

2016 IL App (1st) 140154-U

SIXTH DIVISION
April 8, 2016

No. 1-14-0154

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 DISTRICT

CITIMORTGAGE, INC., Successor by merger)	Appeal from the
to ABN AMRO Mortgage Group, Inc.,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	No. 2011 CH 39714
v.)	
)	
JAY S. ABRAMOVITZ, Also Known as Jay)	
Abramovitz, and NANCY S. ABRAMOVITZ,)	Honorable
Also Known as Nancy Abramovitz,)	Robert E. Senechalle,
)	Judge Presiding.
Defendants-Appellants,)	
)	
(TCF National Bank,)	
)	
Defendant-Appellee).)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford specially concurred.
Justice Hoffman specially concurred.

ORDER

¶ 1 *Held:* The circuit court's denial of the borrowers' motion for reconsideration was affirmed. Summary affirmance of the circuit court's judgment was appropriate where the borrowers failed to provide an adequate record on appeal. Even if considered on the merits, the motion to vacate the order of default entered against the holder of the second mortgage was not untimely. Therefore, the circuit court's denial of the borrowers' motion for reconsideration was not error.

¶ 2 The defendants, Jay S. and Nancy S. Abramovitz (the borrowers), appeal from an order of the circuit court of Cook County denying their motion for reconsideration of the court's order allowing the defendant, TCF National Bank (TCF), to vacate an order of default. The sole issue on appeal is whether the circuit court erred in denying the borrowers' motion for reconsideration. For the reasons explained below, we affirm the judgment of the circuit court.¹

¶ 3 On November 11, 2011, the plaintiff, Citimortgage, Inc. (Citimortgage), filed a complaint to foreclose its mortgage on real property (the property) owned by the borrowers. TCF was named a defendant because it had an interest in the property as the second mortgagee.² The borrowers and TCF were served with process, but only the borrowers filed an appearance. Between March 2012 and April 2013, Citimortgage and the borrowers engaged in an extensive exchange of pleadings.³ Ultimately, Citimortgage filed an amended complaint. The borrowers filed an answer and affirmative defenses that were later stricken by the circuit court.

¹Citimortgage filed a brief but requested no relief unless this court reversed the circuit court's judgment.

²The complaint also named as defendants, unknown owners and nonrecord claimants. Any rights held by these party-defendants were extinguished by the judgment of foreclosure, and they are not parties to this appeal.

³We have omitted references to the pleadings filed in this case that are peripheral to the issue on appeal.

¶ 4 On April 9, 2013, the circuit court entered a judgment of foreclosure against all defendants not previously dismissed, and ordered the sale of the property. The sale took place on July 11, 2013. If the sale was approved, a surplus of \$226,434.71 would result from the sale proceeds.

¶ 5 On July 18, 2013, TCF filed its appearance and a motion to vacate any defaults entered against it, and to file its answer instant. In support of its motion to vacate, TCF alleged that it was the holder of a lien on the property that was inferior to Citimortgage's lien but superior to the interests of all other defendants. It acknowledged that an order of default had been entered against it on April 9, 2013, but maintained that its counsel had been diligent in defense of the suit and that filing its answer would not prejudice the parties. On July 19, 2013, TCF filed a motion to amend the judgment of foreclosure to reflect its interest in the property. TCF alleged that \$243,549.91 was due and owing on its mortgage and sought payment of that amount after Citimortgage's lien and costs were satisfied.

¶ 6 On July 24, 2013, Citimortgage filed a motion for an order approving the sale of the property and for an order of possession. On July 26, 2013, the borrowers filed a motion to set aside the sale.

¶ 7 On August 1, 2013, the circuit court entered an order vacating the default against TCF and granting it leave to file an answer to the complaint and a counterclaim against the borrowers. TCF's motion to amend the judgment was withdrawn. On August 20, 2013, TCF filed a counterclaim against the borrowers seeking an adjudication of the priority of the liens against the property and for a turnover order of the surplus funds from the proceeds of the sale.

¶ 8 On October 11, 2013, the circuit court entered an order denying the borrowers' motion to reconsider the August 1, 2013, order vacating the default as to TCF "for the reasons set forth by the Court on the record before the Court Reporter" and giving the borrowers until October 25, 2013, to answer TCF's counterclaim. A hearing on Citimortgage's motion to approve the sale was set for December 18, 2013. On December 11, 2013, TCF refiled its motion to amend the judgment of foreclosure.

¶ 9 On December 18, 2013, the circuit court entered an order confirming the sale, the distribution of funds and for possession of the property. An order of default was entered against the borrowers on TCF's counterclaim. The court granted the borrowers' motion to accept late pleadings but denied their motion to set aside the sale. The court granted TCF's motion to amend the judgment of foreclosure to reflect its lien and its right to the funds remaining after Citimortgage's lien and costs had been satisfied.

¶ 10 On February 4, 2014, the court granted TCF's motion for the turnover of the surplus funds.

¶ 11 On February 18, 2014, the borrowers filed an amended notice of appeal from the circuit court orders denying their motion for reconsideration of the court's orders vacating the default against TCF, and approving the sale of the property.

¶ 12 ANALYSIS

¶ 13 The borrowers contend that the circuit court erred in denying their motion for reconsideration of the August 1, 2013, order vacating the default against TCF.

