No. 126606

In the Supreme Court of Illinois

PNC BANK, NATIONAL ASSOCIATION, et al.,

Plaintiff-Appellee,

v.

JERZY KUSMIERZ and HALINA KUSMIERZ et. al.,

Defendants-Appellants,

(Brian T. Heath, Nellisa S. Ragland, and Mortgage Electronic Registration Systems, Inc., Respondents-Appellees).

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

BRIEF OF PLAINTIFF-APPELLEE

Oral Argument Requested

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NATURE OF THE CASE

Defendants-Appellants Jerzy and Halina Kusmierz (the "Kusmierzes") owned a parcel of vacant land commonly known as 1405 Wisconsin Avenue in the Village of Lombard in DuPage County (the "Property"). They bought it with $120,000 borrowed from Plaintiff-Appellee PNC Bank, National Association ("PNC"). When the Kusmierzes failed to make their loan payments, PNC filed a foreclosure action in the Circuit Court for DuPage County, on March 30, 2011.

PNC's foreclosure counsel hired Metro Detective Agency ("Metro") to serve the summons. On March 31, 2011, Jennifer I. Magida of Metro attempted to serve the Kusmierzes at the Property but found it vacant. On Friday, April 1, 2011, Magida served the Kusmierzes with the summons and the foreclosure complaint in the Village of Palatine in Cook County. The Circuit Court entered the order appointing Metro on Monday, April 4, 2011. The Kusmierzes did not appear and defend the action. Further, the Kusmierzes did not raise any objection or assert any right to the Property at any point during the entire 14-month period between receipt of actual notice of the filing of the foreclosure complaint and confirmation of the Sherriff's sale to PNC in June 2012.

Nearly ten months after the Sheriff's sale, in April 2013, PNC sold the Property to Respondents-Appellees Nellisa S. Ragland and Brian T. Heath, a married couple (hereafter, the "Current Owners"). The Current Owners then used $42,000 in personal savings and borrowed approximately $300,000 in construction loans from STC Capital Bank (the "Current Owners' Lender") to build their family home on the Property. At no time during this period did the Kusmierzes do anything to object or assert any rights to the Property.

For approximately 5½ years more, the Current Owners continued in the quiet enjoyment of the Property. In September 2018, the Kusmierzes filed a petition for relief from the 2012 foreclosure judgment pursuant to Illinois Code of Civil Procedure section 2-1401 (the "Petition"). Seizing on the one business day delay between the date they were served with the foreclosure complaint (Friday, April 1st) and entry of the Circuit Court's order appointing Metro (Monday, April 4th), the Kusmierzes assert that the foreclosure judgment is void. On this basis, the Kusmierzes seek ownership of the Property, including the home built by the Current Owners, and monetary compensation for each day of the nearly ten-year period between the sale of the Property to PNC and the present.

PNC timely filed a motion to dismiss the Petition pursuant to sections 2-615, 2-619 and 2-619.1 of the Illinois Code of Civil Procedure. As allowed in response to any civil action, PNC based its motion on affirmative matter under section 2-619(a)(9), specifically, the affirmative defense of *laches*. By order entered on May 21, 2019, the Circuit Court dismissed with prejudice the Petition against PNC on the basis of *laches*. By the same order, the Circuit Court also granted a similar motion filed by the Current Owners and, in addition to relying on *laches*, held that dismissal of the Current Owners and their lender was warranted because they qualified for *bona fide* purchaser protection within the meaning of section 2-1401(e). The Kusmierzes timely appealed.

On August 28, 2020, a unanimous Appellate Court affirmed. As to PNC, the Appellate Court rejected the Kusmierzes' contention that *laches* is *never* an available defense to a section 2-1401 petition alleging a judgment is void for defective service. Instead, the Appellate Court held that though a void judgment may be challenged at any time, numerous decisions of this Court and the Appellate Court have recognized that *laches*

is an available defense to a section 2-1401 petition alleging defective service, and that, in an appropriate case, a section 2-1401 petition may be defeated on the basis of *laches*. The Appellate Court found specifically that the Kusmierzes were served with the complaint and summons notifying them that their interest in the Property was in jeopardy, were on constructive notice of the subsequent sales of the Property to PNC and then to the Current Owners, and still did nothing to protect their purported rights in the Property for six years prior to filing their Petition, "two transfers of title later." A 86.[1] It found that "[t]o permit relief against [PNC] at this juncture and under these circumstances would be inequitable, as [PNC] has no ability to recover the property and, depending on statutes-of-limitations issues, might have no recourse against other parties or counsel." *Id.*

The Kusmierzes seek unprecedented relief. They ask this Court to depart from longstanding Illinois law to hold that the affirmative defense of *laches* may *never* be asserted to bar a petition for relief from an allegedly void foreclosure judgment pursuant to section 2-1401. As described below, courts in Illinois have long found that *laches* may serve as a defense to a challenge against an allegedly void foreclosure judgment and, further, that it may apply *even* where that void judgment terminated such fundamental liberty interests as parental rights. These prior decisions recognize that the elements of *laches*—unreasonable delay resulting in prejudice to another party—embody sound public policy reflecting that courts will not aid parties who knowingly slept on their rights to the detriment of others. The basis for that policy is plainly evident here. After knowingly sleeping on their rights for over six years, the Kusmierzes now seek a windfall by asking

[1] PNC refers to the Record on Appeal with a "C," the Report of Proceedings with an "R," and the Kusmierzes' Appendix with an "A."

the courts of this State to order the Current Owners—who built a home on the once-vacant lot through financing and their own funds—to transfer their home to the Kusmierzes. Aside from the unthinkable nature of such a result in this specific case, the Kusmierzes' position—if adopted as the law of Illinois—would create substantial uncertainty and risk related to the title of foreclosed properties in this State. The increased risk and potential liability arising from transactions relating to foreclosed properties would potentially decrease the value of such properties, which could in turn produce larger deficiencies for borrowers who cannot pay their mortgage loans. Leaving the doctrine of *laches* to operate according to the usual rules of Illinois civil practice would serve the important public interest of barring relief to those who have slept on their rights to the detriment of others, as has long been the policy of Illinois law for every kind of civil proceeding.

ISSUES PRESENTED ON APPEAL

1. Whether the Appellate Court correctly held that the affirmative defense of *laches* applies to, and bars, the Kusmierzes' section 2-1401 collateral attack on the 2012 foreclosure judgment where the Kusmierzes, with knowledge that their interest in the Property was in jeopardy, did nothing to protect their rights in the Property for six years prior to filing their Petition, and where, as a result of two intervening transfers of title to the Property, PNC had no ability to recover the Property and the Kusmierzes' knowing delay created the alleged harm for which they seek monetary recovery?

2. In the alternative, whether a duly licensed or registered private detective may serve process for a case pending in a county with a population less than 2,000,000 upon the Kusmierzes wherever they may be found in the State?

STATEMENT OF JURISDICTION

This Court has jurisdiction under Illinois Supreme Court Rule 315. The Appellate Court filed its opinion affirming the decision of the Circuit Court on August 28, 2020. On November 3, 2020, the Kusmierzes filed their Petition for Leave to Appeal pursuant to Rule 315. Such filing was timely because of this Court's March 24, 2020 order providing for the temporary extension of deadlines to file petitions for leave to appeal. Subsequently, on January 27, 2021, this Court allowed the Kusmierzes' Petition for Leave to Appeal.

STATUTES INVOLVED

735 ILCS 5/2-1401 Relief from judgment

> "(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. * * * .
>
> (b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. A petition to reopen a foreclosure proceeding must include as parties to the petition, but is not limited to, all parties in the original action in addition to the current record title holders of the property, current occupants, and any individual or entity that had a recorded interest in the property before the filing of the petition. All parties to the petition shall be notified as provided by rule.
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> * * *
>
> (c) [T]he petition must be filed not later than 2 years after the entry of the order or judgment. * * * .
>
> (d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless 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, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment. When a petition is filed pursuant to this Section to reopen a foreclosure proceeding, notwithstanding the provisions of Section 15-1701 of this Code, the purchaser or successor purchaser of real property subject to a foreclosure sale who was not a party to the mortgage foreclosure proceedings is entitled to remain in possession of the property until the foreclosure action is defeated or the previously foreclosed defendant redeems from the foreclosure sale if the purchaser has been in possession of the property for more than 6 months.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

735 ILCS 5/2-202 Persons authorized to serve process; place of service; failure to make return

(a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. In matters where the county or State is an interested party, process may be served by a special investigator appointed by the State's Attorney of the county, as defined in Section 3-9005 of the Counties Code. A sheriff of a county with a population of less than 2,000,000 may employ civilian personnel to serve process. In counties with a population of less than 2,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 or by a registered employee of a private detective agency certified under that Act as defined in Section (a-5). A private detective or licensed employee must supply the sheriff of any county in which he serves process with a copy of his license or certificate; however, the failure of a person to supply the copy shall not in any way impair the validity of process served by the person. The court may, in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action. It is not necessary that service be made by a sheriff or coroner of the county in which service is made. If served or sought to be served by a sheriff or coroner, he or she shall endorse his or her return thereon, and if by a private person the return shall be by affidavit.

