2011 IL App (2d) 101175-U
No. 2-10-1175
Order filed September 29, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EMC MORTGAGE CORPORATION,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-CH-112
	)	
BARBARA J. KEMP,	)	
	)	
Defendant-Appellant	)	
	)	
(Anthony Antine, Hobson Meadows Home	)	Honorable
Owners Association, and Unknown Heirs and	)	Robert G. Gibson,
Legatees of Barbara J. Kemp, Defendants).	)	Judge, Presiding

JUSTICE BOWMAN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: Appeal dismissed for lack of jurisdiction.

¶ 1 Defendant, Barbara J. Kemp, appeals the circuit court orders entered on October 5, 2010, which denied her motions to vacate and dismiss, and November 16, 2010, which denied her motion to reconsider. On appeal, Kemp argues that plaintiff, EMC Mortgage Corporation, did not have standing to file the original foreclosure complaint against her on her Naperville property, and therefore the judgment for foreclosure was a void judgment. EMC counters that we do not have

jurisdiction to consider Kemp's appeal because the original foreclosure judgment was not a final order and did not contain language pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304 (eff. Feb. 26, 2010)). Further, EMC argues that Kemp forfeited her argument that EMC did not have standing to sue for foreclosure, and lack of standing does not render a judgment void. We agree with EMC that we lack jurisdiction to consider the merits of this appeal.

¶ 2 I. BACKGROUND

¶ 3 On July 7, 2006, EMC filed its foreclosure complaint, alleging the following. On December 14, 2005, MERS, Inc., as nominee for Maribella Mortgage, LLC, recorded a mortgage in the name of Kemp in the amount of $863,200. EMC, as "legal holder, agent or nominee of the legal holder, of the indebtedness" brought its suit against Kemp. The mortgage document was attached and identifies the lender as Maribella Mortgage, LLC and Kemp as the borrower. In the agreement, Kemp also mortgaged the property to MERS as nominee for Maribella and Maribella's successors and assigns.

¶ 4 On August 31, 2006, Kemp filed a *pro se* motion to dismiss the suit for lack of personal jurisdiction, which was stricken. On October 26, 2006, Kemp then filed a *pro se* answer to the foreclosure suit. In that answer, Kemp denied the allegation that EMC had the capacity to file the suit as the legal holder, agent, or nominee of the legal holder, of the mortgage. On January 17, 2007, Kemp filed a *pro se* counterclaim, alleging that Mirabella acted as an agent for EMC and acted as the mortgage lender. Kemp alleged that Mirabella and EMC improperly included her husband, Anthony Intini,[1] on the mortgage and refused to correct the document. EMC moved to dismiss this counterclaim on June 12, 2007, and this motion was granted on October 16, 2007. Kemp filed an

[1] Anthony Intini is also referred to as Anthony Antine in the record. He was later dismissed as a party to this litigation.

amended counterclaim that was relatively the same. EMC filed a motion to dismiss that counterclaim on January 31, 2008. Attached to the motion to dismiss is an affidavit from Ashley Stephenson, an assistant vice president and assistant manager of foreclosures at EMC. She stated that EMC was not involved in the real estate closing of Kemp's property and that the loan was secured with Maribella Mortgage. Maribella assigned the loan to EMC on December 29, 2006. EMC and Maribella had no relationship other than the assignment. A copy of the assignment was also attached. The assignment states that MERS as nominee for Maribella assigned Kemp's mortgage to EMC on December 29, 2006. The assignment was signed on January 12, 2007.[2] EMC's motion to dismiss was granted on May 19, 2008.

¶ 5 On June 24, 2008, Kemp, through counsel at this point in the proceedings, filed a "slander of title" counterclaim. In that motion, Kemp alleged that on November 23, 2005, EMC issued a "Commitment Confirmation" for the transfer and purchase of Mirabella's mortgage with Kemp. This document was part of the November 23, 2005, closing on the property. Kemp alleged that Mirabella was acting as an agent of EMC and that later Mirabella assigned the mortgage to EMC pursuant to an agreement they had. On October 28, 2008, the trial court granted EMC's motion to dismiss Kemp's second amended counterclaim.

¶ 6 On February 2, 2009, EMC moved for summary judgment on its foreclosure complaint pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)). On April 14, 2009, the trial court granted that motion. On June 2, 2009, the trial court entered a judgment for foreclosure and sale of the property. On July 1, 2009, Kemp filed a motion to

[2] The assignment identifies the mortgage as instrument R2005-276717 in the amount of $863,200 and recorded on December 14, 2005, in Maricopa County in the State of Illinois. We presume the county is an error as there is no such county in Illinois.

reconsider the court's order granting summary judgment in favor of EMC and a motion to stay the sheriff's sale. This motion for reconsideration was denied on September 29, 2009. Next, the sheriff's sale set for October 6 was stayed because Kemp filed for bankruptcy.

