2016 IL App (3d) 150001-U

Order filed September 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

NATIONSTAR MORTGAGE, LLC,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-15-0001
	)	Circuit No. 11-CH-439
JACK L. HUFF, DONNA J. HUFF and	)	
HERBERT T. SAUNDERS,	)	
	)	Honorable Thomas A. Thanas,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: Defendant was not a *bona fide* purchaser for value; where no return of service was filed with the circuit clerk, lack of jurisdiction was apparent from the record.

¶ 2 In January 2011, Saxon Mortgage Services Corporation (Saxon) filed a complaint to foreclose a mortgage on certain real property, naming Herbert Saunders as a defendant. Saunders, who had purchased the subject property following a sheriff's sale, filed a motion to dismiss the complaint, alleging a prior foreclosure judgment had terminated Saxon's interest in

the property. Saxon successfully moved to quash service in the prior foreclosure action and transferred its mortgage interest to Nationstar Mortgage, LLC (Nationstar).

¶ 3 Nationstar and Saunders filed cross-motions for partial summary judgment. Following a hearing, the trial court granted Saunders' motion for partial summary judgment, finding: (1) section 15-1509 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1509 (West 2010)) controlled the issue; and (2) Saunders was a *bona fide* purchaser for value. On appeal, Nationstar argues: (1) section 15-1509 does not apply to void judgments or preclude senior lienholders from enforcing valid mortgage interests; and (2) lack of jurisdiction was apparent from the record. We reverse.

¶ 4 BACKGROUND

¶ 5 In December 2008, Mortgage First, LLC (Mortgage First), filed a complaint in the circuit court of Will County to foreclose a mortgage on real property located at 351 Clarendon Lane, Bolingbrook, Illinois. The complaint named Jack Huff, Donna Huff, and Lakewood Ridge Homeowners Association as defendants. All parties were properly served, and the court entered a judgment of foreclosure and sale in February 2009.

¶ 6 On October 20, 2009, Mortgage First filed a motion to amend the judgment of foreclosure seeking to add "Saxon Mortgage Services Corporation f/k/a Taylor Bean & Whitaker Mortgage Corporation" as a secondary lienholder. The motion alleged that Taylor Bean & Whitaker Mortgage Corporation (TBWM) was a secondary lienholder of the property, but that TBWM had "ceased operations" and Saxon was the current loan servicer. The motion further alleged that Saxon had been served on October 8, 2009, and had not filed an answer or appearance in the matter.

¶ 7 The record indicates that the circuit clerk issued a summons to TBWM on September 30, 2009. No summons was issued to Saxon, and no return or affidavit of service was filed with the court with regard to either party.

¶ 8 On November 10, 2009, Lawrence Goldstein (one of the attorneys of record for Mortgage First) appeared and, for some inexplicable reason, indicated to the trial court that he was appearing on behalf of Saxon. Goldstein presented the motion to amend the judgment of foreclosure as "an agreed order," and the court entered an order amending the judgment. The docket entry from that date reads:

> "Plaintiff by Attorney Laurence Goldstein. Defendant not present. Cause comes on for Plaintiff's motion to amend complaint. Motion is granted. The Judgment of Foreclosure entered on 2-24-09 is amended to include Saxon Mortgage Services Corporation f/k/a Taylor Bean & Whitaker Mortgage Corporation as a secondary lien holder."

¶ 9 At a sheriff's sale later that month, Midwest Capital Investments, LLC (Midwest Capital), purchased the property for $67,000. Midwest Capital thereafter assigned its rights to the bill of sale to Saleem Mohammed. In October 2010, Mohammed sold the property to Saunders for $189,900.

¶ 10 On January 1, 2011, an assignment recorded with the Will County recorder's office transferred TBWM's mortgage interest to Saxon. Later that month, Saxon commenced the residential foreclosure action at issue in this appeal. Saxon's complaint named the Huffs, Saunders, and Wells Fargo (Saunders' lender) as defendants. Saunders filed a motion to dismiss Saxon's complaint, arguing that the trial court's November 2009 amended judgment of

foreclosure terminated Saxon's interest in the property. Saxon thereafter filed a motion to quash service of summons and vacate the trial court's November 2009 amended judgment of foreclosure, arguing it: (1) was never served; (2) was never "formerly known as" TBWM; and (3) was not assigned the mortgage until after entry of the amended judgment. Following a hearing, the court granted Saxon's motion and vacated the amended judgment of foreclosure.

¶ 11 In April 2012, Saunders filed his answer to Saxon's complaint, wherein he included an affirmative defense that he was a *bona fide* purchaser for value pursuant to section 2-1401(e) of the Code (735 ILCS 5/2-1401(e) (West 2010)). In November 2013, Saxon assigned its mortgage and this action to Nationstar.

