

FIFTH DIVISION
MARCH 28, 2014

No. 1-13-2014

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

US BANK NATIONAL ASSOCIATION, as Trustee,)	Appeal from the
Successor in Interest in Wachovia Bank,)	Circuit Court of
National Association as Trustee for Wells)	Cook County.
Fargo Asset Securities Corporation, Mortgage)	
Pass-Through Certificates, Series 2003-17,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
ADAM KIELCZEWSKI; and AGNES KIELCZEWSKI a/k/a)	No. 12 CH 7841
AGNES NAGORZANSKI,)	
)	
Defendants-Appellants)	
)	
(JPMorgan Chase Bank, N.A. s/i/i to Bank One, N.A.; The)	
State of Illinois; The United States of America;)	
Unknown Owners and Nonrecord Claimants,)	Honorable
)	John H. Ehrlich,
Defendants).)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court's decision to deny defendants' motion to quash service was not against the manifest weight of the evidence.

¶ 2 In this mortgage foreclosure action, Adam Kielczewski and Agnes Kielczewski (hereinafter defendants¹), appeal from the trial court's order denying their motion to quash service. On appeal, defendants contend that the trial court's decision was against the manifest weight of the evidence. They argue that plaintiff did not strictly comply with the requirements for service by publication and did not act with due inquiry or diligence in attempting to serve them.

¶ 3 For the reasons that follow, we affirm.

¶ 4 On March 6, 2012, plaintiff filed a complaint to foreclose mortgage against defendants. The mortgage was recorded against property located at 1916 West School Street, Chicago. A summons was issued against defendants directing that they be served at that address, as well as at addresses in Long Grove, Illinois, and Arlington Heights, Illinois.

¶ 5 Plaintiff had ProVest, LLC, appointed as special process server. On March 7, 2012, Kenneth Sydnor, an employee of ProVest, LLC, completed affidavits stating that defendants were not served at the Chicago address because he visited the address, spoke with a woman there, and learned defendants were landlords who did not live at the address.

¶ 6 On March 10, 2012, Joseph Finch, an employee of ProVest, LLC, completed affidavits stating that he was unable to serve defendants at the Long Grove address. Finch indicated that "Per [Adam Kielczewski's] mother *** the defendant does not reside here. No further information provided."

¹ The remaining defendants are not parties to this appeal.

¶ 7 On March 14, 2012, Dennis Velickovich, an employee of ProVest, LLC, completed affidavits stating that he was unable to serve defendants at the Arlington Heights address after diligent investigation. Velickovich listed the following details regarding attempts at service:

"3/7/2012 2:00:00 PM – FURNISHED HOUSE

3/7/2012 8:00:00 PM – LIGHTS ON INSIDE

3/8/2012 7:30:00 AM – LOTS OF KIDS TOYS INSIDE

3/9/2012 5:45:00 PM – I HAVE SERVED THESE

PEOPLE A FEW TIMES – THE LAST COUPLE OF TIMES

SERVING THEY WON'T OPEN DOOR FOR ME

3/11/2012 2:00:00 PM – I SEE PEOPLE INSIDE – NO

ANSWER

3/12/2012 7:15:00 AM – NO CONTACT

3/13/2012 5:45:00 PM – I SEE SOMEONE IN THE

BASEMENT

3/14/2012 7:45:00 PM – LIGHTS ON UPSTAIRS[.]"

¶ 8 On March 15, 2012, Daniel Walton, an employee of ProVest, LLC, completed an "Affidavit of Due and Diligent Search" for each defendant. Each affidavit included the following statement:

"A diligent search and inquiry to discover the name and residence of the subject person was performed by the following acts set forth, as particularly as is known to affiant, below.

After diligent search and inquiry by affiant, the residence of the subject person is unknown to the affiant."

Walton indicated in the affidavits that inquiry was made into defendants' (1) credit information, including searches of their social security numbers, a comprehensive employment database, and creditors; (2) telephone listings; (3) motor vehicle ownership; and (4) other records, including voter registration, professional licenses, death records, jail and prison records, and United States Postal Service records. Those searches revealed that Adam Kielczewski's social security number and employment history were associated with the address in Long Grove, and his vehicle was associated with the Arlington Heights address. Agnes Kielczewski's social security number was associated with the Long Grove address and the Arlington Heights address, her credit file showed the Arlington Heights address, and her professional license was associated with the Arlington Heights address. Walton listed a mobile telephone number in the affidavits, followed by a notation stating, "Spoke with ADAM KIELCZEWSKI, stated he & Agnes reside at 501 WILSHIRE LN ARLINGTON HTS 60004, please attempt in the evening."

