ILLINOIS OFFICIAL REPORTS

Appellate Court

***Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899**

Appellate Court Caption	AURORA LOAN SERVICES, LLC, Plaintiff-Appellee, v. JADWIGA PAJOR, Defendant-Appellant (Bogdan Pajor, Harris National Association, f/k/a Harris Trust and Savings Bank, Mortgage Electronic Registration Systems, Inc., as Nominee for First Magnus Financial Corporation, Unknown Occupants, Unknown Owners, and Nonrecord Claimants, Defendants).
District & No.	Second District Docket No. 2-11-0899
Filed	July 16, 2012
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	Although the assignee of a mortgage sent the mortgagor premature notice of the statutory grace period, in that the notice was sent before the assignment of the mortgage, the mortgagor was not entitled to the relief sought in her petition under section 2-1401 of the Code of Civil Procedure, that is, vacatur of the judgment of the order of possession entered in the assignee's favor, since the timing of the notice was only a technical violation and flawless notice is not a condition precedent to a foreclosure judgment.
Decision Under Review	Appeal from the Circuit Court of Du Page County, No. 10-CH-2287; the Hon. Robert G. Gibson, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal	Lucas M. Fuksa and Thomas D. Carroll, both of Fuksa Khorshid, LLC, of Chicago, for appellant. Ralph T. Wutscher and Jeffrey T. Karek, both of McGinnis Tessitore Wutscher LLP, of Chicago, for appellee.
Panel	JUSTICE SCHOSTOK delivered the judgment of the court, with opinion. Justices Bowman and Hudson concurred in the judgment and opinion.

OPINION

¶ 1 The defendant, Jadwiga Pajor, appeals the denial of her petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), in which she sought vacatur of a judgment of an order of possession in favor of the plaintiff, Aurora Loan Services, LLC (Aurora). Pajor asserts that the trial court erred when it denied the petition on the basis that she had not sufficiently shown diligence. She further argues that Aurora's alleged failure to comply with section 15-1502.5 of the Code (735 ILCS 5/15-1502.5 (West 2010)) (as it applies to notice of a grace period) caused the subsequent proceeding to be "invalid under Illinois law." We hold that Pajor's section 2-1401 petition was of the type authorized by *Collins v. Collins*, 14 Ill. 2d 178 (1958), and therefore was not subject to the requirement to show diligence. However, because the alleged violation of section 15-1502.5 did not, under the facts established in the record, invalidate the foreclosure action, the trial court did not err in denying her petition.

¶ 2 I. BACKGROUND

¶ 3 Pajor fell behind in paying the mortgage on her home at 201 East Foster Avenue in Roselle. The original holder of the mortgage on the property was First Magnus Financial Corporation. On April 22, 2010, Aurora filed a complaint for foreclosure on the property. Aurora identified itself as the assignee of Mortgage Electronic Registration Systems, Inc. (MERS), which in turn was nominee for First Magnus. The complaint's exhibits included a "Corporate Assignment of Mortgage" from MERS to Aurora dated July 22, 2009, and a "grace period notice" mailed by Aurora to Pajor dated April 21, 2009. Pajor does not dispute that she received the grace-period notice more than 30 days before the foreclosure action was filed.

¶ 4 The record on appeal contains a notice filed July 23, 2010, of a chapter 7 (11 U.S.C. § 701 *et seq.* (2006)) bankruptcy filing by Pajor and her husband, Bogdan Pajor. According to the notice, the Pajors filed for protection on July 15, 2010, and had counsel in the

bankruptcy. In response to the Pajors' bankruptcy filing, the foreclosure case was repeatedly continued.

¶ 5 On February 14, 2011, Aurora moved for entry of a default judgment of foreclosure and for an order for sale. The court entered judgment on February 18, 2011.

¶ 6 On May 19, 2011, Aurora filed a motion for approval of the report of the sheriff's sale and distribution and for an order of possession. The same day, the court denied the Pajors' motion to stay the sheriff's sale. The colloquy at the hearing implies that there was a written motion, but no copy of the motion appears in the record. No one appeared for the Pajors on this motion, and Aurora told the court that the Pajors' attorney had said that he would not be going forward with the motion. The transcript of the hearing that day shows that Aurora represented that the Pajors' motion was based on a proposal for a short sale that Aurora did not intend to accept.

¶ 7 On June 6, 2011, the court approved the report of sale. The report showed a deficiency of $208,499.51, described as *in rem*, suggesting that the Pajors had discharged the *in personam* obligation in the bankruptcy.