* * *

> (b) Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process. An officer may serve summons in his or her official capacity outside his or her county, but fees for mileage outside the county of the officer cannot be taxed as costs. The person serving the process in a foreign county may make return by mail.

STATEMENT OF FACTS

I. The Kusmierzes default on their mortgage loan and PNC forecloses.

On December 9, 2005, the Kusmierzes entered into a Land/Construction Loan Mortgage (the "Mortgage") evidenced by a $120,000 Land/Construction Loan Adjustable Rate Note (the "Note"), for the purchase of a vacant lot located at the Property. C 24; C 31. The Kusmierzes failed to make payments required under the Mortgage and Note. C 21, ¶ 2(J). Accordingly, on March 30, 2011, PNC filed a Complaint for Foreclosure (the "Complaint") in the 18th Judicial Circuit Court, DuPage County. C 20.[2]

On March 31, 2011, Jennifer Magida, a registered employee of Metro, attempted to serve the Kusmierzes at the Property, but upon arrival, discovered it to still be "a vacant residential lot" with "no structures on the property." C 57; C 61. On April 1, 2011, Magida personally delivered a copy of the summons and Complaint to Defendant-Appellant Halina Kusmierz ("Halina") at 1107 West Eaton Court in Palatine, Illinois ("the Palatine Address"). C 69. Magida, understanding Defendant-Appellant Jerzy Kusmierz ("Jerzy") to reside at that address, left a copy of the summons and Complaint for Jerzy with Halina

[2] The Mortgage was initially entered into by the Kusmierzes and MidAmerica Bank, FSB, but PNC is the legal holder of the Note, Mortgage, and indebtedness as successor by merger to National City Bank, which was successor by merger to MidAmerica Bank, FSB. See C 21, ¶ 2(N). See also 12 U.S.C. § 215a(e)("The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger.").

that same day at the same address and mailed a copy of the summons and Complaint on April 4, 2011 in a sealed envelope to Jerzy. C 65. In affidavits of service filed April 7, 2011 reflecting the prior service by Magida on the Kusmierzes, Magida further attested that she was "a registered employee of a Private Detective Agency licensed by the Illinois Department of Financial and Professional Regulation and thereby authorized to serve process within the State of Illinois pursuant to 735 ILCS 5/2-202(a)." C 65; C 69.

II. The Kusmierzes fail to appear in the foreclosure proceeding and stand idly by for more than six years while the Property is sold to PNC at foreclosure and then sold to the Current Owners.

During the eleven months following the Kusmierzes' receipt of notice of the action, they failed to appear, answer, or otherwise respond to the Complaint. Accordingly, on February 27, 2012, PNC moved for a default judgment against them, along with a judgment of foreclosure and sale. C 85; C 97. On February 28, 2012, the Circuit Court entered an order of default against the Kusmierzes and a judgment of foreclosure and sale in the amount of $132,418.51. C108-109. Approximately three months later, on May 31, 2012, PNC was the successful bidder at the judicial foreclosure sale; its successful bid was $40,000. C 124. The Circuit Court then confirmed the sale by order entered June 12, 2012, and simultaneously entered a $54,229.26 deficiency judgment against the Kusmierzes.[3] C 125; C 127. On that same day, the DuPage County Sheriff issued a deed vesting PNC with title to the Property. C 303. The record reflects that numerous filings in the proceeding were mailed to the Kusmierzes at both the Property and the Palatine Address,

[3] For unknown reasons, the original judgment amount of $132,418.51 was reduced to $91,286.54, and then subsequently reduced by PNC's bid amount of $40,000. C 125. Once other fees and costs accruing since entry of the judgment were accounted for, the resulting deficiency judgment amounted to $54,229.26. *Id.* Pursuant to 735 ILCS 5/12-108, that deficiency judgment lapsed on June 12, 2019.

including the Motion for Judgment of Foreclosure and Sale and Motion for Default, as well as the Notice of Hearing for Confirmation of Foreclosure Sale. C 84; C 121.

Almost a year later, on or about April 9, 2013, PNC sold the Property, which still consisted of a vacant lot, to the Current Owners for $24,000 via Special Warranty Deed. C 176; C 178. The Current Owners then constructed a single-family home on the Property, financed by (i) a $220,400 loan secured by a mortgage lien, (ii) a $72,250 home equity line of credit secured by a subordinate mortgage lien, and (iii) $42,000 of the Current Owners' personal funds. C 176-179. From 2013 on, the Current Owners paid at least $29,500 in real estate taxes and at least $6,500 for insurance coverage. C 177; C 179.

III. More than six years after completion of the foreclosure proceedings, the Kusmierzes seek relief for the first time, and, demand possession of the Current Owners' home, plus a windfall monetary award from PNC.

Seven years after the Kusmierzes learned of the foreclosure proceeding that they chose not to participate in, and more than six years after entry of judgment, the Kusmierzes asserted their purported rights in the Property for the first time by filing their Petition for Relief from Void Orders on September 12, 2018. C 136. The Kusmierzes alleged that service of summons was defective because Metro had not been appointed before effecting service in Cook County in purported violation of 735 ILCS 5/2-202(a). C 136, 138.[4] The Kusmierzes sought to vacate all orders as void *ab initio* and an order declaring them the "owners" of the Property. C 138-139. The Kusmierzes also sought monetary relief from PNC and the Current Owners "as restitution, reasonable use and occupancy of [the Property] from July [sic] 12, 2012, through and including, the date [they] are restored to possession,"

[4] The Petition alleged that "[t]here is no order in the record appointing a special process server." C 137. That is untrue. The order appointing a special process server was entered on April 4, 2011, the Monday after service on the Kusmierzes. C 53.

or, "[i]n the alternative, in the event that possession is not restored," an order directing PNC and the Current Owners "to pay [them], as restitution, the value of the Property on the date that [their] petition is granted plus reasonable use and occupancy of [the Property] from July [sic] 12, 2012, through and including, the date restitution is paid in full." C 138-139.

The Current Owners and the Current Owners' Lender responded to the Petition with a motion to dismiss under sections 2-615 and 2-619. C 157. According to their motion, the Current Owners were *bona fide* purchasers entitled to the protections of 735 ILCS 5/2-1401(e). The Current Owners submitted affidavits attesting that at the time they purchased the Property, it was a vacant lot and that they constructed a single family home financed through two mortgages and their own funds, that they have lived in the home since it was completed in June of 2014, that they have paid taxes and insurance related to the Property since 2013, and that prior to receipt of the Petition they were unaware of the alleged jurisdictional defect of the foreclosure proceedings. C 176-179.[5]

PNC also moved to dismiss the Petition under sections 2-615 and 2-619. C 189. PNC argued that the Petition was barred by the doctrine of *laches*. C 191-193. Specifically, PNC argued the Kusmierzes' six-year delay in pressing their rights was unreasonable. PNC further argued that such delay unfairly prejudiced PNC because, by withholding their objections to service for over six years, the Kusmierzes increased the damages they claimed without any detriment to themselves. C 191-193. PNC additionally argued that the Kusmierzes' delay in asserting their rights resulted in PNC selling the Property to *bona*

[5] The Current Owners also moved to dismiss the Petition on the basis of *laches*, among other reasons. C 157.

fide purchasers. Finally, PNC pointed out that, due to the Kusmierzes' unreasonable delay, PNC was prejudiced in that it could no longer recover the Property used to secure the Kusmierzes' loan. C 192-193.

