2016 IL App (1st) 141273-U

SIXTH DIVISION
DECEMBER 23, 2016

No. 1-14-1273

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2004-BC3, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 08 CH 36415
ALAN K. YOUNG and TRACY YOUNG, Defendants-Appellants,	)	
(Charles Jordan Jr., Countrywide Home Loans, Inc., City of Chicago, an Illinois Municipal Corporation, Capital One Bank (USA), N.A. d/b/a Capital One Bank, Concrete Clinic, Inc., Abateman Materials, Inc., Emjwish, Inc., f/k/a Westmont Interior Supply House, Inc., State of Illinois, Unknown Owners-Tenants and Non-Record Claimants, Defendants).	)	Honorable Lisa A. Marino, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's refusal to vacate its order of foreclosure and sale is affirmed, where defendants forfeited the issues on appeal by failing to raise those issues in the trial court before raising them for the first time on appeal.

¶ 2 This foreclosure action was filed in the trial court by plaintiff-appellee, Bank of New York (the Bank), as successor in interest and trustee for the predecessor mortgagees. Although not named in the Bank's original October 2008 complaint, defendants-appellants Alan Young and Tracy Young (the Youngs)[1] were named as defendants in an amended foreclosure complaint.

¶ 3 The facts of the case are convoluted and presented in a disjointed manner by the appellants. Additionally, the record is incomplete and there are no transcripts or bystanders' reports of hearings which relate to the issues raised on appeal, thereby presenting this court with a significant challenge regarding the facts and circumstances of what occurred in the trial court. We remind the appellants that the Supreme Court Rules which govern appeals require appellants to present this court with a coherent brief which includes an orderly statement of facts, including appropriate citations to the record which shall be complete and compliant with applicable rules. Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Further, arguments shall be supported by legal precedent, properly cited. Ill. S. Ct. R. 341(h)(7) (eff. Jan 1, 2016). The brief submitted by the appellants was woefully inadequate and noncompliant in its entirety.

¶ 4 BACKGROUND

¶ 5 In December 2003, defendant, Alan Young purchased a residential property located at 1156 S. Wesley Avenue in Oak Park, Illinois. It is that property which is the subject of this foreclosure action based on a mortgage executed by co-defendant Charles Jordan in 2004. The trial court entered a judgment of foreclosure for the Bank and subsequently denied the Youngs' motion to vacate as well as their motion for reconsideration.

[1] The record on appeal and the parties' briefs are inconsistent as to the spelling of the Youngs' first names, referring to either "Alan" or "Allen," as well as "Tracy" or "Tracey."

¶ 6 The gist of the Youngs' argument appears to be that they are not accountable under the mortgage foreclosure laws because they were induced by co-defendant, Charles Jordan, through fraudulent means, to quitclaim the property to him. After Jordan entered into the subject mortgage, he absconded with the money with which he should have paid the mortgage. They allege that their family's financial challenges made it difficult to pay a prior mortgage. Supposedly Jordan offered to help the Youngs extricate themselves from the financial difficulty with their mortgage payments.[2] The plan called for the Youngs to execute a quitclaim deed for the property to Jordan. Jordan would in turn secure a new mortgage presumably in his name and retire the Youngs' mortgage debt. The Youngs would then make rental payments to Jordan who would in turn use those payments to make monthly mortgage payments to the bank on the mortgage loan that Jordan had secured. The Youngs assert that after securing the mortgage in his name, Jordan never made mortgage payments to the bank and instead, kept the money received as rental payments from the Youngs for his personal use.

¶ 7 Jordan entered into a mortgage on the property in February 2004. The mortgage obtained by Jordan was transferred from the original lender at least twice, finally ending with the Bank, which is the plaintiff-appellee in the action before us on appeal.[3]

¶ 8 The record is incomplete and disjointed, but it suggests a lengthy procedural history in this case. The Bank's predecessor filed its complaint to foreclose the mortgage on October 1, 2008. That original complaint was voluntarily dismissed on May 5, 2009, only to be refiled on June 17, 2009. Defendant, Jordan was originally served on October 3, 2008. It is unclear from

[2] Although the defendants in the trial court included Jordan and the Youngs, for purposes of this appeal, the Youngs are the only defendants before this court.

[3] For purposes of this appeal and in the interest of clarity we will refer to all of the predecessor mortgagees for whom the Bank is now the successor, as the Bank.

the record whether Jordan was served again when the case was refiled in June 2009. The Youngs were served by publication on July 30, 2009.

