2015 IL App (2d) 140916-U
No. 2-14-0916
Order filed March 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BANK OF AMERICA, NATIONAL ASSOCIATION, as successor by merger to LaSalle Bank, NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2006-3 Trust,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-4359
HECTOR ANTONIO MORALES,	)	
Defendant-Appellant	)	Honorable Luis A. Berrones,
(Kimberly Jordan Morales, Defendant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's petition to quash service of process, because there was conflicting evidence as to whether defendant was served; the trial court did not abuse its discretion in denying defendant's oral motion for a supplemental evidentiary hearing.

¶ 2 Plaintiff, Bank of America, National Association, as successor by merger to LaSalle Bank, NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT

Series 2006-3 Trust, filed this mortgage foreclosure action against defendant, Hector Morales, and Kimberly Morales. Default judgments were entered against defendant and Kimberly, and the trial court confirmed the judicial sale. Defendant thereafter filed a petition to quash service of process pursuant to sections 2-301(a) and 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301(a), 1401 (West 2012)). Following an evidentiary hearing, the trial court denied the petition. The court also denied defendant's emergency motion for reconsideration and oral motion for a supplemental evidentiary hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In early 2009, plaintiff's predecessor in interest filed a foreclosure action against defendant and Kimberly pertaining to a property in Gurnee, Illinois (the residence). That case was identified as No. 09-CH-51. On January 6, 2009, summonses were issued to defendant and Kimberly.

¶ 5 On January 12, 2009, special process server Mark Edds signed two returns of service. Edds indicated that he served defendant by abode service. Specifically, at 5:10 p.m. on January 9, 2009, he left a copy of the summons and complaint with Kimberly at the residence. He mailed a copy of the summons to the residence the next day. On a separate return of service, Edds indicated that he personally served Kimberly at the residence at 5:20 p.m. on January 9, 2009. Case No. 09-CH-51 was subsequently dismissed.

¶ 6 On October 1, 2009, plaintiff commenced the instant foreclosure action against defendant and Kimberly regarding the same residence. The summons issued to defendant listed the address of the residence and an address for one of defendant's businesses, which was known as Grand Audio. The same process server, Edds, signed a return of service indicating that he personally served defendant on October 8, 2009, at the residence at 8:50 a.m. Edds provided the following

description of defendant in the return of service: male; Hispanic; age 53; 5'5"; average build; and black hair. Edds also made notes on a work order documenting that he had unsuccessfully attempted to serve defendant on October 7, 2009. The notes stated: "10-7 6:25 p.m. N/A LIGHTS ON IN KITCHEN & FAMILY ROOM. TV IS ON TO A KID'S SHOW."

¶ 7 Neither defendant nor Kimberly filed appearances. On December 4, 2009, plaintiff filed a motion for default and a motion for judgment of foreclosure and sale. The trial court granted both motions that same day. Plaintiff was the highest bidder at a judicial sale, which the court confirmed on December 20, 2012.

¶ 8 On January 30, 2014, defendant entered a special and limited appearance through counsel and petitioned the court to quash service of process pursuant to sections 2-301(a) and 2-1401 of the Code. Defendant alleged that he had not been served on October 8, 2009. Specifically, he claimed that he left the residence that day at approximately 8:00 a.m. to go to the passport agency in Chicago.

¶ 9 On August 4, 2014, the trial court conducted an evidentiary hearing on defendant's petition. The following evidence was introduced at the hearing.

¶ 10 Defendant's Testimony

¶ 11 Defendant and Kimberly had four children: Joshua, Jeremy, Kimberly Grace,[1] and Nina. Defendant owned a family business with two stores. One store was known as Grand Audio, and the other was JJ's Auto Sound and Security. Around October 6, 2009, Kimberly was notified that they had won a trip to Punta Cana, Dominican Republic, because of business sales. They were scheduled to leave for Punta Cana on October 10, 2009. They decided to take their two

[1] To avoid confusing her with Kimberly, we refer to defendant's daughter as Kimberly Grace, as defendant does in his brief.

daughters on the trip, but the girls did not have passports. On October 7, 2009, the family went to the passport agency in Chicago. They filled out an application and were told to come back the next day to pick up the passports.

