2017 IL App (1st) 160787
No. 1-16-0787
Order filed March 14, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WELLS FARGO BANK, Plaintiff-Appellee, v. THOMAS ZAJAC, Defendant-Appellant.	)	Appeal from the Trial court of Cook County. No. 07 CH 33784 The Honorable Freddrenna M. Lyle, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by reinstating a foreclosure action more than one year after voluntary dismissal and did not err by granting plaintiff's motion to reconsider its motion to confirm sale.

¶ 2 American Home Mortgage Acceptance, Inc. (AHMAI) brought a foreclosure action against Thomas Zajac, which it voluntarily dismissed with leave to reinstate so the parties could pursue loss mitigation efforts. When these efforts failed, the trial court granted AHMAI's motion

to reinstate. Zajac's attorney filed a motion to withdraw, which the trial court granted at the time the case was reinstated. AHMAI held a judicial sale, then substituted Wells Fargo as the plaintiff. Wells Fargo filed a motion to confirm the sale, which the trial court initially denied and, after reconsideration, allowed.

¶ 3 Zajac contends the trial court erred (i) in reinstating the case after granting AHMAI more than one year to reinstate without his consent or notice, and by granting the reinstatement at the same time as allowing his attorney to withdraw; and (ii) in granting Wells Fargo's motion to reconsider because the court was bound to follow *First Mortgage Company, LLC v. Dina*, 2014 Il App (2d) 130567, and not apply the amendment to section 1-3(e) of the Residential Mortgage Licensing Act of 1987 (RMLA). We affirm, finding that the trial court did not abuse its discretion in reinstating the case nor err in granting Wells Fargo's motion to reconsider.

¶ 4 BACKGROUND

¶ 5 Thomas Zajac obtained a mortgage from AHMAI on residential property in Chicago. On November 16, 2007, AHMAI filed a complaint for foreclosure, alleging Zajac had not made a payment in almost a year, and owed over $600,000 in principal, interest, costs, advances, and fees. Later, when AHMAI filed an amended complaint counsel for Zajac filed an appearance and the court gave Zajac 35 days to answer or otherwise plead. Zajac did not respond, and on July 23, 2008, AHMAI filed a motion for default judgment and an affidavit of prove-up. The trial court entered an order of default against Zajac and a judgment of foreclosure and sale. But, due to ongoing loss mitigation efforts, on July 16, 2009, the trial court dismissed the case with leave to reinstate at any time if loss mitigation efforts failed. On the form order dismissing the case, the judge crossed out and initialed the following: "supported by Affidavit, filed and presented within

one (1) year of this dismissal, if Defendant(s) default on the loan modification, repayment plan, or other settlement agreement."

¶ 6 On July 9, 2010, AHMAI moved to amend the July 16, 2009 order regarding reinstatement. The loss mitigation efforts were still ongoing. On July 30, 2010, the trial court amended the July 16 order, allowing AHMAI to reinstate on motion supported by affidavit.

¶ 7 On October 15, 2013, AHMAI moved to reinstate with a supporting affidavit. Zajac's attorney filed a motion to withdraw on October 30, 2013. On November 4, 2013, the trial court reinstated the foreclosure proceedings and granted Zajac's attorney's leave to withdraw. Zajac was in court and did not object to his attorney's request to withdraw, but did object to AHMAI's motion to reinstate. On November 13, 2013, AHMAI mailed Zajac a notice of sale set for December 12, 2013. Zajac's new attorney filed an emergency motion to vacate the reinstatement and delay sale on December 3, 2013. Three days later, the trial court entered a briefing schedule, delaying the sale until January 21, 2014, and setting a hearing for January 17.

¶ 8 At the hearing, Zajac's attorney presented the emergency motion, arguing that the trial court should not have allowed Zajac's former attorney to withdraw at the same time as reinstating the case. Zajac argued that if the court granted the withdrawal before reinstating the case, then the court lacked jurisdiction. Alternatively, if the court reinstated the case before it granted the withdrawal, then the attorney was guilty of gross misconduct for failing to obtain a briefing schedule that would allow Zajac more time to respond to the motion to reinstate. The trial court denied Zajac's motion, but granted his request for a stay of sale through February 7, 2014. Zajac filed another emergency motion to delay the sale and vacate the judgment, which was denied.

