

No. 1-16-2077

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK NATIONAL ASSOCIATION,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CH 33751
)	
GEORGE W. POTE, JR.,)	Honorable
)	Pamela McLean Meyerson,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Judgment affirmed. Defendant could not challenge confirmation of judicial sale via petition for relief from judgment because he failed to present evidence that judicial sales deed had not been delivered to purchaser, and because his allegations of fraud, even if true, would not render judgment void.

¶ 2 Plaintiff U.S. Bank, National Association (U.S. Bank) foreclosed on a mortgage it held on defendant George W. Pote, Jr.'s home. More than four months after the court confirmed the judicial sale of the property to U.S. Bank, defendant filed a petition for relief from judgment alleging that U.S. Bank had fabricated evidence of the assignment of the mortgage and note from U.S. Bank's nominee, Mortgage Electronic Registration Systems, Inc. (MERS), to U.S. Bank. Specifically, defendant said that the individuals who purportedly signed the assignment

documents on MERS's behalf were actually U.S. Bank employees. The court denied the petition, finding that defendant could not collaterally attack the order confirming the judicial sale.

¶ 3 Defendant appeals, claiming that the trial court erred in denying his petition because there was no evidence that the deed had been delivered to U.S. Bank, which would have barred his collateral attack. And he argues that the confirmation of sale is void—and thus subject to attack at any time—because U.S. Bank secured it through fraud.

¶ 4 We affirm the judgment of the trial court. Section 15-1509(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2014)) bars all claims between the parties to a foreclosure action after the judicial sales deed has been delivered to the purchaser of the property. And defendant, who bore the burden to prove the allegations in his petition, failed to allege or prove that the selling officer failed to deliver the deed to U.S. Bank. Moreover, defendant did not allege fraud sufficient to declare the confirmation void.

¶ 5 I. BACKGROUND

¶ 6 On January 14, 2002, defendant entered into a home mortgage loan with Mortgage Amenities Corporation (MAC). The loan was secured with a mortgage listing MAC as mortgagee. Several months later, MAC executed an assignment of the mortgage to MERS.

¶ 7 MAC endorsed the note to Firststar Bank, N.A. (Firststar). Firststar endorsed the note in blank.

¶ 8 On February 9, 2010, U.S. Bank recorded an assignment of mortgage that purported to transfer the mortgage from MERS to U.S. Bank. The assignment said that MERS had assigned U.S. Bank the mortgage “prior to 10/23/09.” The assignment was signed on MERS's behalf by Gregg Speer, who was listed as MERS's vice president, and Kim Stewart, who was labeled as MERS's assistant secretary.

¶ 9 Two years later, U.S. Bank filed its complaint to foreclose on the mortgage. It attached a copy of the note, the mortgage, and the assignments of the mortgage from MAC to MERS to U.S. Bank. U.S. Bank alleged that it was the holder of the mortgage and note in its complaint.

¶ 10 Along with the mortgage and note, U.S. Bank attached two loan modification agreements between U.S. Bank and defendant. The first modification, dated May 1, 2004, was signed by defendant and Speer. Speer signed on behalf of U.S. Bank, but his title was listed as, “Vice President, as Assistant Secretary for MERS.” The second modification, dated January 14, 2010, was also signed by Speer on U.S. Bank’s behalf. This time, Speer was listed as U.S. Bank’s “Senior Vice President.”

¶ 11 When defendant did not answer the complaint, U.S. Bank moved for a default judgment. In response, defendant filed an appearance and moved to quash U.S. Bank’s service of the complaint. On July 18, 2014, the court entered an agreed order stating that defendant had submitted to the court’s jurisdiction and giving defendant 90 days to file an answer or otherwise plead.

¶ 12 On October 31, 2014, U.S. Bank again moved for a default judgment, stating that defendant had failed to file an answer or other responsive pleading. U.S. Bank simultaneously moved for a judgment of foreclosure. Defendant did not respond to either motion.

¶ 13 On November 17, 2014, the court found that defendant was in default and entered a judgment of foreclosure and sale.

¶ 14 Four days later, defendant filed an answer to the complaint and sought to have the default judgment vacated. In his motion to vacate the default judgment, defendant said that his attorney did not receive proper notice of U.S. Bank’s motion for a default judgment and that the mortgage was void because MAC was not licensed to issue mortgages in Illinois. Defendant also said that

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he was “in the process of researching and gathering more evidence” to support a defense that his signature on the note and mortgage had been forged.

