2016 IL App (1st) 153614-U
No. 1-15-3614
Order filed October 25, 2016

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

U.S. BANK TRUST, N.A. as Trustee for LSF6 MRA REO Trust, Plaintiff-Appellee, v. CLARRISA LOVE and GLENN LOVE, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 12 CH 07755 The Honorable Anna M. Loftus, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concur in the judgment and opinion.

ORDER

¶ 1 *Held*: We affirm the trial court's denial of defendants' section 2-1401 petition to vacate the foreclosure judgment and confirmation of sale, 735 ILCS 5/2-1401 (West 2016), on the basis that (i) the trial court's judgment was not void on account of an alleged fraud on the court, and (ii) the Loves failed to prove a meritorious defense or due diligence under section 2-1401.

¶ 2 This appeal arises from the trial court's denial of Defendants Clarrisa Love and Glenn Love's section 2-1401 petition, 735 ILCS 5/2-1401 (West 2010), in a mortgage foreclosure action filed by Plaintiff U.S. Bank Trust, N.A., as Trustee for LSFG MRA REO Trust. The Loves now appeal the trial court's denial of their petition to vacate the sale and confirmation of

the sale and to dismiss the foreclosure complaint. The Loves argue that the trial court's orders and judgment were void as a result of fraud on the court and, in the alternative, they properly alleged a meritorious defense. We find the trial court's orders were not void because the trial court had proper jurisdiction. Further, the Loves have not shown that the judgment was procured by fraud. Finally, the Loves did not allege a meritorious defense or due diligence.

¶ 3 BACKGROUND

¶ 4 The Loves signed a mortgage against their home. The mortgage identified CIT Group/Consumer Finance, Inc. as the lender, and Mortgage Electronic Registration System, Inc. as the mortgagee and "nominee for Lender and Lender's successors and assigns." The Loves also signed a promissory note in the amount of $418,500. The note provided that the Loves understood that CIT Group may transfer the note. The Loves defaulted on their payments in late 2011 and on March 2, 2012, the plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF6 MRA REO Trust ("U.S. Bank"), filed a mortgage foreclosure complaint against the Loves. U.S. Bank alleged that it was the "holder of the Indebtedness based on the attached Note, which was incorporated in the complaint."

¶ 5 Additionally, U.S. Bank's complaint included as exhibits a copy of the mortgage, the promissory note, and three allonges or attachments to a legal document: (i) to pay to the order of Wells Fargo Delaware Trust Company, N.A., as Trustee for Vericrest Opportunity Loan Trust 2009-PL1 without recourse to the CIT Group, by Vericrest Financial, Inc., as Attorney in Fact; (ii) to pay to the order of U.S. Bank Trust National Association, as Trustee for LSF6 Investments 2011-1 Trust without recourse to Wells Fargo Delaware Trust Company, N.A., as Trustee for Vericrest Opportunity Loan Trust 2009-PL1, by Vericrest Financial, Inc., acting as servicer; and

(iii) to pay to the order of U.S. Bank without recourse to U.S. Bank Trust National Association, as Trustee for LSF6 Investments 2011-1 Trust, by Vericrest Financial, Inc., acting as servicer.

¶ 6 The complaint was properly served on the Loves at their residence. In their answer, the Loves pled affirmative defenses asserting that U.S. Bank failed to provide them with a grace period notice and failed to prove standing, and that the mortgage and note failed to comply with the Trust in Lending Act. The trial court struck the affirmative defenses with prejudice.

¶ 7 U.S. Bank moved for summary judgment and judgment of foreclosure and submitted an affidavit of judgment. The trial court granted U.S. Bank's motions in August 2014, over the Loves' response that the affidavit was not based on the personal knowledge of the affiant nor meet threshold requirements of Illinois Supreme Court Rule 191(a).

¶ 8 Thereafter, the Loves were served the notice of sale; a public sale was held at which U.S. Bank placed the highest bid. U.S. Bank moved for an order approving the report of sale and distribution and for an order of possession. The Loves contended that they did not receive notice of sale and questioned U.S. Bank's ownership of their note because their mortgage was allegedly securitized and improperly "placed into the R.E.M.I.C. Trust."

¶ 9 On May 18, 2015, the trial court granted U.S. Bank's motion, entered an order approving the report of sale and distribution, and confirmed the sale and order of possession. The trial court found that the Loves failed to meet their burden of showing any defect in the sale notice and failed to provide a basis on which they were previously prevented from raising the defense; therefore, the trial court refused to consider their defense because section 15-1509 of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1509 (West 2008), had been triggered. The Loves did not appeal these findings.

