2018 IL App (5th) 170211-U

NO. 5-17-0211

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
GREGG S. BLOMENKAMP,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 07-D-937
	)	
TERESA M. BLOMENKAMP,	)	
	)	
Respondent-Appellee	)	
	)	Honorable
(Wells Fargo Financial Illinois, Inc.,	)	Christopher T. Kolker,
Third-Party Respondent-Appellant).	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order denying the section 2-1401(f) petition for relief and terminating the third-party respondent's interest in the marital estate is affirmed where the court's order did not exceed the requested prayer for relief and provided proper notice.

¶ 2 The third-party respondent, Wells Fargo Financial Illinois, Inc. (Wells Fargo), appeals from the circuit court's judgment denying its petition for relief from a void order

brought pursuant to section 2-1401(f) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(f) (West 2012)). For the following reasons, we affirm.

¶ 3 I. Background

¶ 4 On August 7, 2006, the appellees, Gregg Blomenkamp (Gregg B.) and Teresa Blomenkamp (Teresa B.), executed a mortgage on their marital estate, located in Freeburg, Illinois, in favor of Wells Fargo. On that date, Teresa B. signed a corresponding promissory note. Gregg B. did not sign the promissory note.

¶ 5 In 2007, Gregg B. filed for divorce from Teresa B. Although the appellees' marriage was dissolved in February 2010, all property issues were reserved.

¶ 6 On May 4, 2011, Wells Fargo brought a foreclosure action against the appellees. Shortly thereafter, Gregg B. filed a petition in the foreclosure action to consolidate the divorce and foreclosure proceedings. In October 2011, the foreclosure court denied Gregg B.'s petition to consolidate.

¶ 7 On December 12, 2011, while the foreclosure action was pending, Gregg B. filed a motion for leave to file an amended complaint in the divorce action, requesting the circuit court to name Wells Fargo as a third-party respondent in the parties' divorce proceeding because the validity of the mortgage was at issue. The court granted Gregg B.'s motion and he subsequently filed an amended two-count complaint. The amended complaint alleged that Wells Fargo, as a third-party respondent, held a property interest in the marital residence and had moved to foreclose on the marital residence. The amended complaint also requested that the divorce court determine Gregg B. and Teresa B.'s interests, as well as Well Fargo's interest, if any, in the marital residence.

¶ 8 The record reveals that Wells Fargo's counsel in the foreclosure proceeding received a copy of Gregg B.'s amended complaint at a hearing on the foreclosure action. Counsel later responded by sending a letter to the divorce court stating that he was not an authorized agent to accept service of the amended complaint, as he did not represent Wells Fargo in the divorce proceeding. On December 21, 2011, however, the amended complaint and summons was properly served on Wells Fargo's registered agent. Wells Fargo did not file an answer or other pleading within 30 days.

¶ 9 On April 25, 2012, the divorce court entered an order finding Wells Fargo in default for failure to file an answer to the amended complaint. The court additionally found that Wells Fargo had "failed to proper[ly] perfect its mortgage and security instrument regarding the parties' real estate" because Wells Fargo had not obtained a homestead waiver from Gregg B. As a result, the court determined that Wells Fargo had no legal or equitable interest in the marital residence and ordered Wells Fargo to "execute a Release of the purported Mortgage/security agreement regarding said property within 14 days."

¶ 10 On June 18, 2013, Gregg B. and Teresa B. submitted a proposed order to the divorce court containing the terms of the marital settlement agreement. The court approved and signed the proposed order, finding that Wells Fargo's interest in the marital residence had terminated on April 25, 2012, following entry of the default order. The court's order further stated that both Gregg B. and Teresa B. could apply for a release of the mortgage if Wells Fargo failed to execute a release of the mortgage within 30 days. The court also awarded Gregg B. the marital residence without liability to Wells Fargo

for any loan documents that had been executed by Teresa B. Moreover, the order mandated that Teresa B. indemnify Gregg B. from any and all debt owed to Wells Fargo.

