

No. 1-14-0875

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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WELLS FARGO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
FERNANDO OLIVAN; MARTHA A. OLIVAN	)	
A/K/A MARTHA OLIVAN,	)	
	)	
Defendants-Appellants.	)	No 11 CH 6734
	)	
UNKNOWN OWNERS & NON- RECORD	)	
CLAIMANTS,	)	
Defendants.	)	
-----	)	
C & I HOMES LLC,	)	Honorable
	)	Alfred M. Swanson,
Intervenor.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Denial of motion to quash service of process affirmed over contention that plaintiff did not strictly comply with statutory requirements for substitute service.

¶ 2 Defendants Fernando Olivan and Martha Olivan appeal the judgment of the circuit court of Cook County denying Fernando's motion to quash service of process of a complaint to foreclose mortgage on their home. Defendants contend the court erred in denying that motion because the record shows that substitute service of process on Fernando did not strictly comply with the statutory requirements. They thus request that we reverse the court's order and remand for further proceedings. We affirm.

¶ 3 The pleadings in the common law record show that on February 23, 2011, plaintiff Wells Fargo Bank, N.A. filed a complaint to foreclose the mortgage that was executed in January 2008 between Fernando and Martha and M.E.R.S. Inc., as Nominee for Franklin American Mortgage Company, plaintiff's predecessor in interest, on the premises commonly known as 8741 South Francisco Avenue, Evergreen Park, Illinois (the property). Special process server Joshua Battung submitted two sworn affidavits indicating he served process on Fernando and Martha on March 9, 2011, at 8:45 p.m. In the first affidavit, Battung averred, *inter alia*, that he personally served Martha with the summons and complaint in this case at the property. In the second affidavit, Battung averred, *inter alia*, that he also served a set of the summons and complaint to Fernando by substitute service at his usual place of abode, *i.e.* the property, by giving the documents to Martha Olivan, defendant's step-daughter, a Hispanic female who resided at the property and who was approximately 21-to-25 years of age, and informing her of the contents of those documents.

¶ 4 The common law record further shows that Fernando and Martha failed to appear and/or file a responsive pleading in this case, and that on May 29, 2012, an order of default was entered

against them. A judgment of foreclosure and sale was entered on that same date. On October 5, 2012, Martha entered a *pro se* general appearance in which she listed the property as her contact address, and, on October 12, 2012, she filed an emergency motion to stay the judicial sale. Therein, she represented that she had found a buyer for the property, which she described as "[her] home," and had submitted the short sale offer to plaintiff for approval. On October 16, 2012, the court entered an order staying the judicial sale through November 20, 2012. The record shows that although the judicial sale was postponed twice more over the ensuing months, Fernando and Martha were unable to complete a short sale of the property.

¶ 5 On July 16, 2013, Fernando and Martha filed an appearance through an attorney, and, on September 9, 2013, Fernando filed a motion to quash service of process. Therein, Fernando argued, *inter alia*, that the process server did not serve the complaint and summons to a resident of his household, or at his usual place of abode, as required by section 2-203(a)(2) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-203(a)(2) (West 2010)). However, Fernando did not appear to contest the court's jurisdiction over Martha, as he acknowledged that she "appears to have filed a *pro se* appearance more than 60 days prior to filing this motion, and appears to have filed something according to the Clerk's online website."

¶ 6 In his motion, Fernando argued that the property was not his usual place of abode in March 2011, and that the process server's description of the person he claimed to have served at the property indicates that it was not Martha or a resident of his household. In support of his motion, Fernando attached an affidavit in which he averred that he never received a complaint or summons in this case; that he was living in Mexico, and not at the property, in March 2011; and

that he had been living in Mexico for "some time" at that point and did not have an absolute intention to return to Chicago. Fernando further averred that he had gone to Mexico because he had been working doing car detailing in Chicago, but "people do not want to have that work done when it is cold." Fernando further averred that he has a daughter named Carla Castellanos, and does not have a step-daughter named Martha Olivan, and that his wife, "is a lovely woman, but if a process server says he served someone between 21 and 25 years of age, that would not be my wife."

¶ 7 Fernando also attached Martha's affidavit in support of his motion. Therein, Martha averred that she was never given a complaint or summons in this case, and that in March 2011, Fernando lived in Mexico, and not at the property. Martha further averred that she and Fernando have a daughter named Carla Castellanos and do not have a step-daughter named Martha Olivan. Martha finally averred that "I am a lady and I will not discuss my age, but I do not resemble anyone in the age of 21 to 25." Fernando also attached a photocopy of Martha's Illinois driver's license, which was issued on February 19, 2010, and which lists the property as Martha's address and indicates that her birth date is February 14, 1973. However, the photograph of Martha that is depicted on the copy of the license in the record is almost entirely obscured by dark ink, and we cannot discern any facial features.

¶ 8 On January 24, 2014, the circuit court denied Fernando's motion to quash service of process. A third-party bidder subsequently purchased the property at a judicial sale and assigned its interests to C&I Homes LLC, who petitioned to intervene in this case and moved to confirm the sale. Fernando and Martha objected to approval of the sale based on the sale price, arguing

that it was unconscionably low. On February 24, 2014, the circuit court granted the motion to intervene and to approve the sale, over Fernando and Martha's objections. Fernando and Martha now appeal the circuit court's denial of Fernando's motion to quash service and, because the court denied the motion based solely on documentary evidence, the parties agree that our review is *de novo*. *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 13.

¶ 9 Pursuant to section 2-203(a)(2) of the Code, substitute service of process upon a defendant may be made by leaving a copy of the summons at defendant's usual place of abode with some person of the family or a person residing there, of the age of 13 or upwards, and informing that person of the contents of the summons. 735 ILCS 5/2-203(a)(2) (West 2010); *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309-10 (1986). The affidavit of service of the person making substituted service must show strict compliance with each of these statutory requirements. *Id.* at 309.

