2016 IL App (2d) 150739-U
No. 2-15-0739
Order filed March 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

COMMUNITY BANK-WHEATON/ GLEN ELLYN,	)	Appeal from the Circuit Court of DuPage County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CH-3508
JAMES R. FREDERICK JR., MARY A. FREDERICK, a/k/a MARY ANN FREDERICK, NONRECORD CLAIMANTS, and UNKNOWN OWNERS,	)	
Defendants	)	
(Discovery Ventures, Inc. – Intervenor-Appellant).	)	Honorable Robert G. Gibson, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice McLaren concurred in the judgment.
Presiding Justice Schostok concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court's denial of intervenor's section 2-1401 petition was affirmed where intervenor failed to allege a meritorious defense or claim and diligence in presenting that defense or claim in the original action. We granted sanctions on appellee's request contained in its brief under Supreme Court Rule 375 due to the frivolous nature of the appeal.

¶ 2 Plaintiff, Community Bank-Wheaton/Glen Ellyn (Community Bank), commenced foreclosure proceedings on a junior mortgage it held on a residential property. Intervenor, Discovery Ventures, Inc., purchased the property at a foreclosure sale, and the trial court entered an order confirming the sale. Nearly eight months later, Discovery Ventures filed a petition for relief from the trial court's order confirming the sale pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) when it discovered that the senior mortgage held by JP Morgan Chase Bank, N.A. (Chase Bank) had not been paid off with the proceeds from the sale. Discovery Ventures appeals the trial court's denial of its section 2-1401 petition. For the reasons that follow, we affirm and impose sanctions.

¶ 3 I. BACKGROUND

¶ 4 On July 26, 2011, Community Bank filed a mortgage foreclosure complaint against defendants, James Frederick, Jr. and Mary Frederick, as well as nonrecord claimants and unknown owners.[1] Community Bank sought to foreclose the junior mortgage it held on the Frederick's residence, although the complaint did not specify that it held a junior mortgage or that Chase Bank held a senior mortgage on the property. Chase Bank was never a party to the proceedings.

¶ 5 On December 14, 2012, the court entered a "Judgment of Foreclosure and Sale" in favor of Community Bank and against defendants in the amount of $126,808.93. Relevant to this appeal, the judgment order provided that Community Bank's mortgage was "prior and superior to the right, title, interest, claim, or lien of all parties and unknown owners and non-record claimants whose interest in the mortgaged real estate is terminated by this foreclosure." It further provided that the property was "free and clear of all other liens and encumbrances except

[1] The defendants named in the complaint are not parties to this appeal.

*** JP Morgan Chase Bank, N.A.'s Mortgage, which is a first priority lien." The proceeds of the sheriff's sale were to be distributed "to the lien holders hereinabove set forth in the sums hereinabove found to be due ***. Payment shall be made by the Clerk of this Court first to the first priority lien holder in an amount sufficient to pay all amounts due the first priority lien holder and then in a like manner to all other lien holders in order of his priority."

¶ 6 At the sheriff's sale on July 8, 2014, Discovery Ventures purchased the property for $170,000.00. Community Bank then moved to confirm the sale and approve the sheriff's report of sale and distribution. The sheriff's report of sale and distribution indicated that all of the proceeds were to be disbursed to Community Bank.[2] Discovery Ventures intervened and opposed the motion to confirm the sale. Discovery Ventures asked the court to vacate the sale on the grounds that the terms of the sale were unconscionable and justice was not otherwise done. Specifically, Discovery Ventures argued that the sale should be vacated because the property "was contaminated with Trichloroethylene," a known carcinogen. Discovery Ventures claimed that Community Bank "withheld critical information about the condition" of the property, thus receiving an "inflated price at the sale[.]" Discovery Ventures took no issue with the sheriff's report of sale and distribution.

