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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MTGLQ INVESTORS, L.P.,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 10-CH-441
)	
ANDRZEJ POWROZNIK, as Trustee under)	
a Trust Agreement dated February 11, 2009,)	
and any Amendments thereto known as the)	
Andrzej Powroznik Revocable Trust)	
)	
Defendant-Appellant)	Honorable
)	Robert G. Gibson,
(Mahesh Patel, Intervenor-Appellee).)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing defendant's section 2-1401 petition to vacate a foreclosure judgment as void for lack of personal jurisdiction, as defendant was served in violation of section 2-202 and, because the defect was apparent on the face of the record and produced a void judgment, defendant's attack was not precluded by the interests of a third-party purchaser; the dismissal also could not be sustained under Rule 103(b).
- ¶ 2 Defendant, Andrzej Powroznik, as trustee of the Andrzej Powroznik Revocable Trust (the trust), appeals the dismissal of his petition filed under section 2-1401 of the Code of Civil

Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). He contends that the trial court erred in determining that he was properly served with a complaint for foreclosure by plaintiff, MTLGQ Investors, L.P., and in determining that he failed to act with reasonable diligence in serving MTLGQ and the subsequent purchaser of the property, intervenor Mahesh Patel, with his petition. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4 In April 2005, Powroznik executed a promissory note to PNC Bank secured by a mortgage against real property in Hinsdale, Illinois. Powroznik later conveyed the property to the trust with himself as trustee.

¶ 5 Powroznik defaulted on the mortgage and, on January 26, 2010, PNC Bank filed a complaint for foreclosure in Du Page County. On January 31, 2010, summons was served on Powroznik individually and as trustee when a private investigator personally delivered the summons to Powroznik's wife at his home in Cook County. The record does not contain a special appointment by the court allowing service by an investigator in Cook County, and the parties do not assert that a special appointment was ever made. Powroznik does not deny that he received the summons.

¶ 6 On April 20, 2010, a judgment of foreclosure and sale was entered. On June 21, 2011, MTGLQ was substituted as plaintiff in place of PNC Bank. MTGLQ later purchased the property and in turn sold it to Patel on March 16, 2012.

¶ 7 On December 12, 2012, Powroznik, acting as trustee, filed a "motion to quash service" and "motion" to vacate the judgment under section 2-1401 (the petition). Powroznik argued that the trust was not properly served in the foreclosure action, depriving the court of jurisdiction to foreclose the property, because Powroznik was served personally and because the investigator

was not authorized to serve the summons. Powroznik served the petition on PNC Bank instead of MTGLQ. On January 30, 2013, the court struck the petition due to improper service.

¶ 8 On March 11, 2013, Powroznik refiled the same petition, adding service on MTGLQ, with a notice of hearing for May 1, 2013. On May 1, 2013, the court, relating the filing date back to the date of the original petition, struck the petition because there was no notice for it to be heard within 60 days. See 18th Judicial Cir. Ct. R. 6.04(f) (May 10, 1993).

¶ 9 On May 22, 2013, Powroznik, acting through new counsel, filed the petition a third time and failed to include a certificate of service. On July 10, 2013, a hearing was held, during which the court noted that there was no certificate of service, that it was not provided with a courtesy copy of the pleading, and that over three years had passed since the date of the original judgment of foreclosure. Counsel stated that he was new to the case and that previous counsel had been sick or claimed to be sick, which was the reason for the delay. The court struck the petition based on the lack of proof of service. Powroznik moved to reconsider. At the first hearing on the motion, the court noted that it had not been provided with a courtesy copy of the pleading and the matter was continued. At the next hearing, counsel indicated confusion about who the correct parties were. The court noted the previous errors in service and told counsel to pull the transcripts of the foreclosure action and look at the order approving the sale so that he could know who the parties were. On October 31, 2013, the motion to reconsider was denied.

¶ 10 On November 26, 2013, Powroznik filed the petition for the fourth time, with a notice of hearing set for February 5, 2014. On February 5, 2014, the court struck the petition for Powroznik's noticing it to be heard more than 60 days after it was filed, for his failure to provide a courtesy copy to the court, and for Powroznik's counsel's failure to appear on time.

¶ 11 On February 24, 2014, Powroznik filed the petition for the fifth time. At that time, Patel intervened and filed a motion to dismiss, in which he argued that the original foreclosure complaint was properly served. MTGLQ filed a concurrence to the motion to dismiss and additionally argued that Powroznik failed to plead a meritorious defense or due diligence, and that Powroznik could not recover after the property was sold to Patel as a *bona fide* purchaser. Powroznik responded that, under section 2-202 of the Code of Civil Procedure (735 ILCS 5/2-202 (West 2010)) and *Schorsch v. Fireside Chrysler-Plymouth, Madza Inc.*, 172 Ill. App. 3d 993, 1001 (1988), a private investigator could not serve process in Cook County without a court appointment. Powroznik argued that, as a result, the foreclosure judgment was void and a subsequent *bona fide* purchaser was not protected.

