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

BRIEF OF AMICUS CURIAE, ILLINOIS LAND TITLE ASSOCIATION

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E-FILED
5/18/2021 11:51 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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STATUTES INVOLVED

735 ILCS 5/2-1401(e) (West 2018)

Sec. 2-1401. Relief from judgments.

(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.

735 ILCS 5/2-202 (West 2018)

Sec. 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;

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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.

(a-5) Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. Under the appointment, any employee of the private detective agency who is registered under that Act may serve the process. The motion and the order of appointment must contain the number of the certificate issued to the private detective agency by the Department of Professional Regulation under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. A private detective or private detective agency shall send, one time only, a copy of his, her, or its individual private detective license or private detective agency certificate to the county sheriff in each county in which the detective or detective agency or his, her, or its employees serve process, regardless of size of the population of the county. As long as the license or certificate is valid and meets the requirements of the Department of Financial and Professional Regulation, a new copy of the current license or certificate need not be sent to the sheriff. A private detective agency shall maintain a list of its registered employees. Registered employees shall consist of:

(1) an employee who works for the agency holding a valid Permanent Employee Registration Card;

(2) a person who has applied for a Permanent Employee Registration Card, has had his or her fingerprints processed and cleared by the Department of State Police and the FBI, and as to whom the Department of Financial and Professional Regulation website shows that the person's application for a Permanent Employee Registration Card is pending;

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(3) a person employed by a private detective agency who is exempt from a Permanent Employee Registration Card requirement because the person is a current peace officer; and

(4) a private detective who works for a private detective agency as an employee.

A detective agency shall maintain this list and forward it to any sheriff's department that requests this list within 5 business days after the receipt of the request.

(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.

(c) If any sheriff, coroner, or other person to whom any process is delivered, neglects or refuses to make return of the same, the plaintiff may petition the court to enter a rule requiring the sheriff, coroner, or other person, to make return of the process on a day to be fixed by the court, or to show cause on that day why that person should not be attached for contempt of the court. The plaintiff shall then cause a written notice of the rule to be served on the sheriff, coroner, or other person. If good and sufficient cause be not shown to excuse the officer or other person, the court shall adjudge him or her guilty of a contempt, and shall impose punishment as in other cases of contempt.

(d) If process is served by a sheriff, coroner, or special investigator appointed by the State's Attorney, the court may tax the fee of the sheriff, coroner, or State's Attorney's special investigator as costs in the proceeding. If process is served by a private person or entity, the court may establish a fee therefor and tax such fee as costs in the proceedings.

(e) In addition to the powers stated in Section 8.1a of the Housing Authorities Act, in counties with a population of 3,000,000 or more inhabitants, members of a housing authority police force may serve process for eviction actions commenced by that housing authority and may execute eviction orders for that housing authority.

(f) In counties with a population of 3,000,000 or more, process may be served, with special appointment by the court, by a private process server or a law enforcement agency other than the county sheriff in proceedings instituted under Article IX of this

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Code as a result of a lessor or lessor's assignee declaring a lease void pursuant to Section 11 of the Controlled Substance and Cannabis Nuisance Act.

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I. INTRODUCTION

The Illinois Land Title Association ("ILTA") is a not-for-profit Association of title insurance companies, agents and attorneys that has served the Illinois land title community for over 100 years. ILTA is the only such organization in Illinois that addresses legislative and judicial concerns related to land titles for its members and the citizens of this State. *See* www.illinoislandtitle.org. ILTA submits this brief in its capacity as Amicus Curiae in support of affirmance of the Appellate Court's Decision.

II. STATEMENT OF FACTS

The Circuit Court of DuPage County, Illinois is besieged with Petitions filed pursuant to 735 ILCS 5/2-1401 ("§2-1401") that challenge service of process in long-ago completed residential mortgage foreclosure proceedings, such as this case.[1] According to Trial Court Judge James D. Orel, "this Court has been inundated with 1401 Petitions from cases that are 10, 12, years old and this case was 9 years old and suddenly it appears . . . I can't even count of the number of 1401 Petitions I've received since I've been on the bench." *Report of Proceedings on January 23, 2019*, C280: 6-14.

