No. 126290

IN THE

SUPREME COURT OF ILLINOIS

MUNICPAL TRUST AND SAVINGS BANK Plaintiff-Appellee/Respondent v. DENIS MORIARTY; MUNICIPAL TRUST AND SAVINGS BANK, as Trustee Under Provisions of a Trust Agreement Dated January 8, 2014 and known as Trust No. 2487; LUCIEN SHERROD; THE CITY OF KANKAKEE; KANKAKEE ENVIRONMENT) UTILITY SERVICE; UNKNOWN OWNERS; and NONRECORD CLAIMANTS Defendants (Denis J. Moriarty, Petitioner-Appellant)	) Appeal from the Appellate Court of) Illinois, Third Judicial District) Case No. 3-19-0016)) Therein heard on appeal from the) Twenty-First Judicial Circuit) Kankakee County) Circuit Court Case No. 16-CH-258) The Honorable Ronald J. Gertz,) Judge Presiding

BRIEF AND APPENDIX OF APPELLEE MUNICIPAL TRUST AND SAVINGS BANK

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STATEMENT OF THE ISSUES

1. Whether the final judgment confirming sale was entered with jurisdiction over the mortgagor, rendering said judgment valid, and thereby barring this collateral attack per section 15-1509 of the Illinois Mortgage Foreclosure Law, and thus depriving the trial and appellate courts of jurisdiction to hear this collateral attack.
2. Whether a defendant can raise a challenge to personal jurisdiction after he previously challenged personal jurisdiction, received a ruling on that challenge, and voluntarily dismissed the subsequent appeal to let that order stand.
3. Whether a section 2-1401 petition and appeal should be dismissed because the defendant failed to join the non-party record titleholder of the properties he asks to be returned.
4. Whether a defect in service of process affirmatively appears in the record, thus depriving a third-party purchaser from protection as a *bona fide* purchaser under Section 2-1401(e).
5. Whether a collateral challenge is moot where a mortgagor seeks return of properties that were foreclosed and subsequently conveyed to a third-party purchaser and the mortgagor had not obtained a stay.

JURISDICTION

Pursuant to the Mortgage Foreclosure Law, *res judicata*, and mootness principles, the circuit court lacked subject matter jurisdiction over this collateral proceeding. Because it lacked jurisdiction, it could not issue a valid final judgment. With no valid final judgment under either Rule 301 or Rule 303, there was no appellate jurisdiction. Because the

appellate court lacked jurisdiction, this Court lacks a valid decision to review, and dismissal of this appeal is appropriate.

STATEMENT OF FACTS

Moriarty's statement of facts omits certain relevant facts and contains some false or misleading statements as noted below. A more complete and accurate statement of the facts follows.

On December 14, 2016, Municipal filed a Complaint for Foreclosure against Moriarty in his home county of Kankakee County, Illinois relating to several commercial properties located therein. (C13-216[1]). Municipal had a summons issued for Moriarty with an address in Hinsdale, IL, which straddles Cook and DuPage counties.

On December 28, 2016, Moriarty, while in the city of Chicago, was served by a registered process server employed by a licensed process serving agency. Chicago is in Cook County, the only county in Illinois with a population of greater than 2 million. The process server was not specially appointed by the Kankakee County circuit court to serve the Kankakee County summons in Cook County. (C242-43).

On January 23, 2017, Municipal filed a Motion for Entry of Foreclosure and Sale. (C248-265).

On January 30, 2017, the Judgment for Foreclosure and Sale was signed and entered. The judgment included findings of proper service on and personal jurisdiction over Moriarty and found Moriarty in default for failure to answer or otherwise appear. (C290-350).

[1] Municipal will refer to the Common Law with a "C", the Report of Proceedings with an "R", and its Appendix with an "A".

On June 28, 2017, a sheriff's sale was held and Municipal was the successful bidder. (C363-74).

On June 30, 2017, Municipal filed a Motion for Confirmation of Foreclosure Sale ("Motion to Confirm Sale") with a hearing set for July 17, 2017. (C375-378).

On July 17, 2017, prior to the hearing on the Motion to Confirm Sale, Moriarty filed a written "Appearance Pro-Se." (C379). He did not file any objection to the court's jurisdiction and his appearance contained no language indicating the appearance was anything other than a general appearance.

After filing his appearance, Moriarty appeared at and participated in the July 17, 2017 hearing on the Motion to Confirm Sale. (R6-18). He made no objection to the court's jurisdiction, stating only that he had not been served with the notice of the sale despite receiving other mail from Municipal at another location. (R12:13-R13:11). At that hearing and before the sale was confirmed, Moriarty asked the court for relief, *i.e.*, a 30-day extension to redeem the property. (R11-13). Moriarty even brought a witness who addressed the court on his behalf. (R7-11). The court denied Moriarty's motion and confirmed the sale.

On August 16, 2017, Moriarty's 30-day appeal deadline expired.

On Thursday, August 17, 2017, after the trial court had lost jurisdiction to consider postjudgment motions and the appeal deadline had expired, Moriarty filed a motion to "quash serive judication [*sic*]." (C382).

On August 28, 2017, the court conducted a hearing at which Moriarty's motion was considered on the merits and denied, with the court stating that "the process of the service was good." (R23:4).

On September 8, 2017, with the appeal deadline passed and no motion, appeal, or stay pending, Municipal conveyed title to a third-party buyer. (R41:19-20; A3-4).

On September 25, 2017, Moriarty filed a notice of appeal from the denial of his Motion to Quash. The notice makes specific reference to the interlocutory order of foreclosure and sale but does not mention the final order confirming sale. (C386-389). Because Moriarty's Motion to Quash was filed 31 days after the order confirming sale, this notice was not a timely appeal of the order confirming sale.

On January 8, 2018, the appellate court entered an order on its own motion, to show cause why the appeal of the Motion to Quash should not be dismissed for lack of jurisdiction, as such motion is "neither a final judgment nor an appealable interlocutory order." (A5).

On April 26, 2018, the appellate court allowed Moriarty's motion to voluntarily dismiss that appeal. (C401).

On May 21, 2018, Moriarty filed a section 2-1401 petition with the trial court, again challenging the "Judgment of Foreclosure . . . and all subsequent orders," but not referencing the final order confirming sale. (C402-407).

On July 6, 2018, Municipal filed a response in opposition to the section 2-1401 Petition, arguing that the circuit court had personal jurisdiction over Moriarty at the time it entered final judgment confirming the sale. (C42-438; R40). Moriarty filed a reply, and Municipal filed a supplemental response asserting that Moriarty failed to join all necessary parties, including "the current record titleholder." (C450).

On September 21, 2018, after hearing argument on the issues raised by the pleadings, the circuit court denied Moriarty's section 2-1401 petition on the ground that service of process was proper. (C455).

On January 4, 2019, after denial of his motion to reconsider, Moriarty filed a notice of appeal of the denial of his section 2-1401 petition. (C466).

On March 5, 2019, Municipal moved the dismiss the appeal, arguing that the appellate court lacked subject matter jurisdiction because the circuit court had jurisdiction over Moriarty when the order confirming sale was entered and because the appeal was moot due to a sale of the properties to a third party. (A10-20).

On March 26, 2019, the appellate court denied Municipal's motion to dismiss the appeal, instead ordering the parties to address the issues of mootness and jurisdiction in their briefs. (A21).

On May 4, 2020, the appellate court affirmed the denial of the section 2-1401 petition on the ground that service of process was proper. 2020 IL App (3d) 190016. The appellate court's decision did not address nor reference the appellate jurisdiction or mootness questions.

Moriarty's motion for reconsideration was denied and this Court granted leave to appeal.

ARGUMENT

I. INTRODUCTION AND FRAMEWORK FOR ANALYSIS

This is an appeal of the denial of a section 2-1401 petition that attacks the underlying foreclosure action as void and improperly asks the court to award the mortgagor damages. Municipal argues in this brief that the underlying final judgement is not void

because service of process was good, and even if this Court finds otherwise, Moriarty submitted to jurisdiction before the final order was entered. The court had jurisdiction over Moriarty at the time the final judgment was entered; and even if this Court were to determine that the final judgment was void, these collateral proceedings are moot because the subject properties have been sold to a *bona fide* purchaser. 735 ILCS 5/2-1401(e).

The order confirming sale is the final judgment in a foreclosure action. The pivotal issue in this collateral proceeding is whether the final judgment confirming sale was entered with or without jurisdiction over Moriarty, *i.e.*, whether the judgment confirming sale is void or valid. If the order confirming sale is valid, the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-101 *et seq.*) bars this collateral attack, thus depriving this Court and the courts below of subject matter jurisdiction to rule on the merits of the section 2-1401 petition. 735 ILCS 15-1509(c); see also *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017, ¶ 48 (quoting *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30) ("'There is simply no Illinois authority to support the defendant's argument that she can utilize section 2-1401 to circumvent . . . section 15-1509(c) of the Foreclosure Law after the circuit court confirmed the sale of the property.'"). Resolving the question of personal jurisdiction and validity of the judgment confirming sale would, however, also resolve the merits of the section 2-1401 petition if the Court were to consider it on its merits. The only difference is whether this Court's analysis seeks to resolve the "threshold" issue of the court's subject matter jurisdiction (*Secura Insurance Co. v. Illinois Farmers' Insurance Co.*, 232 Ill.2d 209) or seeks to resolve the merits of the section 2-1401 petition.

II. SERVICE OF SUMMONS WAS PROPER AND EFFECTIVE TO OBTAIN JURISDICTION OVER MORIARTY.

The appellate court was correct in its interpretation of Section 2-202 of the Code of Civil Procedure. 2020 IL App (3d) 190016 (interpreting 735 ILCS 5/2-202). The Circuit Court acquired personal jurisdiction over Moriarty because service of summons was effective, notwithstanding the absence of a special appointment to serve it in Cook County. For this reason, the final foreclosure judgment was valid and section 15-1509 of the Mortgage Foreclosure Act (735 ILCS 5/15-1509) bars this collateral proceeding, rendering the section 2-1401 petition a nullity. *Prabhakaran*, 2013 IL App 111224 ¶ 30.

This case was filed and adjudicated in Kankakee County—a county with a population of fewer than 2 million people. The foreclosed property is in Kankakee County. Summons was issued in Kankakee County. Moriarty's residence was in Kankakee County. (R42:7-17). He was served with process where and when he could be found in Cook County, by a private detective who was a registered employee of an agency that was licensed under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004, as authorized by the Code of Civil Procedure. Moriarty does not dispute that he received the summons and complaint by personal delivery that would otherwise strictly comply with the service of process rules and that the private detective was a licensed process server.[2] Thus, due process was served.

