

NOTICE

Decision filed 11/17/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 160108-U

NO. 5-16-0108

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

BANK OF AMERICA, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Fayette County.
)	
v.)	No. 12-CH-30
)	
JODY A. PORTER; TRACY L. PORTER;)	
Unknown Heirs and Legatees of Jody A. Porter,)	
if any; Unknown Heirs and Legatees of)	
Tracy L. Porter, if any; Unknown Owners and)	
Non-Record Claimants,)	
)	
Defendants)	Honorable
)	Kevin S. Parker,
(Tracy L. Porter, Defendant-Appellee).)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying the plaintiff's motion to vacate judgment is affirmed where the plaintiff's delay in ascertaining and bringing to the court's attention the information relating to the original mortgagee's licensure was unreasonable.

¶ 2 In the Fayette County circuit court proceedings between the plaintiff, Bank of America, N.A., (BA), and the defendant Tracy L. Porter (Porter), BA's failure to respond to Porter's motion for summary judgment resulted in the circuit court's granting judgment

in Porter's favor. BA did not appeal. Approximately six months later, BA sought to vacate the summary judgment order pursuant to section 2-1401 of the Code of Civil Procedure (section 2-1401) (735 ILCS 5/2-1401 (West 2014)). The circuit court dismissed the petition on the grounds that BA did not exercise due diligence in presenting its meritorious claim to the court or in the filing of its section 2-1401 petition seeking relief from the order. BA appeals this decision. For the following reasons, we affirm.

¶ 3 On May 23, 2012, plaintiff-appellant BA filed a mortgage foreclosure action against defendant-appellee Porter pursuant to a note and mortgage executed by Porter on April 20, 2009. Porter filed two affirmative defenses in response to this action, the second of which, filed on April 11, 2014, is pertinent to this appeal. Porter alleged therein that at the time the mortgage and note were executed, the original mortgagee, Taylor, Bean & Whitaker Mortgage Corporation, was not licensed as a lender under the Residential Mortgage License Act of 1987 (RMLA) (205 ILCS 635/1-1 *et seq.* (West 2008)). Porter asserted that the transaction was unenforceable and void pursuant to the holding in *First Mortgage Co. v. Dina*, 2014 IL App (2d) 130567 (holding that a mortgage made by an entity that lacked authorization under the RMLA to conduct the business of residential mortgage lending is void as against public policy). Porter subsequently filed a request to admit, asking BA to admit that the original lender was not licensed prior to or at the time of the parties' alleged transaction. BA did not file any response to Porter's request. Porter's request to admit was deemed admitted after 28 days elapsed, pursuant to Illinois Supreme Court Rule 216 (eff. May 1, 2013).

¶ 4 On July 14, 2014, Porter filed her motion for summary judgment based on her second affirmative defense. Porter again cited *Dina* and attached to her motion a copy of her request to admit.

¶ 5 Thereafter, Porter's summary judgment motion was set for hearing on September 11, 2014. However, the duly noticed hearings on the motion were continued twice, first on September 11, 2014, and again on November 6, 2014. The matter was continued at BA's request and over Porter's objection, in order to allow BA time to respond. When the court granted the second and final continuance, BA's counsel was advised that if no pleadings were filed within 21 days, the court would rule on Porter's motion.

¶ 6 On January 20, 2015, 75 days after the final continuance was granted, the trial court found that because BA had not filed any responsive pleadings, Porter's motion for summary judgment stood uncontested; as such, "there is no genuine issue as to any material fact regarding the Defendant's Second Affirmative Defense." The court noted that it found no just reason to delay enforcement or appeal of the order. The docket order stated that summary judgment was entered in favor of Porter and dismissed the complaint without prejudice; however, the court later corrected the docket order, deleting "case dismissed without prejudice" in response to a request by Porter, discussed in further detail below.

¶ 7 On February 6, 2015, Porter filed a motion to modify the order, as an order granting summary judgment (an adjudication on the merits) was inconsistent with dismissing the complaint to foreclose the mortgage without prejudice (an adjudication not on the merits). Porter argued that BA's lack of response to her request to admit and to her

motion for summary judgment entitled her to an order granting her motion on the merits, so that BA would be precluded from bringing a subsequent action on the note and mortgage under the principles of *res judicata* and collateral estoppel. BA filed no response to this motion but requested that the hearing be reset for March 16, 2015.

¶ 8 A docket entry for March 16, 2015, reflects that BA's counsel requested additional time to respond, which was denied "as the Plaintiffs have repeated [*sic*] requested continuances and additional time to file responsive pleadings." The court heard the motion and corrected the docket order to reflect dismissal with prejudice, reiterating that there was no just reason to delay finding or appeal of that decision. BA did not file a motion to reconsider the docket order or file an appeal from the order granting summary judgment.

¶ 9 On June 22, 2015, the date of the hearing scheduled for Porter's motion for order to compel release of the mortgage, counsel for BA appeared and made an oral motion to continue the hearing, which was granted over objection. BA was given 30 days to file responsive pleadings.

