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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ALLY BANK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Chancery Division
)	
v.)	No. 15 CH 02676
)	
ROZELLA O'NEAL; CARL O'NEAL; PNC)	Honorable
BANK, N.A., s/b/m to NATIONAL CITY)	Pamela McLean Meyerson,
BANK; UNKNOWN OWNERS and NON-)	Judge Presiding.
RECORD CLAIMANTS,)	
)	
Defendants-Appellants.)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendants have forfeited their challenge to the court's jurisdiction on appeal by failing to object to the court's jurisdiction or otherwise challenge service of process in the lower court. Plaintiff's affidavit was sufficient to establish valid service of process by publication.

¶ 2 The instant appeal arises from a default judgment and order of foreclosure against defendant-mortgagors, Rozella and Carl O'Neal, foreclosing on their residential property. On

appeal, defendants contend the trial court lacked personal jurisdiction over defendants because plaintiff failed to properly serve defendants by publication as the affidavit used to establish service was facially invalid. Defendants also contend that, based upon the facially deficient affidavit, the court confirmed the judicial sale of the property in error because it failed to ensure that justice was done. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On February 17, 2015, plaintiff filed a complaint seeking judicial foreclosure of a mortgage agreement with defendants for the residential property located at 4453 West Walton Street in Chicago. A summons was issued directing defendants to file an appearance in court. Plaintiff also filed a standing order for special process server. Affidavits from the special process server, filed March 5, 2015, indicate service was unsuccessfully attempted at the subject property and at a separate residential property located at 5333 West Galewood Avenue in Chicago on February 21 and February 22. The affidavits averred that defendants did not reside at either property, the properties were currently tenant occupied, and that neither tenant was able to provide the process server with defendants' "current address, work address, phone number or any further information."

¶ 5 Two additional affidavits from the special process server, both entitled "Affidavit of Due and Diligent Search," indicate that on February 27, 2015, the process server "performed a diligent search and inquiry" to discover defendants' current residence by using "skip trace software," and returned only the two previously aforementioned property addresses. The process server also averred as follows:

"Directory assistance stated there is a telephone number for our subject in Illinois.

I called the phone number *** on February 25, 2015 at 11:45 AM. I spoke with

Defendant, Rozella O'Neal, who advised that she has an attorney and that I should speak with him. She provided her attorney's name and contact information.

I called [defendant's] Attorney *** on February 25, 2015 at 11:50 AM. Attorney *** advised that he will not accept the legal documents on her behalf and that I need to serve her.

I called the [defendant's] phone number *** on February 25, 2015 at 11:52 AM. I left a message for Defendant, Rozella O'Neal, to return my call.

I called [defendant's] phone number *** on February 26, 2015 at 10:16 AM. I left a message for Defendant, Rozella O'Neal, to return my call. To this date, I have not received a call back."

The affidavit also indicated that, on February 27, 2015, the process server searched several other databases but was unable to locate an additional address for defendants.

¶ 6 Subsequently, on March 6, 2015, plaintiff's counsel executed an "Affidavit for Service by Publication Pursuant to 735 ILCS 5/2-206" which was filed on March 9. Counsel averred in her affidavit that:

- "1. Defendant(s) on due inquiry cannot be found so that service cannot be served upon them.
2. The following actions have been taken by the office of Plaintiff's counsel to ascertain the whereabouts of the above-named Defendant(s):
 - a. Ordered and reviewed data report on Defendant(s) for possible address on or about February 27, 2015.
 - b. Reviewed mortgagee's foreclosure information package for possible addresses on or about February 27, 2015.

c. Reviewed Deed to Defendants for possible additional addresses on or about February 27, 2015.

d. Ordered and reviewed property inspection report to determine occupants of the subject property on or about February 27, 2015.

3. Other investigation completed:

See Special Process Server Affidavit Attached

Special process server made 3 attempts to serve defendants"

The affidavit further stated that "[d]efendants' place of residence upon diligent inquiry cannot be ascertained" and listed their last known place of residence as the two aforementioned addresses. Having executed the requisite affidavit for service by publication, notice was published in the Chicago Daily Law Bulletin on March 13, March 20, and March 27, 2015.