Section 2-202 of the Code of Civil Procedure, which dictates who is authorized to serve process, distinguishes counties with a population of 2 million or more from those

[2] Although Moriarty claims for the first time in his Supreme Court brief that the address on the summons is a Cook County address, that fact is not apparent from the "Hinsdale" reference, and it is not the location where he was actually served. Hinsdale straddles Cook and Du Page counties.

with fewer than 2 million. The only county in Illinois with a population of 2 million or more is Cook County. The section provides that the sheriff of each county will serve process and, in every county but Cook, the sheriff may employ civilian personnel to do so. 735 ILCS 5/2-202(a). Moreover, in every county but Cook, this statute permits private detectives licensed or registered pursuant to the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 to serve process "without special appointment." *Id.* The statute goes on to state that "[s]ummons may be served upon the defendant wherever they may be found within the State." *Id.* § 5/2-202(b).

Notably, subsection (b) does not say that a summons may be served in any county with a population of less than 2 million but "wherever they may be found within the State." 735 ILCS 5/2-202(b). Wherever means anywhere, in any county. The statute expressly contemplates an officer serving process outside his or her county—again without distinguishing Cook County—noting that he or she may not tax her mileage outside his or her home county as costs. *Id.* The plain language of the statute demonstrates the legislature's intent to distinguish Cook County's courts as having to specially appoint private detectives on a case-by-case basis. At the least, it demonstrates that the General Assembly knows how to distinguish Cook County when it wants to do so, and the Court should therefore not imply such distinction where the legislature has failed to do so. See e.g., *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997) ("[T]he inference that all omissions should be understood as exclusions stands despite the lack of a negative words of limitation."). This "maxim is closely related to the plain language rule in that it emphasizes the statutory language as written." *Id.*

When interpreting a statute, the Court views "the statute as a whole, taking 'words and phrases in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous.'" 2020 IL App 190016, ¶ 17 (quoting *People v. Clark*, 2019 IL 122891, ¶ 20). Further, the Court presumes "that the General Assembly did not intend absurdity, inconvenience, or injustice in enacting legislation." *Clark*, 2019 IL 122891 ¶ 20.

Although subsection (a) may seem ambiguous when read in isolation, the only way to read that subsection harmoniously with subsection (b)'s direction that service may be had on a defendant "wherever they may be found in the State" is to interpret subsection (a) as a direction to litigants in the Cook County circuit court. To hold otherwise would be to render the distinction between counties with a population of 2 million or more from those with fewer than 2 million superfluous: every plaintiff would have to ask every circuit court for a special appointment when using a private process server just in case the private process server happens to find the defendant in Cook County. While this situation may happen less often in downstate counties, the prospect of its occurrence in closer counties like Kankakee would render the distinction useless.

Moreover, it would create considerable inconvenience. For example, there will be times when a process server unexpectedly finds or follows a defendant into Cook County; it would be absurd to believe that the legislature intended to allow that defendant to evade service simply because the plaintiff filed suit in another county and did not seek a special appointment when he did not believe the defendant would be found in Cook County. This Court should consider, as well, the unknown number of summonses that were served by

special process servers on defendants in Cook County without special appointment, whether known to be or unexpectedly found to be in Cook County, and whether all of those cases—whether foreclosure actions or not—would be opened to a collateral attack, perhaps years after judgment. See *People v. Davis*, 156 Ill. 2d 149, 155 (1993) (the court can consider a collateral challenge to its jurisdiction at any time).

Because service of summons was valid and effective, the entire foreclosure proceedings were valid and effective, and Moriarty's attempt to collaterally attack the foreclosure via a section 2-1401 Petition is barred by Section 15-1509(c) of the Mortgage Foreclosure Act, thus depriving the circuit court of subject matter jurisdiction and the appellate court of appellate jurisdiction. If this Court finds that the final judgment confirming the sale was entered with jurisdiction over Moriarty (*i.e.*, was valid, not void), then this court should dismiss the appeal for lack of jurisdiction, vacate the appellate court's decision, and dismiss the section 2-1401 petition with prejudice.

Even if this court concludes that service of summons was not compliant with section 2-202, this court should find that the defect was a mere technical deficiency that did not invalidate the actual service. Compare *BankUnited, National Association v. Giusti*, 2020 IL App (2d) 190522, ¶ 30 (defect in form of summons was technical, nonsubstantive, and did not deprive the trial court of personal jurisdiction over the defendant).

However, even if this Court finds that service of the Kankakee County summons was not effective due to lack of a special appointment in this case to serve this summons in Cook County, the Court can and should dismiss the appeal because Moriarty submitted to the court's jurisdiction before entry of the order confirming sale.

III. THE CIRCUIT COURT ACQUIRED PERSONAL JURISDICTION OVER MORIARTY WHEN HE APPEARED, PARTICIPATED, AND REQUESTED RELIEF AT THE HEARING ON MUNICIPAL'S MOTION TO CONFIRM SALE.

Even if the Court finds that service of process was ineffective, Moriarty voluntarily subjected himself to the court's jurisdiction before final judgment by way of a general appearance, active participation in the hearing, and submission of an oral motion that did not challenge the court's jurisdiction. Because the court had jurisdiction over him when it entered the final judgment confirming the sale, that final judgment was perhaps voidable, but was not void. Moriarty failed to challenge that order within 30 days by postjudgment motion or appeal. Instead, 31 days after the final order was entered, he filed a Motion to "quash serive judication [*sic*]" and, after that motion was denied, he filed a notice of appeal—which he later voluntarily dismissed after the appellate court questioned its jurisdiction. He subsequently attempted to restart his appeal clock with the section 2-1401 petition at the heart of this appeal, ignoring the voidness principles set out in this Court's precedents and section 15-1509 of the Mortgage Foreclosure Law, both of which deprive the circuit court of subject matter jurisdiction to entertain that petition. Because the circuit court lacked jurisdiction to consider the section 2-1401 petition, the appellate court too lacked jurisdiction to hear the appeal. *KT Winneburg v. Calhoun County Board of Review*, 403 Ill. App. 3d 744, 747 (2010) (quoting *Greer v. Illinois Liquor Control Commission*, 185 Ill. App. 3d 219, 221 (1989)). The circuit court's denial of the section 2-1401 petition is a void order and cannot support appellate jurisdiction under the final judgment rules in Rules 301 or 303. This Court should therefore dismiss this appeal and the entire section 2-1401 proceeding or, alternatively, affirm the lower courts.

a. Moriarty subjected himself to the court's jurisdiction—before entry of the final judgment—by entering his appearance, participating in the hearing, and requesting relief from the court, without objecting to service of summons or jurisdiction.

The order confirming sale is the final judgment in a foreclosure action. "It is well settled that a judgment ordering the foreclosure of a mortgage is not final and appealable until the trial court enters an order approving the sale and directing the distribution." *EMC Mortgage Company v. Kemp*, 2012 IL 113419, ¶ 11. That is because the judgment of foreclosure "does not dispose of all issues between the parties and terminate the litigation." *Id.* "Accordingly, it is the order confirming sale, rather than the judgment of foreclosure, that operates as the final and appealable order in a foreclosure case." *Id.* ¶ 11. Indeed, it is "the confirmation of sale that ultimately divests the borrower of [his] property rights." *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 30.

When a defendant subjects himself to the jurisdiction of the circuit court, he voluntarily subjects himself to the court's jurisdiction from that point forward. *BAC Home Loan Servicing LP v. Mitchell*, 2014 IL 116311, ¶ 26; *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). Moreover, when a litigant intends to challenge the court's jurisdiction, he must do so before filing any other pleading or motion. 735 ILCS 5/2-301(a). Under the version of this statute in effect at the time, a failure to challenge the court's jurisdiction before filing a pleading or other motion waived any such challenge. 735 ILCS 5/2-301(a-5) (West 2016).

1. Moriarty did not object to jurisdiction or entry of the confirmation order at the hearing.

Moriarty physically appeared in court for the hearing on the Motion to Confirm Sale on July 17, 2017 (R3) and filed a written appearance (C379; R11). He claims that he

objected to entry of the confirmation order. (Appellant's Brief ("App. Br.") p. 9). The record, however, belies that assertion. When the circuit court explained to Moriarty that he had not filed an appearance after service of summons, he responded "Okay." (R14:15-17). The Court told him that he was in default because he never answered or appeared, and that notice of the sale was not required to be provided to him; admonishments to which repeatedly answered "Okay." (R15:4-21). Finally, the court told him that it was going to confirm the sale and, after an interruption by his advocate witness, he again responded "Okay. Thank you, sir." (R15:22-R17:1). The word "okay" can hardly be interpreted to be an objection.

Although Moriarty leaves Municipal and the Court to guess what words or statements he construes to be an objection, he states at one point that Municipal "didn't serve me --." (R12:13). This statement, however, was not an objection or even a reference to the court's jurisdiction or to entry of the order confirming sale. It was his response to the court's inquiry into whether or not the bank was required to send him notice of the sale. (See R13:5-11 (Moriarty pointing out that he received mail other than the notice of sale at another address)). Moreover, Moriarty stated that not receiving notice of the sale was not a "big deal," at least not if the court were to grant him the additional 30 days he asked for to pay off the loan and redeem the properties. (R12:19-R13:11).

2. Moriarty actively participated in the hearing, including requesting relief from the Court.

Moriarty's written appearance contained no language limiting its scope or otherwise indicating that it was a limited appearance. (C379). It did not in any way challenge jurisdiction, service of process, or the court's power to grant judgment. It was a template-form "Appearance Pro-Se" onto which he wrote the case caption and his

signature. (C379). Moreover, he actively participated in the hearing. (R7-R17). He asked for additional time to redeem the property (R11:8-12; R12:19-R13:4), and even brought a witness (R7:22-R8:1) who not only addressed the court (R8:18-R9:1; R10:18-R11:5) but advocated on Moriarty's behalf (R9:14-15; R11:22-24; R16:8-11). The combination of Moriarty's appearance and subsequent participation, taken together, was sufficient to establish jurisdiction over Moriarty. *BAC*, 2014 IL 116311, ¶ 35; *Verdung*, 126 Ill. 2d at 547-48.

In his brief, Moriarty equivocates on the question of whether jurisdiction attached when he appeared on July 17, 2017, hinting that jurisdiction may not have attached until sometime after the hearing, if at all. (See App. Br. p. 12: "The Trial Court's jurisdiction over Moriarty is only prospective – at the earliest from July 17, 2017 – but arguably not even as early as that time.").). However, in his argument below he admits that he "eventually submitted to the jurisdiction of the Court" by way of "the appearance by Moriarty on July 17, 2017" (Moriarty's Appellate Reply ("App. Rep."), pp. 2-3; see also R36:7-15 and R45:6-11 (Moriarty's admissions at the hearing on the section 2-1401 petition)).

On the same date and during the same hearing, Moriarty asked the court for an extension of time to redeem the commercial properties at issue. (R12:19-R13:4). More specifically, he invoked the court's jurisdiction by asking that it delay confirmation of the sale for 30 days so that he could negotiate with Municipal to pay off his loan and redeem the properties. (R12:19-R13:4). He brought a witness from another bank to address the court and advocate on his behalf. (R7-16). The court could not have delayed confirming the sale, which would have been contrary to Municipal's interest and desire, unless it

entertained Moriarty's request. Such a request is a motion. See e.g. *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005) ("A motion is an application to the court for a ruling or an order in a pending case.").

