2023 IL App (3d) 210585-U

Order filed February 15, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

ARCHER BANK,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-21-0585
	)	Circuit No. 12-CH-2455
HOMER DEVELOPERS, LLC, THE	)	
CHICAGO TRUST COMPANY,	)	
ORLAND OAK PARTNERSHIP	)	
OAK PARTNERSHIP, THOMAS BOOTH	)	
and JOAN BOOTH,	)	
	)	
Defendants	)	
	)	Honorable
(Thomas Booth and Joan Booth,	)	Domenica A. Osterberger
Defendants-Appellants).	)	Judge, Presiding.

JUSTICE BRENNAN[1] delivered the judgment of the court.
Justices Hettel and Albrecht concurred in the judgment.

ORDER

[1] Justice Brennan was substituted for Justice Hauptman after oral argument upon his election to the Third District Appellate Court, effective December 5, 2022. He has read the briefs and listened to the recording of the oral argument.

¶ 1 *Held*: The circuit court did not err in granting plaintiff bank's section 2-1602 petition to revive a 2014 judgment against defendant guarantors or in denying defendant guarantors' section 2-1401 petition to vacate the 2014 judgment. Affirmed.

¶ 2 Appellants, Thomas and Joan Booth, appeal from the circuit court's orders: (1) granting Appellee's, Archer Bank's,[2] section 2-1602 petition to revive an April 4, 2014, judgment against the Booths as guarantors of a loan, and (2) denying the Booths' section 2-1401 petition to vacate the April 4, 2014, judgment. See 735 ILCS 5/2-1401, 2-1602 (West 2020). Affirmed.

¶ 3 I. BACKGROUND

¶ 4 In February 2008, Archer Bank loaned $8,650,000 to Homer Developers, LLC, a commercial real estate development company managed by Thomas Booth. In June 2010, Archer Bank loaned $2,100,000 to Orland Oak Partnership, a commercial development partnership in which Thomas owned a majority interest. Promissory notes evidenced both loans. Thomas and his wife, Joan Booth, guarantied payment of each note. Homer Developers and Orland Oak defaulted on the notes.

¶ 5 On May 10, 2012, Archer Bank filed a 14-count complaint against the Booths and multiple other entities and individuals. Counts I through VIII consisted of suits on the promissory notes executed by Homer Developers and Orland Oak and foreclosure of multiple mortgages securing those notes. Counts XIII and XIV sought injunctive relief precluding Orland Oak from transferring certain assets. Counts IX, X, XI, and XII, at issue here, sought to collect on the Booths' guaranties of the Homer Developers and Orland Oak notes. Archer Bank moved for summary judgment on Counts I through XIII (the foreclosure counts) and Counts IX through XII (the guaranty counts),

[2]Archer Bank merged with North Community Bank, which later became known as Byline Bank.

and the Booths filed a cross-motion for summary judgment as to counts IX through XII.

¶ 6 On April 4, 2014, the circuit court entered a written order granting Archer Bank's motion for summary judgment on Counts I though VIII and Counts IX through XII, each in the amount of $9,636,852.36 (including costs of the suit and attorney fees). The court noted, in paragraph 6, that "[t]his matter will proceed to sheriff's sale pursuant to separate order."

¶ 7 The circuit court denied the Booths' cross-motion for summary judgment as to the guaranty counts, in which the Booths had argued that Archer Bank's settlement and release with different guarantors applied to them as well. Those different guarantors were relations of the Booths and shared their last name. The court entered Rule 304(a) language (Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)), allowing the instant Booths, Thomas and Joan, to appeal the denial of their cross-motion for summary judgment. The April 4, 2014, transcripts show that the following colloquy occurred concerning the import of the Rule 304(a) language:

> "[ARCHER BANK'S COUNSEL]: If Counsel is saying, or this court is saying, the 304(a) language would not impact the final order of *foreclosure* allowing the sheriff's sale to proceed and for the property to go back to the bank by foreclosure in the sheriff's sale, I might be—
>
> [DEFENDANTS' COUNSEL]: That's exactly what I am saying. I am not trying to stop them from—
>
> THE COURT: And I think I'm saying the same thing. I think the foreclosure and the sheriff's sale process needs to move forward." (Emphasis added.)

In April 2015, the appellate court affirmed the denial of the Booths' cross-motion for summary judgment, holding that the settlement and release did not apply to the instant Booths. *Archer Bank v. Homer Developers, LLC*, 2015 IL App (3d) 140345-U.

