

SIXTH DIVISION
September 19, 2014

No. 1-13-3828

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

ONE WEST BANK, FSB,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CH 034743
)	
BARBARA SARZYNSKI a/k/a Barbara H.)	
Sarzynski,)	The Honorable
)	Anthony Kyriakopoulos,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* This court has jurisdiction to review the merits of the underlying appeal. Following our review, we conclude the circuit court properly granted summary judgment in favor of plaintiff and entered a judgment for the foreclosure and sale of the subject property where defendant failed to demonstrate her procedural due process rights were violated by the circuit court's reliance on plaintiff's complaint, which complied with

section 15-1504(a) of the Foreclosure Law, and, therefore, included allegations that were deemed and construed as indicated and described therein pursuant to section 15-1504(c) of the Foreclosure Law.

¶2 Defendant, Barbara Sarzynski, appeals the circuit court's order approving the sale and distribution of the subject property in favor of plaintiff, One West Bank, N.A.

Defendant contends the entry of the order violated her due process rights where plaintiff's mortgage foreclosure complaint failed to expressly establish the "deemed and construed" allegations, upon which the proceeding judgment for foreclosure and sale was entered, and the form answer she used as a *pro se* defendant also failed to provide her notice of the "deemed and construed" allegations. Based on the following, we affirm.

¶3 **FACTS**

¶4 On September 22, 2009, plaintiff filed a foreclosure complaint against defendant as a result of her failure to make timely mortgage payments on the subject property located at 1911 Hollywood Avenue, Hanover Park, Illinois. Defendant personally was served with the complaint on September 24, 2009. On December 10, 2009, plaintiff filed a motion for default judgment after defendant failed to appear in court. On February 1, 2010, the circuit court ordered defendant to "file an appearance and answer or otherwise plead to the complaint by 3-3-10." On February 26, 2010, defendant appeared *pro se* and filed a general appearance, but did not file an answer or other pleading. On March 10, 2010, plaintiff filed a second motion for default judgment. The circuit court gave defendant until June 25, 2010, to respond to the complaint. On May 26, 2010, defendant filed a *pro se* verified answer using the Clerk of the Circuit Court of Cook County's Form CCCH 0315 (form CCCH 0315).

¶15 On July 29, 2010, plaintiff filed a motion for summary judgment. Plaintiff filed an amended motion for summary judgment on September 24, 2012. The motion was unchallenged by defendant and was granted by the circuit court on October 2, 2012. On that date, the circuit court also entered a judgment of foreclosure and sale of the subject property. On October 23, 2012, defendant filed a *pro se* motion to set aside the October 2, 2012, foreclosure judgment, alleging she did not receive notice of the hearing on plaintiff's motion for summary judgment. Over plaintiff's objection, the circuit court granted defendant's motion on December 19, 2012, vacating its October 2, 2012, order of foreclosure and sale and summary judgment. Defendant was given until January 22, 2013, to respond to plaintiff's summary judgment motion. However, on January 22, 2013, defendant filed another *pro se* verified answer using form CCCH 0315. Defendant did not file a response to plaintiff's motion for summary judgment.

¶16 Then, on April 19, 2013, plaintiff filed a reply in support of its motion for summary judgment, noting that defendant failed to file a proper response to the summary judgment motion and that defendant's verified answer did not raise any genuine issues of material fact. On April 25, 2013, the circuit court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale. In the April 25, 2013, foreclosure judgment, the circuit court provided that:

“ALLEGATIONS PROVEN: This Judgment is fully dispositive of the interest of all defendants. All the material allegations of the Complaint filed pursuant to 735 ILCS 5/15-1504, those allegations being both required and those deemed alleged by virtue of subsection (c), are true and proven.”

¶7 On June 13, 2013, defendant, now represented by counsel, responded by filing a motion designated as a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), alleging her due process rights were violated by the entry of the foreclosure judgment where the judgment considered allegations that were “deemed and construed” without having been expressly stated on the face of plaintiff’s complaint. Defendant did not allege a meritorious defense nor file supporting affidavits. On August 20, 2013, the circuit court denied defendant’s “2-1401” petition. On November 5, 2013, the circuit court entered an order confirming the sale of the subject property to a third-party purchaser. Defendant then filed her notice of appeal on December 4, 2013.

¶8 ANALYSIS

¶9 I. Jurisdiction

¶10 Plaintiff contends this court lacks jurisdiction to consider the merits of defendant’s appeal. Specifically, plaintiff contends defendant failed to file a timely notice of appeal from the order denying her “section 2-1401” petition which sought relief from the foreclosure judgment and, therefore, is barred from raising the underlying challenge to the foreclosure judgment.

