2012 IL App (1st) 111440-U

FIRST DIVISION
June 29, 2012

No. 1-11-1440

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

US BANK AS TRUSTEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CH 37946
	)	
TRINIDAD GARCIA and JUAN MENDEZ[1],	)	Honorable
	)	Pamela Gillespie and
	)	Laura C. Liu,
Defendants-Appellants.	)	Judges Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendants were properly served with valid summons, the circuit court acquired personal jurisdiction over them and their motion to quash service was properly denied; judgment affirmed.

¶ 2 Trinidad Garcia and Juan Mendez, defendants in a mortgage foreclosure suit brought by plaintiff, U.S. Bank as trustee, appeal from a circuit court order denying their motion to quash

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[1]Although the notice of appeal states Ms. Garcia's first name as "Maria," it is the only document in the record to do so. All other documents, including those signed by Ms. Garcia, indicate her first name as "Trinidad."

service. On appeal, defendants contend that the circuit court erred in denying their motion to quash service because the court did not have personal jurisdiction over them where they did not receive the summons and complaint in the mail and there were defects in the proofs of service. We affirm.

¶ 3 On December 21, 2007, plaintiff filed a complaint in the circuit court to foreclose a mortgage on property located at 4925 West Oakdale Avenue in Chicago, naming defendants as the present owners of the premises and the mortgagors on a mortgage held by Wells Fargo Bank. The following day, according to the affidavits of the special process server, defendant Mendez was personally served at the property being foreclosed, and the server also obtained substitute service on defendant Garcia by leaving a copy of the process with Mendez and by mailing a copy to Garcia's place of abode, *i.e.*, the foreclosed property. Defendants failed to appear in court or respond to the foreclosure complaint, and plaintiff filed a motion for order of default. On November 13, 2008, on plaintiff's motion, the trial court entered an order of default against defendants and entered a judgment for foreclosure and sale of the subject property.

¶ 4 Before the sale, the parties entered into a repayment agreement, and, on plaintiff's motion, the circuit court entered an order on May 29, 2009, dismissing the foreclosure without prejudice. Defendants failed to make their payments under the loan modification and defaulted on June 19, 2009. Plaintiff filed a motion to reinstate the foreclosure proceeding and served notice of the motion on August 12, 2009, by mailing a copy to the property being foreclosed. On September 2, 2009, the circuit court reinstated the foreclosure action and all previously entered orders. Upon reinstatement, plaintiff served a new notice of sale on defendants by mail on September 20, 2009. On October 27, 2009, the property in question was sold and plaintiff submitted the winning bid. On November 6, 2009, plaintiff filed a motion requesting an order approving the

selling officer's report of sale and distribution and for possession against defendants. On November 25, 2009, the trial court entered an order confirming the sale to plaintiff.

¶ 5 On February 17, 2011, defendants filed a motion to quash service and vacate all orders pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). In the motion, defendants maintained that they were not served with a summons or complaint in this case, and that no returns of service were found in the court file. In their attached affidavits, defendants claimed that they had no recollection of being served with a summons or a complaint. Defendants also attached an affidavit from attorney Stephen Richek who attested that he examined the court file in this case and found no service returns. An order entered by the trial court on March 1, 2011, indicated that plaintiff tendered the returns of service to defendants, and the court granted defendants seven days to amend their motion to quash service.

¶ 6 On March 21, 2011, defendants filed an amended motion to quash service, alleging that the returns presented to them by plaintiff were defective in that they did not include the case number or a file stamp from the clerk of the court as required by Illinois Supreme Court Rule 102(d) (eff. July 1, 1971). Defendants further alleged that the return of service was defective in that it did not reflect a date that the summons was mailed to defendant Garcia. In their attached affidavits, defendants claimed that they did not receive a summons or complaint in the mail.

¶ 7 Plaintiff responded, maintaining that the affidavits of service were valid and defendants' technical arguments lacked merit. Plaintiff attached affidavits showing that defendants were served on December 22, 2007, and an affidavit of plaintiff's process server explaining his standard business procedure when mailing abode service. Defendants replied, contending that the process server failed to follow his own procedure by not including the date he mailed the

summons, the summons was not mailed, and the proofs of service did not contain the case number.

¶ 8 On April 26, 2011, after noting that the matter was fully briefed and argued, the circuit court denied defendants' motion to quash. The court specifically found that plaintiff's failure to file the returns of service was not fatal to jurisdiction, and the returns of service were not required to contain the case number or the date of mailing. Defendants filed a notice of appeal challenging the denial of their motion to quash service.

¶ 9 We initially note that we agree with plaintiff that defendants' motion to quash service was substantively a petition seeking relief from a final judgment pursuant to section 2-1401 of the Code as it sought relief from a final judgment more than 30 days after confirmation. A typical section 2-1401 petition must show the existence of a meritorious defense and due diligence in presenting that defense to the trial court in the original action. *Sarkissian v. Chicago Board of Education,* 201 Ill. 2d 95, 103 (2002). However, under paragraph (f) of section 2-1401 (735 ILCS 5/2-1401(f) (West 2010)), a petition alleging voidness is exempt from these general requirements. *In re County Treasurer,* 2012 IL App (1st) 101976, ¶31. Such is the case here where defendants appear to claim voidness due to a lack of personal jurisdiction, and our review is *de novo. Deutsche Bank National Trust Company v. Hall-Pilate,* 2011 IL App (1st) 102632, ¶12.

¶ 10 To enter a valid judgment, the circuit court must have jurisdiction over the subject matter of the litigation and jurisdiction over the parties. *Id.* at ¶13. Personal jurisdiction may be acquired over a defendant by his appearance or by effective service of summons. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 842 (2010). The court lacks jurisdiction over a party when service is flawed and that party has not voluntarily submitted himself to the jurisdiction of the court. *People v. Wallace*, 405 Ill. App. 3d 984, 988 (2010).

