No. 2—10—0322
Order filed March 31, 2011

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

SECOND DISTRICT

JAVIER HERRERA,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 06—L—444
	)	
SERVICE CONSTRUCTION COMPANY,	)	
INC.,	)	Honorable,
	)	Dorothy F. French,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court properly granted defendant's section 2—1401 petition, because defendant alleged that it was not properly served and that the judgment was thus void; it did not need to allege a meritorious defense; the trial court's finding of a lack of proper service, either because no service was made or because service was made on a person unauthorized to accept service, was not against the manifest weight of the evidence.

Plaintiff, Javier Herrera, appeals from a judgment granting the petition of defendant, Service Construction Company, Inc., for relief under section 2—1401 of the Code of Civil Procedure (735 ILCS 5/2—1401 (West 2008)) from a default judgment. We affirm.

On May 3, 2006, plaintiff filed a three-count complaint against defendant and Allstate Insurance Company (Allstate). The first and second counts were directed against defendant and alleged, respectively, that, in 2003, defendant breached its contract to repair fire damage to plaintiff's house and that defendant committed statutory consumer fraud. The third count alleged that Allstate breached its insurance contract with plaintiff.

On July 6, 2006, at 11:41 a.m., a deputy sheriff with the Cook County sheriff's office served—or purportedly served—defendant at its office at 5460 N. Milwaukee Avenue in Chicago. The return of service stated that the deputy left an alias summons and a copy of the complaint with Debbie Liberto, an "Authorized Person." The deputy handwrote, "R.A. out of town."

Allstate filed its answer. On October 19, 2006, the trial court found defendant in default for failing to file an appearance. The court continued the cause to February 28, 2007, for "case management." On February 22, 2007, plaintiff moved for a default judgment against defendant, attaching to the motion a copy of a letter from his attorney, William Thompson. The letter is entitled "Memo for Service Construction Co." and is dated October 20, 2006. In the letter, Thompson states that, the previous day, the trial court had held defendant in default and that, although the next court date was February 28, 2007, Thompson would be "taking action regarding the Default [*sic*] much sooner." On February 28, 2007, the trial court continued the cause to March 7, 2007, for the hearing on plaintiff's motion for a default judgment. On March 7, 2007, after the hearing, the court granted plaintiff a default judgment on count I only, for $51,829.27. On March 24, 2009, the court approved a settlement between plaintiff and Allstate and dismissed count III.

On October 1, 2009, defendant filed an appearance. On November 5, 2009, defendant filed its section 2—1401 petition, seeking to quash service and vacate the default judgment. The petition

alleged as follows. Thomas Kuzniar is defendant's president and registered agent, and his wife Kathryn Kuzniar is defendant's secretary. They are defendant's only officers. Liberto's duties are clerical and limited, and she had never been authorized to accept service of process for defendant. In July 2006, she had been taking medicine for rheumatoid arthritis, with side effects including fatigue and drowsiness. Thomas Kuzniar had authorized Kathy Gutzman, defendant's office manager, to accept service of process in his absence, but she was not served in this case. Thus, plaintiff had not served defendant in accordance with section 2—204 of the Code of Civil Procedure (735 ILCS 5/2—204 (West 2006)), as Liberto had not been authorized to accept service of process.

Defendant's petition attached several affidavits, which we summarize. Thomas Kuzniar stated as follows. On or about September 8, 2009, he learned of plaintiff's action. On July 6, 2006, he and Kathryn Kuzniar were out of the office. Three employees were regularly in the office: Gutzman, Liberto, and Phil Kroker. Gutzman alone was authorized to accept legal process for defendant when Thomas Kuzniar was absent. Liberto had limited clerical duties, which did not include opening mail or accepting process. She had long had rheumatoid arthritis and had been taking medicine that caused drowsiness and fatigue. Neither the Kuzniars nor any of defendant's employees received any mailings or other documents about plaintiff's suit until September 2009, when Thomas Kuzniar received an envelope containing papers related to plaintiff's enforcement proceeding. He contacted his attorney, who told him about plaintiff's lawsuit and the alleged service of process on July 6, 2006.

Liberto's affidavit stated as follows. Her duties for defendant did not include opening mail or accepting legal process on defendant's behalf. She had never been instructed to accept legal process or legal documents on defendant's behalf, and she would not do so without explicit

instructions from Thomas Kuzniar. She had long suffered from rheumatoid arthritis, and, since 2000, she had taken painkillers daily, causing her fatigue and drowsiness. She did not recall receiving legal process in this case on July 6, 2006, or speaking to anyone from defendant about having done so. At no time after July 6, 2006, did she receive or open any mail addressed to defendant concerning this case. She did recall that, on September 3, 2009, she received documents from a man who did not identify himself, did not ask for Thomas Kuzniar, and stayed for no more than 30 seconds. The man handed her an unsealed envelope containing documents related to plaintiff's enforcement proceeding.