Later, Judge Orel tallied his §2-1401 caseload, stating: "I've counted and I probably have close to 100 of these. So the Court is not being fooled that there is some due process ideal that's being set here. This is a money grabber. That's what it is." *Report of Proceedings on May 21, 2019*, SUP C 18: 18-23. Judge Orel was not alone, commenting, "Judge Rohm probably had over 100 of these" as well. *Id.*, SUP C 15: 7.

[1] The facts of this case are set forth in the parties' briefs. The details provided by ILTA put those facts in context of the nature and extent of the problem that the lower courts, the legislature, and this Court have been asked to address.

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As such, although the Trial Court relied "strictly on the facts", the decision in this case was not made in a "vacuum." *Id.*, SUP C 17: 7-9.[2]

The deluge of §2-1401 Petitions challenging the finality of residential foreclosures has spawned much appellate litigation. For instance, *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App. (2d) 190275 (¶9) involved a §2-1401 Petition that challenged service of a DuPage County Summons in Cook County approximately twelve years after service of process and approximately seven years after a subsequent purchaser acquired title to the property. Seven years also was the delay in filing the defendant's §2-1401 Petition in *BankUnited, National Association v. Giusti*, 2020 IL App. (2d) 190522 (¶5), where Giusti challenged a subsequent purchaser's title by claiming that a Summons entitled "*BankUnited, FSB v. Scott D. Giusti, et al*." did not give Giusti adequate notice that he was a defendant in the mortgage foreclosure action. *See also, Parkvale Savings Bank v. Taylor*, 2020 IL App (2d) 190820 ¶¶5 and 9 (seven year delay), and *Federal National Mortgage Ass'n v. Altamirano*, 2020 IL App (2d) 190198, ¶16 (eight year delay).

In each of these cases, the defendants were served with a foreclosure Summons and, despite their knowledge of the proceedings, took no action to challenge the Court's jurisdiction over them until long after title had changed hands. In *Robinson* and *Giusti*, the Second District held that the title of the subsequent purchasers was protected under 735

[2] The Kusmierz (Appellants) filed two §2-1401 Petitions, one in case 2010 CH 1262 and the other in 2011 CH 1585. The latter case is the subject of the appeal in this action, but proceedings in the two Kusmierz cases often were handled contemporaneously. *See, e.g., Report of Proceedings on September 16, 2019*, SUP R 38: 8-12 (Kusmierz counsel stating: "Those are the same issues in both cases, the same defenses in both cases that they asserted, the same form of 6.219.1 Motion that they both - - they filed in both Kusmierz matters, both the 10 CH 1262 and the 11 CH 1585."

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ILCS 5/2-1401(e) because the jurisdictional defect did not appear on the face of the record. *Robinson*, ¶27; *Giusti*, ¶36. In *Parkvale* and *Altamirano*, the Second District denied §2-1401 relief on the basis of the affirmative defense of laches. *Parkvale*, ¶¶ 29-30; *Altamirano*, ¶¶ 17-28.

Although the flood of §2-1401 Petitions in foreclosure proceedings is primarily in DuPage County, the issue has had a trickle over effect elsewhere. For instance, in *Municipal Trust and Savings Bank v. Moriarty*, 2020 IL App. (3d) 190016, *appeal pending*, 195 N.E.3d 95, a defendant in a Kankakee County residential foreclosure action who resided in Kankakee County was served by a special process server ("SPS") in Cook County. Notwithstanding lack of appointment of an SPS, the Third District upheld service under 735 ILCS 5/2-202 (West 2016), holding "that a duly licensed or registered private detective may serve process, 'without special appointment,' anywhere in the State so long as the Summons was issued from a County 'with a population less than 2 million.'" *Id*., ¶22. This created a split between the Second and Third Districts by holding that the validity of service without Court appointment of an SPS was based on the County of issuance of the Summons, rather than the County of service. *Id*.

