

THIRD DIVISION
JUNE 25, 2014

No. 1-12-0203

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|-----------------------|
| BRIDGET ESSI, individually and d/b/a |) | Appeal from the |
| BEN & BRIDGE DEVELOPMENTAL |) | Circuit Court of |
| DISABILITY CENTERS, LLC, |) | Cook County. |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | 10 L 014243 |
| v. |) | |
| |) | |
| CHARLES P. FIDUCCIA, |) | The Honorable |
| |) | Edward Washington II, |
| Defendant-Appellee. |) | Judge Presiding. |
| |) | |

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 HELD: The circuit court did not err in granting defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) to vacate a default judgment against him for failure to appear where he was not personally served and abode service was not effected as required by section 2-203(a) of the Illinois Code of Civil Procedure (735 ILCS 5/2-203(a) (West 2010)). At the evidentiary hearing on the petition, defendant testified that the address of

service was his business address and he did not work that day. While the plaintiff filed an affidavit by her counsel averring that he saw defendant with a copy of the summons for this case in another proceeding, that affidavit was insufficient as not based on any personal knowledge regarding service, and plaintiff did not file any other counteraffidavit establishing service or present any testimony by the sheriff's deputy to establish proper service. Thus, the court did not err in granting the 2-1401 petition to vacate the default judgment.

¶ 2

BACKGROUND

¶ 3 This case arises from a dispute between defendant landlord, Charles P. Fiduccia, and the plaintiff tenant, Bridget Essi, regarding eviction. Fiduccia leased Essi a commercial space located at 2998 South Archer Avenue, Chicago, Illinois. Fiduccia filed an eviction action against Essi, case number 09 M1 731733. After unsuccessfully challenging the eviction proceedings, Essi subsequently brought this wrongful eviction action against the landlord, case number 10 L 014243, which proceeded to a default judgment against Fiduccia, but Fiduccia was not personally served. Essi appeals the entry of an order vacating the default judgment against Fiduccia in this case, number 10 L 014243. For clarity, we refer to the prior separate eviction action by Fiduccia (case number 09 M1 731733) as the "*Fiduccia* case," and Essi's subsequent wrongful eviction case that is before us (case number 10 L 014243) as the "*Essi* case."

¶ 4 On December 28, 2009, Fiduccia filed a *pro se* eviction action against Essi for failure to pay rent in case number 09 M1 731733 (*Fiduccia* case). At trial, Essi unsuccessfully maintained that she never received a five-day notice or a summons for the eviction proceeding. An order of possession was entered on February 26, 2012, and was stayed until March 20, 2010.

¶ 5 On December 17, 2010, Essi filed a verified complaint for wrongful eviction, conversion, breach of contract, and fraud, 10 L 014243, which is the subject of this appeal (the *Essi* case).

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According to the sheriff's return of service, Fiduccia was personally served on December 31, 2010 by Sheriff's Deputy D. Loftus, #10489. The address where Fiduccia was allegedly served was 636 Pratt Avenue North, Schaumburg, Illinois, which was Fiduccia's American Family Insurance agency business address, not his home address. Fiduccia had listed his address on the lease as 636 Pratt Avenue North, Schaumburg, Illinois.

¶ 6 On February 24, 2011, Alexander Michalakos, Essi's counsel, filed a motion for default in the *Essi* case. It was heard on March 9, 2011, and the court entered a default order. The court's order stated: "plaintiff will give notice instanter *** to defendants who have appeared, as well as to the parties against whom default has been entered." No appearance was filed on behalf of Fiduccia in the *Essi* case.

¶ 7 On March 21, 2011, the *Essi* case proceeded to prove-up and a judgment was entered in favor of Essi in the amount of \$245,735, plus costs. The default judgment order entered was prepared by plaintiff's counsel and stated the following:

"This matter coming to be heard for prove up of damages, the Defendant having been defaulted on March 9, 2011, all due notice having been given, the Court having jurisdiction and holding an evidentiary hearing, receiving exhibits and hearing testimony the Plaintiff Bridget Essi having been sworn under oath, it is hereby ordered:

Judgment is hereby entered in favor of Plaintiff and against Defendant Charles P. Fiduccia in the total amount of \$245,735.00 plus costs, which includes \$21,471 for equipment, \$188,112 in lost profits, and \$30,000 in punitive damages, plus other damages as determined by the court and itemized in open court."

