2011 IL App (1st) 110498-U

No. 1-11-0498

FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AURORA LOAN SERVICES, LLC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CH 19160
	)	
MAGALY MARTINEZ, et al.,	)	Honorable
	)	Jeffrey Warnick,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice Joseph Gordon concurred in the judgment.

ORDER

HELD: Because plaintiff acted with due diligence in attempting to personally serve the defendants in a foreclosure action and properly complied with the statutory requirements necessary for service of summons by publication, we find the court did not err in denying defendants' motion to quash service.

¶ 1 Plaintiff, Aurora Loan Services, LLC., brought a foreclosure

action against defendants, Magaly Martinez and Jose Genaro Martinez. The trial court entered a default order, judgment of foreclosure and order for sale against defendants on June 29, 2010. On November 24, 2010, plaintiff filed a motion to confirm sale. Both defendants filed an appearance in the case that same day. Defendants subsequently filed a motion to quash service of process on December 21, 2010. The trial court denied defendants' motion to quash service and granted plaintiff's motion to confirm sale. Defendants appeal, contending the trial court erred in denying their motion to quash service. For the reasons that follow, we affirm the trial court's judgment.

¶ 2 BACKGROUND

¶ 3 On June 16, 2009, plaintiff filed a complaint to foreclose mortgage against defendants, who were allegedly living in the mortgaged property located at 5819 S. Kolmar in Chicago, Illinois (subject property). Plaintiff hired Amicus Professional Legal Services (Amicus) to personally serve defendants with notice of the foreclosure action. The record reflects Amicus attempted to serve defendants at the subject property on eight separate occasions between June 17, 2009, and June 28, 2009. Amicus prepared several "affidavits of due diligence by special process service" outlining the steps it took in attempting to serve defendants.

¶ 4 On August 19, 2009, plaintiff filed an attorney affidavit for service by publication, which attested that defendants' place of residence could not be determined upon diligent inquiry. The affidavits prepared by Amicus were attached in support. Defendants were then served by publication of notice in the *Chicago Daily Law Bulletin*. Plaintiff mailed a notice of initial case management conference to defendants at the subject property on November 13, 2009. On December 9, 2009, defendants filed for Chapter 7 bankruptcy and listed plaintiff and its foreclosure counsel in their pleadings. On January 20, 2010, plaintiff was granted leave by the bankruptcy court to proceed with the foreclosure action.

¶ 5 On March 11, 2010, plaintiff filed a motion for foreclosure judgment against defendants. The motion was set for a hearing on March 17, 2010. Notice of the motion and hearing date was mailed to defendants at the subject property. Defendant Magaly Martinez appeared at the March 17 hearing, where she informed the trial court that she had entered into a loan modification agreement with regards to the subject property. As a result, the hearing on the motion was continued to April 17, 2010. On April 7, 2010, plaintiff withdrew its motion for judgment without prejudice.

¶ 6 On June 29, 2010, the trial court entered a default judgment of foreclosure and order for sale against defendants. On

November 24, 2010, plaintiff filed a motion to confirm sale of the subject property. On that same date, defendants filed an appearance in the case.

¶ 7 On December 21, 2010, defendants filed a motion to quash service, alleging they were improperly served with notice of the foreclosure action by publication. On January 18, 2011, the trial court denied defendant's motion to quash service. The court also granted plaintiff's motion to confirm judicial sale of the subject property. Defendants appeal.

¶ 8 ANALYSIS

¶ 9 Defendants contend the trial court erred in denying the motion to quash service. Specifically, defendants contend the trial court should have granted the motion and vacated all of its prior orders in the case for lack of personal jurisdiction based on plaintiff's improper service of notice by publication.

¶ 10 Initially, plaintiff asks us to strike defendants' brief and dismiss this appeal based on defendants' complete failure to mention in their statement of facts that defendant Magaly Martinez actually appeared before the trial court on March 17, 2010, prior to when defendants first challenged the court's personal jurisdiction over them in their motion to quash service filed on December 21, 2010. Plaintiff contends Magaly's appearance before the court on March 17 constitutes a material

fact necessary to a proper understanding of this case.

¶ 11 Supreme Court Rule 341(e)(6) requires that an appellant's statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly." Ill. S. Ct. R. 341(e)(6) (eff. July 1, 2008); *Alederson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001). We have the discretion to strike an appellant's brief and dismiss the appeal as a result of an appellant's failure to provide a complete set of facts. *Alderson*, 321 Ill. App. 3d at 845.

¶ 12 Defendants conceded that they failed to mention Magaly's appearance in their initial statement of facts, and that such a failure would condone our striking of their brief and dismissal of this appeal under Rule 341(e)(6). However, defendants argue we should refrain from dismissing their appeal under Rule 341(e)(6) because the failure to mention Magaly's appearance was unintentional.

