2014 IL App (1st) 131238-U

SIXTH DIVISION
August 15, 2014

No. 1-13-1238

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ONE WEST BANK, FSB, Plaintiff-Appellee, v. NINO GIORGOBIANI; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR INDYMAC BANK, FSB; VILLAGE OF MAYWOOD; UNKNOWN HEIRS AND LEGATEES OF NINO GIORGOBIANI, IF ANY; UNKNOWN OWNERS AND NON RECORD CLAIMANTS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 974 Honorable Laura C. Liu, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's denial of defendant's motion to quash is affirmed where defendant failed to support the motion with a proper affidavit.

¶ 2 Defendant Nino Giorgobiani appeals an order entered by the circuit court of Cook County denying her motion to quash service of summons. On appeal, defendant contends the

circuit court erred because the facts of the motion to quash, presented pursuant to sections 2-301(a) and 2-1401(f) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-301(a), 2-1401(f) (West 2012)), were "verified" in accordance with section 1-109 of the Code (735 ILCS 5/1-109 (West 2012)). Defendant maintains that section 1-109 of the Code is equivalent to an affidavit under Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) and, therefore, her motion to quash was sufficient. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 8, 2010, plaintiff filed a complaint to foreclose the mortgage on the property located at 835 South 17th Avenue in Maywood, Illinois (the property), alleging that defendant was in default on her mortgage payments. Plaintiff further alleged that the balance due on the note and mortgage was $183,525.41 plus interest, costs and fees. The complaint also alleged the property was not defendant's primary residence.

¶ 5 On January 12, 2010, special process server, Daniel Marco (Marco), signed an affidavit averring that at 6:15 p.m. on January 11, 2010, he served a copy of the summons and complaint on defendant via substitute service on a female at defendant's usual place of abode, 363 Vita Drive, in Wheeling, Illinois, and informed her of the contents of the summons and complaint. This female indicated to him that she resided with defendant at the Wheeling address, and identified herself as defendant's roommate, but refused to provide her name. The special process server described this woman as Caucasian, 30 years of age, 5' 9" tall, weighing between 151-175 pounds, with black hair, and wearing glasses. He also averred that on January 12, 2010, he mailed a copy of this process in a sealed envelope with postage paid, addressed to defendant at her usual place of abode, 363 Vita Drive, in Wheeling, Illinois.

¶ 6 On January 14, 2010, special process server Marco signed another affidavit, averring that he had unsuccessfully attempted to serve defendant at 7:05 p.m. on January 12, 2010, at 835 South 17th Avenue in Maywood, as the property was vacant. He noted that the window on the first floor of the property was boarded up, that there was no electricity, the snow had not been removed, and there was uncollected mail.

¶ 7 On April 9, 2010, plaintiff filed a motion for a default judgment against defendant, noting that defendant had not filed an answer or motion in the 60 days following the date of service. A prove-up affidavit in support of the motion indicated that defendant owed plaintiff $224,481.21. On May 25, 2010, the circuit court entered a default judgment against defendant for foreclosure and sale of the property. The court determined that plaintiff was entitled to an award of $226,688.21, which included attorney fees, costs of the suit, and principal, accrued interest, advances and other amounts due plaintiff, and appointed a foreclosure sale officer.

¶ 8 Public notice was subsequently provided that, pursuant to a judgment of foreclosure, the property in question would be sold to the highest bidder on August 27, 2010. Plaintiff was the highest bidder at the foreclosure sale. On July 6, 2011, the circuit court entered an order approving the report of sale and distribution. The court also ordered plaintiff be provided immediate possession of the property, as the property was vacant.

¶ 9 On September 14, 2012, defendant, through counsel, filed an appearance and a verified motion to quash service pursuant to sections 2-301(a) and 2-1401(f) of the Code (735 ILCS 5/ 2-301(a), 2-1401(f) (West 2012)), objecting to the court's jurisdiction over her person. She alleged, in relevant part, that the circuit court did not have the requisite jurisdiction due to the insufficiency of the service of process, and claimed that she had never been served with a

summons or complaint in this case, that she did not have a roommate living with her, and that she lived with her husband, Maxim Furman, and her 11-year-old daughter. She further claimed that special process server Marco previously served her in a different case and knew who she was, but did not serve her in this case. Defendant also alleged that "[o]n information and belief," Marco did not mail the process to her, and that there was no evidence in the record that he did so.

