

No. 1-13-0287

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

BAYVIEW LOAN SERVICING, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 M1 709341
)	
MAIAA GANCHEVSKA; PAVLO MITKEVICH; and)	
ALL UNKNOWN OCCUPANTS,)	Honorable
)	Martin Moltz,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 **Held:** The trial court properly denied defendants' motion to quash service where the record revealed that plaintiff strictly complied with the requirements for service by posting.

¶ 2 Defendants Maiaa Ganchevska and Pavlo Mitkevich (defendants) appeal from the trial court's order denying their combined motion to quash service and vacate a default judgment in favor of plaintiff Bayview Loan Servicing. On appeal, defendants contend that plaintiff failed to

conduct a due inquiry when, although it knew that defendants were represented by counsel, it failed to contact counsel prior to resorting to constructive service. We affirm.

¶ 3 In April 2012, plaintiff filed a forcible entry and detainer action in the circuit court against Mark Laskowski and all "unknown occupants" seeking possession of 1106 East Oakton Street in Arlington Heights (the property). The complaint alleged that plaintiff was entitled to possession of the property because it had purchased the property after foreclosure. Attached to the complaint was a special process server's affidavit, averring that the "unknown occupants" had been served on January 26, 2012. Specifically, the affidavit averred that "Maya Grachevska," who rented the property from Laskowski alongside her husband, had been served.

¶ 4 The trial court subsequently entered an order of possession against Laskowski and all "unknown occupants." Plaintiff then moved to amend the complaint to specifically name the "unknown" tenants, that is, defendants. After the trial court granted the motion, an alias summons was issued. The record reflects that a special process server attempted, unsuccessfully, to serve defendants at the property six times between Friday, August 17, 2012 and Thursday, August 23, 2012. The service attempts took place in the morning, the afternoon, and the evening. The special process server averred that the same car was always in the driveway, but that he was unable to serve defendants. On August 30, 2012, plaintiff's counsel filed an affidavit for service by posting, which indicated that defendants "cannot be found after diligent inquiry." The affidavit listed defendants' "place of residence" as 1106 East Oakton Street, *i.e.*, the property. Plaintiff then served defendants by posting. A copy of the notice was also mailed to defendants at the property.

¶ 5 On September 20, 2012, the trial court entered an order of possession in favor of plaintiff. Enforcement of the possession order was stayed until September 27, 2012.

¶ 6 In October 2012, counsel entered an appearance on behalf of defendants. Counsel then filed a motion to quash service and vacate the default judgment, alleging that defendants were in the Ukraine on August 30, 2012, had never been served a summons or complaint in the instant action, and were not aware that they were to appear before the court on September 20, 2012. The motion further alleged that although plaintiff's counsel knew that defendants were represented by counsel, he failed to exercise diligent inquiry when he did not contact defendants' counsel before serving them by posting.

¶ 7 Attached to the motion in support was the affidavit of defendant Mitkevich. Mitkevich averred that he did not receive notice of the August 30, 2012 court date and that he and his wife were in the Ukraine between July 18 and September 10, 2012. Also attached to the motion were copies of certain emails between plaintiff's counsel and defendants' counsel. These emails, from June 2012, discuss serving defendants, as well as an offer of \$1,000 to defendants if they were to leave the property in order to avoid litigation, and defendants' counteroffer to either vacate in exchange for \$20,000 or stay in the property for a year. The final email from plaintiff's counsel requested that defendants' counsel "confirm that you are authorized to accept notices" on defendants' behalf and would accept service on behalf of defendants.

¶ 8 The trial court denied defendant's combined motion to quash service and vacate the judgment, after a hearing, finding that plaintiff exercised due diligence and that service upon defendants was valid.

¶ 9 On appeal, defendants contend that service by posting was improper because plaintiff knew that defendants were represented by counsel, yet failed to contact counsel first. Plaintiff responds that it strictly complied with the requirements of section 9-107 of Code of Civil Procedure (the Code) (see 735 ILCS 5/9-107 (West 2012)), and that it was not required to contact defendants' counsel. Plaintiff further contends that the counteraffidavit filed in support of the motion to quash failed to establish that defendants could have been found by due inquiry.

¶ 10 Section 9-107 of the Code establishes a method of constructive service in forcible entry and detainer actions. When a plaintiff is unable to obtain personal service on the defendant or unknown occupant and a duly issued summons in the action is returned stating that service cannot be obtained, then the plaintiff or plaintiff's counsel may file an affidavit stating that "the defendant or unknown occupant *** on due inquiry cannot be found, *** and also stating the place of residence of the defendant or unknown occupant, if known." 735 ILCS 5/9-107 (West 2012). A defendant may then be notified by the posting and mailing of notices that state, *inter alia*, the nature of the case, the time and place for trial, and that unless the defendant or the unknown occupant appears trial, judgment will be entered by default. See 735 ILCS 5/9-107 (West 2012). The sheriff must post copies of the notice in three places including, *inter alia*, "the neighborhood of the court where the cause is to be tried, at least 10 days prior to the day set for the appearance," and shall mail one copy addressed to the defendant at the defendant's residence, if the place of residence is stated in any affidavit. See 735 ILCS 5/9-107 (West 2012).

