2015 IL App (2d) 140803-U
No. 2-14-0803
Order filed June 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CAPITAL ONE, N.A.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-4989
	)	
DMITRI KITSUTKIN a/k/a DIMITRI KITSUTKIN,	)	
	)	Honorable
	)	Robert G. Gibson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's second motion to vacate, where it did not constitute a section 2-1401 petition or a successive postjudgment motion. Trial court's taking of judicial notice was harmless. Affirmed.

¶ 2 In this mortgage foreclosure action, the trial court entered a judgment of foreclosure with respect to defendant's, Dmitri Kitsutkin's a/k/a Dimitri Kitsutkin's, property after he defaulted on a loan that it secured. Plaintiff, Capitol One, N.A., had served defendant via publication. Over two-and-one-half years later, defendant moved to vacate the judgment, and, after failing to

appear to present it, the trial court struck the motion. Defendant appealed, and this court dismissed the appeal, finding that the trial court's order was not final and appealable.

¶ 3 Defendant moved again in the trial court to vacate the judgment. Plaintiff moved to dismiss (735 ILCS 5/2-619(a)(9) (West 2014)), and the trial court granted the motion, finding that defendant's motion was an improper, successive postjudgment motion. Alternatively, it found that: (1) his claim was barred by section 2-1401(e) of the Code of Civil Procedure (735 ILCS 5/2-1401(e) (West 2014)); (2) he failed to meet his burden to challenge publication service because he did not file an affidavit supporting his assertions; and (3) plaintiff exercised due diligence and inquiry in attempting to serve or locate defendant. The court also took judicial notice of two other cases in the courthouse involving defendant and wherein two other lenders were unable to serve him. Defendant appeals. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On October 21, 2009, plaintiff filed a complaint to foreclose mortgage (dated January 27, 2006) against defendant with respect to the property commonly known as 1S138 Indian Knoll Street in Winfield (tax parcel No. 04-23-101-014). Defendant had defaulted on the loan on December 1, 2007. The mortgage, with initial lender Chevy Chase Bank, F.S.B.,[1] provided that all notices by the borrower or lender be in writing and that the notice address "shall be the Property Address unless Borrower has designated a substitute notice address by notice to lender." Further, any notice to the lender "shall be given by delivering it to or mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower." On the same day he executed the mortgage and note, defendant listed his address on a construction/permanent loan rider as 822 Dawes Avenue, Wheaton.

[1] Plaintiff is a successor by merger to Chevy Chase Bank.

¶ 6 On November 5, 2009, plaintiff filed an affidavit (signed by one of its attorneys) to allow service by publication. 735 ILCS 5/2-206 (West 2008). It asserted that it had made diligent and due inquiry as to defendant's whereabouts, but could not serve process on him. It also listed defendant's last known residence as 1S138 Indian Knoll Street in Winfield. Plaintiff attached an affidavit (also dated November 5, 2009) of due diligence by a special process server, Ryan Ben, an investigator with United Processing, Inc., a licensed private detective agency. Ben averred that he "was unable to locate the defendant." Further:

> "during the investigation[,] we attempted to locate the defendant by searching public, online and confidential databases, calling Directory Assistance, and searching by means of other various data resources. These resources include the Social Security Death Index, property tax rolls and sales information, records containing voters, DMV, deed transfers and real estate ownership, active U.S. Military personnel, professional licenses, significant shareholders, trademarks, service marks, and UCC filings. We found evidence that *** defendant *** no longer resides at 1S138 Indian Knoll Street Winfield, IL 60190."

He further averred that, on October 22, 2009, an attempt was made at 4:15 p.m. and it was discovered that defendant "does not reside" at the Winfield address. "This address is a vacant and unfinished new construction single family residence." Further, on the same date, at 8:15 p.m., "it was discovered that [defendant] does not reside at 822 Dawes Avenue Wheaton, IL 60187. Current owner *** has no knowledge of defendant."

¶ 7 On November 12, 2009, plaintiff served defendant by publication.

¶ 8 On January 7, 2010, plaintiff filed an affidavit of attempted service by John Verstat, a private process server. He signed the affidavit on November 4, 2009, and stated that, on October

22, 2009, at 4:15 p.m., he discontinued attempting service on defendant at 1S138 Indian Knoll Street, Winfield, IL 60190 because the address was "a vacant and unfinished new construction single family residence."

