No. 2—09—1206
Order filed June 17, 2011

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

SECOND DISTRICT

MUTUAL FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CH—1247
FRANCISCO J. DIAZ,	)	
Defendant-Appellant	)	Honorable Michael J. Sullivan,
(Unknown Owners, Defendants).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: (1) We did not address the merits of defendant's "motion to quash service" attacking a foreclosure judgment: that judgment was given a Rule 304(a) finding, and defendant made his motion more than 30 days later; even if the motion were deemed a section 2—1401 petition, defendant did not appeal its denial within 30 days; (2) the trial court properly denied defendant's motion to vacate the foreclosure and the confirmation of sale: defendant's objection to standing was forfeited as to the foreclosure and without merit as to the sale; as to service by publication, to the extent that defendant could rely on his own affidavits, he failed to aver, as required, that upon due inquiry he could have been found; that the servers had not been appointed was irrelevant, and the court was not required to approve publication.

Francisco J. Diaz, the defendant in a foreclosure proceeding, appeals from an order confirming the report of sale in that proceeding. He asserts that the court erred when it failed to hold an evidentiary hearing on the adequacy of the affidavits of the plaintiff, Mutual Federal Savings and Loan Association of Chicago, for service by publication. We deem Diaz's filings to collaterally attack the original foreclosure judgment as void for lack of personal jurisdiction over him. We conclude that, by either of two possible standards, the court could properly allow the existing judgment to stand without need for an evidentiary hearing. We therefore affirm.

BACKGROUND

On July 16, 2008, Mutual Federal filed a single-count complaint to foreclose the mortgage on the property at 3 Saville Row in Barrington. Diaz and "unknown defendants" were the only defendants. Attached to the complaint were copies of the note and the mortgage instrument. Mutual Federal was the lender and note-holder named in the documents.

On August 8, 2008, Mutual Federal, invoking section 2—206 of the Code of Civil Procedure (Code) (735 ILCS 5/2—206 (West 2008)), filed affidavits for service by publication. The affidavit of counsel for Mutual Federal stated that Diaz could not be found and that his last known addresses were (1) 3 Saville Row in Barrington, (2) 977 West 19th Street, Chicago, and (3) 501 Bartlett Road, Streamwood. Besides counsel's affidavit, the filing included several "affidavit[s] of special process server[s]."

One affidavit was that of John Cali, who averred that he had tried to serve Diaz at 3 Saville Row, but that the rooms were empty, the electricity was off, and the grounds were not maintained.

Another was that of Robert Zidak, who averred that, on July 18, 2008, at 6:15 p.m., he had tried to serve Diaz at 977 West 19th Street, Chicago. This affidavit has only the notation "non-service, TENANT, MICHELLE MANNO, NO OTHER INFO PROVIDED."

A third is also Zidak's. In that, Zidak described attempted service at 2207 California Avenue, Chicago, but that address was a restaurant, and the manager said that Diaz did not work there.

Finally, William R. Thornburg averred that he had tried 10 times to serve Diaz at 501 South Bartlett Road, Streamwood, but that he had had no contact with Diaz. (At a later hearing, counsel for Mutual Federal represented that this was another restaurant.)

All these "process servers" were employees of a detective agency, ProVest LLC. All the affidavits described ProVest as having been appointed as special process server, a statement that the record does not support.

Another ProVest employee, Daniel Walton, averred that he had made a credit bureau search that led to the California Avenue address, a directory assistance search that also led to that address, and a motor vehicle search that led to the foreclosed property address. Other searches, including a search of drivers' licenses, a request to the postmaster, and a search of voter registrations, were "negative."

Mutual Federal published notice of the suit; Diaz did not file an appearance. On December 18, 2008, the court, on Mutual Federal's motion, entered an order of default. That same day, it also entered a judgment of foreclosure. In the findings of that judgment, on the second page, was a finding of enforceability and appealability under Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006). The court also entered an order shortening the redemption period on the basis that Mutual Federal had shown that the property was abandoned.

The sale took place on February 26, 2009. Mutual Federal was the purchaser and there was a large deficiency.

On March 31, 2009, Mutual Federal obtained an order appointing ProVest as special process server. It also obtained leave to file an amended complaint in which it added a count for judgment on the note. Simultaneously, it moved for approval of the report of sale and distribution.

