

No. 1-14-0427

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

NORTHBROOK BANK AND TRUST COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	
GREEN & KINZIE PROPERTY CORP.,)	
)	No. 11 CH 15649
Defendant-Appellant)	
)	
(Jerome Cedicci, Unknown Owners,)	
and Non-record Claimants,)	Honorable
)	Allen Price Walker,
Defendants).)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant-appellant failed to stay enforcement of a final judgment approving the sale of property pursuant to Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004), and the property was sold to a third-party purchaser who is not a party to the litigation, the appeal of the foreclosure judgment as to that property is dismissed as moot.

¶ 2 Defendant, Green & Kinzie Property Corp. (G&K), appeals the trial court's orders granting judgment in favor of plaintiff and approving the sale of the foreclosed property at issue.

G&K argues that the order entering the judgment of foreclosure did not include the words "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED" and therefore, the order is void for failure to contain a proper decretal section. G&K seeks reversal of the orders and requests a new foreclosure sale.

¶ 3

BACKGROUND

¶ 4 Plaintiff, First Chicago Bank (First Chicago) made a loan to defendant Green & Kinzie Property Corp., in the principal sum of \$3,264,300.40. The terms of the loan were memorialized in a promissory note. The note was secured by a mortgage and modifications to the mortgage for four parcels of land with a common address of the "Southwest Corner of Green Street, Chicago, Illinois." Defendant Jerome Cedicci personally guaranteed payment of G&K's indebtedness. G&K fell behind on its mortgage payments and on April 27, 2011, plaintiff filed a complaint for foreclosure and other relief. Count I of the complaint sought foreclosure of the mortgage against G&K. Count II sought relief for breach of Cedicci's personal guaranty. On December 12, 2011, upon motion, Northbrook Bank and Trust Company (Northbrook) was substituted as plaintiff.

¶ 5 On October 22, 2012, G&K and Cedicci filed an appearance through counsel. Thereafter, G&K and Cedicci answered the complaint. Neither G&K nor Cedicci denied any allegations in the complaint and no affirmative defenses or counterclaims were raised.

¶ 6 On January 15, 2013, Northbrook filed a "Motion for Default, Default and Summary Judgment, and Judgment of Foreclosure and Sale" arguing that G&K was in default on the note for failure to pay amounts due. Northbrook sought the entry of an order granting summary judgment against G&K and Cedicci, default judgment against any unknown owners and non-record claimants, and a judgment of foreclosure and sale. Attached to this motion was a proposed "Order for Default, Default and Summary Judgment and Judgment of Foreclosure and Sale"

(Judgment Order) prepared by Northbrook's counsel. G&K and Cedicci were served with Northbrook's motion and the proposed order. Neither G&K nor Cedicci filed a response in opposition to Northbrook's motion or the proposed order.

¶ 7 On May 21, 2013, after hearing, the trial court granted Northbrook's motion. Using Northbrook's proposed order, the trial court entered judgment in favor of plaintiff and against the defendants in the amount of \$4,151,680.85. The Judgment Order set forth that: (1) the trial court had jurisdiction over the parties; (2) due notice was given to defendants; (3) no genuine issue of material fact existed concerning the allegations of the complaint; (4) "summary judgment [was] awarded in favor of plaintiff and against Green & Kinzie Property Corp., and Jerome Cedicci;" (5) default judgment was entered against the remaining defendants; (6) plaintiff's lien against the property for \$4,151,680.85 was established by plaintiff's note and mortgage alleged in the complaint and plaintiff's "Affidavit of Proof;" (7) the foreclosed property was "directed to be sold" by a judicial sales officer; and (8) judgment was entered in favor of plaintiff and against Cedicci on Count II in the amount of \$4,173,396.96. The order recited the legal description of the property and identified the expiration of the redemption period as August 21, 2013. The order also provided for the appointment of a judicial sales officer and delineated the procedure for publishing notice of the impending sale, the process of the sale and explained that the sale was subject to confirmation by the trial court.