¶ 10 Four months following the court's correction of the docket entry, on July 20, 2015, BA filed a response to Porter's motion for order to compel release of the mortgage. BA also filed a motion to vacate the summary judgment order, pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2014)). BA asserted that although it and Porter both failed to find the license "due to the [Illinois Department of Financial and Professional Regulation] website's difficult search functions," the original lender, Taylor, Bean and

Whitaker Mortgage Corp., was in fact licensed at the time of the loan origination. BA asserted that the summary judgment order should be vacated to prevent an unjust result.

¶ 11 On July 23, 2015, Public Act 99-0113 was approved, amending the RMLA to add the following language:

"A mortgage loan brokered, funded, originated, serviced, or purchased by a party who is not licensed under this Section shall not be held to be invalid solely on the basis of a violation under this Section. The changes made to this Section by this amendatory Act of the 99th General Assembly are declarative of existing law."

205 ILCS 635/1-3(e) (eff. July 23, 2015).

On July 28, 2015, BA filed an amended motion to vacate judgment to include an argument that the judgment should be vacated pursuant to the RMLA amendment. On August 24, 2015, Porter filed a response, arguing that the motion should be dismissed because BA failed to exercise due diligence in bringing its defense. On October 20, 2015, the court heard argument from the parties. After taking the matter under advisement, the court denied BA's motion to vacate judgment on February 22, 2016.

¶ 12 In its order, the court laid out the procedural history of the case, making note of BA's failure to respond to both Porter's request to admit and to the motion for summary judgment, as well as the fact that BA had twice obtained continuances to allow it to respond to the motion. The court next reviewed the law relating to the petitioner's burden in a motion for relief from judgment, in that a petitioner must allege and establish (1) the existence of a meritorious defense, (2) due diligence in presenting the defense or claim, and (3) due diligence in filing the section 2-1401 petition for relief.

¶ 13 As to the first element, the court found that BA had established a meritorious defense in that it was discovered, and no longer disputed, that the original mortgage lender was in fact properly licensed in Illinois, "a fact not known by the Court when it granted the Defendant's Motion For Summary Judgment." In making this finding, however, the court stated that it did not give weight to the RMLA amendment because "if retroactively in effect at the origination of the Defendant's loan and mortgage, [the change in law] would not have rendered the loan void and unenforceable in any event and would have rendered the Defendant's Motion for Summary Judgment pointless and without merit." (Emphasis in original.)

¶ 14 Although the court found that BA had established a meritorious defense, it concluded that BA had not established the exercise of due diligence in presenting its meritorious claim to the court or in the filing of its section 2-1401 petition seeking relief from the summary judgment order. Specifically, the court found persuasive the following:

"a.) When the Plaintiff filed its Complaint To Foreclose Mortgage on May 23, 2012 and throughout all stages of these proceedings, the burden was on the Plaintiff, not the Defendant, to investigate and establish the status of its assignor, the original mortgage lender, as it relates to licensure and compliance with Illinois' Residential Mortgage License Act;

b.) While the Court appreciates the difficulty the Plaintiff may have experienced in accessing the Illinois Department of Financial and Professional Regulation (IDFPR) website in order to confirm the status of the Plaintiff's assignor, the

original mortgage lender's licensure, the delay in ascertaining this seemingly basic informatio [*sic*] from the filing of its Complaint on May 23, 2012[,] to the filing of its Motion To Vacate Judgment July 20, 2015 is simply unreasonable.

c.) The arguments articulated in the Defendant's Memorandum of Law filed August 24, 2016 [*sic*], specifically Articles III and V as to the Plaintiff's lack of due diligence[.]"

The court denied BA's motion to vacate the judgment. BA appeals.

¶ 15 On appeal, BA argues that the circuit court erred in denying its motion to vacate the judgment, as (1) the summary judgment order was based on demonstrably false information, (2) the RMLA amendment negates the ruling in *First Mortgage v. Dina*, upon which the court based its judgment order, and (3) the court improperly shifted the burden of proof to BA when it ordered summary judgment in Porter's favor.

¶ 16 A petition under section 2-1401, which provides relief from final orders and judgments more than 30 days after their entry, must be supported by affidavit or other appropriate showing as to matters not of the record and can be filed no later than two years after the entry of the contested order or judgment. 735 ILCS 2-1401(b), (c) (West 2014). To obtain relief under section 2-1401, the petitioner needs to set forth specific facts showing (1) the existence of a meritorious defense, (2) due diligence in presenting this defense or claim that would have precluded the judgment, and (3) due diligence in filing the section 2-1401 petition for relief. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51.

¶ 17 When the section 2-1401 petition involves purely legal questions, a *de novo* standard of review is to be employed; where the petition involves a fact-dependent challenge to a final judgment, the abuse of discretion standard is appropriate. *Warren County*, 2015 IL 117783, ¶ 51. We apply an abuse-of-discretion standard to BA's fact-dependent challenges to the circuit court's decision. "In determining whether the trial court abused its discretion, the question is not whether the reviewing court agrees with the trial court but rather did the trial court in the exercise of its discretion act arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceed the bounds of reason and ignore recognized principles of law so that substantial injustice resulted." (Internal quotation marks omitted.) *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794 (1992).

