

**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).

FIRST DIVISION  
June 27, 2016

No. 1-15-2345  
2016 IL App (1st) 152345-U

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

FIFTH THIRD MORTGAGE, CO.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ALBERTO MARTINEZ, MAXIMO	)	
FERNANDEZ, MARTHA MARTINEZ,	)	No. 13 CH 6658
EVANGELINA CUEVAS, STATE OF ILLINOIS	)	
DEPARTMENT OF REVENUE,	)	
UNKNOWN OWNERS, and NON-RECORD	)	
CLAIMANTS,	)	
	)	
	)	
Defendants	)	
	)	
(Alberto Martinez and Maximo Fernandez,	)	Honorable Allen P. Walker,
	)	Judge Presiding.
Defendants-Appellants).	)	

---

JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendants' notice of appeal was untimely filed; appeal dismissed.

¶ 2 This appeal involves a residential foreclosure by plaintiff, Fifth Third Mortgage Company (Fifth Third), of a property located at 4907 West Parker Avenue in Chicago. Two of the defendants in the case, Alberto Martinez and Maximo Fernandez, appeal the denial of their motion to reconsider the circuit court's denial of a motion to vacate the confirmation of the sale. Defendants contend that the court should have vacated the confirmation of the sale because Fifth Third failed to provide notice of the corresponding hearing. Defendants also assert that the sale should be set aside because Fifth Third failed to comply with the guidelines for the Home Affordable Modification Program. After reviewing the record, we must dismiss this appeal for lack of jurisdiction.

¶ 3 We briefly summarize the key events in this matter. On March 11, 2013, Fifth Third filed a complaint to foreclose a mortgage on the subject property. Defendants were the obligors on the related note and the mortgagors were defendants and Martha Martinez. Fifth Third alleged that the mortgage was in default due to the mortgagors' failure to make payments since October 1, 2012, leaving an outstanding principal balance of \$300,935.05. On March 10, 2014, the court entered a judgment of foreclosure and sale. The sale was scheduled for June 11, 2014, but on June 10, Maximo Fernandez and Martha Martinez filed a motion to stay the sale. Fernandez and Martinez stated that they had received a loan modification application from Fifth Third. On June 11, 2014, the court stayed the sale for 30 days, through July 11, 2014, and stated that Fifth Third could proceed to the sale thereafter without further order of the court.

¶ 4 On July 29, 2014, Maximo Fernandez filed a motion to reconsider, vacate the June 11 order, and object to the confirmation of the sale. In part, Fernandez stated that the sale should be set aside pursuant to section 15-1508 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508 (West 2012)) because a loan modification had been pending.

¶ 5 On August 28, 2014, Fifth Third filed a motion to confirm report of the sale and distribution and for possession and a deficiency judgment. The motion was noticed for September 12, 2014. On that date, the court entered an order confirming report of the sale and distribution, and for possession and a deficiency judgment.

¶ 6 On October 7, 2014, defendants filed a motion for sanctions and to vacate a default judgment pursuant to section 2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301 (West 2012)). Defendants contended that Fifth Third proceeded with its motion to confirm the sale on September 12, 2014, without giving notice to defense counsel. Defendants also asserted that Fifth Third never mailed a copy of the September 12, 2014, order to defendants or their attorneys.

¶ 7 On January 23, 2015, Fifth Third responded to defendants' motions to vacate a default judgment and for sanctions. In part, Fifth Third asserted that it did not have a completed loan modification application when the sale occurred on July 14, 2014, and so did not proceed with a sale with a pending modification in place. Fifth Third also maintained that it provided proper notice of its motion to confirm the sale.

¶ 8 In an order entered on March 30, 2015, the court stated that "[t]his cause coming to be heard on Defendants' Maximo Fernandez and Alberto Martinez's Motions to Vacate and for Sanctions, due notice being given and the Court being fully advised on the premises; the Court finding Plaintiff properly gave notice of its Motion to Confirm Sale, \*\*\* Defendants' Motions are denied \*\*\*." The record does not contain a transcript of this proceeding.

¶ 9 On April 21, 2015, defendants filed a motion to reconsider and vacate the March 30, 2015, order and filed an amended motion to reconsider on May 26, 2015. Defendants contended that the March 30, 2015, order merited reconsideration due to newly discovered evidence, in that

Fifth Third improperly recorded the deed of sale for the property while defendants' motions to vacate were pending. Defendants averred that during the March 30, 2015, hearing on the motion to vacate, counsel for Fifth Third stated that the deed of sale was recorded on January 21, 2015. Defendants asserted that Fifth Third proceeded as though defendants' motion to vacate and request for reconsideration of the confirmation of the sale had already been adjudicated in Fifth Third's favor, which was premature, improper, and prejudicial. Additionally, defendants asserted that the court allowed the confirmation of the sale without proper notice of the motion to confirm the sale.

¶ 10 In response, Fifth Third characterized defendants' motion to reconsider as "yet another attempt to argue the same matters that have already been fully examined by this Court and ruled upon on the merits." Fifth Third asserted that the alleged newly-discovered evidence was a deed that was recorded more than two months before the hearing on the motion to vacate, and was part of the public record and available at the time of the hearing. Fifth Third further contended that defendants failed to show how recording the deed prejudiced them, was improper, or had any impact on the validity of the denied motion to vacate. Fifth Third also maintained that it provided proper notice of its motion to confirm the sale.

¶ 11 On July 21, 2015, the court denied defendants' motion to reconsider. The record does not contain a transcript of this proceeding.<sup>1</sup> Defendants filed their notice of appeal on August 13, 2015, indicating that the relief sought was to reverse and remand the order entered on July 21, 2015.

