2013 IL App (1st) 113558-U

SIXTH DIVISION
April 26, 2013

No. 1-11-3558

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DAVID L. WASHINGTON, Individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. BANK OF AMERICA, N.A., COUNTRYWIDE HOME LOANS, INC., TCF NATIONAL BANK, INDYMAC FEDERAL BANK and other UNKNOWN DEFENDANTS, Defendants (Wells Fargo Bank, N.A,, as trustee for Option One Mortgage Loan Trust 2002-A, Asset-Backed Certificates, Series 2002-A, assignee of Option One Mortgage Corporation and Wells Fargo Bank, N.A., Defendants-Appellees).	Appeal from the Circuit Court of Cook County. No. 10 CH 49776 Honorable LeRoy K. Martin, Jr., Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Dismissal of amended complaint to set aside a void judgment was proper; General Administrative Order providing an alternative procedure for the appointment of a special process server in mortgage foreclosure cases did not conflict with the service of process provisions in the Code of Civil Procedure and did not violate the court's rule-making authority. Because the judgment was not void, *res judicata* barred the plaintiff's collateral attack on the judgment of foreclosure. The plaintiff's appeal did not warrant the imposition of sanctions.

¶ 2 The plaintiff, David L. Washington, filed a complaint in the circuit court of Cook County challenging the validity of judgments entered in mortgage foreclosure actions where the service of process was made pursuant to General Administrative Order 2007-03 (the GAO). The defendants, Wells Fargo Bank, N.A., as trustee for Option One Mortgage Loan Trust 2002-A, Asset-Backed Certificates, Series 2002-A, assignee of Option One Mortgage Corporation, and Wells Fargo Bank, N.A., moved to dismiss the amended complaint. The circuit court granted the motion and dismissed the amended complaint with prejudice.[1] The plaintiff appeals from the dismissal of the amended complaint.

¶ 3 On appeal, the plaintiff contends the circuit court erred when it dismissed the amended complaint and determined that the plaintiff's collateral attack on the judgment of foreclosure was barred by *res judicata*. The defendants contend that the plaintiff's appeal is frivolous and seek

[1]Pursuant to an agreed order, the other named defendants, TCF Bank, Bank of America and Countrywide Home Loans were dismissed with prejudice.

sanctions pursuant to Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994).

¶ 4 The amended complaint alleged the following facts. On December 31, 2002, the plaintiff obtained a mortgage from the defendants to purchase real property. On June 22, 2007, the presiding judge of the chancery division of the circuit court issued the GAO, which permitted attorneys to obtain a standing order for the appointment of a designated special process server in mortgage foreclosure cases. On July 21, 2008, the defendants filed a complaint to foreclose their mortgage on the plaintiff's property. On August 1, 2008, the defendants filed the affidavit of the special process server in which he averred that he had personally served the plaintiff. The defendants did not move to have a special process server appointed after the complaint was filed. Instead, the plaintiff believed that the appointment of a special process server was obtained by the defendants pursuant to the GAO. When the plaintiff did not appear in response to the service of process, the defendants obtained a judgment of foreclosure. Subsequently, the circuit court entered an order confirming the sale of the property to the defendants.

¶ 5 The defendants filed a combined motion under sections 2-615 and 2-619 to dismiss the amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)) (the Code). On November 2, 2011, after hearing arguments on the motion, the circuit court dismissed the amended complaint with prejudice. This appeal followed.

¶ 6 ANALYSIS

¶ 7 I. Standard of Review

¶ 8 This court reviews the dismissal of a complaint pursuant to sections 2-615 and 2-619 *de novo*. See *R&B Kapital Development, LLC v. North Shore Community Bank & Trust Co.*, 358

Ill. App. 3d 912 (2005) (section 2-615 dismissal); *Schrager v. Bailey*, 2012 IL App (1st) 111943 (section 2-619 dismissal).

