

No. 1-10-2637

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

WACHOVIA MORTGAGE, FBS f/k/a)	Appeal from the
WORLD SAVINGS BANK,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 08 CH 42515
)	
SOTERO SALAZAR, THE CITY OF CHICAGO,)	
UNKNOWN HEIRS AND LEGATEES OF)	
SOTERO SALAZAR,)	Honorable
)	Thomas R. Mulroy, Jr.,
Defendants-Appellants.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred with the judgment.

ORDER

¶ 1 **HELD:** Trial court orders denying appellant's motion to quash service by publication and motion to reconsider are affirmed, where the record on appeal is insufficient to allow for meaningful review of trial court's actions.

¶ 2 Defendant, Sotero Salazar, appeals from orders denying his motion to quash service by publication, and motion to reconsider that order in this foreclosure suit brought by plaintiff, Wachovia Mortgage FSB f/k/a World Savings Bank (Wachovia). We affirm.

¶ 3

I. BACKGROUND

¶ 4 On November 12, 2008, Wachovia filed its complaint to foreclose a mortgage issued to defendant on the property located at 6207 W. Cuyler Avenue, Chicago, on December 24, 2007. Plaintiff began promptly to serve defendant with process.

¶ 5 The affidavit of special process server, Steven Stosur stated, at 7:14 p.m. on November 16, 2008, he unsuccessfully attempted service on defendant at 6207 West Cuyler Avenue. The affidavit further stated:

"**NON-SERVICE** for the reason that after diligent investigation found The Defendant could not be served at this address. The defendant is the absentee owner of this property. The defendant's name is not listed on the door bells or mailboxes. The current occupant said the defendant is the landlord and does not live here and comes by to pick up the rent." (Bolding, capitalization and underlining in original.)

The affidavit was made under oath, signed and notarized.

¶ 6 In another affidavit, Mr. Stosur stated he made six additional attempts to serve defendant at 2730 N. Artesian Avenue in Chicago, on different dates and at various times, as follows: November 16, 2008, at 8:37 a.m.; November 18, 2008, at 2:11 p.m.; November 19, 2008, at 8:07 p.m.; November 21, 2008, at 8:11 a.m.; November 23, 2008, at 10:16 p.m.; and November 25, 2008, at 6:32 p.m. The affidavit further stated:

"**NON-SERVICE** for the reason that after diligent investigation found The defendant is avoiding service. Access to the building was prohibited. All of the entry doors were locked. This is a 2nd floor unit. There is no access up to the 2nd floor. There are

no names on the doorbell or mailbox. The 1st floor occupant confirmed the defendant lives here. The occupant has looked out of the window but would not answer the door. The occupant has also turned off] the lights while I was knocking on the door and ringing the bell." (Bolding, capitalization and underlining in original.)

This affidavit was made under oath, signed and notarized.

¶ 7 On December 12, 2008, James Bernhad, an attorney from the law firm of Pierce & Associates, filed an affidavit for service by publication pursuant to section 2-206(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-206(a) (West 2008)), stating:

- "1. Defendant(s) on due inquiry cannot be found so that service cannot be served upon them.
2. The following actions have been taken to ascertain the whereabouts of the above-named Defendant(s):
 - a. Ordered and reviewed credit report on Defendant(s) for possible address on or about November 6, 2008.
 - b. Reviewed mortgagee's foreclosure information package for possible addresses on or about November 6, 2008.
 - c. Reviewed Deed to Defendants for possible additional addresses on or about November 6, 2008.
 - d. Reviewed public records of the COOK County Probate Court for a pending Probate case on or about November 6, 2008.
 - e. Made 7 attempts to serve Defendants (See Affidavit of Special Process Server);
 - f. Ordered and reviewed property inspection report to determine occupants of the subject property on or about November 12, 2008.
 - g. Other investigation completed.

See Affidavit of Special Process Server attached;

3. Defendant's address upon diligent inquiry cannot be ascertained, and Defendant's last known address is at:

6207 West Cuyler Avenue
Chicago, IL 60634 ***."

The affidavit was signed under oath and notarized.

¶ 8 Between December 22, 2008, and January 5, 2009, service by publication was accomplished in the Chicago Daily Law Bulletin. The clerk of the circuit court certified that a copy of the publication notice was mailed to defendant at the Cuyler address on December 23, 2008. Defendant did not appear or answer. On October 6, 2009, the trial court granted plaintiff's motions for default and for judgment for foreclosure and sale. On December 14, 2009, plaintiff filed a proof of mailing the notice of sale to defendant at the Cuyler address and the Artesian address. The notice informed defendant the sale of the Cuyler property was set for January 8, 2010.