¶ 9 On February 1, 2010, defendant, Alan Young appeared *pro se* in the circuit court of Cook County when the Bank's motion for default was set to be heard. Young obtained an order for a continuance so that he could retain legal counsel. It does not appear from the record that Young filed a formal appearance. The Bank's motion for default was reset for March 24, 2010. The record does not indicate whether Alan Young was in court on March 24, 2010, when the circuit court of Cook County entered a default judgment of foreclosure against all the defendants with respect to the subject property and ordered that the property be sold. The Youngs are not mentioned in the court's order of March 24, 2010. Jordan is identified in court documents as the mortgagor for purposes of the loan which is the subject of the foreclosure action.

¶ 10 On March 30, 2010, attorney Willis E. Brown filed an appearance and jury demand on behalf of Alan Young. On May 10, 2010, notice was sent by mail to the defendants of record, as well as to the Youngs at the Wesley Avenue address, informing them that the judicial selling officer would place the property for sale on June 28, 2010. On June 22, 2010, the Youngs filed an emergency motion in the circuit court of Cook County to correct the record and vacate the judgment of foreclosure and sale entered on March 24, 2010, and to stay the impending sale which was set for June 28, 2010, but erroneously stated in the motion as June 29, 2010. The substance of the Youngs' motion was that the Bank misled the Youngs by telling them that they "had no interest in the property"; that the Youngs were "not allowed to communicate with any of the mortgage companies"; and by telling the Youngs that the arrearage which was the subject of the foreclosure "would be reviewed and possibly restructured" by the mortgage holders. On June 23, 2010, the trial court denied the Youngs' motion to vacate the judgment of foreclosure and

sale, but stayed the sale until July 30, 2010. No transcript of that hearing is included in the record on appeal.

¶ 11 On July 27, 2010, the Youngs filed their second emergency motion to stay the sale scheduled for July 30, 2010. The substance of that motion was that, contrary to the court's expectation when it granted the first stay, the Bank's attorneys did not cooperate with the Youngs' attorney while the stay was in effect. The Youngs argued that the lack of cooperation by the Bank's attorneys hindered their ability to secure financing to rescue the foreclosed property. On July 30, 2010, the court granted a further stay until August 25, 2010. No transcript of the hearing on that motion is included in the record on appeal.

¶ 12 On August 25, 2010, the court granted a further stay and allowed the Youngs to serve discovery on the Bank. The court also allowed the Youngs to file a motion by September 30, 2010, for the court to reconsider the June 23, 2010 denial of the motion to vacate the foreclosure judgment.

¶ 13 The Youngs argued before the trial court that they needed information about Jordan, the mortgagor, in order to move forward with their own efforts to seek financing to save the property. They claim that the Bank did not provide the information. Jordan filed for bankruptcy on September 8, 2010. We discern from the incomplete record that, after denying the Youngs' motion to reconsider its earlier rulings, the trial court granted the Bank's motion to foreclose on the property and sell it. It appears that the Youngs attempted to stop the Bank from executing on the court's order of foreclosure and sale. It is unclear from the record and the briefs exactly what happened next.

¶ 14 However, on April 25, 2013, the Youngs filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), attempting to vacate the sale of the

property which had occurred on January 28, 2013. After additional continuances, on April 3, 2014, the trial court entered its order confirming the judicial sale and denying the Youngs' petition to vacate the court's judgment of foreclosure and sale, which had been entered on March 24, 2010, and which had been amended to include the Youngs as additional defendants. On April 24, 2014, the Youngs filed their timely notice of appeal. Therefore, this court has jurisdiction, pursuant to Ill. S. Ct. R. 303(a) (eff. June 4, 2008).

¶ 15 ANALYSIS

¶ 16 Prior to addressing the issues raised by the Youngs, we must again comment on the quality of the brief filed by the Youngs. The Illinois Supreme Court Rules which govern appeals are not mere suggestions, but are mandatory and require strict compliance. See *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002). Parties who file non-compliant pleadings and briefs run the risk of dismissal of their appeal, as could easily have been the case here in light of the extensive non-compliance with applicable Supreme Court Rules. However, in the interest of justice and resolution of this long pending case, we will resolve this appeal.

¶ 17 The Youngs raise four issues on appeal: (1) whether the trial court had jurisdiction over the parties in light of the service by publication upon the Youngs; (2) whether the trial court erred in failing to grant the Youngs' motion to vacate the foreclosure judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)); (3) whether the Bank violated Cook County Circuit Court Local Rule 2.1 and Illinois Supreme Court Rules 104 and 105; and (4) whether the foreclosure judgment is void because of alleged fraud in the underlying mortgage transaction between Jordan and the original mortgagee bank.

