2017 IL App (2d) 160117-U
No. 2-16-0117
Order filed February 3, 2017

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

SECOND DISTRICT

LLANO FINANCING GROUP, LLC,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-L-393
	)	
MYLES B. HOFFMAN and	)	
MBH APPRAISAL SERVICES, INC.	)	Honorable
	)	James R. Murphy,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE McLaren delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: 1) As plaintiff failed to present a sufficient record of the hearing on defendant's motions to dismiss and to vacate, we presume that the trial court's orders were in conformity with the law and were properly supported by evidence; and 2) plaintiff's arguments that the trial court erred by dismissing its complaint and by denying its motion to vacate were forfeited on appeal where plaintiff failed to raise the arguments in the trial court. Affirmed.

¶ 2

¶ 3 Plaintiff, Llano Financing Group, LLC, appeals the denial of its motion to vacate the trial court's order dismissing its complaint against defendants, Myles B. Hoffman and MBH Appraisal Services, Inc. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On September 1, 2015, plaintiff filed its complaint against defendants alleging that, on September 11, 2006, defendants appraised certain real property and determined its value as $370,000, which indicated that it was adequate to secure a loan by the original lender. Based on defendants' appraisal, the original lender issued the borrower a promissory note secured by the mortgage on the appraised property for $370,000. Subsequently, plaintiff was assigned the borrower's loan. The borrower defaulted, and plaintiff foreclosed on the property. A subsequent sale of the property did not satisfy the full loan amount resulting in damages of $186,526.11. Plaintiff alleged that defendants were liable for negligence, negligent misrepresentation, and false information negligently supplied for the guidance of others.

¶ 6 On November 16, 2015, defendants filed a motion to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619(a)(3), (5), and (9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(3), (5), (9) (West 2014)). Defendants argued that the complaint should be dismissed pursuant to: (1) section 2-619(a)(3) of the Code, because of an earlier-filed federal lawsuit; (2) to section 2-619(a)(9) of the Code, because plaintiff, as an alleged assignee, failed to file a verified complaint alleging how and when it obtained title to the causes of action as required by section 2-403(a) of the Code (735 ILCS 5/2-403(a) (West 2014)); and (3) section 2-619(a)(5) of the Code, because plaintiff's claims were barred as untimely under section 15-30 of the Real Estate Appraiser Licensing Act of 2002 (Act) (225 ILCS 458/15-30 (West 2014)) (providing that an action against a person licensed under the Act must be commenced "within 5 years after the occurrence of the alleged violation."). Defendants also argued that plaintiff's request for costs and attorney's fees should be dismissed pursuant to section 2-615 of the Code.

¶ 7 On November 16, 2015, defendants filed a notice of motion notifying plaintiff's counsel that the motion to dismiss would be heard on at 9:30 a.m. on November 17, 2015. The attached

certificate of service indicates that defendants sent the notice of motion and the motion to dismiss to plaintiff's counsel on November 4, 2015, via U. S. mail and e-mail.

¶ 8 On November 17, 2015, without plaintiff or plaintiff's counsel being present, the trial court granted defendants' motion and dismissed plaintiff's complaint with prejudice, stating in its written order:

> "Defendants' motion to dismiss complaint pursuant to 2-615 and 2-619(a)(3), (5), and (9) is granted. Plaintiff's complaint is dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(3) due to a prior pending action, dismissed pursuant to 2-619(a)(5) as being barred by the statute of limitations contained in 225 ILCS 458/15-30 and dismissed pursuant to 2-619(a)(9) for failure to comply with 735 ILCS 5/2-403."

¶ 9 On December 14, 2015, pursuant to section 2-1301(e) of the Code (735 ILCS 5/1301(e) (West 2014)) plaintiff filed a motion to vacate the dismissal of its complaint, alleging the following:

> 8. The Defendants['] alleged certificate of service states that its Motion to Dismiss was mailed to Plaintiff's counsel on November 4, 2015 and November 12, 2015, however, Plaintiff did not receive a copy of Defendants' Motion until the afternoon of November 17, 2015.
>
> 9. Plaintiff's failure to appear on November 17, 2015[,] was not intentional. Plaintiff has a meritorious case for [*sic*] which it plans to diligently prosecute."

¶ 10 On January 5, 2016, the trial court denied plaintiff's motion to vacate. On February 4, 2016, plaintiff filed its notice of appeal, listing both the trial court's order denying its motion to vacate and the trial court's order dismissing its complaint.

¶ 11 II. ANALYSIS

¶ 12 Motions to vacate judgments that are filed within 30 days of the judgment are governed by section 2-1301(e) of the Code, which provides:

> "The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2014).

The moving party bears the burden of establishing sufficient grounds to vacate a judgment. *Day v. Curtin*, 192 Ill. App. 3d 251, 254 (1989). The trial court's decision to grant or deny a motion to vacate will not be reversed on appeal absent an abuse of discretion. *Id.*

¶ 13 Plaintiff argues that the trial court abused its discretion by denying its motion to vacate because: (1) defendants failed to properly send plaintiff notice of their motion at least five court days prior to the hearing pursuant to local rule 6.05(e)(2) (16th Judicial Cir. Ct. R. 6.05(e)(2) (eff. May 5, 2008)); (2) plaintiff was denied due process for lack of notice and, therefore, the trial court's order granting defendants' motion to dismiss is void; and (3) defendants' motion to dismiss was improper because it was not supported by affidavit as required by section 2-619(a) of the Code. In response, defendants make one argument: that plaintiff waived these arguments by failing to raise them in the trial court.

