

No. 1-12-1576

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITIMORTGAGE, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
SLAWOMIR LUBOWICKI,)	09 CH 28796
)	
Defendant-Appellant,)	
)	
(Agnieszka Lubowicka, Unknown Owners and)	Honorable
Non-Record Claimants,)	Mathias W. Delort,
Defendants).)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

- ¶ 1 *Held:* Substituted service on the defendant was properly obtained when the process server left a copy of the of the summons and complaint at the defendant's residence with a family member and mailed a copy of the summons and complaint to his residence.
- ¶ 2 On August 18, 2009, the plaintiff, Citimortgage Incorporated (Citi), filed a complaint to

foreclose its mortgage on property owned by the defendant, Slawomir Lubowicki (Slawomir) and his wife, Agnieszka Lubowicka (Agnieszka). The property was sold at a judicial foreclosure sale and the trial court confirmed the sale on March 10, 2011. On April 5, 2012, Slawomir filed a motion to quash service of process arguing that substituted service was not properly obtained because the process server failed to leave two copies of the summons and complaint with the family member who was served. Slawomir claimed that due to improper service, the circuit court lacked jurisdiction over him. The trial court denied Slawomir's motion. Slawomir now appeals.

¶ 3 We hold that the process server properly served Slawomir by leaving a copy of the summons and complaint at his residence with a family member and by mailing a copy of the summons and complaint to his residence. Accordingly, we affirm the decision of the trial court.

¶ 4 **Background**

¶ 5 On June 6, 2008, Slawomir and his wife, Agnieszka, obtained a mortgage from Citi in the amount of \$329,000 for a property located at 2000 East Ivy Lane in Mount Prospect, Illinois. In August 2009, Citi filed a complaint against Slawomir and his wife to foreclose on the mortgage, alleging that they defaulted on the mortgage in December 2008.

¶ 6 Aaron Isaacson (Isaacson), a special process server, submitted two affidavits indicating that he served process on Slawomir and Agnieszka on August 18, 2009. In one affidavit, Isaacson averred that he personally served "Agnieszka Lubowicka" with a copy of the summons and complaint at 7:01 p.m., at her usual place of abode, 2000 East Ivy Lane in Mount Prospect. In the other affidavit, Isaacson averred that he served Slawomir by

substitute service by leaving a copy of the summons and complaint with Slawomir's wife, Agnieszka Lubowicka, at 7:11 p.m., at the same address. In addition, Isaacson averred that on August 19, 2009, he mailed a copy of the summons and complaint in a sealed envelope with postage fully prepaid, addressed to Slawomir at his usual place of abode.

¶ 7 On August 30, 2010, the trial court found Slawomir and his wife in default for failing to appear or plead and entered a judgment of foreclosure and sale for the subject property. The property was sold and the trial court confirmed the sale on March 10, 2011.

¶ 8 On September 12, 2011, Agnieszka filed her appearance along with a motion to quash service and to vacate the default judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code). 735 ILCS 5/2-1401 (West 2010). Agnieszka attached her affidavit and an affidavit from Grazyna Ciesla, her employer, to her motion. Agnieszka averred in her affidavit that she was at work on August 18, 2009, the date of service, from 11:00 a.m. until 9:00 p.m., that she was not at home in Mount Prospect, that she was never served with a copy of the summons and complaint, and that she did not receive a copy of the summons and complaint in the mail. Grazyna Ciesla averred in his amended affidavit that on August 18, 2009, "Mrs. Lubowicka was working at the restaurant from 11:00 a.m. to 9:00 p.m. and to the best of my knowledge never left the premises at any time. *** Even though I was not at the restaurant that day, I remember seeing time records for August 18, 2009, but I did not retain them."

¶ 9 Citi filed a response to Agnieszka's motion and argued that Agnieszka had failed to prove by clear and convincing evidence that she was not properly served. The court denied

Agnieszka's motion to quash service and vacate the default judgment on December 30, 2011. Agnieszka filed a motion to reconsider, but the trial court denied the motion on February 28, 2012. Agnieszka did not appeal.

¶ 10 On April 5, 2012, Slawomir filed a motion to quash service of process arguing that Agnieszka Fijalkowska (Fijalkowska), his sister, was the person served with a copy of the summons and complaint and not his wife, Agnieszka Lubowicka. Slawomir argued that because there were two defendants, the process server was required to leave two copies of the summons and complaint with Fijalkowska. Slawomir attached his affidavit and Fijalkowska's affidavit to his motion to quash.

¶ 11 Slawomir averred in his affidavit that he never received a copy of the summons and complaint in this case and that his sister "Agnieszka Fijalkowska was the person who received the papers from the Court."

¶ 12 Fijalkowska averred in her affidavit that she "was served with a copy of the summons and complaint on behalf of her brother, Slawomir Lubowicki" and that her "sister in law Agnieszka Lubowicka was not at home when the process server came to the house in Mt. Prospect."

¶ 13 The trial court denied Slawomir's motion on May 4, 2012. On June 21, 2012, this court granted Slawomir's motion to file a late notice of appeal. Slawomir appeals pursuant to Supreme Court Rule 304(b)(3). Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010).

¶ 14 Analysis

¶ 15 While Slawomir's motion to quash service does not identify the statutory basis upon which

relief was sought, the parties agree that the motion to quash was substantively a petition seeking relief from a final judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)) because it sought relief from a final judgment more than thirty days after the judgment was entered. We will treat Slawomir's motion as a petition brought pursuant to section 2-1401 of the Code. Therefore, the appellate court has jurisdiction to review the order denying Slawomir's motion under Rule 304(b)(3). *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 496-97 (1998).