¶ 7 On August 14, 2014, the court held a hearing on the motion. The court rejected Discovery Ventures' claim. The court noted that a judicial sale is "a no-warranty situation[.]" It also commented: "Bidding at foreclosure sales is risky[.] *** [A]lthough a foreclosure can wipe out liens relative to the parties to the case, there's the potential for other lien holders to come in

[2] The sheriff's report of sale and distribution also indicated that, after disbursing the proceeds to Community Bank, a deficiency of $11,417.31 would remain. The deficiency is due to postjudgment interest, attorney fees, and costs.

at a future point that weren't named." The court granted Community Bank's motion and entered an order approving the sale and the sheriff's report of sale and distribution. The order directed the sheriff "to immediately tender a check to Community Bank-Wheaton/Glen Ellyn in the amount of $170,000.00."

¶ 8 Nearly eight months later, on April 3, 2015, Discovery Ventures filed a petition pursuant to section 2-1401 of the Code, seeking to modify the court's order approving the sale and the sheriff's report of sale and distribution. Specifically, Discovery Ventures argued that the plain language of the judgment of foreclosure and sale required that the proceeds be directed to Chase Bank, as the first priority lien holder. Hence, Discovery Ventures sought "merely to reapportion the proceeds pursuant to the Judgment Order[.]"

¶ 9 In support of its petition, Discovery Ventures attached an affidavit from its treasurer, Ronald Javorek. Javorek averred that Discovery Ventures located the judgment of foreclosure and sale while preparing for the sheriff's sale. Discovery Ventures also determined that Chase Bank held a first priority lien on the property. Javorek attested that Discovery Ventures bid $170,000 at the sheriff's sale under the assumption that the proceeds would be directed to Chase Bank, as directed by the judgment of foreclosure and sale. Additionally, Discovery Ventures never received a copy of the sheriff's report of sale and distribution. Javorek further attested that, in January 2015, Discovery Ventures "learned that the Chase Lien had not been released." In March of 2015, "after months of telephone calls and in person visits," Discovery Ventures determined that the Chase lien had not been paid off from the proceeds of the sale and that the Chase lien had been sold to a third party. Discovery Ventures then filed the petition for relief from the order approving the sale.

¶ 10 Community Bank filed a response, arguing that Discovery Ventures (1) did not present a meritorious defense to the order approving the sale; (2) was not diligent in presenting the defense; and (3) was not diligent in filing the section 2-1401 petition.

¶ 11 The court held a non-evidentiary hearing on Discovery Venture's 2-1401 petition to vacate and modify the order confirming the sale. After hearing the arguments of counsel, the court denied Discovery Venture's petition. The court initially noted that Discovery Ventures "did object to confirmation of the sale, but on [] completely different grounds relative to soil contamination." The court also found that the August 19, 2014, order approving the sale explicitly stated that the sheriff was ordered to tender a check for $170,000 to Community Bank. Additionally, it noted that the notice of sale explicitly stated that the sale was the result of a second lien foreclosure. The court reasoned that, when read in its entirety, the judgment of foreclosure and sale "clearly says" that the proceeds were to be directed to Community Bank.

¶ 12 Discovery Ventures timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Discovery Ventures asserts that the trial court erred in denying its section 2-1401 petition. It contends that it presented a meritorious defense to the order approving the sale; that Javorek's affidavit established Discovery Venture's diligence; and that equitable considerations require that its petition be granted. Community Bank rebuts Discovery Venture's arguments, and it seeks sanctions for having to respond to a frivolous appeal.

¶ 15 A party is entitled to relief under section 2-1401 when it sets forth specific factual allegations for each of three elements: (1) a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Warren County Soil & Water Conservation District v.*

Walters, 2015 IL 117783, ¶ 51. The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Warren County Soil*, 2015 IL 117783, ¶51. When the petition presents a fact-dependent challenge to the final judgment or order, as here, we review a trial court's ultimate decision for an abuse of discretion. *Warren County Soil*, 2015 IL 117783, ¶ 51.

¶ 16 For the following reasons, after thoroughly reviewing the record, we hold that the trial court did not abuse its discretion in denying Discovery Ventures' section 2-1401 petition.

