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2012 IL App (3d) 110847-U

Order filed July 2, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

WELLS FARGO BANK, N.A.,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0847
) Circuit No. 09-CH-3901
)
DARRELL COBURN,) Honorable
) Richard J. Siegel,
Defendant-Appellant.) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's motion to vacate where defendant failed to file a verified pleading or attach an affidavit to the motion. Additionally, defendant's pleading did not establish the due diligence required to succeed on a motion to vacate because the documentation giving rise to his allegations of fraud was available to him during the original action.

¶ 2 Defendant Darrell Coburn appeals from an order dismissing his motion to vacate the foreclosure of his mortgage loan. On appeal, defendant argues the foreclosure was procured by fraud because plaintiff Wells Fargo Bank, N.A. (Wells Fargo) did not have standing to

commence a foreclosure action. We affirm.

¶ 3

FACTS

¶ 4 On May 8, 2008, defendant purchased the property commonly known as 646 Birchwood Drive, Bolingbrook, Illinois. In order to finance the purchase, defendant executed a note in the amount of \$177,219 and secured that debt with a mortgage from Franklin American Mortgage Company (Franklin), naming Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Franklin with the power to foreclose on the property in the event of a default by defendant.

¶ 5 On September 1, 2009, Wells Fargo filed a mortgage foreclosure complaint alleging Wells Fargo was the holder of the mortgage and note for the property located at 646 Birchwood Drive, Bolingbrook, Illinois. Defendant, appearing *pro se*, filed an answer which did not dispute Wells Fargo was a legal holder of the debt at the time the foreclosure action was initiated.

¶ 6 On November 4, 2009, Wells Fargo filed a motion for summary judgment and attached an undated supplemental document indicating that MERS, as nominee for Franklin, assigned the mortgage to Wells Fargo "prior to 08/24/2009." The document was signed by Jill Rein, a "Certifying Officer" for MERS, and was notarized on September 25, 2009. In addition, the record contains an uncontested printout from the Will County Recorder's office showing the assigned mortgage in favor of Wells Fargo was not recorded until October 14, 2009, more than a month after the foreclosure action began on September 1, 2009.

¶ 7 Defendant filed his response to the motion for summary judgment on December 31, 2009. Defendant claimed he was procuring the necessary funds to cure his default before the next court date of February 23, 2010, but he did not challenge Wells Fargo's standing to bring this action.

¶ 8 On July 8, 2010, the court granted summary judgment in favor of Wells Fargo. The property was sold at a public sale on December 8, 2010. On March 11, 2011, the trial court approved the foreclosure sale and entered the final foreclosure judgment. Defendant did not appeal.

¶ 9 On November 4, 2011, defendant filed a motion to vacate the foreclosure judgment alleging Wells Fargo did not have legal standing to file the mortgage foreclosure complaint and Wells Fargo had altered the original mortgage.¹ Wells Fargo did not file a responsive pleading, but both parties appeared before the court to argue the motion to vacate on November 15, 2011. The trial court denied defendant's motion. No explanation for the denial is provided in the written order, and appellant has not provided either a transcript of the hearing or a bystander's report of the proceedings. Defendant appeals the denial of his motion to vacate.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant claims Wells Fargo committed a fraud upon the court because MERS had not completed the assignment of the mortgage to Wells Fargo before Wells Fargo initiated the foreclosure action by filing a complaint on September 1, 2009. Defendant also argues MERS did not have the legal authority to transfer the note, and that Rein was operating under a conflict of interest in the original foreclosure action.

¹Although defendant did not state he was bringing the motion to vacate pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401) (West 2010), we will treat the motion as a 2-1401 motion. See *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902, 905-06 (2009) (holding that untimely post-judgment motions should be treated as section 2-1401 petitions).

¶ 12 As an initial matter, we must decide the standard of review. Traditionally, courts have reviewed a trial court's decision on a motion to vacate for an abuse of discretion. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007). However, as our supreme court recognized in *Vincent*, the indiscriminate use of the abuse of discretion standard was founded on the false belief that the power to vacate a judgment was based on the equitable power of the court. *Id.* at 15. Therefore, once the power to vacate a judgment became a statutory remedy pursuant to section 2-1401 of the Code, a decision to vacate a previous judgment did not require the court to exercise any equitable authority. *Id.* at 16. The *Vincent* court recognized there were five possible outcomes when dealing with a statutory 2-1401 motion to vacate: "the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding a hearing at which factual disputes are resolved." *Id.* at 9. The court held *de novo* review was more appropriate for dispositions where the trial court either dismissed the petition or ruled on the petition based on the pleadings alone. *Id.* at 16.