¶ 9 On December 28, 2009, defendant filed a *pro se* motion to quash service by publication in which he challenged the statement of the special process server that he did not reside at the Cuyler address. Attached to the motion was defendant's affidavit which stated:

"1. I live at 6207 West Cuyler Avenue, Chicago, Il 60634 and am normally home after 7pm every day.

2. My mother-in-law is normally at the home and she did not encounter or speak with a special process server.

3. My name is on the mailbox.

4. I am the owner of the property and do not have any renters. The Bank is going to sale [*sic*]

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the property on Jan[u]ary 8th and I really want[] to fight."

The affidavit was made under oath, signed and notarized.

¶ 10 On January 4, 2010, defendant presented the motion to quash to the trial court. The trial court found defendant's affidavit was self serving, insufficient to challenge the publication service, and unsupported. Over plaintiff's objection, defendant was given leave to supplement his motion to quash and the motion was continued for hearing. Defendant, subsequently, filed an "Amendment/Supplement to Motion to Quash Service by Publication" which was signed by defendant but not notarized nor made under oath. Defendant attached copies of his driver's license, a cell-phone bill and a personal bank statement all showing his address as 6207 Cuyler Avenue in Chicago, and a gas and water bill for the Cuyler Avenue property addressed to him at that address. The bills and bank statements are from late October to December 2009, dates after the attempts to personally serve him. The driver's license was issued in 2006. Defendant did not authenticate and did not provide a foundation for the exhibits.

¶ 11 After an evidentiary hearing on the motion to quash, the trial court entered an order on January 7, 2009, denying the motion, but staying the sale of the property for 30 days. This order stated in part:

"Defendant was cross-examined by plaintiff's counsel. The court judged the credibility of Defendant and found it lacking, Plaintiff carried its burden to prove service was effective, and Defendant's Motion to Quash Service is denied."

The order also stated defendant "owns four homes." The record on appeal does not contain reports of any of the proceedings relating to the motion to quash.

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¶ 12 On February 11, 2010, counsel appeared on behalf of defendant and filed a motion to reconsider the denial of his motion to quash. After hearing arguments on the motion to reconsider, the court denied it on February 25, 2010. The record on appeal does not include a transcript of the proceedings as to the motion to reconsider.

¶ 13 On June 23, 2010, plaintiff moved to approve the sale of the Cuyler property. Defendant filed objections to the confirmation of the sale arguing again that the trial court lacked jurisdiction as service by publication was improper. The court set the matters over for hearing. On August 23, 2010, the trial court entered an order approving the report of sale and distribution and confirmation of sale. Again, there are no reports of proceedings as to these matters. Defendant filed a notice of appeal seeking review of the orders denying the motion to quash and reconsider.

¶ 14

II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erred in denying his motion to quash publication service because his affidavit and supporting exhibits showed he resided at the Cuyler Avenue address and, thus, plaintiff should have made additional attempts to serve him at that address. Plaintiff argues that defendant has presented an inadequate record on appeal, and for this reason alone, the trial court's orders should be affirmed. Plaintiff also argues that publication service was proper.

¶ 16 Section 2-203(a) of the Code sets forth the methods for service of process on a defendant at his usual place of abode by leaving a copy of the summons with the defendant personally or with some appropriate person residing there. 735 ILCS 5/2-203(a) (West 2008).

¶ 17 Section 2-206(a) of the Code provides an alternative method of service to obtain personal jurisdiction over a party as follows:

"Whenever, in any action affecting property or status within the jurisdiction of the court *** plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, 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, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending." 735 ILCS 5/2-206(a) (West 2008).

¶ 18 A defendant may challenge the affidavit made in support of publication service by "filing an affidavit showing that upon due inquiry he could have been found." *Household Finance Corp., III v. Volpert*, 227 Ill. App. 3d 453, 455 (1992). "Upon defendant's challenge, plaintiff must produce evidence establishing due inquiry." *Id.*

¶ 19 The parties are in dispute as to the proper standard of review of the denial of the motion to quash. Defendant cites *Dargis v. Paradise Park*, 354 Ill. App. 3d 171, 177 (2004), and argues that, because there are no transcripts of the proceedings in the record, our review is *de novo*. Plaintiff contends that, under *Dargis*, we must review the trial court's decision under a clearly erroneous standard and also argues that, because defendant has failed to provide an adequate record, the trial court must be assumed to have acted correctly.