¶ 10 Attached in support of defendant's motion to quash were two process server affidavits. The first was for service of process in the instant action and it stated that Marco served defendant by substitute service at 363 Vita Drive in Wheeling Illinois, on January 11, 2010. Marco averred that he served defendant's "roommate, a person residing therein who is the age of 13 years or upwards and confirmed the defendant resides at the above address * * *." Marco's affidavit indicated the person he left a copy of the summons and complaint with was a female 30 years of age, Caucasian, 5' 9" tall, weighed between 151-175 pounds, had black hair, and wore glasses. The second process server affidavit attached to the motion was for case number 09 CH 48934. In the affidavit Marco averred he personally served Nino Giorgobiani at 363 Vita Drive in Wheeling, Illinois on December 10, 2009. Marco attested to a description of defendant which stated she was 35 years of age, Caucasian, 5' 9" tall, weighed between 126-150 pounds, had black hair, and was not wearing glasses. Defendant also attached to her motion a signed verification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2012)).

¶ 11 On October 11, 2012, when the motion to quash was scheduled for presentment, defendant's counsel withdrew the motion to quash service. The order entered stated in full:

"The matter coming before the court on Nino Giorgobiani's verified motion to quash service against plaintiff, One West Bank FSB; It is hereby ordered, Defendant's attorney withdraws [the] motion with leave to renotice."

The order did not indicate the reason defendant's motion was withdrawn.[1]

¶ 12 Defendant filed another motion to quash on October 15, 2012, pursuant to sections 2-301(a) and 2-1401(f) of the Code (735 ILCS 5/2-301(a), 2-1401(f) (West 2012)), which asserted the same arguments. The motion, however, indicated it was dated October 12, 2012, and the verification page was not signed by defendant, but was signed by her attorney. On January 15, 2013, the circuit court entered a briefing schedule on the motion to quash and set the matter for status on March 15, 2013.

¶ 13 The circuit court denied defendant's motion to quash service on March 15, 2013.[2] In support of its determination, the circuit court cited the lack of an affidavit from defendant and the lack of any evidence that defendant did not have a roommate on the date of service at the subject address.

¶ 14 On April 1, 2013, defendant filed this notice of appeal.

¶ 15 ANALYSIS

¶ 16 Initially, we note that defendant inaccurately asserts that we have jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(4) (eff. Feb. 26, 2010), which provides that a final judgment or order entered in a proceeding under section 2-1402 of the Code is appealable without the

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[1] The record on appeal does not include any record of proceedings.

[2] Neither the order nor the record indicates whether the circuit court conducted a hearing on the motion to quash. Moreover, in neither of the motions to quash did defendant request an evidentiary hearing.

finding required for appeals under Rule 304(a). As defendant presented her motion to quash pursuant to section 2-1401, we do not have jurisdiction pursuant to Rule 304(b)(4). We further note that the committee comments to Rule 304(b)(4) expressly indicate that "Subparagraph (4) is derived from paragraph (7) of section 73 of the Civil Practice Act (Ill. Rev. Stat. 1967, ch. 110, par. 73(7)), which deals with supplementary proceedings." A reading of this note would have alerted defendant to the fact that she was not engaged in supplementary proceedings, but was instead requesting relief from a judgment after 30 days had passed. We do, however, have jurisdiction to hear this appeal pursuant to Rule 304(b)(3) (eff. Feb. 26, 2010), as that rule allows us to review a judgment or order granting or denying any of the relief prayed for in a petition under section 2-1401 of the Code. Considering defendant's appeal was timely and plaintiff does not contest our jurisdiction, we will review defendant's appeal despite defendant's inaccurate jurisdictional statement.

