2012 IL App (2d) 120008-U
No. 2-12-0008
Order filed October 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE GLENS OF HANOVER CONDOMINIUM ASSOCIATION,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 10-LM-2147
IMTIAZ CARBIDE,	)	
Defendant-Appellant,	)	Honorable Robert G. Gibson,
(Unknown Occupants, Defendants).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's motion to quash service and vacate judgment in plaintiff's forcible entry and detainer action was reversed where plaintiff failed to demonstrate that it exercised the due diligence required to permit the use of alternative service of process. Given the trial court's lack of personal jurisdiction over defendant, the order of default judgment in plaintiff's favor and against defendant was vacated.

¶ 2 Plaintiff, Glens of Hanover Condominium Association, filed a complaint in forcible entry and detainer against defendant, Imtiaz Carbide, and unknown occupants. Plaintiff ultimately

obtained a judgment of default against defendant for possession and for money owed it for assessments and other common charges. Defendant appeals from the default judgment and from the court's denial of his motion to quash service and vacate the judgment. For the following reasons, we reverse.

¶ 3 BACKGROUND

¶ 4 On June 21, 2010, plaintiff filed a complaint pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq*. (West 2010)), alleging that it was entitled to possession of 1488 Sutter Drive, Unit 1624-2, Hanover Park, Illinois. Plaintiff also sought unpaid assessments and other common charges in the amount of $1,464.66, plus attorney fees and costs. The condominium unit was apparently owned by defendant and used as a rental property. A summons, directed to defendant and "unknown occupants" at the property address, was issued and returned not served, reflecting three attempts at service and indicating that a neighbor advised the sheriff's deputy that "renters moved out over 2 months ago."

¶ 5 Thereafter, a special process server was appointed. On August 2, 2010, plaintiff issued an alias summons directed to defendant in "c/o Sakina Carbide" at 2315 West Devon, Chicago, Illinois, with a return date of August 25, 2010. The alias summons was never returned.

¶ 6 The record contains an August 20, 2010, file-stamped return of what appears to be an original summons (dated June 21, 2010), but directed to defendant at the Chicago address in "c/o Sakina Carbide." The proof of service indicated that substitute service was made on Sakina Carbide on July 20, 2010, at the Chicago address.

¶ 7 On August 25, 2010, the trial court entered an order of possession and judgment in plaintiff's favor, in the amount of $3,876.52.

¶ 8 Defendant filed a motion to quash service of summons. He attached his own affidavit, averring that he never lived at either the Hanover Park or the Chicago address. He also attached an affidavit from his attorney, Sakina Carbide, averring that the Chicago address was a commercial building and that she never received any court documents. On December 9, 2010, the trial court granted the motion to quash and vacated its August 25, 2010, order.

¶ 9 On May 17, 2011, defendant filed a motion to dismiss for failure to serve and for want of prosecution. Plaintiff responded, arguing that plaintiff and defendant had been in communication about settling the case and about the possibility of Sakina Carbide accepting service for defendant, who was Sakina's client and husband. Plaintiff attached several exhibits reflecting such communication, in which defendant agreed that he owed plaintiff for past assessments but disagreed as to the total amount owed. On July 28, 2011, the trial court denied defendant's motion and granted plaintiff leave to issue an alias summons.

¶ 10 On August 12, 2011, plaintiff issued an alias summons, directed to defendant at 9 Heath Way, South Barrington, Illinois, with a return date of August 25, 2011. An affidavit of service was returned by the previously-appointed special process server, file stamped August 25, 2011. In the affidavit, the process server indicated that he had been unable to serve defendant. He averred:

> "Attempts were made to serve this subject at the address provided on 08/17/11 @ 5:50 pm, 08/19/11 @ 8:00 pm, 08/20/11 @ 2:00 pm, 08/21/11 ! [*sic*] 7:00 pm & 08/27/11 @ 8:00 pm. No one has answered the door at the time of our attempts. This subject is avoiding service. Calls were placed to the number previously developed, ***. This subjects [*sic*] name is on the voice mail recording. A call was received on the server's cell and the person identified himself as Imtiaz Carbide. The server did not leave a message. A person called the server's

> cell and identified himself of [*sic*] Imtiaz Carbide and asked why the server had called his cell a few times. The server advised that he had a delivery. Mr. Carbide stated that he did not want whatever the server had. No further return calls were received. At the time of our attempts vehicles were parked in the driveway and the server believed someone was home, but would not come to the door. On 08/22/11 a car pulled into the driveway as the server was arriving. The server followed the car up to the garage. A female/white was driving. She saw the server as he was walking up to the garage and she hit the button to close the garage door. She would not answer the door."

