No. 2—09—0132
Order filed February 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CITIBANK N.A.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—CH—783
	)	
RONNIE FARBER,	)	
	)	
Defendant-Appellant	)	Honorable
	)	Paul M. Fullerton,
(Ramzey D., LLC, Intervenor-Appellee).	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Even assuming the mailbox rule applied to defendant's motion to vacate, defendant could not avail himself of the rule without proof of mailing, and his appeal is dismissed.

Defendant, Ronnie Farber, appeals the trial court's denial of his motion to vacate under section 2—1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2—1301(e) (West 2008)) on the basis that it was untimely. On appeal, Farber contends that the mailbox rule applies in this case, rendering his postjudgment motion timely. Because the record contains no proof of mailing,

however, Farber's postjudgment motion was untimely, which means that his notice of appeal was also untimely. We thus dismiss his appeal.

I. BACKGROUND

The facts are undisputed. On February 26, 2008, plaintiff, Citibank, initiated foreclosure proceedings against Farber based on his failure to pay the mortgage on a single family residence located in West Chicago, Illinois. Farber did not answer the complaint, and a default judgment and judgment for foreclosure and sale were entered against him on July 25, 2008. The judgment indicated that Farber owed $122,144.42, and that the statutory period of redemption would expire on October 26, 2008. On September 16, 2008, a notice was filed providing that the property would be sold on October 30, 2008. The sale was conducted on that date, and Ramzey purchased the property for $130,376.49. Although Citibank's motion to confirm the judicial sale does not appear in the record, an order dated November 18, 2008, indicated that the next matter before the court was Citibank's "motion for order confirming judicial sale and for order of possession on November 18, 2008." The order stated that Citibank's motions were entered and continued to December 9, 2008. In addition, the order gave Farber until December 9, 2008, to file his appearance and objection to Citibank's motion.

Farber and Ramzey appeared in court on December 9, 2008. Farber's counsel explained that his firm had just received the case and had not yet filed an appearance; that he needed a continuance in order to review the file; that Citibank's counsel had no objection to continuing the case to December 19, 2008; and that he intended to file a motion to vacate the sale. Counsel for Ramzey urged the court to confirm the sale, pointing out that Farber currently had no basis to vacate the sale. The court agreed that it should enter an order confirming the sale. According to the court, Farber

knew that he had until December 9 to file an appearance and object to the confirmation of the sale, yet he failed to do so. The court granted Ramzey possession of the property 30 days from entry of the December 9, 2008, order (January 8, 2009).

Farber then moved to extend stay of possession in an emergency motion file stamped January 12, 2009. In his motion, Farber argued that on December 9, 2008, the court entered an order of possession with a stay of possession that expired on January 8, 2009; that he "caused to be filed" a motion to vacate confirmation of the sale within 30 days of the entry of the December 9, 2008, order confirming the sale; and that a copy of this motion was faxed to Citibank's attorneys on January 7, 2009. The motion to vacate confirmation of the sale under section 2—1301(e) of the Code was also file stamped January 12, 2009.

On February 20, 2009, the parties appeared in court on Farber's motion to vacate confirmation of the sale. Ramzey, who had been allowed to intervene, also appeared. The court questioned Farber's counsel regarding the motion to vacate that was filed stamped on January 12, 2009, and Farber's counsel responded that it was "filed by mail before then." The court disagreed, stating, "It's not filed by mail. You can send it out in the mail but it needs to be filed." The court continued:

> "Then you say that your motion was filed within 30 days of December 9 but it wasn't. So your motion, your current motion is not pursuant to 1301, it should be pursuant to 1401 and in that regard it fails because there is no due diligence alleged, there is no meritorious defense alleged and there is no affidavit to support the motion."

In other words, the trial court determined that the mailbox rule did not apply, and that Farber's motion was filed on the date that it was file stamped, January 12, 2009, which was more than 30 days

after the December 9, 2008, order confirming the sale. In so ruling, the trial court did not reach the merits of Farber's motion to vacate confirmation of the sale.

Farber filed his notice of appeal on March 2, 2009.

II. ANALYSIS

On appeal, Farber argues that the trial court erred by entering the December 9, 2008, order confirming the sale. However, Farber recognizes that this issue is dependent on his section 2—1301(e) motion to vacate being timely, which in turn hinges on the application of the mailbox rule. See 735 ILCS 5/2—1301(e) (West 2008) ("The 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"). While the parties dispute the standard of review, we agree with Farber that this issue presents a question of law entitled to *de novo* review. Rather than reviewing the trial court's decision to deny Farber's section 2—1301(e) motion for an abuse of discretion (see *Jacobo v. Vandervere*, 401 Ill. App. 3d 712, 715 (2010)), our narrow issue is whether the motion was timely (see *Baca v. Trejo*, 388 Ill. App. 3d 193, 194 (2009) (whether the defendant's section 2—1301(e) motion was timely was a question of law entitled to *de novo* review)).

