2014 IL App (2d) 140456-U
No. 2-14-0456
Order filed December 23, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST MIDWEST BANK (as successor in interest to the FEDERAL DEPOSIT INSURANCE CORPORATION solely as receiver for FIRST DU PAGE BANK),	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 10-CH-6692
IRED ELMHURST, LLC; INTERNATIONAL REAL ESTATE DEVELOPMENT, LLC; INTERNATIONAL LAND DEVELOPMENT CORPORATION; INLAND MORTGAGE DIRECT FUNDING CORPORATION; UNKNOWN OWNERS and NONRECORD CLAIMANTS,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying the plaintiff's motion to re-open the case and substitute as party plaintiff. We remand for further proceedings.

¶ 2 On November 29, 2010, the plaintiff, First Midwest Bank (First Midwest), filed a three-count complaint to foreclose a mortgage against the defendant, IRED Elmhurst, LLC (IRED

Elmhurst) (count one), and to recover any deficiency from the guarantors of the related note, the defendants, International Real Estate Development, LLC (IRED) (count two) and International Land Development Corporation (ILDC) (count three). On July 27, 2011, the trial court entered summary judgment in favor of First Midwest on all three counts. In January 2012 the trial court approved the foreclosure sale and administratively closed the case. On February 5, 2014, The National Bank (TNB) filed a motion to re-open the case, to substitute as party plaintiff, and to award it damages on counts two and three of the complaint. The trial court denied the motion. We reverse and remand for additional proceedings.

¶ 3 I. BACKGROUND

¶ 4 In November 2007, First Du Page Bank (First Du Page) loaned IRED Elmhurst $11,624,243. The loan was evidenced by a promissory note. Security for the note included a construction loan agreement, a mortgage for the property at 111 West Third Street in Elmhurst, and an assignment of rents and leases. Additionally, IRED and ILDC executed a guaranty of payment on the note, guaranteeing performance and prompt payment of the obligations of the borrower, IRED Elmhurst.

¶ 5 On October 23, 2009, the Illinois Department of Financial and Professional Regulation Division of Banking closed First Du Page and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. On that same day, First Midwest obtained certain assets of First Du Page, including the note, the mortgage, and the guaranty at issue in this case.

¶ 6 On November 29, 2010, First Midwest filed a three-count complaint for foreclosure and other relief related to the loan documents at issue. Count one was a claim to foreclose the aforementioned mortgage against IRED Elmhurst. Counts two and three were against IRED and ILDC to recover on the guaranty.

¶ 7 On May 20, 2011, First Midwest filed a motion for summary judgment. On July 27, 2011, the trial court granted First Midwest's motion for summary judgment on all three counts of the complaint. On August 12, 2011, the trial court entered a judgment for foreclosure and sale. On November 28, 2011, TNB purchased the subject loan documents and guaranty from First Midwest. On December 1, 2011, the sheriff conducted the foreclosure sale and First Midwest was the successful bidder. On January 6, 2012, the trial court entered an order approving the sale and entered a deficiency judgment against IRED Elmhurst in the amount of $8,527,840. On January 27, 2012, the trial court entered a written order approving the court-appointed receiver's final report, discharging the receiver, and striking all future dates.

¶ 8 On February 5, 2014, TNB filed a motion to re-open the case, to substitute it as party plaintiff, and to enter a judgment on counts two and three of the complaint in the amount of $8,527,840.50. On March 13, 2104, IRED and ILDC (hereinafter "the defendants") filed a response to the motion. The defendants argued that the motion to enter judgment on the guaranty was barred as it was not filed within 30 days of the order approving the foreclosure sale. Additionally, they argued that it was inequitable to re-open the case, enter judgment on the guaranty, and allow the substitution of parties so long after the litigation had ceased.

¶ 9 On April 11, 2014, a hearing was held on TNB's motion. TNB's attorney argued that by the time he came into the case, he was not aware of the guaranty. He did not become aware of the guaranty until his client had called and asked what had become of the claims based thereon. That was when he realized there had never been a dollar amount as to the judgments on counts two and three and that the case should not have been administratively closed in January 2012. As a result, TNB filed the motion at issue.

¶ 10 TNB argued that there was no harm in reopening the case because the statute of limitations had not run on the claims to recover on the guaranty. The guaranty was a contract and governed by a 10-year statute of limitation. TNB further argued that it had not waived the claims as to counts two and three by only seeking a deficiency as to count one, because a deficiency based on a guaranty would have to be entered separate and apart from the foreclosure claim. TNB clarified that it was not seeking to attack the foreclosure claim; it was just seeking to obtain final judgments as to counts two and three of the complaint. TNB acknowledged that if the case was reopened, the defendants would have an opportunity to argue waiver, laches, or that the amount bid on the property was too low.