¶ 15 Defendant’s answer listed three affirmative defenses. The first alleged that the mortgage and note were void and unenforceable because MAC did not have a valid license to operate its mortgage lending business in Illinois. The second alleged that MAC fraudulently induced defendant to execute the mortgage when it falsely told him that it was a valid residential mortgage lender. The third claimed that the circuit court lacked jurisdiction because U.S. Bank had not been assigned the mortgage and note; defendant noted that U.S. Bank had obtained the mortgage and note “through an illegal mortgage transaction performed by the unlicensed lender, [MAC].”

¶ 16 U.S. Bank sent notice of the judicial sale to defendant’s attorney. On March 3, 2015, U.S. Bank filed a motion for approval of the judicial sale, a report of sale, and a receipt of sale indicating that it had purchased the property at an auction held on February 19, 2015.

¶ 17 On March 13, 2015, the court struck defendant’s answer and affirmative defenses, noting that defendant’s attorney failed to appear in court.

¶ 18 On April 22, 2015, the court denied defendant’s motion to vacate the default judgment.

¶ 19 On May 13, 2015, defendant responded to U.S. Bank’s motion seeking confirmation of the judicial sale. Defendant claimed that his signature on the second loan modification had been forged and that he never signed the second modification. Defendant cited section 1508(b)(iv) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b)(iv) (West 2014)), which provides that a court may decline to approve a judicial sale if “justice was otherwise not done.”

¶ 20 Defendant also moved the court to reconsider the denial of his motion to vacate the default judgment. Defendant said that his attorney had missed the court date set for hearing on

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his motion to vacate the default judgment because his attorney had changed offices and did not receive notice of the hearing. Defendant also claimed he had a meritorious defense based on the fact that the “loan modification [was] not genuine and contain[ed] the forged signature of Defendant.”

¶ 21 On November 2, 2015, the court denied defendant’s motion to reconsider and, in a separate order, confirmed the judicial sale. The court ordered the selling officer to execute and deliver “a deed sufficient to convey title” to U.S. Bank. Defendant did not appeal the confirmation.

¶ 22 On March 25, 2016, defendant filed the petition at issue in this appeal. Defendant said that he was filing his petition pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2016)), section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2016)), and section 1508(b)(iv) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(b)(iv) (West 2016)). Defendant asked the court “to vacate all orders entered in the *** action because Defendant recently discovered the assignment used in the foreclosure case falsely stated the date of transfer, was signed by employees of U.S. Bank who falsely claimed to be officers of MERS, and was robo-signed.” Defendant claimed that both Speer and Stewart, who signed the assignment on MERS’s behalf, were actually U.S. Bank’s employees.

¶ 23 As evidence supporting his claim, defendant attached a copy of the first loan modification, which Speer had signed as U.S. Bank’s senior vice president. Defendant also noted that:

“[t]he Federal District Court, in an opinion by *** Judge Christopher Boyko, slammed the Foreclosure Firm Rosicki, Rosicki & Associates, P.C. in regards to the ‘conflicted Robo-signer Kim Stewart,’ and dismissed the case with prejudice in a manner similar to

the instant case *** (*i.e.*, Kim Stewart signing on behalf of MERS when she works for U.S. Bank.)”

Defendant did not attach any copies of the federal district court order to his petition but he included a document that purportedly had been filed in the Superior Court of New Jersey, in which Stewart said, “I am currently an Assistant Vice President for U.S. Bank ***.”

¶ 24 Defendant also submitted an affidavit in which he attested that he “just recently discovered the assignment *** was signed by officers that work for U.S. Bank.” He added, “I never would have known this information until [he] did some research and after a google [*sic*] search, I found similar complaints against U.S. Bank for creating fraudulent documents.”

¶ 25 Defendant argued that the forgery rendered the foreclosure judgment and confirmation of sale void and, consequently, he did not have to allege a meritorious defense or due diligence. He also argued that, because the court’s orders were “based upon fraud,” they could be “attacked at any time.”

¶ 26 In response to defendant’s petition, U.S. Bank argued that section 2-1203 did not apply because any motion to vacate made pursuant to that section must be filed within 30 days of the judgment, and defendant filed his motion 145 days after the court had confirmed the sale. U.S. Bank also argued that defendant had waived any fraud and standing defenses because he did not raise them until after the judicial sale had been approved.

¶ 27 On July 13, 2016, the court denied defendant’s “2-1401 motion pursuant to *U.S. Bank v. Prabhakaran*, 2013 IL App (1st) 111224.” The court noted that it had read defendant’s petition “and *** heard the arguments of counsel” before denying the petition.

¶ 28 Defendant filed this appeal.