¶ 17 A. Meritorious Defense

¶ 18 Discovery Ventures argues that it alleged a meritorious defense or claim because the language of the judgment of foreclosure and sale mandates that the proceeds of the sheriff's sale be first distributed to Chase Bank.

¶ 19 To establish the existence of a meritorious defense or claim, a petitioner must allege facts that would have prevented entry of the judgment if known by the trial court. *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001). A judgment is construed like other written instruments, and the determinative factor is the "intention of the court as gathered from all parts of the judgment itself." *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 605 (1999). An unambiguous judgment is enforced as drafted, but an ambiguous judgment can be read and construed in combination with the entire record. *Antonucci*, 311 Ill. App. 3d at 605.

¶ 20 Here, the judgment of foreclosure and sale, when all of its provisions are considered together, is unambiguous; it provided that the proceeds of the sale were to be directed to Community Bank, not Chase Bank. Indeed, in the judgment the court expressly found that Community Bank's mortgage is "prior and superior to" all parties and unknown owners and non-record claimants whose interest was terminated by the foreclosure proceedings. The judgment of

foreclosure and sale further provided that judgment was entered in Community Bank's favor. The terms of the judgment also provided that defendants were to pay Community Bank the total balance due to redeem the property. Moreover, the judgment ordered the sale of the property to satisfy the amount owed to Community Bank, and that Community Bank was to receive a deficiency judgment if the sale proceeds were less than the judgment amount.

¶ 21 Discovery Ventures correctly notes that the judgment of foreclosure and sale also provided that the property was free and clear of all liens and encumbrances except Chase Bank's mortgage, "which is *a* first priority lien." (Emphasis added.) Nevertheless, the judgment directed the sheriff to deliver the "proceeds to the lien holders *hereinabove set forth in the sums hereinabove found to be due*[.]" (Emphasis added.) Specifically, the judgment ordered the sheriff to disburse the proceeds to "*the* first priority lien holder" and then to all other lien holders in order of priority. (Emphasis added.) Read together, these provisions clearly required that the proceeds were to be distributed to the lien holders in the amount and priority specifically adjudicated. This is consistent with section 15-1512(c) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1512(c) (West 2014)), which provides that the proceeds from a judicial sale will be distributed "in the order of priority adjudicated in the judgment of foreclosure or order confirming the sale ***." Chase Bank was not a party to the foreclosure proceedings and its senior lien was never adjudicated.

¶ 22 Even if the terms of the judgment of foreclosure and sale could be viewed as ambiguous, its meaning is clear when the entirety of the record is considered.

¶ 23 Here, Chase Bank was not a party to this action and thus its interest as a senior lien holder was not affected by the foreclosure proceedings. *Heritage Federal Credit Union v. Giampa*, 251 Ill. App. 3d 237, 238 (1993) ("A suit to foreclose a junior mortgage can cut off

only rights or claims of interest *subsequent* to the interest asserted" (emphasis in original)); 735 ILCS 5/15-1501 (West 2014) ("[A]ny disposition of the mortgaged real estate shall be subject to (i) the interests of all other persons not made a party or (ii) interests in the mortgaged real estate not otherwise barred or terminated in the foreclosure."). Consequently, we reject Discovery Ventures' argument that it could not ascertain whether Chase Bank was a party to the foreclosure proceedings. The judgment of foreclosure and sale, which Discovery Ventures claims to have relied on in bidding for the property, specifically listed each party in the caption, and Chase Bank was not included. Discovery Ventures also intervened and participated in the proceedings before the trial court confirmed the sale, so it had to have known that Chase Bank was not a party.

