

FOURTH DIVISION
August 21, 2014

1-13-3717

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. Successor by)	Appeal from the
Merger to WELLS FARGO HOME MORTGAGE,)	Circuit Court of
INC.,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
(V & T INVESTMENT CORP.,)	
)	
Intervenor),)	
)	
v.)	No. 07 CH 4644
)	
JERRY BOONE,)	
)	
Defendant-Appellant)	
)	
(CHICAGO TITLE LAND TRUST COMPANY,)	
successor Trustee to CHICAGO TITLE and TRUST)	
COMPANY as Trustee u/t/a dated March 8, 2002 a/k/a)	
TRUST NO. 1110715, UNKNOWN BENEFICIARIES)	
OF CHICAGO TITLE LAND TRUST COMPANY)	
successor Trustee to CHICAGO TITLE and TRUST)	
COMPANY as Trustee u/t/a dated March 8, 2002 a/k/a)	
TRUST NO. 1110715, UNKOWN OWNERS and)	
NONRECORD CLAIMANTS,)	Honorable
)	Darryl B. Simko,
Defendants).)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court of Cook County's orders denying defendant's motion to vacate judgment of foreclosure and granting plaintiff's motion to confirm sale are affirmed. Defendant forfeit his arguments that the judgment of foreclosure violated his right to due process and that the judicial sale violated the Illinois Mortgage Foreclosure Law by failing to raise them on appeal; and defendant forfeit any argument the trial court should have vacated the judgment of foreclosure or should not have confirmed the sale because of defendant's counsel's performance by failing to raise it in the trial court.

¶ 2 Plaintiff, Wells Fargo Bank, N.A., filed a complaint under the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2006)) against defendant, Jerry Boone. Defendant answered the complaint and asserted affirmative defenses. Plaintiff moved for summary judgment. The circuit court of Cook County granted plaintiff's motion for summary judgment. Defendant filed two postjudgment motions attacking the foreclosure judgment and the trial court denied them both. Plaintiff filed a motion for an order confirming the judicial sale of the property subject to the mortgage at issue in this case. Defendant filed a response to plaintiff's motion to confirm the sale. Defendant separately filed a motion to vacate the foreclosure judgment. The trial court denied defendant's motion to vacate the judgment of foreclosure and granted plaintiff's motion to confirm the sale. This appeal followed.

¶ 3 BACKGROUND

¶ 4 In 2001 defendant obtained a loan secured by a mortgage on the subject property. In June 2007 plaintiff filed an amended complaint to foreclose mortgage against defendant.

Plaintiff's amended complaint alleges that defendant has not paid the monthly installments of principal, taxes, interest, and insurance for November 2006 continuing to the date of the complaint. In August 2007 defendant filed a *pro se* answer to the complaint. Defendant's *pro se* answer to plaintiff's amended complaint alleged defendant made all of the payments required by the mortgage agreement but plaintiff failed to properly apply certain of defendant's payments to the principal, taxes, interest and insurance. In September 2007 defendant, through an attorney, filed a counterclaim and an amended answer and affirmative defenses to plaintiff's amended complaint.

¶ 5 Defendant's counterclaim sought damages against plaintiff for breach of contract for allegedly failing to apply certain of defendant's mortgage payments to principal and interest as required by the parties' loan note and mortgage agreement. Defendant alleged that plaintiff's breach of the parties' contracts caused damages in that defendant's mortgage appeared to be in default because of the misapplied payments resulting in plaintiff's legal action to foreclose the mortgage, and interest, penalties, court costs, and attorney fees. Defendant's amended answer asserted defendant's allegedly making all of the payments required under the note and mortgage agreements and the misapplication of certain of those payments as affirmative defenses. Plaintiff moved to dismiss defendant's counterclaim and affirmative defenses.

¶ 6 In response, defendant filed a motion for leave to file an amended answer and affirmative defenses and an amended counterclaim to address the allegations in plaintiff's motion to dismiss. In July 2008 the trial court granted defendant leave to file an amended answer and affirmative defenses and an amended counterclaim and ordered plaintiff to answer or otherwise plead thereto.

