2013 IL App (3d) 120152-U

Order filed June 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

ALASKA SEABOARD PARTNERS, Limited Partnership, a Delaware Limited Partnership,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0152
	)	Circuit No. 10-CH-5174
DAVID CABRERE, ELEANOR CABRERE, et al.,	)	
Defendants-Appellants.	)	Honorable Richard J. Siegel, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Appellants failed to file a timely notice of appeal following the denial of their section 2-1401 motion. Appeal dismissed for lack of jurisdiction.

¶ 2 Plaintiff, Alaska Seaboard Partners, Ltd. (Alaska), brought this mortgage foreclosure

action against defendants, David and Eleanor Cabrere, in the circuit court of Will County. The circuit court found defendants in default and denied their motion to vacate the default order. Defendants filed a motion to reconsider the denial of their motion to vacate, which the trial court also denied. Defendants appeal, claiming the trial court erred when denying their motion to vacate, abused its discretion by denying them "substantial justice," and failed to conduct a necessary evidentiary hearing to determine the factual basis for its judgments and rulings.

¶ 3 BACKGROUND

¶ 4 Alaska filed this mortgage foreclosure action on August 25, 2010, seeking to foreclose on a property located at 4827 Snapjack Circle, Naperville. The complaint notes the original amount of indebtedness was $391,500 attributable to a mortgage executed on March 9, 2006. David and Eleanore are the mortgagors and ACE Mortgage Funding Incorporated was the original mortgagee.

¶ 5 The complaint further states that as of June 13, 2010, the unpaid principal stood at $390,191.93 with a total of $558,434.21 due. The complaint identifies the Department of Treasury-Internal Revenue Service (IRS) as an additional interested party, noting that the IRS recorded a lien in the amount of $47,296.01 on February 22, 2010. Paragraph 3N of the complaint indicates that plaintiff "is the legal holder of the indebtedness or the servicing agent for the legal holder of the indebtedness," but that plaintiff had not yet recorded its assignment.

¶ 6 Plaintiff attached the original mortgage to the complaint, as well as the corresponding "Balloon Note." The mortgage contains a standard assignment clause, stating that the "Note or a

partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." Attached to the complaint is a summons commanding each defendant to appear to answer the complaint.

¶ 7 Michael Menichini filed two affidavits on September 15, 2010. Both affidavits state that the circuit court appointed him a special process server. The first notes that on August 28, 2010, at 4:32 p.m., Menichini personally served David Cabrere at 4827 Snapjack Circle, Naperville. The second indicates he served Eleanor Cabrere through substitute service by leaving a copy of the summons and complaint with her spouse David Cabrere at 4827 Snapjack Circle, Naperville. The affidavit avers that David indicated he is Eleanor's husband and they both lived at the residence.

¶ 8 On October 7, 2010, plaintiff filed a notice of motion indicating that it would appear at a November 2, 2010, hearing and seek the entry of a default order. The certificate of service attached to the motion identifies both David and Eleanor, but lists their address as "4827 Sanpjack Circle, Naperville" and notes that service was directed to that address by enclosing a copy of the motion with proper postage prepaid in the United States mail.

¶ 9 On December 21, 2010, the trial court entered an order finding defendants in default as well as a "Judgment for Foreclosure and Sale." The defendants then filed, on January 20, 2011, an appearance and motion to vacate the default judgment pursuant to section 2-1203 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1203 (West 2010)). Defendants' motion claims they failed to appear in court at the December 21, 2010, hearing as they "did not receive proper

notice of the motion for default judgment." Defendants' motion requests the default judgment be vacated and that they be allowed to answer or otherwise plead in the matter. Defendants never scheduled their motion for a hearing.

¶ 10 The next document appearing in the record is the sheriff's report of sale and distribution filed on April 8, 2011. The report of sale notes the sheriff sold the property to the highest bidder on March 30, 2011, for $310,000. Plaintiff filed a motion seeking entry of an order approving the sale, and scheduled a hearing on the matter for May 10, 2011. On that day, the circuit court entered an order approving the sale and distributing the sale proceeds.

¶ 11 Approximately five months thereafter, on October 4, 2011, defendants filed an emergency motion to vacate pursuant to section 2-1401 of the Code. 735 ILCS 5/2-1401 (West 2010). Defendants' motion claims that defendants never received the notice of motion to default as their address appears as "4827 Sanpjack" instead of "4827 Snapjack" on the certificate of service. As such, defendants claim "the motion for default was improperly presented and the judgment is void." Defendants cited no authority in their motion, nor is there an attached memorandum of law, to support defendants' conclusion.

