2012 IL App (1st) 110832-U

FOURTH DIVISION
DECEMBER 20, 2012

No. 1-11-0832

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	08 CH 08438
	)	
BARBARA J. BROWN, FLOYD R. ALLEN, UNKNOWN OWNERS and NONRECORD CLAIMANTS,	)	
	)	The Honorable
	)	Darryl B. Simko,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: (1) The appellate court had jurisdiction to hear the appeal where the circuit court did not rule on the merits of defendants' first section 2-1401 petition but, rather, struck the first section 2-1401 petition and allowed defendants leave to file a second 2-1401

petition, and defendants timely filed an appeal of the denial of the second section 2-1401 petition. Also, there was no impropriety in defendants' supplementation of the record on appeal, including the report of proceedings which defendants' hired court reporter prepared and certified without timely objection by the plaintiff. (2) Affirmed the circuit court's denial of the defendants' second section 2-1401 petition objecting to the court's exercise of personal jurisdiction as to two defendants in a foreclosure action without an evidentiary hearing. The circuit court did not abuse its discretion in not holding an evidentiary hearing after not allowing defendants' late filing of a witness list in noncompliance with its deadline where no good cause for the late filing was shown. Also, no evidentiary hearing was necessary where the affidavit of the defendant who was served by publication did not present any material evidentiary conflict necessitating an evidentiary hearing, and the facts averred in the special process server's affidavit established due inquiry and due diligence where the process server averred that he attempted service at the defendant's admitted address nine times. The co-defendant who challenged the substitute service effected at a different address waived her objection to personal jurisdiction by executing a forbearance agreement with the plaintiff bank waiving all her defenses and, further, failing to refute the bank's forbearance agreement waiver argument on appeal.

¶ 1 BACKGROUND

¶ 2 This appeal is based on alleged defective service by publication of a mortgage foreclosure action. Plaintiff is the holder of a certificate of sale of the subject properly at 9913 S. Charles Street, Chicago, Illinois, pursuant to an order approving the sale entered in chancery court. A judicial deed granting plaintiff title of the property was issued pursuant to the order approving the sale and was recorded on June 1, 2010.

¶ 3 Despite numerous attempts at several addresses, U.S. Bank was unable to personally serve either defendant, Floyd R. Allen and Barbara J. Brown. On March 5, 2008, plaintiff filed its complaint to foreclose the mortgage on the property. U.S. Bank's special process servers executed several affidavits regarding their attempts to serve both Brown and Allen. Through its appointed special process server, U.S. Bank served defendant Brown through substitute service on April 2, 2008. U.S. Bank served defendant Allen by publication on April 24, 2008.

¶ 4 Special process server James Van Buskirk's affidavit of April 2, 2011, 3:08 p.m. averred that he attempted to serve Allen at 9913 S. Charles Street a total of nine times: (1) 9:26 a.m. on March 8, 2008; (2) 10:00 a.m. on March 11, 2008; (3) 4:26 p.m. on March 14, 2008; (4) 9:18 p.m. on March 17, 2008; (5) 5:29 p.m. on March 20, 2008; (6) 11:17 a.m. on March 23, 2008; (7) 6:19 p.m. on March 26, 2008; (8) 9:51 a.m. on March 30, 2008; and (9) 3:08 p.m. on April 2, 2008.

¶ 5 Buskirk's affidavit of April 2, 2008, 3:11 p.m., averred that he attempted to serve Brown also at 9913 S. Charles Street a total of ten times: (1) 9:26 a.m. on March 8, 2008; (2) 10:01 a.m. on March 11, 2008; (3) 1:57 p.m. on March 13, 2008; (4) 11:08 a.m. on March 16, 2008; (5) 7:07 a.m. on March 18, 2008; (6) 1:19 p.m. on March 21, 2008; (7) 8:09 p.m. on March 24, 2008; (8) 8:12 a.m. on March 27, 2008; (9) 9:52 a.m. on March 30, 2008; and (10) 3:11 p.m on April 2, 2008. On both of these affidavits, the process server stated that there was no service for the reason that after diligent investigation he found the following: "The defendant could not be served at this address. The defendant is the absentee owner of this property. Spoke to Mildred Johanson who states the defendant is the landlord, and they come by once a month for the rent."

¶ 6 Special process server Buskirk executed another affidavit at 3:31 p.m. on April 2, 2008, averring that there was substitute service on Brown at that time by leaving a copy of the process at 8032 S. Honore Street, Apartment 1, Chicago, Illinois, with Tommy Brown, Brown's brother-in-law, and confirmed that Brown resided at this address and further mailed a copy of the process to Brown at this address. The affidavit further averred that Tommy Brown was an individual over 13 years old.

¶ 7 Buskirk also executed another affidavit at 3:33 p.m. on April 2, 2008, averring that he attempted to also serve Allen at 8032 S. Honore Street, Apartment 1, Chicago, Illinois, listed on U.S. Bank's attorney's affidavit as one of Allen's last known addresses, a total of four times, but that he could not serve Allen at this address. The special process server further averred that Tommy Brown stated that he knows Allen but that this address was a friend's house and Allen did not live at this address.

¶ 8 U.S. Bank's attorney's affidavit also showed 8032 S. Kedzie as a known address of Allen. Special process server Thomas Murphy executed an affidavit at 12:00 p.m. on April 4, 2008, averring that he attempted to serve Allen at 8032 S. Kedzie, Chicago, Illinois, a total of 17 times: (1) 1:20 p.m. on March 10, 2008; (2) 8:50 a.m. on March 11, 2008; (3) 9:00 a.m. on March 14, 2008; (4) 8:20 a.m. on March 16, 2008; (5) 8:35 a.m. on March 17, 2008; (6) 8:40 a.m. on March 19, 2008; (7) 8:10 a.m. on March 22, 2008; (8) 1:50 p.m. on March 24, 2008; (9) 11:20 a.m. on March 25, 2008; (10) 8:30 a.m. on March 26, 2008; (11) 4:40 p.m. on March 27, 2008; (12) 7:55 a.m. on March 28, 2008; (13) 5:30 p.m. on March 29, 2008; (14) 8:30 a.m. on March 30, 2008; (15) 3:55 p.m. on March 31, 2008; (16) 7:00 p.m. on April 3, 2008; and (17) 12:00 p.m. on April 4, 2008.

