2015 IL App (2d) 140609-U
No. 2-14-0609
Order filed February 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DLJ MORTGAGE CAPITAL, INC. Plaintiff-Appellee, v. VALENTIN N. GEORGIEV, a/k/a Valentin Georgiev, and JANA KOTOVA, a/k/a Jana Georgiev, Defendants-Appellants (JP Morgan Chase Bank, National Association, and Oakwood Homeowners Association, Defendants).	)	Appeal from the Circuit Court of Du Page County. No. 13-CH-131 Honorable Robert G. Gibson, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in not treating defendants' motions as mislabeled motions to quash service. Regardless, service by publication was appropriate under the circumstances. Therefore, we affirmed.

¶ 2 In this foreclosure action, defendants, Valentin N. Georgiev, a/k/a Valentin Georgiev, and Jana Kotova,[1] a/k/a Jana Georgiev, appeal from the trial court's rulings on their emergency motion to stay the judicial sale of their property and their motion under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) to set aside the default judgment and stay the judicial sale. Defendants argue that the trial court should have treated the motions as wrongly-captioned motions to quash service, and that the trial court should have quashed the service by publication. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendants obtained a mortgage from Colonial National Mortgage on March 3, 2008, for a residence at 837 Revere Court in Westmont. Mortgage Electronic Registration Systems, Inc., as nominee for Colonial National Mortgage, assigned the mortgage to plaintiff, DLJ Mortgage Capital, Inc., in November 2012.

¶ 5 Plaintiff filed a complaint for foreclosure on January 11, 2013. It alleged that defendants had failed to pay the monthly installments due beginning April 1, 2011, and currently owed $790,789.11 in principal and interest.

¶ 6 On February 6, 2013, plaintiff filed affidavits from a special process server stating that defendants were unable to be served at the residence on January 14, 2013. The affiant stated that there were no signs of activity and that no furnishings or personal possessions were visible through the windows. A resident from the same street stated that defendants had not lived at the property for " 'some time' " and had rented it out, with the renters having moved out " 'last Friday.' " On January 16, 2013, the affiant attempted to serve Jana at 416 East Ogden Avenue, suite A, an office building. A woman said that Jana no longer worked there and had moved to

[1] The pleadings below also spell her last name "Kostova."

the Czech Republic over one year before. Another affiant attempted to serve Valentin at 2011 South Wheaton Avenue in Wheaton, but the receptionist stated that he did not work there.

¶ 7 Also on February 6, 2013, plaintiff filed an affidavit of due diligence from a private detective who attempted to locate defendants using commercial information databases, public records, postal service forwarding address requests, public internet websites, and the Social Security Death Index. The only addresses located were those at which service attempts were made.

¶ 8 Plaintiff further filed an affidavit for service by publication on February 6, 2013, stating that defendants' last known address was the subject property and that upon due inquiry, defendants could not be found for process to be served upon them.

¶ 9 An affidavit of attempted service dated February 8, 2013, stated that the affiant attempted to serve defendants at 230 North Wilmette Avenue in Westmont on February 6, 2013. A woman at the home said that she was a family friend; that defendants did not reside there; that she had not seen them in over one year; and that she had no contact information for them.

¶ 10 On February 11, 2013, plaintiff filed an affidavit of abandonment, alleging that the house was vacant and/or abandoned. On February 21, 2013, plaintiff filed a notice by publication.

¶ 11 On April 30, 2013, plaintiff filed a motion for a judgment of foreclosure and sale. It also filed a motion for default and a motion to shorten the redemption period. The trial court granted the motions and entered a foreclosure judgment on May 2, 2013. The redemption period was set to expire on June 2, 2013.

¶ 12 On June 14, 2013, plaintiff filed a notice for sale, setting the auction for July 9, 2013.

¶ 13 On July 9, 2013, defendants filed an emergency motion to stay the judicial sale and for other relief, alleging as follows. In 2011, Valentin was undergoing treatment for several

significant medical conditions such as severe headaches, spinal issues, and numbness in his hands and feet. However, he lost his job and medical insurance, so he temporarily went to his wife's native country, the Czech Republic, for treatment. Before the trip, defendants locked all of their furniture in the home's third floor and garage, where it currently remained. Valentin also gave power of attorney to his friend, F. Patrick Murphy, to handle any financial matters that arose. Valentin returned to the home in October to November 2011 and February, April, and June 2012. Defendants had a tenant from June 2012 to January 2013, and they had a short-term tenant as recently as mid-June 2013.

