

No. 1-13-3555

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

WELLS FARGO BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CH 25181
)	
MIROSLAV TOMAS; AGATA TOMAS,)	Honorable
)	Daniel Patrick Brennan,
Defendants-Appellants.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

O R D E R

¶ 1 **Held:** Denial of motion to quash service of process affirmed over contention that plaintiff did not strictly comply with statutory requirements for substitute service.

¶ 2 Defendants Miroslav Tomas and Agata Tomas appeal the judgment of the circuit court of Cook County denying Miroslav's motion to quash service of process of a complaint to foreclose mortgage on the home in which he and Agata lived. Defendants contend that the court erred in denying that motion because the record shows that substitute service of process on Miroslav did

not strictly comply with the requisite statutory requirements. They thus request that we reverse the court's order and remand for further proceedings, including an evidentiary hearing.

¶ 3 The pleadings in the common law record show that on July 6, 2012, plaintiff Wells Fargo Bank, N.A., as Trustee for WAMU Mortgage Pass-through Certificates Series 2006-PRI Trust, filed a complaint to foreclose the mortgage that was executed in August 2005 between Miroslav and Washington Mutual Bank, plaintiff's predecessor in interest, on the premises commonly described as 927 Hastings Lane, Hanover Park, Illinois (the property). Special process server Craig Palmer submitted two sworn affidavits indicating he served process on Agata and Miroslav on July 15, 2012, at 11:25 a.m. In the first affidavit, Palmer averred, *inter alia*, that he personally served Agata with the summons and complaint in this case at 927 Hastings Lane, Hanover Park, Illinois. In the second affidavit, Palmer averred, *inter alia*, that he also served a set of the summons and complaint to Miroslav by substitute service at his usual place of abode, 927 Hastings Lane, Hanover Park, Illinois, by giving the documents to Agata, Miroslav's spouse and co-defendant in this case, and informing her of the contents of those documents.

¶ 4 The common law record further shows that Miroslav and Agata failed to appear and/or file a responsive pleading in this case, and that on May 8, 2013, an order of default was entered against them. A judgment of foreclosure and sale of the home was entered on that same date. On June 25, 2013, Miroslav filed a motion to quash service of process, admitting personal service upon Agata, but denying substitute service on himself. The sole issue he raised in that motion was whether substitute service took place at his "usual place of abode," as required by section 2-203(a)(2) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-203(a)(2)) (West 2012)). Miroslav argued that because Agata was standing outside their home at the time of service, that particular area could not be considered "curtilage" that is given protection under the fourth

amendment to the United States constitution, and by extension, does not constitute a part of an "abode." In support of his motion, Miroslav attached Agata's affidavit in which she averred, *inter alia*, that in July 2012, a man came to her house, located at 927 Hastings Lane in Hanover Park, Illinois, while she was "standing outside," and gave her a bundle of papers, but did not tell her what they were. Miroslav also attached his own affidavit in which he averred that he lived at 927 Hastings Lane in Hanover Park, Illinois, and that he never received a summons or complaint in this case.

¶ 5 On September 12, 2013, the circuit court denied Miroslav's motion. The property was sold the following day, and the sale was confirmed on October 16, 2013. Miroslav and Agata now appeal the circuit court's denial of Miroslav's motion to quash service of process, and our review is *de novo*. *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 13.

¶ 6 Pursuant to section 2-203 (a)(2) of the Code, substitute service of process upon a defendant may be made by leaving a copy of the summons at defendant's usual place of abode with some person of the family or a person residing there, of the age of 13 or upwards, and informing that person of the contents of the summons. 735 ILCS 5/2-203 (a)(2) (West 2012); *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309-10 (1986). The affidavit of service of the person making substituted service must show strict compliance with each of these statutory requirements. *Id.* at 309.

¶ 7 Defendants maintain that the statutory requirements of section 2-203 of the Code were not strictly complied with in this case, and therefore Miroslav was not properly served via substitute service. Specifically, they contend (1) that Agata was not informed of the contents of the documents that Palmer gave to her, and (2) that because she was standing outside the home when she was given those documents, service was not made at Miroslav's usual place of abode.

¶ 8

A. Waiver

¶ 9 Plaintiff first argues that because Miroslav did not raise the issue of whether Agata was informed of the contents of the documents with the trial court, defendants have waived it for purposes of appeal. Defendants maintain that this issue is not waived because Agata's affidavit, which was attached to Miroslav's motion to quash service of process, included her averment that Palmer gave her a bundle of papers, but did not tell her what they were. The fact remains, however, that the entirety of Miroslav's argument in his motion to quash service of process dealt with the meaning of "abode" and "curtilage" and whether substitute service took place at his "usual place of abode." Because Miroslav did not raise an argument pertaining to a failure to inform Agata regarding the contents of the documents with the court below, we find that this argument is waived. See *Cambridge Engineering Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007).

