2014 IL App (2d) 140198-U
No. 2-14-0198
Order filed November 24, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRSTMERIT BANK N.A., f/k/a Midwest Bank and Trust Co., f/k/a State Bank and Trust;	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CH-1813
J.L. PIAZZA ASSOCIATES, LLC, and JENNIFER L. PIAZZA,	)	
Defendants-Appellants	)	
(Landmark Pointe Subdivision Association, Nonrecord Claimants, and Unknown Owners, Defendants).	)	Honorable Mitchell L. Hoffman, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's foreclosure judgment: without an official record of the relevant hearing, we could not say that the court abused its discretion in denying a motion to vacate the judgment as an improper summary judgment; as it stood, the record indicated that the court properly responded to the motion by converting the summary judgment to a proper default judgment.

¶ 2 The owner of the property in a foreclosure action, J.L. Piazza Associates, LLC (JLPA), and the personal guarantor of the associated note, Jennifer L. Piazza (collectively, defendants), appeal after the judicial sale's confirmation. They ask us to vacate the judgment of default against JLPA and the related judgment of foreclosure against defendants on the basis that plaintiff, FirstMerit Bank, N.A., f/k/a Midwest Bank & Trust Company, f/k/a State Bank & Trust, did not move for the judgment against JLPA. Plaintiff asserts, among other things, that we lack jurisdiction of the appeal as a whole or, alternatively, lack jurisdiction to review the specific orders that defendants challenge. We hold that we have jurisdiction both of the appeal and to review the orders at issue. We further hold that there was no impropriety. We therefore affirm both the challenged orders and the ensuing confirmation of sale.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff, on April 12, 2012, filed a foreclosure complaint relating to the property at 1257 Bayshore Drive, Antioch. The named defendants were defendants and the homeowners' association, Landmark Pointe Subdivision Association. On June 5, 2012, plaintiff filed a motion for default judgment against every defendant. It served JLPA with this motion care of Piazza, described as "member."

¶ 5 Piazza, acting *pro se*, appeared and filed an answer on June 11, 2012. On June 28, 2012, Lou Brydges & Associates P.C. filed a motion assertedly on behalf of both Piazza and JLPA. The motion sought: (1) leave to withdraw Piazza's *pro se* answer; (2) 28 days to file responsive pleadings; and (3) leave to file the appearance of counsel. The court granted the motion. Brydges then filed an appearance on behalf of Piazza only.

¶ 6 On August 21, 2012, defendants not having answered, plaintiff filed a second motion for default judgment against every defendant. It served JLPA care of Brydges.

¶ 7 Piazza obtained a further extension and succeeded in filing an answer. JLPA, however, filed nothing.

¶ 8 On November 14, 2012, plaintiff filed a motion seeking summary judgment against Piazza only. No response was filed.

¶ 9 On June 5, 2013, the court granted the motion for summary judgment. However, the order stated that summary judgment was granted "against defendants J.L. PIAZZA ASSOCIATES, LLC and JENNIFER L. PIAZZA."

¶ 10 A further order entered that day stated that, the "[m]atter coming on to be heard *** on Plaintiff's Motion for Default," Landmark Pointe Subdivision Association, unknown owners, and nonrecord lien claimants, were "defaulted for failure to file an Appearance or Answer."

¶ 11 The court entered a judgment of foreclosure that stated that Piazza and JLPA had filed responsive pleadings and that Landmark Pointe Subdivision Association, unknown owners, and nonrecord lien claimants were defaulted.

¶ 12 As of July 30, 2013, the judicial sale was set for September 10, 2013.

¶ 13 On August 9, 2013, JLPA, represented by Brydges, filed a motion to vacate the summary judgment. That motion noted that plaintiff had not sought summary judgment against JLPA, but that the court granted judgment against it nonetheless. It asked the court to vacate the summary judgment or to amend the judgment to make it against Piazza only. JLPA also sought leave to answer.

¶ 14 The court denied JLPA's motions on September 6, 2013:

> "2) Defendant's motion is denied as there has been an egregious set of circumstances in this matter and there is no overwhelming reason to grant Defendant's

instant motion; further, the court finds there was no summary judgment, but rather a default judgment."

¶ 15 The sale went forward; plaintiff filed a motion for confirmation of the sale on September 12, 2013. It simultaneously filed a motion for entry of a deficiency judgment against JLPA Piazza. JLPA and Piazza filed a response.

¶ 16 On October 7, 2013, Piazza filed a *pro se* appearance. On the same day, she filed what she captioned as a motion on behalf of JLPA to vacate the default judgment. The basis for the motion was her claim that JLPA had never been served with a motion for default judgment. She further filed papers that she captioned as JLPA's responses to the motion for a deficiency judgment and the motion to confirm the sale. She filed separately her own responses to those motions.

