

No. 1-14-0977

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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MAREK NOWAKOWSKI and JONTANTA	)	Appeal from the
NOWAKOWSKI,	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	No. 13 M1 717899
	)	
ALFRED ZWOLINSKI a/k/a A. ZWOLINSKI	)	
a/k/a FRED ZWOLINSKI and BEATA	)	
ZWOLINSKI, AND ALL UNKNOWN OCCUPANTS,	)	Honorable
	)	Orville Hambright,
Defendants-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE PALMER delivered the judgment of the court.  
Justices McBride and Reyes concurred in the judgment.

**O R D E R**

- ¶ 1 **Held:** Trial court did not err in denying motion to quash service by posting in a forcible entry action; record does not establish that trial court failed to hold an evidentiary hearing on the motion.
- ¶ 2 This cause concerns a forcible entry action by plaintiffs Marek and Jolanta Nowakowski against defendants Alfred and Beata Zwolinski (named defendants) and unknown occupants of the residential premises in question ("the premises"). Jessica Zwolinski (Jessica) appeals from an

order denying her motion to quash service by posting on unknown occupants. She contends that the motion to quash was erroneously denied because plaintiffs failed to establish the requisite due and diligent inquiry to find unknown occupants for service of process.

¶ 3 Plaintiffs filed their complaint on August 1, 2013, seeking to evict named defendants and unknown occupants from the premises, alleging that they failed to vacate the premises upon service of a 90-day termination notice following foreclosure. Summonses were issued the same day, with plaintiffs attaching a service list naming Alfred, Beata, and unknown occupants as three parties to be served at the premises.

¶ 4 The sheriff issued three returns showing unsuccessful attempts at serving process upon defendants, made on the afternoons of August 4, 7, and 14. Alias summonses were issued on August 23 and again on September 6, with a special process server appointed on the latter date. A process server issued three returns showing unsuccessful attempts at serving defendants in September, on the mornings of the 7<sup>th</sup>, twice on the morning of the 8<sup>th</sup>, and on the evening of the 9<sup>th</sup>. The process server averred that the premises were apparently vacant with "no mail in box, no sign of people, [and] no furniture in home."

¶ 5 On September 20, 2013, plaintiffs filed an affidavit for service by posting, in which their counsel averred that defendants "cannot be found after diligent inquiry" and their residences "cannot be ascertained after diligent inquiry" with their last known residences being the premises. Notice was issued on September 20, stating that default judgment would be entered if defendants did not appear in court on October 4. The sheriff issued a return indicating service of the notice on

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September 23 by posting copies at Chicago City Hall, the Cook County building, and Daley Center courthouse and mailing copies addressed to the three parties at the premises.

¶ 6 The case was continued on October 4 to October 11 for trial. On that day, the court noted that counsel had appeared "for defendants" and granted time to answer or otherwise plead to the complaint, continuing the case to October 28. The record does not include counsel's appearance form and thus does not show on whose behalf he appeared. On October 28, the court set a briefing schedule on plaintiffs' motion for summary judgment, including a date for the motion's filing.

¶ 7 Plaintiffs timely filed their summary judgment motion, alleging that defendants were served with a 90-day notice of termination of tenancy on March 5, 2013, named defendants appeared in court on October 4 to successfully request time to find counsel, and defendants failed to answer or otherwise plead by the date set in the October 11 order. Plaintiffs alleged that they were entitled to possession by purchasing the premises in an approved judicial sale in a foreclosure action, ultimately vesting plaintiffs with title to the premises, and by not reaching a lease or other agreement with defendants (the prior owners of the premises) for their occupancy. Copies of the order approving the judicial sale, the title deed, and the 90-day notice were attached, the latter indicating that it was served by being posted on the main door of the premises on March 5.

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¶ 8 In December 2013, named defendants filed a motion to dismiss, arguing that plaintiffs had previously commenced two actions against them on the same basis (2012 M1 704110 and 2013 M1 711556) that were both dismissed, and that the second dismissal was *res judicata* here.

¶ 9 Plaintiffs replied in support of their motion for summary judgment, arguing that named defendants' motion to dismiss was not a response to the summary judgment motion and they had not refuted the allegations of that motion.

¶ 10 On December 19, 2013, the court granted plaintiffs' summary judgment motion while striking the motion to dismiss as untimely filed. The court also issued that day an order for possession directing that plaintiffs recover possession of the premises from defendants, including unknown occupants, with enforcement stayed until January 18, 2014.

¶ 11 On January 24, 2014, when the case was before the court to correct the December 19 orders to properly reflect the case number, the court continued the case to February 5 "for status on unknown occupants" and stayed the order of possession until February 23.

¶ 12 On February 5, 2014, the court considered the "status of the unknown occupants and \*\*\*being fully advised in the premises" found that Jessica was the only unknown occupant and is the daughter of named defendants. The court also ordered a briefing schedule on a motion to quash. The record does not contain a copy of such a motion.

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¶ 13 Plaintiffs responded to Jessica's motion to quash, arguing that her motion alleges and her supporting affidavit aver that she resides at the premises, and has done so her entire life, so that with due diligence she could have been found there. However, it is insufficient to state in a conclusory manner that one could have been found with diligent inquiry but instead particular facts supporting that conclusion must be presented. Plaintiffs argued that Jessica failed to state when she was home for service and to present documentation that she resided at the premises. Plaintiffs also argued that Jessica's averment that due inquiry would have found her at the premises was belied by the multiple unsuccessful service attempts (upon named defendants as well as unknown occupants) at the premises by the sheriff and special process server. The response was not supported by an affidavit, but copies of various documents filed in the case were attached.

