

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 111064-U

NO. 4-11-1064

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 19, 2012

Carla Bender

4th District Appellate
Court, IL

DEUTSCHE BANK NATIONAL TRUST COMPANY, as)	Appeal from
Trustee for FREMONT HOME LOAN TRUST)	Circuit Court of
2005-2, ASSET BACKED CERTIFICATES SERIES)	DeWitt County
2005-2,)	No. 09CH13
Plaintiff-Appellee,)	
v.)	
CRAIG ISLAM RIDDLE, MADELYN RIDDLE, and)	
UNKNOWN OWNERS AND NONRECORD)	Honorable
CLAIMANTS,)	Garry W. Bryan
Defendants-Appellants.)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in denying defendants' section 2-1401 petition for relief from judgment as they did not show due diligence in bringing their petition.

(2) The trial court did not err in denying defendants' section 2-1401 petition for relief from judgment as their asserted defenses, plaintiff lacked standing and plaintiff's notice of sale contained an error in the address of the property, were forfeited and speculative, respectively.

¶ 2 Plaintiff, Deutsche Bank National Trust Company, brought a complaint to foreclose a mortgage against defendants, Craig and Madelyn Riddle. Personal service was obtained on both defendants and a default judgment was entered against them after they did not appear in court. A notice of sale was filed and advertised. The property was sold at a judicial sale, a certificate of sale was filed, and an order approving the sale was entered. Defendant Craig

Riddle was present for the entry of the order approving the sale. Nine months after the approval of the sale and 21 months after initial service on defendants of the complaint, defendants filed a section 2-1401 petition for relief from judgment alleging plaintiff failed to prove it was the owner of the note sued upon and the notice of sale was erroneous and did not list the common address of the property.

¶ 3 After arguments, defendants' petition was denied. Defendants' later motion to reconsider was also denied. We affirm the trial court's judgment denying defendants' petition for relief from judgment.

¶ 4 I. BACKGROUND

¶ 5 In April 2005, defendants, Craig Riddle and Madelyn Riddle, obtained a mortgage for residential property. The mortgagee named MERS, or Mortgage Electronic Registration Systems, Inc., as nominee for lender Fremont Investment & Loan. The address for the property was listed in the mortgage as R.R. 4 Box 253F, Clinton, Illinois. By spring 2009, defendants had fallen behind on their mortgage payments. On March 12, 2009, plaintiff, Deutsche Bank National Trust Company, as Trustee for Fremont Home Loan Trust 2005-2, Asset Backed-Certificate Series 2005-2, filed a complaint to foreclose defendants' mortgage in the circuit court of DeWitt County. In the complaint, the mortgagee is stated to be M.E.R.S., Inc., as Nominee for Fremont Investment & Loan. Attached to the complaint is a copy of the original mortgage and the note. The mortgage states, under the heading "Transfer of Rights in the Property," borrower (defendants) "does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS, the following described property * * *." The attached note makes no mention of the assignment of any interest

to MERS and solely identifies Fremont Investment & Loan as the lender or note holder.

¶ 6 On April 9, 2009, an assignment of mortgage was filed in the DeWitt County Recorder's Office by MERS, as nominee for Fremont Investment & Loan. The assignment stated MERS did "assign, transfer, convey without warranties and without recourse" to plaintiff, its successors and assigns prior to March 10, 2009, the following described mortgage and goes on to describe the mortgage at issue. The notary oath following the signature of the certifying officer of MERS states the seal was affixed on February 24, 2009.

¶ 7 On March 15, 2009, personal service was obtained on both defendants. Notice of the hearing for a default judgment was sent to defendants. A default judgment was entered against defendants on June 24, 2009, and an order appointing a selling officer was entered. On September 14, 2009, notice of the judicial sale was sent to defendants. On September 18, 2009, plaintiff filed its certificate of publication of notice of sale of the property, listing the "common address" as R.R. 4 Box 253F, Clinton, Illinois, 61727. On October 27, 2009, the judicial sale was conducted at the DeWitt County courthouse and plaintiff was the highest bidder. On December 11, 2009, a certificate of sale was filed with the trial court and the order approving the sale was entered on March 12, 2010, with defendant, Craig Riddle, present.