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¶ 8 There is no report of proceedings in the record that indicates the evidence plaintiff had to support these damages, or how the court arrived at this amount. In fact, there is no evidence in the record that Essi's business, Ben & Bridge Developmental Centers, LLC, ever actually operated at the leased premises.

¶ 9 Fiduccia received a postcard from the Clerk of the Circuit Court on March 28, 2011, notifying him that a default order had been entered against him in the *Essi* case on March 9, 2011. There is no indication in the record regarding to which address this postcard notice was sent. Fiduccia forwarded the postcard to his attorney at some point thereafter. No action was taken to vacate the judgment in the *Essi* case within 30 days.

¶ 10 On June 16, 2011, Fiduccia filed a petition to vacate the default judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Fiduccia filed two affidavits, his own and one from his brother, James Fiduccia.

¶ 11 The Charles Fiduccia affidavit dated June 14, 2011, averred the following:

"1. That I, Charles Fiduccia, was allegedly served a copy of the complaint in *Essi v. Fiduccia* on December 31, 2010, according to the Clerk's website; however, I have no recollection of ever being served.

2. That I did not receive a copy of the Case Management Call Notice mailed to BRIDGET ESSI on December 29, 2010, by the Circuit Court of Cook County, regarding the Case Management conference in *Essi v. Fiduccia* scheduled for April 19, 2011, at 9:30 a.m.

3. That as I had no knowledge of *Essi v. Fiduccia*, I did not file an Appearance in

this matter.

4. That I was not given notice of the Prove Up court proceeding in *Essi v. Fiduccia* on March 9, 2011, and therefore was unable to appear before the Court and argue on my behalf.

5. That I was not given notice of the Evidentiary Hearing in *Essi v. Fiduccia* on March 21, 2011, and therefore was unable to appear before the Court and argue on my behalf.

6. That I did not learn of the lawsuit until sometime in March 2011.

7. That on or about March, 2011, I attempted to retain counsel to represent me in this matter after learning of the lawsuit.

8. That I first learned of the Court's decision to enter a Default Judgment on or about March 28, 2011, when I received a post card in the U.S. Mail from the Circuit Court of Cook County, notifying me that a default judgment was entered against me.

9. Further, I did not receive a copy of the March 21, 2011 Order until May 26, 2011, after URGO & NUGENT, LTD contacted counsel for BRIDGET ESSI and requested a copy.

10. That as of June 10, 2011, I have not received a copy of the Court Order entered on March 9, 2011, or any of the documentation submitted at the evidentiary hearing on March 21, 2011.

11. Further affiant sayeth naught."

¶ 12 The James Fiduccia affidavit averred that he, James, was the only person who worked at

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the insurance agency at 636 Pratt Avenue North, Schaumburg, Illinois, on the date of service and recalls that he was personally served by the sheriff. James believed the service of the complaint in this case related to an American Family Insurance claim and that he could accept service of such papers because he worked for the insurance agency. James averred that because he believed the papers related to an American Family Insurance claim, he placed the documents in the bin to be sent to American Family Insurance. James averred that he did not show the documents to Fiduccia before placing them in the bin. The documents were sent to American Family Insurance and were not returned until months later.

¶ 13 On July 20, 2011, Essi filed a citation to discover assets directed to Fiduccia's business, Fiduccia Insurance Agency, Inc., as well as a citation notice directed to Charles Fiduccia as judgment debtor. The citation notice to Fiduccia was sent to his last known address, which was listed as 15 Eastings Way, South Barrington, Illinois. A memorandum of judgment was also entered on July 20, 2011, against Fiduccia, and stated "whose address is 15 Eastings Way, South Barrington, IL 60010."

¶ 14 Fiduccia moved to stay all collection proceedings on the default judgment. On August 11, 2011, the court entered an emergency order staying all supplemental collection proceedings regarding the default judgment. Essi filed an emergency motion to void, quash, or reconsider this order staying supplementary proceedings, which was denied by the court in an order entered August 29, 2011.