¶ 9 Murphy executed a second affidavit at 12:00 p.m. on April 4, 2008, averring that he also attempted to also serve Brown at 8032 S. Kedzie Avenue, Chicago, Illinois, a total of 17 times: (1) 1:20 p.m. on March 10, 2008; (2) 8:50 a.m. on March 11, 2008; (3) 9:00 a.m. on March 14, 2008; (4) 8:20 a.m. on March 16, 2008; (5) 8:35 a.m. on March 17, 2008; (6) 8:40 a.m. on March 19, 2008; (7) 8:10 a.m. on March 22, 2008; (8) 1:50 p.m. on March 24, 2008; (9) 11:20 a.m. on

March 25, 2008; (10) 8:30 a.m. on March 26, 2008; (11) 4:40 p.m. on March 27, 2008; (12) 7:55 a.m. on March 28, 2008; (13) 5:30 p.m. on March 29, 2008; (14) 8:30 a.m. on March 30, 2008; (15) 3:55 p.m. on March 31, 2008; (16) 7:00 p.m. on April 3, 2008; and (17) 12:00 p.m. on April 4, 2008. The special process server averred that "no contact could be made with defendant at this address," but that there was "no evidence that the property was vacant," and that the time for service had expired.

¶ 10 U.S. Bank states in its recitation of the facts that "[a] skip trace listed Floyd R. Allen's last known addresses as 8032 South Honore Street Apt 1 [sic], Chicago, IL and 9913 South Charles Street Chicago, Illinois respectively but no further attempt was made to serve Floyd R. Allen," citing to an affidavit filed in the circuit court on April 21, 2008, by Erika Manzano, who was employed by Excel Innovations, Inc., an Illinois licensed private detective agency. Manzano averred that on April 2, 2008, 3:33 p.m. service was attempted at 8032 S. Honore Street, Apt. 1, Chicago, IL, but it was discovered that Allen did not live there and that the address was a friend's residence. Manzano spoke with Tommy Brown "who state[d] that he knows the defendant but he does not live at this address." Manzano further averred:

> "That during the investigations, we attempted to locate the defendant by searching public, online and confidential databases, postal authorities in accordance with 38 FCR 265.6(D)(6)(II), 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 Floyd R[.] Allen, did or is believed to reside at 9913 S. Charles Street, Chicago, Illinois 60643[.]"

¶ 11 The attorney for U.S. Bank executed an affidavit on April 16, 2008, as to Allen and unknown owners and non-record claimants, averring the following:

"1. Defendants reside or have gone out of this State, or on due inquiry cannot be found, or are concealed within this State, so that process cannot be served upon them.

2. Diligent inquiry has been made as to the whereabouts of all the aforesaid Defendants.

3. That upon Diligent inquiry, the place of residence of the aforesaid Defendants cannot be ascertained and/or their last know[n] place of residence is:

Floyd R. Allen, 9913 S. Charles Street[,] Chicago, IL 60643

Floyd R. Allen (MA), 8032 S. Kedzie Avenue[,] Chicago, IL 60652

Unknown Owners and Nonrecord Claimants, 9913 S. Charles Street[,] Chicago, IL."

¶ 12 This affidavit, and an affidavit to allow service by publication on Allen pursuant to Cook County Local Rule 7.3 allowing service by publication in foreclosure suits (Cook County Local Rule 7.3 (eff. Oct. 1, 1996)), were filed on April 21, 2008, and service by publication was allowed. Defendant Allen was served by publication on April 24, 2008. The notice of publication was mailed to both Allen and Brown at 9913 S. Charles Street, Chicago, Illinois, as well as to Allen at 8032 S. Kedzie, Chicago, Illinois. However, both Allen and Brown failed to appear and plaintiff moved for default, shortening of the redemption period, and judgment of foreclosure.

¶ 13 U.S. Bank sent defendant Brown a letter dated June 13, 2008 notifying her that her mortgage was in default and setting forth a forbearance agreement, whereby U.S. Bank agreed not to pursue the foreclosure action if Brown abided by the incorporated repayment schedule. The letter was sent to Brown at 9913 S. Charles Street. The foreclosure would only be placed on hold during the forbearance and repayment plan. Pursuant to the terms of the agreement, if Brown failed to comply with the plan, U.S. Bank could obtain a final judgment in the foreclosure action by sending Brown a copy of its request for final judgment of foreclosure. The agreement provided: "You agree that you have no defenses, set offs, or counter-claims to this foreclosure." However, the forbearance agreement did not contain any provisions regarding waiver of service of process. Brown signed the agreement on June 26, 2008.

¶ 14 On March 31, 2009, the court granted plaintiff's motions for default, shortening the redemption period, and judgment of foreclosure. Plaintiff filed its first notice of sale on May 1, 2008. The property was sold in a judicial sale and purchased by U.S. Bank.

¶ 15 On May 21, 2010, defendant Barbara J. Brown appeared *pro se* at the hearing on plaintiff's motion for order approving report of sale and distribution. After the court asked her whether she wanted additional time, Brown indicated she did and the court then entered an order staying possession from the statutory 30 days to 90 days. Brown did not object to personal jurisdiction at that time. The order entered reflected the extension from 30 days to 90 days with a handwritten strikethrough on the number "30" and a handwritten "90." Brown and Allen subsequently retained counsel to represent both of them.

¶ 16 On August 17, 2011, counsel for defendants filed an emergency motion pursuant to

section 301 and section 1401 of the Illinois Code of Civil Procedure objecting to the court's exercise of personal jurisdiction and to quash the exercise of personal jurisdiction of Allen and Brown. Attached to the motion were affidavits of both Allen and Brown.

¶ 17 Allen averred that he resided at 9913 S. Charles Street, Chicago, Illinois, with Brown, who is his wife. Allen further averred that the affidavit of Buskirk was false regarding the following: that Brown had a brother-in-law named "Tommy Brown," as described in his affidavits, as she did not; that Brown's and/or Allen's usual place of abode was 8032 S. Honore Street, because that was their former address; that there was substitute service on Brown; that Allen or Brown were absentee owners of 9913 S. Charles Street; that he and his wife travel to 9913 S. Charles Street to collect rent from a Mildred Johanson; that a copy of the summons and complaint was mailed to Brown and/or Allen at 9913 S. Charles Street. Allen's affidavit also averred that he and/or Brown could have been served at 9913 S. Charles Street but were not.

