

No. 1-11-3509

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

MB FINANCIAL BANK, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CH 40165
)	
WITOLD P. SALISZEWSKI, MALGORZATA)	
SALISZEWSKI, CHICAGO TITLE AND TRUST)	
COMPANY, as trustee per document No. 08045150456)	
recorded February 14, 2008, ROBERT DUBIEL,)	
UNKNOWN OWNERS, and NONRECORD)	
CLAIMANTS,)	Honorable
)	Darryl B. Simko,
Defendants-Appellants.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Order of circuit court denying defendant's motions to quash service and vacate orders in mortgage foreclosure action affirmed.

¶ 2 Malgorzata Saliszewski, one defendant in a mortgage foreclosure suit¹ brought by plaintiff, New McHenry Union LLC (McHenry), appeals from circuit court orders denying her

¹Defendants Witold Saliszewski, Chicago Title and Trust Company, Robert Dubiel, unknown owners, and nonrecord claimants are not a part of this appeal.

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motion to quash service and vacate orders. On appeal, defendant contends, through counsel, that the trial court erred in failing to quash service and vacate all orders in this case for lack of personal jurisdiction based on service by an unauthorized process server, and also based on improper service by publication. We affirm.

¶ 3 The record shows that in June 2006, defendant obtained a mortgage from MB Financial Bank (MB Financial) in the amount of \$1.7 million for the property commonly known as 838-40 East 52nd Street, Chicago, Illinois. Defendants also signed a promissory note for the same sum on February 27, 2008. On October 24, 2008, MB Financial filed a complaint to foreclose the mortgage against defendants. According to Count I of the complaint, defendants were in default since October 22, 2008, for failing to make the required payments per the note secured by the mortgage and for failing to maintain the required insurance. The balance due on the note and mortgage on October 22, 2008, was \$1,769,902.47 plus daily accruing interest, costs, advances, and fees. As relief, MB Financial requested a judgment of foreclosure and sale, an order granting a shortened redemption period, a personal judgment for deficiency, an order granting possession, an order placing MB Financial in possession, a judgment for attorney fees, costs, and expenses, the appointment of a selling officer, and further relief as the court deemed just.

¶ 4 In Count II, MB Financial alleged that the promissory note matured on June 27, 2008, and the entire amount became due. Defendants defaulted on the note, and, as relief, MB Financial requested that the trial court enter a judgment against defendants in the amount of \$1,769,902.47, plus pre- and post- judgment interest, costs, attorney fees and all other additional sums accruing to date of judgment, and award further relief as the court deemed just.

¶ 5 On November 12, 2008, MB Financial assigned its interest in the note and mortgage to McHenry. Subsequently, the trial court substituted McHenry for MB Financial as plaintiff.

¶ 6 Defendant Malgorzata Saliszewski was served the complaint by substitute service via a special process server, *i.e.*, ProVest, on February 10, 2009, and again by publication on February 24, 2009. Defendants did not file an appearance or answer the complaint.

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¶ 7 In April 2009, the trial court entered an order of default against defendants and a judgment for foreclosure and sale of the subject property. In May 2009, the subject property was sold and McHenry submitted the winning bid. The court confirmed the judicial sale on July 6, 2009. A quitclaim deed was recorded on July 29, 2010, transferring away any interest defendant had in the property.

¶ 8 On August 20, 2010, defendant filed a motion to quash the substitute service effected on her, asserting that nothing in the court file reflected the appointment of ProVest as special process server. On December 2, 2010, the trial court granted defendant's motion to quash substitute service for the reasons stated in the motion.

¶ 9 On December 21, 2010, defendant filed a motion to quash the service by publication and vacate the subsequent judgment, sale, and confirmation orders. McHenry responded that between the time the confirmation order was entered (July 2009) and the filing of defendant's motion (December 2010), it had sold four units at the subject property to third-party purchasers, and expended over \$150,000 in improvements at the property. McHenry argued that service by publication was proper, the relief sought in defendant's motion was barred by the doctrine of laches, and defendant cannot have the judgment, sale, or confirmation order set aside as it related to the intervening third-party purchasers who bought condominiums at the property. During the pendency of this motion, the court appointed a special process server who served defendant Malgorzata Saliszewski at her abode on April 20, 2011. In June 2011, the court entered an order setting this matter for an evidentiary hearing.

¶ 10 After defendant's motion relating to the service by publication was set for an evidentiary hearing, McHenry filed a combined reply disputing defendant's position regarding both the substitute service and service by publication. In particular, McHenry filed a motion pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), to vacate the granting of defendant's motion to quash substitute service (December 2, 2010 order). In it, McHenry alleged that defendant lacked standing to bring the motion to quash substitute service

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because they no longer had any interest in the property. McHenry further alleged that defendant's motion to quash substitute service should have been denied as their only remedy was against the proceeds of the sale of the property. In the combined reply, McHenry also filed a motion to strike defendant's pending motion to quash service by publication and vacate orders, alleging the same claims as above. Defendant replied to both motions alleging, in part, that because they were never served, the court did not have jurisdiction to render a valid judgment, and they can challenge a court's jurisdiction at any time.

