FIRST DIVISION
February 16, 2016

No. 1-14-3468
2016 IL App (1st) 143468-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DOUGLAS R. JOHNSON, Plaintiff-Appellant, v. TONY PLATAS d/b/a TONY'S MARINE SERVICES, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 96 M1 136070 Honorable Allan W. Masters, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Because the record was incomplete, plaintiff's argument that the trial court erred and misapplied the law when it granted defendant's section 2-1401 petition could not be reviewed; plaintiff failed to show that he ever properly served defendant; trial court's granting of defendant's section 2-1401 petition affirmed.

¶ 2 Following the court's entry of an order which vacated a default judgment that was entered in 1999, plaintiff, Douglas R. Johnson, contends on appeal that the trial court erroneously determined that it previously lacked jurisdiction to vacate a dismissal for want of prosecution

(DWP) and therefore its subsequent entry of a default judgment against defendant, Tony Platas, was void. We affirm.

¶ 3 BACKGROUND

¶ 4 This case stems from an alleged agreement between plaintiff and defendant whereby defendant was to perform boat repair services for plaintiff. According to plaintiff's complaint, which was filed on June 24, 1996, defendant breached their agreement by failing to perform boat repair services as promised. Plaintiff's complaint alleged causes of action for breach of contract, promissory estoppel, and violation of the Consumer Fraud Act. Plaintiff attempted to serve defendant with summons twice through the Cook County sheriff but was unsuccessful. On September 19, 1996, plaintiff filed an *ex parte* motion seeking to appoint Tom Kopecki[1] as special process server, which was granted on September 26, 1996. The order, specifically, appointed Tom Kopecki to make service of process in this case. Three summonses were issued on October 3, 1996, October 25, 1996, and January 17, 1997.[2] The record reflects that, for approximately the next five months, there was no activity in this case. On June 20, 1997, a dismissal for want of prosecution (DWP) was entered. On July 8, 1999, plaintiff filed a "motion to reinstate and appointment of special process server" and a notice of motion setting the motion for hearing on July 15, 1999, at 2 p.m. The notice of motion in the record is not file-stamped and contains no addressee information. Additionally, the notice of motion's proof of service is blank. The motion to reinstate and appointment of special process server is merely titled as such, but contains no text in the body of the motion.

[1] According to plaintiff's *ex parte* motion for appointment of special process server, Tom Kopecki was listed as a "process server/ paralegal" employed by the law firm of "Coffield Ungaretti & Harris."

[2] The record does not contain any affidavits from special process servers regarding service of these three summonses. However, in his brief, plaintiff states that all three were "returned unserved."

¶ 5 On July 15, 1999, the trial court entered an order wherein a box was checked that the motion to vacate the DWP entered on June 20, 1997, was granted. The order reflected that only plaintiff was present in court. At the bottom of the order on a blank line, the order read that the motion "to reinstate and appointment of special process server is granted." On the court's original copy of the order, the name "Tom Kopecki" was written underneath the language granting the appointment of a special process server. Additionally, the record is completely void of any summons or alias summons issued after the court granted plaintiff's motion to reinstate and appoint a special process server. According to a copy of an affidavit of service, signed by "Brett K. Starr," defendant was personally served on August 5, 1999, at Diversey Harbor. This copy of Starr's affidavit of service presumably was never filed with the court as it does not bear the clerk of court's file stamp. The record neither contains the original copy of the process server's affidavit nor any order that ever appointed "Brett K. Starr" as process server. Further, the record does not contain a copy of the summons that Starr allegedly served.

¶ 6 On September 9, 1999, the court entered an order that defaulted defendant and set the case for proveup on October 13, 1999. On October 13, 1999, the court entered an *ex parte* default judgment order against defendant in the amount of $3,125.00, plus costs. The record reflects that for the next 14 years and 7 months, there was no activity in this case.

¶ 7 On April 16, 2014, plaintiff filed a petition to revive judgment. The petition to revive judgment incorrectly stated, "[t]he plaintiff, on October 13, *2009*, recovered in this court a judgment against the [d]efendant, *Edward Christopher*, for $3,125.00." (Emphasis added.) Nonetheless, the trial court granted plaintiff's petition to revive judgment on April 28, 2014. On May 12, 2014, plaintiff filed a third party citation to discover assets directed to U.S. Bank. In response to the citation, U.S. Bank withheld $4,892.55 from defendant's bank account.