¶ 8 On August 10, 2011, the court entered an order denying Pajor's "Motion to Vacate this court's Order of June 6, 2011." However, the record does not contain a copy of this motion. A transcript of the hearing on the motion makes clear that Aurora and the court each had a copy of the filing. The argument and discussion also show that Pajor asserted that cancer treatment had delayed her in responding to the foreclosure. Further, the discussion shows that she asserted that Aurora had violated section 15-1502.5 of the Code. Section 15-1502.5 requires a "mortgagee" to send mortgagors a notice of the existence of a grace period at least 30 days before it files a foreclosure suit. Aurora's exhibits to the complaint show that it had sent the notice before it was formally the assignee of the mortgage. Pajor argued that, "based on the uncertainty regarding the grace period in light of the assignment," Aurora had not "followed the proper procedure in bringing this action to judgment."

¶ 9 The court ruled against Pajor on the basis that she had not acted with sufficient diligence. It noted that the Pajors had had the benefit of counsel for the bankruptcy and that the deficiency was *in rem* only. The court also noted that someone had been present for the Pajors on the day it "approv[ed] the sale date" and that it had given the Pajors additional time for possession. Pajor filed a timely notice of appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, Pajor argues that the trial court erred in denying her motion to vacate (which the parties agree should be viewed as a petition under section 2-1401 of the Code) because she was diligent and had a meritorious defense. Specifically, Pajor contends that section 15-1502.5 requires the "mortgagee" to send the notice of grace period before commencing a foreclosure action, that Aurora was not the mortgagee when it sent the notice and was thus incapable of sending an effective notice, and that, without effective notice, the proceedings were unauthorized. Aurora responds that Pajor did not adequately show either diligence or a meritorious defense.

¶ 12 Before considering these arguments, we pause to resolve an issue regarding the record

on appeal. As noted, the record on appeal does not contain a copy of Pajor's petition. In an effort to remedy this lack, Pajor has included an alleged copy of that petition in the appendix to her brief. She did not move for leave to supplement the record on appeal, however, and so the inclusion of the petition was improper. *MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 150-51 (2007). We therefore do not consider the improperly appended material. Nevertheless, the record adequately conveys the arguments raised by Pajor in her petition and the trial court's rulings. Thus, we reject Aurora's contention that, lacking a proper copy of the petition, we must presume that the trial court's rulings had a sufficient legal and factual basis. Instead, we examine the merits of the parties' arguments.

¶ 13 We start by noting that Pajor bases her claim of a meritorious defense on documents that Aurora filed with its complaint. Under the most familiar section 2-1401 standard, a proper petition " 'serves to bring before the court that rendered judgment "facts not appearing of record which, if known to the court at the time judgment was entered, would have prevented its rendition." ' " *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241 (2003) (quoting *In re Marriage of Broday*, 256 Ill. App. 3d 699, 705 (1993), quoting *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1035 (1991)). Under this standard, Pajor's petition (both as she describes it on appeal and as the transcripts imply that it was) would fail because it was not based on new facts. However, as we will explain, section 2-1401 also allows relief based on errors of law apparent on the face of the record. This section 2-1401 theory encompasses the kind of claim that Pajor has made. Nevertheless, even assuming for the sake of argument that Aurora's section 15-1502.5 notice was technically defective, that defect would not preclude entry of the judgment of foreclosure and related judgments under the facts shown in the record here. Therefore, there was no error on the face of the record, and Pajor's claim for relief could not succeed under this second theory.

¶ 14 Section 2-1401, Illinois's primary statutory source for relief from final judgments, has an unusual structure in that it sets out no standards for the availability of relief. Instead, it adopts the standards for relief under a heterogeneous collection of old forms of action:

> "(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984, there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.
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> * * *
>
> (f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(a), (f) (West 2010).

Because of the section's structure, "to know the scope of the section, one needs to know the

scope of the old forms of action." *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902, 908 (2009).

¶ 15 Current law recognizes at least three primary types of section 2-1401 petitions. The most familiar is the "new facts" type, exemplified by *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986).[1] Also familiar is the petition to vacate a void judgment as described in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002). A third type, based on errors of law apparent on the face of the record, is now rare, but remains viable. *Collins* contains the best description of this kind of petition.

¶ 16 *Airoom*-type petitions derive from petitions for writs of *coram nobis*. See *People v. Quidd*, 409 Ill. 137, 140 (1951); *Lammert*, 46 Ill. App. 3d at 673-74. By contrast, *Collins*-type petitions derive from bills of review.

