

No. 1-13-0423

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

WELLS FARGO BANK, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 10 CH 31348
)	
PETER ABATANGELO,)	The Honorable
)	Robert Senechalle,
Defendant- Appellant.)	Judge Presiding.

JUSTICE Harris delivered the judgment of the court.
Presiding Justice Quinn and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order approving and confirming the judicial sale is affirmed, as is the underlying foreclosure complaint, where defendant challenges the sale based on the merits of the foreclosure complaint rather than challenging the confirmation of the sale pursuant to the Foreclosure Act as the supreme court required in *Wells Fargo Bank, N.A. v. Katie McCluskey*, 2013 IL 115469.

¶ 2 Defendant, Peter Abatangelo, appeals the order of the circuit court granting summary judgment in favor of plaintiff, Wells Fargo Bank, N.A. (Wells Fargo), on plaintiff's foreclosure complaint. On appeal, Mr. Abatangelo contends that the court erred in granting summary judgment because (1) the mortgage contract did not properly assign the right to foreclose to Wells Fargo; and (2) the trial court improperly considered new arguments raised by Wells Fargo for the first time in a reply brief in support of their motion to dismiss. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered summary judgment on the foreclosure complaint on March 13, 2012. The trial court entered an order approving and confirming the sale, and order for possession on January 18, 2013. Mr. Abatangelo filed his notice of appeal on January 30, 2013. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

BACKGROUND

¶ 5 On January 16, 2008, Advanced Mortgage Systems, LLC, loaned Mr. Abatangelo \$349,000.00 under the terms of a note also dated January 16, 2008. The note was secured by a mortgage on Mr. Abatangelo's residence located at 416 North Lincoln Lane in Arlington Heights, Illinois. Mortgage Electronic Registration Systems, Inc. (MERS) was the mortgagee under the mortgage. The mortgage also stated that MERS is the beneficiary of the security instrument "solely as nominee for Lender and Lender's successors and assigns ***. This Security Instrument secures to Lender: (I) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and

the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale," the Arlington Heights property. Advanced Mortgage Systems subsequently endorsed an allonge to the note "without recourse" to AmTrust Bank, which, in turn, endorsed the note in blank and gave it to Wells Fargo. Mr. Abatangelo acknowledged that Wells Fargo is the holder of the note.

¶6 Mr. Abatangelo failed to pay his monthly installment on the mortgage due for March 1, 2010. On July 21, 2010, MERS executed an assignment transferring "all title to and interest in the Note and Mortgage dated January 16, 2008," to Wells Fargo. That same day, Wells Fargo filed a complaint to foreclose the mortgage. Mr. Abatangelo did not file an answer to the complaint and the trial court entered an order of default and judgment of foreclosure and sale on April 22, 2011. Mr. Abatangelo subsequently moved to vacate the default and judgment of foreclosure, which the trial court granted. He also moved for summary judgment which the trial court denied on December 1, 2011. Mr. Abatangelo filed an answer to the complaint, arguing that Wells Fargo did not have standing to foreclose the mortgage.

¶7 Wells Fargo moved for summary judgment and the trial court held a hearing on the motion. The trial court granted the motion on March 13, 2012, and the judgment of foreclosure and sale was entered that same day. The judgment of foreclosure provided that the "redemption period shall end in this case on 6/13/2012." The trial court denied Mr. Abatangelo's request for an Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding. A judicial sale was held on December 3, 2012, and Wells Fargo emerged as the successful bidder. On January 18, 2013, the trial court, upon Wells Fargo's motion, entered an order approving the sale, confirming the sale, and for possession. The order stated that "all notices required by Section 1507(c) of the Illinois Mortgage Foreclosure Law

(735 ILCS 5/15-1507(c) (West 2010))" (Foreclosure Law) were given to the appropriate parties. It further stated that the "sale was fairly and properly made," conformed to the terms of the court's judgment, and therefore "justice was done." Mr. Abatangelo filed this timely appeal.

¶ 8

ANALYSIS

¶ 9 On appeal, Mr. Abatangelo challenges the trial court's grant of summary judgment on Wells Fargo's foreclosure complaint, specifically its finding that Wells Fargo had standing to foreclose on the mortgage.¹ We note that in this case, Mr. Abatangelo's right of redemption had passed and the judicial sale took place on December 3, 2012. On Wells Fargo's motion, the trial court approved and confirmed the sale, and entered an order of possession on January 18, 2013. Our supreme court recently addressed the issue of challenging the merits of the underlying judgment of foreclosure after the trial court's approval and confirmation of the sale in *Wells Fargo Bank, N.A. v. Katie McCluskey*, 2013 IL 115469.

