FIRST DIVISION
May 9, 2016

No. 1-13-0160

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CH 17420
	)	
MILAN ANTIC,	)	Honorable
	)	Robert Senechalle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

Held: The circuit court did not err in denying defendant's motion to quash service. Accordingly, the circuit court had jurisdiction over the defendant to adjudicate this foreclosure action. Additionally, the circuit court did not err denying defendant's motion to set aside the judicial sale.

¶ 1 This is the second appeal[1] in this matter arising from a mortgage foreclosure action involving a property owned by defendant, Milan Antic. In his first appeal, we held defendant did not waive his jurisdictional challenge to orders entered by the circuit court prior to the filing of his initial motion in the matter. Accordingly, we remanded these proceedings back to the circuit court for an evidentiary hearing on defendant's motion to quash. On remand, an evidentiary hearing was held. The circuit court found the affidavit of the special process server was *prima facie* evidence the statutory requirements for substitute service had been satisfied. The circuit court also found defendant failed to come forward with clear and convincing evidence to rebut the affidavit of the special process server and denied the motion to quash.

¶ 2 Defendant now appeals from the circuit court order denying his motion to quash. Upon review, we find the circuit court did not err in denying the motion to quash service. Because the circuit court had personal jurisdiction over the defendant, we must review the remaining issue from the first appeal - whether the subject property was sold in material violation of section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(d-5)) (West 2016).

¶ 3 For the following reasons, we affirm the decision of the circuit court.

¶ 4 JURISDICTION

¶ 5 On June 10, 2014, this court issued a Rule 23 Order in which we remanded this case back to the circuit court for a hearing on defendant's motion to quash service. On November 6, 2014, the circuit court held an evidentiary hearing on defendant's motion to quash and ultimately denied it. On July 27, 2015, the circuit court also denied defendant's motion to reconsider. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the

[1] This second appeal was fully briefed and marked ready for determination on March 11, 2016.

Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 6 BACKGROUND

¶ 7 For a full recitation of the facts in this case see *Bank of America, N.A., v. Milan Antic,* 2014 IL App (1st) 130160-U. In the first appeal, we remanded this case back to the circuit court for an evidentiary hearing on defendant's motion to quash service based on our supreme court's recent decision in *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311.

¶ 8 After we remanded this case, the circuit court held an evidentiary hearing on defendant's motion to quash service. Prior to the hearing both sides submitted memorandums in support of their respective position. In support of his position, defendant attached an affidavit to his memorandum, in which he attested: (1) he lived at 4200 N. Whipple, Chicago; (2) there was currently no persons and never have been any persons living with him named David Pecanak; (3) he has no family members or members of his household named David Pecanak; (4) he had never been personally served with summons in this matter and; (5) never received a copy of the summons and complaint in this matter. He also included a reaffirmation of these facts. In support of its position that defendant had been properly served, plaintiff attached the three affidavits of its process server. The first two averred on the process server's failure to serve the defendant. The third affidavit averred that he left a copy of the mortgage foreclosure summons and complaint to foreclose mortgage at 4024 N. California Avenue, Chicago with a member of defendant's household, David Pecanak. The affiant further stated he was on the phone with defendant at the time service was being completed and it was defendant who set up the affiant's meeting with David Pecanak because defendant was going to be out of town for another week or two.

¶ 9 The circuit court heard oral argument on November 6, 2014. Both parties were present through counsel and at the commencement of the proceedings both parties stipulated to the admission into evidence of the three affidavits of plaintiff's process server. Defendant presented no witnesses and relied in argument upon his affidavit. Plaintiff then moved for a directed finding to deny defendant's motion to quash based upon the absence of admissible evidence to support the motion. The circuit court found both affidavits contained inadmissible hearsay and gave conflicting versions of events which would preclude ruling solely on the documents. The court found defendant had not met his burden by failing to produce any competent, admissible, evidence sufficient to require plaintiff to produce evidence to support service. Accordingly, the court denied defendant's motion to quash.

¶ 10 Defendant filed a motion to reconsider, which the circuit court also denied. No notice of appeal needed to be filed, because this court retained jurisdiction over the matter based on our previous order. See *Bank of America v. Milan Antic*, 2014 IL App (1st) 130160-U.