¶ 18 Brown averred that she was married to Allen and that they resided at 9913 S. Charles Street, Chicago, Illinois. Brown also averred that Buskirk's affidavit regarding substitute service on her was false regarding the following facts: that Brown had a brother-in-law named "Tommy Brown," as described in his affidavits, as she did not; that Brown's and/or Allen's usual place of abode was 8032 S. Honore Street, because that was their former address; that there was substitute service on Brown; that Allen or Brown were absentee owners of 9913 S. Charles Street; that he and his wife travel to 9913 S. Charles Street to collect rent from a Mildred Johanson; that a copy of the summons and complaint was mailed to Brown and/or Allen at 9913 S. Charles Street. Brown's affidavit likewise also averred that he and/or Brown could have been served at 9913 S.

Charles Street but were not.

¶ 19 On August 19, 2010, the court entered an order stating that it was "construing the motion a 1401 Petition as the Order Approving Sale was entered in the above captioned matter on May 21, 2010." The court ruled specifically the following as to the alleged first section 1401 petition:

> "The petition will be stricken. It doesn't comply with 2-1401.
>
> You can certainly raise a 2-1401 challenge to a final order at your leisure. This petition doesn't do it. So I am going to strike the petition on its face."

¶ 20 Defendants filed a second section 2-1401 petition on September 10, 2010, alleging the same material facts as alleged in their first section 2-1401 petition. On October 8, 2011, the parties appeared before the court on the petition and a briefing schedule was entered. On December 14, 2010, the court entered an order setting defendants' second section 2-1401 petition for an evidentiary hearing. The court also ordered that a list of evidence and witnesses for the hearing be filed "no later than twenty-one (21) days prior to the date of hearing, the parties shall file with the Court and serve on opposing parties a List of Witnesses and Intended Exhibits," and ordered that all objections must be filed "no later than seven (7) days prior to the date of hearing." The court set the hearing on the section 2-1401 petition for February 10, 2011. The order set the case for status and hearing on objections to evidence for February 3, 2011. U.S. Bank filed its witness and evidence list on January 20, 2011. Defendants did not file any objection. Defendants filed a motion seeking leave to file their evidence and witness list *instanter* and to continue the hearing date after the court-ordered deadline, on January 26, 2011. Defendants alleged that defense counsel did not have sufficient time to further investigate and

prepare the witness list due to the unavailability of his clients because of "prior commitments and a later family crisis involved the Defendant Floyd R. Allen," and, "moreover [defense counsel's] involvement in several other matters including a jury trial on January 11, 2011", matters in another case, and hearings in several other foreclosure cases. Defendants also requested that the hearing date be continued for these same reasons and because Brown slipped on ice on January 24, 2011, hitting her head and that "due to these injuries [Brown] most likely would not be in shape to adequately participate in any type of hearing." The motion further stated that defendants had not requested any prior extensions of time, that U.S. Bank would not be prejudiced because "they would get equal time to file and or object to the Defendants[']' evidence", and that it was U.S. Bank's "commission and omission in not complying with Illinois law concerning service of process" which was "highly prejudicial" and violated defendants' "constitutional rights to Due Process." U.S. Bank objected to defendants' motion. U.S. Bank states that it filed its motion *in limine* to exclude all witness testimony and evidence and for entry of an order striking and denying defendants' second section 2-1401 petition objecting to jurisdiction on February 4, 2011, because the circuit court was closed on February 3, 2011, the date originally set for hearing on objections, due to inclement weather.

¶ 21 On February 10, 2011, the parties appeared before the court for a hearing on the section 2-1401 petition. The court denied defendants' motion to file their late witness and evidence list *instanter* and barred defendants from presenting any evidence on their section 2-1401 petition regarding personal jurisdiction. Defendants argued that U.S. Bank's filing was late also because according to defendants' calculation the witness and evidence list was due January 19, 2011, and

U.S. Bank filed its list on January 20, 2011. The court asked U.S. Bank whether it had anything to add to its response to plaintiff's motion and U.S. Bank indicated it would rest on its filed objection. The court denied defendants' motion, citing Illinois Supreme Court Rule 183 (Ill. S. Ct. R. 183 (corrected eff. Feb. 16, 2011)), and *Parkway Bank and Trust Company v. Meseljevic*, 406 Ill. App. 3d 435 (2011), finding that "[t]here [was] plenty of time to comply with that scheduling order, from December, the 14th [sic] to January 20th." The court found defendants failed to show good cause for a late filing and thus forfeited the opportunity to present witnesses at the hearing on the petition. The court ruled that defendants forfeited the opportunity to present any witnesses and put on their case on their petition. The court further acknowledged the court closure on February 3, 2011, and indicated that if defendants had any written objections to U.S. Bank's list of witnesses and evidence, it would consider late filed objections. However, defendants did not have any written objections prepared. The court noted U.S. Bank's objections to the petition, including specifically on the basis of waiver as to Brown due to the forbearance agreement and accepting the benefit of the stay on the order for possession, but the court deferred ruling on those issues at that time and denied the remainder of the objections.

¶ 22 The court did not hear any evidence, from either defendants or U.S. Bank. U.S. Bank did not present any evidence but simply argued that it was defendants' burden and that defendants could not establish that on due inquiry Allen could have been found and requested that the motion to quash as to Allen be denied, which the court granted. The court then ruled, "As to Ms. Brown then and her jurisdictional challenge, her motion is also denied." The court found that Brown waived any challenge to personal jurisdiction, stating specifically: "someone can't take

the benefit of the court's jurisdiction in accepting relief and then challenge the court's jurisdiction." The court explained that Brown obtained the benefit of the court extending the stay of possession from 30 day s to 90 days from the date of the order confirming the sale of the property. The court entered its order denying defendants' second section 2-1401 petition that same day, February 10, 2011. Defendants filed their appeal on March 14, 2011.

¶ 23 ANALYSIS

¶ 24 I. Issues Relating to the Appeal

¶ 25 A. Jurisdiction

¶ 26 We first address U.S. Bank's argument that we lack jurisdiction to hear the present appeal because defendants did not timely appeal the denial of their first section 1401 petition (735 ILCS 5/2-1401 (West 2010)) and their second section 1401 petition did not extend the time to appeal to vacate the default judgment. Defendants reply that the court did not actually adjudicate the first section 1401 petition but, rather, merely found it did not comply facially with the section 1401 requirements for a valid petition and merely struck it off the call, thereby rendering their second 1401 petition as the one which triggered the 30-day appeal period.

¶ 27 We agree with defendants. Here, the court did not rule on the merits of the first section 1401 petition. Instead, the court struck it and indicated that defendants could later raise a section 1401 petition. The court ruled specifically the following as to the first section 1401 petition:

> "The petition will be stricken. It doesn't comply with 2-1401.
>
> You can certainly raise a 2-1401 challenge to a final order at your leisure. This petition doesn't do it. So I am going to strike the petition on its face."

