

No. 1-15-3056

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

BANKFINANCIAL, F.S.B., LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 13 CH 24669
)	13 CH 24670
)	
HG KING PROPERTIES, INC., et al.,)	Honorable
)	Darryl B. Simko,
Defendant-Appellant.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: Judgment and order confirming sale in mortgage foreclosure action affirmed over defendant's contention that the court erred in denying his section 2-1401 petition where relief under that section is barred by section 15-1509(c) of the Foreclosure Law.

¶ 1 Defendant, HG King Properties, Inc., appeals from an order of the circuit court of Cook County denying his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). Defendant's petition sought to vacate the default judgment and confirmation of the judicial sale of two of defendant's mortgaged

properties. In its petition, defendant asserted that plaintiff, BankFinancial, F.S.B., violated the Home Affordable Modification Program (HAMP), committed fraud and deception throughout the proceedings and the sale of the properties, and lacked standing to initiate the proceedings because it was not licensed under the Illinois Residential Mortgage License Act (IRMA). Defendant also maintained that it exercised due diligence in pursuing its section 2-1401 petition. On appeal, defendant contends that the court erred in denying its section 2-1401 petition and that "continued enforcement of [the circuit court's] judgment would be unfair, unjust, unconscionable [*sic*] and inquitabl[r] [*sic*]." For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2

I. BACKGROUND

¶ 3

On October 31, 2013, plaintiff filed a complaint to foreclose a mortgage in case number 13 CH 24669 involving a property located at 14141 South Tracy Avenue in Riverdale, Illinois (Tracy Property). That same day, plaintiff also filed a complaint to foreclose a mortgage on a property located at 14041 South School Street in Riverdale, Illinois (School Property), in case number 13 CH 24670. Plaintiff identified defendant as the mortgagor for both properties. On December 17, 2013, the court granted plaintiff's motion to consolidate the two foreclosure actions.

¶ 4

In the complaints, plaintiff alleged that it was the mortgagee under section 5/15-1208 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1208 (West 2012)) and that defendant was in default on its mortgage payments on both properties. Plaintiff attached copies of the mortgages and notes to its complaints. On February 2, 2014, plaintiff filed a motion for a default judgment contending that defendant had been properly served with copies of the

complaints and summons, but had failed to answer the complaints or file a responsive pleading. On February 11, 2014, the court entered a judgment of foreclosure and sale in both cases.

¶ 5 On May 21, 2014, plaintiff filed a motion to confirm the judicial sale of the properties. On May 29, 2014, the court entered separate orders for each property confirming the sheriff's report of sale and distribution. The orders reflected that plaintiff is the current holder of the certificate of sale for each property. The sheriff's deeds for each property reflect that plaintiff purchased both properties at a public judicial sale on April 23, 2014.¹

¶ 6 On August 12, 2015, defendant filed a petition pursuant to section 2-1401 of the Code "to vacate the judgment of foreclosure" and for leave to file an answer and affirmative defense. In its petition, defendant contended that it had a meritorious defense, that it was not at fault for not presenting this defense to the court before the entry of the judgment, and that it had exercised due diligence in filing its section 2-1401 petition. Defendant contended that plaintiff had violated "2HAMP [sic] Tier 2 guidelines" by conspiring to sell the properties without affording defendant any loss mitigation alternatives. Defendant further contended that plaintiff lacked the proper licensure under IRMA, and that plaintiff committed numerous acts of fraud, conspiracy, and deception throughout the proceedings. Defendant finally contended that plaintiff lacked standing to bring the foreclosure action.

¶ 7 In contending that it had been diligent in pursuing its defense, defendant contended that it believed its original attorney in the matter had successfully negotiated a resolution and defendant did not discover that there was litigation pending until February 11, 2015. Defendant contended that it then retained a new attorney and had been working diligently to resolve the litigation.

¹ Plaintiff has included copies of the sheriff's deeds for both the School Property and the Tracy Property in the appendix to its brief. Although these documents are not included in the record filed on appeal, we may take judicial notice of the sheriff's deeds because they are part of the public record and aid in the disposition of this appeal. *Village of Riverwoods v. BG Ltd. P'ship*, 276 Ill. App. 3d 720, 724 (1995) (citing *Muller v. Zollar*, 267 Ill. App. 3d 339, 341-42 (1994)).

Defendant further contended that it had been diligent in filing its section 2-1401 petition by retaining a paralegal on April 19, 2015, to search and obtain copies of the court documents in this case. Defendant asserts that the files were then reviewed throughout June and July of 2015 before filing the section 2-1401 petition in August of 2015.

¶ 8 The court entered an order on September 22, 2015, which indicated that plaintiff's "oral motion to dismiss the petition" was granted and that defendant's section 2-1401 petition was dismissed. On October 21, 2015, defendant filed a notice of appeal seeking to vacate the court's order entered on September 22, 2015, denying its section 2-1401 petition.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant contends that the court erred in denying its section 2-1401 petition. In its brief, defendant repeats many of the same arguments raised in the section 2-1401 petition, including that plaintiff committed numerous acts of fraud, deceit, and conspiracy throughout the proceedings, that plaintiff violated HAMP, and that plaintiff lacked standing to foreclose because it was not licensed under IRMA.² Plaintiff responds that relief under section 2-1401 is not available after the confirmation of the judicial sale and the delivery of the sheriff's deed. Alternatively, plaintiff contends that defendant failed to satisfy the requirements for relief under section 2-1401.