¶ 16 Slawomir's motion to quash service contends that the trial court did not have jurisdiction over him and, thus, all orders entered by the court are void. We review an order denying a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007); *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12.

¶ 17 Slawomir acknowledges that this appeal only involves the question of whether he was properly served by substitute service. However, he argues that the process server was required to leave two copies of the summons and the complaint with his sister, Fijalkowska. Citi responds that the question of whether the process server was required to leave two copies of the summons and complaint only impacts the "propriety" of service on Agnieszka, which is irrelevant here because Agnieszka is not a party to this appeal.

¶ 18 It is essential to the validity of a judgment that the court has both jurisdiction of the subject matter of the litigation and personal jurisdiction over the parties. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). "Absent a general appearance, personal jurisdiction can be acquired only by service of process in the manner directed by statute." *Thill*, 113 Ill. 2d

at 308. The Code authorizes service of process either by summons (735 ILCS 5/2-203, 2-204, 2-205 (West 2010)), or by publication and mailing. 735 ILCS 5/2-206 (West 2010).

¶ 19 Section 2-203(a) of the Code provides, in pertinent part, that service upon an individual defendant shall be made:

"(1) by leaving a copy of the summons with the defendant personally, (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. *** The certificate of the officer or affidavit of the person that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so." 735 ILCS 5/2-203 (West 2010).

¶ 20 In this case, Slawomir was not served personally; instead, service was made by substituted service. Substituted service is acquired by an authorized person delivering a copy of the summons to another person other than the defendant, but the process server's return of service must demonstrate strict compliance with every requirement in section 2-203(a) because the presumption of validity that attaches to a return reciting personal service does not apply in cases of substituted service. *Thill*, 113 Ill. 2d at 309. The process server's return of service cannot be set aside based upon the uncorroborated affidavit from the person served but can only be set aside by clear and satisfactory evidence. *Central Mortgage Co. v.*

Kamarauli, 2012 IL App (1st) 112353, ¶ 28 (citing *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983)).

¶ 21 One of the main purposes of service of process is to give notice to those whose rights are about to be affected by the plaintiff's action. *Performance Network Solutions, Inc. v. Cyberklix, USA, Inc.*, 2012 IL App (1st) 110137, ¶ 44. Substituted service at the defendant's place of abode can only be obtained by leaving a copy of the summons and complaint with a member of defendant's family or with a person who resides with defendant. See 735 ILCS 5/2-203(a)(2) (West 2010). The statute presupposes by the use of the word family, that "such a relation of confidence exists between the person with whom the copy is left and defendant that notice will reach defendant" and it assumes that such person will deliver the process or copy to defendant or in some way give him notice thereof. *Kamarauli*, 2012 IL App (1st) 112353, ¶ 20 (citing *Anchor Finance Corp. v. Miller*, 8 Ill. App. 2d 326, 330 (1956)).

¶ 22 Here, all the affiants aver that a family member was served with a copy of the summons and complaint at Slawomir's residence: (A) Isaacson, the special process server, averred in his affidavit that Agnieszka, a family member (whether it was his wife or his sister), was served with a copy of the summons and complaint at Slawomir's residence; (B) Slawomir averred in his affidavit that Fijalkowska, his sister, who was a family member, was served with a copy of the summons and complaint at his residence, but he also averred that he never received a copy of the summons and complaint; and © Fijalkowska averred in her affidavit that she received a copy of the summons and complaint on behalf of her brother, but she did not aver that she did not give her brother a copy of the summons and complaint.

¶ 23 We find the evidence unclear and unsatisfactory on whether Slawomir received a copy of the summons and complaint from Fijalkowska, because Fijalkowska's affidavit fails to corroborate Slawomir's affidavit by averring that she did not give her brother a copy of the summons and complaint. *Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. Therefore, given the fact that Slawomir's affidavit is uncorroborated, and given the fact the special process server averred, without contradiction, that he mailed the summons and complaint to Slawomir's residence, this court is unwilling to set aside the special process server's return of service. Accordingly, we hold that the evidence establishes that Isaacson complied with section 2-203 of the Code when he served Slawomir (A) by leaving a copy of the summons and complaint at Slawomir's residence with a person of the family, and (B) by mailing a copy of the summons and complaint to Slawomir's residence. 735 ILCS 5/2-203 (West 2010).

¶ 24 Finally, Citi requests that we impose Supreme Court Rule 375 sanctions (Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994)), against Slawomir for filing a frivolous appeal. Rule 375(b) provides that a reviewing court may impose an appropriate sanction on a party or the party's attorney if the court determines that the appeal is frivolous or that the appeal was not taken in good faith. Ill. S. Ct. R. 375(b)(eff. Feb. 1, 1994). Under Rule 375(b), an appeal will be deemed frivolous where it is not reasonably grounded in fact and not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Ill. S. Ct. R. 375(b)(eff. Feb. 1, 1994).

¶ 25 The decision to impose Rule 375(b) sanctions is a matter left strictly to the appellate's court's discretion. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011). In the exercise

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of our discretion, we decline to impose sanctions.

¶ 26 Conclusion

¶ 27 We find that Slawomir was properly served as required by section 2-203 of the Code when the process server left a copy of the summons and complaint at Slawomir's residence with a member of the family and mailed a copy of the summons and complaint to his residence. Accordingly, we affirm the order of the trial court denying Slawomir's motion to quash service of process.

¶ 28 Affirmed.