NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

Case No. 118,885

MIDFIRST BANK,

Plaintiff/Appellee,

vs.

ANDY ALEXANDER and
SHAUNA ALEXANDER,

Defendants/Appellants,

and

JOEL WINELAND and
SCOTT NEWCOMB,

Intervenors/Appellees.

APPEAL FROM THE DISTRICT COURT OF
GARVIN COUNTY, OKLAHOMA

HONORABLE LEAH EDWARDS, TRIAL JUDGE

AFFIRMED

Blake C. Parrott
BAER & TIMBERLAKE, P.C.
Oklahoma City, Oklahoma — For Plaintiff/Appellee

Billy D. Vandever
Pauls Valley, Oklahoma — For Defendants/Appellants

Dean Hart, Jr.
HART & HART
Pauls Valley, Oklahoma — For Intervenor/Appellee Joel Wineland

Micah G. Yache
Pauls Valley, Oklahoma — For Intervenor/Appellee Scott Newcomb

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The defendants, Andy and Shauna Alexander, bring this appeal after the trial court denied their motions to vacate a default judgment in favor of the plaintiff, Midfirst Bank, and to vacate orders allowing two parties to intervene and impress judgment liens against the excess proceeds of the sale of the realty at issue. The Alexanders claim that the district court was without jurisdiction when it issued the default judgment because Midfirst Bank failed to serve them with an amended petition in accordance with § 2005 of our pleading code. The Alexanders further claim that the court improperly sustained motions to intervene because the Alexanders were not served with the motions, nor were they allowed twenty days to respond to the order pursuant to § 2024(C) of the code. We find that although Midfirst did not properly serve their amended petition, the denial of the request to vacate the default judgment was proper, that intervenors were not required to serve the Alexanders with their motions to intervene because the Alexanders were in default, and that the trial court did not abuse its discretion in relation to the twenty-day time period referenced in § 2024(C). Accordingly, the trial court's order is affirmed in all respects.

BACKGROUND

The relevant facts concern Andy and Shauna Alexander's default on a note, secured by a mortgage dated April 23, 2004, which came to be owned by Midfirst. In a prior (2017) case, Midfirst Bank sued on the note and foreclosed the mortgage against the Alexanders, and the district court in Garvin County entered an order of sale. However, Midfirst recalled the sale, as the parties were

contemplating dismissing the proceeding and renegotiating the note and mortgage. Although the sale did not proceed, the judgment of foreclosure was never vacated nor was the case dismissed.

That same note went into default again in 2018, and Midfirst filed a foreclosure petition in a new case. The Alexanders were properly served with a summons and the petition on April 20, 2019. Five days later, Midfirst Bank filed an amended petition identical to the original petition except for a single paragraph. The new paragraph asked the trial court to vacate the 2017 foreclosure judgment. The record does not reflect that Midfirst Bank mailed or made any attempt to serve the Alexanders with the amended petition.

The Alexanders never responded to the summons, and the court entered a default judgment against the Alexanders on June 18, 2019. The property sold at auction on January 30, 2020, for $106,000.

Prior to any order confirming the sale, two lienholders filed motions to intervene in the proceedings. First, Joel Wineland alleged that he recovered a judgment against Andy Alexander for $20,715.14 in 2017. Wineland claimed that the judgment was properly recorded with the Garvin County Clerk, but that the abstract company failed to include the statement of judgment in the abstract of title for the property at issue. Shortly thereafter, Scott Newcomb filed a similar motion alleging that he also received a judgment against Andy Alexander for $36,880.00. Newcomb also claimed his judgment was recorded with the Garvin County Clerk, but was missing from the abstract. Each lienholder asked that his

lien on the realty be released, but that a judgment lien against the excess proceeds of the sale be impressed in his favor.

On March 2, 2020, the trial court held a combined hearing on the motions to intervene and Midfirst's pending motion to confirm the sale. The court granted each motion, entering orders granting intervention to both Wineland and Newcomb, orders allowing each of them a lien on the excess proceeds, an order confirming sale, and an order of disbursement of the proceeds. Although it appears from the record that Mr. Alexander was present at this hearing, it does not appear that he objected to the entry of these orders. However, on March 9, 2020, the Alexanders filed a motion seeking to vacate each of these orders, as well as the initial default judgment entered against them. The trial court denied the Alexanders' request to vacate *in toto*. The Alexanders timely appealed.