¶ 11 On August 25, 2011, the trial court entered an order noting that defendant did not appear and stating that "alternative service by regular US mail, certified mail and posting is approved."

¶ 12 On October 6, 2011, plaintiff appeared in the trial court and requested a default judgment. Plaintiff told the court that it had served defendant pursuant to the alternative service authorized in the August 25, 2011, order. The court entered a default judgment against defendant and in plaintiff's favor for possession and for a money judgment in the amount of $14,156.32, which included attorney fees.

¶ 13 On November 4, 2011, defendant filed a motion to quash service and vacate judgment. Defendant attached his own affidavit in which he averred the following: he never received the summons or complaint; since 2008, plaintiff had his contact information, including his employment information; from 2008 until about the summer of 2011, defendant had a Facebook page, without "privacy indicators," that contained his contact information, including his employer, and associations and clubs to which he belonged; defendant worked weekdays from 9 a.m. to 5:30 p.m. and had a 90-minute commute each way; during August 2011, defendant was observing the Muslim holy month

of Ramadan, and went straight to his mosque after work and did not return home until between 11 p.m. and 4 a.m.; on the weekends during Ramadan, defendant volunteered at his mosque from morning until after nightly prayers; when defendant's children did not attend mosque with him, they were home with the nanny, who did not speak "proper English" and was not allowed to answer the telephone or the door, or to permit the children to answer the door.

¶ 14 Also attached to defendant's motion to vacate judgment and quash service was an affidavit from Kamlaben Patel. She averred that she worked for defendant on week nights and some weekends doing cooking, cleaning, and babysitting. Patel indicated that, during the month of Ramadan, she worked at defendant's house more often. She stated that she was not allowed to answer the telephone or the door.

¶ 15 On November 9, 2011, defendant filed a supplemental affidavit in which he averred that: he was either at work or at his mosque during the special process server's attempts at service; he used his cell phone for work, often received "junk calls" offering free samples, and always rejected them; in August 2011, there were often cars in his driveway when he was not home, because he owned five cars but had only a three-car garage; no "white" people lived at his house; defendant employed a "white" "Polish maid," who had access to the garage but was not allowed to transact business or accept papers for him; and he never tried to avoid service.

¶ 16 On December 1, 2011, the trial court heard argument on defendant's motion to quash and vacate. The court denied the motion and entered an order that stated, "The Order of Possession entered on 10/6/11 to stand."

¶ 17 Defendant timely appeals.

¶ 18 ANALYSIS

¶ 19 Initially, we note that defendant's brief on appeal contains no appendix. Although the certificate of compliance signed by defendant's counsel indicates that defendant is exempt from attaching an appendix pursuant to Illinois Supreme Court Rule 341(i) (eff. Sept. 1, 2006), that rule applies to briefs for the appellee and other parties. Because defendant is the appellant, under Illinois Supreme Court Rule 341(h)(9) (eff. Sept. 1, 2006), he was required to include an appendix in his brief. However, given that the issues raised are simple and the record is not long, we will not exercise our discretion to strike his brief and dismiss the appeal. See *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 10. Nonetheless, we caution defendant's counsel to be more diligent in complying with the rules of our supreme court in the future.

