2016 IL App (1st) 152569-U

No. 1-15-2569

FIFTH DIVISION
February 5, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
KATHERINE CARDENAS,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 12 D 9546
	)	
MANUEL A. CARDENAS,	)	The Honorable
	)	Veronica B. Mathein,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *HELD*: This appeal must be dismissed where respondent failed to serve notice of the appeal to an interested party that may be adversely affected by this court's judgment.

¶ 2 Respondent, Manuel Cardenas, appeals the circuit court's order requiring him to sign a deed in lieu of foreclosure for the parties' marital property effectively transferring the property to the mortgaging bank. Respondent contends the circuit court erred in: (1) finding the parties' November 7, 2014, agreed order superseded their previously entered marital settlement

agreement; (2) punishing respondent for his failure to comply with the agreements without punishing petitioner, Katherine Cardenas, for her lack of compliance; and (3) failing to hold an evidentiary hearing regarding the parties' mutual noncompliance. Based on the following, we dismiss the appeal.

¶ 3 FACTS

¶ 4 The parties were married on December 23, 1999, and had two children thereafter. However, on October 4, 2012, petitioner filed for dissolution of the marriage. The parties, both attorneys, initially negotiated settlement and custody agreements in December 2012, but respondent appeared in court at the subsequent prove-up hearing and notified the court that he no longer wished to enter into those agreements. On February 27, 2013, the parties again appeared before the court. On that date, the circuit court entered a custody judgment and parenting agreement, a uniform order for support, and a Judgment for Dissolution of Marriage. The dissolution judgment incorporated a marital settlement agreement, which, in relevant part, stated:

> "That the parties acquired the residence located [on] Landers, Chicago, IL which has served as the marital residence. This property shall be awarded to the HUSBAND as his own separate property, and WIFE shall cooperate with providing HUSBAND a quit claim deed for the refinance or sale of property as described herein. HUSBAND shall have one year to refinance the property to remove WIFE'S name from the property. If after this year, HUSBAND cannot refinance the property he shall place the home for sale. HUSBAND shall pay the expenses associated with the residence, including but not limited to mortgage, real estate taxes, insurance, utilities and upkeep or repairs. If the house falls into foreclosure, or if it is short sold, HUSBAND shall be responsible for all

fees and costs associated with the foreclosure or short sale, including attorney fees and costs, and shall indemnify and hold WIFE harmless from same."

In addition, the marital settlement agreement provided that:

"C. Oral Amendments. No covenant, promise, or undertaking shall be effective to modify or amend this Agreement or to waive or relinquish any right provided by the terms and provisions hereof, unless said covenant, promise, or undertaking shall be reduced to a writing which is duly executed by both parties.

D. Modifications. This Agreement shall not be subject to modification or amendment unless specifically permitted by the express provisions hereof and except as to the provisions relating to the custody, visitation, support, and education of the child(ren) of the parties."

¶ 5 On September 5, 2014, petitioner filed a verified petition for modification of the dissolution judgment and for an order of eviction against respondent. Petitioner alleged that respondent failed to comply with the marital settlement agreement where he did not refinance the marital home to remove petitioner's name from the mortgage and did not provide a quitclaim deed to petitioner in order to obtain refinancing. Moreover, petitioner alleged respondent failed to make any mortgage payments and failed to place the property for sale. The circuit court set a hearing date for the petition and provided respondent time to respond.

¶ 6 On November 7, 2014, the parties entered an agreed order modifying the terms of the marital settlement agreement. More specifically, the agreed order provided that respondent would list the marital property for sale and continue his efforts at assuming the mortgage to the property, while petitioner would cooperate with respondent and his lender on his loan assumption. The agreed order additionally provided, in paragraph 8, that "[i]f the property has

not been sold or mortgage removed from the Petitioner's name by March 15, 2015, the Petitioner will have the right to return the property to the bank under deed in lieu of foreclosure at her sole expense and assume any tax liability."

¶ 7 Then, on July 14, 2015, petitioner filed another verified petition for modification of the dissolution judgment and for an order of eviction against respondent. In response, on July 27, 2015, respondent filed a motion to strike petitioner's petition and a rule to show cause. Respondent alleged his attempts to refinance the marital property were unsuccessful because petitioner refused to execute a quitclaim deed to him. Respondent additionally requested that the court issue a rule to show cause regarding whether petitioner should be held in contempt of court for failing to obey the dissolution judgment and agreed order. A hearing was held on August 21, 2015. Following the hearing, the circuit court entered an order on the same date finding the language of the parties' agreed order requiring that "[i]f the property has not been sold or mortgage removed from the Petitioner's name by March 15, 2015, the Petitioner will have the right to return the property to the bank under deed in lieu of foreclosure at her sole expense and assume any tax liability" controlled. As a result, the circuit court denied respondent's motion to strike and for a rule to show cause. The case was continued for petitioner to file the necessary documents in order obtain a deed in lieu of foreclosure. On September 10, 2015, respondent filed a motion to reconsider, arguing that petitioner failed to comply with a condition precedent of him transferring the mortgage into his name, namely, providing a quitclaim deed. Respondent requested three more months to assume the mortgage.

¶ 8 On September 11, 2015, the circuit court denied respondent's motion to reconsider and ordered respondent to execute a deed in lieu of foreclosure in open court. The deed was executed and, according to the Cook County Recorder of Deeds, the Bank of New York Mellon

f/k/a the Bank of New York, as trustee for the certificate holders of the CWALT, Inc., alternative loan trust 2006-29T1, mortgage pass-through certificates, series 2006-29T1 (Bank of New York Mellon) is the owner of the marital property. The deed was recorded on October 8, 2015.