Instead of responding to the motions to dismiss, the Kusmierzes moved to pursue discovery from the Current Owners under Illinois Supreme Court Rule 191(b). C 206. The Circuit Court originally denied that motion over the Kusmierzes' objection on January 23, 2019, but later reversed its ruling on March 12, 2019 and permitted the Kusmierzes to pursue discovery. C 260; C 288.[6] The Kusmierzes opted not to pursue any discovery, and, instead, responded to the merits of the motions to dismiss. C 295; C306. Their responses to the section 2-619 arguments, including the response to the defense that *laches* applied, did not include any evidence attempting to show the six-year delay was reasonable. *Id.* The Kusmierzes did not make any showing in the record that they paid taxes or insurance for the Property. *See* C136-139; C 306-315.

On May 21, 2019, after hearing oral argument, the Circuit Court granted both pending motions to dismiss with prejudice. C 349. The court dismissed the Petition as to the Current Owners because they were *bona fide* purchasers under section 2-1401(e) and based on the affirmative defense of *laches*. R 15. The court also granted PNC's motion to dismiss based on the affirmative defense of *laches*. R 15.

IV. The Appellate Court affirms that the Petition is barred by *laches*.

On June 18, 2019, the Kusmierzes filed their notice of appeal. C 350. On August 28, 2020, the Appellate Court entered an order affirming the Circuit Court's dismissal of

[6] The Kusmierzes' brief (at p. 7) recites the Circuit Court's original order denying discovery but omits that the court later reconsidered and permitted discovery.

the Petition as to all parties. A 74. The Appellate Court first addressed the argument that relief against the Current Owners was barred by 735 ILCS 5/2-1401(e). A 81. The court noted a judgment may be collaterally attacked with respect to innocent third-party purchasers "only where an alleged personal-jurisdictional defect affirmatively appears in the record." *Id.* The court found the alleged error was not apparent on the face of the record because the affidavit of service did not specify that service was effected in Cook County, and it specifically stated the process server "was authorized to serve process 'pursuant to 735 ILCS 5/2-202(a).'" A 82. Accordingly, the court affirmed the dismissal of the Petition against the Current Owners.

The court also affirmed the dismissal as to PNC. The court first addressed the Kusmierzes' argument that *laches* cannot apply because a void judgment may be attacked at any time. A 83. The court noted that it had "no quarrel with [the Kusmierzes'] position that void judgments may be challenged at any time"; however, *laches*, as an affirmative defense, "can preclude *relief* in an appropriate case where prejudice is demonstrated." A 83 (quotation marks omitted). The court cited a number of cases in support of its holding that *laches* may apply when a void judgment may be collaterally attacked including, *Slatin's Properties, Inc. v. Hassler*, 53 Ill. 2d 325, 329-30 (1973), *James v. Frantz*, 21 Ill. 2d 377, 383 (1961), *In re Jamari R.*, 2017 IL App (1st) 160850, ¶ 55, *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 26, *LaSalle National Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 350-51 (2003), *Eckberg v. Benso*, 182 Ill. App. 3d 126, 131-32 (1989), *In re Adoption of Miller*, 106 Ill. App. 3d 1025, 1030 (1982), *Rodriguez v. Koschny*, 57 Ill. App. 3d 355, 361 (1978), and *Miller v. Bloomberg*, 60 Ill. App. 3d 362, 365 (1978). A 84-85. Applying the rule adopted

in these cases, the court noted that "[f]or six years, [the Kusmierzes] did nothing to protect their rights in the property and, had they participated in court proceedings they might have earlier discovered the alleged defect in service." A 85. The court found nothing in the record to support this delay being reasonable because there was no dispute the Kusmierzes had actual or constructive notice of the proceedings. A 85-86. The court further held that the delay resulted in prejudice to PNC because PNC had "no ability to recover the property and, depending on statutes-of-limitations issues, might have no recourse against other parties or counsel." A 86. Accordingly, the Appellate Court dismissed the Petition as to PNC as well.

On November 3, 2020, the Kusmierzes filed their petition for leave to appeal to this Court, which was allowed on January 27, 2021. A 88.

ARGUMENT

I. Introduction and summary of argument.

In this Court, the Kusmierzes rest their case against PNC on the premise that *laches* is *never* an applicable defense to a section 2-1401 petition alleging a void judgment. As the Appellate Court held correctly, and, as demonstrated further below, this is not the law of Illinois. In 1961, this Court, in *James v. Frantz*, found that Illinois had long recognized *laches* as an affirmative defense to a collateral attack on an allegedly void judgment. *James* was decided over sixty years ago on the basis of this Court's precedents dating back to the 1930s.[7] Citing the "black letter of the Restatement [of Judgments]," the Court in *James*

[7] See *James*, 21 Ill. 2d at 383 (citing *Wright v. Simpson*, 200 Ill. 56, 65 (1902); *Elieff v. Lincoln Nat'l Life Ins. Co.*, 369 Ill. 408 (1938); *Koberlein v. First Nat'l Bank of St. Elmo*, 376 Ill. 450, 456-57 (1941)) ("In that case [*Elieff*] we pointed out that the petition for leave to file the bill was filed within thirty days after the complainant learned of the entry of the foreclosure decree against him, and consequently he was not guilty of laches. We did not

held that where prejudice is shown "equitable relief from a judgment may be refused to a party thereto if * * * after ascertaining the facts the complainant failed promptly to seek redress." *James*, 21 Ill. 2d at 383 (quoting Restatement (First) of Judgments § 129 (Am. L. Inst. 1942)).

This well-established Illinois law serves sound public policy against the assertion of stale claims or defenses when unreasonable delay would result in prejudice to the opposing party. In applying *laches*, the courts deem it good public policy to allow claims and titles long acquiesced in to remain in repose. This is particularly true where a party knowingly allows adverse parties to act to their prejudice during the delay. Thus, when title to real property is at issue, prejudice is established and *laches* is applied when a party remains passive while an adverse claimant or third party incurs risk, enters into transactions affecting title, or makes expenditures for improvements or taxes.

Applying these principles, the Appellate Court correctly held the Kusmierzes' unreasonable delay, in combination with the undisputed resulting prejudice, constituted *laches*. There is no dispute that the Kusmierzes received actual notice of the foreclosure complaint and thus knew from April 1, 2011 onward that their interest in the Property was in jeopardy and still did nothing to protect their asserted rights in the Property for more than seven years after receiving notice and six years prior to filing their Petition. The Kusmierzes' brief in this Court offers no explanation for their unreasonable delay. Nor do the Kusmierzes dispute the prejudice found by the Appellate Court that PNC and the Current Owners would suffer if relief were allowed. Indeed, the prejudice found by the

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hold that the defense of laches would never lie. The Sloan case [] is authority for the proposition that it will."). See also *Sloan v. Sloan*, 102 Ill. 581, 584 (1882).

Appellate Court here—where a claimant stands idly by while title to real property is transferred and subsequently improved at great expense—is quintessentially the kind of prejudice that triggers *laches*.

Rather than dispute the existence of prejudice constituting *laches*, the Kusmierzes argue that this Court should ignore it in service of the principle that a void judgment can be attacked at any time. As this Court and the Appellate Court have recognized, there is no genuine conflict between recognizing that although a claim for relief pursuant to section 2-1401 may be *brought* at any time, it is not necessarily entitled to *prevail* at any time, especially here, where PNC demonstrated, and the Circuit and Appellate Court have found, that the Kusmierzes' unreasonable delay resulted in prejudice constituting *laches*.

The Kusmierzes rely primarily on this Court's decision in *Warren Cnty. Soil and Water Conservation Dist. v. Walters*, 2015 IL 117783 ("*Walters*") for their assertion that *laches* can never be raised in response to a section 2-1401 petition alleging a void judgment. Yet, *Walters* provides no support for their contention. The question raised by the Kusmierzes—whether *laches* could be raised as an affirmative defense in response to a section 2-1401 petition alleging a void judgment—was neither presented to, nor decided by, this Court in *Walters*. *Walters* did *not* involve a challenge to, or even a discussion of, the role of affirmative defenses to a section 2-1401 petition. At issue in *Walters* was the legal sufficiency of the section 2-1401 petition and whether the trial court could exercise equitable discretion to relax the burden on the petitioner to establish affirmatively that he exercised due diligence in presenting his meritorious defense to the underlying claim. The trial court in *Walters* found that it had no discretion to relax the statutory due diligence elements of Walter's *prima facie* case for section 2-1401 relief. This Court reversed,

finding that the trial court had authority to exercise its discretion in equity to lower the petitioner's burden. *Walters* is thus a case addressed to the legal sufficiency of a petitioner's affirmative claim for relief. It decided nothing generally about a respondent's ability to raise affirmative defenses to a section 2-1401 petition and nothing specifically in reference to the affirmative defense of *laches*.