¶ 11 Constructive service is permitted only when the plaintiff strictly complies with the statute's requirements that it conduct "due inquiry" and "diligent inquiry" before moving for constructive service. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App.

3d 26, 32 (2006). A superficial or perfunctory inquiry will not suffice, but instead a plaintiff must make an inquiry as comprehensive as circumstances allow. *Id.* "Depending upon the particular circumstances of a case, inquiring with neighbors, inquiring with known counsel, checking court records, and investigating employment information may be part of the 'due inquiry' and 'diligent inquiry' required of a plaintiff intending to rely on constructive service." *Id.* Because a plaintiff receives the benefit of constructive service, the plaintiff also has the burden to show strict compliance with all statutory requirements. *Id.* A defendant may challenge the plaintiff's affidavit by filing an affidavit showing that upon due inquiry, he could have been found. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18.

¶ 12 If service of process by publication or posting is defective, then the circuit court does not acquire personal jurisdiction over the party that was served. *Cotton*, 2012 IL App (1st) 102438, ¶ 12. A judgment entered without personal jurisdiction is void regardless of whether the party had actual knowledge of the proceedings. *Id.* This court reviews *de novo* whether personal jurisdiction was conferred. *Id.*

¶ 13 In the case at bar, we find that plaintiff complied with section 9-107. The record reveals that plaintiff knew that defendants resided at the property and had previously served them, as "unknown occupants," there in January 2012. Consequently, after amending the complaint to specifically name defendants, plaintiff attempted to serve them at the property six times between August 17 and August 23, 2012. The attempts at service took place on both weekdays and the weekend, and at various times throughout the day. It was only after these six attempts at personal service that plaintiff's counsel filed an affidavit for service by posting averring that defendants could not be found after diligent inquiry. See 735 ILCS 5/9-107 (West 2012) (when the plaintiff

cannot obtain personal service on the defendant then the plaintiff or its attorney can file an affidavit stating, *inter alia*, that the defendant cannot be found after due inquiry such that process may be served upon him and stating defendant's residence if known).

¶ 14 We are unpersuaded by defendants' reliance on *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26 (2006), and *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, for the proposition that plaintiff should have inquired with defendants' counsel prior to resorting to constructive service. Initially, we note that the court in *Nasolo* merely stated that depending on the circumstances, a diligent inquiry "may" require the plaintiff to inquire with the defendant's known counsel. *Nasolo*, 364 Ill. App. 3d at 26. However, the main distinction is the circumstances, that is, in *Nasolo* and *Cotton*, the defendant stated that he or she could have been found at a work address known to the plaintiff. See *Nasolo*, 364 Ill. App. 3d at 30, 32-33 (noting that the defendant's affidavit, in which she averred that she was generally at work when the plaintiff attempted service and that the plaintiff knew her work address as it was disclosed on her rental application, left a significant question as to the sufficiency of the plaintiff's inquiry); *Cotton*, 2012 IL App (1st) 102438, ¶ 30 (holding that, despite the plaintiff's 19 attempts to serve the defendant at 2 different residences over a period of almost a month, the defendant's affidavit, averring that the plaintiff could have found him at his place of employment and that plaintiff knew where he worked, called into question whether the plaintiff had exercised due inquiry). In the case at bar, defendant Mitkevich averred that his family was in the Ukraine between July 18 and September 10, 2012, he did not however, aver that either his attorney or plaintiff was aware that defendants were out of the country or that he could have been found after diligent inquiry. *Cotton*, 2012 IL App (1st) 102438, ¶ 18 (a defendant may challenge the

plaintiff's affidavit by filing an affidavit showing that upon due inquiry, he could have been found).

¶ 15 Contrary to defendants' argument on appeal, there is no requirement that a plaintiff contact a defendant's counsel before resorting to constructive service. Although defendants are correct that this court has previously held that "due inquiry" may include "inquiring with neighbors, inquiring with known counsel, checking court records, and investigating employment information," we also recognize that whether a plaintiff has exercised the requisite due inquiry depends "upon the particular circumstances of a case." See *Nasolo*, 364 Ill. App. 3d at 32. In this case, although the record reveals that plaintiff's counsel corresponded with defendants' counsel and requested that defendants' counsel confirm that he would accept notices upon behalf of defendants, there is no indication in the record that defendants' counsel agreed to accept notices or service on their behalf.

¶ 16 Ultimately, here, while plaintiff could have contacted defendants' counsel after it was unable to serve them at the property it was not required to do so. See *Nasolo*, 364 Ill. App. 3d at 32 (although due inquiry may include contacting defendant's counsel, whether a plaintiff has exercised due inquiry depends upon the circumstances of each individual case). Consequently, plaintiff's failure to contact defendants' counsel prior to resorting to constructive service cannot establish a failure to strictly comply with section 9-107 of the Code.

¶ 17 Accordingly, for the foregoing reasons, we affirm the judgment of the trial court denying defendants' motion to quash.

¶ 18 Affirmed.