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2018 IL App (3d) 160699-U

Order filed February 21, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

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|--|---|--|
| U.S. BANK, N.A., AS SUCCESSOR            | ) | Appeal from the Circuit Court<br>of the 12th Judicial Circuit,<br>Will County, Illinois. |
| TRUSTEE TO BANK OF AMERICA, N.A.,        | ) |  |
| AS SUCCESSOR TO LASALLE BANK, N.A.,      | ) |  |
| AS TRUSTEE FOR THE MERRILL LYNCH         | ) |  |
| FIRST FRANKLIN MORTGAGE LOAN             | ) |  |
| TRUST, MORTGAGE LOAN ASSET-              | ) |  |
| BACKED CERTIFICATES, SERIES 2007-5,      | ) |  |
|  | ) |  |
| Plaintiff-Appellee,                      | ) |  |
|  | ) |  |
| v.                                       | ) | Appeal No. 3-16-0699<br>Circuit No. 11-CH-2821   |
|  | ) |  |
| PAUL E. STIBOLT, a/k/a PAUL STIBOLT,     | ) | Honorable<br>Brian E. Barrett,<br>Judge, Presiding                                       |
|  | ) |  |
| Defendant-Appellant,                     | ) |  |
| and                                      | ) |  |
|  | ) |  |
| United States of America; Unknown Heirs  | ) |  |
| And Legatees of Paul E. Stibolt, if any; | ) |  |
| Unknown Owners and Non-Record Claimants, | ) |  |
|  | ) |  |
| Defendants.                              | ) |  |

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

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**ORDER**

¶ 1 *Held:* Trial court properly denied defendant’s section 2-1401 petition (735 ILCS 5/2-1401 (West 2016)) where he failed to establish diligence.

¶ 2 Plaintiff U.S. Bank filed a complaint for foreclosure against defendant Paul Stibolt, alleging he defaulted on a note secured by a mortgage that U.S. Bank owned by assignment. U.S. Bank moved for summary judgment. The trial court granted the motion and entered a judgment of foreclosure. The property was sold at a judicial sale and the trial court approved the sale and entered an *in rem* deficiency judgment against Stibolt. He moved to vacate the orders against him under section 2-1041 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2016)), which the trial court denied. We affirm.

¶ 3 **FACTS**

¶ 4 On June 7, 2011, plaintiff U.S. Bank, N.A., as successor trustee to Bank of America, N.A., as successor to LaSalle Bank, N.A., as trustee for the Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-5 (2007 Trust), filed a foreclosure complaint against defendant Paul Stibolt and other defendants not at issue in this appeal. The complaint alleged that Stibolt’s mortgage secured a \$607,750 note on which Stibolt defaulted.

¶ 5 Attached to the complaint were several exhibits. Exhibit A was a copy of the mortgage dated June 11, 2007, showing Stibolt as borrower and First Franklin Financial Corp. an Op. Sub. of MLB&T Co., FSB as lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for the lender and the lender’s successors and assigns. Exhibit B was a certified copy of the adjustable rate note dated June 11, 2007. The note, certified as a true copy of the original note, was signed by Stibolt and identified the lender as First Franklin Financial Corp., an Op. Sub. of MLB&T Co., FSB. Exhibit C was a copy of a corporate assignment of real estate by

MERS to U.S. Bank, N.A., as successor trustee to Bank of America, N.A., as successor to LaSalle Bank, N.A., as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-backed Certificates, Series 2007-5. The assignment was dated August 19, 2009, and recorded on August 26, 2009.

¶ 6 The trial court granted summary judgment in favor of U.S. Bank and entered a default judgment and a judgment of foreclosure against Stibolt on January 31, 2012. On December 2, 2013, Stibolt moved to vacate the default judgment, arguing that the trial court was without jurisdiction because U.S. Bank lacked standing and that he did not receive notice of the default motion. The trial court granted Stibolt's motion to vacate on May 15, 2013.

¶ 7 On March 13, 2014, U.S. Bank moved to substitute party plaintiff, naming Nationstar Mortgage, L.L.C., as plaintiff on the basis the mortgage had been assigned out of the 2007 Trust effective July 19, 2013. The assignment was attached as exhibit A. It was executed by Bank of America, N.A. on July 19, 2013, and recorded on August 28, 2013. U.S. Bank also moved for summary judgment, for default, and for a judgment of foreclosure. Stibolt answered the complaint in April 2014 and filed affirmative defenses, including U.S. Bank lacked standing and failed to perform a condition precedent to filing the complaint. Stibolt also argued the complaint did not comply with the Illinois Mortgage Foreclosure Law. U.S. Bank withdrew its motion for a default judgment and refiled its motion to substitute party plaintiff on June 26, 2014, which the trial court granted on July 10, 2014.