¶ 28 A postjudgment motion to quash service is in essence a motion seeking relief from a final judgment pursuant to 735 ILCS 5/2-1401 (2010), when it seeks relief from a final judgment more than 30 days from the judgment's entry. *Deutsche Bank*, 2011 IL App (1st) 102632 at ¶ 11 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002)). Once a court rules on the merits of a post-judgment motion, it signals the disposition of the last pending post-judgment motion and the thirty-day period to appeal begins to run. *Holloway v. The Kroger Company*, 253 Ill. App. 3d 115, 123 (1991).

¶ 29 As defendants argue, this court's decisions in *Picardi v. Edwards*, 228 Ill. App. 3d 905 (1992), *Romo v. Allin Express Service, Inc.*, 219 Ill. App. 3d 418 (1991), and *Belluomimi v. Lancome*, 207 Ill. App. 3d 583 (1990), are dispositive. In *Romo*, this court held that because the dismissal of a first section 2-1401 petition was "without prejudice," "the trial court invited a refiling, and thus retained jurisdiction" over the second section 2-1401 petition. *Romo*, 219 Ill. App. 3d at 418. The trial court in *Romo* stated the following in its order:

> "Now, there is no question that your petition does not set forth specific factual allegations of your having a meritorious claim. *** At this point my order is, your petition is denied without prejudice."

This court held that the above language "makes this judgment substantially similar to an order granting leave to amend." *Romo*, 219 Ill. App. 3d at 419 (citing *Elliott Construction Corporation v. Zahn*, 99 Ill. App. 2d 112 (1968) (holding that a trial court has authority to grant leave to amend a 2-1401 petition and that the time for filing notice of appeal is tolled until the amended petition is filed), *Sullivan v. Bach*, 100 Ill. App. 3d 1135 (1981) (same)).

¶ 30 In *Picardi*, this court held that the defendants had the right to file a second section 2-1401 petition because the trial court "expressly invited defendants to refile the 2-1401 petition when it stated at the *** hearing, 'I suggest you continue the matter, refile the petition'; and 'File it some other time.' " *Picardi*, 228 Ill. App. 3d at 909.

¶ 31 The language in the instant case by the trial court is similar to the language of the trial court in *Romo* and *Picardi*. Here, the trial court stated it was striking the petition and specifically stated, "You can certainly raise a 2-1401 challenge to a final order at your leisure."

¶ 32 In *Belluomimi*, this court held that where a motion was not denied but, rather, simply stricken, "it remained pending and there was no adjudication on the merits of the plaintiff's cause." *Belluomimi*, 207 Ill. App. 3d at 586. Pursuant to *Belluomimi*, we hold that because the court did not rule on the merits of the first section 2-1401 petition but instead struck it, it remained pending and there was no final order on the first section 2-1401 petition necessitating an appeal within 30 days as U.S. Bank contends. Thus, there was no final order on the first section 2-1301 petition necessitating an appeal, the trial court retained jurisdiction, and defendants properly filed their second post-judgment section 2-1401 petition as the circuit court gave them leave to do.

¶ 33 After defendants's first section 2-1401 petition was stricken, defendants filed a second section 2-1401 petition as the court gave them leave to do. Defendants thereafter timely filed their appeal on March 14, 2011, within 30 days of the February 10, 2011, order denying their second section 1401 petition. See Ill. S. Ct. Rule 303(a) (eff. June 4, 2008) (requiring an appeal within 30 days after the entry of the order disposing of the last pending postjudgment motion);

Ill. S. Ct. Rule 304(b)(3) (eff. Feb. 26, 2010) (judgment or order granting or denying any of the relief prayed in a petition under section 2–1401 of the Code of Civil Procedure appealable without a special finding under Supreme Court Rule 304(a)). Therefore, we have jurisdiction of this appeal.

¶ 34 B. The Record

¶ 35 U.S. Bank also argues that defendants have failed to present a sufficient record for our review. U.S. Bank complains that the record should be construed against defendants because several filings were missing from the record, including U.S. Bank's motion *in limine* and objections, and because there was no Supreme Court Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) report of proceedings filed. U.S. Bank also objects to the propriety of the transcripts filed by defendants because they were provided by defense counsel's "personal court reporter."

¶ 36 "The responsibility for preserving a sufficiently complete record of the proceedings before the trial court rests with the defendant, as the appellant." *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007) (citing *People v. Fernandez*, 344 Ill. App. 3d 152, 160 (2003); *People v. Malley*, 103 Ill. App. 3d 534, 536 (1982)). "Where the record on appeal is incomplete, any doubts arising from that incompleteness will be construed against the defendant (*Fernandez*, 344 Ill. App. 3d at 160) and every reasonable presumption will be taken in favor of the judgment below (*Malley*, 103 Ill. App. 3d at 536)." *Banks*, 378 Ill. App. 3d at 861. Defendants have since moved to supplement the record, which we allowed.

¶ 37 Illinois Supreme Court Rule 323(b) provides:

"Court reporting personnel who transcribe a report of proceedings shall certify to its

> accuracy and shall notify all parties that the report of proceedings has been completed and is ready for filing. A report of proceedings may be filed without further certification if, within 14 days of the date on which notice of its completion was sent to the parties, no party has objected, citing alleged inaccuracies involving matters of substance." Ill. S. Ct. R. 323(b) (eff. Dec. 13, 2005).

¶ 38 Here, defendants did file a report of proceedings, and the transcripts were certified by the court reporter. Defendants moved to supplement the record, which we allowed, and U.S. Bank did not file any objections. Thus, the report of proceedings was properly filed under Supreme Court Rule 323(b). As defendants point out, although U.S. Bank states in its brief generally that it "finds the transcripts that are included as exhibits, or otherwise, to be incomplete and inaccurate," U.S. Bank fails to inform us what those inaccuracies are. Thus, we reject U.S. Bank's contention that there is anything improper in defendants' supplementation of the record and filing of the report of proceedings as part of the record in this case.

