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2013 IL App (3d) 120166-U

Order filed July 1, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

AMERICAN CHARTERED BANK,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	
)	Appeal No. 3-12-0166
DUNDEE ADVISORS, LLC, ROBERT L. KEALY,)	Circuit No. 10-CH-4850
WHITE EAGLE CLUB PROPERTY OWNERS)	
ASSOCIATION, UNKNOWN OWNERS and NON-)	
RECORD CLAIMANTS,)	
)	
Defendants)	Honorable
)	Richard J. Siegel,
(Michael Brdecka and Sandra Brdecka,)	Lawrence C. Gray,
)	Judges, Presiding.
Intervening Defendants-Appellants).)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The denial of a homeowner's motion to vacate a judgment of foreclosure was reversed because it presented a meritorious defense, showing evidence of a forged deed, and the homeowners' multiple filings showed due diligence.

¶ 2 The plaintiff, American Chartered Bank, filed a judgment of foreclosure and sale on a home owned by the intervening defendants, Sandra and Michael Brdecka. The Brdeckas were not parties to the Bank's mortgage, and they were not named as defendants in the foreclosure action. The judgment of foreclosure and sale was entered, and the Brdeckas' motions to vacate or reconsider were denied. The Brdeckas appealed.

¶ 3 FACTS

¶ 4 The Bank filed a complaint to foreclose on a mortgage on a residence in Naperville, Illinois. The complaint named as defendants: Dundee Advisors, LLC, Robert L. Kealy, White Eagle Property Owners Association, unknown owners, and nonrecord claimants. The mortgagor on the subject mortgage, and the borrower on the promissory note, was Dundee Advisors, and both the mortgage and the note were signed by Kealy, as the managing member of Dundee Advisors. Dundee Advisors defaulted on the mortgage and the note.

¶ 5 Three months after the complaint was filed, the Brdeckas, through their attorney, Steven Bashaw, filed a motion to intervene in the foreclosure. The Brdeckas alleged that they had resided at the subject property since 1992, and the property was held in the Sandra Brdecka Trust. The Brdeckas and their mortgagee, CitiBank, Inc., were not named in the foreclosure complaint, and the Brdeckas were current on their mortgage with CitiBank. The motion further alleged that, on May 9, 2007, a quitclaim deed, bearing the signature of Sandra Brdecka, transferred title of the home to Dundee Advisors. The motion stated that the Brdeckas conveyed the property by quitclaim deed to provide collateral and security to the Bank for a debt. The mortgage and promissory note executed by Kealy on behalf of Dundee Advisors was also dated May 9, 2007.

¶ 6 On January 24, 2011, Bashaw filed a notice of motion to withdraw as the Brdeckas' counsel, due to a conflict of interest. In court on February 9, 2011, with Michael Brdecka present, Bashaw stated that the motion to intervene was in error, and the Brdeckas were unaware of the quitclaim deed. Also, Bashaw had discovered a conflict of interest between Dundee Advisors and the Brdeckas. Then, Bashaw stated that he had discussed the matter with the Bank, and the Brdeckas would agree to a judgment in favor of the Bank, as long as they had a right of redemption, which had been explicitly waived in the mortgage executed by Dundee Advisors. The trial court entered an order, granting the Brdeckas leave to intervene, and granting Bashaw's motion to withdraw. The judgment of foreclosure and sale was entered, with the names of the Brdeckas handwritten in as defendants. The Brdeckas were also listed as defendants in the order of default.

¶ 7 Thereafter, on March 2, 2011, Michael Brdecka filed a motion to vacate the judgment. The trial court denied the motion on May 4, 2011, finding that it was clear that Bashaw consented to the entry of the order of default and judgment of foreclosure prior to his withdrawal as counsel.

¶ 8 On June 1, 2011, both Brdeckas filed a *pro se* motion to reconsider, set aside the judgment, and dismiss the complaint, alleging that they discovered that the quitclaim deed was a forged document. That motion was stricken after the Brdeckas failed to appear when the case was called. Their attorney then filed an emergency motion to stay the sale, but he withdrew that motion after he could not confirm the sale date. The sale went forward on July 27, 2011, with the Bank as the highest bidder.

¶ 9 On August 29, 2011, Sandra Brdecka filed a motion to vacate or to reconsider the

judgment of foreclosure and set aside the sale. The trial court denied that motion, and entered an order confirming sale. The Brdeckas' attorney also filed a new motion to vacate, under 2-1301 (735 ILCS 5/2-1301 (West 2010)) and, alternatively, under 2-1401 (735 ILCS 5/2-1401 (West 2010)), which was later amended. The trial court denied the amended motion to vacate. The Brdeckas appealed the February 9, 2011, order granting the judgment of foreclosure and sale; and the May 4, 2011, November 3, 2011, and February 9, 2012, orders denying their motions to reconsider and/or vacate that judgment order.