¶ 17 Plaintiff replied. It noted that Piazza's October 7, 2013, *pro se* appearance was filed without leave of court and was therefore unauthorized. It further asserted that the other issues that Piazza had raised had already been raised in motions filed by counsel.

¶ 18 On December 11, 2013, the court confirmed the sale and entered a deficiency judgment. The confirmation order also denied "Defendants' Motions to Vacate and Objection to Confirmation." A transcript, filed by defendants as a supplemental record on appeal, shows that, at that hearing, an attorney from Brydges's office appeared; she stated that a miscommunication had occurred and that she had been under the impression that the office had withdrawn. The same transcript also shows that the court reviewed the order it had entered on September 6, 2013. It questioned how the language "no overwhelming reason to grant Defendant's instant motion" had come to appear in the order, and it stated that it had not applied the standard implied by those words.

¶ 19 Piazza filed another *pro se* appearance on January 9, 2014. At the same time, she filed a document that she captioned as the motion of Piazza and JLPA jointly for reconsideration of the confirmation of the sale and the deficiency judgment. The motion for reconsideration essentially restated the argument in JLPA's motion to vacate the summary judgment, noting that plaintiff never moved for summary judgment against JLPA and questioning the court's characterization of the foreclosure judgment as one premised on a *default* judgment against JLPA.

¶ 20 On January 24, 2014, the court entered an order allowing Brydges to withdraw, but striking the motions of Piazza and JLPA on the basis that they had been filed by Piazza personally at a time when Piazza and JLPA were represented by counsel. On February 24, 2014, a Monday, Piazza and JLPA, now represented by counsel, filed a notice of appeal. The orders from which the notice of appeal seeks relief are that confirming the sale and that of January 24, 2014.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendants assert first that, because plaintiff never moved for summary judgment against JLPA, such judgment against JLPA was improper. Defendants recognize that, in ruling on JLPA's motion to set aside the judgment, the court stated that the judgment was a default judgment rather than a summary judgment. However, they also assert that no motion for a default judgment against JLPA was pending and that plaintiff did not follow the procedure for a default judgment set out in the court's standing order. Defendants ask us to vacate "the Default Judgment entered on September 6, 2013[,] and in so doing[,] *** vacate and void the foreclosure." (That order that the court entered on September 6, 2013, is the one that denied JLPA's motion to vacate the summary judgment and that stated that the judgment against JLPA was a default judgment.)

¶ 23 Plaintiff responds first that the appeal is untimely. In particular, it asserts: (1) that, because the court struck the motion that Piazza filed on January 9, 2014, the motion was no longer an effective part of the record and therefore did not extend the time for defendants to file their appeal for 30 days after the court disposed of the motion; and (2) that that motion was "void" because Piazza filed in part on behalf of JLPA and did so before counsel withdrew. It further asserts that the notice of appeal is inadequate in that it refers to the confirmation order and not to the orders that defendants ask us to vacate.

¶ 24 On the merits, plaintiff, among other things, points out that it filed two motions for default. It argues that the second of these, which it filed on August 21, 2012, remained pending when the court entered the orders of June 5, 2013 (which included the foreclosure judgment). It argues that the order of September 6, 2013, which deemed the foreclosure judgment against JLPA to be a default judgment, was a proper *nunc pro tunc* correction.

¶ 25 Defendants reply that the supreme court's holding in *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, ¶¶ 24-31, makes the penalty for unauthorized practice of law a matter for the court's discretion and abrogates the so-called "nonattorney nullity rule," under which any paper filed by a nonattorney on behalf of another was *per se* of no effect.

¶ 26 As we will discuss, we have jurisdiction of this appeal and jurisdiction to grant the relief that defendants seek. However, we will conclude that defendants' argument is insufficiently supported by the record on appeal. We will further conclude that the argument is based on the unsupported premise that the change the court made in the judgment against JLPA on September 6, 2013—changing it from a summary judgment to a default judgment—was a *nunc pro tunc* correction that the court made *sua sponte*. We conclude that the record is most consistent with the change being made in response to the facts raised in JLPA's own motion to vacate.

¶ 27 Initially, we hold that we have jurisdiction of this appeal. We agree with defendants that the holding of *Downtown Disposal* abrogates the nonattorney nullity rule; that rule made *per se* void any paper filed by a nonattorney purporting to represent another.

¶ 28 Moreover, that defendants had counsel when Piazza filed her motion does not change the motion's effectiveness to toll the time for filing the notice of appeal. We addressed the identical issue in a criminal context in *People v. Stanford*, 2011 IL App (2d) 090420.

