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IN THE COURT OF APPEALS OF INDIANA

JPMORGAN CHASE BANK, N.A., s/b/m BANK ONE, N.A.,

Appellant/Plaintiff,

vs.

MIKE S. FORBING, SUCCESSOR TRUSTEE OF THE JACK D. FORBING REVOCABLE LIVING TRUST,

Respondent.

No. 02A05-1107-MI-395

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
John d. Kitch III, Hearing Officer
Cause No. 02C01-1012-MI-2138

December 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

JPMorgan Chase Bank, N.A. ("Chase") appeals from the Allen Circuit Court's denial of its motion to set aside the trial court's order releasing surplus funds from the tax sale of real estate commonly described as 1416 Lakewood Drive in Fort Wayne, Indiana ("the Property") to the Jack C. Forbing Revocable Living Trust ("the Trust") and dismissing Chase's petition to claim those tax sale surplus funds. Chase raises two issues for our review, which we restate as:

I. Whether the trial court abused its discretion by denying its motion to set aside the order to release the tax sale surplus funds; and

II. Whether the trial court erred by dismissing its petition to claim the tax sale surplus.

We affirm.

Facts and Procedural History

On October 13, 2003, Jack Forbing ("Jack") executed a promissory note in the amount of $91,497.78, naming Bank One, N.A. as the payee. Also on that date, Jack executed a mortgage that granted Bank One a security interest in the Property. That mortgage was recorded on October 27, 2003. Chase is the successor by merger to Bank One. On January 6, 2005, Jack executed a quitclaim deed transferring the Property to the Trust. The deed was recorded on May 24, 2005. Jack died on February 29, 2008, and his brother, Mike Forbing ("Mike"), became the trustee of the Trust.

Mike determined that the balance owed on the promissory note exceeded the value of the Property, so the Trust defaulted on the mortgage, and on May 20, 2008, it sent a letter to Chase stating that it was willing to surrender possession of the property in lieu of

foreclosure. On July 28, 2008, Mike sent another letter to Chase stating that the Property's lights, gas, and water were shut off and that he was no longer paying insurance on the Property. Chase took no action following these letters.

The Property was sold at a tax sale on October 21, 2009 for $46,000, which, after subtracting the tax bill and the costs of sale, left a surplus of $44,047.37. On June 18, 2010, the Allen County Auditor sent Chase a letter stating that the Property had been sold at a tax sale, that the period of redemption would end on October 21, 2010, that a petition for a tax deed would be filed on or after November 3, 2010, and that the petitioner intended to request a tax deed issued on or after December 6, 2010. The letter also stated that if the property had been sold for an amount more than the minimum bid and the property was not redeemed, then the owner of record may have a right to the tax sale surplus. On November 3, 2010, the Allen County Auditor sent Chase another letter stating that a petition had been filed requesting a tax deed for the Property. The letter offered Chase the opportunity to file a written objection and a hearing. Chase took no action following these letters and the tax deed was issued on December 7, 2010.

On January 27, 2011, the Trust filed a petition requesting release and payment of tax sale surplus funds from the Allen County Auditor. The trial court held a hearing on February 3, 2011. That same day, it ordered the Allen County Auditor to pay the surplus funds to the Trust.

On February 15, 2011, Chase filed an "Emergency Order to Set Aside Order to Release Funds" and a "Petition to Claim Tax Sale Surplus." Appellant's App. pp. 11, 13.

The Trust filed a motion to dismiss Chase's petition on March 2, 2011, and Chase filed a response on April 21, 2011. After holding a hearing, the trial court issued an order denying Chase's motion to set aside the order disbursing the funds on June 9, 2011. On July 7, 2011, the court issued a *nunc pro tunc* order granting the Trust's motion to dismiss Chase's Petition to claim the tax sale surplus. Chase now appeals.

I. Motion to Set Aside Order Releasing Surplus Funds to Trust

Chase contends that the trial court abused its discretion by denying its motion to set aside the court's previous order directing the Allen County Auditor to pay the tax sale surplus funds to the Trust. Actions seeking payment of a tax sale surplus are essentially ones for a declaratory judgment. Beneficial Ind., Inc. v. Joy Props., LLC, 942 N.E.2d 889, 891-92 (Ind. Ct. App. 2011), trans. denied (citing, *inter alia*, Lake Cnty. Auditor v. Burks, 802 N.E.2d 896 (Ind. 2004)). Declaratory orders have the force and effect of a final judgment, and we review them in the same manner as other judgments. Id.