¶ 24 *Members Equity Credit Union v. Duefel*, 295 Ill. App. 3d 336 (1998), is also instructive. In *Duefel*, a junior mortgagee foreclosed on a property, and a third-party bidder purchased the property at a judicial sale. *Duefel*, 295 Ill. App. 3d at 337. The third-party bidder successfully moved to claim the surplus proceeds, and the trial court ordered the third-party bidder to apply the surplus to a senior mortgage, which was not identified in the complaint or the judgment of foreclosure. *Duefel*, 295 Ill. App. 3d at 337. On appeal, the court held that the trial court abused its discretion in ordering that the surplus be applied to the repayment of the senior mortgage, because the senior mortgagee was not a party to the action and its interest was not affected by the foreclosure proceedings. *Duefel*, 295 Ill. App. 3d at 337, 340. Thus, if the loan was in default, the senior mortgagee could protect its interest by either initiating proceedings against the signatories to the note or by commencing foreclosure proceedings against the property. *Duefel*, 295 Ill. App. 3d at 340. The record contained no information about the terms and status of that mortgage, and the court refused to speculate or make a determination as to the senior mortgage. *Duefel*, 295 Ill. App. 3d at 340.

¶ 25 As in *Duefel*, the record contains no information about Chase Bank's mortgage. The only reference in the record to Chase Bank's mortgage was the single sentence in the judgment of foreclosure and sale mentioned above. The record contains no information whatsoever as to the amount due on that mortgage, whether defendants were the sole signatories to the note securing the mortgage, or what the terms were.

¶ 26 Thus, we cannot say that the trial court abused its discretion in finding that Discovery Ventures failed to allege a meritorious defense.

¶ 27 B. Diligence in Presenting Claim or Defense in Original Action

¶ 28 We initially note that in its briefs, Discovery Ventures does not attempt to differentiate between the two different diligence requirements that must be alleged under a section 2-1401 petition. Instead, Discovery Ventures argues that Javorek's affidavit established its diligence in this matter, and that lack of diligence cannot form the basis for a denial of its petition, because the facts in Javorek's affidavit were uncontroverted. Hence, it does not specifically argue that it was diligent in presenting its claim or defense to the trial court in the original foreclosure action.

¶ 29 A section 2-1401 petition is not intended to allow a litigant a new opportunity "to do that which should have been done in an earlier proceeding, nor is the provision intended to relieve a litigant of the consequences of her mistake or negligence." *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, ¶ 22. The party relying on a section 2-1401 petition must have a reasonable excuse for failing to act within the appropriate time. *Hawthorne*, 2013 IL App (5th) 110475, ¶ 22. The party must show that through no fault or negligence of its own, the existence of a valid defense "was not made to appear to the trial court." *Hawthorne*, 2013 IL App (5th) 110475, ¶ 22. The party must also show that its failure to defend against the judgment or order was the result of an excusable mistake and that under the circumstances, it acted reasonably and

not negligently when it failed to resist the judgment. *Hawthorne*, 2013 IL App (5th) 110475, ¶ 22.

¶ 30 We reject Discovery Ventures' argument that Javorek's affidavit established its diligence. Indeed, Javorek attested that Discovery Ventures detrimentally relied on the order approving the sale. But that order explicitly stated: "That the Sheriff of Dupage Count[y] is hereby ordered to immediately tender a check to Community Bank-Wheaton/Glen Ellyn in the amount of $170,000.00." This language is unequivocally clear that the proceeds of the sale were to be distributed to Community Bank, not Chase Bank.

¶ 31 Discovery Ventures also argues that equitable considerations require that its petition be granted. In addition to its argument that it relied on the order approving the sale, Discovery Ventures claims that it never received a copy of the sheriff's report of sale and distribution. Discovery Ventures thus argues that the "balance of hardships weigh heavily in favor" of it and that "equity demands that those provisions [of the orders] be followed."

¶ 32 We also reject Discovery Ventures' argument that equitable considerations entitle it to relief. Our Supreme Court recently reaffirmed the principle that trial courts may consider "equitable considerations to relax the applicable due diligence standards under the appropriate limited circumstances." *Warren County Soil*, 2015 IL 117783, ¶ 51 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226-29 (1986)). Simply stated, no equitable considerations are present here. See *Kulikowski v. Larson*, 305 Ill. App. 3d 110, 115 (1990) ("[B]ecause we conclude that [petitioner] failed to establish a meritorious defense *** we need not address the propriety of the trial court's decision not to relax or excuse diligence."). As explained above, Discovery Ventures failed to establish a meritorious claim that the proceeds of the sale should be redirected to pay off the Chase Bank mortgage**.** Additionally, the terms of the judgment of foreclosure and sale did not

provide that Community Bank was to be responsible for disbursing or handling the proceeds of the sale. Thus, when the order approving the report of sale directed the sheriff to immediately tender a check to Community Bank, Discovery Ventures should have been immediately aware that Community Bank was the entity receiving the proceeds of the sale.

