THIRD DIVISION
August 7, 2019

No. 1-19-0109

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COLUMBIA COLLEGE CHICAGO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 M 1123020
	)	
ELIZABETH KOGIONES,	)	Honorable
	)	Mary Kathleen McHugh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; absent a transcript of the evidentiary hearing on defendant's section 2-1401 petition for relief from judgment based on lack of personal jurisdiction, the record failed to establish that plaintiff did not present competent proof defendant was served with summons out of state, therefore, we must presume the trial court had a sufficient factual basis to deny defendant's petition.

¶ 2 Plaintiff, Columbia College of Chicago (Columbia), filed a complaint for breach of contract against defendant, Elizabeth Kogiones. When the complaint was filed, defendant resided out of state. Plaintiff allegedly caused defendant to be personally served at her permanent place of abode in New Jersey. Plaintiff later obtained a default judgment against defendant. Several years later defendant filed a motion to quash service of process and vacate

default judgment on the ground she was not personally served and had no knowledge of plaintiff's lawsuit. The circuit court of Cook County construed defendant's motion as a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2018)). Following an evidentiary hearing, the trial court denied defendant's petition.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 In April 2010 plaintiff filed a complaint against defendant for breach of contract seeking damages of $2,868.07 plus interest, attorney fees, and costs. The complaint alleged defendant enrolled in classes at Columbia and agreed to make payments for classes, Columbia complied with its obligations, and defendant failed to pay for services rendered. Plaintiff attempted to serve defendant at 200 West 145th Street, #9, New York, NY 10039 with a summons to appear and answer the complaint but the special process server was unsuccessful. The affidavit of non-service states the special process sever attempted service three times but received no answer and on the fourth attempt the special process server spoke to the building superintendent who stated he did not know defendant to be living in the building. The trial court issued an alias summons. The record contains an affidavit of service of the alias summons from the Hudson County (New Jersey) Sheriff's Office. The affidavit of service ("affidavit") lists the person to serve as defendant at an address of 106 Duncan Ave. #L, Jersey City, NJ. The affidavit lists fields for "Defendant," "Date of Action," "Time of Action," "Attempts," "Delivered To," "Relationship," and "Type of Action." The affidavit lists defendant and the address in New Jersey stated above, a "Date of Action" of 4/27/2010, and lists a description, presumably of the person served although it is not expressly labeled as such, as follows: "Race CAUC Sex F Height 508 Weight

150 Eyes BRO Hair RED Age 26." The affidavit lists the "Type of Action" as "PERSONAL SERVICE AT PLACE OF ABODE." The affidavit does not state a "Time of Action" nor does it separately list who the documents were "Delivered To."

¶ 6 In June 2010 plaintiff filed a motion for default judgment against defendant. In August 2010 the trial court granted defendant's motion and entered a default judgment in favor of plaintiff against defendant for $2,868.07 plus costs. In December 2017 plaintiff filed a petition to revive the judgment against defendant. A special process server served defendant with a notice of filing of the petition to revive judgment at 893 Montgomery St., #5, Jersey City, NJ 07305-5948 by leaving a copy with an adult household member and by placing a copy in the United States mail. In February 2018 plaintiff filed a motion to revive the judgment. Plaintiff's motion stated, in part, that the petition to revive judgment was properly served. Plaintiff attached the affidavit of the special process server who served defendant with the petition to revive judgment. In March 2018 plaintiff issued a "Citation to Discover Assets to Third Party (Wages)." The citation states that $5,313.39 was now due on the judgment. On March 13, 2018, the trial court entered an order for revival of the judgment in favor of plaintiff against defendant. (The return of the citation states that based on defendant's income nothing would be withheld from defendant's wages. The trial court later entered a "Non-Withholding Wage Deduction Order" stating an answer was filed showing no funds available to the judgment creditor.)

¶ 7 In April 2018 defendant appeared in the trial court and the cause was continued. On May 30, 2018 defendant, appearing *pro se*, filed a motion to quash service of process and vacate default judgment. Defendant's motion stated defendant was appearing "solely for the special and limited purpose of challenging the jurisdiction of the court over [her] person." Defendant's motion to quash and her attached affidavit stated defendant was not served in this case.