¶ 11 The court scheduled a hearing for September 1, 2011, and, in preparation for an evidentiary hearing, ordered the parties to prepare lists of witnesses and intended exhibits. Both McHenry and defendant filed their respective lists.

¶ 12 On September 1, 2011, the trial court entered an order granting McHenry's motions and denying defendant's motion to quash. In doing so, the court indicated that it was "fully advised in the premises" and that both parties were represented. Defendant filed a motion to reconsider, which the court denied on November 28, 2011. The record does not contain any transcript of these proceedings. Defendant now appeals the September 1 and November 28, 2011 orders.

¶ 13 On appeal, defendant contends that the trial court erred in failing to quash service and vacate all orders in this case for lack of personal jurisdiction based on service by an unauthorized process server and on improper service by publication.

¶ 14 In response, plaintiff observes that defendant failed to provide this court with an adequate record on appeal, *i.e.*, there is no transcript (or an authorized substitute) for the dispositive September 1 hearing. Plaintiff also maintains that defendant is estopped from reopening this foreclosure action and lacks standing to challenge the order approving the sale.

¶ 15 A section 2-1401 motion to vacate is reviewed *de novo* where the decision is determined on the pleadings only without an evidentiary hearing. *Algonquin v. Lowe*, 2011 IL App (2d) 100603, ¶ 14, citing *People v. Vincent*, 226 Ill. 2d 1, 14-17 (2007). However, where the trial court conducts an evidentiary hearing, we do not apply a *de novo* standard. *Vincent*, 226 Ill. 2d at

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17 n.5. Instead, we can review the judgment under the manifest weight of the evidence standard. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35 (reviewing the trial court's judgment under the manifest weight of the evidence standard after granting the respondent's section 2-1401 petition following an evidentiary hearing). In such a case, this court cannot evaluate the judgment without the evidence presented.

¶ 16 Here, all the motions were the subject of the dispositive hearing. However, the parties dispute whether it was an evidentiary hearing. In anticipation of an evidentiary hearing, the parties filed lists of witnesses and intended exhibits. However, as plaintiff observes, the appellate record is barren of evidence and argument presented at the hearing, as well as the trial court's analysis of the evidence and argument.

¶ 17 In this regard, we note that we originally issued (on February 26, 2013) an order acknowledging and founded upon the incompleteness of the record but also making repeated reference to the dispositive hearing as an evidentiary hearing. Defendant filed a petition for rehearing to which she attached affidavits from her counsel and Rebecca Reyes, who participated in the dispositive hearing as plaintiff's counsel, averring that no evidentiary hearing was held and no evidence was admitted. In its answer or response to the rehearing petition, plaintiff argued that the affidavits constitute an improper attempt to supplement the record and should be stricken, and in particular stated that Reyes was no longer representing plaintiff by the time she signed the affidavit so that her representations cannot be considered the agreement or stipulation of the parties. We agree on both points. Supreme Court Rule 323(c)(eff. Dec. 13, 2005) provides for supplementing the record with a bystander's report, but a key element of that method is approval of the report by the circuit court, which did not happen here. Supreme Court Rule 323(d) provides that the "parties by written stipulation may agree upon a statement of facts material to the controversy and file it without certification in lieu of and within the time for filing a report of proceedings," but that time is long past (see Ill. S. Ct. R. 323(e)) and moreover Reyes could not with her affidavit stipulate for plaintiff if she was no longer plaintiff's counsel. We

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therefore strike and disregard the affidavits in the rehearing petition and consider the case on the state of the properly-filed record on appeal.

¶ 18 Where a hearing was held and the appellant fails to provide this court with a transcript of the proceeding or an acceptable substitute, *i.e.*, a bystander's report or an agreed statement of facts pursuant to Supreme Court Rule 323(c),(d) (eff. Dec. 13, 2005), we must presume the correctness of the trial court's decision. As the appellant, defendant is obligated to provide us a sufficiently complete record of the trial court proceedings to support her claim of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). "Where the record is incomplete, we will indulge every reasonable presumption favorable to the judgment order from which the appeal is taken." *Tucker v. Soy Capital Bank and Trust Co.*, 2012 IL App (1st) 103303, ¶¶ 17-18 (applying presumption in *de novo* review of motion to dismiss). We consider it key that the trial court stated in its dispositive September 1 order that it was fully advised in the premises. This court has previously held that:

"The presumption of correctness in the circuit court is especially strong when, as here, there is an indication that the court below was 'fully advised in the premises.' " *** This presumption even operates to the extent that 'where the record lacks information of evidence presented at a hearing, [a reviewing court will not] assume none was heard and that the court's order, therefore, was improper. Instead, *** it [will] presume[] that the court heard adequate evidence to support the decision that was rendered unless the record indicates otherwise.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 758 (2006), quoting *Webster v. Hartman*, 195 Ill. 2d 426, 433 (2001).

On the state of the record before us, we must make the same presumptions.

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¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.