SECOND DIVISION
June 25, 2013

No. 1-12-0398

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 11 M1 714845
JACQUELINE SMITH and UNKNOWN OCCUPANTS, Defendant-Appellant.	)	Honorable Orville E. Hambright, Jr., Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court erred in denying defendant's motion to quash service by posting in a forcible entry action. The court had jurisdiction over the motion, and issue was properly joined as to whether plaintiff had made a due and diligent inquiry to find defendant, so that the case must be remanded for an evidentiary hearing on that issue.

¶ 2 This cause concerns a forcible entry and detainer action by plaintiff Bank of New York Mellon against defendant Jacqueline Smith. Defendant appeals from an order denying her motion to quash service by posting, following a judgment or order of eviction. She contends that service by posting was improper because plaintiff failed to establish the requisite due inquiry to find defendant for personal service, and thus did not vest the court with personal jurisdiction.

Plaintiff responds that defendant (1) waived or forfeited any objection to personal jurisdiction by filing a motion to vacate judgment without first objecting to jurisdiction, (2) waived or forfeited her challenge to the affidavit in support of service by posting by not raising it in the trial court, and (3) was properly served by posting.

¶ 3 Plaintiff filed its complaint on July 11, 2011, seeking to evict defendant from certain residential premises in Chicago ("the premises") over which plaintiff alleged exclusive right of possession through a judicial sale in a foreclosure action. A copy of the June 2010 foreclosure-action order approving sale was attached to the complaint, showing that in that case plaintiff herein was both plaintiff and successful bidder.

¶ 4 Summons was issued on July 11, 2011. The sheriff issued a return showing three unsuccessful attempts at serving process were made on the mornings of July 13, 15, and 22. Alias summons was issued on August 12. The sheriff issued a return showing three unsuccessful attempts at serving process on the midday of August 17 and the mornings of August 18 and 22. Both returns stated the reason for non-service as "no contact" with no elaboration.

¶ 5 On September 16, 2011, plaintiff filed an affidavit for service by posting, averring that defendant "on due inquiry cannot be found so that process cannot be served upon defendant"[1] and that "defendant's place of residence *** upon diligent inquiry cannot be ascertained and his [*sic*] last known place of residence is at" the premises. The affidavit ended with a prayer for relief – "The Plaintiff respectfully requests that this Honorable Court enter an order of possession in favor of the Plaintiff" – and was signed by Elliott Halsey with no averment describing Halsey or his relationship to plaintiff or its counsel.

¶ 6 Notice requiring appearance in this case was issued on September 16, 2011, stating that default judgment against defendant would be entered if she did not appear in court on October

[1]The affidavit listed various other grounds for service by posting, including that the defendant resides outside the state, has gone out of the state, or is concealed within the state. Plaintiff indicated the "on due inquiry cannot be found" basis by marking it with three asterisks and making no mark upon or next to any of the other grounds.

14. The sheriff issued a return indicating service thereof on September 20 by posting copies at Chicago City Hall, the Cook County building, and the Daley Center courthouse and by mailing a copy to defendant addressed to the premises.

¶ 7 On October 14, 2011, the court issued an order for possession directing that plaintiff recover possession of the premises from defendant, with enforcement stayed until October 21.

¶ 8 In January 2012, defendant filed a *pro se* motion to vacate the order of possession, arguing that according to the computerized records of the circuit court clerk, service of process was not obtained by August 22, the case was dismissed with prejudice on September 9, no new complaint was filed, and no motion was filed seeking service by publication. Defendant argued that the default judgment of possession was issued without notice of any of the prior proceedings and was "invalid" because the case "no longer existed" at that point due to the dismissal with prejudice.

¶ 9 On January 18, 2012, the court denied the motion.

¶ 10 Later in January, defendant filed a *pro se* "motion to quash service by publication," arguing that she was never served with process by personal or substitute service, that she lives alone at the premises so that substitute service could not occur, that she never avoided service of process, and that plaintiff failed to make reasonable efforts to serve her. She argued that because plaintiff's affidavit in support of service by posting was filed on September 16, it could not be the basis for a default judgment less than 30 days later on October 14. She also argued that the underlying foreclosure case "was initiated on falsified service" and that service was quashed and judgment vacated in that case. She stated that she was not voluntarily submitting to the court's jurisdiction.