¶ 9 Walton next listed the addresses where the process servers attempted service. He related in his affidavits that a process server attempted service at the Chicago address, where he learned from a woman that defendants were landlords and did not live there. Walton reported that a process server attempted service at the Arlington Heights address, and repeated the information listed in Velickovich's affidavit regarding the details of those attempts. Finally, Walton related that a process server had attempted service at the Long Grove address, spoke with "the defendant's mother," and learned that defendants did not live there.

¶ 10 On March 20, 2012, an attorney for plaintiff filed an affidavit for service by publication, averring that on due inquiry, defendants could not be found so that service could be served upon them. The attorney stated that special process servers made 10 attempts to serve defendants and attached the affidavits completed by the process servers. The attorney's affidavit concluded, "Defendants' place of residence upon diligent inquiry cannot be ascertained and their last known place of residence is at: *** 1916 WEST SCHOOL STREET, CHICAGO, IL 60657."

¶ 11 Notice of the foreclosure was published in an area newspaper on March 22, March 29, and April 5, 2012. In addition, the circuit court clerk mailed a copy of the notice to defendants at the Chicago address.

¶ 12 On October 30, 2012, the circuit court entered an order of default and judgment of foreclosure and sale. A judicial sale was held on February 1, 2013. Defendants appeared in the case on April 16, 2013, and moved to quash service. In the motion, defendants argued that plaintiff served them by publication without exercising due diligence or inquiry in their attempts at personal service. Defendants further asserted that the affidavits of service and due diligence were deficient because they did not identify the individual who attempted service or state the actions taken to attempt service, and that the affidavit for service by publication did not "speak the truth of Defendants' residence." Defendants asserted that the circuit court did not have jurisdiction over them and that therefore, the judgment must be vacated. Following a hearing, the circuit court denied the motion on April 22, 2013. The court also entered an order approving the sale of the property.

¶ 13 On appeal, defendants contend that the trial court's denial of their motion to quash service was against the manifest weight of the evidence. Defendants assert that plaintiff did not strictly

comply with the requirements for service by publication. They argue that plaintiff's affidavit for service by publication did not "speak the truth," as it stated defendants' place of residence could not be ascertained and listed defendants' last known place of residence as the Chicago address. Defendants maintain that plaintiff knew they lived at the Arlington Heights address and, therefore, made patently false statements in the affidavit. Defendants further argue that plaintiff did not act with due inquiry or diligence in attempting to serve them and that, therefore, the trial court did not obtain personal jurisdiction over them. They assert that the affidavits executed by Dennis Velickovich and Daniel Walton do not support service by publication because they were written in the passive voice and do not set forth the particular actions taken to serve defendants, for example, whether anyone knocked on their door or rang their doorbell on the dates listed. Finally, defendants argue that even if the affidavits were sufficient, the efforts made to serve them at the Arlington Heights address did not constitute due inquiry into ascertaining their whereabouts.

¶ 14 When reviewing a decision on a motion to quash service of process, we must determine whether the trial court's findings of fact are against the manifest weight of the evidence.

Deutsche Bank National Trust Co. v. Brewer, 2012 IL App (1st) 111213, ¶ 17.

¶ 15 Personal jurisdiction acquired by publication is only allowed in limited cases where personal service could not be achieved, and then, only after strict compliance with statutory requirements. *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 926-27 (1978). Section 2-206 of the Code of Civil Procedure allows service by publication in actions affecting property. 735 ILCS 5/2-206 (West 2010). Under section 2-206, the plaintiff must file an affidavit showing that the defendant "on due inquiry cannot be found, or is concealed within this

State, so that process cannot be served upon him or her, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained[.]" 735 ILCS 5/2-206(a) (West 2010). The Cook County circuit court has adopted a rule that elaborates on the requirement for the affidavit. Rule 7.3 provides in relevant part as follows:

"Pursuant to 735 ILCS 5/2-206(a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such 'due inquiry' setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication." Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 16 In the instant case, we find that plaintiff complied with section 2-206 and Rule 7.3. The record contains affidavits filed by three different process servers, detailing their unsuccessful attempts to serve defendants at the Chicago, Long Grove, and Arlington Heights addresses, as well as the actions they took in attempting service. Most notably, Dennis Velickovich stated in his affidavits that he was unable to serve defendants at the Arlington Heights address. He indicated that he attempted service at the address eight times between March 7 and March 14, 2012, at different times during the days and the evenings. He indicated that on some of those

occasions, lights were on inside, lights were on upstairs, he could see people inside, and he saw someone in the basement. In addition, Daniel Walton filed affidavits averring that he performed diligent search and inquiry of defendants' credit information, telephone listings, motor vehicle ownership, and other records, including voter registration, professional licenses, death records, jail and prison records, and United States Postal Service records. These affidavits sufficiently demonstrate that plaintiff acted with due diligence and made due inquiry in its unsuccessful attempt to locate defendants to effectuate personal service upon them.

