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FIRST DIVISION
December 7, 2015

No. 1-15-0964
2015 IL App (1st) 150964-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OCWEN LOAN SERVICING, LLC,)	
)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
)	
v.)	
)	No. 11 CH 44808
TOMAS KACEL; Unknown owners and)	
Non-record Claimants,)	
)	
Defendant-Appellant.)	Honorable
)	Allen Price Walker,
)	Judge Presiding.
)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion when it denied defendant's section 2-1401 petition, which was improperly brought as a motion pursuant to section 2-1301(e), where defendant failed to include facts that evidenced the requisite due diligence.

¶ 1 This case stems from a mortgage foreclosure on the residential property of defendant, Tomas Kacel (Kacel). On appeal, Kacel argues that the trial court improperly denied his motion to vacate summary judgment and the judgment of foreclosure because plaintiff, Ocwen Loan Servicing, LLC (Ocwen), failed to prove that it sent him a grace period notice as required by

section 5/15-1502.5 (c) of the Illinois Mortgage Foreclosure Law (the Law). 735 ILCS 5/15-1502.5(c) (West 2010).

¶ 2

BACKGROUND

¶ 3 On December 30, 2011, OneWest Bank, FSB (OneWest) filed a complaint seeking foreclosure of Kacel 's residential property, which was located in Des Plaines, Illinois. The complaint alleged that Kacel had defaulted on his mortgage loan. On October 18, 2012, Kacel filed a *pro se* appearance and verified answer and did not raise any affirmative defenses.

OneWest filed its motion for summary judgment on February 22, 2013. Kacel, acting *pro se*, filed a response to the motion for summary judgment on June 4, 2013. On November 4, 2013, OneWest filed a motion for substitution of party plaintiff, and on November 8, 2013, the trial court granted its motion and Ocwen was substituted as party plaintiff. The court also granted the motion for summary judgment on November 8, 2013, and entered an order that stated,

"[s]ummary [j]udgment and [j]udgment of [f]oreclosure and [s]ale is hereby entered in favor of [p]laintiff and against the following [d]efendants: Tomas Kacel."

¶ 4 On November 7, 2014, counsel for Kacel filed an appearance on his behalf. On that same date, Kacel also filed a "motion to vacate,"¹ which he brought pursuant to section 2-1301(e) of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/2-1301(e). In his motion to vacate, Kacel argued that Ocwen did not provide him with a grace period notice. Kacel attached an affidavit in which he attested he never received a grace period notice, and "[o]n information and belief, [p]laintiff has never mailed me a grace period notice." Kacel further argued that pursuant to the Law and the court's decision in *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 124, the complaint and all orders should be dismissed. *Bank of*

¹ We note that a copy of Kacel's motion to vacate is not included in the record on appeal. The effects of this omission will be discussed in further detail later in this order.

America, N.A. v. Adeyiga, 2014 IL App (1st) 131252, ¶ 124 (holding "where the required grace period notice has not been sent prior to the commencement of a foreclosure action or where the plaintiff has not waited past 30 days to file suit, mortgagors have been 'prevented from protecting their property interests,' and justice has not been done under subsection 15-1508(b)(iv) of the [the Law]").

¶ 5 On November 21, 2015, Ocwen filed its motion for an order approving the report of sale and distribution. Its motion stated that a judgment of foreclosure and sale was entered on November 8, 2013, and pursuant thereto, a sale was scheduled for November 10, 2014. A copy of the selling officer's report of sale and distribution was attached. The court entered concurrent briefing schedules on Kacel's motion to vacate and Ocwen's motion to approve the report of sale on December 17, 2014, and set both motions for hearing.

¶ 6 On January 14, 2015, Kacel filed his response to Ocwen's motion to approve the report of sale. The only argument he raised was that the report of sale and distribution attached to Ocwen's motion contained post-judgment costs for which Ocwen failed to provide any receipts or other proof that such costs were incurred or actually paid. Ocwen filed its reply in support of its motion on February 10, 2015. In its reply, Ocwen asserted that Kacel had the burden to show why the sale should not be confirmed, and that he failed to do so by merely objecting to the post-judgment costs contained in Ocwen's motion rather than showing that any of those costs were incorrect or inaccurate.

¶ 7 On January 15, 2015, Ocwen filed its response² to Kacel's motion to vacate and argued that Kacel's motion was untimely, that Kacel failed to demonstrate error in the entry of the judgment, and that Kacel's arguments were waived. Ocwen asserted that Kacel's motion to

² We note that the copy of Ocwen's response contained in the record on appeal is missing page four. The effects of this omission will be set forth later in this order.

