2019 IL App (1st) 182686-U

FIFTH DIVISION
Order filed: December 20, 2019

No. 1-18-2686

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE LAW OFFICES OF BEVERLY PEKALA, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 M1 45716
	)	
HIRAM BOURNE,	)	Honorable
	)	Mary Kathleen McHugh,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the order of the circuit court that denied the defendant's motion to vacate the default judgment entered against him because the circuit court lacked personal jurisdiction over him when it entered the default judgment. We also vacate the circuit court's entry of default judgment in favor of the plaintiff and against the defendant.

¶ 2 The defendant, Hiram Bourne, appeals from an order of the circuit court of Cook County, denying his petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS

5/2-1401 (West 2016) to vacate the default judgment entered against him in favor of the plaintiff, the Law Offices of Beverly Pekala, P.C. On appeal, the defendant contends that the plaintiff failed to properly serve him with process and, therefore, the default judgment entered against him is void for want of personal jurisdiction. The defendant argues, in the alternative, that the default judgment entered against him is void because the circuit court failed to determine the reasonableness of the plaintiff's requested attorney fees. For the reasons that follow, we reverse the judgment of the circuit court that denied the defendant's section 2-1401 petition to vacate the default judgment and vacate the order of the circuit court that entered a default judgment in favor of the plaintiff.

¶ 3 The following factual recitation is derived from the pleadings and the record on appeal.

¶ 4 On July 21, 2004, the plaintiff filed a two-count complaint against the defendant, seeking $25,385.90 in unpaid legal fees related to its representation of the defendant during his divorce. On August 5, 2004, the plaintiff filed a motion requesting that the circuit court appoint Shadow Investigations (Shadow) as a special process server. The plaintiff attached the affidavit of one its attorneys, Robert Sheridan, averring to the following: the defendant is a former client of the plaintiff; the defendant keeps hours that would make it difficult for the local sheriff to serve him with process; and "in the interest of concluding this cause in an expeditious manner, it is in the parties' best interest" for the circuit court to appoint a special process server. On August 16, 2004, the circuit court granted the plaintiff's request and appointed Shadow as a special process server.

¶ 5 On August 26, 2004, the plaintiff filed a motion pursuant to section 2-203.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-203.1 (West 2004)) for service by special order of the court. Therein, the plaintiff stated that the defendant resided "at 2121 W. Gladys, Chicago, Illinois" and that Shadow attempted service "on several occasions at 5521 W. Fletcher, Chicago, Illinois, as set

forth in the attached affidavit." The motion further stated that the defendant was "intentionally avoiding and frustrating [the plaintiff's] good faith and proper attempts" to serve the defendant. The plaintiff requested that the circuit court allow it to serve the defendant via certified mail and first-class mail "at 2121 W. Gladys, Chicago, Illinois ***."

¶ 6 The plaintiff attached to its motion an affidavit from Donald Eskra of Shadow, averring that he was unable to serve the defendant. Eskra stated that he attempted to serve the defendant at 2121 West Gladys seven times between August 11, 2004, and August 18, 2004. Eskra attempted to serve the defendant on the following dates and times: August 11 at 5:30 p.m. and 9:24 p.m.; August 13 at 10:21 a.m.; August 15 at 3:20 p.m.; August 17 at 9:02 a.m.; and August 18 at 3:58 p.m. and 7:21 p.m. The affidavit also stated that Eskra never observed the lights on at the address and that he spoke with a neighbor who "advised that [the defendant] does reside at this address but kept unusual hours." On September 7, 2004, the circuit court granted the plaintiff's motion, allowing it to serve the defendant by way of both first-class mail and certified mail at his "last known home address."

¶ 7 On September 29, 2004, the plaintiff filed a motion for default judgment, arguing that the defendant had not responded to the plaintiff's verified complaint. The plaintiff averred that it had complied with the circuit court's September 7, 2004 order by mailing a summons and a copy of the verified complaint to the defendant at 2121 West Gladys, Chicago, Illinois, via both first-class mail and certified mail. On October 7, 2004, the circuit court granted the plaintiff's motion and entered a default judgment against the defendant in the amount of $25,385.90.

¶ 8 On June 10, 2011, the plaintiff petitioned the circuit court for a revival of the October 7, 2004 default judgment with interest. On June 21, 2011, the circuit court granted the motion and revived the judgment with interest for a new total of $40,615.88 plus costs and fees.

¶ 9 On February 27, 2018, the plaintiff filed its second petition for revival of judgment. In addition, the plaintiff filed a motion for service of process by special process server. In its motion, the plaintiff stated that, "[b]ased upon defendant's prior conduct," it believed that the defendant "may attempt to evade service." On March 14, 2018, the circuit court granted the plaintiff's motion for a special process server. On June 6, 2018, the special process server was able to personally serve the defendant at 2121 West Gladys Avenue.