¶ 9 On March 22, 2010, plaintiff moved for entry of an order of default against defendant, who had failed to appear and/or answer. On the same date, the trial court entered a judgment of foreclosure and sale. The subject property was sold to plaintiff[2] at a June 24, 2010, sheriff's sale, and an order confirming the sale was entered on July 23, 2010.

¶ 10 More than 2 1/2 years later, on December 20, 2012, defendant moved to vacate the judgment. 735 ILCS 5/2-203 (West 2012). He argued that he was never served with process and that the court had no personal jurisdiction over him or the property because the attempted service by publication was void, where plaintiff did not demonstrate due diligence or inquiry in attempting to locate defendant. Defendant argued that plaintiff knew or should have known that defendant did not reside at the subject property, since he never resided there and it was uninhabitable. Defendant attached an affidavit to his motion, averring that the subject property's closing statement, mortgage, note and all other closing documents listed his address as 822 Dawes Avenue in Wheaton, which is where he resided at the time. Defendant stated that, in the summer of 2007, he moved from the Dawes address to 15 Royal Vale (city, state, and/or zip code unspecified). "At that time, I contacted Joe Biancardi, at Chevy Chase Bank, and told him that I moved to 15 Royal Vale." (He did not specify whether he contacted Biancardi in writing or orally.) Defendant denied ever being served in this case. He averred that, in late 2009, when

[2] Plaintiff subsequently sold the subject property to Kenneth and Patricia Craft, who are the current owners.

plaintiff attempted to serve him at the subject property, he lived at the Royal Vale address (again, he did not specify the city, state, and/or zip code).

¶ 11 On January 18, 2013, defendant was granted leave to file an amended petition to vacate to add the current property owner to the proceeding. On February 5, 2013, defendant filed his amended motion (hereinafter, the first motion to vacate), which he noticed for presentment on February 27, 2013. (The amended motion was accompanied by the same affidavit that he attached to his initial motion.) He subsequently requested additional time, and the hearing was rescheduled for April 3, 2013.

¶ 12 On April 3, 2013, defendant's counsel failed to appear in support of defendant's amended motion to vacate judgment, and the trial court entered an order stating that the motion was "stricken."

¶ 13 On April 30, 2013, defendant moved to vacate the April 3, 2013, "dismissal for want of prosecution" of his first motion to vacate judgment. He explained that counsel inadvertently docketed the matter for April 9, instead of April 3, 2013. He argued that his motion was filed in good faith and raised meritorious arguments.

¶ 14 On May 22, 2013, the court entered an order acknowledging being advised of defendant's May 16, 2013, Chapter 7 bankruptcy filing, and it declined to rule on his pending first motion to vacate the April 3, 2013, ruling. In referring to its April 3, 2013, order, the court stated, "It wasn't DWP'd. The Motion was stricken because no one appeared on that date." Defendant's counsel replied, "Right. We're asking that the Court vacate that."

¶ 15 On November 19, 2013, defendant moved for ruling on his motion to vacate "dismissal for want of prosecution" (of his first motion to vacate the foreclosure judgment), asserting that

the bankruptcy proceeding had ended and requesting that the court vacate the "dismissal" entered on April 3, 2013.

¶ 16 On December 13, 2013, the trial court denied defendant's motion to vacate.

¶ 17 On January 15, 2014, defendant filed a notice of appeal from the trial court's December 13, 2013, order. In this court, plaintiff moved to dismiss the appeal on the grounds that it was not from a final and appealable order. On March 13, 2014, we granted the motion. The order stated that the "Dismiss[al] for Want of Prosecution," which was filed on April 3, 2013, "will become a final and appealable order on April 2, 2014." *Flores v. Dugan*, 91 Ill. 2d 108, 111-12 (1982) (dismissal for want of prosecution not a final and appealable order because the action could have been re-filed within one year of the dismissal). "At that time the appellant may file a notice of appeal if he desires to appeal the merits of the entry of the dismissal."

¶ 18 On April 2, 2014, instead of filing an appeal, defendant moved in the trial court to vacate the foreclosure judgment (hereinafter, the second motion to vacate), but without attaching any affidavit (as he had done to his first motion to vacate). He brought the motion pursuant to both sections 2-203 and 2-1401 of the Code and added an allegation that, on May 11, 2010, plaintiff sold the subject property to the Crafts, who are the current owners. Defendant raised only the same arguments as in his first motion to vacate: that the trial court had no jurisdiction over him because he was never served and that service by publication was not appropriate because plaintiff did not show due inquiry or diligence in attempting to locate defendant. He argued that the court file contained no affidavit or other evidence of due inquiry or diligence justifying service by publication. Addressing plaintiff's second affidavit (by Ryan Ben), wherein it averred that the process server had attempted to serve defendant at the 822 Dawes, Wheaton, address, defendant argued that there was "no evidence of what other steps were taken." (Because there

was no affidavit supporting this motion, it contained no averments concerning defendant's alleged contact with Biancardo or reference to the 15 Royal Vale address, as were contained in his first motion to vacate.)

