No. 126606

In the
Supreme Court Of Illinois

PNC BANK NATIONAL ASSOCIATION,
Plaintiff-Appellee,

v.

JERZY KUSMIERZ and HALINA KUSMIERZ,
Defendants-Appellants,

On Review of the Opinion of the Illinois Appellate Court, Second District
No. 2-19-0521
Therefrom Up on Appeal from the 18th Judicial Circuit Court, DuPage County, Illinois
No. 2011 CH 1585
Honorable James D. Orel, Judge Presiding

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The Third-Party Respondents Attempt to Introduce Matters That Are Not Germane to This Appeal

The issues properly before this Court are: (1) the application of *bona fide* purchaser protections set forth in section 2-1401(e) and (2) whether *laches* can be used as an affirmative defense in a section 2-1401 jurisdictional challenge to a foreclosure judgment based on purely legal issues. The issues before this Court are narrowly tailored to address the Second District's ruling in favor of PNC Bank based on *laches* and in favor of the Third-Party Respondents based on section 2-1401(e)'s *bona fide* purchaser protections. *Kusmierz*, 2020 IL App (2d) 190521 ¶ 27, ¶ 33.

Though the brief of the Third-Party Respondents[1] addresses the above issues, significant sections of the brief are devoted to matters not properly before this Court. Specifically, the Third-Party Respondents attack various relief sought in the Petition. 3d-Party Br., 38-42. Pending this Court's ruling on the application of section 2-1401(e) and/or *laches*, the issues outlined in those sections will be rendered moot or be handled by the circuit court upon remand. As such, the Kusmierzes will not encumber this Court's resources addressing matters not properly before the Court.[2]

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[1] The brief of the Third-Party Respondents will be cited to as "3d-Party Br." and the brief of PNC Bank will be cited to as "PNC Br."

[2] The Illinois Land Title Association ("ILTA") raises concerns of "heir hunters;" however, this matter concerns the due process rights of the Kusmierzes, both of whom are alive. ILTA cites to sections 13-107.1 and 13-109.1 of the Code of Civil Procedure which apply to actions filed *after* February 19, 2019. ILTA Br., 10. The Petition was filed in 2018; these sections are inapplicable. Notably, the legislature affirmed that the bill (S.B. 2432) was not designed to abrogate any jurisprudence or Rules. *See* ILTA Br., 11. Similarly, the Illinois Mortgage Bankers Association ("IMBA") cites to sections of the Marketable Title Act. *See* IMBA Br., 7-8. None of the laws cited by ILTA or IMBA are at issue before this Court. Aside from addressing the inapplicability of certain arguments raised by the aforementioned, the Kusmierzes will not otherwise encumber this Court's resources addressing matters not properly before the Court.

II. The Third-Party Respondents Attempt to Assert Matters Which They Have Forfeited

As the Third-Party Respondents note, "issues not raised in the trial court are waived and may not be considered for the first time on appeal." *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 59. Below, the Third-Party Respondents never argued that they represent "special interests" such that *laches* should apply. Indeed, they merely alleged that *laches* applies without exception. Further, the Third-Party Respondents never previously argued that due diligence within the context of an affirmative defense (i.e. as an element of *laches*) differs from due diligence as an essential part of a section 2-1401 petition. These newly asserted issues are forfeited.

III. Service on the Kusmierzes is Invalid

Notwithstanding forfeiture of the issue,[3] the Third-Party Respondents and PNC Bank (collectively, the "Respondents")'s newly asserted argument that service was proper is easily disposed of. The record reveals that on April 1, 2011, Jennifer I. Magida, a registered employee of Metro Detective Agency, LLC, purportedly served process on the Kusmierzes at 1107 W. Eaton Ct., Apt. M, Palatine, IL 60067.[4] C 65; C 69. At the time of purported service, neither Jennifer I. Magida nor Metro Detective Agency, LLC were appointed to serve process in Cook County. On April 4, 2011, an order appointing Metro Detective Agency, LLC "to serve all writs of summons, writs and other process necessary in the above-mentioned case," was entered by the circuit court. C 53. In sum, it

[3] In the courts below, the Respondents never argued that whether court appointment is required for a special process server under section 2-202 of the Code of Civil Procedure is controlled by the county where the case pends rather than the county where service is performed. C 157-166; C 182-182; C 332-341; C 189-195; C 342-346.