¶ 17 Now turning to the merits of the appeal, defendant contends that the circuit court erred in denying her motion to quash service because there was improper substitute service. Defendant maintains that the verification of her motion to quash service is equivalent to an affidavit under Illinois Supreme Court Rule 191(a) (eff. July 1, 2002), and that since her motion remains unrebutted and uncontradicted, it provides a sufficient basis upon which service should be quashed.

¶ 18 We note that defendant has failed to provide us with a record of proceedings or a bystander's report. As the appellant, defendant "has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Company, Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill.

2d 389, 391-92 (1984)). In the absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)). We acknowledge that in the present case, the parties agree that the circuit court did not conduct an evidentiary hearing. As the circuit court based its determination solely on the documents provided to the court, which were included in the record on appeal, the standard of review for the denial of defendant's motion to quash is *de novo*. *Central Mortgage Company v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 26.

¶ 19 In Illinois, when no appearance is filed by a defendant, personal jurisdiction may be acquired by service of process in the manner prescribed by law. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986). Personal jurisdiction may be obtained only by service of process as provided by statute unless it is waived by a party. *Id.* "In the case of personal service, the return of summons is *prima facie* proof of proper service which can only be overcome by clear and convincing evidence, and the court is required to indulge in every reasonable presumption in favor of the return." *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 838 (1992).

¶ 20 Service of a summons on a party by delivering a copy to another person, as is at issue here, is referred to as substitute service. The requirements for obtaining jurisdiction over a person served in this manner are set forth in section 2-203(a) of the Code. A defendant may be

served through substitute service by leaving a copy of the summons at defendant's usual place of abode with some person residing at the location of the age of 13 years or older, and informing that person of the contents of the summons, provided the person making service also sends a copy in a sealed envelope with postage prepaid, addressed to defendant at her usual place of abode. 735 ILCS 5/2-203(a) (West 2010).

¶ 21 Where substitute service is obtained, the return of the process server must show strict compliance with the statute, since the same presumption of validity that attaches to a return on personal service does not apply to substitute service. *State Bank of Lake Zurich*, 113 Ill. 2d at 309. In the case of substitute service, the clear and satisfactory evidence requirement applies to matters within the personal knowledge of the process server making the return. *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). Information outside of the serving officer's personal knowledge includes whether the summons was served at the defendant's usual place of abode. *Chiaro v. Lemberis*, 28 Ill. App. 2d 164, 171-172 (1960). It is the defendant's burden to rebut the recitals not within the process server's personal knowledge. *Four Lakes Management & Development Company v. Brown*, 129 Ill. App. 3d 680, 684 (1984). Defendant may do so with an affidavit. *Id.* Where a defendant submits an affidavit and no counteraffidavit or testimony from the plaintiff is provided, the defendant's affidavit, *if otherwise sufficient*, must be taken as true and the purported service of process is quashed. *Prudential Property and Casualty Insurance Company v. Dickerson*, 202 Ill. App. 3d 180, 184 (1990). However, "[a]n uncorroborated affidavit by a party allegedly served denying service is insufficient to contradict a * * * return [of service of process]." *Four Lakes Management & Development Company*, 129 Ill. App. 3d at 683.

¶ 22 In this case, the special process server's affidavit is *prima facie* evidence of abode service where he averred that he served defendant at 6:15 p.m. on January 11, 2010, by leaving a copy of the summons and complaint at her usual place of abode in Wheeling with a woman who was 13 years of age or older, and identified herself as a roommate, but refused to disclose her name, and informed this woman of the contents of the summons and complaint. See *Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. In strict compliance with the provisions of the substitute service statute, the special process server also noted in his affidavit the sex, race, and approximate age of the person served, and the place where, and the date and time of day when, the summons was left with the person served. 735 ILCS 5/2-203(b) (West 2010); see *c.f. State Bank of Lake Zurich*, 113 Ill. 2d at 310 (the failure to recite any of the particular information required by the statute renders the return defective). In addition, the special process server averred that on January 12, 2010, he placed copies of the summons and the complaint in the mail in a sealed envelope, addressed to defendant with postage prepaid to her usual place of abode in Wheeling.