¶ 11 Attached to the motion to quash was a September 2007 order in the foreclosure case granting defendant's motion to quash service and vacating all prior orders but also stating that defendant then submitted to jurisdiction.

¶ 12 Also attached was defendant's affidavit, averring that she lives alone at the premises, keeps her personal property there, never avoided service, and answered the door whenever someone knocked. She also averred that in "open court," plaintiff's counsel alleged that it searched unsuccessfully for defendant since spring and that the process server had averred that he could hear someone inside the premises when he knocked on the door, while defendant noted that the sheriff's affidavit or return did not so aver, and alleged that she was away from home often from April through August due to her mother's illness but was also home periodically during that time. She averred that plaintiff's counsel told the court that publication service was accomplished by posting the summons on the door of the premises, while nothing was posted on the door and plaintiff presented no documentation of such posting. Defendant averred that the due-inquiry affidavit was signed by an "Elliott Halsey, who had no specific knowledge of any efforts of the Plaintiff to attempt any service and *** is unknown to the Defendant and has not stated [his] relationship to the case."

¶ 13 On February 2, 2012, the court denied defendant's motion to quash "for lack of jurisdiction." The order noted that plaintiff and defendant appeared in court (the former through counsel) and that the court was "duly advised." This appeal timely followed.

¶ 14 The record on appeal does not include a transcript or appropriate substitute (Ill. S. Ct R. 323 (eff. Dec. 13, 2005)) for any of the hearings or proceedings herein. Beyond a "half-sheet" entry there is no written order denying defendant's January 18, 2012, denying defendant's first post-judgment motion. Defendant is obligated to provide this court with a sufficiently complete record of the trial court proceedings to support her claim of error. Therefore, in the absence of such a record, we must presume that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). Conversely, our review is not precluded by the absence of transcripts where the record contains that which is necessary to dispose of the issues raised under the applicable standard of review. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007).

¶ 15 Furthermore, the circuit court's stated basis for denying defendant's motion to quash service by posting was "lack of jurisdiction" and, in this appeal, plaintiff does not raise the trial court's lack of jurisdiction to grant post-judgment relief as a basis for affirming the court's decision. This is understandable, as we find that defendant's post-judgment motions fall under section 2-1401 of the Code of Civil Procedure (Code), 735 ILCS 5/2-1401 (West 2010), which provides that "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." Though neither *pro se* motion expressly invokes section 2-1401, both were filed in January 2012 seeking relief from a judgment of October 2011. Thus, the circuit court was vested with jurisdiction to reconsider its judgment more than 30 days after issuing that judgment. However, this is not dispositive, as our review of the denial or dismissal of a section 2-1401 petition is *de novo* and we may affirm the disposition on any basis supported by the record. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

¶ 16 On appeal, defendant contends that service by posting was improper because plaintiff failed to establish due inquiry and, thus, did not vest the court with jurisdiction to enter the judgment of eviction. Plaintiff responds that defendant (1) waived or forfeited any objection to personal jurisdiction by filing a motion to vacate judgment without first objecting to jurisdiction, (2) waived or forfeited her challenge to the due-inquiry affidavit by not raising her claims in the trial court, and (3) was properly served by posting.

¶ 17 Because of its potential to dispose of the matter decisively, we shall first consider plaintiff's contention that defendant waived or forfeited her objection to personal jurisdiction by first filing the motion to vacate.

¶ 18 Section 2-301 of the Code governs objections to personal jurisdiction and provides that:

> "Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a

> court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process." 735 ILCS 5/2-301(a) (West 2010).

While a motion challenging jurisdiction "may be made singly or included with others in a combined motion," filing "a responsive pleading or a motion (other than a motion for extension of time to answer or otherwise appear) prior to the filing of a motion" challenging jurisdiction "waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a), (a-5) (West 2010).

¶ 19 Here, defendant's motion to vacate the judgment of eviction was filed and ruled upon before she filed her motion to quash service. However, while the *pro se* motion to vacate did not expressly allege that the court lacked jurisdiction, it (1) alleged that "no service was attained" and "no motion was ever filed or approved to allow service by publication," and (2) argued that the judgment of eviction was invalid. Although the expressly-argued basis for the invalidity was not personal jurisdiction but a dismissal with prejudice preceding the judgment, this does not preclude it being a combined motion as envisioned in section 2-301(a). We find that the motion to vacate was a motion challenging personal jurisdiction that together with the motion to quash based on in adequate service by posting, did not waive defendant's first motion challenging personal jurisdiction.

