2019 IL App (2d) 180997-U
No. 2-18-0997
Order filed August 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BAYVIEW LOAN SERVICING, LLC, Plaintiff, v. WILLIAN G. NOVAK; THERESA M. NOVAK; SUN CITY COMMUNITY ASSOCIATION, INC.; BMO HARRIS BANK NATIONAL ASSOCIATION, f/k/a Harris N.A.; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS, Defendants (BMO Harris Bank National Association, Defendant-Appellant; William G. Novak, Defendant-Appellee).	)	Appeal from the Circuit Court of McHenry County. No. 18-CH-20 Honorable Suzanne C. Mangiamele, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion in denying BMO Harris's motion to vacate the default against it and amend the judgment of foreclosure to recognize its lien. Therefore, we reversed and remanded.

¶ 2 In this residential mortgage foreclosure case, defendant, BMO Harris Bank National Association, f/k/a Harris, N.A. (BMO Harris), is a junior lienholder on the property. It appeals from the trial court's denial of its motion to vacate the default order against it and amend the judgment of foreclosure to recognize its lien. On appeal, BMO Harris argues that the trial court erred: (1) by not comprehensively analyzing the relevant factors in order to determine substantial justice; (2) by using BMO's alleged lack of diligence as the sole basis for denying its motion; and (3) in ruling that in order to vacate the default against BMO Harris, it would have had to vacate the foreclosure sale. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On January 9, 2018, Bayview Loan Servicing, LLC (Bayview) filed a complaint to foreclose a mortgage secured by a property commonly known as 12035 Bloomfield Drive in Huntley, Illinois. The complaint alleged that the mortgage was dated December 1, 2004, and modified on January 27, 2012, and that the amount of the loan modification was $142,300.62. It alleged a failure to make payments when due and a current unpaid principal balance of $136,100.70 plus other costs and fees. Both William G. Novak and Theresa M. Novak signed the mortgage, but only William signed the note. The complaint alleged that BMO Harris held a junior lien by virtue of a mortgage executed by William to secure a note in the sum of $75,000.

¶ 5 William was served on January 16, 2018, and BMO Harris was served on January 18, 2018. On February 28, 2018, Bayview filed a motion to default all named defendants, and a motion for a judgment of foreclosure and sale. The trial court granted the request for a default on March 6, 2018, and further entered a judgment of foreclosure in the amount of $148,375.51. The judgment listed BMO Harris's lien as one of the liens sought to be terminated. The property was sold at a foreclosure sale on August 23, 2018, resulting in a surplus of $13,495.35.

¶ 6 On September 5, 2018, BMO Harris filed an appearance. It also filed a motion to vacate the default against it and amend the judgment of foreclosure and sale, pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2016)). It alleged that the amounts due and owing under the indebtedness secured by its mortgage totaled $116,550.84.

¶ 7 On September 11, 2018, Bayview filed a motion for an order approving the report of sale and distribution, and for an eviction order. On September 18, 2018, counsel for the Novaks filed an appearance. William subsequently filed a response opposing BMO Harris's motion.

¶ 8 The trial court denied BMO Harris's motion on November 27, 2018, and granted Bayview's motion to confirm the foreclosure sale. It stated as follows. BMO Harris argued that substantial justice required granting its motion because its loan remained unpaid, and Bayview would not be affected by granting BMO Harris relief. William argued that any interest BMO Harris had in the property terminated with the entry of the judgment of foreclosure. He also argued that BMO Harris did not act diligently to protect its lien interest and did not offer an explanation for its lack of diligence. BMO Harris argued in reply that its interest was not terminated with the judgment because there had been no confirmation of sale. BMO Harris further argued that the lack of diligence was just one factor to consider, and that substantial justice would be done "by granting its motion because it's – everyone acknowledges this is an undisputed fact and defendant, William Novak, owed BMO Harris money that was secured by a mortgage." BMO Harris additionally argued that it proved the amounts due and that there was no prejudice to William because he was discharged in bankruptcy, whereas BMO Harris would be prejudiced if William were granted the surplus.

¶ 9 The trial court further stated that it was an "odd type of proceeding" because the plaintiff was not objecting, other than not wanting the sale vacated. BMO Harris's motion was filed before Bayview filed its motion to confirm the sale. Under *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, once there has been a sale, "if you seek to vacate, you're also going to have to unravel the sale." BMO Harris argued that it wanted to vacate the default but only amend the judgment, but for such relief, BMO Harris would have had to have participated in the proceedings at some point. Further, under the section 2-1301 factors, BMO Harris took no action in the case until it learned that there was a surplus. The trial court "would love to fix it and make it right" but did not see how it could do so "without unraveling the sale which nobody want[ed] [it] to do."