vacate, brought pursuant to section 2-1301(e) of the Code was the improper vehicle for moving to vacate because section 2-1301(e) applies to orders of default, not summary judgment, as was entered here. Further, Ocwen argued that even if the court construed Kacel's motion as a motion to reconsider under section 2-1203(a) of the Code, Kacel's motion was untimely because it was required to be filed within 30 days. 735 ILCS 5/2-1203(a) (West 2010). Next, Ocwen contended that defendant failed to argue any error or defect in the entry of summary judgment, and instead only sought to raise a defense to Ocwen's complaint, which should have been raised in Kacel's answer. Finally, Ocwen asserted that Kacel's arguments, which could have been raised prior to summary judgment but were not, were waived. Ocwen argued that Kacel's motion to vacate, which was actually a motion to reconsider, improperly raised new arguments or legal theories. Specifically, Ocwen acknowledged that although *Adeyiga* held that an allegation of non-receipt can imply that a notice was not sent (*Adeyiga*, 2014 IL App (1st) 131252, ¶ 124), Kacel failed to plead or aver any facts that demonstrated a failure to receive the notice such that a failure to send could be implied. As support for its position, Ocwen attached the affidavit of Gregory Peck, assistant vice president of OneWest.

¶ 8 On February 11, 2015, Kacel filed his reply in support of his motion to vacate. He began his reply by asserting that Ocwen's argument "is contrary to well established Illinois law which holds that designating a motion pursuant to the wrong section of the Code is not fatal and does not preclude the court from deciding the motion in its merits." Kacel further argued that the sending of the grace period notice cannot be waived. Kacel also attacked Peck's affidavit, arguing that he was not competent to testify regarding a notice that was mailed when he was not yet employed by One West.

¶ 9 On March 4, 2015, the trial court granted Ocwen's motion to approve the sale and distribution and denied Kacel's motion to vacate. Kacel filed his timely notice of appeal on March 31, 2015.

¶ 10 ANALYSIS

¶ 11 On appeal, Kacel argues that Ocwen did not prove that it sent him a grace period notice pursuant to section 15-1502.5 of the Law. 735 ILCS 5/15-1502.5 (West 2010). Specifically, Kacel asserts that Ocwen has not shown that the grace period notice it allegedly sent was contained in a properly addressed envelope and deposited in the mail. Kacel also argues that the grace period notice was non-compliant with the Law because it was not in 14-point font. Finally, Kacel attacks Peck's affidavit, contending that he is not competent to testify about the grace period notice at issue because he was not employed by OneWest at the time it was allegedly mailed.

¶ 12 Notably, Kacel's notice of appeal reflects that Kacel appeals both the order denying the motion to vacate and the order granting Ocwen's motion to approve the sale. However, Kacel's appellate brief contains no argument regarding why the motion to approve sale should not have been granted. Mere contentions, without argument or citation of authority, do not merit consideration on appeal and are waived. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001). Therefore, we limit this appeal to arguments actually raised and will focus our decision on the trial court's denial of Kacel's motion to vacate.

¶ 13 Before addressing Kacel's arguments, we must first address two issues regarding the record on appeal. The record on appeal does not contain a copy of Kacel's motion to vacate. In an effort to fix this problem, Kacel has included a copy of his motion in the appendix to his brief. Generally, “[a] reviewing court will not supplement the record on appeal with the documents

attached to the appellant's brief on appeal as an appendix, where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the material.” *Pikovsky v. 8440-8460 North Skokie Boulevard Condominium Association, Inc.*, 2011 IL App (1st) 103742, ¶ 16. Here, however, although there was no expressly stated stipulation, we find that the parties implicitly stipulated to the inclusion of Kacel's motion to vacate in the record on appeal. We find significant the fact that, in its response brief, Ocwen references Kacel's motion to vacate and the specific arguments made therein on numerous occasions. Further, Ocwen neither explicitly objects to the inclusion of Kacel's motion to vacate, nor requests that this court disregard it. Rather, Ocwen merely states "the inclusion of the motion is improper." Likewise, Ocwen also acknowledges, "this means that the Kacel affidavit is nowhere in the record on appeal." However, Ocwen later cites to and challenges the substance of Kacel's affidavit. Based on Ocwen's conduct, we find that it stipulated to the inclusion of Kacel's motion to vacate in the record on appeal. *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 20 (finding that the parties had stipulated to the motion in the appellant's appendix when the party opposing inclusion cited to the motion at issue in its response brief). As such, we will consider Kacel's motion to vacate and affidavit in our analysis.

¶ 14 Additionally, the copy of Ocwen's response to Kacel's motion to vacate that is included in the record is incomplete, as it is missing page four. Although it is the burden of the appealing party to provide the reviewing court with a sufficiently complete record to allow for meaningful appellate review (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)), here we find that the missing page does not hinder meaningful review. Even if it did, we decide this appeal on its merits, and, for the reasons that follow, we find that the trial court did not err in denying Kacel's

motion to vacate. Therefore, even without construing any insufficiency against Kacel, the outcome of this appeal is in Ocwen's favor.

