

No. 1-14-2809

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

U.S. BANK NATIONAL ASSOCIATION, AS)	Appeal from the
TRUSTEE FOR CREDIT SUISSE FIRST BOSTON)	Circuit Court
MORTGAGE SECURITIES CORP., HOME EQUITY)	Cook County.
ASSET TRUST 2004-7, HOME EQUITIES)	
PASS-THROUGH CERTIFICATES, SERIES 2004-7)	
)	
Plaintiff-Appellee,)	
v.)	No. 13 CH 2365
)	
FERNANDO SIERRA,)	
)	
Defendant-Appellant.)	
)	
(Unknown Owners and Nonrecord claiminants,)	Honorable
)	Darryl B. Simko,
Defendants).)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's motion to quash service on him where defendant's challenge was time-barred, and where the affidavits attached to defendant's motion to quash were insufficient to overcome the presumption of valid service arising from the affidavit of service.

¶ 2 Defendant, Fernando Sierra, appeals the judgment of the circuit court of Cook County denying his motion to quash service of process of a complaint to foreclose the mortgage on his home, claiming that he provided clear and satisfactory evidence rebutting the affidavit of service.

¶ 3 The record shows that plaintiff, U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., filed a mortgage foreclosure complaint against defendant on January 25, 2013. In its complaint, plaintiff alleged that defendant executed a mortgage on May 24, 2004, in the amount of \$198,000, for the property located at 14 North Lind Avenue in Hillside, IL (Hillside address), and that he was in default for payments beginning in September 2012. Under the terms of his mortgage, defendant agreed to "occupy, establish, and use the Property as [his] principal residence *** and [to] continue to occupy [it] as [his] principal place of residence for at least one year." In 2010, the loan was modified by agreement, at which time defendant represented that he continued to live in the property as his "principal residence."

¶ 4 On February 2, 2013, Kerry Polizzi of ProVest, LLC, who had previously been appointed as a special process server, executed an affidavit stating that she personally served defendant with the summons and complaint at the Hillside address, at 8:06 a.m. Polizzi described defendant as a Hispanic male, aged 36-40. She further stated that the Hillside address was a two unit apartment house, that defendant lived on the first floor, and that the second floor appeared to be vacant.

¶ 5 Thereafter, plaintiff moved for a default judgment and judgment for foreclosure and sale. On October 25, 2013, the court entered an order finding defendant in default for failure to appear or plead, and entered judgment for foreclosure and sale. A judicial sale was held on January 28, 2014, and, in February 2014, plaintiff filed a Motion for Order Approving the Report of Sale and

Distribution, and a notice of motion setting the matter to be heard on March 7, 2014. The notice was mailed to defendant at the Hillside address.

¶ 6 Although the record on appeal does not contain a report of proceedings for the March 7, 2014 court date, the record shows that defendant appeared through counsel, Charles A. Silverman, as the order entered on that date was drafted by counsel Silverman. That order set a briefing schedule on plaintiff's motion, allowed defendant until March 21, 2014, to file his response, and set the motion for hearing for April 18, 2014. Counsel Silverman entered his appearance for defendant on March 14, 2014, but the record on appeal does not contain a response to plaintiff's motion. On April 18, 2014, the court entered an order approving the report of sale and distribution, and confirming the sale and order of possession.

¶ 7 Nearly four months later, on August 7, 2014, defendant filed a motion to quash service of process, as well as a document titled "RE-NOTICE OF MOTION," although no prior motions to quash or notices thereof appear in the record on appeal. In his motion, defendant alleged that he "could not have been served" on the morning of February 2, 2013, "because he was at work." He attached his own affidavit, in which he averred that he "was never served with a complaint or summons" and that the service return claiming he "was served on Feb. 2nd, 2013, at 8:06 AM" was inaccurate because "[t]hat day was a Saturday, and [he] worked that Saturday." Defendant stated that his job was to "operate a laser" and "cut stainless steel sheets into parts." He "frequently work[ed] on Saturdays" and "work[ed] most Saturdays" because the parts were needed by workers who would come in on Monday mornings. He claimed that he usually started work "between 5 and 6 in the morning" and would "work until noon."

¶ 8 Defendant also attached an affidavit from John Stoch, his supervisor. Stoch confirmed that defendant "operates a laser *** [and] cuts stainless steel sheets into parts which are laid out

for the other workers." Stoch stated that defendant "works on Saturdays" because his job is "important and the other work revolves around it." Defendant started work "by 6 AM" and worked "until noon" on Saturdays.

