2017 IL App (1st) 160738-U

FOURTH DIVISION
June 22, 2017

No. 1-16-0738

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

THE BANK OF NEW YORK MELLON f/k/a The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-47CB, Mortgage Pass-Through Certificates, Series 2005-47CB,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 12 CH 1103
MARINELA STEF, DANIEL STEF, *et al*.,	)	Honorable Michael F. Otto,
Defendants-Appellants.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed as moot, as plaintiffs failed to obtain a stay of judgment pursuant to Supreme Court Rule 305 (Ill. S. Ct. R. 305 (eff. July 1, 2004)), and property was sold to *bona fide* third-party purchaser after final judgment.

¶ 2 In this mortgage foreclosure suit brought by plaintiff, The Bank of New York Mellon f/k/a the Bank of New York, as Trustee for the certificateholders of CWALT, Inc., Alternative Loan Trust 2005-47CB, Mortgage Pass-Through Certificates, Series 2005-47CB (BNY Mellon), defendants, Marinela Stef, Daniel Stef, *et al*., appeal from-the circuit court's order entering

summary judgment in favor of BNY Mellon. Plaintiffs argue that summary judgment was premature and that they should have been granted additional time to respond to BNY Mellon's motion for summary judgment.

¶ 3 Plaintiffs filed a timely notice of appeal from the circuit court's order granting summary judgment. But they failed to seek a stay of judgment pending appeal pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004). In the interim, the property was purchased at a foreclosure sale by a third-party purchaser, which then transferred its interest to another entity, which then sold the property to yet another, indisputably non-party entity. Thus, at this juncture, we would be unable to grant relief to plaintiffs and have no choice but to dismiss this appeal as moot.

¶ 4 I. BACKGROUND

¶ 5 On July 15, 2005, defendants, Marinela Stef and Daniel Stef (the Stefs) entered into a home mortgage loan. The mortgage secured a property located at 383 Park Avenue in Glencoe. The property was a non-owner occupied, multi-unit dwelling with tenants. The mortgage loan was later assigned to BNY Mellon.

¶ 6 On January 12, 2012, BNY Mellon filed a complaint to foreclose on the mortgage.

¶ 7 On July 7, 2015, BNY Mellon filed a motion for summary judgment. In support, BNY Mellon submitted an affidavit setting forth facts establishing that the Stefs were in default and the amounts that remained due. The court set a briefing schedule. Hearing was set for October 13, 2015. Notably, the scheduling order stated: "A responding party who fails to file a written response will not be permitted to argue orally." It further stated: "Hearing dates shall not be changed, except by court order. Parties should consider this schedule to be firm. The court will not consider requests for extensions of time which are made on the hearing date."

¶ 8 On September 4, 2015, the date their response was due, the Stefs filed a motion for an extension of time to respond to BNY Mellon's motion for summary judgment. The Stefs argued that the affidavit submitted by BNY Mellon did not reflect a remittance of $2,117.57 for the February 1, 2010 payment, nor a remittance of $2,117.57 on January 25, 2012 (which we note was 13 days after the complaint was filed). The Stefs argued that additional discovery was crucial for them to properly respond to the motion for summary judgment. The Stefs scheduled their motion for hearing on October 13, 2015, the hearing date set for BNY Mellon's motion for summary judgment.

¶ 9 At the hearing, the circuit court denied the Stefs' motion for an extension of time and entered summary judgment in favor of BNY Mellon.

¶ 10 On January 18, 2016, a foreclosure sale was held. FK Investments, LLC (FK Investments), a purchaser unrelated to either party to the case, was the successful bidder for the property, with its bid of $362,000. Two days after buying the property, on January 20, 2016, FK Investments filed a motion to intervene in this action to protect its potential interest in the subject property, to ensure that the sale was confirmed, and to obtain a judicial sales deed and order of possession.

¶ 11 On February 6, 2016, FK Investments assigned its interest in the property to Park Glencoe, LLC, of which FK Investments was a manager.