¶ 11 Section 2-1401 of the Code provides a comprehensive statutory procedure by which final judgments may be vacated more than 30 days after their entry. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986). To obtain relief under section 2-1401, the petitioner must set forth the existence of a meritorious defense, due diligence in presenting the defense to the circuit court, and due

² Although we are able to discern the import of defendant's arguments, we would be remised if we did not mention the numerous typos, misspellings, and other grammatical errors prevalent throughout defendant's brief before this court. Furthermore, we observe that many of defendant's arguments are unsupported by citation to authority in violation of Illinois Supreme Court Rule 341(h) (Ill. S. Ct. R. 341(h) (eff. Jan. 1, 2016)).

diligence in filing the section 2-1401 petition. *Id.* at 220-21. A section 2-1401 petition can present either a factual or legal challenge to a final judgment or order. *Warren Cty. Soil and Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 31. We review the circuit court's dismissal of a section 2-1401 petition *de novo*. *U.S. Bank Nat'l Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 23; see also *People v. Vincent*, 226 Ill. 2d 1, 18 (2007) (“when a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*.”)

¶ 12 In this case, defendant did not file an appeal challenging the order confirming the sale within the 30-day period mandated by Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008). Rather, defendant filed a section 2-1401 petition more than a year after the entry of the trial court's judgment. A section 2-1401 petition is not a timely appeal, but rather a new action in the circuit court that seeks to vacate a final judgment. See *Sarkissian v. Chicago Bd. of Educ.*, 201 Ill. 2d 95, 102 (2002).

¶ 13 Section 15-1509(c) of the Foreclosure Law provides that “any vesting of title by *** deed pursuant to subsection (b) of section 15–1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure ***.” 735 ILCS 5/15–1509(c) (West 2012). “Delivery of the deed executed on the sale of the real estate, even if the purchaser or holder of the certificate of sale is a party to the foreclosure, shall be sufficient to pass the title thereto.” 735 ILCS 5/15–1509(b) (West 2012).

¶ 14 This court recently considered the applicability of section 15-1509(a) to a section 2-1401 petition in *Prabhakaran*, 2013 IL App (1st) 111224. In that case, the plaintiff, U.S. Bank, brought a foreclosure action against defendant, Prabhakaran. *Id.* ¶ 3. The circuit court subsequently granted U.S. Bank's motion for summary judgment and the subject property was

sold at a judicial sale to U.S. Bank. *Id.* ¶ 9. On January 5, 2010, the circuit court entered an order confirming the sale. *Id.* Prabhakaran did not appeal that order. *Id.* The selling officer executed a judicial sale deed to U.S. Bank on January 19, 2010. *Id.* On May 20, 2010, Prabhakaran filed a section 2-1401 petition alleging that the circuit court's summary judgment order was invalid and void. *Id.* ¶ 14. U.S. Bank responded that Prabhakaran's petition was barred by section 15-1509(c) of the Foreclosure Law. *Id.* ¶ 15. The circuit court denied Prabhakaran's petition after a hearing. *Id.* ¶ 17.

¶ 15 On appeal, this court noted that it had addressed a similar issue involving motions for default under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2008)) in *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1 (2010). In *Barnes*, this court recognized that section 15-1508(b) of the Foreclosure Law (which provides that after the foreclosure judgment and judicial sale, the circuit court shall confirm the sale unless the court finds that: (i) a required notice was not given, (ii) the terms of the sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) that justice was otherwise not done) was more restrictive, and thus inconsistent with section 2-1301(e) because it limited the circuit court's discretion to refuse confirmation of the sale to the four statutory grounds. The *Barnes* court thus denied relief under section 2-1301(e). *Pabhakaran*, 2013 IL App (1st) 111224, ¶ 29.

¶ 16 Relying on its reasoning in *Barnes*, this court in *Pabhakaran* found that:

“From a procedural posture alone, the instant case presents a more compelling example of an attempt to circumvent the Foreclosure Law because here, the judicial sale was completed and confirmed by the circuit court on January 5, 2010. The defendant did not challenge the confirmation of the sale within the 30-day period to appeal. There is simply no Illinois authority to support the

defendant's argument that she can utilize section 2-1401 to circumvent *** section 15-1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property. If there is no relief available to the defendant under section 2-1301(e), it follows logically that there can be no relief under section 2-1401. It is undisputed that the defendant was a party to the foreclosure from its inception and cannot rely upon section 2-1401 as an alternative remedy once the circuit court confirmed the sale of the property. The clear and unambiguous language of section 15-1509(c) of the Foreclosure Law bars the defendant's claims in her section 2-1401 petition and is dispositive.” *Id.* ¶ 30.

¶ 17 The current case at bar presents the same circumstances as those present in *Pabhakaran*. Defendant here did not challenge the order confirming the sale within 30 days after its entry, nor did it appeal the order confirming the sale. We observe that defendant did not address *Pabhakaran* in its brief, nor file a reply brief to respond to plaintiff's contentions that the holding in *Pabhakaran* and section 15-1509(c) of the Foreclosure Law bar defendant's claims. Because we find that defendant's claims are barred by section 1509(c) of the Foreclosure Law (735 ILCS 5/15–1509(c) (West 2012)), we need not address the issue of whether its section 2-1401 petition raised a meritorious defense. See *Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30.

¶ 18

III. Conclusion

¶ 19 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.