FIFTH DIVISION
April 29, 2011

No. 1-10-0959

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DBL DISTRIBUTING, LLC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois,
	)	Municipal Department.
v.	)	
	)	No. 2009 M1 193996
	)	
E&E ELECTRONICS, INC.,	)	Honorable
ALINA MOGILEVSKY, and	)	Pamela E. Hill Veal,
GREGORY MOGILEVSKY,	)	Judge Presiding
	)	
Defendants-Appellees.	)	

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: The trial court did not abuse its discretion in refusing to vacate adefault judgment against a properly served corporate defendant. However, because service of process upon the individual defendants was improper, the trial court erred in refusing to grant their motions to vacate default judgment and to quash service of process.

Plaintiff DBL Distributing, LLC brought the instant action against defendants E&E Electronics, Inc., and Gregory and Alina Mogilevsky seeking to recover approximately $28,000 allegedly owed to them by defendants for the purchase of electronic goods. Defendants did not respond to the complaint and plaintiff sought and obtained a default judgment against them. This appeal followed.

I. BACKGROUND

The record indicates that in March 2008, defendant E&E Electronics (E&E) executed a credit application and agreement with plaintiff DBL Distributing, LLC (plaintiff) for the purchase of electronic goods . Alina and Gregory Mogilevsky (the Mogilevskys), who owned E&E, signed the agreement as well, personally guaranteeding any indebtedness of E&E to plaintiff. That agreement provided for the sale of goods from plaintiff to E&E on credit. The Mogilevskys listed their address as a home on Red Oak Lane in Highland Park, Illinois (the Highland Park home). Plaintiff's invoices indicate that between November 2008 and February 2009, it shipped approximately $24,000 worth of electronics to E&E and other individuals at E&E's direction. All of those invoices were billable to E&E and required payment within 30 days.

On November 4, 2009, plaintiff filed a complaint against defendants, contending that it never received payment from them, and seeking $28,157.76 in payment, interest, and attorney's fees from E&E as well as the Mogilevskys, as guarantors of E&E's indebtedness. With respect

to the Mogilevskys, the affidavit of a special process server indicated that summonses and copies of the complaint were delivered to the Highland Park home on November 22, 2009, and left with a 17 year old Asian male named Josh Mintz at the home. Copies were mailed to that same address the next day. A summons and the complaint were also served upon E&E on December 1, 2009 in Northbrook, Illinois, where it apparently maintained an office.

None of the defendants filed a responsive pleading, and on January 7, 2010, plaintiff moved for default judgment. The trial court granted that motion on January 19, 2010.

On February 16, 2010, counsel for defendants entered a general appearance on behalf of E&E and a self described "special and limited" appearance on behalf of the Mogilevskys. Counsel filed motions to vacate the default judgments entered against E&E and the Mogilevskys. Defendants, in both motions, argued that the default judgments should be vacated because of the severity of the penalty, the presence of meritorious defenses, and the lack of hardship to plaintiff in litigating the case on the merits. The Mogilevskys, in their motion, further contended that they were never properly served because they were not residing at the Highland Park home when service was attempted. They requested that the court "vacate the Default Judgment against [them] for lack of personal service; or in the alternative, allow [the Mogilevskys] to file a responsive pleading and have the case proceed on its merits." Attached to the Mogilevskys' motion was their affidavit stating, in pertinent part, "Plaintiff did not serve us with the subject lawsuit." Following a March 11, 2010 hearing on those motions, the trial court declined to

vacate the default judgments entered against defendants.[1]

On March 16 2010, the Mogilevskys filed a motion to reconsider, arguing that the trial court improperly found that abode service at the Highland Park home was valid. They contended that service was improper because the couple did not live there. They also alleged that the trial court incorrectly held that the proper vehicle for contesting the validity of service should have been a motion to quash service rather than a motion to vacate default judgment.

On March 16, 2010, in addition to their motion to reconsider, the Mogilevskys also filed a separate motion to quash service, again arguing that service at the Highland Park home was invalid because they had not resided there for over a year. Attached to that motion was an affidavit of the Mogilevskys, stating:

> "1. Following a default judgment, counsel for the Plaintiff mailed a collection letter to us by mailing it to the property we own in Highland Park, Illinois.
>
> 2. Plaintiff attempted to collect a debt against us, individually.
>
> 3. We have not lived in Highland Park, Illinois for about one year.
>
> 4. Highland Park property was unoccupied for many months.
>
> 5. At the time the Plaintiff claims to have served us on abode, we did not live there and no one lived there."

On March 30, 2010 A hearing was held on the Mogilevskys' motions to reconsider and

[1] A transcript of the March 11, 2010 hearing has not been made part of the appellate record.

to quash service. The trial court denied the motion to reconsider as being "without underlying basis" and the motion to quash service because the "affidavit is lacking." This appeal followed.