¶ 12 On October 8, 2009, defendant, along with Kimberly and the girls, left the residence for the passport agency at around 7:50 a.m. Asked how he knew what time they left that morning, defendant said that he had to make sure that his son Jeremy got on the bus to go to school. Defendant also said that it was his routine to wait for Jeremy to leave for school. They did not stop for gas or have to pay tolls, and it took 45 minutes to an hour to get to the passport agency from Gurnee. Defendant believed that they got to the passport agency at around 9 a.m. However, he later clarified that it may have been 9:30 a.m. by the time they found parking. He did not have a receipt showing what time they parked.

¶ 13 Defendant testified that, although he already had a passport, he went with the girls to Chicago because they were minors; he was there to verify that he was the girls' father. He believed that they waited four hours for the passports. Kimberly paid for the passports, and he did not have a receipt evidencing payment. Nor did he have other documents, apart from the actual passports, confirming that the passports were issued. After leaving the passport agency, the family went sightseeing in Chicago. They went to the American Girl store, but they did not purchase anything there. They also went to the Gap. Defendant insisted that he was not served in this case on October 8, 2009.

¶ 14 The court admitted into evidence an account statement for what appears to be a Chase credit card in Kimberly's name. That statement showed that a $114.66 purchase was made at Macy's in Chicago on October 8, 2009. However, the statement did not indicate the time of the purchase. The court also admitted a receipt from H&M on Michigan Avenue in Chicago, which

reflected a sales transaction in the amount of $15.27 at 8:11 p.m. on October 8, 2009. Additionally, the court admitted copies of Kimberly's, Nina's, and Kimberly Grace's passports. The passports documented an issuance date of October 8, 2009, but they were not time-stamped. Finally, the court admitted into evidence a photograph, which defendant testified was taken on October 8, 2009. From defendant's description of the photograph, it apparently depicted defendant with one of his daughters.

¶ 15 Kimberly's Testimony

¶ 16 Kimberly's testimony was substantially similar to defendant's. She testified about having won the trip through their business and said that she and her daughters needed passports. However, in contrast to defendant's testimony, she said that they were notified that they had won the contest five to six weeks before the trip. She did not initially know that their daughters would be going on the trip, which was why they needed to get the passports on an expedited basis. Both she and defendant had to be present for passports to be issued to the children.

¶ 17 Kimberly testified that on October 7, 2009, they went to the passport agency to turn in their paperwork. She believed that they paid a cash fee of $450 for the expedited passports, but she did not have a receipt. Nor did she get copies of the applications for the passports. They were told to return the next day. On October 8, 2009, they left the residence at approximately 8 a.m. and arrived at the passport agency at around 10 a.m. They waited for 3 ½ to 4 hours at the passport agency and then ate and went shopping. Some of the stores they went to included Macy's, the Gap, H&M, Eddie Bauer, and Banana Republic.

¶ 18 Kimberly testified that she was a defendant in a previous foreclosure action captioned as No. 09-CH-51. She acknowledged that she was served in that case by Edds on January 9, 2009. She explained that she had a "very lengthy conversation" with Edds at that time, telling him why

she had gotten behind on payments. She also told Edds that a building had blown up across the street from her store, blowing out the store's signs and windows and leading to a decline in sales. According to Kimberly, after she was served with process in the original foreclosure action, business increased for the rest of 2009. The court received into evidence a news article dated February 28, 2008, which reported a gas leak explosion.

¶ 19 Testimony of Joshua Morales

¶ 20 Joshua Morales testified that he was defendant's and Kimberly's son. By October of 2009, he had already graduated high school. He was at the residence all day on October 8, 2009. His parents left for the passport agency around 7:50 a.m., shortly after his little brother left for school. He woke up early, and he would have known had anyone come to the door that day. Specifically, he would have heard the door, and his dog would have barked and his parrot would have made noise. He did not hear the dog bark, the parrot make noise, or anybody knock or ring a doorbell.