¶ 8 On June 5, 2014, a document captioned "special and limited appearance" was filed by counsel on behalf of defendant. Although the document was captioned as such, the words "general appearance" were circled on the document's face.[3] On that same date, June 5, 2014, a notice of motion directed to plaintiff at his law office[4] and a motion to vacate judgment, quash citation served on U.S. Bank, and dismiss with prejudice was filed. The certificate of delivery on the notice of motion was unsigned. In his motion to vacate, defendant argued that plaintiff's failure to file and present to the court either a motion brought pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301) (West 2012)) or a petition brought pursuant to section 2-1401of the Code (735 ILCS 5/2-1401 (West 2012)) voided the default judgment order that was entered on October 13, 1999. Defendant also argued that the default judgment was void because plaintiff failed to establish jurisdiction over defendant. Defendant pointed out that the court file did not contain any proof of service on defendant. Further, defendant asserted that any collection action was barred due to the invalidity of the default judgment.

¶ 9 On June 9, 2014, defendant filed a motion to stay citation proceedings. On that same date, an order was entered continuing the third-party citation to discover assets to August 12, 2014, for status on defendant's motion to vacate. On June 17, 2014, an order was entered wherein defendant was granted leave to amend his motion to vacate and the third-party citation was stayed pending the outcome of the motion to vacate. The June 17, 2014, order reflects that plaintiff's counsel and defendant's counsel were present in court. There is no evidence in the record that defendant ever filed a motion for leave to amend his motion to vacate. On July 9,

[3] We note that as of January 1, 2000, pursuant to section 301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2012)), Illinois no longer recognizes special and limited appearances. Therefore, regardless of the document's title, there was only one form of appearance on June 5, 2014, the date defendant filed his appearance.

[4] Although never addressed in plaintiff's brief, it seems to this court that plaintiff, an attorney, either represented himself, or someone from his law firm represented him, during this case at the trial level and on appeal. The record contains various court orders wherein plaintiff, "Doug Johnson," is listed as attorney for plaintiff. Additionally, the orders show that "Doug Johnson" used an attorney code, not 99500, the number that is indicative of a *pro se* litigant.

2014, defendant filed an amended motion to vacate judgment, quash citation served on U.S. Bank, and dismiss with prejudice. In his amended motion, he argued that plaintiff never filed a motion pursuant to section 2-1301 or section 2-1401 of the Code; therefore, the July 15, 1999, order vacating the DWP entered on June 20, 1997, was void. Defendant attached an affidavit in which he attested that, "[a]t no time between June 24, 1996[,] and June 20, 1997[,] was I ever served with any documents whatsoever on the above case. I never received any [m]otion or [n]otice of [m]otion or notice of any kind, in this matter during the period between June 20, 1997[,] and June 20, 1999." Defendant further argued that "[p]laintiff lost the right to pursue his case on June 20, 1998[,] based on his failure to comply with the requirements of SCR [*sic*] 5/2-1301 and SCR [*sic*] 5/2-1401, [and] the 'reinstatement' of July 15, 1999[,] should never have been entered and is void."

¶ 10 On July 28, 2014, plaintiff filed a response to defendant's amended motion asserting that although defendant was granted leave to refile his section 2-1401 petition to vacate, he failed to show any diligence or a meritorious defense. Plaintiff also argued that based on defendant's own argument, his motion to vacate should be denied since it was filed 15 years after judgment was entered in this case. Under defendant's logic, plaintiff argued, the court would not have jurisdiction to hear defendant's motion to vacate. Plaintiff further asserted that defendant's argument that the order was void because plaintiff's motion to vacate DWP was filed over two years after the entry of the DWP was invalid. Plaintiff stated that "[u]nder Illinois law, a plaintiff may vacate a dismissal for want of prosecution within one year or within the statute of limitations period for the original claim." Specifically, plaintiff asserted that because the original claim took place in 1996 and the statute of limitations for breach of an oral contract is five years, plaintiff had until 2001 to file his motion to vacate DWP.