Gutzman's affidavit stated as follows. As office manager, she was authorized to accept legal process for defendant. She, Liberto, and Kroker were regularly in the office, but the other two were not authorized to accept legal process for defendant. Gutzman was not served with process in this case on July 6, 2006, and did not recall anyone from the Cook County sheriff's department coming into the office to serve any. Gutzman was not aware that any mail concerning the lawsuit had been sent to defendant's office. The lawsuit was never discussed there, and, until September 2009, Gutzman did not know that defendant was involved in the suit. Had she been served with process or otherwise become aware of the lawsuit, she would have notified Thomas promptly.

Plaintiff filed a response to defendant's section 2—1401 petition, arguing that service on a clerk or receptionist at a corporate office can be valid. The response attached a copy of a letter signed by Thompson, dated August 15, 2006, and entitled "SENT AGAIN ON 31 AUGUST 2006." The letter is addressed to Thomas Kuzniar and defendant at defendant's corporate office. In the letter, Thompson refers to the service of process on July 6 and continues, "I haven't received any contact from your defense attorneys and wonder if this fell between the cracks somehow. Kindly

double check where the paperwork went and perhaps your attorney will want to contact me." In an affidavit attached to the response, Thompson stated that he mailed the letter on August 15, 2006, and August 31, 2006; that he mailed the "Memo for Service Construction Co." to defendant on October 20, 2006; and that, on February 7, 2007, he mailed defendant copies of plaintiff's notice of motion for a default judgment, his motion for a default judgment, the alias summons, and the return of service. Thompson stated that he had not received any response to these mailings.

The trial court held an evidentiary hearing on defendant's section 2—1401 petition. Thomas Kuzniar testified as follows. On July 6, 2006, he and Kathryn were out of the office, on holiday, and did not return until several days later. When he returned, nobody told him about plaintiff's suit. Until September 2009, Kuzniar saw no correspondence or legal documents about the suit and heard no talk about it. When he learned of the action, he and Kroker reviewed the file for plaintiff (on whose house defendant had a mechanic's lien) but found nothing about the suit. Having spoken with his employees, Kuzniar learned that, until September 2009, they had known nothing about plaintiff's suit.

Kuzniar testified that, because he often worked in the field, he authorized Gutzman, who was in the office most days, to accept service of process in his absence. Liberto had limited duties, including sorting, but not normally opening, mail. Kuzniar had never authorized her to accept process on defendant's behalf. However, Kuzniar had never explicitly told Liberto not to accept process. Liberto had severe arthritis and took medicine that often made her "drowsy or loopy."

Liberto testified as follows. She recalled very little about July 6, 2006. Had Kuzniar not been in the office that day, and had a deputy sheriff entered and handed her papers, she would have looked at them, told Gutzman and Kroker, and placed the documents into Kuzniar's mailbox. In

general, if Liberto received a letter from an attorney, she would give it to Kuzniar. Asked whether, as of July 6, 2006, Kuzniar had ever told her that she was not authorized to accept service of process, Liberto responded, "It's not entirely ever been discussed" and "it's a gray area."

Liberto testified that, in September 2009, a man delivered an unsealed envelope containing legal documents, asked Liberto for her name, and quickly departed. Liberto testified that she would have put the envelope into Kuzniar's mailbox, but she also admitted that she looked at the papers. Between July 6, 2006, and September 9, 2009, Liberto never spoke to anyone in the office about plaintiff's suit. For years, Liberto had had rheumatoid arthritis and had long taken painkillers. Both the disease and the medicines could cause her grogginess and confusion.

Gutzman testified as follows. She did not recall whether she had been in the office on July 6, 2006. At that time, Kuzniar had not explicitly told her that she could accept legal process, but she had "just assumed" that she could do so, based on the confidence that Kuzniar had placed in her as office manager. The statement in her affidavit that she was the only person authorized to accept legal process in Kkuzniar's office was based on this assumption. When she received a legal document, she would place it into Kuzniar's mailbox or, sometimes, leave it on Liberto's desk. Between July 6, 2006, and September 2009, she had heard nothing about plaintiff's lawsuit. She had never seen any letters from Thompson, but she did not always see letters from attorneys.

Kroker testified as follows. He remembered plaintiff and recalled that, in 2005, defendant placed a lien on plaintiff's house. Before September 2009, he was not aware of plaintiff's suit against defendant and had never seen any letters from Thompson to defendant. Kroker had spoken to Thompson before July 6, 2006, and spoke to him next in September 2009, when Thompson visited

defendant's office. After the visit, Kroker examined plaintiff's file; "the last thing that happened on [defendant's] end" was the placement of the lien; there was no copy of the complaint.

