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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-690

BAC HOME LOANS SERVICING, LP, f/k/a COUNTRYWIDE HOME LOANS SERVICING, LP APPELLANT V. BENEFIT BANK APPELLEE	**Opinion Delivered** MARCH 9, 2011 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CV 2009-625] HONORABLE MICHAEL MEDLOCK, JUDGE AFFIRMED

ROBIN F. WYNNE, Judge

BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP, appeals from an order of the trial court denying its motion to set aside a foreclosure decree, which was a default judgment as to appellant, in which the court found that a mortgage held by appellee Benefit Bank is superior to the interest held by BAC. On appeal, appellant argues that the decree should be set aside because 1) it does not strictly conform to appellee's pleading, as is required for default judgments and 2) appellee is judicially estopped from asserting that its interest in the property is superior to appellant's interest because appellee took the opposite position in a related bankruptcy proceeding. We affirm.

On June 27, 2005, Lloyd F. James and Dalla S. James executed and delivered to appellee a promissory note in the amount of $25,767.75, in which they promised to make monthly payments followed by a balloon payment. As collateral for the note, the Jameses

executed and delivered to appellee a mortgage to two lots, Lot 84 and Lot 85, in an addition to the city of Van Buren. Later, appellee filed a partial release of mortgage in which it released Lot 84 in order to allow the Jameses to refinance the first mortgage on Lot 84. The Jameses then executed a mortgage on Lot 84 to re-establish appellee's second mortgage on the property. The Jameses defaulted on the promissory note and entered into Chapter 13 bankruptcy. On September 22, 2009, appellee filed a complaint in which it sought to foreclose on the property pledged as collateral for the note. Appellant was named as a party in the complaint. In the complaint, appellee states that appellant may have an interest in the property but alleges that its interest has priority over the interests of appellant and of the other defendants named in the complaint. Appellee also requested that the other parties that might have an interest in the property be required to provide proof of that interest.

The parties do not dispute that appellant was properly served with the complaint. Further, there is no dispute that appellant never answered the complaint. On October 27, 2009, the trial court entered a decree of foreclosure. In the decree, the court states that appellant did not appear and that, while appellant may have had an interest in the property, there was no proof before the court that appellant had an interest. The trial court decreed that the mortgages held by appellee were first and second mortgages on the property and that all other mortgages on the property, including the one held by appellant, were extinguished. The trial court further ordered that the property be sold at public auction. Lot 84 was sold to appellee for $20,000. The Commissioner's deed was recorded on December 15, 2009.

On January 25, 2010, appellant filed a motion to set aside the foreclosure decree. In the motion, appellant alleged that the creditor's plan in the Jameses' bankruptcy case provided that Lot 84 would be surrendered to appellant as the first mortgage holder and that the filings in the bankruptcy case showed that appellee did not have a first lien on the property, which, appellant alleged, precluded appellee from asserting a first lien in the foreclosure action by operation of the doctrine of judicial estoppel. Appellant further alleged that, because appellee stated in its complaint that it held a second mortgage to Lot 84, the most appellee was entitled to in foreclosure was a judgment in the form of a second lien subject to appellant's first priority lien.

On April 13, 2010, the trial court issued an order in which it denied appellant's motion to set aside the foreclosure decree. In the order, the court found that the foreclosure decree was consistent with the factual allegations and prayer for relief in the complaint. The court further found that appellant was not entitled to relief on the grounds of judicial estoppel. Appellant has now appealed to this court.

Appellant's first argument is that the foreclosure decree, which was a default decree as against appellant, is void because it failed to strictly conform to appellee's complaint. Our standard of review depends on the grounds claimed by the party that moved to set the decree aside. When the party claims that the judgment is void, as appellant does here, then the matter is a question of law, which we review de novo. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Ark. R. Civ. P. 54(c) (2010). Appellant argues that the foreclosure decree violates Rule 54(c) because appellee stated in its complaint that it held a second mortgage to Lot 84, but the decree stated that appellee's mortgage had priority over any interest held by appellant. Our review of appellee's complaint and the foreclosure decree reveals that appellee received in the decree exactly what it requested in its complaint. It was clear from appellee's complaint that it was challenging the supremacy of appellant's interest in the property and that appellant would be required to provide proof of a superior interest. Appellant failed to respond to the complaint. We hold that the foreclosure decree does not violate Rule 54(c).

Appellant's second point on appeal is that appellee should be judicially estopped from asserting that its interest in the property has priority over appellant's interest because appellee took a different position in the bankruptcy proceeding. Judicial estoppel occurs when the following elements are present: 1) a party assumes a position clearly inconsistent with a position taken in an earlier case or with a position taken in the same case; 2) the party assumes the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage; 3) the party has successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; 4) the integrity of the judicial process of at least one court is impaired or injured by the inconsistent positions taken. *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004).

In the bankruptcy filings, appellee stated that it had a first mortgage on Lot 85 and a mortgage on Lot 84. Appellant argues that the use of the term "mortgage" as opposed to "first mortgage" with reference to Lot 84 was an assertion by appellee in the bankruptcy proceeding that it had a second mortgage as opposed to a first mortgage. Appellant further argues that this precludes appellee from arguing that it had a first mortgage on Lot 84 in the foreclosure action. Appellant's arguments fail because appellee never argued in the foreclosure proceeding that it had a first mortgage on Lot 84. Instead, appellee admitted that it had a second mortgage on the property but argued that its second mortgage had priority over the first mortgage that was owned by appellant, and the trial court agreed with appellee because there was no evidence before the court that appellant had any interest in the property as a result of appellant's failure to answer the complaint. Appellant has failed to prove the first element necessary for judicial estoppel to apply. Because appellant failed to prove at least one necessary element of judicial estoppel, that doctrine does not bar appellee from making the factual allegations set forth in its foreclosure complaint.

Affirmed.

HART and BROWN, JJ., agree.