

No. 1-14-0085

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

| | | |
|---|---|------------------|
| THE BANK OF NEW YORK, as Trustee, etc., |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 CH 27480 |
| |) | |
| GEORGE DIAMOND and SHERYL DIAMOND, |) | Honorable |
| |) | Allen P. Walker, |
| Defendants-Appellants. |) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court had personal jurisdiction over defendant mortgagors so as to enter a judgment of foreclosure. The defendants did not provide sufficient evidence to rebut the process server's affidavit, which is *prima facie* proof of service, as to each defendant.

¶ 2 In this mortgage foreclosure action, defendants, George and Sheryl Diamond, appeal the circuit court's order denying their motion to vacate the foreclosure judgment and confirmation of sale pursuant to section 2-1401 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-1401 (West 2012). On appeal, defendants contend that clear and convincing evidence existed to rebut

the affidavits of service and they did not receive proper personal or substitute service of the foreclosure action. We affirm.

¶ 3 On July 29, 2008, the Bank of New York (BNY) filed a complaint to foreclose a mortgage against the defendants regarding a property at 45 Brookside Drive in Lemont, Illinois. The affidavit of the process server, Robin Sanfratello of ProVest LLC, averred that personal service on Sheryl was effectuated on August 1, 2008, by giving Sheryl a copy of the summons and complaint at the subject property. A separate affidavit of Sanfratello averred that substitute service was effectuated on George by leaving a copy of the complaint and summons with Sheryl at the same time she was served and by informing Sheryl of the contents. The Diamonds did not answer the complaint or otherwise appear.

¶ 4 On October 17, 2008, BNY moved for a default judgment, asserting that 30 days had passed since all defendants (the Diamonds and the homebuilder) had been served. On June 13, 2012, the circuit court entered an order of default judgment of foreclosure and sale. The property was sold at auction to BNY in September 2012. On December 4, 2012, the circuit court entered an order confirming the sale.

¶ 5 Seven months later, on July 8, 2013, defendants filed a motion to quash service and vacate the judgment of foreclosure pursuant to section 2-1401 of the Code. In the motion, defendants asserted, *inter alia*, that Sheryl was not personally served and did not receive substitute service for George. The motion also asserted that Sheryl did not fit the process server's description of the female who was served because she was 52 years old at the time service was purportedly made, while the process server's affidavit averred that the person served was between 46 and 50 years old. Attached to the motion were affidavits from Sheryl and George

averring that neither had been personally served with process nor were they aware that substitute service was attempted or made.

¶ 6 On September 4, 2013, BNY responded that defendants had not met their burden of rebutting the affidavits of the process server. BNY further asserted that: (1) the instant petition was the second motion filed by defendants to quash service; (2) Sheryl had waived her right to contest jurisdiction by appearing in court on December 4, 2012, to request additional time to remain in possession of the property after it had been sold; and (3) Sheryl and George had failed to rebut the *prima facie* evidence of personal service created by the process server's affidavits. On October 18, 2013, defendants filed a reply, reasserting they did not receive personal service and denying they had brought successive motions to vacate or had appeared in court and thus waived the right to contest jurisdiction.

¶ 7 On December 9, 2013, the circuit court denied the defendants' section 2-1401 motion. The defendants now appeal that ruling.

¶ 8 Section 2-1401 provides a comprehensive, statutory procedure by which final orders and judgments can be vacated or modified more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). "Although a section 2-1401 petition is ordinarily used to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded its entry (citation), a section 2-1401 petition may also be used to challenge a purportedly defective judgment for legal reasons." (Citation.) *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). A petition under section 2-1401 is not a continuation of the original action; it is a new cause of action. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007).

¶ 9 This court has recently held that, as a general rule, a section 2-1401 petition is not an available form of relief after judicial confirmation of the sale of property in a mortgage foreclosure action. In *U.S. National Bank Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 30, this court held that where the defendant mortgagor in a foreclosure case does not challenge the confirmation of sale within 30 days, that party cannot appeal the judgment using section 2-1401 of the Code, which would circumvent section 15-1509 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1509 (West 2006)). However, subsequent decisions have declined to apply *Prabhakaran* in cases where the section 2-1401 petition raises a lack of jurisdiction based on inadequate service of process. See *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 17 n. 3; *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 12 n. 1. Because defendants in this case contested the circuit court's personal jurisdiction over them by filing a motion to quash service, we proceed to consider defendants' contentions as to the validity of their service.

¶ 10 Defendants contend on appeal that factual questions exist as to the service of summons upon them. They argue Sheryl's affidavit stating that she was not served is corroborated by the incorrect age range listed on the process server's affidavit. They further contend the substitute service upon George was not completed properly and that BNY has not provided affidavits to contradict their contentions that service was defective.

