

THIRD DIVISION  
July 18, 2012

No. 1-11-1698

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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AURORA LOAN SERVICES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CH 7956
	)	
PAUL G. BLACK and SARA J. BLACK,	)	Honorable
	)	Franklin Ulyses Valderrama,
Defendants-Appellants.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Murphy and Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: Where plaintiff made eight unsuccessful attempts at personal service on defendants, service by publication in the Chicago Daily Law Bulletin with a copy of that notice mailed to defendants at the subject property's address constituted sufficient service of process to vest the circuit court with jurisdiction over defendants; therefore, the circuit court's denial of defendant's motion to vacate the judgment of foreclosure and order of sale is affirmed.

¶ 2 In this mortgage foreclosure action, defendants, Paul and Sara Black, appeal from an order of the circuit court denying their motion to vacate the court's judgment of foreclosure and order of sale of their residential property. On appeal, defendants contend that the court erred in denying their motion to vacate because the judgment of foreclosure was void where the circuit court lacked

personal jurisdiction over defendants because publication in the Chicago Daily Law Bulletin was insufficient service of process. We affirm.

¶ 3 Documents in the record show that in August 2004, defendants obtained a mortgage in the amount of \$333,700 for the residential property located at 513 S. Hi Lusi Avenue in Mount Prospect, within Cook County, Illinois. In February 2009, plaintiff filed a complaint against defendants in the circuit court of Cook County to foreclose on that mortgage. Plaintiff alleged that defendants defaulted on the mortgage in October 2008, and were in arrears in the amount of \$11,042.77. The unpaid principal balance at that time was \$333,621.79.

¶ 4 Special process server Brandon Paris submitted sworn affidavits that he made eight unsuccessful attempts to serve copies of the summons and complaint on the defendants at the residential property. Paris averred that these attempts were made at 9:30 a.m. on February 28, 2009; at 9:45 p.m. on March 1, 2009; at 8 p.m. on March 4, 2009; at 7:45 a.m. on March 5, 2009; at 6:20 a.m. on March 7, 2009; at 8 a.m. on March 9, 2009; at 10 p.m. on March 11, 2009; and at 9:30 a.m. on March 12, 2009. Paris stated that no contact could be made with the defendants at this address, and that their names were not listed on the door bell or mailbox. He explained that there was no evidence that the property was vacant, but that he was unable to verify who was currently residing there. Paris stated that on his first attempt at service, a man was looking out the window of the home at him, but would not answer the door. He further stated that during his evening attempts, lights were on inside the home and a car was parked on the driveway.

¶ 5 On March 13, 2009, special process server Hasani Stovall submitted sworn affidavits that after an investigation, he was unable to locate the defendants and unable to serve them at the subject address. Stovall averred that investigators attempted to locate defendants by searching public, online and confidential databases, and calling directory assistance. He further stated that various data resources were searched, including the social security death index, property tax rolls and sales

information, voter records, the "DMV," deed transfers and real estate ownership, active U.S. military personnel, professional licenses, significant shareholders, trademarks, service marks and UCC filings.

¶ 6 Plaintiff then served defendants by way of a notice published in the Chicago Daily Law Bulletin on March 18, 2009, March 25, 2009, and April 1, 2009. The record contains a certification from the clerk of the circuit court that on March 20, 2009, she mailed separate copies of the published notice to each of the defendants at the residential property's address.

¶ 7 In September 2009, plaintiff filed a motion for a default order to be entered against defendants, noting that the court obtained jurisdiction over them by means of publication. The motion stated that defendants had not filed an appearance, answer or motion in the case. Plaintiff simultaneously filed a motion for judgment of foreclosure and order for sale, and a motion to appoint a selling officer. Notice of these motions were sent to defendants at the subject property. In November 2009, plaintiff withdrew these motions. Though not included in the record on appeal, it appears these motions were refiled by plaintiff a few months later. Plaintiff filed an amended certificate of service on March 29, 2010, stating defendants were served by publication in the Chicago Daily Law Bulletin, and that they had not filed any responsive pleadings.

¶ 8 On April 14, 2010, the circuit court entered an order finding defendants in default. The court also entered a judgment of foreclosure and order of sale for the subject property, and an order appointing a selling officer. The judgment of foreclosure indicates that a copy of that order would be mailed to defendants within seven days of entry.

¶ 9 On December 23, 2010, plaintiff filed a motion for an order approving the sale of the property and for possession. Plaintiff attached a certificate and receipt of sale indicating that it had purchased the property at a public auction on December 6, 2010. The record also includes a notice of sale that was mailed to the defendants at the subject property on November 20, 2010. On January

21, 2011, the circuit court entered an order approving the report of sale and for possession.