STANDARD OF REVIEW

"The standard of review for a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion." *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, ¶ 7, 280 P.3d 328. "An abuse of discretion occurs 'when the decision is based on an erroneous interpretation of the law, on factual findings that are unsupported by proof, or represents an unreasonable judgment in weighing relevant factors.'" *Williams v. Meeker North Dawson Nursing*, 2019 OK 80, ¶ 10, 455 P.3d 908 (quoting *Okla. City Zoological Tr. v. State ex rel. Pub. Emps. Relations Bd.*, 2007 OK 21, ¶ 5, 158 P.3d 461).

ANALYSIS

Failure to Serve the Amended Petition

The Alexanders first argue that the district court erred by denying their motion to vacate the default judgment because they were not properly served as to Midfirst Bank's amended petition. The Alexanders urge that the district court was "without jurisdiction" to hear the case because procedural due process requires "at minimum, that parties be given notice of the claims against them." As the record notes, and the Alexanders do not dispute, the Alexanders were properly served with a summons and a copy of the initial petition on April 20, 2019, pursuant to 12 O.S.Supp.2017, § 2004. Their complaint here is that they were not served a copy of the amended petition pursuant to § 2005.

The Alexanders are correct that Midfirst Bank should have served them with a copy of the amended petition in accordance with § 2005. This does not end our inquiry, however. The question on appeal is whether the trial court erred in denying the motion to vacate the default judgment based on this failure of service. For the following reasons, the trial court did not abuse its discretion in denying the motion to vacate the default judgment.

We first note that the Alexanders' motion to vacate the default judgment was filed *eight months* and *twenty days* after the judgment was entered. However, if more than thirty days have elapsed, a request to vacate "shall be ***by petition***, ***verified by affidavit***, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and ***the defense to the action***." *Id.* § 1031(C). Here, however, the Alexanders filed their request by unverified motion and did

not, and have not on appeal, set forth any actual defense to Midfirst's initial request to foreclose.

Although default judgments are generally disfavored, *Williams v. Meeker North Dawson*, 2019 OK 80, ¶ 12, 455 P.3d 908, and substantial compliance is the requisite standard in regards to vacation requirements, *Yeagley v. Brewer*, 1976 OK CIV APP 30, ¶ 7, 551 P.2d 312 (citing *Allen v. Allen*, 1948 OK 183, ¶ 23, 209 P.2d 172), a motion or petition to vacate must still "contain[] all the averments" required under the requisite statute. *Id.* Under these facts, it was not an abuse of discretion to deny the motion to vacate the default judgment, which should have been by verified petition, and which made no effort to set forth any defense that might have been pled on the merits. *See State ex rel. Hunt v. Liberty Invs. Life Ins. Co.*, 1975 OK 165, 543 P.2d 1390; *In re Estate of Davis*, 2006 OK CIV APP 31, ¶ 20, 132 P.3d 609.[1]

The Motions to Intervene

The second question presented is whether intervention was improper for lack of notice or inadequate time to respond. The Alexanders argue on appeal

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[1] The dissent argues that the trial court was without jurisdiction because the note merged into the 2017 judgment, thereby depriving the plaintiff of any basis for its suit. While we do not quarrel with the general proposition that a note merges into a judgment, *but see Whitten v. Kroeger*, 1938 OK 442, ¶8, 82 P.2d 668, 671 ("While it is true that a promissory note is ordinarily merged into the judgment recovered thereon, such judgment does not ... discharge the note."), the trial court had jurisdiction below. Though the requirement of payment under a note may cease upon the entry of a foreclosure judgment, a mortgage lien does not so merge. *See Hub Partners XXVI, Ltd. v. Barnett*, 2019 OK 69, ¶ 14, 453 P.3d 489, 494 ("[A] mortgage lien does not merge into a foreclosure judgment, nor is it extinguished by a foreclosure judgment."). We view the continued existence of this lien as sufficient to give the trial court the power to hear the second case. Though the debtor might have succeeded in a motion to dismiss pursuant to 12 O.S. § 2012(B)(8) ("Another action pending between the same parties for the same claim"), the debtor—duly summoned—failed to appear and raise this defense.

that neither intervenor Wineland nor Newcomb properly served the Alexanders notice on their respective motions to intervene. Further, the Alexanders claim that they were not given twenty days to respond to the pleadings attached to the motions to intervene before judgment was entered.