This Court has long held that "a person cannot, by his voluntary action, invite the court to exercise its jurisdiction and at the same time deny that jurisdiction exists." *Lord v. Hubert*, 12 Ill. 2d 83, 87 (1957); see also *in re Estate of Burmeister*, 2013 IL App (1st) 121776, ¶ 35 (quoting *Lord*.). Thus, even if Moriarty's appearance and participation were not enough to confer jurisdiction over him, he nonetheless submitted to the court's jurisdiction by asking the court—*i.e.*, invoking the court's power—for an extension of time to redeem.

Notably, Moriarty's appearance and motion occurred before the court entered the order confirming sale. (R7–R15). Moriarty submitted himself to the court's jurisdiction from that point forward. *BAC*, 2014 IL 116311 ¶ 35; *Verdung*, 126 Ill. 2d at 547-48. Because he made a motion that did not challenge the court's personal jurisdiction, he acknowledged the court's jurisdiction over him, effectively waiving objection to the attachment of personal jurisdiction. 735 ILCS 5/2-301(a-5) (West 2016). The court even reviewed the record in front of him to confirm that the notice requirements of section 15-1507(c) were met. (R13:12-R16:7). Only then—after Moriarty's general appearance, motion, and waiver—did the circuit court enter the order approving the sale. (R15:22-23). Moriarty responded: "Okay. Thank you, sir." (R17:1).

Thus, even assuming, *arguendo*, that service of process did not strictly comply with the technical requirements of section 2-202, the order confirming the sale was entered with jurisdiction because Moriarty voluntarily subjected himself to the court's jurisdiction

before the order was entered. This voluntary submission gave Moriarty his day in court and an opportunity to object to confirmation of the sale on any grounds, including that the default judgment and sale were void. It also rendered the confirmation order valid and effective in divesting his ownership in the subject properties, subject only to a timely postjudgment motion or appeal. Under these circumstances, "[t]here can be no doubt that as of [July 17, 2017], the date of the general appearance, the court had jurisdiction over [Moriarty]." *Verdung*, 126 Ill. 2d at 547; see also *BAC*, 2014 IL 116311, ¶ 26 (citing *Verdung*.).

Indeed, Moriarty's 2-1401 petition does not mention the final judgment confirming the sale. Instead of targeting that final order in his section 2-1401 petition, he runs an end-around and asks the court to find "the default Judgment of Foreclosure . . . and all subsequent orders entered in this case are void." (C406). He improperly asks for additional damages (C406), despite that the only relief authorized by section 2-1401 is "[r]elief from final orders or judgments" (735 ILCS 5/2-1401(a)). In his notice of appeal, he again fails to mention the order confirming sale, which was the final order in this case and was unquestionably entered after Moriarty submitted to the court's jurisdiction. (C466). These linguistic acrobatics demonstrate what he cannot dispute: that the final order confirming sale was entered with jurisdiction.

b. Because the circuit court had jurisdiction over Moriarty when it entered the order confirming the sale, that order is not void, but valid and effective.

Although Moriarty acknowledged his voluntary submission to jurisdiction in argument below, he nonetheless attacked the confirmation order as void. He did so based not on a lack of jurisdiction, but based on the alleged voidness of the prior interlocutory

orders of default and sale. See App. Br. P. 9 ("The subsequent confirmation order entered by the Court on July 17, 2017 (C380-381) is void because there cannot be a confirmation order when the default judgment was void.") This argument is premised on a fundamental misunderstanding of the difference between the terms "void" and "voidable." See generally *Taylor v. Bayview Loan Servicing, LLC,* 2019 IL App (1st) 172652, ¶ 14 (discussing this Court's precedents differentiating a void judgment from a voidable judgment). Moriarty's attempt to side-step the distinction between a void and voidable judgment is an acknowledgement that the distinction is dispositive of this appeal.

First, as noted in the primary case on which Moriarty relies, a judgment rendered without proper service of process is void only "where there has been neither a waiver of process nor a general appearance by the defendant." *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 1001 (1988) (citing *State Bank v. Thill*, 113 Ill. 2d 294, 308 (1986)). "An order is rendered void not by error or impropriety but by lack of jurisdiction of the issuing court." *Vulcan Materials Company v. Bee Construction*, 96 Ill. 2d 159, 165 (1983). "Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time." *Davis*, 156 Ill. 2d at 155; see also *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 530-31 (2001) (citing and quoting *Davis*.). "By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *Davis*, 156 Ill. 2d at 155-56. "[J]urisdiction is not affected by an incorrect judgment: 'jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right.'" *Steinbrecher*, 197 Ill. 2d at 532 (quoting *Davis*, 156 Ill. 2d at

156.). Indeed, "judgments in a civil proceeding may be collaterally attacked as void only where there is a total want of jurisdiction in the court which entered the judgment, either as to the subject matter or as to the parties." *Johnston v. City of Bloomington*, 77 Ill. 2d 108, 112 (1979). "If jurisdiction has attached, no error committed by the court can render the judgment void and the judgment is binding on the parties and on every court unless reversed or annulled in a direct proceeding." *Id.*

The distinction between void and voidable is key to deciding this matter, and to understanding where Moriarty's argument falls apart: whether the circuit court obtained jurisdiction over Moriarty by way of service of process does not, *ipso facto,* invalidate the final order, because he submitted himself to the court's jurisdiction before the entry of that final order confirming sale. As he admits (at least in prior pleadings and argument), the court acquired jurisdiction over him by way of his voluntary submission to its authority before entry of the final order confirming sale. Even if the Court were to adopt Moriarty's argument that service of summons was invalid, personal jurisdiction attached by way of his appearance, participation, and motion before the order confirming sale. Such a holding by this Court might mean that the circuit court confirmed a void sale. It might mean that the order confirming the sale was entered in error. Every order entered before Moriarty's appearance might be void, but that would not change the fact that Moriarty submitted to jurisdiction before entry of the order confirming sale, and that final order, even if erroneous, is not void. A judgment can be rendered void only by a lack of jurisdiction; any other error or impropriety renders the order voidable. *Vulcan*, 96 Ill. 2d at 165; *Johnston*, 77 Ill. 2d at 112. The circuit court was not without jurisdiction at the time it entered its

final judgment, and that final judgment was therefore not void. Erroneous and voidable perhaps, but not void. *Vulcan*, 96 Ill. 2d at 165.

Moreover, Moriarty had multiple opportunities to challenge the court's jurisdiction in effecting the foreclosure. He could have responded to the summons he received—even if just to challenge the propriety of service—instead of waiting until the eleventh hour. After entering his eleventh-hour appearance, he could have objected to the motion to confirm sale on the grounds that justice was not done in that the sale was void for lack of jurisdiction. 735 ILCS 5/15-1508(b)(iv); *McClusky*, 2013 IL 115469 ¶ 19. He could have timely sought reconsideration or filed a timely postjudgment motion. 735 ILCS 5/2-1203(a). Finally, he could have appealed that order within 30 days of its entry or denial of any timely postjudgment motion. Ill. S. Ct. R. 303(a)(1). He failed to take any of those actions.

Moriarty's section 2-1401 petition is merely a last-ditch attempt to avoid the consequences of his lack of diligence and repeated errors in attempting to avoid the foreclosure.[3] While Moriarty limits his argument in this case to whether service of process was proper, the simple fact is that he blew multiple opportunities to contest jurisdiction, and waived objection to entry of the order confirming sale. 735 ILCS 5/2-301(a), (a-5) (West 2016).

To be clear, Municipal does not argue that Moriarty waived objection to jurisdiction retroactively, but only that he subjected himself to prospective jurisdiction before entry of the order confirming sale and thereafter waived any argument that the court did not have

[3] Notably, as later argued, Moriarty's Motion to "Quash Serive Judication [*sic*]" was also, in substance, a section 2-1401 petition.

the power to confirm a void sale. Further, even if the Court takes him at his word that he objected to entry of the order confirming sale, he failed to renew and preserve that objection through a timely postjudgment motion, a timely appeal, or both. Because of these failures, the order confirming sale remains valid and enforceable—even if erroneous—because the circuit court was not without jurisdiction to enter it. It became final upon expiration of the postjudgment and appeal deadlines 30 days later.

c. Because the order confirming sale was entered with jurisdiction, even if erroneously, the circuit court did not have jurisdiction to consider Moriarty's section 2-1401 Petition.

Whether an order is void or voidable presents a question of subject matter jurisdiction. *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 27. The circuit court generally has jurisdiction to entertain a collateral challenge to its jurisdiction at any time, but lacks jurisdiction to consider other defenses, even if those defenses might have been meritorious if timely asserted. See *Davis*, 156 Ill. 2d at 155-56 (discussing the difference between a void judgment and a voidable judgment.). A voidable judgment "is not subject to collateral attack." *Id.* "A section 2-1401 petition is not a timely appeal; it is a new action in the circuit court that seeks vacation of a final judgment." *Prabhakaran*, 2013 IL App (1st) 111224 ¶ 28 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002).). It is, therefore, a collateral attack.

As argued above, the circuit court was not without jurisdiction when it entered the order confirming sale. Moriarty all but expressly admits that fact, instead arguing that the prior interim orders were entered without jurisdiction, and therefore the Court was precluded from confirming the sale. That the court had jurisdiction at entry of the final order means that, regardless of how this Court rules on the service of process issue, the

confirmation order was, at worst, voidable and not void. It cannot be collaterally attacked. *Davis*, 156 Ill. 2d at 155-56. Because the order was voidable and not void, and therefore could not be collaterally attacked, the circuit had no jurisdiction to consider Moriarty's Section 2-1401 petition attacking it. *Johnston*, 77 Ill. 2d at 112.

The Mortgage Foreclosure Law codifies this point. Section 15-1509(c) bars any collateral challenge to a final foreclosure judgment after payment of the purchase price and vesting of title in the foreclosure buyer. 735 ILCS 5/15-1509(c); *Prabhakaran*, 2013 IL App 111224 ¶ 30; see also *McClusky*, 2013 IL 115469 ¶ 27 (similarly, borrow could not use section 2-1301(e) to set aside a default judgment in a foreclosure case). The only exception to this complete bar is when the circuit court lacked personal jurisdiction over the defendant at the time it confirmed the sale. *BAC*, 2014 IL 116311, ¶¶ 44-45; *Deutsche Bank National Trust Company v. Hall-Pilate*, 2011 IL App (1st) 102632. In this case, the circuit court had jurisdiction over Moriarty at the time it entered the order confirming sale, whether by proper service or by his later submission to jurisdiction. (C379-38l; R6-18). See argument above. Municipal thus lawfully acquired and subsequently transferred title to a third-party buyer after Moriarty missed his appeal deadline. (R41; A3-4). This section 2-1401 collateral attack is therefore barred, and the circuit court was without jurisdiction to consider it. Thus, this Court should dismiss this appeal and the entire section 2-1401 proceeding or affirm the lower courts' denial of the petition.

d. The appellate court, in a 2011 published decision, has already addressed the issue of appearing and participating in a case after a default judgment of foreclosure but before entry of the order confirming sale and this Court should adopt that reasoning.