¶ 11 Here, we note that the record on appeal does not include a transcript of the confirmation hearing or any other hearings, and thus our review is limited to the orders contained in the record. *Deutsche Bank National Trust Company*, 2011 IL App (1st) 102632, ¶16. We further note that any doubts arising from the incompleteness of the record will be resolved against the appellant (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)); and when a reviewing court is faced with an incomplete record on appeal, we must presume the trial court ruled or acted correctly (*Moenning v. Union Pacific Railroad Comp*, 2012 IL App (1st) 101866, ¶38).

¶ 12 We first address defendants' contention on appeal that they did not receive a summons in the mail.

¶ 13 "In the case of personal service, the return of summons is *prima facie* proof of proper service; that proof can be overcome only by clear and convincing evidence." *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 724 (2004), citing *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 838 (1992). Furthermore, proof of substitute service is "*prima facie* evidence of service which cannot be set aside upon the uncorroborated affidavit of the person served. It can only be set aside by clear and satisfactory evidence. This rule applies, however, only to matters within the knowledge of the officer making the return." *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983).

¶ 14 Here, the returns of service show that defendant Mendez was personally served. Although defendants claim they did not receive a summons and complaint in the mail, a party personally served is not required to receive a summons and complaint in the mail. See 735 ILCS 5/2-203(a) (West 2010) (requiring mailing for substitute service, not personal service). Therefore, defendants have presented no evidence to overcome the presumption of proper personal service.

¶ 15 We also note that the returns of service show that defendant Garcia was properly served via substitute service. The defendants' challenge to the substitute service again consisted only of their contention that they did not receive the summons and complaint in the mail. Whether the process server mailed the summons and complaint is within his personal knowledge, and thus his affidavits to that effect are *prima facie* evidence of proper service. See *Johnson*, 98 Ill. 2d at 172 (stating that the fact that service was made upon a particular person and the place where it was made are within the personal knowledge of the process server and cannot be contradicted by the uncorroborated affidavit of the defendant). Moreover, when there is evidence of mailing, as in this case, receipt is presumed, even in the face of a contrary contention from the opposing party. See *Montalbano Builders, Inc. v. Rauschenberger*, 341 Ill. App. 3d 1075, 1078 (2003), quoting *Bernier v. Schaefer*, 11 Ill. 2d 525, 529 (1957) ("[i]f proper giving of notice can now be frustrated by the mere allegation of the defendant that he did not receive it, then the giving of notice by mail cannot be relied upon even though the rules specify such a method"). Therefore, defendants' mere allegation that they did not receive the summons and complaint in the mail does not constitute the clear and satisfactory evidence necessary to overcome the server's affidavit.

¶ 16 Defendants also contend that there were defects in the returns of service, which included that they were not filed until after the motion to quash was filed, did not contain a case number, and the return of substitute service did not contain the specific date of abode mailing.

¶ 17 Section 2-203(b) of the Code provides the requirements for what must be contained in a return of service. It states:

> "The officer, in his or her certificate or in a record filed and maintained in the Sheriff's office, or other person making service, in his or her affidavit or in a record filed and maintained in his or her employer's office, shall (1) identify as to sex, race, and

> approximate age the defendant or other person with whom the summons was left and (2) state the place where (whenever possible in terms of an exact street address) and the date and time of the day when the summons was left with the defendant or other person." 735 ILCS 5/2-203(b) (West 2010).

Furthermore, the following list of factors, if met, constitute a valid return with respect to substitute service:

> "[S]ervice of summons upon an individual defendant shall be made *** by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. 735 ILCS 5/2-203(a) (West 2010).

¶ 18 Here, the record shows that the affidavit evidencing personal service upon defendant Mendez and substitute service upon defendant Garcia clearly contained all of the information required by applicable law. Specifically, the affidavit served upon defendant Mendez stated that he was a 35 year-old Hispanic male, and that service occurred at 4925 West Oakdale Avenue in Chicago on December 22, 2007, at 8:35 p.m. With respect to defendant Garcia, the affidavit of service stated that a copy of the summons was left at her usual place of abode with her roommate, defendant Mendez, who was of the age of 13 years or older. The affidavit also stated that defendant Mendez was informed of the contents of the summons, and that the process server

sent a copy of the summons in a sealed envelope with postage paid addressed to defendant Garcia at her usual place of abode.

¶ 19 In reaching this conclusion, we reject defendants' contention that service was improper because the return of service was not filed with the court until after the motion to quash was filed. According to Rule 102(d), "[f]ailure of the officer or other person to return the summons or file proof of service does not invalidate the summons or the service thereof, if had." Accordingly, the fact that the affidavits of service were not filed until after the motion to quash does not invalidate the service or void jurisdiction. We also reject defendants' contention that the proofs of service could not have been properly filed because they did not contain a case number, and the proof of service upon Garcia did not contain the date on which the server mailed the summons. As discussed above, section 2-203(b) of the Code contains no such requirements, and defendant fails to cite to any law in Illinois that states the contrary.

¶ 20 Defendants finally contend, for the first time on appeal, that "there is no evidence in the record of the appointment of the Special Process Server." Because defendants did not raise this issue in the circuit court, it is waived on appeal. See *Jackson v. Hooker*, 397 Ill. App. 3d 614, 617 (2010) (finding that questions not raised in the trial court are waived and cannot be raised for the time on appeal).

¶ 21 We conclude that the circuit court acquired personal jurisdiction over defendants through valid service of process. Accordingly, the circuit court's denial of defendants' motion to quash summons was appropriate and is affirmed.

¶ 22 Affirmed.