¶ 8 At the end of the April 4, 2014, hearing when the parties reviewed the aforementioned written order granting Archer Bank's motion for summary judgment and denying the Booths' motion for summary judgment, the following colloquy ensued:

"[DEFENDANTS' COUNSEL]: I don't see where it says in here my motion for summary judgment [regarding the guaranties] is denied.

[ARCHER BANK'S COUNSEL]: Defendant's motion to compel and for summary judgment is denied.

[DEFENDANTS' COUNSEL]: Oh, okay.

I don't have—one issue, I suppose. So they entered a judgment in a certain dollar amount on the guarantees, but *theoretically* that won't be correct if ultimately, once there is a sale and everything, then the amount of the sale will be deducted, and then they're getting a judgment on the deficiency, right?

[ARCHER BANK'S COUNSEL]: Correct.

THE COURT: The confirmation order would include a specific amount, and there would be a memorandum of judgment presented with a specific amount of the deficiency as opposed to the nine million plus.

[DEFENDANTS' COUNSEL]: So there is no memorandum of judgment going to be entered now based on the $9 million?

THE COURT: Cannot be until there is a sale.

***

THE COURT: It's on the record.

[DEFENDANTS' COUNSEL]: Okay.

[ARCHER BANK'S COUNSEL]: We'll present it to the Court, an order for

confirmation, which will include the order of judgment and will include the amount that was bid at the sheriff's sale.

[DEFENDANTS' COUNSEL]: That's fine. As long as no one is doing it now and trying to collect on the judgment now.

THE COURT: That's all stayed." (Emphasis added.)

The circuit court did not amend the April 4, 2014, written order.

¶ 9 On May 8, 2014, the circuit court entered a nine-page, single-spaced Judgment of Foreclosure and Sale. Relevant to the Booths' argument on appeal, paragraph 4(g) provided that, if the proceeds of sale were insufficient to pay the indebtedness, Archer Bank shall be entitled to a deficiency judgment against Homer Developers, Orland Oak, and the Booths. Archer Bank was the high bidder at the sale, bidding $4,743,000.

¶ 10 On August 22, 2014, the circuit court approved the sheriff's report of sale and confirmed the sale and order of possession. This was the final order in the foreclosure action. The court entered a deficiency judgment of $4,893,582.36 against Homer Developers and Orland Oak. It did not enter a deficiency judgment against the Booths.

¶ 11 On July 6, 2020, Archer Bank issued numerous section 2-1402 citations to discover assets to the Booths and their third-party businesses, stating therein that it had received a judgment against the Booths on April 4, 2014, in the amount of $9,636,852.36. 735 ILCS 5/2-1402 (West 2020). The citations calculated that, after subtracting the proceeds from the sale of the foreclosed properties and accounting for interest due on the remainder of the judgment, the Booths owed $7,880,119.

¶ 12 A. The Booths' Motion to Quash and

The Origin of Their Argument on Appeal

¶ 13 On September 18, 2020, the Booths moved to quash the citations. Essentially, their argument, first stated in their motion to quash and maintained in subsequent motions as well as in the instant appeal was as follows. The Booths argued that the April 4, 2014, order was not a final and enforceable order. They noted that paragraph 6 of the April 4, 2014, written order provided that the matter would proceed to a sheriff's sale. They asserted that, consistent with this, the parties agreed at the close of the April 4, 2014, hearing, that the April 4, 2014, written order against them as guarantors was not final, and that the $9-million-plus judgment amount would later be reduced by the proceeds from the sale of the foreclosed property. They urged that, again consistent with this alleged agreement, the May 8, 2014, judgment of foreclosure and sale provided in paragraph 4(g) that, if the proceeds of sale were insufficient to pay the indebtedness, Archer Bank shall be entitled to a deficiency judgment against Homer Developers, Orland Oak, and the Booths. However, the August 22, 2014, confirmation of sale contained deficiency judgments against Homer Developers and Orland Oak only, not the Booths. The Booths noted that, because the August 22, 2014, order was the final order in the case overall, the circuit court lost jurisdiction 30 days thereafter. The Booths contended that, because Archer Bank failed to amend the $9 million judgment against them before the circuit court lost jurisdiction, Archer Bank chose to abandon the April 4, 2014, judgment against them, which, in their view, had not yet been finalized.