Our Courts have not been alone in dealing with this issue. As recognized by the legislature, a "cottage legal industry" has arisen to challenge service of process in completed residential mortgage foreclosure proceedings. As stated in the legislative record:

> Thapedi: "All right. Isn't it true that a cottage legal industry has recently been created whereby hundreds of cases are now pending alleging that the initial summons is somehow defective in the foreclosure process?"
>
> Martwick: "Yes."

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> Thapedi: "And the results of which, meaning a defective summons, is that homeowners may have the opportunity to fight to get their houses back, correct?"
>
> Martwick: "Yes."
>
> Thapedi: "And isn't it also true that this Bill will affect several cases currently pending in the state by either reducing the number of cases in this cottage industry or decreasing the number of cases in this industry?"
>
> Martwick: "Yes."
>
> Thapedi: "Isn't it also true that there's an army of lawyers watching and waiting for our floor debates so that they can run into court and use the debate transcript to support their respective positions?"
>
> Martwick: "I would imagine, yes."
>
> Thapedi: "All right. Now, after these foreclosure cases surrounding the cottage industry, these cases sometimes affect subsequent purchasers following the foreclosure of sale, correct?"
>
> Martwick: "That is correct."
>
> Thapedi: "And in doing so, these cases can have either a direct or indirect impact on the cost of purchasing, owning, or selling a single family home that's been foreclosed upon, correct?"
>
> Martwick: "Yes."
>
> Thapedi: "And this Bill is... is partially designed to provide some certainty to the lenders, consumers and title companies that are involved in the foreclosure process. Isn't that also correct?"
>
> Martwick: "Yes."

Hearing on S.B. 2432, Illinois House Transcript, 2018 Reg. Sess. No. 141 at 175-176.

As a result, legislation was proposed to address this threat to real property titles arising from foreclosure proceedings, which received a lot of attention from constituencies affected by it, including this Amicus Curiae. *Id.* at 193 (Rep. Martwick). Although a number of constituents raised concerns about the legislation, their concerns were addressed

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during the legislative process (*Id.* at 187 – 188 (Rep. Martwick)) – that is, except for the cottage industry:

> Zalewski: "But there remains a bar of attorneys that are opposed?"
>
> Martwick: "Yes. And these are the bar of attorneys that are... have... the cottage industry that was talked about that has grown up around this court decision that is now combing through old foreclosure decisions looking for technical deficiencies in the summons, reopening cases with an attempt to extort some sort of settlement under the threat of taking homes away from subsequent purchasers and returning them to the original foreclosure defendants. And they're doing it with obscene... really obscene sort of fee sharing arrangements. Some as much as an 80 percent contingency fee."

Id. at 194.

After due consideration, the legislature adopted several laws to address the threat to land titles posed by this cottage industry. Among other things, the legislature amended §2-1401(e) by adding the following language to protect the interests of non-parties to the foreclosure proceeding:

> 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.

735 ILCS 5/2-1401(e) (West 2018).

In addition, the legislature provided additional protection against §2-1401 Petitions through limitations on Real Actions under Article XIII of the Code of Civil Procedure. In particular, limitations were imposed on challenges to possessory interests and record title acquired through mortgage foreclosure proceedings:

> Sec. 13-107.1. Two years with possession and record title derived from a judicial foreclosure sale.

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> (a) Actions brought for the recovery of any lands, tenements, or hereditaments of which any person may be possessed for 2 successive years, having a connected title, deductible of record, as a purchaser at a judicial foreclosure sale, other than a mortgagee, who takes possession pursuant to a court order under the Illinois Mortgage Foreclosure Law, or a purchaser who acquires title from a mortgagee or a purchaser at a judicial foreclosure sale who received title and took possession pursuant to a court order, shall be brought within 2 years after possession is taken. When the purchaser acquires title and has taken possession, the limitation shall begin to run from the date a mortgagee or a purchaser at a judicial foreclosure sale takes possession pursuant to a court order under the Illinois Mortgage Foreclosure Law or Article IX of this Code. The vacation or modification, pursuant to the provisions of Section 2-1401, of an order or judgment entered in the judicial foreclosure does not affect the limitation in this Section.
>
> (b) This Section applies to actions filed on or after 180 days after the effective date of this amendatory Act of the 100th General Assembly.

