

No. 1-10-3752

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK NA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CH 35877
)	
KRZYSZTOF MROZ and PATRYCJA TOMASIK,)	Honorable
)	Darryl B. Simko,
Defendants-Appellants.)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Circuit court's judgment affirmed where plaintiff had established in its affidavit in support of service by publication that it engaged in the statutorily-required due inquiry conducted with due diligence, so that service by publication was proper.
- ¶ 2 This cause concerns a mortgage foreclosure action by plaintiff Wells Fargo Bank N.A. against defendant Patrycja Tomasik and codefendant Krzysztof Mroz. Defendant appeals from orders denying her motion to quash service of process, approving a foreclosure sale, and ordering her eviction from the mortgaged premises. She contends that the court erred in denying her motion to quash because plaintiff failed to establish the requisite due diligence and due

inquiry to serve her by publication. For the reasons stated below, we disagree and affirm the judgment of the circuit court.

¶ 3 Plaintiff filed its foreclosure complaint in late September 2009, alleging that the mortgaged premises in Chicago were "owner occupied" and that codefendant was the mortgagor but later conveyed the premises to a trust with defendant as beneficiary. The attached mortgage and note showed codefendant as sole mortgagor and borrower.

¶ 4 Summonses were issued. Affidavits by special process servers ("servers") averred that codefendant was served personally and the trustee, a banking corporation, was served through an assistant manager. However, attempted service upon defendant at the mortgaged premises on September 30 was unsuccessful; a man answered the doorbell and told the server that defendant was his landlord, and the mailbox bore names other than defendant or codefendant.

¶ 5 A server signed an affidavit in mid-October averring that despite a "due and diligent search" for defendant, her residence was unknown. The telephone company did not have a directory entry for defendant in Illinois, the postal service "has not provided further information" for the mortgaged premises, and no record for defendant was found in the records of the county jail or the federal prison system. The affidavit also described the unsuccessful service attempt at the mortgaged premises, despite which the affidavit gave defendant's last known address as the mortgaged premises. Based upon the service attempt and diligent-search affidavit, plaintiff employed service by publication upon defendant. In November 2009, the requisite notice was published and a copy was mailed to defendant at the mortgaged premises.

¶ 6 In November 2009, codefendant appeared and filed his answer and affirmative defenses. In January 2010, plaintiff filed a combined motion for summary judgment and to dismiss some of the affirmative defenses. Codefendant responded to plaintiff's motion in March 2010, and plaintiff replied in support of its motion that same month.

¶ 7 In February 2010, plaintiff filed a motion for default against defendant and the trustee and a motion for judgment of foreclosure and sale. In support of the motions, plaintiff filed an affidavit that neither defendant nor codefendant was in military service.

¶ 8 On April 5, 2010, the court found defendant and the trustee to be in default, granted plaintiff summary judgment against codefendant, entered judgment for plaintiff in the amount of \$444,096.39 and ordered the sale of the premises. The sale was scheduled for September 21.

¶ 9 On September 16, 2010, defendant appeared and filed a motion to quash service of process, alleging that plaintiff did not make sufficient efforts to find her or her residence before resorting to service by publication. In particular, she argued that plaintiff's documentation purporting that it conducted a diligent search was so facially insufficient that she "need not prove by affidavit that she could be found." That said, defendant attached her affidavit providing her residential address in a suburb of Chicago – not the mortgaged premises – and averring that she lived there openly and that her driving license, tax returns, utility bills, and the like bear the suburban address. She admitted to being the beneficiary of the trust that owned the mortgaged premises but averred that "I am no one's landlord" and had never entered into a lease of the premises. Attached to the affidavit were copies of defendant's driving license, federal income tax return, pay stub, utility bill, and bank statement all bearing the same suburban address.

¶ 10 Also on September 16, codefendant filed a motion to stay the sale on unrelated grounds. The court denied the motion on September 20, 2010, the sale proceeded the next day as scheduled, and plaintiff moved for the court to approve the report of sale.

¶ 11 On November 29, 2009, the court denied defendant's motion to quash service, granted plaintiff's motion to approve the report of sale, ordered the issuance of a deed to the buyer, and ordered that defendant and codefendant be evicted from the premises in 30 days. This appeal timely followed.

¶ 12 On appeal, defendant contends that the court erred in denying her motion to quash service because plaintiff failed to establish the due diligence and due inquiry required to serve her by publication. We cannot agree.