¶ 7 On May 6, 2010, the proceedings resumed, and Kemp filed a motion to continue the sheriff's sale set for May 27, stating that while in bankruptcy, she attempted to sell the home as a short sale and had a buyer. The trial court granted the stay the next day. On June 15, Kemp filed another emergency motion to stay the sheriff's sale. This time she attached a short sale contract listing the buyer as Resort Acquisitions, a Florida corporation. The court denied this motion on June 15. On July 9, 2010, the bankruptcy court lifted the automatic stay to allow the sheriff's sale of the property.

On October 5, 2010, Kemp filed an Emergency Motion to Vacate Judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)), a motion to dismiss the foreclosure complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)), and a motion to continue the sheriff's sale, now scheduled for the same day, October 5. These new motions raised completely new arguments by counsel. First, Kemp argued that her section 2-1401 petition should be granted because EMC lacked proper standing to proceed with the sheriff's sale. She argued her motion was timely because it was filed "within 16 months of the entry of the judgment order," and she filed it within 48 hours of a New York Times article that questioned Chase Home Mortgage's legal methods in obtaining title to properties subject to foreclosure. Kemp stated that even though the bankruptcy order lifting the automatic stay on the sheriff's sale listed "EMC Mortgage Corporation/Chase Home Finance LLC," neither the judgment of foreclosure order dated June 2, 2009, or the sheriff's sale notice dated September 28, 2010, refer to Chase Home Finance as a successor in interest or loan service of Kemp's mortgage. In the news article, Chase issued a moratorium on its pending mortgage foreclosures. According to Kemp, the court should stay the

sheriff's sale until EMC could prove it was the proper party in possession of the mortgage. As to the motion to dismiss, Kemp argued the same, that EMC may not be the proper party for this foreclosure because it may have sold its interest to Chase.

¶ 8 On October 5, the trial court stayed the sheriff's sale for 45 days, denied Kemp's section 2-1401 motion to vacate, and denied Kemp's section 2-619 motion to dismiss. The court included language pursuant to Rule 304(a), stating there was no just cause to delay the enforcement or appeal of this order. At the hearing on these motions, the trial court recognized that the issue of standing in foreclosure proceedings had made headlines but that in this case, the timing of Kemp's objection to standing was problematic. Counsel for Kemp argued that a stay would allow EMC to submit documentation to the court that it was the proper party and not Chase. The court asked Kemp's counsel whether there was case law indicating that a plaintiff had to show standing again after the judgment for foreclosure was entered before a sheriff's sale could take place. Counsel was unaware of any case law supporting his argument. The court then advised that unless there was any case law supporting Kemp's position, which counsel could raise in a motion for reconsideration, the motions to dismiss and vacate were denied.

¶ 9 Naturally, Kemp filed a motion for reconsideration on November 4. In this motion, Kemp again raised an entirely new argument. Kemp now argued that EMC did not have standing to file its original foreclosure complaint on July 7, 2006, because Mirabella had not assigned the mortgage to EMC until December 29, 2006. In support, Kemp cited an unreported case, *Bank of New York v. Mulligan*, 2010 NY slip op. 51509 (N.Y. Sup. Ct. Aug. 25, 2010)[3], which determined that the bank

[3] In this New York order, the trial court dismissed the bank's application for a default judgment for failing to meet the statutory requirements for a default judgment. The court also addressed the standing issue as a reason to dismiss the complaint but this was not a situation where the issue was raised after a judgment of foreclosure was entered upon years of litigation.

lacked standing to foreclose the mortgage on the date the action commenced because it was not assigned the mortgage until two months later. Kemp also pointed out the county name error on the assignment documents, which listed Maricopa as the county where the mortgage was recorded. Kemp failed to submit any evidence that this error was anything more than a scrivener's error and that the mortgage was not recorded in Illinois. The motion also failed to address why this issue was not raised earlier other than counsel had recently discovered the New York case.

¶ 10 On November 16, 2010, the trial court denied Kemp's motion for reconsideration and again included Rule 304(a) language. In denying the motion, the court noted that Kemp's motion was well done and that it laid out many issues that were ripe for consideration by appellate courts and the supreme court. However, the court denied the motion because there was no Illinois authority providing that it could rule otherwise in light of the timing of the motion.

¶ 11 Kemp appealed, arguing again that EMC lacked standing at the time it filed its original foreclosure complaint because it had not yet been assigned Kemp's mortgage. EMC argues that we lack jurisdiction because the trial court's Rule 304(a) language cannot render a nonfinal order final and the judgment of foreclosure is not a final and appealable order until the court enters an order approving the sale of the property and directing its proceeds. Further, EMC argues that Kemp forfeited the argument that it lacked standing. Alternatively, EMC argues that it was the holder of the mortgage note, which was endorsed in blank, and attached to the complaint.