¶ 12 Nationstar and Saunders filed cross-motions for partial summary judgment on the issue of whether Saunders was a *bona fide* purchaser for value. In a December 2014 order, the trial court granted Saunders' motion for partial judgment and denied Nationstar's motion for partial summary judgment. The court held that section 15-1509(c) of the Code controlled the case (an issue not raised by either party), and that Saunders was a *bona fide* purchaser for value.

¶ 13 Nationstar appeals.

¶ 14 ANALYSIS

¶ 15 A. Standard of Review

¶ 16 This appeal arises from an order granting partial summary judgment to Saunders and denying partial summary judgment to Nationstar. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Where the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and

agree that only questions of law are involved; they invite the court to decide the issues based on the record. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 25. This court reviews a trial court's grant of summary judgment *de novo. Id.*

¶ 17 B. Section 15-1509 of the Code Does Not Bar Nationstar's Claim

¶ 18 Nationstar argues and Saunders concedes that the trial court improperly relied on section 15-1509 of the Code in granting Saunders' motion for partial summary judgment. We agree. Section 15-1509 of the Code provides that any vesting of title by deed pursuant to a foreclosure sale, unless otherwise specified in the judgment, shall be an entire bar of all claims by parties to the foreclosure. 735 5/15-1509(c) (West 2010). However, "section 15-1509 applies only to valid judgments entered with jurisdiction over the parties and the subject matter." *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 15; *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 25. Where a defendant has not been served with process as required by law, the court has not acquired jurisdiction over the person and any judgment entered against the defendant is void *ab initio*. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 15.

¶ 19 Here, Saxon filed a motion to quash service of summons and vacate the trial court's November 2009 amended judgment of foreclosure. Following a hearing, the court granted Saxon's motion and vacated the order on jurisdictional grounds. As such, we conclude the trial court erred in relying on section 15-1509 to grant judgment in Saunders' favor. Saxon was never served, and therefore, was not a party to the foreclosure action. Section 15-1509 does not preclude Nationstar from pursuing its current claims.

¶ 20 C. Saunders Was Not a *Bona Fide* Purchaser

¶ 21 Nevertheless, Saunders argues that we should affirm the trial court's judgment because he is a *bona fide* purchaser for value pursuant to section 2-1401(e) of the Code. 735 ILCS 5/2-1401(e) (West 2010). He asserts he was entitled to rely on the judgment of foreclosure naming Saxon as a party, and that nothing affirmatively appeared in the record suggesting otherwise when he purchased the property. Nationstar argues Saunders cannot be a *bona fide* purchaser for value. It maintains that the lack of service on Saxon affirmatively appeared on the record at the time Saunders took the property.

¶ 22 Section 2-1401(e) provides:

> "Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition." 735 ILCS 5/2-1401(e) (West 2010).

Courts have interpreted this section as intending to protect *bona fide* purchasers of property. *Christiansen v. Saylor*, 297 Ill. App. 3d 719, 724 (1998).

¶ 23 In determining whether lack of jurisdiction affirmatively appears from the record, we must look to the record as a whole. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 313 (1986). This includes "the pleadings, the return on the process, the verdict of the jury, and the judgment or decree of the court." *Id.* Under this analysis, the relevant inquiry is whether a third-party purchaser would reasonably be put on notice that there was a jurisdictional defect in the

underlying proceedings. *Mid-America Federal Savings & Loan Ass'n v. Kosiewicz*, 170 Ill. App. 3d 316, 321 (1988).

¶ 24 It is well established that "[a] judgment rendered without service of process, either by summons or by publication and mailing, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings." *Thill*, 113 Ill. 2d at 308.

¶ 25 Saunders argues a review of the record reveals: (1) notice of motion sent to Saxon; (2) a reference in the motion by counsel for plaintiff that Saxon had been served; and (3) an agreed court order being entered and signed by the judge indicating that Saxon agreed that its mortgage rights would be extinguished. He maintains that any reasonable person looking at the record would believe Saxon had decided not to contest the foreclosure. Nationstar argues that, despite the foregoing, any reasonable person would have notice that the judgment rendered against Saxon was void where no return of service was ever filed with the circuit clerk.

¶ 26 Other courts that have ruled on the issue have found lack of jurisdiction apparent from the record where the return of service was merely defective. See *Thill*, 113 Ill. 2d at 314 (affidavit of service failed to show the requirements for substituted service were met); *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 44 (affidavit of service and corporation report, which were filed at the same time, showed that service was attempted on the wrong person at the wrong address). We believe it would be paradoxical for us to rule that lack of jurisdiction is apparent where a return is defective, but that lack of jurisdiction is not apparent where a return is nonexistent. What could be more defective than no return at all?