¶ 9 II. The GAO

¶ 10 The GAO provides in pertinent part as follows:

"For many years, service of summons has been accomplished through the appointment of special process servers. Due to the insufficient resources in personnel, equipment, and technological capabilities, the Sheriff of Cook County has been unable to effectuate service of process promptly and accurately in mortgage foreclosure cases."

As a result, in each mortgage foreclosure case filed in the Chancery Division, where the summons was not placed with the Sheriff, a separate Motion for the Appointment of a special process server has been filed and a separate Order Appointing Special Process Server has been signed by the judge to whose calendar the case is assigned. These documents must be stamped, coded, and entered into the Clerk's electronic docket (data entry). The Orders must also be microfilmed.

In the year 2006, mortgage foreclosure filings in the Circuit Court of Cook County increased from 16,494 (2005 filings) to 22,248. Based upon filings for the first five (5) months of the year 2007, it is estimated that mortgage foreclosure filings for the year 2007 will be in excess of 30,000 cases.

Because of the increase in mortgage filings and insufficient resources allocated to the Chancery Division's Clerk's Office, the Clerk of the Court has been unable to process promptly Motions for the Appointment of Special Process Servers and Orders Appointing

> Special Process Servers. *** Because of the expiration of summonses, these processing delays have created significant problems for plaintiffs' attorneys and their clients. Attempts over the past year to remedy the delays in the Clerk's Office have proved unsuccessful.
>
> IT IS HEREBY ORDERED THAT:
>
> 1. Effective immediately, each law firm handling mortgage foreclosures cases in the Chancery Division may by Motion seek a Standing Order for the appointment of designated special process servers. Each Order will have a three (3) month or quarterly duration ***.
>
> 2. Each Motion and Order for a standing special process server order should bear the heading: 'In the Matter of the Application of the Law Firm of [INSERT NAME] for a Standing Order for the Appointment of a Special Process Server for the Quarter Ending [INSERT DATE]." A law firm may designate one or more individuals or companies to serve as special process servers for each quarter of a year on all cases filed by that firm."

The GAO further provided that the original of the motion and standing order would be on file in the chancery clerk's office, and a copy would be kept on file in the office of the supervising judge of the mortgage foreclosure/mechanics lien section.

III. Discussion

¶ 11 A judgment which is obtained without proper service of process is void. *Deutsche Bank National Trust Co. v. Akbulut*, 2012 Ill App (1st) 112978 ¶ 4. The plaintiff contends that the chancery court lacked the power to enact the GAO. Without the power to enact the GAO,

service of process in accordance with the GAO was improper. Therefore, the judgments in those mortgage foreclosure cases are void.

¶ 12 This court has held the chancery court had the authority to enact the GAO. In *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, we determined that Illinois Supreme Court Rule 21(c) (eff. Dec. 1, 2008) "authorized the presiding judge of the chancery division to enter general orders in the exercise of her general administrative authority." *Dzis*, 2011 IL App (1st) 102812, ¶ 20. This court further found that the GAO did not conflict with section 2-202 of the Code. We rejected the argument that the court lacked authority to alter statutory provisions governing the service of process because the Code determined substantive rights. Citing our supreme court's pronouncement that the service of process was a matter of procedure, we held that "courts have the power to adopt procedural rules governing service of process, and that the court's rules prevail over conflicting statutes." *Dzis*, 2011 IL App (1st) 102812, ¶ 27; see *In re Pronger*, 118 Ill. 2d 512, 524 (1987). We followed the analysis and holding in *Dzis* in *Onewest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187.

¶ 13 The plaintiff asserts that the decisions in *Markowicz* and *Dzis* did not consider the arguments he raises on appeal. We do not find his arguments persuasive.