Defendant's motion stated she previously resided in Jersey City but defendant moved to New York on January 10, 2010; therefore, the "place of alleged service was not [defendant's] 'usual place of abode' on the date of alleged service." Defendant's motion also stated that when she formerly resided in New Jersey, she resided at "106 Duncan Ave. apt 1L, not #L as indicated on the address listed on the Affidavit of Service." Defendant's motion asserts that several units in the building were identifiable as "#L (for example 1L, 2L, and 3L)" and, therefore, even though defendant was no longer residing there on the date indicated by the affidavit of service, the affidavit "may very well have been served upon an occupant of any of the other units, identifiable as #L, and not upon [d]efendant." In addition to defendant's own affidavit, defendant attached to the motion the affidavit of (1) a person who averred defendant moved in with the affiant at an address in New York City on or about January 10, 2010; and (2) a person who averred she has known defendant as a neighbor in New York since February 2010. Defendant also attached emails dated February 2011 from H&R Block referencing defendant's tax returns being filed in New York. (Defendant also attached tax documents for subsequent tax years after service allegedly took place in New Jersey.)

¶ 8 The trial court continued defendant's motion as a petition pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2018)) and entered a briefing schedule. Plaintiff filed a motion to dismiss defendant's petition and defendant filed a response. Defendant's response argued, in part, that "[w]hile the description of the person allegedly served somewhat matches my description, there are several notable differences in my personal appearance that do not match the deputy's description." Defendant asserted she was not 5'08" and 150 lbs. on the alleged date of service and from her recollection her hair was blonde. Defendant argued there could have been other people living in the building who generally matched her description who

may have received the service. Defendant's response to the motion to dismiss also noted the affidavit "does not state that the person who was allegedly served indicated that she was Elizabeth Kogiones. Nor was the affidavit of service signed by the person who allegedly received service of process." Defendant attached to her response her 2010 tax return listing her address in New York.

¶ 9 The trial court denied plaintiff's motion to dismiss defendant's 2-1401 petition, ordered plaintiff to answer or plead, and granted plaintiff leave to issue discovery. The court set the matter for a hearing. The court granted defendant leave to file a memorandum in support of her petition to quash service and vacate default judgment. Defendant's memorandum asserted, in part, that defendant withdrew from all of her classes at Columbia within the time designated whereby she would not be charged any fees or penalties. The memorandum also alleged plaintiff had garnished approximately $300 from defendant's wages and that prior to the garnishment defendant was completely unaware of the lawsuit. The memorandum argued, for the first time, that the affidavit of service of the lawsuit is defective on its face because it "does not state the time of day that the service was allegedly effectuated" and the "time of day is a requirement that must be included *** for the Affidavit of Service to be valid and legal." Defendant's memorandum argued that courts must be meticulous in requiring that affidavits of service satisfy all statutory requirements, including an indication of the time of day service was allegedly effectuated, as a matter of due process. Defendant argued that if the affidavit is found legally sufficient without stating the time of day defendant was allegedly served she will be stripped of her right to present evidence challenging service in this case. Defendant asserted she was employed on the alleged date of service and is able to produce clear and convincing evidence "that she was working at a specific location and at a specific time on that day;" however, the

"fact the Affidavit of Service does not state the time of day would prevent any such proof from being used to impeach the testimony of the officer who allegedly served her."

¶ 10 Plaintiff filed a response to defendant's memorandum arguing "strict compliance 'with every requirement' of the applicable statute with regard to personal service is not the applicable legal standard." Plaintiff argued the omission of the time of day does not make the affidavit invalid on its face and defendant failed to present evidence that the omission of the time of day "should be considered an essential element invalidating the Deputy Sheriff's return in this matter." Plaintiff's response to defendant's memorandum also stated that "the legislative intent is clear that personal service pursuant to section 5/2-208 [(the section under which defendant was served out of state)] should bear the same indicia of reliability as service had pursuant to section 5/2-203 and be assessed by the [same] standard."

¶ 11 Following an evidentiary hearing, the trial court denied defendant's 2-1401 petition.

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 The sole question on appeal is whether the trial court erred in denying defendant's petition pursuant to section 2-1401 of the Code because the court never obtained personal jurisdiction over defendant.

