2016 IL App (2d) 160706-U
No. 2-16-0706
Order filed September 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST TENNESSEE BANK, NA,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-2632
	)	
KYLE KINZY and JACKI KINZY,	)	Honorable
	)	Louis A. Berrones,
Defendants-Appellants,	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice McLaren specially concurred in the judgment.

ORDER

¶ 1 *Held*: Where property at issue in appeal of confirmation order was transferred to a third party, appeal was moot in accordance with Illinois Supreme Court Rule 305(k) (eff. July 1, 2004).

¶ 2 I. INTRODUCTION

¶ 3 Defendants, Kyle and Jacki Kinzy, appeal an order of the circuit court of Lake County confirming the judicial sale of a residence (the "subject property") securing a note held by plaintiff, First Tennessee Bank, N.A., (as successor by merger to First Horizon Home Loan Corp.). Plaintiff states that after this case was fully briefed on March 17, 2017, it sold the subject

property to a third party on May 8, 2017. On this basis, plaintiff moves to dismiss this appeal as moot in accordance with Illinois Supreme Court Rule 305(k) (eff. July 1, 2004). For the reasons that follow, we agree with plaintiff and dismiss this appeal.

¶ 4 II. BACKGROUND

¶ 5 First Horizon Home Loan Corporation was a wholly owned subsidiary of plaintiff at the time the loan at issue in this case was made, and it merged into plaintiff on May 31, 2007. First Horizon financed defendants' purchase of the subject property. The proceedings leading to this appeal began on July 14, 2009, when a complaint to foreclose the mortgage on the subject property was filed. On April 9, 2010, the complaint was amended for a first time. In May 2011, defendants filed various affirmative defenses and counterclaims, including an allegation that the mortgage was a forgery. Plaintiff filed a second-amended complaint on August 3, 2011. On October 24, 2013, the trial court dismissed defendants' counterclaims. Defendants filed their first amended counterclaims and cross claims on July 16, 2014, and the trial court dismissed them because defendants had not obtained leave of the court to file them.

¶ 6 On January 15, 2015, plaintiff filed a third-amended complaint. On February 13, 2015, defendants filed a motion to extend time to respond to the complaint, as Jacki had filed for bankruptcy on February 5, 2015. On March 12, 2015, plaintiff filed a motion a motion to remove the case from the bankruptcy docket as the bankruptcy stay had terminated. Defendants filed a motion to extend time to respond to plaintiff's third-amended complaint; the motion was set for April 9, 2015. The trial court gave defendants until April 15, 2015, to respond to the complaint. On that date, defendants filed another motion for an extension of time "so the motion to dismiss or answer, affirmative defenses and counterclaim may be filed outside of the automatic stay of the bankruptcy court." Plaintiff opposed the motion because the stay had

already terminated. In a May 6, 2015 order, the trial court, *inter alia*, denied defendants' motion for an extension of time "for the reasons stated on the record." It also granted plaintiff's motion for a default judgment. On June 5, 2015, defendants filed a motion to vacate the default judgment. The trial court denied this motion on July 29, 2015.

¶ 7 Plaintiff purchased the subject property on April 19, 2016, for a credit bid of $1,060,000 in a judicial sale. On July 27, 2016, the trial court entered an order confirming the judicial sale of the subject property. No deficiency judgment was entered in the bankruptcy case

¶ 8 Defendants filed the notice that initiated this appeal on August 26, 2016. The notice states that defendants are appealing "the Nineteenth Judicial Circuit Court of Lake County's Order of July 27, 2016, which Order granted Plaintiff's Motion to Confirm Sale and denied Defendants' requests for relief." Defendants did not seek a stay of the execution of this order. The order confirming the sale also provided that defendants' objections to the confirmation were overruled and that all of defendants' outstanding motions were "denied for reasons stated on the record."

¶ 9 In an affidavit attached to its motion to dismiss this appeal as moot, Nick Volpe (a vice president of plaintiff's) avers that plaintiff received an offer to purchase the subject property for $510,000 from a third party (Ninos Shiba). Plaintiff made a counteroffer of $515,000. The counter offer was accepted and the property was sold to Shiba on May 8, 2017. Additional supporting documents, including an "arm's-length affidavit," are attached to the affidavit as well.

¶ 10 III. ANALYSIS—PLAINTIFF'S MOTION TO DISMISS THE APPEAL

¶ 11 Defendants raise a number of issues in this appeal; however, as plaintiff's motion to dismiss appears dispositive, we will examine it first. Plaintiff contends that the sale of the subject property moots this appeal. An appeal becomes moot when events occurring after the

filing of the appeal make it impossible for the reviewing court to order effective relief. *Whitten v. Whitten*, 292 Ill. App. 3d 780, 784 (1997).

