

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).

FOURTH DIVISION
March 31, 2014

No. 1-13-0580

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois,
)	County Department,
v.)	Chancery Division.
)	
MARIE BEAUVOIR,)	No. 12 CH 306
)	
Defendant-Appellant.)	Honorable
)	Darryl B. Simko,
)	Judge Presiding

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in summarily dismissing the defendant's motion to quash service where the defendant averred that she was never served with a summons or a complaint and her statement was corroborated by gross inaccuracies in the process server's description of her.

¶ 2 This cause arises from a mortgage foreclosure action filed by the plaintiff, Bank of America N.A., against the defendant, Marie Beauvoir. The plaintiff obtained a default judgment and order of foreclosure and sale from the circuit court on certain property owned by the defendant. After the property was sold at a public auction, the defendant filed a *pro se* motion to

set aside the sale. The trial court denied the defendant's motion and entered an order approving and confirming the sale. The defendant then obtained counsel and filed a motion to quash service of process and dismiss the proceedings due to lack of personal jurisdiction. The circuit court denied that motion. The defendant now appeals contending that the circuit court erred in summarily dismissing her motion to quash service of process since the defects in the service prohibited any personal jurisdiction over her and thus, the default judgment and order for foreclosure and sale were void. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 The record contains the following undisputed facts and procedural history. The defendant, Marie Beauvoir (hereinafter Beauvoir) owns a three-unit apartment building, located at 2043 W. Birchwood Avenue, in Chicago (hereinafter the property), which is the subject of this appeal. On January 5, 2012, Bank of America, N.A. (hereinafter Bank of America) filed for foreclosure on the property. On that same day, Bank of America sought the appointment of a special process server and the court granted that request, appointing United Processing, Inc. (hereinafter United Processing), as the special process server.

¶ 5 On February 16, 2012, Bank of America filed an affidavit from special process server Richard White, of United Processing, attesting that he personally served Beauvoir on January 12, 2012 at 5:46 p.m. at 8809 Sutton Drive, in Firsco, Texas.¹ This affidavit was notarized by a

¹We note that on this same date, Bank of America filed several affidavits of attempted, but failed service. These affidavits reveal that United Processing attempted service on Beauvoir

No. 1-13-0580

Texas notary public. Although the affidavit contained White's printed name, it did not contain his signature. According to White's affidavit, Beauvoir, whom he personally served, was a 70-year-old black female approximately 6 '7" tall and weighing 160 pounds.

¶ 6 On March 8, 2012, the court held a case management conference. The court's case management order from that day indicates that Beauvoir was present in court. The order also states that Beauvoir was given until April 5, 2012, to file an appearance, answer or other pleading.

¶ 7 On April 6, 2012, Bank of America filed a motion for default judgment and sale, as well as a motion to shorten the redemption period pursuant to section 15-1603(b)(3) of the Illinois

at several different locations in Illinois. On January 5, and January 6, 2012, United Processing attempted service at 2043 W. Birchwood, in Chicago, which is the property subject to this appeal. There, the service processor was informed that Beauvoir is the owner, but that she does not live on the premises, and that rent is paid to a third party. The process server was also told that Beauvoir had moved to Texas. On January 6, January 7, and January 8, 2012, service was attempted at 1721 Darrow Avenue in Evanston, where the process server spoke to Velma Johnson who said that she rents the property from Beauvoir. Johnson would not tell the process server where Beauvoir lives but took down his information so that she could pass it along to Beauvoir. On January 8, 2012, process was also attempted at 311 Ferndale Road in Glenview. The process server noted that the property was vacant and appeared to have been vacant for a long time. A neighbor informed the process server that Beauvoir has not lived at the address for years, and that the property was rented to a family for a while before it was left vacant.

No. 1-13-0580

Mortgage Foreclosure Law (IMFL) (735 ILCS 5/15-1603(b)(3) (West 2012)). On April 26, 2012, the court continued the case and gave Beauvoir until May 24, 2012, to file an appearance and answer or otherwise plead to the foreclosure complaint.²

¶ 8 On June 14, 2012, the circuit court entered a default judgment against Beauvoir, as well as an order of foreclosure and sale of the property. The court also entered an order dismissing certain party defendants as to the unknown owners and nonrecord claimants on the property and an order shortening the redemption period to 60 days from the entry of the foreclosure judgment pursuant to section 15-1603 of the Code (735 ILCS 5/15-1603(b)(3) (West 2012)).