¶ 18 We note at the outset that BA's argument regarding the RMLA amendment's effect on this case is essentially an assertion that it has a meritorious defense. However, this is not a contested issue. The circuit court explicitly found that BA had a meritorious defense, but denied BA's motion on the grounds of diligence. Our inquiry on review, then, involves determining whether the circuit court erred in finding that BA's conduct did not constitute due diligence.

¶ 19 Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 222 (1986). This reasonableness should be determined by all of the circumstances attendant upon entry of the judgment. *Id.* A litigant cannot use section 2-1401 to be relieved of the consequences of his own mistake or negligence, nor can a movant obtain such relief

unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court. *Id.* Specifically, "the petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently, when he failed to initially resist the judgment." *Id.*

¶ 20 The circuit court in this instance ruled that while it appreciated the difficulty of navigating the IDFPR website, the delay in ascertaining this information was "simply unreasonable." We cannot say that this determination was an abuse of discretion.

¶ 21 BA argues that equitable considerations require relaxing the diligence requirements, as the motion for summary judgment was granted based on "clearly and demonstrably inaccurate" information. However, we disagree.

¶ 22 A circuit court may take equitable considerations into account when ruling on a section 2-1401 petition, to prevent the enforcement of a judgment when it would be unfair, unjust, or unconscionable. *Smith*, 114 Ill. 2d at 225. However, the diligence standard should not be relaxed when the new facts brought forward could readily have been discovered before summary judgment was entered. *Goncaves v. Saab*, 184 Ill. App. 3d 952, 958 (1989).

¶ 23 After the facts in Porter's summary judgment motion went unchallenged by BA, the trial court ruled for Porter based on those facts. Neither party contests that Porter's claim regarding the original lender's lack of licensure was later discovered by BA to be patently untrue. However, we are not to relax the diligence standard if the newly discovered information was readily available. Here, the status of the original lender's

licensure was publicly available well before summary judgment was entered by the circuit court. BA passed on multiple reasonable opportunities to investigate this information, namely, in 2012, when BA obtained the assignment of the mortgage; in April 2014, when Porter filed her request to admit this fact; in July 2014, when Porter filed her motion for summary judgment based on this fact; and, at any point up to and including 21 days following the November 6, 2014, granting of BA's final motion to continue. Like the trial court, we can appreciate that this type of information may be difficult to find, but we cannot fault the trial court for reasoning that such a search does not realistically take months upon months, particularly when the information resulting from that search was (at the time) ostensibly crucial enough to defeat an opponent's motion. Upon review of the sequence of events, we find that the trial court reasonably concluded that BA had ample time to identify and correct the misinformation before judgment was entered, and cannot now request that it be reversed on the grounds of equity.

¶ 24 Additionally, we must note that the Illinois cases in which the equitable standards have been relaxed involve evidence of fraudulent conduct or other unusual circumstances that make enforcement of the judgment unjust. *European Tanspa, Inc. v. Shrader*, 242 Ill. App. 3d 103, 108 (1993). BA has not alleged that Porter engaged in fraudulent conduct or in any way attempted to conceal the fact that the original lender was, in fact, licensed. No evidence demonstrates that Porter hindered or prevented BA from discovering this information in time to respond to her request to admit or motion for

summary judgment. Consequently, nothing in the record before us justifies relaxing the diligence standard that is required of BA.

¶ 25 Finally, BA argues that the circuit court improperly shifted the burden of proof, noting that the burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 805 (1998). BA points to the circuit court's order, which states that "[w]hen the Plaintiff filed its Complaint to Foreclose Mortgage on May 23, 2012, and throughout all stages of these proceedings, the burden was on the Plaintiff, not the Defendant, to investigate and establish the status of its assignor."

¶ 26 Summary judgment is appropriate when the movant shows that there is no genuine issue as to any material fact, entitling the movant to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). However, if BA believed that the circuit court placed an improper burden on it when summary judgment was granted, then it should have filed an appeal containing this argument. A section 2-1401 petition is not intended to provide for review of an order from which a party could have taken a timely appeal, and such a petition is not to be invoked as a substitute for a party's right to appeal. *Anest v. Bailey*, 265 Ill. App. 3d 58, 68 (1994). BA is precluded from raising any claims of error regarding the court's granting of the summary judgment motion because it did not appeal from that final order. See *Baumgartner*, 226 Ill. App. 3d at 794 (issues that could have been raised on direct appeal are *res judicata* and may not be relitigated in a section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action).

BA has therefore forfeited its challenges to the trial court's final summary judgment order by failing to appeal it.

¶ 27 For the foregoing reasons, we affirm the decision of the circuit court.

¶ 28 Affirmed.