2014 IL App (2d) 130607-U
No. 2-13-0607
Order filed April 17, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2005-W5,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CH-1433
KIMBERLY PETITTI, a/k/a Kimberly A. Petitti,	)	
Defendant-Appellant.	)	
(The Glens of College Green Homeowners Association, Target National Bank, Unknown Owners and Nonrecord Claimants, Defendants).	)	Honorable Leonard J. Wojtecki, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's section 2-1401 petition: without an official record of the relevant hearing, we could not say that plaintiff, which appeared at that hearing, did not waive a response so as to enable the court to timely dismiss the petition *sua sponte*; plaintiff's alleged failure to plead its standing as allegedly required by statute did not divest the court of jurisdiction to enter a foreclosure judgment for plaintiff.

¶ 2 Defendant, Kimberly A. Petitti, the property owner in a foreclosure action, appeals after the trial court dismissed her petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) in which she sought to vacate the confirmation of the judicial sale of the property at issue. She first asserts that, under the rule in *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), the dismissal was premature because it came before the expiration of the 30 days in which plaintiff, Deutsche Bank National Trust Company as Trustee for Argent Securities, Inc., Asset-backed Pass-Through Certificates, Series 2005-W5, could respond. We hold that this claim is defeated under the principles of *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), because the record is insufficient to show that plaintiff did not waive its right to respond to the petition. She further asserts that, because plaintiff failed to comply with the statutory pleading requirements for a foreclosure action (see 735 ILCS 5/15-1504(a) (West 2010)), the trial court lacked subject matter jurisdiction to enter a foreclosure judgment for plaintiff. Following *Nationstar Mortgage, LLC v. Canale*, 2014 IL App (2d) 130676, we reject defendant's contention that the kind of pleading fault at issue here resulted in a lack of subject matter jurisdiction. We thus affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 25, 2010, plaintiff filed a foreclosure complaint concerning the property at 1881 Mission Hills Drive in Elgin. Line 3(D) of the complaint stated:

"Name of the mortgagee:

Argent Mortgage Company, LLC."

Line 3(N) of the complaint stated, "Capacity in which Plaintiff brings this foreclosure: Plaintiff is the Mortgagee under 735 ILCS 5/15-1208." Attached to the complaint were the mortgage and note instruments. These named Argent Mortgage Company, LLC, as the lender; the note

required defendant to make the required payments "to the order of the Lender." The note was without endorsements, and plaintiff included no assignment of the note in the exhibits.

¶ 5 Defendant appeared *pro se*. She did not file a formal answer, but instead wrote a letter to the judge explaining her circumstances. Plaintiff filed a motion for summary judgment in which it treated defendant's letter as an answer that effectively admitted all of plaintiff's allegations. Defendant responded with another letter discussing her circumstances and suggesting irregularities by the mortgage originator. The court entered a default order against the other named defendants. The court granted summary judgment against defendant on December 20, 2011. The record, as the clerk originally prepared it, lacked an order embodying the foreclosure judgment. However, plaintiff has caused the record to be supplemented with that order.

¶ 6 On January 18, 2012, defendant moved to vacate the summary judgment, asserting that she had been "a victim of predatory lending." The court denied this motion. The judicial sale took place on January 24, 2013; a third party, Grandview Capital, LLC, was the successful bidder. The court confirmed the sale on February 4, 2013. On March 5, 2013, defendant, now represented by counsel, filed a motion to vacate the confirmation. She asserted that agents of Argent Securities had misrepresented the terms of the mortgage, so that the mortgage was "procured by fraud." The court denied the motion on March 8, 2013.

¶ 7 On April 19, 2013, defendant filed a *pro se* petition under section 2-1401 of the Code seeking to vacate the confirmation. She asserted that she had filed the petition as soon as she became aware of this court's decision in *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL App (2d) 120164. She asserted that plaintiff lacked standing to file the complaint in that nothing in the record showed any relationship between the original mortgagee and plaintiff. She asserted that it was fraudulent for the complaint to allege that "Argent" was then the mortgagee. (Context

suggests that defendant intended to say "plaintiff" rather than "Argent"; the paragraph does not make this entirely clear.)

¶ 8 On May 2, 2013, plaintiff filed a "Notice of Motion" that stated that on May 9, 2013, it would "present" defendant's petition. It mailed this notice to defendant on April 30, 2013. The court "denied" the petition on May 9, 2013; neither of the boxes on the form that should indicate whether defendant was present was marked. The same order also barred defendant from filing further "motions" without leave of court. Defendant filed a notice of appeal on June 10, 2013, a Monday.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant asserts three claims of error. Two remain after plaintiff corrected the omission of the foreclosure judgment from the record. Her first remaining claim is that the dismissal was premature under *Laugharn*. This claim is defeated under *Foutch* because the record does not contain a transcript of the hearing of May 9, 2013. In any appeal, it is the responsibility of the appellant to supply a complete record sufficient to permit review of the issues she wishes to raise on appeal. *In re County Treasurer and Ex Officio County Collector*, 373 Ill. App. 3d 679, 684 n.4 (2007). In the absence of such a record, we must presume that the order entered by the trial court was in conformity with the law. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1008 (2007). Thus, lacking any record of the the trial court's reasons for the dismissal, we must presume that the dismissal was not *sua sponte*.

¶ 11 For her final claim, defendant asserts:

> "Neither the allegations in the complaint, the complaint's exhibits, the judgment [n]or any affidavits contained in [the record] establish [plaintiff's] legal or equitable ownership

> of the note or mortgage *** resulting in a void judgment that can be challenged at any time."

