THIRD DIVISION
July 22, 2015

No. 1-14-2236

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JANET S. STOPKA,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County
	)	
v.	)	14 OP 50165
	)	
KATIE A. KALOUSEK,	)	Honorable
	)	Sheila McGinnis,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justice Hyman concurred in the judgment.
Presiding Justice Pucinski specially concurred.

ORDER

¶ 1 *Held*: A default plenary order of protection is void and must be vacated where there is no proof of service of summons in the independent proceeding and the respondent's motion to vacate did not retroactively confer personal jurisdiction on the circuit court.

¶ 2 Respondent Katie Kalousek appeals the circuit court's order denying her motion to vacate a default plenary order of protection entered in favor of her sister, petitioner Janet Stopka. Kalousek claims that the circuit court lacked personal jurisdiction to enter the default order of protection against her because she was not personally served with summons and the petition for

an order of protection. Finding the circuit court entered the default plenary order of protection without having personal jurisdiction over Kalousek, we reverse the circuit court's order denying her motion to vacate and vacate as void the default plenary order of protection.

¶ 3 Initially, we note that Stopka has not filed a brief on appeal. Because the record is simple and Kalousek's claimed error can be decided without the aid of Stopka's brief, we will decide this appeal on Kalousek's brief alone. *State Farm Mutual Insurance Co. v. Ellison*, 354 Ill. App. 3d 557, 388 (2004).

¶ 4 Stopka originally appeared on an emergency petition for an order of protection on April 9, 2014. A transcript of the hearing reflects that the subject matter of the petition was an altercation that occurred the previous day in a residence owned by the parties' father where Stopka had been living. No order was entered on April 9 and the matter was continued to April 30, 2014.

¶ 5 On the next court date, Stopka again appeared and informed the court that she had attempted to serve the petition on her sister by certified mail, but that Kalousek had refused to accept the letter. The trial judge informed Stopka that it was necessary to serve Kalousek either through the sheriff or a special process server. Stopka told the trial judge that she would arrange for service through the sheriff. Stopka's petition was continued to May 21, 2014.

¶ 6 Kalousek appeared in court on May 21, informed the court that she had not been served and that she had just learned that Stopka was seeking an order of protection. The record reflects that the court provided Kalousek a copy of the petition and recessed the hearing so that she could review it. When the matter was re-called, Kalousek informed the court that she was not ready to proceed that day and the court again entered and continued Stopka's petition to June 18.

¶ 7 Kalousek did not appear on June 18. A colloquy between Stopka and the court revealed that the court was under the impression that Kalousek had been served with process prior to appearing on May 21. ("So, then the Sheriff went and served her, and you are saying she was here on the last court date.") The record contains no return of service. Reasoning that Kalousek knew of the scheduled hearing and failed to appear, the court proceeded with the hearing on the petition and ultimately granted Stopka a default plenary order of protection, which ordered Kalousek to have no contact with Stopka and granted Stopka exclusive possession of the parties' father's home. The order was set to expire on December 17, 2014.

¶ 8 As the court was ruling on the petition, an attorney for Kalousek attempted to address the court regarding the lack of service on his client. Because the attorney had not filed an appearance (under the mistaken impression that doing so would waive his client's objection to the lack of service), the court did not entertain the objection.

¶ 9 Following entry of the plenary order, Kalousek filed a motion to vacate, supported by her affidavit, attesting to the lack of service. Stopka's brother, David Stopka, also filed a petition to intervene and a motion to vacate or modify the plenary order of protection in which he alleged that (i) his father had designated him to act pursuant to an Illinois Statutory Short Form Power of Attorney for Property, (ii) Stopka had no ownership interest in their father's home, (iii) he was attempting to sell the property and use the proceeds to pay for his father's nursing home expenses, and (iv) his sister's continued exclusive occupation of the home would be an impediment to the sale. The court granted the latter motion and modified the plenary order to eliminate Stopka's right to exclusive possession of the home. Kalousek's motion to vacate was denied.

¶ 10 The order of protection has now expired by its own terms, and Kalousek's appeal is moot or arguably moot. *In re Marriage of Kiferbaum*, 2014 IL App (1st) 130736, ¶ 22; see *Felzak v.*

Hruby, 226 Ill. 2d 382, 392 (2007); *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005) (stating an appeal becomes moot if events occurring after the filing of the appeal render it impossible for this court to grant effectual relief to the complaining party). Expired orders of protection, however, may be reviewed under the public interest exception to the mootness doctrine. *Benjamin v. McKinnon*, 379 Ill. App. 3d 1013, 1020 (2008); *Lutz v. Lutz*, 313 Ill. App. 3d 286, 288 (2000); *Whitten v. Whitten*, 292 Ill. App. 3d 780, 784 (2000). Thus, we will consider the merits of Kalousek's appeal.

¶ 11 For a judgment to be valid, a court must have both personal and subject matter jurisdiction. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311 (2014), ¶ 17. Kalousek's sole claim on appeal is that the default plenary order of protection must be vacated because the circuit court lacked personal jurisdiction to enter that order. We agree.