¶ 10 On August 22, 2018, the defendant filed a petition pursuant to section 2-1401 of the Code to vacate the October 7, 2004 default judgment entered against him. Therein, the defendant argued that the judgment was entered "without notice and without statutorily-compliant service of process." Specifically, the defendant maintained that the plaintiff did not show that it met the requirements of section 2-203.1 of the Code. In support, the defendant raised the following points: the plaintiff averred in its August 26, 2004 motion that it attempted to serve the defendant at 5521 West Fletcher, even though it knew that the defendant resided at 2121 West Gladys; the plaintiff provided no evidence to support its claim that the defendant was "intentionally avoiding and frustrating" its attempts to serve him; and the plaintiff never attempted to serve him at his workplace address, where it had previously served him during the divorce litigation.

¶ 11 On October 5, 2018, the plaintiff filed its response to the defendant's section 2-1401 petition. The plaintiff maintained that it fully complied with the circuit court's September 7, 2004 order and alleged that the defendant misrepresented when he became aware of the default judgment

entered against him. Moreover, the plaintiff argued that it was not required to serve the defendant at his place of business and denied his contention that it had served him at his workplace address while representing him. Rather, the plaintiff stated that it faxed a subpoena for records to the Chicago Police Department (CPD) office "that responds to document subpoenas." The plaintiff attached a copy of the fax showing that it was sent to the CPD on March 23, 2003.

¶ 12 On November 15, 2018, the circuit court held an evidentiary hearing. The defendant testified to the following facts. He has lived at 2121 West Gladys since 1997, except for a period in 2003 when he was going through his divorce. During August 2004, he worked for the CPD and was assigned the "second shift" where his work hours were from 9 a.m. to 6 p.m. or 3 p.m. to 11 p.m. The defendant did not know that the plaintiff was attempting to serve him, and he did not become aware of the judgment against him until 2012.

¶ 13 The defendant also presented the testimony of Robert Sheridan, an attorney employed by the plaintiff who was prosecuting this matter. According to Sheridan, the seven failed attempts to serve the defendant were the only evidence the plaintiff had to support its claim that the defendant was intentionally avoiding and frustrating the plaintiff's attempts to serve him. He stated that "there was no need to conduct an investigation to determine" the defendant's whereabouts because they knew that he lived at 2121 West Gladys. Sheridan acknowledged that he knew the defendant was employed as a Chicago police officer when the plaintiff represented the defendant in 2003 but stated that he "had no reason to believe he was employed as anything" in 2004. He also acknowledged that the plaintiff did not attempt to serve the defendant at his place of business.

¶ 14 On December 19, 2018, the circuit court denied the defendant's section 2-1401 petition to vacate the October 7, 2004 default judgment entered against him. On December 20, 2018, the

circuit court granted the plaintiff's motion to revive the October 7, 2004 default judgment with interest. This appeal followed.

¶ 15 On appeal, the defendant argues that the circuit court did not have personal jurisdiction over him when it entered the October 7, 2004 default judgment because of statutorily deficient service of process and, therefore, the default judgment entered against him is void and should be vacated.

¶ 16 Before turning to the merits, we first address the plaintiff's contention that the defendant failed to exercise due diligence in bringing his section 2-1401 petition. In order to obtain relief pursuant to section 2-1401, the petitioning party must establish (1) the existence of a meritorious defense; (2) due diligence in presenting the defense to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). According to the plaintiff, the record established that the defendant knew about the default judgment against him as early as 2013, but he failed to file a section 2-1401 petition until 2018. However, when a section 2-1401 petition is brought on voidness grounds, "the general rules pertaining to section 2-1401 petitions—that they must be filed within two years of the order or judgment, that the petition must allege a meritorious defense to the original action, and that the petition must show that the petition was brought with due diligence—do not apply." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Any judgment entered without jurisdiction is void and may be challenged at any time, either directly or collaterally. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. Thus, the plaintiff's argument that the defendant did not exercise due diligence in bringing his motion is unavailing.

¶ 17 We now turn to the merits of the defendant's argument on appeal. In order to enter a valid judgment, the circuit court must possess both subject-matter jurisdiction and personal jurisdiction over the parties. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986); *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. The circuit court acquires personal jurisdiction over a defendant either through the filing of an appearance or by service of process as directed by statute. *Thill*, 113 Ill. 2d at 308; *Mitchell*, 2014 IL 116311, ¶ 18. We review the question of whether the circuit court obtained personal jurisdiction over a defendant *de novo*. *Mitchell*, 2014 IL 116311, ¶ 17.