¶ 14 On about July 3, 2013, Murphy learned from the tenant that the home was scheduled for judicial sale on July 9, 2013. Prior to that, defendants had never received any notice that the home was in foreclosure. The mortgage had been serviced by Selene Finance from before November 23, 2011, through April 2013. Defendant had been in regular contact with Selene Finance, first requesting a hardship forbearance on their mortgage and then trying to extend the same. On April 17, 2013, Selene Finance sent a correspondence to Valentin stating that he would be working with Zucker Asset Group regarding his home. Both Selene Finance and Zucker had Valentin's e-mail address and were able to communicate with him at all times. Since November 2012, defendants had been planning to return to the United States in August 2013 and had enrolled their children in school here. Valentin had communicated these plans to Selene Finance and Zucker. Defendants had continued to pay for utilities and a security system on the property. Upon hearing of the pending sale, Valentin returned to the United States that weekend. Selene Finance and Zucker, plaintiff's agents, never communicated to defendants that their home was in foreclosure. Plaintiff represented to the court, through its process server, that the house was abandoned, even though it knew through its agents that it was not. In this manner, plaintiff

misled the trial court into entering an order shortening the redemption period. Defendants never abandoned their home but rather intended to return home, and at all times they kept control over it. Defendants requested that the judicial sale scheduled for July 9, 2013, be stayed and that the orders of May 2, 2013, be vacated.

¶ 15 Defendants attached to their motion letters from Selene Finance dated November 8, 2011, and April 17 and 25, 2013, and addressed to them at the property. Another letter dated November 23, 2011, regarding a loan forbearance was addressed to attorney Murphy. Finally, defendants attached copies of e-mail correspondences from May 2013 purporting to be from Zucker to Valentin and Murphy.

¶ 16 On July 9, 2013, the trial court granted defendants' motion in part. It stayed the sheriff's sale and extended the redemption period to August 2, 2013.

¶ 17 On July 30, 2013, defendants filed a motion to reconsider. They alleged that the publication by notice was stated to have taken place on February 27, 2013, and that the redemption period should have expired at least seven months later, on September 27, 2013, rather than the August 2, 2013, date set by the trial court.

¶ 18 The trial court granted the motion on August 5, 2013, and reset the redemption date to September 27, 2013. The date of sale was subsequently extended several times, and the property was eventually sold on May 1, 2014. Also in May 2014, defendants changed counsel.

¶ 19 On May 12, 2014, defendants filed a section 2-1401 motion to set aside the default judgment and sale. They stated as follows. Plaintiff served notice by publication on February 25, 2013, "[a]fter many failed attempts at effectuating service upon" defendants. Defendants asserted in their July 9, 2013, emergency motion that they were not aware of the foreclosure until July 4, 2013, and that plaintiff had improperly represented that the property was abandoned. Via

the trial court's order of July 9, 2013, the trial court agreed that the property was not abandoned and vacated the portion of the default judgment allowing for a shortened redemption period. Defendants checked their mail daily and never received mailed notice of the May 1, 2014, judicial sale.

¶ 20 Defendants argued that the default judgment should be set aside because they had a meritorious defense. They argued that personal service should have been mandated because plaintiff knew or should have known that their property was not abandoned and that they were out of the country. Defendants maintained that they were in regular contact with plaintiff's agent-servicers, and this knowledge should be imputed to plaintiff. Defendants argued that they were not negligent in asserting their defense and had exercised due diligence in filing their petition.

¶ 21 Defendants also argued that the sale should be set aside because once defendants had entered an appearance through counsel, notice of all future court activity should have been sent to counsel. However, neither defendants nor their former counsel received notice of the May 1, 2014, sale date.

¶ 22 Defendants requested that the default judgment of foreclosure be set aside, as well as the May 1, 2014, sale.

¶ 23 On May 20, 2014, the trial court denied defendants' request to set aside the default judgment and sale. It entered an order confirming the sale. The trial court did grant defendants' request, *instanter*, for a 60-day stay on the order of possession, extending it to July 20, 2014.

¶ 24 Defendants timely appealed.

