2014 IL App (2d) 130939-U
No. 2-13-0939
Order filed July 23, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIFTH THIRD MORTGAGE COMPANY, Plaintiff-Appellee, v. MARINA AKOPIAN, UNKNOWN OWNERS, NONRECORD CLAIMANTS, Defendants (Rights Residential Series 1 LLC, Intervenor-Appellee, Rights Residential Series 2, LLC, Petitioner-Appellee, Gary A. Oganov and David G. Oganov, Respondents- Appellants, Gary Doto, a/k/a Gary Dodo, Respondent).	)	Appeal from the Circuit Court of Lake County. No. 11-CH-4060 Honorable Luis A. Berrones, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Respondents failed to establish that the trial court erred in granting petitioner an order of possession following a mortgage foreclosure: they did not establish that they had homestead rights or that a formal error in an earlier judgment prevented the entry of the present order.

¶ 2 Gary A. Oganov (Gary) and David G. Oganov (David) (collectively, respondents) appeal after the court granted the petition for a supplemental order of possession by Right Residential Series 2, LLC (Series 2), which purchased respondents' residence at a post-foreclosure judicial sale. The foreclosure plaintiff was Fifth Third Mortgage Company (Fifth Third) and the property-owner defendant was Marina Akopian. Right Residential Series 1, LLC (Series 1), received leave to intervene as the purchaser and filed an initial petition for possession; this appears to have been the result of a confusion between the Rights Residential entities. Gary Doto, a/k/a Gary Dodo (Doto), was a respondent to the petition for a supplemental order of possession, but did not join respondents in this appeal.

¶ 3 On appeal, respondents assert (1) that the court erred in rejecting respondents' asserted homestead rights as a defense to Series 2's petition for a supplemental order of possession and (2) that we should vacate the supplemental order of possession because it was awarded to Series 2, rather than to the recipient of the original order of possession, Series 1.

¶ 4 We hold that respondents failed to meet their burden of proving the existence of any kind of homestead right. We further hold that, although the record establishes that Series 1 sought confirmation of the judicial sale and received the initial order of possession, respondents have failed to establish that that had an effect on Series 2's ability to get a supplemental order of possession. We therefore affirm the grant of the supplemental order of possession.

¶ 5 I. BACKGROUND

¶ 6 On September 7, 2011, Fifth Third, the original mortgagee, filed a foreclosure complaint relating to the property at 652 Buckthorn Terrace, Buffalo Grove. Akopian, the sole mortgagor, was the sole named defendant. According to the April 16, 2010, mortgage documents, Akopian was "an unmarried woman." No party answered or appeared, and, on July 11, 2012, the court

entered an order of default against Akopian and a judgment of foreclosure in favor of Fifth Third. On December 27, 2012, Series 1, asserting that it was the winning bidder at the judicial sale, filed a motion for leave to intervene and a motion for confirmation of the judicial sale. The court granted those motions and awarded Series 1 an order of possession. A "transcript" of the judicial-sale proceedings was filed on January 29, 2013. This showed that the successful bidder was Series 2 not Series 1. Other documents similarly show that the purchaser was Series 2.

¶ 7 On February 20, 2013, Series 2 filed a petition for a supplemental order of possession. It alleged that respondents and Doto were occupants of the property. Series 2 sought an order for their dispossession. Respondents and Doto filed a response. They asserted the existence of formal defects in the petition that are not relevant in this appeal. They also asserted that Gary was Akopian's husband and, as such, had homestead rights in the property of which he could be divested only by payment of the homestead exemption amount of $15,000. An attached translation of a marriage license showed that Gary and Akopian were married in 1980 in Tbilisi, Georgia (USSR). Series 2 replied, asserting, as to Gary's claim of homestead rights, that those rights had been extinguished no later than when the court approved the sale.

¶ 8 After an August 8, 2013, hearing, the court entered the requested supplemental order of possession in favor of Series 2. Respondents filed a timely motion to reconsider in which they argued that it made no sense to argue that a nonparty's rights could be adjudicated in the foreclosure proceeding. The court denied respondents' motion the day they filed it. Respondents filed a timely notice of appeal that designated the supplemental order of possession and the denial of the motion to reconsider the supplemental order of possession as the orders appealed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, respondents make four claims of error. One, "unless specifically waived, homestead rights are not adjudicated by a judgment of foreclosure, and, therefore, the circuit court erred when it stated that homestead is not a defense to an eviction proceeding or supplemental petition for possession." Two, "the argument of homestead is proper when made at the party's earliest moment, therefore, the circuit court erred when it stated that the argument was untimely." Three, "*res judicata*," that is, the defense of homestead was not *res judicata* in the supplemental possession proceedings. Four, "Series 2 *** had no rights to bring an action against appellants," and the supplemental order of possession should thus be vacated.