¶ 12 At issue here is the application of Illinois Supreme Court Rule 305(k) (eff. July 1, 2004), which provides, in pertinent part, as follow:

> "If a stay is not perfected within the time for filing the notice of appeal * * * 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."

This rule "protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal." *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001). Extrinsic evidence may be considered in determining whether an appeal is moot, and such facts may be presented by affidavit. *La Salle National Bank v. Chicago*, 3 Ill. 2d 375, 379 (1954). Furthermore, facts set forth in an affidavit that are not contradicted are to be taken as true. *Barber-Coleman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1078 (1992).

¶ 13 This would seem to be a fairly simple matter. The order confirming the sale of the subject property was a final order. *CitiMortgage, Inc. v. Sharlow*, 2014 IL App (3d) 130107, ¶ 19. It was not stayed. Plaintiff has submitted affidavits averring that the subject property was conveyed to a third party after the confirmation order became final, and defendants have not

submitted *evidence* to the contrary. As such, the conditions set forth in Rule 305(k) have been established and this court could not, pursuant to that rule, issue an order that would affect the interests of that third party. The appeal is therefore moot.

¶ 14 Defendants, however, raise a host of issues seeking to avoid this straightforward result in their response to plaintiff's motion to dismiss this appeal. Defendants began their response with a narrative of the underlying facts of this case. The relative merits of the underlying action have no bearing on whether the subject property was transferred to a third party. If that has happened (as plaintiff's affidavits indicate), even if defendant had been entitled to prevail on the merits, Rule 305(k) limits our power to render any relief. See *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 3.

¶ 15 Defendants next contend that plaintiff's motion and the new documents attached to it are "untimely and waived." Defendants assert plaintiff "raises new facts and arguments in its [m]otion to [d]ismiss which were not made in its [r]esponse [b]rief * * * and those new arguments have accordingly been waived." However, briefing was completed on March 17, 2017, and the subject property was not sold until May 8, 2017. Obviously, plaintiff could not have raised mootness during briefing when the events that caused the appeal to become moot did not take place until nearly two months after briefing was completed. Defendants suggest that plaintiff waited until briefing was completed to sell the property, citing nothing in support. What plaintiff's possible motivation to deliberately proceed in such a manner would have been is not apparent to us—had the property sold prior to the completion of briefing, plaintiff could have easily raised this issue in its brief. Defendants also complain of the new documents submitted by plaintiff in support of the motion. However, mootness has been raised successfully in other cases following the conclusion of briefing. See *Marion Hospital Corp. v. Illinois Health*

Facilities Planning Board¸ 201 Ill. 2d 465, 469, 475 (2002). Moreover, as explained earlier, such evidence may be presented by affidavit. See *La Salle National Bank*, 3 Ill. 2d at 379. Indeed, defendants cite no legal authority to support their contention that the trial court could not consider such documents, forfeiting the issue. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19.

¶ 16 Defendants next attack the contents of the supporting documents submitted by plaintiff. Defendants contend that the "arm's-length affidavit" submitted by plaintiff was not presented by an actual officer of plaintiff and asserts that the failure of any "actual human being" to aver to its contents undermines its credibility. However, even a cursory comparison of the signature on this affidavit and that of the supporting affidavit executed by Volpe shows that Volpe signed the arm's-length affidavit. Thus, defendants' contentions lack a foundation. Defendants also make much out of the introductory phrase of the arm's-length affidavit: "[Plaintiff] is negotiating a sale of [the subject property]" and, according to defendants, "will require" certain assurances of the parties to the sale. This is not what the introductory paragraph says. In fact, the sentence defendants paraphrase as "will require" reads as follows: "As a condition of the Seller's agreeing to a sale of the Property to the Buyer, Seller expressly requires that Buyer's and Seller's real estate agents (collectively 'Agent') each truthfully represent, affirm, and state as follows." The document then sets forth 12 propositions, most of which concern the arm's-length nature of the transaction. Contrary to defendants' claims, the introductory sentence set forth above does not render the propositions that follow meaningless. The document is then executed by Mike Muisenga (on the buyer's behalf) and Volpe. Defendants make other complaints, such as the fact that despite there being places on the arm's-length affidavit for attorneys to sign, none actually did so. However, they cite nothing to establish that such an affidavit is insufficient if

executed by one party from each side of the transaction. The failure to provide legal support for an argument forfeits the issue. *Gakuba*, 2015 IL App (2d) 140252, ¶ 19.