¶ 11 On October 31, 2013, the foreclosure court voluntarily dismissed Wells Fargo's foreclosure complaint without prejudice and with leave to reinstate. The court's order is not contained in the record on appeal.

¶ 12 In July 2016, Wells Fargo filed a motion to reinstate the foreclosure action. Gregg B. objected and cited the April 25, 2012, default order that was entered in the divorce proceedings. The record on appeal does not contain the foreclosure court's rulings on Wells Fargo's motion or Gregg B.'s objection.

¶ 13 On November 17, 2016, Wells Fargo filed a section 2-1401(f) petition in the divorce proceeding seeking to vacate the April 25, 2012, default order as void. Wells Fargo asserted that the amended complaint provided insufficient notice that its interest in the mortgage could be terminated. Additionally, Wells Fargo's legal counsel, who was also counsel for Wells Fargo in the foreclosure action, claimed that he was presented with the default order for the first time at the hearing on the motion to reinstate the foreclosure action that was filed in July 2016.

¶ 14 On January 31, 2017, the circuit court heard argument and then entered a judgment which, in effect, denied Wells Fargo's section 2-1401(f) petition. The court, however, granted Wells Fargo leave to file a motion to reconsider.

¶ 15 On February 28, 2017, Wells Fargo filed a motion to reconsider. Following a hearing on the matter, the circuit court entered an order denying Wells Fargo's motion to reconsider. Wells Fargo filed a timely notice of appeal.

¶ 16 II. Analysis

¶ 17 Wells Fargo argues that the circuit court erred as a matter of law by denying its section 2-1401(f) petition. Specifically, Wells Fargo argues that the April 25, 2012, default order is void because it does not strictly comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989) and section 2-604 of the Code (735 ILCS 5/2-604 (West 2012)). On that basis, Wells Fargo argues that entry of the default order, which exceeded the requested prayer and therefore did not provide proper notice, constituted an unfair surprise.

¶ 18 Conversely, Gregg B. and Teresa B. argue that the court's order is not void, thus, section 2-1401(f) was inapplicable and Wells Fargo's action was time-barred under section 2-1401(a) of the Code (735 ILCS 5/2-1401(a) (West 2012)). Moreover, Teresa B. challenges our jurisdiction, arguing that Wells Fargo failed to file a posttrial motion or notice of appeal within 30 days of the entry of the April 25, 2012, default order. In light of the foregoing, it is necessary to first address our jurisdiction before proceeding on the merits.

¶ 19 From the outset, we note that Teresa B. challenges our jurisdiction based on Wells Fargo's failure to file a posttrial motion or notice of appeal within 30 days of the entry of the April 25, 2012, default order, which she contends was mandated by Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). In response, Wells Fargo asserts that this court has jurisdiction to hear this appeal pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. Jan. 1, 2015). While we agree that we have jurisdiction to hear this appeal, we do so for reasons not argued by Wells Fargo.

¶ 20 First, the filing of a section 2-1401 petition is considered a new proceeding, not a continuation of an old one. 735 ILCS 5/2-1401(b) (West 2016); *Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 149 (1994). Therefore, a circuit court's judgment on a section 2-1401 petition is deemed a final order and subject to immediate review. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). Second, Illinois Supreme Court Rule 304(b)(3) (Mar. 8, 2016) specifically allows this court to review an order granting or denying any relief prayed for in a petition under section 2-1401 of the Code. See *Sarkissian*, 201 Ill. 2d at 102. Thus, our jurisdiction is well established.

