

No. 1-09-0815

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|-------------------------|---|------------------|
| COUNTRYWIDE HOME LOANS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 07 CH 25712 |
| |) | |
| JAMES BARBEE, |) | Honorable |
| |) | Jesse G. Reyes, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

This cause concerns a mortgage foreclosure action by plaintiff Countrywide Home Loans, Inc. (succeeded on appeal by BAC Home Loans Servicing, L.P.) against defendant James Barbee. Defendant appeals from an order, following an evidentiary hearing, denying his motion to quash service of process and to vacate an earlier order approving a foreclosure sale and ordering his eviction from the mortgaged premises. He contends that the court erred in denying his motion to quash on the basis that he submitted to the court's jurisdiction by successfully seeking to extend the stay of eviction in the order approving the sale. Specifically, he contends that a submission to jurisdiction is wholly prospective and thus any submission by him after the

1-09-0815

foreclosure judgment and sale did not retroactively vest the court with jurisdiction to foreclose upon and sell the premises.

Plaintiff filed its foreclosure complaint in mid-September 2007 and summons was issued. Plaintiff's October 2007 return of service indicated that a private investigator served process at a certain residence -- not the mortgaged premises -- on the morning of September 23rd upon Susan Reynolds, a 35-year-old woman described as defendant's "roommate." The return also indicated that "[m]ortgagor states that [the service address] is their residence." The record does not include either any indication of unsuccessful service by the sheriff or an order appointing a special process server.

In December 2007, plaintiff filed a motion for a default judgment. On January 10, 2008, the court entered judgment for plaintiff in the amount of \$148,690.63 and ordered the sale of the premises. The sale was held in April 2008, and plaintiff filed a motion that month seeking approval of the sale.

In May 2008, defendant appeared and filed a motion to quash service of process and vacate the default judgment. He alleged that he resided at the mortgaged premises and owned but did not reside at the service address, and that no person named Susan Reynolds ever lived at the service address. While no affidavit was attached, defendant verified the motion. See 735 ILCS 5/1-109 (West 2008).

1-09-0815

Plaintiff responded to the motion, arguing that the return was *prima facie* evidence of proper service and that defendant failed to provide an affidavit or other evidence refuting it.

Defendant replied in support of his motion, arguing that plaintiff knew he resided at the mortgaged premises rather than the service address because it sent correspondence to the former and not the latter. He also argued that a return of service indicating substitute service is not presumed valid. Attached to the reply were copies of defendant's driving license showing the mortgaged premises as his residence and correspondence from plaintiff addressed to defendant at those premises.

On July 8, 2008, the court denied defendant's motion to quash and vacate without prejudice, approved the sale of the premises, ordered the issuance of a deed to the buyer, and ordered defendant's eviction from the premises after 45 days. The eviction order was drafted with a stay of 30 days, and the amendment to 45 days was marked "MΔK" and initialed by the court.

In August 2008, defendant filed a new motion to quash service, seeking to vacate the judgment and approval of sale upon the allegations and arguments of his earlier motion. His affidavit was attached.

Plaintiff responded to the motion, arguing that the return of process was *prima facie* correct and that defendant's affidavit failed to refute it because his averments "are self-serving and

completely uncorroborated." Plaintiff also argued that, once title vests following a foreclosure sale, the only claims that a party may present are against the proceeds of the sale rather than the premises themselves. 735 ILCS 5/15-1509(c) (West 2008). Lastly, plaintiff argued that defendant waived his objections to the court's jurisdiction by making an oral motion to extend the stay of eviction from 30 to 45 days, citing *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2008), to the effect that defendant's vacatur motion should therefore be denied.

Defendant replied in support of his motion, arguing that he could corroborate his allegations of improper service in an evidentiary hearing. The reply did not address plaintiff's argument that defendant had submitted to, or waived his objection to, jurisdiction retroactively.

The court held an evidentiary hearing on the motion to quash beginning in February 2009 and continuing to March 5, 2009. On that date, the court denied defendant's motion to quash with prejudice, finding that he waived his objection to jurisdiction by seeking and receiving an extension of the stay of eviction on July 8, 2008. Defendant filed no post-judgment motion, and this appeal timely followed.

Before proceeding to the merits of this case, we must consider plaintiff's contention that defendant has forfeited his claim of error by not contesting in the circuit court plaintiff's

allegation that he retroactively submitted to jurisdiction by successfully seeking the extended stay of eviction. An issue or argument not timely raised in the circuit court is forfeited on appeal, because the failure to raise an issue or argument in the trial court deprives that court of the opportunity to correct its own alleged error. *Colella v. JMS Trucking Co.*, 403 Ill. App. 3d 82, 95 (2010); *Stahelin v. Forest Preserve District of Du Page County*, 401 Ill. App. 3d 1030, 1041 (2010).

The record shows that defendant did not argue in the pleadings on any motion, or in any other document before the trial court, that any submission to jurisdiction was prospective or otherwise challenge plaintiff's allegation that he waived his jurisdictional objection. Because the absence of a transcript or appropriate substitute (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for the hearing on the second motion to quash is attributable to defendant as appellant (*In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009)), we will not presume that he responded to plaintiff's submission argument at the motion hearing when he did not do so in the motion pleadings or elsewhere. Therefore, on the record before us, defendant failed to preserve his instant argument that submission to jurisdiction is wholly prospective and deprived the circuit court of the opportunity to remedy the error he now alleges.

We acknowledge that the plain error doctrine allows appellate consideration of unpreserved and thus otherwise-forfeited claims where there is a clear or obvious error and, in relevant part, that error is so serious that it affected the fairness of the appellant's case and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The plain error doctrine is applicable in civil cases where the decision in question was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855-56 (2010). However, our supreme court has clarified that we cannot apply the plain error doctrine where the appellant has not raised it before us. *People v. Hillier*, 237 Ill. 2d 539, 545-47 (2010). As defendant does not address plain error in his brief, we must agree with plaintiff that the issue is forfeited.

Accordingly, for the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.