[4] Noteworthy is that the IMBA acknowledged that the purported service took place "in the Village of Palatine, located in *Cook County*, *Illinois*." *See* IMBA Br., 4 (emphasis added).

is undisputed that the purported service on the Kusmierzes was performed by a process server in Cook County, Illinois before being authorized to do so.

The purported service on the Kusmierzes was in violation of section 2-202 of the Code of Civil Procedure. *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 998 (2d Dist. 1988) ("a plain reading of section 2-202, a licensed or registered private detective is authorized to serve process without court appointment only in counties with a population of less than 1 million"); *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910-912 (1st Dist. 2008) (finding service of process to be invalid where the process server served process before being appointed by the court). This Court's recent opinion in *Municipal Trust and Savings Bank v. Moriarty* succinctly stated the requirements of section 2-202 as follows:

> it logically follows that, for a private detective to serve process on a defendant in Cook County, he or she must be specially appointed by the court. Subsection (b) then provides that summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process.

2021 IL 126290, ¶ 21. This Court's well-reasoned opinion in *Moriarty* reaffirms that the purported service on the Kusmierzes was invalid: the purported service was effected in Cook County by an individual who was not specially appointed by the court to do so.

IV. Section 2-1401(e) Protections Do Not Apply to the Third-Party Respondents

As a threshold matter, the Third-Party Respondents argue that the Kusmierzes have forfeited their ability to cite to *C.T.A.S.S.&U. Fed. Credit Union v. Johnson,* 383 Ill. App. 3d 909 (1st Dist. 2008) in support of their argument that the Third-Party Respondents are not afforded section 2-1401(e)'s *bona fide* purchaser protections. The Third-Party Respondents misapply the law on forfeiture. Forfeiture applies to issues, not case law. *Bowman,* 2014 IL App (1st) 132122, ¶ 59. The Kusmierzes have consistently

argued against the application of section 2-1401(e), asserting that "because the record contains no order appointing a special process server before the service attempts and because the record reflects that the service was accomplished in Cook County, respondents are not afforded the protections of section 2-1401(e)." C 308; App. Reply Br., 3. There can be no doubt that the issue is properly before this Court and consideration of *Johnson* is proper.

The remaining issues raised by the Third-Party Respondents – (1) that *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294 (1986); *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472 (1st Dist. 2006); and *Concord Air, Inc. v. Malarz*, 2014 IL App (2d) 140639 are distinguishable and (2) that *bona fide* purchasers under section 2-1401(e) differ from *bona fide* purchasers under common law with respect to inquiry notice – are without merit.

In *Thill*, this Court declined to apply section 2-1401(e) *bona fide* purchaser protections where the record as a whole reflected a lack of jurisdiction despite a recital in the circuit court's judgment that service was valid. 113 Ill. 2d at 294. In *Thill*, the service affidavit failed to show that a summons was served and that a copy of the summons was subsequently mailed in a sealed envelope with postage fully prepaid to the defendant's address. 113 Ill. 2d at 311. Despite these failures, the circuit court's judgment recited that service was valid. *Id*. Importantly, this Court held that jurisdictional defects "cannot be aided by recitals of valid service in the judgment or decree." *Id*. at 310. The Third-Party Respondents' proposal that the mere recital of being "authorized" in the service affidavit should inoculate them from the issues contained in the record is contradicted by *Thill*.

The Appellate Court in *Bank of New York* rejected the notion that a section 2-1401(e) *bona fide* purchaser differs from a common law *bona fide* purchaser. 369 Ill. App. 3d at 472.[5] The Appellate Court recited the language of section 2-1401(e) and then reviewed the relevant case law interpreting section 2-1401 as follows:

> In determining whether a lack of jurisdiction is apparent from the record, reviewing courts look to the whole record, which includes the pleadings, the return on process, the jury verdict, and the court's judgment or decree. In this case, the lack of jurisdiction affirmatively appears in the record in the form of plaintiff's defective affidavit and the allegations set forth in defendant's motions to dismiss for insufficiency of service, which were sufficient to put the intervenors on notice that service by publication on defendant might have been improper. A subsequent purchaser cannot be a *bona fide* purchaser for value if he has actual or constructive notice of the outstanding rights of other parties. *Moreover, a purchaser having notice of facts that would put a prudent man on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry*.