In a published decision ignored by Moriarty, the appellate court has already considered and decided the effect of a general appearance and motion after entry of a

default judgment but before entry of the order confirming sale. *Hall-Pilate*, 2011 IL App 102632. In that case, as in this case, the defendants to a mortgage foreclosure action challenged the court's jurisdiction based on an alleged failure to properly serve process. *Id.* ¶ 6. Although the defendants filed a motion to quash service, they agreed that they were seeking relief from a final judgment pursuant to section 2-1401. *Id.* ¶ 11. After the judgment of foreclosure but before confirmation of the sale, the defendants filed a motion to stay approval of the judicial sale. *Id.* ¶ 17. "The motion did not mention or raise any kind of objection as to the trial court's jurisdiction over either of the defendants nor did the motion seek an extension of time to answer or otherwise appear." *Id.* The motion to stay was denied and the sale approved. *Id.*

Under these circumstances, the *Hall-Pilate* court held that the "[d]efendants, by participating in the case without raising an objection to personal jurisdiction, voluntarily submitted to the trial court's jurisdiction and waived any objection." *Hall-Pilate*, 2011 IL App 102632 ¶ 18. It also noted that the defendants sought a stay of the judicial sale, "not an extension of time to answer the complaint or otherwise appear." *Id.* It explained that section 2-301(a-5) (735 ILCS 5/2-301(a-5) (West 2010)) "makes it clear that any motion, apart from a motion for an extension of time to answer or otherwise appear, filed by the party contesting personal jurisdiction waives all jurisdictional objections." *Hall-Pilate*, 2011 IL App 102632 ¶ 18. More importantly, the court explained, consistent with this Court's later ruling in *BAC* (2014 IL 116311 ¶ 28), that defendants' waiver did not violate the rule that one cannot retroactively waive a personal jurisdiction defense, because the defendants filed it prior to entry of the *final* judgment, *i.e.*, the order confirming the sale. *Hall-Pilate*, 2011 IL App 102632 ¶ 20; see also *McCluskey*, 2013 IL 115469 ¶ 30 ("[I]t is

the confirmation of sale that ultimately divests the borrower of [his] property rights."). When the defendants argued that the waiver of jurisdiction did not apply to one of the defendants because she did not appear at an earlier hearing with her husband, the court rejected that argument: "We are not persuaded[,] as the relevant action by the defendants was the filing of the emergency motion for a stay . . . ." *Id.* ¶ 19.

Hall-Pilate is directly on point with the facts of this case. Like here, the defendants alleged that they were not properly served. *Hall-Pilate*, 2011 IL App 102632 ¶ 6. Like here, they submitted to the court's jurisdiction after a default judgment of foreclosure was entered but before entry of the order confirming sale. *Id.* ¶ 17. Like here, they appeared and participated in the proceedings and filed a motion before the order confirming the sale that "did not mention or raise any kind of objection as to the trial court's jurisdiction [nor] seek an extension of time to answer or otherwise appear." *Id.* Thus, just like in *Hall-Pilate*, Moriarty waived objection to the attachment of jurisdiction as of the time of his appearance and motion, which was before the entry of the final order in the case. *Id.* ¶¶ 18, 20.

Thus, if this Court adopts Moriarty's position on the service of process issue, it should also adopt the *Hall-Pilate* holding as a well-reasoned and principled extension of its own holdings that fairly balances the requirement that a court obtain jurisdiction before entering final judgment with the need for finality of judgments. After all, "[o]nce a final judgment has been rendered, setting it aside is a matter of considerable significance." *Sarkissian*, 201 Ill. 2d at 102. Such a holding would mean that, even if Moriarty prevails on the service of process issue, the order confirming sale was entered with jurisdiction after Moriarty's voluntary appearance, participation in the case, and motion. Because that order

was entered with jurisdiction over him, Moriarty's only remedy was to object to that order (735 ILCS 5/15-1508(b)) in a timely motion to reconsider or directly appeal that order with the time constraints of Rule 303. 735 ILCS 5/15-1509(c). Without a timely motion to reconsider or appeal, the appellate court could not grant any effective relief and an appeal is moot. *Steinbrecher*, 197 Ill. 2d at 522-23.

This is the only holding fully consistent with the Mortgage Foreclosure Law and all of this Court's precedents because it does not find that Moriarty submitted to retroactive jurisdiction (*BAC*, 2014 IL 116311 ¶ 28), but that he submitted to jurisdiction before entry to the order confirming sale, wherein he had the statutory right to object to confirmation (735 ILCS 15-1508(b); *McCluskey*, 2013 IL 115469 ¶ 26), rendering that final order valid (*Davis*, 156 Ill. 2d at 155-56; *Johnston*, 77 Ill. 2d at 112). Because the order was entered with jurisdiction, it was not void. *Davis*, 156 Ill. 2d at 155-56; *Johnston*, 77 Ill. 2d at 112. Because it was not void, it was not subject to collateral attack, and Moriarty's section 2-1401 petition was barred both statutorily and by voidness principles. 735 ILCS 5/15-1509; *Davis*, 156 Ill. 2d at 155-56; *Johnston*, 77 Ill. 2d at 112. Because the petition was barred, the circuit court was without jurisdiction to consider it. This Court should therefore dismiss this appeal and the entire section 2-1401 proceeding or, alternatively, affirm the lower courts.

IV. THIS ACTION IS MORIARTY'S SECOND CHALLENGE TO THE CIRCUIT COURT'S JURISDICTION, RENDERING THE QUESTION *RES JUDICATA*

Alternatively, if this Court finds that Moriarty is not barred from bringing a section 2-1401 petition, the Court should still deny Moriarty's requested relief because he previously raised, and the court has already ruled on, the issue of the personal jurisdiction

when it decided his motion to quash. Because the issue has already been decided, he is prevented from raising it again.

a. Moriarty's section 2-1401 petition alleges the same jurisdictional question that the court decided when it decided his Motion to "Quash Serive Judication [*sic*]."

After final judgment was entered and Moriarty failed to challenge it by postjudgment motion or appeal, he then challenged the circuit court's personal jurisdiction over him by filing his motion to "Quash Serive Judiciation [*sic*]" on the thirty-first day after final judgment. The only statement offered in support of this motion—"[i]n order to serve in Chicago, with over a million people, you have to be appointed"—makes clear its purpose to challenge service of summons and the court's jurisdiction. (C382). Although he appeared for the argument on this motion *pro se*, Moriarty told the court that he had hired an attorney and argued that service was not proper because the private process server had not been specially appointed to serve process in Cook County. (R21:9-R22:8). The court denied that motion on the merits, expressly finding that "the process of service is good." (R22:11-R23:5).

A postjudgment motion must be filed within 30 days of judgment. 735 ILCS 5/2-1203. The trial court loses jurisdiction to consider a postjudgment motion filed more than 30 days after judgment. *Beck v. Stepp*, 144 Ill. 2d 232, 241 (1991). Section 2-1401, however, "authorizes a party to seek relief from a final judgment, such as a default judgment, when brought more than 30 days after judgment has been entered." *Sarkissian*, 201 Ill. 2d at 101. Regardless of the label a litigant gives his motion, a motion alleging voidness brought more than 30 days after entry of judgment is, "in substance, a section 2-1401 motion." *Id.* at 102. Illinois courts often construe motions to quash service as section

2-1401 petitions. See e.g., *Deutsche Bank National Trust Company v. Brewer*, 2012 IL App (1st) 111213, ¶ 10 (defendants, several months after the final order, filed a motion to quash service of process); *Hall-Pilate*, 2011 IL App 102632 ¶ 11 (defendants filed a motion to quash service but agreed that they were seeking relief from a final judgment pursuant to section 2-1401). In other words, the courts will ignore the title assigned to a motion and rule on the substance of the motion if otherwise appropriate.

Moriarty's motion to quash service and challenge jurisdiction was filed 31 days after judgment, on a Thursday not following a holiday. Under this Court's precedent, it was a section 2-1401 petition. *Sarkissian*, 201 Ill. 2d at 102. If not, it could only have been a nullity, because the circuit court lost jurisdiction to consider postjudgment motions 30 days after judgment. *Beck*, 144 Ill. 2d at 241. Here, the circuit court did not dismiss the motion without prejudice or instruct Moriarty that he mistitled his motion, but expressly denied the motion on the merits of its argument, finding "the process of the service was good." (R23:4-5). Thus, notwithstanding the court's subsequent discussion with Moriarty about filing a section 2-1401 petition, the court ruled on the merits of the argument; if service of process was good, the court had jurisdiction. The only way it had jurisdiction to rule on the motion was to treat it as a section 2-1401 petition. See e.g., *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 627 (2008) (finding that the only way a late postjudgment motion alleging a lack of jurisdiction based on improper service could be granted is if it were a meritorious section 2-1401 petition.). The circuit court's ruling on a section 2-1401 petition is final and appealable. Ill. S. Ct. R. 304(b)(3); *Sarkissian*, 201 Ill. 2d at 102. Here, the circuit court denied the motion, which denial was final and appealable.

Moreover, Moriarty did not interpret the circuit court's ruling as one without prejudice or inviting a refiling. Moriarty, through counsel, filed a Notice of Appeal from the denial of his motion. (C386-387). In response to the appellate court's order to show cause why the appeal should not be dismissed for lack of jurisdiction, Moriarty could have called his motion what it was—a section 2-1401 petition—but instead "admitted" that a motion to quash service of summons was neither final nor appealable. He then argued, just like he does here, that "the January 30, 2017 Order, in which the Court found that all parties have been properly served and noticed as to the proceedings, that the Court's Granting of the Plaintiff's Motion for Judgment of Foreclosure and Sale Tendered and Approved (and entered) is a final and appealable order from which [Moriarty] can and does appeal." A 14-17. He then dismissed his appeal, leaving the trial court's ruling upholding jurisdiction to stand as the law of the case.

Finally, after dismissing the appeal of his first section 2-1401 petition (the late motion to quash), Moriarty proceeded to file the section 2-1401 petition underlying this appeal. (C402-417). The first line of his Memorandum of Law in support, in bold, repeats what he stated was the basis of his first appeal: "Mr. Moriarty was never properly served with process and therefore the default Judgment of Foreclosure and all subsequent orders entered in this case are void." (C411). This petition mirrors the motion to quash in other ways as well. The verbatim language in the notices of appeal says it all: they both state that Moriarty is appealing from the circuit court's denial of the motion at issue "and all other adverse rulings of the Court against [Moriarty], including but not limited to the Court's finding on Jan. 30, 2017 that there was proper personal service . . . despite the fact

that there was no appointment of a special process service." (compare C386-387 with C466-467).

Thus, Moriarty seeks the very same relief in the section 2-1401 petition underlying this appeal that he sought in his motion to quash service and challenge jurisdiction. Because of his failure to follow through on his appeal of the denial of the motion to quash, however, the circuit court's ruling stands as the law of the case, and this court should not allow him another chance to seek the same relief.

b. A defendant only gets one opportunity to challenge the court's jurisdiction.