¶ 8 On June 12, 2015, Nationstar filed a motion to amend the face of the complaint, alleging the 2007 conveyance of the mortgage out of the 2007 Trust was in error. The motion was supported by an affidavit. The trial court granted Nationstar's motion on June 18, 2015, and U.S. Bank filed a first amended complaint on June 14, 2015. Attached to the complaint were copies of

the mortgage, the note and the assignment. The note included a specific endorsement and an endorsement in blank. U.S. Bank moved for summary judgment on October 16, 2015, which the trial court granted on October 22, 2015. The trial court also entered a default judgment of foreclosure. Stibolt moved to vacate the judgment of foreclosure and grant of summary judgment. On December 10, 2015, the court granted the motion and set a hearing for U.S. Bank's summary judgment motion. Stibolt answered the amended complaint with the same answer and affirmative defenses he filed in response to the original complaint. The trial court again granted summary judgment to U.S. Bank on February 25, 2016, and issued a judgment of foreclosure.

¶ 9 The property was sold by judicial sale on May 26, 2016, to U.S. Bank. The trial court approved the sale on June 23, 2016, and entered a judgment against Stibolt for the *in rem* deficiency amount of \$445,521. On September 28, 2016, Stibolt moved to vacate under section 2-1401 of the Civil Code (735 ILCS 5/2-1401) (West 2016)), which was heard and denied. Stibolt moved to stay execution of the order pending appeal, which was also heard and denied. He timely appealed.

¶ 10 ANALYSIS

¶ 11 On appeal, Stibolt complains the trial court improperly granted summary judgment in favor of U.S. Bank and denied his motion to vacate the judgment of foreclosure. Stibolt argues that the grant of summary judgment to U.S. Bank was improper because genuine issues of material fact exist regarding whether U.S. Bank had standing when the complaint was filed; whether the copy of the note complied with the statutory requirements; and whether U.S. Bank fulfilled a condition precedent prior to accelerating Stibolt's loan.

¶ 12 As an initial matter, we determine the trial court's grant of summary judgment to U.S. Bank is not an issue on appeal. The trial court granted U.S. Bank's summary judgment motion

on February 25, 2016. Stibolt did not timely challenge the summary judgment order. 735 ILCS 5/2-1203(a) (West 2016) (30-day deadline to move to modify or vacate judgment). Rather, on September 26, 2016, he filed a section 2-1401 petition to vacate the judgment of foreclosure. On appeal, Stibolt maintains that summary judgment was improperly granted. However, the issue before us is whether the trial court erred in denying Stibolt's motion to vacate the judgment of foreclosure. We will analyze Stibolt's claims under the section 2-1401 framework.

¶ 13 Section 2-1401 of the Civil Code authorizes a postjudgment motion to be filed more than 30 days and less than two years after judgment was entered. 735 ILCS 5/2-1401 (West 2016). To sustain a 2-1401 petition, the petitioner must establish: (1) the existence of a meritorious defense; (2) due diligence in presenting the defense; and (3) due diligence in bringing the motion to vacate. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). The purpose of a section 2-1401 petition is to bring to the court's attention facts not appearing on the record that would have prevented the judgment if the court had been aware of them at the time it entered the judgment. *Arch Bay Holdings, LLC-Series 2010B v. Perez*, 2015 IL App (2d) 141117, ¶ 8. We review a trial court's denial of a section 2-1401 petition for an abuse of discretion. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51.

¶ 14 Delivery of the deed is sufficient to pass title in a foreclosure action. 735 ILCS 5/15-1509(b) (West 2016). All claims of parties to a foreclosure are barred where title has vested by deed after confirmation by the court of the foreclosure sale. 735 ILCS 5/15-1509(c) (West 2016). A party cannot use section 2-1401 as an "alternative remedy" after the sale has been confirmed by the trial court. *U.S. Bank N.A. v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30. Actions to challenge a foreclosure cannot be maintained once title has vested under the foreclosure proceedings. *BMO Harris Bank N.A. v. LaRosa*, 2017 IL App (1st) 161159, ¶ 19 (petitioners'

challenge to a personal deficiency judgment barred under 15-1509(c)); *Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30 (“section 15-1509(c) \*\*\* bars the defendant’s claims in her section 2-1401 petition and is dispositive”); *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017, ¶ 48 (section 2-1401 petition to vacate judgment of foreclosure barred by section 15-1509). Here, title passed to U.S. Bank when the judicial sale was confirmed on June 23, 2016. Stibolt did not petition to vacate the foreclosure until September 2016, after title had passed. We find his claim is barred.