¶ 33 Moreover, the record casts doubt on Discovery Ventures' assertion that it never received the sheriff's report of sale and distribution. The record shows that on July 14, 2014, Community Bank mailed to Discovery Ventures a notice of its motion to approve the sale and sheriff's report of sale and distribution, which included the report. Discovery Ventures then intervened and opposed the motion at the hearing on July 22, 2014, on the grounds that the property was contaminated, but it did not assert its Chase Bank priority lien defense or claim. In its response to the motion to confirm the sale, Discovery Ventures explicitly acknowledged that "[t]he Judgment states that the amount recoverable by the Plaintiff [Community Bank] equaled $126,808.93." It then claimed that Community Bank would "profit" from the $170,000 bid at the judicial sale. Community Bank's reply addressed this argument and explicitly referenced the sheriff's report of sale and distribution. Even if Discovery Ventures did not receive a copy of the report of sale and distribution, as Javorek attested, it has presented no excuse for not asking for a copy or informing the court at the very hearing regarding that document. Under these circumstances, Discovery Ventures has not presented a reasonable excuse for its lack of diligence.

¶ 34 C. Due Diligence in Filing Section 2-1401 Petition

¶ 35 A party must establish all three elements to warrant relief under section 2-1401. *Airoom, Inc.*, 114 Ill. 2d at 220-21. Because we have concluded that Discovery Ventures did not allege a meritorious defense or claim and was not diligent in presenting its defense or claim in the

original action, we need not discuss the third element. See *Airoom, Inc.*, 114 Ill. 2d at 223 (holding that trial court did not abuse its discretion in denying section 2-1401 petition solely on the element of due diligence in defending against claims in original action).

¶ 36 D. Evidentiary Hearing

¶ 37 Discovery Ventures alternatively contends for the first time on appeal, that we should remand the matter to the trial court for an evidentiary hearing. To support its argument, Discovery Ventures' relies on the proposition that if "the facts sufficient to support the grant of relief under section 2-1401 are challenged by the respondent, a full and fair evidentiary hearing must be held." *Airoom, Inc.*, 114 Ill. 2d at 223. Discovery Ventures, however, waived its right to an evidentiary hearing when it participated in the non-evidentiary hearing based solely on the pleadings, affidavits, and arguments without requesting an evidentiary hearing. See *Airoom, Inc.*, 114 Ill. 2d at 223 (Petitioner "waived its right to an evidentiary hearing involving the testimony of witnesses and the opportunity to cross-examine."); *Blutcher*, 321 Ill. App. 3d at 141 ("[W]hen a party to a section 2-1401 participates in a hearing based solely upon the pleadings, affidavits, and arguments of counsel without requesting an evidentiary hearing, we deem the right to such a hearing waived.").

¶ 38 E. Sanctions

¶ 39 Community Bank argues that it is entitled to sanctions because Discovery Ventures filed an unwarranted and frivolous appeal. Discovery Ventures responds that sanctions are not warranted. Specifically, Discovery Ventures argues that it had made a good faith argument "that its interpretation of the Judgment Order is correct" and that it accurately cited the record and raised valid legal arguments.

¶ 40 Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) allows for the imposition of sanctions against a party when an appeal is frivolous, not taken in good faith, or taken for an improper purpose. An appeal is frivolous "where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Ill. S. Ct. R. 375(b). "Otherwise stated, an appeal will be deemed frivolous if a reasonable, prudent attorney would not in good faith have brought such an appeal." *First Federal Savings Bank of Proviso Township v. Drovers National Bank of Chicago*, 237 Ill. App. 3d 340, 344 (1992).