¶ 12 The trial court granted Patel's motion to dismiss. Without discussing *Schorsch*, it stated that it read section 2-202 to apply to cases filed in Cook County, while the case before it was filed in Du Page County. In the alternative, the trial court ruled *sua sponte* that Powroznik's petition was not diligently served and should be dismissed under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). In doing so, the court noted that the petition was filed in December 2012. The court gave no other analysis pertaining to Rule 103(b). The court did not rule on the effect of Patel's status as a *bona fide* purchaser. Powroznik appeals.

¶ 13

II. ANALYSIS

¶ 14

A. Service of Process on Powroznik

¶ 15 Powroznik contends that the foreclosure judgment is void because the trust was not properly served, resulting in a lack of personal jurisdiction. Specifically, he argues that, under *Schorsch*, service of process in Cook County by a private investigator is not authorized under section 2-202 of the Code without special appointment by the court.

¶ 16 Powroznik raised the matter through a section 2-1401 petition. 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 to the attention of the trial court fact that, if known at the time of judgment, would have precluded its entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006).

¶ 17 Typically, to be entitled to relief under 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 the defense or claim to the circuit court in the original action; and (3) due diligence in filing the petition. *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 limitations period, however, does not apply when the petitioner alleges that the judgment is void. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002). 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. Where a petitioner seeks to vacate a final judgment as void, the allegation of voidness “substitutes for and negates the need to allege a meritorious defense and due diligence.” *Sarkissian*, 201 Ill. 2d at 104.

¶ 18 “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 LP v. Mitchell*, 2014 IL 116311, ¶ 18. Strict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served. *Sarkissian*, 201 Ill. 2d at 109; *C.T.A.S.S.&U. Federal Credit Union v.*

Johnson, 383 Ill. App. 3d 909, 912 (2008). “Where service of process is not obtained in accordance with the requirements of the statute authorizing service of process, it is invalid, no personal jurisdiction is acquired, and any default judgment rendered against a defendant is void.” *Schorsch*, 172 Ill. App. 3d at 998. Accordingly, a foreclosure judgment entered without service of process is void. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 12.

¶ 19 At the time of the original service, section 2-202 provided in part:

“(a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. A sheriff of a county with a population of less than 1,000,000 may employ civilian personnel to serve process. In counties with a population of less than 1,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 or by a registered employee of a private detective agency certified under that Act. ***

(a-5) Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004.” 735 ILCS 5/2-202 (a), (a-5) (West 2008).

The parties do not dispute that Cook County has a population of more than 1,000,000 and that the investigator was not specially appointed to serve Powroznik. The trial court held that section 2-202 contemplated the county where the lawsuit was filed instead of the county where service took place. The issue is a matter of statutory construction.

¶ 20 “The fundamental rule of statutory construction is that courts attempt to give effect to the intent of the legislature.” *O S F Healthcare Systems v. County of Lee*, 239 Ill. App. 3d 824, 828

(1993). “The language of a statute must be given its plain and ordinary meaning.” *Id.* “When further interpretation is necessary to ascertain legislative intent behind a statute, reviewing courts may look to legislative debates.” *Id.* We review questions of statutory construction *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). We also review *de novo* whether the circuit court obtained personal jurisdiction. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 17.

¶ 21 As in the present appeal, in *Schorsch*, suit was filed in Du Page County with process served in Cook County by a private investigator who was not specially appointed by the court. We held that, under the plain language of section 2-202, and based on the legislative history, a private investigator was not authorized to serve process in Cook County without a special appointment by the court. *Schorsch*, 177 Ill. App. 3d at 997. Further, where a private detective was not authorized to serve process because he was not appointed, the court lacked personal jurisdiction over the defendant and the default judgment obtained by the plaintiff was void. *Id.* at 998. Similarly, in *C.T.A.S.S.&U.*, 383 Ill. App. 3d at 912, the First District held that a default judgment was void for lack of personal jurisdiction where process was served before an order appointing a special process server was entered.

¶ 22 Here, *Schorsch* clearly controls, and MTGLQ and Patel do not argue otherwise. Indeed, MTGLQ does not address the matter at all, while Patel concedes that section 2-202 requires the Cook County sheriff “to have first crack at” service of a Cook County resident, or a special service process server must be appointed by the court. However, Patel argues that abode service in general was proper “albeit by a special process server” and argues that Powroznik is asserting form over substance because he failed to set forth any underlying defense to the foreclosure action and was actually aware of it. This, however, ignores that Powroznik’s “defense” is a void

order due to lack of jurisdiction because of the faulty service of process. We held in *Schorsch* that improper service rendered the underlying judgment void. Further, a judgment rendered without personal jurisdiction is void even if the defendant had actual knowledge of the proceedings. *In re Marriage of Kohl*, 334 Ill. App. 3d 867, 880 (2002); see also *Sutton v. Ekong*, 2013 IL App (1st) 121975, ¶ 24 (actual knowledge does not validate a court's order that was rendered without personal jurisdiction over the defendant). Thus, the trial court erred when it found that service was proper when it was accomplished by a private investigator in Cook County without a special appointment by the court.