¶ 15 On August 24, 2011, Essi filed a response to Fiduccia's 2-1401 petition, arguing that the court lacked jurisdiction to hear Fiduccia's 2-1401 petition because service of the petition to

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vacate was not in accordance with Supreme Court Rule 105 (eff. Jan. 1, 1989), because the notice was sent by regular mail and not certified mail. Essi also argued that Fiduccia made no attempt to personally serve Essi or discover her address to serve her with his 2-1401 petition. Fiduccia filed a reply, indicating numerous attempts to serve both Essi and Ben & Bridge Developmental Centers, LLC, through a special process server at 1527 West Farwell. Fiduccia's special process server then utilized skip tracing and discovered that Essi no longer resided at that address and that Ben & Bridge Developmental Centers, LLC was listed at that address on the Illinois LLC information but did not operate at that address. Skip tracing revealed the address of 7110 North Sheridan Road, #3, Chicago, Illinois, for Essi, and the address for the LLC's registered agent, Benediccta Omene, at 2801 South King Drive, #1308, Chicago, Illinois. Numerous attempts at service were made at these addresses, but no one was present. Further, Fiduccia argued that in the *Essi* case Essi, through counsel, appeared at the August 2, 2011, hearing on Fiduccia's 2-1401 petition and did not object to jurisdiction and, instead, requested a briefing schedule on Fiduccia's 2-1401 petition to vacate. Thus, Fiduccia argued, any objection to jurisdiction of his 2-1401 petition was waived. The court determined it would hear Fiduccia's 2-1401 petition and set the petition for hearing on December 13, 2011.

¶ 16 On December 13, 2011, Fiduccia filed a motion in the *Essi* case to quash service. He argued that service upon him as an individual was not effected and attempted service at his place of business on a family member did not comply with the personal service requirements of section 2-203(a) of the Illinois Code of Civil Procedure (735 ILCS 5/2-203(a) (West 2010)). The motion alleged that at the time the service was effected, the only person working at the business address

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was Fiduccia's brother, James Fiduccia.

¶ 17 Essi filed an answer to Fiduccia's 2-1401 petition and motion to quash service, to which she attached an affidavit from her attorney, Michalakos, in which he averred that while in court on January 5, 2011, for Essi's motion to void the possession order in the *Fiduccia* case, Fiduccia approached him and asked what he should do. Michalakos advised Fiduccia that he was not his attorney and that he should get his own attorney. According to Michalakos, Fiduccia was holding a copy of the summons and complaint in the *Essi* case.

¶ 18 He further averred that within one or two weeks, Fiduccia telephoned Michalakos and left a message requesting how the matter could be resolved. Michalakos called Fiduccia back and discussed whether Fiduccia wished to make an offer to settle the case. According to Michalakos, Fiduccia laughed and stated that if he was paid \$20,000 by the plaintiff, that would resolve the matter.

¶ 19 Because there were affidavits and a counter-affidavit filed on the 2-1401 motion, the court held an evidentiary hearing. On December 13, 2011, and December 15, 2011, the court heard testimony on Fiduccia's 2-1401 petition to vacate the default judgment in the *Essi* case. Charles Fiduccia, Essi and Michalakos testified.

¶ 20 Charles Fiduccia testified that December 31, 2010, was New Year's Eve and that on New Year's Eve he is not normally in the office. When asked about being personally served with summons for this case, Fiduccia testified that he "cannot recall" ever speaking with or being served by a sheriff. No one, including Essi's counsel, told him that this case against him was filed by Essi and pending. Fiduccia testified that the first time he learned of this lawsuit was

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when he was mailed postcard notice of the default judgment in March 2011. He testified that he often would not appear in his business office on a Friday (as the alleged date of service, December 31, 2010, was a Friday) and that he did not learn of Essi's wrongful eviction action against him until sometime nearly a year after Essi filed her wrongful eviction action. Fiduccia claimed that shortly after the date he was allegedly served with Essi's complaint in this case, when he was present in his business office, Fiduccia was served with one of the motions that Essi had filed to void the order of possession in Fiduccia's eviction action. That motion was noticed for January 5, 2011. Fiduccia maintained that he attended court on that date but was still unaware of Essi's wrongful eviction action in this case.