¶ 17 Although reliance on facts already of record is fatal to a writ-of-*coram-nobis*-derived petition, such reliance is a necessity for a proper bill-of-review-derived petition. In *Collins*, the supreme court noted that section 2-1401 (then section 72 of the Civil Practice Act (Ill. Rev. Stat. 1955, ch. 110, ¶ 72)) incorporated the power, formerly available under bills of review, to vacate final judgments based on legal errors. *Collins*, 14 Ill. 2d at 182-83. It explained that relief under bills of review had been available for a narrow class of errors of law:

> "Bills of review were formerly available for the purpose of obtaining relief from decrees for error apparent upon the face of the record. *** It could not be availed of where the decree was merely the result of mistaken judgment, but was applicable where the decree was contrary to a rule of law or statutory provision. [Citations.] The error of law must be apparent from an examination of the record, as the court cannot look into the evidence in the case [citation] and in a chancery case that record is confined to the pleadings, process and decree." *Collins*, 14 Ill. 2d at 183.

The court then vacated a divorce in which the decree showed that the marriage had not lasted the two years that would have been necessary to establish the grounds of habitual drunkenness. *Collins*, 14 Ill. 2d at 183-84.

¶ 18 Illinois courts continue to recognize the viability of bill-of-review-derived petitions. As recently as 2006, the supreme court noted the continued vitality of relief for errors of law. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). In 2009, this court, in *Hanson*, held that relief was available under section 2-1401 when the trial court's judgment was contrary to a statutory provision.

¶ 19 Unlike the usual test applied to *Airoom*-type section 2-1401 petitions, in a *Collins*-type petition the petitioner need not show diligence. This might not be apparent from *Hanson*, in which we suggested that the petitioner would have had no difficulty in meeting a diligence requirement. *Hanson*, 391 Ill. App. 3d at 907. However, the case law contains no indication that a petition rooted in a bill of review is subject to a diligence requirement. No mention of

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[1] *Airoom* itself does not explicitly state a "new facts" standard, but the cases that it drew on, particularly *Lammert v. Lammert Industries, Inc.*, 46 Ill. App. 3d 667, 673-74 (1977), show that the court used this standard.

such a requirement exists in *Collins* or similar cases. Given the differences between writs of *coram nobis* (based on new facts) and bills of review (based on obvious legal errors), and the diligence requirement's tie to writs of *coram nobis* (*Quidd*, 409 Ill. at 141), we conclude that the diligence requirement does not apply to claims derived from bills of review. Thus, the trial court erred in denying Pajor's petition on the ground that she had not adequately shown diligence. Nevertheless, we may affirm on any ground appearing in the record. *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007). We therefore examine whether the arguments raised by Pajor show an error appearing on the face of the record such that the judgment is legally inconsistent with the undisputed facts.

¶ 20 Although most of the cases involving bill-of-review-derived petitions are old enough that the legal contexts have become obscured, the general principles remain clear enough. In *Regner v. Hoover*, 318 Ill. 169, 170-71 (1925), the supreme court stated:

> "[T]he error to be reviewed by a bill of review must be more than the result of a mistaken judgment. The question whether there is an error apparent on the record is one of law, as where an infant has not had his day in court or where the decree provides relief against the provisions of statute law, as a decree directing a legacy to be distributed contrary to the statute of distribution."

This court's modern bill-of-review-derived decision, *Hanson*, followed similar principles. There, the trial court had allowed a person with a felony conviction to get a firearm owner's identification card. *Hanson*, 391 Ill. App. 3d at 903. This court held that, based on the nature of the conviction, a statutory provision barred the allowance of the card, and the petitioner could properly attack that order through a section 2-1401 petition. *Id.* at 910-11.

¶ 21 Both *Hanson* and *Collins* involved circumstances in which the trial court's ruling was legally inconsistent with the undisputed facts. We must apply that same test to determine whether Pajor's petition was properly denied. As the supreme court noted, this inquiry is purely legal. *Regner*, 318 Ill. at 171. Accordingly, our review is *de novo*. *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 22.

¶ 22 Rephrasing Pajor's claim in terms proper for a *Collins*-type petition, she asserts that a flawed section 15-1502.5 notice of grace period–flawed because an entity other than the true mortgagee sent it[2]–was legally inconsistent with the entry of a foreclosure judgment. However, an examination of section 15-1502.5 does not support Pajor's contention that a foreclosure action must be dismissed whenever there has been a technical flaw in the notice provided to the mortgagor.