¶ 19 On June 19, 2014, plaintiff moved to dismiss (735 ILCS 5/2-619(a)(9) (West 2014)) defendant's second motion to vacate, arguing that: (1) defendant's motion constituted an improper, successive postjudgment motion; (2) the claim was barred by section 2-1401(e) of the Code; (3) defendant failed to meet his burden in challenging publication service, where he failed to support his motion with an affidavit or to otherwise establish how he could have been found upon due inquiry or diligence; and (4) publication *was* proper, where plaintiff made two attempts to personally serve defendant and where the process server made numerous inquiries into defendant's whereabouts, including searching various databases.

¶ 20 On July 30, 2014, the trial court granted plaintiff's motion to dismiss defendant's second motion to vacate, dismissing the motion with prejudice. The court found that defendant's motion constituted an improper successive postjudgment motion; alternatively, it found that his claim was barred by section 2-1401(e) of the Code, that he failed to meet his burden to challenge publication service because he did not file an affidavit to support his assertions, and that plaintiff exercised due diligence and inquiry in attempting to serve or locate defendant. Also, the court took judicial notice that, in two other cases in the circuit court involving defendant ("2010 AR 4293, American Express Bank versus [defendant], as well as Discovery Bank versus [defendant]"), the plaintiff-lenders were unable to serve defendant "despite diligent efforts similar to what occurred in this case." Defendant appeals.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that the trial court erred in granting plaintiff's section 2-619(a)(9) motion to dismiss his alleged section 2-1401 petition (*i.e.*, his second motion to vacate), wherein he argued that service by publication did not satisfy due process and, thus, the trial court's foreclosure judgment was void because the court never obtained personal jurisdiction over him. He also argues that the trial court's alternative findings were erroneous, specifically that the trial court erred: (1) in finding that defendant's motion to vacate was a successive postjudgment motion; (2) in finding that section 2-1401(e) of the Code applied; and (3) in misapplying judicial notice to utilize unreliable and prejudicial information from unrelated cases.

¶ 23 Defendant's second motion to vacate the foreclosure judgment (arguing lack of personal jurisdiction) was brought more than 30 days (specifically, nearly four years) after the entry of the final order in the foreclosure action and, thus, it arguably constituted a section 2-1401 petition. 735 ILCS 5/2-1401(a) (West 2014) (relief from final orders and judgments after 30 days from the entry thereof); see also *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 98 (2002) (a petition that seeks to vacate a void judgment should be construed as a petition for relief from judgment brought pursuant to section 2-1401 of the Code). The order appealed here is the section 2-619(a)(9) dismissal of defendant's second motion to vacate the foreclosure judgment (wherein the trial court found availing plaintiff's arguments that: defendant's motion was an improper successive postjudgment motion, his claim was barred by section 2-1401(e) of the Code, he failed to meet his burden in challenging publication service, where he failed to attach an affidavit to his motion or otherwise establish how he could have been found upon due inquiry or diligence, and where publication was proper).[3] For the following reasons, we conclude that

[3] Because the parties do not raise it, we do not address the question whether any of the court's findings were more properly assessed pursuant to section 2-615 of the Code (735 ILCS

dismissal was proper because defendant's second motion was not a proper section 2-1401 petition or a successive postjudgment motion.

¶ 24 A motion to dismiss a section 2-1401 petition is reviewed under the same standards as any motion to dismiss a pleading. *In re Marriage of Reines*, 184 Ill. App. 3d 392, 404 (1989). A motion to dismiss under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint but asserts some "affirmative matter" as a defense. *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 130 (2010). " 'Affirmative matter' is defined as a defense that either negates the alleged cause of action completely or refutes a crucial conclusion of law or conclusion of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007). It is well settled that the "affirmative matter" asserted by the movant must be apparent on the face of the complaint; otherwise, the motion must be supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). Once a movant satisfies this initial burden of going forward on the section 2-619(a)(9) dismissal motion, the burden then shifts to the nonmovant to establish that the defense is " 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Id.* (quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d 112 116 (1993)). " 'If, after considering the pleadings and affidavits, the trial judge finds that the [nonmovant] has failed to carry the shifted burden of going forward, the motion may be granted and [the pleading] dismissed.' " *Id.* (quoting *Kedzie*, 156 Ill. 2d at 116). In ruling on a section 2-619(a)(9) motion to dismiss, all well-pleaded facts and the inferences arising from those facts must be taken as true. *Lawson*, 398 Ill. App. 3d at 130. "The question on appeal is 'whether the existence of a genuine issue of material fact should

