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2015 IL App (3d) 130851-U  
(Consolidated with 140266)

Order filed July 2, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

U.S. BANK NATIONAL ASSOCIATION, AS )	Appeal from the Circuit Court
TRUSTEE FOR MASTR ASSET BACKED )	of the 12th Judicial Circuit,
SECURITIES TRUST 2005-HE1, )	Will County, Illinois.
MORTGAGE PASS-THROUGH )	
CERTIFICATES, SERIES 2005-HE1 )	
)	
Plaintiff-Appellee, )	
)	
v. )	
)	
HEREFORD JOHNSON, JR., a/k/a, )	Appeal No. 3-13-0851
HEREFORD JOHNSON; PAMELA )	Circuit No. 08-CH-5296
JOHNSON, a/k/a PAMELA G. JOHNSON, )	
a/k/a PAMELA G. ADAMS, a/k/a PAMELA )	
ADAMS; THEODORES CROSSING )	
HOMEOWNERS ASSOCIATION; )	
UNKNOWN OWNERS AND NON RECORD )	
CLAIMANTS, )	Honorable
)	Raymond E. Rossi,
Defendants-Appellants. )	Judge, presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err in finding that the defendants were properly served and, therefore, had personal jurisdiction over the defendants at the time it entered the default order and judgment of foreclosure. The mortgagors forfeited the affirmative defense of standing.

¶ 2 The plaintiff, U.S. Bank National Association, as trustee for master asset backed securities trust 2005-HE1, mortgage pass-through certificates, series 2005-HE1, brought a foreclosure complaint against the defendants, Pamela Johnson and Hereford Johnson. The defendants initially appealed the denial of their motion to reconsider the trial court's order denying various motions prior to the sale of the property. In a subsequent appeal, the defendants appealed the trial court's order confirming the sale of the property. On appeal, the defendants argue that: (1) the trial court lacked personal jurisdiction over them when it entered a default order and judgment of foreclosure; and (2) the plaintiff lacked standing to file the foreclosure complaint. We affirm.

¶ 3 **FACTS**

¶ 4 On December 4, 2004, the defendants executed a promissory note in favor of "The Lending Connection, Inc.," which was secured by a mortgage on the defendants' residential property. On November 14, 2008, the plaintiff filed a foreclosure complaint. The complaint alleged that the plaintiff was bringing the complaint in its capacity as "the legal holder, agent or nominee of the legal holder, of the indebtedness," and that the plaintiff was "the owner, agent or nominee of the owner, of the Mortgage given as security." A service of process affidavit was filed, indicating that: (1) on November 21, 2008, Hereford was personally served with the summons and complaint by a special process server; (2) on November 21, 2008, Pamela was served by substitute service, with the special process server leaving a copy of the summons and complaint with her husband, Hereford; and (3) on November 22, 2008, the special process server mailed a copy of the process to Pamela at her usual place of abode.

¶ 5 On February 10, 2009, the plaintiff filed a motion for an order of default and a notice of motion, which indicated that the plaintiff sent the defendants notice of the motion and the hearing date. On February 17, 2009, having found that the defendants failed to appear or plead, the trial court entered an order of default and judgment of foreclosure against the defendants.

¶ 6 On June 26, 2009, the *pro se* defendants filed an emergency motion for a stay of the sale, alleging that they "did not know about the sale" until June 18, 2009, when they received a letter in the mail. The defendants claimed that they had a mortgage modification application under review. The defendants claimed that they had "never received any paperwork citing [they] should appear in court." At the hearing on the motion, the defendants indicated that they had started the loan modification process on January 29, 2009, and had been checking on the status of their application every two weeks. The trial court continued the sale of the property to September 2, 2009.

¶ 7 On August 17, 2009, the defendants filed another emergency motion to stay the sale, alleging that they could not sign the proposed loan modification contract because they could not afford the proposed increased payment. On September 1, 2009, the plaintiff placed the case on hold, and the trial court cancelled the pending sheriff's sale. Almost a year later, on July 29, 2010, the defendants filed an emergency motion to stay the upcoming foreclosure sale of the subject property because their loan modification application was still under review. On August 3, 2010, over the plaintiff's objection, the trial court continued the sheriff's sale to October 20, 2010, as a "final continuance." The trial court's order also indicated that "no further notice or publication [was] required." On October 19, 2010, the trial court cancelled the sheriff's sale because the defendants had filed bankruptcy. On February 21, 2012, defendants filed a motion for an emergency stay of the sale scheduled for March 28, 2012. At the hearing, on February 28,

2012, the parties agreed to a stay of sale until June 6, 2012, because the defendants had listed the property for sale. On May 23, 2012, the defendants filed a motion to stay the proceedings until the court determined whether plaintiff had standing to bring the foreclosure complaint. On May 25, 2012, the defendants filed their initial answer and served interrogatories and requests for admissions on the plaintiff.