¶ 21 Asked whether there were any large, distinctive objects in the driveway at the time, Joshua noted that his brother had skateboards, a "half pipe," and "a flat box and a grinding rail" for skateboarding. Additionally, he testified that because of the way that the television was mounted on the wall, a person standing at the front door could not see the television in the house.

¶ 22 Edds' Testimony

¶ 23 Plaintiff called Edds as its only witness. He testified that he had worked as a process server for almost six years and had served over 18,000 individuals. He did not remember each individual service. However, he recognized defendant and pointed him out in the courtroom.

¶ 24 Edds explained his normal procedure for serving a summons. If he comes into contact with the person identified on the summons, he confirms the person's identity and usually informs

the person of the contents of the documents being served. Specifically, he inquires as to the person's age and sometimes the person's height. He would not necessarily include in his field notes the fact that he had a conversation with somebody. Nor would he include in his notes that he saw something large and unusual in a yard, such as a skateboard ramp.

¶ 25 Edds was shown the return of service indicating that he personally served defendant on October 8, 2009. According to Edds, the return accurately reflected his service on defendant. The return included information such as defendant's height, build, hair color, and age. This was all information that Edds gathered on October 8, 2009, at the time of service. Edds also identified a work order containing his notes. According to his notes, he went to the residence at 6:25 p.m. on October 7, 2009, and there was no answer at the door. He observed that there were lights on in the kitchen and the family room and that there was a children's show on the television. He returned to the residence on October 8, 2009, and he personally served defendant at 8:50 a.m. He knew that he served defendant at 8:50 a.m., because that was the time on the clock in his car and on his iPhone.

¶ 26 Asked whether he had an independent recollection of serving defendant in this case, Edds said that nothing unusual happened and that defendant was very cordial. Edds recalled the residence, but did not remember there being a skateboard ramp in the driveway. He also remembered defendant saying something about Grand Audio, a place that Edds had passed many times. Specifically, defendant had said that Grand Audio was his business. However, Edds testified that he did not recall defendant talking about the state of business at the store. According to Edds, defendant did not mention an explosion having occurred near Grand Audio.

¶ 27 Edds was cross-examined with an affidavit that he had signed on June 10, 2014. Plaintiff previously submitted that affidavit as an exhibit to its brief in response to defendant's petition.

In that affidavit, Edds asserted that he specifically recalled speaking with defendant on October 8, 2009, because defendant "complained about the decrease in business at the store where he worked." Defendant's counsel questioned Edds about that prior statement, asking: "And so just to clarify, when you executed this affidavit of service on June 10, 2014, you recall[ed] [defendant] complaining about the decrease in business, though now you do not recall that specific conversation, is that correct?" Edds responded, "[p]robably, yes."

¶ 28 Additionally, Edds testified that he remembered defendant saying something about Grand Audio, because Edds "had that address as a provided alternate address." (Edds was apparently referring to the summons issued to defendant on October 1, 2009, which listed an alternate address on Grand Avenue in Waukegan.) Presumably referring to his service of Kimberly in January 2009, Edds testified that he had previously served Kimberly and was "told to go to the audio place on Grand Avenue." Edds explained that when he returned to the residence in October to execute service, he remembered, "oh, this is the guy with the audio place." However, Edds testified that he did not recall having a conversation with Kimberly about Grand Audio when he served her in January 2009. According to Edds, "I looked at my old work order, the original one from January when I personally served Mrs. Morales. And before I served her, I met a gentleman there who told me to go to the audio place." The record is not clear regarding the identity of the gentleman who told Edds about the audio place. Nor did either party attempt to introduce a January 2009 work order into evidence.

¶ 29 Edds was also shown the summonses issued to defendant and Kimberly in the original foreclosure action, as well as the returns of service that Edds signed on January 12, 2009. The documents indicated that Edds served defendant by abode service through Kimberly at 5:10 p.m. on January 9, 2009, but that Kimberly was personally served at 5:20 p.m. Edds acknowledged

that he could have had a conversation with Kimberly between 5:10 and 5:20 p.m., but also said that it was possible that he had gotten a phone call while he was writing his notes.