> "Serving a copy of a summons and complaint on a party-defendant is an essential part of the litigation process and allows a court to obtain personal jurisdiction over that defendant. A court must have personal jurisdiction over the parties in order to enter a valid judgment. [Citation.] Service of process protects a party's right to due process through proper notification and providing an opportunity to be heard. [Citation.] '[A] failure to effect service as required by

> law deprives a court of jurisdiction over the person, and any default judgment based on defective service is void.' [Citation.] *** Such a judgment may be attacked at any time, and the waiver rule does not apply. [Citation.]" *Urban Partnership Bank v. Ragdale*, 2017 IL App (1st) 160773, ¶ 18.

¶ 15 A party may obtain relief from a default judgment that is void due to a failure to obtain personal jurisdiction over the defendant because of defective service by filing a petition pursuant to section 2-1401 of the Code. See *Dei v. Tumara Food Mart, Inc.*, 406 Ill. App. 3d 856, 866 (2010). "Normally, we review *de novo* whether the trial court obtained personal jurisdiction. [Citation.]" *Abbington Trace Condominium Ass'n v. McKeller,* 2016 IL App (2d) 150913, ¶ 10. If no evidentiary hearing occurs, we apply a *de novo* standard of review to the question of whether the trial court obtained personal jurisdiction. *Ragdale*, 2017 IL App (1st) 160773, ¶ 16. Additionally, "[w]hen the trial court bases its decision regarding personal jurisdiction over a party solely on documentary evidence, we review a trial court's dismissal for lack of personal jurisdiction *de novo*." *In re Marriage of Lasota & Luterek,* 2014 IL App (1st) 132009, ¶ 21.

> "However, when material evidentiary conflicts exist, the trial court must conduct an evidentiary hearing to resolve those disputes. [Citation.] '[I]f there are disputes regarding issues of fact [which] "determine whether the court has personal jurisdiction, the trial court must hear the testimony, evaluate its credibility, and resolve any material conflicts in the evidence." ' [Citations.]" *McKeller*, 2016 IL App (2d) 150913, ¶ 10.

We apply the manifest weight standard when the trial court conducts an evidentiary hearing. *Royal Extrusions Ltd. v. Continental Window and Glass Corp.*, 349 Ill. App. 3d 642, 645 (2004). Under the manifest weight of the evidence standard, "this court should reverse a trial court's

determination only when the opposite conclusion is clearly evident or where the factual findings upon which it is based are unreasonable, arbitrary, or not based on the evidence." (Internal quotation marks omitted.) *In re Marriage of Lasota & Luterek*, 2014 IL App (1st) 132009, ¶ 21.

¶ 16 The parties do not dispute that defendant was not a resident of Illinois at the time she was allegedly served. Accordingly, service upon defendant was controlled by section 2-208 of the Code (735 ILCS 5/2-208 (West 2010)). Section 2-208 of the Code reads, in pertinent part, as follows:

> "(a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.
>
> (b) The service of summons shall be made in like manner as service within this State, by any person over 18 years of age not a party to the action. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, *or any other competent proofs*, in determining whether service has been properly made." (Emphasis added.) 735 ILCS 5/2-208(a), (b) (West 2010).

¶ 17 In this case, the trial court conducted an evidentiary hearing after which it denied defendant's petition claiming that service had not been properly made. The trial court's findings of fact are not contained in the written order denying defendant's 2-1401 petition and the record does not contain a report of proceedings from the evidentiary hearing, a bystander's report of the

hearing, or an agreed statement of facts. Thus, we have no way to determine whether plaintiff presented "other competent proof" of service upon defendant.

> "This court has recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record. [Citations.] An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding. [Citation.]
>
> Without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law. [Citations.] 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' [Citation.]" *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156-57 (2005).

¶ 18 A recent case from the Second District of this court found that the appellant's failure to provide a report of proceedings or a bystander's report after the trial court has held an evidentiary hearing on the issue of service was fatal to the appellant's claim on appeal that service was defective. *Deutsche Bank National Trust Company v. Sedys*, 2019 IL App (2d) 180188, ¶ 38. The court explained the statute allows the trial court to consider testimony in addition to documentary evidence to determine whether proper service was made. *Id.* ¶ 37. Although the court's decision in *Sedys* centered on section 2-206(a) of the Code (735 ILCS 5/2-206(a) (West 2016)) and service by publication, we find that case instructive.

