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2014 IL App (3d) 130562-U

Order filed May 7, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

|                                       |   |                               |
|---------------------------------------|---|-------------------------------|
| THE ENCLAVE CONDOMINIUM ASSOCIATION,  | ) | Appeal from the Circuit Court |
|                                       | ) | of the 12th Judicial Circuit  |
|                                       | ) | Will County, Illinois         |
| Plaintiff-Appellee,                   | ) |                               |
|                                       | ) | Appeal No. 3-13-0562          |
| v.                                    | ) | Circuit No. 11-LM-333         |
|                                       | ) |                               |
| JOSEPH B. KIRK AND UNKNOWN OCCUPANTS, | ) |                               |
|                                       | ) | Honorable                     |
|                                       | ) | Mark Thomas Carney,           |
| Defendants-Appellants.                | ) | Judge, Presiding.             |

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and Schmidt concurred with the judgment.

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**ORDER**

¶ 1 *Held:* Trial court erred in denying defendant's motion to vacate possession order and quash service where plaintiff did not strictly comply with the requirements for substitute service.

¶ 2 After defendant Joseph B. Kirk failed to pay expenses related to his condominium to plaintiff, The Enclave Condominium Association, plaintiff filed a complaint for possession. The trial court entered an order of possession in favor of plaintiff, and the county sheriff executed the order. Thereafter, defendant filed a motion to vacate the possession order and quash service. The trial court denied defendant's motion. We reverse.

¶ 3 On February 4, 2011, plaintiff, The Enclave Condominium Association, filed a complaint for possession of condominium unit, assessments and common expenses against defendant, the owner of condominium unit A, at 131 Enclave Circle, Bolingbrook. According to the complaint, defendant failed to pay common expenses to plaintiff in the amount of \$2,243.09. Plaintiff's complaint sought possession of defendant's condominium and a judgment against defendant for his unpaid common expenses, as well as late charges, interest, fines, court costs and attorney's fees.

¶ 4 On March 4, 2011, plaintiff filed an Affidavit of Non-Service signed by a special process server, stating that service of the complaint and summons on defendant was "not completed." The affidavit listed the address where defendant was to be served as "131 Enclave Circle, Unit A, Bolingbrook, IL 60440." The affidavit contained the following comments from the special process server: "On 2-23-2011 at 4:38 pm Investigator arrived at location and spoke with Abrom Smith M/AA/45 who stated that the defendant is the landlord and does not live at location. He stated that the defendant comes to pick up the rent and that he does not have a current address for him. A skip trace was run, and no new address was found for the defendant." On the same date, plaintiff filed an affidavit for service by posting, which indicated that "process cannot be served on defendant" because he "cannot be found after diligent inquiry." The affidavit listed defendant's "place of residence" as "131 Enclave Circle, Unit A, Bolingbrook, IL 60440."

¶ 5 On April 1, 2011, the trial court entered a judgment and order for possession in favor of plaintiff and against defendant, granting plaintiff possession of defendant's condominium in order to recover the money defendant owed. Enforcement of the possession order was stayed until June 1, 2011.

¶ 6 In June and July, 2011, defendant sent letters to plaintiff's attorneys, requesting that plaintiff extend him a payment plan to repay the amounts he owed. On July 25, 2011, plaintiff

agreed to cancel the impending eviction and set up a payment plan for defendant. Defendant signed a payment plan agreement with plaintiff, which allowed plaintiff to evict defendant without further notice if defendant defaulted on the payment plan. Defendant paid plaintiff for several months pursuant to the agreement but stopped making payments in December 2011.

¶ 7 On June 6, 2012, plaintiff filed an emergency motion for enforcement of the order of possession. The trial court granted plaintiff's motion and entered an order directing the sheriff to immediately enforce the order of possession. The sheriff executed plaintiff's order for possession, and plaintiff gained possession of defendant's condominium unit on July 17, 2012.