¶ 21 Michalakos testified at the 2-1401 hearing to the same facts in his affidavit: that he witnessed Fiduccia with a copy of the summons for the *Essi* case at the January hearing in the *Fiduccia* eviction case, but did not testify as to any personal knowledge as to personal service of the summons upon Fiduccia.

¶ 22 Essi did not present any testimony by the Sheriff's deputy to establish the service as represented in the Sheriff deputy's return document.

¶ 23 On December 15, 2011, after the hearing, the court granted Fiduccia's 2-1401 petition, entered an order vacating the default judgment entered on March 21, 2011, in the *Essi* case and granted Fiduccia 30 days to answer the original complaint or otherwise plead. Essi timely appealed.

¶ 24 **ANALYSIS**

¶ 25 We clarify at the outset that our review is limited only to the order granting Fiduccia's

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section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) to vacate the default judgment against him in the *Essi* case based on lack of personal jurisdiction for failure to effect personal service. The issues in the *Fiduccia* case evicting Essi, and in the *Essi* case for wrongful eviction are not before us.

¶ 26 The "central facts" of a petition under section 2-1401 "are not those which would establish the underlying action, but rather facts which are sufficient merely to support an order vacating the judgment." *Cunningham v. Miller's General Insurance Company*, 188 Ill. App. 3d at 693 (citing *Manning v. Meier*, 114 Ill. App. 3d 835, 840 (1983); *Yorke v. Stineway Drug Company*, 110 Ill. App. 3d 1009, 1014 (1982)).

¶ 27 Ordinarily "[t]o obtain relief under section 2-1401 of the Code, a petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the petition for relief under section 2-1401." *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 723 (2004) (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986); *People v. Waters*, 328 Ill. App. 3d 117, 127 (2002)).

¶ 28 A party seeking to vacate a judgment due to improper service is alleging that the judgment is void. *Cavanaugh v. Lansing Municipal Airport*, 288 Ill. App. 3d 239, 246 (1997) (citing 735 ILCS 5/2-1401(f) (West 1994)). When the judgment sought to be vacated is void, section 2-1401(f) provides that the normal requirements for a section 2-1401 petition to vacate do not apply:

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"(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2010).

¶ 29 A judgment that is entered without personal jurisdiction over a party is void and can be attacked directly or collaterally at any time. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 13 (citing *In re Marriage of Kohl*, 334 Ill. App. 3d 867, 880 (2002)). "[I]t is well settled that '[a] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally.'" *Sarkissian v. Chicago Board of Education*, 201 Ill.2d 95, 103 (2002) (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)). Where a petitioner seeks to vacate a final judgment as being void, the allegations of voidness "substitute[] for and negate[] the need to allege a meritorious defense and due diligence." *Sarkissian*, 201 Ill. 2d at 104. In a 2-1401 petition based on improper service and lack of jurisdiction, the merits of the underlying case are simply not at issue; we are concerned with only whether there was proper service to confer personal jurisdiction.

¶ 30 The issue appealed here is the section 2-1401 petition to vacate the default judgment for lack of personal jurisdiction.

¶ 31 Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007) (citing 735 ILCS 5/2-1401 (West 2002)). Relief under section 2-1401 is predicated upon proof, by a

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preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8 (citing *Smith*, 114 Ill. 2d at 220-21). "If the facts alleged in the section 2-1401 petition are not of record, the petition must be supported by affidavits, and respondent must answer the petition's allegations." *O'Malley v. Powell*, 202 Ill. App. 3d 529, 533 (1990) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273 (1982)). "Where affidavits support the petition, the court may enter judgment if those affidavits are uncontradicted." *O'Malley*, 202 Ill. App. 3d at 533 (citing *Ostendorf*, 89 Ill. 2d 273). If the central facts of a section 2-1401 petition are controverted, an evidentiary hearing must be held. *Ostendorf*, 89 Ill. 2d at 286.