Id. at 477 (emphasis added) (citations omitted). This last statement rejects the contention that *bona fide* purchasers under section 2-1401(e) differ from those under common law.

Nine years later in *Malarz*, the Appellate Court reaffirmed that there is no distinction between a common law *bona fide* purchaser and a section 2-1401(e) *bona fide* purchaser. 2014 IL App (2d) 140639. *Malarz* concerned certain proceedings related to a prior foreclosure that named Concord Air, a junior lien holder, as a defendant. *Id.* ¶ 1. After service via publication, Concord Air was defaulted, the subject property was sold, the sale was confirmed, and the property was transferred. *Id*. Concord Air moved, successfully, to quash service against it in the prior foreclosure and filed a separate complaint to foreclose its junior lien against the new owner. *Id.* ¶ 2. The new owner moved to dismiss, arguing that it was a *bona fide* purchaser. *Id*. ¶ 3. The trial court held that section 2-1401(e) protections applied and dismissed the case.

[5] *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472 (1st Dist. 2006) is briefly cited by the Kusmierzes in their opening brief. Opening Br., 13.

On appeal, Concord Air argued that the jurisdictional defect in the prior foreclosure was apparent on the face of the record. *Id.* ¶ 29. Therefore, the new owner had inquiry notice of the jurisdictional defect and should not be afforded section 2-1401(e) protections. *Id*. The Appellate Court noted that the record of the prior foreclosure contained: (1) an Illinois Secretary of State's corporation report showing that Concord Air was dissolved and identifying Iljco Stojanov as the registered agent with an address on Linder Avenue in Morton Grove and Dzoko Stojanov as the president with an address on Linder Avenue in Niles; (2) the affidavit of non-service reflecting attempted service on Dzoko Stojanova at Pheasant Lane in Deerfield; and (3) an affidavit of due and diligent inquiry showing one address where service was attempted. *Id*. ¶¶ 37-38.

The Appellate Court reversed, concluding:

> that the service defect appear[ed] on the face of the record . . . . [T]he record alone gave [the new owner] inquiry notice of a potential problem. . . . it had constructive notice of the documents submitted in support of service by publication . . . containing inconsistent information, [which] were filed at the same time and appear in sequential pages in the record, which did not require [the new owner] to "comb the record" for the potential jurisdictional error.

Id. ¶ 40. The Appellate Court further noted that, although the new owner did not have the benefit of the court's factual finding of a lack of jurisdiction in the prior foreclosure before the purchase of the property, such a finding was not necessary to rule that section 2-1401(e) *bona fide* purchaser protections did not apply. *Id*. The Appellate Court reasoned that "simply reviewing the documents . . . would have revealed a potential jurisdictional defect worthy of further inquiry." *Id*. ¶ 44.

In summary, *Thill* rejects the argument that a mere recital of being "authorized" inoculates one from jurisdictional defects appearing in the record while *Bank of New York* and *Malarz* reject the notion that a section 2-1401(e) *bona fide* differs from a

common law *bona fide* purchaser with respect to the effect of inquiry notice. Illinois jurisprudence requires that when inconsistencies in the record reveal a potential jurisdictional defect – such as service in Cook County by a process server prior to appointment by the circuit court – potential purchasers are required to investigate those inconsistencies regardless of recitals of proper jurisdiction in the judgment and they are charged with the knowledge they would have gained from the inquiry. For these reasons, the Third-Party Respondents are not *bona fide* purchasers under section 2-1401(e).

V. The Doctrine of *Laches* Does Not Operate as a Bar to the Petition

a. Respondents rely on distinguishable authority and fail to address the narrow issues before this Court

In arguing for application of *laches*, the Third-Party Respondents cite to a number of cases that are readily distinguished. 3d-Party Br., 29. In *Valdovinos v. Tomita*, the court declined to address whether *laches* applied to a fraud claim. 394 Ill. App. 3d 14, 18 (1st Dist. 2009). *Coleman v. O'Grady* involved an employee's wrongful termination claim which was dismissed for *laches*. 207 Ill. App. 3d 43, 51 (1st Dist. 1990). In *Villiger v. City of Henry*, the court affirmed the dismissal of a declaratory judgment action challenging the re-zoning of certain real estate on the basis of *laches*. 47 Ill. App. 3d 565, 567 (3d Dist. 1977). None of these cases concerned the specific issues before this Court.