¶ 39 II. Denial of Second Section 2-1401 Petition Challenging Personal Jurisdiction

¶ 40 Turning now to the merits of the instant appeal, defendants Allen and Brown both argue that the circuit court erred in denying their second section 2-1401 petition to vacate the default judgment based on lack of personal jurisdiction and to quash service, and maintain the circuit court did not obtain personal jurisdiction over them. Section 2-301 of the Code of Civil Procedure (Code) allows a party who objects to the court's personal jurisdiction to file a motion to dismiss for lack of jurisdiction. 735 ILCS 5/2-301(a) (West 2010). "A judgment entered without jurisdiction over the parties is void *ab initio* and lacks legal effect." *Deutsche Bank*

National Trust Co. v. Brewer, 2012 IL App (1st) 111213 at ¶ 17 (citing *Village of Algonquin v. Lowe*, 2011 IL App (2d) 100603, ¶24, *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 928-29 (1978)). "For a court to acquire personal jurisdiction over the defendant, the defendant must be served, waive service, or consent to jurisdiction." *Ryburn v. People*, 349 Ill. App. 3d 990, 994 (2004) (citing *State Bank of Lake Zurich v. Thill*, 113 Ill.2d 294, 308 (1986)).

¶ 41 Section 2-301of the Code requires the following in disposing of a motion objecting to personal jurisdiction:

> "(b) In disposing of a motion objecting to the court's jurisdiction over the person of the objecting party, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon contested issues of fact. The court shall enter an appropriate order sustaining or overruling the objection." 735 ILCS 5/2-301(b) (West 2010).

¶ 42 When the plaintiff's affidavits are challenged, the plaintiff must produce evidence establishing due inquiry and due diligence. *First Bank & Trust Co. v. King*, 311 Ill. App. 3d 1053, 1056 (2000). This court has adopted the approach that, when there are conflicting affidavits regarding whether there was service, "the plaintiff (or whatever party asserts the existence of personal jurisdiction) must establish jurisdiction by a preponderance of the evidence." *TCA International, Inc. v. B & B Custom Auto, Inc.*, 299 Ill. App. 3d 522, 529 (1998) (adopting the preponderance of the evidence standard of review). On appeal, "[w]hen we review a decision on a motion to quash service of process, we must determine whether the trial court's findings of fact are against the manifest weight of the evidence." *Brewer*, 2012 IL App (1st)

111213 at ¶ 17 (citing *Household Finance Corp. III v. Volpert*, 227 Ill. App. 3d 453, 455-56 (1992)).

¶ 43 However, if any material evidentiary conflicts exist, the trial court must conduct an evidentiary hearing to resolve those disputes. *Madison Miracle Products, LLC* , 2012 IL App (1st) 112334 at ¶ 35 (citing *Russell v. SNFA*, 408 Ill. App. 3d 827, 830-31 (2011), *TCA International, Inc. v. B&B Custom Auto, Inc.*, 299 Ill. App. 3d 522, 531-32 (1998)). "When the trial court bases its decision solely on such documentary evidence, an appellate court reviews a trial court's dismissal of a case for lack of personal jurisdiction *de novo*. *Madison Miracle Products, LLC v. MGM Distribution Co.*, 2012 IL App (1st) 112334 at ¶ 34 (citing *McNally v. Morrison*, 408 Ill. App. 3d 248, 254 (2011)). In addition, a section 2-1401 petition claiming voidness due to a lack of personal jurisdiction is reviewed *de novo*. *Deutsche Bank National Trust Company v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12.

¶ 44 Here, because the court did not hold an evidentiary hearing, we review the issue *de novo*. Further, *de novo* review is proper because the defendant's motion was a section 2-1401 petition.

¶ 45 A. Personal Jurisdiction of Defendant Allen

¶ 46 We first examine the propriety of the court's order denying the motion to quash service by publication on Allen. We note that defendant Allen's assertion that the court erred in entering the order against him because there was no "actual motion pending" on behalf of Allen is incorrect, as defendants' second section 2-1401 petition, the subject of the present appeal, was clearly filed on behalf of both Brown and Allen jointly.

¶ 47 1. Noncompliance with Court Deadline for Filing Witness List Without Good Cause

¶ 48 Defendants argue that the court erred in denying the motion to quash where it held no evidentiary hearing. The record reveals that the court did not hold a hearing because defendants did not comply with the court deadline for the disclosure and filing of a list of witnesses and evidence for the hearing on the section 2-1401 petition. The court had ordered that a list of evidence and witnesses for the hearing be filed no later than 21 days prior to the date of hearing on the defendants' section 2-1401 petition, which was set for February 10, 2011. The court set the case for status and hearing on objections to evidence for February 3, 2011. U.S. Bank objected to defendants' motion, but defendants did not object to U.S. Bank's allegedly late filing of their witness list, which was January 20, 2011, exactly 21 days before the date of the hearing, February 10, 2011. The court did not rule on whether U.S. Bank's filing was late. Regardless, defendants did not file any objection to U.S. Bank's witness and evidence list, based on either untimeliness or for any other reason. Thus, defendants forfeited any objection to U.S. Bank's witness list. On the other hand, U.S. Bank did object to defendants' motion seeking to file their witness and evidence list late, and also filed their written objections.

¶ 49 The court denied the defendants' motion for leave to file their witness and objection list late, citing Illinois Supreme Court Rule 183 (Ill. S. Ct. R. 183 (eff. Feb. 16, 2011)), and *Parkway Bank and Trust Company v. Meseljevic*, 406 Ill. App. 3d 435 (2011), and finding that "[t]here [was] plenty of time to comply with that scheduling order, from December, the 14th [sic] to January 20th." The court found defendants failed to show good cause for a late filing and thus forfeited the opportunity to present witnesses at the hearing on the petition. The court's order of February 10, 2011 barred Allen from presenting any evidence to establish his burden on the

motion to quash.

¶ 50 Rule 183 provides that the trial court, for good cause shown, may extend the time for filing any pleading or the doing of any act which the rules require to be done within a limited period, either before or after the expiration of the time. Ill. S. Ct. R. 183 (eff. Feb. 16, 2011). *Meseljevic* held that Rule 183 vests the circuit court with discretion to extend the time a party has to comply with a court-ordered or rule-imposed deadline, both before and after expiration of the filing deadline, but "the court's discretion to allow a late response pursuant to a Rule 183 motion ' "does not come into play under the rule unless the responding party can first show good cause for the extension." ' " *Meseljevic*, 406 Ill. App. 3d at 439-40 (quoting *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 344 (2007), quoting *Bright v. Dicke*, 166 Ill. 2d 204, 209 (1995)). "Good cause" is a prerequisite to relief under Rule 183, and the burden of establishing it rests on the party who is seeking relief under the rule. *Vision Point of Sale, Inc.*, 226 Ill. 2d at 353. In determining whether good cause exists, the trial court may consider all objective, relevant evidence as to why there is good cause for the failure to comply with the original deadline and why an extension of time should be granted. *Vision Point of Sale, Inc.*, 226 Ill. 2d at 353. The determination of what constitutes good cause is fact-dependent and rests within the sound discretion of the trial court; we will not disturb the decision rendered absent an abuse of that discretion. *Vision Point of Sale, Inc.*, 226 Ill. 2d at 353-54.