Also on March 31, 2009, Diaz (who later filed a special appearance) filed a "Motion to Quash Service." He noted that the court had not yet appointed ProVest as special process server when its employees made the service attempts described in the affidavits, and he claimed that the affidavits were incorrect in that respect. He further noted that Mutual Federal had not moved for leave to serve him by publication. He did not explain the significance of these observations or tie them to section 2—206's provisions for service by publication.

He also asserted in the motion that, had Mutual Federal and ProVest conducted the claimed investigations, the results would not have been negative. He gave examples of searches that would have produced the addresses at which Mutual Federal had sought to serve him. That is, he asserted that checks of sources such as voter registration information would not have been negative, but would have yielded the known addresses. He attached his own affidavit concerning the databases in which he claimed Mutual Federal or ProVest should have been able to find him.

Diaz also attached the affidavit of his mother, Gualberta Rodriguez, in which she averred that she was the owner of the Pelican Restaurant at 2207 South California Avenue in Chicago. She further averred that she lived at 997 West 19th Street at all relevant times. She had never received mail to Diaz from Mutual Federal's attorneys at that address. She had received one envelope at that address to Diaz from Judicial Sales Corporation.

Mutual Federal responded. It asserted that one of its vice presidents, Maribel Islas, had participated in trying to find Diaz. She had met and spoken to Rodriguez, asking her to have Diaz call Mutual Federal. Rodriguez had told Islas that she did not know where Diaz was living; she thought that he was with a girlfriend. According to the response, as late as March 14, 2009, Rodriguez had told Islas that she did not know where Diaz was. On April 23, 2009, a ProVest process server went to the Pelican Restaurant and was told by an employee that, although Diaz was involved with the restaurant, the process server would never find him there. Mutual Federal also noted that it was a party to other foreclosure cases against Diaz in Cook County. It provided notes associated with the attempts to serve him in those cases that gave more detail of what happened it the various places at which ProVest had tried to serve Diaz.

Citing *Household Finance Corp., III v. Volpert*, 227 Ill. App. 3d 453, 454-55 (1992), Mutual Federal argued that, to effectively challenge its affidavits of diligent inquiry, Diaz would need to aver that he could be found at some specific place within the state. Because he did not explain where he could be found, his affidavits did not contradict the claim of diligence.

Diaz did not file a reply. On May 12, 2009, the court denied the motion to quash after hearing the arguments of counsel. Counsel for Mutual Federal argued at length, describing ongoing attempts to find Diaz not only for this case but for a group of Cook County foreclosures. He represented that, in one of the Cook County cases, Diaz had filed a *pro se* motion that showed the California Street restaurant as his return address, but, when a ProVest employee went there, a restaurant employee said that Diaz, although associated with the restaurant, could not be found there. Counsel for Diaz responded briefly, arguing that the attempts at service by ProVest were improper

because the court had not appointed it as process server. He further asserted that the law required an evidentiary hearing based on the affidavits of Diaz and Rodriguez.

On June 16, 2009, the court entered an order confirming the report of sale.

Diaz responded immediately by filing "Defendant's Motion to Confirm Vacate [*sic*] Ex-Parte Order of Default, the Ex-Parte Judgment of Foreclosure and Sale and the Judgment Confirming Sale and the Order of Possession." He asserted that Mutual Federal had failed to show that it was the holder in due course of the note and mortgage. (Mutual Federal had said that the originals had been lost, but its president certified that what it had attached were true and correct copies.) He objected to certain fees included in the judgment. He asserted that many of the formalities associated with the execution of the note and mortgage were suspect; for instance, he denied that it was his signature on the mortgage. He repeated his arguments about service.

Mutual Federal responded. It first asserted that the court had already addressed the service-related issues. Next, it claimed that, because the court had made a Rule 304(a) finding when it entered the judgment for foreclosure, Diaz's motion had to be treated as a petition under section 2—1401 of the Code (735 ILCS 5/2—1401 (West 2008)). In other words, it claimed that Diaz was seeking modification of a judgment that had been final for more than 30 days and so had to meet the standards for modifying such a judgment. Islas' affidavit concerning her search for Diaz, which Mutual Federal had omitted in its response to the motion to quash, was an exhibit to Mutual Federal's current response.