Farber relies on a recent decision by this court, *Baca*, for the proposition that the mailbox rule applies in this case. Like Farber, the defendant in *Baca* filed a section 2—1301(e) motion to vacate more than 30 days after entry of the judgment. *Baca*, 388 Ill. 3d at 193-94. In response to the plaintiff's argument that the postjudgment motion was untimely, the defendant replied that the motion was timely because it was delivered to the "carrier" for delivery to the court on the 30th day following entry of the judgment. *Id.* at 194. The trial court ruled that the motion was untimely

because the court had not received it within 30 days of the judgment and because the defendant had not delivered it via the United States mail (he used UPS overnight delivery). *Id.* This court agreed on the basis that the defendant had consigned the motion to UPS, a private carrier, rather than the United States mail. *Id.* at 195. In particular, we stated: "Although *we agree that the motion would have been timely had defendant consigned it to the United States mail on the thirtieth day after the judgment,* such a mailbox rule does not apply to consignment of a motion to a private carrier." (Emphasis added.) *Id.* Based on our decision in *Baca*, Farber is correct that the mailbox rule would apply if he placed the motion in the United States mail within 30 days of the December 9, 2008, order confirming the sale. The problem is that there is no proof that Farber did so.

Supreme Court Rule 12 (eff. Nov. 15, 1992), entitled "Proof of Service in the Trial and Reviewing Courts; Effective Date of Service," states that when service of a paper is required, proof of service shall be filed with the clerk. Rule 12(b)(3) provides that "in case of service by mail, [service is provided] by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid[.]" As proof of mailing in this case, Farber asserts that "the facts show" that Farber "deposited the original [motion to vacate] in the United States Mail to the Circuit Clerk of the Eighteenth Judicial Circuit for filing," and that "[n]o party disputed that Farber deposited the motion in the U.S. mail within 30 days of the entry of the December 9, 2008, order." We disagree that the "facts" show that the motion to vacate was placed in the United States mail. On the contrary, the only indicia of mailing in the record is Farber's attorney's statement in court that the motion to vacate was "filed by mail before" the January 12, 2009, file stamp. While Farber is correct that no party disputes his claim that the motion

to vacate was placed in the United States mail, this does not somehow relieve Farber of his obligation to comply with Rule 12(b)(3). *Cf. Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 216 (2009) (under Supreme Court Rule 373, a party can only take advantage of the mailbox rule for filing a notice of appeal if it files proper proof of mailing as required by Rule 12(b)(3)).

On this point, *Knapp v. Bulun*, 392 Ill. App. 3d 1018 (2009), is controlling. In *Knapp*, the court rejected the proposition that the mailbox rule applied to the plaintiffs' motion to convert. *Knapp*, 392 Ill. App. 3d at 1025-26. Even so, the reviewing court reasoned that assuming *arguendo* that the motion to convert could be filed by mail, there was "no evidence in the record indicating that the plaintiffs attempted to do so" in that case. *Id.* at 1027. The *Knapp* court listed several ways in which the plaintiffs failed to support their claim that the motion was filed by mail. For example, the proof of service reflected that the motion was mailed to opposing counsel but not to the circuit court; there was no notice of filing stating that the motion was mailed to the circuit court; and there was no affidavit attesting that the motion was mailed to the circuit court. *Id.* at 1027. Referring to this lack of proof as a "fundamental flaw," the court determined that the plaintiffs' motion was not timely filed. *Id.* at 1025.

The same is true here. First, the certificate of service indicated only that Farber's motion to vacate was faxed to Citibank's counsel; there was no indication that it was mailed to the court. Second, the notice of filing did not indicate that the motion was mailed to the court. Third, there was no affidavit averring that the motion was mailed to the court. Finally, the statement by Farber's counsel to the court was simply that the motion had been filed by "mail," which could mean the United States mail or a private carrier. As a result, we hold like the *Knapp* court that there is "no

evidentiary support in the record" for Farber's assertion that the motion to vacate was filed by mail "on the 29th day after the entry" of the December 9, 2008, order confirming the sale. See *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 502 (1987) (where the record contained no proof of service as required by Rule 12, the statement of the attorney in open court that he had personally placed a copy of the petition in a mailbox on a certain date was not sufficient proof of service by mail).

III. CONCLUSION

The trial court in this case determined that the mailbox rule did not apply and that Farber's motion to vacate was therefore untimely. We also determine that Farber's postjudgment motion was untimely, not because the mailbox rule was inapplicable, but because Farber provided no proof of mailing. Having determined that the postjudgment motion was untimely, it follows that Farber's notice of appeal was untimely. As we noted in *Baca*, only a *timely* postjudgment motion extends a party's time for filing a notice of appeal under Supreme Court Rule 303(a)(1) (eff. May 1, 2007). Given that Farber did not file a timely postjudgment motion, his notice of appeal was filed more than 30 days after the entry of the final judgment, which means that we must dismiss his appeal. See *Baca*, 388 Ill. App. 3d at 198-99.

Appeal dismissed.