¶11 We note that, on June 12, 2014, plaintiff filed a motion to dismiss this appeal for lack of jurisdiction, contending defendant failed to file a timely appeal of the circuit court’s August 20, 2013, order denying her “section 2-1401” petition. In response, defendant argued that her notice of appeal was timely as filed on December 4, 2013, because the final judgment confirming the judicial sale of the subject property was entered on November 5, 2013. Citing Illinois Supreme Court Rule 303(a) (eff. June 4,

2008), defendant alleged the order approving the judicial sale was the final judgment disposing of the case, and, therefore, her notice of appeal had to be filed within 30 days of entry of that order. Defendant further argued that she was appealing not only the circuit court's denial of her "section 2-1401" petition for relief from the foreclosure judgment, but also appealing the circuit court's order approving the sale of the subject property on the same basis, namely, the lack of notice regarding the "deemed and construed allegations" implicitly included in plaintiff's complaint. On June 27, 2014, during routine motion practice, this court denied plaintiff's motion to dismiss this appeal for lack of jurisdiction.

¶12 Based on our review, we conclude that we have jurisdiction to consider the merits of defendant's appeal where she filed a timely appeal from the entry of the final judgment in this case. Pursuant to Rule 303(a), a notice of appeal must be filed within 30 days after the circuit court's entry of a final judgment. While plaintiff is correct in noting that Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010) provides for a direct appeal of a judgment granting or denying a section 2-1401 petition within 30 days of entry of that judgment, Rule 304(b)(3) presumes the propriety of the section 2-1401 petition at issue.

¶13 As defined, a section 2-1401 petition provides relief from final orders and judgments. 735 ILCS 5/2-1401 (West 2012). Here, defendant titled the relevant pleading a section 2-1401 petition for relief from the foreclosure judgment. A foreclosure judgment, however, is not a final and appealable order. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555-56 (1989). Instead, in a foreclosure proceeding, the order confirming the sale and distribution of the subject property operates as the final order. *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 11. As a result, the April 25, 2013, judgment was not

a final order and it could not be the subject of a section 2-1401 petition. See *EMC Mortgage Corp.*, 2012 IL 113419, ¶ 11; see also *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998) (“[i]f an order is not final, section 2-1401 is inapplicable and cannot be the basis for vacating the order”). The fact that a motion or petition claims to have been brought pursuant to section 2-1401 does not make it so if the pleading does not seek relief from a final judgment anymore than painting stripes on a donkey makes the animal a zebra.

¶ 14 Plaintiff additionally challenges our jurisdiction to consider the merits of defendant’s appeal because her December 4, 2013, notice of appeal did not expressly list the August 20, 2013, order denying her section “2-1401” petition. Although, as we have discussed, the “2-1401” pleading merely challenged the circuit court’s April 25, 2013, interlocutory order and, therefore, the circuit court’s August 20, 2013, order necessarily denied defendant’s challenge to that interlocutory order, her notice of appeal from the circuit court’s November 5, 2013, final judgment provides this court with jurisdiction to review all prior orders and judgments in the procedural progression of the final judgment. *In re Marriage of King*, 336 Ill. App. 3d 83, 86 (2002). “A notice of appeal is to be liberally construed and an appeal from a subsequent final judgment will draw into question all prior nonfinal rulings and final but nonappealable orders that produced the judgment.” *Id.*

¶ 15 In sum, this court has jurisdiction to consider the merits of defendant’s appeal.

¶ 16 II. Due Process Challenge

¶ 17 Turning to the merits, defendant contends the circuit court erred in entering the foreclosure judgment where it was based on “deemed and construed” allegations that

were not expressly included within plaintiff's complaint. Defendant maintains that her procedural due process rights were violated because she lacked notice of the implicit "deemed and construed" allegations and, therefore, was prevented from having an opportunity to meaningfully respond to those allegations in her answer, especially where the form she used for her *pro se* answer failed to acknowledge the existence of the "deemed and construed" allegations.

¶18 Defendant's basis of appeal challenges the circuit court's April 25, 2013, order granting summary judgment and entering the foreclosure judgment. Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). We review *de novo* the circuit court's decision whether to grant or deny a motion for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶19 As previously stated, the circuit court's April 25, 2013, judgment for foreclosure and sale found that "[a]ll the material allegations of the Complaint filed pursuant to 735 ILCS 5/15-1504, those allegations being both required and those deemed alleged by virtue of subsection (c), are true and proven." Section 15-1504(a) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1504(a) (West 2012)) defines the proper form of a foreclosure complaint, expressly listing the requisite information concerning the mortgage and, *inter alia*, instructs that a copy of the mortgage and securitized note be attached to the complaint. Section 15-1504(b) of the Foreclosure

Law further instructs that “[a] foreclosure complaint need contain only such statements and requests called for by the form set forth in subsection (a) of Section 15-1504 as may be appropriate for the relief sought.” 735 ILCS 5/15-1504(b) (West 2012). Then, section 15-1504(c) of the Foreclosure Law provides that “[t]he statements contained in a complaint in the form set forth in subsection (a) of Section 15-1504 are deemed and construed to include allegations” as indicated and described therein. 735 ILCS 5/15-1504(c) (West 2012).