II. ANALYSIS

Defendants raise three arguments on appeal. First, E&E argues that the trial court abused its discretion when it denied its motion to vacate the default judgment. Next, the Mogilevskys contend that the trial court improperly denied their motions to vacate default judgment and to quash service of process because service upon them was invalid. The Mogilevskys further argue that the collection letter sent by plaintiff to the Highland Park home and then forwarded to them does not constitute proper notice. For the reasons that follow, we affirm in part and reverse in part.[2]

A. Proper Service of Process

We will first consider the Mogilevskys contention that because service of process upon them was improper and that the trial court therefore lacked in personam jurisdiction over them. For the reasons that follow, we agree. "Because the question whether a court had personal jurisdiction is a question of law, our review is *de novo*." *Mugavero v. Kenzler*, 317 Ill. App. 3d 162, 164 (2000).

The Code of Civil Procedure provides that a party may substitute service upon individual defendants by:

[2]Plaintiff failed to file a brief within the time prescribed by this court and we therefore will consider this case based on the record and defendants' brief only.

> "leaving a copy at the defendant's usual place of abode, with *** 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 2008)).

The party attempting substituted service "must show strict compliance with every requirement of the statute authorizing such substituted service, since the same presumption of validity that attaches to a return reciting personal service does not apply to substituted service." *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986).

Moreover, our courts have repeatedly held that "where [the] return is challenged by affidavit and there are no counteraffidavits, the return itself is not even evidence, and, absent testimony by the deputy, the affidavits must be taken as true and the purported service of summons quashed." *Harris v. American Legion John T. Shelton Post No. 838*, 12 Ill. App. 3d 235, 237 (1973). See also *Clinton Co. v. Eggleston*, 100 Ill. App. 3d 1135, 1139-40 (1981), *Sterne v. Forrest*, 145 Ill. App. 3d 268, 274 (1986).

Here, the Mogilevskys filed a motion to quash service, contending that the purported abode service at the Highland Park home was improper. They alleged that the home was not their usual place of abode as they had not resided there for over a year at the time service was attempted. In support of this motion the Mogilevskys submitted an affidavit attesting to the fact

that they had not resided at the Highland Park home "for about one year" at the time service was attempted. That affidavit was notarized in the state of Florida, and plaintiff did not file any counteraffidavit. Nonetheless, the trial court denied the Mogilevsky's motion because it found their affidavit to be lacking, stating, "There's nothing that says that they were anywhere else or where they were. *** [T]he affidavit is – does not comport to what the statute requires." We disagree with this conclusion.

Illinois Supreme Court Rule 191 requires that an affidavit submitted in connection with a motion to quash service of process "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; *** shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan 1, 1967).

The affidavit in this case included facts supporting the primary contention of the Mogilevskys' motion to quash service, namely that service at the Highland Park was improper because it was not their "usual place of abode." It appears that the affidavit was "made on the personal knowledge" of the Mogilevskys, "set forth with particularity" the key facts supporting their claim, and otherwise complied with the requirements of Rule 191. We find nothing in that rule, or in any other authority, which supports the trial court's holding that the Mogilevskys' affidavit was defective because it did not disclose their current place of residence. It has been long established in Illinois that the burden of proving the facts essential to valid service, including a defendant's usual place of abode, rests upon the plaintiff, and we are unwilling to

now hold otherwise. See *Zazove v. Wilson*, 334 Ill. App. 594, 598 (1948).

Therefore, in light of the Mogilevskys' affidavit indicating that they were not served at their usual place of abode, and the lack of any counteraffidavit from plaintiff to the contrary, we find that service upon the Mogilevskys was invalid.

Having determined service on the Mogilevskys insufficient, we must next determine whether they have waived any objection to that service. Generally, when a defendant seeks affirmative relief on the merits, he waives any objection he may have to the court's *in personam* jurisdiction over him. "He may not, by his voluntary action, invite the court to exercise its jurisdiction over him while he simultaneously denies that the court has such jurisdiction." *Poplar Grove State Bank v. Powers*, 218 Ill. App. 3d 509, 515 (1991). A defendant will not be deemed, however, consent to the court's jurisdiction by filing a combined pleading or motion if that motion contains an objection to jurisdiction and complies with the Code of Civil Procedure. See 735 ILCS 5/2-301(a) (West 2008). This was not always the case.