¶ 14 A. *Statutory Nature of Foreclosure Actions*

¶ 15 The plaintiff points out that neither *Markowicz* nor *Dzis* considered the statutory nature of a mortgage foreclosure action. Where jurisdiction is conferred only by statute, a court of equity has no inherent power and must exercise its authority within the limits of the jurisdiction conferred by the statute. *Strukoff v. Strukoff*, 76 Ill. 2d 53, 60 (1979). The Illinois Mortgage

Foreclosure Law requires that the manner of the service of pleadings be in accordance with the provisions of the Code, other applicable statutes and the applicable supreme court rules. 735 ILCS 5/15-1107(a) (West 2010). The plaintiff maintains that where the method of service of process in a mortgage foreclosure action does not comply with the service of process rules in the Code, the judgment is void for lack of jurisdiction.

¶ 16 In both *Markowicz* and *Dzis*, this court found that the GAO did not conflict with the service of process requirements in section 2-202 of the Code. See *Dzis*, 2011 IL App (1st) 102812, ¶¶ 22-23 (section 2-202 does not require the sheriff to attempt service first or be disqualified); *Markowicz*, 2012 IL App (1st) 111187, ¶¶ 21-22 ("[t]he GAO does not do away with the requirements for who can serve process. It merely sets forth an alternative procedure for appointment of a special process server, who must naturally meet the requirements of section 2-202."). The plaintiff argues that the GAO conflicts with section 2-201of the Code because it permits a motion for a special process server to be brought prior to the commencement of the action. See 735 ILCS 5/2-201 (West 2010). While that argument was not addressed in *Dzis*, this court considered and rejected it in *Markowicz*, stating as follows:

> "Nothing in the GAO circumvents the requirements of section 2-201. An order appointing a standing special process server obtained pursuant to the GAO is not an order to serve process. The GAO is solely addressed to the appointment of persons (or agencies) who can serve process in foreclosure cases handled by a particular law firm during a finite three-month period. The GAO does not address the timing of service of process. Such timing must, therefore, still follow the statutory requirements set forth in

section 2-201." *Markowicz*, 2012 IL App (1st) 111187, ¶ 25.

In other words, the action must still be filed before service of process is attempted.

¶ 17 The plaintiff points out that neither *Markowicz* nor *Dzis* addressed the holding in *Strukoff*. In *Strukoff*, the supreme court held that since divorce was a statutory action, the trial court had no authority to waive the mandatory 48-hour waiting period between the hearing on grounds and the hearing on property. *Strukoff*, 76 Ill. 2d at 60-62. While the waiting period in *Strukoff* could not be waived, compliance with the GAO was not mandatory. Moreover, the GAO was consistent with the Code's procedures. Therefore, the issuance of the GAO was within the court's authority under the Mortgage Foreclosure Law.

¶ 18 B. *The GAO Violated the Court's Rule-Making Authority*

¶ 19 The plaintiff next contends that the enactment of the GAO violated the court's rule-making authority under Illinois Supreme Court Rule 21(a), section 1-104(a) of the Code and Cook County Circuit Court Rule 0.1. We disagree.

¶ 20 Rule 21(a) provides in pertinent part as follows:

> "A majority of the circuit judges in each circuit may adopt rules governing civil and criminal cases which are consistent with these [supreme court] rules and the statutes of the State, and which, so far as practicable, shall be uniform throughout the State." Ill. S. Ct. R. 21(a) (eff. Dec. 1, 2008).

Section 1-104(a) of the Code provides in pertinent part as follows:

> "The Supreme Court of this State has the power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to, but not

> inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in small claims actions, including the service of process in connection therewith." 735 ILCS 5/1-104(a) (b) (West 2010).

Circuit Court Rule 0.1. provides in pertinent part as follows:

> "These rules are promulgated pursuant to the Code of Civil Procedure Section 1-104(b) providing that the Circuit Court may make rules regulating their dockets, calendars, and business and Supreme Court Rule 21(a) providing that a majority of the circuit judges in each circuit may adopt rules governing civil and criminal cases consistent with rules and statutes and which, so far as practicable, shall be uniform throughout the state." Cook Co. Cir. Ct. R. 01 (eff. Dec. 15, 1982).