¶ 14 The Booths further alleged that Archer Bank had previously assured them in out-of-court discussions that it would not pursue a deficiency judgment against them. The Booths' attorney attached a supporting affidavit providing as follows.[3] In March 2014, the parties discussed settling

[3]There was also a substantively similar affidavit by Thomas Booth, which contained slightly less, though no different, information. The parties focus on the attorney's affidavit.

the matter. Then, "[Archer Bank's representative] stated that Archer Bank would agree not to pursue any deficiency against the Booths. [The representative] said the total amount of damages will not matter because Archer Bank did not intend to pursue a deficiency against the Booths. I believe the Booths reached an enforceable agreement at this meeting." That is why when the Booths' attorney saw that a July 2014 draft copy of the motion to confirm the sale included a deficiency judgment against the Booths, he contacted Archer Bank's attorney "to find out what was going on." Archer Bank's attorney "said that the proposed order contained a mistake and that the language providing a deficiency judgment against the Booths would be removed from the order entered by the court." Indeed, as mentioned, the August 22, 2014, confirmation of sale did not contain a deficiency judgment against the Booths.

¶ 15 In response, Archer Bank agreed that the April 4, 2014, written judgment against the Booths as guarantors in the amount of $9 million plus was not, absent express language, immediately enforceable or appealable. However, this was not because Archer Bank had agreed to amend the order, but merely because the order adjudicated fewer than all of the claims, rights, and liabilities of all of the parties. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Namely, the foreclosure counts (I through XIII) were not yet resolved. As the April 4, 2014, order instructed in paragraph 6, the foreclosure matter would proceed to a sheriff's sale pursuant to separate order. Archer Bank explained that the foreclosure counts and guaranty counts were separate causes of actions premised on different contractual agreements. As such, if Archer Bank desired, it could have dismissed the foreclosure counts against Homer Developers and Orland Oak and proceeded to enforce the April 4, 2014, judgment that it had obtained against the Booths as guarantors in the amount of $9 million plus. (Of course, Archer Bank still would have had to wait until the resolution of the Booths' pending appeal regarding whether Archer Bank's settlement and release

with the other guarantors applied to the instant Booths.) In the alternative, where Archer Bank chose, as it did, to pursue the foreclosure counts to a final confirmation of sale, then the April 4, 2014, judgment against the Booths as guarantors would not become enforceable until those remaining claims, rights, and liabilities as to the foreclosure counts had been resolved. See, *e.g.*, *Wells Fargo Bank v. McCluskey*, 2013 IL 115469, ¶ 12 (confirmation of sale is the final order in a foreclosure case).

¶ 16 Archer Bank explained that the May 8, 2014, judgment of foreclosure pertained only to the foreclosure counts against Homer Developers and Orland Oak. Paragraph 4(g)'s reference to a deficiency judgment as to the Booths was mere surplusage and/or a mistake. The Booths were not subject to the foreclosure counts; the Booths were guarantors. As such, the subsequent absence of any reference to the Booths in the August 22, 2014, confirmation of sale was merely a correction that did not affect the legitimacy of the April 4, 2014, judgment on the guaranty.

¶ 17 Archer Bank acknowledged that, following the confirmation of sale of the foreclosed property, it would not be entitled to collect the full judgment amount of $9 million plus against the Booths. Archer Bank had already been partially reimbursed through the sale proceeds of the foreclosed property, and it could not collect the same amount twice. Still, Archer Bank explained, this facet of the case was just a matter of collections in practice and did not affect the finality or legitimacy of the April 4, 2014, judgment against the Booths as guarantors.

¶ 18 Finally, Archer Bank denied the Booths' assertion that it had agreed in out-of-court discussions to abandon its judgment against the Booths. It noted further that the Booths appeared to be raising a collateral attack on the judgment. Also, it noted that the Illinois Credit Agreement Act (815 ILCS 160/0.01 *et seq*. (West 2020)) generally bars oral agreements to forego a right pertaining to an existing credit agreement, let alone a credit agreement involving millions of

dollars. See *Bank of America N.A. v. 108 N. State Retail, LLC*, 401 Ill. App. 3d 158, 173 (2010).

¶ 19 On December 22, 2020, the circuit court denied the Booths' motion to quash, essentially agreeing with the rationale set forth by Archer Bank. On January 21, 2021, the Booths filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307 (eff. Nov. 1, 2017). The appeal was given the case number 3-21-0034. However, on April 19, 2021, on Archer Bank's motion, this court dismissed the appeal as unsuitable under Rule 307.