¶ 12 On February 11, 2016, the circuit court entered an order approving the report of sale and distribution, confirming the sale, and granting possession of the property to the successful bidder. The court also granted FK Investments' motion to intervene. On February 18, 2016, the court clarified its order stating that Park Glencoe, LLC, as assignee of FK Investments, was entitled to immediate possession of the property, as well as rents from the tenants.

¶ 13 On March 10, 2016, the Stefs filed a timely notice of appeal. But they did not move to stay enforcement of the final judgment approving the sale of the property under Supreme Court Rule 305.

¶ 14 On November 29, 2016, FK Investment's assignee, Park Glencoe, LLC, sold the property to 383 Park, LLC.

¶ 15 On January 24, 2017, BNY Mellon filed a motion to dismiss this appeal as moot. The basis of its mootness argument was that, pursuant to Supreme Court Rule 305(k) (eff. July 1, 2004), the court could no longer grant effectual relief to plaintiffs, given that the property had been transferred to a non-party purchaser.

¶ 16 A single Justice from a different division of this court denied the motion to dismiss.

¶ 17 II. ANALYSIS

¶ 18 BNY Mellon renews its argument that this appeal is moot as a result of the property being sold to a third party. We are well within our authority to reconsider this argument, pursuant to our inherent authority to reconsider our prior rulings, and because we have a continuing obligation to consider our own jurisdiction. See, *e.g.*, *Loman v. Freeman*, 229 Ill. 2d 104, 128 (2008) (court has continuing duty to consider its jurisdiction, even if not raised by parties); *Horvath v. Loesch*, 87 Ill. App. 3d 615, 621 (1980) (reconsidering previous denial of motion to dismiss on grounds of mootness and granting it); *Stevens v. Village of Oak Brook,* 2013 IL App (2d) 120456, ¶ 37 ("A court has the inherent authority to reconsider and correct its rulings, and this power extends to interlocutory rulings as well as to final judgments."); *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 64 (appellate court may reconsider previous ruling).

¶ 19 Having reviewed the briefs of the parties, as well as the arguments raised by each party in the previous Motion to Dismiss Appeal, we agree with BNY Mellon that this appeal must be dismissed as moot.

¶ 20 An appeal is moot if it involves no actual controversy, or the reviewing court cannot grant the complaining party effectual relief. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001). It is well established that, in the absence of a stay, when the property that is the subject of an appeal is sold to a third party who is not a party to the litigation or a nominee for a party to the litigation, the appeal is moot. *Steinbrecher*, 197 Ill. 2d at 532; see also *Northbrook Bank & Trust Co. v. 2120 Division, LLC*, 2015 IL App (1st) 133426, ¶ 3; *Town of Libertyville v. Moran*, 179 Ill. App. 3d 800, 886 (1989); *Horvath v. Loesch*, 87 Ill. App. 3d 615, 619 (1980). The failure to obtain a stay pending appeal, in and of itself, does not make an issue moot. *In re Tekela*, 202 Ill. 2d 282, 292 (2002); *Smith v. Goldstick*, 110 Ill. App. 3d 431, 434 (1982). But when supervening events make it impossible for a reviewing court to grant relief to any party, the case is rendered moot because an appellate ruling on the issue cannot have any practical legal effect on the controversy. *In re Tekela*, 202 Ill. 2d at 292-93; *Smith*, 110 Ill. App. 3d at 434.

¶ 21 Absent a stay of judgment pending appeal, Supreme Court Rule 305(k) protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property. *Steinbrecher*, 197 Ill. 2d at 523. Rule 305(k) states:

> "If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, 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 in 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. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final." Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

¶ 22 Thus, the rule protects a third-party purchaser of the property from "reversal or modification of the judgment" (*id.*) regarding that property if: "(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) the litigating party failed to perfect stay of judgment within the time allowed for filing a notice of appeal." *Steinbrecher*, 197 Ill. 2d at 523-24.

¶ 23 The Stefs challenge only the second requirement listed above. They claim that FK Investments was a party to the proceeding below and thus cannot seek Rule 305(k) protection.