On October 13, 2009, the court heard argument on Diaz's "Motion to *** Vacate." It denied the motion, and, at Mutual Federal's oral request, it made a new Rule 304(a) finding. (Mutual Federal's Count II remained pending.) Diaz filed a timely notice of appeal.

ANALYSIS

On appeal, Diaz asserts that the court erred when it failed to grant him an evidentiary hearing on his motion to quash service. He further argues that the court erred in denying his postjudgment motion to vacate on the basis that Mutual Federal's loss of the note placed in question its standing to bring the foreclosure action.

Mutual Federal responds that the December 18, 2008, Rule 304(a) finding included in the foreclosure judgment meant that the court could vacate the foreclosure only if Diaz could satisfy the standards for the granting of a section 2—1401 petition. It again asserts that, under *Volpert*, to effectively challenge its affidavits of diligent inquiry, Diaz would need to aver that he could be found at some specific place within the state.

Diaz has not filed a reply.

We agree that, because of the December 18, 2008, Rule 304(a) finding, Diaz 's "Motion to Quash" and "Motion to *** Vacate" could have been effective only as collateral attacks on the foreclosure judgment. We further agree that, under the standards for collateral attacks, Diaz's filings were insufficient to require further action from the court. We begin by explaining why any error associated with the court's treatment of Diaz's "Motion to Quash" is unreviewable here. We then consider which issues could properly be raised in "Defendant's Motion to *** Vacate."[1] We conclude that lack of jurisdiction to enter the foreclosure judgment was a proper issue, but lack of

[1]Diaz's arguments, read narrowly, raise claims of error only in connection to the "Motion to Quash." However, we will not apply the doctrine of forfeiture so rigidly as to refuse to consider Diaz's arguments as they apply to "Motion to *** Vacate."

standing was not. We then turn to the question of whether Diaz adequately raised the question of jurisdiction. We conclude that he did not.

The December 18, 2008, Rule 304(a) finding made the foreclosure appealable, such that, once 30 days had passed without an appeal or motion to reconsider, it was subject to collateral attack only. Foreclosure proceedings are complete only after the entry of the order approving the report of sale. However, the foreclosure judgment is "final" in the sense that a court can make it appealable by entering a Rule 304(a) finding. *Washington Mutual Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427, 431-32 & n.1 (2008). *Absent* a Rule 304(a) finding, the trial court is free to modify the foreclosure judgment at any time until the entry of the order approving the report of sale. *Archer Bank*, 385 Ill. App. 3d at 432. The converse proposition is also true: a Rule 304(a) finding ends the free modifiability of the foreclosure judgment. It would not be reasonable to enforce or appeal a judgment that the court could modify at any time. In other words, by the time that Diaz filed his "Motion to Quash," he could no longer attack the foreclosure judgment through an ordinary motion to vacate, such as one under section 2—1301(e) of the Code (735 ILCS 5/2—1301(e) (West 2008)). To the extent that the court treated the "Motion to Quash" as such a motion, it had no choice but to deny it.

There exists authority that would permit the court to have treated the "Motion to Quash" as a petition under section 2—1401. *E.g., Margaretten & Co. v. Martinez*, 193 Ill. App. 3d 223, 228 (1990) (authorizing treating a late motion to vacate as a section 2—1401 petition). Such treatment would be of no aid to Diaz in this appeal; Diaz could have appealed the denial of such a petition only within 30 days of its disposition. See Ill. S. Ct. R. 303(a)(1) (eff. Sept. 1, 2006); Ill. S. Ct. R.

304(b)(3). Therefore, any error now before us must relate to the court's treatment of the "Motion to *** Vacate."

We start by considering Diaz's claim in that motion that Mutual Federal lacked standing to bring the foreclosure action. We then turn to his claim that Mutual Federal's affidavits for service by publication were flawed and that, consequently, the court lacked jurisdiction to enter the foreclosure judgment.

The limitation of our consideration to the "Motion to *** Vacate" is fatal to Diaz's claim that Mutual Federal lacked standing to seek the foreclosure. Lack of standing is an affirmative defense; the defendant has the burden to plead it and to prove it. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010). A defendant forfeits the defense by failing to timely raise it in the trial court. *Lebron*, 237 Ill. 2d at 252-53. Because the defense can be forfeited, a lack of standing does not invalidate an existing judgment.