Motions to intervene are governed by 12 O.S.Supp.2016, § 2024. Intervening parties are required to serve a motion to intervene in accordance with § 2005. *Id.* § 2024(C). However, as noted above, the Alexanders were in default for failing to appear long before either Mr. Wineland or Mr. Newcomb filed a motion to intervene. Section 2005(A) states that "[n]o service need be made on parties in default for failure to appear." Thus the intervenors were under no legal obligation to serve their motions to intervene and failure to vacate on this basis was thereby not an abuse of discretion.[2]

The Alexanders also call our attention to the requirement that when pleadings assert new or additional claims against parties in default, those pleadings must be served in accordance with § 2004. 12 O.S.2011, § 2005. However, this exception does not apply to this case because a motion to intervene is not a pleading. *Id.* § 2007. Further, any intervention does not bring any new or additional claim against the Alexanders, but instead attaches a previously recorded judgment onto Midfirst Bank's existing claim against the Alexanders. Such is the nature of intervention; rather than raising a new cause of action or

[2] Nevertheless, we note, despite the Alexanders' claim in their motion to vacate, that the record reflects Mr. Wineland's motion contains a certificate of service that includes the Alexanders. Mr. Newcomb's motion, however, does not. Both motions indicate that service was effectuated upon Midfirst.

complaint, the interested intervenor joins a pending cause of action. *See Crossroads Grassroots Policy Strategies v. Federal Elections Com'n*, 788 F.3d 312, 320 (D.C. Cir. 2015). Thus, there was no requirement that the intervenors serve the Alexanders with their respective motions.

The Alexanders finally object that they were denied the allowed twenty-day period to respond to the intervenors' pleadings prior to the entry of judgment. Parties are permitted twenty days to respond to any pleadings filed by intervenors, "unless the court prescribes a shorter time." 12 O.S.Supp.2016, § 2024. The question here is whether the court abused its discretion for failing to vacate the order of intervention for violation of this provision. On these facts, we hold that it did not.

First, we note that the Alexanders do not contest that Mr. Alexander actually appeared at the hearing on intervention and made no objection. Further, the Alexanders' complaint in their motion to vacate was that they were not permitted twenty days to respond to the *motions*, not to any pleadings as a result of the granting of the motions. However, § 2024 allows for twenty days to respond to any *pleadings* filed as a result of intervention. The Alexanders never offered any such responsive pleading to the court at the hearing, in their motion to vacate, or at any time after. Indeed, because no cross-claim was filed with the intervenors' answer, the pleading code does not allow for *any* pleading to be filed in response to an answer absent leave of court. 12 O.S.2011, § 2007. The record does not indicate leave of court was sought here. Finally, the Alexanders offered no reason in their motion to vacate why intervention should not have been

allowed in the first instance or what pleading they would have filed in response to the intervenors' answers had they been given such a chance. The trial court cannot be said to have abused its discretion in refusing to vacate the intervention where the party seeking vacatur appeared but made no objection at the hearing allowing intervention, offered no substantive defense to the intervention in its motion to vacate, and did not offer a responsive pleading that they would have filed if the time period allowing such a responsive pleading was not shortened by the court. Accordingly, this allegation of error provides no basis for reversal.

AFFIRMED.

BARNES, J., concurs, and WISEMAN, P.J., dissents.

WISEMAN, P.J., dissenting:

I must respectfully dissent. As the majority notes, MidFirst Bank in the original 2017 case, Garvin County Case No. CJ-2017-113, obtained judgment on the note in question and a decree foreclosing the mortgage given as security. This September 20, 2017 judgment on the note and decree of foreclosure were extant and valid, *i.e.*, unvacated,[1] when Bank filed its second foreclosure lawsuit on March 27, 2019, seeking the same relief on the same note and mortgage.

[1] The case was still open and awaiting future collection action by way of a sheriff's sale.

Pursuant to Oklahoma law, when judgment was entered in 2017, the note was merged in that judgment[2] and could not be the basis for an identical subsequent lawsuit in 2019.

> The doctrine of merger is a common law principle in which a cause of action is merged into a judgment, extinguishing the underlying cause of action. Under the general rule, the judgment replaces the old debt which ceases to exist, and extinguishes all the remedial rights which accompany the underlying claim. Under the rule of merger, the judgment does not annihilate the debt and the essential nature of the debt remains intact.

