

2015 IL App (1st) 143911-U
No. 1-14-3911
December 15, 2015

SECOND DIVISION

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 DISTRICT

ONE WEST BANK, FSB,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 11 CH 05744
)	
REMEDIOS SALES, PASCUAL SALES and)	The Honorable
Unknown Owners,)	Pamela Meyerson,
)	Judge Presiding.
Defendants-Appellants.)	

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

ORDER

¶ 1 *Held:* The uncorroborated affidavits of the defendants, standing alone, did not constitute clear and satisfactory evidence sufficient to set aside the process server's affidavits of service.

¶ 2 On February 15, 2011, OneWest Bank, FSB, the plaintiff¹, filed a complaint to foreclose the mortgage on the property located at 3932 West Greenleaf Avenue, Lincolnwood, Illinois,

¹ On October 14, 2013, OneWest assigned its mortgage to Ocwen Loan Serving, LLC and the court granted a motion to substitute Ocwen as the plaintiff. Plaintiff in this order refers to "OneWest" on all dates prior to the October 14, 2013 assignment of the mortgage and "Ocwen" on all dates after the assignment.

60712 (the property) when the defendants, Remedios Sales and Pascual Sales, failed to make payments on the mortgage. On October 17, 2012, Remedios Sales was personally served with a summons and complaint and Pascual Sales was served by substitute service. On February 14, 2014, the circuit court entered a default judgment against the defendants for failure to appear or plead to the plaintiff's complaint.

¶ 3 On June 25, 2014, the circuit court denied the defendants' motion to quash service and vacate the default judgment. On October 7, 2014, the circuit court treated the second motion to quash service and vacate the default judgment as a motion to reconsider and denied that motion.

¶ 4 The circuit court entered an order approving the sale on November 19, 2014. The defendants timely filed their notice of appeal challenging service of summons and seeking review of the order approving the report of sale and distribution and granting the plaintiff possession.

¶ 5 We find that Remedios Sales and Pascual Sales were properly served with a summons and complaint on October 17, 2012. We also find that the affidavits appended to the defendants' motions to vacate failed to establish that service on the defendants on October 17, 2012 should be set aside. Therefore, because the defendants were properly served with a summons and complaint on October 17, 2012, the circuit court acquired jurisdiction to enter the February 14, 2014 default judgment. Accordingly, we affirm that circuit court's November 19, 2014 order approving the report of sale and distribution and granting the plaintiff possession.

¶ 6

BACKGROUND

¶ 7

On February 15, 2011, the plaintiff filed a complaint to foreclose the mortgage on the property after the defendants failed to make payments on the mortgage in August 2010. Gary McDaniels, an agent of Elite Process Serving & Investigations, Inc. (Elite), averred in two affidavits of service that he served the defendants with a summons and complaint on February 16, 2011. A default judgment was entered against the defendants on March 8, 2012.

¶ 8

The circuit court vacated the March 8, 2012 default judgment against the defendants on July 18, 2012 and the clerk of the circuit court issued alias summons on September 28, 2012 for the defendants. Wilson, a process server, averred in an affidavit of service that he served Remedios Sales with a summons and complaint by "individual service" on October 17, 2012, by "delivering a copy of the process to the defendant personally" at 3932 West Greenleaf Avenue, Lincolnwood, Illinois 60712. Wilson further averred in the affidavit that Remedios' signature was "OBTAINED ON FIELD SHEET." The field sheet was not a part of the record.

¶ 9

Wilson also averred in another affidavit of service that he served Pascual Sales by substitute service on October 17, 2012, by: " leaving a copy of the process at his/her usual place of abode with REMEDIOS SALES *** CO-OCCUPANT, a person of his/her family, or other person residing there, over of the age of 13 years old who was informed of the contents thereof" at 3932 West Greenleaf Avenue, Lincolnwood, Illinois 60712. Wilson further averred in the affidavit that "[o]n October 18, 2012, a copy of the process was mailed in a sealed envelope with postage fully prepaid, addressed to the defendant at his/her usual place of abode."