¶ 8 Defendants were served with a public notice of sale informing them that pursuant to the May 21, 2013 Judgment Order, the foreclosed property would be sold at a judicial sale on August 23, 2013.

¶ 9 On August 20, 2013, a non-party, L.I. Development, LLC, filed an emergency "Motion to Void and Vacate the Order for Default Judgment and Judgment of Foreclosure" requesting a stay

of the judicial sale arguing that defendant Cedicci was not properly served with process in the action and therefore the court had no jurisdiction to order the sale. The trial court denied the motion, but continued the date of the judicial sale.

¶ 10 On October 7, 2013, pursuant to the trial court's Judgment Order, a judicial sale of the property was conducted. The property was sold to a third party, Marc A. Bushala (Bushala), for \$1,400,000.00, an amount in excess of Northbrook's appraised value for the property.

¶ 11 Also that morning, G&K filed a "Motion to Vacate and Void the Notice of Sale, Cancel the Judicial Sale, and Void the Judgment of Foreclosure and Sale." G&K asserted that the May 21, 2013 order was invalid due to the lack of a decretal section. G&K argued that because the order did not specifically state "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED" when adjudicating Count I, judgment was not properly entered foreclosing the mortgage. G&K requested the trial court vacate the Judgment Order, enter a proper order foreclosing the mortgage, cancel the October 7, 2013 judicial sale, and order a new sale. This motion was not labeled as an emergency motion. In fact, a week later, G&K spindled this motion, scheduling it for presentment on December 17, 2013.

¶ 12 During that time, on November 7, 2013, Northbrook filed a motion to approve the judicial sale, distribution and possession and for a deficiency judgment.

¶ 13 On January 8, 2014 the trial court held a hearing on G&K's motion to vacate and plaintiff's motion to approve the sale. Counsel for plaintiff, defendants and Bushala were all present in court. After the hearing, the trial court denied G&K's motion to vacate finding that the Judgment Order was valid and properly adjudicated Count I of the complaint. The trial court found that although the Judgment Order may have been "inartfully drafted," its alleged deficiency did not have "an impact on the sale such that it would render it to be unconscionable

or *** that [the] ends of justice require the Court to void the sale." There was no evidence that the sale was conducted fraudulently or that the Judgment Order itself caused confusion. Although, the Judgment Order did not specifically include the language "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED," the order did provide that the "court further finds and orders" before finding the loan in default, granting summary judgment on Count I and setting forth that the property was to be sold to pay the amounts found due and owing.

¶ 14 On January 10, 2014, the trial court entered a written order granting Northbrook's motion to approve the October 7, 2013 sale and entering a deficiency judgment against defendants in the amount of \$2,916,866.56. Thereafter, G&K timely filed this appeal.

¶ 15 ANALYSIS

¶ 16 As an initial matter, we must address plaintiff's contention that this appeal is moot. Plaintiff argues that the appeal is moot because the foreclosed property was sold at judicial sale to a third-party bidder, Marc Bushala, and G&K failed to post a bond to stay enforcement of the order approving the sale pursuant to Illinois Supreme Court Rule 305(k) (eff. July 1, 2004). G&K responds arguing that the appeal is not moot and that it would be "inequitable" to dismiss the appeal on this basis.

¶ 17 Generally, a reviewing court will not consider moot questions "because our jurisdiction is restricted to cases which present an actual controversy." *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001). An appeal is moot if no controversy exists or if "events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief." *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005). It is well established that in the absence of a stay, an appeal is moot if the relief sought involves possession or ownership of property that has already been conveyed to a third party who is not a party to the litigation. *Town of*

Libertyville v. Moran, 179 Ill. app. 3d 880, 886 (1989). Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004) provides that

"[i]f a stay is not perfected within the time for filing the notice of appeal, *** the reversal or modification of the judgment does not affect the right, title or interest of any person who is not a party to the action or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed." Ill. S. Ct. R. 305(k) (eff. Jan. 1, 2004).