¶ 21 We now turn to Wells Fargo's contention that the circuit court erred in denying its section 2-1401 petition. Pursuant to section 2-1401 of the Code, a petitioner must affirmatively set forth specific factual allegations that support, by a preponderance of the evidence, the following three elements: (1) the existence of a meritorious claim; (2) due diligence in presenting this claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). This statutory procedure allows for relief from a final judgment that is older than 30 days but does not exceed two years. 735 ILCS 5/2-1401(a), (c) (West 2012). An exception to these requirements exists when the order or judgment at issue is attacked as void. *In re Haley D.*, 2011 IL 110886, ¶ 58. Specifically, "[p]etitions brought on voidness grounds need not be brought within the two-year time limitation." *Sarkissian*, 201 Ill. 2d at 104; see also *Capital One Bank, N.A. v. Czekala*, 379 Ill. App. 3d 737, 741 (2008) (a party may attack a void order at any time through the filing of a section 2-1401(f) petition).

¶ 22 A circuit court has discretion in determining whether to grant or deny a section 2-1401 petition. *Smith*, 114 Ill. 2d at 221. A reviewing court should not disturb the circuit court's judgment unless the record shows the court abused its discretion. *Id*. We review the court's denial of a section 2-1401(f) petition seeking to vacate a void judgment, a purely legal issue, *de novo*. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 47.

¶ 23 Here, the circuit court, after finding Wells Fargo in default, determined that Wells Fargo did not have legal or equitable interest in the marital residence because it had failed to obtain a homestead waiver from Gregg B. The court further ordered Wells Fargo to execute a release of the mortgage and security agreement within 14 days. In denying Wells Fargo's section 2-1401(f) petition, the court reasoned that the prayer section in the amended complaint, relating specifically to Wells Fargo, provided sufficient notice that Wells Fargo's interest, if any, in the marital residence would be determined. On appeal, Wells Fargo asserts that the court's order, terminating its interest in the marital residence, is void because it constituted unfair surprise. We disagree.

¶ 24 The purpose of pleadings is to reasonably inform the opposite party of the nature of the claim or defense which he or she is called upon to meet. See 735 ILCS 5/2-612(b) (West 2016). A party has a right to assume that relief granted on default will not exceed or substantially differ from that requested in the complaint. *Palatine Savings & Loan Ass'n v. National Bank & Trust Co.*, 80 Ill. App. 3d 437, 440 (1980); *Dils v. City of Chicago*, 62 Ill. App. 3d 474, 482 (1978). Section 2-604 of the Code provides, in pertinent part, the following:

> "Every count in every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions for injury to the person ***. *** In case of default, if relief is sought, whether by amendment, counterclaim, or otherwise, beyond that prayed in the pleading to which the party is in default, notice shall be given the defaulted party as provided by rule." 735 ILCS 5/2-604 (West 2012).

Likewise, Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989) provides that a section 2-1401 petitioner must provide the opposing party with notice that the petition has been filed. The notice must inform respondent that a judgment by default may be taken against him unless he files an answer or otherwise files an appearance within 30 days of service. *Id.* If the responding party fails to respond within the 30-day period, any question as to the petition's sufficiency is deemed waived, and the petition is treated as properly stating a cause of action. *Id.*

¶ 25 To support its argument that the circuit court's April 25, 2012, default order is void, Wells Fargo cites *Galapeaux v. Orviller*, 4 Ill. 2d 442 (1954), and *Rauscher v. Albert*, 145 Ill. App. 3d 40 (1986), to demonstrate that it was taken by unfair surprise when the court's order exceeded the requested prayer and failed to provide Wells Fargo with proper notice. We find Wells Fargo's reliance on *Galapeaux* and *Rauscher* misplaced.