¶ 25 II. ANALYSIS

¶ 26 Defendants argue that their July 9, 2013, emergency motion to stay the judicial sale and for other relief and their May 12, 2014, section 2-1401 motion to set aside the default judgment and sale should have been treated as wrongly-captioned motions to quash service, and that the trial court should have quashed the service upon them.

¶ 27 Defendants note that courts typically review motions according to their content rather than their labels. See *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 12 (substance of motion, rather than its label, dictates how it should be treated); *Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924, 932 (2011) (character of a motion should be determined by its content instead of its title). Defendants cite *Bank of Matteson v. Brown*, 283 Ill. App. 3d 599, 606 (1996), where the appellate court stated that courts should be liberal in recognizing motions as a collateral attack upon a void judgment, even if the motion is mislabeled.

¶ 28 Defendants argue that the grounds and requests in both of the motions at issue here show that they should have been labeled as motions to quash service. They argue that both motions addressed service by publication and alleged that plaintiff improperly represented to the court that the property was abandoned. They argue that their May 2014 motion, in particular, clearly attacked the validity of jurisdiction over them.

¶ 29 Defendants argue that in addition to treating their motions as motions to quash service, the trial court should have granted them relief because there was evidence that they should not have been served by publication.

¶ 30 For a judgment to be valid, there must have been jurisdiction over both the subject matter and the parties. *BankUnited v. Velcich*, 2015 IL App (1st) 132070, ¶ 27. Personal jurisdiction can be established by either the effective service of process or a party's voluntary submission to

the court's jurisdiction. *Id.* A judgment that was entered without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally. *Id.* As the trial court did not make any factual findings on the issue of whether it obtained personal jurisdiction over defendants, we review this question *de novo*. See *id.* ¶ 26; see also *JPMorgan Chase Bank v. Ivanov*, 2014 IL App (1st) 133553, ¶ 45 (we review *de novo* whether the trial court obtained personal jurisdiction over the defendant through the plaintiff's service by publication).

¶ 31 Section 2-206 of the Code allows for service by publication in actions affecting property. 735 ILCS 5/2-206 (West 2012). In order to do so, the plaintiff must file an affidavit stating that:

> "the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served on him or her, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained." 735 ILCS 5/2-206(a) (West 2012).

The statutory prerequisites for service by publication, such as due diligence and due inquiry, must be strictly complied with in order for a court to obtain jurisdiction over a defendant. *BankUnited*, 2015 IL App (1st) 132070, ¶ 30. These requirements are not satisfied by perfunctory performance but rather "require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit." *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476 (2006). Service by publication is not justified where efforts to comply with the statute are casual, routine, or spiritless. *Id.*

¶ 32 The defendant may challenge the plaintiff's affidavit by filing an affidavit showing that, upon due inquiry, he or she could have been found. *First Bank & Trust Co. of O'Fallon v. King*, 311 Ill. App. 3d 1053, 1056 (2000). The burden then shifts to the plaintiff to produce evidence establishing due inquiry. *Id.* If the defendant is able to show that that the affidavit filed by the

plaintiff's agent for service by publication may be untruthful, the trial court should hold an evidentiary hearing where the plaintiff has the burden of proving that it made due inquiry to locate the defendant. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18.

¶ 33 In their brief, defendants restate their allegations from their motions that: they traveled to the Czech Republic in 2011 so that Valentin could receive medical treatment; they left furniture in the home's third floor and garage; they gave power of attorney to Murphy to handle financial affairs; they had tenants during their absence; Valentin returned to the home several times in 2011 and 2012; they continued to pay for the home's utilities and security system; defendants and Murphy were in contact with Selene Finance and Zucker; since November 2012, defendants planned to return to the United States in August 2013, had enrolled their children in school here for that fall, and informed Selene Finance and Zucker of these plans; plaintiff could have communicated with defendants through these agents but failed to do so, and it should have also known through these agents that defendants were overseas only temporarily; Murphy first learned that the home was in foreclosure from a tenant on July 3, 2013; Valentin returned to the United States upon learning the news; and plaintiff misrepresented to the court that defendants had abandoned their home.

¶ 34 Defendants argue that they filed a motion attacking plaintiff's affidavits for personal service supported by their own affidavits, as well as exhibits showing defendants' communication with plaintiff's agents at a time they supposedly could not be found. Defendants contend that the evidence was clearly sufficient to call into question the reliability of plaintiff's affidavit for service by publication and should have resulted in quashing service against them, or at least should have triggered an evidentiary hearing.

