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Appellate jurisdiction during pendency of foreclosure: The Illinois Supreme Court clarifies appellate jurisdiction with dissenting opinion

By

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EMC Mortgage Corporation v. Kemp, 2012 IL 113409

According to the Illinois Supreme Court's majority opinion, the issue in this case is whether Appellate Court jurisdiction exists to consider a challenge to an order issued during the pendency of a mortgage foreclosure action. According to the dissenting opinion, the issue is whether the Appellate Court had jurisdiction to consider an *Illinois Supreme Court Rule 304(a)* appeal challenging a judgment of foreclosure and sale in a residential mortgage foreclosure action. The Appellate Court concluded that Appellate Jurisdiction was lacking. The majority Illinois Supreme Court opinion affirmed over the dissent of Justice Karmeier.

Facts

In 2005, Defendant, Kemp mortgaged her residence in Naperville. The loan was sold to EMC Mortgage in 2006. She defaulted on the loan and EMC Mortgage filed suit to foreclose in Du Page County. Eventually EMC filed a Motion for Summary Judgment. The Motion was granted in April of 2009. The Judgment of Foreclosure and Sale Order was entered on June 2, 2009.

Thereafter, Kemp filed a bankruptcy. The bankruptcy stay was eventually lifted and the judicial sale was set for October 5, 2010. On the date of the sale, Kemp filed an Emergency Motion to Vacate the Judgment under *735 ILCS 5/2-1401*, arguing that the Judgment should be vacated and the case should be dismissed pursuant to *735 ILCS 5/2-619*. Although a 45-day stay of the sale was granted, the Trial Court denied the Motion to Vacate and the Motion to Dismiss. The Trial Court's Order denying the Motions included *Illinois Supreme Court Rule 304(a)* language.

Thereafter, Kemp filed a Motion to Reconsider. On November 16, 2010, the Court denied that Motion and again added *Illinois Supreme Court Rule 304(a)* language to the Order. Kemp then

filed her Notice of Appeal seeking review of the Court's Orders of October 5, 2010, denying her Motions and November 16, 2010, denying her Motion to Reconsider. After the case was fully briefed, the Appellant Court for the 2nd District dismissed Kemp's Appeal for lack of jurisdiction.

Analysis

Majority Opinion

The Illinois Supreme Court began its analysis by reviewing *Ill. Const. 1970, art. VI, § 6* which provides that Appeals "from final judgments of a Circuit Court are a matter of right to the Appellate Court." The Court further noted that the Constitution grants the Illinois Supreme Court the right to "provide by rule for appeals to the Appellate Court from other than final judgments." Therefore it was concluded that, without an applicable rule, Appellate Courts are without jurisdiction to review judgments, orders, or decrees which are not final.

The Court then went on to reiterate the proposition that a Judgment of Foreclosure and Sale is not a final and appealable order. Until the Court enters an Order approving the sale, all of the issues between the parties have not been resolved. Therefore, in the Trial Court, a *Section 2-1401* Motion to Vacate was improper because there was no final or appealable order yet entered in the case.

The Court also found a second problem with Kemp's Appeal. The Court stated the "while a judgment of foreclosure is a final order, without *Rule 304(a)* language added to it, the judgment is not appealable" (*citations omitted*). Therefore, the Judgment itself was not appealable. Kemp did not seek to make the judgment of foreclosure appealable by adding the *Rule 304(a)* language.

Although Kemp conceded the foregoing, she still contended that the Trial Court's *304(a)* language granted Appellate Jurisdiction on those two Orders. She also argued that the Court's Order was void and that a Petition to Vacate a void Order may be made at any time.

The majority found both of those contentions "meritless". The majority held that the inclusion of the special finding in Trial Court's Order cannot confer Appellate Court Jurisdiction if the Order is in fact not final. Also, although as a general rule a void Order can be attacked at any time by a person affected by it, that fact alone does not confer Appellate Jurisdiction on a reviewing court, if such jurisdiction is otherwise absent. The proposition that a void Order can be attacked at any time merely allows a party the ability to always raise the issue but only where the Appellate Court Jurisdiction exists. If there is no Supreme Court Rule that permits the Appeal, the Appellate Court has no jurisdictional basis to consider even a void Order.

Dissenting Opinion

The Dissent, however, would have reversed the Appellate Court. Justice Karameier began his analysis by noting that whether an Appellate Court has jurisdiction is a *de novo* question of law. He went on to agree that a Judgment of Foreclosure and Sale is not a final Order because it does not dispose of all of the issues between the parties and does not terminate the litigation and it is the Order confirming the sale, not the Judgment of Foreclosure that is the final appealable Order.

However, contrary to the majority, he believes that the Illinois Supreme Court Rules do permit a review in this instance. Because the Trial Judge made a finding under *Supreme Court Rule 304(a)* that there was not just reason for delaying either enforcement or appeal or both, and made such a finding twice, the Appellate Court should not have invoked “various technical obstacles to preclude the use of *304(a)* findings.”

He went on to note that an interlocutory order may be reviewed, modified, or vacated at any time before a final judgment. Therefore, as long as the Judgment of Foreclosure was “interlocutory” Kemp had the right to ask that the Judgment of Foreclosure and Sale be set aside. Any procedural problems attendant to her motion were not raised by EMC’s counsel or noted by the Trial Court. The clear objective of her Motion was to have the Court reconsider and reject its prior ruling on the Foreclosure Judgment. Therefore, the Dissent would treat both motions as Motions to Reconsider the Judgment of Foreclosure and not be as hyper-technical in its analysis of the *2-1401* title of the Motion.

The Dissent also noted that an Appeal from an Order disposing of a Motion to Reconsider which contains *Rule 304(a)* language has always been treated as having been intended to cover the original Judgment (*citations omitted*). Finally, the Dissent noted that when the case is remanded to the Trial Court, Kemp will be free to file another Motion to Reconsider the Judgment of Foreclosure and Sale. If it is properly denominated as such, she may again request the Trial Court make the appropriate findings under *304(a)*. Therefore, if that occurs, any procedural problems perceived by the majority would be eliminated and she would be free to proceed with her Appeal to the Appellate Court and much time would have been wasted.

Conclusion

There are several “take aways” from this Opinion. Here are a few. Even though the majority found that a “judgment of foreclosure is a final Order,” without *Supreme Court Rule 304(a)* language, it is not appealable. Even though a void Order can be attacked at any time, that fact does not confer Appellate Jurisdiction. A *Section 2-1401* Motion to Vacate is improper when seeking to vacate an order that is not final and appealable.

This opinion provides an excellent refresher course on the appealability of interlocutory Orders generally, and of Orders in Foreclosure cases particularly. In this climate where Homeowners often raise technical issues that result in delays in foreclosure proceedings in order to remain in their residences rent-free as long as they can, appeals may be becoming more prevalent. Thus a thorough understanding of the finality of orders is essential. ■