¶ 8 On June 4, 2012, the trial court noted that the defendants had not filed an appearance and the previous presiding judges should not have allowed their motions. The trial court further noted that the defendants had appeared in court numerous times and submitted to the court's jurisdiction. The trial court informed the defendants that they could not file motions until they were granted leave of court and had an appearance on file. The trial court found that the defendants' answer was improperly filed without leave of court and denied the defendants' motion to stay the sale.

¶ 9 On June 5, 2012, Pamela filed a *pro se* appearance and motion to vacate the default judgment, arguing that the plaintiff lacked standing and that the default judgment was void because they had not been served with the summons and complaint and had only learned of the default order the day prior. At the hearing on June 5, 2012, the trial court noted that the issue of whether the plaintiff had standing was an affirmative defense that could only be raised at the time of answer or, thereafter, with leave of court. The trial court also noted that the defendants had been properly served on November 21, 2008, based on the trial court's presumption that the return of service affidavit was valid and the defendant had failed to prove that service was improper. The trial court denied the defendants' motion to vacate the default judgment.

¶ 10 On June 13, 2012, the defendants filed an objection to the court's order of June 5, 2012. The defendants' allegations questioned the judge's impartiality and alleged that he was biased

against *pro se* defendants. The defendants also filed an amended answer, affirmative defenses, and a motion to dismiss. On June 26, 2012, the trial court denied the defendants' motions, finding: (1) an order of default and judgment of foreclosure had been entered on February 17, 2009; (2) defendants had not filed an appearance; (3) on June 4, 2012, the defendants' motion to stay the foreclosure sale had been denied; and (4) on June 5, 2012, the defendants' motion to vacate the default judgment had been denied.

¶ 11 On July 2, 2012, Pamela filed a *pro se* appearance, and answer to the complaint. On July 6, 2012, the defendants filed a motion to dismiss for lack of subject matter jurisdiction because the plaintiff was not the holder and owner of the mortgage and note. On July 10, 2012, the trial court denied the defendants' motion to dismiss.

¶ 12 On September 25, 2012, the defendants filed an emergency motion to stay the sale, requesting the trial court to reconsider its denial of their motion to dismiss for lack of subject matter jurisdiction. On October 3, 2012, the defendants filed an emergency motion to stay the sale and vacate the foreclosure judgment, arguing that the plaintiff did not have standing to bring the suit. On October 15, 2012, the trial court denied the defendants' motions to stay.

¶ 13 On November 1, 2012, the defendants filed a motion to cancel sale, vacate default judgment, dismiss for lack of subject matter jurisdiction and request for an evidentiary hearing. On December 7, 2012, the defendants filed a motion to quash service of summons, alleging that they had never been served with the complaint and the process server had perjured himself on the return of service affidavit. On December 11, 2012, the trial court denied the defendants' motion to quash service and allowed plaintiff to proceed with the foreclosure sale. On January 22, 2013, the defendants filed a motion for the court to reconsider its order of December 11, 2012, and orders that were void for plaintiff's failure to state a cause of action, plaintiff's lack of standing,

and the court's lack of jurisdiction. The trial court denied the defendants' motion because the issues had previously been litigated several times.

¶ 14 On May 15, 2013, the defendants refiled their motion to cancel sale, vacate default judgment, dismiss for lack of subject matter jurisdiction and request for an evidentiary hearing, which was based on their affirmative defense that the plaintiff lacked standing and that there was "fraud in the procurement of jurisdiction," a lack of subject matter jurisdiction, defective service of process, and fraud upon the court by officers of the court. On May 24, 2013, the trial court continued the motion until June 12, 2013, ordered plaintiff's attorney to appear at the continued hearing, and postponed the sale of the property. On June 12, 2013, the defendants argued that service of process was not perfected and that the process server had committed perjury on the return of service affidavit as evidence by Hereford's height being indicated as five inches taller than his actual height. The defendants also argued the plaintiff did not have standing. The trial court denied the motion, finding that the defendants had voluntarily submitted to the jurisdiction of the court on several occasions and that the matter had already been adjudicated. The trial court indicated that the plaintiff could proceed with the judicial sale of the property.