¶ 12 Defendants' motion further claims that plaintiff failed to properly register as a collection agency, therefore defendants claim that under "Illinois corporate law, they can[not] afford the use of the state courts without registering as a foreign corporation and this matter should have been dismissed." Again, defendants cite no authority to support that conclusion. Defendants also claim the assignment to plaintiff "is fraudulent." Defendants come to this conclusion by noting

the signor to the assignment is "ROBOSIGNOR" and "there is no thumb print as requested by California real estate transfer law" on the assignment. Again, defendants' motion cites no authority to support this conclusion.

¶ 13 Finally, defendants' motion notes that once they learned of the default judgment, they filed a motion to vacate within 30 days. Defendants then claim that plaintiff "moved forward with the sale and possession without obtaining a ruling on the motion to vacate." Defendants' motion does not explain how this entitles them to relief.

¶ 14 The circuit court set a briefing schedule for defendants' section 2-1401 motion, allowing plaintiff to respond and giving defendants seven days thereafter to reply to plaintiff's response. Plaintiff filed its response. Defendants did not file a reply. On November 10, 2011, the trial court denied defendants' motion.

¶ 15 On December 12, 2011, defendants filed a pleading claiming to be both a motion to reconsider denial of their motion to vacate, as well as an "amended petition under 2-1401." This dual-purpose pleading alleges that the trial court failed to conduct an evidentiary hearing into the "legal and equitable defenses of the defendants." Such defenses stemmed from a dispute over property taxes. Defendants further claimed they submitted payments to plaintiff, which were returned, leaving plaintiff with unclean hands. This pleading further states, "The first time the defendants, two attorneys, learned of the foreclosure proceedings was when the Will County Sheriff made contact to evict the defendants and their three children from their home. In fact, shortly thereafter, the Sheriff evicted the defendants and placed all their belongings on the street

in Naperville, Illinois (an affluent city in an affluent county)."

¶ 16 Despite making numerous allegations that they were entitled to an evidentiary hearing to present "salient fact and legal and equitable defenses of the defendants," the pleading contains no citation to authority supporting those contentions. Defendants filed no responsive pleading. On January 24, 2012, the circuit court entered an order stating, "Defendants' motions are denied." On February 21, 2012, defendants filed their notice of appeal. This appeal followed.

¶ 17 ANALYSIS

¶ 18 Noting that defendants seek review of the November 10, 2011, order denying their motion to vacate, plaintiff claims we do not have jurisdiction to entertain this appeal as defendants failed to file their notice of appeal until February 21, 2012, well beyond the 30-day time frame specified in Illinois Supreme Court Rule 303(a)(1) (eff. June 4, 2008).

¶ 19 "Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). A petition seeking relief thereunder, "must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof." 735 ILCS 5/2-1401(b) (West 2010). Pursuant to Supreme Court Rule 304(b)(3), an order resolving a section 2-1401 petition is a final judgment, which is immediately appealable. Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). Consequently, an appeal of the denial of a section 2-1401 petition must be made within 30 days in order to comply with Rule 303(a)(1). *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35, 39 (1998). Generally,

however, a party may toll this deadline by filing a motion "directed against the judgment" as identified in section 2-1203 of the Code. *Djikas v. Grafft*, 344 Ill. App. 3d 1, 7-8 (2003); 735 ILCS 5/2-1203 (West 2010).

¶ 20 Plaintiff, however, cites a number of cases which it claims supports the contention that a motion for reconsideration of the denial of a section 2-1401 petition is not such a motion and does not toll the 30-day filing requirement of Rule 303(a)(1). Therefore, plaintiff concludes we have no jurisdiction to entertain this appeal.

¶ 21 In *City Wide Carpet, Inc. v. John*, 83 Ill. App. 3d 538 (1980), the court found it lacked jurisdiction to entertain defendants' "appeal from a denial of their joint motion for a rehearing of the denial of their individual Section 72 petitions." *Id.* at 539. Section 2-1401 of the Code is the modern day equivalent of section 72 of the former Civil Practice Act. See *People v. Gosier*, 205 Ill. 2d 198 (2001); 735 ILCS 5/2-1401 (West 2010); Ill. Rev. Stat. 1979, ch. 110, ¶ 72.

¶ 22 *City Wide Carpet* involved a mortgage foreclosure action brought against the defendants, who owned the residential property in joint tenancy. *City Wide Carpet*, 83 Ill. App. 3d at 539. The trial court entered an order of default against all defendants and a judgment of foreclosure directing a judicial sale of the property. *Id.* Defendants filed different motions seeking to vacate the order of default. *Id.* at 540. The trial court denied the defendants' section 72 petitions on May 16, 1978. *Id.* Defendants then, on June 15, 1978, filed a joint "motion to vacate the order denying their Section 72 petitions." *Id.* The trial court denied the joint motion, leading defendants to file a notice of appeal on July 21, 1978. *Id.* at 541.