¶ 9 A judicial sale was held on February 10, 2014. On April 1, 2014, AHMAI moved to substitute its assignee, Wells Fargo Bank, as the plaintiff, and Wells Fargo moved to confirm the sale. In his response, Zajac relied on *First Mortgage Company., LLC v. Dina*, 2014 IL App (2d) 130567, ¶ 18, which held that a mortgage made by an unlicensed entity is void as against public policy. Zajac argued that because AHMAI was not licensed when the mortgage was made, the mortgage was void under public policy. Wells Fargo responded that *Dina* was wrongly decided, and any arguments raised by Zajac after the motion for confirmation of sale was filed were limited to those contained in section 15-1508 of the Illinois Mortgage Foreclosure Law (IMFL). 735 ILCS 5/15-1508 (West 2014).

¶ 10 Relying on *Dina*, the trial court denied Wells Fargo's motion to confirm, and declared the mortgage void. The trial court did not consider Wells Fargo's section 15-1508 argument. Thereafter, Wells Fargo moved to reconsider, arguing that the trial court erred in relying on *Dina* and not addressing its section 15-1508 argument. The trial court then reversed itself, granting Wells Fargo's motion to reconsider. Wells Fargo refiled its motion for confirmation of sale, and Zajac filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 Zajac contends that (i) the trial court erred when it reinstated the case more than one year after voluntary dismissal; (ii) the court did not have Zajac's consent and AHMAI did not give proper notice of the voluntary dismissal; (iii) the trial court erred in reinstating the case while simultaneously allowing Zajac's attorney to withdraw; and (iv) the trial court erred when it reconsidered the November 20, 2014 order declaring the mortgage between AHMAI and Zajac null and void because AHMAI was not properly licensed at the time of the mortgage.

¶ 13 Reinstatement of the Case

¶ 14 Zajac's contention that the trial court erred in reinstating the case stems from the court's order amending the July 16, 2009 order to dismiss the case with leave to reinstate. Zajac argues the July 8, 2010 order permitting the amendment was improper because (i) it allowed AHMAI more than one year to reinstate; (ii) AHMAI judicially admitted it was only entitled to one year to reinstate; (iii) the trial court did not obtain Zajac's approval for reinstatement beyond one year; (iv) Zajac was not provided with proper notice of AHMAI's request for voluntary dismissal; and (v) the trial court erred in allowing Zajac's attorney to withdraw on the same day it entered the order reinstating the case.

¶ 15 As a preliminary matter, Wells Fargo contends this court lacks jurisdiction to address the July 16, 2009 order dismissing the case with leave to reinstate because it was a final and appealable order that Zajac had to appeal within 30 days. Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015); *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 307 (1984) (holding voluntary dismissal order is final and appealable order). But "a judgment is not final if the court retains jurisdiction for future determination of a substantial controversy." *Weilmuenster v. Illinois Ben Hur Construction Co.*, 72 Ill. App. 3d 101, 106 (1979). Wells Fargo relies on *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997), but it is distinguishable on its facts. In *Dubina*, the plaintiff did not request reinstatement, so the supreme court held that the voluntary dismissal "terminated the action in its entirety." Here, the trial court granted AHMAI leave to reinstate. Therefore, Zajac was not obligated to appeal the voluntary dismissal within 30 days and did not waive his right to appeal issues arising out of that dismissal order.

¶ 16 Turning to the merits, we review a trial court's decision to reinstate a case after a voluntary dismissal under an abuse of discretion standard. *Weilmuenster*, 72 Ill. App. 3d at 106. This court must consider whether the trial court reasonably exercised sound discretion when it

allowed AHMAI to reinstate the foreclosure case more than one year after the case was voluntarily dismissed. *Id.*

¶ 17 Zajac argues that the trial court should not have reinstated the case after the passage of more than one year. Section 2-1009 does not place restrictions on the leave to reinstate, and offers no guidance about the length of time a plaintiff has to move for leave to reinstate. Zajac argues that under section 13-217 of the Code of Civil Procedure 735 ILCS 5/13-217 (West 2014)), AHMAI was limited to one year. But, this statute is not applicable. Section 13-217 pertains to refiling; it does not apply to reinstatement. 735 ILCS 5/13-217 (West 2014); *Dubina*, 178 Ill. 2d at 504. As the supreme court stated in *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 48, "[a] refiled action pursuant to Section 13-217 is not a reinstatement of the old action, but an entirely new and separate action." No Illinois court has held that reinstatement must be limited to one year. Furthermore, as section 2-1009 does not address reinstatement limitations, if we are to use section 13-217 as guidance, then the plaintiff would be able to reinstate the case until the expiration of the statute of limitations. "If a plaintiff voluntarily dismisses his or her case pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2014)) or if a plaintiff's action is dismissed for want of prosecution, section 13-217 of the Code permits a plaintiff to refile the action within one year or within the remainder of the statute of limitations, whichever is greater." *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶ 22. The statute of limitations for a mortgage foreclosure case is 10 years (735 ILCS 5/13-206 (West 2014)), and the date of default alleged in the complaint was January 1, 2007. Therefore, AHMAI had until January 1, 2017. Accordingly, the trial court did not err in granting AHMAI's motion to reinstate.