¶ 11 The defendants argued that once the trial court entered the order approving the sale, all of the previous orders in the case became final and appealable. Thereafter, under the foreclosure law, TNB only had 30 days to seek modification of any of the previous orders. The defendants further argued that TNB failed to bring counts two and three to judgment and there were no remedies for that failure.

¶ 12 Following argument, the trial court stated that it was bound to apply the standard set forth in section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The trial court found that the final order in the case was the order approving the foreclosure sale. The trial court stated that the case could not be re-opened more than two years after the final order and that TNB had not shown diligence. The trial court believed that it lacked jurisdiction to re-open the case, and thus denied the motion. The trial court stated that it was not making a ruling on the propriety of TNB filing a new contract action against the defendants to recover on the guaranty. Thereafter, TNB filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 On appeal, TNB argues that the trial court erred in denying its motion. TNB argues that it was improper to apply section 2-1401 to its motion because that section only applies to final orders and there had been no final order entered on counts two and three of the complaint. TNB also argues that the trial court erred in not granting its request to substitute as party plaintiff. Where, as in this case, the underlying issues are legal rather than factual, we will review the trial court's determination *de novo*. *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 24.

¶ 15 The purpose of a motion brought pursuant to section 2-1401 is to seek relief from a final judgment brought more than 30 days after the judgment's entry. See 735 ILCS 5/2-1401 (West 2012); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). Generally, a section 2-1401 petition must be filed within two years of the final order or judgment, the petitioner must allege a meritorious defense to the original action, and the petitioner must show that the petition was brought with due diligence. 735 ILCS 5/2-1401(b), (c) (West 2012); *Sarkissian*, 201 Ill. 2d at 103.

¶ 16 In the present case, the trial court erred in treating TNB's motion as a motion pursuant to section 2-1401 because the motion was not attacking a final order. Under Illinois law, a deficiency judgment cannot be entered against the guarantor of a note in a foreclosure action without separately pleading for that relief. *Hickey v. Union National Bank & Trust Co. of Joliet*, 190 Ill. App. 3d 186, 190 (1989). "[A] mortgage and accompanying promissory note constitute separate contracts. A legal remedy for each instrument cannot be pursued in a single count foreclosure action." *Id.* Similarly, a guaranty is yet a third contract that also cannot be used as a basis for relief in a single-count foreclosure complaint. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2004). A judgment of foreclosure does not bar a later suit on a guaranty because

the foreclosure judgment does not adjudicate the defendant's rights and liabilities under a guaranty contract. *Id.* at 242.

¶ 17 Here, TNB separately pleaded to recover on the guaranty in counts two and three of the complaint. TNB's motion to re-open the case was not attacking the final judgment on the foreclosure claim (count one). Rather, it was seeking to re-open the case so that the parties could obtain a damage award on counts two and three of the complaint. It is well settled that the trial court retains jurisdiction until it has disposed of all matters before the court. *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1038 (1993). As such, in the present case, the trial court's jurisdiction continued after the entry of the order approving the foreclosure sale because no final judgment was ever entered on counts two and three of the complaint, which alleged a completely separate basis for relief. TNB's motion to re-open did not seek to amend or change the order relative to the foreclosure sale; it pertained solely to the non-foreclosure counts of the complaint. For the foregoing reasons, the trial court erred in treating TNB's motion as a section 2-1401 petition, because the motion was not attacking a final order, and in finding that it lacked jurisdiction to re-open the case.

¶ 18 The defendants argue that abuse of discretion is the proper standard of review because that is the standard that applies to motions to re-open a case. However, the cases cited by the defendants in support of this proposition have to do with re-opening a case to consider further evidence after closing argument (*People v. Millender*, 140 Ill. App. 3d 504, 511 (1986)) or after the party rested its case (*Country Life Insurance Co. v. Goffinet*, 117 Ill. App. 2d 338, 343 (1969)). These cases are factually inapposite to the circumstances in the present case. Moreover, even if we applied the abuse of discretion standard of review, our determination would not change. Because the trial court improperly treated TNB's motion as a section 2-1401

petition, it necessarily abused its discretion. See *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 24 (2009) (a trial court abuses its discretion when its ruling rests on an error of law).

¶ 19 The defendants also argue that the order granting summary judgment on counts two and three became a final order once the order approving the foreclosure sale was entered. However, as explained above, the claims on the guaranty had to be filed separately from the foreclosure claim and the recovery on the guaranty could not be entered as part of the foreclosure claim. *Goldstein*, 349 Ill. App. 3d at 241; *Hickey*, 190 Ill. App. 3d at 190. Further, a foreclosure judgment does not bar a separate claim on the guaranty. *Goldstein*, 349 Ill. Ap. 3d at 242. Accordingly, although the order approving the sale was the final order with respect to the foreclosure claim, count one, it was not a final order as to counts two and three. Counts two and three sought a money judgment and there was no monetary award included in the order granting summary judgment. As the summary judgment order did not address the issue of damages, it was not a final appealable order because it did not finally terminate the litigation between the parties on counts two and three and did not completely dispose of the action. *Rotogravure Service, Inc. v. R. W. Borrowdale Co.*, 36 Ill. App. 3d 606, 610 (1975).