"The rule is clear that once a court denies a preliminary objection to *in personam* jurisdiction, the jurisdiction of that court is no longer subject to collateral attack." *Gipson*, 379 Ill. App. 3d at 628 (citing Restatement (Second) of Judgments §10(2), at 100 (1982) ("A determination of an objection to notice or territorial jurisdiction precludes the party who asserted it from litigating either contention in subsequent litigation.")). "[W]here the question of personal jurisdiction of the court has been raised and is decided, the adjudication of the issue precludes the raising of the question again." *Moore v. Illinois Pollution Control Board*, 203 Ill. App. 3d 855, 861 (1990). Indeed, "the principles of *res judicata* apply to questions of jurisdiction as well as other matters—whether it be jurisdiction of the subject matter or of the parties." *Id.* (citing *Sunshine Anthracite Company v. Adkins*, 60 S. Ct. 44 (U.S. Sup. Ct. 1940)).

Moreover, "a section 2-1401 petition is not a proper vehicle for allowing 'claimant a new 30-day clock to file a notice of appeal.'" *Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 149 (1994) (quoting *Mitchell v. Industrial Commission*, 232 Ill. App. 3d 943, 949 (1992) with approval.). "[R]epeated section 2-1401 petitions are prohibited because they

‘“unnecessarily frustrate the policy of bringing finality to court proceedings.”’” *People v. Donley*, 2015 IL App (4th) 130223, ¶ 40 (quoting *Empress Casino Joliet Corporation v. Blagojevich*, 638 F. 3d 519, 538 (7th Cir. 2011) (quoting *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35, 39 (1998))). “The reason for the rule is obvious: It cuts down on the waste of judicial resources by preventing litigants from plying courts with the same losing arguments again and again.” *Empress Casino*, 638 F. 3d at 538.

Municipal recognizes that it did not make a *res judicata* argument below. Municipal further recognizes that this argument may have been forfeited. Forfeiture, however, is a limitation on the parties, not on the court. *Klaine v. Southern Hospital Services*, 2016 IL 118217, 41. The Court may overlook forfeiture in the interest of maintaining a sound and uniform body of precedent. *Id.* Moreover, Municipal notes that this argument has more facets than merely *res judicata*; it involves a jurisdictional challenge and successive section 2-1401 petitions. Regardless of the complexities of the legal arguments and defenses, the fact is that Moriarty not only got his day in court before entry of the order confirming sale, he got another day in court to contest the court’s jurisdiction after its entry, all before filing the section 2-1401 petition underlying this appeal.

V. THIS COURT SHOULD DENY MORIARTY’S SECTION 2-1401 PETITION BECAUSE HE FAILED TO JOIN A NECESSARY PARTY, TO WIT: THE RECORD TITLEHOLDER

If this Court determines that Moriarty’s section 2-1401 petition is not barred by 15-1509(c) or *res judicata*, it should deny the petition because Moriarty failed to join a necessary party, to-wit: the record titleholder. Although Moriarty now states that there is no evidence in the record that the property was subsequently sold, this fact was presented

and not disputed in the courts below. Moriarty also addressed protections for an innocent third-party purchaser to the circuit court in his Memorandum of Law in Support of his section 2-1401 petition. (C414). He would have no reason to do so if he did not agree that the property had been subsequently sold to a third party. In its supplemental Response to that Petition, Municipal pointed out that section 2-1401(b) required Moriarty to include the record titleholder as a party and that he failed to do so. (C450-451). At the hearing on the Petition, Moriarty's counsel did not dispute that she had not joined or served the record titleholder, instead asserting that she was not trying to reopen the foreclosure but asking to "get the judgment voided" (R35:19-36:2) as though that is somehow different. She then argued that the alleged defect in service was apparent on the face of the record (R37:3), which argument would only be relevant if there was a third-party purchaser. Municipal's attorney also addressed the issue in her argument, expressly stating that "the bank does not own the property." (R41:19-20). The trial court denied the section 2-1401 Petition without addressing the "necessary party" issue. (C455-56).

On appeal to the Appellate Court, Municipal again raised the issue and included an Affidavit of Catherine Boicken, who has been Municipal's President since 2011, stating that the property had been sold to a third-party purchaser who was not a party in the foreclosure lawsuit. (See A4, ¶¶ 4-6).

"Section 2-1401(e) embodies the public policy respecting third-party purchasers of property and protecting them from the effects of an order setting aside a judgment affecting title to properties." *U.S. Bank National Association as Trustee for Credit Suisse First Boston CSFB 2005-11 v. Laskowski*, 2019 IL App (1st) 181627, ¶ 24. Due process and fundamental fairness require that such a purchaser have his or her day in court to defend

against an action affecting their title. Moriarty even concedes that any occupants of the property have due process rights that require notice: "One, as the court knows, can't just go in and say this is my building you're out." (R47:22-23). Yet he filed an action seeking return of the foreclosed buildings without giving notice to the record titleholders or the occupants.

Section 2-1401 was amended mere months after this petition was filed, to expressly require that section 2-1401 petitions seeking to reopen foreclosures must include as parties "the current record title holders of the property, current occupants, and any individual or entity that had a recording interest in the property before the filing of the petition." 735 ILCS 5/2-1401 (2018); P.A. 100-1048 (effective Aug. 23, 2018). Notably, section 2-406 of the Code of Civil Procedure has long required the court to direct or allow parties with "an interest or title which the judgment may affect" to be joined. 735 ILCS 5/2-406(a). The recent amendment to section 2-1401 was effective immediately upon enactment, demonstrating either that the General Assembly intended to codify existing due process interpretations or that it noticed an omission in need of an immediate correction. Moriarty also ignored this Court's appellate rules, which likewise require that an appealing party notify not just "every other party" but also "any other person or officer entitled by law to notice." Ill. S. Ct. R. 303(c); see also *Wells Fargo Bank, N.A. v. Zwolinski*, 2013 IL App (1st) 120612, ¶ 17 ("Although [the buyers at the foreclosure sale] are not parties of record, they are certainly parties in interest. . . . [They] would be seriously prejudiced because of a lack of opportunity to participate in the legal process and defend their rights.").

VI. NO JURISDICTIONAL DEFECT AFFIRMATIVELY APPEARS FROM THE RECORD, MAKING THE THIRD-PARTY BUYER A PROTECTED *BONA FIDE* PURCHASER AND RENDERING THIS APPEAL MOOT.

"It is essential to the validity of a judgment that the court have both jurisdiction of the subject matter of the litigation and jurisdiction over the parties." *Thill*, 113 Ill. 2d at 308. A judgment rendered without jurisdiction is void. *Id.* Once the property has been sold to a third party, however, section 2-1401(e) provides that "[u]nless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition . . . ." 735 ILCS 5/2-1401(e).

Thus, even if the entire foreclosure proceeding is void for lack of jurisdiction, sale of the property to a *bona fide* purchaser precludes returning the property to Moriarty. 735 ILCS 5/2-1401(e); *PNC Bank National Association v. Kusmierz*, 2020 IL App (2d) 190521, ¶ 24. "Specifically, where the rights of innocent third-party purchasers have attached, a judgment may be collaterally attacked only where an alleged personal-jurisdiction defect affirmatively appears in the record." *Kusmierz*, 2020 IL App 190521 ¶ 24 (citing *Thill*, 113 Ill. 2d at 312-13). To affirmatively appear in the record, the alleged jurisdictional defect must not require inquiry beyond the face of the record. See *Thill*, 113 Ill. 2d at 314 (distinguishing cases that requires inquiry beyond the face of the record).

In *Thill*, this Court found that several defects affirmatively appeared in the record. First, the affidavit of service did not demonstrate the server's strict compliance with the statutory requirements of substituted service, as required by Illinois law. *Thill*, 113 Ill. 2d

at 309. The Court noted that Illinois courts had long acknowledged that the return of service in substituted service cases "must show strict compliance with every requirement of the statute authorizing such substituted service, since the same presumption of validity that attaches to a return reciting personal service does not apply to substituted service." *Id.* Next, the return affidavit failed to show that defendant was served with a summons, referring only to service of the Complaint. Likewise, the return affidavit failed to show that an additional copy of summons was left with for the defendant with his wife, on whom the substituted service was made. *Id.* Finally, the return affidavit did not affirmatively recite that a copy of summons was subsequently mailed in a sealed envelope with postage fully prepaid to defendant. After noting that these defects all appeared on the face of the affidavit, the Court held the return defective. *Id.* at 311.

The appellate court, in a 2012 opinion authorized by Justice Neville, cited *Thill* when it found that a defect affirmatively appeared from the record where a bank did not comply with a Cook County circuit court rule requiring that, prior to service by publication, the plaintiff must file an affidavit "'setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the [defendant's] whereabouts,'" *Brewer*, 2012 IL App 111213 ¶¶ 19-25 (quoting Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996)).

Notably, both of those cases dealt with service of summons by means other than personal service. As expressly noted by this Court in *Thill*, returns reciting personal service have a presumption of validity. *Thill*, 113 Ill. 2d at 309. Moreover, the defects in *Thill* and *Brewer* were facially evident. In *Thill*, several defects were apparent, including that the affidavit was a form affidavit in which the process server was to choose a section and fill

in all of the blanks in that section, which he did not do. *Id.* at 300. In *Brewer*, the affidavits did "not identify who attempted to serve process on [the mortgagor] at her home or who took the steps listed to find other addresses where Excel's employees might serve process on her." *Brewer*, 2012 IL App 111213 ¶ 21.

In this case, conversely, the presumption of validity that a return of personal service receives arises: the return of service affidavit is complete on its face. It states that Mr. Leggott was a registered employee of a licensed private detective agency, and personally served Moriarty at the address at which he served him. (C242). The alleged defect is not some action that Mr. Leggott took or failed to take, but that he lacked special authority to serve process in this case in Cook County. Contrary to *Thill*, *Brewer*, and their progeny,[4] in order to recognize a defect on this record, one would have to look beyond the record because the record in this case does not in any way indicate or imply that Mr. Leggott lacked authority to serve process. Despite Moriarty's assertion that the lack of jurisdiction appears because the return states that service was made in Chicago, the return does not indicate that it was served in Cook County. See, e.g., *Kusmierz*, 2020 IL App 190521 ¶ 27 ("[W]here an affidavit does not specify the county in which service occurred, a third-party purchaser would not, based on the record alone, have any reason to suspect that service was not in compliance with section 2-202(a)"). Moreover, even if it did, it does not indicate that Cook County had a population of more than 2 million people. And even if it did so

[4] Municipal draws this Court's attention to *MB Financial Bank v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, an anomaly that cites *Brewer* for the proposition that a bona fide purchaser is never protected when the mortgagor was not properly served. The *Ted & Paul* court misinterprets *Brewer*, in which no allegation was made that that property had been sold to a third-party purchaser, and is contradictory to this Court's precedents and section 1401(e).

state, it does not indicate that, unlike serving process in the other 101 Illinois counties, a private process server must be specially appointed to serve summons on a defendant if found in a county with a population of more than 2 million people. Each of these factors requires knowledge or examination of information beyond the record, distinguishing this case from *Thill* and *Brewer* and leaving the return affidavit facially valid. Finally, even if the return was not facially valid, the record affirmatively shows an appearance by Moriarty prior to entry of the final order, rendering a lack of proper service of summons irrelevant. See *Schorsch*, 172 Ill. App. 3d at 1001 (citing *Thill*, 113 Ill. 2d at 308).