¶ 8 On April 12, 2013, defendant filed a combined motion to vacate and quash service, pursuant to sections 2-301 and 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301, 2-1401 (West 2010)). Defendant's motion asserted that the trial court lacked jurisdiction over him because he was never personally served with the summons and complaint and plaintiff failed to strictly comply with the requirements for service by posting. According to defendant, his usual place of abode beginning in the fall of 2011 was 626 Bethel in Joliet. In his prayer for relief, defendant asked the court to (1) quash service on him, (2) vacate all orders entered in the case, and (3) dismiss the case for lack of diligent service.

¶ 9 The trial court denied defendant's combined motion to vacate and quash service, finding that (1) defendant waived his right to object to the jurisdiction of the court by filing his motion to vacate, and (2) plaintiff properly effectuated service by posting.

¶ 10 ANALYSIS

¶ 11 Defendant argues that the trial court erred in denying his motion to quash service and vacate the judgment against him because plaintiff's service by posting did not strictly comply with the statute, thereby depriving the court of jurisdiction over him. Plaintiff responds that the trial court properly denied defendant's motion because (1) defendant forfeited any objection to

the trial court's jurisdiction by filing a combined motion to quash service and vacate judgment, (2) defendant was properly served by posting, and (3) defendant had actual notice of the complaint, as evidenced by his correspondence to plaintiff's attorney requesting a payment plan before the eviction occurred.

¶ 12 A court acquires jurisdiction over a party through a summons or by voluntary appearance. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 10. An order entered by a court that lacks personal jurisdiction is void and may be attacked at any time. *Id.* Whether a trial court has obtained personal jurisdiction over a defendant presents a legal question, which we review *de novo*. *Sutton v. Ekong*, 2013 IL App (1st) 121975, ¶ 17.

¶ 13 I. Forfeiture of jurisdictional objection

¶ 14 A party contesting jurisdiction on the ground of insufficiency of service of process must object by filing a motion to dismiss the proceeding or a motion to quash service before filing any other pleading other than a motion for an extension of time. 735 ILCS 5/2-301(a) (West 2010). A motion challenging jurisdiction "may be made singly or included with others in a combined motion." *Id.*; see *Cardenas Marketing Network, Inc. v. Pabon*, 2012 IL App (1st) 111645, ¶ 23. However, filing a responsive pleading or motion (other than a motion for extension of time) prior to filing a motion objecting to the court's jurisdiction "waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5) (West 2010).

¶ 15 By its terms, section 2-301 of the Code provides for forfeiture of an objection to personal jurisdiction "only if the party files a responsive pleading \*\*\* before filing a motion asserting the jurisdictional objection." *Pabon*, 2012 IL App (1st) 111645, ¶ 23. Section 2-301 does not prohibit a defendant from filing a combined motion to quash service and vacate judgment as long as the motion raises only jurisdictional matters, as opposed to substantive issues of the lawsuit. *Kotlisky v. Kotlisky*, 195 Ill. App. 3d 725, 732 (1990). If a defendant's combined motion does

nothing more than object to the court's jurisdiction, it sufficiently complies with section 2-301 and does not constitute a forfeiture of the defendant's jurisdictional objection. *Kottmeyer v. Consolidated Rail Corp.*, 219 Ill. App. 3d 968, 970 (1991); *Kotlinsky*, 195 Ill. App. 3d at 732.

¶ 16 Here, defendant's motion was a combined motion to quash service and vacate the trial court's judgment against him. The relief defendant sought in the motion – to have service quashed, the judgment vacated, and the case against him dismissed – was all premised on the court's lack of jurisdiction over him. The motion did not address any substantive issues of plaintiff's complaint or raise any issue beyond the jurisdictional one. Thus, defendant complied with section 2-301 of the Code and did not forfeit his objection to jurisdiction. See *Kottmeyer*, 219 Ill. App. 3d at 970; *Kotlinsky*, 195 Ill. App. 3d at 732.