¶ 20 The defendants further argue that section 15-1509(c) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1509(c) (West 2010)) bars TNB's claim for a deficiency judgment against the guarantors. Section 15-1509(c) states:

> "Any vesting of title by a consent foreclosure * * * or by deed * * * shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure * * *. Any person seeking relief from any judgment or order entered in the foreclosure in accordance with subsection (g) of Section

> 2-1301 of the Code * * * may claim only an interest in the proceeds of sale." 735 ILCS 5/15-1509(c) (West 2012).

Section 15-1509(c) acts as a bar to claims on the property that was the subject of the foreclosure. See *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 14 ("[u]nder section 15-1509, the party aggrieved by an erroneous judgment and a sale pursuant to that judgment cannot challenge the sale, and the court must limit the relief from an erroneous judgment to a claim for the proceeds from the sale"). In this case, TNB's claims for breach of contract on the guaranty are not claims on the property, but rather are claims against the defendants. As such, section 15-1509(c) does not bar TNB's claims.

¶ 21 TNB's next contention on appeal is that the trial court erred in denying its request to substitute itself as party plaintiff in this case. Section 2-1008(a) of the Code allows for substitution of parties, before or after judgment, if a party in interest has changed due to an assignment. 735 ILCS 5/2-1008(a) (West 2012). The defendants do not dispute that TNB purchased the loan documents at issue. The defendants argue only that TNB should not be granted leave to substitute as party plaintiff because it did not exercise diligence in seeking substitution. In support, the defendants cite *LaMere v. Vaughn*, 34 Ill. App. 3d 261 (1975). In that case, the trial court denied the plaintiff's motion that sought to vacate an order dismissing his cause of action because the plaintiff failed to establish diligence in seeking to vacate the dismissal order. *Id.* at 264. In this case, TNB is not requesting to vacate any previous judgments and we find the facts in *LaMere* to be inapposite. The defendants argue that there is no justification for the 27-month lag between the time TNB purchased the loan documents and the filing of the motion at issue "especially where the [m]otion seeks to amend or modify an order." Again, the defendants are not seeking to amend or modify any previous orders as there had never

been a final order on counts two and three of the complaint. As such, there was no reason for the trial court to deny TNB's motion to substitute as party plaintiff.

¶ 22 In so ruling, we reject the defendant's argument that TNB has waived its rights to seek any relief. The defendants rely on *Resolution Trust Corporation v. Holtzman*, 248 Ill. App. 3d 105 (1993), for the proposition that TNB waived its right to prosecute the guaranty claims. In that case, the plaintiff had filed a two-count complaint, seeking to foreclose a mortgage (count one) and to obtain a deficiency judgment from the guarantor (count two). *Id.* at 108. Following a judicial sale, the plaintiff sought an order confirming the sale and applied for entry of a judgment on count two of the complaint which would impose a deficiency judgment against the guarantor. *Id.* at 109. Thereafter, the trial court entered an order confirming the sheriff's sale and a judgment against the guarantor on count two of the plaintiff's complaint in the amount of the deficiency. *Id.* at 110.

¶ 23 Based on the procedure used in *Holtzman*, the defendants argue that a plaintiff is required to seek a deficiency judgment on a guaranty as part of the order approving the sale. While the trial court in *Holtzman* did enter a deficiency judgment against the guarantor on count two of the complaint as part of the order approving the foreclosure sale, there is no indication in that case that such a procedure was "customary" or that the failure to seek a deficiency judgment against a guarantor at the time of the order approving the sale acts as a bar to such claims. Moreover, "[i]t is *** settled that, upon default, the mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage. 'These remedies may be pursued consecutively or concurrently.' " *Goldstein*, 349 Ill. App. 3d at 241, quoting *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (1985). Accordingly, this specific argument as to waiver is without merit.

¶ 24 In summary, we hold that the trial court erred in denying TNB's request to re-open the case and in not allowing it to substitute as party plaintiff. At the hearing on TNB's motion, TNB acknowledged that if the case was reopened, the defendants would have an opportunity to argue waiver, laches, or that the amount bid on the property was too low. In its appellant's brief, TNB again states that once the case is reinstated, the defendants are still entitled to have a hearing as to the amount of liability. Accordingly, we remand the matter for further proceedings where the trial court can address in the first instance any other arguments as to waiver or laches, and where the parties can further litigate the appropriate amount of damages, if any, on counts two and three.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the judgment of the circuit court of Du Page County and remand for additional proceedings consistent this order.

¶ 27 Reversed and remanded.