¶ 18 The Youngs argue that the trial court does not have jurisdiction because service upon them was improperly made by publication. As we have already commented on the woeful

noncompliance with applicable rules of appellate procedure, we will only say that the Youngs' arguments are disjointed and difficult to follow. Notably, the Youngs' brief asserts a lack of "jurisdiction" without specifying whether their argument is that the court lacked *personal* jurisdiction, or jurisdiction over the subject matter. They list in bullet-point format without legal support or citation to the record, the reasons why service by publication was inappropriate under these facts and conclude that, therefore, the trial court lacked jurisdiction.

¶ 19 The Bank points out that the Youngs did not raise this issue in the trial court. Our review of the record bears that out. While it is a basic tenet of appellate procedure that a party generally may not raise an issue for the first time on appeal, see *Village of Roselle v. Commonwealth Edison Co.*, 368 Ill. App. 3d 1097, 1109 (2006), a specific exception to the general rule is that a lack of jurisdiction may be raised at anytime, even for the first time on appeal. See *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17 (2014) ("A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally.").

¶ 20 The Bank makes an additional argument in contesting the Youngs' jurisdictional objection by pointing out that the Youngs voluntarily submitted to the trial court's jurisdiction by filing many pleadings and actively participating in the case before the trial court without first objecting to the court's jurisdiction. The record also bears out this contention. "Personal jurisdiction may be established either by service of process in accordance with statutory requirements *or by a party's voluntary submission to the court's jurisdiction*." (Emphasis added.) *Id.* ¶ 18. Therefore, notwithstanding the Youngs' argument that service was improper, it is clear that they actively participated in the litigation over a period of approximately two years without

having objected to the court's personal jurisdiction. Accordingly, they have forfeited their right to do so now that they are unhappy with the outcome.

¶ 21 We recognize that, unlike personal jurisdiction, a challenge to subject matter jurisdiction would not be forfeited by the defendants' participation in the circuit court proceedings. See *In re Marriage of Epting*, 2012 IL App (1st) 112727, ¶ 28 ("If subject matter jurisdiction is lacking, it cannot be conveyed by stipulation, consent, or waiver.") Whereas personal jurisdiction is established by service of process or a party's voluntary submission to jurisdiction, "the question of subject matter jurisdiction is a matter of the justiciability of the class of cases to which the instant case belongs." *In re M.W.*, 232 Ill. 2d 408, 423-24 (2009). "Generally, a justiciable matter is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." (Internal quotation marks omitted.) *Id.* We find nothing in the Youngs' brief, or in the record on appeal, to suggest that this mortgage foreclosure action did not present a justiciable matter for purposes of subject matter jurisdiction. Thus, we reject the Youngs' challenges to the trial court's jurisdiction.

¶ 22 The Youngs next claim that the trial court erred in failing to find that the judgment of foreclosure was void pursuant to section 2-1401 of the Illinois Code of Civil Procedure.[4] 735 ILCS 5/2-1401 (West 2012). The Youngs filed a petition pursuant to section 2-1401 in the trial court and were unsuccessful in persuading the court to overturn its earlier judgment of foreclosure. Before this court, the Youngs make a convoluted argument regarding what they claim is the trial court's error in denying their section 2-1401 petition. Their argument is

[4] We note that the Youngs' petition was not, in fact, a valid petition pursuant to section 2-1401, since it sought to challenge an interlocutory order, rather than a final judgment or order.

specifically directed at the alleged lack of notification and improper service in the foreclosure action. The gist of their argument seems to be that they did not receive notice and were the victims of improper service; therefore, their section 2-1401 petition should have been granted. They also argue that the Bank failed to respond to discovery requests propounded to the Bank. We note that the Youngs argue that this failure by the Bank occurred *before* the foreclosure order was entered by the trial court. This statement obviously is inconsistent with the substance of their argument that they lacked notice of the proceedings and had no opportunity to have their day in court. The Youngs' brief on appeal is replete with statements which underscore their participation in the proceedings, notwithstanding their arguments to the contrary. For example, the Youngs state in their opening brief:

> "The [Youngs] through their attorney, in compliance with the Court's order, filed interrogatories and a request to produce information in order to get a grasp not only of the case but the circumstances surrounding the condition of the mortgage of which the Appellants were subject."

¶ 23 The Bank argues that the Youngs have forfeited any objection to the court's denial of their section 2-1401 petition on two bases. First, the Youngs did not raise the jurisdictional issue as the basis for their section 2-1401 petition before the trial court and thus may not raise it for the first time on appeal. Second, even if this issue was not forfeited for failure to raise it before the trial court, the Youngs again fall short on this issue because they submitted to the court's jurisdiction by actively participating in the proceedings without objection.