¶ 9 On August 21, 2014, the circuit court denied defendant's motion to quash without further briefing. The record also does not contain a report of proceedings from this date. Defendant filed a timely notice of appeal, and in this court, he contends that the court erred in denying his motion to quash service because he presented clear and satisfactory evidence that the service was improper. Plaintiff responds that the circuit court properly denied defendant's motion to quash because defendant's objection to service was time barred under section 15-1505.6 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1505.6 (West 2012)).

¶ 10 Section 15-1505.6 of the Code provides that:

(a) In any residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process that objects to the court's jurisdiction over the person, unless extended by the court for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance." *Id.*

¶ 11 Under the plain language of this section, a defendant who participates in a hearing or files an appearance, then delays more than 60 days before moving to quash service upon him, has waived his right to contest such service. *BAC Home Loans Servicing, LP v. Pieczonka*, 2015 IL App (1st) 133128, ¶ 12.

¶ 12 Plaintiff argues that defendant failed to meet the 60-day deadline, and, accordingly, defendant waived his challenge to service. Defendant did not address the applicability of section

15-1505.6 in his initial brief, and he failed to file a reply brief responding to plaintiff's claim that his claim was time-barred.

¶ 13 The record below shows that defendant, through counsel, appeared and participated in the March 7, 2014, court date, as it was defendant's counsel who drafted the order setting a briefing schedule on plaintiff's motion. Plaintiff did not contest the trial court's jurisdiction until he filed a motion to quash service five months later, on August 7, 2014. Additionally, there is nothing in the record to indicate that defendant sought or obtained an extension of that time frame, as would be allowed for good cause pursuant to the statute. 735 ILCS 5/15-1505.6 (West 2012). Pursuant to the plain and unambiguous language of section 15-1505.6(a), we conclude that defendant failed to contest the court's jurisdiction within the required 60-day time frame, and defendant's motion to quash was properly denied. See *Pieczonka*, 2015 IL App (1st) 133128 at ¶ 12.

¶ 14 We also note that, although defendant's notice of his motion to quash is stylized as a "RE-NOTICE," we find no other motions to quash service or notices thereof in the record. Defendant, as the appellant, bears the burden of providing a sufficiently complete record to support his claim or claims of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubt arising from the incompleteness of the record will be resolved against the appellants. *Id.* at 392. Because there is nothing in the record which would indicate that defendant had initially filed his challenge within the 60-day time frame, we conclude that the trial court's order was in conformity with law, and that defendant's claim is time-barred. *Id.* at 391-92; *Pieczonka*, 2015 IL App (1st) 133128 at ¶ 12.

¶ 15 Waiver aside, we also conclude that defendant's appeal fails on the merits, because his motion to quash did not provide sufficient evidence to impeach the affidavit of service in this case.

¶ 16 To enter a valid judgment, a court must have jurisdiction over the subject matter and jurisdiction over the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, and we review the question of whether the circuit court obtained personal jurisdiction over a defendant *de novo*. *Id.*

¶ 17 To determine whether the circuit court had personal jurisdiction over a defendant, we consider the record as a whole, including the pleadings and the return of service. *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. An affidavit of service is "*prima facie* evidence that the process was properly served," and "should not be set aside unless the return has been impeached by clear and satisfactory evidence." *In re Jafree*, 93 Ill. 2d 450, 455 (1982). This court must "indulge every presumption in favor of" an affidavit of service (*Principal Mutual Life Insurance Co. v. Dohm*, 201 Ill. App. 3d 960, 963 (1990)), and uncorroborated testimony of the person purportedly served is not enough to overcome that presumption (*Kamarauli*, 2012 IL App (1st) 112353 at ¶ 28; *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 25).

¶ 18 Defendant argues that he impeached the affidavit of service in this case through his own affidavit, which showed that he was at work at the time he was purportedly served at his home, and the corroborating affidavit of his supervisor, Stoch. We note, however, that in his affidavit, defendant maintained that he "frequently" worked on Saturdays, and that he worked "most" Saturdays. Although defendant specifically contended that he was working on February 2, 2013,

the date he was purportedly served, Stoch's affidavit only confirmed defendant's general schedule. He did not specifically aver that defendant was at work on the particular Saturday in question. Defendant did not provide time cards, paystubs, or any other corroborating evidence that would support his claim that he was working on this particular Saturday. We thus conclude that defendant's uncorroborated allegations are insufficient to overcome the presumption of validity arising from the affidavit of service. *Kamarauli*, 2012 IL App (1st) 112353 at ¶ 28; *MB Financial Bank, N.A.*, 2013 IL App (1st) 122077 at ¶ 25.

¶ 19 For the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 20 Affirmed.