¶ 7 On May 19, 2015, plaintiff moved for default judgment and foreclosure and sale of the property. Plaintiff attached to its motion, *inter alia*, a certificate of service indicating defendants were served by publication on March 13, an additional copy of plaintiff counsel's affidavit for service by publication, a certified copy of the published summons, and the previously described affidavits executed by the special process server, including the affidavits of due and diligent search. On June 9, 2015, the trial court entered orders granting a default judgment against defendants and foreclosing on the property. The property was then auctioned and sold to a third party on September 14 and notice of its sale was published. Plaintiff subsequently filed a motion to confirm the sale and distribution of the property. For the first time, on October 23, 2015, defendants filed an appearance in court through counsel. On November 20, 2015, defendants responded to plaintiff's motion for confirmation of sale as follows:

"1. This residential mortgage foreclosure case was commenced on February 17, 2015 and movant Rozella O'Neal was subsequently served with summons and complaint.

2. Ms. O'Neal did not respond to the complaint but instead she accepted plaintiff's offer to engage in loss mitigations [*sic*] opportunities."

The response additionally alleged that "grounds exist to stay confirmation of the sale which took place in violation of federal law" or alternatively, to vacate the default judgment, as plaintiff proceeded with judicial foreclosure proceedings despite having received a complete loan modification application from defendants. Defendants argued that they filed a lawsuit in the United States District Court for the Northern District of Illinois, attached a copy of the complaint to the response, and "incorporate[d] by reference the allegations contained therein." Notably, the complaint alleges that "O'Neal, at all times relevant, has maintained and currently maintains the Property [4453 West Walton Street] as their primary, principal residence."

¶ 8 Plaintiff generally replied that defendant Rozella failed to prove that she applied for a loan modification. The reply alleged that as of September 8, 2015, six days prior to the sale of the property, defendant was notified that she was ineligible for loan modification as she failed to provide the requisite documentation within the specified time period. Plaintiff attached to its reply, *inter alia*, copies of the letters from the servicer of the mortgage indicating the same. Subsequently, on December 18, 2015, the court entered an order confirming the sale of the property. At the same time, the court denied defendants' motion to stay pending appeal and for use and occupancy bond and extension of time to post bond. Defendants appeal.

¶ 9

II. ANALYSIS

¶ 10

A. Procedural Default

¶ 11 Defendants' contentions on appeal are premised upon the foreclosure court's lack of personal jurisdiction based upon deficient service by publication. They argue that service was deficient because plaintiff's affidavit in support of service by publication was facially invalid and that the trial court lacked jurisdiction to enter the orders of default judgment and foreclosure and to confirm the judicial sale of defendants' property based upon the deficient affidavit. Plaintiff initially responds that defendants have waived and/or forfeited any challenge to the foreclosure court's jurisdiction as they (1) raised this challenge for the first time on appeal; (2) failed to contest service of process in the lower court by filing a motion objecting to jurisdiction; and (3) voluntarily submitted to the court's jurisdiction by participating in the confirmation hearing without challenging the court's jurisdiction as required by section 15-1505.6 of the Illinois Mortgage Foreclosure Law. See 735 ILCS 5/15-1505.6 (West 2014). Alternatively, plaintiff argues the affidavit was sufficient to establish valid service. Accordingly, we begin our analysis with plaintiff's claims of procedural default.

¶ 12 Personal jurisdiction may be obtained either by effective service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). As plaintiff correctly asserts, a party must file a motion challenging the court's personal jurisdiction in a foreclosure action within 60 days from the date the moving party first filed an appearance or participated in a hearing without filing an appearance. 735 ILCS 5/15-1505.6(a) (West 2014). Further, pursuant to this state's laws governing foreclosure and civil procedure, "[i]f the objecting party files a responsive pleading or a motion (other than a motion for extension of time to answer or otherwise appear) prior to the filing of a motion [objecting to the court's jurisdiction] ***, that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/15-1505.6(b) (West 2014); 735 ILCS

5/2-301(a-5) (West 2014). Similarly, as a general rule, "[a]rguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal." *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24. A defendant's appearance, however, does not submit him or her to the circuit court's jurisdiction retroactively to validate orders previously entered without personal jurisdiction. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 27. Further, as defendants correctly assert, if service was deficient, the resulting orders were void and may be attacked at any time, either directly or collaterally. See *Id.* ¶ 17; *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 13 ("a judgment that is entered without personal jurisdiction over a party can be attacked directly or collaterally at any time.").