¶ 14 It is well settled that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *Bank of New York Mellon v. Roger*, 2016 IL App (2d) 150712, ¶ 72, (citing *Haudrich v. Howmedica*, 169 Ill. 2d 525, 536 (1996)). Plaintiff's motion to vacate argued only that "Plaintiff's failure to appear on November 17, 2015[,] was not intentional" because plaintiff did not receive notice of the motion until the afternoon of November 17. The arguments that plaintiff raises here on appeal are not contained in its motion to vacate. Accordingly, these arguments are forfeited. See *In re Marriage of Steichen*, 163 Ill. App. 3d 1074, 1083 (1987) (this

court determined that appellant's argument was "waived" where appellant failed to raised argument in his motion to vacate).

¶ 15 In addition, defendants contend that plaintiff has failed to provide a record sufficiently complete to permit review of the trial court's denial of plaintiff's motion to vacate. We agree. The record contains no transcript or bystander's report of the hearing on the motion to vacate. The record contains the trial court's written order denying plaintiff's motion to vacate, which indicates only that both parties were present and that "plaintiff's motion is denied." Plaintiff, as the appellant here, has failed to present a sufficiently complete record of the hearing on the motion to vacate. Therefore, we must presume that the denial of the motion was in conformity with the law and was properly supported by evidence. See *Foutch v. O'Byrant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 16 Further, we note that the record reflects that plaintiff's counsel was sent a "Notice of Motion" by U.S. Mail and e-mail on November 4, 2015. The notice of motion provided that at 9:30 a.m. on November 17, 2015, defendants would "present the attached" motion to dismiss plaintiff's complaint. The version of Supreme Court Rule 11 in effect at the time permitted the service of documents upon the attorney of record "by depositing them in a United States post office or post office box," or "by transmitting them via e-mail to the designated e-mail address of record for the attorney or party if the attorney or party consented to e-mail service." See Ill. S. Ct. Rs. 11(b)(3), 11(b)(6) (eff. July 1, 2013). Rule 11(b)(6) also provided that "[t]he listing of a designated e-mail address on documents *** shall be deemed consent by that party or attorney to receive e-mail service."

¶ 17 The record contains numerous documents filed by plaintiff's attorney listing her e-mail address. In addition, the record contains a copy of an e-mail sent from defendants' attorney to plaintiff's attorney at 11:47 a.m. November 13, 2015, attaching the notice of motion and motion

to dismiss. "Service by e-mail is complete on the first court day following transmission." Ill. S. Ct. R. 12(f) (eff. Sept. 19, 2014). The trial court heard the motion on November 17, 2015, two court days after defendants sent the November 13 e-mail. Therefore, the record indicates that plaintiff was effectively served.

¶ 18 We also note that plaintiff did not reference local rule 6.05(e)(2) in its motion to vacate. Even if plaintiff had not waived this issue, and in so far as the rule applies, the record shows that defendants complied with the rule. Local rule 6.05(e)(2) provides:

> "Notice by mail shall be deposited in a U.S. Post Office at least five court days before the scheduled hearing." (16th Judicial Cir. Ct. R. 6.05(e)(2) (eff. May 5, 2008)).

¶ 19 The record indicates that defendants mailed its notice of motion on November 4, nine court days before the scheduled hearing. To be clear, plaintiff has not waived the issue regarding whether it received notice of motion, but plaintiff has waived the argument that defendants' mailing of notice of motion was not in compliance with local rule 6.05(e)(2). Waiver aside, the local rule could not invalidate the Supreme Court's rule relative to service by email and thus the argument, as far as it has been perfected is lacking in merit. See Ill. S. Ct. R. 21(a) (authorizing circuit courts to adopt local rules governing criminal and civil cases provided they do not conflict with supreme court rules or statutes, and so far as practical, they are uniform throughout the state). See also *People v. Atou*, 372 Ill. App. 3d 78, 82 (2007) (local rules must not place additional burdens on litigants, as compared to the requirements of corresponding statutes or supreme court rules).

¶ 20 Next, plaintiff argues for the first time on appeal that the trial court erred by dismissing its complaint because: (1) defendants failed to include affidavits in support of their defenses; and (2) defendants failed to establish that the state and federal actions arose out of the same transaction or occurrence and involved the same substantive claims and legal theories. Because

plaintiff failed to raise these arguments in the trial court, these arguments are forfeited. See *Bank of New York Mellon*, 2016 IL App (2d) 150712, ¶ 72. Further, because plaintiff, as the appellant here, has failed to present a sufficiently complete record of the hearing on the motion to dismiss, we presume that the trial court's dismissal of plaintiff's complaint was in conformity with the law and had a sufficient factual basis. See *Foutch*, 99 Ill. 2d at 391-92.

¶ 21 III. CONCLUSION

¶ 22 The judgment of the circuit court of Kane County is affirmed.

¶ 23 Affirmed.