¶ 11 On August 4, 2014, defendant filed his reply in support of his motion and, regarding the issue of due diligence, asserted "Illinois law is clear that where jurisdiction fails to attach, '[a] judgment by a court that fails to acquire personal jurisdiction is void and can be attacked at any time.' " Defendant also argued, "[p]laintiff's assertion that defendant failed to plead a meritorious defense is bogus." Defendant contended that his argument that plaintiff failed to file the motion to vacate DWP in a timely matter, standing alone, constituted a meritorious defense because plaintiff's failure to file his motion to vacate DWP within two years of the entry of the DWP was fatal to his claim. Additionally, defendant asserted that plaintiff was incorrect in arguing that he had the entire five-year statute of limitations period to file a motion to vacate DWP. Instead, he argued, the statute of limitations is relevant only for the refiling of the lawsuit, not for the filing of a motion to vacate.

¶ 12 On August 14, 2014, the trial court entered an order that set the matter for hearing on September 18, 2014, and reflected the court file was being ordered by the court for review. The record does not contain any evidence that a hearing ever took place. On October 1, 2014, the court continued the matter to October 29, 2014, for issuance of a written ruling. On October 29, 2014, the court entered an order that granted defendant's motion to vacate the default judgment entered on October 13, 1999, and further stated, "order of 7/15/99 void (vacated DWP entered on 6/20/97) beyond 24 months per req. [*sic*] of 735 5/2 1401 [*sic*]." Although defendant had filed an amended motion to vacate, the court's order does not reflect that it ruled on the amended motion. Rather, the order merely states, "motion to vacate default judgment of 10/13/1999 is granted."

¶ 13 Plaintiff timely filed his notice of appeal on November 24, 2014.

¶ 14 ANALYSIS

¶ 15 Plaintiff presents two arguments in support of his appeal: (1) the trial court erred when it determined that on July 15, 1999, the court lacked jurisdiction to vacate the DWP entered on June 20, 1997, and (2) the trial court erred when it granted defendant's section 2-1401 petition to vacate the judgment that was entered 15 years earlier. However, because the record on appeal does not contain certain requisite documents, we cannot determine the merits of plaintiff's arguments, and so, we affirm.

¶ 16 Before we can address plaintiff's substantive arguments on appeal, we must first address defendant's assertion that he was never properly served in this matter.[5] The Illinois Supreme Court has held that we have a duty to vacate void trial court orders, including those entered without personal jurisdiction over a party. *Delgado v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 481, 486 (2007). It is imperative to note that defects in the service of process are neither technical nor insubstantial. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 20. Strict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 109 (2002). "[A] judgment rendered by a court which fail[ed] to acquire jurisdiction of either the parties or the subject matter of the litigation may be attacked and vacated at any time or in any court, either directly or collaterally." *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308-09 (1986). We review *de novo* whether personal jurisdiction was conferred. *Commerce Trust Co. v. Air 1st Aviation Cos.*, 366 Ill. App. 3d 135, 140 (2006).

¶ 17 Here, defendant argues that the court's October 13, 1999, default judgment order is void because service was not proper. Defendant raised the issue of jurisdiction in both his motion to

[5] We find it pertinent to note that we do not know how plaintiff responds to certain arguments raised in defendant's response brief, because he did not file a reply. Thus, we are limited to the arguments in plaintiff's opening brief and the relevant motions in the record on appeal.

vacate and his amended motion to vacate. On appeal, defendant stresses that service was improper because "Brett K. Starr" was never appointed as a process server. Section 2-202(a) of the Code sets forth the procedure for appointing a special process server and, in relevant part reads, "[t]he court may, in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action." 735 ILCS 5/2-202(a) (West 2012). Additionally, regarding the appointment of a private detective agency as a special process server, section 2-202(a-5) of the Code, in relevant part, reads,

> "Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. Under the appointment, any employee of the private detective agency who is registered under that Act may serve the process. The motion and the order of appointment must contain the number of the certificate issued to the private detective agency by the Department of Professional Regulation under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. A private detective or private detective agency shall send, one time only, a copy of his, her, or its individual private detective license or private detective agency certificate to the county sheriff in each county in which the detective or detective agency or his, her, or its employees serve process, regardless of size of the population of the county." 735 ILCS 5/2-202(a-5) (West 2012).