735 ILCS 5/13-107.1 (West 2018).

Similarly, protections were afforded to those paying real estate taxes with color of title acquired through foreclosure proceedings:

> Sec. 13-109.1. Payment of taxes with color of title derived from judicial foreclosure. Every person in the actual possession of lands or tenements, under claim and color of title, as a purchaser at a judicial foreclosure sale, other than a mortgagee, who takes possession pursuant to a court order under the Illinois Mortgage Foreclosure Law, or a purchaser who acquires title from a mortgagee or a purchaser at a judicial foreclosure sale who received title and took possession pursuant to such a court order, and who for 2 successive years continues in possession, and also, during such time, pays all taxes legally assessed on the lands or tenements, shall be held and adjudged to be the legal owner of the lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, legacy, or descent, before such 2 years have expired, and who continue possession, and continue to pay the taxes as above set forth so as to complete the possession and payment of taxes for the term above set forth, are entitled to the benefit of this Section. The vacation or modification, pursuant to the provisions of Section 2-1401, of an order or judgment entered in the judicial foreclosure does not affect the limitation in this Section.
>
> This Section applies to actions filed on or after 180 days after the effective date of this amendatory Act of the 100th General Assembly.

735 ILCS 5/13-109.1 (West 2018).

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As reflected in the legislative record, the intent of these legislative actions was to shut down the cottage industry without impinging on this Court's jurisdiction:

> Thapedi: "All right. So, your Bill is designed to shut down this cottage legal industry but not to overturn any case law or Supreme Court Rules, correct?"
>
> Martwick: "That is correct."

Hearing on S.B. 2432, Illinois House Transcript, 2018 Reg. Sess. No. 141 at 177.

III. ARGUMENT

A. Introduction.

This case raises two issues of particular importance to the reliability of, and public confidence in, Illinois land titles, both of which are ripe for resolution by this Court. First, whether a summons served in Cook County needs to state the County of service to put a purchaser on notice that a special process server had to be appointed for service of process to be effective. Second, is laches a defense to a §2-1401 Petition based on an allegedly void judgment.

Respectfully, both questions should be answered in the affirmative, thereby affirming the dismissal of the §2-1401 Petition in this action, providing clarity to the lower courts, and protecting the rights of parties attacked by a cottage industry that arose from the ashes of long-ago completed foreclosure proceedings.

B. This case arises in the context of a long history of heir hunters challenging vested real estate titles.

As set forth above, this case arises in amidst an onslaught of litigation brought about by a cottage industry developed to challenge real estate titles in long-ago completed residential mortgage foreclosures. Over 50 years ago, the U.S. Supreme Court recognized the impropriety of "Heir-hunting" and other techniques to stir-up litigation.

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Nat'l Ass'n for Advancement of Colored People v. Button, 83 S. Ct. 328, 341, fn. 20 (1963). As stated by the Court:

> Hostility still exists to stirring up private litigation where it promotes the use of legal machinery to oppress: as, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public. And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned…

Id. at 341-42.

Unfortunately, the practice continues. Less than a month ago, the New Jersey Appellate Court denied equitable relief to a mining company who used such "nefarious" practices in an attempt to acquire land owned by the State of New Jersey. *Phoenix Pinelands Corp. v. Davidoff*, No. A-2823-16, 2021 WL 1679682, at *1 (N.J. Super. Ct. App. Div. Apr. 29, 2021). In that case, the mining company scoured the public real estate records to acquire the interests of heirs who "had no idea their remote ancestor had ever held title to one of the State's seven Properties." Id. at *32. As described by the Court:

> Because Phoenix researched the State's titles, ignored its recorded deeds and surreptitiously acquired hostile interests from the heirs of long-dead record owners for its own purpose of undermining the State's title, thereby interfering with the State's vested rights to these seven Properties, its conduct is aptly characterized as heir hunting or title raiding, without regard to the amounts it paid the heirs to acquire those interests.