¶ 15 We further find Stibolt failed to establish the elements necessary to sustain his section 2-1401 petition. We first consider whether Stibolt raised a meritorious defense. To show the existence of a meritorious defense, a petitioner must offer facts that would have prevented entry of the original judgment had they been known when the trial court entered the judgment. *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, ¶ 21. Stibolt offers several defenses he alleges are meritorious, including that U.S. Bank lacked standing because the note attached to the original complaint was inadequate and the assignment of the note was invalid. He also claims as a defense that U.S. Bank failed to satisfy a condition precedent to bringing the foreclosure action.

¶ 16 Stibolt’s arguments are without merit. The alleged deficiencies were based on attachments to the original complaint, which was replaced by the amended complaint. *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983) (“amended complaint controls and supersedes earlier complaints where the amended complaint does not refer to or adopt the original complaint”). A copy of the note with an indorsement in blank was attached to the amended complaint and established U.S. Bank’s standing. *CitiMortgage, Inc. v. Moran*, 2104 IL App (1st) 132430, ¶ 40 (copy of mortgage and note attached to a complaint for

foreclosure is *prima facie* evidence plaintiff owns the note). In addition, Stibolt himself lacks standing to assert a claim the assignment was invalid. “Indeed, the prevailing rule is that, barring third-party beneficiary status, a litigant lacks standing to attack an assignment to which he or she is not a party.” *Bank of America National Ass’n v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶ 15. However, an exception exists where the acts at issue are *ultra vires* of the trustee’s authority. *Id.* at ¶ 16. The *Bassman* court addressed the apparent inconsistency and concluded that the *ultra vires* acts are merely voidable, not void. *Id.* at ¶ 21. Here, where U.S. Bank ratified the claimed improper assignment, the *ultra vires* conduct is voidable, and as such, Stibolt is without standing to challenge the assignment. *Id.*

¶ 17 Stibolt claims that U.S. Bank did not comply with a condition precedent requiring notice of acceleration of the note prior to foreclosure. In support of his claim, he relies on his affidavit averring that he reviewed his file regarding the foreclosure and did not find an acceleration notice nor did he remember receiving one. While Stibolt’s assertion arguably raises a meritorious defense, as the following discussion regarding his lack of diligence establishes, he cannot satisfy the remaining requirements to be granted relief under section 2-1401.

¶ 18 The next factor is whether Stibolt exercised due diligence in presenting his defenses. To satisfy the due diligence requirement, a petitioner must establish that his failure to defend before judgment was not his fault. *Hawthorne*, 2013 IL App (5th) 110475, ¶ 21. Stibolt submits that he exercised diligence in asserting his defenses. The record establishes otherwise. He did not appear at the first foreclosure hearing and a default judgment was entered. He successfully moved to vacate the foreclosure but failed to respond to the complaint. After summary judgment was granted for U.S. Bank, Stibolt was granted another motion to vacate. The trial court thereafter entered summary judgment and a foreclosure judgment against Stibolt, to which he again failed

to respond. The property was sold in May 2016, the sale was approved the following month and the deed recorded thereafter but Stibolt did not file his section 2-1401 motion until September 2016. The complaint for foreclosure was originally filed in June 2011 and the judgment of foreclosure was not entered until February 2016, with the majority of the five-year period attributable to Stibolt's untimely responses. Even after the foreclosure order was entered and the property sold, Stibolt still failed to timely act. Stibolt has offered no excuse, reasonable or not, for his failure to diligently defend this action.

¶ 19 The last factor is due diligence in bringing the motion to vacate. Due diligence requires a reasonable excuse for a defendant's failure to act within the proper time. *Domingo v. Guarino*, 402 Ill. App. 3d 690, 700 (2010). The judgment of foreclosure was entered on February 25, 2016, and the sheriff's sale took place on May 26, 2016, and was approved on June 23, 2016. Stibolt did not file his motion to vacate until September 28, 2016, more than four months after the property was sold. Along with his motion to vacate, he filed an affidavit stating only that he did not receive an acceleration notice. Stibolt does not provide an explanation for his failure to timely file a motion to vacate and cannot establish he acted diligently in bringing the motion.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 22 Affirmed.