¶ 20 Defendant appeals from the October 6, 2011, order of default judgment against him and from the December 1, 2011, order denying his motion to quash service and vacate the default judgment. Defendant contends that the trial court lacked personal jurisdiction over him because he was never personally served and because plaintiff did not comply with the statutory requirements necessary to permit alternative service. Although no appellee's brief has been filed, we will decide the merits of the appeal because the record is simple and the claimed errors are such that we can easily decide them without the aid of an appellee's brief. See *Prudential Property & Casualty Insurance Co. v. Dickerson*, 202 Ill. App. 3d 180, 182 (1990) (notwithstanding the lack of an appellee's brief, the appellate court took the appeal and reversed the trial court's reinstatement of a default judgment); *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 21 A judgment rendered without personal jurisdiction is void even if the defendant had actual knowledge of the proceedings. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). Unless the defendant appears or waives service of process, personal jurisdiction can be acquired only

by service of process in the manner prescribed by statute. *Thill*, 113 Ill. 2d at 308; *Metrobank v. Cannatello*, 2012 IL App (1st) 110529, ¶ 15. Section 2-203 of the Code of Civil Procedure (Code) (735 ILCS 5/2-203 (West 2010)) provides for individual defendants to be served with summons either personally or by leaving a copy of the summons at the defendant's usual place of abode with either a family member or resident who is at least 13 years old. 735 ILCS 5/2-203(a)(1), (a)(2) (West 2010); *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 367 (2001).

¶ 22 If personal or abode service under section 2-203 is "impractical," section 2-203.1 of the Code provides that the plaintiff may move the court for an alternative method of service in any manner consistent with due process. 735 ILCS 5/2-203.1 (West 2010). The plaintiff's motion must be accompanied by an affidavit stating the nature and extent of the plaintiff's investigation of the defendant's whereabouts, and the reasons why personal and abode service are impractical, "including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful." 735 ILCS 5/2-203.1 (West 2010).

¶ 23 Similarly, section 9-107 of the Act provides for constructive service (by mailing and either posting or publication) in a forcible entry and detainer case upon the plaintiff's filing an affidavit stating that the defendant is not an Illinois resident or has left the state, or "on due inquiry cannot be found, or is concealed within" the state, such that process cannot be served. 735 ILCS 5/9-107 (West 2010). The affidavit must also state the location of the defendant's residence, if known, "or if not known, that upon diligent inquiry the affiant has not been able to ascertain the defendant's *** place of residence." 735 ILCS 5/9-107 (West 2010).

¶ 24 In the present case, the record contains no evidence that plaintiff made personal service on defendant. Plaintiff initially obtained a default judgment based on abode service under section 2-203(a)(2) of the Code by purportedly leaving a copy of the summons and complaint at Sakina Carbide's law office in Chicago. However, the trial court subsequently granted defendant's motion to quash service and vacate that judgment based on lack of personal jurisdiction. On July 28, 2011, the trial court granted plaintiff leave to issue an alias summons. We begin our analysis here as the parties were essentially returned to square one—the complaint had been filed but defendant had not yet been served. Whether the trial court had personal jurisdiction generally presents a question of law, which we review *de novo*. *Mugavero v. Kenzler*, 317 Ill. App. 3d 162, 164 (2000). This is especially true where, as here, the trial court's judgment was based entirely on documentary evidence. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31 (2006).

¶ 25 Pursuant to the trial court's July 28, 2011, order, on August 12, 2011, plaintiff issued an alias summons with a return date of August 25, 2011. The alias summons was directed to defendant at his home address—9 Heath Way, South Barrington, Illinois.[1] The alias summons was returned unserved on August 25. On that date, the trial court entered an order noting defendant's failure to appear and approving alternative service by regular mail, certified mail, and posting. Defendant argues that the trial court's approval of alternative service was erroneous because plaintiff failed to provide the requisite affidavit under either section 2-203.1 of the Code, or section 9-107 of the Act.[2]

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[1]Defendant's subsequent motion to quash and vacate refers to this summons as the first one directed to his "proper address."

[2]It is not clear from the record whether plaintiff proceeded under section 2-203.1 of the Code

¶ 26 Both section 2-203.1 of the Code, providing generally for alternative service, and section 9-107 of the Act, providing for constructive service in forcible entry and detainer cases, require the plaintiff to file an affidavit demonstrating the plaintiff's diligent inquiry in seeking the defendant's location. Section 2-203.1 of the Code requires that the affidavit filed in support of alternative service also indicate the reasons that personal or abode service was impractical, including that reasonable efforts at service were unsuccessful. 735 ILCS 5/2-203.1 (West 2010). Section 9-107 of the Act requires that the affidavit demonstrate that, on due inquiry, the defendant could not be found or was concealed within the state so that process could not be served. 735 ILCS 5/9-107 (West 2010). Both provisions require strict compliance. *Nasolo*, 364 Ill. App. 3d at 32 (addressing section 9-107 of the Act and section 2-206 of the Code (735 ILCS 5/2-206 (West 2010)) (providing for service by publication in cases affecting property and containing affidavit requirements almost identical to section 9-107)); *Mugavero*, 317 Ill. App. 3d at 166 (addressing section 2-203.1 of the Code).

