

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 DISTRICT

DEUTSCHE BANK NATIONAL TRUST CO.,) Appeal from the Circuit Court of
) Cook County
Plaintiff-Appellee,)
v.)
) No. 11 CH 03195
)
CHRISTOPHER DEVINS,) Honorable
) Lisa Ann Marino,
) Judge Presiding
Defendant-Appellant,)
)
)
(Alpine Capital Investments LLC, East View Park)
Condominium Association, Unknown Owners and)
Non Record Claimants, Defendants.))

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

Held: There was no error in the denial of the defendant's motion to quash service by publication where the plaintiff's affidavits in support of such service sufficiently attested to the affiant's diligent attempts to locate and personally serve the defendant prior to publication.

¶ 1 On January 25, 2011, the plaintiff, Deutsche Bank National Trust Company, filed an action for foreclosure against the defendant, Christopher Devins, under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.* (West 2010)). After numerous efforts at personal service failed, the defendant was served by publication but failed to appear, and on May 3, 2012, the circuit court entered a default order against him and a judgment of foreclosure and sale of the subject property. The defendant subsequently appeared and filed a motion to quash service of process which was denied by the trial court. He now appeals, arguing that the trial court erred in denying his motion to quash service because the affidavits in support thereof failed to comply with the requirements of section 2-206 of the Code of Civil Procedure (Code) (735 ILCS 5/2-206 (West 2010)), and Circuit Court Rule 7.3 (Rule 7.3) (Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996)). We affirm.

¶ 2 On October 23, 2006, the defendant executed a note to Long Beach Mortgage Company, secured by a mortgage on a residence located at 1717 E. 54th St. in Chicago (the property). The note was subsequently assigned to the plaintiff. As of June 1, 2010, the defendant was in default on the loan and had ceased paying any further monthly installments. The plaintiff then brought this action in the capacity of mortgagee, seeking to foreclose upon the property securing the loan.

¶ 3 On March 1, 2011, the plaintiff filed an affidavit to allow service by publication under section 2-206 of the Code. The affidavit was executed by one of the plaintiff's attorneys, Maria Georgopoulos, and attested that the defendant "resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served" upon him. The affidavit further averred that "[d]iligent inquiry has been made as to the whereabouts of [the defendant], (see exhibit A)." Attached to the affidavit as "exhibit A" was an affidavit dated February 28, 2011, executed by Mark Skrzydlak, averring as follows:

"Before me, the undersigned authority, this day, personally appeared, MATT TREADWELL [sic], who upon being first duly sworn, upon his/her oath, deposes and says:

A diligent search and inquiry to discover the name and residence of [the defendant] was performed by the following acts set forth, as particularly as is known to Mark Skrzydlak [sic], below.

After diligent search and inquiry by affiant, the residence of the subject person is unknown to the affiant."

¶ 4 The Skrzydlak affidavit then proceeded to enumerate in detail the efforts undertaken to locate the defendant, including a search of telephone, prison, and death records, in addition to numerous governmental, business, professional, and property databases. Under a section designated "other inquiries," the affiant noted that a search of an expansive private database "provided the following results: 6826 S. Wabash Ave. Chicago." Above the signature line was the word "affiant," followed by an illegible signature, under which appeared the name Mark Skrzydlak. The name "Matt Treadwell" does not appear again in the affidavit and is not alleged to have any further connection to this action.

¶ 5 The Georgopoulos affidavit also included two affidavits of attempted service executed by William Tobias, declared in both affidavits to be an employee of the court-appointed special process server. The Tobias affidavits detailed a total of 16 unsuccessful attempts to serve the defendant, 12 at the subject property, and 4 more attempts at the 6826 S. Wabash address. In both affidavits, Tobias averred that, despite these efforts, "I have been unable to effect service" of the foreclosure complaint and summons upon the defendant.

¶ 6 Thereafter, the defendant was served by publication in the Chicago Daily Law Bulletin on March 4, 11, and 18, 2011. Over one year later, the plaintiff filed its motion for a default

order and a judgment of foreclosure and sale of the subject property. The trial court granted the motion, and entered a judgment of foreclosure and sale on May 3, 2012.

¶ 7 On September 7, 2012, the defendant filed an appearance and a "Motion to Quash Service by Publication." The defendant argued that the affidavits attesting to the plaintiff's attempts to ascertain his whereabouts for personal service failed to comply with section 2-206 of the Code, or Rule 7.3. In particular, he claimed that, prior to service by publication, there was no affidavit on file by any individual purporting to have made personal efforts to locate him for service, as allegedly required by this court in the recent case of *Deutsche Bank v. Brewer*, 2012 IL App 111213, 974 N.E.2d 224. As support for his motion, the defendant attached the Georgopoulos affidavit, but, without explanation, failed to include either the Skrzydlak or the Tobias affidavits.

¶ 8 In its response to the motion to quash, the plaintiff argued (1) that the defendant failed to file a counter-affidavit showing that, with diligent inquiry, he could have been located, and that this omission was fatal to his motion to quash; and (2) the defendant also failed to attach the affidavits of Skrzydlak and Tobias, which sufficiently established that the plaintiff was diligent in its efforts to both serve and locate the defendant, so as to satisfy section 2-206 of the Code and Rule 7.3. In addition, while still maintaining that its affidavits were in compliance with *Brewer*, the plaintiff attached a supplemental affidavit of Mark Skrzydlak, rephrasing the list of searches set forth in his February 28, 2011, affidavit, to reflect that he personally conducted each individual search. The supplemental affidavit also eliminated the reference to Matt Treadwell.