Prior to 2000, a party challenging personal jurisdiction while raising additional defenses was required to enter a general appearance and submitted to jurisdiction. *Mortgage Electronic Systems v. Gipson,* 379 Ill. App. 3d 622, 630 (2008), citing *J.C. Penney Co. v. West*, 114 Ill. App. 3d 644, 646 (1983). Section 2-301 of the Code of Civil Procedure governs objections to personal jurisdiction. 735 ILCS 5/2-301 (West 2008). Before 2000, *section 2-301* required a defendant seeking to challenge personal jurisdiction to file a special and limited appearance and provided that "[e]very appearance, prior to judgment, not in compliance with the foregoing is a general appearance." 735 ILCS 5/2-301(a) (West 1998). As amended, however, *section 2-301* provides

that a defendant may object to personal jurisdiction in a motion "made singly or included with others in a combined motion," and that filing "a responsive pleading or a motion (other than a motion for extension of time to answer or otherwise appear) prior to a" motion challenging jurisdiction "waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a), (a-5) (West 2008). *Section 2-301* as amended makes no reference to either general or special appearances. "[I]n its present form *section 2-301* allows a defendant to combine a motion challenging jurisdiction with other motions seeking relief on different grounds; under the prior law, doing so would, in most cases, amount to a general appearance waiving the jurisdictional challenge." *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593, 595 (2006).

Section 2-301 provides that such a combined motion "shall be in parts. Each part shall be limited to and shall specify that it is made under one of *Sections 2-615*, *2-619*, or *2-1005*. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based" (735 ILCS 5/2-619.1 (West 2008)).

Here, the Mogilevskys motion to vacate default judgment was divided into two parts. The first part of that motion sought a vacation of the default judgment entered against the Mogilevskys based on deficient service of process on them, while the second section sought, in the alternative, a vacation of that judgment based on the merits. Neither section strictly complied with the requirements of *section 619.1*.

Our appellate court recently held, however, that strict compliance with *section 619.1* is not essential in combined motions, such as the one in the instant case. In *Higgins v. Richards*, 401 Ill. App. 3d 1120 (2010), the defendant filed a combined motion to set aside default

judgment and to dismiss for lack of jurisdiction. While granting the defendant's motion to set aside default judgment, the trial court denied his motion to dismiss because it "was not filed in parts with each part specifying the statutory section under which each request for relief was being brought," and thus failed to comply with *section 2-619.1* of the Code. Therefore, the trial court held that the defendant waived his objection to jurisdiction under *section 2-301(a)*. *Higgins*, 401 Ill. App. 3d at 1122-23. On appeal, the appellate court found that *section 2-619.1* "is applicable only to motions combining motions pursuant to any two of its three listed sections" and thus that section was "inapplicable to the defendant's motion, and *he need not have complied with its directives*." *Higgins*, 401 Ill. App. 3d at 1125-26 (emphasis supplied). The appellate court therefore held that the strict compliance with *section 2-619.1* was not essential, and the defendant's failure to file his motion in parts, with each part specifying the relevant statutory section was not grounds for denying that motion, stating:

> "we believe that section 2-301(a-5)'s language-'in compliance with subsection (a)'-refers to the time that a motion to dismiss for a lack of personal jurisdiction must be filed and *is not meant to impose a strict mandate regarding section 2-619.1's pleading requirements*. Section 2-619.1 is not a strict mandate (see *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006)), and even if it were, *we could not conclude that a party's failure to comply with its requirements would be sufficient to waive the party's otherwise timely objection to a court's lack of personal jurisdiction*. We agree

> with the defendant's suggestion that interpreting section 2-301(a-5) in that manner would allow a technical pleading requirement to 'obliterate due process concerns.'" *Higgins*, 401 Ill. App. 3d at 1126 (emphasis supplied).

We are persuaded by the reasoning in *Higgins*. While the Mogilevskys' motion to vacate default judgment did not explicitly conform to the requirements of *section 619.1*, we believe that its compliance was sufficient to not constitute waiver of their jurisdictional objection. Their motion was preceded by a "special and limited appearance" by defense counsel, a clear attempt to contest jurisdiction, and was divided, albeit without explicit headings, into two separate and distinct sections, one disputing the validity of service of process and the other contesting the default judgment on its merits.

Even if we were to find that the Mogilevsky's attack on the trial court's jurisdiction in their motion to vacate was improper under *section 2-301(a)*, they arguably still did not waive their objection to that jurisdiction.