¶ 27 Illinois Supreme Court Rule 102(d) (eff. Jan 1, 1967) specifically requires that the officer or person making service "shall make a return by filing proof of service immediately after

service on all defendants." This rule is of utmost importance, as a court can only acquire jurisdiction over a defendant by service in a manner directed by law. *Kosiewicz*, 170 Ill. App. 3d. at 324-25. Moreover, "[t]he return of the sheriff is the only evidence which the court can receive of such service." *Werner v. W.H. Shons Co.*, 341 Ill. 478, 486 (1930).

¶ 28 Here, Saxon was not a party to the original action, but was added later through what Mortgage First presented to the court as an "agreed order." However, at the time of both the sheriff's sale and Saunders' subsequent purchase, the record was completely void of any return of service on Saxon, and Saxon never appeared or waived its appearance in the matter. This makes sense considering Saxon did not acquire its interest in the property until a month after the sheriff's sale. Sanders seeks to rely on the fact that Mortgage First's motion to amend judgment asserted that Saxon had been served. Such a statement is irrelevant however, as a court's jurisdiction "cannot rest in parol." *Id.* at 486-87. Moreover, a review of the record indicates that the circuit clerk never even issued a summons to Saxon. Commonsense dictates that a party must first be issued a summons in order to be served with one.

¶ 29 Although attorney Goldstein indicated to the trial court at the hearing on the motion to amend judgment that he was appearing on behalf of Saxon, a closer reading of the record indicates that Goldstein was actually an attorney of record for Mortgage First. Indeed, the court's docket entry from that date correctly states that Goldstein was appearing on behalf of the plaintiff, and that "defendant [was] not present."

¶ 30 Thus, we find that even a cursory examination of the record should have alerted a reasonable person that the judgment rendered against Saxon was void for lack of jurisdiction. In a nutshell, Saxon had no interest in the property at the time the trial court entered its amended judgment of foreclosure in November 2009. Saxon did not acquire its interest until January

2011. The circuit clerk never issued a summons to Saxon, and Saxon was never "formerly known as" TBWM. The only way the trial court's amended judgment of foreclosure could have extinguished Saxon's interest in the property is if that judgment had extinguished TBWM's interest in the property. Saxon could only receive what TBWM had to transfer. Although the record indicates that the circuit clerk issued a summons to TBWM in September 2009, no return or affidavit of service was ever filed with the court. As stated above, a judgment rendered without service of process is void. *Thill*, 113 Ill. 2d at 308. Accordingly, we conclude the trial court erred when it found Saunders was a *bona fide* purchaser for value pursuant to section 2-1401(e) of the Code.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the trial court's order granting Saunders' motion for partial summary judgment and denying Nationstar's motion for partial summary judgment is reversed. The cause is remanded to the trial court for entry of an order granting Nationstar's cross-motion for summary judgment.

¶ 33 Reversed and remanded with directions.

¶ 34 JUSTICE WRIGHT, dissenting.

¶ 35 I respectfully dissent. At the onset, I respectfully note that this court does not have the record in Will County case No. 08-CH-5893 available for our review. This appeal involves the foreclosure proceedings in Will County case No. 11-CH-439.

¶ 36 Appellant's brief contains representations of the procedural history in case No. 08-CH-5893, which I have attempted to verify based on the Will County circuit clerk's records available to the public online. It appears from the contents of the appellate briefs in this case that the parties do not dispute the following facts.

¶ 37 On December 30, 2005, Fifth Third Bank entered into a Flexline Credit Agreement with the Huffs, resulting in a mortgage to secure a debt of $55,000. Fifth Third Bank sold their interest in this Flexline Credit Agreement to Mortgage First, LLC (Mortgage First) sometime in 2008. When the Huffs defaulted on this Flexline Credit Agreement in 2008, Attorney Kimberly Weissman filed a foreclosure complaint against the Huffs and on behalf of her client, Mortgage First, on December 22, 2008. Mortgage First's foreclosure action against the Huffs was assigned Will County case No. 08-CH-5893. The parties seem to be in agreement that the foreclosure complaint in case No. 08-CH-5893 did not incorporate any information informing the court, before the original judgment of foreclosure, that Taylor Bean & Whitaker Mortgage Corporation (TBWM) also had a valid mortgage lien on the same residential property.

¶ 38 Again, the parties seem to agree that on December 30, 2005, the Huffs also borrowed $250,400 from TBWM and this loan was secured by a residential mortgage. Like the Fifth Third loan, the Huffs also fell behind on the TBWM loan.

¶ 39 Mortgage First's 2008 foreclosure complaint percolated through the circuit court without any roadblocks in case No. 08-CH-5893. In fact, on February 24, 2009, the court entered a judgment of foreclosure in case No. 08-CH-5893. However, six months after the entry of the original judgment of foreclosure, problems developed as the parties prepared for the sheriff's sale.