¶ 10 More than 30 days after the order approving the sale, the Loves filed a *pro se* motion to vacate the judgment and sale claiming fraud. The Loves also moved to remove the action to federal court. The trial court denied both motions as the case already had been disposed.

¶ 11 On November 30, 2015, the Loves filed another motion to the vacate the sale and confirmation of the sale, and to dismiss the foreclosure complaint. The Loves contended that the trial court's summary judgment order was invalid and void because Vericrest and counsel for U.S. Bank "committed fraud upon the court by preparing the executing fraudulent assignments" and the servicer of the loan violated the Making Home Affordable Program guidelines. The trial court interpreted this November motion as a section 2-1401 petition to vacate on the merits and denied it.

¶ 12 STANDARD OF REVIEW

¶ 13 We review a trial court's denial of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 14 ANALYSIS

¶ 15 The Loves argue that: (a) the trial court's orders "were void since they were procured by fraud," (b) they need not allege a meritorious defense and due diligence when asserting that a trial court's judgment or order is void, (c) they properly alleged a meritorious defense when they alleged the assignments were fraudulent. They also argue that (d) "justice was not done and the sale of their home must be vacated" because "there was no evidence" that they were "properly viewed under the waterfall steps [related to the Making Home Affordable Program] to get them to an affordable payment." We do not need to consider this argument because of our affirmance of the trial court on its denial of their section 2-1401 petition.

¶ 16 In their opening brief, the Loves assert their November 30, 2015 motion sought "to vacate all orders entered pursuant to 735 ILCS 5/2-1401 and 735 ILCS 5/1508(b) (iv)" and they appeal "the trial court ['s denial] of their 2-1401 petition." Their reply brief suggests that U.S. Bank "misunderstands" their request for relief, and their petition was not a section 2-1401 petition, but rather, "simply represents a collateral request for the court to expunge a void order." Illinois courts "have repeatedly held that an untimely [post-judgment motion] must be viewed as a section 2-1401 motion by the appellate court because it is the only vehicle that a party may use once the 30 days has expired." *Protein Partners, LLP v. Lincoln Provision, Inc.*, 407 Ill. App. 3d 709, 715 (2010). The 30 days expired; therefore, we will view the motion under section 2-1401.

¶ 17 The Allegations of Fraud on the Court

¶ 18 A "void judgment may be attacked at any time, either directly or collaterally." *In re County Collector*, 397 Ill. App. 3d 535, 542 (2009). Essentially, a section 2-1401 petition codifies the "common law means of collaterally attacking judgments." *Id.* A collateral attack on an allegedly void judgment is allowed on the ground that "the rendering court lacked subject matter or personal jurisdiction." *Protein Partners*, 407 Ill. App. 3d at 716. When a petitioner challenges a judgment "on voidness grounds[,] there is no need for the petitioner to establish that it had acted with due diligence or to allege that a meritorious defense existed." *Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st) 141272, ¶ 17.

¶ 19 And whether the judgment is void or voidable is a question of jurisdiction. *People v. Davis*, 156 Ill. 2d 149, 156 (1993). "A void judgment or order is one that is entered by a court lacking jurisdiction over the parties or the subject matter, or lacking the inherent power to enter the particular order or judgment, or where the order was procured by fraud." (Citation omitted) *In re Adoption of E.L.*, 315 Ill. App. 3d 137, 154 (2000).

¶ 20 We first analyze the jurisdiction inquiry. "Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *Davis*, 156 Ill. 2d at 156. The trial court did not lack personal or subject matter jurisdiction over these proceedings. A court possesses subject matter jurisdiction when the complaint presents a "justiciable matter" which "is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002). Trial courts generally enjoy "original jurisdiction of all justiciable matters." Ill. Const. 1970, art. VI, § 9; *McCarthy v. Pointer*, 2013 IL App (1st) 121688, ¶ 14. The trial court here was vested with subject matter jurisdiction when U.S. Bank filed the mortgage foreclosure complaint.

¶ 21 Additionally, "a trial court may acquire personal jurisdiction over a defendant by his [or her] appearance or it may impose jurisdiction upon him [or her] by effective service of summons." *McCarthy*, 2013 IL App (1st) 121688, ¶ 14. The Loves were properly served with the complaint, appeared, and answered. Therefore, the trial court also obtained personal jurisdiction. The trial court did not lack jurisdiction over the parties.