¶ 7 In August 2008 plaintiff filed a response to defendant's amended affirmative defenses denying defendant's allegations. On August 26, 2008 the trial court granted defendant's attorney's motion to withdraw his appearance on behalf of defendant. In November 2008 plaintiff filed a response to defendant's amended counterclaim. In June 2011 plaintiff moved for summary judgment on plaintiff's amended complaint to foreclose mortgage and on defendant's amended affirmative defenses and amended counterclaim.

¶ 8 In July 2011 the trial court set a briefing schedule on plaintiff's motion for summary judgment. The briefing schedule required defendant to file his response to the motion by August 11, 2011, and scheduled a hearing for September 12, 2011. On the date defendant's response to plaintiff's motion was due defendant's attorney filed a motion for an extension of time to respond. The motion noted defendant's affirmative defense of making all payments required under the note and mortgage agreements and asked for an extension to permit defendant to compile complete documentary support for a counteraffidavit to the affidavit plaintiff filed in support of its motion.

¶ 9 Defendant nor his attorney appeared at the September 12, 2011 hearing. On September 12 the trial court entered an order granting plaintiff's motion for summary judgment on plaintiff's complaint to foreclose mortgage and defendant's amended affirmative defenses and amended counterclaim. The trial court denied defendant's August 11 motion for an extension of time and entered judgment of foreclosure and sale. On October 12, 2011, defendant, through counsel, filed a motion to vacate the judgment. Defendant's motion to vacate asserted that defendant's attorney did not appear before the court on September 12, 2011 due to a scheduling error. The motion to vacate also stated that defendant's response to

plaintiff's motion for summary judgment was still not complete, but that defense counsel "intends to complete, and serve [the] Court and opposing counsel with a copy of the proposed response brief prior to the date scheduled for presentation of this Motion [to vacate]."

Defendant's attorney noticed the motion to vacate for hearing on November 17, 2011.

¶ 10 On November 17, 2011, following oral argument by the attorneys for the parties, the trial court denied defendant's motion. The same day, plaintiff filed and served defendant with notice of the sale of the foreclosed property.

¶ 11 On December 9, 2011, defendant filed an emergency motion to reconsider the denial of the motion to vacate. Defendant's emergency motion argued that defendant could demonstrate that there is a genuine issue of material fact as to the plaintiff's claim for foreclosure and that plaintiff would not be unduly prejudiced by granting defendant a rehearing on plaintiff's motion for summary judgment. Defendant's emergency motion purported to set forth defendant's mortgage payments between November 25, 2002 and December 11, 2006, and plaintiff's application of those payments to either defendant's loan or to defendant's "suspense" account. Following the recitation of those payments, defendant's emergency motion argued that "plaintiff's affidavit erroneously states that the subject loan remained due and owing for the November 1, 2006 monthly installment payment, where there was more than sufficient funds in the defendant's suspense account to pay in-full the installment due for November 2006."

¶ 12 The motion argued plaintiff failed to notify defendant of a change in his monthly mortgage payment until sometime after the change and that defendant continued to make payments in the previous amount. But, nonetheless, after application of all sums defendant

did pay, to principal, interest, and escrow, a balance remained that plaintiff never applied to defendant's mortgage or escrow obligation, therefore defendant was not in default. In support of his argument he was not in default defendant attached to the emergency motion spreadsheets he created showing his payments and plaintiff's application of those payments. Defendant argued that based on the information he provided he could demonstrate a genuine issue of material fact as to whether plaintiff is entitled to a judgment of foreclosure and sale.

¶ 13 On December 12, 2011, with counsel for plaintiff and counsel for defendant present, the trial court denied defendant's emergency motion to reconsider the order denying defendant's motion to vacate the judgment of foreclosure and sale. On April 13, 2012, defendant's attorney filed a motion to withdraw appearance on behalf of defendant. On May 29, 2012, the trial court granted the motion and ordered defendant to file his substitute appearance through new legal counsel or on his own behalf within 21 days.

¶ 14 On August 15, 2013, plaintiff filed a motion for an order approving the report of the sale and distribution of the subject property. The receipt of sale stated that V & T Investment Corporation made the highest bid and that the seller sold V & T the property.¹ On September 3, 2013, the trial court set a briefing schedule on plaintiff's motion for an order confirming the sale and set the matter for a hearing on October 28, 2013. The court's order setting the briefing schedule states that defendant appeared in court.