¶ 10 BMO Harris timely appealed.

¶ 11 II. ANALYSIS

¶ 12 We first address BMO Harris's argument that the trial court erred in ruling that it could not vacate the default judgment and amend the judgment of foreclosure and sale to provide BMO Harris the relief it requested, but rather would have to vacate both the default judgment and the judgment of foreclosure and sale. BMO Harris brought the motion to vacate pursuant to 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 2016).

¶ 13 The trial court relied on *McCluskey*, 2013 IL 115469, in denying the motion to vacate. There, the appellate court stated that, in general, a liberal policy exists regarding vacating default

judgments under section 2-1301. *Id.* ¶ 18. However, it further stated that "a party seeking to vacate a default judgment of foreclosure after the judicial sale of the mortgaged property necessarily must also seek to set aside the judicial sale." *Id.* ¶ 18. Read in isolation, this statement appears to support the trial court's reasoning that it would have to vacate the judicial sale in order to provide BMO Harris relief. However, the statement is then immediately followed by the sentence: "Under the Foreclosure Law, after 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)." *Id.* Thus, the appellate court clarified that the need to set aside the judicial sale arises only after both a judicial sale and a filing of a motion to confirm the sale. It restated these principles later in the case, stating that "up until a motion to confirm the judicial sale is filed, a borrower may seek to vacate a default judgment of foreclosure under the standards set forth in section 2-1301(e)," but that "after a motion to confirm the judicial sale has been filed, a borrower seeking to set aside a default judgment of foreclosure may only do so by filing objections to the confirmation of the sale under the provisions of section 15-1508(b)." *Id.* ¶ 27. Here, BMO Harris filed its motion to vacate the default judgment before Bayview filed a motion to confirm the judicial sale, making section 2-1301(e) applicable.[1]

[1] We note that even if Bayview had filed a motion to confirm the sale before BMO Harris filed its motion seeking to vacate the default, a party need not seek to vacate the judicial sale in order to claim an interest in the proceeds. See *Bank of America, N.A. v. Higgin*, 2014 IL App (2d) 131302, ¶ 21 (where the defendants did not ask the trial court to set aside the judicial sale but only sought an interest in the proceeds, section 15-1508(b) did not apply). Additionally, section 2-1301(g) of the Code (735 ILCS 5/2-1301(g) (West 2016)), though also not at issue here, allows the trial court to amend a judgment while permitting a sale to stand.

¶ 14 William argues that the trial court committed no error in applying *McCluskey*, because *McCluskey* sets the standard by which motions to vacate defaults must be considered in a foreclosure. It is true that *McCluskey* is relevant case law, but the trial court's mistake was in erroneously stating that *McCluskey* required that it set aside the judicial sale in order to grant BMO Harris the relief it sought. William further argues, relying on *JP Morgan Chase Bank, N.A. v. Bank of America, N.A.*, 2015 IL App (1st) 140428, that BMO's request to just amend the foreclosure judgment, as opposed to vacating it, does not impact the outcome. However, in that case the appellate court determined that it lacked jurisdiction to review the denial of the appellant's motion to vacate the default judgment (*id.* ¶ 26), so it did not reach the merits of the issue before us.

¶ 15 As stated, there is a liberal policy regarding vacating default judgments under section 2-1301(e). *McCluskey*, 2013 IL 115469, ¶ 16. The overriding consideration in ruling on such a motion is whether substantial justice has been done between the litigants and whether it is reasonable to compel the other party to go to trial on the merits. *Id*. In determining whether substantial justice will be achieved, considerations can include a party's diligence or lack thereof, whether the party has a meritorious defense, the severity of the resulting penalty, and the relative hardships on the parties. *Draper & Kramer, Inc., v. King*, 2014 IL App (1st) 132073, ¶ 23. "Although relevant, the party need not necessarily show a meritorious defense and a reasonable excuse for failing to timely assert such defense." *McCluskey*, 2013 IL 115469, ¶ 16. The appropriate considerations depend on the facts of each case. *Id.* Whether to grant or deny a motion to vacate a default judgment is within the trial court's discretion. 735 ILCS 5/2-1301(e) (West 2016); *Godfrey Healthcare & Rehabilitation Center, LLC v. Toigo*, 2019 IL App (5th) 170473 ¶ 38. A trial court abuses its discretion only where no reasonable person would take the

trial court's view, meaning that the trial court acted arbitrarily or ignored recognized principles of law. *Glover v. Fitch*, 2015 IL App (1st) 130827, ¶ 29