¶ 17 Defendants contend that, contrary to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2016)), the arm's-length affidavit was executed under federal and Tennessee penalties of perjury. According to defendants, section 1-109 requires the affidavit to be executed "[u]nder penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure." 735 ILCS 5/1-109 (West 2016). We note that section 1-109 requires only substantial compliance. See *Walker v. Monreal*, 2017 IL App (3d) 150055, ¶ 18. Defendants make no attempt to establish (and cite nothing to support) the proposition that referencing the federal law or the law of another state does not constitute substantial compliance, thus forfeiting this contention. *Gakuba*, 2015 IL App (2d) 140252, ¶ 19. Defendants also cite Illinois Supreme Court Rule 341(b)(2) (eff. Jan. 1, 2016) without explaining why it applies—on its face, it concerns motions concerning the length of appellate briefs.

¶ 18 Again without explanation, defendants assert that Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) applies here. By its own terms, Rule 191 concerns "proceedings under sections 2-1005, 2-619 and 2-301(b) of the Code of Civil Procedure." Plaintiff's motion is authorized by Illinois Supreme Court Rule 361(h) (eff. Jan. 1, 2015). By failing to explain why this rule applies or cite anything so indicating, defendants have forfeited this claim as well. *Gakuba*, 2015 IL App (2d) 140252, ¶ 19. Defendants cite rule 361(h), which requires a movant of a dispositive motion on appeal to submit additional evidence, as necessary, to support the motion. Defendants then identify various documents—the relevance of much of which is not made clear (*i.e.*, "the agreement of the controlled business arrangement providing that Mr. Braverman is providing services for and being paid by the title company")—that were not submitted with

plaintiff's motion. Our role is to evaluate what was provided, not speculate about what else might have been provided, and determine if the motion should be granted based on what is before us.

¶ 19 Defendants next identify numerous purported discrepancies between the real estate contract for the subject property and the settlement statement which, they claim, establish that "there were undisclosed special understandings among the parties thereto." First of all, we note that the parties averred that no such special understandings existed. Specifically, they averred, "The Buyer, nor any person or entity affiliated with the Buyer, will receive any funds or commissions from the sale of the Property." They further averred that there was no shared business interest between the seller and buyer. As such, it is hard to see how any material "special understanding" could undermine the arm's length nature of the sale. Other so-called discrepancies identified by defendants include that the real estate contract specifies a cash transaction while the settlement statement reveals that the buyer secured a loan, that the closing occurred after the period specified in the contract, and neither party initialed a section called "*Confirmation* of Dual Agency." (Emphasis added.) A dual agent was used. In a conclusory fashion, defendants assert that plaintiff's "withholding of the written agreements with the dual agent realtor make it that much less likely that an arm's length transaction actually took place." We do not follow defendants' logic and fail to see how any of these purported discrepancies leads to the conclusion that the sale was anything but an arm's-length transaction.

¶ 20 Accusing plaintiff of engaging in "double speak," defendants disingenuously characterize the record. They claim the arm's-length affidavit states that the buyer will receive funds from the sale of the property. The sentence defendants are relying on here states, "The Buyer, nor any person or entity affiliated with Buyer, will receive any funds from the sale of the property." The

use of the word "nor" in the clause following the first instance of "Buyer" indicates that "neither" should have appeared at the beginning of the sentence. Defendants fail to persuade by attempting to make this scrivener's error into more that it obviously is.

¶ 21 Defendants' next argument concerns the use of the term "affiliated" in the arm's-length affidavit. The affidavit defines "affiliated" to include persons "controlled by, controlling, or in common control of the other entity." Defendants contend that this definition encompasses the buyer's real estate agent, attorney, and lender. In paragraph six of the arm's-length affidavit, it was stated that no agent of the seller or buyer will receive any proceeds from the sale other than as specified on the final closing statement. Defendants point out that disbursements to these individuals are not, in fact, reflected on the settlement statement. However, defendants also acknowledge that such disbursements are "common." Assuming, *arguendo*, that the documents in question are not absolutely congruent, we fail to see how "common" disbursements in the course of a real estate transaction support an inference that the transaction was somehow less than arm's length even if they were not properly reflected in certain documents. If anything, the occurrence of disbursements that are "common" confirms that this was an ordinary transaction. We find this point unpersuasive as well.