¶ 9 More than a month later, on August 12, 2012, Beauvoir filed her first court appearance *pro se*.

¶ 10 The property was sold four days later on August 16, 2012, at a public auction, with Bank of America making the highest bid at \$228,768.

¶ 11 On August 20, 2012, Beauvoir filed an application and affidavit with the court seeking to sue or defend as an indigent person and that application was granted. The following day, she filed a *pro se* motion to set aside the sale of the property, arguing that because after the default judgement was entered she immediately applied for assistance under the Making Home Affordable Program, the sale should have been stayed. The record contains no responsive pleading by Bank of America as to this motion.

¶ 12 Rather, the record reveals that on August 30, 2012, Bank of America motioned the court

²As shall be explained further below, Beauvoir admits to having been present at this hearing.

No. 1-13-0580

to enter an order approving the sale and distribution of the property.

¶ 13 On September 7, 2012, the circuit court denied Beauvoir's motion to set aside the sale, but held on making a decision as to Bank of America's motion to approve the sale and distribution of the property.

¶ 14 On October 1, 2012, Beauvoir obtained the services of counsel and counsel filed an appearance on her behalf.

¶ 15 A month later, on November 2, 2012, the court entered an order approving the report of sale and distribution and confirming the sale and order of possession.

¶ 16 On December 3, 2012, for the first time, through counsel, Beauvoir filed a motion to quash service of process and in the alternative to vacate the default judgment pursuant to section 5/2-1301(e) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2012)). In her pleading, Beauvoir argued that she was not served process on January 12, 2012, in Frisco, Texas. Additionally, she contended that the affidavit of service of process used by the circuit court to establish personal jurisdiction over her was defective because: (1) it did not contain the service processor's signature; and (2) the description given by the service processor of Beauvoir was "grossly inaccurate," stating that she was 70 years old, 6'7" tall, and weighed 160 pounds, when in fact she is 78 eight years old, only 5'4" tall, and weighs 180 pounds. In support of her motion to quash, Beauvoir attached an affidavit, attesting to the aforementioned facts. In that affidavit, Beauvoir also stated that she "currently resides" in the "garden apartment" at 2043 W. Birchwood (the property subject to this appeal) and at 8809 Sutton Drive in Frisco, Texas, where her daughter lives. In addition, according to the affidavit, for several months out of the year,

No. 1-13-0580

Beauvoir travels to her native Haiti to spend time with her family. Beauvoir averred that she was first put on notice about the sale of the property on August 1, 2012, when she returned to Chicago from Haiti. Beauvoir averred that she then filed her *pro se* appearance and the motion to vacate the sale. She stated that she did so only upon advice from attorneys on the 13th Floor of the Daley Center, but that because she speaks only Creole and no interpreters were available to assist her, she did not understand much of their advice. She stated that she would not have filed her *pro se* motion to vacate the sale if she had known that by doing so she would subject herself to the court's jurisdiction and waive her opportunity to later challenge the propriety of the service of process later. In her affidavit, Beauvoir also admitted that she came to the courthouse on April 26, 2012, but explained that because of the language barrier she did not understand that she had until May 24, 2012, to file her appearance to avoid the default order.

¶ 17 Bank of America did not file a response to Beauvoir's motion to quash. Instead, without holding a hearing or requesting a response from Bank of America, on January 15, 2013, the circuit court denied Beauvoir's motion to quash service of process. Beauvoir now appeals.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Beauvoir asserts that the trial court never had personal jurisdiction over her because she was never personally served in this matter. Bank of America responds: (1) that Beauvoir waived or forfeited any objection to personal jurisdiction by filing a motion to set aside the sale without first objecting to jurisdiction; and (2) that she was properly served in Texas.

¶ 20 We first consider Bank of America's contention that Beauvoir waived or forfeited her objection to personal jurisdiction when she filed her motion to set aside the sale without

No. 1-13-0580

contesting the court's jurisdiction over her.