¶ 23 Although she failed to attach an affidavit to her motion to quash, defendant attempts to rebut the process server's affidavit by asserting that her "verification" of the motion pursuant to section 1-109 of the Code was the equivalent of a Rule 191(a) affidavit. She claims that this is especially so because her "verification" remains unrebutted and uncontradicted.

¶ 24 Section 2-301(a) provides that "[u]nless the facts that constitute the basis for the objection [to jurisdiction over the person] are apparent from papers already on file in the case, the motion must be supported by an affidavit setting forth those facts." 735 ILCS 5/2-301(a) (West 2012). Section 1-109 of the Code and Rule 191(a) provide for two different types of attestation. Rule 191(a) provides, *inter alia*, that affidavits submitted in connection with a

motion to contest jurisdiction over the person, as provided by section 2-301 of the Code, shall be made on the personal knowledge of the affiants, set forth with particularity the facts upon which the claim, counterclaim, or defense is based, have attached thereto sworn or certified copies of all documents upon which the affiant relies, consist of facts admissible in evidence, not conclusions, and affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 25 In contrast, section 1-109 of the Code provides:

> "Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.
>
> Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath." 735 ILCS 5/1-109 (West 2012).

¶ 26 Based on the specific facts of the present case, we need not reach defendant's argument that the verification was a sufficient substitution for a Rule 191(a) affidavit because her motion to quash was unsigned and, therefore, did not comply with section 1-109. Although defendant had previously filed a motion to quash which was signed by her pursuant to section 1-109, that motion was withdrawn as indicated in the order of October 11, 2012. Despite the order stating that defendant was given leave to "renotice" the motion to quash, defendant instead elected to file a new motion to quash. This second motion to quash was dated October 12, 2012, and was

not signed by defendant. The motion was, instead, certified by her attorney under section 1-109. A briefing schedule was then set for the second motion to quash and the circuit court ruled on that motion. See *Kulhavy v. Burlington Northern Santa Fe R.R.*, 337 Ill. App. 3d 510, 515 (2003) ("The fact that the motion was withdrawn is determinative. The circuit court had no authority to consider, much less grant, a withdrawn motion."). In order to rebut the process server's affidavit, defendant must impeach the return by clear and satisfactory evidence. *Johnson*, 98 Ill. 2d at 172. Where, as here, defendant has failed to provide any sworn statement which was contrary to the statements of the process server's affidavit, we cannot say that the defendant rebutted the process server's affidavit.

¶ 27 Despite not being properly supported by an affidavit, we further note that the motion to quash suffers from a lack of particularity as to the substitute service on the unidentified woman. Defendant merely states that she did not have a roommate living with her, without any reference to place or date. It is well settled that a valid return of service will not be set aside merely upon the uncorroborated testimony of the person on whom process has been made, but only upon clear and satisfactory evidence. See *Hatmaker v. Hatmaker*, 337 Ill. App. 175, 181 (1941); *Paul v. Ware*, 258 Ill. App. 3d 614, 617 (1994). As the circuit court pointed out in its ruling, there is a lack of any evidence that on the date of the service at the subject address defendant did not have a roommate living with her, and her motion does not convincingly rebut the propriety of abode service indicated in the return. See *MB Financial Bank, N.A. v. Ted & Paul*, LLC, 2013 IL App (1st) 122077, ¶ 28.

¶ 28 Defendant further contends that she raised other affirmative matters and issues in her motion to quash service, which the circuit court failed to consider or address. There is no

indication in the record that she brought these matters to the attention of the circuit court for a ruling, effectively abandoning them, and, thus, may not raise them for the first time on appeal. See *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶ 35.

¶ 29 For these reasons, we find that the circuit court did not err in denying defendant's motion to quash service and affirm its ruling to that effect. Accordingly, the circuit court here had personal jurisdiction over defendant and, thus, its default judgment and order of foreclosure and sale regarding the property was also properly entered.

¶ 30 CONCLUSION

¶ 31 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.