¶ 30 At the conclusion of the evidence, the trial court denied defendant's petition to quash service of process. The court noted that it was defendant's burden to establish improper service by clear and convincing evidence. The court stated: "Clear and convincing evidence is more than a preponderance of the evidence and is akin to [*sic*] beyond a reasonable doubt standard." According to the court, the matter "boils down to the issue of a time frame and the credibility of the witnesses with respect to that time frame."

¶ 31 The court discussed the photograph that was introduced into evidence, which showed "[defendant] and his daughter presumably somewhere in Chicago." The court observed that the picture was taken during daylight hours, supposedly on October 8, when there would have been less daylight. The court inferred that the picture was taken "before 6:00, maybe even before 5:00." The court presumably was referring to 5 or 6 p.m.

¶ 32 The court found that "[t]he timetable or the time line as to when the Moraleses left and got downtown is actually supported by the evidence on both sides." The court recalled that Kimberly testified that they got to the passport agency at 10 a.m. Depending on traffic, they could have left the residence at 8:50 or 9 a.m., or they could have left at 7:50 a.m. However, there was no testimony as to traffic, weather, or the conditions of the roads.

¶ 33 The court also found that Edds' testimony was "not definitive" and had "some problems, the fact that he doesn't remember certain things." Nevertheless, the evidence showed that Edds did not have contact with defendant at the time of service in the original foreclosure action. Therefore, the difficulty that defendant faced in overcoming the fact that Edds swore that he served defendant was that the October 2009 return of service contained a description of

defendant. The court noted that defendant's hair was completely white at the time of the hearing in 2014, but found that the description of defendant as having black hair in 2009 matched the photograph admitted into evidence. According to the court, "[t]here's no explanation as to how Mr. Edds knows this other than having personally served him."

¶ 34 On August 22, 2014, defendant filed an emergency motion for reconsideration. On August 25, 2014, he filed a brief in support of that motion. Defendant argued that the trial court disregarded evidence in the record—specifically, Kimberly's January 30, 2014, affidavit, which defendant had submitted as an exhibit to his petition to quash service of process. In that affidavit, Kimberly asserted that when she accepted service on behalf of herself and defendant in the original foreclosure action on January 9, 2009, Edds asked her for a physical description of defendant, and she responded truthfully. Defendant argued in his motion that this affidavit explained how Edds obtained defendant's description. Defendant also offered a number of reasons why he believed that the trial court should have found the Morales' testimony more credible than Edds'.

¶ 35 On September 2, 2014, the trial court denied defendant's emergency motion for reconsideration. The court declined to consider Kimberly's affidavit, because it was not presented in the testimony at the evidentiary hearing. The court reasoned that opposing counsel did not have an opportunity to cross-examine Kimberly regarding the statements at issue, explaining that defendant should have called Kimberly as a rebuttal witness. The court once again noted that there was no explanation in the record as to how Edds provided a description of defendant in the October 2009 return of service. Additionally, the court found that even if defendant had been served at 8:50 a.m., he still could have gotten to the passport agency by 10 a.m., as Kimberly testified. Moreover, addressing counsel for defendant, the court said: "Even if

I believe, and I'm at an issue as to well both parties sound credible, then you lose because it's [*sic*] tie and you don't meet your burden." Defendant's counsel then orally requested a follow-up evidentiary hearing to address the issue of how Edds was able to obtain a description of defendant. The court denied that request, finding that defendant had an opportunity to present evidence.

¶ 36 Defendant timely appealed from the court's orders of August 4 and September 2, 2014.

¶ 37 II. ANALYSIS

¶ 38 Defendant raises two principal arguments. He first argues that the court erroneously denied his petition to quash service of process, because he established by clear and convincing evidence that he was not served. Specifically, he contends that the court incorrectly conflated the evidentiary burdens of clear and convincing evidence and beyond a reasonable doubt. He also contends that the denial of the petition was against the manifest weight of the evidence. Defendant's other principal argument is that the court abused its discretion in denying his oral motion for a supplemental evidentiary hearing.