¶ 20 B. Archer Bank's Section 2-1602 Petition

¶ 21 On January 13, 2021, Archer Bank filed a section 2-1602 petition to revive the April 4, 2014, judgment against the Booths. 735 ILCS 5/2-1602 (West 2020). Section 2-1602 provides a mechanism by which a party may seek enforcement of a judgment after seven years. *Id.*; see also 735 ILCS 5/2-108 (West 2020) (no judgment may be enforced after seven years from the time it was rendered, unless the judgment is revived under section 2-1601, which, in turn, refers to the procedure set forth in section 2-1602). Per section 2-1602's requirements, Archer Bank included a statement as to the original date of the judgment, the court costs expended, accumulated interest, and credits to the judgment. See *id.* The only two defenses to a petition to revive are: (1) the denial of the existence of a judgment, or (2) proof of satisfaction or discharge of the action. *Department of Public Aid ex rel. McGinnis v. McGinnis*, 268 Ill. App. 3d 123, 131 (1994). These defenses must appear on the face of the record. *Id*.

¶ 22 On July 6, 2021, the Booths responded to the petition. Relevant here, they denied the existence of a judgment against them. They argued as they had in their motion to quash. However, they did not focus on their claim that Archer Bank's attorney had assured them in out-of-court statements that Archer Bank would not pursue a judgment against them, as that claim did not appear on the face of the record.

¶ 23 On July 9, 2021, Archer Bank replied to the Booths' argument denying the existence of a judgment against them and arguing as it had in its response to the motion to quash.

¶ 24 C. The Booths' Section 2-1401 Petition

¶ 25 On August 16, 2021, while Archer Bank's petition to revive remained pending, the Booths filed a section 2-1401 petition to vacate the April 4, 2014, judgment. Using section 2-1401 as a vehicle, the Booths introduced the affidavit of their attorney in support of their claim that Archer Bank assured them in out-of-court discussions that it would not pursue a judgment against them. The Booths acknowledged that it seemed counter-intuitive to file a section 2-1401 petition to vacate a judgment that they deny exists, but they explained:

> "At the oral argument [on Archer Bank's petition to revive in July 2021][4], a discussion occurred about whether the Booths needed to file a separate section [2-]1401 petition to properly bring the argument that no judgment exists before the court.
>
> *** The Booths want to ensure that the correct procedure is used[.]"

In support of their section 2-1401 petition, the Booths equate their claim that no judgment exists with the section 2-1401 concept of a void judgment. They then note that a section 2-1401 petition that argues that a judgment is void need not meet the standard section 2-1401 requirements that the petition: (1) be filed within two years of the challenged judgment; (2) allege due diligence; and (3) allege a meritorious defense. *Sarkissan v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002).

¶ 26 On September 30, 2021, Archer Bank responded to the Booths' section 2-1401 petition. It argued that the Booths' claim that no judgment exists cannot be equated with the section 2-1401 concept of a void judgment. The supreme court, it continued, has identified only three

[4] These transcripts are not in the record on appeal.

circumstances in which a judgment will be deemed void for the purposes of a section 2-1401 petition: (1) where the judgment was entered by a court that lacked personal or subject matter jurisdiction; (2) where the judgment was based on a statute that is facially unconstitutional and void *ab initio*; or (3) where the judgment imposed a sentence that did not conform to a statutory requirement. *People v. Price*, 2016 IL 118613, ¶ 31 (noting that, in *People v. Castleberry*, 2015 IL 116916, ¶ 17, the court eliminated the third type of void judgment). As none of these circumstances are present in the instant case, the Booths cannot be excused for their failure to file a timely section 2-1401 petition alleging due diligence and a meritorious defense. Archer Bank then proceeded to address the Booths' position that no judgment against them existed, raising the same points as in its response to the motion to quash and in its reply to the petition to revive.

¶ 27 D. The Circuit Court's Written Order

¶ 28 On November 18, 2021, the circuit court entered a written order, granting Archer Bank's section 2-1602 petition to revive and denying the Booths' section 2-1401 petition. As to the section 2-1601 petition to revive, the court disagreed that the May 8, 2014, judgment of foreclosure superseded the April 4, 2014, judgment against the guarantors. The plain language of the May 8, 2014, judgment does not purport to vacate the April 4, 2014, judgment against the Booths as guarantors. Rather, the May 8, 2014, judgment's reference to the Booths in paragraph 4(g) was mere surplusage. Further, "[w]hile the Booths argue that the fact that no personal judgment against them was entered *after* the May 2014 foreclosure order signals that the May 2014 order *sub silento* vacated the April 2014 [order], this Court finds the opposite to be true. There was no need for the entry of any personal judgments, as those issues were determined in April 2014." The court agreed with Archer Bank that the only reason the April 4, 2014, order was unenforceable for a short time was that other matters in the complaint, namely the foreclosure counts, were slower to resolve.

Upon the resolution of the remaining matters, the April 4, 2014, order became final and enforceable.