¶ 12 Personal jurisdiction over a defendant is obtained when: (1) the defendant is served with process personally or by publication or (2) the defendant voluntarily submits to the court's jurisdiction. *Id*. at ¶ 35. Under section 210(a) of the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/210(a) (West 2014)), "[a]ny action for an order of protection, whether commenced alone or conjunction with another proceeding, is a distinct cause of action and *requires that a separate summons be issued and served*." (Emphasis added.) When service of a document is required, proof of service shall be filed with the clerk of the court. Ill. S. Ct. R. 12(a) (eff. July 1, 1971); see also 750 ICLS 60/205(a) (West 2014) (incorporating Illinois Supreme Court rules to actions commenced under the Act). Service may be proved by a written acknowledgment signed by the person served, a certificate or affidavit of the person who personally delivered the documents, or a certificate of the attorney or person who deposited the document in the mail or transmitted it by facsimile. Ill. S. Ct. R. 12(b) (eff. July 1, 1971); 735 ILCS 5/2-203(a) (West 2014).

¶ 13 Here, Stopka's filing of the petition was a distinct cause of action unrelated to any pending case and required the service of summons. Although the record reveals that a summons was issued, the record lacks any proof that the summons was actually served. Various addresses listed for Kalousek in the record are obviously incomplete. Moreover, Kalousek affirmatively averred in an affidavit that she was not personally served with summons or the petition. Absent service of summons, the court's plenary order would be valid only if Kalousek voluntarily submitted to the court's jurisdiction.

¶ 14 In this case, Kalousek's attorney filed an appearance and a motion to vacate in order to challenge the court's personal jurisdiction over Kalousek, contending there was no service of summons. Kalousek's motion to vacate and appearance were a voluntary submission to the court's jurisdiction, operating prospectively only. *Mitchell*, 2014 IL 116311, ¶ 44. Nothing in the record establishes that Kalousek either personally filed an appearance or one was filed on her behalf before the circuit court entered the default plenary order of protection. Likewise, the record lacks any responsive pleading or motion filed by Kalousek before the circuit court entered the order against her. Kalousek's motion to vacate did not retroactively validate the circuit court's prior default order entered when it lacked personal jurisdiction where there was no service of summons and Kalousek had not otherwise voluntarily submitted to the court's jurisdiction. *Id*.; see 750 ILCS 60/210(f) (2014) (default plenary order of protection may be entered where respondent fails to appear after being served with summons). Consequently, we agree with Kalousek that the default plenary order of protection is void because the circuit court had no personal jurisdiction over her when it entered that order. See *Mitchell*, 2014 IL 116311, ¶ 45; *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986); *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 32 (2006) (recognizing judgments entered without personal jurisdiction are void). Thus, we reverse the circuit court's order denying

Kalousek's motion to vacate and instruct the circuit court clerk to vacate the default plenary order of protection. See Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967) (reviewing court may set aside all of the proceedings dependent upon the judgment from which the appeal is taken).

¶ 15 Reversed and order vacated.

¶ 16 PRESIDING JUSTICE PUCINSKI, specially concurring.

¶ 17 I agree with the majority that there was no proper service and that the Plenary Default Order of Protection is therefore void.

¶ 18 I would add several other facts to the analysis.

¶ 19 That Petition asked for several remedies, including exclusive possession of 12402 S. 73rd, Palos Heights, yet on the same document the Petitioner's address is given as 12402 S. Harlem, Palos Heights. This should have been cleared up by the judge.

¶ 20 Why is this important? Because the Summons that was filed on April 9, 2014 has the same non-address for the Respondent: "121st 1 block east of Harlem, Palos Heights" making any service of the summons impossible, and perhaps giving the court an indication that the Petitioner was being less than forthright in the Petition, especially since the Petitioner testified that the Respondent did not live with Petitioner but had her own home and family.

¶ 21 In addition, when the Petition was entered and continued with no order being entered, the Petitioner was apparently told by someone (off the record) that it could be treated like a motion, which is incorrect. She tried to do that but the Notice of Motion that she completed and filed on April 9, 2014 at 4:04 p.m. shows the Respondent's address as: "Katie A. Kalousek, Palos Heights, IL" which is clearly not a proper mailing address, and on top of that the Notice of Motion, even if it were a good way to serve a Summons and the Petition, does not have an affidavit of service by a non-attorney, just a certificate, which is not effective. All of this "fuzzy"

addressing to the Respondent should have flagged for the court that service was going to be an issue.

¶ 22 There are several things that this case can clear up:

¶ 23 1) When a Petition is filed but an order is not entered the Petition is a complaint and it and the summons need to be served by the Sheriff, or a Special Process Server, or once that proves impossible, by publication. The majority has correctly pointed out the service by a sheriff part, but not the part about the Petition being a complaint, not a motion, and therefore not able to be "served" like a notice of motion.

¶ 24 2) When the Respondent came to court on May 21, 2014 the court did not ask her if she waived service, nor did the court serve her in open court and document that service with a copy of the Petition and of the Summons in the File each stamped: "SERVED IN OPEN COURT" and an additional order to be entered and docketed by the clerk that the Respondent was served in open court with the Petition and Summons – it is getting that on the record that waives service by the sheriff. It is true that the Court did say on the record: [the Respondent] "acknowledges receipt of a copy of the Petition" *but not the summons*…. so that was not enough.