¶ 20 Defendant contends that service by posting was improper because plaintiff did not establish due inquiry. Plaintiff responds that defendant waived or forfeited this argument by not raising it in the trial court, and that service by posting was proper.

¶ 21 Section 9-107 of the Code establishes a method of constructive service in forcible entry and detainer cases. 735 ILCS 5/9-107 (West 2010). Where a plaintiff:

> "is unable to obtain personal service on the defendant or unknown occupant and a summons duly issued in such action is returned without service stating that service can not be obtained, then the plaintiff, his or her agent or attorney may file an affidavit stating that the defendant or unknown occupant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, or is concealed within this State so that process cannot be served upon him or her, and also stating the place of residence of the defendant or unknown occupant, if known, or if not known, that upon diligent inquiry the affiant has not been able to ascertain the defendant's or unknown occupant's place of residence." 735 ILCS 5/9-107 (West 2010).

The defendant then "may be notified by posting and mailing of notices" that "state the nature of the cause against the defendant or unknown occupant and at whose instance issued and the time and place for trial, and shall also state that unless the defendant or unknown occupant appears at the time and place fixed for trial, judgment will be entered by default, and shall specify the character of the judgment that will be entered in such cause." The sheriff must post copies of the notice in three public places "in the neighborhood of the court where the cause is to be tried, at least 10 days prior to the day set for the appearance," and "shall at the same time mail one copy of the notice addressed to such defendant" at his last known place of residence. 735 ILCS 5/9-107 (West 2010).

¶ 22 Constructive service is permissible only upon strict compliance with the statute, and the statute in particular requires "due inquiry" and "diligent inquiry" before constructive service is proper. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 32 (2006). A cursory or perfunctory inquiry will not suffice, but instead a plaintiff must make an inquiry as comprehensive as circumstances allow. *Id.* The circuit court has no jurisdiction over

a defendant who has not been served with process as required by law, so that a default judgment against the defendant is void. *Id.*

¶ 23 The plaintiff, as the party claiming benefit of constructive service, bears the burden of showing strict compliance with all statutory requirements. *Id*. A defendant may challenge a plaintiff's due-inquiry affidavit by filing a counter-affidavit showing that he could have been found by due inquiry. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 19; *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18. Upon such a challenge, a plaintiff must produce evidence establishing due and diligent inquiry. *Citimortgage, Inc.*, ¶ 18. In other words, where there is a properly-joined issue as to whether the plaintiff made the requisite due and diligent inquiry, the court should hold an evidentiary hearing with the burden of proof upon plaintiff. *American Chartered Bank*, ¶ 19. Where such a hearing is not conducted, the case should be remanded for such an evidentiary hearing. *Id*.

¶ 24 Here, defendant challenged the due-inquiry affidavit in the trial court. She argued in her affidavit attached to the motion to quash, that the due-inquiry affidavit did not state or show the affiant's basis for making his averments. Moreover, she filed her own affidavit in which she averred that she still resided at the premises.

¶ 25 We also find that plaintiff has *prima facie* met the requirements of Code section 9-107. The record shows that the sheriff made multiple unsuccessful attempts at service. In the due-inquiry affidavit, plaintiff indicated the basis for constructive service by marking the relevant allegation and averred that defendant's residence could not be ascertained. As to the affiant Elliott Halsey's basis for making his averments, we note that the affidavit includes a prayer for relief, thus tending to indicate that Halsey is plaintiff's counsel. This is borne out by the records of the Attorney Registration and Disciplinary Commission of our supreme court, which show that Richard Elliott Halsey is a licensed attorney in Illinois who registered as his firm and business address the law firm serving as plaintiff's counsel.

¶ 26 However, it is inescapable that, against the due-inquiry affidavit, defendant filed a counter-affidavit and thereby required plaintiff to establish its due and diligent inquiry. Because the circuit court erroneously denied relief on the grounds that it lacked jurisdiction, we cannot presume, especially absent a transcript of the hearing on the motion to quash, that the requisite evidentiary hearing was held.

¶ 27 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for an evidentiary hearing for plaintiff to establish whether it made a due and diligent inquiry as required by Code section 9-107.

¶ 28 Vacated and remanded with directions.