2013 IL App (1st) 112141, 113433 & 122307-U

FOURTH DIVISION
May 2, 2013

Nos. 1-11-2141, 1-11-3433 and 1-12-2307 (consolidated)

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CH 31889
	)	
MONICA CANNON,	)	The Honorable
	)	Jesse Reyes,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

HELD: Trial court's denial of defendant's motion to quash service was properly entered where defendant's affidavit did not sufficiently challenge abode service; accordingly, trial court had personal jurisdiction over defendant and its default judgment and order of foreclosure and sale were not void and must stand.

¶ 1 Plaintiff-appellee Wells Fargo Bank, N.A. (plaintiff) obtained a default judgment and an order of foreclosure and sale from the trial court regarding certain property belonging to

defendant-appellant Monica Cannon (defendant). Following this, defendant filed motions to quash service of process and dismiss the proceedings due to lack of personal jurisdiction. The trial court denied these motions and eventually confirmed the sale of the property, which was sold to plaintiff. Defendant appeals, *pro se*, contending that the trial court erred in denying her motions to quash and dismiss since defects in service prohibited any personal jurisdiction over her and, thus, the default judgment and order of foreclosure and sale were void. She asks that we "overrule and reverse" the trial court's orders. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On November 2, 2007, plaintiff filed for foreclosure on property belonging to defendant. Included in the record on appeal are both an order obtained by plaintiff from the trial court appointing ProVest, LLC, as its special process server, and a notarized affidavit from special process server Ed Tomaszek of ProVest, LLC. In his affidavit, Tomaszek attests that he served defendant on November 4, 2007, with the summons and complaint in this matter via substitute service on her brother, Steve Cannon, a resident of defendant's usual abode at 15913 Evans Avenue in South Holland, Illinois. The return of service describes Cannon as a black male, approximately 31-35 years old, and states that Tomaszek informed Cannon of the contents of the service and that Tomaszek mailed a copy of it in a sealed envelope with postage paid and addressed to defendant at her usual abode. Defendant never appeared or answered the complaint. In February 2008, the trial court entered a default judgment against defendant, as well as an order of foreclosure and sale of the property.

¶ 4 On July 11, 2011,[1] defendant filed a *pro se* motion to quash service of process, entitled "Motion in Objection to Jurisdiction and to Dismiss the Entire Proceeding, Vacate Default Judgment of Foreclosure with Prejudice due to Insuffiency [*sic*] of Process/Insurfficency [*sic*] of Service of Process and for Defective Service." In the motion, defendant claimed that she was never served with the summons or complaint in the matter and, thus, that any order entered by the trial court is void and the entire cause should be dismissed. To this motion, defendant attached a "Counter Affidavit," wherein she stated that she read and knew the contents of her motion, that this affidavit was intended to "contradict" Tomaszek's affidavit, and that she "was never served, [and] there was no service of process." Defendant noticed this motion for hearing before the trial court for July 20, 2011. However, on this date, defendant did not appear. The trial court struck her motion.

¶ 5 On July 25, 2011, defendant filed a second motion to quash service. The content of this motion, entitled "Motion to Dismiss for Lack of Jurisdiction due to Insufficiency of Service of Process," was nearly identical to that of her original *pro se* motion, but this time, the motion was filed on her behalf by her attorney and no affidavit was attached. This second motion to quash was noticed for September 8, 2011. However, before that hearing date, on July 29, 2011, defendant filed a third motion to quash service. This third motion to quash was, again, virtually

[1]There is a considerable time lapse between the trial court's February 2008 entry of default judgment and order of foreclosure and sale and defendant's July 2011 filing of her *pro se* motion to quash. The trial court had set a sale date for the property in 2008. However, for reasons completely unrelated to this appeal, the cause was dismissed with leave to reinstate in 2009. Upon plaintiff's motion, the cause was reinstated in November 2009, and defendant subsequently filed her *pro se* motion to quash service in July 2011.

identical to the first and second motions, all of which argued that the cause should be dismissed because defendant had never been properly served. Like the first motion, it was entitled "Defendant Combined Motion in Objection to Jurisdiction and to Dismiss the Entire Proceeding, Vacate Default Judgment of Foreclosure with Prejudice due to Insuffiency [*sic*] of Process/Insurfficency [*sic*] of Service of Process and for Defective Service," and, like the second motion, it was filed on defendant's behalf by her attorney and no affidavit was attached. Defendant noticed this third motion to quash for the same date as she had noticed her second motion to quash: September 8, 2011.

¶ 6 On July 29, 2011, in addition to filing her third motion to quash and before any hearing on her pending motions had taken place, defendant filed an emergency motion to stay sale of the property for 120 days. Defendant appeared in court with her attorney for a hearing on this emergency motion on that date. The trial court denied her motion to stay sale and did not address any of her motions to quash service at that time.