¶ 10 Defendants maintain that the statutory requirements of section 2-203 of the Code were not strictly complied with in this case, and therefore Fernando was not properly served via substitute service. Specifically, they contend that the requisite documents were not left (1) with a family member or person residing at the property, or (2) at Fernando's usual place of abode.

¶ 11 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 v. H.P.H., Inc.*, 231 Ill. App. 3d 1, 4-5 (1992). That said, we note that in relation to matters that are within the personal knowledge of the officer making the return, such as the fact that service was made at a particular place and upon a person who gave a particular name to the process server, the process server's

return is *prima facie* evidence of substitute service which cannot be set aside upon the uncorroborated affidavit of the person served. *Nibco Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). Rather, it can only be set aside upon clear and satisfactory evidence. *Id.*

¶ 12 Here, Battung averred that he made substitute service upon Fernando by leaving copies of the requisite documents at the property with a Hispanic female who identified herself as Martha Olivan, and who appeared to him to be approximately 21 to 25 years of age. Because all of the aforementioned are matters within his personal knowledge, Battung's return cannot be set aside merely upon defendants' uncorroborated affidavits. *Id.*

¶ 13 Defendants argue that the person at issue could not have been Martha given the disparity between Martha's age and the age Battung listed on the service affidavit. In so arguing, defendants rely upon a copy of Martha's Illinois driver's license, which reflects that she was 38 years old at the time of service, 13 years older than Battung's estimation of her age. However, Battung averred that the age he listed in the service affidavit was merely an approximation of Martha's age. The fact that Martha was older than Battung estimated her to be does not, without more, rise to the level of clear and satisfactory evidence. We note that comparable differences have been described as "not particularly remarkable." *Pineschi v. Rock River Water Reclamation Dist.*, 346 Ill. App. 3d 719, 724 (2004) (12-year age discrepancy).

¶ 14 Additionally, although Battung averred that Martha Olivan was defendant's step-daughter instead of his wife, the fact remains that defendants do not contest that defendant is married to a woman named Martha Olivan and that she lived at the property at the time of service. As previously mentioned, Martha listed the property as her address in her *pro se* appearance, and

that address is listed on her driver's license. Accordingly, we find that defendants have failed to provide clear and satisfactory evidence contradicting Battung's averment that he gave the requisite documents to a person who identified herself as Martha Olivan, who is a person over the age of 13 and who resided at the property at the time of service.

¶ 15 Defendants also argue that Fernando was not served at his usual place of abode because he was living in Mexico, and not at the property, in March 2011. Whether a person occupies a home or property as his or her "usual place of abode," is not generally a matter presumptively within the personal knowledge of the process server (*Four Lakes Management and Development Co. v. Brown*, 129 Ill. App. 3d 680, 684 (1984)), and what constitutes a person's "usual place of abode" is a question of fact (*United Bank of Loves Park v. Dohm*, 115 Ill. App. 3d 286, 289 (1983)). Additionally, there is a rebuttable presumption that the house where a man's wife and children reside is his "usual place of abode." *Id.* In determining whether that presumption has been overcome, courts look to factors such as "the state of the marriage at the time of service, the frequency of the husband's contacts with the house in which the family has been residing, the defendant's intent or lack of intent to abandon this residence permanently or to move his family elsewhere, whether defendant has removed his personal belongings from this residence, the defendant's address for voter registration, driver's license, mail delivery and other purposes, and whether the wife and children continue to live at the residence." *Id.* The underlying consideration is whether substitute service at that property is reasonably likely to provide defendant with actual notice of the proceedings. *Id.*

¶ 16 Here, Fernando and Martha do not contest that they were a legally married couple at the time of service and are currently still married, or that Martha lived at the property at the time of service. Nor did they attest, or argue in their briefs, that at the time of service their marriage was not in a good state. Neither Fernando nor Martha averred that Fernando had ceased contact with Martha or that he had removed his personal belongings from the property, nor is there any evidence in the record indicating that to be the case. We also note that the mortgage itself contains a residency clause in which both Olivans stated they would use the Property as their principal residence and continue to occupy the Property as their principal residence for at least one year following the date of their initial occupancy. While we note that the date of substitute service fell more than a year after the one-year required occupancy period, this representation in the mortgage further undermined the reliability of Fernando's assertion that he had established an entirely new residence in Mexico different from the Illinois residence of his wife at the marital home.

¶ 17 Further, defendants introduced no evidence corroborating their assertion that Fernando lived in Mexico at the time of service, such as a signed lease reflecting where Fernando was living at that time or correspondence mailed to him at a Mexico address during that time period. Nor is there any indication as to how long Fernando had been in Mexico, other than his vague assertion that he had been there for "some time." Additionally, although Fernando averred that he "did not have an absolute intention to return to Chicago," the remainder of his affidavit implies otherwise. Fernando's averment that the reason he went to Mexico was because the work he did



detailing cars was not in high demand in cold weather implies that his time in Mexico would be limited to cold weather months.

¶ 18 Finally, even if Fernando had moved into a new residence, that alone would not necessarily prevent the property from being his usual place of abode. *Id.* at 291. Rather, courts usually also require evidence of aggravating factors such as marital discord and permanent removal in order to find that the presumption has been overcome. *Id.* As previously stated, no evidence of either of those factors can be found in the record. In sum, we find that defendants have failed to overcome the presumption that the property, where Fernando's wife Martha lived, was his "usual place of abode" at the time of service, and, accordingly, that the trial court did not err in denying Fernando's motion to quash service of process.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.