FOURTH DIVISION
July 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BOARD OF DIRECTORS OF VISION ON STATE CONDOMINIUM ASSOCIATION, Plaintiff-Appellee, v. WARREN BARR AND KELLY MACULAN-BARR, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 09 M1 705467 The Honorable Orville E. Hambright, Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court. Justices Pucinski and Sterba concurred in the judgment.

MODIFIED UPON DENIAL OF PETITION OF REHEARING

HELD: Judgment reversed in this forcible entry and detainer action based on a lack of subject matter jurisdiction where there was no proper service of the demand for possession.

¶ 1 Plaintiff, Board of Directors of Vision on State Condominium Association, filed a forcible entry and detainer action against defendants, Warren Barr and Kelly Maculan-Barr, seeking possession of their condominium unit, and the payment of delinquent condominium assessments. The circuit court of Cook

County entered a default judgment in favor of plaintiff, and denied defendants' motion to vacate that judgment and their subsequent motion to reconsider. In this appeal, defendants claim that the court erred in denying their motion to reconsider because plaintiff did not properly serve them with a demand for possession or summons.

¶ 2 On March 4, 2009, plaintiff filed a forcible entry and detainer complaint against defendants alleging that they owned unit 1703 in the Vision building at 1255 South State Street in Chicago, and owed the association $8,869.73, in assessments. Plaintiff also alleged that it had sent defendants a demand for possession at their last known address on January 27, 2009, by certified mail.

¶ 3 Plaintiff attached a copy of this demand which reflected that it was sent to defendants at 1255 South State Street, unit 1703. It also included the sworn statement of plaintiff's attorney that he served the demand for possession on January 27, 2009, by sending a copy of it to "such person" listed on the face of the demand (defendants) by first class and certified mail, return receipt requested. The demand was sent to defendants at 1255 South State Street, unit 1703. Plaintiff sent the demand twice on the same date, and attached to its complaint the copies of the two certified mail envelopes used to send the demand. These envelopes indicate that on February 2, 2009, the demand was

returned to sender as undeliverable, "attempted - not known," and unable to forward.

¶ 4 Summons issued on the complaint, and on March 13, 2009, the sheriff of Cook County certified that he completed substitute service by leaving a copy of the summons and complaint at defendants' usual place of abode at 1255 South State Street, unit 1703, with a member of defendants' family or a person residing there, namely, Rohit Gandhi, who was 40 years old, and informed him of the contents of the summons. He also certified that he mailed a copy of the summons on March 13, 2009, in a sealed envelope with postage fully paid and addressed to defendants at their usual place of abode.

¶ 5 On January 5, 2010, plaintiff filed a motion to set a trial date alleging that, to date, defendants owed $13,152.43 in past due assessments and fees. Notice of the matter was mailed to defendants at the State Street address. The circuit court granted plaintiff's motion on January 22, 2010, and set a trial date for February 16, 2010.

¶ 6 On March 11, 2010, the court entered an *ex-parte* judgment, *nunc pro tunc* to February 16, 2010, giving plaintiff possession of the subject premises, and awarding $14,137.40 in assessments, $1,122.50 in fees and $499 in costs. Enforcement of the judgment was stayed until April 17, 2010.

¶ 7 On April 27, 2010, defendant Warren Barr filed a *pro se*

motion requesting the court to vacate the order of possession, and for 30 days to file an appearance, present his defenses to plaintiff's complaint and to obtain an attorney. Warren alleged that he was apprised of the possession order on April 26, 2010, when a member of the management company for plaintiff emailed him a copy. Warren alleged that he has been in regular contact with the management company regarding the payment of his assessments, and never once was informed of the pending court action. Warren also alleged that, for the past year, he has been paying plaintiff $1,000 per month while he tried to improve his financial situation to pay down the outstanding amount. The court denied the motion to vacate the order of possession in a written order dated May 7, 2010.

¶ 8 Four days later, Warren filed a *pro se* motion asking the court to reconsider its denial of his motion to vacate, to amend his motion to include legal reasons for vacating the judgment, to quash service, and to include Kelly Maculan-Barr as a defendant. Defendants alleged that they were not previously served "with this case" until the management company notified them of the possession order via email on April 26, 2010. They further alleged that they went through the court records which showed that plaintiff served Gandhi, who is not a member of their household, and that there were two notices sent to them at 1255 South State Street which were marked "return to sender."

