

2013 IL App (2d) 130865-U
No. 2-13-0865
Order filed May 6, 2014

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
SECOND DISTRICT

JP MORGAN CHASE NATIONAL ASSOCIATION,)	Appeal from the Circuit Court
)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CH-1707
)	
PAWEL SUDER,)	
)	
Defendant-Appellant,)	
)	
(Right Residential, LLC, Intervenor-Appellee;)	
Wieslawa Redlich, JP Morgan Chase National)	Honorable
Association, Successor by Merger to Bank)	Luis A. Berrones,
One, Defendants).)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* In mortgage foreclosure proceeding, the trial court did not err in entering a supplemental order of possession against defendant and in enforcing his prior written waiver of homestead rights.

¶ 2 Defendant, Pawel Suder, appeals from the judgment of the trial court granting the supplemental petition of Intervenor, Right Residential (Right), for possession of certain premises in Highland Park. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On April 3, 2009, plaintiff JP Morgan Chase National Association (JP Morgan), filed a complaint to foreclose a mortgage on property located at 2374 Green Bay Road in Highland Park (the Property). The complaint named, *inter alia*, Wieslawa Redlich and Suder. The mortgage document attached to the complaint was signed by both Redlich and Suder, but only Redlich was listed as “borrower.” A handwritten notation next to Suder’s signature indicated that he was Redlich’s spouse and was signing “solely for the purpose of waiving all homestead rights.”

¶ 5 Affidavits of service filed with the foreclosure complaint aver that Wieslawa was personally served with the complaint at the Property on April 8, 2009. The affidavits further aver that, though Suder was not home, service on Wieslawa constituted substitute service on him because the Property was his usual place of abode.

¶ 6 On August 16, 2012, the trial court (1) entered a default judgment on the complaint for defendants’ failure to appear or plead; (2) entered a judgment of foreclosure and sale; and (3) appointed a selling officer.

¶ 7 On December 3, 2012, Right filed (1) a petition to intervene; (2) a motion for an order approving the report of sale and distribution; and (3) a motion for an order of possession. Right attached a sheriff’s report stating that Right purchased the Property at a sale on November 27, 2012.

¶ 8 There was a flurry of activity in this case on December 13, 2012. We reconstruct the following chronology of events that day. (1) JP Morgan filed a motion for an order approving the report of sale and for an order of possession. JP Morgan attached the same sheriff’s report that Right had submitted with its own motion. (2) The trial court entered a combined “order approving report of sale and distribution and order of possession.” The order authorized the

sheriff to dispossess and evict Redlich and Suder. (3) Suder filed an appearance and moved to quash service. Suder alleged that the attempted substitute service on April 8, 2009, was ineffective because the Property was not his usual place of abode. Suder averred that he moved from the Property on November 2007 and, from February 2009 through May 2010, was renting an apartment in Chicago, which during that period was his usual place of abode. Redlich filed an affidavit stating that Suder “ceased living with her at [the Property] in contemplation of a divorce and [they] have not lived together since.” (4) The trial court vacated its order approving the sale and set a briefing schedule on the motion to quash. Also on December 13, 2012, the trial court granted Right’s petition to intervene.

¶ 9 On January 29, 2013, JP Morgan filed a motion to vacate the December 13, 2012, order vacating the order approving the sale. JP Morgan alleged that it was never served with Suder’s motion to quash.

¶ 10 On February 8, the trial court granted JP Morgan leave to file a motion to dismiss Suder. The court struck the briefing schedule of December 13, 2012, and entered a new briefing schedule on the motion to dismiss.

¶ 11 On February 25, JP Morgan filed its motion to dismiss Suder because he was not a mortgagor, the mortgage documents contained a waiver of his homestead interest in the Property, and he was no longer living at the Property.

¶ 12 On April 12, the trial court took several actions. First, the court struck Suder’s motion to quash, citing his failure to appear on the motion. Second, the court granted JP Morgan’s motion to dismiss Suder. The court reasoned that Suder had “admitted that he has no interest in [the Property].” Third, the court “reinstated as if never vacated” its December 13, 2012, order approving the report of sale.