¶ 21 It is well established that to enter a valid judgment, the circuit court must have jurisdiction over the subject matter of the litigation and jurisdiction over the parties. *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 13; see also *Sarkissian v. Chicago Board of Education*, 201 Ill.2d 95, 103 (2002) (" '[A] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, *** is void, and may be attacked at any time or in any court, either directly or collaterally.' " (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945))). A court acquires personal jurisdiction over a defendant by her appearance or by effective service of summons. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 842 (2010); see also *Rockdale Cable T.V. Co. v. Spandora*, 97 Ill. App. 3d 754, 758 (1981) (Personal jurisdiction is acquired over a defendant "by the coercive power of a summons or the consensual authority of a voluntary appearance"). The court lacks jurisdiction over a party when service is flawed and the party has not voluntarily submitted herself to the jurisdiction of the court. *People v. Wallace*, 405 Ill. App. 3d 984, 988 (2010).

¶ 22 Section 2-301 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2012)) governs objections to personal jurisdiction and provides:

"Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action

No. 1-13-0580

involved in the proceeding or by filing a motion to quash service of process." 735 ILCS 5/2-301(a) (West 2012).

Section 2-301(a) of the Code, further explicitly provides that while a motion challenging jurisdiction "may be made singly or included with others in a combined motion," filing "a responsive pleading or a motion (other than a motion for extension of time to answer or otherwise appear) prior to the filing of a motion" challenging jurisdiction "waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a), (a-5) (West 2010); see also *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 11. Consequently, a defendant who has already filed a pleading (other than a motion to quash or a motion for extension of time to file a motion to quash) automatically accepts the jurisdiction of the court and forfeits her right to bring a motion to quash. See *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2008); see also *Poplar Grove State Bank v. Powers*, 218 Ill. App. 3d 509, 515 (1991) ("[a defendant] may not by his voluntary action, invite the court to exercise its jurisdiction over him while [s]he simultaneously denies that the court has such jurisdiction.").

¶ 23 Up until a few days ago, our appellate courts were in disagreement as to whether this type of waiver applies retrospectively or prospectively. One line of courts held that section 2-301 of the Code (735 ILCS 5/2-301 (West 2012)) does not apply retroactively to any judgement entered prior to a jurisdictional waiver. See *C.T.A.S.S.&U. Fed. Credit Union v. Johnson*, 383 Ill. App. 3d 909, 911 (2008) ("a party who submits to the court's jurisdiction does so only prospectively" so that filing a substantive motion or appearance prior to the motion to quash "does not retroactively validate orders entered prior to that date"). Another line of courts, however, held

No. 1-13-0580

that failure to follow section 2-301 acts as a comprehensive waiver of all jurisdictional objections. See *GMB Financial Group, Inc., v. Marzano*, 385 Ill. App. 3d 978 (2008) ("the text of [section] 2-301 does not contain any temporal restriction on waiver; it works prospectively and retroactively."); see also *Eastern Sav. Bak, FSB v. Flores*, 2012 IL App (1st) 112979, ¶ 16 ("When a party waives objections to jurisdiction, it does so both prospectively and retroactively, and there is no issue of retroactive validation of orders and judgments once a party has waived jurisdiction."); see also *Deutsche Bank Nat'l Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632 ¶ 18 (holding that where the defendants filed a motion to quash service after the denial of their motion to stay the sale and the court's approval of the sale and distribution, confirming the sale and order of possession, "without raising an objection to personal jurisdiction" they had "voluntarily submitted to the trial court's jurisdiction and waived any objection" to it).

