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2012 IL App (3d) 120042-U

Order filed December 11, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

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|--|---------------------------------|
| PROVIDENT FUNDING ASSOCIATES,<br>L.P.,                               | ) Appeal from the Circuit Court |
|  | ) of the 12th Judicial Circuit, |
| Plaintiff-Appellee,  | ) Will County, Illinois,        |
|  | )                               |
| v.   | ) Appeal No. 3-12-0042          |
|  | ) Circuit No. 11-CH-73          |
|  | )                               |
| ANDREW J. SZAFLARSKI and unknown<br>owners and non-record claimants, | ) Honorable                     |
|  | ) Victoria Kennison,            |
| Defendant-Appellant.   | ) Judge, Presiding.             |
|  | )                               |
|  | )                               |

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The denial of a mortgagor's motion to vacate an order confirming sale in a mortgage foreclosure action was affirmed because the allegations in the mortgagor's petition, filed pursuant to section 2-1401 of the Code of Civil Procedure, were insufficient to support a finding that the mortgagor acted with due diligence with respect to the order confirming sale.

¶ 2 The plaintiff, Provident Funding Associates, L.P. (Provident), obtained a default judgment of foreclosure and sale against the defendants, Andrew J. Szaflarski, unknown owners,

and non-record claimants, in a mortgage foreclosure action. The subject property was sold at a sheriff's sale, and the circuit court granted Provident's motion to confirm the sale. Szaflarski's motion pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) (the Code) to vacate the order confirming the sale was denied, and Szaflarski appealed.

¶ 3

### FACTS

¶ 4 Provident filed a complaint to foreclose the mortgage on property located in Homer Glen, Illinois, where Szaflarski was named as the mortgagor. Szaflarski was personally served on January 7, 2011. On May 17, 2011, Provident filed a motion for a default judgment. On May 25, 2011, the circuit court entered the default and entered a judgment for foreclosure and sale. On June 22, Szaflarski filed a *pro se* motion to vacate the default judgment, which was denied by the circuit court. Although the judgment for foreclosure and sale stated that it was a final and appealable order, Szaflarski did not file an appeal.

¶ 5 Provident proceeded with a sheriff's sale, which was scheduled for August 31, 2011. On August 30, 2011, through counsel, Szaflarski filed an emergency motion to stay the judicial sale, arguing that he was currently negotiating a loan modification under the Making Home Affordable Program. The stay was denied on August 31, and the sale proceeded as scheduled later that same day.

¶ 6 The circuit court's docket sheet indicates that a motion for an order approving the sale was faxed to the circuit court by Provident's counsel on September 13, 2011. However, the motion is not contained in the record, and Szaflarski claimed that he never received notice of that motion. Three days later, on September 16, 2011, the circuit court entered an order approving

the sale and distribution. That order states that notice of the motion was given, and all notices required by section 15-1507 of the Code (735 ILCS 5/15-1507(c) (West 2010)) were properly given. It also states that it was a final and appealable order.

¶ 7 Thereafter, on November 16, 2011, Szaflarski filed a motion pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)) to vacate the order approving the sale, alleging that he “just learned of the entry of order confirming sale,” he never received notice of the motion to approve the sale, and he had a meritorious defense to the motion to confirm sale. During argument on the motion, Szaflarski’s counsel indicated that his firm had entered an appearance prior to the judicial sale, but the firm did not receive notice of the motion to confirm the sale. His firm did receive notice of the order approving the sale and distribution, but he did not know when that notice had been received. The circuit court denied the motion to vacate, finding that Szaflarski had notice of the judicial sale and he failed to diligently act to vacate the order of sale pursuant to section 2-1401 of the Code. Szaflarski appealed.

¶ 8 ANALYSIS

¶ 9 Szaflarski argues that the circuit court erred in concluding that he had notice of the judicial sale and abused its discretion in finding an absence of due diligence. Provident argues that the circuit court correctly denied Szaflarski’s motion to vacate because Szaflarski failed to establish any of the requirements under section 2-1401 of the Code so that he was entitled to have the order confirming the sale vacated.

¶ 10 Section 2-1401 of the Code provides a party with an avenue to seek relief from a final judgment when it has been more than 30 days since the judgment was entered. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002). A party seeking relief from a final judgment

or order under section 2-1401 of the Code must make specific factual allegations that support: (1) the existence of a meritorious defense or claim in the original action; (2) due diligence in pursuing that defense or claim in the original action; and (3) due diligence in presenting the section 2-1401 petition for relief. *Cavalry Portfolio Services v. Rocha*, 2012 Ill. App. LEXIS 858 (2012). Generally, such a petition is directed to the sound discretion of the circuit court, and that court's decision will not be disturbed on review unless it has abused its discretion. *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321 (2010). However, when a circuit court disposes of a section 2-1401 petition on the pleadings, or on a motion to dismiss, as in this case, our review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1 (2007).

¶ 11 The circuit court, in denying the petition, found that Szaflarski had notice of the judicial sale and that he failed to diligently act to vacate the order of sale pursuant to section 2-1401 of the Code. Szaflarski contends that his allegation that he “just learned of the entry of order confirming the sale” was a fact that should have been deemed true, and the circuit court should have liberally construed “just learned” in favor of Szaflarski.

¶ 12 Due diligence requires that the party submitting the section 2-1401 petition have a reasonable excuse for failing to act within the appropriate time. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986). The circuit court’s docket establishes that Szaflarski knew that the judicial sale was scheduled for August 31, 2011, which is evidenced by Szaflarski’s emergency motion to stay the judicial stay. In his section 2-1401 petition, Szaflarski contends that his attorney never received notice of the motion to confirm the sale. However, Szaflarski had a duty to follow the progress of his case. See *Smith*, 114 Ill. 2d at 227. Szaflarski was aware of the date of the sale, and notice of the order confirming that sale was sent to Szaflarski’s counsel. Szaflarski’s counsel

acknowledged that he received notice of the order confirming sale, but he argued that he did not know when the notice was received. Although Szaflarski alleges that he “just received” notice prior to filing his motion to vacate, he does not allege that the order confirming sale was not received in a timely fashion. As such, Szaflarski’s allegations do not explain why he did not file a motion to reconsider or an appeal within 30 days of that order. Section 2-1401 of the Code does not relieve a litigant of the consequences of his own mistake or negligence. *Smith*, 114 Ill. 2d at 222.

¶ 13 Since we agree that Szaflarski had notice of the judicial sale, and he did not act with due diligence to reverse the implications of the order confirming the sale, we affirm the denial of the motion to vacate. Thus, it is not necessary to reach Provident’s arguments regarding notice of the section 2-1401 petition and whether the appearance filed by Szaflarski’s counsel was defective.

¶ 14

#### CONCLUSION

¶ 15 The judgment of the circuit court of Will County is affirmed.

¶ 16 Affirmed.