¶20 Plaintiff’s complaint alleged it was filed pursuant to section 15-1101 of the Foreclosure Law against defendant, Mortgage Electronic Registration Systems, Inc., American Mortgage Network, Inc. d/b/a Amnet Mortgage, and unknown owners and nonrecord claimants. The complaint alleged that Marian Sarzynski executed the original mortgage, but he had since died, leaving defendant as the owner of the subject property. The complaint named, as the mortgagee, Mortgage Electronic Registration Systems, Inc., as the nominee for American Mortgage Network, Inc. d/b/a Amnet Mortgage. The complaint alleged the mortgage was executed on October 31, 2006, for \$221,200 for the subject property, and was recorded on November 6, 2006, and rerecorded on April 24, 2008. The complaint further alleged defendant had not paid the monthly installments of principal, taxes, interest, and insurance since April 1, 2009, leaving the principal balance due as \$233,374.04 plus interest, costs, advances, and fees. Plaintiff attached a copy of the mortgage and note to the complaint.

¶21 In her May 26, 2010, *pro se* verified answer using form CCCH 0315, defendant admitted to the existence of the mortgage, the original amount of the mortgage, and the relevant dates attached thereto. Defendant, however, denied the outstanding monthly

installments of principal, taxes, interest, and insurance since April 1, 2009 and denied there was a principal balance due of \$233,374.04 plus interest, costs, advances, and fees. In the “other affirmative matter” section of the form document, defendant stated that “[a]ccording to One West Bank, I have no right to pursue the process of loan modification because I'm not on the loan. I just hold a title to this property (tenancy in entirety). I believe that, after my husband's death, I'm a [sic] heir to this real estate property according to Gar St Geremin Act. I wish One West Bank could let me work with them so I can save my house. This is all I have left after my husband's death.” Defendant did not attach any supporting documentation.

¶22 Thereafter, plaintiff filed its motion for summary judgment alleging there were no genuine issues of material fact, which the circuit court granted, but then vacated to give defendant an opportunity to respond. Defendant, however, failed to respond to plaintiff's motion for summary judgment and instead, on January 22, 2013, filed another *pro se* verified answer using form CCCH 0315, admitting to the same allegations of the complaint and again denying that she failed to remit monthly installments since April 1, 2009 and that there was an outstanding principal balance due of \$233,374.04 plus interest, costs, advances, and fees. In the “other affirmative matter” section of the form, defendant stated “on January 18, 2013, I have [sic] applied for loan modification under Home Affordable Modification Program (HAMP) with One West Bank. Currently awaiting for One West Bank to review, response [sic] and approval [sic] of my application.” Defendant did not attach any supporting documentation. Plaintiff responded by filing a reply in support of its motion for summary judgment again alleging that defendant failed to raise any genuine issues of material fact.

¶23 A foreclosure complaint is deemed sufficient if it contains the statements and requests called for by the form set forth in section 15-1504(a) of the Foreclosure Law. *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 20; *Barnes*, 406 Ill. App. 3d at 6. As we described above, plaintiff complied with the form and attached the requisite mortgage and note to the complaint. In her answers, defendant denied the failure to pay monthly installments since April 1, 2009, and the purported outstanding balance. In both answers, defendant alleged plaintiff failed to work with her to modify the mortgage obligations. Defendant, however, never presented a supported argument in defense to the foreclosure complaint or motion for summary judgment. As this court has instructed:

“Denials in a defendant’s answer do not create a material issue of genuine fact to prevent summary judgment. [Citation.] When a party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant’s affidavits stand as admitted. [Citation.] The opposing party may not stand on his or her pleadings in order to create a genuine issue of material fact.” *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49.

Ultimately, in this case, defendant failed to establish any resulting prejudice from her alleged lack of notice of the allegations that were considered deemed and construed where, even on appeal, she still has not demonstrated how she would have challenged the deemed and construed allegations. In other words, defendant continues to fail to raise

any genuine issues of material fact that would have prevented the entry of summary judgment.

¶24 We recognize that defendant's procedural due process claim alleged that the circuit court's entry of summary judgment and the foreclosure judgment violated her property interest in the subject property. Due process is granted when, during an orderly proceeding, "a person is served with notice, actual or constructive, and has an opportunity to be heard to enforce and protect his rights." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 244 (2006). Even assuming, *arguendo*, defendant failed to receive notice of the deemed and construed allegations as provided by section 15-1504(c) of the Foreclosure Law, defendant had multiple opportunities to answer plaintiff's foreclosure complaint, as well as multiple opportunities to respond to plaintiff's motion for summary judgment. If defendant had raised a successful defense to the complaint in her answers or successfully responded to the motion for summary judgment, she essentially would have negated section 15-1504(c) because the allegations in the complaint could no longer be deemed and construed as indicated and described therein. We, therefore, conclude that summary judgment was proper, as was the circuit court's entry of the foreclosure judgment.

¶25

CONCLUSION

¶26 After finding that we have jurisdiction to review the merits of the underlying appeal, we conclude the circuit court properly granted summary judgment in favor of plaintiff and entered a foreclosure judgment where defendant failed to demonstrate she was prejudiced by the circuit court's reliance on plaintiff's complaint, which complied

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with section 15-1504(a) of the Foreclosure Law, and, therefore, included allegations that were deemed and construed as indicated and described therein.

¶27 Affirmed.