¶ 29 In *Stanford*, we considered whether an appeal was timely under Illinois Supreme Court Rule 606(b) (eff. Feb. 6, 2013). *Stanford*, 2011 IL App (2d) 090420, ¶ 19. The defendant, although represented by counsel, filed a *pro se* motion for reduction of his sentence. He filed the motion within the allotted period for such a motion. Over the State's objection, the court considered the motion but denied it; the defendant filed a notice of appeal the same day. *Stanford*, 2011 IL App (2d) 090420, ¶¶ 14-17. We noted that the "defendant had no authority to file a *pro se* motion while he was represented by counsel and that the trial court should not have entertained it." *Stanford*, 2011 IL App (2d) 090420, ¶ 20. Nevertheless, we concluded that the motion's unauthorized status did not make it ineffectual to toll the time to file a notice of appeal. *Stanford*, 2011 IL App (2d) 090420, ¶ 20.

¶ 30 As we noted, *Stanford* concerned the interpretation of Rule 606(b). The civil counterpart to Rule 606(b) is Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008). If an improper *pro se* motion is effective to toll the time to appeal under Rule 606(b), *a fortiori* it is effective under Rule 303(a)(1).

¶ 31 Further, that the court struck the motion did not make it ineffectual to toll the time for appeal. The court's striking of the motion removed it from consideration but did not go back in time to unfile it. Both Rule 606(b) and 303(a)(1) refer to the motion's *filing* as the critical step.

Were it the case that the motion's disposition could undo its filing, the timing of notices of appeal, already a matter of some confusion, would be further confused.

¶ 32 As a final jurisdictional matter, we hold that the notice of appeal was sufficient. "[W]hile a notice of appeal is jurisdictional, it is generally accepted that such a notice is to be construed liberally." *People v. Smith*, 228 Ill. 2d 95, 104 (2008). " '[N]otice should be considered as a whole and will be deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal.' " *Smith*, 228 Ill. 2d at 105 (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991)). Here, the notice of appeal cited, among other things, the January 24, 2014, order denying the motion to reconsider. That motion to reconsider was itself based on a claim that the summary judgment against JLPA and the court's subsequent recategorization of that judgment as a default judgment were improper. Therefore, the notice of appeal addresses the same subject matter as defendants' brief. The notice of appeal adequately advised plaintiff of the nature of the appeal.

¶ 33 Turning to the merits of the matter, we hold that defendants have failed to provide a record of the relevant proceeding sufficient to support their claim of error. The order entered on September 6, 2013, was the one that denied JLPA's motion to vacate the summary judgment and stated that the judgment against JLPA was a default judgment.[1] We review for an abuse of

[1] Although JLPA filed its motion to vacate the default more than 30 days after the entry of the foreclosure, the judgment remained modifiable under the standard applicable to nonfinal judgments until plaintiff filed its motion to confirm the sale. See *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27 (holding that the relatively liberal standards of section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012)) apply in a

discretion a court's ruling on a motion to vacate a judgment in a nonjury case. *E.g.*, *Steiner v. Eckert*, 2013 IL App (2d) 121290, ¶ 16. Where a court's ruling is discretionary, under the rule in *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), we generally cannot reverse that ruling absent a record sufficient to show the basis for the court's decision.

¶ 34 Under *Foutch*, the "appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392. The supreme court ruled in *Foutch* that, where the record showed that the court, in denying a motion to vacate a judgment, considered material adduced at the hearing, but the record did not show what those matters were, it, as the reviewing court, was required to presume that the material adduced was sufficient to support the denial. *Foutch*, 99 Ill. 2d at 393-94.

¶ 35 The circumstances here closely match those in *Foutch*. The September 6, 2013, order denying JLPA's motion to vacate the foreclosure refers to "egregious circumstances" as part of the court's basis for denying the motion to vacate. The record does not show what those circumstances were. The record does show that a motion for default judgment was pending against JLPA when the court entered the judgment of foreclosure. Thus, based on the record we do have, the court's decision to modify the summary judgment to a default judgment was a natural response to JLPA's having brought attention to what was essentially an error of form in the foreclosure judgment. Further, lacking a record of the hearing, we cannot know whether issues of notice and scheduling were addressed. We thus must presume that the court had a

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foreclosure until the filing of the motion for confirmation).

proper reason for concluding that any violation of the standing order on motions for default judgments did not preclude its characterizing the judgment it previously had labeled a summary judgment as a default judgment.

¶ 36 We do note that the standard implied by the order of September 6, 2013, that "there is no overwhelming reason to grant Defendant's instant motion," was not consistent with any standard for consideration of a motion to vacate. However, the court, in denying the final motion to reconsider, made clear that that was not the standard that it used.

¶ 37 As a final matter, we note that we took with the case plaintiff's motion to strike defendants' reply brief on the basis that it referred to a transcript that was not a part of the certified record on appeal. We deny the motion. We granted defendants leave to file the transcript as a supplemental record. Moreover, as our disposition makes clear, plaintiff suffers no prejudice from our consideration of the reply or, for that matter, of the transcript.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the foreclosure judgment and the ensuing confirmation of the sale.

¶ 40 Affirmed.