

UNKNOWN OWNERS AND UNKNOWN LIEN)	
CLAIMANTS,)	
)	
Defendants)	
)	
(FirstMerit Bank, N.A., Successor in Interest to George)	Honorable
Washington Savings Bank, Counterplaintiff-Appelle, v.)	Anthony C. Kyriakopoulos,
Rhoda Bogardus, Counterdefendant-Appellant).)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court’s order granting the plaintiff’s motion for an order *nunc pro tunc* where the record provided definite and clear evidence that the circuit court made a clerical error in striking an *in personam* deficiency judgment against the defendant.

¶ 2 The counterdefendant-appellant, Rhoda Bogardus, appeals from an order of the circuit court of Cook County, granting the motion of the Huntington National Bank (Huntington), successor-in-interest to FirstMerit Bank, N.A., to correct the circuit court’s order entering a deficiency judgment *nunc pro tunc* to reflect an *in personam* judgment against Bogardus.¹ For the following reasons, we affirm.

¶ 3 The following facts relevant to this appeal were derived from the record. In 2008, Huntington’s predecessor-in-interest loaned \$3,832,000 to JB Milwaukee Avenue, LLC (the borrower) secured by a construction mortgage for the development of certain property.² In 2008 and 2009, Bogardus signed commercial guaranties whereby she agreed to pay any and all amounts due to Huntington in connection with the loan obligations of the borrower. In addition to Bogardus, two

¹ This court allowed the parties to file their pleadings in this matter under a shortened caption, which has since been corrected to reflect the proper caption.

² For clarity, we will treat FirstMerit Bank, N.A., Huntington’s predecessor-in-interest, as though it were Huntington and refer to them as such in the remainder of the opinion.

other individuals executed commercial guaranties. On January 19, 2010, a mechanics' lien claimant filed suit to foreclose its lien on the commercial property. Huntington was named as a party due to its mortgage on the property. Along with its answer, Huntington filed a counterclaim to foreclose on the mortgage and to obtain a personal judgment for any deficiency against the borrower and the three individuals who guaranteed the loan, including Bogardus. Subsequently, Huntington moved for summary judgment on its counterclaim, which the circuit court granted.

¶ 4 On, May 23, 2013, the circuit court entered a judgment of foreclosure and sale (the foreclosure order) in favor of Huntington, finding that Huntington was due \$4,739,591.21 (with a per diem interest of \$595.15) and that the borrower and the three guarantors were personally liable for any deficiency. The foreclosure order also provided that if the money “arising from the sale shall be insufficient to pay the amount due to [Huntington] with interest and costs and expense of sale, [Huntington] may seek entry of a court order, upon motion duly noticed, against parties liable for said deficiency pursuant to the operative loan documents and Illinois Law.” Subsequently, a judicial sale was held and Huntington purchased the subject property for \$1.8 million, which left a deficiency of \$3,124,610.05.

¶ 5 On August 21, 2013, Huntington filed a motion asking the circuit court to approve the report of the sale and distribution of the subject property, order possession, and enter a deficiency judgment. Huntington attached a draft order to its motion that included a finding that the circuit court had “obtained personal jurisdiction over those [parties] who are personally liable to [Huntington] for the deficiency, if any, from said sale.” The draft order also included the following paragraphs:

¶ 6 “IT IS THEREFORE ORDERED:

That there shall be an *in rem* deficiency judgment entered in favor of [Huntington], in the sum of \$3,124,610.05 with interest thereon by statute against the subject property;

That there shall be an *in personam* deficiency judgment entered in the sum of \$3,124,610.05 with interest thereon as provided by statute against the defendants JB Milwaukee Avenue, LLC, Jason Wei Ding, Rhoda P. Bogardus, and Bridget Garcia in favor of [Huntington].”

On August 28, 2013, the circuit court entered an order approving the report of sale and distribution, confirming the sale, entering a deficiency judgment, and ordering possession (the order confirming sale). The order confirming sale entered by the circuit court was identical to the draft order Huntington attached to its motion with one notable exception: the circuit court struck the paragraph that reflected an *in personam* judgment against the borrower and the guarantors by crossing it out with a pen and initialing it. As such, the order confirming sale reflected only an *in rem* deficiency judgment against the property. Also on that day, the circuit court signed and entered on the docket four memoranda of judgment against the borrower and the three guarantors, including Bogardus. The memorandum relating to Bogardus stated: “On August 28, 2013, judgment was entered in this court in favor of [Huntington] and against [Bogardus] *** in the amount of \$3,124,610.05.”