¶ 10 The plaintiff filed a motion for an order of default against the defendants on January 14, 2014. On February 14, 2014, the circuit court entered an order of default against the defendants for failing to appear or plead.

¶ 11 On March 11, 2014, the defendants filed a motion to quash service and vacate the February 14, 2014 *ex parte* judgment for foreclosure and sale. The defendants attached affidavits to the motion in which they admitted being owners of the property, but denied ever being served "with summons or process, either before July 18, 2013 or after that date." The circuit court denied the motion to quash service on June 25, 2014. The record does not contain a report of proceedings or bystander's report of the June 25, 2014 proceedings.

¶ 12 On July 2, 2014, the defendants filed another motion to quash service and vacate the *ex parte* judgment of February 14, 2014. In the second motion to quash service, the defendants argued that they were never served. They also argued that the purported substitute service on "Alfareda Sales" on August 7, 2012, was defective because only "Angelia Francisco" was present at the property. The defendants further argued that Angelina Francisco "was not a relative, family member, or member of the household." The defendants attached three affidavits to the July 2, 2014 motion to quash service and vacate the *ex parte* judgment: an affidavit from Remedios Sales, an affidavit from Pascual Sales and an affidavit from Angelina Francisco.

¶ 13 Remedios and Pascual averred in their affidavits that they were owners of the property, that they were never served, that they have no relative named Alfareda Sales, and that they have no relative or member of their household who resides at the property. Angelina Francisco averred in her affidavit that she was served by a process server in the present case

on August 7, 2012, that she never told the process server that she was a relative of either defendant, that she did not live with the defendants, and that she was neither a relative nor a member of the defendants' household.

¶ 14 The circuit court treated the July 2, 2014 motion to quash service as a motion to reconsider. On October 7, 2014, the circuit court denied the motion, finding that it did "not raise any new evidence not previously available or that the law was misapplied." The record does not contain a report of proceedings or bystander's report of the October 7, 2014 proceedings.

¶ 15 In May 2014, the plaintiff filed a public notice of sale, announcing that the property would be sold at auction to the highest bidder, and sent the same document to the defendants on May 16, 2014. According to the report of sale and distribution of the selling officer, the property was sold on June 26, 2014. On July 9, 2014, the plaintiff filed a motion for entry of an order approving the selling officer's report of sale and distribution and for possession against the defendants.

¶ 16 On October 21, 2014², the plaintiff filed another motion for entry of an order approving the selling officer's report of sale and distribution and for possession. On November 19, 2014, the circuit court granted the plaintiff's motion for entry of an order approving the report of sale and distribution and for possession. The record does not contain a report of proceedings or bystander's report of the November 19, 2014 proceedings.

² The stamp of the circuit court of Cook County reflects that the motion was filed on October 21, 2015, but the court ruled on the motion on November 19, 2014. We find that the stamped date was a clerical error. *In re Marriage of Shelton*, 127 Ill. App. 3d 775, 782 (1984) ("Clerical errors or matters of form are those errors, mistakes or omissions which are not the deliberate result of judicial reasoning and determination"). Therefore, we find that the motion was filed on "October 21, 2014."

¶ 17 On December 18, 2014, the defendants filed their notice of appeal challenging the summons served on the defendants and seeking review of the November 19, 2014 order that granted plaintiff's motion for entry of an order approving the report of sale and distribution and granting the plaintiff possession.

¶ 18 ANALYSIS

¶ 19 The validity of a court's judgment is dependent upon the court having both subject matter jurisdiction and personal jurisdiction over the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17; *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). "Subject matter jurisdiction refers to a court's power 'to hear and determine cases of the general class to which the proceeding in question belongs.' [Citations.] Personal jurisdiction refers to the court's power 'to bring a person into its adjudicative process.' [Citations.]" *People v. Castleberry*, 2015 IL 116916, ¶ 12. "A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally." *BAC*, 2014 IL 116311, ¶ 17. We review *de novo* the question of whether the circuit court obtained personal jurisdiction over the defendants by individual and substitute service on October 17, 2012. *BAC*, 2014 IL 116311, ¶ 17.