¶ 7 On September 8, 2011, the scheduled date on which she had noticed her second and third motions to quash service, defendant failed to appear in court. Accordingly, on that date, the trial court proceeded with the scheduled hearing and denied defendant's motions. Sale of defendant's property proceeded and, on November 1, 2011, the trial court, upon plaintiff's motion, confirmed its sale.

¶ 8 ANALYSIS

¶ 9 Defendant's primary contention on appeal is that the trial court never had personal jurisdiction over her because plaintiff failed to properly serve her in this matter and, thus, that the

trial court's default judgment and its order of foreclosure and sale were void *ab initio*. Asserting a *de novo* standard of review, she claims that, because she had objected to service since the outset of the cause, the trial court should have held an evidentiary hearing regarding the validity of service and should not have denied her motions to quash. She further asserts that process server Tomaszek's affidavit was "fraudulent" and that he "fraudulently under Oath testif[ied] *** that he served defendant with proper service while he didn't."

¶ 10 As a threshold matter, we must clarify the appropriate standard of review to be applied in this cause. We have already noted that defendant argues for a *de novo* standard, as the trial court here did not conduct an evidentiary hearing of any sort to discuss the propriety of service. Plaintiff, however, focuses on the trial court's "broad discretion" to choose to proceed or continue the matter before it and asserts an abuse of discretion standard is proper since defendant failed to appear in court as scheduled. Plaintiff is correct that the trial court's decision to proceed on September 8, 2011, and to hear and decide defendant's scheduled motions, which she herself had noticed for that day, was well within its discretion to do. See *J.S.A. v. M.H.*, 224 Ill. 2d 182, 196 (2007) (trial court has inherent authority to control own docket and may do what is needed to prevent undue delays in the progression of cases); accord *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 65; see also *Fiallo v. Lee*, 356 Ill. App. 3d 649, 656 (2005) (party has duty to follow progression of own case).

¶ 11 However, defendant's assertion of error on appeal is not that the trial court proceeded on that date without her, but that its ultimate decision (*i.e.*, its denial of her motions to quash) and the manner in which it reached that decision (*i.e.*, without first conducting an evidentiary

hearing), were improper in light of the circumstances. The standard of review with respect to a motion challenging jurisdiction depends on what proceedings were had below. Where the trial court conducted an evidentiary hearing as to jurisdiction, its determination is reviewed pursuant to an abuse of discretion standard. See *Household Finance Corp., III v. Volpert*, 227 Ill. App. 3d 453, 456 (1992). But, when a trial court determines jurisdiction solely on the basis of documentary evidence, a *de novo* standard of review is applied. See *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31 (2006). See also *People v. Vincent*, 226 Ill. 2d 1, 17-18 (2007) (explaining the shift from abuse of discretion standard to *de novo* standard in such circumstances). In the instant cause, the trial court here denied defendant's motions to quash based on the documentary evidence before it: defendant's motions and her "Counter Affidavit," and process server Tomaszek's affidavit and the return of service. The court did not hold any sort of evidentiary hearing but, rather, ruled based on the pleadings alone. Accordingly, *de novo* review should be applied. See *Nasolo*, 364 Ill. App. 3d at 31; accord *Vincent*, 226 Ill. 2d at 18.

¶ 12 Nevertheless, while defendant is correct regarding the applicable standard of review, this is where our agreement with her ends. Instead, based on the record before us, we find that plaintiff properly served defendant and, thus, that the trial court did have personal jurisdiction over her and its default judgment and order of foreclosure and sale were properly entered against her in the instant cause.

¶ 13 Plaintiff served defendant here through abode service via her brother, Steve Cannon. Abode service, also referred to as substitute service, does not carry the same presumption of

validity as, for example, personal service, since it is not the defendant herself being served, but someone in her stead living at her abode. Compare *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986) (discussing requirements of abode service), with *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 838 (1992) (discussing requirements of personal service). Thus, when service is perform via the defendant's abode, the return or affidavit of service must affirmatively state that a copy of the summons was left at the usual abode with a family member over the age of 13, that this family member was informed of the content of the summons, and that the process server sent a copy of the summons in a sealed envelope with postage fully paid and addressed to the defendant at her usual place of abode. See *Thill*, 113 Ill. 2d at 310. The failure to recite any of these renders the abode service defective. See *Thill*, 113 Ill. 2d at 310 (because the in-person service of a party is, essentially, being substituted by service to another on the party's behalf, strict compliance with each of these requirements is mandatory).