¶ 22 Next, we analyze whether the trial court's judgment was procured by fraud. But "[n]ot all judgments obtained by fraud are void. Courts distinguish between fraud which prevents a court from acquiring jurisdiction or merely gives the court colorable jurisdiction, and fraud occurring after the court's valid acquisition of jurisdiction, such as false testimony or concealment." (Citations omitted) *Adoption of E.L.*, 315 Ill. App. 3d at 154. Only judgments procured by fraud occurring after the court's acquisition of jurisdiction are "void." *Id.* This type

of fraud can be considered "extrinsic fraud," "which is defined as fraud that occurs in situations where an unsuccessful party has been prevented from fully exhibiting his [or her] case by being kept away from the court or is kept from gaining knowledge of the suit." *Id.*

¶ 23 The Loves contend that the trial court's judgment is void because there was "fraud upon the court" based on (1) "the agents of [U.S. Bank] creating bogus assignments that were robo-signed and not done in the presence of a notary," (2) Vericrest and U.S. Bank's counsel creating "inaccurate, false, and misleading assignments," and (3) "the assignments dated February 13, 2013 and June 27, 2013 [were] fraudulently concealed from" them and that they did not receive notice of these and "several other assignments" until well after the fact. The Loves also contend that "assignments were manufactured and partially concealed from the court" and them based on a letter from U.S. Bank dated April 8, 2015 that stated that "U.S. Bank is merely the trustee for the trust, which owns the mortgage and note" and that the trust owns the mortgage and note, not the "Trustee or U.S. Bank in its individual capacity." In other words, the Loves argue that U.S. Bank does not have standing as a result of assignments that were allegedly manufactured fraudulently to give it standing.

¶ 24 U.S. Bank counters that the Loves cannot challenge the validity of the alleged fraudulent assignments, citing *Bank of America National Ass'n v. Bassman FBT, L.L.C.* 2012 IL App (2d) 110729. But that case turned on the "New York Trust" defense, or whether noncompliance with a pooling and servicing agreement rendered the assignment void, and the Loves assert that the assignment of the mortgage is void because of fraud, not because of the lack of compliance with a trust agreement to which they were not parties.

¶ 25 In the trial court, the Loves challenged U.S. Bank's standing by alleging "notary fraud, false execution of documents, robo signing, violations of securities laws[,] and other violations

that seem to be present in the lawsuit as well." The trial court concluded that the Loves' standing argument was untimely and "factually insufficient."

¶ 26 Because the trial court dismissed the Loves' standing argument, the Loves now attempt to bootstrap their prior standing argument to their section 2-1401 petition and develop the argument that U.S. Bank's standing is based on manufactured and fraudulent assignments. By attacking the assignments in this way, the Loves implicitly attack U.S. Bank's standing.

¶ 27 But, the Loves' implied standing argument does not affect a court's subject matter jurisdiction. Standing is not a basis on which a judgment or order can be deemed void. *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102 n.5 (1st Dist. 2001). The fact that parties can waive standing and cannot waive the issue of subject matter jurisdiction demonstrates that the lack of standing does not impact or eliminate a trial court's jurisdiction or authority to adjudicate a dispute. "[I]ssues of standing and ripeness do not implicate [a] court's subject matter jurisdiction." *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 254 (2010). The defendant has the "burden to prove that the plaintiff does *not* have standing" because [s]tanding is an affirmative defense." *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 24 (emphasis added in original). "The mere fact that a copy of the note is attached to the complaint is itself *prima facie* evidence that the plaintiff owns the note." *Id.* U.S. Bank has standing.

¶ 28 The allegations of fraud and the claimed lack of standing do not affect the trial court's jurisdiction and therefore do not render the trial court's judgment void. Similar to our decision in *McCarthy*, we "need not resolve the issue of the nature of the fraud necessary to render an order void because plaintiff's conclusory allegations of fraud fail to state any facts to support those allegations." *McCarthy*, 2013 IL App (1st) 121688, ¶ 14. "Fraud consists of misrepresentations of material facts or, under some circumstances, the failure to disclose facts."

Id. at ¶ 17 (emphasis omitted). The Loves presented mere conclusory statements and failed to present facts to support their allegations of fraud. We affirm the trial court.

¶ 29 Meritorious Defense and Due Diligence

¶ 30 A section 2-1401 petition is not intended to be "a substitute for a party's right to appeal." *Universal Outdoor, Inc. v. City of Des Plaines*, 236 Ill. App. 3d 75, 80–81 (1992). The Loves' attempt to bootstrap a previously-raised standing argument, which they failed to appeal, onto their current allegation of fraudulent assignments does not establish a meritorious defense. But even if the Loves successfully asserted factual allegations supporting the existence of a meritorious defense, they fail to set forth support to demonstrate any due diligence in presenting the meritorious defense to the trial court. Therefore, we affirm the trial court's dismissal of the Loves' amended section 2-1401 petition due to the Loves' lack of a meritorious defense and lack of due diligence.

¶ 31 Affirmed.