¶ 24 Very recently, in *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, our supreme court put an end to the debate, holding that a party's voluntary submission to the circuit court's personal jurisdiction is prospective-only and does not retroactively validate prior orders entered without jurisdiction. In that case, the defendant did not file an appearance in the circuit court until after the circuit court entered both the judgment of foreclosure and order confirming the report of sale and distribution and for possession of her property. *BAC Home Loans Servicing*, 2014 IL 116311, ¶¶ 3-8. The defendant initially filed a motion to vacate the order confirming the report of sale and distribution and for possession of her property, and subsequently a motion to quash service of process. *BAC Home Loans Servicing*, 2014 IL 116311, ¶¶ 7-8. The circuit court denied both motions and the defendant appealed, contending

No. 1-13-0580

that service of process was defective and the circuit court, therefore, lacked personal jurisdiction to enter the default judgment, the judgment of foreclosure, the order of sale, and the order of possession against her. *BAC Home Loans Servicing*, 2014 IL 116311, ¶¶ 11-12. On appeal, the plaintiff argued that the defendant had waived objections to the court's personal jurisdiction by filing her postjudgment motion to vacate the order confirming the sale first. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 12. The appellate court held that pursuant to by section 2-301 of the Code (735 ILCS 5/2-301(a), (a-5) (West 2010)), the defendant had waived personal jurisdiction because her initial postjudgment motion to vacate the order of sale did not challenge the circuit court's personal jurisdiction. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 13. The appellate court also found that this waiver applied both retroactively and prospectively, so as to bar her from challenging any of the prior orders entered by the circuit court on the basis of lack of jurisdiction. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 13.

¶ 25 Our supreme court disagreed, and in reversing the decision of the appellate court, explained:

"Based on the statutory language and legislative history, we do not believe the legislature intended to adopt a rule allowing a defendant's waiver to validate retroactively orders entered without personal jurisdiction. Plaintiff's proposed construction of the statute is at odds with the fundamental rationale of our rule providing for prospective-only submission to the court's jurisdiction, namely, to avoid 'depriv[ing] the defendant of his day in court.' (Internal quotation marks omitted.) [Citation.] In the absence of clear language or legislative history to the contrary, we conclude section 2-

No. 1-13-0580

301(a-5), as amended, codified the law on waiver as it existed before the amendment.

We, therefore, reaffirm the longstanding rule that 'a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date.' [Citation.] To the extent that Illinois appellate court decisions, including *Marzano* and *Flores*, hold to the contrary, they are overruled." *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 43.

¶ 26 Applying *BAC Home Loans Servicing*, 2014 IL 116311, to the facts of this case, we are compelled to conclude that Beauvoir has not waived her objection to the circuit court's personal jurisdiction. The record below reveals that Beauvoir voluntarily submitted herself to the jurisdiction of the court on August 21, 2012, when she filed her *pro se* motion to set aside the sale of the property. By doing so, however, she waived objections to the circuit court's personal jurisdiction prospectively-only. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 43. The waiver did not serve to validate retroactively any allegedly void orders entered prior to her submission to the court's jurisdiction on August 21, 2012, namely, the order of default, the judgment of foreclosure and the order for the sale of the property. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 43. Accordingly, we may proceed with the merits of her claim. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 44.

¶ 27 Before we do so, however, we note that *BAC Home Loans Servicing*, 2014 IL 116311, left open the question of whether the prospective-waiver-only rule applies with equal force to section 15-1505.6(a) of the IMFL. 735 ILCS 5-1505.6(a) (West 2012). Pursuant to that provision of the IMFL, a defendant in a "residential foreclosure action" must file a motion to

No. 1-13-0580

dismiss the entire proceedings or to quash service of process on the basis of lack of personal jurisdiction 60 days after, either filing an appearance, or participating in a hearing without filing an appearance. 735 ILCS 5-1505.6(a) (West 2012). Under section 1505.6(a) of the IMFL, failure to do so within the prescribed time period waives any objections to personal jurisdiction. 735 ILCS 15-1505.6(a) (West 2012). In the present case, Beauvoir's presence at the March 8, 2012, hearing and her admitted presence at the April 26, 2012, would have triggered section 15-1505.6(a) of the IMFL so as to bar her from filing her motion to quash service of process six months later in December 2012. Nevertheless, in the present case, we are without a sufficient record to determine whether Beauvoir's foreclosed property was "residential" so as to trigger section 15-1505.6(a) of the IMFL. 735 ILCS 5-1505.6(a) (West 2012).³ In her affidavit, Beauvoir asserted that she "resides" both at the foreclosed property in Chicago that is subject to this appeal and in Texas. However, one of the affidavits of attempted but failed service filed by Bank of America, explicitly notes that the process server was informed that Beauvoir does not live at the Chicago address. In addition, in her *pro se* appearance form filed on August 20, 2012, Beauvoir listed 8809 Sutton Drive, Frisco, Texas as her address. From this contradictory record we cannot determine whether the property is "residential" so as to find Beauvoir's challenges to

³The IMFL defines "residential real estate" as: "[A]ny real estate *** which is improved with *** residential condominium units or a multiple dwelling structure containing single family dwelling units for six or fewer families living independently of each other, which residence or at least one of which condominium or dwelling units, is occupied as a principal residence *** by the mortgagor." 735 ILCS 5/15-1219 (West 2012).