¶ 20 Remedios and Pascual Sales argue that the plaintiff's failure to effectuate service on them through substitute service on August 7, 2012 divested the circuit court of jurisdiction and therefore, the November 19, 2014 order granting the plaintiff's motion for entry of an order approving the foreclosure report of sale and distribution and for possession is void. The defendants are attempting to obfuscate the issue presented to this court by ignoring the fact that Remedios was personally served and Pascual was served by substitute service on

October 17, 2012. If the plaintiff served Remedios and Pascual Sales with personal and substitute service, respectively, on October 17, 2012, then all orders entered by the circuit court after the October 17, 2012 service date are valid. Therefore, if service was effected on Remedios and Pascual on October 17, 2012, even if substitute service was not effected on the defendants on August 7, 2012, the February 14, 2014 default judgment and the November 19, 2014 order approving the sale would be valid.

¶ 21 Personal Service

¶ 22 In light of the fact that we review jurisdiction questions *de novo*, we must determine whether Remedios Sales was personally served with a summons on October 17, 2012, and whether Pascual Sales was served by substitute service on October 17, 2012. 735 ILCS 5/2-203(a)(1), (2) (West 2010).

¶ 23 Personal jurisdiction can be obtained either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *BAC*, 2014 IL 116311, ¶ 18. Section 2–203(a)(1) of the Code of Civil procedure (Code) prescribes the procedure for personal service on an individual and provides in pertinent part: “(a) *** service of summons upon an individual defendant shall be made (1) by leaving a copy thereof with the defendant personally ***.” 735 ILCS 5/2-203(a)(1) (West 2010).

¶ 24 Generally, “[an] affidavit of service should be considered *prima facie* evidence that the process was properly served. It 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). In *Jafree*, the court concluded that “[t]he evidence indicating a lack of service [was] respondent's own assertion” and that of his client and those assertions did not constitute clear and satisfactory

evidence sufficient to overcome the presumption established by the affidavit of service. *Jafree*, 93 Ill. 2d at 455.

¶ 25 The law is also clear that "an uncorroborated affidavit by a party allegedly served denying service is insufficient to contradict a sheriff's return." *Four Lakes Management & Development Co. v. Brown*, 129 Ill. App. 3d 680, 683 (1984). In *Four Lakes*, the court found that the only evidence indicating the lack of personal service on the defendant consisted of her affidavit and testimony that she was not served with process, that she had moved from the apartment in question three weeks before the purported service was made, and that she had never returned to the premises. *Four Lakes*, 129 Ill. App. 3d at 683. No corroboration or documentation was presented to support the defendant's contention that she was not served with summons or that she vacated the premises before service was effected. *Four Lakes*, 129 Ill. App. 3d at 683-84. The *Four Lakes* court held that "[a]bsent any such corroboration or documentation [defendant's] affidavit and testimony d[id] not constitute clear and satisfactory evidence, sufficient to overcome the sheriff's return and testimony." *Four Lakes*, 129 Ill. App. 3d at 684.

¶ 26 Here, the record contains the process server's affidavit, which establishes that on October 17, 2012, Remedios Sales was served personally at 3932 West Greenleaf Avenue, Lincolnwood, Illinois 60712. The only evidence which contradicts the process server's affidavit of service is Remedios' own affidavit, averring generally, that she was never served "with summons or process, either before July 18, 2013 or after that date." There is no evidence in the record to corroborate Remedios' averment that she was not personally served on October 17, 2012. Remedios's affidavit, standing alone, does not constitute clear and

was made upon a [specific] person *** and that service was made at a particular place” can only be set aside by clear and satisfactory evidence. *Nibco Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). However, facts that are not within the process server’s personal knowledge, such as whether a person is a member of defendant’s household (*Nibco*, 98 Ill. 2d at 172-73) or whether the location where the process server effected substitute service was defendants’ usual place of abode (*Four Lakes*, 129 Ill. App. 3d at 684-85) can be denied in an affidavit by the defendant. *Nibco*, 98 Ill. 2d at 172-73. If the defendant’s affidavit is not contradicted or left un rebutted, “that part of the affidavit attacking those recitals in the return which are beyond the personal knowledge of the officer would be taken as true” and present a proper basis for quashing service. *Nibco*, 98 Ill. 2d at 172-73.