Johnson v. State ex rel. Dep't of Pub. Safety, 2000 OK 7, ¶ 9, 2 P.3d 334 (citations omitted). Thus Bank had the right to enforce its 2017 judgment, but it could not, because of that previous judgment and the "merger" doctrine, pursue or enforce its rights under the same note in a new lawsuit. With the existence of the 2017 judgment and decree of foreclosure well within Bank's knowledge as the judgment creditor, it is not explained in the record why the trial court was not advised of this redundancy or why Bank did not alleviate the problem before the second lawsuit was filed.

This is an instance where, had it been advised of the pre-existing lawsuit, the trial court should have dismissed the second action for lack of jurisdiction

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[2] Although the majority states that the note is not "discharged," citing *Whitten v. Kroeger*, 1938 OK 442, 82 P.2d 668, *Whitten* states that the "judgment does not, as between the parties against whom the judgment is taken, discharge the note." *Id.* ¶ 8. This question regarding primary and secondary liability between judgment co-debtors when one pays the note and seeks repayment from the other is not before us in this case. The issue is not discharge but merger of the note in the unvacated judgment, and the majority has not cited any authority showing the trial court had jurisdiction of the note in the second action or supporting its grant of equitable relief in the form of foreclosing a mortgage which had already been foreclosed.

due to the pre-existing judgment and decree of foreclosure, thereby reinforcing the reason behind dismissing cases pursuant to 12 O.S.2011 § 2012(B)(8), "[a]nother action pending between the same parties for the same claim."

This brings us to the second point fatal to Bank's position. The new, improper 2019 foreclosure petition was served on the Alexanders on April 20, 2019. Then, without notice to or service on the Alexanders, Bank—recognizing its tenuous position *vis à vis* the 2017 judgment—amended its petition five days later expressly to seek vacation of the 2017 judgment. In order to vacate that judgment, which Bank sought more than 19 months after its entry, Bank was required to follow the statutory procedures of 12 O.S.2011 and Supp. 2020 §§ 1031-1038, in particular § 1033.[3] Other than filing a verified petition, as mandated by § 1033, Bank made no attempt to meet the requirements of § 1033. No reason, basis or grounds for vacating pursuant to 12 O.S.2011 § 1031 were given, and more importantly, as Bank admits, neither amended petition nor summons on that amended petition was issued or served on the Alexanders as required by § 1033.

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[3] Section 1033 states:

> If more than thirty (30) days after a judgment, decree, or appealable order has been filed, proceedings to vacate or modify the judgment, decree, or appealable order, on the grounds mentioned in paragraphs 2, 4, 5, 6, 7, 8, and 9 of section 1031 of this title, shall be by petition, verified by affidavit, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and the defense to the action, if the party applying was [the] defendant. On this petition, a summons shall issue and be served as in the commencement of a civil action.

12 O.S.2011§ 1033.

I must agree with the Alexanders that, having successfully served them just five days earlier, Bank was obligated by law to serve them with the amended petition pursuant to § 1033 and 12 O.S.2011 § 2005(A) which mandates that "every pleading subsequent to the original petition . . . shall be served upon each of the parties."[4] Bank offers no explanation for proceeding to judgment on the amended petition without any notice to the Alexanders—not even mailing the amended petition to the Alexanders (let alone, serving it on them[5]), particularly when this was well within the Alexanders' remaining time (15 days) to answer or respond to the lawsuit. As the Alexanders' opening brief points out, the judgment and decree of foreclosure entered on June 18, 2019, specifically and erroneously recites that "due and regular service of summons with [a] copy of [Bank's] Petition *and Amended Petition* attached has been made" on each of the Alexanders as provided by law, which service "is legal and regular in all respects." (Emphasis added.) This is clearly false, when the *only* service of the second lawsuit on the Alexanders occurred five days *before* the amended petition was even filed. Bank has not directed us to any place in the judgment roll or the appellate record supporting this untrue recitation in the default judgment, and Bank concedes the lack of service of the amended petition and requisite summons.

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[4] *See also* Rule 2(b)(i) of the Rules for District Courts, 12 O.S. Supp. 2020, ch. 2, app.