¶ 51 We find the circuit court did not abuse its discretion, as Allen failed to establish good cause for not complying with the court's deadline for the filing of a witness list. Defense counsel alleged below in the motion for leave to file the late witness list *instanter* two reasons the witness

list was late: (1) defense counsel did not have sufficient time to further investigate and prepare the witness list due to the unavailability of his clients because of "prior commitments and a later family crisis involved the Defendant Floyd R. Allen"; (2) defense counsel's "involvement in several other matters including a jury trial on January 11, 2011", matters in another case, and hearings in several other foreclosure cases; and (3) U.S. Bank would not be prejudiced. The court's ruling, in pertinent part, is as follows:

> "First of all, the motion that you filed, Mr. Spencer, is not supported by an affidavit. There is a recent case right on point, Parkway Bank verses [sic] Meseljevic, I can make copies if you'd like them, that deals with Rule 183 and similar situations. The reasons that are stated in your motion don't say specifically why ***
>
> * * *
>
> Why you couldn't meet the deadline and why the extension of time should be granted, in my opinion.
>
> The motion, again, unsupported by affidavit contains no due dates for the matters that you set, what you were doing, what prevented you from complying with [the] scheduling order.
>
> There is plenty of time to comply with that scheduling order, from December, the 14th [sic] to January 20th. All it called for was a simple list of witnesses and exhibits to prepare for today's hearing. And I might add that that list of witnesses and exhibits should reasonably have been in your mind at the time you filed a 1401 petition given the nature of the petition you filed, the petition to vacate a final judgment.

> The last, I will address very quickly just the issue of prejudice since you raised it in asserting that the plaintiff would not be prejudiced by delayed filing. I disagree with that assessment.
>
> You're collaterally challenging the final order. It's not a small matter[.] Obviously, anyone who has the benefit of a final judgment would be prejudiced by someone collaterally challenging, [sic] so to the extent that Rule 183 allows for consideration of prejudice to determine whether your motion is a meritorious one, it would be prejudice, so for all of those reasons, the motion is denied[.]"

¶ 52 We agree with the circuit court's ruling. As the circuit court found, despite the alleged vague conflicts defense counsel had with other pending matters, defendants had ample time to file a witness list, and there should not have been a need for any further time to investigate or prepare a witness list since all the facts supporting the section 2-1401 petition were alleged in the petition. We note that defendants filed their first section 2-1401 petition on August 17, 2010 and filed their second section 2-1401 petition on September 10, 2010, alleging all the same material facts, and thus defendants had many months to investigate any witnesses before the court-ordered deadline for filing the witness and evidence lists.

¶ 53 Moreover, defendants make no reply to U.S. Bank's argument that the circuit court did not abuse its discretion in barring Allen from presenting witnesses at the hearing based on this failure to timely file the witness list, thus waiving the issue of the propriety of the court's ruling. We hold that the circuit court's finding that defendants' motion did not show good cause under Rule 183 was not an abuse of discretion, and we affirm its decision to therefore bar Allen from

presenting any witnesses in an evidentiary hearing on the section 2-1401 petition.

¶ 54 2. No Controversy of Material Fact

¶ 55 We also hold that an evidentiary hearing was not required as to Allen because the affidavits by Allen and the special process server do not present a controversy of material fact. Defendants argue that U.S. Bank's "collection of affidavits and actions at best set forth hearsay, contradictions and absurd false statements" and do not demonstrate due inquiry and due diligence. However, the statute itself specifically requires the court to consider affidavits submitted by any party. See 735 ILCS 5/2-301(b) (West 2010) ("In disposing of a motion objecting to the court's jurisdiction over the person of the objecting party, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon contested issues of fact.").

¶ 56 Defendants argue that because there was no evidentiary hearing on Allen's motion he was denied due process. However, a court may determine personal jurisdiction on the basis of documentary evidence alone but on appeal our review is *de novo*, and if there is any material evidentiary conflict then the circuit court would be required to hold an evidentiary hearing. See *Madison Miracle Products, LLC* , 2012 IL App (1st) 112334 at ¶¶ 34-35.

¶ 57 Defendants also argue that the court erred in its denial of their second 2-1401 petition because U.S. Bank failed to file counteraffidavits. However, U.S. Bank already had its affidavits supporting service by publication on Allen on file, as part of its motion for service by publication. Defendants are incorrect that U.S. Bank somehow had to again file affidavits. Under section 301 there is no further requirement for yet another set of affidavits; rather, the

parties file their respective affidavits and the court considers whether there is a contested issue of material fact. 735 ILCS 5/2-301 (West 2010). "If the defendant is able to present a significant issue with respect to the truthfulness of the affidavit filed by the plaintiff's agent for service by publication, then the trial court should hold an evidentiary hearing on the issue with the burden of proof being upon the plaintiff to establish that due inquiry was made to locate the defendant." *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18 (citing *First Federal Savings & Loan Ass'n v. Brown*, 74 Ill. App. 3d 901, 907-08 (1979)).

¶ 58 We must determine what facts are material in order to determine whether there is any material evidentiary conflict in the affidavits. Evidence is material when it is offered to prove a proposition which is in issue or is probative of a matter in issue. *Banovz v. Rantanen*, 271 Ill. App. 3d 910, 920 (1995) (citing *Yamnitz v. William J. Diestelhorst Co.*, 251 Ill. App. 3d 244, 250 (1993), citing *Migliore v. County of Winnebago*, 24 Ill. App. 3d 799, 803 (1974)).

¶ 59 The statutory provision on service by publication provides:

> "Whenever, in any action affecting property or status within the jurisdiction of the court *** 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 2010).

Under the statute, "due inquiry" regarding the defendant's whereabouts and "diligent inquiry" about the defendant's residence are required before service by publication. 735 ILCS 5/2-206(a) (West 2010).

¶ 60 Also, Cook County Circuit Court Rule 7.3 provides the following regarding service by publication specifically in foreclosure suits:

> "7.3 Foreclosure Suits
>
> 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 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 (eff. Oct. 1, 1996).

¶ 61 A plaintiff must conduct both "diligent inquiry" in ascertaining the defendant's residence and "due inquiry" in ascertaining the defendant's whereabouts before the plaintiff can properly execute an affidavit stating that the defendant cannot be found. *Citimortgage, Inc.*, 2012 IL App (1st) 102438 at ¶ 18 (citing *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 927-28 (1978)). Thus, whether the plaintiff exercised "due inquiry" in ascertaining Allen's whereabouts and "diligent inquiry" in ascertaining Allen's residence constitute the material facts that are probative as to whether service by publication was appropriate.