¶ 32 The evidentiary burden of proof at the 2-1401 hearing is the elevated clear and convincing burden, but we review the trial court's factual findings under the manifest-weight-of-the-evidence standard of review. *Roadside Auto Body, Inc. v. Miller*, 285 Ill. App. 3d 105, 113 (1996). The trial court's factual finding under a clear-and-convincing evidentiary burden is against the manifest weight of the evidence " 'where, upon review of all the evidence in the light most favorable to the prevailing party, an opposite conclusion is clearly apparent' or the factual finding is 'palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence.' " *In re Estate of Cuneo*, 334 Ill. App. 3d 594, 598 (2002) (quoting *Joel R. v. Board of Education of Mannheim School District 83*, 292 Ill. App. 3d 607, 613 (1997)). In a nonjury case, the trial court's judgment will be sustained if there is evidence in the record to support it. *In re Estate of*

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Cuneo, 334 Ill. App. 3d at 598. We must keep in mind that we are reviewing the trial court's determination that the petitioner, in this case Fiduccia, presented clear and convincing evidence to rebut the presumption of personal service. See *In re Estate of Cuneo*, 334 Ill. App. 3d at 598. The trial court was the finder of fact and, as such, it was required to consider the credibility of the witnesses and weigh the effect of their testimony. *People v. Bannister*, 236 Ill.2d 1, 18 (2009). The trial court is in the best position to judge the witnesses' credibility, and we will employ a deferential review of the trial court's determination on service. *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 167 (1998).

¶ 33 As to the ultimate ruling on the section 2-1401 petition after an evidentiary hearing, although traditionally an abuse of discretion standard of review was applied on appeal to a trial court's ruling on a section 2-1401 petition, in *Vincent* our supreme court held that a *de novo* standard of review was a more appropriate standard to be applied in cases where the trial court either dismissed the petition, or ruled on the petition based on the pleadings alone, but stated in *dicta* that the manifest weight of the evidence standard was more appropriate in cases where the petition was ruled on after an evidentiary hearing. See *Vincent*, 226 Ill. 2d at 17, n. 5. See also *Lincoln Title Co. v. Nomanbhoy Family Limited Partners*, 2013 IL App (3d) 120999, ¶ 22 (discussing *Vincent*). Most of our appellate courts have heeded the guidance of *Vincent* and applied the manifest weight of the evidence standard of review to dispositions of section 2-1401 petitions after an evidentiary hearing, pursuant to the court's *dicta* in *Vincent*. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35; *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2d Dist. 2010); *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 440 (5th Dist. 2010). This court

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has long deemed the manifest weight of the evidence the appropriate standard of review for rulings on section 2-1401 petitions after an evidentiary hearing has been held. See *Uptown Federal Savings & Loan Ass'n of Chicago v. Kotsiopoulos*, 105 Ill. App. 3d 444, 451 (1982) (noting that the manifest weight of the evidence standard applies after trial court has held an evidentiary hearing in a section 2-1401 action).

¶ 34 As to the question of law where a section 2-1401 petitioner requests relief based on an argument that the judgment is void, Illinois courts apply the *de novo* standard of review.

Deutsche Bank National Trust Co. v. Hall-Pilate, 2011 IL App (1st) 102632, ¶ 12. Also, "[a]ppellate courts review *de novo* whether personal jurisdiction was conferred." *Citimortgage, Inc.*, 2012 IL App (1st) 102438, ¶ 12 (citing *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910 (2008)).

¶ 35 Regarding the court's findings on questions of fact regarding whether there was personal service, the trial court's findings that Fiduccia met the clear and convincing standard of proof is reviewed deferentially under the manifest weight of the evidence standard. As to the ultimate question of law, whether the lack of personal service rendered the default judgment void, the *de novo* standard applies.