Id. at *33. As a result, the Court found that:

> Withholding equitable relief to Phoenix based on its unclean hands in unduly interfering with the State's rights to these seven parcels in the Preservation Area "not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public," Precision Instrument, 324 U.S. at 815, 65 S.Ct. 993, by "support[ting] and maintain[ing] the integrity of the recording system," Palamarg, 80 N.J. at 453, 404 A.2d 21.

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Id. at *39.

C. Lack of Jurisdiction over a defendant served in Cook County is not apparent on the face of the proof of service of a non-Cook County summons that does not state the County of service.

In this case, the challenge to the rights of the Current Owners must be considered in the context of §2-1401(e) of the Code of Civil Procedure, 735 ILCS 5/2-1401(e) (West 2018). §2-1401(e) balances the interest of parties challenging void judgments against the interests of parties acquiring property without notice of the judgment's invalidity. §2-1401(e) does that by putting third parties on notice of any "lack of jurisdiction [that] affirmatively appears from the record proper." 735 ILCS 5/2-1401(e). Based on this limitation, the Appellate Court held that a third party purchaser does not have to analyze jurisdictional facts beyond the face of the record proper to determine the County in which a particular city or zip code is located if the County's name is not disclosed by the proof of service. Appellate Opinion, A74, ¶27.

"There is a strong policy in the State of Illinois favoring judicial sales…. [which is] encoded in section 2–1401(e) of the Code." *Mountain States Mortg. Ctr., Inc. v. Allen*, 257 Ill. App. 3d 372, 380 (1993) (internal citations omitted). "Section 5 of the Joint Committee Comments to subsection 2–1401(e) of the Code states that said provision was specifically enacted to protect bona fide purchasers of property for value, from the effects of an order setting aside a judgment or decree affecting title to said property if the purchaser was not a party to the original proceeding, when there is no affirmative evidence of lack of jurisdiction in the record. *Id.*

The legislative rationale behind this statutory requirement is that the impact of a void judgment must be balanced against the rights of a *bona fide* purchaser for value.

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U.S. Bank Nat. Ass'n v. Rahman, 2016 IL App (2d) 150040, ¶ 26 ("Section 2–1401(e) embodies the public policy respecting third-party purchasers of property and protecting them from the effects of an order setting aside a judgment affecting title to property). This is critical to our system of land titles because members of the public must be able to rely on the relevant public records to protect their interests as property owners and lien holders and maximize property values for themselves and the associated real estate tax revenues for our municipalities. *See, e.g*; and *People v. Eisenberg*, 19 Ill. 2d 360, 363, 166 N.E.2d 71, 74 (1960) (purpose of tax foreclosure procedures "is to return the property to the regular tax rolls, free of tax liens.")

Here, the Kusmierz were served with summons by an SPS. Having been served, the Kusmierz knew about the foreclosure action, but never contested it on the basis of service or otherwise. Instead, they respected the Court ordered foreclosure and did not assert any claims against the foreclosed property for many years.

However, more than seven years after they were served with process, and more than six years after the foreclosure sale was confirmed, the Kusmierz filed a §2-1401 Petition seeking to have their interests placed ahead of the of the vested property interests of the current owners, Brian T. Heath and Naillisa S. Ragland ("Current Owners") and of their mortgage lender, Mortgage Electronic Registration Systems, Inc., as nominee for STC Capital Bank ("MERS"). Unlike the Kusmierz, the Current Owners and MERS were not parties to the foreclosure proceeding and never walked away from the foreclosed property. Instead, the Current Owners borrowed money and constructed a house on the formerly vacant land, pledged the house to MERS as collateral for their

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loan, and paid the real estate taxes that otherwise would constitute a lien on the property and subject it to sale for non-payment.