¶ 11 No appellee has filed a brief in this case, so this court must decide this appeal under the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976). Under the principles of *Talandis*, a reviewing court has several options when the appellee does not file a brief:

> "[In the absence of an appellee's brief, w]e do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." *Talandis*, 63 Ill. 2d at 133.

Reviewing courts have read the rule in *Talandis* to give them three options: (1) when justice requires, actively seek bases for sustaining the judgment of the trial court; (2) when the issues are

simple, decide the case on the merits; and (3) reverse when the appellant's brief shows *prima facie* error. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). Of course, a decision on the merits requires a stronger showing of error than does a *prima facie* error standard. Thus, an appellant must show at least *prima facie* error to prevail on appeal.

¶ 12 We consider first respondents' claims relating to homestead rights. This group of claims has a simple resolution, and we address them as a group on the merits. All of respondents' claims relating to homestead rights have, as a fundamental but unstated premise, that respondents, or at least Gary, have a right to a homestead exemption in the property. They have failed to show the existence of that right.

¶ 13 "The burden of proving the existence of a homestead is on the one relying on it." *First State Bank of Princeton v. Leffelman*, 167 Ill. App. 3d 362, 366 (1988). The question of whether respondents adequately raised the homestead exemption is an issue of law and therefore subject to *de novo* review. See, *e.g.*, *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 24.

¶ 14 Section 12-901 of the Code of Civil Procedure (Code) (735 ILCS 5/12-901 (West 2010)) creates the homestead exemption. That section states:

> "Every individual is entitled to an estate of homestead to the extent in value of $15,000 *of his or her interest* in a farm or lot of land and buildings thereon, a condominium, or personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence, or in a cooperative that owns property that the individual uses as a residence. That homestead and all right in and title to that homestead is exempt from attachment, judgment, levy, or judgment sale for the payment of his or her debts or other purposes and from the laws of conveyance, descent, and legacy, except as provided in this Code or in Section 20-6 of the Probate Act of 1975. This Section is not applicable

> between joint tenants or tenants in common but it is applicable as to any creditors of those persons. If 2 or more individuals own property that is exempt as a homestead, *the value of the exemption of each individual may not exceed his or her proportionate share of $30,000 based upon percentage of ownership*." (Emphases added.) 735 ILCS 5/12-901 (West 2010).

The emphasized language was added in 1994.[1] See Pub. Act 88-672, § 25 (eff. Dec. 14, 1994). Thus, older cases cannot be assumed to be a reliable guide to the section's interpretation. Under the modern version of the provision, the value of the exemption is limited to the value of the interest of the person claiming it. It follows that, in order to claim the exemption, a person must establish that he or she in fact has a quantifiable interest in the property at issue. Respondents have not alleged any quantifiable interest in the property; they have asserted that they have rights as resident family members, but have not suggested how the value of the right might be quantified.

¶ 15 Further, we recently held in *GMAC Mortgage, LLC v. Arrigo*, 2014 IL App (2d) 130938, that not only must the interest be quantifiable, it must be a *formalized property interest*. The question certified to us on interlocutory appeal was " '[w]hether [under section 12-901 of the Code] a spouse may claim her homestead exemption when that spouse is not on title to the property but is the spouse of the title holder and maintains the property as her primary place of residence.' " *Arrigo*, 2014 IL App (2d) 130938, ¶ 1. We adopted the reasoning of the Seventh Circuit in *In re Belcher*, 551 F.3d 688 (7th Cir. 2008), which required a formalized property

[1] The General Assembly raised the amount of the exemption to its current level effective January 1, 2006, but the structure of the provision did not change. See Pub. Act 94-293, § 5 (eff. Jan. 1, 2006.)

interest for the exemption to apply. *Arrigo*, 2014 IL App (2d) 130938, ¶¶ 19-22. Respondents have not claimed any formalized property interest. Thus, on this basis also, they have failed to demonstrate adequately the right to the exemption.

¶ 16 We now turn to respondents' claim that "Series 2 *** had no rights to bring an action against appellants" and that the supplemental order of possession should thus be vacated. Respondents point out that the court entered the order approving the report of sale and the initial order of possession in favor of Series 1, judgments that never mention Series 2. They further state that Series 1 and Series 2 are "switched all over the record." They challenge Series 2's "capacity" to petition for the supplemental order of possession. However, they do not mention the various documents in the record that show that Series 2 was the purchaser at the judicial sale.

¶ 17 We hold that respondents have failed to state even a *prima facie* case that Series 2 lacks capacity. This holding is not the same as saying that no problem exists with any of the judgments. We read the record to show that the wrong party, Series 1, sought confirmation of the sale and received the original order of possession. Series 2, however, was the successful bidder at the sale. Further, Series 2 took standard jurisdictional steps with regard to the petition for a supplemental order of protection; it filed its petition and served respondents. Thus, it is not clear why Series 2 should not have an order of possession, and respondents provide us with no useful argument or authority that explains why the earlier mistake makes the later order void or voidable.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the grant of the supplemental order of possession.

¶ 20 Affirmed.