¶ 22 Defendants' contention that the sale price of the property was unreasonably low is not supported by meaningful evidence. They cite the "Zillow 'Zestimate' " without explaining how it is we could take judicial notice of such a thing. They also point out that the price paid by Shiba, $515,000, was considerably less than the price at the judicial sale of $1,060,000. While true, defendants ignore the fact that the price at the judicial sale represented a credit bid from plaintiff. As such, its relationship to the fair market value of the property is dubious. See *MidFirst Bank v. Chase*, 234 P.2d 877, 880 (Ariz. Ct. App. 2012) (holding amount of credit bid

inadmissible to show fair market value); *Marble Bank v. Commonwealth Land Title Insurance Co.*, 914 F. Supp. 1252, 1255 (E.D.N.C. 1996) ("Plaintiff also argues that the price it paid for the project at the foreclosure sale, $10.2 million, confirms that the project was worth at least $10 million. Although foreclosure price may be evidence of fair market value, plaintiff's bid on the project represented little more than a credit bid. * * * Without the possibility of a deficiency action on that note, plaintiff had no other option but to bid up to the full amount of the three notes it owned on the project if it wanted any opportunity to recover on the March note.").

¶ 23 Defendants next reference a public-affairs news release from the United States Department of Justice stating that plaintiff agreed to pay $212.5 million "to resolve allegations that it violated the False Claims Act by knowingly originating and underwriting mortgage loans insured by the U.S. Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA) that did not meet applicable requirements." https://www.justice.gov/opa/pr/first-tennessee-bank-na-agrees-pay-2125-million-resolve-false-claims-act-liability-arising (last visited August 14, 2006). Defendants cite nothing that would allow us to consider plaintiff's conduct in a matter unrelated to the instant case. Further, we note that the conduct at issue in the collateral matter involved fraud between plaintiff and a government agency and there was no suggestion in the article that plaintiff engaged in any wrongful conduct with regard to mortgagors. Defendants also point to a statement in the release stating plaintiff sold its subsidiary First Horizon to MetLife Bank N.A. in August 2008. According to defendants, this undercuts plaintiff's claim that it acquired their mortgage through merger with First Horizon (who was a wholly owned subsidiary of plaintiff) in May 2007. However, defendants cite nothing that would indicate that plaintiff could not bring an action on a note originated by a wholly owned subsidiary, even absent a merger. Moreover, this article is

not evidence, so we need not consider it further. See *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). Parenthetically, to the extent this argument implicates standing, it would have properly been raised in a response to plaintiff's third-amended complaint, which defendants declined to file, which forfeits the issue. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (holding that "a lack of standing will be forfeited if not raised in a timely manner in the trial court"). Similarly, defendants attempt to raise the validity of the note in response to plaintiff's motion to dismiss this appeal; such matters should have been raised in a response to the third-amended complaint.

¶ 24 Defendants next complain that their due process and equal protection rights have been violated. No authority supports these claims, save a general citation to the Fourteenth Amendment. U.S. Const. Amend. XIV. Again, such matters would have appropriately been raised before the trial court in response to plaintiff's third-amended complaint. See *Sherman v. Indian Trails Public Library District*, 2012 IL App (1st) 112771, ¶ 21 ("In civil cases, constitutional issues not presented to the trial court are deemed forfeited and may not be raised for the first time on appeal."). We note that defendants assert that monetary damages would be sufficient and that specific performance is not necessary to make them whole. However, the sole order specified in the notice of appeal is the confirmation order, so our jurisdiction is limited to it. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979) ("Thus, it is often stated that a notice of appeal confers jurisdiction on a court of review to consider only the judgments or part thereof specified in the notice of appeal."). In short, we find defendants' constitutional arguments both undeveloped and unpersuasive.

¶ 25 Defendants claim that plaintiff's motion to dismiss this appeal does not comport with Illinois Supreme Court Rule 361(h)(3)(c) (eff. January 1, 2015), which states that "[a] dispositive

motion shall include * * * a discussion of the relationship, if any, of the purported dispositive issue to the other issues on appeal." Defendants argue, for example, that plaintiff does not discuss the relationship between the mootness doctrine and defendants' desire to file amended counter-claims. We disagree. Keeping in mind that defendants' appeal is limited to the confirmation order, we fail to see how the filing of counter-claims is properly before us. As noted above, defendants' notice of appeal vests us with jurisdiction solely over the confirmation order. While it is true that orders that are a step in the procedural progression leading to that order are encompassed by the notice of appeal (*In re F.S.*, 347 Ill. App. 3d 55, 69 (2004)), we fail to see how a counter-claim could constitute such a step. See *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 38; *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 28. Indeed, since the order appealed is the confirmation order, reversing that order is inherently connected to the status of the subject property; no further discussion of the mootness doctrine as it relates to the issues presented would be illuminating.

