

SECOND DIVISION
July 21, 2015

No. 1-14-2838

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

<i>In re</i> MARRIAGE OF MURIEL L. TURNER,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
and)	No. 13 D 494
)	
WILLIAM E. TURNER,)	Honorable
)	Patricia M. Logue,
Respondent-Appellant.)	Judge Presiding.

JUSTICE PIERCE 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 erred in barring respondent from challenging abode service of process when he filed that challenge together with a substantive response to the petition for dissolution. Moreover, where the affidavit of the special process server was countered by a denial of abode service, and no counter-affidavit was filed, motion to quash service should have been granted.

¶ 2 Respondent William E. Turner appeals from the circuit court's order denying his motion to quash service of process and his motion for reconsideration requesting this court to vacate the default judgment in this dissolution of marriage action brought by petitioner Muriel L. Turner.

On appeal, William contends the circuit court erred in denying his motion to quash service based

upon its finding that he could not challenge the validity of abode service because he contemporaneously filed an appearance and response to the dissolution petition along with his motion to quash service of process. Because William's filings do not preclude him from challenging personal jurisdiction due to lack of proper service of process, we reverse the circuit court's ruling on William's motion to quash service and remand for further proceedings.

¶ 3 On January 18, 2013, Muriel filed a petition for dissolution of marriage from William, citing irreconcilable differences and mental cruelty. The parties have four children, including Douglas Turner, born on March 19, 1994.

¶ 4 After unsuccessful attempts at personal service upon William, the circuit court appointed a special process server on May 6, 2013. A different special process server, Thomas D'Anna, was appointed on July 23, 2013. On September 18, 2013, D'Anna filed a notarized affidavit stating he personally served William with the summons and complaint in this matter on August 15, 2013. In the same affidavit, D'Anna also averred that he accomplished substitute service on William on that date via service on Douglas, a resident of William's usual abode at 1713 East 222nd Place in Sauk Village, Illinois. The person described as receiving service was a white male between the ages of 25 and 40 years of age. On November 21, 2013, the circuit court entered a default judgment for dissolution of marriage, finding it had personal jurisdiction over William by virtue of the personal service affidavit of D'Anna and that William had failed to file an appearance or otherwise plead in the matter.

¶ 5 On December 19, 2013, William filed three pleadings: a motion to quash service of process, an appearance and a response to the dissolution petition. In the motion to quash, William asserted that neither he nor Douglas was served on August 15, 2013. Attached to the

motion were separate affidavits of William and Douglas each stating they had not been served with the summons or complaint.

¶ 6 In response to William's filings, Muriel asserted abode service was completed upon William and that William also was sent a copy of the proposed default judgment. A FedEx delivery confirmation attached to Muriel's response indicates a package was delivered to William on November 20, 2013, and was "left at side door" at the Sauk Village address; however, the confirmation indicates that no signature was required for receipt of the delivery. As an affirmative defense to William's motion to quash service, Muriel argued he waived any objection to personal jurisdiction by filing a response to the dissolution petition.

¶ 7 On June 30, 2014, after a hearing involving both parties and counsel, the circuit court denied William's motion to quash "based on the judge's ruling that answer was filed prior to motion to vacate and thus submitted [William] to this court's jurisdiction." The court ordered William to comply with various portions of the judgment for dissolution. A transcript of that hearing is not included in the record on appeal.

¶ 8 On July 3, 2014, William filed a motion to reconsider the June 30, 2014 ruling, arguing his filing of a responsive pleading together with a motion to quash service of process only conferred jurisdiction prospectively and did not validate the November 21, 2013 judgment for dissolution, which he maintained was entered without personal jurisdiction. On September 9, 2014, after hearing argument, the circuit court denied William's motion to reconsider. William filed a notice of appeal challenging those two rulings and requests this court to vacate the default judgment of dissolution and remand for further proceedings.

¶ 9 On appeal, William contends the circuit court erred in denying his motion to quash service of process. He argues his contemporaneous filing of a response to the dissolution petition, together with his motion to quash, did not retroactively confer personal jurisdiction over him and does not preclude him from challenging whether personal jurisdiction has been accomplished where improper service of process has been asserted through the affidavits on file. We agree.

¶ 10 A valid judgment requires that a court have subject matter jurisdiction 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 a party is void *ab initio* and may be challenged at any time. *Id.* Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *Id.* ¶ 18.

¶ 11 In this case, the trial court, after hearing, denied William's motion to quash service of process because he had filed a response to the dissolution petition thereby submitting to the jurisdiction of the court. Apparently, the trial court relied on section 2-301(a-5) of the Illinois Code of Civil Procedure which provides that the filing of a responsive pleading or motion constitutes a waiver of any objection to the court's personal jurisdiction over the defendant. 735 ILCS 5/2-301(a-5) (West 2012). William relies on the Illinois Supreme Court's holding in *Mitchell* in support of his argument that the filing of a response to the dissolution petition contemporaneously with his motion to quash did not retroactively confer personal jurisdiction over him and did not preclude him from challenging whether he was properly served in the underlying dissolution proceeding.

¶ 12 In *Mitchell*, after entry of a default judgment of foreclosure and order of sale, the defendant filed an appearance and motion to vacate the order of sale. *Mitchell*, 2014 IL 116311, ¶¶ 6-8. The defendant later filed a motion to quash service and to vacate the order confirming the sale which was denied by the trial court. *Id.* On appeal, the defendant challenged substitute service of process (also known as abode service), and the plaintiff acknowledged that the method of service was improper; however, the appellate court found the defendant waived any challenge based on personal jurisdiction by not raising the jurisdictional argument prior to filing an appearance and motion to vacate the order of sale. *Id.* ¶¶ 12-14.

