2014 IL App (1st) 131736-U

FIFTH DIVISION
March 7, 2014

1-13-1736

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JPMorgan CHASE BANK, N.A.,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	10 CH 06628
	)	
NATALIE E. SOLOMON aka NATALIE SOLOMON,	)	Honorable
	)	Darryl B. Simko,
Defendant-Appellee.	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

Held: Where defendant's evidence of lack of service was clear, convincing, and uncontradicted by plaintiff, defendant was entitled to a remand for an evidentiary hearing on her motion to quash service of process.

¶ 1 In this residential mortgage foreclosure action, the defendant borrower appeals from the trial judge's denial of a motion to quash service of process and motion to reconsider. The appellant contends a special process server's affidavit of substitute service does not describe a member of the appellant's household as required by section 2-203(a) of the Code of Civil Procedure (735 ILCS 2-203(a) (West 2010)) (Code), and fails to support service of process.

¶ 2 On February 17, 2010, appellee JPMorgan Chase Bank, N.A. filed a complaint in the circuit court of Cook County to foreclose a 30-year, $275,000 mortgage loan that had been taken in 2007 by appellant Natalie E. Solomon. The mortgaged property is a suburban lot commonly known as 1052 Whitehall Drive, Northbrook, Illinois, 60062-4659. The bank also filed a motion to appoint a special process server, which the judge granted. The bank subsequently filed a motion for default judgment on grounds that substitute service of process was accomplished by Daniel Marco on March 18, 2010, but Solomon had not appeared within 30 days as summoned. The bank also filed a motion requesting a judgment of foreclosure and judicial sale and the appointment of a selling officer. After the judge granted the motions and entered judgment on June 24, 2010, for $296,429, the selling officer publically auctioned the Northbrook property on November 19, 2012, for the exact amount then calculated to be due, which was $389,957. The Illinois Mortgage Foreclosure Law provides for the seller to inform the court of the sale of the property and the proposed distribution of the proceeds and for the court to confirm the transaction and order possession. See 735 ILCS 15-1508 (West 2010) (report of sale and confirmation of sale); 735 ILCS 15-1701(c) (West 2010) (timing of order for possession).

¶ 3 However, on the day of the judicial sale, Solomon filed a motion to quash service of process due to conflicts between the private process server's affidavit and her own affidavit and a photocopy of her Illinois driver's license and a doctor's note which stated her height and weight. In his affidavit, private process server Marco had written " X SUBSTITUTE SERVICE," "Name Refused" "(Relationship [to the defendant]) Refused to state." Below this, in a paragraph that was entitled "Additional Comments," Marco had written, "Female occupant answered door and refused to say whether or not she was the defendant. Occupant stated she would not give her name or any

information in regards to the property or defendant. Server left papers on doorstep in front of the front door." Marco also wrote, Dodge Caravan registered to defendant was parked in driveway[.]" Marco described the unnamed woman that he encountered on March 18, 2010, at 7:28 p.m. to be 125 to 150 pounds and 5' 4." In her affidavit, Solomon swore she had "made no attempts to conceal herself at [the subject property]" and "was not at home at the time the alleged service occurred" because she had gone out to dinner that evening with her sister as she usually did on Thursdays. "Every Thursday, my sister picks me up [from my house] at around 6:00 p.m. and she drives her car. I leave my car in the driveway. We have been doing this every Thursday evening for a number of years.") Solomon further swore she "was the only individual living at the property" on that date, and "no one else was living at the address at the time who could have accepted service on her behalf." Solomon also swore "I am 4 feet and 11 inches in height, [and] 120 pounds." JPMorgan did not file a response brief or counter-affidavit nor does the record indicate that it asked for additional time to do so or to conduct discovery. Without conducting an evidentiary hearing, the trial judge denied Solomon's motion to quash and entered a written order that did not specify the court's reasoning.

¶ 4 Solomon filed a motion to reconsider that ruling, reiterating her two main arguments (no resident was home at the time and Solomon did not resemble the woman who purportedly opened the front door) and pointing out that she had not been given an evidentiary hearing. JPMorgan filed a response in which it argued Solomon's affidavit was insufficient alone and uncorroborated, yet, no evidentiary hearing was warranted and the motion to reconsider should be denied. The trial judge denied the motion in a written order which did not disclose the court's rationale.

¶ 5 This appeal concerns both orders.

¶ 6 The record indicates the judge also heard and granted the plaintiff's motion to approve the report of sale, authorized the selling officer to deliver a deed to the buyer, and granted possession of the Northbrook residence to the buyer as of May 26, 2013.