¹ On May 28, 2014 this court granted V & T's motion to file an appearance in this appeal. V & T moved to dismiss the mortgaged property as a subject of this appeal on the grounds defendant's interest in that property terminated when V & T's title vested before defendant filed a notice of appeal. That motion was allowed without a response having been filed by defendant. Thereafter, it was subsequently vacated on defendant's motion and V & T's motion was denied.

¶ 15 On September 24, 2013, defendant, by counsel, filed a motion pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) titled “Motion to Vacate Judgment of Deemed Allegations for Being Void.” Also on September 24, 2013, defendant filed a response to plaintiff’s motion to confirm sale. Defendant’s response to the motion to confirm argued the sale violated section 15-1507(c)(4) of the Foreclosure Law (735 ILCS 5/15-1507(c)(4) (West 2012)) because the report of sale failed to specify that the seller announced the date, time, and place of the adjourned sale.

¶ 16 Defendant’s motion to vacate argued that the trial court’s judgment of foreclosure and sale “purports to have findings of fact regarding ‘deemed and construed’ allegations” but that those “allegations are not found anywhere in the face of the complaint.” Defendant argued that the trial court’s judgment deprived him of a constitutionally protected interest in the subject property without due process of law when the judgment stated that the deemed allegations were found to be true, but those allegations are not on the face of the complaint and were not addressed in defendant’s amended answer. Defendant argued the trial court violated his procedural due process right to be heard on those facts on which the trial court premised its judgment of foreclosure and sale. Therefore, defendant argued, the judgment of foreclosure and sale is void.² Defendant prayed for an order vacating the judgment of foreclosure and sale and granting him 28 days to file an answer regarding the “deemed allegations.”

² Defendant also argues that because his motion asserts the trial court’s judgment is void he is relieved of the usual requirements of a motion pursuant to section 2-1401 to demonstrate the existence of a meritorious defense and due diligence in presenting the claim.

¶ 17 On October 28, 2013, the trial court held a hearing on plaintiff's motion to confirm the sale and on defendant's motion to vacate the judgment of foreclosure and sale. The court denied defendant's motion to vacate premised on an alleged procedural due process violation and granted plaintiff's motion to confirm the sale. On November 25, 2013, defendant filed a notice of appeal from the October 28, 2013 judgment denying defendant's motion to vacate the "judgment of deemed allegations for being void" and confirming judicial sale.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues that the trial court's order granting summary judgment in favor of plaintiff should be reversed because his attorney's conduct equates to ineffective assistance of counsel which prejudiced defendant. Defendant asserts the court has adopted the test for ineffective assistance of counsel used in criminal cases "for use in a civil law context" and that his attorney's conduct in this case and the resulting orders by the trial court satisfy that test.³ In this case, defendant argues, his attorney failed to file a response to the motion for summary judgment or to appear at the hearing on the motion and but for defendant's counsel's conduct "it is far from certain that judgment would have been entered in Plaintiff's favor." Defendant argues the test for ineffective assistance of counsel is satisfied because the failure to file a responsive pleading to a dispositive motion could not have been a trial strategy

³ "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. [Citation.] More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks and citation omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984))

in light of defendant's affirmative defenses and counterclaim, and that there is at least a reasonable probability that the outcome of the hearing on plaintiff's motion for summary judgment would have been different had counsel responded. Specifically, defendant argues that his affirmative defenses and counterclaim could have been expanded on and brought to the trial court's attention to defeat plaintiff's motion.⁴

¶ 20 Plaintiff responds "ineffective assistance of counsel" does not provide a basis to vacate a judgment in a civil action and regardless, defendant has waived any argument concerning his attorney's performance by failing to raise the issue in the trial court. Plaintiff concedes defendant "might arguably be excused from raising his initial counsel's purported ineffective assistance in the circuit court if he had not obtained new counsel until he appealed, [but] that is not the case here." In this case, defendant's third attorney filed a motion to vacate the judgment of foreclosure and sale but never mentioned defendant's prior counsel's performance in that motion. Instead, defendant's motion to vacate filed on September 24, 2013 relied solely on the argument that the trial court violated defendant's right to procedural due process. Similarly, defendant's response to plaintiff's motion to confirm the sale did not complain of defendant's prior counsel's performance. Defendant's response only argued that the record did not contain evidence the seller announced the date, time, and place of the adjourned sale of the subject property. The October 28, 2013 order denying defendant's

⁴ When defendant's attorney at the time requested an extension of time to respond to plaintiff's motion for summary judgment, defendant's "response to the Plaintiff's motion was still incomplete." When defendant's subsequent attorney filed an emergency motion to reconsider the denial of the motion to vacate, that motion set forth the bases for defendant's argument he made the payments he was required to make and was not actually in default.

motion to vacate and granting plaintiff's motion to confirm the sale is the only order listed in defendant's notice of appeal.