¶ 13 While we would certainly be within our discretionary powers under Rule 341(e)(6) to dismiss the appeal based on defendants' inadequate statement of facts, we find this foreclosure action--especially where personal jurisdiction over the defendants is at issue--presents significant enough issues to warrant examining the merits to ensure the "interest of justice" is served here. See *Alderson*, 321 Ill. App. 3d at 845 (citing *Luttrell v.*

Panozzo, 252 Ill. App. 3d 597, 600 (1993)).

¶ 14 As this court cautioned in *Alderson*, however, our decision not to strike defendants' brief and dismiss their appeal under Rule 341(e)(6) should not be interpreted as a signal that we are willing to overlook violations of our supreme court's rules as a matter of course. *Id.* Rather, we simply find the issues defendants raise here are serious enough to warrant review.

¶ 15 I. Sufficiency of the Affidavits and Due Diligence

¶ 16 Defendants contend that because plaintiff's affidavits in support of service by publication were insufficient, publication service was improper in this case. Specifically, defendants contend plaintiff's affidavit for service by publication was insufficient because it was not accompanied by sworn affidavits in compliance with Cook County Circuit Court Local Rule 7.3 (Local Rule 7.3) (Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996)). Defendants also contend plaintiff's affidavit was insufficient because it listed five last known addresses for defendants, in violation of section 2-206(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-206(a) (West 2008)).

¶ 17 Initially, we note defendants forfeited any argument regarding plaintiff's failure to comply with Local Rule 7.3 by not raising the issues during the proceedings below. See *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 912

(2010). The only issues actually raised in defendants' motion to quash service were that plaintiff's special process server's attempts to serve process between June 17 and June 28, 2009, were unreasonable; that the process servers' affidavits were insufficient to show due diligence; and that plaintiff failed to comply with section 2-206 of the Code because it listed five last known addresses for defendants.

¶ 18 Any forfeiture aside, we find the record reflects plaintiff adequately complied with both Local Rule 7.3 and section 2-206 when it filed its affidavits in support of service by publication. We also find the affidavits submitted by plaintiff indicate plaintiff acted with due diligence in attempting to personally serve defendants with summons at the subject property.

¶ 19 Local Rule 7.3 provides:

> "Pursuant to 735 ILCS 5/2-206(a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit for service of summons by publication and must be accompanied by a sworn affidavit by the

> individual(s) making such 'due inquiry' setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication." Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 20 Section 2-206(a) of the Code provides, in relevant part, that:

> "Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him or her, and stating the place

> of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending." 735 ILCS 5/2-206(a) (West 2008).

¶ 21 Our courts have recognized section 2-206(a)'s prerequisites are not intended as *pro forma* or useless phrases requiring mere perfunctory performance; on the contrary, the section requires an honest and well-directed effort to ascertain the whereabouts of the defendants by as full an inquiry as the circumstances permit. *Bank of New York v. Unknown Heirs and Legatees*, 369 Ill. App. 3d 472, 476 (2006). "Where the efforts to comply with these statutory provisions have been casual, routine, or spiritless, service by publication is not justified." *Id.* A defendant may challenge a plaintiff's section 2-206(a) affidavit by filing an affidavit showing that upon due inquiry, he could have been found. *Id.* Upon such a challenge, the plaintiff must present evidence establishing due inquiry. *Id.*

¶ 22 Here, defendants each filed a sworn affidavit stating that on or about June 2009, they were living at 5819 South Kolmar Avenue in Chicago, Illinois. Jose averred that he would leave

for work around 5 a.m. and usually return around 3 p.m. Magaly averred that she would leave for work around 9 a.m. and usually return around 7 p.m. Both defendants said they had never been served with summons in the present case.

¶ 23 Although defendants concede on appeal that their affidavits did not state that they could have been found upon sufficient due inquiry by plaintiff, defendants suggest such a contention can be reasonably drawn from their statements.

¶ 24 In its section 2-206(a) affidavit in support of service by publication, plaintiff's attorney stated that "on due inquiry," defendants could not be found. The affidavit also noted that defendants' last place of residence could not be determined upon diligent inquiry. The affidavit listed five addresses as the potential last addresses of the defendants, including the 5819 South Kolmar Avenue address.

¶ 25 In support of its affidavit, plaintiff attached several affidavits from the special process servers who attempted to serve defendants. With regards to the 5819 South Kolmar Avenue address, the affidavits from a special process server employed by Amicus Professional Legal Services (Amicus) indicates she attempted to serve both defendants at that address at 7:51 p.m. on June 17, 2009; at 5:18 p.m. on June 18, 2009; at 11:07 a.m. on June 20, 2009; at 10:15 a.m. on June 22, 2009; at 9:50 a.m. on

June 24, 2009; at 10:55 a.m. on June 25, 2009; at 11:17 a.m. on June 27, 2009; at 11:20 a.m. on June 28, 2009; and at 6:52 p.m. on June 30, 2009. The affidavits note "[a]ttempts were made at this address; however, no contact could be made with the defendant at this address. There is no evidence that the property is vacant. Never home, no lights on, no animals, cannot see inside home. No cars. Nothing." Several additional special process server affidavits were attached to plaintiff's affidavit in support of summons by publication indicating service was also attempted at the other four potential last known addresses of the defendants.