¶ 21 In *Markowicz*, this court held that the GAO did not conflict with Rule 21(a). We explained that the GAO was not "a typical, mandatory rule" but "a general order, presented as an additional and entirely optional method for obtaining appointment of a special process server. The chief judge has the authority to issue general orders pursuant to Rule 21(c), and the presiding judge, as his or her delegate, had the authority to do the same." *Markowicz*, 2012 IL App (1st) 111187, ¶ 18. The plaintiff's argument that the GAO violates the uniformity of rules requirement is belied by the qualifying language in both Rule 21(a) and Circuit Court Rule 0.1, namely, that uniformity is governed by practical considerations. The chancery court's decision to issue the GAO was based on practical considerations: the widespread use of special process servers in

mortgage foreclosure cases, the limited resources allocated to the chancery clerk's office and the increasing number of mortgage foreclosure case filings in Cook County.

¶ 22 The plaintiff points out neither *Markowicz* nor *Dzis* considered that the supreme court has authority to make rules governing the service of process only in small claims actions. 735 ILCS 5/1-104(a) (West 2010). That provision has no bearing on this issue because the GAO only deals with an optional procedure for the appointment of a special process server, not the service of process on a party.

¶ 23 We conclude that the issuance of the GAO does not violate the rule-making authority of the court.

¶ 24 C. *The Decisions in Markowicz* and *Dzis Are Distinguishable, Are Not Binding On And Should Not Be Followed By This Court*

¶ 25 The plaintiff maintains that *Markowicz* and *Dzis* are factually distinguishable from the present case because a motion to appoint a special process server in those cases was made after the case was filed. In both cases, the attorneys obtained a standing order for the appointment of special process servers to serve process during a specified three-month period. Along with filing the foreclosure complaint, the attorneys filed a motion for the appointment of a special process server; attached to the motion was a copy of the standing order. See *Markowicz*, 2012 IL App (1st) 111187, ¶ 3; *Dzis*, 2011 IL App (1st) 102812, ¶ 3.

¶ 26 In the amended complaint, the plaintiff alleged, on information and belief, that the appointment of a special process server was obtained under the GAO rather then by a motion after the case had been filed, in contrast to the procedure filed by the attorneys in *Markowicz* and

Dzis. We have previously rejected the plaintiff's argument that the GAO circumvents section 2-201 of the Code. *Markowicz*, 2012 IL App (1st) 111187, ¶ 25. Moreover, once a standing order for the appointment of a special process server has been entered, nothing in the GAO requires a party or his attorney to file a second motion for the appointment of a special process server after the case was filed. See *Markowicz*, 2012 IL App (1st) 111187, ¶ 4 ("Prior to entry of the GAO, a law firm would have had to file a separate motion for appointment of a special process server and obtain an order appointing such in each mortgage foreclosure it handled.").

¶ 27 Next, the plaintiff points out that, unlike the present case, in *Markowicz* and *Dzis*, service of process was by publication and not pursuant to the GAO. The plaintiff maintains that the statements as to the validity of the GAO in those cases were only *dicta*.

¶ 28 Illinois permits service by publication only when the plaintiff presents an affidavit showing that process cannot be served on the defendant. It should be permitted only where the plaintiff shows that proper service of process on the defendant has been attempted. *Dzis*, 2011 IL App (1st) 102812, ¶ 18. In both *Markowicz* and *Dzis*, the ultimate service was by publication. In both cases, the initial attempts to serve the defendants were by special process servers appointed pursuant to the GAO. Because service under the GAO had to be valid in order to permit service by publication, the validity of the GAO itself had to be addressed. See *Dzis*, 2011 IL App (1st) 102812, ¶ 18. This court's statements as to the validity of the GAO clearly were not *dicta*.