¶ 23 B. Diligence in serving the section 2-1401 petition

¶ 24 Powroznik next argues that the trial court erred in determining *sua sponte* that he failed to act with reasonable diligence in serving his section 2-1401 petition.

¶ 25 Under Rule 103(b):

“If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant ***. The dismissal may be made on the application of any party or on the court's own motion. In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances ***.” Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 26 The purpose of Rule 103(b) is to protect defendants from unnecessary delay in the service of process and to prevent the circumvention of the statute of limitations. *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). Generally, a trial court's dismissal pursuant to Rule 103(b) will not be

disturbed absent a showing of an abuse of discretion. *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 34. “However, if a trial court’s decision rests on an error of law, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law.” *Id.*

¶ 27 In this case, a mistake of law occurred. Quite simply, Rule 103(b) has no application when a party attacks a void judgment or order under section 2-1401. As the Fourth District explained in *Settlement Funding, LLC v. Brenston*, 2013 IL App (4th):

“Generally, a petition for relief from judgment filed pursuant to section 2-1401, to be legally sufficient, must be filed within two years after the entry of the order or judgment, and the petitioner must allege a meritorious defense to the original action and must show due diligence in bringing the petition. [Citations.] These requirements do not apply to a petition to vacate a void judgment. [Citation.] Petitions brought on voidness grounds need not be brought within section 2-1401’s two-year time limitation. [Citation.] A void judgment may be attacked at any time or in any court, either directly or collaterally. In addition, *the allegation that the judgment is void negates the need to allege a meritorious defense and due diligence.*” (Emphasis added.)

Rule 103(b) is entitled “dismissal for lack of diligence.” Since due diligence is not a prerequisite to an attack on a void judgment, it has no application under the current circumstances.

¶ 28 As Rule 103(b) does not apply in the instant situation, the trial court erred in dismissing the petition for lack of reasonable diligence in effecting service.

¶ 29 C. Protection of a *Bona Fide* Purchaser

¶ 30 With little argument and without citing to case law, MTGLQ and Patel contend that the dismissal was also appropriate because Patel is a *bona fide* purchaser protected by section 2-1401(e) of the Code (735 ILCS 5/2-1401(e) (West 2012)) and section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1508(b) (West 2012)). The trial court never ruled on the issue, although the parties raised it.

¶ 31 “It is fundamental that a judgment ordinarily may be attacked at any time by a necessary party who is not given proper notice of the proceedings.” *Rockford v. Lemar*, 157 Ill. App. 3d 350, 352 (1987). However, a *bona fide* purchaser takes free of any interests of third persons, except interests of which he has notice. *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 30. Thus, when the defects in service are not apparent from the face of the record and a *bona fide* purchaser has intervened, section 2-1401(e) mandates that the necessary party will be precluded from attacking the otherwise void foreclosure judgment. *Lemar*, 157 Ill. App. 3d at 352-53. The corollary is that “innocent third-party purchasers are not protected from setting aside a judicial sale where a lack of personal jurisdiction affirmatively appears on the face of the record.” *Concord Air*, 2015 IL App (1st) 140639, ¶ 41. In determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, including the pleadings, the return on the process, and the judgment of the court. *Id.* If the jurisdictional defect does not require inquiry beyond the face of the record, a *bona fide* purchaser cannot prevent a collateral attack on the judgment. *Id.* ¶ 42; See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 314 (1986).

¶ 32 Here, the improper service was apparent on face of the record, which shows that service was performed by an investigator in Cook County without a special appointment from the court.

Thus, Patel's status as a *bona fide* purchaser was not an alternate ground for dismissal of the section 2-1401 petition.

¶ 33 As to the Foreclosure Law, we recently held that the statutes governing the setting aside of foreclosure judgments apply only to valid judgments entered with jurisdiction over the parties and the subject matter. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 25. As a result, the Foreclosure Law does not preclude a collateral attack on the judgment based on a lack of personal jurisdiction. *Id.*; see also *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 19 (stating that the Foreclosure Law cannot protect a *bona fide* purchaser when the underlying foreclosure and sale orders are void because mortgagor was not properly served).

¶ 34

III. CONCLUSION

¶ 35 The trial court erred when it determined that service was proper in the foreclosure action, and it abused its discretion in dismissing Powroznik's petition under Rule 103(b). The presence of a *bona fide* purchaser, as noted above, does not change that result. Accordingly, the judgment of the circuit court of Du Page County is reversed, and the cause is remanded.

¶ 36 Reversed and remanded.