¶ 20 The standard of review as to a motion challenging jurisdiction depends, in part, on the type of proceeding which took place below. When the trial court determines the jurisdiction issue solely on the basis of documentary evidence, the standard of review is *de novo*. See, e.g., *Equity*

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Residential Properties Management Corp. v. Nasolo, 364 Ill. App. 3d 26, 31 (2006). Where there has been an evidentiary hearing as to jurisdiction, reviewing courts have applied a manifest weight of the evidence standard to the trial court's finding. See *Volpert*, 227 Ill. App. 3d at 456; *Bell Federal Savings & Loan Association v. Horton*, 59 Ill. App. 3d 923, 931 (1978). Under this standard, a trial court's decision will be overturned only where the opposite conclusion is "clearly evident or the factual findings on which it is based are unreasonable, arbitrary or not based on the evidence." *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 628-29 (2003). Other reviewing courts, including the court in *Dargis*, have held that, where "the trial court heard disputed evidence and made factual findings, thereby creating a mixed question of law and fact regarding proper service of summons, we would apply the clearly erroneous standard of review which permits reversal of the trial court's findings only if we are left with the 'definite and firm conviction of an erroneous finding.'" *Dargis*, 354 Ill. App. 3d at 177 (citing *People ex rel. Waller v. Harrison*, 348 Ill. App. 3d 976, 979-80 (2004)).

¶ 21 Before deciding defendant's motion to quash, the trial court held an evidentiary hearing and assessed the credibility of defendant. Thus, *de novo* review is not applicable in this case. However, under either the manifest weight of the evidence standard or the clearly erroneous standard, we are without a sufficient record to review defendant's claims of error as to the denial of his motion to quash.

¶ 22 As the appellant, defendant "has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003), (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In the

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absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)).

¶ 23 Defendant failed to file a report of any of the proceedings in the court below, or, in the absence of such reports, bystander's reports or agreed statements of facts pursuant to Illinois Supreme Court Rule 323(c) (eff. December 13, 2005). We do not have a record of the arguments and evidence which were presented or considered by the trial court in finding defendant's affidavit challenging publication service inadequate, defendant to be incredible, and the motion to quash unfounded. Under these circumstances, and based on the record on appeal, we cannot conclude that the trial court's denial of defendant's motion to quash service was in error.

¶ 24 We reject defendant's reliance on *Dargis* in support of his argument that, because he failed to provide transcripts, a *de novo* review of only the documents is required. In *Dargis*, there was no transcript of the proceedings, and further, it was not clear from the record whether the trial court decided the jurisdictional issue on the documents alone, or after hearing evidence. Because of the lack of clarity as to how the trial court reached its decision, the appellate court considered the issue of service under both a clearly erroneous and a *de novo* standard. *Dargis*, 354 Ill. App. 3d at 177. In this case, it is undisputed that the trial court heard evidence and arguments before denying the motion to quash and, thus, even in the absence of reports of proceedings a review of strictly the

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documents under a *de novo* standard would not be proper.

¶ 25 Even if we were to consider only the documentary evidence in this case on a *de novo* basis, we would affirm the trial court's order denying the motion to quash. Affidavits submitted in support of a motion to quash service must aver facts with particularity and not state mere conclusions. Ill. S. Ct. Rule 191(a) (eff. July 1, 2002). Defendant's affidavit lacked particularity and was insufficient to challenge the publication affidavit. Defendant's affidavit did not address his residency status at the time of the attempted services. The unauthenticated exhibits later submitted to the court could not provide evidentiary support for defendant's motion to quash, and the exhibits related to time periods well before or after the attempts at service.

¶ 26 Defendant also appeals from the denial of his motion to reconsider the denial of his motion to quash. "When reviewing a trial court's denial of a motion to reconsider that was based on new matters, such as additional facts or new arguments or legal theories that were not presented during the course of the proceedings leading to the issuance of the order being challenged, this court employs an abuse of discretion standard. When reviewing a denial of a motion to reconsider based only on the circuit court's application of existing law, the standard is *de novo*." *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006). Without a complete record, we do not know if the motion to reconsider raised any new matters not considered on the motion to quash, and, therefore, are unable to determine the proper standard of review as to the motion to reconsider. Additionally, the insufficiency of the record prevents a full and adequate review of the denial of the motion to reconsider under either standard.

¶ 27 Because we have no report of any of the proceedings on which defendant's claims of error

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are based, we must presume the orders of the trial court were in "conformity with the law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92.

¶ 28

III. CONCLUSION

¶ 29 Accordingly, we affirm the trial court's orders denying defendant's motion to quash and his motion to reconsider that order.

¶ 30 Affirmed.