¶ 13 On April 25, the trial court entered another combined “order approving the report of sale and distribution and order of possession.” Unlike the December 13, 2012, order, which identified both Redlich and Suder as occupants to be evicted and dispossessed, the April 25 order identified Redlich alone.

¶ 14 On May 2, Right moved to enforce the April 25 order of possession. In the motion, Right acknowledged that, according to Suder’s counsel, Suder was again residing at the Property. Right maintained that the order of possession was still enforceable against Redlich. On May 9, the court issued an order directing the sheriff to immediately dispossess and evict Redlich.

¶ 15 On May 14, Right filed a supplemental petition for an order of possession against Suder. The motion was brought pursuant to section 15-1701(h)(1) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1701(h)(1) (West 2012)), which permits “a supplemental petition for possession against a person not personally named as a party to the foreclosure action.” On July 12, Suder filed a written response contending that, since he had been named in the foreclosure action, proceedings under section 15-1701(h)(1) were not available against him. Suder also argued that he had a homestead right in the Property.

¶ 16 On August 8, the trial court entered a supplemental order of possession against Suder. The court gave Suder no homestead allowance.

¶ 17 Suder filed this timely appeal.

¶ 18 II. ANALYSIS

¶ 19 Suder argues that the trial court erred in granting the order of possession against him and in denying him his homestead rights.

¶ 20 We address first, however, Right's contention that this appeal is moot because Suder failed to perfect a stay of the August 8 supplemental order of possession. Supreme Court Rule 305 (eff. July 1, 2004) governs stays of judgment pending appeal. Rule 305(k) states:

“(k) Failure to Obtain Stay; Effect on Interests in Property. 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.”

¶ 21 Rule 305(k) “protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending appeal.” *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001). The *Steinbrecher* court drew the following elements from Rule 305(k): “(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 a stay of judgment within the time allowed for filing a notice of appeal.” *Id.* at 523-24.

¶ 22 Rule 305(k) does not apply here. The judgment from which Suder appeals is the August 8, 2013, order of possession. Right was made a party to the action long before this order was

issued, and indeed Right was the party that petitioned for the order. Consequently, Suder's failure to perfect a stay does not affect his appeal.

¶ 23 We turn to Suder's contentions on appeal. First, Suder contends that Right's May 14, 2013, petition for a supplemental order of possession was untimely. A petition for a supplemental order of possession may be filed "at any time during the pendency of the foreclosure and up to 90 days after the date of the order confirming the sale ***" (735 ILCS 5/15-1701(h)(1) (West 2012)). Suder contends that the 90-day window must be reckoned from December 13, 2012--the date of the court's first order confirming the sale, which the court vacated but later reinstated "as if never vacated."

¶ 24 As Suder acknowledges, however, he did not raise this timeliness objection in the court below. "It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill.2d 525, 536 (1996). Suder observes that we can (in his words) "overlook waiver under certain circumstances." Indeed, we can "overlook general forfeiture principles in a civil case and consider an issue not raised below if the issue is one of law, is fully briefed and argued by the parties, and the public interest favors considering the issue now." *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 28. Suder remarks that he "did not realize that the Order of April 12, 2013, was made retroactive as he did not appear in Court that day." The retroactivity, however, was explicit in the written order of April 12, 2013, and so Suder had ample notice of this aspect of the order before he filed his July 12, 2013, response to the petition for a supplemental order of possession. The circumstances do not justify our overlooking the forfeiture.

¶ 25 Suder's second contention on appeal is that, since Suder was once named in the foreclosure action, a supplemental petition for possession under section 15-1701(h)(1) was not available to Right. Section 15-1701(h)(1) permits the filing of a supplemental petition "against a person not personally named as a party to the foreclosure" (735 ILCS 1/15-1701(h)(1) (West 2012)). According to Suder, he was "personally named as a party" to the proceedings because he was named at the outset, and his status as a named party necessarily persisted even after his dismissal. As Suder frames it, "the issue presented [on appeal] is whether an exception exists for defendants that are named as [parties] and subsequently dismissed."