The general rule has been that a defendant can submit to jurisdiction only prospectively, so that his appearance does not retroactively validate judgments or orders entered prior to his submission. This rule has been articulated in a series of appellate decisions. See *Sullivan v. Bach*, 100 Ill. App. 3d 1135, 1142 (1981) ("A defendant's attempts to set aside a void judgment subsequent to the entry of that judgment are not to be considered as giving the court original jurisdiction to enter the judgment; doing so deprives the defendant of his day in court."), *J.C.*

Penney Co. v. West, 114 Ill. App. 3d 644, 647 (1983) ("where a judgment is void when entered [for want of jurisdiction], it remains void notwithstanding subsequent general appearances and, that a general appearance does not serve to validate retroactively a judgment void when entered."), and *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 629-30 (2008). Our Supreme Court has upheld this rule, citing *J.C. Penney* and *Sullivan* approvingly, stating, "A judgment rendered by a court which fails to acquire jurisdiction over the parties is void and may be attacked and vacated at any time, either directly or collaterally. *** [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." *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989).

The argument has been made that this rule no longer applies in light of the 2000 amendment to *section 2-301*. See *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 991 (2008) (holding that "section 2-301 [allows] retroactive waiver of personal jurisdiction, even as to a prior judgment.") However, this contention was rejected in *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909 (2008). There, the appellate court held that a defendant's motion to vacate a sheriff's sale on the merits, filed before his motion contesting jurisdiction, did not retroactively subject him to the court's jurisdiction, not withstanding the amendment to *section 2-301*, in an analysis to which we adhere. Specifically, the *Johnson* court stated:

> "There is no authority to support the argument advanced by plaintiffs that defendant's filing retroactively validated the earlier orders entered

> without jurisdiction. Section 2-301 has *never* been applied in a postjudgment proceeding to give a trial court retroactive jurisdiction or to validate orders entered without jurisdiction. Nor is there indication that the legislature intended to achieve this result when it amended section 2-301." (Emphasis in original.) *Johnson*, 383 Ill. App. 3d at 912.

We therefore find that because service upon the Mogilevskys was improper and because they did not waive their objections to that service, the trial court erred when it denied their motions to vacate default judgment and to quash service.

B. E&E's Motion to Vacate Default Judgment

Having determined that the trial court did not have personal jurisdiction over the Mogilevskys, we must next ask whether the trial court abused its discretion when it denied E&E's motion to vacate default judgment. We believe it did not.

E&E does not challenge the trial court's personal jurisdiction in this matter, but only the merits of its decision not to vacate the default judgment entered against it. The decision of whether to vacate a default judgment lies within the sound discretion of the trial court and will be reversed only "where no reasonable person would take the position adopted by the trial court; that is, where the trial court acted arbitrarily or ignored recognized principles of law." *W.M. Mold & Tool v. DeRosa*, 251 Ill. App. 3d 433, 439 (1993), *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548-9 (2008). "The overriding concern in ruling on a motion to vacate is whether substantial

justice is being done between the litigants, and whether it is reasonable under the circumstances to proceed to trial on the merits. [Citation]." *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 931 (1997). In deciding whether substantial justice will be done by vacating a default judgment, a trial court should consider "diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties from granting or denying vacatur." *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548-9 (2008).

E&E contends that the trial court should have granted its motion because (1) it filed its motion within 30 days, (2) the judgment of over $28,000 was too severe to not be litigated on its merits, (3) it had meritorious defenses, namely that it "did not receive the items complained of, or if it received the said items, then it previously paid for them," (4) plaintiff would not experience hardship litigating in Illinois, and (5) plaintiff acted in bad faith when it sued E&E.

Here, however, as stated above, E&E has failed to provide a transcript of the March 10, 2010 hearing where its motion to vacate was denied. Without such a transcript, "it is presumed that the circuit court acted properly and that the evidence supported its rulings." *Farm Credit Bank of St. Louis v. Schwarm*, 251 Ill. App. 3d 205, 208 (1993). In the absence of this transcript, "we have no basis on which to determine whether the trial court abused its discretion in denying defendant's motion" and we must therefore presume that the trial court's denial of the motion conformed with the law and was properly supported by the evidence. *Schwarm*, 251 Ill. App. 3d at 211, citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 394 (1984).

Even if we were to look past the lack of a transcript, E&E is unable to provide any justification for its lack of diligence in responding to plaintiff's complaint after being properly

served. Over five weeks elapsed between service and the appearance entered by E&E's defense counsel. We therefore cannot say that the trial court abused its discretion when it denied E&E's motion to vacate default judgment.

C. Proper Notice to the Mogilevskys

The Mogilevskys finally contend that a collection letter allegedly sent by plaintiff to the Mogilevskys at the Highland Park home and forwarded to them in Florida did not constitute notice to overcome ineffective service of process. Because we find that service on the Mogilevsky's was improper, we need not address this contention.

III. CONCLUSION

For the foregoing reasons, the decision of the trial court denying E&E's motion to vacate default judgment is affirmed. The court's decisions denying the Mogilevskys' motions to vacate default judgment and to quash service of process are reversed.

Affirmed in part and reversed in part.