¶ 11 ANALYSIS

¶ 12 Before this court, defendant now argues the circuit court erred in denying his motion to quash. Defendant argues plaintiff failed to strictly comply with Illinois law regarding substitute service and the circuit court erred when it required plaintiff to produce competent evidence as to require plaintiff to produce evidence to support service. Because we find the circuit court did not err in denying defendant's motion to quash, we must also reach the unresolved issue from the first appeal as well. In the first appeal, Defendant claimed the circuit court erred in denying his motion to set aside the sale.

¶ 13 Before addressing the merits of the first issue we note that the parties disagree over the standard of review we should apply to reviewing the circuit court's denial of defendant's motion

to quash. Defendant argues for a *de novo* review, while plaintiff argues for the more deferential manifest weight of the evidence standard. While, generally, the applicable standard of review for evidentiary rulings by the trial court is abuse of discretion (*People v. Caffey*, 205 Ill. 2d 52, 89 (2001)) where the ruling is not based on live testimony and the credibility of the witnesses is not premised upon the court's observation of demeanor but, rather, the ruling is exclusively based upon the submission of documents, *de novo* review is appropriate. See *People v. Mitchell*, 165 Ill. 2d 211, 230 (1995) (providing that if neither the facts nor the credibility of witnesses is questioned, *de novo* review is appropriate); *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31 (2006). Plaintiff admits the circuit court heard no live testimony and its decision is based solely on the memorandums and affidavits submitted. Accordingly, our review of the circuit court's denial of defendant's motion to quash is *de novo*. *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 13.

¶ 14 Defendant argues the plaintiff's failure to properly serve him prevented the circuit court from obtaining personal jurisdiction over him. A judgment entered without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). 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. *Id.*

¶ 15 Here, both parties concede plaintiff attempted to serve defendant via substitute service. Substitute service in Illinois is governed by section 2-203(a)(2) and states in relevant part:

> (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or

> other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. 735 ILCS 5/2-203(a)(2) (West 2012).

Our supreme court has long acknowledged the return of the officer or other authorized person making service of a summons on a defendant by delivering a copy via substitute service, "must show strict compliance with every requirement of the statue authorizing such substitute service, since the same presumption of validity that attaches to a return reciting personal service does not apply to substitute service." *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986). Accordingly, when personal jurisdiction is based on substitute service of a summons, the return or affidavit of service must affirmatively state (1) a copy of the summons was left at the usual place of abode of the defendant with some person of the family or person residing there the age of 13 years of above, (2) that such family member or person residing there was informed of the content of the summons, and (3) the person making service sent a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his usual place of abode.

¶ 16 When an affidavit of service meets these requirements, it "should be considered *prima facie* evidence that the process was properly served. It should not be set aside unless the return has been impeached by clear and satisfactory evidence." *In re Jafree*, 93 Ill. 2d 450, 455 (1982). Furthermore, the law in Illinois is clear that "an uncorroborated affidavit by a party allegedly served denying service is insufficient to contradict a sheriff's return." *Four Lakes Management & Development Co. v. Brown*, 129 Ill. App. 3d 680, 683 (1984).

¶ 17 Based on this case law, we must first examine the affidavit of the special process server to determine whether it complies with section 2-203(a)(2). The record contains two affidavits

of attempted service and one affidavit of service. In affidavit of service dated June 1, 2011, the special process server stated that on May 15, 2011, he served a mortgage foreclosure summons and complaint to foreclose mortgage on Milan Antic by substitute service by leaving a copy at 4024 N. California with a member of the household, David Pecanak, a person residing there over the age of 18. The affidavit further states that on May 18, 2011, a copy of the mortgage foreclosure summons and complaint to foreclose mortgage was mailed in a sealed envelope with postage prepaid to defendant's usual place of abode. Important for our decision here, the affidavit avers that it was defendant who set up meeting between the special process server and the member of his household. The affidavit avers that while he served David Pecanak, he was on the phone with the defendant and that defendant advised him that he could leave the summons and complaint with Mr. Pecanak, his roommate, at 4024 N. California.

¶ 18 We find that the affidavit meets the three requirements to be considered *prima facie* evidence that the summons was properly served. The first and second requirements are satisfied through defendant's statements to the special process server, which are not hearsay. The statements made by the defendant to the process server are not hearsay because they are statements by a party-opponent. Illinois rule of evidence 801(d)(2) provides a statement is not hearsay if "the statement is offered against a party and is the party's own statement, in either an individual or representative capacity." Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). Furthermore, even if the statements were hearsay, the record indicates defendant stipulated to their admission. Finally, the special process server averred he mailed a copy of the mortgage foreclosure summons and complaint to foreclose mortgage in a sealed envelope with postage prepaid to defendant's usual place of abode. Accordingly, the affidavit of the special process server is *prima facie* evidence the requirements of section 2-203(a) were met.