¶ 35 Plaintiff, for its part, notes that under section 2-301(a) of the Code, before filing a pleading or motion other than a motion for an extension of time to answer or appear, a party may object to the trial court's jurisdiction over him or her by filing a motion to dismiss the entire proceeding or any cause of action, or by filing a motion to quash service of process. 735 ILCS 5/2-301(a) (West 2012). Plaintiff argues as follows. Defendants' motions should not be treated as motions to quash service because they did not request that the trial court dismiss the entire action or quash service. The emergency motion requested that the orders of May 2, 2013, entering judgment of foreclosure and default be vacated. The motion did not say that service by publication was improper but rather stated that there was no evidence in the court file of service by publication. The motion's allegations that plaintiff was aware that defendants were in Europe were the basis for defendants' request for vacating the order granting a shortened redemption period, not for vacating the default judgment or judgment of foreclosure and sale. Moreover, defendants' subsequent motion to set aside the default judgment and sale did not request that the entire action be dismissed or that service be quashed, only that the default judgment and sale be vacated. Defendants' allegations as to plaintiff's knowledge of their whereabouts related to this aforementioned request. Therefore, according to plaintiff, defendants' motions should not be considered motions to quash, and the trial court's judgment should be affirmed because the issue of jurisdiction was not properly raised below.

¶ 36 Plaintiff argues that defendants additionally failed to file a motion to quash within the 60-day deadline found in section 15-1505.6 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1505.6 (West 2012)). That statute states that in a residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process objecting to the court's personal jurisdiction is 60 days after the earlier of (1) the date the moving

party filed an appearance, or (2) the date the moving party participated in a hearing. 735 ILCS 5/15-1505.6 (West 2012). Plaintiff notes that defendants filed their appearance on July 9, 2013, the same day they filed their emergency motion. Plaintiff argues that the emergency motion does not qualify as a motion to quash service, and if defendants had intended it to, they could have raised the issue in their July 30, 2013, motion to reconsider. Plaintiff points out that in defendants' motion to reconsider, they did not request to dismiss the case or quash service but rather requested that the trial court reset the "redemption expiration date as September 27, 2013, or seven months after any date later than February 27, 2013, that this court finds service by publication was made." Plaintiff argues that because defendants did not file a motion to dismiss the entire action or quash service within 60 days of their initial appearance, they forfeited their right to object to personal jurisdiction.

¶ 37 Plaintiff argues that even if we address the merits of the issue, service by publication was proper here. Plaintiff maintains that defendants seem to insinuate that a finding of abandonment was necessary to proceed with service with publication, but the subject of abandonment related only to shortening the redemption period, and the trial court ultimately extended the redemption period to the full seven months. Plaintiff argues that defendants failed to file affidavits that state that upon due inquiry, they could have been found, so their contentions regarding service should not be considered. Plaintiff argues that, even otherwise, the content of plaintiff's affidavits of due diligence show that it made a diligent inquiry.

¶ 38 In response to defendants' argument that plaintiff was aware that they had moved to the Czech Republic and, in fact, was in contact with them, plaintiff contends that defendant failed to provide evidence showing that plaintiff knew the current address or actual whereabouts of defendants. Plaintiff argues that, to the contrary, defendants' affidavits show that they were in an

unknown location in Europe when the foreclosure action was filed. Plaintiff maintains that there was also no evidence in the record that defendants notified plaintiff's agents of their location, as the letters were addressed to the subject property and the e-mail correspondence occurred several months after the foreclosure was filed, in April and May 2013. Plaintiff argues that the e-mails actually confirm that the property was vacant and that defendants were at an unknown location as of May 20, 2013. Plaintiff also argues that the mortgage states that notice delivered to the subject property is deemed proper unless defendants provide notification in writing of a change in address, which did not occur here, so attempted service at the residence was proper. See *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 15 (finding without merit the defendant's argument that the bank knew he did not reside at the property, where the notice provisions of the mortgage designate the property address as the notice address unless the defendant designated a substitute notice address, which he did not do). Plaintiff argues that under the plain language of section 2-206, it is unclear how plaintiff could have located defendants for personal service when they concede that at the time of attempted service, they were at an undisclosed location overseas and could not have been served at the residence or even anywhere in Illinois. Plaintiff therefore argues that service by publication was entirely proper.