Similarly, PNC Bank, in support of the application of *laches,* cites to three easily distinguished cases. PNC Br., 25. In *Schroeder v. Schlueter*, the court applied *laches* to bar a claim for specific performance. 85 Ill. App. 3d 574, 577 (5th Dist. 1980). Similarly, in *Stuckrath v. Briggs & Turivas*, this Court held that unreasonable delay will defeat a right to specific performance. 329 Ill. 555, 566 (1928). In *Harry Manaster & Brother v. Young*, the court reversed a lower court order requiring specific performance pursuant to

a written contract, finding that the conduct of the parties to the contract evidenced abandonment of the right thereto. 302 Ill. App. 545 (1st Dist. 1939). As the Kusmierzes are not seeking specific performance, none of these cases are applicable.

b. Courts have an independent duty to vacate void orders

The Respondents contend that, because personal jurisdiction is the right of the individual, courts do not have an independent duty to vacate void orders for want of personal jurisdiction. 3d-Party Br., 28; PNC Br., 35. The Respondents misapply the law, narrowly tailoring it to fit their narrative. This Court has held that "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void." *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). The Respondents narrow this rule to only apply to void orders that do not involve a jurisdictional challenge. But the rule is not so limited: in *Schak v. Blom*, a case that involved the improper turnover of funds belonging to an adverse claimant, the Appellate Court held that a void order "is a complete nullity." 334 Ill. App. 3d 129, 134 (2002). "Courts have a duty to vacate and expunge void orders from court records and thus may *sua sponte* declare an order void." *Id*.

In *Siddens v. Industrial Commission (Moorehead Machinery)*, the Appellate Court vacated as void an award by the Workers' Compensation Commission where such award exceeded the commission's authority. 304 Ill. App. 3d 506, 511-14 (4th Dist. 1999). The court, reiterating the rule that "courts have a duty to vacate and expunge void orders from court records and thus may *sua sponte* declare an order void," noted that it "could have addressed the instant issue *sua sponte*," but "[the worker] himself challenged the validity of the [award]." *Id*. 511. The duty to vacate a void judgment is based upon the inherent power of a court to expunge from its records void acts of which it has knowledge. *People v. Childs*, 278 Ill. App. 3d 65, 78 (4th Dist. 1996). Once the court

learns of a void order – such as when a section 2-1401 petition is filed seeking to vacate a judgment as void – the court has a duty to vacate the void order.

c. Respondents' policy arguments are without merit

i. The policy favoring finality of judgments does not trump the policy against void orders

The Respondents, appealing to public policy arguments, assert that *laches* applies to a purely legal challenge to a void judgment involving the taking of property and the levying of a personal judgment because to allow otherwise would forever inhibit the alienability of property. The public policy of Illinois is found in the constitution, statutes, and long-standing case law. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 79. The public policy of Illinois can also be found in federal law. *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 506 (1985). Just as the U.S. Constitution does, the Illinois Constitution sets forth that "no person shall be deprived of life, liberty or property without due process of law." ILL. CONST. 1970, art. I, § 2; U.S. CONST., amends. V, XIV.

Providing effective service is a means of protecting an individual's right to due process. *In re Dar C.*, 2011 IL 111083, ¶ 61. When proper service of process is not obtained, a court lacks personal jurisdiction over the person and any judgment entered against that person is void. *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 39. "A judgment rendered without service of process . . . where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings." *Thill*, 113 Ill. 2d at 308.

Indeed, in *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, this Court acknowledged that, "because of the disastrous consequences which follow when orders and judgments are allowed to be collaterally attacked, orders should be characterized as

void only when no other alternative is possible." 199 Ill. 2d 325, 341 (2002).[6] This court has repeatedly held that a voidness challenge based on a lack of personal jurisdiction "is not subject to forfeiture or other procedural restraints." *People v. Thompson*, 2015 IL 118151, ¶ 31 (quoting *Trice*, 2015 IL 116129, ¶ 38). So, while courts recognize a policy of preserving the finality of judgments as noted in *Trice*, such policy is subordinate when the court is faced with a void judgment based on a lack of personal jurisdiction.

ii. Special interests are already protected under the Illinois Mortgage Foreclosure Law and section 2-1401(e) such that laches cannot be applied

The Respondents' concern about alienability of title is squarely addressed by the Illinois Mortgage Foreclosure Law and section 2-1401(e) which protects title that vests in a *bona fide* purchaser. First, within the context of the Illinois Mortgage Foreclosure Law, section 15-1509(c) provides, in relevant part:

> Any vesting of title by a consent foreclosure pursuant to Section 15-1402 or by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims *of parties to the foreclosure* and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure in accordance with paragraph (2) of subsection (c) of Section 15-1502, notwithstanding the provisions of subsection (g) of Section 2-1301 to the contrary.