After arguments, the trial judge explained her ruling as follows. Under section 2—204 of the Code of Civil Procedure, a private corporation may be served by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the state. 735 ILCS 5/2—204 (West 2006). The judge noted that the statute does not allow service on a mere employee or on one who has only apparent agency. On the return of service, the deputy sheriff wrote, "R.A. out of town," while also affirming that service had been made on an "authorized person." The details of the return convinced the judge that the deputy had spoken to Liberto. Yet the judge also credited the witnesses' testimony that, until September 2009, they had known nothing about plaintiff's lawsuit. Thus, to reconcile this discrepancy, the judge concluded:

> "[It]'s more probably true than not that the Sheriff found out that the registered agent wasn't there, that the president wasn't there, and that he walked out without delivering the documents and then said, oh, what the hell, I think I'll just go ahead and fill this out and see what happens.
>
> And if you say that I have to believe a Deputy Sheriff all the time, I have had many, many returns that were not credible and not believable and did not happen."

To the judge, this explanation made sense of why defendant's office had no documents or discussions relating to the suit until September 2009. The affidavit was not reliable because the deputy sheriff "walked out and then decided to file the affidavit [anyway]."

Moving from whether there was "proper service in the first place" to whether Liberto "was an agent," the judge found that the deputy sheriff had realized Liberto was not defendant's agent for

accepting process and that, despite what the return of service stated, the testimony established that Liberto had not been an "authorized person." Although there was no testimony that Liberto had been explicitly forbidden to accept service, agency must be created by "actually do[ing] something," which was absent here. Thus, Liberto had not been authorized to accept process for defendant. As a result, defendant had not been properly served. The trial court granted defendant's section 2—1401 petition and vacated the default judgment. Plaintiff timely appealed.

On appeal, plaintiff argues—in a single somewhat garbled paragraph—that the judgment must be reversed because (1) defendant did not prove a meritorious defense to plaintiff's complaint; and (2) the testimony at the evidentiary hearing was inherently incredible. We reject both arguments.

We speedily dispose of plaintiff's first argument. Defendant's petition alleged that the judgment against it was void because defendant was never properly served with process—so that the trial court never acquired jurisdiction over defendant. A section 2—1401 petition is a proper method to attack a judgment as void. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). "[T]he allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Thus, plaintiff's first argument is unsound as a matter of law.

Plaintiff's second argument appears to attack the factual basis of the judgment—although, as we shall explain, we are not even certain of that. In any event, we explain why the judgment must stand. Under section 2—204 (735 ILCS 5/2—204 (West 2006)), proper service on the corporate defendant required "leaving a copy of the process with [defendant's] registered agent or any officer or agent of the corporation found anywhere in the State." The trial court found that plaintiff did not

satisfy this requirement. We shall not disturb this finding unless it is against the manifest weight of the evidence. *Ruprecht Co. v. Sysco Food Services*, 309 Ill. App. 3d 113, 119 (1999).

The trial court found that defendant had not been served with legal documents at all on July 6, 2006, or, indeed, at any time until September 2009, during enforcement proceedings. We cannot say that this finding is against the manifest weight of the evidence. A total failure of service, which the trial court found, would obviously not satisfy section 2—204.

Further, even assuming that the deputy sheriff did leave process with Liberto on July 6, 2006, there is no dispute that, at the time, Liberto was neither an officer of defendant nor its registered agent. (Indeed, the return of service says that the registered agent was not in the office.) Finally, the court found that, as of July 6, 2006, Liberto was not an agent, as she had not been authorized to accept legal process on defendant's behalf. See *Island Terrace Apartments v. Keystone Service Co.*, 35 Ill. App. 3d 95, 98-99 (1975) (clerk may or may not be corporation's agent for receiving service of process, depending on particular facts). Because Thomas Kuzniar and Liberto testified that Liberto had never been authorized to accept service for defendant, and that her work duties and medical condition were inconsistent with having that authority, this finding is also supported by the evidence.

Plaintiff says nothing about any of the foregoing but he contends that defendant "fails in the second element of a [section 2—1401 petition] because "Plaintiff's lawyer sent two letters plus a Notice of Default Hearing plus a letter with a copy of the Default Order" to defendant's office, so that it is incredible that defendant "didn't get all this mail" or that Liberto did not recall being served with process. Insofar as we can tell, plaintiff might be contending only that defendant did not show due diligence in filing the section 2—1401 petition, which, of course, it was not required to do.

Insofar as plaintiff is attacking the factual basis of the judgment, the attack must fail; defendants' witnesses testified consistently that they knew nothing of plaintiff's suit until after September 2009 and that, until then, defendant's file on plaintiff contained no information about the suit. Finally, whether defendant received the letters Thompson sent after the suit began is legally irrelevant as to whether defendant was properly served.

The judgment of the circuit court of Du Page County is affirmed.

Affirmed.