¶ 18 In this case, defendant argues that service was improper because there is no evidence that Starr was ever appointed as a process server. The record does not show that plaintiff ever filed a motion seeking to appoint Starr as process server, and no order was ever entered appointing Starr as process server. The record only contains an order, dated September 26, 1996, appointing

"Tom Kopecki" as special process server. Further, we are perplexed regarding the context under which Starr was hired by plaintiff. His affidavit of service contains his signature over the words, "[w]orking under [l]icense #117-0968." We cannot be certain, but based on the requirements of section 2-202(a-5) of the Code (735 ILCS 5/2-202(a-5) (West 2012)), which makes reference to license numbers, these numbers may indicate that Starr, in fact, works for a private detective agency. However, the record at issue lacks the necessary information to make such a determination. Because the record lacks any order that appointed Starr or a private detective agency as process server, we do not know whether section 2-202(a) or section 2-202(a-5) of the Code (735 ILCS 5/2-202(a), (a-5) (West 2012)) applies here. It is similarly impossible to determine whether plaintiff complied with the requirements of the applicable section of the Code.

¶ 19 The affidavit from process server Starr is not file-stamped and only appears in the record as an attachment to plaintiff's response to defendant's amended motion to vacate. It was never filed and made a part of the record outside of being an exhibit. Starr's affidavit reflects that he served defendant with the complaint and summons on August 5, 1999. Plaintiff's response to defendant's amended motion to vacate was filed on July 28, 2014. Thus, the first time Starr's affidavit appears in the record is nearly 15 years after he allegedly served defendant. Further, there is no evidence that a summons was properly issued prior to Starr's alleged service on August 5, 1999. The most recent summons in the record is an alias summons dated January 17, 1997. On June 20, 1997, this case was dismissed for want of prosecution. On July 15, 1999, plaintiff's motion "to reinstate and appointment of special process server is granted." According to Starr's affidavit, he served defendant with "summons and complaint at law" on August 5, 1999. However, we cannot determine what summons, if any, was ever issued after plaintiff's

motion to reinstate was granted. Overall, we believe Starr's affidavit is problematic for the following reasons: Starr's affidavit is not file-stamped; there is no evidence in the record that Starr was ever appointed as process server; the record does not contain a copy of the summons that Starr purportedly served; and Starr's affidavit is a copy and is not the original. Based on the record before this court, it is impossible to determine whether defendant was properly served. Because we cannot determine whether personal jurisdiction exists, we cannot address the merits of plaintiff's appeal.

¶ 20 An appellant has the burden to present a sufficiently complete record, and in the absence of such a record, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. In addition to the omissions listed above regarding Starr's affidavit of service, we note that the record lacks any transcript, report of proceedings, bystander's report or agreed statement of facts for any of the hearings conducted in this case. Ill. S. Ct. R. 323(a), (c), (d) (eff. Dec. 13, 2005). Thus, even though our review is *de novo*, and even if we were able to determine whether defendant was properly served, we would still not be able to determine whether plaintiff satisfied the requirements of section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). Plaintiff's motion to "reinstate and [for] appointment of special process server" lacked any substance. The motion, itself, consisted only of its title. Plaintiff contends that he satisfied the requirements of section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)) through his own testimony at the hearing and that the court decided to vacate the DWP based on his testimony. However, such an issue would be impossible for this court to review because no

record of that proceeding, or any other hearing in this case, was contained in the record on appeal.

¶ 21 According to *Foutch*, we must construe the deficient record against plaintiff, the appellant. *Foutch*, 99 Ill. 2d 389 at 392. Simply put, the record before this court is deficient in myriad ways and prevents us court from undertaking a substantive review. Under these circumstances, we presume the trial court heard adequate evidence to support its decision and that its orders were in conformity with the law. See *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001).

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 24 Affirmed.