¶ 13 Here, defendants entered their first appearance subsequent to the court's entry of default judgment and foreclosure but prior to the confirmation of sale hearing. They did not object to service or the court's jurisdiction at any point during the proceedings. Defendants have therefore waived any objection to the court's jurisdiction. See 735 ILCS 5/15-1505.6(b); 735 ILCS 5/2-301(a-5). The record demonstrates that defendants participated in the sale confirmation proceedings by filing an appearance and subsequent motion challenging the confirmation of sale. In so doing, they prospectively conferred personal jurisdiction upon the court as of the date of their initial appearance, regardless of valid service, by actively participating in the litigation while failing to object to jurisdiction. See *Mitchell*, 2014 IL 116311, ¶ 44; *Verdung*, 126 Ill. 2d at 547, 551-52. Defendants have thus forfeited their jurisdictional claims regarding the confirmation of sale as the order was not void and they raise this challenge for the first time on appeal.

¶ 14 As previously stated, however, defendants' voluntary submission to the court's jurisdiction does not operate retroactively to confer jurisdiction upon the court. *Mitchell*, 2014 IL

116311, ¶ 27. Defendants had not yet filed an appearance when the court entered the orders of foreclosure and default judgment. Therefore, the court's jurisdiction to enter the aforementioned orders depends upon the validity of service by publication. See *Verdung*, 126 Ill. 2d at 547 (personal jurisdiction may be established *either by* effective service of process *or by* a party's voluntary submission to the court's jurisdiction) (emphases added). Despite their forfeiture of these arguments by failing to raise these challenges in the court below, we acknowledge that void orders may be attacked at any time, either directly or collaterally. *Cotton*, 2012 IL App (1st) 102438, ¶ 13. Consequently, we must address the merits of defendants' jurisdictional claims as they apply to the court's orders of default judgment and foreclosure and thus, focus the remainder of our analysis on the sufficiency of plaintiff's affidavit for service by publication.

¶ 15

B. Affidavit for Service by Publication

¶ 16 Pursuant to section 2-206 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-206 (West 2014)), valid service of process by publication requires the plaintiff to first "file, at the office of the clerk of the court in which the action is pending, an affidavit showing that defendant resides or has gone out of his State, or 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 2014).

¶ 17 Accordingly, plaintiff must conduct both diligent inquiry in ascertaining defendants' residence, and "due inquiry" in ascertaining the defendant's whereabouts before plaintiff can execute a valid affidavit indicating defendant cannot be found. *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 927-28 (1978). "Due inquiry requires 'an honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances

can permit.' " *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 20 (citing *City of Chicago v. Leakas*, 6 Ill. App. 3d 20, 27 (1972)). The Cook County circuit court adopted a rule elaborating on the requirements of an affidavit for service by publication 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).

The rule therefore requires sworn affidavits by the individuals who attempted to serve process on the defendant and determine his or her whereabouts, in which they "set[] forth with particularity" the specific actions taken to locate and serve the defendant with process. See *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 20; see also Cook County Cir. Ct. R. 7.3. We review *de novo* whether the trial court obtained personal jurisdiction. *In re Detention of Hardin*, 238 Ill. 2d 33, 39 (2010).