¶ 21 The failure to raise an issue in the trial court generally results in forfeiture of that issue on appeal. "Issues raised on appeal must be at least 'commensurate with' those raised before the trial court. [Citation.]" *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 22. Moreover, "[i]t is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal." *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8. Defendant never argued to the trial court that its order granting plaintiff's motion for summary judgment should be reversed because defendant suffered prejudice from his attorney's deficient performance. Defendant's motion to vacate did not argue that but for said performance the court may not have entered the judgment of foreclosure and sale on plaintiff's motion for summary judgment because defendant could have demonstrated the existence of a genuine issue of fact. Defendant advanced this theory for the first time on appeal. Accordingly, the argument is forfeited.

¶ 22 Defendant's forfeiture is a limitation on him as a party, not on this court's jurisdiction to address an issue. *Sekeerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 64. We note however that in this appeal defendant has not pursued his argument that he was not in default on the mortgage because he made the payments he was required to make and plaintiff misapplied those payments. Nor has defendant argued in this appeal that the sale of the property violated the Foreclosure law. The sole ground for relief asserted in defendant's appeal is his trial attorney's performance and speculation that the outcome may have been different had counsel expanded on defendant's affirmative defenses and counterclaim. The

failure to argue an issue in the opening brief waives that issue on appeal. *Fink v. Banks*, 2013 IL App (1st) 122177, ¶ 15. Accordingly, defendant also forfeited both arguments raised in defendant's motion to vacate and in his response to plaintiff's motion to confirm the sale.

¶ 23 Defendant argued his prior attorney's performance prejudiced him because a genuine issue of fact could have been raised had counsel responded to plaintiff's motion for summary judgment. Defendant argued that genuine issue of fact would have been based on further development of his affirmative defenses and counterclaim, both of which are based on defendant's assertion that he made his payments and was not in default because plaintiff misapplied those payments. Defendant's emergency motion to reconsider filed on December 9, 2011 raised the argument defendant was not in default because of misapplied mortgage payments before the trial court. Yet, defendant did not pursue that argument in his September 24, 2013 motion to vacate. Defendant did not include the trial court's December 12, 2011 order denying defendant's emergency motion to reconsider the order denying defendant's motion to vacate the judgment of foreclosure and sale in his notice of appeal. "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." (Internal quotation marks and citation omitted.) *Hatchett v. W2X, Inc.*, 2013 IL App (1st) 121758, ¶ 26.

¶ 24 Defendant has not in any way pursued any theory related to his affirmative defenses or counterclaim in this appeal. Under the circumstances, we do not find that our "responsibility to reach a just result" (*Sekeerez*, 2011 IL App (1st) 090889, ¶ 64) requires us to forgive defendant's forfeiture where defendant has foregone multiple opportunities to demonstrate the very prejudice of which he now complains in an only conclusory and speculative manner.

See *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007) (party claiming ineffective assistance has burden to demonstrate sufficient prejudice); *People v. Rucker*, 346 Ill. App. 3d 873, 883 (2003) (conclusory allegations fail to effectively raise a claim of ineffective assistance of counsel).

¶ 25 Accordingly, we hold that defendant's sole contention on appeal that the trial court's October 28, 2013 order denying his motion to vacate should be reversed because the court would not have granted plaintiff's motion for summary judgment but for defendant's counsel's performance has been forfeited. We make no ruling on defendant's claim that an ineffective assistance-type analysis could apply in a civil context to reverse a trial court order because that question is not properly before this court. *Aylward v. Settecase*, 409 Ill. App. 3d 831, 834 (2011) ("a reviewing court generally declines to issue advisory opinions on moot or abstract questions") (Internal quotation marks and citation omitted.).

¶ 26

CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 28 Affirmed.