735 ILCS 5/15-1509(c) (emphasis added).

The Appellate Court has considered the application of section 15-1509(c) when the foreclosure judgment is challenged for want of personal jurisdiction. In *Deutsche Bank National Trust Co. v. Brewer*, the Appellate Court reiterated the well-established rule that "[a] judgment entered without jurisdiction over the parties is void *ab initio* and

[6] This Court has also acknowledged three types of voidness challenges to a final judgment: (1) challenges based on lack of personal or subject matter jurisdiction, (2) challenges based on a facially unconstitutional statute, and (3) challenges based on the void sentence rule. *People v. Thompson*, 2015 IL 118151, ¶¶ 31-33. The instant matter concerns the first type of challenge.

lacks legal effect." 2012 IL App (1st) 111213, ¶ 15. Considering the implications of void judgments in the context of section 15-1509(c), the Appellate Court held that "[e]ven if the legislature had the power to make a void judgment effective, nothing in section 15-1509 indicates that the legislature sought to make foreclosure judgments take effect and deprive owners of their properties when the trial court lacked personal jurisdiction over the owners." *Id.* The Appellate Court then held, unequivocally, "that section 15-1509 applies only to valid judgments entered with jurisdiction over the parties and the subject matter." *Id.* "Accordingly, section 15-1509 does not bar [a defendant's] jurisdictional challenge to the trial court's judgment." *Id.* The aforementioned is relevant to establish that the Illinois legislature has already expressed, as interpreted by Illinois courts, that protection of due process rights is paramount to the alienability of title.

Similarly, within the context of subsequent purchasers, if the jurisdictional defect is not apparent on the face of the record, title interests of subsequent purchasers are not affected. 735 ILCS 5/2-1401(e). The Third-Party Respondents are well aware of this protection: they seek to it in this very case. Thus, through section 2-1401(e), the legislature has already accounted for alienability of title. Section 2-1401(e) strikes the important balance between one's due process rights and the rights of a subsequent purchaser for value *without notice*. The Appellate Court, when it declined to address the application of *laches*, acknowledged that "[t]here are already equitable exceptions for granting relief from a void judgment, including the one that was the basis for the denial of relief in this case [section 2-1401(e)]." *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275 ¶ 30. Because these considerations are already accounted for under section 2-1401(e), *laches* is not needed to protect *bona fide* purchasers.

By way of comparison, *laches* has been used to bar relief in cases that involve minor children as their interests are not accounted for under section 2-1401(e) or section 15-1509(c). As clearly set out in *Rodriguez v. Koschny*:

> [t]he adoption decree is *sui generis* because it closely concerns the life of someone other than the contending parties, the child. A rule that an individual's right to set aside a judgment entered without jurisdiction over him cannot be cut off by lapse of time (assuming there is such a rule) does not and should not apply to the case where interests exist superior to those of the party whose rights are terminated.

57 Ill. App. 3d 355, 361 (2d Dist. 1978); *accord In re Adoption of Miller*, 106 Ill. App. 3d 1025, 1030 (1st Dist. 1982).[7] Here, unlike in the adoption cases, the rights involved are those of the contending parties. Moreover, there are no interests that are superior to that of the Kusmierzes given that section 2-1401(e) protections do not apply.

iii. Respondents' policy arguments rely on distinguishable authority

The Respondents rely heavily on this Court's prior rulings in *James v. Frantz*, 21 Ill. 2d 377 (1961) and *Koberlein v. First National Bank of St. Elmo*, 376 Ill. 450 (1941) while the IMBA cites to *Shapiro v. Grosby*, 25 Ill. 2d 245 (1962) and *Miller v. Siwicki*, 8 Ill. 2d 362 (1956) in their respective attempts to convince this Court that *laches* should bar the Petition. These cases are distinguishable. In *James*, this Court held that service was proper. 21 Ill. 2d at 381. The *James* opinion further noted that because the parties to the original deed had long since passed, their intent could not be ascertained. *Id*. at 382. Similarly, *Koberlein* did not involve a void judgment: the parties that challenged the judgment had previously filed appearances. 376 Ill. at 454.