Nor have the Kusmierzes raised anything about the procedural structure, history, or policy underpinning the section 2-1401 proceeding to suggest that this Court should depart from longstanding Illinois law to reach the unprecedented conclusion that the defense of *laches* is unavailable to respond to a section 2-1401 petition alleging a void judgment. The section 2-1401 petition, though filed in the same case in which the judgment was rendered, is still a collateral attack on the judgment, *i.e.*, an independent proceeding, and not a continuation of the underlying litigation. Given this separate identity as a collateral attack and not a continuation of the underlying litigation, the section 2-1401 proceeding is in law an independent legal action—a case within a case—that begins with a pleading, the petition, and to which general rules of pleading and civil procedure apply. As in any other civil action, therefore, the Kusmierzes were required to plead the statutory elements of their section 2-1401 cause of action. In turn, as in any other civil action, PNC was then entitled to respond to the Petition by answer or motion and was also entitled to set up affirmative defenses in response to the claim.

Nothing in this Court's decisions has eliminated the Circuit Court's ability to hear equitable defenses and, in accordance with usual rules of civil practice, dismiss an otherwise well-pleaded section 2-1401 petition when a defense in equity is established on the face of the petition. The Kusmierzes have offered no reason for this Court to depart

from the usual rules of civil practice and long-settled Illinois substantive law and hold, for the first time, that a *laches* defense may not be raised as an affirmative defense to a section 2-1401 petition alleging a void judgment.

The result the Kusmierzes seek here would be extraordinary. The Kusmierzes borrowed $120,000 from PNC and secured that loan with a small parcel of vacant land. They defaulted on the loan. When PNC commenced a proceeding to foreclose on the loan, the Kusmierzes received actual notice of the proceedings and did nothing. While they knowingly sat by, the Property was sold, not once, but twice. The third-party purchasers in the second sale, the Current Owners, improved the Property by borrowing and investing their own money to build their home, dramatically increasing the value of the Property. The Current Owners paid all the taxes and insurance for years. Then, with no explanation for the delay, the Kusmierzes filed their Petition seeking to force the Current Owners out of their home, and to cause PNC substantial harm, thereby realizing an enormous and unprecedented windfall. Yet, as found by both the Circuit Court and the Appellate Court, decades of established Illinois law dictate against such a result. Nothing about this matter provides a basis for the Court to depart from established Illinois law governing here. To the contrary, this case provides the quintessential example of *why* Illinois recognizes *laches* as a valid defense in this context. For these reasons, the Court should affirm the judgment below.

Further, as set out in Part IV, below, this Court may affirm the judgment of the Appellate Court for an independent reason appearing in the record. Currently, before this Court is the case of *Municipal Trust and Savings Bank v. Moriarty*, 2020 IL App (3d) 190016, *appeal allowed sub nom. Mun. Tr. & Sav. Bank v. Moriarty*, 159 N.E.3d 951 (Ill.

2020). In that case, this Court is considering whether the county of service controls whether appointment of a special process server is required or, alternatively, whether the need for such an appointment is controlled by the county that issues the summons. If this Court agrees with the Third District in *Moriarty*, that the county of issuance controls, it may affirm the judgment here because the allegedly defective service at issue in this case would be valid under *Moriarty.*

II. Standard of review.

Dismissal of a section 2-1401 petition raising a collateral attack on an allegedly void judgment is reviewed *de novo* by this Court. *People v. Carter*, 2015 IL 117709, ¶ 13; see also *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶ 17 (citing *Better Gov't Ass'n v. Ill. High Sch. Ass'n* , 2017 IL 121124, ¶ 21) ("The propriety of a dismissal under section 2-619(a)(9) of the Code presents a question of law that we review *de novo*.").

III. The doctrine of *laches* precludes the relief sought by the Kusmierzes against PNC.

As demonstrated below, PNC and the Current Owners properly raised the affirmative defense of *laches* in response to the section 2-1401 petition filed by the Kusmierzes. Further, the Circuit Court and the Appellate Court properly applied the law of *laches* to the facts appearing on the face of the section 2-1401 petition to find that *laches* bars relief from the judgment. The Kusmierzes have not cited, and PNC has been unable to find, a single decision of this Court holding that a section 2-1401 respondent is prohibited from setting up affirmative defenses by way of answer or motion according to the usual rules of Illinois civil practice. Nor have they cited any case that so holds specifically with respect to the affirmative defense of *laches.* None of the Kusmierzes'

objections to the application of *laches* provides a basis to overturn the decision of the Appellate Court. Accordingly, that decision should be affirmed.

A. A section 2-1401 proceeding is a collateral attack on the judgment, and not a continuation of the underlying litigation, to which the usual rules of pleading and civil procedure apply.

Section 2-1401 governs "[r]elief from final orders and judgments, after 30 days." 735 ILCS 5/2-1401(a); *Sarkissian v. Chi. Bd. of Educ.*, 201 Ill. 2d 95, 104–05 (2002). This section provides a statutory remedy and "expressly abolishe[d] all other common law means of attacking void judgments." *Sarkissian*, 201 Ill. 2d at 104. Specifically, paragraph (a) of section 2-1401 states:

> Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered.

735 ILCS 5/2-1401(a); see also *Walters*, 2015 IL 117783, ¶ 33 ("[O]ur legislature abolished the common law practice of using a writ to obtain relief from judgment and replaced it with a statutory scheme, the predecessor of section 2-1401.") (citing *Ellman v. Ruiter*, 412 Ill. 285, 290-91 (1952)). Whereas such common law remedies required the initiation of a separate action for a collateral attack on an otherwise final judgment, section 2-1401 and its predecessor Illinois statutes eliminated the need to bring a separate action. See 735 ILCS 5/2-1401(b) ("The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof."). However, proceedings under section 2-1401, "though filed in the same case in which the judgment was entered, are viewed as a collateral attack and not as a continuation of the underlying litigation." *People v. Ellis*, 2020 IL App (1st) 190774, ¶ 14; see also *Walters*, 2015 IL 117783, ¶ 31 ("A

proceeding under section 2-1401 constitutes an independent and separate action from the original action[.]") (citing 735 ILCS 5/2-1401(b), (d)); *Sarkissian*, 201 Ill. 2d at 102 ("The filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one.") (citing 735 ILCS 5/2-1401(b); *Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 149, 198 (1994)).

A proceeding under section 2-1401 begins with a petition. *Studentowicz v. Queen's Park Oval Asset Holding Tr.*, 2019 IL App (1st) 181182, ¶ 9 ("A section 2-1401 petition is the initial pleading in a *new* proceeding, rather than a pleading seeking relief in the midst of an ongoing case.") (emphasis added) (citing *Sarkissian*, 201 Ill. 2d at 102). "As an initial pleading, a section 2-1401 petition is the procedural counterpart of a complaint and subject to all the rules of civil practice that that character implies." *Excalibur Energy Co. v. Rochman*, 2014 IL App (5th) 130524, ¶ 20 (citing *People v. Vincent*, 226 Ill. 2d 1, 15 (2007)) ("*People v. Vincent*"); *People v. Bradley*, 2017 IL App. (4th) 150527, ¶ 14 ("Proceedings under section 2-1401 are subject to the civil practice rules."). "From the petition's character as an initial pleading, it follows that the respondent may answer or move to dismiss the petition either under section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)) for failure to state a claim or under section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)) based on an affirmative defense, such as untimeliness." *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 207 (2d Dist. 2010). Accordingly, the Petition operated as a complaint, to which PNC was entitled to respond by motion based on an affirmative defense (such as *laches*) that appeared on the face of the Petition under the usual rules of civil procedure.

B. Consistent with the usual rules of Illinois Civil Procedure, *laches* is an affirmative defense that may be raised in response to a section 2-1401 petition.