¶ 9 The defendant subsequently filed a reply in support of its motion to quash, again arguing that the original Skrzydlak affidavit failed to attest to which individual made the purported "due inquiry" into his whereabouts. On March 7, 2013, the trial court denied the motion to quash, and

on June 10, 2013, entered an order confirming the judicial sale of the property. This appeal followed.

¶ 10 On appeal, the defendant asserts that his motion to quash should have been granted because the original Skrzydlak affidavit fails to comply with Rule 7.3. In particular, he argues that the reference to Matt Treadwell as the individual appearing and making the sworn statement precludes the reader from knowing who, if anyone, performed the inquiries listed in the affidavit. He further claims that, although the affidavit identifies Skrzydlak as affiant, it employs the passive voice to describe the searches undertaken rather than identifying who actually conducted the inquiry. With regard to Skrzydlak's supplemental affidavit, he argues that it may not be considered, because it was filed after the execution of service by publication rather than before it as required by Rule 7.3. For the reasons below, we reject these arguments.

¶ 11 We note first that, throughout his challenge to the plaintiff's affidavits, the defendant has failed to present his own affidavit demonstrating that upon due inquiry he could have been located. We agree with the plaintiff that such an affidavit is a prerequisite to a valid motion to quash service of process by publication. *First Bank & Trust Co. of O'Fallon v. King*, 311 Ill. App. 3d 1053, 726 N.E.2d 621 (2000); *Household Finance Corp. III v. Volpert*, 227 Ill. App. 3d 453, 455, 592 N.E.2d 98 (1992); *First Federal Savings & Loan Ass'n v. Brown*, 74 Ill. App. 3d 901, 393 N.E.2d 574 (1979). Upon the filing of the counter-affidavit, the burden shifts to the plaintiff to produce evidence that it conducted a due inquiry. *First Bank & Trust*, 311 Ill. App. 3d at 1056. If the defendant fails to file this affidavit, however, a reviewing court may presume that the decision in favor of the publishing party was correct. *Id.*, at 1056 .

¶ 12 Aside from this omission, however, the defendant's arguments are without merit. As this case turns upon a jurisdictional issue which the trial court resolved without the taking of

1-13-2259U

contested evidence, our review is *de novo*. *Madison Miracle Productions, LLC v. MGM Distribution Co.*, 2012 IL App (1st) 112334 ¶ 36-37, 978 N.E.2d 654. Section 2-206 of the Code, as supplemented by Rule 7.3, provides for service by publication in actions affecting property. Such service is appropriate if the plaintiff files an affidavit showing that the defendant “on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him,” and “stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained.” 735 ILCS 5/2–206(a) (West 2010). Rule 7.3 further explains the affidavit requirement as follows:

“Pursuant to 735 ILCS 5/2–206(a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such ‘due inquiry’ setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication.” Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 13 This court requires strict compliance with the statute governing service by publication. *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476, 860 N.E.2d 1113 (2006). A diligent inquiry means that the efforts to ascertain the defendant's whereabouts are honest and well-directed, and as full as the circumstances of the case permit. *Id.* Where the efforts have been casual, routine, or spiritless, service by publication is not justified. *Id.*

¶ 14 In this case, the affidavits submitted prior to the service by publication were sufficient to comply with Rule 7.3. Tobias averred that he made a total of 16 attempts to serve the defendant at two separate addresses, looking inside the windows and speaking to neighbors who were

either unable or unwilling to provide information. His affidavit stated that, despite these efforts, "I have been unable to effect service" of the summons and complaint upon the defendant. The Skrzydlak affidavit stated that a diligent search and inquiry "was performed by the following acts set forth, as particularly as is known to Mark Skrzydlak [sic]," followed by the statement "after diligent search and inquiry *by affiant*, the residence" of the defendant "is unknown *to the affiant*" (Emphasis added). This was sufficient to show that Skrzydlak was the individual who performed the inquiry as set forth in the affidavit. Further, it is undisputed by the parties that Skrzydlak's name is designated as the affiant in the signature portion of the affidavit. While the name Matt Treadwell appears in the prefatory paragraph, it is never again referenced in the document, and appears to be merely a typographical error on the part of the drafter. Standing alone, it is insufficient to invalidate the force of the affidavit, which was notarized, and signed by the designated affiant. See *People v. Tlatenchi*, 391 Ill. App. 3d 705, 719, 909 N.E.2d 198 (2009); *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 7, 610 N.E.2d 806 (1993).

¶ 15 We are not persuaded by the defendant's reliance upon the *Brewer* case. There, the affidavits failed to identify who attempted to serve the defendant or who conducted due inquiry as to her whereabouts. Instead, they merely averred that "attempts were made" to serve her, and, at best, that "we" searched public and online databases, never stating who actually performed the search. *Brewer*, 2012 IL App 111213 at ¶ 23-24. Here, by contrast, Skrzydlak's affidavit stated that he was the one performing the inquiry. Accordingly, the *Brewer* case is inapposite. Based upon this determination, we need not reach the defendant's argument that the supplemental Skrzydlak affidavit must also be rejected.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court denying the defendant's motion to quash service by publication.

1-13-2259U

¶ 17 Affirmed.