¶ 13 Under section 2-206 of the Code of Civil Procedure (735 ILCS 5/2-206 (West 2008)), service by publication is available "in any action affecting property" where the plaintiff files "an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained." Personal jurisdiction may be acquired only by strict compliance with the statutory prerequisites, including due inquiry and due diligence. *Bank of New York v. Unknown Heirs and Legatees*, 369 Ill. App. 3d 472, 475-76 (2006). These "statutory prerequisites are not intended as *pro forma* or useless phrases requiring mere perfunctory performance, but, on the contrary, require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit," so that an effort that was "casual, routine, or spiritless" does not authorize service by publication. *Bank of New York*, 369 Ill. App. 3d at 476.

¶ 14 A defendant may challenge a plaintiff's affidavit under section 2-206 by filing an affidavit showing that he or she could have been found by due inquiry. *Bank of New York*, 369 Ill. App. 3d at 476. Upon such a challenge, a plaintiff must produce evidence establishing due inquiry. *Bank of New York*, 369 Ill. App. 3d at 476.

¶ 15 Here, defendant argues that plaintiff's affidavit was fatally deficient on its face and that, even if the affidavit were adequate, she could have been found and served personally. In support of this argument defendant relies primarily on *City of Chicago v. Leakas*, 6 Ill. App. 3d 20 (1972), and *City of Rockford v. Lemar*, 157 Ill. App. 3d 350 (1987). We find, however, that

defendant's reliance on these two cases is misplaced because they are readily distinguishable on their facts.

¶ 16 In *Leakas*, the plaintiff's process server drove up to the premises but did not exit his vehicle and, based on what he observed from a substantial distance, concluded that the premises were vacant. *Leakas*, 6 Ill. App. 3d at 27. The process server drove away after a few seconds and reported that the defendant was "Not Found." *Leakas*, 6 Ill. App. 3d at 27. In holding that the plaintiff's efforts at service were insufficient, the court found significant that the premises were not boarded up, that the defendant was on the premises four days per week, that signs posted at the premises provided a telephone number where the defendant could be reached. *Leakas*, 6 Ill. App. 3d at 27. The court held that, based on these circumstances, the plaintiff did not conduct an honest and well-directed effort to locate the defendant. *Leakas*, 6 Ill. App. 3d at 27.

¶ 17 In *City of Rockford v. Lemar*, 157 Ill. App. 3d 350 (1987), the plaintiff's affidavit did not attest that diligent inquiry had been made to locate the defendant's place of residence. *Lemar*, 157 Ill. App. 3d at 353. Instead, the plaintiff's affidavit "merely stated that the defendant's address is 'unknown.'" *Lemar*, 157 Ill. App. 3d at 353. In addition, the search for the defendant consisted only of an examination of the telephone directory by the plaintiff's attorney. *Lemar*, 157 Ill. App. 3d at 354. Accordingly, the court held that the plaintiff failed to satisfy its burden of due inquiry, as required by the statute. *Lemar*, 157 Ill. App. 3d at 354.

¶ 18 In this case, plaintiff's special process server went to the property identified in the mortgage foreclosure documents and spoke with one of the residents of the building. That person told the process server that defendant was "his landlord," but refused to furnish any other information. The process server ascertained the names of the residents listed on the mailboxes and that the utilities were functional, but this information did not provide any further clues to

defendant's whereabouts. Plaintiff's search of the telephone directory did not yield a listing for defendant in Illinois, and its searches of records for both the Illinois Department of Corrections and the federal prison system also did not render any results. Finally, a Freedom of Information Act inquiry to the United States Postal Service did not supply any further information with regard to the premises in question. In light of these significant factual distinctions, we find that *Leakas* and *Lemar* do not govern this case.

¶ 19 In support of her contention that she could have been found, defendant argues that her employer had her correct address and that certain tax documents and utility bills reflected her actual place of residence. Yet, defendant does not explain how plaintiff would have been able to ascertain the name of her employer or obtain access to the other documents on which she relies. Defendant also alleges that her address was available through the documents relating to the trust that owned the subject property and that “this evidence is present throughout the record.” However, defendant has failed to identify the location of this information in the record on appeal, nor have we found it upon our own examination. Consequently, the circuit court's judgment is not subject to reversal on this ground. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958 (1984) (holding that the appellant bears the burden of presenting a sufficiently complete record to support her claim of error, and any doubts arising from the incompleteness of the record will be resolved against her).

¶ 20 Based on the foregoing, we conclude that plaintiff's affidavit established that it conducted a diligent inquiry to ascertain defendant's residence, in accordance with section 2-206 of the Code of Civil Procedure (735 ILCS 5/2-206 (West 2008)), and we need not address the parties' arguments regarding the shifting of the burden of proof. For the reasons set forth above, the circuit court's denial of defendant's motion to quash service is affirmed.

¶ 21 Affirmed.