The imbalance between these two positions is striking. One party had actual knowledge of the foreclosure proceeding and did nothing to protect their interest in the property from foreclosure. In contrast, absent notice of a lack of jurisdiction affirmatively appearing from the public record, the other parties invested time and money to improve and preserve the value of the property.

Illinois case law steadfastly holds that third party purchasers such as the Current Owners are not required to conduct jurisdictional searches beyond the affirmative disclosures that exist in the public record. *See State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 312-13 (1986) and its progeny. To hold otherwise would create uncertainty regarding the finality of the judicial foreclosure process, depress foreclosure sale prices, and subject third party purchasers and their mortgagees to unnecessary risk and expense. For each of these reasons, this Court should affirm the Second District's determination that third party purchasers are not required to search for County of service information where it does not appear affirmatively in the court record.

Alternatively, the Court can affirm the Appellate Court's ruling by resolving the conflict between the Districts concerning whether a Circuit Court sitting outside of Cook County is required to appoint an SPS before a summons issued by it is served in Cook County. This conflict was recognized in *Moriarty*, which held that the County of issuance of a summons is determinative of the need to appoint an SPS, notwithstanding the Second District's ruling that the location of service is determinative. 2020 IL App. (3d) 190016, ¶22.

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In particular, although this case and the Second District's *Robinson* and *Giusti* cases were decided on §2-1401(e) grounds, in *Moriarty*, the Third District resolved the same issue under 735 ILCS 5/2-202 (West 2018). All three cases involved service of process issued in a case pending outside of Cook County in which service was made on a defendant in Cook County. The Second District assumed such service to be improper in the absence of the timely appointment of an SPS, finding that §2-1401(e) was dispositive in the absence of County information affirmatively disclosed by the returns of service. *Robinson*, ¶22; *Giusti*, ¶19.

In contrast, in *Moriarty*, a defendant in a Kankakee County case who resided in Kankakee County was served by an SPS in Cook County. Unlike the Second District, the Third District did not assume that service by an SPS without prior court order was improper. To the contrary, it upheld such service, finding that the County of issuance of the Summons, rather than the County of service, was determinative. As stated in *Moriarty*: "We hold that a duly licensed or registered private detective may serve process, 'without special appointment,' anywhere in the State so long as the Summons was issued from a County 'with a population less than 2 million.'" 2020 IL App. (3d) 190016, ¶22. As a result, the *Moriarty* Court did not need to consider the applicability of §2-1401(e).

Although *Moriarty* was decided in a different judicial District, as this Court has long held, "[r]egardless of the reasoning of the appellate court, we may affirm its judgment if that judgment is correct on other grounds." *People ex rel. Daley v. Datacom Sys. Corp.*, 146 Ill. 2d 1, 19 (1991). Respectfully, the Third District's ruling provides a bright line on which the public can rely in all cases involving service of process in another County because the County of the Court issuing the summons clearly and

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affirmatively appears on the face of the record. Therefore, even though the Court can rule on §2-1401(e) grounds based on the lack of County of service in the public record, the title community and the public-at-large would be best served if the Court addresses how the issue of service of process should be addressed under 735 ILCS 5/2-202.

D. Laches is a defense to a challenge to the validity of a void Judgment.

Although the Kusmierz took no action with respect to the foreclosed property for six years prior to filing their §2-1401 Petition, they seek restitution from the foreclosing lender, PNC Bank, N.A., for the damages allegedly sustained as a result of the purportedly defective service of process. As the foreclosing lender, PNC Bank is not entitled to the benefit of §2-1401(e) because it was a party to the foreclosing proceeding.

Yet, the passage of time has taken its toll. In the absence to a timely challenge to the foreclosure proceeding, the Appellate Court determined: "[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." Appellate Opinion, A74, ¶33.