¶ 27 The record contains only one affidavit that could qualify under either relevant statutory provision—the August 25, 2011, affidavit of service from the special process server. In that affidavit, the process server averred that he had made six attempts at service, that no one ever answered the door, and that defendant was "avoiding service." The server also stated that he had spoken with defendant on defendant's cell phone, that he had told defendant that he had a delivery for him, and that defendant had said he did not want it. The server further averred that at the time of each service attempt there were vehicles parked in the driveway, which led the server to believe

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or section 9-107 of the Act. Nevertheless, because the affidavit requirements in each provision are similar, and because defendant makes argument with respect to both sections, our analysis includes both.

that someone was home but refused to answer the door. The server described one particular attempt on August 22, 2011, stating that, as he arrived at the residence, a white female drove into the garage, that he followed the car up to the garage, and that the woman closed the garage door and would not answer the door.

¶ 28 We conclude that this affidavit did not demonstrate strict compliance with either section 2-203.1 of the Code or section 9-107 of the Act. It is only where personal service cannot be had that the law allows the concession of constructive service, and the "concession is not made readily." *Nasolo*, 364 Ill. App. 3d at 31 (addressing section 9-107 of the Act). Mere difficulty in effecting service should not be sufficient to satisfy section 2-203.1's requirement that the plaintiff show impracticality. *People ex rel. Waller v. Harrison*, 348 Ill. App. 3d 976, 987 (2004) (Kapala, J., dissenting). The "law requires an honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances can permit." (Internal quotations omitted.) *Nasolo*, 364 Ill. App. 3d at 32 (applying case law addressing due inquiry and diligent inquiry under section 2-206 of the Code (service by publication in cases affecting property) as generally relevant to those terms under section 9-107 of the Act). Depending upon the circumstances, the plaintiff might be required to inquire with neighbors or known counsel, to check court records, or to investigate the defendant's employment information. *Nasolo*, 364 Ill. App. 3d at 32. "[I]f the statutorily mandated inquiries are not made, a plaintiff's affidavit for constructive service does not speak the truth and cannot confer jurisdiction." (Internal quotations omitted.) *Nasolo*, 364 Ill. App. 3d at 32.

¶ 29 Here, although the affidavit showed six[3] unsuccessful attempts at service at defendant's residence over a period of 11 days, it did not demonstrate plaintiff's diligent inquiry in locating defendant, as required by section 2-203.1 of the Code, or that upon plaintiff's due inquiry, defendant could not be found or was concealed, as required by section 9-107 of the Act. Although the affidavit implicitly demonstrates plaintiff's diligent inquiry in ascertaining defendant's residence, because service was attempted at what defendant acknowledges was his home address, the affidavit says nothing about plaintiff's due inquiry in trying to locate defendant anywhere other than his residence. See *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18 (under section 2-206 of the Code, distinguishing between diligent inquiry in ascertaining the defendant's residence and due inquiry in ascertaining the defendant's whereabouts). That the affidavit indicates that the process server spoke with defendant on his cell phone does not demonstrate an attempt to ascertain defendant's whereabouts. The server averred that he called defendant's cell phone, but did not leave a message on defendant's voice mail. The server stated that, when defendant returned the server's call, the server advised that he had a delivery and defendant said he was not interested. The server did not ask for defendant's location or ask for a location at which he could make the "delivery." Accordingly, the affidavit does not demonstrate plaintiff's strict compliance with the relevant statutory requirements. See *Nasolo*, 364 Ill. App. 3d at 33 (questioning whether sending the sheriff to one address, where four attempts were made in six days, without doing anything more, constituted an honest and well-directed effort); *Mugavero*, 317 Ill. App. 3d at 165 (holding that the process server's affidavit, indicating that the defendant had moved and left no forwarding address, failed to

[3]The server's sixth attempt was purportedly made on August 27, 2011, two days after the affidavit of service was filed.

satisfy section 2-203.1 of the Code because it "evinced virtually no investigation into defendant's current whereabouts, much less the 'diligent inquiry' that the section requires").