The appellate court has repeatedly examined this defect-appearing-of-record issue and has consistently held that a return of service that lists an address in Cook County—but does not specify that the address is in Cook County—is not an apparent defect in the record. *Kusmierz*, 2020 IL App 190521; *JP Morgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275; *Giusti*, 2020 IL App 190522. These cases hold that "where an affidavit does not specify the county in which service occurred, a third-party purchaser would not, based on the record alone, have any reason to suspect that service was not in compliance with section 2-202(a) and, further, that a third-party purchaser should be able to rely on the affidavit's statement that service complied with the service requirements." *Kusmierz*, 2020 IL App 190521 ¶ 27 (citing *Giusti*, 2020 IL App 190522 ¶ 33-36; *Robinson*, 2020 IL App 190275 ¶ 23-27).

VII. MORIARTY'S FAILURE TO OBTAIN A STAY OF THE ORDER CONFIRMING SALE RENDERS THIS APPEAL MOOT.

"An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief." *Steinbrecher*, 197 Ill. 2d at 523. "[W]hen an intervening event occurs making it impossible for a reviewing court to grant

relief to any party, the case is rendered moot because a ruling on the issue cannot have any practical effect on the controversy." *In re Tekela*, 202 Ill. 2d 282, 292-93 (2002). "Where the issues involved in the trial court no longer exist, an appellate court will not review a case merely to decide moot or abstract questions, to establish precedent, or to determine the right to, or the liability for, costs, or, in effect, to render a judgment to guide potential future litigation." *La Salle National Bank v. City of Chicago*, 3 Ill. 2d 375, 378-79 (1954).

Moriarty expressly seeks to have the foreclosed properties returned to him. App. Br. p. 29. Such relief is not possible because Moriarty did not obtain (or even seek) a stay to prevent the foreclosed properties from being sold. A stay of a nonmonetary judgment is not automatic. Ill. S. Ct. R. 305.

Thirty days after the Order Confirming Sale was entered, Municipal's mortgages terminated or were extinguished by law. After Moriarty's 30-day deadline to appeal the order confirming sale expired without notice of appeal, the foreclosed properties were sold to third parties not related to this lawsuit. (A4 ¶ 4-5; C450-55; R41:19-20; R45-46). That the properties have been sold to third-party purchasers is further confirmed by Moriarty in his brief wherein he seeks to have the purchaser lose its ownership to the properties. The sale of the properties to a third-party purchaser is an intervening event which prevents effectual relief in this case.

"It is well established that in the absence of a stay, an appeal is moot if a specific property, possession or ownership of which is the relief being sought on appeal, has been conveyed to third parties." *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (1989). Should orders in this case be reversed, Municipal would be unable to put the properties (or interests in the properties) back into the foreclosure lawsuit. At best, the foreclosure

lawsuit would be reopened without the properties or interests in them. Moriarty's requested relief is not possible rendering this appeal moot.

Whatever the decision in this case, the third-party property owners are protected by Ill. S. Ct. R 305(k). That rule "protects third-party purchasers of property from appellate reversals or modifications of judgment regarding the property" absent a stay pending appeal. *Steinbrecher*, 197 Ill. 2d at 523.[5]

Rule 305(k) applies here because: 1) title to the foreclosed properties passed by final judgment when the trial court issued the order confirming sale; 2) the right, title and interest to the properties have passed to a third party who was not part of the foreclosure proceeding; and 3) Moriarty failed to perfect a stay preventing sale of the properties.

Since neither the properties nor Municipal's mortgage interests in those properties can be put back into a reopened foreclosure case, a reversal of the judgment of foreclosure or other orders in this case would be pointless. An intervening event—legal transfer of the properties to another—has occurred which prevents Moriarty from obtaining the relief he requests. This appeal is moot and should be dismissed.

CONCLUSION

For the reasons stated above, this Court should dismiss the entire section 2-1401 proceeding or affirm the decisions below denying Moriarty's section 2-1401 petition. The circuit court had personal jurisdiction over Moriarty when it entered the order confirming sale, which means that Moriarty was a party to the foreclosure, had his day in court, and was required by Rule 303 to file a notice of appeal within 30 days. He failed to do so.

[5] Rule 305(j) cited in *Steinbrecher* became Rule 305(k) after that decision. For clarity, Rule 205(k) is used herein.

Section 15-1509 of the Mortgage Foreclosure Law expressly prohibits collateral challenges to validly foreclosed and transferred properties, including prohibiting Moriarty's attempt to use a section 2-1401 petition to extend his appeal deadline. Because Moriarty's petition is barred by statute or, alternatively, by *res judicata*, the circuit court lacked subject matter jurisdiction to consider it and this court should enforce the Mortgage Foreclosure Law and its rules by dismissing the entire section 2-1401 proceedings or, alternatively, affirming the lower courts' denial of the section 2-1401 petition.

WHEREFORE, Municipal Trust and Savings Bank, Plaintiff-Respondent, prays that this Court find that the court had personal jurisdiction over Moriarty when it entered the final order confirming sale in the foreclosure action and that section 15-1509(c) of the Mortgage Foreclosure Law bars this section 2-1401 collateral attack, rendering the collateral proceeding a nullity. Municipal therefore asks this Court to vacate the appellate court decision, dismiss this appeal for lack of subject matter jurisdiction or because it is moot, and either dismiss the section 2-1401 petition underlying this appeal or deny it with prejudice. Alternatively, if this Court determines that the courts below had jurisdiction over this collateral proceeding, Municipal prays that this Court affirm the appellate court's affirmation of the circuit court's denial of Moriarty's section 2-1401 petition. In the further alternative, if this Court decides to announce that summons issued in any of Illinois' 102 counties cannot be served on a defendant found in Cook County unless a special appointment is granted by the court issuing the summons, Municipal asks that this Court announce such rule as effective prospectively only, and not apply it to the case at bar, in which the parties relied on the existing procedure—as affirmed by the trial and appellate court—that a private process server can serve process in this state wherever and whenever

the defendant may be found. Finally, Municipal prays that this Court grant it such other further relief that it finds just and equitable under the circumstances.

Respectfully Submitted,

MUNICIPAL TRUST AND SAVINGS BANK, Plaintiff-Respondent

By: /s/ Marc J. Ansel
One of its Attorneys

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 315 and 341(a) and (b). The length of this Brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 39 pages.

Meyer Capel, A Professional Corporation

By: /s/ Marc J. Ansel
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CERTIFICATE OF SERVICE

The undersigned attorney, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct and that the attached document, namely: **Brief and Appendix if Appellee Municipal Trust and Savings Bank**, was served for electronic filing upon:

Clerk of the Illinois Supreme Court
Supreme Court Building
Springfield, IL 62701

by uploading the same and electronically filing via ESP Odyssey eFileIL (https://illinois.tylerhost.net/OfsWeb/FileAndServeModule) on September 27, 2020.

On January 27, 2021, the undersigned sent a copy of the same sent via Electronic Mail to:

Ruth E. Wyman
Ruth E. Wyman Law Office LLC
ruth@ruthwymanlaw.com

And, on January 27, 2021, a copy of the same sent via U.S Mail to:

Municipal Trust & Savings Bank
As Trustee for Trust No. 2487
720 Main Street, NW
Bourbonnais, IL 60914

Kankakee Environment Utility Service
850 N. Hobbie Ave.
Kankakee, IL 60901

City of Kankakee c/o City Clerk
304 S. Indiana Ave.
Kankakee, IL 60901

Lucien Sherrod
1853 Greenview Ave.
Kankakee, IL 60901

by depositing envelopes addressed thereto into a United States mailbox with postage prepaid thereon.

Meyer Capel, A Professional Corporation

By: /s/ Marc J. Ansel
Marc J. Ansel
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APPENDIX

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(One Volume)

3-19-0016

APPEAL TO THE APPELLATE COURT OF THE THIRD DISTRICT
FROM THE CIRCUIT COURT OF THE 21ST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

MUNICIPAL TRUST AND SAVINGS BANK Petitioner-Appellee, v. DENIS J. MORIARTY, Respondent-Appellant, and MUNICIPAL TRUST AND SAVINGS BANK AS TRUSTEE UMDER PROVISIONS OF A TRUST AGREEMENT DATED JANUARY 8, 2014 AND KNOWN AS TRUST #2487, LUCIEN SHERROD, CITY OF KANKAKEE, KANKAKEE ENVIRONMENT UTILITY SERVICE, UNKNOWN OWNERS, AND NON-RECORD CLAIMANTS, Respondents.	Appeal from Kankakee Co. Circuit Number 16-CH-258 Trial Judge: Ronald J. Gerts Date of Notice of Appeal: 1/4/19 Date of Judgment: 9/21/18 Date of Postjudgment Motion Order: 12/17/18 Supreme Court Rule which confers jurisdiction on reviewing court: SCR 303

AFFIDAVIT OF CATHERINE BOICKEN

I, Catherine Boicken, being duly sworn upon oath, do depose and state that I am over the age of twenty-21, that I have personal knowledge of the facts set forth herein, that the facts are true and correct and if called as a witness, I could competently testify as follows:

1. I am President of Municipal Trust & Savings Bank ("Municipal") and have been President since 2011. I am authorized to make this Affidavit on behalf of Municipal. I am a custodian of Municipal's records and files including those pertaining to Denis J. Moriarty.

2. My responsibilities at Municipal include oversight of the lawsuit styled *Municipal Trust and Savings Bank v. Denis J. Moriarty, et. al.*; No. 2016-CH-258, which was pending in the 21st Judicial Circuit Court in Kankakee County, IL ("Moriarty Lawsuit").

3. In June 2017, I attended the Sherriff's foreclosure sale pertaining to the properties at issue in the Moriarty Lawsuit ("Foreclosed Properties"). Municipal purchased the Foreclosed Properties at that foreclosure sale and its liens or mortgages on the Foreclosed Properties were terminated or extinguished.

4. On or about September 8, 2017, Municipal sold the Foreclosed Properties to a third party who is not now and has not been a party in the Moriarty Lawsuit. With that sale, the right, title and interest in and to the Foreclosed Properties passed to that third-party. Municipal has not been an owner of the Foreclosed Properties since the third party sale.

5. When the Foreclosed Properties were sold to the third party, there was no stay preventing the sale of the Foreclosed Properties. To my knowledge, there has never been a stay of judgment in the Moriarty Lawsuit.

6. I have reviewed the Notice of Appeal and proof of service filed by Moriarty on January 4, 2019. The proof of service did not include notice on the current owner of the Foreclosed Properties.