¶ 7 Service of process serves two purposes. *Equity Residential Properties Management Corp. v. Nasolo,* 364 Ill. App. 3d 26, 31, 847 N.E.2d 126, 131 (2006). First, effective service is a means of protecting the defendant's right to due process by allowing for proper notification and an opportunity to be heard. *In re Dar C.,* 2011 IL 111083, ¶60, 957 N.E.2d 898. " 'Second, it vests jurisdiction in the court over the person whose rights are to be affected by the litigation.' " *Nasolo,* 364 Ill. App. 3d at 31, 847 N.E.2d at 131; *GMB Financial Group, Inc. v. Marzano,* 385 Ill. App. 3d 978, 984, 899 N.E.2d 298, 304 (2008) (indicating a court acquires personal jurisdiction over a party only by the coercive power of a summons or by the acquiescence of a voluntary appearance). Thus, if a defendant is not served with process as required by law, the court has not acquired jurisdiction over the person and any default judgment entered against the defendant is void *ab initio*. *Nasolo,* 364 Ill. App. 3d at 32, 847 N.E.2d at 132; *In re Dar C.*, 2011 IL 111063, ¶60, 957 N.E.2d 898 (when subject matter jurisdiction or personal jurisdiction is lacking, proceedings are a nullity and do not create any rights for the plaintiff); *Clinton Co. v. Eggleston*, 78 Ill. App. 3d 552, 555, 397 N.E.2d 183, 185-86 (1979) (it is elementary that when the defendant has not been served as required by law and has not entered an appearance, the court has no personal jurisdiction and a default judgment is void); *State Bank of Lake Zurich v. Thill,* 113 Ill. 2d 294, 308, 497 N.E.2d 1156, 1161 (1986) (a foreclosure judgment rendered without service of process is void); *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, 974 N.E.2d 224 (foreclosure judgments are not meant to be effective and deprive owners of their property when the

trial court lacks personal jurisdiction over the owners).

¶ 8 We review *de novo* whether personal jurisdiction was obtained. *Nasolo,* 364 Ill. App. 3d at 31, 847 N.E.2d at 130; *C.T.A.S.S.& U Federal Credit Union v. Johnson,* 383 Ill. App. 3d 909, 910, 891 N.E.2d 558, 560 (2008).

¶ 9 Illinois defendants are entitled to receive the best possible notice of an action pending against them and it is only when personal service of summons cannot be had that another form of service will be permitted. *Nasolo,* 364 Ill. App. 3d at 31, 847 N.E.2d at 130. Section 2-203(a) of the Code provides that substitute service can be had only "by leaving a copy [of the summons] 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." 735 ILCS 5/2-203(a) (West 2010). The person purporting to make substitute service must show strict compliance with every requirement of the statute since the presumption of validity that attaches to a return or affidavit of service reciting personal service does not apply to a return reciting substitute service. *Thill,* 113 Ill. 2d at 309, 497 N.E.2d at 1162 (sting citation). For instance, one of the reasons the affidavit of substitute service in *Thill* was ineffective was because it indicated the process server delivered a copy of the complaint but not the summons. *Thill,* 113 Ill. 2d at 311, 497 N.E.2d at 1163. Unless the affidavit of service affirmatively shows compliance with all the particulars required by statute, it will not give the court personal jurisdiction over the defendant. *Thill,* 113 Ill. 2d at 310, 497 N.E.2d at 1162.

¶ 10 Plaintiff JPMorgan has two general contentions, which, if correct, would end Solomon's appeal. JPMorgan contends Solomon waived all of her appellate arguments by failing to present them in the circuit court. We find JPMorgan's statement to be mostly incorrect, with the exception of Solomon's new contentions on appeal (1) that the private process server had to affirmatively

state in the affidavit that he had personal knowledge of the facts recited in the affidavit and (2) that he had to determine and state whether the woman he had contact with was a family member or merely a resident of the same household. We limit our analysis to arguments that were presented to the trial judge. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996) (generally, issues not raised in the trial court may not be raised for the first time on appeal). JPMorgan next contends Solomon waived her objection to personal jurisdiction by participating in the foreclosure proceedings. JPMorgan bases this argument on the fact that Solomon's first attorney filed a motion to withdraw as counsel and attached a copy of Solomon's affidavit indicating she wanted to be represented by someone else. We find these documents do not amount to waiver because they were filed after the motion to quash and they do not request affirmative relief from the court. Solomon was merely informing the court of her desire to dismiss her attorney. This situation contrasts with what occurred in the case JPMorgan cites, *In re Marriage of Adler*, 271 Ill. App. 3d 469, 648 N.E.2d 953 (1995), in which a party filed a motion for an award of funds that were in dispute and being held in escrow and an award of attorney fees and costs. The party in *Adler* was seeking affirmative relief from the court, Solomon was not. Solomon has had a single purpose – to vacate what she contends was an *ex parte*, void judgment.