¶ 30 Moreover, defendant's affidavit, attached to his motion to quash and vacate, tended to further undermine the conclusion that plaintiff exercised the requisite due inquiry in attempting to ascertain defendant's whereabouts. In addition to explaining that he was either at work or at his mosque observing Ramadan during the service attempts, defendant averred that plaintiff had his employment information and that it was also publicly available on defendant's Facebook page. As in *Nasolo*, where the defendant filed an affidavit with her motion to quash and vacate, in which she averred that the plaintiff had her employment information and that she was at work during the attempts at service at her apartment, defendant's affidavit here supports the conclusion that due inquiry would have required plaintiff to investigate defendant's employment information. See *Nasolo*, 364 Ill. App. 3d at 32-33 (noting that the defendant's affidavit, in which she averred that she was generally at work when the plaintiff attempted service and that the plaintiff knew her work address, left a significant question as to the sufficiency of the plaintiff's inquiry); see also *Cotton*, 2012 IL App (1st) 102438, ¶ 30 (holding that, despite the plaintiff's 19 attempts to serve the defendant at 2 different residences over a period of almost a month, the defendant's affidavit, averring that the plaintiff could have found him at his place of employment, called into question whether the plaintiff had exercised due inquiry).

¶ 31 We note the trial court's comments on December 1, 2011, after hearing argument on defendant's motion to quash and vacate. The court noted that it had approved alternative service because the record reflected that defendant was "wittingly or unwittingly" attempting to avoid service. In rejecting defendant's argument that he had not attempted to avoid service, the court

stated that defendant "created a situation" of actively avoiding service, whether intentional or not, "by never being at the property during any reasonable hours and telling the care keepers of the property not to answer the door for anyone." However, the court's decision was not supported by the special process server's affidavit. The process server's conclusory statement that defendant was "avoiding service" was not based on any facts that defendant was intentionally avoiding service or concealing himself. *Cf. Schmitt*, 321 Ill. App. 3d at 368-69 (holding that, under section 2-203.1, the petitioner had demonstrated due diligence and that personal or abode service was impractical based on more than a dozen unsuccessful attempts over a month to serve the summons and two alias summons at various locations, including petitioner's use of two private detective agencies, surveillance of the respondent's two places of business and of defendant's employee and alleged paramour, and the petitioner's allegations that the respondent was "willfully and intentionally engaged in a course of conduct calculated to evade service of process" in order to continue to transfer and dissipate marital assets).

¶ 32 Because the special process server's affidavit did not demonstrate plaintiff's strict compliance with the requirements of either section 2-203.1 of the Code or section 9-107 of the Act, the trial court improperly permitted alternative service. Therefore, the court's entry of default judgment against defendant was void for lack of personal jurisdiction. Accordingly, the trial court's denial of defendant's motion to quash and vacate was erroneous. *Nasolo*, 364 Ill. App. 3d at 37 (vacating the trial court's denial of the defendant's motion to quash and vacate the default judgment entered against her based on the plaintiff's failure to comply with section 9-107 of the Act); *Mugavero*, 317 Ill. App. 3d at 166 (reversing the trial court's denial of the defendant's motion to quash service and vacating the default judgment against the defendant based on the plaintiffs' failure

to strictly comply with section 2-203.1 of the Code).

¶ 33 Given our holding, we need not address defendant's remaining arguments (that, even if the trial court had personal jurisdiction, it was to enter only an *in rem* judgment for possession; that plaintiff defectively effectuated alternative service; and that plaintiff lacked standing on the date that the default judgment was entered in its favor). We do note, however, that we agree with defendant that the record does not contain proof of posting as required by section 9-107 of the Act.

¶ 34 For the foregoing reasons, we reverse the December 1, 2011, order in which the circuit court of Du Page County denied defendant's motion to quash and vacate. We also vacate the court's October 6, 2011, entry of default judgment in plaintiff's favor and against defendant.

¶ 35 Order reversed; default judgment vacated.