"A section 2–619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim." *Krilich v. Am. Nat'l Bank and Tr. Co. of Chi.*, 334 Ill. App. 3d 563, 569-70 (2d Dist. 2002) (citing *Neppl v. Murphy*, 316 Ill. App. 3d 581, 585 (1st Dist. 2000)). "A section 2–619 proceeding permits a dismissal after the trial court considers issues of law or easily proved issues of fact." *Krilich*, 334 Ill. App. 3d at 570. Section 2-619(a)(9) allows dismissal when "the claim asserted . . . is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "The term 'affirmative matter' as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Krilich*, 334 Ill. App. 3d at 570. "One such affirmative matter is the defense of *laches*." *Ricther v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 50 (citing *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 34; *Summers v. Vill. of Durand*, 267 Ill. App. 3d 767, 771 (2d Dist. 1994)). "The issue of laches does not have to be decided after a trial on the merits but may properly be determined on a motion to dismiss if its applicability appears from the face of the complaint or by affidavits submitted with the motion." *In re Adoption of Miller*, 106 Ill. App. 3d at 1032 (citing *Beckham v. Tate*, 61 Ill. App. 3d 765, 768 (5th Dist. 1978)).

Applying these usual rules of Illinois civil procedure, Illinois courts have long held *laches* can be raised as an affirmative defense to limit collateral attacks on allegedly void

judgments. See e.g., *James*, 21 Ill. 2d at 383 ("[L]aches is a familiar defense when the validity of an earlier judgment or decree has been attacked in equity.") (citation omitted); *Koberlein*, 376 Ill. at 455-57 (1941) (upholding *laches* as a defense to a proceeding to set aside a foreclosure purportedly void for lack of service); *Fed. Nat'l Mortg. Ass'n v. Altamirano*, 2020 IL App (2d) 190198, ¶ 19 ("*Altamirano*") ("The principle that *laches* may bar a collateral attack on a void judgment is far from novel") (citing *Eckberg v. Benso*, 182 Ill. App. 3d 126, 131 (1st Dist. 1989)); *BankUnited, Nat'l Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶ 39 (finding that "laches can preclude relief [from a void judgment] in an appropriate case where prejudice is demonstrated"); *In re Adoption of Miller*, 106 Ill. App. 3d at 1033 (applying *laches* to affirm dismissal of petition seeking to vacate void judgment that had terminated petitioner's parental rights).

Laches is "grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his rights to the detriment of the opposing party." *Altamirano*, 2020 IL App (2d) 190198, ¶ 15 (quoting *Tully v. State of Ill.*, 143 Ill. 2d 425, 432 (1991)). Collectively, the foregoing cases illustrate the importance of applying *laches* in cases alleging a void judgment and the long history of Illinois of applying *laches* upon an appropriate showing. For example, in *Koberlein*, this Court applied *laches* to bar relief from an allegedly void foreclosure judgment where the claimants stood idly by for four years while "large sums of money were expended in the development of the property involved in the foreclosure." *Koberlein*, 376 Ill. at 456. In *Altamirano*, the court found *laches* notwithstanding allegations that the foreclosure judgment was void due to defective service because the foreclosure defendant received actual notice of the foreclosure but

stood idly by for 8 years while the property was sold to third parties who expended funds to maintain the property. 2020 IL App (2d) 190198, ¶ 16.

The doctrine of *laches* is so firmly rooted in Illinois civil law—including the law governing collateral challenges to void orders—that PNC has been unable to identify *any* types of civil claims that are categorically immune from that defense. Thus, a holding in this case that an entire class of civil claims is immune from a *laches* defense would be wholly unprecedented in Illinois. Yet, the Kusmierzes have offered neither legal precedent nor a meaningful policy justification for this Court to depart for the first time from the usual rules of civil practice.

C. The Kusmierzes' claims are barred by *laches*.

The Appellate Court correctly held that the defense of *laches* bars the Kusmierzes' claims. It applied the correct, *de novo*, standard of review. A 79. It stated the law of *laches* correctly. The court also noted that *laches* requires more than the mere passage of time and requires an unreasonable delay that results in prejudice to another party.[8] A 83. To establish the defense of *laches*, "the party raising it [must] show that there was an unreasonable delay in bringing an action and that the delay caused prejudice." *Id.*; see also *In re Adoption of Miller*, 106 Ill. App. 3d at 1030 (quoting *Pyle v. Ferrell*, 12 Ill. 2d 547,

[8] The Kusmierzes cite non-binding federal authority, *Merit Management Group v. Ponca Tribe of Indians of Oklahoma*, 778 F. Supp. 2d 916 (N.D. Ill. 2011) and *Allen v. United States*, 102 F. Supp. 866 (N.D. Ill. 1952), for the proposition that "the passage of time cannot render a void judgment valid." Kusmierzes' Br. at 20. However, these cases are inapplicable because the Appellate Court clearly held void judgments may be attacked at any time and dismissed the case because of the prejudice combined with the delay, not just the passage of time. Moreover, those cases did not address the applicability of *laches* in any way. *Merit* concerned a judgment entered by a court lacking *subject matter jurisdiction* (*Merit*, 778 F. Supp. 2d at 919) and *Allen* addressed whether someone could be imprisoned pursuant to a judgment entered against them without representation where they never waived their constitutional right to counsel (*Allen*, 102 F. Supp. At 869).

552 (1958)) ("Laches has been defined as 'such neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity.'").

Neither the unreasonable delay nor the prejudice elements of *laches* are genuinely contested here. The Kusmierzes do not, and cannot, deny actual knowledge of the foreclosure action; they admit that they were handed the summons and Complaint by a process server and then received it again by first class mail. Yet, they did nothing to assert their purported rights to the Property until filing their section 2-1401 Petition seven years after they learned of the foreclosure proceeding. A failure to act for seven years after one becomes aware of a proceeding to terminate one's rights in real property is not reasonable as a matter of law. The Kusmierzes' brief does not even try to dispute this. See *Koberlein*, 376 Ill. at 456 (finding four-year delay in challenging title to real property unreasonable as matter of law); *James*, 21 Ill. 2d at 382 (same); see also *Altamirano*, 2020 IL App (2d) 190198, ¶ 16 (concluding eight-year delay in challenging allegedly void foreclosure judgment unreasonable as a matter of law).

The record also establishes that the Kusmierzes' unreasonable delay prejudiced PNC in two ways. First, because the Kusmierzes did not act until well after PNC sold the Property to the Current Owners, the Kusmierzes' delay made it impossible to restore PNC to the position it would have been in prior to the sale. If the Kusmierzes had acted prior to sale, either before or after the foreclosure judgment was entered, PNC's Note and Mortgage would have been reinstated and PNC would have foreclosed again, there being no question as to the validity of the underlying debt or the Kusmierzes' default. *See* Restatement (Third) Restitution and Unjust Enrichment § 18 cmt. e, Illus. 6. (Am. L. Inst. 2011) (recognizing

that underlying indebtedness remains valid notwithstanding void judgment). The Kusmierzes' knowing delay thus destroyed PNC's interest in the collateral, the very claim that PNC sought to vindicate in the foreclosure action and that PNC would have been able to enforce had the Kusmierzes acted reasonably in raising defective service. As illustrated by *James*, *Koberlein*, and *Altamirano*, this is exactly the kind of prejudice cognizable under the doctrine of *laches*. Under the law of *laches*, prejudice is recognized where a party "remains passive while an adverse claimant incurs risk, enters into obligations, or makes expenditures for improvements or taxes." See *Pyle*, 12 Ill. 2d. at 555; see also *Tully*, 143 Ill. 2d at 434 (holding *laches* barred judge from challenging automatic retirement statute where he silently sat by as five candidates ran campaigns to fill his vacancy). *Laches* is also recognized in connection with claims to real property, where delay results in loss of material evidence to support or defend a claim. See *James*, 21 Ill. 2d at 383. Here, if the Kusmierzes were permitted to take advantage of their knowing delay, it would deprive PNC of the claim itself. See *id.*; *Koberlein*, 376 Ill. at 456.

Second, the Petition seeks monetary relief based on the amount of time the Kusmierzes have not possessed the Property, meaning that as they slept on their rights for over seven years, the monetary relief they now seek grew, and, indeed, continues to grow. In essence, the Kusmierzes created, or at least acquiesced in, the very harm for which they now seek monetary relief from PNC. *Laches* has often been applied to bar such efforts to monetize delay. See *Schroeder v. Schlueter*, 85 Ill. App. 3d 574, 577 (5th Dist. 1980) ("In regard to the right at equity to have specific performance of a contract of sale, unreasonable delay coupled with a material advance in value is fatal for equity will not allow a purchaser to remain in the wings gambling on the future rise in price.") (citing *Stuckrath v. Briggs &*

Turivas, 329 Ill. 555, 566 (1928); *Manaster v. Young*, 302 Ill. App. 545 (1st Dist. 1939)). Thus, the record fully supports the Appellate Court's conclusion that the Kusmierzes were guilty of *laches*.