¶ 19 Based on this finding, the defendant must come forward with clear and convincing evidence. *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. In an attempt to overcome the affidavit of the special process server, defendant attached his own affidavit to his motion to quash. His affidavit averred he: (1) lived at 4200 N. Whipple with his wife and her mother; (2) there are currently are no persons and never have been any persons living with him named David Pecanak; (3) has no family members or members of his household named David Pecanak and; (4) never was served personally or received a copy of the summons or the complaint via mail. However, Illinois courts have continually stated "in the case of substitute service the return of an officer will not be set aside merely upon the uncorroborated testimony of the person on whom process has been served." *Alvarez v. Feiler*, 174 Ill. App. 3d 320, 323 (1988) citing *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 171-72 (1983). Defendant's affidavit is uncorroborated and does not even contradict the testimony of the special process server that he talked with the defendant via phone and defendant told him to serve his roommate, Mr. Pecanak, at 4024 N. California.[2] Accordingly, defendant's self-serving affidavit is insufficient to overcome the affidavit of the special process server and the motion to quash was properly denied.

¶ 20 Next, defendant challenges the denial of the circuit court's motion to reconsider its denial of his motion to quash service. The purpose of a motion to reconsider is to bring to the circuit court's attention changes in the law, newly discovered evidence not available at the time of the original hearing, or a mistake in the court's previous application of the law. *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 577 (2000). The decision to

[2] The affidavit of the special process server also contains the cell phone number he used to contact the defendant and defendant's affidavit does not dispute that it is his phone number listed.

grant or deny a motion to reconsider "lies with the discretion of the trial court and will not be reversed absent an abuse of discretion." *N. River Ins. Co. v. Grinnell Mut. Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006).

¶ 21 The circuit court did not abuse its discretion when it denied defendant's motion to reconsider. First, defendant argued that the circuit court erred because there was not strict compliance with section 2-203(a)(2). We have already addressed this issue and found the process server's affidavit did comply with section 2-203(a)(2).

¶ 22 Next, Defendant argues that circuit court erred in finding his affidavit attached to the motion to quash was hearsay. However, whether or not defendant's affidavit contains hearsay does not matter because a review of the affidavit shows it contains self-serving statements that Illinois courts have consistently rejected as insufficient to impeach a return of service. *Alvarez*, 174 Ill. App. 3d at 323.

¶ 23 Finally, defendant argues that the circuit court failed to consider the affidavits of Jordan Chalmers and David Pecanak.[3] The affidavits were not attached to the original motion to quash but were first presented as part of the motion to reconsider. The circuit court rejected defendant's request to consider them because it determined they were not newly discovered evidence. Illinois courts have defined newly discovered evidence as "evidence that was not available prior to the hearing." *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1078 (2007). At the hearing on defendant's motion to reconsider, defendant's attorney conceded the information in the three affidavits was available to defendant long before the hearing took place. Based on this, the circuit court was correct in not relying on them for the

[3] A third affidavit is mentioned by the parties but does not appear in the record.

purpose of ruling on defendant's motion to reconsider. Accordingly, we find no error in the circuit court's denial of defendant's motion to reconsider.

¶ 24 After finding that the circuit court had both personal and subject matter jurisdiction in this case, we turn to defendant's final contention that the circuit court erred in denying his motion to set aside the sale of the subject property. On appeal, defendant claims the subject property was sold in material violation of 735 ILCS 5/15-1508(d-5) (West 2016). In response, plaintiff argues defendant has waived this issue because defendant raised it only in his reply in support of his motion to set aside the judicial sale. A review of the record demonstrates the circuit court rejected defendant's current argument based on section 15-1508(d-5) as untimely because it was raised for the first time in his reply brief. We agree with the plaintiff that the defendant has waived review of this issue on appeal. See *Johnson Press of America, Inc. v. Northern Ins. Co. of New York*, 339 Ill. App. 3d 864, 874 (2003). Because defendant did not raise this issue properly before the circuit court it is waived on appeal.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.