---

<sup>1</sup>Defendants included a transcript of the July 21, 2015, hearing in the appendix to their brief. However, we may not consider it because attachments to a brief that are not included in the record are not properly before this court and cannot be used to supplement the record. See *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000); *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068, 1069 (1994).

¶ 12 On appeal, defendants contend that the court should have vacated the confirmation of sale because Fifth Third failed to provide proper notice of the hearing. Additionally, defendants assert that the sale should be set aside because Fifth Third failed to comply with the guidelines for the Home Affordable Modification Program.

¶ 13 Fifth Third asserts that we do not have jurisdiction over this appeal because defendants did not file their notice of appeal within 30 days of the denial of their motion to vacate. We agree and dismiss this appeal accordingly. Moreover, even if Fifth Third had not raised the issue, we have an independent duty to consider our own jurisdiction. *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 24.

¶ 14 Defendants filed this appeal pursuant to Illinois Supreme Court Rule 303, which states that a notice of appeal must be filed "within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, \*\*\* within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order \*\*\*." Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015). Here, the final judgment was the September 12, 2014, order confirming the sale. See *North Community Bank*, 2015 IL App (1st) 133672, ¶ 7 (in a foreclosure case, the order confirming the sale is the final and appealable order).

¶ 15 Within 30 days after the entry of judgment, a party may file a postjudgment motion that seeks rehearing, retrial, to modify or vacate the judgment, or other relief. 735 ILCS 5/2-1203(a) (West 2012). Here, defendants filed their motion to vacate and for sanctions on October 7, 2014, which was within 30 days of the order confirming the sale. The motion to vacate was denied on March 30, 2015. At that point, defendants had 30 days to file a notice of appeal. Instead, on April 21, 2015, defendants filed a second postjudgment motion—a motion to reconsider and

vacate the March 30, 2015, order. This was impermissible. "A party may make only one postjudgment motion directed at a judgment order that is otherwise final." Ill. S. Ct. R. 274 (eff. Jan. 1, 2006). Further, successive postjudgment motions are impermissible when the second motion is filed more than 30 days after the judgment or any extension of time allowed for the filing of the postjudgment motion. *Sears v. Sears*, 85 Ill. 2d 253, 259 (1981).

¶ 16 Additionally, the motion to reconsider did not toll the time for filing a notice of appeal. A second postjudgment motion that merely repeats what was in the first motion or raises points that could have been raised the first time does not extend the time for appeal. *Id.* at 258. Here, the motion to reconsider raised the same argument about proper notice that was raised in the motion to vacate. Further, although the motion to reconsider contended that the recording of the deed was newly-discovered evidence, the parties agree that the deed was recorded on January 21, 2015, which was while the motion to vacate was still pending. Defendants' motion to reconsider was an improper successive postjudgment motion and did not extend the time for defendants to appeal. See Ill. S. Ct. R. 303(a)(2) (eff. Jan. 1, 2015) ("No request for reconsideration of a ruling on a postjudgment motion will toll the running of the time within which a notice of appeal must be filed"); *Dus v. Provena St. Mary's Hospital*, 2012 IL App (3d) 091064, ¶ 11 ("[a] motion to reconsider the trial court's ruling on a postjudgment motion does not extend the time to appeal").

¶ 17 We are not persuaded by defendants' arguments that their notice of appeal was timely. Defendants rely on cases that involve petitions for rehearing and cite to a case interpreting Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010), neither of which are at issue here. Further, defendants' construction of Rule 303 to allow multiple postjudgment motions ignores Rule 274's admonition that a party may make only one postjudgment motion directed at a final judgment. See Ill. S. Ct. R. 274 (eff. Jan. 1, 2006).

¶ 18 We also note that our result is not affected by Fifth Third's participation in the proceedings on the improper motion to reconsider. Generally, a trial court loses jurisdiction to hear a cause at the end of the 30-day window after a judgment is entered. *People v. Bailey*, 2014 IL 115459, ¶ 8. However, the trial court can be revested with jurisdiction if the parties actively participate without objection in proceedings that are inconsistent with the prior judgment. *Id.*

¶ 19. That did not occur here. Indeed, Fifth Third Bank defended the judgment in its response to the motion to reconsider. Further, neither the motion to reconsider nor Fifth Third's response indicates that the parties ignored the judgment and started to retry the case. See *Sears*, 85 Ill. 2d at 260. Additionally, as Fifth Third notes, "[w]hen a party opposes a motion to reconsider, a simple failure to note the untimeliness of the motion is not inconsistent with the merits of the judgment and does not cause jurisdiction to revest in the trial court." *Shatku v. Wal-Mart Stores, Inc.*, 2013 IL App (2d) 120412, ¶ 13.

¶ 19 Defendants' motion to reconsider did not extend the time for appeal. The motion to vacate was denied on March 30, 2015, but defendants did not file their notice of appeal until August 13, 2015, which was well past the 30-day deadline. "The timely filing of a notice of appeal is both mandatory and jurisdictional." *Dus*, 2012 IL App (3d) 091064, ¶ 10. Neither a circuit court nor an appellate court may excuse compliance with the filing requirements mandated by the supreme court's rules. *Id.* And, when an appeal is untimely under a supreme court rule, we have no discretion to take any action other than to dismiss the appeal. *Id.* Because defendants' notice of appeal was untimely filed, we must dismiss the appeal for lack of jurisdiction. As a result, we do not address the other issues raised by defendants related to notice and the guidelines for the Home Affordable Modification Program.

¶ 20 Appeal dismissed.