¶ 23 The *City Wide Carpet* court noted that to confer appellate jurisdiction on the court, Supreme Court Rule 303(a) mandates a notice of appeal must be filed within 30 days after the entry of a final order or judgment unless a timely posttrial motion is filed, in which case the notice of appeal must be filed within 30 days of the trial court's disposal of the posttrial motion. *Id.* at 541. The court went on to find that a "motion to vacate the denial of a Section 72 motion" does not toll the period in which a notice of appeal must be filed. *Id.*

¶ 24 *City Wide Carpet* would seem directly on point if we could be sure that the defendants therein filed a motion for rehearing from the denial of their section 72 petitions. However, we cannot be certain exactly what document they filed as the *City Wide Carpet* court vacillated between referring to the pleading as a "motion for rehearing" (*Id*. at 539), "successive motions to reconsider" (*Id*. at 543), a "motion to vacate" (*Id*.), and "Section 72 petitions." *Id.* It is very possible that the defendants in *City Wide Carpet* filed a successive section 72 motion to vacate the denial of their original section 72 motion, making the case distinguishable.

¶ 25 Plaintiff also identifies *Deckard v. Joiner*, 44 Ill. 2d 412 (1970), claiming it supports the conclusion that defendants' motion for rehearing did not toll the 30-day time frame in which to file a petition for leave to appeal. *Deckard* involved a paternity matter in which the trial court found the defendant to be the father of a minor child and ordered him to pay support. *Id.* at 414. Years later, the court entered an order finding defendant in contempt of court for failing to pay support. *Id.*

¶ 26 On November 2, 1967, defendant filed a motion to vacate the contempt order (entered

September 21, 1967), support order (entered February 5, 1963) and finding of paternity (entered March 27, 1962). *Id.* at 414-15. On November 24, 1967, the trial court denied defendant's motion to vacate those orders. *Id.* Defendant then filed at least three more motions to vacate, including a motion to vacate all previous orders and judgments in the proceedings. *Id.* at 416. The trial court denied the final motion to vacate all orders of the court, leading defendant to file a notice of appeal 28 days later. *Id.*

¶ 27 Our supreme court found the notice of appeal untimely. *Id.* In doing so, the court stated:

> "Under the compulsion of Rule 303(a) ***, defendant, to perfect a timely appeal, was required to file [a] notice of appeal within 30 days from the August order disposing of his motion [to vacate]. This he did not do. Instead, on the 27th day, he filed a new and general motion to vacate and dismiss which was merely a consolidation and repetition of all his prior unsuccessful motions. *** To hold to the contrary would not only violate the spirit of our rule, which contemplates the prompt and orderly prosecution of an appeal, but would render it a nullity. As occurred in this case, any party could defeat the rule and delay [an] appeal merely by filing successive and repetitious motions to vacate. *** The last motion or petition contained nothing that was not in the first motion or could not have been included therein. *** They were merely

attempts to have the trial court review its own orders after thirty days, which it cannot do. Such motions or petitions may not be utilized to toll the time for appeal." *Id.* At 418-19.

¶ 28 In *Village of Glenview v. Buschelman*, 296 Ill. App 3d 35 (1998), the circuit court awarded the village summary judgment on its claims that the defendants violated various zoning ordinances. *Id.* Defendants failed to file a timely notice of appeal from the award of summary judgment, but did file a section 2-1401 petition attacking the order. *Id.* at 38. The trial court denied the section 2-1401 petition on October 16, 1995. *Id.* Defendants then sought leave to file an amended section 2-1401 petition, which the trial court granted. *Id.* The trial court denied the amended petition and defendants filed a notice of appeal from the order denying the amended petition. *Id.*

¶ 29 The *Village of Glenview* court dismissed the appeal for want of jurisdiction. *Id.* at 42. In doing so, it noted that "the grounds asserted in the [amended] petition were either already of record and previously considered by the trial court or comprised issues that defendants could have raised in earlier proceedings." *Id.* at 41. The court continued, "Based on the foregoing facts, we conclude that defendants' proper recourse following the denial of their first section 2-1401 petition was to make a timely appeal from that denial, as it was a final judgment. *** And, since defendants' only basis for appellate jurisdiction was their timely notice of appeal from the trial court's denial of the second petition, this court also lacks jurisdiction to consider the merits of defendants' appellate arguments." *Id.* at 42.

¶ 30 While the case at bar is neither on all fours with either *Village of Glenview*, *Deckard* or *City Wide Carpet*, it is seemingly similar to *City Auto Paint & Supply, Inc. v. Brandis*, 73 Ill. App. 3d 863 (1979). In *City Auto*, the plaintiff obtained a default judgment against the defendant, which the defendant moved to vacate pursuant to section 72 of the Civil Practice Act. *Id.* at 864. Again, section 2-1401 of the Code is the modern day equivalent of section 72 of the former Civil Practice Act. The trial court denied the petition to vacate leading the defendant to file "a motion for rehearing, seeking a reconsideration of his motion to vacate." *Id.* The trial court denied the motion for rehearing or reconsideration and defendant filed his notice of appeal 29 days later. *Id.* at 865.