¶ 15 On July 12, 2013, the defendants filed a "motion for summary judgment for dismissal of complaint of foreclosure and fraud upon the court" and a supporting affidavit. On July 17, 2013, at the hearing, the defendants argued that the default judgment was improper because they had not received service of the summons and complaint. The trial court denied the motion.

¶ 16 On October 4, 2013, the defendants filed a motion to reconsider, dismiss, and vacate, and for a directed verdict, arguing that the plaintiff failed to prove that it was an assignee at the time the foreclosure complaint was filed. The defendants also argued that the trial court lacked personal jurisdiction over them, and there was "fraud upon the court." In addition, the

defendants argued that orders entered by the previous presiding judge were void because that judge had recused himself due to Pamela's in-court conduct and allegations of his impartiality. On October 11, 2013, the trial court denied the motions. On October 15, 2013, the defendants filed motions to reconsider, arguing that the complaint, note and mortgage did not support the plaintiff's allegations of standing. On October 24, 2013, the trial court denied the motions. On November 8, 2013, the defendants appealed the order in appeal No. 3-13-0851.

¶ 17 In the meantime, on November 7, 2013, the property was sold at a public sale. On February 25, 2014, the plaintiff filed a motion for order approving the sale. The defendants filed a motion to vacate the foreclosure judgment. On March 4, 2014, the trial court denied the defendants' motion to vacate and confirmed the sale of the property. The defendants appealed that ruling in appeal No. 3-14-0266. On appeal, the defendants' two appeals were consolidated.<sup>1</sup>

¶ 18 ANALYSIS

¶ 19 Defendants argue that: (1) the default was order was void because the trial court lacked jurisdiction to enter the order; and (2) and the plaintiff lacked standing to file the foreclosure complaint against them.

¶ 20 I. Trial Court's Jurisdiction

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<sup>1</sup> We note that we do not have jurisdiction over the initial appeal that was filed prior to the trial court confirming the sale. See *Wells Fargo Bank, N.A. v. McCluskey*, 2013 IL 115469, ¶ 12 (providing that in the absence of a Supreme Court Rule 304(a) finding in an order prior to the order confirming the sale, it is the order confirming the sale that operates as the final and appealable order in a foreclosure case). However, the initial appeal has been consolidated with the appeal from the final order confirming the sale, over which we do have jurisdiction.

¶ 21 The defendants argue that the default order was void because service of process was defective and they had challenged the court's jurisdiction at the first opportunity to do so. The plaintiff responds that the defendants failed to properly raise their jurisdictional argument and had waived any objection to the trial court's personal jurisdiction over them.

¶ 22 To enter a valid judgment, a court must have both jurisdiction over the subject matter and jurisdiction over the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. A judgment entered without the court having jurisdiction over the parties is void and may be challenged at any time. *Id.* We review *de novo* the issue of whether the circuit court obtained personal jurisdiction. *Id.*

¶ 23 Personal jurisdiction may be obtained by proper service of process or by a party's voluntary submission to the court's jurisdiction. *Mitchell*, 2014 IL 116311, ¶ 18. A party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date. *Id.* at ¶ 43.

¶ 24 Challenges to personal jurisdiction are governed by section 2-301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2008)) and section 15-1505.6 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1505.6 (West 2012)).

¶ 25 Section 2-301 of the Code provides:

"(a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process[.] \*\*\* Unless the facts that



constitute the basis for the objection are apparent from papers already on file in the case, the motion must be supported by an affidavit setting forth those facts.

(a-5) If the objecting party files a responsive pleading or motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person.

(b) In disposing of a motion objecting to the court's jurisdiction over the person of the objecting party, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon contested issues of fact. \*\*\*

(c) Error in ruling against the objecting party on the objection is waived by the party's taking part in further proceedings unless the objection is \*\*\* that the party is not amenable to process." 735 ILCS 5/2-301 (West 2008).

¶ 26 Under section 2-301 of the Code, the filing of a general appearance does not result in a waiver of all objections to the court's personal jurisdiction but provides for waiver if the party files a responsive pleading or motion—other than a motion seeking an extension of time to answer or otherwise appear—prior to filing a motion objecting to the court's jurisdiction. 735 ILCS 5/2-301 (West 2008).

¶ 27 Section 15-1505.6 of the Illinois Mortgage Foreclosure Law provides:

"(a) In any residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process that objects to the court's jurisdiction over the person, unless extended for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an

appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance.

(b) \*\*\* [I]f the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion [objecting to personal jurisdiction], that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/15-1505.6 (West 2012).