¶ 41 We believe that sanctions are appropriate in this case. Discovery Ventures' appeal from the trial court's denial of its section 2-1401 petition was not well grounded in the facts of the case nor was it warranted by existing law. See *Drovers*, 237 Ill. App. 3d at 344. As explained above, the trial court did not abuse its discretion in finding no meritorious defense or claim, as the terms of the judgment of foreclosure and sale clearly stated that the proceeds of the judicial sale were to be disbursed to Community Bank. The order approving the judicial sale also explicitly stated that Community Bank was to receive the proceeds of the sale. Discovery Ventures then waited nearly eight months to assert its defense or claim, despite having intervened and participated in the underlying action before the sale was confirmed.[3] Moreover, and most importantly, Discovery Ventures' argument that the proceeds of the sale should be redirected to Chase Bank's senior mortgage – a mortgage which was not adjudicated – is

[3] We again feel compelled to note that when it intervened and opposed Community Bank's motion to confirm the judicial sale, Discovery Ventures explicitly stated that the judgment "states that the amount recoverable by the Plaintiff [Community Bank] equaled $126,808.93."

contrary to the Illinois Mortgage Foreclosure Law (See 735 ILCS 5/15-1512(c) (West 2014); 735 ILCS 5/15-1501 (West 2014)) as well as Illinois caselaw (See *Giampa*, 251 Ill. App. 3d at 238; *Duefel*, 295 Ill. App. 3d at 340). We also note that Discovery Ventures did not attempt to make a good-faith argument for the extension, modification, or reversal of the well-established existing law.

¶ 42 In its appellee's brief, Community Bank requested attorney fees for defending this appeal, and it provided this court with the affidavit of one of its attorneys as an exhibit to the brief. The affidavit states that attorney fees and costs incurred in defending this appeal total $7,449.25. Attached to the affidavit are copies of the attorneys' invoices, which show that Community Bank's attorneys spent a total of 24.75 hours working on the appeal. Discovery Ventures' reply brief neither addressed the reasonableness nor the amount of the fees requested. After having reviewed the affidavit and invoices, we conclude that the fees requested by Community Bank are reasonable and adequately documented. Thus, we order Discovery Ventures to pay the reasonable attorney fees that Community Bank incurred in defending this appeal. See *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 582-83 (1993).

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of DuPage County and impose sanctions.

¶ 45 Affirmed; sanctions imposed.

¶ 46 PRESIDING JUSTICE SCHOSTOK, DISSENTING:

¶ 47 I join the majority in affirming the trial court's denial of Discovery Ventures' section 2-1401 petition. However, I do not believe that Rule 375 sanctions are warranted in this case.

Accordingly, I respectfully dissent from the portion of this order that grants Community Bank's request for such sanctions.

¶ 48 In my view, the facts of the case provide some support for Discovery Ventures' arguments on appeal. The language of the judgment order identified Chase Bank as the holder of the first priority lien and directed that the foreclosure sale proceeds be paid first to the "first priority lien holder and then *** to all other lien holders in order of *** priority." However, the foreclosure proceeds did not go to Chase Bank, but to Community Bank. Given the language of the judgment order, there was a reasonable basis for Discovery Ventures' argument, in its section 2-1401 petition and on appeal, that it had a meritorious defense to the foreclosure. Although its reading of the legal import of this language was mistaken, its arguments were grounded in the terms of the judgment. Hence, I would not characterize its appeal as frivolous. See *Clean World Engineering, Ltd. v. MidAmerica Bank, FSB*, 341 Ill. App. 3d 992, 1003 (2003).

¶ 49 Although I agree that attorneys must be careful to investigate the legal basis for their arguments before bringing those arguments before the court, I do not want to discourage attorneys from bringing appeals that are arguable, even if those cases ultimately turn out not to be meritorious. Accordingly, I respectfully dissent from the imposition of Rule 375 sanctions in this case.