No. 1-13-0580

the service of process untimely and therefore waived. If the circuit court had ordered Bank of America to file a responsive pleading to Beauvoir's motion to quash service of process, this issue could have properly been raised before and resolved by the circuit court. However, as the record stands now, it has not. Accordingly, we proceed with the merits of Beauvoir's claim. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 44.

¶ 28 Beauvoir asserts that the circuit court never had personal jurisdiction over her when it entered the default order, the judgement of foreclosure and the order of the sale of the property. She specifically alleges that the court lacked jurisdiction because she was never served with the summons or the complaint. Beauvoir therefore contends that the circuit court should not have summarily dismissed her motion to quash service of process without permitting her to go to a hearing or at the very least requiring a responsive pleading from Bank of America. For the reasons that follow, we agree.

¶ 29 In Illinois, the affidavit of service by a service processor is *prima facie* evidence that process was properly served. *Paul v. Ware*, 258 Ill. App. 3d 614 , 618 (1994). "Courts are required to indulge every presumption in favor of the return of service." *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998). To attack an underlying default judgment on the grounds that the court never obtained personal jurisdiction over the defendant, the defendant bears the burden of presenting evidence to impeach the affidavit of service. *Paul*, 258 Ill. App. 3d at 618. In order to proceed to a hearing, the defendant must present a counter-affidavit supported by corroborating evidence. See *Paul*, 258 Ill. App. 3d at 618 ("An uncorroborated defendant's affidavit merely stating that [s]he had not been personally served with summons is

No. 1-13-0580

insufficient to overcome the presumption favoring the affidavit of service"); see also *Freund Equipment*, 301 Ill. App. 3d at 166 (party's uncorroborated testimony that he was never served "is insufficient to overcome the presumption of service"). The defendant has the burden of proof at the hearing, and must show that she was not served by clear and convincing evidence. See *In re Jafree*, 93 Ill. 2d 450, 455 (1982) ("The affidavit of service should be considered *prima facie* evidence that the process was properly served. It should not be set aside unless the return has been impeached by clear and satisfactory evidence.").

¶ 30 As already noted above, in the present case, the circuit court denied Beauvoir's motion to quash service of process solely on the basis of her pleading and the record before it. That record contains a copy of the return of summons, which includes special process server Richard White's affidavit of service, attesting to the fact that he personally served Beauvoir with the summons at 5:46 p.m., on January 12, 2012, at 8809 Sutton Drive, in Frisco, Texas. In her affidavit, filed with the circuit court, Beauvoir admitted that she was in Frisco, Texas, visiting her daughter at the time of the alleged service, but denied that she was served process. To corroborate her claim that she was never served her with the summons and complaint, Beauvoir pointed to numerous defects in the process server's affidavit, namely: (1) that the affidavit was not signed by the process server; and (2) that it inaccurately described the person served as a black female approximately 70 years old, 6'7" tall and weighing 160 pounds, when in fact Beauvoir is 78 years old, 5'4" tall and weighs 180 pounds. Taking into account the gross discrepancies in the description of Beauvoir and the person actually served, as well as the process server's failure to sign his affidavit, we hold that Beauvoir presented sufficient corroborative evidence to proceed

No. 1-13-0580

to an evidentiary hearing to determine whether process was proper. We therefore conclude that the circuit court erred in denying Beauvoir's motion to quash service of process, and remand for further proceedings.

¶ 31

III. CONCLUSION

¶ 32 For the aforementioned reasons, we reverse and remand the judgment of the circuit court.

¶ 33 Reversed and remanded.