Even if they could not assert a §2-1401(e) defense, the same would be true for the Current Owners and MERS. During the extended time period in which the Kusmierz sat on their alleged rights, the Current Owners purchased the foreclosed vacant lot, borrowed funds from MERS secured by a mortgage against the property to construct a residence on it, and paid the property's real estate taxes that otherwise would constitute a lien upon it. For these reasons, it would be inequitable for the Kusmierz to be allowed to pursue any claims to the detriment of the Current Owners or MERS at this late date.

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The doctrine of laches is intended to prevent such an inequitable result. As described by this Court in *Pyle v. Ferrell*, 12 Ill. 2d 547, 552 (1958):

> Although laches is defined by one authority as such delay in enforcing one's rights as will work to the disadvantage of another, (30 C.J.S. Equity s 112,) it is, unlike limitations, not a mere matter of time but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property and parties, and where there is such a change as to make it inequitable to grant relief, it will be refused.

Thus, where, as here, "a party is guilty of laches which ordinarily bars the enforcement of his right where he remains passive while an adverse claimant incurs risk, enters into obligations, or makes expenditures for improvements or taxes." *Id.* at 555.

As a result, this Court has applied the doctrine of laches even in the face of a challenge to a void judgment. When faced with an argument that laches is not a defense because a void judgment may be attacked at any time, this Court responded as follows: "[t]hese statements are far too sweeping, however, for laches is a familiar defense when the validity of an earlier judgment or decree has been attacked in equity. … As the black letter of the Restatement puts it, 'equitable relief from a judgment may be refused to a party thereto if * * * after ascertaining the facts the complainant failed promptly to seek redress.' (Restatement of Judgments, s 129.)" *James v. Frantz*, 21 Ill. 2d 377, 383 (1961) (internal citations omitted).

There is no rational basis to limit laches to special circumstances as the Kusmierz suggest, nor have the Courts done so. To the contrary, this principle is applicable to all cases, including those involving real property rights. *See, e.g., Koberlein v. First Nat. Bank of St. Elmo*, 376 Ill. 450, 456 (1941) (applying laches in the context of a foreclosure proceeding in which "large sums of money were expended in the development of the

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property involved in the foreclosure" during the "almost four years after [the petitioners] knew about the foreclosure decree")

In this case, the delay was seven years and the indisputable consequences of that delay are significant. PNC Bank, as the foreclosing lender, has conveyed the foreclosed property, cannot recover it, and may be barred by the statutes of limitations from recourse against other parties or counsel if the Kusmierz are allowed to pursue a claim against it. The Current Owners have built a home on the formerly vacant property with the proceeds of MERS' mortgage loan, and have paid the property's real estate taxes for many years. To allow the Kusmierz to recover from PNC Bank, the Current Owners, or MERS would result in a significant windfall to the Kusmierz (and their solicitors) to the detriment of each of these parties. Therefore, the equities that underlie the doctrine of laches should be available to prevent such a result.

IV. CONCLUSION

This Court's role is not to legislate. As indicated above, the legislature has done just that in an attempt to rein in the §2-1401 cottage industry. However, this Court can provide guidance to the lower courts in dealing with the remaining §2-1401 Petitions, while at the same time providing clarity to future home purchasers, mortgage lenders, and title insurers acquiring or evaluating interests in foreclosed properties, as well as other final judgments that may become the subject of §2-1401 Petitions.

ILTA respectfully requests that this Court do just that by holding that a summons served in Cook County needs to state the County of service to put a purchaser on notice that an SPS had to be appointed for service of process to be effective or, alternatively, that the need to appoint a special process server is determined by the County in which a

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case is pending, not the County in which process is served. In addition, ILTA respectfully requests that this Court reaffirm the well-established principle that laches a defense to a §2-1401 Petition based on an allegedly void judgment, and affirm the Appellate Court's ruling on the foregoing grounds.

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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 20 pages.

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