¶ 9 On September 11, 2015, respondent filed the underlying appeal. This court has granted respondent's emergency motion to stay the enforcement of his eviction and has granted his motion to expedite the appeal.

¶ 10 ANALYSIS

¶ 11 At the outset, we address petitioner's argument that this appeal is moot because respondent failed to name Bank of New York Mellon as a party to his appeal. Initially, we must recognize that respondent's failure to name the bank does not render this appeal moot as a decision on the merits could result in relief to respondent as the complaining party, namely, invalidating the deed in lieu of foreclosure. *Fisch v. Lowes Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 539 (2005) ("[a]n appeal is considered moot if no actual controversy exists or if events have occurred that make it impossible to grant the complaining party effectual relief"). Notwithstanding, we conclude that respondent's failure to serve a notice of appeal on Bank of New York Mellon, as an interested party, requires dismissal of this appeal.

¶ 12 Pursuant to Illinois Supreme Court Rule 303(c) (eff. May 30, 2008), "[t]he party filing the notice of appeal *** shall, within 7 days, file a notice of filing with the reviewing court and serve a copy of the notice of appeal upon every other party and upon any other person or officer entitled by law to notice." Ill. S. Ct. R. 303(c) (eff. May 30, 2008). It is important to note that this court is not deprived of jurisdiction in the event an appellant fails to serve a copy of the notice of appeal on the appropriate party because the filing of the notice of appeal itself is the only requisite jurisdictional step to appeal from a final and appealable decision of the circuit

court. *Zwolinski*, 2013 IL App (1st) 120612, ¶ 14. That said, an appeal may be dismissed on the basis that an opposing party was not served with a copy of the notice of appeal if there is evidence of prejudice to the party. *Id*. (citing *Kawa v. Harnischfeger Corp.*, 204 Ill. App. 3d 206, 209 (1990)). Prejudice results where a party cannot file an appellate brief or argue orally. *Id*. Ultimately, "failure to serve a copy of the notice of appeal on parties who may be adversely affected by the appellate court's decision may result in dismissal of the appeal." *Id*.

¶ 13 In *Wells Fargo Bank, N.A. v. Zwolinski*, 2013 IL App (1st) 120612, this court dismissed an appeal where the complaining party failed to serve a notice of appeal on any adverse or interested parties in violation of Rule 303(c). We acknowledge that, here, respondent did serve a notice of appeal on petitioner; however, we find the rationale applied in *Zwolinski* equally applies to the case at bar. In *Zwolinski,* this court determined that the appellant's failure to serve notice of the appeal not only on the named parties, but also on the purchasers of the foreclosed property, required dismissal of the appeal because they were significantly prejudiced where they were denied an opportunity to participate in the appellate process. 2013 IL App (1st) 120612, ¶ 17. With regard to the parties of record, they were officially unaware of the appeal and were unable to file appellate briefs or argue orally, thus depriving them of the opportunity to protect their interests. *Id.* ¶ 16. With regard to the purchasers of the property at issue, this court found that, although not parties of record, they were "certainly parties in interest" because, "if the judgment of the trial court were reversed and the sale of the *** property unwound, the purchasers of the *** property, *** would also be greatly disadvantaged." *Id*. ¶ 17.

¶ 14 Similarly, in the case before us, Bank of New York Mellon was not served with a notice of the instant appeal. Although not a party of record, we find Bank of New York Mellon is a party of interest. Like the purchasers in *Zwolinski*, if this court reversed the September 11, 2015,

order of the circuit court and invalidated the deed in lieu of foreclosure recorded on October 8, 2015, Bank of New York Mellon would be significantly disadvantaged. As a result, Bank of New York Mellon suffered prejudice by not having the opportunity to participate in this appeal in order to protect its interests, which may be adversely affected by a decision in the substantive appeal. We, therefore, conclude that we must dismiss the appeal.

¶ 15 As a final matter, petitioner has requested that this court issue sanctions against respondent's counsel pursuant to Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994) for having filed a "frivolous appeal for the purposes of delay and harassment." We deny petitioner's request.

¶ 16 Rule 375 provides sanctions for frivolous appeals not taken in good faith. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 87. Whether to impose Rule 375 sanctions is within the sole discretion of the reviewing court. *Id*. In determining whether an appeal is frivolous, a reviewing court applies an objective standard. *Id*. " '[T]he appeal is considered frivolous if it would not have been brought in good faith by a reasonable, prudent attorney.' " *Id.* More specifically, Rule 375(b) provides:

> "An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. An appeal or other action will be deemed to have been taken or prosecuted for an improper purpose where the primary purpose of the appeal or other action is to delay, harass, or cause needless expense." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 17 We do not find the imposition of Rule 375 sanctions are warranted in this case. The substance of the appeal essentially mimics respondent's arguments presented before the circuit

court following petitioner's July 14, 2015, verified petition for modification of the dissolution judgment and for an order of eviction against respondent. Although respondent did not prevail in his arguments, we do not find the appeal of those contentions is frivolous. Moreover, we cannot say the appeal was filed to delay, harass, or cause needless expense. In fact, respondent requested that this appeal be expedited in order to resolve his contentions. We, therefore, choose not to impose Rule 375 sanctions.

¶ 18 CONCLUSION

¶ 19 Based on the foregoing, we dismiss the instant appeal and deny petitioner's request for Rule 375 sanctions.

¶ 20 Appeal dismissed.