¶ 26 In *Galapeaux*, plaintiff brought an action for specific performance to enforce an oral contract to devise a residential estate. *Galapeaux*, 4 Ill. 2d at 443. The parties initially executed a deed, which created a joint tenancy for the residential estate, and then

executed a subsequent deed removing plaintiff's interest in the property. *Id.* at 450. Plaintiff asserted that the subsequent deed, which conveyed his joint interest in the residence to decedent, should have been set aside because it was induced by fraud and misrepresentation. *Id.*

¶ 27 Our supreme court determined that granting plaintiff relief, based on unfair surprise, would have been inappropriate, given that plaintiff's complaint did not allege that the execution of the subsequent deed had been induced by fraud or misrepresentation. *Id.* If the court found otherwise, defense would have been completely surprised at trial. *Id.* at 446. The supreme court noted that relief may be granted under a general prayer for relief "only when it is consistent with the facts alleged and proved, provided it does not take the defendant by surprise." *Id.* (citing *Kelly v. Kelly*, 293 Ill. 169, 173 (1920); *VanZanten v. VanZanten*, 269 Ill. 491, 498 (1915)).

¶ 28 In *Rauscher*, this court found the circuit court's judgment, awarding damages in excess of the *ad damnum* without notice to defendant, void and subject to attack in a motion to set aside the judgment. *Rauscher*, 145 Ill. App. 3d at 46-47. At the damages hearing, the court entered a default order with a monetary amount nearly 2½ times the amount specifically requested in the *ad damnum*. *Id.* at 46. Under those facts, this court determined that defendant was prejudiced by reason of unfair surprise. *Id.* In resolving *Rauscher*, this court determined that "the inclusion of a general prayer in a complaint does not serve to inform the defendant that such additional relief has been sought so as to protect the defendant from surprise." *Id.* at 43-44. Rather, this court concluded that "relief

may be granted in excess of a specific prayer so long as appropriate measures are taken to prevent prejudice by reason of surprise." *Id.*

¶ 29 Dissimilar to *Galapeaux*, where allegations of fraud and misrepresentation were not contained in the complaint and, as such, unfairly surprised the defense at trial; here, Gregg B.'s amended complaint specifically requested the circuit court to determine Wells Fargo's interest, if any, in the marital residence. Accordingly, the court's determination that Wells Fargo possessed no interest in the marital residence, based on its failure to obtain a homestead waiver from Gregg B., was consistent with the prayer for relief. Thus, the court was in compliance with section 2-604 of the Code when it did not grant relief "beyond that prayed in the pleading to which the party is in default." 725 ILCS 5/2-604 (West 2012). Moreover, it is undisputed that Wells Fargo, although properly served, did not respond. As such, we conclude that Wells Fargo's claim of unfair surprise is meritless.

¶ 30 Unlike *Rauscher*, where a specific amount was requested in the *ad damnum*, here, the amended complaint did not seek a specified amount of monetary damages. Instead, Gregg B. requested a determination of Wells Fargo's interest, if any, in the marital residence. Although the court in *Rauscher* concluded that "relief may be granted in excess of a specific prayer so long as appropriate measures are taken to prevent prejudice by reason of surprise" (145 Ill. App. 3d at 43), here, the relief requested was not in excess of the prayer, which, as stated above, was to determine Wells Fargo's interest in the marital residence.

¶ 31 Lastly, in further support of its contention that it had been taken by unfair surprise, Wells Fargo points to the lack of notice regarding the setting for the entry of the default order. At the time of the entry, however, section 2-1302(a) of the Code provided as follows:

> "Upon the entry of an order of default, the attorney for the moving party shall immediately give notice thereof to each party who has appeared, against whom the order was entered, or such party's attorney of record. However, the failure of the attorney to give the notice does not impair the force, validity or effect of the order." 735 ILCS 5/2-1302(a) (West 2016).

Consequently, based on the language contained in section 2-1302(a) of the Code, failure to provide defendant with notice of entry of a default order does not, by itself, invalidate the default order. See *Kaput v. Hoey*, 124 Ill. 2d 370, 379 (1988). Because Wells Fargo failed to demonstrate unfair surprise, we conclude that the circuit court's default judgment was not void.

¶ 32 III. Conclusion

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County denying the third-party respondent's section 2-1401(f) petition for relief from a void judgment.

¶ 34 Affirmed.