¶ 23 The relevant portions of section 15-1502.5 state as follows:

> "(b) *** [N]o mortgagee shall file a complaint to foreclose a mortgage secured by residential real estate until the requirements of this Section have been satisfied.
>
> (c) ***
>
> *** [I]f a mortgage secured by residential real estate becomes delinquent by more

[2]We assume here solely for the sake of argument that Pajor is correct that Aurora was not legally the mortgagee when it sent the grace-period notice.

than 30 days the mortgagee shall send via U.S. mail a notice advising the mortgagor that he or she may wish to seek approved housing counseling. ***

* * *

(d) Until 30 days after mailing the notice provided for under subsection (c) of this Section, no legal action shall be instituted under Part 15 of Article XV of the Code of Civil Procedure." 735 ILCS 5/15-1502.5(b), (c), (d) (West 2010).

A mortgagee cannot comply with these requirements while a foreclosure suit is pending. The notice must come before the suit.

¶ 24 Section 15-1502.5(e) (735 ILCS 5/15-1502.5(e) (West 2010)) provides for a further 30-day extension if the mortgagor gets approved housing counseling. The mortgagor or the counselor can then offer a "proposed sustainable loan workout plan" to the mortgagee. If the mortgagee accepts the plan, the mortgagee cannot instate a foreclosure action while the mortgagor is in compliance. Section 15-1502.5(h) states that "[t]here shall be no waiver of any provision of this Section." 735 ILCS 5/15-1502.5(h) (West 2010). The purpose of section 15-1502.5 is clear from its language: to encourage workouts for mortgages in default.

¶ 25 The requirements for a complaint to foreclose are set out in section 15-1504 of the Code (735 ILCS 5/15-1504 (West 2010)). Section 15-1504(c) requires a mortgagee to allege "that any and all notices *** required to be given have been duly and properly given," and "that any and all periods of grace or other period of time allowed for the performance of the covenants or conditions claimed to be breached or for the curing of any breaches have expired." 735 ILCS 5/15-1504(c)(9), (c)(10) (West 2010). As required, Aurora made these allegations in its complaint. The question is whether the fact that the grace-period notice provided to Pajor came from an entity that was not yet the mortgagee negates those allegations and is equivalent to a failure to comply with the requirements of the statute. We hold that, where the record clearly shows that the substantive requirements were met and that the mortgagor received actual notice of the type mandated by section 15-1502.5, a technical defect such as the one present here does not require dismissal of the foreclosure action.

¶ 26 In this case, the record reveals that, despite the irregularity that Aurora sent the grace-period notice at a time when it does not appear to have been the mortgagee, the substantive requirements of the statute were met. As required, a grace-period notice containing the statutory language was sent, and it is undisputed that Pajor received it. As required, more than 30 days (indeed, almost a year) elapsed between the mailing of the grace-period notice and the filing of the foreclosure action. Although the entity sending the grace-period notice (Aurora) did not become the holder of the indebtedness (*i.e.*, the mortgagee) until three months after it sent the notice, it did in fact become the holder and was therefore entitled to file the foreclosure action. There is no suggestion in the record that Pajor suffered any prejudice from the technical defect in the notice, such as confusion over which bank held her mortgage or uncertainty over with whom she should attempt a workout. In fact, Aurora asserts, and Pajor does not deny, that Pajor entered into workout negotiations with Aurora in October 2009, demonstrating that the defect did not frustrate the overarching goal of the statute to encourage workouts.

¶ 27 Where a "process *** utilized did not occur exactly as the statute dictates, the law would

not require a futile act to redo the process." *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 73. Where, as here, the mortgagor has alleged only a technical defect in the notice and has not alleged any resulting prejudice, a dismissal of the foreclosure complaint to permit new notice of the grace period would be futile; we would not read the section to require such a result unless its plain language compelled it. See *Bjork v. Draper*, 381 Ill. App. 3d 528, 538-39 (2008) (the plain language of a statute, where not ambiguous, controls).

¶ 28 Nothing in section 15-1502.5 states that flawless notice of the grace period is a condition precedent to a foreclosure judgment. Accordingly, Aurora's premature sending of the notice (premature in the sense that Aurora was not yet the mortgagee when it sent the notice, although it would have that status in the future) did not compel dismissal of the foreclosure action. Consequently, no error appeared on the face of the record, and the trial court was correct to deny Pajor's section 2-1401 petition. Where a disposition is legally consistent with the undisputed facts, relief is not available under a *Collins*-type section 2-1401 petition.

¶ 29 Finally, we note that Aurora has filed a motion seeking to strike portions of Pajor's reply brief. As we resolve all substantive matters in the appeal in favor of Aurora, we deny the motion as moot.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the denial of Pajor's section 2-1401 petition.

¶ 32 Affirmed.