¶ 14 Moreover, with respect to abode service, while the certificate of the process server that he sent the copy of summons is evidence that he did so, this may be overcome by contradictory affidavit. See *Thill*, 113 Ill. 2d at 312. Therefore, where the return of abode service is challenged by affidavit, and there is no counteraffidavit to address this challenge, the return of service itself is not enough evidence; instead, the affidavit must be taken as true and the service of summons must be quashed. See *Thill*, 113 Ill. 2d at 312; see also *Clinton Co. v. Eggleston*, 78 Ill. App. 3d 552, 555-57 (1979) (quashing substituted service where the defendant's affidavit attacked this service as improper for various reasons and no counteraffidavit was presented to dispute the defendant's challenge); accord *Harris v. American Legion John T. Shelton Post No.*

838, 12 Ill App. 3d 235, 237 (1973).

¶ 15 In the instant cause, the return of service and affidavit contained in the record demonstrates that, when serving defendant with abode service via Steve Cannon, process server Tomaszek recited the three mandatory requirements of abode service. That is, he left a copy of the summons and complaint at 15913 Evans Avenue in South Holland, Illinois, defendant's usual place of abode, with her brother, Steve Cannon, who resides there and who Tomaszek described as a black male, approximately 31 to 35 years old. The return and affidavit further state that Tomaszek informed Steve Cannon of the contents of the summons, and that Tomaszek mailed a copy of the summons in a sealed envelope with postage paid and addressed to defendant at her usual place of abode at that address.

¶ 16 As we noted, under abode service, defendant had an opportunity to attack Tomaszek's service as improper with an affidavit. See *Thill*, 113 Ill. 2d at 312. Defendant did submit such an affidavit; she attached it to her original *pro se* motion to quash service filed on July 11, 2011, entitled "Motion in Objection to Jurisdiction and to Dismiss the Entire Proceeding, Vacate Default Judgment of Foreclosure with Prejudice due to Insuffiency [*sic*] of Process/Insurfficency [*sic*] of Service of Process and for Defective Service." Again, this affidavit, which defendant labeled "Counter Affidavit," was never attached to any of defendant's subsequent motions to quash as filed by her attorney. Upon examination of defendant's affidavit, however, any court would be hard-pressed to say that it sufficiently attacked the propriety of the abode service that occurred here with any credible merit. Instead, her affidavit is extremely brief. It states only that she filed it "to contradict the private processor server affidavit" and that she "was never served."

Defendant never affirmatively rebuts any of the three elements of abode service that the return verified. For example, she does not rebut that Tomaszek properly left a copy of the summons or complaint at her usual abode with her brother, Steve Cannon, a family member over the age of 13; she does not challenge that Tomaszek properly informed Steve of the content of the summons; and she never denies that Tomaszek sent a copy of the summons in a sealed envelope with postage fully paid and addressed to her at her home. Moreover, there is no affidavit from Steve Cannon to attack plaintiff's abode service as improper, averring, for example, that Tomaszek did not leave a copy of the summons in the instant case at their home, that this was not defendant's usual abode, that he was not her family member or was under the age of 13, that Tomaszek did not inform him of the content of the summons, or that Tomasek did not send a copy of the summons in a sealed envelope with postage fully paid and addressed to defendant at her home. Furthermore, not even defendant's motion to quash itself–to which her affidavit was attached–challenges plaintiff's abode service. Even were we to rely on this, the only references to service defendant makes therein are to repeatedly state, in conclusory terms only, that she "did not receive" service and that she "was not served." The same is true regarding her second and third motions to quash service, as well; nowhere does defendant attack any of the requirements of abode service.

¶ 17 Clearly, defendant's affidavit is simply insufficient to effect any real challenge to Tomaszek's return of abode service. Based on our review of the return, and in light of defendant's failure to provide any challenge to it via at least one substantive and challenging affidavit from the person or persons served, we hold that plaintiff properly served defendant via

abode service and that the trial court's denial of defendant's motions to quash was proper, as well. See *Thill*, 113 Ill. 2d at 310, 312 (where return or affidavit of service affirmatively states the three abode service requirements, and since certificate of process server that he sent copy of summons is evidence that he did so, it is assumed, without contradiction, that abode service was proper); see also *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶¶ 28-29 (process server's return is *prima facie* evidence of proper service within context of substitute service and cannot be set aside based on uncorroborated affidavit of person served but, instead, requires clear and satisfactory evidence challenging service; where the defendant presents no such evidence to challenge the return, the denial of motion to quash service is considered to have been proper). Accordingly, then, the trial court here had personal jurisdiction over defendant and, thus, its default judgment and order of foreclosure and sale regarding her property were correctly entered.

¶ 18 CONCLUSION

¶ 19 For all the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.