Defendant relies on *City National Bank of Hoopeston v. Langley*, 161 Ill. App. 3d 266, 276-77 (1987), for the proposition that omission in the complaint of any of the facts specified in section 15-1504 of the Code (735 ILCS 5/15-1504 (West 2012)) (setting out the form for a mortgage foreclosure complaint)) deprives the court of subject matter jurisdiction to decide the matter.

¶ 12 We first consider defendant's claim that the judgment was premature under *Laugharn*. In *Laugharn*, 233 Ill. 2d at 323, the trial court entered a *sua sponte* dismissal of a defendant's section 2-1401 petition before the 30 days in which the State could file a response or otherwise plead were up. The supreme court ruled that that dismissal "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Laugharn*, 233 Ill. 2d at 323. Here, both parties agree that the 30 days had not run.

¶ 13 Plaintiff asserts, however, that, under *Foutch*, because the record does not contain a transcript of the hearing of May 9, 2013, we must presume that the dismissal was not *sua sponte*. Plaintiff defines *sua sponte* as either " 'without prompting or suggestion [or] on [the court's] own motion.' " It concedes that, under *Laugharn*, a *sua sponte* dismissal would be error. (As we will discuss, this concession is not entirely correct.)

¶ 14 Defendant replies that she was not present at the hearing and that, based on the lack of any motion on file, she presumes that the court acted *sua sponte*.

¶ 15 At first glance, it appears that defendant has the right side of the procedural point. The initiative for the judgment must have been either plaintiff's or the court's. If the initiative was the court's, it would superficially appear that the judgment violated the rule in *Laugharn*. If the initiative was plaintiff's, it must have been on an impermissible unscheduled motion. See 16th

Judicial Circuit Cir. Ct. R. 6.05(c) (eff. June 20, 2001) (providing that "[n]o [nonemergency] motion may be heard unless previously scheduled for hearing on the Court's calendar").

¶ 16 Plaintiff seems to suggest that the instigation for the judgment might fall somewhere between its motion and *sua sponte*. Plaintiff's idea seems to be that, although it did not specifically seek the judgment, it suggested some basis, which was enough to make the decision other than *sua sponte*. We cannot accept this reasoning. If plaintiff requested the relief, it made a motion. A "motion" is nothing more than "an application to the court for a ruling or an order in a pending case." *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005). An application made by hints and indirection is still a motion. Furthermore, rules exist for both how a party can make a motion and for when a court can act *sua sponte*. Plaintiff's argument implies a category of decision apparently governed by no rules at all; we can reject such a suggestion out of hand.

¶ 17 That said, the record does not exclude the possibility of a proper *sua sponte* dismissal. That could have happened if plaintiff made a full waiver of all its possible response rights. Assume that plaintiff appeared on May 9, 2013, and, rather than arguing for a judgment against defendant, told the court that it was irrevocably waiving its right to raise any factual or legal challenge to the petition. As we noted, the *Laugharn* court reasoned that a premature *sua sponte* disposition of a section 2-1401 petition is impermissible because it cuts off the respondent's right to answer or file a responsive motion. However, if the respondent gives up those rights, nothing remains to be cut off. The trial court can then, without procedural impropriety, dismiss the petition *sua sponte* as allowed by the rule in *People v. Vincent*, 226 Ill. 2d 1, 11-12 (2007). A full waiver of response rights is risky, as it will leave the respondent with few options should the court rule in the petitioner's favor. Here, however, that procedure is the possibility that best matches plaintiff's notice to defendant stating that on May 9, 2013, it would "present"

defendant's petition. On *Foutch* principles, this is what we must presume occurred, so that we reject defendant's claim that the judgment was premature.

¶ 18 Defendant, relying primarily on *Langley*, also asserts that the trial court lacked subject matter jurisdiction due to defects in the pleadings. She is incorrect. As we discussed in *Nationstar*, 2014 IL App (2d) 130676, ¶¶ 12-14, *Langley* is no longer good law. The *Langley* court implied that any judgment rendered on a complaint that failed to comply with statutory pleading requirements would necessarily be void for lack of subject matter jurisdiction. *Langley*, 161 Ill. App. 3d at 276-77. In *Nationstar*, we recognized that, to invoke the court's subject matter jurisdiction, an initial pleading need only state a justiciable matter. *Nationstar*, 2014 IL App (2d) 130676, ¶ 12. Moreover, a claim for foreclosure, "even if defectively stated, presents a 'justiciable matter,' *i.e.*, 'falls within the general class of cases that the court has the inherent power to hear and determine.' " *Nationstar*, 2014 IL App (2d) 130676, ¶ 14 (quoting *In re Luis R.*, 239 Ill. 2d 295, 301 (2010)). Finally, although " '[s]tanding is an element of justiciability' " (*In re M.I.*, 2013 IL 113776, ¶ 32 (quoting *People v. Greco*, 204 Ill. 2d 400, 409 (2003)), this is not the same "justiciability" that is required for the court to have subject matter jurisdiction. *Nationstar*, 2014 IL App (2d) 130676, ¶¶ 16-17.

¶ 19 Defendant framed her section 2-1401 petition entirely as one challenging the trial court's jurisdiction to enter the judgments in the foreclosure action. Her jurisdictional argument fails, and, with her claim that the judgment was premature under the rule in *Laugharn* rejected on *Foutch* principles, the trial court's judgment of May 9, 2013, must be affirmed.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm dismissal of defendant's petition.

¶ 22 Affirmed.