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5/2-615 (West 2014)).

have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 11617 (1993)). Our review is *de novo*. *Sandholm*, 2012 IL 111443, ¶ 55. We also review *de novo* the question whether the trial court obtained personal jurisdiction. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17.

¶ 25 Defendant notes that, in its motion to dismiss, plaintiff challenged the factual basis for defendant's motion to vacate by arguing that publication service was proper. Plaintiff supported its motion to dismiss with its previously-filed affidavits of due diligence and inquiry, wherein it claimed that defendant could not be located and that he had been living at the subject property. According to defendant, plaintiff knew or should have known that he never resided at the subject property because the property was not habitable. The process server, he asserts, was never notified of this. Defendant notes that he filed an affidavit disputing the facts in plaintiff's affidavits of due diligence and inquiry. (He asserts that the trial court erred when it stated that he filed no affidavit.) In the affidavit, defendant stated that he told Joe Biancardi that he had moved to 15 Royal Vale in 2007. (He did not specify if his notice was oral or in writing, and he did not specify the city, state, and/or zip code of the Royal Vale address.) Defendant argues that plaintiff filed no counter-affidavit from Biancardi or anyone else (instead, it merely denied the merits of defendant's motion to vacate) and, thus, "this conversation was undisputed fact."

¶ 26 Defendant further contends that the trial court erred in finding that his motion to vacate was a successive post-trial motion and, thereby, dismissing it. Defendant urges that, prior to ruling on plaintiff's motion to dismiss, the trial court had never ruled on the merits of any section 2-1401 petition to vacate the judgment of foreclosure. There was no explanation by the court, he

argues, as to what prior motion by defendant had resulted in a *final and appealable* order that rendered the motion to vacate a successive post-trial motion. Pointing to this court's March 13, 2014, order, dismissing the first appeal, defendant asserts that this court ruled that the trial court had *not* ruled on the merits in first appeal and, hence, there was no prior final and appealable order. After this court's ruling, defendant moved (a second time) to vacate the judgment of foreclosure based on lack of jurisdiction. Only then did the trial court render a final and appealable order, he urges, by granting plaintiff's motion to dismiss. Defendant notes that he filed a timely notice of appeal and argues that the timeliness and appealable character of the final order has not been raised. Further, defendant maintains that he had no obligation to wait until April 2, 2014, and re-file a notice of appeal because such an appeal would only have involved the issue of the trial court's refusal to reach the merits. Instead, he notes, he returned to the trial court, sought a ruling on the merits, and the trial court considered whether it had jurisdiction to enter a foreclosure judgment. Defendant contends that this was the correct path and that the issue here is whether the trial court correctly dismissed his second motion to vacate the judgment.

¶ 27 A judgment that is entered without personal jurisdiction over a party is void and can be attacked directly or collaterally at any time. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 13. Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The purpose of a section 2-1401 petition is to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded its entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the

judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8. "If the facts alleged in the section 2-1401 petition are not of record, the petition must be supported by affidavits, and respondent must answer the petition's allegations." *O'Malley v. Powell*, 202 Ill. App. 3d 529, 533 (1990). If the central facts of a section 2-1401 petition are controverted, an evidentiary hearing must be held. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 286 (1982).

¶ 28 Typically, to be entitled to relief pursuant to section 2-1401, the petitioner must set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). In general, a section 2-1401 petition must be filed within two years of the entry of judgment. 735 ILCS 5/2-1401(c) (West 2012). The two-year limitation period, however, does not apply when the petitioner alleges the judgment is void. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002). Moreover, where a petitioner seeks to vacate a final judgment as being void, the allegations of voidness "substitute[ ] for and negate[ ] the need to allege a meritorious defense and due diligence." *Id.* at 104.

¶ 29 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. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 18.

> "Service of process serves the dual purposes of protecting a defendant's right to due process by allowing proper notification and an opportunity to be heard ([citation]) and 'vests jurisdiction in the court over the person whose rights are to be affected by the litigation' ([citation]). Failure to effect service as required by law deprives a court of

jurisdiction over the person and any default judgment based on defective service is void." *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 12.