¶ 36 Service of process on individuals is governed by section 2-203 of the Illinois Code of Civil Procedure and requires service of summons on an individual only in the manners specified, which in this case include either "(1) leaving a copy of the summons with the defendant personally," or "(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

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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) (West 2010).¹

¶ 37 A return of service for personal service has a presumption of validity. *Walker v. Ware*, 2013 IL App (1st) 122364, ¶ 21 (citing *Dec v. Manning*, 248 Ill. App. 3d 341, 348 (1993)). A return of service is *prima facie* evidence of service as to matters within the personal knowledge of the individual executing service of summons. *Walker*, 2013 IL App (1st) 122364 at ¶ 21 (citing *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983)). An uncorroborated affidavit by a party allegedly served and denying service has long been generally deemed insufficient to contradict a sheriff's return. See *Four Lakes Mgt. & Dev. Co. v. Brown*, 129 Ill. App. 3d 680, 683 (1984) (holding that as a general rule, the sheriff's return should be considered *prima facie* evidence that the process was properly served upon the defendant in person, and it should not be set aside unless the return has been impeached by clear and satisfactory evidence); *In re Jafree*, 93 Ill. 2d 450, 455 (1982) (same); see also *Marnik v. Cusack*, 317 Ill. 362, 364 (1925) ("The stability of judicial proceedings, however, requires that the return of an officer *** should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served but only upon clear and satisfactory evidence."). And "[w]here such a return is challenged by affidavit and there are no counteraffidavits, the return itself is not even evidence, and, absent testimony by the deputy, the affidavits must be taken as true and the purported service of

¹ There is a third manner of service with respect to violations of an ordinance governing parking or standing of vehicles, but that subsection does not apply in this case.

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summons quashed.' " *Nibco, Inc.*, 98 Ill. 2d at 171-72 (quoting *Harris v. American Legion John T. Shelton Post No. 838*, 12 Ill. App. 3d 235, 237 (1973)).

¶ 38 The petition must be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(a) (West 2010). Fiduccia's 2-1401 petition was supported by two affidavits, his and his brother's. Essi filed a counter affidavit from Michalakos.

¶ 39 The court held an evidentiary hearing at which Charles Fiduccia, Essi and Michalakos testified. Essi's testimony was largely about the underlying cases and did not provide any evidence that Essi had personal knowledge on how personal service was effectuated on Fiduccia.

¶ 40 Fiduccia's testimony at the hearing mirrored his affidavit, with the addition that he explained in his testimony that he is not usually in the office on New Year's Eve, when the service purportedly happened.

¶ 41 Michalakos' testimony mirrored his affidavit. Michalakos' testimony did not, and could not, establish any facts regarding the alleged service because he was not present when the deputy allegedly served Charles Fiduccia. The trial court found that Michalakos' assertion that he saw Fiduccia holding court papers was insufficient to overcome Fiduccia's testimony that, in fact it, was Fiduccia's brother who was served, and not Fiduccia.

¶ 42 Essi did not provide testimony from the Sheriff's deputy regarding personal service on Charles Fiduccia.

¶ 43 We find that the trial court did not err when it found that Essi failed to rebut Fiduccia's evidence challenging service, and that Fiduccia was not personally served.

¶ 44 That being the case, personal jurisdiction was never obtained over Fiduccia and the

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default judgment against him is void. Personal jurisdiction can only be obtained by complying with the precise manner of service of process set forth by statute. *Forest Preserve District of Cook County v. Industrial Commission*, 305 Ill. App. 3d 657, 663-64 (1999) (citing *Miller v. Town of Cicero*, 225 Ill. App. 3d 105, 110 (1992)). Unless waived by a party, personal jurisdiction can only be attained where the party is served with process in accordance with the manner directed by statute. *Hall–Pilate*, 2011 IL App (1st) 102632, ¶ 13. It is essential to the validity of a judgment that the court entering the judgment have jurisdiction of the subject matter of the litigation and jurisdiction over the parties. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). The basic legal principle that a judgment entered without jurisdiction over the parties is void *ab initio* is one that cannot be overcome. See *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 15. For a judgment to be valid, the circuit court must have jurisdiction over both the subject matter of the litigation, and over the parties named in the action. *Hall–Pilate*, 2011 IL App (1st) 102632, ¶ 13.