¶ 29

II. ANALYSIS

¶ 30 Before reaching the merits of defendant's argument, we must address U.S. Bank's claim that defendant forfeited his argument on appeal by failing to provide a transcript of the hearing on his petition. U.S. Bank claims that, in the absence of a transcript, we should presume that the trial court's ruling was correct.

¶ 31 The appellant bears the burden of presenting a sufficiently complete record on appeal, including a report of proceedings or acceptable substitute. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); see also Ill. S. Ct. R. 323 (eff. Dec. 13, 2005) (requiring appellant to file report of proceedings or acceptable substitute such as bystander's report or agreed statement of facts). Where the record is insufficient to resolve the appellant's claims, we must presume "that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.*

¶ 32 But even if an appellant has not filed a report of proceedings, we will not find that he or she has forfeited an argument where a record of the proceedings is unnecessary to resolve the questions presented on appeal. See, e.g., *Candice Co. v. Ricketts*, 281 Ill. App. 3d 359, 362 (1996) (argument not forfeited where "[t]he report of proceedings would contain only the arguments of counsel and the remarks of the judge, none of which would be controlling in our determination of a question of law"). In this case, the record contains defendant's petition, the evidence supporting the petition, and U.S. Bank's response. And the court's order states that it heard the arguments of both parties' attorneys, not that it conducted an evidentiary hearing.

¶ 33 When a court dismisses a section 2-1401 petition on the pleadings, without conducting an evidentiary hearing, we apply *de novo* review. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Here, the court denied the petition on the pleadings, without hearing any evidence or making factual

findings. Thus, the fact that we may not know the court's full rationale does not impede our review. See *Bituminous Casualty Corp. v. Iles*, 2013 IL App (5th) 120485, ¶ 19 (“Under the *de novo* standard of review, we perform the same analysis a trial court would perform and give no deference to the judge's conclusions or specific rationale.”).

¶ 34 Because the absence of a report of proceedings or other record of the court proceedings does not affect our ability to review defendant's argument, we decline to find that he has forfeited it. But to the extent the absence of a report creates an ambiguity regarding the proceedings below, we will construe that ambiguity against defendant. *Foutch*, 99 Ill. 2d at 392. We now turn to the merits of defendant's appeal.

¶ 35 Defendant argues that the trial court's “sole reason” for denying his petition, this court's decision in *Prabhakaran*, 2013 IL App (1st) 111224, is not persuasive. In *Prabhakaran*, this court held that a defendant could not seek relief via a section 2-1401 petition after the court had confirmed a judicial sale and a deed had been executed to the purchaser of the property. *Id.* ¶¶ 9, 30. The court in *Prabhakaran* pointed out that section 15-1509(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2008)) barred any claims between the parties once title had vested in the purchaser of a property at a judicial sale, thereby precluding the defendant from seeking relief via section 2-1401. *Id.* ¶ 30; see also 735 ILCS 5/15-1509(c) (West 2016) (“Any vesting of title by a consent foreclosure *** or by deed ***, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure ***.”).

¶ 36 Defendant claims that *Prabhakaran* does not apply for two reasons. First, he notes that, unlike *Prabhakaran*, where the deed had actually been executed in favor of the purchaser

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(*Prabhakaran*, 2013 IL App (1st) 111224, ¶ 9), there was no evidence in this case that any deed had actually been delivered to U.S. Bank. Second, he argues that he could attack the judgment at any time, because the fraud he alleged in his petition rendered the confirmation of the sale void. Unfortunately, we cannot agree with either of defendant's arguments.

¶ 37 With respect to the absence of evidence of the deed's delivery, it is true that section 15-1509(c) only bars claims after a deed has been delivered to the purchaser following a judicial sale. See 735 ILCS 5/15-1509(b), (c) (West 2014) (stating that title is vested in purchaser when judicial sales deed is delivered and that all claims between parties are barred after transfer of title by deed). But defendant fails to recognize that, as the party bringing the section 2-1401 petition, he bore the burden "to allege and prove facts sufficient to justify relief." *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1035 (1991). Defendant did not allege that the selling officer, Judicial Sales Corporation, failed to deliver the deed to U.S. Bank. Nor did he present any evidence suggesting that the deed had not been delivered.