A foreclosure judgment entered without service of process is void. *Id.*

¶ 30 Section 2-206(a) of the Code provides for service by publication and requires the filing of an affidavit showing that the defendant "on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon 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 2014). A party must strictly comply with the statute. *Karbowski*, 2014 IL App (1st) 130112, at ¶ 13.

¶ 31 Sections 2-203(a)(1) and (a)(2) of the Code (735 ILCS 5/2-203(a)(1), (a)(2) (West 2014)) provide for service of process on individuals by leaving a copy of the summons with the defendant personally, or by leaving a copy at the defendant's usual place of abode with a family member or person residing there over the age of 13. *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 32. Here, plaintiff's affidavits stated that unsuccessful attempts were made to serve defendant at both the subject property and at the 822 Dawes Avenue address in Wheaton. Defendant's affidavit that he filed with only his *first* motion to vacate stated that, in the summer of 2007, he moved from the Dawes address to 15 Royal Vale (city, state, and/or zip code unspecified) and that, at that time, "I contacted Joe Biancardi, at Chevy Chase Bank, and told him that I moved to" that address. The affidavit does not specify how defendant contacted Biancardi (*e.g.*, orally or in writing). Nor does it aver that defendant had otherwise designated a notice address pursuant to the notice provisions in the mortgage note and/or rider. See *Karbowski*, 2014 IL App (1st) 130112, at ¶ 15 (rejecting the defendant's argument that the bank knew he did not reside at the property, where the notice provisions of the mortgage designated

the property address as the notice address unless the defendant designated a substitute notice address, which he did not do; borrower provided "no evidence that he had designated a substitute notice address" and did not affirmatively represent where he lives, thus, he failed to provide competent evidence substantiating the claimed error). We disagree with defendant's argument that plaintiff provided no evidence of what steps other than trying to serve defendant at the two addresses were taken. In his affidavit, Ben averred that he "was unable to locate the defendant" after searching various databases, tax rolls, and other records.

¶ 32 Section 2-1401 "contemplates the introduction of new or additional information that was not nor could have been included in the first motion." *B-G Associates*, 194 Ill. App. 3d at 59. Where allegations in a second postjudgment motion "simply duplicate verbatim those set forth in the first," the second postjudgment motion does not comply with section 2-1401's requirements and a party may not proceed thereunder. *Id.* Also, where facts alleged in the petition are not of record, they must be supported by affidavit. *O'Malley*, 202 Ill. App. 3d at 533. Here, critically, defendant's second motion to vacate raised the same arguments as his first motion to vacate and it did not include his affidavit (which was the only pleading where he asserted that he had contacted plaintiff to notify it of his Royal Vale address). Thus, it was not a proper section 2-1401 petition. *Id.* Even if we construed it as such, it would fail to raise a material factual issue precluding dismissal because, containing only conclusory allegations (*e.g.*, that there was "insufficient due inquiry and due diligence") and lacking defendant's affidavit (which itself did not specify how defendant contacted Biancardi and did not list his complete Royal Vale address), the motion, thus, did not refute plaintiff's assertions (supported by affidavits).

¶ 33 Further, the motion did not constitute a successive postjudgment motion to vacate and, thus, the circuit court lacked jurisdiction to consider it. A party may only file one postjudgment

motion directed at a judgment. See Supreme Court Rule 274 (eff. Jan 1, 2006) ("A party may make only one postjudgment motion directed at a judgment order that is otherwise final"); *Sears v. Sears*, 85 Ill. 2d 253, 258-59 (1981) (a second postjudgment motion, at least if filed more than 30 days after judgment, is not authorized by statute or supreme court rule and must be denied). Circuit courts have no authority to hear successive postjudgment motions. *Won v. Grant Park 2, LLC*, 2013 IL App (1st) 122523, ¶ 34. See also *Benet Realty Corp. v. Lisle Savings & Loan Ass'n*, 175 Ill. App. 3d 227, 231-32 (1988) (the filing of a second postjudgment motion that merely repeats arguments made in the first motion is not a "timely" post-trial motion under Rule 303(a)(1) and does not extend the time for the filing of a notice of appeal). (A section 2-1401 petition, however, is not considered a successive postjudgment motion over which a trial court would lack jurisdiction because proceedings thereunder are considered new matters and not mere continuations of the original proceeding. *B-G Associates*, 194 Ill. App. 3d at 59.)