¶ 45 Essi then alternatively argues that the alleged service on Fiduccia at his place of business was sufficient to satisfy notice requirements to obtain personal jurisdiction, relying on *Smith*, 114 Ill. 2d 209. In *Smith*, service on the defendant corporation was effected at the defendant's place of business, and the court held that the defendant was thus aware of the litigation before the default judgment was entered and failed to exercise due diligence in defending against the plaintiff's claims. *Smith*, 114 Ill. 2d at 223-24. But the party served in *Smith*, Airoom, was a corporation and so service at the place of business was proper. "A private corporation may be served by leaving a copy of the process (i.e., the summons and complaint) with its registered

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agent or any officer or agent of the corporation found anywhere in the state." *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 29. Fiduccia is an individual, not a corporation. Service upon an individual has different requirements and is governed by section 2-203(a) of the Code of Civil Procedure. In this case, section 2-203(a) required service upon Fiduccia personally or at his place of abode. 735 ILCS 5/2-203(a) (West 2010). Essi failed to serve Fiduccia in either manner.

¶ 46 Essi also argues that Fiduccia nevertheless had actual notice of the litigation in this case, but even actual notice is insufficient to overcome the lack of personal service. As this court recently reiterated, " '[a] judgment rendered without personal jurisdiction is void regardless of whether the defendant had actual knowledge of the proceedings.' " *Citimortgage, Inc.*, 2012 IL App (1st) 102438 at ¶ 12 (quoting *In re Marriage of Kohl*, 334 Ill. App. 3d at 880). "Service of summons upon defendant is essential to create personal jurisdiction of the court [citations], and, absent proper service, any judgment entered against a defendant is void *ab initio*, whether or not he had actual knowledge of the proceedings. [Citations]." *State Bank of Lake Zurich v. Thill*, 135 Ill. App. 3d 747, 754 (1985).

¶ 47 Essi further argues that Fiduccia's testimony at the hearing that he "does not recall" being served is insufficient to dispute personal service. Essi's argument is misplaced because in this case we are dealing with personal service and not service upon a corporation. For corporate service, a denial as to recollection of service will not overcome sufficiency of service upon a defendant corporation if service is effected at the office of the corporation, and the person who received the service was an agent of the corporation. See, e.g., *Cleeland v. Gilbert*, 334 Ill. App.

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3d 297, 301 (2002) (although a casualty claims analyst for the defendant American Family Insurance Group stated in her affidavit that she had no recollection of receiving the summons, service was properly made on the corporation because the summons clearly identified American Family Insurance Group as the respondent the claims analyst was an agent of the corporation). Here, however, Fiduccia is an individual defendant and we are presented with Fiduccia's statement in his affidavit and testimony that he did not recall being served.

¶ 48 The only person who could have rebutted Fiduccia's testimony that he does not recall being served was the Sheriff's deputy. However, the deputy did not testify, and thus Fiduccia's testimony was not rebutted.

¶ 49 The court did not make a specific finding as to personal service but granted the petition, thereby concluding that Fiduccia was not personally served and that there was no personal jurisdiction. We hold that the trial court's factual findings that Fiduccia proved the facts in his section 2-1401 petition by clear and convincing evidence were not against the manifest weight of the evidence. Under our *de novo* review of the legal issues, Fiduccia established his right to vacate the default judgment in the *Essi* case based on lack of personal jurisdiction due to lack of service. Because there was no personal jurisdiction, the court had no authority to hear the prove-up and award damages in an *ex parte* judgment. The damages award and judgment are void. On this ground, the court's order vacating the default order and judgment was proper. We affirm the court's order vacating the default order and judgment.

¶ 50

CONCLUSION

¶ 51 Defendant established that the alleged personal service upon him in this case was

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ineffective. First, the evidence at the hearing, including defendant's testimony that he was not the individual personally served, rebutted the *prima facie* presumption of personal service on the sheriff's return. Second, plaintiff did not present the testimony of the sheriff to rebut defendant's testimony that he was not in fact served. Due to the failure of plaintiff to serve process upon defendant in compliance with section 2-203(a), the court did not obtain personal jurisdiction of defendant and all orders entered against defendant in this case are void. The court did not err in granting the 2-1401 petition to vacate the default judgment. We affirm the court's order vacating the default judgment and remand for further proceedings.

¶ 52 Affirmed.