¶ 11 Service of process protects the due process rights of a defendant in a lawsuit by providing notice of an action and by providing an opportunity to be heard. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 12. Failure to effect service as required by law deprives a court of jurisdiction over the person, and therefore, any default judgment based on defective

service is void. *Karowski*, 2014 IL App (1st) 130112, ¶ 12. Thus, a foreclosure judgment entered without service of process is void. *Karowski*, 2014 IL App (1st) 130112, ¶ 12. Whether the circuit court obtained personal jurisdiction over a defendant presents a legal question, which is reviewed *de novo*. *Sutton v. Ekong*, 2013 IL App (1st) 121975, ¶ 17; see also *Karowski*, 2014 IL App (1st) 130112, ¶ 10 (*de novo* standard applies to trial court ruling on a motion raising jurisdictional issues where no evidentiary hearing was held and the trial court relied on the parties' written submissions and counsel's arguments in ruling on motion to quash).

¶ 12 To determine whether the circuit court had personal jurisdiction over the defendants, we must consider the whole record, including the pleadings and the return of service. *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. In Illinois, the process server's return affidavit is *prima facie* evidence that process was properly served, and the affidavit of service should not be set aside unless impeached by "clear and convincing evidence." *Paul v. Ware*, 258 Ill. App. 3d 614, 617 (1994); *In re Jafree*, 93 Ill. 2d 450, 455 (1982)). A court is required to indulge in every reasonable presumption in favor of the affidavit's validity, and the uncorroborated account of the party upon whom service was made is not sufficient to set aside that evidence; rather, affirmative evidence is needed to impeach the affidavit of service. *Ted & Paul*, 2013 IL App (1st) 122077, ¶ 24, citing *Winning Moves, Inc. v. HIBaby, Inc.*, 238 Ill. App. 3d 834, 838 (1992); accord *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998); see also *Paul*, 258 Ill. App. 3d at 617-18.

¶ 13 BNY maintained that it effected personal service on Sheryl. Personal service can be made "by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there" who is age 13 or older, and by informing that person of the contents of the

summons. 735 ILCS 5/2-203(a)(2) (West 2012). The process server also must send a copy of the summons in a sealed envelope with postage fully prepaid to the defendant at the usual place of abode. 735 ILCS 5/2-203(a)(2) (West 2012). An affidavit of service is required to identify the sex, race and approximate age of the defendant or other person with whom the summons was left and state the place and time of day when the summons was left. 735 ILCS 5/2-203(b) (West 2012). Here, the affidavit of process server Sanfratello included the information required by statute. 735 ILCS 5/2-203 (West 2012). The affidavit attesting to individual service on Sheryl indicated that service was made on a white female, age 46 to 50, on August 1, 2008, at 2:25 p.m. at 45 Brookside Drive, Lemont, IL 60439.

¶ 14 Sheryl's challenge to service solely consists of her assertion on appeal that the process server's affidavit stated an incorrect age. Those contentions do not counter the sworn averments of the process server. As to Sheryl's age (52 years) versus the age range (46 to 50 years) set out in the process server's affidavit, the discrepancy is not so great as to impeach the process server. In her affidavit attached to the section 2-1401 petition, Sheryl did not refer to her age in her own affidavit or offer any proof of her age. Accordingly, Sheryl has not defeated the presumption of validity of the process server's affidavit.

¶ 15 We next consider the validity of the substitute service on George. Abode service, or substitute service, does not carry the same presumption of validity as personal service because the defendant himself is not being served but, instead, the person served is someone in the defendant's stead living at his abode. *Ted & Paul*, 2013 IL App (1st) 122077, ¶ 26; see also *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986). Thus, the return or affidavit of service must affirmatively state that a copy of the summons was left at the usual abode with a family

member over the age of 13, that this family member was informed of the content of the summons, and that the process server sent a copy of the summons in a sealed envelope with postage fully paid and addressed to the defendant at his usual place of abode. *Thill*, 113 Ill. 2d at 310.

¶ 16 A review of the process server's affidavit as to George reveals that those three requirements were met. The process server's affidavit indicated that substitute service was performed by leaving a copy of the process at George's usual place of abode, *i.e.*, the Lemont address, with his spouse, Sheryl, that Sheryl was informed of the contents, and that a mailed copy of the process was sent to George at that address.

¶ 17 George's affidavit in support of the section 2-1401 petition did not counter those attestations. George averred that he was not personally served with process and was not "aware that service of process was made upon me by substituted service at any time." His first averment does not rebut the process server's representations, because personal service was not attempted on George. Moreover, George's attestation that he was not "aware" of substitute service does not negate the process server's statements that Sheryl was effectively served as described. See *Ted & Paul*, 2013 IL App (1st) 122077, ¶ 28 (the defendant's vague averment did not rebut the averments of the process server that the summons was left with a person at his abode and a copy was mailed to that address).

¶ 18 Therefore, because we find that BNY properly served Sheryl by personal service and George by substitute service, we hold that the circuit court had personal jurisdiction over both defendants. Thus, the default judgment and order of foreclosure and sale were properly entered in this case.

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¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.