Catherine R Boicken

Catherine Boicken

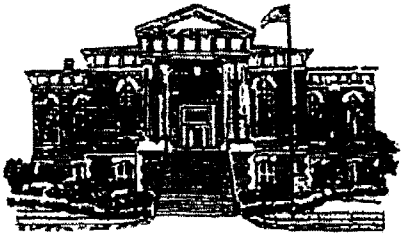
Subscribed and sworn to before me on March 4, 2019.

OFFICIAL SEAL
TONI JO PROVOST
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:08/14/21

Toni Jo Provost

NOTARY PUBLIC in and for the
State of Illinois

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT



BARBARA TRUMBO
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

January 8, 2018

Ruth Elizabeth Wyman
Ruth E. Wyman Law Office LLC
202 S. Broadway, Ste. 207
PO Box 722
Urbana, IL 61803-0722

RE: Municipal Trust & Savings v. Moriarty, Denis J.
General No.: 3-17-0646
County: Kankakee County
Trial Court No: 16CH258

The court has this day, January 08, 2018, entered the following order in the above entitled case:

On the Court's own motion, the appellant is ordered to show cause, on or before January 16, 2018, why this appeal should not be dismissed for lack of jurisdiction. The Court notes that the parties, in a joint motion, seek reversal and remand from an order of the circuit court denying a motion to quash service. However, "[a]n order denying a defendant's motion to quash service of summons is neither a final judgment nor an appealable interlocutory order." Burton v. Autumn Grain Transp., Inc., 222 Ill. App. ed 755, 756 (1991).

Barbara A. Trumbo
Barbara Trumbo
Clerk of the Appellate Court

c: Jeffrey Alan Grotevant
Joseph Patrick Chamley
Kendra Karlock

E-FILED
Transaction ID: 3-17-0646
File Date: 1/16/2018 5:31 PM
Barbara Trumbo, Clerk of the Court
APPELLATE COURT 3RD DISTRICT

3-17-0646
APPEAL TO THE APPELLATE COURT
FOR THE THIRD DISTRICT FROM
THE CIRCUIT COURT OF THE 21ST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

Municipal Trust and Savings Bank, Plaintiff-Appellee,	) Appeal from Kankakee County, Illinois) Circuit Number 2016-CH-258) Trial Judge: The Honorable Ronald J. Gerts
v.	) Date of Notice of Appeal: Sept. 25, 2017
Denis J. Moriarty, Defendant-Appellant,	) Date of Judgment: Aug. 28, 2017) Date of Post judgment Motion Order: N/A.) Motion Order
Municipal Trust and Savings Bank as Trustee, Lucien Sherrod, City of Kankakee, Kankakee Environment Utility, Defendants,	) Supreme Court Rule which confers jurisdiction) Upon the reviewing Court: 303)))

Response to Court's Order to Show Cause

NOW COMES the Defendant-Appellant DENIS J. MORIARTY, by and through his attorney, Ruth E. Wyman, and in response to the Court's Order to Show Cause, states as follows:

1. That the parties filed a Joint Motion to Remand to Trial Court on Jan. 2, 2018 alleging that the Defendant-Appellant filed a motion for quash of service Judication (sic), which the Court denied on Aug. 28, 2017 and further that the Defendant-Appellant contends that the Motion to quash was in error, and the Plaintiff was not contesting the issue..
2. That the Court entered a Rule to Show Cause why the appeal should not be dismissed for lack of jurisdiction.
3. The Defendant-Appellant notes that in his Notice of Appeal, Defendant-Appellant filed notice of his appeal of the Court's Aug. 28, 2017 ruling denying the

Defendant's Motion as reflected in the docket, and further that the Defendant-Appellant was appealing "***all other adverse rulings of the Court against the Respondent-Appellant Denis J. Moriarty***, ..." (Emphasis added.)

4. That Defendant-Appellant admits that a Motion to Quash Services of Summons is neither a final judgment nor an appealable interlocutory order, as noted by the Appellate court in its ruling, but states that the January 30, 2017 Order, in which the Court found that all parties have been properly served and noticed as to proceedings, that the Court's Granting of the Plaintiff's Motion for Judgment of Foreclosure and Sale Tendered and Approved (and entered) is a final and appealable order from which the Defendant-Appellant can and does appeal.
5. That Defendant-Appellant prays that this Court not dismiss the appeal for lack of jurisdiction.
6. That Defendant-Appellant notes that the parties had reached the Joint Motion that was filed on January 2, 2018 and as such, given the agreement of the parties, Defendant-Appellant's attorney did not prepare the Brief.
7. That Plaintiff-Appellee would not be prejudiced if Defendant-Appellant were granted an extension of time to file his Brief in this cause if the Court decides to not dismiss the appeal for lack of jurisdiction.
8. That Defendant-Appellant further prays that this Court grant Defendant-Appellant an additional 21 days to file his Brief with this Court.

WHEREFORE, for the reasons stated herein, Defendant-Appellant DENIS J. MORIARTY prays that this Court not dismiss his appeal for lack of jurisdiction and

further that this Court grant an extension of an additional 21 days to file his Brief.

Respectfully Submitted,

DENIS J. MORIARTY,
Defendant-Appellant

By: /s/ Ruth E. Wyman
Ruth E. Wyman Law Office LLC, his attorney

Prepared by:
Ruth E. Wyman
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PROOF OF SERVICE (By Attorney)

I, as the attorney for the Defendant-Appellant, under penalties of perjury as provided by Section 1-109 of the Illinois Code of Civil Procedure, certify that I caused to be served the original of the **Response to Court's Order to Show Cause**, upon the following person(s):

Appellate Court Clerk
3rd District
1004 Columbus Street
Ottawa, IL 61350
by: Efile

and a copy of the same to the following person(s):

Municipal Trust and Savings Bank
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By: email: kkarlock@outlook.com

Joseph P. Chamley,
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Municipal Trust & Savings Bank Trust #2487 as Trustee
720 Main Street, NW
Bourbonnais, IL 60914
BY: U.S. MAIL

City of Kankakee c/o City Clerk
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Kankakee, IL 60901
BY: U.S. MAIL

Kankakee Environment Utility Service
850 N. Hobbie Ave.
Kankakee, IL 60901
BY: U.S. MAIL

Lucien Sherrod
1853 Greenview Ave.
Kankakee, IL 60901
BY: U.S. MAIL

by depositing them in the United States mail mailbox located at 202 S. Broadway in Urbana, Illinois, with the complete address showing on the envelope and proper postage prepaid on January 16, 2018.

By: /s/ Ruth E. Wyman
Ruth E. Wyman Law Office LLC, his attorney

Prepared by:
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3-19-0016

APPEAL TO THE APPELLATE COURT OF THE THIRD DISTRICT
FROM THE CIRCUIT COURT OF THE 21ST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

MUNICIPAL TRUST AND SAVINGS BANK Petitioner-Appellee, v. DENIS J. MORIARTY, Respondent-Appellant, and MUNICIPAL TRUST AND SAVINGS BANK AS TRUSTEE UMDER PROVISIONS OF A TRUST AGREEMENT DATED JANUARY 8, 2014 AND KNOWN AS TRUST #2487, LUCIEN SHERROD, CITY OF KANKAKEE, KANKAKEE ENVIRONMENT UTILITY SERVICE, UNKNOWN OWNERS, AND NON-RECORD CLAIMANTS, Respondents.	Appeal from Kankakee Co. Circuit Number 16-CH-258 Trial Judge: Ronald J. Gerts Date of Notice of Appeal: 1/4/19 Date of Judgment: 9/21/18 Date of Postjudgment Motion Order: 12/17/18 Supreme Court Rule which confers jurisdiction on reviewing court: SCR 303

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee Municipal Trust and Savings Bank files this Motion to Dismiss Appeal, including the Affidavit of Catherine Boicken ("Affidavit") which is attached hereto and incorporated herein as Exhibit "A," and in support respectfully shows as follows:

I. SUMMARY OF ARGUMENT

This appeal is moot because effective relief cannot be granted to Moriarty for three independent and alternative reasons. First, if the foreclosure judgment and subsequent orders were reversed, Municipal would not be able to convey the foreclosed properties or an interest in those properties into the reopened case. Municipal is not the

owner of the foreclosed properties. Because a reopened foreclosure case would be without the properties, reversal of the judgment or orders would be meaningless act.

Second, a third party, who is not part of this appeal, owns the foreclosed properties and its ownership is protected from appellate reversal by Supreme Court Rule 305(k).

Third, this Court lacks jurisdiction to reverse the final Order Confirming Sale because Moriarty missed his deadline under Rule 303 to appeal that Order and his 1401 Petition did not revive the missed appeal deadline. Accordingly, even if the foreclosure judgment was reversed, the Order Confirming Sale of the properties remains operative meaning this Court could not grant Moriarty effective relief.

Should this case not be dismissed as moot, the Notice of Appeal should be dismissed because the owner of the foreclosed properties has not been given notice of this appeal and could be seriously prejudiced if the judgment and orders were reversed.

II. STATEMENT OF FACTS

1. On 12/14/16, Municipal filed a Complaint for Foreclosure of several commercial properties (apartments) against Moriarty. C13 – C216.

2. On 1/30/17, the Judgment for Foreclosure and Sale was signed. C290 – C350.

3. Municipal purchased the properties at the Sheriff's Sale. C 363-370.

4. On 6/30/17, Municipal filed a Motion for Confirmation of Foreclosure Sale ("Motion to Confirm Sale"), setting a hearing on 7/17/17. C375 – C37

5. On 7/17/17, Moriarty filed a written Appearance. C379

6. Without making an objection to service or jurisdiction, Moriarty participated at the hearing on the Motion to Confirm Sale, requested relief from the court, and was physically before the court when the Motion to Confirm Sale was granted. (R6-17).

7. After hearing, the Order Confirming Sale was signed on 7/17/17. C 380-81. That Order states: "The purchaser of said real estate is granted a judgment for permanent possession of said real estate sold . . . There is no just reason to delay enforcement of or appeal from this final appealable Order."

8. Moriarty did not request a stay prohibiting Municipal from selling the properties.

9. The 30th day after the Order Confirming Sale was entered was 8/16/17. Moriarty did not file a notice of appeal or post-trial motion directed against a judgment within 30 days after entry of the Order Confirming Sale.

10. Municipal sold the foreclosed properties to a third party on or about 9/8/17. Affidavit ¶4. C450-452. Since that sale, Municipal has not been an owner of the foreclosed properties. *Id.*

11. On 9/25/17, Moriarty filed his first Notice of Appeal. C386 – C394.

12. On 4/26/18, the first appeal (No. 3-17-0646) was dismissed at Moriarty's request. C401, 418-20.

13. On 5/21/18, Moriarty filed a Petition Pursuant to Rule 2-1401 ("1401 Petition") to reopen the foreclosure case claiming bad service of process. C402-406.