¶ 62 Here, there were no material evidentiary conflicts between the affidavits of U.S. Bank and Brown and Allen because nothing in Brown's or Allen's affidavits regarding service upon Allen that controvert the due inquiry and diligent inquiry exercised by U.S. Bank through its special process server. The defendants averred in their affidavits that they resided at 9913 S. Charles Street, Chicago, Illinois. Defendants argue that U.S. Bank "could have simply inquired by phone with [Brown] about her husbands the Co-Defendant Floyd R. Allen's [sic] whereabouts if they [sic] did not think he resided with her at the 9913 South St. Charles [sic], Chicago, IL address but according to the records they did [not] take this simply five minute step." Defendants argue that "upon 'Due Inquiry' Floyd R. Allen could have been found at 9913 South St. Charles [sic] where he resides with his wife."[1]

¶ 63 However, the affidavit of the special process server averred that he attempted service on Allen at 9913 S. Charles Street, a total of nine times. Moreover, defendants admit and aver in their affidavits that they in fact did live at this address. Thus, U.S. Bank exercised diligent inquiry and had the correct address for defendants' residence. Defendants do not dispute the fact that the process server attempted to serve Allen at this address nine times.

¶ 64 Defendants also do not aver that they could have been located elsewhere upon due inquiry. Thus, U.S. Bank exercised due inquiry regarding defendants' whereabouts. The uncontroverted facts between the affidavits that defendants resided at 9913 S. Charles Street and

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[1] Although defendants state that their address was "9913 South St. Charles," the mortgaged property that was the subject of the foreclosure, sale, and order of possession was 9913 S. Charles Street.

that the special process server attempted service there 9 times on Allen are dispositive. We hold that U.S. Bank exercised both due inquiry and due diligence and that service by publication upon him was proper.

¶ 65 In so holding, we find *Household Finance Corp. V. Volpert*, 227 Ill. App. 3d 453 (1992), on point and dispositive. In *Volpert*, the plaintiff's special process server attempted service nine times over a week-and-a-half period at the subject address and so the plaintiff served the defendant by publication. *Volpert*, 227 Ill. App. 3d at 453. The defendant moved to quash service, claiming that he had resided at the subject property for the past eleven years. *Id*. The trial court found that " 'service was properly attempted' " and denied the defendant's motion. *Volpert*, 227 Ill. App. 3d at 454. This court affirmed, holding that the nine attempts at service at the subject address constituted due inquiry.

¶ 66 Similarly here, we find that the special process server's affidavit established diligent inquiry and due inquiry as to Allen. Defendant Allen admits and argues that 9913 S. Charles Street was his residence. Contrary to defendants' assertions, U.S. Bank exercised due inquiry and diligent inquiry in attempting to locate and serve defendant Allen. The special process server averred in his affidavit of April 2, 2008, at 3:08 p.m. that he attempted service at 9913 S. Charles Street a total of nine times over a three-week period at various times of day and night: (1) 9:26 a.m. on March 8, 2008; (2) 10:00 a.m. on March 11, 2008; (3) 4:26 p.m. on March 14, 2008; (4) 9:18 p.m. on March 17, 2008; (5) 5:29 p.m. on March 20, 2008; (6) 11:17 a.m. on March 23, 2008; (7) 6:19 p.m. on March 26, 2008; (8) 9:51 a.m. on March 30, 2008; and (9) 3:08 p.m. on April 2, 2008. Further, the process server inquired as to Allen's whereabouts and was told by

Mildred Johanson that Allen and Brown were the landlords and come by once a month for rent. Allen was not found by the special process server on any of the nine attempts at service on him at 9913 S. Charles Street.

¶ 67 Allen did not present any evidence showing that the process server's averments of nine attempts at service at the correct address were false, or that he and Brown in fact resided at some other address which could have been found. Rather, Allen admitted that he resided at the address. Under *Volpert*, as a matter of law nine attempts to serve a party at their admitted residence constitute due inquiry, and Allen's affidavit does not create any material evidentiary conflict. Because the defendants' affidavits do not contest the fact that there were nine attempts at service at this address, there is no need for an evidentiary hearing. See *Soria v. Chrysler Canada, Inc.*, 2011 IL App (2d) 101236 at ¶ 15 (affirming the trial court's denial of a motion to dismiss for lack of personal jurisdiction and holding that there was no need for a remand for an evidentiary hearing where the facts relied on by the appellate court were not contested by the party challenging jurisdiction).

¶ 68 We find that the court appropriately relied on the affidavits, and that because there was no material evidentiary conflict the circuit court was not required to conduct a hearing. We hold that based on the uncontroverted nine attempts at service at Allen's admitted residence, U.S. Bank exercised due diligence in attempting service and that subsequent service by publication was proper. We thus affirm the denial of Allen's motion to quash service.

¶ 69 B. Personal Jurisdiction of Defendant Brown

¶ 70 Defendant Brown argues that the substitute service upon her was ineffective and did not

confer personal jurisdiction. In her affidavit, Brown averred that Buskirk's affidavit regarding substitute service on her was false regarding the following facts: that Brown had a brother-in-law named "Tommy Brown," as described in his affidavits, as she did not; that Brown's and/or Allen's usual place of abode was 8032 S. Honore Street, because that was their former address; that there was substitute service on Brown; that Allen or Brown were absentee owners of 9913 S. Charles Street; that he and his wife travel to 9913 S. Charles Street to collect rent from a Mildred Johanson; and that a copy of the summons and complaint was mailed to Brown and/or Allen at 9913 S. Charles Street.

¶ 71 Regarding substitute service the statute provides, in pertinent part, the following:

> "§ 2-203. Service on individuals. (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made *** (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." 735 ILCS 5/2-203(a)(2) (West 2010).

¶ 72 Once the substitute return of service is challenged by a defendant's affidavit, the burden shifts to the plaintiff who must show strict compliance with every requirement of the statute authorizing substituted service. *Thill*, 113 Ill.2d at 310. 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." *Thill*, 113 Ill.2d at 309.