¶ 11 Solomon now emphasizes that in personal service, the return is considered *prima facie* evidence that process was properly served on the defendant in person and it should not be set aside unless it is impeached by clear and convincing evidence, but in substitute service, there is no such presumption. *West v. H.P.H., Inc.*, 231 Ill. App. 3d 1, 4-5, 596 N.E.2d 1, 3 (1992). In instances of substitute service, when a return is challenged by affidavit and there are no counter-affidavits, the return itself is not even evidence (*West*, 231 Ill. App. 3d at 4-5, 596 N.E.2d at 3), and absent

testimony by the process server, the defendant's affidavit must be taken as true and the purported service quashed (*Sullivan v. Bach*, 100 Ill. App. 3d 1135, 1139-40, 427 N.E.2d 645, 649 (1981)). "But whether personal or substitute service is challenged, the plaintiff is entitled to at least a hearing to determine the validity of service." *West*, 231 Ill. App. 3d at 5, 596 N.E.2d at 3. JPMorgan does not respond.

¶ 12 We find Solomon's argument persuasive. Her affidavit and supporting exhibits are more than sufficient to challenge the private process server's affidavit and entitle her to an evidentiary hearing. Although Marco swore to making contact with an unknown woman at Solomon's residence on March 18, 2010, at 7:28 p.m. when Solomon's car was parked in the driveway, Solomon's affidavit indicated she "was the only person living at the property" on that date, she "was not at home" at that time, she usually went out with her sister for dinner on Thursday evenings at around 6 p.m., and on that date, her sister had picked her up before 7:28 p.m. for their dinner out. Alone, these uncorroborated statements would not be enough to persuade us, however, Solomon also thoroughly addressed the description of the woman that was purportedly inside her home and she corroborated her statements with her driver's license and a note from her doctor. Marco said the woman he met weighed between 125 and 150 pounds, which is a broad range that gave the private process server a substantial margin of error. Solomon swore in her 2012 affidavit, "I am *** 120 pounds," which is toward the lower end of the stated range, her driver's license issued on November 14, 2012, indicated she weighed 120 pounds, and the doctor's note (an unsworn document) dated November 25, 2012, indicated Solomon was then 114 pounds. These were indications of Solomon's approximate weight in late 2012, but they did not rule out the possibility that Solomon weighed considerably more in early 2010 and had lost weight in the

ensuing two years and eight months. There is, however, no plausible explanation for the 5" difference between the 5' 4" woman who talked with the Marco and Solomon's height of 4' 11". Solomon swore, "I am 4 feet and 11 inches in height," and these same numbers appear on her driver's license and in the doctor's note. An Illinois court found in *Winning Moves* that a 4" difference in height failed to support service. *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 605 N.E.2d 1026 (1992). We agree with the trial judge's observation in that case, " 'to say she's 5'7' when she's *** 5'3" *** [*well, it's*] *pretty hard to misconstrue somebody* [sic] *by four inches*.' " *Winning Moves*, 238 Ill. App. 3d at 837-38, 605 N.E.2d at 1029 (emphasis added). The height difference here is even greater than in *Winning Moves*.

¶ 13 In our opinion, the dramatic height difference and Solomon's affirmative statements about who resided at her house and where Solomon was when private process server Marco said he knocked at the front door call into question whether his affidavit spoke the truth. We reiterate that JPMorgan did not attempt to refute any of Solomon's presentation, either in a response brief or opposing affidavit, and JPMorgan has argued that no evidentiary hearing was necessary. Nonetheless, Solomon's evidence as to lack of service was sufficient to warrant an evidentiary hearing. *Sullivan*, 100 Ill. App. 3d at 1142, 427 N.E.2d at 651. See *e.g. Newell v. Jackson*, 72 Ill. App. 3d 598, 391 N.E.2d 22 (1979) (at evidentiary hearing on defendant's motion to vacate judgment due to defective service, trial court heard from defendant, her sister, her nephew, and the nephew's wife regarding defendant's appearance and whereabouts). Accordingly, we find that the trial court erred in denying Solomon's motion to quash without conducting an evidentiary hearing. We reverse that ruling and remand for that purpose. If Solomon can establish the facts set out in her motion to quash, then it will be clear the trial court did not have personal jurisdiction over her

when it entered the default judgment, and that the judgment is void and must be set aside.

¶ 14 It follows that it was an abuse of discretion for the trial judge to deny Solomon's motion to reconsider the ruling and we reverse that additional ruling. *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 23, 983 N.E.2d 1124 (indicating that when ruling on a motion for reconsideration, a trial court can abuse its discretion by applying the wrong legal standard, using the wrong legal criteria, or adhering to factual findings that are against the manifest weight of the evidence).

¶ 15 Reversed and remanded for further proceedings consistent with this order.