14. The current property owners were not served with the 1401 Petition or the hearing date. C 402-07, 422-23.

15. On 1/4/2019, after denial of the 1401 Petition, Moriarty filed a second Notice of Appeal. C466 – C486.

16. The Notice of Appeal was not served on the current owner of the foreclosed properties. Affidavit ¶6; C466 – C486.

III. ARGUMENT

A. This Appeal Should be Dismissed as Moot

1. Background

Moriarty's ultimate goal is to reopen the foreclosure case and have the properties placed back into the foreclosure action. To accomplish this, he seeks reversal of the Judgment of Foreclosure and all subsequent orders including the Order Confirming Sale. C406, 466-67. However, such reversals would not cause the properties to be subject to the foreclosure action.

When the underlying lawsuit was filed, Municipal had mortgages on properties. C13 – C216. Municipal foreclosed its interests in those mortgages and the properties were sold to it at the Sherriff's sale. C363 - 374.

After the sale, Moriarty filed a written appearance in the lawsuit, requested relief from the court, and participated at the hearing on the Motion to Confirm Sale. At no time did Moriarty ask for a stay to prevent the properties from being sold to third parties. When the Order Confirming Sale became final, Municipal's liens or mortgages on the properties were terminated or extinguished by law. *See* 735 ILCS 5/15–1404; *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 30. After the time to file a notice of appeal passed, the properties were sold to a third party, who was not a party in the lawsuit. Affidavit ¶4.

2. Mootness Doctrine Applies Here

"An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief" or where an "intervening event" has "rendered it impossible for the reviewing court to grant effectual relief to the complaining

party." *In re J.T.*, 221 Ill. 2d 338, 349-50 (2006); S*teinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 527-28 (2001); *Holly v. Montes*, 231 Ill. 2d 153, 896 N.E.2d 267, 271 (2008).

Should this Court reverse the Judgment and all circuit court orders, at best, because the properties are owned by a third party, the foreclosure lawsuit would be reopened without the properties being subject to foreclosure.

Neither Moriarty nor Municipal are able to effect a transfer of interests in properties because the properties belong to a third party. The sale of the properties is an "intervening event" making it is impossible for this Court to grant effective relief to the Moriarty and this case should be dismissed under the "mootness doctrine." *See supra.*

3. Appeal is Moot under Rule 305(k)

Alternatively, this appeal should be dismissed as moot because the current property owners are protected from appellate reversals under Supreme Court Rule 305(k). In other words, even if the Judgment of Foreclosure and all trial court orders were reversed, the current owner would continue to have title of the properties at issue. *See Steinbrecher*, 197 Ill. 2d at 523.

Rule 305(k) states:

> "**Failure to Obtain Stay; Effect on Interests in Property.** If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. . . ."

"Rule 305(k) requires that (1) the property passed by final judgment (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding;

and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal." *Steinbrecher*, 197 Ill. 2d at 523-24. Here, each of the three elements for property owner protection under 305(k) have been met.

First, title to the properties passed to Municipal by final judgment when the court issued the Order Confirming Sale. C380-81. Second, the right, title and interest to the properties passed to a third party who was not part of the foreclosure proceeding. Affidavit ¶4. Third, Moriarty failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. Although Moriarty entered an appearance in the lawsuit on July 17, 2017, he failed to request or obtain a stay preventing the properties from being sold.

Because the current property owner is protected from appellate court reversals by Rule 305(j), the properties would not become part of a reopened foreclosure case. Without the properties, a reversal of the Judgment or other orders in this case is pointless and ineffectual. This appeal should be dismissed as moot.

3. Appellate Jurisdiction is Lacking

Alternatively, this appeal should be dismissed as moot because this Court lacks jurisdiction to reverse the Order Confirming Sale. As explained below, the circuit court had personal jurisdiction over Moriarty at the time the Order Confirming Sale was granted. That Order states: the Sherriff's "Report of Sale is approved"; the sale of the properties "is confirmed"; the "Court will execute a deed to the holder of the Certificate of Sale . . . to convey title" to the properties; the purchaser of the properties "is granted a judgment for permanent possession" of the properties; and the Order Confirming Sale is a "final appealable Order."

Moriarty missed the deadline under Rule 303(a) to appeal the Order Confirming Sale and this Court lacks jurisdiction to reverse it. Because the Order Confirming Sale remains in effect, reversal of the judgment or other orders would be ineffectual. The properties remain with the current owner and this appeal is moot.

i. Circuit Court Had Jurisdiction Over Moriarty *Before* the Order Confirming Sale Was Granted

On July 17, 2017, without objecting to service of process or jurisdiction and *before* the Order Confirming Sale was granted, Moriarty: filed a written Appearance (C379); voluntarily appeared before the Court (R6-7); sought relief from the Court through a request for a 30-day extension of the redemption time (R6-13); brought a witness to address the Court on his behalf (R7-8, 10-11); participated in the hearing on the Motion to Confirm Sale (R6-17); and was physically present when the Court granted the Motion to Confirm Sale (R15-16; C8).

Those facts establish that the circuit court has personal jurisdiction over Moriarty before the Order Confirming Sale was granted. *See Lord v. Hubert,* 12 Ill.2d 83, (1957) ("a person cannot, by his voluntary action, invite the court to exercise its jurisdiction and at the same time deny that jurisdiction exists"); *O'Connell v. Pharmaco, Inc.,* 143 Ill. App. 3d 1061, 1069 (1986) (personal jurisdiction existed when individual entered an appearance, participated in the proceedings, and sought relief from the court).

Alternatively, pursuant to 735 ILCS § 5/2-301(a-5), the circuit court had jurisdiction over Moriarty because he waived all objections to personal jurisdiction by making an oral motion to extend the time to redeem the properties before the Order Confirming Sale was granted. *See* Municipal's Brief and Argument, Appeal No. 3-17-0646, Section III, pp. 16-18, which is incorporated herein by reference.

ii. Moriarty Missed the Deadline to Appeal the Order Confirming Sale

Here, the Order Confirming Sale contained Rule 304(a) language and was a final order concluding the foreclosure action. C380-81. Pursuant to Supreme Court Rule 303(a)(1), which governs appeals from final judgments in civil cases, Moriarty had 30 days from July 17, 2017 (date of the Order Confirming Sale) to file a notice of appeal or a post-trial motion. He did neither and no longer has the right to challenge that ruling. *See Steinbrecher*, 197 Ill. 2d at 514; *American National Bank and Trust Co v. Bentley Builders, Inc.*, 308 Ill. App. 3d 246, 254 (1999).

Since Moriarty has not timely appealed from the Order Confirming Sale, this Court has no jurisdiction to reverse that Order. Moriarty's 1401 Petition did not extend the time for him to file an appeal relating to the Order Confirming Sale. *See Mitchell v. Fiat-Allis*, Inc., 158 Ill.2d 143, 149 (Ill., 1994) ("1401 petition is not a proper vehicle for allowing 'claimant a new 30-day clock to file a notice of appeal"). A 1401 petition cannot be used as a substitute for the appeal deadline.

Because Moriarty did not file an appeal of the Order Confirming Sale within the time allowed by Rule 303(a), both the circuit court and this Court lost jurisdiction over matters resolved in Order Confirming Sale. Even if the Judgment of Foreclosure is reversed, the final Order approving the Sherriff's Sale to Municipal would remain in tact. Thus, the foreclosed properties would not become a part a reopened foreclosure lawsuit and a reversal of the Judgment of Foreclosure would be of no consequence. Accordingly, this appeal should be dismissed as moot.

B. This Appeal Should be Dismissed for Lack of Notice to the Property Owner

Moriarty failed to serve the Notice of Appeal on the third-party owner of the properties at issue here. C466-68; Affidavit ¶ 6. As a result, dismissal of this appeal is warranted.

A similar situation existed in *Wells Fargo Bank, N.A. v. Zwolinski*, 2013 IL App (1st) 120612. There, Alfred, a mortgagor/defendant, was served by publication. He did not answer and a judgment of foreclosure and sale was entered. Almost a year later, the property was sold to a third party and Alfred filed an appearance and a motion to quash service. The motion to quash was denied and the court entered an order confirming the sale. Alfred filed a notice of appeal but failed to serve the notice on some parties and the current property owner / purchasers (who were not parties in the underlying litigation).

The *Zwolinski* court found that the property owners were "parties in interest" who "would be seriously prejudiced" if the "court were to reverse the judgment of the trial court" without the owners being served with the Notice of Appeal and having an opportunity to participate in the legal process. *Id.* at ¶17. The appeal was dismissed.

Likewise, here, the Notice of Appeal was not served on the third-party owner of the properties. Affidavit ¶6. Nothing in the record suggests that the owner had notice of this appeal or the 1401 Petition or that Moriarty attempts to put the owner's property rights in jeopardy. Like in *Zwolinski*, *supra* ¶16, the third-party property owner here remains "officially unaware of the appeal" and is seriously prejudiced by the lack of opportunity to protect its interests or participate in this appeal.

If this appeal is not dismissed as moot, then this appeal should be dismissed because the properties' owner was not served with the Notice of Appeal or otherwise

notified by Appellant that its property rights may be adversely affected by a decision in this appeal.

WHEREFORE PREMISES CONSIDERED, for the foregoing reasons, Municipal prays that this Motion be granted and that the appeal be dismissed.

Respectfully submitted,

MUNICIPAL TRUST AND SAVINGS BANK

By: Kendra Karlock
One of its Attorneys

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ARDC #: 6305274

PROOF OF SERVICE

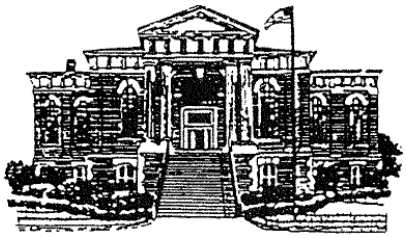
I, as the attorney for the Petitioner-Appellee, under penalties of perjury as provided by Section 1-109 of the Illinois Code of Civil Procedure, certify that I caused to be served the original of the RESPONSIVE STATEMENT TO DOCKETING STATEMENT upon the following:

Appellate Court Clerk
Third Judicial District
1004 Columbus Street
Ottawa, IL 61350
By: EFile on February 5, 2019

and a copy of the same to the following person(s):

Ruth E. Wyman
Ruth E. Wyman Law Office LLC
202 S. Broadway, Suite 207
P.O. Box 722
Urbana, IL 61803-0722
By: EFile on February 5, 2019

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT



BARBARA TRUMBO
Clerk of the Court
815-434-5050

1004 Columbus Street
Ottawa, Illinois 61350
TDD 815-434-5068

March 26, 2019

Kendra Karlock
720 Main Street, NW
Bourbonnais, IL 60914

RE: Municipal Trust and Savings Bank v. Moriarty, Denis J., et al.
General No.: 3-19-0016
County: Kankakee County
Trial Court No: 16CH258

The court has this day, March 26, 2019, entered the following order in the above entitled case:

Appellee's motion to dismiss appeal, response of Appellant noted, is DENIED. The parties are ordered to address issues of mootness and jurisdiction in their respective briefs.

Barbara A. Trumbo
Barbara Trumbo
Clerk of the Appellate Court

c: Ruth Elizabeth Wyman