¶ 39 "A judgment rendered without service of process, either by summons or by publication and mailing, where there has been neither a waiver of process nor a general appearance by the defendant, is void regardless of whether the defendant had actual knowledge of the proceedings." *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). A return of summons reflecting personal service is *prima facie* proof of service, and courts must "indulge in every reasonable presumption in favor of the return." *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 24. A defendant's uncorroborated testimony that he or she was not served is insufficient to overcome the return of service (*MB Financial Bank, N.A.*, 2013 IL App (1st) 122077, ¶ 24), and the defendant bears the burden to produce clear and convincing evidence that

the purported service was invalid (*Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998)). It is for the trial court to assess witness credibility, and a reviewing court may not substitute its judgment for that of the trial court. *Freund Equipment, Inc.*, 301 Ill. App. 3d at 166-67.

¶ 40 Section 2-1401 of the Code establishes a procedure for litigants to challenge final judgments between 30 days and 2 years after the entry of the judgment. 735 ILCS 5/2-1401(a)(c) (West 2012); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Generally, "[r]elief 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. However, "[p]etitions brought on voidness grounds need not be brought within the two-year time limitation," and "the allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002).

¶ 41 We note that the standard of review following an evidentiary hearing on a section 2-1401 petition is not entirely clear. See *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 32 (declining to decide whether the abuse of discretion or manifest weight of the evidence standard applied, where the trial court did not err under either standard). We need not comment further on this issue, because we would affirm under either standard of review.

¶ 42 Defendant first argues that the trial court erroneously denied his petition to quash service of process, because he established by clear and convincing evidence that he was not served. He contends that the court incorrectly conflated the evidentiary burdens of clear and convincing evidence and beyond a reasonable doubt. Specifically, he takes exception to the trial court's

description of clear and convincing evidence as being "more than a preponderance of the evidence" and "akin to [*sic*] beyond a reasonable doubt standard."

¶ 43 We cannot infer from this isolated comment that the court held defendant to an improper standard of proof. The court in *In re Estate of Ragen*, 79 Ill. App. 3d 8 (1979), explained the nature of clear and convincing evidence as follows:

> "While it has been defined as evidence which leaves the mind well-satisfied of the truth of a proposition, strikes all minds alike as being unquestionable, or leads to but one conclusion, proof by clear and convincing evidence has most often been defined as the quantum of proof which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question. It is apparent, however, that, although stated in terms of reasonable doubt, clear and convincing evidence is considered to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense. The spectrum of increasing degrees of proof, from preponderance of the evidence, to clear and convincing evidence, to beyond a reasonable doubt, is widely recognized, and it has been suggested that the standard of proof required would be clearer if the degrees of proof were defined, respectively, as probably true, highly probably true and almost certainly true." (Internal citations omitted.) *Ragen*, 79 Ill. App. 3d at 13-14.

It is readily apparent from the record that the trial court understood that clear and convincing evidence means something more than a preponderance of the evidence and something less than beyond a reasonable doubt. Indeed, the court said that defendant's burden was "akin" to beyond a reasonable doubt; the court did not say that it was applying that standard. See *In re Estate of Lukas*, 155 Ill. App. 3d 512, 520 (1987) (trial court's comment that it had "doubt tantamount to a

'reasonable doubt' " did not indicate that the court imposed a standard stricter than clear and convincing evidence). The trial court's description of defendant's burden was consistent with *Ragen*.

¶ 44 Defendant next contends that denying his petition was against the manifest weight of the evidence. According to defendant, his own testimony was corroborated by clear and convincing evidence specific to the date of the purported service, while Edds' testimony was unreliable and impeached by clear and convincing evidence.

¶ 45 As noted above, the return of service—which reflected that Edds personally served defendant on October 8, 2009, at 8:50 a.m.—was *prima facie* proof of proper service. *MB Financial Bank, N.A.*, 2013 IL App (1st) 122077, ¶ 24. Therefore, it was incumbent on defendant to prove by clear and convincing evidence that he was not served. *Freund Equipment, Inc.*, 301 Ill. App. 3d at 166. To be sure, defendant and his family provided mostly consistent accounts of their whereabouts on October 8, 2009. Additionally, plaintiff did not introduce evidence to dispute that defendant went to Chicago at some point that day.

