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2013 IL App (3d) 120867-U

Order filed August 16, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

WELLS FARGO BANK, N.A.,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0867
)	Circuit No. 11-LM-2802
CECIL W. WATSON,)	
)	Honorable
Defendant-Appellant.)	Mark Thomas Carney,
)	Judge, Presiding.
)	

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

ORDER

¶ 1 *Held:* The denial of an occupant's motion to vacate an order of possession in favor of a bank in a forcible entry and detainer action was reversed on appeal because the occupant's presented newly discovered evidence that challenged the bank's right to possession.

¶ 2 The plaintiff, Wells Fargo Bank, N.A., obtained summary judgment in a forcible entry and detainer action brought against the defendant, Cecil W. Watson, and other unknown occupants. After this court affirmed that judgment, Watson filed a motion to vacate the summary judgment

order and to vacate a later order extending the enforcement period for the order of possession.

The trial court denied the motion, and Watson appealed.

¶ 3

FACTS

¶ 4 Watson sold his single family residence in 2008 to his cousin, Darrell Coburn. Coburn financed the purchase with a note and a mortgage. Watson continued to reside at the residence with Coburn. Thereafter, Wells Fargo filed a foreclosure action against Coburn. Wells Fargo alleged that it was the holder of the note and the mortgage. The foreclosure sale was approved, and a final order approving the foreclosure sale and distribution, and an order for possession and deed, was entered. Watson continued to reside at the property.

¶ 5 Thereafter, Wells Fargo filed a complaint under the Illinois Forcible Entry and Detainer Act, 735 ILCS 5/9-101 *et seq.* (West 2010), seeking possession of the property from Watson and other unknown occupants. The trial court granted Wells Fargo's motion for summary judgment, and entered a judgment for possession in favor of Wells Fargo. Watson appealed, and we affirmed the trial court. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930 (2012).

¶ 6 Wells Fargo did not take possession of the property within the period of enforcement during the appeal process. On the same day as the mandate was issued, Wells Fargo filed a motion requesting an extension of the period of enforcement of the judgment. The trial court granted the motion, extending the enforcement period for the order of possession another 120 days. Watson filed a motion to vacate the summary judgment order and the order of extension, alleging fraud upon the court. Attached to his motion was a copy of a recorded assignment of the property by Wells Fargo to the Secretary of Housing and Urban Development (HUD) on March 15, 2011. The trial court construed the motion as a motion pursuant to section 1401 of the Code

of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) because Watson was attempting to vacate an order that was over 30 days old. The trial court denied the motion, and Watson appealed.

¶ 7

ANALYSIS

¶ 8 Watson argues that the trial court erred and abused its discretion in entering the judgment for possession because Wells Fargo lacked the legal standing to seek possession. Watson argues that his supportive evidence showed that the property was assigned to HUD prior to Wells Fargo's filing of the forcible entry complaint. Watson also argues that counsel representing Wells Fargo committed fraud upon the court because they signed and filed legal documents that they knew to be false. Wells Fargo argues that *res judicata* should bar this action because Watson made the same arguments that had already been rejected on direct appeal.

¶ 9 Watson's motion, seeking to vacate a final judgment of the trial court, was filed more than 30 days after the entry of that judgment, so it was properly considered under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). To be entitled to relief under section 2-1401, a petitioner must affirmatively set forth facts that support: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986); 735 ILCS 5/2-1401 (West 2010). To establish a meritorious defense, the petitioner must allege facts that, if they had been known by the trial court, would have prevented the entry of the judgment. *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131 (2001). The petitioner must establish the existence of a meritorious defense by a preponderance of the evidence. *Smith*, 114 Ill. 2d at 220-21. Points previously raised at trial or other collateral proceedings cannot form the basis for section 2-1401 relief. *People v. Addison*, 371 Ill. App. 3d

941 (2007). We review a trial court's ruling on a motion to vacate under section 2-1401 for an abuse of discretion. *Smith*, 114 Ill. 2d at 221.

¶ 10 In the direct appeal, Watson challenged the underlying foreclosure judgment, arguing that Wells Fargo lacked standing to file the mortgage foreclosure complaint. The trial court found, and we agreed, that Wells Fargo had a judgment of foreclosure judgment that clearly entitled it to possession. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930 (2012). Watson's motion to vacate, though, raised a new challenge. Specifically, Watson presented evidence that the property was assigned to HUD after the judicial sale but before the filing of the forcible entry complaint. In his motion to vacate, and when questioned by the trial court, Watson represented that he did not become aware of the transfer until weeks before he filed the motion to vacate. So, although Watson was again challenging Wells Fargo's right to possession, this challenge was directed to events that occurred after the judicial sale. Since entitlement to possession is the basis for a forcible entry and detainer action, see *Avenaim v. Lubecke*, 347 Ill. App. 3d 855 (2004), we find that the trial court abused its discretion in denying Watson's motion to vacate.¹ Thus, we reverse the denial of the Watson's section 2-1401 motion to vacate, vacate the summary judgment order, and remand for further proceedings.

¶ 11 CONCLUSION

¶ 12 The judgment of the circuit court of Will County is reversed, vacated, and remanded.

¶ 13 Reversed in part and vacated in part; cause remanded.

¹We recognize that Watson could have discovered the assignment at an earlier date, because it was a matter of public record, but we find that it does not show a lack of due diligence, especially in light of the fact that Wells Fargo did not disclose that it made the assignment. See *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102 (2009) (section 1401 invokes the equitable power of the court).