¶ 29 As to the section 2-1401 petition, the circuit court denied it for the reasons argued by Archer Bank. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 The Booths appeal the circuit court's November 18, 2021, order: (1) granting Archer Bank's section 2-1602 petition to revive the April 4, 2014, judgment against the Booths as guarantors, and (2) denying the Booths' section 2-1401 petition to vacate the April 4, 2014, judgment against them. The Booths' section 2-1602 argument denying the existence of a valid judgment against them presents a question of law, which we review *de novo*. See *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998) (questions of law are reviewed *de novo*). Similarly, the Booths' section 2-1401 argument denying the existence of a valid judgment against them, while adding evidence contained in the Booths' attorney's affidavit, presents a purely legal challenge, which we review *de novo*. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 47.

¶ 32 On appeal, the Booths do not focus on their section 2-1602 argument that Archer Bank never finalized and, in fact, abandoned the April 4, 2014, judgment against them as guarantors. The Booths instead employ that same abandonment argument in the context of reviewing their section 2-1401 petition. This is so even though the Booths have previously acknowledged that section 2-1401 may not be the perfect procedural fit for their argument. See *supra* ¶ 25. We infer that the Booths' change of focus recognizes that a significant component of their argument hinges on matters outside the record, *i.e.*, Archer Bank's former attorney's alleged assurance that Archer Bank would not pursue a personal judgment against the Booths. In neglecting to set forth any meaningful section 2-1602 argument on appeal, the Booths may be implicitly acknowledging that

the face of the original record is insufficient to support their claim that no judgment against them exists. Notwithstanding, our analysis begins with a discussion of the section 2-1602 petition.

¶ 33 A. Section 2-1602 Petition to Revive

¶ 34 Again, section 2-1602 provides a mechanism by which a party may seek enforcement of a judgment after seven years. 735 ILCS 5/2-1602 (West 2020). The only two defenses to a petition to revive are: (1) the denial of the existence of a judgment, or (2) proof of satisfaction or discharge of the action. *McGinnis*, 268 Ill. App. 3d at 131. These defenses must appear on the face of the record. *Id.*

¶ 35 As section 2-1602 case law does not permit us to look outside the record to determine whether the April 4, 2014, order constitutes an enforceable order, we limit our review of the Booths' argument to the April 4, 2014, order itself, the April 4, 2014, transcripts, the May 8, 2014, order, and the August 22, 2014, order. We do not consider the alleged out-of-court discussions that occurred between Archer Bank's former attorney and the Booths' attorney.

¶ 36 The Booths' argument denying the existence of a judgment against them requires us to construe the April 4, 2014, order in relation to the May 8, 2014, and August 22, 2014, orders. It also requires a general understanding of the separate nature of judgments against guarantors versus foreclosure judgments and, also, Rule 304(a) concerning final and enforceable judgments.

¶ 37 Generally, the rules of statutory interpretation apply to judgments, with the determinative factor being the intention of the circuit court as gathered from all parts of the judgment itself. *In re Marriage of Plymale*, 172 Ill. App. 3d 455, 459 (1988). We presume that the circuit court intended a valid, and not a void, judgment and, where possible, we will interpret a judgment to give it valid effect. *Id.* An ambiguous judgment may be read in conjunction with the entire record. *Id*. This does not mean, however, that the record may be supplemented with parole evidence. *In*

re Marriage of Breslow, 306 Ill. App. 3d 41, 57 (1999).

¶ 38 Also, we are cognizant of the separate nature of actions for breach of a guaranty and mortgage foreclosure actions. "[A] mortgage and an accompanying promissory note securing the mortgage constitute separate legal contracts, [so] they give rise to legally distinct remedies that cannot be pursued in a single-count foreclosure suit." *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2004). Similarly, the guaranty is a third contract, and "the guaranty accompanying the mortgage and note likewise cannot be used as a basis for relief in a single-count foreclosure action." *Id.* These legally distinct remedies may be pursued consecutively or concurrently. *Id.*

¶ 39 Finally, we consider that Rule 304(a) informs the finality of the April 4, 2014, order. Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 40 The Booths agree with these principles, and they even agree that the April 4, 2014, order *would have been* a final and enforceable order upon the resolution of all pending matters, notwithstanding Archer Bank's partial recovery of its losses through the foreclosure proceedings, *if* the parties had not agreed otherwise. ("[T]he April 4, 2014, order pertaining to the guaranty counts could in theory become a final and enforceable judgment *** when the last order was