¶ 46 However, there was conflicting evidence as to whether defendant was present at the residence at 8:50 a.m. to receive service of process. Defendant and his family testified that defendant had already left for Chicago by that time. Edds, on the other hand, testified to having served defendant, and he even had some independent recollection of both defendant and the residence. It is true that defendant impeached several aspects of Edds' testimony. Indeed, the trial court acknowledged that Edds' testimony was "not definitive" and had "some problems." Nevertheless, the court did not find that Edds testified untruthfully or that he falsified the return of service.

¶ 47 In light of the conflicting testimony, the trial court could have properly relied on the lack of documentary evidence substantiating defendant's claim that he was absent from the residence at 8:50 a.m. The copies of the passports admitted into evidence indicated that they were issued on October 8, 2009, but they were not time-stamped. Nor did the Chase credit card statement, which indicated that Kimberly made a purchase at Macy's in Chicago, reflect the time of the transaction. Additionally, not much can be gleaned from the photograph that defendant introduced into evidence, apart from the fact that it was apparently taken during daylight hours. Indeed, the trial court determined that the photograph could have been taken sometime before 5 or 6 p.m, and defendant does not challenge that finding on appeal. The only documentary evidence submitted by defendant that established any sort of timeframe was the H&M receipt, which showed that a purchase was made in Chicago at 8:11 p.m., more than eleven hours after defendant was purportedly served.

¶ 48 The evidence presented to the court was sharply disputed, and it was ultimately for the trial court to assess the credibility of the witnesses. As a reviewing court, we may not substitute our judgment for that of the trial court. *Freund Equipment, Inc.*, 301 Ill. App. 3d at 166-67. In light of the conflicting testimony, and in the absence of any documentary evidence substantiating defendant's claim that he was not at the residence at 8:50 a.m. on October 8, 2009, we cannot say that the trial court erred in denying defendant's petition.

¶ 49 We reject defendant's attempt to analogize the matter to *Newell v. Jackson*, 72 Ill. App. 3d 598 (1979). In that case, the defendant presented "uncontradicted and unchallenged" testimony that she was out of the state at the time when she was allegedly served in Chicago. *Newell*, 72 Ill. App. 3d at 600. Additionally, the return of service in that case indicated that the party served was 26 years old, but the defendant was actually 41 years old. *Newell*, 72 Ill. App.

3d at 600. Moreover, the evidence showed that a family of women in their twenties lived across the hall from the defendant, and they happened to have the same last name as the defendant. *Newell*, 72 Ill. App. 3d at 600. The present case is readily distinguishable from *Newell*, because the evidence was sharply disputed, and the trial court was tasked with assessing credibility in the face of conflicting evidence.

¶ 50 Nor does *Ford v. Continental Illinois National Bank & Trust Co.*, 18 Ill. App. 3d 166 (1974), compel a different result. In that case, the trial court *granted* the defendant's motion to quash service of the summons. *Ford*, 18 Ill. App. 3d at 169. The appellate court affirmed, finding evidence in the record to support the trial court's order. *Ford*, 18 Ill. App. 3d at 171. As the court explained: "Moreover, the experienced and distinguished trial judge heard the evidence and determined that the defendant had overcome the presumption in favor of the validity of the sheriff's return. Since it is his proper function to judge the credibility of the witnesses, we will not substitute ourselves for the trial judge in determining this issue." *Ford*, 18 Ill. App. 3d at 171.

¶ 51 Citing *Mitchell v. Tatum*, 104 Ill. App. 3d 986 (1982), defendant asserts: "A circuit court's determination that a defendant did not overcome the presumption of service will stand when: (1) the process server did not know the defendant prior to the date of the purported service; (2) the process server includes an accurate description of the defendant on the return of service; and (3) the defendant is unable to explain how the process server obtained the description other than by service of process." *Mitchell* did not establish any generally applicable legal principles about the specific types of evidence that will or will not overcome the presumption of service. The court in *Mitchell* did nothing more than affirm the trial court's order denying a motion to quash service where the evidence was conflicting. Specifically, in that

case, the defendant's witnesses testified that she was in another state when she purportedly was served. *Mitchell*, 104 Ill. App. 3d at 989. The process server, on the other hand, testified that he did not know the defendant prior to the date of service, yet he accurately described her on the return of service. *Mitchell*, 104 Ill. App. 3d at 989. The appellate court declined to substitute its judgment for the trial court's judgment. *Mitchell*, 104 Ill. App. 3d at 989.