¶ 13 In this case, the trial court denied the 2-1401 motion to vacate before Wells Fargo filed a responsive pleading. Thus, the court's action operates as "the functional equivalent of a dismissal for failure to state a cause of action." *Id.* at 14. Therefore, we review defendant's claim that the dismissal was improper *de novo*. *Id.* at 16. Accordingly, we must determine whether the allegations in defendant's motion, when interpreted in the light most favorable to defendant, sufficiently set forth a cause of action upon which relief may be granted. *Herrera-Coral v. Hyman*, 408 Ill. App. 3d 672, 674 (2011).

¶ 14 Turning to the merits of this case, the purpose of a 2-1401 motion to vacate "is to bring before the court matters of fact which were unknown at the time judgment was entered, and if

known, would have affected or altered the judgment." *In re Marriage of Lindjord*, 234 Ill. App. 3d 319, 325 (1992) (citing *In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 282 (1991)). To succeed on a 2-1401 motion to vacate, the petitioner must affirmatively set out specific facts demonstrating: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the trial court in the original action; and (3) due diligence in filing the motion to vacate. *Id.* at 325. The due diligence requirement need not be rigidly enforced where fraud or unconscionable behavior is shown. *Id.*

¶ 15 First, defendant's 2-1401 motion to vacate the judgment was insufficient as a matter of law because it was not verified or supported by an affidavit as required by statute. See 735 ILCS 2-1401(b) (West 2010) (stating "[t]he petition must be supported by affidavit or other appropriate showing as to matters not of record"); *In re Estate of Barth*, 339 Ill. App. 3d 651, 664 (2003) (a petition for relief from judgment alleging fraud is insufficient as a matter of law unless it is verified or supported by an affidavit). The fact that defendant filed his 2-1401 motion to vacate *pro se* does not excuse the requirement that the petition be verified. See *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009) (petitioner's purported *pro se* post-conviction petition did not satisfy requirement that post-conviction petition be verified).

¶ 16 Second, while defendant raises a valid concern that the assignment of the mortgage to Wells Fargo may not have actually occurred before September 1, 2009, defendant's motion was nonetheless legally insufficient because he did not act with due diligence in the original action. To explain, defendant accurately points out that Wells Fargo has not provided a specific date MERS transferred the mortgage to Wells Fargo. The undated supplemental document attached to the motion for summary judgment in November 2009 only purports that MERS transferred the

mortgage to Wells Fargo sometime before August 24, 2009. In addition, the supplemental document was not presented to the notary to verify Rein's signature until September 25, 2009, and was not recorded until October 14, 2009, six weeks after the complaint was filed. Thus, there were puzzling, if not suspicious, circumstances surrounding whether Wells Fargo was a legal holder of the debt at the time the complaint was filed on September 1, 2009 or whether the assignment was created sometime after Wells Fargo began foreclosure proceedings.

¶ 17 Nonetheless, the supplemental documentation at the heart of this appeal became available to defendant on November 4, 2009, long before the court granted summary judgment in favor of Wells Fargo on July 8, 2010. Here, defendant had the opportunity as early as November 4, 2009 to challenge Wells Fargo's standing due to the questionable nature of the supplemental documentation tendered to the court as part of the motion for summary judgment. However, defendant did not raise this issue in the trial court. Instead, defendant objected to summary judgment on the grounds that he was working to secure additional funds to bring the mortgage current.

¶ 18 On appeal, defendant now argues that, as a *pro se* litigant, he did not review documents filed by Wells Fargo until October 2011, after learning of media reports regarding illegal foreclosures throughout the United States. However, this discovery could have occurred sooner if either defendant or the court had carefully examined the documents Wells Fargo submitted to the court prior to the judgment of foreclosure. Consequently, even viewed in the light most favorable to defendant, we conclude the motion to vacate did not establish defendant exercised due diligence. As stated by the court in *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1038-39 (1991):

"In sum, [defendant's] allegations of fraud fail because he does not, and the record demonstrates that he cannot, show that [plaintiff's] statements caused his delay in presenting his new evidence. *** If [defendant] did not avail himself of the means of knowledge open to him, he cannot be heard to say that he was misled by the misrepresentations."

Defendant's status as a *pro se* litigant does not excuse his failure to diligently present his defense in the original action. See *Fiallo v. Lee*, 356 Ill. App. 3d 649, 657 (2005). Therefore, the trial court did not err by denying defendant's motion for relief from judgment.

¶ 19 For the same reasons, defendant's remaining arguments regarding MERS's legal authority to transfer the loan to Wells Fargo and Rein's purported conflict of interest must also fail. Defendant's arguments are based on documentation which was available to him during the original action. Accordingly, defendant is unable to demonstrate that he met the due diligence requirement necessary to vacate the foreclosure judgment.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 22 Affirmed.