¶ 8 On December 16, 2010, defendants filed a verified petition for relief from judgment alleging plaintiff failed to prove or allege it was the owner of the note and had no standing to file suit. The petition also alleged the notice of sale was erroneous and did not list the actual common address for the property of 5347 Brush College Road, Clinton, Illinois, 61727.

¶ 9 Arguments were heard on defendants' motion on July 21, 2011, and taken under advisement. On August 2, 2011, the trial court denied the petition with prejudice. On August

31, 2011, defendants filed a motion to reconsider. On October 6, 2011, the court heard arguments on the motion and denied the motion. By agreement of the parties, enforcement of the judgment was stayed pending appeal.

¶ 10

II. ANALYSIS

¶ 11 On appeal, defendants argue they have exercised due diligence in filing their petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). They contend plaintiff lacked standing to bring this action and, alternatively, the judgment entered was void and may be attacked at any time without showing due diligence or a meritorious defense. Finally, defendants contend they have presented a meritorious defense in demonstrating a material defect in the notice of sale.

¶ 12 When a trial court denies a petition for relief from judgment under section 2-1401 and no evidentiary hearing was held, that order is reviewed *de novo* on appeal. *People v. Vincent*, 226 Ill. 2d 1, 17-18, 871 N.E.2d 17, 28 (2007). Here, there was argument, but the only evidence considered was the exhibits already attached to the complaint, the assignment already filed with the recorder of deeds and the notice of sale already in the record.

¶ 13 To prevail under section 2-1401, a petitioner must state specific factual allegations proving by a preponderance of the evidence (1) petitioners exercised due diligence in presenting their defense to the court in the original action; (2) petitioner exercised due diligence in filing the section 2-1401 petition; and (3) the existence of a meritorious claim or action. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986). The standard for due diligence requires a 2-1401 petitioner to have a reasonable excuse for failure to act within a reasonable time. *Safety-Kleen Corp. v. Canadian Universal Insurance Co., Ltd.*, 258 Ill. App. 3d

298, 301, 631 N.E.2d 475, 479 (1994). Additionally, the petitioner must prove by a preponderance of the evidence " 'through no fault or negligence of his own, the error of fact or the existence of a valid defense was not' " presented to the trial court. *Smith*, 114 Ill. 2d at 222, 499 N.E.2d at 1387 (quoting *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505, 165 N.E.2d 294, 296 (1960)).

¶ 14 Defendants did not act with diligence. They failed to act within a reasonable time. They waited until 21 months after the lawsuit was filed and they were served; 18 months after the default judgment was entered against them; 15 months after they were served with notice of the impending judicial foreclosure sale; 14 months after the property was sold; and 9 months after the court order approving the sale was entered. At the hearing on their section 2-1401 petition, defendants admitted they were served with summons and received notice of all court hearings. They offered no reasonable excuse for their failure to act. They simply stated they had no reason to doubt plaintiff's standing to bring suit against them and assumed plaintiff would not try to mislead the court by bringing suit without standing to do so.

¶ 15 Defendants proved no new facts suddenly discovered or that they could not have discovered earlier. Defendants, by their own admission as well as the record in the trial court, were well-apprised of the status of this case as it progressed and, yet, chose not to bring any defenses to the attention of the court prior to its collateral attack on the judgment long after it was entered. They have failed to meet their burden of proving by a preponderance of the evidence they exercised due diligence in discovering the defenses they have raised.

¶ 16 In addition, defendants have failed to prove they exercised due diligence in bringing their petition under section 2-1401. For the 14 months after the property was sold, and the 9 months after the order approving the sale was entered, they have offered no explanation for

their delay in filing their petition. They have offered no explanation for why they could not have filed their petition sooner or what actions they were taking prior to filing the petition. They have failed to prove they exercised due diligence in bringing the section 2-1401 petition.

¶ 17 As for defendants' alleged defense of lack of standing on the part of plaintiff, defendants have forfeited this issue. It is well-established under Illinois law, lack of standing is an affirmative defense which will be forfeited if not raised in a timely manner. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53, 930 N.E.2d 895, 916 (2010).