¶ 38 Moreover, the record strongly suggests that the deed *was* delivered in favor of U.S. Bank. In its report of sale, Judicial Sales Corporation asserted that, "upon confirmation of [the] sale, [it would] execute and *deliver* to [the] successful bidder [(i.e., U.S. Bank)], *** a Deed to said bidder in accordance with said judgment and law." (Emphasis added.) In the confirmation, the court ordered Judicial Sale Corporation to "execute and *deliver* *** a deed sufficient to convey title" to U.S. Bank. (Emphasis added.) Pursuant to the report and confirmation, Judicial Sales Corporation would have delivered the deed to U.S. Bank, transferring title to U.S. Bank. And in the months following the confirmation and before defendant filed his section 2-1401 petition, U.S. Bank did not ask the court to compel Judicial Sales Corporation to comply with the confirmation and deliver the deed. It is reasonable to assume that, if Judicial Sales Corporation

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withheld the deed, U.S. Bank would have done something to get the deed to the property it purchased. Defendant has not borne his burden of alleging or proving that the deed was not delivered to U.S. Bank.

¶ 39 Nor has defendant raised an argument that the confirmation of sale in this case is void. It is true that, when a judgment is void, it may be attacked at any time, including in a section 2-1401 petition attacking the confirmation of a judicial sale. See, e.g., *Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st) 141272, ¶ 34 (distinguishing *Prabhakaran* and finding that defendant could challenge judicial sale pursuant to section 2-1401 because he claimed that judgment was void for lack of personal jurisdiction); *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 12, n.1 (same). But defendant's claim that U.S. Bank presented a fabricated assignment is not one that, even if true, would render the judgment void.

¶ 40 The Illinois Supreme Court has “differentiated between fraud which gives the court only colorable jurisdiction and fraud which occurred after the court acquired jurisdiction, such as obtaining an order or decree by false testimony or concealment.” *Schwarz v. Schwarz*, 27 Ill. 2d 140, 144 (1963). “It is only fraud which gives a court colorable jurisdiction that renders a decree void.” *Id.* at 145. Fraud giving a court colorable jurisdiction, which is also known as “ ‘extrinsic fraud,’ ” occurs when a party “ ‘has been prevented from fully exhibiting his case by being kept away from the court or is kept from gaining knowledge of the suit.’ ” *City of Naperville v. Mann*, 378 Ill. App. 3d 657, 661 (2008) (quoting *In re Adoption of E.L.*, 315 Ill. App. 3d 137, 154 (2000)).

¶ 41 Here, defendant did not claim that some fraud by U.S. Bank affected the jurisdiction of the circuit court, whether by keeping him away from court or preventing him from gaining knowledge of the foreclosure proceedings. To the contrary, defendant participated regularly—if

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sporadically—in the foreclosure proceedings. Nor did defendant raise questions regarding his notice of the judicial sale when the court was considering whether to confirm the sale. See 735 ILCS 5/15-1507(c), 15-1508(b)(i) (West 2014) (requiring mortgagee to give public notice of sale and permitting court to deny confirmation of sale if public notice not given).

¶ 42 Rather, defendant’s claim was that U.S. Bank obtained the judgment of foreclosure and sale confirmation through fraudulent evidence (the forged assignment). But obtaining a judgment through false evidence is not the type of extrinsic fraud that would render the judgment void. *Schwarz*, 27 Ill. 2d at 144; *Mann*, 378 Ill. App. 3d at 661; *In re Adoption of E.L.*, 315 Ill. App. 3d at 154.

¶ 43 Because defendant has not raised a claim that the confirmation of sale is void, he cannot avoid section 15-1509(c)’s bar to any claims raised after the sale’s confirmation. Defendant has not shown that the trial court erred in denying his section 2-1401 petition.

¶ 44 In his reply brief, defendant notes that he did not pursue relief via section 2-1401 alone. He also cited section 2-1203 and section 15-1508(b)(iv) as bases for relief in his petition. Defendant argues that the court erred in denying his petition based on section 2-1401 alone.

¶ 45 But neither section 2-1203 nor section 15-1508(b)(iv) applied. Section 2-1203 deals with motions challenging a judgment in “cases tried without a jury.” 735 ILCS 5/2-1203(a) (West 2016). There was no trial in this case which would have allowed defendant to file a posttrial motion under section 2-1203. Moreover, any posttrial motion pursuant to section 2-1203 must be filed within 30 days of judgment, which defendant failed to do in this case. *Id.*

¶ 46 Nor does section 15-1508(b) help defendant. That provision lays out four conditions a court must find *before* confirming a judicial sale. See 735 ILCS 5/15-1508(b)(i)-(iv) (West 2016). It does not provide bases for vacating a sale after it has been confirmed.

¶ 47

III. CONCLUSION

¶ 48 For the reasons stated above, we affirm the circuit court's order denying defendant's petition.

¶ 49 Affirmed.