[7] The Kusmierzes make no representation that the application of *laches* within the context of parentage rights as applied by Appellate Courts is proper; that issue is outside the purview of this case.

Shapiro did not involve a challenge to a void judgment; rather, it involved a dispute concerning various properties among family members of the deceased title owner. 25 Ill. 2d at 245-47. After resolving the title issues without resort to *laches*, this Court noted that "dismissal of the complaint was also proper on the ground of *laches*," before further commenting that, "[d]uring the intervening years not only the parties to the transaction but several other material witnesses had died." *Id*. In so doing, this Court cited to another case involving a belated challenge to a deed the parties to which had since passed – *James*. In both *James* and *Shapiro*, though couched in terms of *laches*, the issue was one of proof made unobtainable due to the deaths of parties to a transaction.

Lastly, *Miller*, a case involving an ejectment action, is also distinguishable. 8 Ill. 2d at 352. Therein, the defendant asserted, *inter alia*, a defense of *laches*. But unlike the matter before this Court, *Miller* did not involve due process rights. This Court's holdings in *James*, *Koberlein*, *Shapiro*, and *Miller* do not countenance the application of *laches* to void judgments. Rather, in those cases, consistent with current jurisprudence, this Court applied a due diligence standard where the challenge did not involve a void judgment.

d. A section 2-1401 petition that challenges a final judgment as void renders equitable considerations such as due diligence inapplicable

Next, Respondents argue that

> it does not automatically follow that equitable defenses are precluded simply because equitable considerations are not relevant to assessing the elements of section 2-1401 petition that raises a legal challenge . . . It is not petitioners' 2-1401 petition that invokes the equitable powers of the trial court; rather, it is respondents' assertion of an equitable defense.

See PNC Br., 28-29 (citing *Federal National Mortgage Association v. Altamirano*, 2020 IL App (2d) 190198, ¶¶ 20-21); 3d-Party Br., 30. (same). This is a novel, if flawed, argument. There are two types of section 2-1401 petitions: those that present a factual

challenge and those that present a legal challenge. *Warren County Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 31. If a section 2-1401 petition presents a factual challenge (an "*Airoom*-type petition"), a petitioner must allege and prove by a preponderance of the evidence "(1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986).

However, a section 2-1401 petition that raises a purely legal challenge that an order or judgment is void (a "*Vincent*-type petition") is not subject to the same requirements. *Walters*, 2015 IL 117783, ¶ 47-50 (referencing *People v. Vincent*, 226 Ill. 2d 1 (2007). In a *Vincent*-type petition, "the allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002) (considering a challenge to a void judgment filed 10 years after entry of judgment). In *Walters*, this Court reaffirmed its holding in *Vincent* prohibiting equitable considerations in defense to a section 2-1401 petition challenging a judgment or order as void. 2015 IL 117783, ¶ 47 ("equitable considerations are inapplicable when a section 2-1401 petition raises a purely legal issue because that type of petition will not involve a factual dispute").

Curiously, PNC Bank argues that this Court's decision in *Vincent* supports the application of *laches*. PNC Br., 29-31. PNC Bank misapprehends *Vincent*. In *Vincent*, this Court noted that section 2-1401 petitions "are subject to the usual rules of civil practice," "are essentially complaints inviting responsive pleadings," and are "subject to dismissal for want of legal or factual sufficiency," when, "even taking as true [their]

allegations, . . . [they] do[] not state a meritorious defense or diligence under section 2-1401 case law." 226 Ill. 2d at 8. But PNC Bank's contention that the statements of law regarding section 2-1401 proceedings authorize a *laches* defense is unsupported: the *Vincent* Court did not address the issue of *laches*.