Defendants claimed that they have received billing statements from plaintiff's management company at 2215 South York Road in Oakbrook, Illinois, which plaintiff knew was defendants' correct billing address, and that the checks defendants have sent to plaintiff have their home address listed as 332 Gatesby Road, Riverside, Illinois.

¶ 9 Defendants further alleged that when the court reviewed the motion to vacate, there was uncertainty as to the applicable law, and that the court deferred to plaintiff's counsel for an interpretation. Plaintiff's counsel informed the court that there were postings made that satisfied the law. Defendants alleged that Warren requested proof of this, and pointed out to the court that plaintiff clearly knew his last known address, but the court did not honor his request or provide any explanation for denying the motion to vacate.

¶ 10 Defendants also claimed that plaintiff knew that their last known address was 2215 South York Road, and not 1255 South State Street, but did not properly serve them in compliance with the forcible entry and detainer statute. Defendants finally claimed that the court never obtained personal jurisdiction over them, and, as a result, the service of process must be quashed and any defaults or *ex parte* judgments against them are void.

¶ 11 Defendants attached to their motion, in relevant part, a March 2010 bill plaintiff sent to Warren at 2215 South York Road,

and a check from defendants to plaintiff on March 15, 2010, which listed their address as 322 Gatesby Road, Riverside, Illinois. Defendants also attached Warren's affidavit in which he attested that on March 13, 2009, he and Kelly resided in Riverside, Illinois, at 322 Gatesby Road, that no one in his family has been served, and that Gandhi is not a member of his household which includes himself, his wife Kelly, his daughter, and Kelly's grandmother. Warren further attested that since June 2008, he has been receiving monthly statements and notices regarding his condominium unit at his business address at 2215 South York Road, which "is the last known address for [him] in regards to this unit."

¶ 12 On June 18, 2008, defendants, through counsel, filed a motion to reconsider the court's denial of their motion to vacate the default judgment and quash service of summons. Defendants essentially reiterated the allegations in their *pro se* motion to reconsider, and further alleged that service was made on their rental tenant, who occupied the subject condominium unit, that plaintiff knew that the unit was not owner occupied since plaintiff had a copy of the lease between defendants and the tenant which listed defendants' current address, and that plaintiff was aware of their home and business addresses. Defendants claimed that there was no proper service of summons where a copy of it was not sent to their usual place of abode,

and that Warren's affidavit was sufficient to quash service and set aside the default judgment. They further claimed that they never received the statutorily required demand, which was a prerequisite to this lawsuit, where it was not sent to their last known address or served on them.

¶ 13 On June 24, 2010, the circuit court denied defendants' motion to reconsider in a written order. This appeal follows.

¶ 14 As an initial matter, plaintiff claims that defendants failed to cite to the record in support of their statement of facts in violation of the Supreme Court Rules, and therefore, this court should either enter an order "striking" their appeal or disregard their statement of facts. We agree that defendants have failed to comply with the rules regarding briefs in this regard. Although this failure makes appellate review of their claim more onerous, and may result in waiver, we choose not to take such a harsh measure in this case where the facts are relatively uncomplicated, and the issue is apparent. *Menard v. Illinois Workers' Compensation Com'n*, 405 Ill. App. 3d 235, 238 (2010).

¶ 15 Substantively, defendants claim that the court erred in denying their motion to reconsider because plaintiff failed to comply with the requirements of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2008)). Defendants specifically maintain that plaintiff did not properly serve them

with a demand for possession under the Act, and the corresponding 30 days in which to cure any defects, and, as a result, the court did not have jurisdiction over the forcible entry and detainer action.

¶ 16 We observe that defendants raised this issue for the first time in their motion to reconsider, and did not include it in the motion to vacate. This court has held that arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal. *RBS Citizens Nat'l Ass'n v. RTG-Oak Lawn, LLC,* 407 Ill. App. 3d 183, 189 (2011).

¶ 17 That said, we further observe that defendants' arguments regarding the alleged ineffectual service of the demand in this case necessarily raise the question of whether the court had jurisdiction over the forcible entry and detainer action. *Nance v. Bell*, 210 Ill. App. 3d 97, 101 (1991). Since subject matter jurisdiction either exists or not, it cannot be waived by the parties, and may be reviewed at any time, even *sua sponte* if necessary. *Jones v. Industrial Com'n*, 335 Ill. App. 3d 340, 343 (2002), and cases cited therein. Our review of this jurisdictional issue is *de novo*. *Blount v. Stroud*, 232 Ill. 2d 302, 308 (2009).