¶ 19 In *Sedys*, the plaintiff filed a complaint for foreclosure and an affidavit for service by publication. *Sedys*, 2019 IL App (2d) 180188, ¶ 4. Section 2-206(a) of the Code requires the

clerk of the court to mail a copy of the notice of publication to the defendants at the addresses listed in the affidavit for service by publication. *Id*. ¶ 6; 735 ILCS 5/2-206(a) (West 2016). The statute also states that "[t]he certificate of the clerk that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so." 735 ILCS 5/2-206(a) (West 2016). In *Sedys*, the record contained "no certificate from the clerk that the published notice was mailed to [the] defendant[s] at the address listed in the affidavit." *Sedys*, 2019 IL App (2d) 180188, ¶ 4. The trial court entered a default judgment on the complaint for foreclosure. *Id*. ¶ 5. There, as here, the defendants filed a petition under section 2-1401 "claiming that the default judgment, and all successive judgments, were void" because the court lacked personal jurisdiction over the defendants (*id*. ¶ 6) where "the record contained no indication that the clerk mailed a copy of the notice" (*id*. ¶ 8). The trial court granted a motion to dismiss the section 2-1401 petition on the ground the defendants failed to attach a supporting affidavit to the petition. *Id*. ¶ 8. On appeal, the *Sedys* court rejected the trial court's reason for dismissing the petition (*id*. ¶ 13) but nonetheless affirmed the dismissal (*id*. ¶ 14). The court held the record was "insufficiently complete to support [the] defendant's contention that the clerk failed to mail the published notice." *Id*. ¶ 14.

¶ 20 The *Sedys* court noted that "Illinois cases have long held that personal jurisdiction over a party through service by publication is not successful if the clerk fails to mail a copy of the published notice to each defendant listed in the affidavit filed in support of service by publication, as required by section 2-206(a)." *Id*. ¶ 16. The parties in *Sedys* did not dispute that the record did not contain a certificate of mailing a copy of the published notice. The defendants argued the absence of the certificate alone was a sufficient ground to find the trial court lacked jurisdiction. *Id*. The *Sedys* court analyzed the question of whether section 2-206(a) mandated a

certificate of mailing or whether it simply identified a certificate of mailing as one means of proof the clerk mailed a copy of the notice of publication to the defendants listed in the affidavit. See *id*. ¶ 19-20. After "consulting judicial interpretations of other service-of-process statutes" (*id*. ¶ 24), the *Sedys* court held that "a certificate from the clerk is not the only acceptable proof of mailing under section 2-206(a) but that such proof may take the form of other documentary evidence and also testimony" (*id*. ¶ 37). "Thus, the absence of a clerk's certificate from the record in a case does not, of itself, show a failure to comply with the mailing requirement of section 2-206(a)." *Id*. ¶ 37.

¶ 21 Having determined that the certificate of mailing was not the only acceptable form of proof the clerk had mailed a copy of the notice as required by section 2-206(a), and noting that the party relying on service by publication must show "strict compliance with all statutory requirements" (*id*. ¶ 38), the *Sedys* court found that it could not "determine whether [the] plaintiff here did so comply, because *** the record [does not] include a report of proceedings of the hearing at which the trial court granted plaintiff's motion for a default judgment." *Id*. ¶ 38. The *Sedys* court noted that following a hearing on the plaintiff's motion for default judgment, "the trial court made a written finding that it had personal jurisdiction" over the defendants. *Id*. The court found that "[w]ithout a report of what transpired at the hearing, we do not know what argument or evidence was presented with respect to personal jurisdiction." *Id*.

> "As appellants, [the] defendants had the burden of providing a sufficiently complete record of the proceedings below to support a claim of error. [Citation.] In the absence of an adequate record, we must presume that the orders entered by the trial court were in conformity with the law and had a sufficient factual basis.

> [Citation.] Any doubts that arise from the incompleteness of the record are resolved against the appellant." *Id.*

In *Sedys*, the trial court found it had personal jurisdiction over the defendants. The *Sedys* court found there was nothing in the record to suggest the trial court "was presented with evidence on some elements of personal jurisdiction but not others." *Id.* ¶ 40. The court held that "[i]n the absence of a sufficiently complete record, we presume *** that the trial court received sufficient evidence to support all elements of personal jurisdiction." *Id.* ¶ 40.