The Petition alleges that the underlying judgment is void, a *Vincent*-type petition.[8] Therefore, no allegation or proof of due diligence is required. *See Sarkissian*, 201 Ill. 2d at 104. Despite there being no due diligence required of the Kusmierzes in bringing their Petition, Respondents, in pleading *laches* as a defense, necessarily argue that a lack of due diligence can be used *against* the Kusmierzes. *See People v. McClure*, 218 Ill. 2d 375, 389 (2006) (*laches* "requires a showing of lack of due diligence"). Respondents create a distinction without a difference. Because a lack of due diligence cannot be established against the Kusmierzes, Respondents could never establish a fundamental element of *laches*.

This Court has made it clear that, in a *Vincent*-type petition, due diligence is not a factor. It stands to reason that if a *Vincent*-type petition does not have to allege or prove due diligence, then a purported lack of due diligence cannot be used to uphold the judgment challenged as void. In short, the equitable consideration of due diligence is not relevant. *Walters*, 2015 IL 117783, ¶ 47. Indeed, if due diligence arguments could be used against a petition seeking to vacate a void order, then a petitioner bringing a *Vincent*-type petition would be in no different position than one bringing an *Airoom*-type petition. As held in *Sarkissian*, *Airoom*, *Vincent*, and *Walters*, this is simply not the case.

[8] This Court has acknowledged three types of voidness challenges to a final judgment. *See, supra*, n. 6. Although *Vincent* involved the third type of challenge – one based on the void sentence rule, relevant here is the first type of challenge – one based on the court's lack of personal jurisdiction.

e. PNC Bank's arguments concerning prejudice impermissibly attempt to litigate the underlying merits of the foreclosure case

PNC Bank, under the guise of asserting a *laches* defense, attempts to utilize the passage of time to shield itself from the results of its own conduct. Having addressed the inapplicability of any purported lack of due diligence above, this section addresses the alleged prejudice asserted by PNC Bank. The original foreclosing plaintiff, PNC Bank filed a motion for default, signed by counsel, stating that the Kusmierzes "were served with Summons on April 1, 2011." C 97. In reliance on that misrepresentation, the circuit court entered judgments against the Kusmierzes, divesting them of the Property and levying a personal judgment against them in excess of $50,000. C 109-113; C 127-128. It is self-evident that absent such misrepresentations of proper service, the circuit court would not have entered judgment or permitted PNC Bank to sell the Kusmierzes' property and obtain a monetary judgment against them.

With respect to the prejudice required to invoke *laches*, PNC Bank embraces the Second District's reasoning that "[t]o permit relief against the Bank at this juncture and under these circumstances would be inequitable, as the Bank has no ability to recover the property and, depending on statutes-of-limitations issues, might have no recourse against other parties or counsel." *Kusmierz*, 2020 IL App (2d) 190521, ¶ 33. Now, PNC Bank goes further and argues that it "would have foreclosed again, there being no question as to the validity of the underlying debt or the Kusmierzes' default." PNC Br., 24. These contentions concern PNC Bank's ability to litigate the merits of the underlying case rather than the Petition.

Litigating the merits of the underlying foreclosure or PNC Bank's ability to recover against others goes beyond the considerations relevant to the Petition. *See Ruben*

H. Donnelley Corp. v. Thomas, 79 Ill. App. 3d 729, 730 (1st Dist. 1979) ("it is not the trial court's responsibility to determine the merits of the underlying cause of action"). This Court acknowledged as much in *Vincent*, holding that there are only five types of final dispositions in a section 2-1401 petition: dismissal (upholding the underlying judgment), grant or denial on the pleadings (vacating or affirming the underlying judgment), and grant or denial after holding a hearing to resolve factual disputes (again, vacating or affirming the underlying judgment). 226 Ill. 2d at 9. Even setting aside the fact that PNC Bank never provided any evidence to support its contentions of prejudice (*see* C 189-95), the suppositions of prejudice embraced by PNC Bank and the Second District go well beyond the considerations relevant to the Petition and create a new final disposition not envisioned by this Court in *Vincent*.

VI. If the Equitable Consideration of *Laches* Applies, Then So Too Does the Doctrine of Unclean Hands

The Respondents argue that unclean hands is only applicable when misconduct rises to the level of fraud or bad faith. In support, Respondents rely upon a statement in *Jaffe Commercial Finance Co. v. Harris*, that "the misconduct . . . must have been fraud or bad faith directed toward the defendant in the very transaction being considered." PNC Br., 38 (citing 119 Ill. App. 3d 136, 140 (1st Dist. 1983)); Heath Br., 37. (same). But there is no such rule regarding severity of misconduct necessary to give rise to unclean hands. This is evidenced by the cases relied upon in *Harris*; namely, *Mills v. Susanka*, 394 Ill. 439 (1946) and *Baal v. McDonald's Corp.*, 97 Ill. App. 3d 495 (1st Dist. 1981).