entered in the case [on August 22, 2014,] *if* [the parties did not agree otherwise at the April 4, 2014, hearing and if] the April 4, 2014, order was not revised or amended or superseded by [the May 8, 2014,] order[.]") Thus, in the Booths' view, as stated *supra* ¶ 13, the April 4, 2014, written judgment against them as guarantors was not immediately final and enforceable because the parties noted in paragraph 6 that the matter would proceed to a sheriff's sale and agreed in an April 4, 2014, on-the-record colloquy that the written judgment would be subject to amendment following the sale of the foreclosed property. This agreement, the Booths continue, was borne out in the May 8, 2014, judgment of foreclosure, which, in their view, superseded the April 4, 2014, written judgment against the guarantors. The May 8, 2014, judgment of foreclosure and sale provided in paragraph 4(g) that, if the proceeds of sale were insufficient to pay the indebtedness, Archer Bank shall be entitled to a deficiency judgment against Homer Developers, Orland Oak, and the Booths. According to the Booths, when the circuit court entered the August 22, 2014, confirmation of sale in the foreclosure action and Archer Bank declined to amend the judgment amount against the Booths as guarantors within 30 days, Archer Bank abandoned any judgment against the Booths as guarantors.

¶ 41 There are several problems with the Booths' position. First, while the Booths contend that Archer Bank was required to amend its judgment against them as guarantors within 30 days of the resolution of the foreclosure action, they do not explain how that would have been possible given that the question of whether they were released from all liability was then pending before this court. See *Archer Bank*, 2015 IL App (3d) 140345-U, ¶ 10 ("Appellants argue that the court erred in denying their motion for summary judgment and granting Archer's motion"). It was not until our resolution of *that* issue that the circuit court regained jurisdiction over the guaranty claim and its enforcement. Surely, at that time, the Booths could have received the credit they seem to believe

was required to have been noted within 30 days of August 22, 2014. Indeed, although the Booths do not develop their 2-1602 claim on appeal, petitions to revive judgment allow for subsequent credits to the original judgment to be taken into account. See 735 ILCS 5/2-1602(b) (West 2020) ("A petition to revive a judgment shall *** include a statement as to the original date and amount of the judgment, *** and credits to the judgment, if any). Thus, we disagree with the Booths' suggestion that the circuit court retained jurisdiction over the guaranty counts during the pendency of their 2015 appeal. Indeed, the portion of the record to which they point confirms our position. In discussing the import of attaching the 304(a) language to the guaranty counts, the circuit court stressed that the *foreclosure* counts alone could proceed to the sheriff's sale. ([ARCHER BANK'S COUNSEL]: [T]his court is saying, the 304(a) language would not impact the final order of foreclosure allowing the sheriff's sale to proceed ***; *** THE COURT: And I think I'm saying the same thing. I think the foreclosure and the sheriff's sale process needs to move forward.")

¶ 42 Next, we reject the notion that the May 8, 2014, judgment of *foreclosure* superseded the April 4, 2014, judgment against the *guarantors*. Foreclosure and guaranty actions are separate. Each action involves separate legal principles. See *Goldstein*, 349 Ill. App. 3d at 241. That paragraph 6 of the April 4, 2014, order noted that the matter would proceed to a sheriff's sale most obviously and simply means that the foreclosure action would proceed to a sheriff's sale. That paragraph 4(g) of the May 8, 2014, nine-page foreclosure judgment may have inadvertently referred to the Booths in a single line (and without reference to their status as guarantors) was surplusage. The surplus status is clear from the fact that the August 22, 2014, confirmation of sale, the final order in a foreclosure action (*Wells Fargo*, 2013 IL 115469, ¶ 12), omitted references to the Booths. As Archer Bank observed in its response to the motion to quash: "The Booths *** attemp[t] to circumvent the [April 4, 2014] judgment against them [as guarantors] simply because

a different [foreclosure] judgment order was entered against different parties as to different counts related to different contracts in this same case."

¶ 43 We disagree with the Booths' position that Archer Bank judicially admitted, upon reviewing the April 4, 2014, written order, that the finality of the judgment against the Booths as guarantors hinged on a post-foreclosure memorandum of judgment against the Booths in the foreclosure proceeding. To bring the April 4, 2014, judgment against the Booths as guarantors outside the general rule that judgments against a guarantor stand on their own, and even accepting it were possible to somehow supplant a judgment against a guarantor in a combined judgment of foreclosure and judgment against the guarantor, we would of course require more explicit wording and formal agreement.