¶ 73 The special process server's affidavit of April 2, 2008, 3:11 p.m., averred that he attempted to serve Brown at 9913 S. Charles Street, a total of ten times: (1) 9:26 a.m. on March 8, 2008; (2) 10:01 a.m. on March 11, 2008; (3) 1:57 p.m. on March 13, 2008; (4) 11:08 a.m. on March 16, 2008; (5) 7:07 a.m. on March 18, 2008; (6) 1:19 p.m. on March 21, 2008; (7) 8:09 p.m. on March 24, 2008; (8) 8:12 a.m. on March 27, 2008; (9) 9:52 a.m. on March 30, 2008; and (10) 3:11 p.m on April 2, 2008. The process server stated that there was no service for the reason that after diligent investigation he found the following: "The defendant could not be served at this address. The defendant is the absentee owner of this property. Spoke to Mildred Johanson who states the defendant is the landlord, and they come by once a month for the rent."

¶ 74 The special process server executed another affidavit at 3:31 p.m. on April 2, 2008, averring that there was substitute service on Brown at that time by leaving a copy of the process at 8032 S. Honore Street, Apartment 1, Chicago, Illinois, with a "Tommy Brown," Brown's brother-in-law, who confirmed that Brown resided at this address, and further mailed a copy of the process to Brown at this address. The affidavit further averred that Tommy Brown was an individual over 13 years old.

¶ 75 However, defendants in their affidavits both controverted U.S. Bank's special process server's affidavits as to service on Brown. Brown and Allen controverted that Brown resided at 8032 S. Honore and averred in her affidavit that she resided at 9913 S. Charles Street. Brown and Allen both further averred that the special process server's affidavit was false in that 8032 S. Honore was not her usual place of abode but rather was her former address prior to May 2007,

when she and Allen acquired the 9913 S. Charles Street property. As Brown argues, U.S. Bank's affidavits do not dispute her affidavit that 8032 S. Honore was not her usual place of abode, and thus the trial court was required to accept her allegations in her affidavit regarding improper substitute service as true. See *Sterne v. Forrest*, 145 Ill. App. 3d 268, 274 (1986). The attempted substitute service did not comply with the statute's requirement that such service be effected at the defendant's "usual place of abode." 735 ILCS 5/2-203(a)(2) (West 2010).

¶ 76 However, the circuit court did not reach the issue of substitute service but instead found that Brown, by appearing *pro se* and availing herself an extension of the stay of the order of possession without objecting to jurisdiction at that time, waived any challenge to personal jurisdiction. Defendant Brown argues she did not waive personal jurisdiction. U.S. Bank argues that Brown waived her challenge to personal jurisdiction both by appearing and availing herself an extension of the stay of the order of possession without objecting and by executing a forbearance agreement with U.S. Bank. We hold Brown waived her challenge to personal jurisdiction by executing the forbearance agreement with U.S. Bank. Because we find the forbearance agreement was an effective waiver, we do not reach the issue of whether Brown waived her objection to personal jurisdiction by agreeing to the extension of the stay of the order of possession offered by the court.

¶ 77 By executing the forbearance agreement with U.S. Bank, Brown agreed to waive all her defenses in the foreclosure proceedings. Defenses can be waived by entering into forbearance agreements with lenders, as the waiver of defenses is valuable consideration that a lender seeks in exchange for entering into a forbearance agreement. *Eastern Savings Bank, FSB v. Flores*,

2012 IL App (1st) 112979, ¶ 14.

¶ 78 Recently, in *Flores*, we held that the defendant waived any objection to personal jurisdiction by entering into a forbearance agreement in a foreclosure proceeding. *Flores*, 2012 IL App (1st) 112979 at ¶ 15. In *Flores*, the forbearance agreement included a provision that the defendant waived all "defenses, set-offs, or counterclaims to any foreclosure proceeding except as to the non-existence of a default under this agreement." *Flores*, 2012 IL App (1st) 112979 at ¶ 3. However, the defendant also acknowledged in paragraph eight of the forbearance agreement "that borrower was properly served in the foreclosure action." *Id*.

¶ 79 Here, we have a similar forbearance agreement where Brown agreed to waive all defenses in the foreclosure action, but there is no additional waiver provision specifically as to the method of service. However, Brown makes no reply to U.S. Bank's argument as to her waiver of personal jurisdiction under the forbearance agreement. Under Supreme Court Rule 341(e)(7), a party is required to raise its arguments and provide citation to legal authority in its appellate brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("[p]oints not argued are waived"). Brown had the opportunity to address U.S. Bank's argument regarding the forbearance agreement in her reply brief but failed to do so, thereby forfeiting any counterargument and conceding the issue. See *Crossroads Ford Truck Sales v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 63 (finding forfeiture of argument by plaintiff for failure to respond in plaintiff's reply brief to the substance of an argument raised by the defendant in its brief). Thus, we find waiver of personal jurisdiction was established by the forbearance agreement, and Brown has forfeited any argument that the forbearance agreement is insufficient to establish a waiver of objection to personal jurisdiction.

¶ 80 CONCLUSION

¶ 81 As to our own jurisdiction to hear this appeal, we hold we properly have jurisdiction because the circuit court did not rule on the merits of defendants' first section 20-1401 petition but, rather, allowed them leave to file a second 2-1401 petition, and defendants timely filed an appeal of the denial of the section 2-1401 petition. We further hold that there is no impropriety in defendants' supplementation of the record on appeal, which we allowed, including the report of proceedings, and U.S. Bank did not object.

¶ 82 As to the merits of whether the circuit court had personal jurisdiction of both defendants, we affirm the circuit court's order denying the section 2-1401 petition objecting to the court's exercise of personal jurisdiction and to quash the exercise of personal jurisdiction of both Allen and Brown.

¶ 83 As to Allen, first, the trial court properly refused an evidentiary hearing based on defendants' failure to abide by the court-ordered deadline for disclosure of witnesses. Defendants' motion did not show good cause under Rule 183 for their late filing of the witness list beyond the court's deadline and the court's refusal to allow the late filing and presentation of witnesses at the scheduled hearing was not an abuse of discretion.

¶ 84 Second, the affidavits did not present any material evidentiary conflict necessitating an evidentiary hearing. The facts averred in the special process server's affidavit established due inquiry as to Allen's whereabouts, as Allen admitted that his address was 9913 S. Charles, and due diligence was established where the process server averred that he attempted service at this address nine times.

¶ 85 As to Brown, we hold that although Brown's affidavit refuted the special process server's affidavit that he effected substitute service on a Tommy Brown at 8032 S. Honore, Brown waived her objection to personal jurisdiction by executing a forbearance agreement with U.S. Bank waiving all her defenses and, further, by not refuting U.S. Bank's forbearance agreement waiver argument on appeal.

¶ 86 Affirmed.