¶ 16 BMO Harris argues that there are numerous factors that show that substantial justice could be accomplished only by granting its motion. First, it argues that the trial court criticized BMO Harris for its alleged lack of diligence yet allowed the Novaks to prevail even though they never sought to vacate the default against them. BMO Harris points out that diligence is just one factor to consider in determining substantial justice. See *Campbell v. White*, 187 Ill. App. 3d 492, 503 (1989) (under section 2-1301(e), lack of diligence is only one factor and alone will not require denial of a motion). It maintains that punishing a party for failing to respond to a summons by denying a timely motion to vacate renders section 2-1301(e) meaningless.

¶ 17 Second, BMO Harris argues that because the Novaks failed to answer Bayview's complaint, they admitted the complaint's allegation alleging the existence of BMO Harris's lien in the principal amount of $75,000. See *Mortgage Electronic Registration Systems, Inc.*, 406 Ill. App. 3d 1, 7 (2010) (a defendant in default is considered to have admitted all well-pleaded allegations of a complaint). BMO Harris asserts that the trial court should therefore not have allowed the Novaks to subsequently take an inconsistent position when objecting to BMO Harris's motion. Third, BMO Harris argues that it established William's indebtedness under the note, and because the Novaks failed to deny the debt and/or failed to file a counter-affidavit, its allegations should be deemed admitted. BMO Harris contends that although William took the position that its mortgage was extinguished, that argument was baseless because only a judicial sale of the property followed by judicial confirmation of the sale will fully terminate the rights of defendants and third parties. See *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶ 36. Fourth, BMO Harris argues that Bayview would be unaffected by the relief it sought,

distinguishing this case from others where vacating a plaintiff's judgment would result in the plaintiff having to go to trial on the merits. Last, BMO Harris maintains that William's personal liability to repay the note was discharged in his bankruptcy, so the only recourse BMO Harris has to collect the indebtedness is through this foreclosure proceeding. BMO Harris argues that it defies all concepts of fairness and justice that William could borrow $75,000 from it, promise to pay the loan back with interest, have this liability discharged in personal bankruptcy, and then be put in a position to be granted the $13,495.35 surplus as a result of BMO's motion being denied.

¶ 18 William argues that BMO Harris has forfeited various aspects of its argument by failing to cite sufficient authority. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). We disagree with this assertion.

¶ 19 William further argues that although both he and BMO Harris did not timely respond to the complaint and were defaulted, the entry of the judgment of foreclosure on the two was different, in that he maintained his rights in the property post-judgment while BMO Harris did not. He cites *EMC Mortgage Corp v. Kemp*, 2012 IL 113419, for the proposition that a judgment of foreclosure is final as to the matters it adjudicates. William argues that because BMO Harris failed to appear and file an answer, its interest was not included in the judgment, and its right to obtain the surplus funds terminated. According to William, by contrast, his interest as the mortgagor and property owner survived the judgment, in that section 15-1404 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1404 (West 2016)) provides that the borrower's interests "shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure, provided the sale is confirmed." William argues that it was therefore not unreasonable that the trial court would place more emphasis on BMO Harris's default and inaction.

¶ 20 It is true that the mortgagor has different rights than third parties in foreclosure cases, but William's assertion, that BMO Harris was barred from taking action once the trial court entered the judgment of foreclosure, is without merit. William cites *Kemp*, 2012 IL 113419, ¶ 11, but that case actually states: "although a judgment of foreclosure is final as to the matters it adjudicates, a judgment foreclosing a mortgage, or a lien, determines fewer than all the rights and liabilities in issue because the trial court has still to enter a subsequent order approving the foreclosure sale and directing distribution." The case goes on to say that, therefore, the final and appealable order in a foreclosure sale is the order confirming the sale, as opposed to the judgment of foreclosure. *Id.* As such, the judgment of foreclosure is in the nature of an interlocutory order and can be amended. Indeed, after citing *Kemp*, the *McClusky* court stated: "Accordingly, a motion to vacate a default judgment of foreclosure brought before the order confirming the sale or within 30 days thereafter would be timely." *McCluskey*, 2013 IL 115469, ¶ 16. Further, in *Turczak*, 2013 IL App (1st) 121964,¶ 36, which BMO Harris cites, the appellate court rejected the argument that a default judgment extinguished a bank's second mortgage, stating that "[a]fter a judgment of foreclosure, only a judicial sale of the property followed by judicial confirmation of the sale will terminate 'with finality' the rights of third parties." BMO Harris was therefore not prohibited by the entry of the foreclosure judgment from seeking to vacate the default judgment against it and collect on its lien.

