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2013 IL App (3d) 110799-U

Order filed February 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

FORD MOTOR CREDIT COMPANY,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0799
)	Circuit No. 10-SC-9049
)	
CLEVELAND MYERS,)	Honorable
)	Mark Thomas Carney,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying the defendant's motion to vacate the default judgment where the defendant failed to establish a meritorious defense based upon lack of proper service of process.

¶ 2 The defendant, Cleveland Myers, appeals from a judgment of the circuit court of Will County denying his motion to vacate a default judgment entered against him in an action for breach of a retail installment contract. On appeal, Myers maintains that the circuit court erred as

a matter of law when it failed to vacate the default judgment order based upon alleged improper service. We affirm.

¶ 3

FACTS

¶ 4 On September 8, 2010, the plaintiff filed a complaint alleging that Myers was in breach of a retail installment contract and sought damages of \$6,312.48 plus contractual interest, attorney fees and costs. Myers was served with a summons and copy of the complaint on October 4, 2010. A court-appointed special process server filed a proper affidavit of service with the court. On October 14, 2010, plaintiff's counsel appeared and obtained a continuance until a status hearing set for January 20, 2011. Myers did not appear or file any pleading at that time. The plaintiff's attorney sent Myers a notice of hearing advising him of the January 20, 2011, hearing. Myers failed to appear at the January 20, 2011, hearing. The court entered a default judgment against Myers. On September 12, 2011, Myers filed an emergency motion to vacate the default judgment, maintaining that he had not received the summons and complaint as attested to by the affidavit of the special process server. On September 19, 2011, the court heard arguments on the motion. Myers testified that the process server appeared at his residence but, when Myers produced the title to the vehicle, the process server told Myers that he did not have to appear in court. The court found that Myers's testimony was not credible. The court further found that affidavit of the special process server contained a description of the person served that matched the court's observation of Myers's physical appearance. The court denied Myers's motion to vacate the default judgment. On September 30, 2011, Myers filed a motion to reconsider. A hearing on the motion to reconsider was held on October 14, 2001, after which the court denied the motion to reconsider. Myers then filed this appeal.

¶ 5

ANALYSIS

¶ 6 Myers maintains on appeal that the trial court erred in denying his motion to vacate the default judgment. He further maintains that the trial court should have found that the judgment was rendered without proper return of service. We disagree.

¶ 7 Myers filed a motion seeking to vacate a default judgment. 735 ILCS 5/2-1401 (West 2010). To be entitled to such relief, a petitioner must show by a preponderance of the evidence that: (1) a meritorious defense or claim exists; (2) he exercised due diligence in discovering the defense or claim; (3) despite his diligence and through no fault of his own, the valid claim or defense was not presented to the trial court during the original action; and (4) he exercised due diligence in bringing the petition to vacate the default judgment. *Klose v. Mende*, 378 Ill. App. 3d 942, 947 (2008). A reviewing court will not disturb a trial court's ruling on a section 2-1401 petition absent an abuse of discretion. *Id.*

¶ 8 In the instant matter, Myers seeks to establish improper service of process as his meritorious defense. He claimed in testimony before the trial court that the process server did not serve the summons and complaint upon him but, instead, merely showed the documents to him. Myers further testified that the process server told him that he did not have to appear in court since he had evidence of title to the vehicle in his possession. In contrast, a properly executed affidavit of service was filed with the court which purported to establish that Myers had been properly served. Faced with this conflicting evidence regarding service, the trial judge gave more weight to the affidavit and concluded that the process server had properly served the document upon Myers. In doing so, the court found Myers's testimony was not credible. Because it is the unique function of the trial court to weigh credibility, a trial court's finding that

a witness was not credible will only be ignored on appeal if there is a clear abuse of discretion. *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352, 356 (1967). Here, we find no abuse of discretion in the trial court's assessment of Myers's credibility.

¶ 9 Moreover, an affidavit evidencing personal service on a party is *prima facie* evidence of effective service which can only be impeached by clear and convincing evidence otherwise. *Four Lakes Management & Development Co. v. Brown*, 129 Ill. App. 3d 680, 683 (1984). A party's uncorroborated testimony that he was never served is insufficient to overcome a properly filed affidavit of service. *Id.* at 684. Here, Myers offers no evidence, other than his own uncorroborated testimony, to rebut the evidence of proper service contained in the affidavit of service.

¶ 10 We find no abuse of discretion in the trial court's order denying Myers's motion to vacate the default judgment. The trial court heard Myers's testimony that he had not been properly served by the process server but simply did not find that his testimony was sufficient to overcome the affidavit attesting to proper service. Myers presented no evidence, other than his own uncorroborated testimony, that would permit the trial court to reject the properly filed affidavit of service. Given this record, we cannot say that the trial court's ruling amounted to an abuse of its discretion.

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 13 Affirmed.