¶ 10 In *McCluskey*, the defendant filed a motion to vacate the default judgment 10 months after the judgment of foreclosure, and after the holding of the judicial sale of the property. *McCluskey*, 2013 IL 115469, ¶ 5. In her motion, defendant alleged that plaintiff's affidavit in support of foreclosure was insufficient, and that plaintiff lacked standing to bring the suit. *Id.* Following a

¹Mr. Abatangelo failed to include a transcript of the proceedings before the trial court, or a bystanders report, or agreed statement of facts as required by Supreme Court Rule 323 (eff. Dec. 13, 2005). "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). Without a record of the proceeding, we must presume that the court below had a sufficient factual basis for its determination and that it conforms with the law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We address his contentions on appeal under this limitation.

hearing, the trial court denied the motion to vacate. It then entered an order confirming the judicial sale and finding that all notices were given, the sale was fairly and properly made, the sale proceeded in accordance with the court's judgment, and justice was done. Defendant filed her notice of appeal in which she challenged the denial of her motion to vacate the default judgment. She did not, however, challenge the order confirming the sale of the property. *Id.* at ¶ 6.

¶ 11 Our supreme court determined that to allow a party to challenge a default judgment through a motion to vacate, after the judicial sale has taken place, is inconsistent with the procedures set forth in the Foreclosure Law. *Id.* at ¶ 25. The court cited to *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 4-5 (2010), in which this court held that the Foreclosure Law takes precedence over any inconsistent statutory provisions.

¶ 12 In making this determination, the supreme court examined the procedures under the Foreclosure Law. The Foreclosure Law sets forth "a carefully crafted procedural process" that balances the interests of the lender with the competing interests of the borrower. *McCluskey*, 2013 IL 115469, ¶ 24. Each step of the foreclosure process terminates legal and equitable interests in the property while also providing protections to the borrower's equity in the property, including an allotted time for reinstatement of the mortgage, equitable and statutory rights of redemption and notice of the judicial sale. When the trial court enters a judgment of foreclosure, the process "culminates in the confirmation of the sale and possession of the property." *Id.*

¶ 13 "Under the Foreclosure Law, after a judicial sale and a motion to confirm the sale has been filed, the court's discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b)." Section 15-1508(b) states that the court shall confirm the sale unless it finds that (1)

proper notice was not given; (2) terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2010). The supreme court noted that section 15-1508(b) did not expressly define what constitutes an injustice, but the court reasoned that the section appeared "to merely codify the long-standing discretion of the courts of equity to refuse to confirm a judicial sale." *Id.*

¶ 14 After a motion to confirm the sale has been filed, "the court has discretion to see that justice has been done, but the balance of interests has shifted between the parties." *Id.* Therefore, it is not sufficient at this stage of the process "to merely raise a meritorious defense to the" underlying foreclosure complaint. *Id.* at ¶ 26. Our supreme court held that "after a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a default judgment of foreclosure may only do so by filing objections to the confirmation of the sale under the provisions of section 15-1508(b)." *Id.* at ¶ 27. Therefore, "a party seeking to set aside the sale at that point is limited to the three specified grounds related to defects in the sale proceedings, or to the fourth ground, that 'justice was otherwise not done.'" *Id.* at ¶ 18. To show that justice was not otherwise done, a party must establish that the lender, through fraud or misrepresentation, prevented the borrower from raising the meritorious defense to the complaint, or the borrower was otherwise prevented from protecting his property interests. *Id.* at ¶ 25. The court reasoned that to hold otherwise would be inconsistent with the need for stability in the process and "would allow the borrower to circumvent the time limitations for redemption and reinstatement." *Id.*

¶ 15 Although Mr. Abatangelo did not file a motion to vacate the default judgment, he is essentially requesting that this court vacate the default judgment in order to set aside the subsequent

judicial sale of the subject property. However, Mr. Abantangelo's redemption period has passed, the judicial sale has already taken place, and the trial court has confirmed the sale upon a motion filed by Wells Fargo. As our supreme court held in *McCluskey*, a party seeking to set aside the sale at this point "is limited to the three specified grounds related to defects in the sale proceedings," or to allege that justice was otherwise not done. *McCluskey*, 2013 IL 115469, ¶ 18. As to the three grounds, the trial court below found that proper notice was given to the parties, the "sale was fairly and properly made," the sale conformed to the terms of the court's judgment, and therefore "justice was done." On appeal, Mr. Abantangelo does not challenge the order confirming the sale of the property, nor does he allege fraud by any parties to the transactions at issue. Instead, he raises allegedly meritorious defenses to the underlying foreclosure judgment which is insufficient once the trial court enters an order confirming the judicial sale. See *McCluskey*, 2013 IL 115469, ¶¶ 26, 27. Therefore, the trial court's order approving and confirming the sale, as well as the underlying judgment of foreclosure, will stand.

¶ 16 Furthermore, in his answers to the foreclosure complaint, Mr. Abantangelo acknowledged "that some payments were not paid on time or remain outstanding." He also admitted that Wells Fargo "brings this action as the holder of the subject note." As this court noted in *Barnes*, section 15-1504(a)(3)(N) of "the Foreclosure Law indicates that the legal holder of the indebtedness *** may file the case." *Barnes*, 406 Ill. App. 3d at 7. Wells Fargo had standing to bring the foreclosure action.

¶ 17 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.

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