¶ 34 We reject defendant's arguments that his second motion to vacate was a successive postjudgment motion. Defendant contends that this court's March 13, 2014, order reflected that the trial court's ruling would *not* have become final and appealable on April 2, 2014. However, this court's order clearly stated that it "*will* become a final and appealable order on April 2, 2014." (Emphasis added.) Thus, on April 2, 2014, there was a final and appealable order with respect to defendant's first motion to vacate—namely, the trial court's December 13, 2013, order striking defendant's motion. (Also on that date, defendant filed his second motion to vacate the foreclosure judgment, raising the same arguments as in his first motion to vacate, but not attaching his affidavit wherein he averred that he lived at the Royal Vale address.) As to the stricken motion, defendant takes issue with plaintiff's characterization of the trial court's action, noting that the motion was not dismissed, but stricken, and that the effect of an order striking a

motion is that it remains pending unless the order expressly states that it was denied or dismissed. It is true that the intention of the court is determined by the order entered, and where the language of the order is clear and unambiguous, it is not subject to construction. See *Belluomini v. Lancome*, 207 Ill. App. 3d 583, 585-86 (1990) (where there was no adjudication on the merits of the plaintiff's cause—*i.e.*, her case was dismissed for want of prosecution—and her motion to vacate the dismissal was stricken when she failed to appear at the motion hearing, the court found the strike order ambiguous under the circumstances because it lacked the term "with prejudice" to clearly denote a finality); *cf. B-G Associates*, 194 Ill. App. 3d at 58-59 (in analyzing whether the trial court had jurisdiction to consider the defendants' successive postjudgment motion, the appellate court deemed the trial court's order, which struck the first postjudgment motion "with prejudice," to have disposed of the first postjudgment motion), with *Clark v. Han*, 272 Ill. App. 3d 981, 985 (1995) (where the trial court stated that the postjudgment motion "has been withdrawn," the appellate court concluded that the motion "was merely taken off the [court's] call" and the local court rules provided that a movant could set a motion within 90 days after notice). However it may be characterized, the court's striking of defendant's first motion to vacate became a final and appealable order on April 2, 2013, and, on the same day, defendant filed a second motion to vacate, which was unsupported by affidavit. As we concluded above, it was not a proper section 2-1401 petition because it included the same arguments as in his first motion to vacate and, separately, was not supported by affidavit. Further, it was not a proper successive postjudgment motion because it was filed over 30 days after the final order in this case, and, thus, the trial court had no authority to consider it. Accordingly, the court properly granted plaintiff's motion to dismiss the second motion to vacate.

¶ 35 Finally, we note that defendant takes issue with the fact that the trial court, at the conclusion of its findings, took judicial notice that, in two other cases in the circuit court involving defendant, the plaintiff-lenders were unable to serve defendant "despite diligent efforts similar to what occurred in this case." Defendant argues that this constituted prejudicial and reversible error. The trial court, he urges, had no foundation to declare efforts in the other cases to be diligent; none of the pleadings in those cases are part of the record in this case; and there was "no foundation linking other parties' alleged service efforts to the facts of this case." Courts may take judicial notice of facts proven by "immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy." *Vulcan Materials Co. v. Bee Construct*ion, 96 Ill. 2d 159, 166 (1983); see also Ill. R. Evid. 201 (eff. Jan. 1, 2011) (allowing a court to take judicial notice of certain adjudicative facts that are "not subject to reasonable dispute," which include either: (1) facts that are generally known among the local population; or (2) "capable of accurate and ready determination" by consulting sources "whose accuracy cannot reasonably be questioned"). However, courts " 'will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties.' " *Id.* (quoting *Ashland Savings & Loan Ass'n v. Aetna Insurance Co.*, 18 Ill.App.3d 70, 78, 309 N.E.2d 293 (1974)). We agree with defendant that the trial court erred in taking judicial notice of the other cases. The lenders' inability to serve defendant in the other cases was not determinative of any issues in this case. However, we conclude that the court's error was harmless. The court's findings we uphold above do not reflect that it necessarily relied upon the other cases in rendering its findings, and defendant has not shown that he was prejudiced by the taking of judicial notice of the other proceedings. See *In re Marriage of Brudd*, 307 Ill. App. 3d 57, 62 (1999) (circuit court's error

was harmless, where the petitioner did not prove that she was prejudiced to the extent that the outcome was affected; trial court stated other reasons for its findings and did not rely heavily upon other case).

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 38 Affirmed.