D. The cases cited by the Kusmierzes do not support their argument that the affirmative defense of *laches* cannot be raised in response to a section 2-1401 petition.

The Kusmierzes argue that "[b]ecause [their] Petition raises a purely legal issue, equitable considerations such as *laches* do not apply." Kusmierzes' Br. at 16. They are wrong. *Walters*, the principal authority they cite for this argument, does not address *laches* or otherwise support their argument. Similarly, the Kusmierzes' argument—that a *laches* defense should be precluded because it "effectively plac[es] a due diligence requirement on a jurisdictional challenge to a void judgment" (Kusmierzes' Br. at 10)—bespeaks a misunderstanding of the doctrine of *laches* and finds no support in the cases they cite.

1. *Laches* may be raised as a defense to a section 2-1401 petition raising a purely legal claim alleging a void judgment.

Walters involved a section 2-1401 petition seeking relief from entry of a default judgment. *Walters*, 2015 IL 117783, ¶ 14. In his petition, Walters alleged that judgment by default was taken because Walters' Illinois attorney failed to timely file an answer to the complaint and, if allowed to defend on the merits, he would present a meritorious defense to liability. *Id.* at ¶ 17. The plaintiff filed a response to Walters' section 2-1401 petition arguing that Walters was bound by the mistakes of his counsel and that section 2-1401 is not intended to relieve a party of their counsel's negligence. The trial court agreed with Walters that his section 2-1401 petition set out a meritorious defense to the underlying claim for which he had been sued and defaulted. However, the trial court denied the petition because he failed to exercise due diligence in asserting his meritorious defense.

Id. at ¶ 21. In other words, the trial court agreed with the plaintiff's argument that section 2-1401's due diligence requirement mandated that it impute to Walters his attorney's negligence in failing to timely answer the original complaint. In denying Walters' section 2-1401 petition, the trial court observed that this Court's decision in *People v. Vincent* had resulted "in a split of authority on whether a trial court may exercise its discretion to relax the applicable due diligence requirements in section 2-1401 proceedings for equitable reasons." *Id*. at ¶ 22. The trial court noted that if it had equitable discretion, it would have "'lessened the due diligence standard'" and granted Walters relief from judgment "in the interest of justice." *Id*.

This Court framed the question on review in *Walters* as "whether our decision in *People v. Vincent*, should be interpreted as eliminating the circuit court's discretion to consider equity when ruling on a petition seeking relief from a final judgment or order under section 2-1401 of the Code of Civil Procedure." *Id*. at ¶ 1 (internal citations omitted). In *Walters*, the Court found that there are two types of section 2-1401 petitions: (1) those that raise "a fact-dependent challenge to a final judgment or order;" and (2) those that raise a "purely legal challenge to a judgment alleging that it is void." *Walters*, 2015 IL 117783, ¶¶ 47, 50. The distinction is important because a petition challenging a void order need not allege "a meritorious defense or satisfy due diligence requirements." *Id.* at ¶ 48 (citation omitted). This Court characterized the petition in *Walters* as a fact dependent section 2-1401 petition and held that a "trial court may also consider equitable considerations to relax the applicable due diligence standards under the appropriate limited circumstances." *Id*. at ¶ 51 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226-29 (1986)). In other words, this Court has held that trial courts may consider equitable issues when

deciding whether to a *allow* a fact-based challenge that does not otherwise establish due diligence to proceed. This Court's statements that "[e]quitable considerations are inapplicable when a section 2-1401 petition raises a purely legal issue" simply means that equitable considerations need not be considered when determining if a petition states a claim for relief.

In this case, the Kusmierzes would turn this Court's decision in *Walters* on its head and have this Court hold that its decision *allowing* application of equitable discretion in the petitioner's favor in judging the sufficiency of section 2-1401 petition implicitly *disallowed* the ability of a respondent to raise affirmative defenses sounding in equity, such as *laches*, to an otherwise well pleaded petition. Nothing in *Walters* supports the Kusmierzes' argument.

In fact, the Appellate Court in *Altamirano, supra*, rejected the same argument the Kusmierzes make here in a well-reasoned opinion.

> At issue in [*Walters*] was whether the trial court could relax due diligence standards in light of equitable considerations. The supreme court ultimately held that equitable considerations were relevant to a fact-based section 2-1401 petition but not to one that raises a solely legal challenge to a judgment. Here, petitioners reason, their voidness challenge is purely legal, so equitable considerations should not apply and the defense of *laches* should not be available to respondents. Thus, petitioners are attempting to extend the holding of [*Walters*] from its original circumstances—whether a trial court may consider equitable matters in assessing due diligence—to the ability of a respondent to assert an affirmative defense.
>
> We do not believe that these two situations are sufficiently analogous such that [*Walters*] controls here. *Laches* is an affirmative defense. Due diligence, conversely, is something a petitioner must show to prevail on a section 2-1401 petition. Thus, unlike due diligence, *laches* is not raised by the petition at all. Indeed, an affirmative defense admits the sufficiency of the petition and asserts new matter to defeat the cause of action. Thus, in resolving a *laches* issue, the merits of the 2-1401 petition are not a consideration. Therefore, whether the trial court can consider equitable matters in assessing due diligence—the issue addressed in [*Walters*]—is beside the point. Further, 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. Petitioners do not attempt to address this relationship. Petitioners' reliance on [*Walters*] is misplaced. It is not petitioners' 2-1401 petition that invokes the equitable powers of the trial court; rather, it is [R]espondents' assertion of an equitable defense. This, in turn, renders [*Walters*] consistent with the extensive caselaw cited above that holds that *laches* may be interposed to a claim that a judgment is void.

Altamirano, 2020 IL App (2d) 190198, ¶¶ 20-21 (internal citations omitted). Given this well-reasoned analysis, this Court should adopt the reasoning applied by the Appellate Court in *Altamirano*. See also *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 26 (following *Altamirano*).

The relevance of *Walters* to the Kusmierzes' argument, if any, is its suggestion that "purely legal" section 2-1401 claims may be governed by *People v. Vincent***,** which**,** like this case, involved a challenge to an allegedly void judgment. See *Walters*, 2015 IL 117783, ¶ 47. Tellingly, the Kusmierzes do not cite, much less discuss, *People v. Vincent* in their brief in this Court. Examination of that decision suggests why: it negates their argument.

In *People v. Vincent*, a criminal defendant sought to set aside as void his extended-term sentence for murder (and other crimes). *Vincent*, 226 Ill. 2d at 4. The trial court dismissed Vincent's section 2-1401 petition *sua sponte*, *i.e.*, without holding a hearing, on the grounds that the petition was legally insufficient to state a claim for relief under section 2-1401. *Id.* at 12. On appeal from that denial, Vincent argued that it was error for the trial court to dismiss his petition without affording a hearing. This Court rejected that argument on the grounds that "actions pursuant to section 2-1401 are civil proceedings and are to be litigated in accordance with the usual rules of civil procedure." *Id.* at 11 (citing *Ostendorf v. Int'l Harvesters Co.*, 89 Ill. 2d 273, 279 (1982)). This Court held that the trial court was

within its rights to dismiss Vincent's section 2-1401 petition because under the ordinary rules of civil practice, "a trial court may, on its own motion, dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law." *Vincent*, 226 Ill. 2d at 12 (citation omitted).

As part of its decision, this Court in *People v. Vincent* addressed the standard of review to be applied when judging a dismissal of a section 2-1401 petition for failure to state a claim. *Id*. at 15. The Court noted that historically Illinois appellate courts had applied an abuse of discretion standard on review given the historic characterization of section 2-1401 as invoking the equitable discretion of the trial court. *Id.* The Court then stated:

> When the legislature abolished the writs in favor of today's statutory remedy, it became inaccurate to continue to view the relief in ***strictly*** equitable terms. Moreover, this court's application of civil practice rules and precedent factored out any notions about a trial court's "discretion" to do justice. Because relief is no longer *purely discretionary*, it makes little sense to continue to apply an abuse of discretion standard on review. Simply put, an abuse of discretion standard of review in cases where either a judgment on the pleadings or a dismissal has been entered does not comport with the usual rules of civil practice and procedure.