¶ 10

ANALYSIS

¶ 11 The Brdeckas allege that the trial court erred each time it denied one of their motions to vacate the default or reconsider because substantial justice was not done.

¶ 12 A trial court's decision to grant or deny a motion to vacate will only be reversed if it was an abuse of discretion. *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367 (2001). When a motion to reconsider is based on new matters, such as additional facts that were not previously presented, the abuse of discretion standard also applies. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323 (2008). However, agreed orders may be modified or vacated only upon a showing that meets the standard applied to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) petitions. *In re Marriage of Rolseth*, 389 Ill. App. 3d 969 (2009).

¶ 13 Typically, when a party seeks to set aside a default under section 2-1301(e), which governs before final judgment has been entered or within 30 days thereafter, the party need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense. *In re Haley D.*, 2011 IL 110886 (2011). Pursuant to section 2-1301(e), the trial court may, in its discretion, upon a motion filed within 30 days after entry of a

default, set aside any final order or judgment upon any terms and conditions that shall be reasonable. 735 ILCS 5/2-1301(e) (West 2010). The question is whether or not substantial justice was done between the litigants and whether it was reasonable, under the circumstances, to compel the other party to go to trial on the merits. *Haley D.*, 2011 IL 110886, ¶69.

¶ 14 It appears that the trial court made great efforts to determine whether the agreed order was entered before or after the motion to withdraw was granted before ruling on the motion to vacate. While technically still operating as the attorney for the Brdecka's at the time of the entry of the agreed order, the motion to withdraw due to a conflict of interest had been filed several weeks in advance of the court date at issue. The more prudent course of conduct would have been to dispose of the motion to withdraw before handling any other matters in this case. It is safe to say that an attorney who claims he cannot represent clients due to a conflict of interest should not be agreeing to the entry of an order on behalf of those same clients. However since that did happen, we must examine the matter under the standards of section 2-1401 (735 ILCS 5/2-1401 (West 2010)). A party seeking to set aside a final order or judgment under section 2-1401(a) (735 ILCS 5/2-1401(a) (West 2010)) is required to show by a preponderance of the evidence not only the existence of a meritorious claim or defense in the original action, but also due diligence in pursuing the claim or defense in the circuit court as well as due diligence in presenting the petition for relief under section 2-1401(a). *Haley D.*, 2011 IL 110886, ¶58.

¶ 15 In any event, Michael Brdecka stated that he had a meritorious defense, and the trial court held a hearing on the motion, but it focused on the other factual allegations (the timing of the attorney's withdrawal) rather than the defense. The issue of forgery was not raised at this time. However, within 30 days of the denial of that motion (on June 1, 2011), the Brdeckas filed their

motion to reconsider, which raised the issue of forgery. Although it was filed prior to the sale, it was also stricken prior to the sale when the Brdeckas failed to appear. Sandra Brdecka followed with a motion to vacate or reconsider, also raising the issue of forgery, which was filed after the sale but before the sale was confirmed.

¶ 16 The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence, changes in the law, or errors in the trial court's previous application of the existing law. *Stringer v. Packaging Corporation of America*, 351 Ill. App. 3d 1135 (2004). We agree with the Second District that we may consider this motion even after the judicial sale. *Wells Fargo Bank, N.A. v. McCluskey*, 2012 IL App (2d) 110961, ¶10 (2012) (declining to follow the holding of *Mortgage Elec. Registration Sys. v. Barnes*, 406 Ill. App. 3d 1 (2010), that a section 2-1301(e) motion after a sheriff's sale is improper because it is inconsistent with section 15-1508(b) of the Foreclosure Law (735 ILCS 5/15-1508 (West 2010)). A mortgage foreclosure judgment is not final and appealable until the court enters an order approving the sale and directing distribution. *Mortgage Electronic Registration Systems v. Barnes*, 406 Ill. App. 3d 1 (2010).

¶ 17 While there was no affidavit attached to the motion, it is supported by a notarized letter of opinion from an expert. Also, it does not appear that evidence of the forgery was available at the time of the judgment. While the Brdeckas may not have chosen the most appropriate procedural mechanisms, there does not appear to be a lack of due diligence. A motion to vacate was filed within 30 days of the judgment of foreclosure, followed by a motion to reconsider and a second motion to vacate or reconsider, all before the sale was confirmed. Thus, we find that the denial of Sandra Brdecka's motion to vacate or reconsider was an abuse of discretion. We reverse the

denial of the motion to vacate, vacate the judgment of foreclosure and sale, and remand for further proceedings.

¶ 18

CONCLUSION

¶ 19 The judgment of the circuit court of Will County is vacated and remanded.

¶ 20 Vacated and remanded.