¶ 26 Defendants further argue that the public-interest exception to the mootness doctrine applies in this case. Defendants assert, "The appellate court has a substantial public interest in protecting the public from forgery, in preventing a party from using perjury to win judgments, and in resolving matters on the merits." Defendants set forth the elements of the exception properly as: "(1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable for the purpose of guiding public officers; and (3) the question is likely to recur." *Bettis v. Marsaglia*, 2014 IL 117050, ¶ 9. They then simply state, without explanation, that the criteria have been met. Case-specific, factual issues are not issues of a public nature. *Id.* At issue in this case are primarily factual issues between the parties; defendants do not identify

any issue that effects the public generally or, for that matter, lacks adequate legal precedent such that further elucidation is necessary. In other words, the exception does not apply.

¶ 27 Finally, defendants assert that Illinois has a strong public policy against forgery. Here defendants engage in rank question begging. Had defendants answered the third-amended complaint, they could have presumably raised the issue of forgery. Now, they wish us to assume that forgery occurred and proceed as if it had. The only issue presented in the motion to dismiss is whether this appeal is moot. Defendants complain that if this appeal is dismissed, "a default judgment in favor of a forger will stand without any court ever having considered the actual merits of this case." Even if this argument had any validity, defendants ironically would have played a role in allowing the situation to exist by failing to raise this issue in a timely manner before the trial court.

¶ 28 IV. MAIN BRIEFS

¶ 29 Before closing, we note that this appeal was fully briefed, and we have reviewed the entirety of the parties' submissions. It does not appear to us that defendants set forth any basis for reversing the trial court, and, before closing, we will comment briefly.

¶ 30 To recap the relevant procedural posture of this appeal, the trial court denied defendants an extension of time to file a response to plaintiff's third-amended complaint and entered a default judgment. Defendants moved to vacate the default judgment. The trial court denied the motion.

¶ 31 Defendants now complain that the trial court applied the incorrect standard in considering the motion to vacate. They assert that the trial court applied the "good cause" standard applicable to a motion to extend time to file (see Illinois Supreme Court Rule 183 (eff. February 16, 2011)) rather than the standards applicable to vacating a default judgment, which are whether

the defendants exercised due diligence and whether they had a meritorious defense (*Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 27).

¶ 32 What defendants fail to grasp is that even if they succeeded in vacating the default judgment, plaintiff's third-amended complaint would still stand, unanswered. To answer, they would need an extension of time. As such the standard for allowing such an extension would remain relevant and the trial court did not, therefore, err in relying upon it. Moreover, to the extent defendants argue that the trial court ignored their meritorious defenses, such are only relevant to vacating the default judgment—good cause is the sole consideration with regard to a motion to extend time. Further, as for the trial court's assessment of defendants' proffered "good cause," we could not say it was an abuse of discretion. In other words, though we base our decision upon plaintiff's motion to dismiss, the arguments presented in defendants' main briefs were destined for failure as well.

¶ 33 IV. CONCLUSION

¶ 34 In light of the foregoing, we dismiss this appeal as moot.

¶ 35 Appeal dismissed.

¶ 36 Justice McLaren specially concurring.

¶ 37 I specially concur because I wish to present an analysis which the disposition does not. On page 29 of appellants' brief, it is related that both Mr. & Mrs. Kinzy were discharged in bankruptcy. There is no allegation that either reaffirmed the mortgage. There was no deficiency judgment entered.

¶ 38 A mortgage foreclosure is deemed a *quasi in rem* proceeding. "A *quasi in rem* action is brought against the defendant personally, with jurisdiction based on an interest in property, the objective being to deal with the particular property or to subject the property to the discharge of

the claims asserted." (Internal quotation marks omitted.) *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill. 2d 526, 533 (2010). When a mortgagor is discharged in bankruptcy without a reaffirmation of the debt, the mortgagee is left with the only option of taking the property or selling it in order to attempt to satisfy its interest in the property brought about by providing funds to the mortgagor. There is no contract to remediate or ameliorate. See *PNC Bank, Nat'l Ass'n v. Wilson*, 2017 IL App (2d) 151189, ¶ 26 (discharge in bankruptcy without reaffirmation of mortgage "means [the mortgagor is] no longer bound by the mortgage contract between the parties and should not be allowed to enjoy any benefits of the mortgage contract that [his] own volitional act has nullified"). In other words, the appellants do not have a personal interest that is prejudiced by the sale of the property regardless of good faith or the lack thereof.

¶ 39 Although I do not disagree with the majority analysis regarding mootness, I submit this analysis better addresses the equities between the parties. Regardless of the alleged irregularities of the mortgage documents, the appellants chose no longer to be subject to the terms and conditions of whatever agreement gave them the funds to purchase the secured property. Since there was no deficiency sought against them, they have not been harmed and no prejudice has been established.