¶ 18 Zajac also argues that AHMAI made a judicial admission in its July 9, 2010 motion to amend the dismissal order that AHMAI had only one year to reinstate. But the trial court was without jurisdiction to enter the amended order on July 30, 2010. Until the case was reinstated, any orders entered while the court lacked jurisdiction are void. "A void order or judgment is one entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved." *In re Estate of Steinfeld*, 158 Ill. 2d 1, 12 (1994). Accordingly, the July 16, 2009 order was still in effect and still granted AHMAI leave to reinstate if loss mitigation efforts failed. The order did not affect the outcome of the litigation, because AHMAI complied with the original order when it reinstated the case. "Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed." *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964).

¶ 19 Next, Zajac argues that the trial court erred in granting leave to reinstate after one year without his consent or knowledge. The argument is without merit. Section 2-1009 does not require the defendant to be present at a hearing or given notice when the plaintiff requests leave to reinstate. Zajac also does not reference any authority to support this claim and, in any event, given our analysis above, Zajac did not have a defense to reinstatement.

¶ 20 Zajac's then argues that the trial court made an "egregious error" when it reinstated the case on November 4, 2013, and granted his attorney's motion to withdraw on the same day. Because the court was without jurisdiction to enter any orders until the case was reinstated it could not grant Zajac's attorney motion to withdraw until the case was reinstated. *Steinfeld*, 158 Ill. 2d at 12. Zajac received timely notice of the motion to withdraw, was present in court, and consented to this withdrawal. But, in the motion to withdraw, Zajac's attorney did not advise

Zajac that he should obtain new counsel or file an appearance within 21 days of the order granting the withdrawal. *People ex rel. Burris v. Maraviglia*, 264 Ill. App. 3d 392, 398 (1994). Zajac did not request a continuance to seek new counsel, and the trial court order for the motion to withdraw does not grant a continuance. As noted in *In re Marriage of Ehgartner-Shacter and Schacter*, 366 Ill. App. 3d 278, 289 (2006), when the trial court fails to grant a 21-day continuance for a party to seek new counsel, this may constitute reversible error, but it is not grounds for vacating a judgment. Zajac obtained new counsel by December 3, 2013, and the court did not enter any actions prejudicing his rights during the intervening time. *Id.* Accordingly, the trial court did not abuse its discretion when, on the same day, it reinstated the case and allowed Zajac's attorney to withdraw.

¶ 21 Motion to Reconsider

¶ 22 In contending that the trial court erred in granting Wells Fargo's motion to reconsider (which allowed the refiling of the confirmation of sale), Zajac makes three arguments: (i) the trial court erred in retroactively applying the amendment to RMLA section 1-3(e) (205 ILCS 635/1-3 (West 2014)); (ii) the trial court should have followed *First Mortgage Co., LLC v. Dina*, 2014 IL App (2d) 130567 which held a mortgage void if the mortgager was not licensed when the loan was procured; and (iii) the amendment to RMLA section 103(e) makes only the collateral securing the loan void, and not the loan itself.

¶ 23 The reviewing court commonly applies an abuse of discretion standard for a trial court's ruling on a motion to reconsider. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. But, we apply a *de novo* standard of review where a motion to reconsider asks the trial court to reexamine the law and how it was applied to the case at the time of judgment. *Id.* Wells Fargo's motion to reconsider argued that the trial court erred in applying the law by failing to address

IMFL section 15-1508. Because Wells Fargo only asked the trial court to reexamine the law, we apply a *de novo* standard of review. *J.P. Morgan Chase Bank v. Frankhauser*, 383 Ill. App. 3d 254, 259 (2008).