¶ 39 We agree with plaintiff that the trial court did not err by not treating defendants' motions as improperly-titled motions to quash service. Defendants' July 9, 2013, emergency motion to stay the judicial sale and for other relief did not seek to quash service or dismiss the entire action, as required to assert an objection to personal jurisdiction under section 2-301(a) of the Code. 735 ILCS 5/2-301(a) (West 2012). Rather, defendants' allegations regarding continued control over the home all related to their assertion that the home was not abandoned and that, therefore, there should not have been a shortened redemption period. As plaintiff points out, if defendants

had truly intended that the emergency motion be treated as a motion to quash service, they would have brought up the trial court's lack of ruling on the service issue in their July 30, 2013, motion to reconsider, but they did not, instead focusing solely on the redemption period's expiration date. Correspondingly, defendants did not meet the 60-day deadline for filing a motion to quash service objecting to the court's personal jurisdiction under section 15-1505.6. *BAC Home Loans Servicing, LP v. Pieczonka*, 2015 IL App (1st) 133128, ¶ 12 (where the defendant filed a motion to quash service beyond the time allowed in section 15-1505.6, the trial court properly dismissed the motion). Even looking beyond this deadline defendants' section 2-1401 motion to set aside the default judgment and sale, the content of the motion does not reveal the motion to be an improperly labeled motion to quash service, as defendants sought only to set aside the foreclosure judgment and sale rather than seeking to quash the original service on them and dismiss the entire case.

¶ 40 Even if, *arguendo*, the motions should have been treated as motions to quash service, we agree with plaintiff that service by publication was appropriate under the circumstances of this case. While defendants assert on appeal that plaintiff improperly represented to the trial court that the property was abandoned, the issue of abandonment is relevant to whether the redemption period can be shortened. See 735 ILCS 5/15-1603(b) (West 2012); *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 30. Defendants raised this issue in the trial court, arguing that they should receive the full redemption period, and the trial court agreed and granted this relief. However, abandonment of the property is not a requirement for service by publication. 735 ILCS 5/2-206(a) (West 2012).

¶ 41 Rather, plaintiff had to show that upon due diligence and due inquiry, defendants could not be found for process to be served upon them. 735 ILCS 5/2-206(a) (West 2012). Defendants

do not contest that they were not living at the residence, working in the state, or even within this country around the time that plaintiff was attempting to serve notice. Instead, as plaintiff points out, defendants simply alleged that they were in the Czech Republic, and they did not provide a specific address. They also admitted that they did not visit the home from July 2012 to June 2013, whereas this foreclosure case was filed in January 2013. In short, defendants do not reveal how plaintiff could have personally served them during the relevant time frame.

¶ 42 Defendants do rely heavily on their correspondence with entities they allege were plaintiff's agents. However, two of the letters from Selene Finance are from November 2011, long before this action was filed. The other two letters from Selene Finance are from April 2013, about two months after service by publication. The letters to defendants are all addressed to the property's address. As far as the e-mails, one is from Murphy to Zucker, and the other ones are from Zucker to Valentin, with all of the Zucker e-mails requesting that Valentin contact it to confirm receipt of Zucker's e-mails. Thus, none of the e-mails show that Zucker was actually able to communicate with Valentin. The e-mails are also from April and May 2013, well after service by publication. Neither the letters nor the e-mails reveal how plaintiff could have personally served defendants during the relevant time frame. Finally, as plaintiff notes, attempted service at the residence was also proper because defendants never notified it in writing of a change in address, as required under the mortgage. See *Bank of New York Mellon*, 2014 IL App (1st) 130112, ¶ 15. Accordingly, service by publication was appropriate under section 2-206(a).

¶ 43 III. CONCLUSION

¶ 44 We conclude that the trial court did not err in not treating defendants' motion as improperly-labeled motions to quash service, as the content of the motions did not seek such

relief. Even otherwise, because defendants never revealed the exact location where they could be reached, were not in Illinois or even in the United States around the time of attempted service, and did not provide an alternate address for service as required under the mortgage for service at a location other than the residence, service by publication was entirely appropriate under 2-206(a).

¶ 45 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 46 Affirmed.