¶ 44 Indeed, a judicial admission is a deliberate, clear, and unequivocal statement by a party about a concrete fact within a party's knowledge. *In re Estate of Renmick*, 181 Ill. 2d 395, 406 (1998). The colloquy between the parties following their review of the April 4, 2014, written order was anything but clear. See *surpa* ¶ 8. The Booths' attorney began by referencing counts IX through XII pertaining to the guarantors, confirming that the Booths' motion for summary judgment had been denied (and that 304(a) language had been granted). The Booths' attorney, who also represented the foreclosure defendants, then moved on to the topic of the foreclosure sale, stating "So they entered a judgment in a certain dollar amount on the guarantees, but *theoretically* that won't be correct if ultimately, once there is a sale and everything, then the amount of the sale will be deducted, and they're getting a judgment on the deficiency, right?" (Emphasis added.) The Booths' attorney used the word "guarantees," but Archer Bank's counsel responded to the topic in terms of a traditional foreclosure action, which would implicate only the foreclosure defendants. It is not clear whether the word "guarantees" escaped Archer Bank's counsel's

attention or whether he focused on the Booths' counsel's qualifying phrase of "theoretically." Either way, if the parties intended for the finality of the April 4, 2014, written order against the guarantors to hinge on the foreclosure sale, they were required to finalize that contingency deliberately and clearly.

¶ 45 The Booths' attorney's qualifying phrase of "theoretically" evinced his recognition that the proceeds from the sale of the foreclosed property would have the practical effect of reducing the amount Archer Bank would be entitled to *collect* from the Booths as guarantors. It is true, as Archer Bank concedes, that, because Archer Bank chose to pursue the foreclosure judgment to finality, the proceeds from the sale of the foreclosed property would lessen the amount that Archer Bank would be entitled to collect from the Booths. Archer Bank cannot collect the same damages twice. However, as the court in *Berea College v. Killian*, 304 Ill. App. 3d 296, 301 (1940), observed, this circumstance is not cause for a guarantor defendant to complain. There, the court reasoned:

> "[T]he defendants as guarantors are not concerned legally with the steps taken to foreclose the mortgage. [The] [p]laintiff could have sued [the] defendants for the entire balance of due on the notes before the foreclosure if it had seen fit to do so and the guarantors were liable to a judgment for the full amount due on said notes. Surely[,] they cannot be heard to complain in this [guaranty] cause about the foreclosure proceeding which materially decreased the amount of indebtedness they were liable for as guarantors." *Id.*

¶ 46 In sum, we determine that the face of the record does not support the Booths' argument that no judgment against them exists. Therefore, we affirm the circuit court's granting of Archer Bank's section 2-1602 petition to revive.

¶ 47 B. Section 2-1401 Petition to Vacate

¶ 48 We next address the Booths' section 2-1401 argument. Section 2-1401 provides a statutory procedure whereby, under certain conditions, circuit courts may vacate or modify a final judgment more than thirty days after the judgment has been entered. *Askew Insurance Group, LLC v. AZM Group, Inc.*, 2020 IL App (1st) 190179 ¶ 21. Typically, a petitioner must file his or her section 2-1401 petition within two years of the challenged order or judgment. 735 ILCS 5/2-1401(c) (West 2020). Also, a 2-1401 petition generally must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the 2-1401 petition. *Askew*, 2020 IL App (1st) 190179, ¶ 21. However, a void judgment is exempt from the traditional requirements that the petition be filed within two years and that the petition allege a meritorious defense and due diligence. *Sarkissan*, 201 Ill. 2d at 104.

¶ 49 The Booths argue that they need not meet the traditional section 2-1401 requirements, because no judgment against them exists and, therefore, we should construe the April 4, 2014, judgment as a void judgment. Like the circuit court, we disagree that the April 4, 2014, judgment can be thought of as a void judgment. A judgment is deemed void for the purposes of section 2-1401 only if: (1) the judgment was entered by a court that lacked personal or subject matter jurisdiction; or (2) the judgment was based on a statute that is facially unconstitutional and void *ab initio*. *Price*, 2016 IL 118613, ¶ 31 (noting that, in *Castleberry*, 2015 IL 116916, ¶ 17, the court eliminated a third type of void judgment known as the void sentence rule). The Booths do not argue and the record does not support that they have satisfied either of these bases for a void judgment under 2-1401.

¶ 50 The Booths alternatively argue that the two-year limitations period does not apply, because Archer Bank abandoned the April 4, 2014, judgment such that no judgment existed from which to

start the two-year clock. In addition, they essentially argue that we should consider that they have a meritorious defense in that no judgment exists, and they assert that, as soon as they learned that Archer Bank would be attempting to collect, they diligently moved to quash, responded in opposition to Archer Bank's section 2-1602 petition, and filed their own section 2-1401 petition.