¶ 40 On September 22, 2009, Mortgage First seems to have discovered the existence of the other lienholder, TBWM, or its successor in interest, Saxon Mortgage Services Corporation (Saxon). Consequently, Mortgage First filed a motion to amend the judgment of foreclosure, with notice, in case No. 08-CH-5893. The majority decision indicates that Saxon, plaintiff in Will County case No. 11-CH-439, received notice of Mortgage First's motion to amend the

judgment of foreclosure in case No. 08-CH-5893 on October 8, 2009. Although we do not have the record in case No. 08-CH-5893 available for our review, the parties agree the judgment of foreclosure was amended, without objection, in November 2009 to add Saxon as a purported lienholder tied to the TBWM mortgage. Based on these details, I surmise Saxon had actual notice of the hearing on the motion to amend judgment of foreclosure in 2009.

¶ 41 Neither TBWM nor Saxon entered a special appearance or objection challenging the entry of the amended judgment order in 2009 that added the second lienholder. In fact, the minute entry from the file in case No. 08-CH-5893 indicates that on that date, "Defendant [was] not present." The entry then reads: "[t]he Judgment of Foreclosure entered on 2-24-09 is amended to include Saxon Mortgage Services Corporation f/k/a Taylor Bean & Whitake [*sic*] Mortgage Corporation as a secondary lein [*sic*] holder." It is undisputed that an uncontested sheriff's sale took place and Midwest Capital Investments, LLC (Midwest Capital) paid $67,000 for the property at the sheriff's sale.

¶ 42 Thereafter, the circuit clerk's records in case No. 08-CH-5893 show Mortgage First filed a motion to confirm the foreclosure sale conducted by the sheriff and the clerk's records show notice was once again provided. Nonetheless, the foreclosure sale was summarily approved by the court on December 15, 2009. Thereafter, Midwest Capital assigned its interest in the purchased property to another party, Saleem Mohammed.

¶ 43 On September 9, 2010, nine months after the December 15, 2009, judicial approval of the foreclosure sale in case No. 08-CH-5893, Herbert Saunders purchased the property from Mohammed for $189,900. It is important to my dissent to recognize that Saunders purchased the residential property for $189,900 on September 9, 2010. TBWM did not assign their remaining mortgage interests in the property, if any, to Saxon until September 25, 2010. Similarly, when

Saunders purchased the property on September 9, 2010, the amended judgment of foreclosure approved by the court nearly a year before, on November 10, 2009, remained unchallenged. The first challenge to the amended judgment of foreclosure, adding a lienholder in case No. 08-CH-5893, materialized on May 11, 2011, when counsel for Saxon filed a "Motion to Quash Service of Summons" issued prior to November 10, 2009. It does not appear to me that Saxon has ever filed a motion to *vacate* the prior amended judgment in case No. 08-CH-5893 pursuant to section 2-1301 or section 2-1401 of the Code of Civil Procedure. Instead, Saxon sought to merely quash the summons in case No. 08-CH-5893.

¶ 44 In conclusion, the trial court correctly determined Saunders was a bona fide purchaser on September 9, 2010, for several reasons. First, Saunders gave fair value for the property subject to a deed issued after the court approved the sheriff's foreclosure sale and one year before the court issued its agreed order amending the judgment of foreclosure to add TBMW.

¶ 45 Second, Saxon filed the foreclosure complaint against Saunders and others in Will County case No. 11-CH-439 on January 25, 2011, *before* Saxon raised any challenge to the circuit court's jurisdiction to enter the 2009 amended judgment of foreclosure naming Saxon as a lienholder. Saxon did not attempt to undo what had been done in case No. 08-CH-5893 by filing a motion to quash the summons in case No. 08-CH-5893 on October 13, 2011, nearly two years after the sheriff's sale that resulted in the deed.

¶ 46 Looking back in time, when Saunders paid fair value for the property in 2010, he did so without knowledge of any arguable irregularity in the foreclosure sale and therefore became a *bona fide* purchaser *before* Saxon accepted the assignment of debt from TBWM on September 25, 2010. Here, it appears to me that Saxon had actual notice of the proceedings to amend the judgment of foreclosure in October 2009 and elected *not* to raise any challenge to the

summons received in case No. 08-CH-5893 until March 2011. Saxon's delay came with serious consequences due to the intervening sale to an innocent buyer.

¶ 47 If Saxon had actual knowledge of the amended judgment entered on November 9, 2010, then Saxon knew or should have known the 2005 mortgage debt they accepted by assignment would be a risky acquisition. I conclude the trial court made the right call and dismissed the foreclosure complaint filed by Saxon against Saunders in case No. 11-CH-439 based on an affirmative matter arising out of his status as a *bona fide* purchaser of the property.