¶ 26 The goal of statutory interpretation is to ascertain the legislature's intent, the best indicator of which is the language used, accorded its plain and ordinary meaning. *Fleissner v. Fitzgerald*, 403 Ill. App. 3d 355, 366 (2010). "Under the doctrine of *in pari materia*, two or more statutes concerning the same subject must be construed together in order to produce a harmonious whole." *In re Christopher P.*, 2012 IL App (4th) 100902, ¶ 27. We must construe section 15-1701(h) together with section 15-1508(g) of the Mortgage Foreclosure Law (735 ILCS 5/15-1508(g) (West 2012)), which describes who may be the object of an order of possession:

"An order of possession authorizing the removal of a person from possession of the mortgaged real estate shall be entered and enforced only against those persons personally named as individuals in the complaint or the petition under [section 15-1701(h)]. No order of possession issued under this Section shall be entered against a lessee with a bona fide lease of a dwelling unit in residential real estate in foreclosure, whether or not the lessee has been made a party in the foreclosure. An order shall not be entered and enforced against any person who is only generically described as an unknown

owner or nonrecord claimant or by another generic designation in the complaint.”

(Emphasis added.)

¶ 27 The italicized phrase “who is” indicates the present tense, and the remainder of the italicized language in the passage is consistent with an inquiry that views the state of the pleadings as it exists at the time the order of possession is issued. Hence, the proper scope of an order of possession is determined by which persons are named--either in the complaint or in a supplemental petition for possession--when the order of possession is issued. Accordingly, we interpret section 15-1701(h) to mean that a supplemental petition may be filed against persons who, *at the time*, are not named in the foreclosure proceeding, whether because they were never named or because, like Suder, they were once named and later dismissed.

¶ 28 Though the relevant statutory text unambiguously undermines Suder’s interpretation, we also note the absurdity of the policy his reading would entail. According to Suder’s understanding, once a defendant is successfully dismissed from a mortgage foreclosure proceeding, he falls into limbo and can no longer be reached by an order of possession in that proceeding. The potential for abuse is obvious. A party rightfully named in the original foreclosure complaint because he is an occupant of the premises could avoid eviction by vacating the premises, securing a dismissal on those grounds, and then waiting until the original order of possession is issued before moving back into the premises. Thus, even if we found the governing text ambiguous, we would not be inclined to adopt Suder’s interpretation. See *MD Electrical Contractors, Inc. v. Abrams*, 369 Ill. App. 3d 309, 312 (2006) (“If the language is ambiguous, *i.e.*, susceptible to more than one reasonable interpretation [citation], then we presume that the legislature did not intend to create absurdity, inconvenience, or injustice, and

we must choose a reasonable interpretation over one that leads to absurd, inconvenient, or unjust consequences.”)

¶ 29 Suder also seems to find it significant that, following the order dismissing him as a party, he continued to be listed as defendant in the captions of pleadings and orders. Suder, however, presents no grounds for viewing these as other than scrivener’s errors, which could not, of course, undo the dismissal.

¶ 30 We conclude that, because Suder was named in Right’s petition for a supplemental order of possession, the resulting order of possession was appropriately directed against Suder.

¶ 31 Suder’s final contention on appeal is that the trial court erred by not honoring his homestead rights in the Property. Section 12-901 of the Code of Civil Procedure (Code) (735 ILCS 5/12-901 (West 2012)) provides for homestead rights. The most obvious impediment to Suder’s argument is his purported waiver, in the mortgage documents, of his homestead rights. On this issue, Suder offers this conclusory remark: “Suder’s handwritten waiver on the mortgage does not automatically release his rights to homestead.” Suder cites no authority for this assertion. Section 12-904 of the Code (735 ILCS 5/12-904 (West 2012)) states that “[n]o release, waiver, or conveyance of the [homestead] estate so exempted shall be valid, unless the same is in writing [and] signed by the individual and his or her spouse, if he or she have one ***.” Suder’s handwritten waiver would appear to meet these terms; at least, he has developed no argument to the contrary.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 34 Affirmed.