¶ 21 William additionally argues that he never admitted the existence of BMO Harris's lien. He again cites *JP Morgan Chase Bank, N.A.*, 2015 IL App (1st) 140428, ¶ 50, where the appellate court stated that because the junior mortgagee and the mortgagors were found in default, "there was no responsive pleading filed admitting the validity of the [junior mortgagee's] lien." William argues that this statement is logical, as the failure to answer the complaint meant

an admission to Bayview's allegations, not BMO Harris's, and Bayview alleged only that BMO Harris had an interest in the property, as opposed to a valid lien. William continues that BMO Harris's untimely and unnecessary filing of an affidavit is not relevant, as it is not necessary to prove-up a lien amount before filing a petition for the distribution of surplus proceeds. See 735 ILCS 5/15-1512(d) (West 2016). William argues that a counter-affidavit by him was similarly not necessary, and that the cases BMO Harris relies on for this issue involved summary judgment.

¶ 22 William also argues that other parties would be affected by the relief BMO Harris sought, in that Bayview had to face a months-long delay in the confirmation of the sale, in addition to William being "affected and prejudiced by [BMO Harris's] timely failure [*sic*] to file." William maintains that his bankruptcy discharge is all the more reason that BMO Harris's failure to act was so egregious, in that BMO Harris unquestionably failed to act diligently in protecting its alleged lien interest in the property. William contends that there is no question that BMO Harris waited in the wings and only filed its pleading because there was a surplus. William again cites *JP Morgan Chase Bank, N.A.*, 2015 IL App (1st) 140428, ¶ 45, where the court stated that the termination of the junior mortgagee's lien "resulted from its default in the case and its own failure to act with any sense of urgency."

¶ 23 Last, William asserts that the record shows that the trial court relied on factors other than BMO Harris's lack of diligence in denying it motions.

¶ 24 Contrary to William's ultimate argument, the record shows that although the trial court spent time summarizing the parties' positions, it ultimately denied BMO Harris's motion to vacate the default judgment on the basis that it would also have to vacate the judicial sale, which we have determined was an error of law (see *supra* ¶ 13), and because it found that BMO Harris

had not acted diligently. We conclude that relying on diligence alone to deny the motion was an abuse of discretion. Indeed, *McCluskey* stated that although diligence is a relevant consideration, a party does not have to show a reasonable excuse for not acting sooner in order to have a default judgment vacated. *McCluskey*, 2013 IL 115469, ¶ 16. William's reliance on *JP Morgan Chase Bank* is unpersuasive because, as previously stated, the appellate court in that case held that it did not have jurisdiction to review the trial court's denial of the bank's motion to vacate the default judgment. *JP Morgan Chase Bank, N.A.*, 2015 IL App (1st) 140428, ¶ 26. Looking at the remaining considerations used in determining substantial justice (see *Draper & Kramer, Inc.*, 2014 IL App (1st) 132073, ¶ 23), BMO Harris showed the existence of a meritorious defense in that it provided evidence of a lien on the property. The severity of the resulting penalty and relative hardships on the parties are minimal in that Bayview's complaint listed BMO Harris's lien, meaning that everyone was on notice of the lien's existence from the outset of the case; Bayview did not even object to BMO Harris's motion; and vacating the default would not necessitate a trial. William does not explain how, on the *merits* of the case, he would be prejudiced by the grant of the motion. Though the parties dispute whether William admitted the existence of BMO Harris's lien by failing to answer Bayview's complaint or filing a counter-affidavit, this is essentially a non-issue because the trial court found that William "owed BMO Harris money that was secured by a mortgage." Given the liberal policy of vacating default judgments under section 2-1301(e), the trial court's erroneous belief that it would have to vacate the sale in order to grant BMO Harris relief, our analysis of the factors used to determine substantial justice, and the trial court's own statement that it "would love to fix it" and grant BMO Harris relief, we conclude that the trial court abused its discretion in denying BMO Harris's motion.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the judgment of the McHenry County circuit court and remand for further proceedings.

¶ 27 Reversed and remanded.