¶ 10 On March 4, 2011, defendants filed a motion to vacate the default order and the orders for sale and possession of the property pursuant to section 2-1401 of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/2-1401 (West 2010). Defendants argued that service of the summons was never effectuated upon them, and therefore, the court lacked personal jurisdiction over them and the subject property. On March 9, 2011, the circuit court struck defendants' motion due to improper notice to plaintiff's counsel as required by section 2-1401. On March 14, 2011, defendants filed their second motion to vacate the orders for default, sale and possession, again arguing that the circuit court lacked personal jurisdiction over them and the property. Defendants claimed they first learned of the default judgment on March 3, 2011. The circuit court struck defendants' second motion with leave to refile due to improper notice to plaintiff.

¶ 11 On March 29, 2011, plaintiff moved for leave to file an additional appearance for other counsel to handle the eviction and submit the possession order to the sheriff. On April 7, 2011, the circuit court granted plaintiff's motion and struck defendants' third motion to vacate the default order, again due to improper notice to plaintiff.

¶ 12 Defendants then filed their fourth motion to vacate the orders for default, possession and sale of the property contending the judgment was void and violated their constitutional right to due process. Defendants argued they were never served with the summons and never subjected themselves to the court's jurisdiction. Defendants claimed that publication in the Daily Law Bulletin was not reasonably calculated to provide them with notice, and therefore, the circuit court lacked personal jurisdiction over them and the subject property. Attached to the motion were affidavits from each of the defendants stating that they were never served with the summons or complaint, they are not lawyers and do not subscribe to the Daily Law Bulletin, and they first learned of the foreclosure on their home on March 3, 2011, when they received a notice from a law firm seeking

to evict them from the property.

¶ 13 On May 25, 2011, the circuit court entered a memorandum opinion and order denying defendants' motion to vacate. The court found that, in the context of real property, service of process by publication is authorized under section 2-206 of the Code (735 ILCS 5/2-206 (West 2010)). The court noted that the statute requires plaintiff to make due inquiry and act with due diligence in locating the defendant, and if defendant cannot be found, then service by publication is permitted. The court stated that, in this case, defendants did not claim that plaintiff failed to exercise due inquiry or due diligence, but instead, argued that plaintiff's use of the Daily Law Bulletin for publication was improper because use of that particular publication was not an attempt calculated to provide defendants with notice as they are not lawyers. The court found that plaintiff presented evidence that it attempted to serve defendants at the property no less than eight times, and it was only after these unsuccessful attempts and a search of public records that plaintiff resorted to service by publication. The court further found that the plain language of section 2-206 does not require publication in a newspaper reasonably calculated to provide notice to a party in a foreclosure case. Instead, the statute requires publication in "some newspaper in the county in which the action is pending," and plaintiff satisfied that requirement in this case. The court additionally noted that defendants did not address section 2-206 in their motion to vacate, much less challenge its constitutionality.

¶ 14 On appeal, defendants contend that the circuit court erred in denying their motion to vacate because the judgment of foreclosure was void where the court lacked personal jurisdiction over defendants because publication in the Chicago Daily Law Bulletin was insufficient service of process. Defendants argue that the service method used here was not reasonably calculated to provide them with actual notice, and therefore, it failed to meet the constitutional threshold for due process. Defendants disagree with the circuit court's reference to the plain language of section 2-206

to determine whether the service by publication in this case met constitutional muster for due process. Defendants assert that, to the extent the circuit court interpreted section 2-206 as authorizing service in any publication in Cook County, this court should declare the statute unconstitutional as applied to them because it does not comport with due process standards established by the Illinois and United States Supreme Courts.

¶ 15 Plaintiff first contends that this court should strike defendants' brief and dismiss this appeal for violating Supreme Court Rule 341 (eff. July 1, 2008) and Rule 342 (eff. Jan. 1, 2005). Plaintiff asserts that defendants' brief improperly includes alleged facts that are not in the record, and includes impermissible argument and commentary in the facts. Plaintiff further argues that defendants did not provide any copies of their brief to plaintiff's counsel as required by Rule 341(e), causing counsel to obtain a copy of the brief from our court clerk well after it was filed and at counsel's expense. Plaintiff also notes that defendants have failed to include an appendix.

¶ 16 We observe that defendants' brief fails to conform with many of the requirements delineated in Rules 341 and 342, as noted above by plaintiff. Based upon defendants' noncompliance with these rules, this court has the authority to dismiss this appeal. *LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 876 (2000). We decline, however, to impose such a harsh sanction here.

¶ 17 Plaintiff next contends that defendants forfeited their argument that section 2-206 is unconstitutional because they failed to notify the Illinois Attorney General that they were challenging the constitutionality of a state statute as required by Supreme Court Rule 19 (eff. Sept. 1, 2006). We agree.