¶ 26 A separate set of affidavits from another employee of Amicus indicate that following an investigation, she was unable to locate either Jose or Magaly. Both affidavits indicate that:

> "during the investigation we attempted to locate the defendant[s] by searching public, online, and confidential databases, calling Directory Assistance, and searching by means of other various data resources. These resources include the Social Security Death Index, property tax rolls and sales information, records containing voters DMV, deed transfers and real estate ownership,

> active U.S. Military personnel, professional licenses, significant shareholders, trademarks, service marks, and UCC filings. We found evidence that the within named defendant[s] ***, no longer resides at 5733 S. Sawyer Ave, Chicago, Illinois 60629, 3S517 Elizabeth Ave, Warrenville, Illinois 60555, 6605 S Fairfield Ave, Chicago, Illinois 60629, and was unable to be served at 5819 S Kolmar Avenue, Chicago, Illinois 60629, and 1069 W. 14th Pl-Unit-123, Chicago, Illinois 60608."

¶ 27 Contrary to defendants contention, we find the affidavits submitted in support of plaintiff's service by publication were clearly sufficient under the requirements of both Local Rule 7.3 and section 2-206(a) of the Code. Although the affidavits may have failed to mention they were being filed under Local Rule 7.3, the affidavits themselves clearly complied with Local Rule 7.3's provisions. Nothing in Local Rule 7.3's language requires that an affidavit specifically mention it is being filed under the rule in order to be deemed sufficient. See Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 28 Moreover, to the extent defendants contend plaintiff's

section 2-206(a) affidavit did not comply with the statutory provisions because it listed five potential addresses as defendants' last known address, we note nothing in the section's plain language indicates a plaintiff may only list one potential last know address for a defendant. Section 2-206(a) simply requires that plaintiff state the "place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained." See 735 ILCS 5/2-206(a) (West 2008). Plaintiff's affidavit clearly complied with that requirement here when it specifically noted defendants' last place of residence could not be determined upon diligent inquiry.

¶ 29 We also find the affidavits submitted by plaintiff indicate its efforts to comply with the statutory provisions and personally serve summons on the defendants were more than casual, routine, or spiritless. *Cf. Bank of New York*, 369 Ill. App. 3d at 476-77.

¶ 30 Defendants call into question plaintiff's attempts to serve summons at the subject property because none of the special process server's attempts occurred earlier than 9:30 a.m.--the time defendants allegedly left the subject property for work. We note, however, that the affidavits presented support a finding that the special process servers acted diligently by attempting to personally serve defendants at the subject property at various

different times during the day between June 17 and June 28, 2009. At least three of those attempts occurred after 5 p.m. The mere fact that none of those attempts ultimately proved successful does not suggest plaintiff's special process server did not act with due diligence in attempting to serve process.

¶ 31 Based on the record before us, we simply cannot say plaintiff's special process servers' numerous attempts to personally serve defendants at the subject property did not amount to due diligence. Accordingly, we find service by publication was clearly justified here under both Local Rule 7.3 and section 2-206(a) of the Code.

¶ 32 Because we have determined service by publication was clearly justified in this case, we need not address plaintiff's remaining contention that Magaly's March 17, 2010, appearance before the trial court meant she submitted to the court's jurisdiction.

¶ 33 II. Special Process Server

¶ 34 Notwithstanding, defendants contend there was no due diligence in serving notice of the action here because nothing in the record suggests Amicus, the special process server used by plaintiff, was ever authorized by the trial court to act as a special process server in this case.

¶ 35 Plaintiff counters that during the proceedings below, the

trial court entered two standing orders allowing plaintiff to appoint Amicus as a special process server in this case. Although plaintiff recognizes the standing orders were not made part of the actual record before us on appeal, plaintiff asks that we take judicial notice of the trial court's standing orders attached to the appendix of its reply brief as part of the public record in this case.

¶ 36 Again, we note defendants forfeited any issue regarding whether Amicus was properly appointed as a special process server here by not specifically raising the issue to the trial court at any point during the proceedings below. See *Zerjal*, 405 Ill. App. 3d at 912. Because defendants clearly forfeited the issue, we need not address it in detail here. We also find forfeiture is especially appropriate to apply here given the fact that defendants' failure to properly raise the issue below likely acted as a significant contributing factor as to why the two standing orders were never made part of the record on appeal.

¶ 37 CONCLUSION

¶ 38 We affirm the trial court's judgment.

¶ 39 Affirmed.