¶ 18 Generally, the Code requires that an individual defendant be served either in person or by abode service—by leaving a copy of the summons with a family member above the age of 13. 735 ILCS 5/2-203(a)(1), (2) (West 2004). However, in situations where serving a defendant is "impractical," the Act provides that "the plaintiff may move, without notice, that the court enter an order directing a comparable method of service." 735 ILCS 5/2-203.1 (West 2004). "The motion shall be accompanied with an affidavit stating the nature and extent of the investigation made to determine the whereabouts of the defendant *** including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful." *Id.* Upon such a showing, the court "may order service to be made in any manner consistent with due process." *Id.* The service of process must be in strict compliance with governing statutes. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 15.

¶ 19 The defendant contends that he was not served in accordance with section 2-203.1 of the Code for the following reasons: (1) the plaintiff's motion showed only that it attempted to serve

him at "5521 West Fletcher," not 2121 West Gladys; (2) the plaintiff's attached affidavit provided no evidence for the claim that the defendant was evading process; and (3) the affidavit did not demonstrate that conventional service was "impractical" or that the plaintiff made a "diligent inquiry" as to the location of the defendant.

¶ 20 The plaintiff responds as follows: (1) the single reference to 5521 West Fletcher in its motion was a typographical error, as evidenced by the multiple references to 2121 West Gladys in other parts of the motion and the attached affidavit; and (2) the seven failed attempts to personally serve the defendant at his home established that conventional service was impractical pursuant to section 2-203.1 of the Code.

¶ 21 We agree with the defendant that the affidavit attached to the plaintiff's motion failed to establish that it made a diligent inquiry into the defendant's whereabouts or that service was impractical. See *Sutton v. Ekong*, 2013 IL App (1st) 121975, ¶¶ 22-23. While there are no magic words that an affidavit in support of a section 2-203.1 motion must include, the affidavit must still set forth facts that demonstrate a diligent inquiry as to the location of the defendant. *People ex rel. Waller v. Harrison*, 348 Ill. App. 3d 976, 980-81 (2004). The term " 'due inquiry' is not intended as a pro forma or useless phrase, requiring only perfunctory performance, but on the contrary, requires honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances can permit." *City of Chicago v. Leakas*, 6 Ill. App. 3d 20, 27 (1972). In other words, the plaintiff was required to perform "the type of search or investigation that an earnest person seeking to locate a defendant to effectuate service on him would make ***." *Sutton*, 2013 IL App (1st) 121975, ¶ 22.

¶ 22 Here, the plaintiff attached an affidavit from Eskra, establishing that he attempted to serve the defendant seven times, on five different days, during a one-week period. Although Eskra confirmed with an unidentified neighbor that the defendant did live at that address, his affidavit stated that "no lights [were] ever on" at the address. The neighbor also confirmed to Eskra what the plaintiff already knew: the defendant did not keep normal hours due to his job as a police officer. Despite knowing that the plaintiff kept odd hours, the plaintiff did not attempt to serve the defendant at his work address or continue its attempts to serve him at his home during "unusual" hours of the day. Put simply, the plaintiff's investigation, which consisted of seven failed attempts to serve the defendant over the course of one week and Eskra's conversation with one unidentified neighbor, is not the type of investigation that an earnest person seeking to locate the defendant to effectuate service on him would make. See *Sutton*, 2013 IL App (1st) 121975, ¶ 22 (finding that the plaintiff did not conduct a diligent inquiry as to the defendant's whereabouts where the plaintiff made six failed attempts to serve the defendant at his residence but did not attempt service at his "easily obtainable business address").

¶ 23 We also note that we could find no evidence in the record to support the plaintiff's claim that the defendant was evading service. According to Sheridan, the only evidence the plaintiff had for making that claim was the seven failed attempts to serve him at 2121 West Gladys. Although the defendant acknowledged that he lived at that address during that time, he testified that he worked two different shifts that would have kept him away from his house during the hours when Shadow attempted to serve him. Additionally, Eskra noted that the lights were never on when he attempted to serve the defendant. These facts are entirely consistent with the defendant keeping

unusual hours and, without more, do not indicate that he attempted to evade service. See *Sutton*, 2013 IL App (1st) 121975, ¶ 23.

¶ 24 Accordingly, we conclude that the plaintiff did not conduct a diligent inquiry as to the defendant's whereabouts prior to requesting service by special order of the court, nor did the plaintiff establish that service was impractical; and therefore, service pursuant to section 2-203.1 of the Code was improper. Having determined that service was improper, we also conclude that the circuit court did not have personal jurisdiction over the defendant when it entered default judgment against him in favor of the plaintiff, and as a result, that judgment is void *ab initio*. *In re Dar. C.*, 2011 IL 111083, ¶ 60.

¶ 25 For the reasons stated, we reverse the order of the circuit court that denied the defendant's section 2-1401 petition. We also vacate the judgment entered against the defendant on October 7, 2004.

¶ 26 Reversed; default judgment vacated.