¶ 13 The *Mitchell* court discussed the effect of the 2000 amendment to section 2-301(a-5) on whether the filing of a responsive pleading confers personal jurisdiction only prospectively or whether it operates to confer personal jurisdiction retroactively so as to validate earlier orders. The supreme court emphatically reaffirmed "the longstanding rule that 'a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date.'" *Id.* ¶ 43. The court further declared that the filing of defendant's post judgment motion to vacate the order confirming the sale "waived objections to the circuit court's personal jurisdiction prospectively only, however. The waiver did not serve to validate retroactively the void orders entered prior to defendant's submission to the court's jurisdiction." *Id.* ¶ 44. The court held that even though the defendant previously filed an appearance and motion to vacate, those filings did not prevent the defendant from arguing the court lacked personal jurisdiction when entering the sale order. *Id.* ¶¶ 44-45, citing *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989) (holding that a party who submits to the court's

jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date).

¶ 14 We find the rule stated in *Mitchell* applies to the case at bar. Here, William filed an appearance and response to the dissolution petition contemporaneously with the motion to quash service. Under *Mitchell*, William is not precluded from objecting to the lack of personal jurisdiction at the time the default judgment was entered.

¶ 15 We reject Muriel's argument that *Mitchell* is not controlling because it involves a motion to vacate in a foreclosure proceeding and does not apply to this dissolution matter. *Mitchell* clearly discussed the applicability and effect of section 2-301(a-5) of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-301(a-5) (West 2010)), which governs jurisdiction over parties in civil actions. See, e.g., *In re Marriage of Lasota and Luterek*, 2014 IL App (1st) 132009, ¶ 9. The trial court was in error in its application of section 2-301(a-5).

¶ 16 Muriel also argues William waived any jurisdictional objection because he filed his appearance and response "prior to" filing his motion to quash. The record indicates that William's appearance and response were file-stamped by the circuit court clerk at 10:17 a.m. on December 19, 2013, and the motion to quash was file-stamped three minutes later, at 10:20 a.m. We do not interpret that three-minute time difference to defeat the contemporaneous nature of the filings, and Muriel cites no authority for that position. This argument is neither persuasive nor reasonable, and any acceptance of it would impose an impossible burden on practitioners in the otherwise routine nature of filing documents with the clerk's office. William did not retroactively submit to the court's jurisdiction when he filed an appearance and response along with his motion to quash. *Mitchell*, 2014 IL 116311, ¶¶ 43-44. Accordingly, pursuant to

Mitchell, William properly challenged whether the circuit court had personal jurisdiction over him when it entered the default judgment for dissolution and this challenge should have been ruled upon by the court.

¶ 17 Because the circuit court did not consider the issue of whether William was properly served we review *de novo* the legal question of whether the circuit court had personal jurisdiction over the defendant when it entered the default judgment of dissolution. *Mitchell*, 2014 IL 116311, ¶ 17. To determine whether the circuit court had personal jurisdiction over a defendant, 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. The form affidavit of the special process server stated that William was personally served with notice of the dissolution action and that abode service also was made on Douglas. Muriel does not contend on appeal that personal service on William was accomplished; she instead argues that William was served by way of abode service on Douglas. Therefore, the only consideration for review is whether proper substitute service was made.

¶ 18 Personal service upon an individual defendant is achieved by: (1) leaving a copy of the summons with the defendant personally, or (2) by leaving a copy at the defendant's usual place of abode, with a family member or person residing at that address who is age 13 or older, and also mailing a copy to the defendant at that location, which is known as abode service. 735 ILCS 5/2-203(a) (West 2012). In the context of personal service, return of summons is *prima facie* proof of proper service. *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 24.

¶ 19 However, abode service, also referred to as substitute service, does not carry the same presumption of validity since it is not the defendant himself being served, but someone in his stead living at his abode. *Id.* ¶ 26, citing *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986). The return or affidavit of service submitted by the special process server must affirmatively state that a copy of the summons was left at the defendant's usual abode with a family member over the age of 13, the 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. *State Bank of Lake Zurich*, 113 Ill. 2d 310. Strict compliance with the statute is required and the failure to aver any of these requirements renders the abode service defective. *Id.*

¶ 20 Where a return of service states that the process server complied with the statutory requirements, the return may be overcome by contradictory affidavit. *Id.* Therefore, where, as here, the return of abode service is challenged by affidavit of the person on whom service was purportedly made, and there is no counter-affidavit of the special process server to address this challenge, the return of service itself is not enough evidence; instead, the affidavit must be taken as true and the service of summons must be quashed. *Id. Clinton Co. v. Eggleston*, 78 Ill. App. 3d 552 (1979).

¶ 21 Here, Douglas filed an affidavit that denied he was served with process on August 15, 2013 and directly challenged the affidavit of the special process server that has not been refuted by a counter-affidavit or other evidence. In addition, the return of service affidavit does not indicate that, in making abode service, the special 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, as is required by section 2-203(a) of the Code. Thus, because William presented evidence challenging the affidavit of the special process server, namely the affidavit of Douglas, and no counter-affidavit was filed, coupled with the absence of strict compliance with the statute as shown on the face of the special process server's affidavit, the court erred in not granting William's motion to quash service and vacate the default judgment order of dissolution.

¶ 22 Accordingly, the circuit court's order denying William's motion to quash service of summons is reversed and this cause is remanded with directions to grant William's motion to quash service of summons, and accordingly to vacate the default judgment order of dissolution against William. The appearance of William and his response to the petition for dissolution of marriage are deemed filed as of December 19, 2013.

¶ 23 Reversed and remanded for further proceedings.