¶ 17 II. Plaintiff's compliance with constructive service statute

¶ 18 "Every defendant in an action filed against him in this State is entitled to receive the best possible notice of the pending suit and it is only where personal service of summons cannot be had, that substituted or constructive service may be permitted." *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 927 (1978). Securing jurisdiction by constructive service is a "concession of the law to the hard circumstance of necessity" that is not readily made. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31 (2006) (quoting *Graham v. O'Connor*, 350 Ill. 36, 40 (1932)).

¶ 19 Constructive service is only allowable in certain limited cases and then only after strict compliance with the statutes governing such service. *Id.* at 32. "The party claiming benefit of constructive service bears the burden of showing strict compliance with every requirement of the statute, and nothing else will confer jurisdiction to the court or grant validity to the court's judgment." *Id.*

¶ 20 Section 9-107 of the Code establishes a method of constructive service in forcible entry and detainer cases. 735 ILCS 5/9-107 (West 2010). It allows constructive service by mailing and posting upon the filing of an affidavit by the plaintiff, his or her agent or attorney "stating that the defendant or unknown occupant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, \*\*\* and also stating the place of residence of the defendant or unknown occupant, if known, or if not known, that upon diligent inquiry the affiant has not been able to ascertain the defendant's or unknown occupant's place of residence." *Id.*

¶ 21 The phrases "due inquiry" and "diligent inquiry" in section 9-107 are not useless phrases but are part of the statute for a purpose. *Nasolo*, 364 Ill. App. 3d at 32. Constructive service is permissible only if the plaintiff shows *both* "due inquiry" in ascertaining the defendant's whereabouts and "diligent inquiry" in ascertaining the defendant's residence. *Id.*; *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 27. An affidavit for constructive service stating that the defendant cannot be found must state both that the plaintiff conducted "diligent inquiry" in ascertaining the defendant's residence and "due inquiry" in ascertaining the defendant's whereabouts. See *Cotton*, 2012 IL App (1st) 102438, ¶ 18.

¶ 22 Here, the affidavit for service by posting filed by plaintiff states: "[P]rocess cannot be served on defendant" because he "cannot be found after diligent inquiry." However, the affidavit does not state "that upon diligent inquiry the affiant has not been able to ascertain the defendant's or unknown occupant's place of residence." See 735 ILCS 5/9-107 (West 2010). Instead, the affidavit lists defendant's "place of residence" as "131 Enclave Circle, Unit A, Bolingbrook, IL 60440" even though plaintiff had substantial knowledge that defendant did not live there. Because the affidavit in this case did not state that plaintiff conducted a "diligent inquiry" to obtain defendant's place of residence, it does not strictly comply with the constructive notice statute and, therefore, does not vest the court with jurisdiction over defendant.

¶ 23

### III. Actual Notice

¶ 24

"[A] judgment rendered without personal jurisdiction is void even if the defendant had actual knowledge of the proceedings." *In re Marriage of Kohl*, 334 Ill. App. 3d 867, 880 (2002). Actual notice does not validate a court's order that was rendered without personal jurisdiction over the defendant. See *Sutton*, 2013 IL App (1st) 121975, ¶ 24.

¶ 25

Here, it appears from the record that defendant may have had notice of plaintiff's complaint against him as of June 2011, based on his correspondence to plaintiff's attorney requesting a payment plan. However, that was two months after the trial court entered its judgment and order of possession against defendant. There is no evidence in the record that defendant had notice of plaintiff's lawsuit prior to the trial court's entry of the order of possession. Moreover, even if defendant had actual notice of plaintiff's complaint before the court entered judgment against him, any such notice is irrelevant because plaintiff's defective service by posting did not confer jurisdiction over defendant. The court's judgment entered without personal jurisdiction over defendant was void and could not be validated even if defendant had actual knowledge of the proceedings against him. See *Kohl*, 334 Ill. App. 3d at 880.

¶ 26

The judgment of the circuit court of Will County is reversed.

¶ 27

Reversed.