¶ 18 Defendants agree this is the case, except in the event of a void judgment. They argue a judgment entered where a plaintiff does not have standing is a void judgment and, thus, may be attacked in a section 2-1401 petition without a showing of due diligence. In support of their argument, they rely on the supreme court's decision in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 776 N.E.2d 195 (2002). The court in *Sarkissian* explained as a general rule, void judgments may be attacked at any time (*Sarkissian*, 201 Ill. 2d at 103, 776 N.E.2d at 201) and the normal requirements of section 2-1401 petitions do not apply to petitions brought to set aside void judgments, *i.e.*, there is no need for allegations of due diligence or of a meritorious defense. *Sarkissian*, 201 Ill. 2d at 104, 776 N.E.2d at 202. However, the court also explained a void judgment occurs where a court entering the judgment lacked jurisdiction over the parties or of the subject matter of the case. That is not the same as lack of standing.

¶ 19 In the present case, the trial court had jurisdiction over both the parties and the subject matter. The judgment it entered was not void. The record indicates plaintiff had standing to sue on the mortgage as it was the lawful assignee of the mortgagee, MERS.

¶ 20 Finally, defendants argue the notice of sale was defective because the wrong

common address was used for the property, the rural route address and post office box rather than a numbered street address. The rural route address was the common address used by all parties and is included in the 2005 mortgage but defendants argue since then, their property has been assigned a specific street address for purposes of 9-1-1 first responders and they contend that is the address that should have been used.

¶ 21 Section 15-1507(c)(1)(B) and (C) of the Illinois Mortgage Foreclosure Law (the Law) (735 ILCS 5/15-1507(c)(1)(B), (C) (West 2010)) requires a notice of sale must include a "common address and other common description" of real estate in addition to a "legal description of the real estate sufficient to identify it with reasonable certainty." There is no question the notice of sale in this case included the legal description of the property in question along with the rural route address.

¶ 22 Defendants argue the rural route address does not identify the property with sufficient certainty, because their box number, 235F, is shared with at least five other households designated as 235A, 235B, 235C, *et. cetera*. However, the clause requiring identification of property with reasonable certainty actually applies to the legal description and is not attached as a qualifier to the requirement of a common address. See 735 ILCS 5/15-1507(c)(1)(B), (C) (West 2010).

¶ 23 Further, section 15-1507 (c)(1) of the Law provides an immaterial error in the information provided in the notice of sale shall not invalidate the legal effect of the notice. 735 ILCS 5/15-1507(c)(1) (West 2010). An error, if any, in including the rural route address for the property here is immaterial. Section 15-1508 of the Law provides no sale shall be held invalid or set aside due to a defect in the notice except upon "good cause shown." 735 ILCS 5/15-1508(d)

(West 2010).

¶ 24 Defendants claim the property was worth more than what plaintiff bid and blamed the lack of receiving a higher price for the property on the fact the allegedly defective notice did not provide the numbered street address and potential purchasers of the property were unable to identify it. The phrase "good cause shown" requires more than what defendants have offered here. In *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 996-98, 899 N.E.2d 298, 313-15 (2008), the court noted the public notices were technically insufficient but refused to vacate the foreclosure sale because there was no good cause to do so. The defendants in *GMB Financial Group* argued the fact the foreclosure sale price was lower than some estimates of the property's value was good cause to vacate the foreclosure. *Id.*, 385 Ill. App. 3d at 997-98, 899 N.E.2d at 314-15. The court rejected their claim because they had failed to actually prove their argument. *Id.* Even in a case where the foreclosure defendants argued defects coupled with an allegedly low sale price and produced a property appraiser to contradict the plaintiff's opinion about the property's fair market value, this was insufficient to constitute good cause to vacate the foreclosure and the court rejected their claim as speculative. *Cragin Federal Bank for Savings v. American National Bank & Trust Co. of Chicago*, 262 Ill. App. 3d 115, 119-22, 633 N.E.2d 1011, 1013-15 (1994).

¶ 25 Defendants have failed to prove any causative link between the alleged defect and the price paid at the foreclosure sale. They have failed to prove what the sale price would have been if the specific 9-1-1 address had also been on the notice of sale. Speculation is not proof. The trial court did not err in denying defendants' petition for relief from judgment.

¶ 26 III. CONCLUSION

¶ 27 We affirm the trial court's judgment.

¶ 28 Affirmed.