Id. at 16 (emphasis added). Accordingly, this Court, in *People v. Vincent*, held the abuse of discretion standard would no longer apply where "either a judgment on the pleadings or a dismissal has been entered" because such a standard "does not comport with the usual rules of civil practice and procedure." *Id.* This Court's decision in *People v Vincent* should not be read as a sweeping repudiation of this Court's equity jurisprudence as applied to section 2-1401 petitions. Rather, to the extent *People v. Vincent* limited the applicability of equitable considerations to section 2-1401 petitions involving allegedly void judgments, it did so in a narrow way merely to conform the role of equity in section 2-1401 practice

to "**usual rules of civil practice and procedure**." *Id.* (emphasis added). As set forth in Part III.A. above, it is beyond cavil that the usual rules of civil practice and procedure permit parties such as PNC and the Current Owners to respond to a section 2-1401 petition by setting up affirmative defenses, including ones sounding in equity, by way of answer or motion. See *id.* at 8-10 (discussing responses to a section 2-1401 petition and stating "[l]ike a complaint, the petition may be challenged by a motion to dismiss for its failure to state a cause of action or if, on its face, it shows that petitioner is not entitled to relief."). Accordingly, this Court's decision in *People v. Vincent* negates the argument that *laches* does not apply here. To the contrary, it supports application of the usual rules of Illinois civil practice and law, pursuant to which *laches* is a recognized and established affirmative defense.

2. There is no genuine conflict between the principle that a void judgment may be attacked at any time and application of *laches* as a defense upon an appropriate showing.

There is no conflict between the principle that a void judgment may be challenged at any time and the availability of *laches* as an affirmative defense in appropriate cases. As set forth above (*supra* p. 21), the affirmative defense of *laches* applies when two elements are shown—unreasonable delay *and* resulting prejudice. It is this second element of "resulting prejudice" that distinguishes *laches* from the due diligence element of a petitioner's affirmative case in a fact-dependent claim for relief under section 2-1401. Accordingly, the due diligence element of an affirmative section 2-1401 claim is not the same legally as a *laches* defense. Allowing the latter, does not effectively impose the former. The Kusmierzes' argument that it does (Kusmierzes' Br. at 10, 19-20) is incorrect. For these reasons, the Kusmierzes' argument—that a petition for relief alleging a void

judgment need not plead or prove due diligence as part the petitioner's affirmative case—is "beside the point." *Altamirano*, 2020 IL App (2d) 190198, ¶ 21. No Illinois case has held that a party responding to such a petition may not raise the defense of *laches* and, if successful in carrying its burden in pleading and proof of both elements of that defense, defeat section 2-1401 relief.

The cases cited by the Kusmierzes merely stand for the proposition that a petitioner need not plead due diligence to establish an affirmative claim for relief in a section 2-1401 petition bringing a voidness challenge. None of them holds that *laches* cannot be raised as an affirmative defense to a section 2-1401 petition. See Kusmierzes' Br. at 20. Specifically, the cases either do not address *laches* at all or hold that the party raising the defense had not made the necessary factual showing to prevail on the *laches* defense. See *In re N.G.*, 2018 IL 121939 (decided without any reference to *laches*); *People v. Castleberry*, 2015 IL 116916; (same); *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311 (same); *W. Suburban Bank v. Advantage Fin. Partners, LLC*, 2014 IL App (2d) 131146, ¶ 27 (holding that the defense of *laches* did not apply to the case because the party seeking to assert the defense "made no showing of material prejudice.").

Nor does the statement from this Court in *Fox v. Dep't of Revenue*, 34 Ill. 2d 358, 361 (1966), that "[t]his court has observed, in other kinds of cases, that a void judgment may be vacated at any time and the doctrines of laches and estoppel do not apply" support the Kusmierzes' position. Indeed, the Court in *Fox* went on to note that, "it [was] unnecessary to decide [*laches*'] application here, for it has not been properly put in issue." *Id.* Moreover, nowhere in the opinion in *Fox* did the Court hold that it was overruling this Court's holding in *James v. Frantz*, 21 Ill. 2d at 383, that had applied *laches* to a collateral

attack on a void judgment. As the Appellate Court said below, "[w]e have no quarrel with [the Kusmierzes'] position that void judgments may be challenged at any time." A 83. Thus, none of the authority cited by the Kusmierzes holds that *laches* cannot be raised as an affirmative defense or that a section 2-1401 petition cannot be denied upon an appropriate showing that the elements of the defense are met.

E. None of the Kusmierzes' other arguments preclude dismissal based on *laches*.

The Kusmierzes' brief raises a slew of additional arguments that can be summarized as follows: (1) the equitable doctrine of *laches* is inapplicable because the Petition's claim is legal in nature; (2) the Circuit Court failed to hold an evidentiary hearing; (3) courts have an independent duty to vacate void orders; (4) the Appellate Court relied on case law that is distinguishable; and (5) the equitable doctrine of "unclean hands" prevents the application of *laches*. Kusmierzes' Br. 15-21. These arguments provide no basis to overturn the decision below.

1. *Laches* may be raised as a defense to a section 2-1401 petition raising a purely legal claim.

Contrary to the Kusmierzes' suggestion (Kusmierzes' Br. at pp. 15-16), that a *laches* defense sounds in equity does not mean that it cannot be raised in response to, and, if proven, defeat a purely legal claim. While *laches* is an equitable doctrine, it can be a defense against both legal and equitable claims. See *Coleman v. O'Grady*, 207 Ill. App. 3d 43, 51-52 (1st Dist. 1990) ("Contrary to plaintiff's assertion, it is not black letter law that *laches* is inapplicable to actions at law. Rather, it has been held that the doctrine is not strictly and unequivocally limited to suits in equity.") (citation omitted); *Villiger v. City of Henry*, 47 Ill. App. 3d 565, 567 (3d Dist. 1977) ("[L]aches now includes delay in the prosecution of legal actions as well as equitable"). Thus, *laches* may be raised as an

affirmative defense by a respondent even where the petition asserts a "purely legal" challenge to an allegedly void order.

2. Dismissal of the Petition was proper without an evidentiary hearing.

As noted above, there is no general rule that a case may not be dismissed based on the affirmative defense of *laches* without an evidentiary hearing. See *In re Adoption of Miller*, 106 Ill. App. 3d at 1032 ("The issue of laches does not have to be decided after a trial on the merits but may properly be determined on a motion to dismiss if its applicability appears from the face of the complaint or by affidavits submitted with the motion.") (citation omitted). Here, the undisputed record shows the Kusmierzes have never contested that they were actually served with notice of the foreclosure proceeding, that PNC purchased the Property and then sold it to the Current Owners, and that the Current Owners built a home on the once-vacant lot. Thus, this is precisely the type of case that would warrant dismissal based on the Petition (operating as a complaint) and the affidavits submitted with the section 2-619 motion.

In addition, the Kusmierzes elected not to pursue development of the factual record that might have made an evidentiary hearing necessary. They had an opportunity to submit affidavits offering any facts that would have shown their delay was reasonable or a lack of prejudice, but they did not. C 295-329. Moreover, while the Circuit Court at first denied the Kusmierzes' request for discovery, it later reversed that decision and the Kusmierzes nevertheless elected to respond to the motions to dismiss without seeking discovery or attaching any affidavits of their own. C 288, 295-329. Thus, this argument can be rejected on the independent grounds that the Kusmierzes waived this argument by failing to raise it in the Circuit Court. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is

well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Accordingly, the lack of an evidentiary hearing does not warrant reversal.

3. There is no inherent duty requiring courts to vacate orders for lack of personal jurisdiction.

The Kusmierzes rely on *People v. Thompson*, 209 Ill. 2d 19 (2014), to argue that courts "have an independent duty to vacate void orders." Kusmierzes' Br. at 9. *Thompson*, which was abrogated by *People v. Vara*, 2018 IL 121823, ¶ 76, *reh'g denied* (Sept. 24, 2018), concerned the vacating of an extended term sentence under the "void sentence rule" and did not address a challenge based on a lack of personal jurisdiction. See *Thompson*, 209 Ill. 2d at 24-25. In general, a criminal sentence in excess of the statutory maximum is considered void. It is equivalent to an act taken without subject matter jurisdiction. The issue cannot be waived, and the court had an independent duty to vacate a sentence that it had no authority to enter. By contrast, the Kusmierzes' challenge to the foreclosure judgment stands on a different footing. Their argument is that the Court never acquired personal jurisdiction over them due to defective service. Defective service can be waived. *People v. Matthews*, 2016 IL 118114, ¶ 18 ("[P]ersonal jurisdiction, unlike subject-matter jurisdiction, can be waived.") (citation omitted). Accordingly, there is no inherent duty for the Court to vacate the foreclosure judgment here.