¶ 31 The *City Auto* court acknowledged that defendant filed the "notice of appeal within 30 days of the denial of his motion for rehearing" and that Supreme Court Rule 303(a) "provid[ed] that the time for appeal is tolled 'if a timely post-trial motion directed against the judgment is filed.' " *Id.* (quoting 58 Ill. 2d R. 303(a)). However, the *City Auto* court concluded that "A motion to reconsider the denial of relief pursuant to section 72 is obviously not the type of motion contemplated by Rule 303(a)." *Id.*

¶ 32 In coming to this conclusion, the *City Auto* court discussed *Deckard* and similar cases which held that filing "successive motions directed against the denial of relief under a section 72 petition will not stay the 30 day notice of appeal requirement." *Id.* at 866. The *City Auto* court saw no difference between filing successive petitions to vacate and filing a motion for reconsideration of the denial of a petition to vacate. It noted that defendant's "subsequent motion

[for reconsideration] and accompanying memorandum consisted essentially of repetitious allegations that he had a meritorious defense and the default was the result of an excusable mistake. These questions had already been adjudicated. If the rules of appellate procedure were strained or extended to permit the tolling of the time for appeal by the procedure engaged in here, there could be an endless succession of such rehearing motions and there would never be a final determination of the dispute." *Id*. at 867. Therefore, the *City Auto* court dismissed the appeal for want of jurisdiction. *Id.*

¶ 33 Relying on *City Auto*, the court in *Dempster Plaza State Bank v. American National Bank & Trust Co. of Chicago*, 83 Ill. App. 3d 870 (1980), also found they had no jurisdiction to entertain an appeal. *Id. Dempster Plaza*, like the case at bar, involved a mortgage foreclosure action in which the defendant failed to take a direct appeal from the judgment of foreclosure and sale. *Id.* at 871. Six months after the entry of the order of the judgment, defendant filed a section 72 petition to vacate, which the trial court dismissed on July 23, 1979. *Id.* On August 10, 1979, defendant filed a "motion to reconsider" denial of the section 72 petition, which the trial court denied. *Id.* Defendant then filed a notice of appeal within 30 days of the denial of the motion to reconsider. The *Dempster Plaza* court found the notice of appeal untimely. *Id.* at 872.

¶ 34 After discussing *City Auto*, the *Dempster Plaza* court noted that the record revealed a lack of diligence on behalf of the defendant. *Id.* at 873. The court stated, "From December 7, 1978, when the trial court entered the judgment of foreclosure and sale until June 14, 1979, when a section 72 petition was filed, the defendants did nothing, even though during that time the

property was sold and sheriff's deed delivered in March of 1979." *Id.* The court continued indicating that Supreme Court Rule 303(a) "contemplates the prompt and orderly prosecution of an appeal. Motions to reconsider the court's ruling on a section 72 petition should not be used to toll the time for appeal." *Id.*

¶ 35 We agree. These defendants also "did nothing" from April 8, 2011, the date the sheriff filed its sale report, until October 4, 2011, when defendants filed their section 2-1401 motion to vacate. Furthermore, the only pleading defendants filed within 30 days of the denial of their section 2-1401 petition is more akin to a successive section 2-1401 petition than a motion for rehearing. They titled the document "Motion to Reconsider Court's Denial to Set Aside Default Judgment and Vacate Pursuant to Section 2-1401 Entered on November 11, 2011 and Amended Petition Under 2-1401 Setting Forth Additional New Facts Requiring This Court to Set Aside All Prior Orders Entered by This Court." The document merely rehashes arguments the trial previously rejected and provides no suggestion as to why any potentially "new" facts could not have previously been raised.

¶ 36 Moreover, plaintiff discussed *Deckard, City Auto* and *Dempster* in its brief to this court, arguing that we should not depart from their holdings. Rather than providing any reasonable response to those arguments, defendants opened their two-page reply brief by referring to the argument as "Poppycock" and closed the brief, indicating that they "chose not to burden the Court with more cites" to relevant authority as "[s]imple truths and legal maxims are just as important as cited authority." One legal maxim defendants' argument, or lack thereof, brings to

mind is the axiom that an appellate court is not a repository into which an appellant may foist the burden of argument and research. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010).

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we find the defendants failed to file a timely notice of appeal. We dismiss this appeal for lack of jurisdiction.

¶ 39 Appeal dismissed.