[5] Pursuant to 12 O.S.2011 § 1033, n.2 *supra*, a petition like this one in 2019 seeking vacation of a judgment must be served along with summons "as in the commencement of a civil action."

Bank's failure to serve the Alexanders with notice of its request to vacate the earlier judgment (the amended petition) and to provide an opportunity to be heard (service of summons with the amended petition) violated the Alexanders' fundamental due process rights. Without any service of the amended petition and accompanying summons on the Alexanders, the trial court had no personal jurisdiction over them to vacate the previous judgment, the only reason Bank amended its petition. 12 O.S.2011 § 1033. "If the record does not reflect that personal service has been made on the defendant, the court lacks in personam jurisdiction over the defendant and any default judgment rendered thereon is void and subject to vacation." *Ferguson Enters., Inc. v. H. Webb Enters., Inc.*, 2000 OK 78, ¶ 11, 13 P.3d 480 (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)). This is just such a default judgment requiring vacation.

Even with service of the original unamended 2019 petition, Bank could not properly take default judgment on that original petition because it already held a judgment granted in 2017 into which the Alexanders' note was merged, extinguishing the note. How does the trial court exercise subject matter jurisdiction over a non-existent note? Can the trial court proceed to foreclose an already-foreclosed mortgage arising from an extinguished note? And can this be cured by filing an amended petition adding only a request to vacate the 2017 judgment but providing the judgment debtors no notice of that new claim? This violates fundamental due process protections.

In addition to these deficiencies, I would further note that if, as the majority holds, the Alexanders are to be held to the statutory standards for a judgment they sought to vacate after eight months and 20 days, then Bank must be held to the same standard for vacating a judgment granted more than 19 months earlier. Bank simply put the cart before the horse and took a shortcut in refiling its lawsuit *before* vacating the earlier judgment and then failed to provide due process notice of its attempt to vacate the problematic previous judgment.

A review of Oklahoma case law on vacating default judgments like this, particularly for lack of personal jurisdiction, tells me that the Alexanders' request to vacate the June 2019 judgment should have been granted and the refusal to do so was an abuse of discretion requiring reversal. Our Supreme Court has long held that it is easier to abuse one's judicial discretion by refusing to vacate a judgment than by vacating it. The Court has said:

> A default judgment is void if the court did not have jurisdiction over the parties. In previous cases reviewing a trial court's ruling either vacating or refusing to vacate a default judgment, we have considered the following:
> 1) default judgments are not favored; 2) vacation of a default judgment is different from vacation of a judgment where the parties have had at least one opportunity to be heard on the merits; 3) judicial discretion to vacate a default judgment should always be exercised so as to promote the ends of justice; 4) a much stronger showing of abuse of discretion must be made where a judgment has been set aside than where it has not. We also consider whether substantial hardship would result from granting or refusing to grant the motion to vacate.

Ferguson Enters., Inc., 2000 OK 78, ¶ 5 (citations omitted). So in addition to the flaws discussed above, these principles in *Ferguson* continue to guide us in this arena, and all four of these tenets weigh in favor of the Alexanders.

On this point, Bank and Intervenors Wineland and Newcomb urge the Court to accept their representation that the amended petition "did not assert any new or additional claims for relief against [the Alexanders]." If the assertions about the previous judgment and the need to vacate it were so inconsequential as to obviate the need for service on the Alexanders, would Bank be willing to relinquish or waive these assertions and proceed to judgment without them? I would suggest that is highly unlikely in light of the previous discussion of the procedural quicksand inherent in prosecuting the second case as long as the first judgment was alive and well.

The Alexanders' second proposition of error raises concerns about motions to intervene filed by third parties Wineland and Newcomb in February 2020 which the trial court granted 14 and four days later, respectively, without allowing the Alexanders the statutory time to respond, if they indeed were properly served with the motions. Without delving into the lack of due process inherent in the analysis upholding this lack of notice, I suggest that because the June 2019 judgment is fundamentally flawed, any subsequent action by the trial court, such as permitting intervention and impressing judgment liens on proceeds from the sale of the property, must also be set aside.

For these reasons, I would reverse the trial court's denial of the Alexanders' request to vacate the June 2019 judgment, reverse the default judgment and the

orders allowing intervention and related matters, and remand for further proceedings to satisfy essential due process requirements. Accordingly, I respectfully dissent.

September 2, 2022