¶ 12 II. ANALYSIS

¶ 13 We first address whether we have jurisdiction to reach the merits of this case. The parties frame the question before us as whether Rule 304(a) language grants us jurisdiction when it is attached to an order denying a section 2-1401 petition for relief from a nonfinal judgment. This framework is somewhat flawed. Our supreme court has held that a judgment ordering the

foreclosure of a mortgage is not final and appealable until the court enters orders approving the sale and directing the distribution. *In re Marriage of Verdung*, 126 Ill. 2d 542, 555 (1989). The exception to this is where the court makes a finding pursuant to Rule 304(a). *Id.* ("Unless the court makes a finding pursuant to Supreme Court Rule 304(a) ***, that there is no just reason for delaying enforcement or appeal, the judgment of foreclosure is not appealable"). In this case, the June 2, 2009, judgment for foreclosure and sale did not contain Rule 304(a) language and actually contained language to the contrary. Specifically, the order stated the trial court retained jurisdiction of the subject matter of the cause and of all parties involved for the purposes of enforcing the judgment. Kemp argues that we have jurisdiction regardless of the language in the June 2, 2009, order because the court included Rule 304(a) language in the denial of her section 2-1401 petition and by virtue of Rule 304(b)(3) (Ill. Sup. Ct. R. 304 (eff. Feb. 26, 2010)), which provides that no Rule 304(a) language is necessary for any orders granting or denying relief from a section 2-1401 petition. We disagree with Kemp.

¶ 14 Section 2-1401 of the Code authorizes a party to seek "relief from *final orders and judgments*" when brought more than 30 days after the judgment has been entered. (Emphasis added.) 735 ILCS 5/2-1401 (West 2010); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 101 (2002). The filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one. *Id.* at 102. "Thus, a circuit court's ruling on such a petition is deemed a final order and provision has been made for immediate review of these orders in Supreme Court Rule 304(b)(3)." *Id.* Section 2-1401 presumes a final order or judgment exists, and here, the judgment of foreclosure was not a final order or judgment.

¶ 15 Further, Kemp's voidness argument fails. In *Sarkissian*, the issue was whether a petition seeking to vacate a void judgment, on grounds of lack of proper service, could be brought under

section 2-1401. The supreme court held that petitions seeking relief from void judgments are section 2-1401 petitions even if not labeled as such, and they are appealable under Rule 304(b)(3). *Id.* at 105. However, in *Sarkissian*, the underlying judgment, a default judgment, was a final order, unlike the underlying judgment in this case. The petition to vacate in *Sarkissian* was also attacking the judgment as being void, which may be raised at any time. *Id.* at 103. Here, standing does not render a judgment void as it does not affect the jurisdiction of the court to enter an order (*Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102 (2001)) and may be forfeited by the parties (*LeBron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). The issue of standing does not relate to the subject matter before the court but rather whether a litigant is entitled to have the court decide the merits of a particular dispute or issue. *Lyons*, 324 Ill. App. 3d at 1102. Regardless of how Kemp has labeled and/or presented her motion to the trial court, we conclude it was not a section 2-1401 petition because the foreclosure order was not a final order, did not contain the requisite Rule 304(a) language to make it final, and even if the order was final, a lack of standing would not have rendered the court's order void.

¶ 16 The fact that the trial court included Rule 304(a) language in its denial of Kemp's motion for reconsideration does not persuade us that we have jurisdiction. We consider the substance of the motions rather than the labels. *Sarkissian*, 201 Ill. 2d at 102. As stated, Kemp's motion did not substantively constitute a section 2-1401 petition as section 2-1401 contemplates a final order or judgment. Merely titling the motion as a section 2-1401 motion is insufficient.

¶ 17 Kemp fails to argue that we have jurisdiction to review her section 2-619(a)(9) motion to dismiss. Points not argued are deemed forfeited. Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008)); *Pace Communications Services Corp. v. Express Products*, 408 Ill. App. 3d 970, 981 (2011). Even so, under Illinois law, lack of standing is an affirmative defense, which is the defendant's burden to

plead and prove. *LeBron*, 237 Ill. 2d at 252. While a lack of subject matter jurisdiction may not be forfeited, a lack of standing will be forfeited if not raised in a timely manner in the trial court. *Id.* An attack on standing is properly brought before the trial court in a section 2-619 motion. *Chicago Teachers' Union, Local 1 v. Board of Education of Chicago*, 189 Ill. 2d 200, 206 (1989). Having already determined that Kemp's motion could not be brought under section 2-1401, Kemp is equally unsuccessful using section 2-619. A denial of a motion to dismiss under 2-619(a)(9) is not a final judgment (*Catlett v. Novak*, 116 Ill. 2d 63, 68 (1987)), and the trial court's inclusion of Rule 304(a) language does not render it a final judgment (*In re Marriage of King*, 208 Ill. 2d 332, 344 (2003)).

¶ 18 III. CONCLUSION

¶ 19 In conclusion, without a final judgment or a proper Rule 304(a) finding, we lack jurisdiction to consider the merits of this case. For the reasons stated, we dismiss the appeal for lack of jurisdiction.

¶ 20 Appeal dismissed.