

No. 1-13-1165

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

JP MORGAN CHASE BANK, National)	Appeal from the
Association, as successor by merger to Chase)	Circuit Court of
Home Finance, LLC,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10 CH 9886
)	
RANDY R. EMERY, JEREMIAH R. EMERY,)	
JP MORGAN CHASE BANK, NA, f/k/a)	
CHASE MANHATTAN BANK,)	Honorable
)	Michael F. Otto,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Order approving report of sale and distribution and confirming sale was not abuse of discretion; record indicated that defendant was properly served; plaintiff was not required to provide notice of hearing where defendant had not entered an appearance; judgment affirmed.

¶ 2 Randy Emery, *pro se* defendant in a mortgage foreclosure suit brought by plaintiff, JPMorgan Chase Bank, National Association, appeals from an order of the circuit court approving the report of sale and distribution of his property located at 2912 North Richmond

Street in Chicago. On appeal, defendant contends he was not properly served with notice of the foreclosure and sale and was not informed of the proceeding where he was found in default and a judgment for foreclosure and sale was entered. We affirm.

¶ 3 Initially, we note that the record does not contain any reports of proceedings. The common law record reveals the following relevant information.

¶ 4 On March 10, 2010, plaintiff¹ filed a foreclosure complaint against defendant for failure to make payments on a mortgage loan. On March 19, 2010, a special process server signed a notarized affidavit stating that he had personally served defendant with a summons and the complaint on March 17, 2010 at 7:35 p.m. at defendant's home at 2912 North Richmond Street. The affidavit also included a physical description of defendant.

¶ 5 Pursuant to plaintiff's motion filed on August 1, 2012, on August 28, 2012, the court entered an order of default against defendant for having failed "to appear and/or plead" and a judgment for foreclosure and sale of the subject property.

¶ 6 On November 12, 2012, notice of sale was mailed to defendant that stated the property would be sold at public auction on November 30, 2012. Ultimately, plaintiff purchased the property.

¶ 7 On December 10, 2012, plaintiff filed a motion for an order approving the report of sale and distribution. In his response filed on February 13, 2013, defendant asserted that although the court file and other sources showed he was served by a special process server on March 17,

¹ At the outset of this case, plaintiff was Chase Home Finance, LLC. However, pursuant to a motion filed by plaintiff, on August 28, 2012, the circuit court entered an order substituting JPMorgan Chase Bank, National Association, as successor by merger to Chase Home Finance, LLC, as plaintiff.

2010, "such indicia of service is false" and he was never properly served with due process of any summons or complaint. Defendant further stated that he would testify to that effect. Defendant requested that the court set a hearing on the issue of service of process, vacate the judgment of foreclosure and sale if service of process was lacking, inadequate, or defective, and grant further relief as it deemed equitable and just. Nonetheless, at a proceeding on March 12, 2013, the court entered an order approving the report of sale and distribution.

¶ 8 On April 9, 2013, defendant timely filed a notice of appeal that listed March 12, 2013 as the date of the order being appealed. Defendant's notice of appeal additionally stated that he was "appealing the [d]ecision of the [j]udge***approving the sale of my house on 2912 N. Richmond St."

¶ 9 In this court, defendant contends he was not properly served with "foreclosure and my home sale papers" and seeks a reversal of "that decision taken by the trial court."

¶ 10 As noted above, the record contains no reports of proceedings, bystander's reports, or agreed statements of facts. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). An appellant has the burden to present a sufficiently complete record of the proceedings to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which may arise from the incompleteness of the record are resolved against the appellant. *Id.* at 392. Further, when the record on appeal is incomplete, a reviewing court should indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly. *Moening v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶ 38.

¶ 11 Turning to the merits of defendant's contention, as requested in defendant's notice of appeal, we consider whether the order approving the sale of the property was proper. Our analysis is governed by section 15-1508 of the Illinois Mortgage Foreclosure Law (Foreclosure Law), which lists four reasons for a court to reject a sale: (1) notice of the judicial sale was not given; (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. 735 ILCS 5/15-1508(b) (West 2010). We review a court's decision to confirm or reject a judicial sale for an abuse of discretion. *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 26.