The *Mills* opinion merely held that unclean hands "assumes the suitor asking the aid of a court of equity has himself been guilty of *conduct in violation of the fundamental conceptions of equity jurisprudence*, and therefore refuses him all recognition and relief

with reference to the subject matter or transaction in question." 394 Ill. at 445. In *Baal*, the court noted that the misconduct "must have been conduct in connection with the very transaction being considered . . . *and must have been misconduct, fraud or bad faith* toward the defendant making the contention." 97 Ill. App. 3d at 500-01 (emphasis added) (citing *Metcalf v. Altenritter*, 53 Ill. App. 3d 904, 908 (5th Dist. 1997) ("Equitable relief may be denied if the applicant is guilty of misconduct, fraud, or bad faith"); *Illinois Power Co. v. Latham*, 15 Ill. App. 3d 156, 168 (1973) ("misconduct . . . which will defeat recovery . . . under the doctrine of unclean hands must have been . . . misconduct, fraud or bad faith")). Contrary to Respondents' argument, the doctrine of unclean hands does not include a threshold severity of misconduct that must be reached before the doctrine will apply. Should this Court hold that equitable considerations are relevant in a *Vincent*-type petition, then this matter should be remanded and the Respondents' unclean hands must be considered.

VII. Discovery and an Evidentiary Hearing Should Have Been Conducted

a. The proceedings before the circuit court prevented the Kusmierzes from conducting discovery

The Respondents argue that the Kusmierzes were afforded an opportunity to conduct discovery but failed to do so. 3d-Party Br., 8; PNC Br., 11. Using this representation, the Respondents argue that an evidentiary hearing was not required. 3d-Party Br., 35; PNC Br., 34. The Respondents are mistaken. The Kusmierzes *did* request discovery pursuant to Rule 191(b) before responding to the Motions to Dismiss.[9] C 206-210. The circuit court denied the Kusmierzes' request for discovery. C 279; C 280;

[9] Although the Kusmierzes argued that section 2-1401(e) and *laches* did not apply to their Petition as a matter of law, they nonetheless sought discovery to resolve factual matters concerning the elements of section 2-1401(e) and *laches* in the event the circuit court allowed application of same.

C 286. The Kusmierzes filed a motion to reconsider. C 271. Following hearing, the circuit court granted the Kusmierzes' motion to reconsider in part, but denied the Kusmierzes' request to conduct discovery to address any factual matters concerning section 2-1401(e) and *laches*. C 288.

b. The Kusmierzes should be allowed to resolve factual disputes through discovery and an evidentiary hearing

Last, despite Respondents' arguments otherwise, should this Court rule that equitable considerations such as *laches*, due diligence, and unclean hands are applicable to the Petition, despite it being a *Vincent*-type petition, the Kusmierzes should be afforded an opportunity to conduct discovery and an evidentiary hearing. *See Walters* 2015 IL 117783, ¶ 38 ("when the opposing party challenges the facts supporting the petitioner's request for relief under section 2-1401, a full and fair evidentiary hearing must be held").

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words 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 nineteen (19) pages.

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No. 126606

IN THE
SUPREME COURT OF ILLINOIS

PNC BANK NATIONAL ASSOCIATION, Plaintiff-Appellee, v. JERZY KUSMIERZ and HALINA KUSMIERZ, Defendants-Appellants.	On Review of the Opinion of the Illinois Appellate Court, Second District No. 2-19-0521 Therefrom Up on Appeal from the Circuit Court of Cook County, Illinois No. 2011 CH 1585 Trial Judge: Honorable James D. Orel

NOTICE OF FILING

To: See attached Service List

You are hereby notified that on June 23, 2021, I electronically filed Reply Brief of Appellants with the Clerk of the Supreme Court of Illinois. A true and correct copy of the same is attached and served upon you.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that on June 23, 2021, I served this notice and a true and correct copy of the above-referenced document by serving a copy in the manner so described to each person listed on the below service list before 11:59 p.m. on June 23, 2021.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Giovanni Raimondi

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