¶ 52 Defendant's remaining arguments pertain to the trial court's refusal to consider certain statements that were not introduced into evidence at the August 4, 2014, hearing. In his emergency motion for reconsideration, defendant proposed that Kimberly's January 30, 2014, affidavit, which had been attached to defendant's petition, explained why Edds was able to accurately describe defendant in the October 2009 return of service. Specifically, Kimberly asserted that when she had accepted service on behalf of herself and defendant in the original foreclosure action, Edds asked her for a physical description of defendant, and she responded truthfully.

¶ 53 Defendant suggests that, by denying his oral request for a supplemental evidentiary hearing, the trial court implicitly held that the statements in Kimberly's affidavit were insufficient as a matter of law to overcome the presumption of service raised by the return of service. We disagree. The court made no finding, explicit or implicit, regarding the legal sufficiency of Kimberly's statements. Instead, the court simply declined to consider the affidavit, because Kimberly did not testify to its contents at the hearing. The court noted that opposing counsel did not have an opportunity to cross-examine Kimberly about these statements, and said that defendant should have called Kimberly as a rebuttal witness.

¶ 54 Defendant finally argues that the court abused its discretion in denying his oral motion for a supplemental evidentiary hearing. We construe this as a motion to reopen proofs. In ruling

on such a motion, the trial court should consider "whether the moving party has provided a reasonable excuse for failing to submit the additional evidence during trial, whether granting the motion would result in surprise or unfair prejudice to the opposing party, and if the evidence is of the utmost importance to the movant's case." (Internal quotation marks omitted.) *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 55. Another relevant consideration is whether the motion was brought after judgment was entered in the case, as opposed to during the hearing. See *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1077-78 (2007) (one of the bases for distinguishing the matter from another case was that the plaintiff only sought to reopen the evidence after judgment had been entered).

¶ 55 Greater liberty should be allowed in reopening proofs where the case is tried without a jury. *Bennoon*, 2014 IL App (1st) 122224, ¶ 55. Nevertheless, " '[i]f evidence offered for the first time in a posttrial motion could have been produced at an earlier time, the court may deny its introduction into evidence.' " *General Motors Acceptance Corp.*, 374 Ill. App. 3d at 1077 (quoting *Chicago Transparent Products, Inc. v. American National Bank & Trust Co. of Chicago*, 337 Ill. App. 3d 931, 942 (2002)). We review the trial court's decision to deny the motion for abuse of discretion. *Bennoon*, 2014 IL App (1st) 122224, ¶ 53. "A court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment, exceeds the bounds of reason and ignores recognized principles of law; or if no reasonable person would take the position adopted by the court." (Internal quotation marks omitted.) *Bennoon*, 2014 IL App (1st) 122224, ¶ 30.

¶ 56 The trial court did not abuse its discretion in denying defendant's request for a supplemental evidentiary hearing. As to the first consideration, granting the motion would not have resulted in surprise or unfair prejudice to plaintiff, given that the affidavit at issue had been

previously submitted with defendant's petition. Additionally, it appears that the evidence was important to defendant's case, given that, in denying the petition, the trial court relied, in part, on the absence of evidence as to how Edds could have accurately described defendant.

¶ 57 Nevertheless, defendant did not attempt to offer an excuse for failing to introduce this evidence at the August 4, 2014, hearing. Nor did defendant seek to reopen proofs until the trial court had already rendered an adverse judgment. Certainly, Kimberly's testimony about events that occurred in 2009 did not constitute newly discovered evidence. Additionally, plaintiff's written response to the petition put defendant on notice that Edds would testify that he served defendant on October 8, 2009, at 8:50 a.m. Furthermore, the October 2009 return of service contained an apparently accurate description of defendant. Under these circumstances, the trial court did not abuse its discretion in denying the motion for a supplemental evidentiary hearing.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 60 Affirmed.