¶ 14 Jessica replied in support of her motion to quash, providing a copy of her driver's license showing the premises as her residence and arguing that plaintiffs had failed to refute her affidavit with a counter-affidavit. She argued that the various attempts at service by the sheriff and process server had been made when she was at school or work, that no service attempts were made after 9:30 p.m. when she was routinely at home, and that defendant Alfred was in Europe from July 16 to September 16, 2013. She argued that because the sheriff's return was signed by an officer who conducted only one of the service attempts, the other attempts by the sheriff are not "valid for consideration." She also argued that the process server's averment that there was no furniture in the

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premises was "a false statement" and "how could the process server have known what was in the home." Attached to the response were the affidavits of Jessica and Alfred, both averring that there was furniture on the premises in September 2013 and that Alfred was in Europe as stated, and Jessica additionally averring to her work and school hours in August and September 2013.

¶ 15 On March 5, 2014, "being fully advised in the premises," the court denied the motion to quash service upon unknown occupants "with prejudice" and found that the order of possession stands with enforcement extended to March 31, 2014. This appeal timely followed.

¶ 16 Before proceeding to the merits of this case, we note that plaintiffs have not filed an appellee brief; this is not a bar to our review. *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 13. We also note that the record on appeal does not include a transcript or appropriate substitute (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for any of the hearings or proceedings. Moreover, the record does not contain a copy of Jessica's motion to quash, though it does contain the response and reply on the motion. As appellant, Jessica is obligated to provide us a sufficiently complete record of the trial court proceedings to support her claim of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). Conversely, our review is not precluded by the absence of transcripts where the record contains that which is necessary to dispose of the issues raised under the applicable standard of review. *Midwest Builder Distributing*,

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*Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). While we do not have Jessica's affidavit attached to her motion to quash, we have the affidavits of Jessica and Alfred attached to her reply in support of her motion.

¶ 17 On appeal, Jessica contends that service by posting was improper, because plaintiffs failed to establish the requisite diligent inquiry for service by posting.

¶ 18 In a forcible entry action, an unknown occupant may be served "by delivering a copy of the summons and complaint naming 'unknown occupants' to the tenant or any unknown occupant or person of the age of 13 or upwards occupying the premises." 735 ILCS 5/9-107.5(a) (West 2012). Section 9-107 of the Code of Civil Procedure also establishes a method of constructive service in forcible entry cases. 735 ILCS 5/9-107 (West 2012). Where a plaintiff:

"is unable to obtain personal service on the defendant or unknown occupant and a summons duly issued in such action is returned without service stating that service can not be obtained, then the plaintiff, his or her agent or attorney may file an affidavit 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, or is concealed within this State so that process cannot be served upon him or her, 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

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the defendant's or unknown occupant's place of residence." 735 ILCS 5/9-107  
(West 2012).

The defendant then "may be notified by posting and mailing of notices" that "state the nature of the cause against the defendant or unknown occupant and at whose instance issued and the time and place for trial, and shall also state that unless the defendant or unknown occupant appears at the time and place fixed for trial, judgment will be entered by default, and shall specify the character of the judgment that will be entered in such cause." The sheriff must post copies of the notice in three public places "in 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 at the same time mail one copy of the notice addressed to such defendant" at his last known place of residence. 735 ILCS 5/9-107 (West 2012).

¶ 19 Constructive service is permissible only upon strict compliance with the statute, which requires "due inquiry" and "diligent inquiry" before constructive service is proper. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 32 (2006). A cursory or perfunctory inquiry will not suffice, but instead a plaintiff must make an inquiry as comprehensive as circumstances allow. *Id.* The circuit court has no jurisdiction over a defendant who has not been served with process as required by law, so that a default judgment against the defendant is void. *Id.*

¶ 20 The plaintiff, as the party claiming the benefit of constructive service, bears the burden of showing strict compliance with all statutory requirements. *Id.* A defendant may challenge a



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plaintiff's diligent-inquiry affidavit by filing a counter-affidavit showing that he could have been found by due and diligent inquiry. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 19; *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18. Upon such a challenge, a plaintiff must produce evidence establishing due and diligent inquiry. *Citimortgage, Inc.*, ¶ 18. In other words, where there is a properly-joined issue as to whether the plaintiff made the requisite due and diligent inquiry, the court should hold an evidentiary hearing with the burden of proof on the plaintiff. *American Chartered Bank*, ¶ 19. Where such a hearing is not conducted, the case should be remanded for such an evidentiary hearing. *Id.*

¶ 21 Here, plaintiffs *prima facie* met the requirements of section 9-107 and Jessica challenged their diligent-inquiry affidavit in the trial court. The record shows that the sheriff and a special process server made multiple unsuccessful service attempts at the premises on named defendants and unknown occupants. In the diligent-inquiry affidavit, plaintiffs indicated the basis for constructive service by marking the relevant allegation and averred that defendants' residences could not be ascertained. Jessica later filed affidavits countering plaintiffs' diligent-inquiry affidavit, so plaintiffs were required to establish their due and diligent inquiry. While they did not file a counter-affidavit, they pointed to factual matters in the record in support of their response. Thus, an evidentiary hearing was required to properly dispose of the motion to quash. However, in

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the absence of a transcript or similar record of the motion hearing, we will not presume that the court failed to hold an evidentiary hearing in denying the motion to quash.

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

¶ 23 Affirmed.