¶ 24 Zajac first argues that the court was incorrect when it retroactively applied section 1-3(e) of the RMLA. Section 1-3(e) was amended in 2015 to state, "[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) (West 2014). This amendment appears to be in response to *First Mortgage Co., LLC v. Dina*, 2014 IL App (2d) 130567, which held that public policy dictates that a mortgage made by an unlicensed lender is void. *Dina*, 2014 IL App (2d) at ¶ 18. Zajac argues the amendment does not apply as it was added July 23, 2015, and Wells Fargo's December 2014 motion to reconsider was pending at that time.

¶ 25 When an amendment is enacted while a case remains pending in the trial court, we must determine if the amendment applies. *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 298-99 (2010). In *K. Miller*, our supreme court listed factors relevant to determining whether an amendment to statutory language is a change in the law. *Id.* If the circumstances surrounding the amendment indicate that the legislature only intended to interpret the original act, there is no presumption that there was an intention to change the law. *Id.* at 299. The court can determine whether an amendment is meant as clarification of existing law or a substantive change in the law by considering (i) whether the General Assembly declared its intent; (ii) whether there was a conflict or ambiguity present at the time of the amendment; and (iii) whether the amendment is consistent with prior reasonable interpretations of the law. *Id.*

¶ 26 The amendment to the RMLA explicitly states, "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) (West 2014). The first factor in *K. Miller* supports Wells Fargo because the legislature intended this amendment to clarify the existing law, and not to act as a new law. *Harris Bank St. Charles v. Weber*, 298 Ill. App. 3d 1072, 1080 (1998) (holding legislature specified in amendment to Code of Civil Procedure that it was clarification of existing law and not new enactment); *Richardson v. JPMorgan Chase Bank, N.A. (In re Jordan)*, 543 B.R. 878, 883 (Bankr. C.D. Ill. 2016) ("The first *K. Miller* factor clearly weighs in favor of JPMorgan here because the amendment contains an express statement that it is 'declarative of existing law'").

¶ 27 The second factor also weights in Wells Fargo's favor, as the amendment passed shortly after the appellate court's decision in *Dina* created a conflict with the original intent of the RMLA. *Wells Fargo Bank, N.A. v. Maka*, 2017 IL App (1st) 155010, ¶ 21; *Jordan*, 543 B.R. at 886. The legislature wanted to prevent a split of authority in the appellate courts by clarifying the scope of the RMLA. *Jordan*, 543 B.R. at 886.

¶ 28 The third factor of the *K. Miller* test favors Wells Fargo as well. The RMLA amendment is consistent with the rest of the License Act; before *Dina*, there was no private right of action to enforce licensing requirements. *Maka*, 2017 IL App (1st) 155010, ¶ 20; *Jordan*, 543 B.R. at 886. The License Act allows for other remedies, including fines and injunctions, for violations of licensing requirements, but does not permit private remedies like evading an overdue mortgage on the basis of a license violation. *Jordan*, 543 B.R. at 886.

¶ 29 The factors in the *K. Miller* test verify that amended section 1-3(e) clarified the scope and meaning of the existing statute. *Maka*, 2017 IL App (1st) 155010, ¶ 23; *Jordan*, 543 B.R. at 886. This means there is no public policy that renders a mortgage contract void if a lender is not

properly licensed under the RMLA. *Maka*, 2017 IL App (1st) 155010, ¶ 23. *Dina*, therefore, is inapplicable, and the trial court correctly granted Wells Fargo's motion to reconsider.

¶ 30 Zajac's argument that the amendment to RMLA section 1-3(e) makes the collateral securing the loan void, and not the loan itself, is both illogical and irrelevant. The RMLA defines a mortgage loan as "any *loan* primarily for personal, family, or household use that is *secured by a mortgage* ***." (emphasis added) 205 ILCS 635/1-4(f) (West 2014). Zajac maintains that this definition distinguishes a mortgage from the actual loan, and that section 1-3(e) applies to the loan only, and not to the mortgage. But, courts interpret section 1-3(e) to include the loan along with the mortgage. See, *e.g.*, *Maka*, 2017 IL App (1st) 155010, ¶ 18 ("after the Second District rendered its decision in *Dina* and while this matter was pending in the trial court, legislation was enacted which clarified that the General Assembly did not intend for violations of the License Act to *result in a void mortgage*") (emphasis added). Thus, even though AHMAI was not properly licensed when the mortgage with Zajac was created, the mortgage loan, which includes the loan and the mortgage itself, are not void.

¶ 31 Affirmed.