Although not expressly styled as such, we interpret Chase's "Emergency Motion to Set Aside Order to Release Funds" as a motion for relief from judgment under Indiana Trial Rule 60(B) because it sought to set aside a prior order of the court. A motion for relief from judgment under Trial Rule 60(B) is entrusted to the sound discretion of the trial court; accordingly, we may neither reweigh the evidence nor substitute our judgment for that of the trial court. Centex Home Equity Corp. v. Robinson, 776 N.E.2d 935, 941-42 (Ind. Ct. App. 2002), trans. denied. "When considering a Trial Rule 60(B) motion, a trial court must weigh the alleged inequity that would result by allowing a judgment to

stand against the interests of the prevailing party in its judgment, as well as those of society at large in the finality of litigation in general." Id. at 942. We will reverse the trial court's ruling on a Trial Rule 60(B) motion only if its decision is squarely opposed to the logic and effect of the facts and circumstances. Id.

Pursuant to Trial Rule 60(B), a trial court may relieve a party[1] from a judgment for the following reasons:

> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
>
> (5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative . . . [;]
>
> (6) the judgment is void;
>
> (7) the judgment has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

[1] The record offers no indication that Chase formally intervened under Trial Rule 24 in the Trust's action against the Auditor for the release of the tax sale surplus. Because Trial Rule 60(B) provides that a trial court may relieve "a party" from a final judgment, "[t]his generally means that one who is not a party to a judgment may not have that judgment set aside unless he intervenes in the action pursuant to Trial Rule 24." Centex, 776 N.E.2d at 942. Nevertheless, because the trial court entertained Chase's motion for relief as an interested party to the tax sale, we address the merits of Chase's motion for relief.

> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

A movant filing a motion for reasons (1), (2), (3), (4), and (8) must also allege a meritorious claim or defense. Id. A Trial Rule 60(B) motion must be filed within a reasonable time, in certain cases within one year of judgment. Id.

Chase arguably has a meritorious claim to the tax sale surplus funds. See Beneficial, 942 N.E.2d at 893-94 (reversing disbursement of tax sale surplus to the intervening holder of a quitclaim deed when a financial institution with a superior mortgage also claimed the surplus). Having filed its motion to set aside the order twelve days after the trial court's order, we also agree that Chase requested relief within a reasonable time.

However, Chase has not argued and the record does not support the existence of any of the equitable reasons for relief listed in Trial Rule 60(B). In its response to the Trust's motion to dismiss, Chase argued that it did not receive proper notice of the tax sale, but it has abandoned that argument on appeal and essentially concedes that its neglect was inexcusable: "Chase does not contend that it failed to receive notices of the impending tax sale and does not contend that the Auditor or Treasurer have acted inappropriately in conducting the sale." Appellant's Br. at 10. Nor would the record support an assertion of excusable neglect given the letters Chase received from the Trust and the Auditor regarding default and the tax sale.

The record, moreover, does not reveal an instance of mistake, newly discovered evidence, or fraud or misconduct on the Trust's part. To the extent that Chase maintains that it is "no longer equitable that the judgment should have prospective application" under Trial Rule 60(B)(7), we observe that "[t]o establish that it is *no longer equitable* for a final judgment to have prospective application the movant must show that there has been a change of circumstances since the entry of the original judgment and that the change of circumstances was not reasonably foreseeable at the time of entry of the original judgment." McIntyre v. Baker, 703 N.E.2d 172, 174-75 (Ind. Ct. App. 1998). Chase has not alleged any such change in circumstances since the entry of the trial court's original judgment releasing the tax sale surplus to the Trust.

Nor has Chase directed our attention to any "exceptional circumstances" warranting relief under Trial Rule 60(B)(8). See JK Harris & Co. v. Sandlin, 942 N.E.2d 875, 883-84 (Ind. Ct. App. 2011), trans. denied; Baker & Daniels, LLP v. Coachmen Indus., Inc., 924 N.E.2d 130, 139 (Ind. Ct. App. 2010), trans. denied. Indeed, any exceptional circumstances Chase might allege could have been avoided had Chase taken action with regard to the Property when it received notice of the Trust's default or the tax sale.

Thus, Chase essentially asked the trial court for equitable relief on the basis of its meritorious claim alone. This approach does not comport with the requirements of Trial Rule 60(B). We therefore conclude that the trial court did not abuse its discretion by denying Chase's motion to set aside the court's previous order.

II. Motion to Dismiss Chase's Petition to Claim Surplus Funds

Chase also maintains that the trial court erred by dismissing its petition to claim the surplus funds. Whether technically treated as an intervenor or an interested party, Chase's intervention after judgment binds it to all prior orders and judgments in the case. Mercantile Nat. Bank of Ind. v. Teamsters Union Local #142 Pension Fund, 668 N.E.2d 1269, 1271 (Ind. Ct. App. 1996). An intervenor is not permitted to relitigate matters that have already been determined. Id. Because Chase was unsuccessful in setting aside the court's prior judgment, it is bound by that judgment and may not relitigate the issue. Consequently, the trial court did not err by dismissing Chase's petition for the surplus funds.

Conclusion

The trial court did not abuse its discretion by denying Chase's petition for relief from judgment. Chase was bound by that judgment, and the trial court did not err by dismissing Chase's petition for the surplus funds.

Affirmed.

MAY, J., and CRONE, J., concur.