¶ 10

B. Usual Place of Abode

¶ 11 Generally, whether substitute service has been properly effectuated on a defendant at his "usual place of abode" is a question of fact. *United Bank of Loves Park v. Dohm*, 115 Ill. App. 3d 286, 289 (1983). There is a rebuttable presumption that the house where a man's wife and children reside is his "usual place of abode." *Id.* In instances of substitute service, when a return is challenged by affidavit and there are no counter-affidavits, the return itself is not even evidence. *West v. H.P.H., Inc.*, 231 Ill. App. 3d 1, 4-5 (1992). That said, we note that in relation to matters that are within the personal knowledge of the officer making the return, the process server's return is *prima facie* evidence of substitute service which cannot be set aside upon the uncorroborated affidavit of the person served. *Nibco Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). Rather, it can only be set aside upon by clear and satisfactory evidence. *Id.* Contrary to

defendants' contention, this rule applies equally where service of process is made by a sheriff or by a special process server. See *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶¶ 3, 28. However, whether the person occupies a home or property as his or her "usual place of abode," is not generally a matter presumptively within the personal knowledge of the process server.

¶ 12 Here, defendants point to Agata's affidavit, in which she states that a man came to her home, located at 927 Hastings Lane in Hanover Park, Illinois, while she was "standing outside" and gave her a bundle of papers. They maintain that because plaintiff did not submit a counter-affidavit to rebut Agata's assertions, an evidentiary hearing is required to determine whether plaintiff complied with the requirements for substitute service of process.

¶ 13 We find that an evidentiary hearing is not warranted in this case because defendants' argument does not relate to a factual dispute, but rather, to a question of law. Neither of the defendants contest the assertions made by Palmer, in his return affidavit, that he gave Agata, Miroslav's wife, a set of the summons and complaint intended for Miroslav, at the property on which defendants' home and place of dwelling existed, and that both he and Agata were standing on the property at that time. Instead, what defendants seek to refute is the legal consequence of this occurrence, and they base their argument on an asserted legal distinction between the inside of a house and outside of it. Defendants maintain that the circuit court should have found that Palmer was not at Miroslav's "usual place of abode" because it was outside of "the curtilage" of the house itself and therefore not a proxy for the house and not within the meaning of "abode" pursuant to section 2-203 of the Code. They essentially suggest that because there is no porch or fence surrounding the house, Palmer's delivery of the summons and complaint occurred outside of the "usual place of abode." In so arguing, they maintain that the word "abode" as used in

section 2-203 of the Code is ambiguous, and that cases construing that word, as well as the word "curtilage" in relation to search and seizure cases are persuasive and guiding authority on the meaning of "abode."

¶ 14 There is simply no legal precedent for extending the protection of the fourth amendment to the procedural requirements for process in a civil case, and we are not persuaded by the rationale urged by defendants for establishing new precedent. Nor do we find "abode" as used in section 2-203 of the Code to be ambiguous. The question of whether a statute, or any part thereof, is ambiguous, is a matter of statutory interpretation, the primary rule of which is to ascertain and give effect to the intent of the legislature. *People v. Donoho*, 204 Ill. 2d 159, 171 (2003). In doing so, a court should consider the objects and purposes sought by the statute at issue, in addition to the plain and ordinary meaning of the statutory language. *Id.* at 171-72. The underlying consideration of the phrase "usual place of abode" as used in section 2-203 of the Code is whether substitute service at the chosen dwelling place is reasonably likely to provide defendant with actual notice of the proceedings. *Dohm*, 115 Ill. App. 3d at 289.

¶ 15 Here, defendants submit, and we agree, that the plain and ordinary meaning of "abode" is a person's home. Defendants do not contest that the address at issue was that of the home in which Miroslav lived. Accordingly, we find that the purpose of section 2-203 of the Code was met in that Miroslav was reasonably likely to receive actual notice of the proceedings in this case when Palmer gave the requisite documents to Agata when she was at the home in which Miroslav lived. We do not believe that the fact that Agata was standing outside the home, instead of inside of it, would have any impact on the likelihood that Miroslav would receive notice of the proceedings. Nor do we believe that the language of the Code requires that the person served be standing inside the home at the time substitute service is made, given that section 2-203 specifies

that the summons should be left "at" the defendant's usual place of abode, and does not state that it must be left "inside" of that abode. 735 ILCS 5/2-203 (a)(2) (West 2012). Because we find that the term "abode," as used in section 2-203 of the Code, is not ambiguous, we need not turn to outside sources to interpret its meaning. *Donoho*, 204 Ill. 2d at 172. We thus find that the circuit court did not err in denying Miroslav's motion to quash service of process.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.