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2017 IL App (3d) 160036-U

Order filed January 13, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

WELLS FARGO BANK, N.A.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-16-0036
)	Circuit No. 14-CH-1140
)	
ANA MARIA MARTINEZ,)	Honorable
)	Daniel Rippey,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion in denying defendant's motion to vacate the judgment of foreclosure, sheriff's sale, and order confirming the sheriff's sale.

¶ 2 Defendant, Ana Maria Martinez, appeals the circuit court's denial of her motion to vacate judgment of foreclosure, judicial sale, and order confirming judicial sale pursuant to section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2014)). We affirm.

¶ 3 **FACTS**

¶ 4 On May 23, 2014, plaintiff, Wells Fargo Bank, N.A., filed a complaint to foreclose mortgage against defendant regarding property located at 424 Elwood Avenue, Joliet, Illinois (the subject property). Defendant entered a *pro se* appearance and answered the complaint.

¶ 5 Plaintiff filed a motion for summary judgment. On April 15, 2015, the circuit court granted summary judgment in favor of plaintiff and entered a judgment of foreclosure and sale.

¶ 6 On April 20, 2015, defendant filed a “Motion to Modificacion [*sic*],” which stated in its entirety: “Im [*sic*] sorry I wasn’t able to present at court on April 15 I had a [*sic*] urgent emergency and it was unexpected Im [*sic*] interested in the case of my house that is why Im [*sic*] here. Thank you.” The circuit court denied defendant’s motion.

¶ 7 On July 10, 2015, plaintiff filed a notice of sheriff’s sale of the subject property. The notice was addressed to defendant at the subject property. The notice was signed by Marc D. Engel, one of plaintiff’s attorneys, and included the following certification:

“I, the undersigned, a licensed attorney, certify that I caused the attached Notice and the Motion(s) referenced in the attached Notice to be placed in the U S Mail at 5707 S Cass Avenue, Westmont, IL 60559 in envelopes properly addressed to the parties indicated above at the addresses indicated above, postage prepaid, before the hour of 5 00 PM on July 06, 2015.”

¶ 8 On July 31, 2015, plaintiff filed a motion for order approving report of sale. Plaintiff also filed a notice of the motion. The notice was addressed to defendant at the subject property. The notice was signed by Jason M. Shulman, one of plaintiff’s attorneys, and included the following certification:

“I, the undersigned, a licensed attorney, certify that I caused the attached Notice and the Motion(s) referenced in the attached Notice to be placed in the U S

Mail at 5707 S Cass Avenue, Westmont, IL 60559 in envelopes properly addressed to the parties indicated above at the addresses indicated above, postage prepaid, before the hour of 5 00 PM on July 29, 2015.”

¶ 9 On August 4, 2015, plaintiff filed a sheriff’s report of sale and distribution. The report indicated that the subject property was purchased by plaintiff at the judicial sale. Plaintiff also filed a certificate of publication signed by the publisher of a Joliet newspaper which stated that notice of the sheriff’s sale was published in the newspaper on June 25, July 2 and 9, 2015.

¶ 10 On August 12, 2015, the circuit court entered an order confirming the sale. The order granted plaintiff possession of the subject property effective 30 days after entry of the order.

¶ 11 Defendant retained counsel. On September 11, 2015, defendant’s counsel entered his appearance and filed a “Motion *** to Vacate Default Judgment of Foreclosure, Order of August 12, 2015, and Purported Sheriff’s Sale Pursuit [*sic*] to Section 2-1301 of the [Code].” The motion alleged that defendant received no notice of the sheriff’s sale or the motion to confirm the sheriff’s sale. The motion stated that defendant had resided at the subject property throughout the proceedings. The motion argued that plaintiff’s failure to provide notice of the sheriff’s sale to defendant was a basis for denying confirmation of the sale under section 15-1508(b)(i) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b)(i) (West 2014)). The motion further argued: “Good cause exists to vacate the Default Judgment as to Defendant Martinez, as she has recovered full employment and stands prepared to satisfy the mortgage obligations in full.”

¶ 12 Plaintiff filed a response to defendant’s motion to vacate, arguing that (1) defendant failed to state a basis for reconsideration of the confirmation of sale, (2) defendant failed to show substantial justice would be done if the motion to vacate was granted, and (3) defendant’s claim

was barred by section 15-1509(c) of the Foreclosure Law. Defendant did not file a reply. Ultimately, the circuit court denied defendant's motion to vacate.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court abused its discretion in denying her “Motion *** to Vacate Default Judgment of Foreclosure, Order of August 12, 2015, and Purported Sheriff’s Sale Pursuit [sic] to Section 2-1301 of the [Code].”

¶ 15 Initially, we reject the defendant’s characterization of the judgment of foreclosure as a default judgment. The judgment of foreclosure was entered on the basis of the substance of the motion for summary judgment, its accompanying exhibits, and the pleadings. It was not a default judgment entered on the procedural basis of defendant’s failure to appear at the hearing on the motion for summary judgment. Accordingly, section 2-1301 of the Code, which concerns default judgments, has no application in this case as the circuit court never entered a default judgment against defendant. *PNC Bank National Ass’n v. Krier*, 2015 IL App (3d) 140639, ¶ 35.

¶ 16 Even if we construe defendant’s motion as a motion to reconsider the order confirming the judicial sale under section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2014)), we find that the circuit court did not abuse its discretion in denying the motion.¹ “[A]fter a judicial sale and a motion to confirm the sale has been filed, the court’s discretion to vacate the sale is governed by the mandatory provisions of section 15-1508(b).” *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 18. A party seeking to set aside a judicial sale after a motion to confirm the sale has been filed is limited to the four grounds set forth in section 15-1508(b) of the Foreclosure Law. *Id.* Section 15-1508(b) provides:

¹A circuit court’s denial of a motion to reconsider under section 2-1203 of the Code is reviewed for an abuse of discretion. *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1079 (2007).

“Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall then enter an order confirming the sale.” 735 ILCS 5/15-1508(b) (West 2014).

¶ 17 Here, defendant raises only one of the four grounds set forth in section 15-1508, namely that notice was not given in accordance with section 15-1507(c). See 735 ILCS 5/15-1508(b)(i) (West 2014). Defendant generically claims that the judicial sale should be set aside because she did not receive notice of the sale or of the motion to confirm the sale.

¶ 18 Notice of a judicial sale and a motion to confirm a judicial sale may be given by typical methods of service. Regarding *notice of a judicial sale*, section 15-1507(c)(3) of the Foreclosure Law (735 ILCS 5/15-1507(c)(3) (West 2014)) provides that “notice [of the judicial sale] shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint.” Regarding *a motion to confirm a judicial sale*, section 15-1508(b) of the Foreclosure Law provides: “Upon motion and notice in accordance with court rules applicable to motions generally *** the court shall conduct a hearing to confirm the sale.” 735 ILCS 5/15-1508(b) (West 2014).

¶ 19 Pursuant to Illinois Supreme Court Rule 11(b)(3) (eff. July 1, 2013), documents may be served by “[d]epositing them in a United States post office or post office box, enclosed in an envelope, plainly addressed *** to the party at the party's business address or residence, with postage fully prepaid.” Under Rule 12(b)(3), service by mail is proved “by certificate of the attorney *** who deposited the document in the mail ***, stating the time and place of mailing

or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid.” Ill. S. Ct. R. 12(b)(3) (eff. Sept. 19, 2014).

¶ 20 “There is a presumption of delivery if sent by regular mail directed to a proper address. Where the rules provide for that method of service, notice is thus satisfied by use of regular mail.” *CitiMortgage Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 39 (quoting *In re Marriage of Betts*, 159 Ill. App. 3d 327, 332 (1987)). “Service of a document by mail is not invalid merely because the party to be served denies receiving it.” *Ingrassia v. Ingrassia*, 156 Ill. App. 3d 483, 501 (1987).

“Service is complete when all the required acts are done. So, if all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and the fact that he does not thereafter personally receive the papers which were so served or that he receives them at a late date ordinarily does not affect the validity of the service.” *French v. French*, 43 Ill. App. 2d 29, 36 (1963) (quoting 72 C.J.S., Process, § 43, at 1054).

¶ 21 A similar issue to the one in the instant case was raised in *Lewis*, 2014 IL App (1st) 131272. In *Lewis*, the defendant argued that the judicial sale of certain real estate should be vacated because she did not receive notice of the sale pursuant to section 15-1507(c)(3) of the Foreclosure Law. *Id.* ¶ 34. The *Lewis* court held that the “defendant’s assertion that she had not received a copy of the notice of the sale is insufficient under Illinois law to justify any suggestion that the sale must be vacated.” *Id.* ¶ 41 (citing *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957); *French*, 43 Ill. App. 2d at 36). In reaching its holding, the *Lewis* court also found that the plaintiff’s proof of service of the notice of sale substantially complied with Supreme Court Rules 11 and 12. *Id.*

¶ 22 In the instant case, similar to *Lewis*, both the notice of the sheriff’s sale and the notice of the motion to confirm the sale contained a certification in compliance with Supreme Court Rule 12(b)(3). Both documents stated that one of plaintiff’s attorneys placed the documents in the United States mail in envelopes properly addressed to defendant. Both notices also listed the time and place of mailing, listed defendant’s name and address, and stated that the postage was prepaid. Thus, the record shows that plaintiff properly served defendant with notice of the sale and the motion to confirm the sale under Supreme Court Rules 11 and 12. Consequently, there is a presumption that the documents were delivered to defendant. *Id.* ¶ 39. Defendant’s mere allegation that she did not receive the documents is insufficient to overcome this presumption. *Id.* ¶ 41. See also *Bernier*, 11 Ill. 2d at 529 (“If the proper giving of the notice can now be frustrated by the mere allegation of the defendant that he did not receive it, then the giving of notice by mail cannot be relied upon even though the rules specify such a method.”).

¶ 23 In reaching our holding, we note that defendant did not include a transcript of the hearing on her motion to vacate in the record on appeal. Therefore, it is unclear whether defendant presented additional evidence beyond her mere allegation in the motion that she did not receive notice. However, “[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984). In the absence of the transcript of the hearing, we presume that the circuit court’s order “was in conformity with the law and had a sufficient factual basis.” *Id.*

¶ 24 Finally, we deny defendant’s motion to file a reply brief *instanter* (*instanter* motion). In doing so, we call attention to the fact that we previously granted defendant three individual extensions with regard to the filing of her initial brief. At one point, we issued a Rule to Show Cause finding “that the Appellant has failed to file the [initial] Brief.” Ultimately, defendant

filed her initial brief on July 18, 2016. We then subsequently allowed defendant an extension to file her reply brief: “Time is extended to and including November 23, 2016.” Defendant failed to comply with this deadline. Significantly, defendant did not request any further extensions to file her reply brief. Instead, on December 23, 2016 (30 days after the extended due date), defendant filed her *instanter* motion. Defendant's motion is untimely.²

¶ 25

CONCLUSION

¶ 26

The judgment of the circuit court of Will County is affirmed.

¶ 27

Affirmed.

²At one point, in her proposed reply brief, which was submitted with her *instanter* motion, defendant states that she “is filing a separate Motion for Leave to Supplement Record with Report of Proceedings.” For purposes of the record, we note that no such motion has been filed to date.