Simply put, Rule 305(k) protects a third-party buyer of property from the reversal or modification of judgment regarding that property, absent a stay of judgment pending the appeal if: (1) the property passed pursuant to final judgment; (2) the right, title and interest of the property passed to a party who is not a party to the action; and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. *Steinbrecher*, 197 Ill. 2d at 523-34.

¶ 18 The instant case satisfies the necessary requirements to invoke the application of Rule 305(k) rendering this appeal moot. As to the first requirement, the property passed pursuant to a final judgment. The property at issue was sold to a third-party purchaser, Bushala, at the foreclosure sale. Title to the property passed to Bushala pursuant to the final judgment on January 10, 2014 when the trial court entered an order approving the sale. *Margaretten & Co., Inv. v. Martinez*, 193 Ill. App. 3d 223 (1990) (order approving a sale of foreclosed property is a final judgment). Therefore, the first requirement under Rule 305(k) is satisfied.

¶ 19 As to the second requirement, G&K contends, without citation to any legal authority, that

Bushala is not a "non-party" to the litigation entitled to protection under Rule 305(k) because his attorney was present in court on several occasions and participated in the trial court's proceedings. G&K asserts that it would be "inequitable and unjust for the bidder to obtain the protection of Rule 305(k) as a 'non-party' just because the trial court allowed the bidder to appear and argue without filing an appearance."

¶ 20 We disagree. Although G&K contends that Bushala can be considered a party even though he was not required to file an appearance or any pleading, a "party" is "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1231-32 (9th ed. 2009). Indeed, section 2-401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-401 (West 2010)) confirms that a "party" to a litigation is either one filing the action (plaintiff) or one required to respond to it (defendant) and requires that the names of the parties must be set forth in all pleadings (735 ILCS 5/2-401(c) (West 2010)).

¶ 21 While G&K now argues that Bushala is a party to the litigation solely because his attorney was present in court, G&K's attorney in fact recognized at the time of the hearing that Bushala was not a party to the action. At the January 8, 2014 hearing on Northbrook's motion to approve the judicial sale, G&K's counsel complained to the trial court that it was not "appropriate that the third-party bidder appear in this proceeding" because Bushala had not filed an appearance or a petition to intervene. However, he explained that if the trial court was "fine" with Bushala's attorney's presence at the hearing, then G&K would be "fine" with it too.

¶ 22 We find that Bushala did not become a party to this litigation simply because his attorney was present in court during the hearing to confirm the judicial sale. No appearance was filed on Bushala's behalf; he was not brought into the action by his own pleading; and no pleading was filed listing him as a party and requiring his response. Therefore, we find he is not a party to this

litigation and the second requirement under Rule 305(k) is satisfied.

¶ 23 Lastly, as to the third requirement, G&K does not contest that it failed to perfect a stay of the judgment. Although G&K timely appealed the January 10, 2014 order, there is nothing in the record to show that G&K ever requested a stay of judgment at any time. Accordingly, we find that all three requirements for the application of Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004) were met as to the property sold to Bushala because: (1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding; and (3) G&K failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. See *Steinbrecher*, 197 Ill. 2d at 523-524.

¶ 24 Through this appeal G&K seeks reversal of the judgment of foreclosure and the order approving the judicial sale to Bushala. In cases where a debtor in a foreclosure action successfully moved to vacate a judgment of foreclosure, the remedy is to vacate the judgment of foreclosure and the sale pursuant to that judgment. See *West Suburban Bank v. Lattemann*, 285 Ill. App. 3d 313, 314 (1991). G&K requests exactly that relief: that we remand this matter to the trial court for the entry of a "valid judgment of foreclosure, following which a proper foreclosure sale of the [p]roperty can occur." Therefore, the relief sought by this appeal is the undoing of the sale to Bushala, whose purchase as a third-party buyer at the judicial sale is protected by Rule 305(k). As a result, we must dismiss this appeal as moot.

¶ 25 Appeal dismissed.