¶ 18 An action under the Act to recover possession of premises is a special statutory proceeding, summary in its nature, in derogation of common law, and a party seeking this remedy must

comply with the statutory requirements, especially with respect to jurisdiction. *Eddy v. Kerr*, 96 Ill. App. 3d 680, 681 (1981), and cases cited therein. Under the Act, a condominium association may maintain such an action against a unit owner who fails to pay the assessments for his unit as agreed upon, and demand has been served in accordance with section 9-104.1 of the Act (735 ILCS 5/9-104.1(c) (West 2008)). 735 ILCS 5/9-102(a)(8) (West 2008). This section expressly requires a written demand before filing suit under the statute, and thus, is a condition precedent before an action may be maintained. *Nance*, 210 Ill. App. 3d at 100. In addition, the demand must be made properly, or jurisdiction does not attach. *Eddy*, 96 Ill. App. 3d at 681.

¶ 19 Defendants contend that the demand was not properly served in this case, and, thus, the court did not have jurisdiction. The Act provides that the demand shall be served on the condominium unit owner by personal service or by sending it via registered or certified mail with return receipt requested to the last known address of the unit owner or purchaser. 735 ILCS 5/9-104.1(c) (West 2008). If the demand is served by a person other than an officer authorized to serve process, the return may be sworn to by that person, and is then *prima facie* evidence of the facts stated therein. 735 ILCS 5/9-104.1(c) (West 2008).

¶ 20 To be effective service under this section, the demand sent by registered or certified mail to the last known address need

not be received by the unit owner. 735 ILCS 5/9-104.1(c) (West 2008). Service of the demand by registered or certified mail is deemed effective upon deposit in the mail with proper postage prepaid and addressed as provided in this subsection. 735 ILCS 5/9-104.1(c) (West 2008).

¶ 21 Here, plaintiff's attorney provided a sworn statement that he served the demand for possession by sending a copy of it to "such person" listed on the face of the demand on January 27, 2009, by first class and certified mail, return receipt requested. The demand was sent to defendants at 1255 South State Street, unit 1703. Although the sworn return is *prima facie* evidence of the facts stated therein (735 ILCS 5/9-104.1(c) (West 2008)), the recitals in the sworn return that are not within the server's personal knowledge, such as defendants' last known address, may be rebutted by an affidavit from defendant (See *Nibco Inc. v. Johnson*, 98 Ill. 2d 166, 172-73 (1983) (facts in a return substitute of service that are not within server's personal knowledge may be rebutted by an affidavit); *Four Lakes Mgmt. & Dev. Co. V. Brown*, 129 Ill. App. 3d 680, 684 (1984) (usual place of abode in a return substitute of service may be rebutted by an affidavit)). Where the affidavit of defendant is not contradicted by a counteraffidavit or testimony, it is sufficient to quash service. *Nibco Inc.*, 98 Ill. 2d at 172-73.

¶ 22 In this case, defendant Warren attested in his affidavit

that his last known address was 2215 South York Road, and that he had received correspondence, including monthly statements, from plaintiff at that address. This affidavit was sufficient to rebut the sworn statement in the demand where plaintiff did not provide a counteraffidavit or testimony. Moreover, plaintiff was aware that the unit was not owner occupied since plaintiff had a copy of the lease between defendants and their tenant.

¶ 23 Furthermore, the sworn return of demand did not reflect that it was sent to defendants' last known address. It merely states that it was sent to "such person" listed on the face of the demand (defendants) by first class and certified mail, return receipt requested, and the face of the demand indicates that it was sent to defendants at 1255 South State Street, unit 1703. In light of the facts showing that plaintiff was aware that this was not defendants' last known address, plaintiff failed to comply with the statutory prerequisite of sending the demand to defendants' last known address. 735 ILCS 5/9-104.1(c) (West 2008).

¶ 24 We, therefore, conclude that proper service of the demand to defendants was not met, and the circuit court did not have jurisdiction to enter the judgment of possession and its subsequent orders in this cause. *Eddy*, 96 Ill. App. 3d at 681. Accordingly, we reverse the judgment of possession entered by the circuit court against defendants. This conclusion renders moot

defendants' remaining contention regarding the lack of proper service of the summons. *Sloan v. O'Dell*, 159 Ill. App. 3d 268, 274 (1987).

¶ 25 Reversed.