¶ 18 Pursuant to Rule 19, in an action where the State is not already a party, a litigant challenging the constitutionality of a state statute must notify the Illinois Attorney General to allow the Attorney General an opportunity to enter an appearance and represent the interests of the State in the action.

Ill. S. Ct. R. 19; *In re Marriage of Vailas*, 406 Ill. App. 3d 32, 42 (2010). "Failure to comply with Rule 19 results in forfeiture of the issue." *Vailas*, 406 Ill. App. 3d at 42.

¶ 19 Moreover, it has long been held that issues not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Wilkins v. Williams*, 2012 IL App (1st) 101805, ¶ 18, (citing *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994)). In this case, the circuit court expressly noted in its order that defendants did not address section 2-206 in their motion to vacate, much less challenge its constitutionality. Here, defendants failed to both raise the issue before the circuit court, and failed to notify the Attorney General of their constitutional challenge claiming section 2-206 violates due process. Accordingly, we find they have forfeited their constitutional challenge to section 2-206 before this court.

¶ 20 Alternatively, plaintiff argues that it complied with the requirements of section 2-206. Plaintiff argues that it made extensive efforts to serve the defendants personally, but after eight unsuccessful attempts, was forced to resort to service by publication. Plaintiff further argues that defendants received actual notice of the foreclosure action when the clerk of the circuit court mailed a copy of the published notice to each of them at the subject address.

¶ 21 The circuit court's decision denying a motion to vacate is reviewed for an abuse of discretion. *Standard Bank & Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 8. An abuse of discretion will be found where the circuit court acted arbitrarily without conscientious judgment, or where its decision ignores principles of law and exceeds the bounds of reason, resulting in substantial injustice. *Madonia*, 2011 IL App (1st) 103516, ¶ 8. It is the movant's burden to establish sufficient grounds for vacating the judgment. *Madonia*, 2011 IL App (1st) 103516, ¶ 8.

¶ 22 Personal jurisdiction acquired by publication is only allowed in limited cases where personal service could not be achieved, and then, only after strict compliance with statutory requirements. *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 926-27 (1978). Pursuant to

section 2-206 of the Code, service by publication is allowed in actions involving property. *First Bank & Trust Co. of O'Fallon v. King*, 311 Ill. App. 3d 1053, 1056 (2000). In order to invoke service by publication, plaintiff must file an affidavit demonstrating that it could not locate the defendant after "due inquiry," and that it acted with due diligence in attempting to ascertain the defendant's place of residence. 735 ILCS 5/2-206(a) (West 2008); *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476 (2006). The statute further requires that "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). In addition, within 10 days of the first publication of the notice, the clerk must mail a copy of the notice to each defendant whose place of residence is stated in the plaintiff's affidavit. 735 ILCS 5/2-206(a) (West 2008).

¶ 23 In this case, the record shows that plaintiff filed an affidavit averring that special process server Brandon Paris made eight unsuccessful attempts at personal service on the defendants at the residential property. The affidavit shows that Paris made these attempts over two weeks, from February 28, 2009, through March 12, 2009, and at various times throughout the day ranging from 6:20 a.m. to 10 p.m. Paris stated that during his first attempt, a man looked out the window at him, but would not answer the door. During Paris' evening attempts, there were lights on inside the home and a car parked on the driveway. Plaintiff also filed affidavits from special process server Hasani Stovall who stated that investigators could not locate the defendants after searching numerous and various data resources detailed in the affidavits. We find that these affidavits sufficiently demonstrated that plaintiff acted with due diligence and made due inquiry in its unsuccessful attempt to locate defendants to effectuate personal service upon them.

¶ 24 The record further reveals that it was only after these failed attempts and investigation that plaintiff resorted to service by publication. Plaintiff published a notice in the Chicago Daily Law Bulletin on three dates at one-week intervals. The Law Bulletin is a newspaper published in Cook

County, Illinois, which is the same county in which the action was pending and the property was located. Consequently, this publication meets the qualification specified in the statute. Section 2-206 does not require the publication to be one that would provide the defendants with actual notice. The fact that defendants are not lawyers and do not subscribe to the Law Bulletin is of no import. In fact, even if the notice had been published in a newspaper of general circulation, there is no guarantee that defendants would be subscribers to that publication.

¶ 25 In addition, in compliance with the statute, the record contains a certification from the clerk of the circuit court confirming that she mailed separate copies of the published notice to each of the defendants at the residential property's address two days after the notice was first published. We therefore find that the record demonstrates that plaintiff fully complied with the requirements delineated in section 2-206 to effectuate service by publication upon the defendants. Accordingly, we conclude that the service by publication in this case constituted sufficient service of process to invoke the court's jurisdiction over defendants. Thus, we find no abuse of discretion by the circuit court in denying defendant's motion to vacate the judgment of foreclosure and order of sale of the residential property.

¶ 26 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.