¶ 15 Turning to the merits, we note that the parties disagree regarding the proper standard of review. Kacel contends that our review is *de novo* where an appeal is taken from a summary judgment ruling. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 36. Conversely, Ocwen argues that, because Kacel's motion to vacate is properly viewed as a motion to reconsider, we should review the trial court's decision for based on an abuse of discretion standard. *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006). We disagree with Kacel's statement that this appeal involves a motion for summary judgment. Here, Kacel does not appeal the trial court's November 8, 2013 order, which granted the motion for summary judgment. Rather, Kacel appeals the March 4, 2015 order, which denied his motion to vacate. As explained in more detail below, we determine that Kacel's motion to vacate should be reviewed as a petition pursuant to section 2-1401. 735 ILCS 5/2-1401 (West 2010). In *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 52, the Illinois Supreme Court examined its previous decision in *People v. Vincent*, 226 Ill. 2d 1 (2007) and determined that when reviewing a section 2-1401 petition, an abuse of discretion standard, although improper in a purely legal challenge to a dismissal, is proper when dealing with a "traditional fact-dependent challenge to a final judgment." *Walters*, 2015 IL 117783, ¶ 52. Because this case presents a fact-dependent challenge, we review for an abuse of discretion.

¶ 16 When analyzing a party's request for relief, courts should look to what the pleading contains, not what it is called. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). This is particularly appropriate in this case. Kacel brought his motion to vacate pursuant

to section 2-1301(e) of the Code arguing that the judgment should be vacated because he did not receive the requisite grace period notice. On appeal, Ocwen contends that Kacel's motion to vacate was not in fact a motion to vacate, but was actually a motion to reconsider that should have been brought pursuant to section 2-1203(a) of the Code. Ocwen further asserts that section 2-1301(e) only applies to motions to vacate *defaults*; therefore, because the judgment entered in this case was entered pursuant to a motion for summary judgment and not a default judgment, then section 2-1301(e) is inapplicable.

¶ 17 Section 2-1301(e) of the Code states, "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after 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 2010). Section 2-1203(a) of the Code states, "[i]n all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203(a) (West 2010).

¶ 18 Based on the plain language of the Code, we disagree with Ocwen's argument that Section 2-1301(e) only applies to orders of default or default judgments. 735 ILCS 5/2-1301(e) (West 2010). Section 2-1301(e) allows a court to "set aside *any* final order of judgment upon any terms that shall be reasonable," not only default judgment orders. (Emphasis added.) 735 ILCS 5/2-1301(e) (West 2010). We also disagree with Ocwen's assertion that Kacel's motion should have been characterized as a motion to reconsider brought pursuant to section 2-1203(a). Like section 2-1301(e), section 2-1203(a) only allows motions brought pursuant thereto to be filed "within 30 days after the entry of the judgment ***." 735 ILCS 5/2-1203(a) (West 2010).

Kacel's motion to vacate was filed on November 7, 2014, which was nearly one year after the order granting summary judgment was entered.

¶ 19 The only section of the Code which could have provided Kacel the relief he sought was section 2-1401. 735 ILCS 5/2-1401 (West 2010). Section 2-1401 of the Code provides relief from final orders and judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2010). To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 20 In light of the fact that section 2-1401 is the only statutory authority that could have afforded Kacel relief, coupled with the requirement that we examine the contents of the motion irrespective of the motion's label (*Sarkissian*, 201 Ill. 2d 95 at 102), we determine whether the trial court abused its discretion in denying Kacel's motion to vacate when viewed as a petition for relief pursuant to section 2-1401. 735 ILCS 5/2-1401 (West 2010). Here, Kacel's motion to vacate is silent as to any facts which would satisfy either of the two elements of diligence required under section 2-1401. Kacel does not allege any facts regarding diligence in bringing his motion to vacate or his underlying defense. Kacel's motion to vacate merely contains his argument that he was not provided a grace period notice and that the notice to cure the default was misleading and was not specific enough. Although this assertion may be construed as a meritorious defense, which would satisfy one of the requirements of section 2-1401, it still remains that Kacel did not allege due diligence in asserting his defense or in filing his motion. Up until his motion to vacate, Kacel never raised the argument that Ocwen failed to provide him

with a grace period notice. Kacel, acting *pro se*, filed an answer to the complaint, but did not file any affirmative defenses. The fact that Kacel was acting *pro se*, however, would have no impact on his failure to file affirmative defenses. *Harvey v. Carponelli*, 117 Ill. App. 3d 448, 452 (1983) (stating that "a *pro se* litigant must comply with the same rules of procedure required of attorneys.") Kacel's motion to vacate was not filed until almost exactly one year after the summary judgment and judgment of foreclosure were entered against him. Therefore, in order to vacate the judgment, he was required to bring his motion to vacate pursuant to section 2-1401 of the Code and meet all of the requirements of section 2-1401. Because Kacel failed to do so, we agree with the trial court's decision to deny Kacel's motion to vacate.

¶ 21 Illinois courts have consistently recognized that "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds ***." *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18 (quoting *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24). Therefore, although the trial court did not express the specific basis upon which it denied Kacel's motion, based on our foregoing analysis, we find that however the trial court arrived at its decision, it did not abuse its discretion.

¶ 22 CONCLUSION

¶ 23 Based on the foregoing, we find that the trial court did not abuse its discretion when it denied Kacel's motion to vacate. We, therefore, affirm the judgment of the circuit court.

¶ 24 Affirmed.