¶ 17 Taken together, the affidavits fully describe the inquiries made by Velickovich and Walton to locate defendants. Accordingly, we find that plaintiff strictly complied with the requirements of section 2-206 and Rule 7.3, and conclude that the trial court's denial of defendants' motion to quash service was not against the manifest weight of the evidence.

¶ 18 In coming to this decision, we reject defendants' heavy reliance on the decision in *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213. In *Deutsche Bank*, the plaintiff bank failed to present any affidavits in which the affiant was specifically identified and swore that he or she had personally attempted to serve process on the defendant homeowner or had attempted to locate the defendant by searching available databases. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶¶ 23-25. Rather, the process server's affidavit was written in the passive voice and stated that "attempts were made" to serve the defendant, and the affidavit for service of publication stated "it was discovered that no contact could be made" with the defendant after "we" attempted to locate the defendant by searching various enumerated databases. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶¶ 6, 7, 23. This court found in *Deutsche Bank* that the trial court erred in denying the defendant homeowner's motion to quash summons because the

plaintiff bank did not comply with the requirements of Rule 7.3. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 25.

¶ 19 The instant case is distinguishable from *Deutsche Bank*. As discussed above, Dennis Velickovich identified himself in his affidavits as the person who attempted to serve defendants at the Arlington Heights address. He did not simply claim that "someone" attempted to serve process on defendants, as was the case in *Deutsche Bank*. See *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 6. In addition, Daniel Walton averred in his affidavits that "after diligent search and inquiry by affiant, the residence of the subject person[s] is unknown to the affiant." Thus, Walton identified himself as the person who searched defendants' credit information and other databases. This differs from *Deutsche Bank*, where the affiant stated that "we" searched databases and "it was discovered that no contact could be made" with the defendants. See *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 7.

¶ 20 Defendants next argue that plaintiff knew they lived at the Arlington Heights address, and, therefore, its affidavit for service by publication did not "speak the truth" when it stated defendants' place of residence could not be ascertained and listed defendants' last known place of residence as the Chicago address. Defendants argue that by not speaking the truth in the affidavit, plaintiff did not strictly comply with the requirements of section 2-206.

¶ 21 We disagree with defendants' interpretation of this affidavit as containing affirmative misstatements. Contrary to defendants' assertion, the record does not conclusively establish that plaintiff knew with certainty that defendants resided at the Arlington Heights address. In the affidavit for service by publication, an attorney for plaintiff averred that defendants' "place of residence upon diligent inquiry cannot be ascertained." The attorney reported that process

servers were unable to serve defendants and attached the process servers' affidavits, detailing their unsuccessful efforts to serve defendants at the Chicago, Long Grove, and Arlington Heights addresses. Given these circumstances, we cannot agree with defendants that plaintiff made an affirmative misstatement of fact in stating that defendants' place of residence could not be ascertained. Furthermore, section 2-206 does not require that a plaintiff list a defendant's last known place of residence; rather, the statute provides that a plaintiff must state "the place of residence of the defendant, if known, or that upon diligent inquiry his or her place of residence cannot be ascertained." 735 ILCS 5/2-206(a) (West 2010). Therefore, we cannot find that plaintiff violated section 2-206 by averring that defendants' last known place of residence was the Chicago address.

¶ 22 Finally, we address defendants' argument that even if all the affidavits were sufficient, the efforts made by plaintiff to serve them at the Arlington Heights address did not constitute due inquiry into ascertaining their whereabouts. Defendants assert that eight attempts at service over an eight-day period constituted only "minimal effort"; that where plaintiff had Adam Kielczewski's mobile number, a telephone call "would easily have resulted in a coordinated effort for [defendants] to accept service at [their] home or some other convenient location"; and that plaintiff should not have abandoned its efforts to serve them less than two weeks after the complaint had been filed.

¶ 23 Here, in denying the motion to quash service, the trial court made a determination that plaintiff's actions constituted due inquiry. After reviewing the record, we conclude that the trial court's determination was not against the manifest weight of the evidence. This is not a case where the plaintiff's efforts were "casual, routine, or spiritless." See *Bank of New York v.*

Unknown Heirs & Legatees, 369 Ill. App. 3d 472, 476 (2006). In the instant case, Daniel Walton searched defendants' credit information, telephone listings, motor vehicle ownership, and other records, including voter registration, professional licenses, death records, jail and prison records, and United States Postal Service records, and discovered three addresses associated with defendants. Three different process servers went to the three different residences in search of defendants. Notably, Dennis Velickovich went to the Arlington Heights address eight times. Given these circumstances, defendants' arguments fail.

¶ 24 The trial court's decision to deny the motion to quash service was not against the manifest weight of the evidence. For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.