251 Ill. App. 3d 237, 238 (1993). The purchaser of a foreclosure sale takes title to the property subject to all prior liens and encumbrances. *Id.* at 239. Contrary to GC's assertions, MLS did not have free and clear ownership of the property. Rather, MLS, whose interest in the property was junior to that of Lakeside, took title as purchaser at the sheriff's sale subject to Lakeside's prior recorded mortgage interest in the property. The title granted to MLS by the sheriff's deed terminated the interest of *anyone who was a defendant in the foreclosure action*, as well as anyone who claimed an interest but *whose interest was never recorded*. However, the sheriff's deed did not, and could not, terminate Lakeside's interest where Lakeside had a prior recorded interest in the property and did not participate in the foreclosure action. Consequently, when the property was later encumbered by the GC mortgage, GC's interest in the property was also junior to that of Lakeside's surviving senior interest. The fact that GC obtained title at a sheriff's sale was irrelevant, where under the facts of this case, the sheriff could only have conveyed an imperfect title that was subject to all senior mortgages on the property.

¶ 32 While Lakeside could have certainly filed a foreclosure action on its own mortgage loan under section 15-1501(f) of the IMFL, for unknown reasons, it chose not to do so. See 735 ILCS 5/15-1501(f) (West 2012) ("[a]ny mortgagee or claimant, *** whose interest in the mortgaged real estate is recorded prior to the filing of a notice of foreclosure *** but who is not made a party to such foreclosure, shall not be barred from filing a separate foreclosure *** (ii) in a new foreclosure subsequent to the entry of a judgment of foreclosure in the original foreclosure").

Instead, Lakeside asks this court to "declare the GC [m]ortgage as being subject to Lakeside's interest." Construing all the allegations in the first amended complaint in a light most favorable to Lakeside, we hold that Lakeside has sufficiently stated a cause against GC upon which relief may be granted. See *Duffy*, 2012 IL App (1st) 113577, ¶ 14. Therefore the circuit court erred in dismissing with prejudice count II of the first amended complaint. Accordingly, we reverse the circuit court's judgment and remand the case for further proceedings consistent with this order.

¶ 33 Reversed and remanded.