¶ 18 In addition to stating defendants' location could not be found, plaintiff's affidavit specifically averred "[t]he following actions have been taken by the office of Plaintiff's counsel to ascertain the whereabouts of the above-named Defendant(s)" and continued to detail several steps taken "on or about February 27, 2015," approximately five days after learning the property was tenant occupied, to determine defendants' current address. In addition, counsel's affidavit referenced and incorporated the affidavits of the special process server, which outlined, in detail, the actions taken and databases searched to locate defendants. Thus, the affidavit clearly

specifies the exact actions and efforts taken to locate defendants by the individuals tasked with determining their whereabouts, and thus, facially complies with statutory and circuit court requirements. See *Brewer*, 2012 IL App (1st) 111213, ¶ 20; see also Cook County Cir. Ct. R. 7.3.

¶ 19 Nonetheless, defendants argue that the affidavit, on its face, failed to establish that due inquiry was made because it demonstrated that plaintiff failed to inquire into defendants' whereabouts after learning the property was rented by tenants and that plaintiff should have looked for a forwarding address or "any officially required filings for landlord tenant relations, such as a housing authority's records or similar public information." We find no merit to this argument.

¶ 20 First, the affidavits indicate plaintiff's further inquiry into defendants' location began as early as February 25, 2015 – several days after discovering the known addresses were tenant occupied on February 22 and prior to executing the affidavit for service by publication on March 6. Further, although the affidavit does not specifically state that plaintiff searched the records suggested by defendants, it does indicate plaintiff performed an extensive search including: (1) inquiring with defendants' tenants regarding their current address or contact information, (2) performing a search employing specialized "skip trace" software, (3) placing multiple phone calls to the phone number registered to defendants with the telephone company, (4) contacting defendants' counsel to verify if he would accept service on their behalf, and (5) conducting a search using various other public databases. The process server also indicated that she spoke with defendant Rozella via telephone on February 25, 2015, who advised that her attorney must be contacted. Her attorney, however, refused to accept service on defendant's behalf and defendant did not answer or return the process server's phone calls after this date. Given plaintiff's multiple attempts to contact and serve defendants through various outlets, including

their extensive search of various databases, we see no reason to conclude the affidavit is facially deficient in this regard.

¶ 21 In so finding, we also reject defendants' contentions that they were not required to file a counter-affidavit challenging service and that the court had an independent duty to *sua sponte* question its jurisdiction. Generally, a defendant may challenge a plaintiff's affidavit for service by publication by filing a counter-affidavit demonstrating that upon due inquiry, he could have been found. *Household Finance Corp. III v. Volpert*, 227 Ill. App. 3d 453, 455 (1992). If the defendant is able to present a significant issue regarding the truthfulness of the plaintiff's affidavit for service by publication, then the trial court must hold an evidentiary hearing on the issue. *Id.* (citing *First Federal Savings & Loan Ass'n v. Brown*, 74 Ill. App. 3d 901, 907-08 (1979)). The burden of proof rests with the plaintiff to establish that due inquiry was made to determine the defendant's location. *Id.* There is no requirement, however, that an evidentiary hearing be held, "even if there were indications of problems with the arguments and affidavits upon which the order for service by publication was based." *Cotton*, 2012 IL App (1st) 102438, ¶ 19.

¶ 22 Here, defendants completely failed to object to service or challenge plaintiff's affidavit in the lower court by filing a motion, counter-affidavit or otherwise. As such, the court was not required to conduct an evidentiary hearing or independent review regarding the affidavit's truthfulness prior to entering judgment as defendant failed to present a significant issue regarding the affidavit's truthfulness and, as previously stated, the affidavit was not deficient on its face. Rather, the court was entitled to rely on the validity of the affidavit which established valid service by publication and conferred personal jurisdiction over defendants upon the court. Accordingly, the court's orders of default judgment and foreclosure were not void and defendants

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have forfeited this claim on appeal. See *supra* ¶ 13 ("defendants have forfeited their jurisdictional claims *** as the order was not void and defendants raise this challenge for the first time on appeal").

¶ 23

III. CONCLUSION

¶ 24 In conclusion, the court had personal jurisdiction over defendants throughout the foreclosure proceedings. The court's orders of default judgment, foreclosure, and confirmation of sale were thus not void for lack of jurisdiction. Accordingly, defendants have forfeited any challenge to the court's jurisdiction on appeal. For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.