¶ 51 To accept this approach, we would have to agree with the Booths that no judgment against them exists. We have already rejected this argument in our section 2-1602 analysis. Using section 2-1401 as a vehicle, however, the Booths seek to add evidence outside the original record—their attorney's affidavit averring that Archer Bank assured the Booths in out-of-court discussions that it would not pursue a judgment against them. For the reasons that follow, this new evidence does not change our determination.

¶ 52 As set forth in the Booths' attorney's affidavit, the alleged out-of-court discussions occurred in March 2014 and July 2014. Regarding the March 2014 discussion, the Booths' attorney's affidavit provided:

> "I attended a meeting on or about March 14, 2014, with [several persons, including Archer Bank's attorney]. *We discussed settling the matter at this time.* Mr. Booth reiterated what he said about his tax problems in January [2014] and said he could not simply agree to a deed in lieu of foreclosure. [Archer Bank's attorney] stated that Archer Bank would agree not to pursue any deficiency against the Booths. [He] said the total amount of damages will not matter because Archer Bank did not intend to pursue a deficiency against the Booths. I believe the Booths reached an enforceable oral agreement at this meeting." (Emphasis added.)

¶ 53 The Booths' allegations concerning the March 2014 discussion are conclusory and at odds with their larger argument on appeal. The allegations, even taken as true, do not show that Archer

Bank gratuitously agreed to abandon future avenues of relief against the Booths.

¶ 54 First, the alleged March 2014 discussion took place in the context of a proposed settlement. Though the terms of the proposed settlement are not clearly delineated in the affidavit, the affidavit clearly suggests that Archer Bank's alleged assurance that it would not pursue a judgment against the Booths was not gratuitous, but rather was meant to apply in the event of a settlement. Significantly, however, the Booths did not settle with Archer Bank, rendering the March 2014 discussion of no consequence.

¶ 55 Moreover, we observe that the Booths' characterization of the March 2014 discussion is at odds with their position that, at the close of the April 4, 2014, hearing, Archer Bank agreed that, theoretically, the $9 million judgment against the Booths as guarantors would be reduced by the proceeds from the foreclosure sale. The Booths want us to accept that Archer Bank assured them in March 2014 that it would not pursue a deficiency judgment against them, but they also want us to accept that Archer Bank subsequently assured them on April 4, 2014, at their request, that it *would* seek what would in practical or theoretical effect would amount to a deficiency judgment (the amount of the judgment against them as guarantors less the proceeds from the sale of the foreclosed property). They also want us to accept that the May 8, 2014, judgment of foreclosure memorialized the alleged April 4, 2014, oral agreement and that they did not object at that time to a deficiency judgment against them.

¶ 56 Turning to the July 2014 discussion, the Booths' attorney averred that he saw a draft copy of the motion to confirm the sale and accompanying deficiency judgment against the Booths:

> "I was totally shocked because we had an agreement that Archer Bank would not pursue such. I contacted Archer Bank's attorney on *** July 23, 2014, to find out what was going on. [Archer Bank's attorney] said the proposed order contained a mistake and

that the language providing a deficiency judgment against the Booths would be removed from the order entered by the court."

¶ 57 The Booths' allegations concerning the July 2014 discussion also are conclusory. The allegations, even if taken as true, do not establish with certainty why Archer Bank initially included and then later chose to remove the language concerning a deficiency judgment against the Booths. The "mistake" Archer Bank's attorney allegedly referenced could very well be that guarantor judgments are distinct from foreclosure judgments and, therefore, it was improper to include the Booths in the foreclosure judgment. Alternatively, the "mistake" could have been an acknowledgement that it would have been improper to pursue collection against the Booths when the Booths' appeal concerning Archer Bank's alleged release and settlement remained pending. We cannot unquestioningly accept that the "mistake" was that Archer Bank had previously "promised" not to pursue judgment against the Booths. This is particularly so given that the alleged promise occurred *prior* to the Booths' alleged April 4, 2014, request that Archer Bank nevertheless pursue a deficiency judgment against them. Finally, we add that, even accepting as true that Archer Bank's attorney assured the Booths in an out-of-court statement that it would not pursue collection on the judgment against them as guarantors, this assurance would not constitute a collateral basis upon which to attack the April 4, 2014, judgment.

¶ 58 In sum, the new information contained in the Booths' attorney's affidavit does not affect our determination that Archer Bank obtained a valid judgment against the Booths as guarantors and that Archer Bank did not abandon the judgment. Accordingly, we reject the Booths' section 2-1401 claim.

¶ 59 III. CONCLUSION

¶ 60 For the aforementioned reasons, the judgments of the circuit court are affirmed.

¶ 61 Affirmed.