¶ 14 A. Standard of Review

¶ 15 Depending upon the basis for the motion, different standards apply to a review of the denial of a motion for reconsideration. Where the motion to reconsider is based solely on the

circuit court's application of existing law, our review is *de novo*. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008). Where the denial of a motion for reconsideration is based on new matters, such as additional facts, or new arguments or legal theories that were not presented during the course of the proceedings leading to the issuance of the order being challenged, the abuse of discretion standard applies. *Compton*, 382 Ill. App. 3d at 330.

¶ 16 In this case, the borrowers moved for reconsideration on the basis that, in granting TCF's motion to vacate, the circuit court misapplied section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012) (the Code)). Therefore, our review is *de novo*.⁴

¶ 17 B. Discussion

¶ 18 The borrowers argue that the circuit court lacked jurisdiction to vacate the April 9, 2013, order holding TCF in default because the motion to vacate was filed on July 18, 2013, more than 30 days after the entry of the order of default. Thus, TCF's motion to vacate was untimely. They rely on section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012) (the Code)). Section 2-1301(e) provides as follows:

"The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after the entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable."

735 ILCS 5/2-1301(e) (West 2012).

Relying on this court's opinion in *Mortgage Electronic Registration System, Inc. v. Barnes*, 406 Ill. App. 3d 1, 5 (2010), the borrowers argue that strict adherence to the 30-day deadline is necessary to afford buyers certainty in the sale and confirmation process.

⁴The record on appeal does not contain the motion for reconsideration. However, the motion is included in the appendix to the borrowers' appellants' brief and appears to have been file-stamped by the circuit court.

¶ 19 In the context of a mortgage foreclosure, it is the order confirming the sale that operates as the final and appealable order in a foreclosure case. *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 12. "[A] motion to vacate a default judgment of foreclosure brought before the order confirming the sale or within 30 days after would be timely." *McCluskey*, 2013 IL 115469, ¶ 12. In the present case, TCF filed its motion to vacate the April 9, 2013, default order against it on July 18, 2013. The order confirming the sale was entered on December 18, 2013.

¶ 20 Neither *McCluskey* nor *Barnes* support the borrowers' argument because those decisions did not address the issue raised in this case, namely, whether a motion to vacate an order of default entered against a mortgagee must be filed within 30 days of the entry of the order. Both cases involved the rights of borrowers, rather than lenders, to vacate a default after a sale. In *Barnes*, this court determined that after a motion to confirm the sale had been filed, the defaulted borrower could not use section 2-1301(e) to circumvent section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508(b) (West 2012)). *Barnes*, 406 Ill. App. 3d at 4-5; see *McCluskey*, 2013 IL 115469, ¶ 27 (holding that "up until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e)").

¶ 21 Moreover, in this case, TCF was not seeking to set aside the sale but only to assert its interest in the property and in the surplus proceeds from the sale. Therefore its motion to vacate the default did not undermine bidder confidence in the sale and confirmation process, a concern of the court in *Barnes*. See *Barnes*, 406 Ill. App. 3d at 5.

¶ 22 The borrowers also argue that section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)) did not provide TCF with a basis for vacating the default since it failed to show

diligence in answering the complaint. Since TCF did not seek relief under section 2-1401 or argue it was entitled to relief under that section, we need not address section 2-1401's applicability to the issue on appeal.

¶ 23 We find no error in the circuit court's denial of the borrowers' motion for reconsideration and affirm the judgment.

¶ 24 Affirmed.

¶ 25 PRESIDING JUSTICE ROCHFORD, specially concurring.

¶ 26 I respectfully concur in the result only.

¶ 27 It is my belief that TCF's motion to vacate default must be viewed in light of our supreme court's decision in *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469. In *McCluskey*, our supreme court established the procedures to be followed when a party seeks to vacate a default judgment in a foreclosure suit, either before or after the filing of a motion to confirm sale. That decision held that "up until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e)." *Id.* ¶ 27. And a motion to vacate a default judgment in a foreclosure suit is not subject to the 30-day requirement of section 2-1301(e) if it is filed before the foreclosure judgment becomes final, that is, when the order to confirm the sale is entered. *Id.* ¶ 12.

¶ 28 Although *McCluskey* involved a default judgment against the borrower, I see no reason not to apply its holding to other defendants to a foreclosure action.

¶ 29 It is my conclusion that, under *McCluskey*, TCF's motion to vacate the default, which was filed before the filing of the motion to confirm sale, was timely filed and properly granted under the standards of section 2-1301(e).

¶ 30 Further, section 2-1401 is inapplicable here where there was no final judgment and, generally, unavailable under these circumstances in a foreclosure suit to vacate a judgment which is final. *U.S. Bank Nat Ass'n v. Probhakaran*, 2013 IL App (1st) 111224, ¶ 21.

¶ 31 JUSTICE HOFFMAN, specially concurring.

¶ 32 I concur in the judgment reflected in Justice Hall's order, but not in the reasoning. It is my belief that this case is controlled by our supreme court's decision in *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469. When, as in this case, a motion to vacate an order of default and judgment of foreclosure is made prior to the filing of a motion to confirm a judicial sale held pursuant to the judgment of foreclosure, the standards set forth in section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012)) govern the resolution of the motion. *Wells Fargo Bank*, 2013 IL 115469, ¶ 27. It is for this reason that I concur in the affirmance of the circuit court's order of August 1, 2013, granting TCF's motion to vacate the order of default entered against it on April 9, 2013, and its order denying the motion of the borrowers, Jay S. and Nancy S. Abramovitz, to reconsider the order of August 1, 2013.