¶ 7 On October 31, 2017, Huntington filed a citation to discover assets against Bogardus. On August 2, 2018, Bogardus responded by filing a motion to strike the citation, arguing that it was not supported by a valid judgment because the order confirming sale entered on the docket reflected only an *in rem* judgment, not a personal judgment against her.

¶ 8 On September 12, 2018, Huntington filed a motion to correct the order confirming the sale *nunc pro tunc* to August 28, 2013, arguing that the circuit court made a clerical error when it “mistakenly struck the paragraph awarding an *in personam* judgment” instead of striking the paragraph awarding an *in rem* judgment. In support of its motion, Huntington provided a copy of the order confirming sale, which is unsigned but was stamped by the clerk as having been entered on August 28, 2013, that it attests was provided to its counsel on that date. In Huntington’s copy of the order, the paragraph stricken and initialed by the circuit court was the paragraph reflecting an *in rem* deficiency judgment, not the *in personam* paragraph. Additionally, Huntington argued that the four memoranda of judgment entered by the circuit court on August 28, 2013, against the borrower and guarantors in the amount of the deficiency are proof that it actually entered an *in personam* judgment against Bogardus.

¶ 9 On October 3, 2018, the circuit court entered an order granting Huntington’s motion. The written order stated that the circuit court entered it after denying Bogardus’s request to submit briefs and “having heard the argument of counsel.” That same day, the circuit court entered an order entitled: “Corrected Order Approving Report of Sale and Distribution, Confirming Sale, for Entry of a Deficiency Judgment, and Order for Possession *Nunc Pro Tunc* to August 28, 2013.” The corrected order reflected that an *in personam* deficiency judgment was entered against Bogardus, the borrower, and the other guarantors and omitted the *in rem* judgment paragraph. This appeal followed.

¶ 10 On appeal, Bogardus argues that the record did not provide definite and certain evidence that the circuit court committed a clerical error in striking the paragraph reflecting an *in*

personam deficiency judgment against Bogardus and, therefore, it was improper for the circuit court to grant Huntington's motion to correct the order *nunc pro tunc*.

¶ 11 “A court has inherent power to make an entry *nunc pro tunc* at any time *** to correct a clerical error or matter of form so that the record reflects the actual order or judgment rendered by the court when such entry is based upon a definite and certain record.” *Johnson v. First Nat. Bank of Park Ridge U/T No. 205*, 123 Ill. App. 3d 823, 827 (1984). Such an order does not alter the actual judgment of the court. *Dauderman v. Dauderman*, 130 Ill. App.2d 807, 809 (1970). Rather, “it merely corrects inadvertent omissions from the judgment order, and should not be entered if the omission is the result of either a deliberate decision by the judge or relates to an issue that was not presented to the judge.” *Z.R.L. Corp. v. Great Central Insurance Co.*, 201 Ill. App. 3d 843, 845 (1990). The distinction between a judicial error and a clerical error “does not depend so much upon the source of the error as upon whether it was the deliberate result of judicial reasoning and determination [citation], as opposed to inadvertence in the ministerial matter of putting in form the judgment of the court [citation].” *Kooyenga v. Hertz Equipment Rentals, Inc.*, 79 Ill. App. 3d 1051, 1058 (1979). A *nunc pro tunc* order must be based on some note, memorandum, or memorial in the record indicating that the omission was an inadvertent clerical error. *Z.R.L. Corp.*, 201 Ill. App. 3d at 845. Any document in the record may serve as evidence of the inadvertent nature of the omission, but the evidence must be definite and certain. *Id.* An order granting or denying a motion for entry of a *nunc pro tunc* order is reviewed *de novo*. *People v. Jones*, 2016 IL App (1st) 142582, ¶ 12.

¶ 12 Here, the record establishes that the circuit court's foreclosure order found Bogardus was “personally liable for the deficiency, if any” following the judicial sale of the subject property.