¶ 29 Next, the plaintiff maintains that the decisions in *Markowicz* and *Diaz* should not be followed because they relied on the rationale for the issuance of the GAO, which had no basis in

fact. In support of his argument, the plaintiff relies on the affidavit of Kevin Connelly, attached as an exhibit to his amended complaint. According to his affidavit, Officer Connelly served as the first assistant chief deputy of court services for the Sheriff of Cook County. Officer Connelly averred that as part of his duties, he supervised the service of process in cases filed in Cook County and was "personally familiar with all of the personnel, equipment and of all the technological capabilities within my department and specifically within the section of my department that serves summons within Cook County."

¶ 30 Officer Connelly further averred that he had read the GAO and that neither he nor the employees that reported to him had ever had contact with the chief judge of the Chancery Division regarding the statement in the GAO referencing the problems in the sheriff's office relating to service of process. He averred that there had never been an audit or study or investigation to determine the capability of the sheriff's ability to serve process in mortgage foreclosure cases and that there was no basis for the chief judge of the Chancery division to make that statement in the GAO.

¶ 31 Officer Connelly's affidavit fails to include a time frame for his duties with the Sheriff's office. According to the GAO, special process servers had been used to effect service in mortgage foreclosure cases for many years. The references to the capabilities of the sheriff's office to serve process merely explain the widespread use of special process servers in mortgage foreclosure actions. It was the increase in the number of mortgage foreclosures and the limited resources of the chancery division that caused delays in processing motions and orders for the appointment of special process servers in these actions that prompted the adoption of the GAO in

2007. Nothing in Officer Connelly's affidavit challenges or even addresses the capabilities of the chancery clerk's office to handle the ever increasing number of mortgage foreclosure actions. Therefore, we reject the plaintiff's argument that the reasons for the adoption of the GAO had no basis in fact.

¶ 32 Finally, the plaintiff points out that a reviewing court is not bound by the decisions made by different panels even in the same district. See *Der Hooning v. Board of Trustees*, 2012 IL App (1st) 111531, § 8. The plaintiff's arguments fail to convince us that *Markowicz* and *Dzis* were wrongly decided. We see no reason to deviate from the analysis and conclusion reached in those cases.

¶ 33 For all of the foregoing reasons, we conclude that the dismissal of the plaintiff's amended complaint to set aside a void judgment was proper. Since the judgment of foreclosure was not void, we need not address the plaintiff's argument that the doctrine of *res judicata* does not bar his collateral attack on a void judgment.

¶ 34 IV. Sanctions

¶ 35 Pursuant to Rule 375, the defendants request that this court impose sanctions on the plaintiff for filing a frivolous appeal. Rule 375(b) provides that a reviewing court may impose an appropriate sanction upon a party or the party's attorney for filing a frivolous appeal. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). The reviewing court applies an objective standard to determine whether an appeal is frivolous; "the appeal is considered frivolous if it would not have been brought in good faith by a 'reasonable, prudent attorney.' " *Thompson v. Buncik*, 2011 IL App (2d) 100589 ¶ 21 (quoting *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App.

3d 304, 312 (1990)). "Sanctions for taking a frivolous appeal are penal in nature and should only be imposed in the most egregious of circumstances." *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 705 (1998).

¶ 36 The imposition of Rule 375(b) sanctions is left entirely to the discretion of the reviewing court. *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011). Some of the plaintiff's arguments meet Rule 357(b)'s description of a frivolous appeal (not reasonably well grounded in fact, not warranted by existing law or a good-faith argument for extending, modifying or reversing existing law). Nonetheless, we do not find the circumstances in this case to be so egregious as to warrant sanctions, and in the exercise of our discretion, we decline to impose them. See *Kheirkhahvash*, 407 Ill. App. 3d at 182.

¶ 37 CONCLUSION

¶ 38 The order of the circuit court dismissing the plaintiff's amended complaint is affirmed.

¶ 39 Affirmed.