¶ 12 In his brief, defendant contends he was not properly served with "foreclosure and my home sale papers." Assuming defendant asserts that he was not notified of the judicial sale, his claim fails. Prior to a public sale, the mortgagee must provide notice to all parties in the cause who have appeared and have not been found in default for failure to plead. 735 ILCS 5/15-1507(c)(3) (West 2010). Here, however, because defendant had not appeared, plaintiff was not required to provide notice of the impending sale. Regardless, plaintiff mailed defendant notice of the sale on November 12, 2012—a procedure that was later codified in Illinois Supreme Court Rule 113(f)(1) (eff. May 1, 2013) (in addition to the Foreclosure Law's notice requirements, the plaintiff's attorney must send notice by mail to all defendants, including defendants in default, of the foreclosure sale date, time, and location). Defendant has not asserted any other grounds for rejecting the judicial sale. Accordingly, we do not find that the court abused its discretion when it approved the sale of the property.

¶ 13 We next consider defendant's contention that he was never properly served with notice of plaintiff's intent to foreclose on the property. Where a defendant has neither waived process nor

entered a general appearance, a judgment entered without service of process is void (*State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986)) and therefore may be attacked and vacated at any time (*In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989)).

¶ 14 The purpose of service is to notify a party of pending litigation and thus secure his presence. *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 838 (1992). Further, absent the appearance of the defendant or waiver of process, the service of summons "in the manner directed by statute" is necessary to create personal jurisdiction over the defendant. *Metrobank v. Cannatello*, 2012 IL App (1st) 110529, ¶ 15. Under the Foreclosure Law, a special process server may serve a defendant by leaving a copy of the summons with the defendant personally. See 735 ILCS 5/2-202(a-5), 2-203(a), 15-1107(a) (West 2010). This is the method plaintiff used to serve defendant.

¶ 15 In the context of personal service, return of summons is *prima facie* proof of proper service and courts are required to indulge every reasonable presumption in favor of the return. *MB Financial Bank, N.A., v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 24. The return of summons can only be overcome by clear and convincing evidence (*Winning Moves, Inc.*, 238 Ill. App. 3d at 838), a standard that is the same whether the return is filed by a process server or a deputy sheriff (*Freund Equipment v. Fox*, 301 Ill. App. 3d 163, 166 (1998)). The uncorroborated testimony of the party upon whom service is made is not enough to set aside the return. *Ted & Paul, LLC*, 2013 IL App (1st) 122077 at ¶ 24.

¶ 16 Here, defendant has failed to overcome the presumption that he was properly served. The record includes the process server's affidavit that states defendant was personally served with the summons and complaint on March 17, 2010 at 2912 North Richmond Street. Defendant's

statements that the "indicia of service" are false and that he was never properly served are insufficient to set aside the return of service. See *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 724 (2004) (a person's mere testimony that he was not served is insufficient to overcome the presumption of service). Apart from his bare assertions, defendant has not presented any evidence that he was not served. As such, the court had personal jurisdiction over defendant and the order of foreclosure and sale of the property were properly entered. See *Ted & Paul, LLC*, 2013 IL App (1st) 122077 at ¶ 25.

¶ 17 Lastly, defendant contends he was not informed of the proceeding held on August 28, 2012—the proceeding at which the order of default and judgment for foreclosure and sale were entered. Defendant had not filed an appearance when plaintiff filed the corresponding motions. As a result, plaintiff was not required to provide notice to defendant.² *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226 (1986). See also Cook Co. Cir. Ct. R. 2.1(a) (Aug. 21, 2000) (written notice of the hearing of all motions shall be given to all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead, and to all parties whose time to appear has not expired on the date of the notice).

¶ 18 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 19 Affirmed.

² We note that the Cook County Clerk of the Circuit Court's website indicates that plaintiff filed a proof of service on August 1, 2012, which is the same date plaintiff filed the motions for default and judgment for foreclosure and sale.