¶ 22 We reach a similar conclusion in this case. First, we hold that any alleged defect in the return of service on an individual outside the state is not, in and of itself, a sufficient ground on which to reverse the trial court's finding after an evidentiary hearing that it had personal jurisdiction over a defendant. The plain language of section 2-208 states: "The court may consider the affidavit, *or any other competent proofs*, in determining whether service has been properly made." (Emphasis added.) 735 ILCS 5/2-208(a), (b) (West 2010). Moreover, in *In re Marriage of Passiales*, 144 Ill. App. 3d 629, 636 (1986), the respondent "was served with a summons by the local sheriff *** in Esterville, Iowa." *Id.* at 632. The respondent argued that "service of process on her was defective because the sheriff did not file a return affidavit." *Id.* at 636. The court held the respondent's argument lacked merit and that service of process was not fatally defective. *Id.* The court agreed that "service on a non-resident must comply with the statutory requirements." *Id.* Nonetheless, the court found as follows:

> "[A]lthough the sheriff in Iowa did not file a return affidavit, there was competent proof that [the respondent] was properly served with a summons. The sheriff testified that he personally served [the respondent,] and she admitted that she was

> served. In view of the facts, service was effective despite the lack of a return affidavit." *Id*.

See also *In re Marriage of Lewis*, 213 Ill. App. 3d 1044, 1048 (1991) ("There being no [valid] affidavit, the question becomes whether any 'other competent proof' establishes the accomplishment of out-of-state service.").

¶ 23 In *Lewis*, the deputy sheriff who purportedly served the respondent in Kentucky did not sign the affidavit of service. *Id*. at 1046. The court held that "section 2-208 requires a signed affidavit that is notarized by one authorized to administer an oath. Therefore, without a signature, the 'affidavit' in this case lacks the minimum standard of trustworthiness and therefore has no effect." *Id*. at 1048. The petitioner in *Lewis* attempted to rely on marks and writings on the face of the summons as "other competent proof" of service. See *id*. at 1046.[1] The *Lewis* court found that the hand printed material on the summons was insufficient to assure the court that out-of-state service had been accomplished thus "neither an affidavit nor 'other competent proof' of service existed" in that case and, accordingly, the court held the trial court lacked personal jurisdiction over the respondent. *Id*. at 1048-49.

¶ 24 In this case, "[w]ithout a report of what transpired at the hearing [on defendant's 2-1401 petition], we do not know what argument or evidence was presented with respect to personal jurisdiction." *Sedys*, 2019 IL App (2d) 180188, ¶ 38. We are cognizant of defendant's argument in her opening brief that other than the allegedly defective affidavit of service, "[n]o additional

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[1] "The 'proofs' that petitioner relies upon are: (1) the stamp, 'Received Jerry Gaines, Sheriff, Warren County, Ky.', appearing on the face of the summons (see Appendix A); (2) the printed notation on the bottom of the summons which states, 'Served William Harold Lewis on the 19th day of October, 1989 By T. Flora # 406 D.S.' (see Appendix A); (3) the checkmark on the reverse side of the summons (see Appendix B); and (4) the partially handprinted words, 'Jerry Gaines, Sheriff of Warren County. By: T. Flora, (Deputy)' (see Appendix B)." *In re Marriage of Lewis*, 213 Ill. App. 3d 1044, 1046 (1991).

competent proofs were filed by Plaintiff with respect to proving that service of process was properly effectuated upon Defendant." Later in her reply, defendant argued "Plaintiff has failed to identify even one 'other competent proof' in the body of the Record on Appeal that establishes definitively that Defendant was properly and legally served process." For its part, plaintiff asserts obliquely that "the Trial Court held an evidentiary hearing and had the opportunity to assess other competent proof, such as the demeanor and physical description of Defendant, as well resolve [*sic*] arguments regarding factual disputes, such as Defendant's address at the time of service, and other assertions made by Defendant." Plaintiff later specifically argues "the Affidavit of Service remains a valid Affidavit by a Sheriffs' Deputy, even if this Court finds it did not strictly comply with the statutory requirement regarding 'time' ***, and may therefore at the very least be considered 'other competent proof.' " Regardless, this court must adhere to the rule that the appellant has the burden to present a sufficiently complete record to support a claim of error and any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Corral*, 217 Ill. 2d at 156-57. Based on the record before us, we cannot say whether or not "other competent proof" of service existed. "In the absence of a sufficiently complete record, we presume, as directed by *Foutch* [*v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)], that the trial court received sufficient evidence to support all elements of personal jurisdiction." *Sedys*, 2019 IL App (2d) 180188, ¶ 40.

¶ 25 CONCLUSION

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

¶ 27 Affirmed.