¶ 24 It is well established that a party may not challenge an issue for the first time on appeal. An orderly system of justice requires that the parties present their issues and objections to the

trial court before seeking relief in a court of review. We cannot know how the trial court would have ruled because the record contains no evidence that the Youngs presented the trial court with the opportunity to address the issue that they now seek to argue in this court. Accordingly, we agree with the Bank that the Youngs have forfeited this issue. See *Village of Roselle*, 368 Ill. App. 3d at 1109.

¶ 25 We also note that while review of this issue has clearly been forfeited, the record as well as the Youngs' brief on appeal lends credence to the Bank's argument that the Youngs also forfeited that issue because they actively participated in the proceedings in the trial court without objection. Accordingly, the Youngs' argument fails under either theory.

¶ 26 The Youngs next argue that the Bank violated Local Rule 2.1 of the circuit court of Cook County (Cook Co. Cir. Ct. R. 2.1 (Aug. 21, 2000)) and Supreme Court Rules 104 and 105 by failing to give the Youngs notice of a motion for substitution of attorneys and also failing to give them notice of a motion to amend the complaint. Ill. S. Ct. R. 104 (eff. Jan 4, 2013); Ill. S. Ct. R. 105 (eff. Jan. 1. 1989). The Youngs make a confusing argument without citation to case law or to the record, regarding the trial court's alleged error in allowing the foreclosure proceeding to go forward in light of the alleged violations of Local Rule 2.1 and Supreme Court Rules 104 and 105.

¶ 27 The Bank counters that the trial court was well within its discretion to allow it to amend its complaint and substitute attorneys. The Bank further asserts that while the motion to substitute attorneys was not sent to the Youngs' attorney, it was sent to the Youngs individually and the motion to amend the complaint was sent to the Youngs' attorney.

¶ 28 The Bank's argument seems to concede that the notice requirements were not strictly followed. The Bank then goes on to say that the lack of notice was of no importance, as the

Youngs were in default and not entitled to notice. In determining whether there was lack of notice and its effect, the relevant inquiry in this case is whether there was actual notice and whether any prejudice occurred as a result of the failure to strictly comply with the notice requirements.

¶ 29 In the instant case, it can hardly be said that the outcome of this case turned on whether there was compliance with Local Rule 2.1 and Supreme Court Rules 104 and 105. The Youngs do not argue what, if anything, would have been different had the Bank sent its notice of substitution of attorneys to their attorney instead of to the Youngs personally in compliance with the rules. The same is true regarding the notice to amend the complaint, which the Bank asserts was sent to the Youngs' attorney but not to the Youngs individually. While we do not condone the Bank's failure to strictly comply with the rules in question, we cannot say that such noncompliance was so prejudicial as to influence the outcome of the case in the trial court. Further, the record does not contain a transcript of the hearing on the motion in which the Youngs' argument was heard. Thus, we have no way of knowing what arguments were presented or the basis for the court's ruling. It is well settled that the appellant is obligated to present a complete record to the reviewing court. In the absence of such a record we will presume that the trial court acted in accordance with applicable law. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005). Accordingly, we will not disturb the trial court's ruling on this issue.

¶ 30 The Youngs next argue that the entire foreclosure action brought by the Bank was rendered null and void because of the allegedly fraudulent action of Jordan. The Youngs make what amounts to an equitable argument regarding Jordan's conduct. They argue that he convinced them to deed their property to him with the promise that he would take action to

extricate them from the mortgage arrearage that they were facing and make the mortgage payments on their behalf. The Youngs cite *Colonial Bank & Trust Co. v. Kozlowski*, 106 Ill. App. 3d 639 (1982), in support of their argument that Jordan's alleged fraud precludes a foreclosure action against them. They attempt to make a distinction between fraud in the inducement and fraud *in factum*. They then conclude that since Jordan's act in obtaining a deed to their property was allegedly fraudulent, every subsequent transaction was void related to the property. Therefore they posit that the foreclosure proceeding which culminated in judgment for the Bank was also void.

¶ 31 The Bank points out that once again, the Youngs did not plead fraud before the trial court and have therefore forfeited that argument on appeal. Our review of the record shows no evidence of the Youngs having pled fraud in the trial court. As with their prior arguments, the Youngs attempt to raise arguments for the first time on appeal without having given the trial court an opportunity to hear the issue. See *1010 Lake Shore Association v. Deutsche Bank National Trust Company*, 2015 IL 118372, ¶ 15 (issues not raised in the trial court are forfeited on appeal). While the record suggests that there were references to Jordan in the trial court, there is nothing in the record which would preserve the issue for appeal. Accordingly, the issue has been forfeited on appeal. Therefore we need not address the additional arguments raised by the Bank in opposition to this issue.

¶ 32 CONCLUSION

¶ 33 For the reasons discussed, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.