¶ 28 Section 15-1505.6 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1505.6 (West 2012)) setting forth the 60-day deadline from the date the moving party files an appearance or participates in a hearing to challenge personal jurisdiction in a residential foreclosure action became effective on August 12, 2011. Pub. Act 97-329 (eff. Aug. 12, 2011). Section 15-1505.6 of the Illinois Mortgage Foreclosure Law applies retroactively because it was a procedural change in the law, which only modified the method of enforcing rights and did not take away the defendants right to challenge jurisdiction. *GreenPoint Mortgage Funding, Inc. v. Poniewozik*, 2014 IL App (1st) 132864, ¶¶ 19-22.

¶ 29 In this case, the defendants voluntarily submitted to the court's jurisdiction. The defendants' initial motion to stay the sale was filed on June 26, 2009, in which the defendants indicated they did not know they were required to appear in court and that they had a mortgage modification application pending with the bank. The trial court continued the sale of the property. Thereafter, the defendants filed additional motions to stay the sale. Under section 2-301 of the Code, the defendants waived all objections to the court's jurisdiction over their persons by voluntarily taking part in further proceedings throughout 2009 and 2010. 735 ILCS 5/2-301 (West 2008).

¶ 30 Additionally, section 15-1505.6 of the Illinois Mortgage Foreclosure Law further supports a finding that the defendants waived any objection to personal jurisdiction. Section 15-1505.6 of the Illinois Mortgage Foreclosure Law was enacted on August 12, 2011, and the defendants did not raise an objection to jurisdiction within 60 days of the enactment of the amendment. Accordingly, the defendants submitted to the court's jurisdiction and, thereby, prospectively waived any objection to the circuit court's personal jurisdiction. See *Mitchell*, 2014 IL 116311, ¶ 43.

¶ 31 However, such a waiver by submission does not serve to retroactively validate any alleged void orders entered prior to the defendants' voluntary submission to the court's jurisdiction. See *id.* Consequently, the defendants' submission to the court's jurisdiction would not have validated the trial court's default order if it had been void.

¶ 32 In determining whether the default judgment was void on the grounds that the court did not have personal jurisdiction over the defendants when entering the order, the defendants bear the burden of presenting evidence to impeach the affidavit of service. See *Paul v. Ware*, 258 Ill. App. 3d 614, 618 (1994). In Illinois, the affidavit of service by a process server is *prima facie* evidence that process was properly served. *Id.* The presumption in favor of the validity of the return of service can only be overcome by clear and convincing evidence. *In re Jafree*, 93 Ill. 2d 450, 455 (1982). A person's uncorroborated testimony or affidavit that he or she was not served, is insufficient to overcome the presumption of validity. *Paul*, 258 Ill. App. 3d at 618.

¶ 33 Our review of the record indicates that the trial court did not err in finding that the defendants failed to impeach the process server's affidavit by clear and convincing evidence where they merely stated that they had not been served with the summons and indicated that

Hereford was five inches shorter than noted on the affidavit. Consequently, the default order and judgment were not void.

¶ 34

## II. Standing

¶ 35

The defendants argue that the plaintiff lacked standing to file the complaint for foreclosure against them. Lack of standing is an affirmative defense that must be plead in the answer or responsive pleading and will be forfeited if not timely raised. *Beal Bank v. Barrie*, 2015 IL App (1st) 133898, ¶ 39. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9. It is the defendant's burden to plead and prove lack of standing. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004); *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (the affirmative defense of lack of standing will be forfeited if not timely raised in the trial court).

¶ 36

In this case, the default order and judgment of foreclosure were entered on February 17, 2009. Prior thereto, the defendants failed to admit or deny that plaintiff was "the legal holder, agent or nominee of the legal holder, of the indebtedness" and "the owner, agent or nominee of the owner, of the Mortgage given as security," thereby admitting the allegations in the complaint when they were found in default. See *Mortgage Electronic Registration System, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010) (holding that the homeowner's default resulted in her admission that the plaintiff had standing because all well-pleaded allegations of a complaint are considered admitted by a defendant when held in default for failure to plead to the complaint).

¶ 37

After the entry of default, the defendants did not raise the issue of lack of standing until filing a motion to stay the sale on May 23, 2012, over three years after the default order and foreclosure judgment had been entered. Consequently, the defendants forfeited the standing issue because it was not raised in timely manner in the trial court.

¶ 38

CONCLUSION

¶ 39

The judgment of the circuit court of Will County is affirmed.

¶ 40

Affirmed.