¶ 30 In the present case, the process server's affidavit of service established that service was effectuated, by substitute service, on Pascual Sales on October 17, 2012 by "leaving a copy of the process at his/her usual place of abode with REMEDIOS SALES *** CO-OCCUPANT, a person of his/her family, or other person residing there, over of the age of 13 years old who was informed of the contents thereof" at 3932 West Greenleaf Avenue, Lincolnwood, Illinois 60712 and that "[o]n October 18, 2012, a copy of the process was mailed in a sealed envelope with postage fully prepaid, addressed to the defendant at his/her usual place of abode."

¶ 31 As required by section 2–203(a) of the Code, the process server's affidavit expressly avers that he delivered a copy of Pascual's summons and complaint to Remedios Sales at 3932 West Greenleaf Avenue, and that he mailed a copy of the process to Pascual Sales. The process server's return is *prima facie* evidence of service which cannot be set aside by the

uncorroborated affidavit of the person served. *Nibco*, 98 Ill. 2d at 172; *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 30; 735 ILCS 5/2-203(a) (West 2010). The process server's averments are matters within the process server's personal knowledge. *Nibco*, 98 Ill. 2d at 172; *Kamarauli*, 2012 IL App (1st) 112353, ¶ 30. Therefore, the process server's affidavits of service could only be set aside by clear and satisfactory evidence. *Nibco*, 98 Ill. 2d at 172.

¶ 32 Here, Pascual avers that he was never served on July 18, 2013 or on any other date. However, he presents no evidence to challenge the process server's affidavit of service that he left a copy of the process with Remedios Sales on October 17, 2012, at 3932 West Greenleaf Avenue, Lincolnwood, Illinois and that he mailed a copy to Pascual Sales on October 18, 2012. We find no averment in Pascual's affidavit that service was not effectuated on Pascual on October 17, 2012, in compliance with section 2-203 (a) (2) of the Code. Instead, Pascual's affidavit only challenges the process server's August 7, 2012 affidavits of service. Defendants' affidavits concerning the August 7, 2012 affidavits of service simply do not present this court with clear and satisfactory evidence that rebuts the process server's affidavits of service on Pascual Sales on October 17, 2012. *Nibco*, 98 Ill. 2d at 172. Therefore, we find that service of the summons and complaint, by substitute service, on Pascual Sales on October 17, 2012, should not be set aside and that the circuit court acquired personal jurisdiction over Pascual Sales.

¶ 33 Because the circuit court obtained jurisdiction over both Remedios, by personal service, and Pascual, by substitute service, on October 17, 2012, we find that the court acquired jurisdiction over the defendants and could enter the February 14, 2014 default judgment, and

the November 19, 2014 order approving the report of sale and distribution and granting the plaintiff possession.

¶ 34

CONCLUSION

¶ 35

Remedios Sales failed to proffer any evidence beyond her own affidavit that she was not personally served on October 17, 2012, so we find no basis to set aside the sheriff's affidavit of service. *Jafree*, 93 Ill. 2d at 455; *Four Lakes*, 129 Ill. App. 3d at 683. Pascual Sales also failed to proffer any evidence to refute the process server's affidavit of service that he served Pascual Sales on October 17, 2012, by substitute service, so we find no basis to set aside the sheriff's return of service. *Nibco*, 98 Ill. 2d at 172. Accordingly, because the court acquired personal jurisdiction over the defendants on October 17, 2012, we affirm the circuit court's February 14, 2012 default judgment and the November 19, 2014 order approving the report of sale and distribution and granting the plaintiff possession.

¶ 36

Affirmed.