The foreclosure order also stated that Huntington could “seek entry of a court order, upon motion duly noticed, against parties liable for said deficiency pursuant to the operative loan documents and Illinois Law.” After Huntington purchased the subject property at auction, it was left with a \$3,124,610.05 deficiency. In its motion to confirm the sale, Huntington requested both an *in rem* deficiency judgment against the foreclosed property and an *in personam* deficiency judgment against the borrower and the guarantors. Bogardus did not file a written objection to Huntington’s motion. In its order confirming sale, the circuit court found that it had “obtained personal jurisdiction over those defendants who are personally liable to [Huntington] for the deficiency, if any, from said sale ***.” However, the circuit court struck and initialed the paragraph reflecting an *in personam* deficiency judgment against the named parties and only entered an *in rem* deficiency judgment against the property. On the same day that it entered the *in rem* deficiency judgment, the circuit court also entered memoranda of judgment in the amount of \$3,124,610.05 against each of the four named parties, including Bogardus.

¶ 13 Bogardus maintains that this evidence does not provide “definite and certain” proof that the circuit court made a clerical error in striking the *in personam* paragraph from the judgment, and therefore, it was inappropriate for the circuit court to grant Huntington’s *nunc pro tunc* motion. Huntington responds that the memoranda of judgment entered against Bogardus and the three other parties reflect that the circuit court actually entered an *in personam* deficiency judgment against those parties, not an *in rem* judgment against the property, which is definite and certain evidence that the circuit court’s entry of an *in rem* deficiency judgment was a clerical error.

¶ 14 We begin by examining the purpose of a memorandum of judgment. A memorandum of judgment is a judgment-enforcement tool that is necessary to create a judgment lien upon the real estate of a debtor. See *Maniez v. Citibank F.S.B.*, 383 Ill. App. 3d 38, 41 (2008). The memorandum must include the judge's signature and show "the court in which entered, date, amount, number of the case in which it was entered, name of the party in whose favor and name and last known address of the party against whom entered." 735 ILCS 5/12-101 (West 2012). To create such a lien against the real estate of a debtor, the memorandum of judgment must be recorded in the county where the real estate is located and "there must be an enforceable judgment standing behind" it. *Maniez*, 383 Ill. App. 3d at 41.

¶ 15 Huntington is therefore correct that that the memoranda of judgment entered by the circuit court against the four named parties are consistent with an *in personam* deficiency judgment. As the United States Supreme Court has explained: "A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property." *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958). "The legal fiction underlying an *in rem* proceeding is that the property, not the owner of the property, is liable to the complainant." (Internal quotation marks omitted.) *ABN AMRO Mortg. Grp., Inc. v. McGahan*, 237 Ill. 2d 526, 532 (2010). The memorandum of judgment entered by the circuit court was against Bogardus, not the property, in the amount of the deficiency. As such, it reflects that she is personally liable for the amount of the deficiency.

¶ 16 Bogardus acknowledges that the memoranda of judgment entered by the circuit court against her and the other named parties raises the possibility that the circuit court made a clerical error. However, she argues that the record does clearly establish which action of the circuit

court—entering an *in rem* deficiency judgment or signing the memoranda of judgment against the four named parties—is the clerical error. She also argues that it was improper for the circuit court to consider the stamped, unsigned copy of the August 28, 2013 order provided to Huntington’s counsel because it was not a part of the circuit court’s record. As the evidence contained within the record does not provide a definite and clear answer, Bogardus contends the circuit court erred in granting Huntington’s motion to correct the order *nunc pro tunc*. We disagree.

¶ 17 The record shows that Huntington sought, and the circuit court granted, an *in personam* deficiency judgment against Bogardus, which was not reflected in the order confirming sale due to a clerical error. We are not persuaded by Bogardus’s argument that the circuit court’s error could have been in signing and entering the four memoranda of judgment after it had entered only an *in rem* judgment against the property. Put simply, there is no reasonable explanation as to why the circuit court entered the four memoranda of judgment unless the circuit court entered an *in personam* judgment against the four named parties. Thus, the record is definite and clear that the circuit court actually entered an *in personam* deficiency judgment against Bogardus in the amount of \$3,124,610.05, not an *in rem* judgment. Accordingly, we conclude that the circuit court did not err when it granted Huntington’s motion and corrected that clerical mistake *nunc pro tunc* to August 28, 2013.

¶ 18 In so holding, we do not reach the issue of whether the stamped copy of the order confirming sale contemporaneously provided to Huntington’s counsel is a “note, memorandum, or paper remaining in the file or records of the court” that can be considered by the circuit court when determining whether to grant a *nunc pro tunc* order. *Jayko v. Fraczek*, 2012 IL App (1st)

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103665, ¶ 29. As we have already concluded, the record contains definite and clear evidence that the circuit court committed a clerical error without considering Huntington's copy of the order.

¶ 19 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.