4. The Appellate Court relied on applicable case law to dismiss the Petition.

The Kusmierzes argue that the cases cited by the Appellate Court to affirm the dismissal of the Petition are "distinguishable" and should not control here. They contend that *James v. Frantz*, *In re Adoption of Miller*, *Rodriguez v Koschny*, *In re Jamari R.*, and *Eckberg v. Benso* dealt with "special interests" of mineral and minor rights that give rise

to a "narrow exception to the general rule that *laches* does not apply" to jurisdictional challenges seeking to vacate void judgments. Kusmierzes' Br. at 16-18. They also argue that the remaining cases cited by the Appellate Court, *Miller v. Bloomberg*, *Slatin's Properties, Inc. v. Hassler*, and *LaSalle Nat. Bank v. Dubin Residential Communities Corp.*, should not control because they "did not reach the applicability of *laches*" or "were not concerned with . . . the applicability of *laches* in the context of jurisdictional challenges." Kusmierzes' Br. at 18-19. The Kusmierzes' attempts to distinguish these cases fail.

The Kusmierzes' contention that "special interests" warrant a "narrow exception" to the purported general rule that the affirmative defense of *laches* cannot be raised in response to a jurisdictional challenge is belied by the case law. In *In re Adoption of Miller*, *Rodriguez*, *In re Jamari R.*, and *Eckberg*, parents sought to vacate judgments they claimed were void where those judgments had terminated their parental rights. 106 Ill. App. 3d at 1030; 57 Ill. App. 3d at 362; 2017 IL App (1st) 160850, ¶ 53; 182 Ill. App. 3d at 132. This Court has recognized that "[b]ecause of the liberty interests involved [in terminating parental rights], courts will not easily terminate those rights." *In re M.H.*, 196 Ill. 2d 356, 363 (2001) (citation omitted); see also *Santosky II v. Kramer*, 455 U.S. 745, 759 (1982) ("When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."). These cases show that courts in Illinois hold that *even* where a fundamental liberty interest will be terminated, an unreasonable delay, combined with prejudice from that delay, may allow an otherwise void order to stand. These cases do not show a narrow exception to the applicability of *laches*, but instead show the broad application of *laches*, even to void orders that terminate a fundamental liberty interest.

Given the applicability of *laches* as a defense to void judgments that terminated fundamental liberty interests, the other cases cited by the Appellate Court actually show that the ability to raise *laches* as a defense is the *general* rule. Because the general rule is that *laches* may be raised as a defense, it is unsurprising to see it applied in the case of mineral rights. *James v. Frantz*, 21 Ill. 2d at 382. Moreover, Illinois courts repeatedly have applied *laches* to bar attacks on void judgments "without language limiting its application to [such] 'special concerns.'" *DeGomez*, 2020 IL App (2d) 190774, ¶ 28; see also *Koberlein*, 376 Ill. at 455-457 (upholding the defense of *laches* in a proceeding to set aside an allegedly void foreclosure decree); *Miller*, 60 Ill. App. 3d at 365 (highlighting the applicability of *laches* to an attack on a judgment directing specific performance of an option to purchase real estate). Accordingly, these cases show there is no general rule limiting the applicability of *laches* to narrow exceptions in cases challenging purportedly void orders.

The Kusmierzes' attempts to distinguish *Miller*, *Slatin's Properties, Inc.*, and *LaSalle National Bank* fare no better. While *Slatin's Properties, Inc.* and *LaSalle National Bank* do not involve challenges to void decrees, they properly state the general rule that whether *laches* applies is dependent on the facts of each case. See 53 Ill. 2d at 329-30 ("The defense of Laches . . . is dependent upon the facts of each case"); 337 Ill. App. 3d at 351 ("Whether the defense of *laches* is available is to be determined upon the facts and circumstances of each case.") (citation omitted). Additionally, the Kusmierzes' contention that *Miller's* discussion of *laches* should be disregarded as *obiter dictum* is inconsequential. Kusmierzes' Br. at 18. The court in *Miller* had to determine whether a petition for relief from an allegedly void order should be dismissed. In stating the rule for analyzing such

petitions, the court noted, "the two year period provided in Section 72 for bringing the action is not applicable where relief is sought from a void decree; although the equitable defense of laches may be interposed." 60 Ill. App. 3d at 365 (citing *James*, 21 Ill. 2d at 383). While the court did not ultimately have to rule on the application of *laches*, it is instructive to see the court's statement of the general rule. Accordingly, the Kusmierzes' claims that the Appellate Court failed to rely on appropriate case law are meritless.

5. The doctrine of unclean hands does not bar PNC's assertion of *laches* as an affirmative defense.

The Kusmierzes conclude their brief by asserting that PNC's "unclean hands in obtaining a void judgment against [them] should now bar it from asserting *laches* to effectively enforce a void judgment." Kusmierzes' Br. at 22. As an initial matter, the Kusmierzes forfeited this argument because they failed to raise it in the Circuit Court. See *Bowman v. Chi. Park Dist.*, 2014 IL App (1st) 132122, ¶ 59 ("[I]ssues not raised in the trial court are waived and may not be considered for the first time on appeal.") (citation omitted). Moreover, unclean hands is only applicable when misconduct rises to the level of fraud or bad faith. *Jaffe Com. Fin. Co. v. Harris*, 119 Ill. App. 3d 136, 140 (1st Dist. 1983) ("[T]he misconduct on the part of a plaintiff which will defeat recovery in a court of equity under this rule must have been fraud or bad faith directed toward the defendant in the very transaction being considered.") (citation omitted). The Kusmierzes have failed to cite anything in the record that would show PNC's conduct rises to the level of fraud or bad faith. Accordingly, the doctrine of unclean hands does not preclude the application of *laches*.

IV. Alternatively, service of summons on the Kusmierzes was effective to obtain jurisdiction pursuant to 735 ILCS 5/2-202.

A threshold issue in this matter is the Petition's allegation that service was defective because "[s]ection 2-202(a) requires the appointment of a special process server for service on parties in counties with a population over 2,000,000" and that "Cook County has a population of over 2,000,000," so that "[a]t the time of purported service [in Cook County], neither Jennifer I. Magida nor Metro Detective Agency, LLC were appointed by the court to serve process in Cook County in this case." Kusmierzes' Br. at 8. Currently before this Court is another case squarely addressing this issue. *Municipal Tr. and Savings Bank v. Moriarty*, 2020 IL App (3d) 190016, *appeal allowed sub nom. Mun. Tr. & Sav. Bank v. Moriarty*, 159 N.E.3d 951 (Ill. 2020). The Third District Appellate Court's ruling on May 4, 2020 occurred after the parties completed briefing in the Appellate Court in this matter. *Moriarty* deviates from prior First and Second District opinions holding that the county of service controls whether appointment of a special process server is required. Should this Court affirm the decision in *Moriarty*, the Court would not need to reach any further issues in this case and the dismissal could be affirmed because facts appearing in the record establish that Metro was authorized to serve process issued by the DuPage County Circuit Court without any order of appointment. C 57; C 61. Therefore, under the holding in *Moriarty*, sub-section 2-202(b) of the Illinois Code of Civil Procedure empowered Metro, the process server hired by PNC, to serve the Kusmierzes "wherever they may be found in the state," including Cook County, where they were, in fact, served. Thus, if this Court affirms *Moriarty*, it may also affirm the judgment of the Circuit Court on the basis of *Moriarty* alone because, under *Moriarty*, service in this case was not defective. *Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 141–42 (1985) (The Supreme Court can

"consider an issue not raised in the circuit court if the record contains all the factual material that is necessary to decide the issue.") (citation omitted).

CONCLUSION

For the reasons stated above, this Court should affirm the dismissal of the Kusmierzes' section 2-1401 Petition.

WHEREFORE, PNC Bank, National Association, Plaintiff-Appellee, prays that this Court affirm the judgment dismissing the Kusmierzes' section 2-1401 Petition. PNC further prays that this Court grant it such other further relief that it finds just and equitable under the circumstances.

Respectfully submitted,

PNC Bank, National Association, Plaintiff-Appellee

Dated: May 12, 2021

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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 containing 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 forty (40) pages.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 12, 2021, he served and filed by electronic means on the Clerk's office a true and correct copy of the above-referenced document and further served a copy in the manner so described to each person listed on the below service list before 11:59 p.m.

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.

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