¶ 24 We take our guidance from our supreme court's decision in *Steinbrecher*, 197 Ill. 2d 514. There, three siblings fought over the partition of inherited property. The trial court determined that partition would be inequitable and ordered a judicial sale. *Id*. at 517. The highest bidder was a company called Moser Enterprises (Moser). *Id*. at 518. The trial court entered a final order confirming the sale. *Id*. One of the children, Rosemary, moved the trial court to vacate the confirmation and for a stay of judgment, both of which the trial court denied. *Id*. at 519. Rosemary then refused to leave the property. *Id*. At that point, Moser was allowed leave to intervene "for the limited purpose of 'enforcing its right to possession.' " *Id*. Ultimately, Moser took possession of the property, and an appeal followed.

¶ 25 The supreme court dismissed the appeal as moot pursuant to Rule 305(k) (at that time, denominated as Rule 305(j)). The court held that the transfer of the property to a third-party

purchaser mooted the case and refused to consider Moser a "party" to the case, even though it had intervened at the later stages of the trial court proceedings. The relevant moment of time for determining "party" status, the court held, was its status "at the time of the judgment and sale." *Id.* at 525. Moser intervened *after* the sale was confirmed, and thus "was a mere purchaser of the property" and "a nonparty for purposes of Rule [305(k)]." *Id.* at 526.

¶ 26 The Stefs claim that *Steinbrecher* is distinguishable, because the intervention there occurred *after* the judgment and sale, whereas here, FK Investments intervened after the sale but on the same day as the confirmation of sale. Thus, they argue, "at the time of the judgment" (*id.*)—albeit on the same day as the judgment—FK Investments became a party to the case.

¶ 27 Arguably, the Stefs are technically correct with regard to FK Investments. On the other hand, one could argue that FK Investments would be entitled to Rule 305(k) protection under the spirit of *Steinbrecher*, considering that it had no role whatsoever in the foreclosure lawsuit and merely wanted to protect the purchase it had just made. Nor did FK Investments file any pleadings with regard to the confirmation of sale before being allowed to intervene.

¶ 28 But we need not decide that thorny question, because even if FK Investments *were* a "party" to the case at the time of judgment, it is undisputed that the property has since been sold to at least one other non-party to the case—383 Park, LLC.

¶ 29 To recap, the following facts are undisputed:

- January 18, 2016: FK Investments bought the property at the foreclosure sale;
- February 6, 2016: FK Investments transferred its interest in the property to Park Glencoe, LLC, of which FK Investments was a manager;
- February 11, 2016: The trial court confirmed the property's sale and also allowed FK Investments to intervene in the case;

- March 10, 2016: The Stefs filed their notice of appeal, but did not seek a stay in this court;
- November 29, 2016: Park Glencoe, LLC sold the property to 383 Park, LLC.

¶ 30 The affidavits submitted by BNY Mellon, and unchallenged by the Stefs, demonstrate that 383 Park, LLC had no connection with BNY Mellon, the Stefs, FK Investments, or even Park Glencoe, LLC. And 383 Park, LLC did not obtain the property until over seven months after the confirmation of sale. Simply put, 383 Park, LLC has never been a party to this case, and certainly was not "at the time of the judgment and sale." *Steinbrecher*, 197 Ill. 2d at 525. Thus, 383 Park, LLC's purchase of the property is entitled to Rule 305(k) protection. See *Moran*, 179 Ill. App. 3d at 886 (relying on unrefuted affidavits of post-judgment conveyance of property to non-party, with no stay of judgment in place, to find appeal moot under Rule 305).

¶ 31 Because the Stefs concede that the property passed pursuant to a final judgment and that they did not obtain a stay of judgment in this court, and because we find that the title to the property passed to a non-party (383 Park, LLC) post-judgment, all three elements for Rule 305(k) protection are satisfied under *Steinbrecher*, 197 Ill. 2d at 523-24. This court could not grant effectual relief to the Stefs, and thus the mootness doctrine applies.

¶ 32 We dismiss this appeal as moot.

¶ 33 Appeal dismissed.