Lack of standing is, at least in theory, a possible defense to the *confirmation of the sale*. That said, we cannot see how such a defense could work under the circumstances here. Mutual Federal was not only the plaintiff in the foreclosure suit; it was also the purchaser of the property at the sheriff's sale. Thus, whatever interest it had in the foreclosure proceeding, it had an interest as purchaser in seeing the sale confirmed. Without some explanation of why the purchaser would lack a legal interest in the confirmation of the sale—an explanation that Diaz has not provided—his argument regarding Mutual Federal's standing must fail.

Turning to the matter of jurisdiction, we agree that a motion seeking to vacate the sale's confirmation was a proper place to attack the court's jurisdiction to enter the foreclosure judgment. A judgment made by a court without jurisdiction can be attacked at any time—including collaterally

in a matter where the court is relying on an existing judgment. *E.g., In re Marriage of Gulla*, 234 Ill. 2d 414, 421-22 (2009). Diaz's claim that flaws existed in the service by publication was potentially a challenge to the court's jurisdiction to enter the foreclosure judgment and was therefore not procedurally barred. Nevertheless, it failed on the merits.

Two competing lines of precedent exist concerning whether external evidence is proper in a collateral challenge to a trial court's jurisdiction. The first line holds that a lack of jurisdiction must be apparent on the face of the record, so that no new evidence is permissible in an attack, the second allows inquiry into the truthfulness of the affidavits. See *Village of Algonquin v. Lowe*, No. 2—10—0603, slip op. at 11-13 (Ill. App. June 1, 2011) (noting the existence of both lines). In *Lowe*, we criticized the rule barring the use of additional evidence. *Lowe*, slip op. at 11-12. Nevertheless, we recognized that it is supported by supreme court precedent, which, although old, has never been overruled or abrogated and which is therefore binding on us. *Lowe*, slip op. at 11. *Volpert*, the case on which Mutual Federal relies, might come from the second line. (We say "might" because the decision does not make clear the status of the order being challenged.) The *Volpert* court held that a defendant can raise a proper challenge to affidavits for service by publication "by filing an affidavit showing that upon due inquiry he could have been found." *Volpert*, 227 Ill. App. 3d at 455; see *Lowe*, slip op. at 13. Diaz would not prevail under either rule.

Under the rule by which no new evidence is allowed, Diaz could prevail only if he could show that Mutual Federal's affidavits were *prima facie* insufficient. Before a plaintiff can obtain service by publication under section 2—206 of the Code, it must make "an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit." *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476 (2006). By insisting that an

evidentiary hearing was necessary regarding the sufficiency of service, Diaz effectively concedes that the affidavits were *prima facie* sufficient.

Under the second (*Volpert*) rule, Diaz's challenge would also fail. To properly initiate an attack on Mutual Federal's affidavits, he would need to have averred that, on due inquiry, he could have been found in some particular place. Diaz's affidavits speak only to the *addresses* that an inquiry would have found and do not suggest that a process server would have found Diaz at any of those addresses. The closest Diaz comes to suggesting that he might have been found at any particular address is his statement that 997 West 19th Street was his "part-time" address. Despite Mutual Federal's citation of *Volpert* in the trial court, Diaz does not address this rule in his appellate brief. Mutual Federal has cited the rule in *Volpert* again on appeal, but Diaz has not filed a reply brief and has never explained why some more favorable rule should apply.

As a final matter, we note that two points that Diaz emphasizes are red herrings. He repeatedly notes that the trial court did not appoint ProVest as special process server and that the court never approved service by publication. Under section 2—206, concerning service by publication in an action affecting property, these are irrelevant:

> "Whenever, in any action affecting property *** within the jurisdiction of the court, *** plaintiff *** shall file at the office of the clerk of the court *** an affidavit showing that the defendant resides or has gone out of this 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, the clerk shall cause publication to be made in some

newspaper published in the county in which the action is pending." 735 ILCS 5/2—206(a) (West 2008).

ProVest's attempts to serve Diaz might or might not have led to effective service had it found him, but whether service would have been effective does not change that its attempts to find him were "due inquiry." Moreover, the section does not require approval from the court for service by publication. The only consequence of Mutual Federal's failure to have ProVest appointed was that its agents' affidavits were incorrect on a nonmaterial point: that they were serving as appointed process servers.

CONCLUSION

For the reasons stated, we affirm the order confirming the report of sale.

Affirmed.