2012 (2d) 110420-U
No. 2-11-0420
Order filed March 7, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK, National Association as Trustee for Securitized Asset-Backed Receivables LLC 2005-FR3 Mortgage Pass-Through Certificates, Series 2005-FR3,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-4756
IDRIS D. CHAUDHRY a/k/a Idris Dean Chaudhry, Shahnaz Begum Chaudhry; Unknown Owners and Nonrecord Claimants,	)	Honorable Robert G. Gibson,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

Held: The trial court correctly found that service of process by publication was valid because the process server's attempts at personal service met the standard of due inquiry and diligence required under section 2-206 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-206 (West 2010)). The trial court's judgment regarding the credibility of the witnesses at the evidentiary hearing was not against the manifest weight of the evidence. Therefore, the trial court's orders were not void *ab initio* because the trial court properly had personal jurisdiction over defendants.

¶ 1 Defendants, Idris D. Chaudhry and Shahnaz Begum Chaudhry, appeal from the trial court's order, dated March 14, 2011, denying their motion to quash service by publication and vacate orders of default and judgment for foreclosure and sale. Additionally, they appeal from the trial court's orders dated May 2, 2011, denying their "Motion for Reconsideration or, in the alternative, for Interlocutory Appeal and the order confirming sale and order of possession." Defendants challenge the validity of the service of process by publication, arguing that the due diligence requirement was not satisfied under section 2-206 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-206 (West 2010)) and that, therefore, Wells Fargo was not justified in serving them by publication. Defendants also assert that the service of process was defective because "[a]bsent from the trial record is any indication that the Circuit Court Clerk mailed, in conformity with the statute, the publication notice." They argue that, therefore, the trial court's orders are void *ab initio* because the trial court lacked personal jurisdiction over them. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In October 2009, plaintiff, Wells Fargo Bank, brought a foreclosure action under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1503 (West 2008)) against defendants, mortgagors of real estate located in Westmont, Illinois. The mortgaged property was defendants' personal residence. Wells Fargo alleged defendants had not paid the monthly installments of principal, taxes, interest and insurance for September 1, 2008, through October 14, 2009, when the complaint was filed.

¶ 4 On October 22, 2009, Tia Byk, a special process server employed by Firefly Legal Services, a licensed private detective agency, filed with the trial court affidavits of due diligence, dated October 18, stating that, on October 15 and October 17, personal service on defendants was

attempted at their residence. The affidavits stated that it was a family member's house, and that the family member who answered the door told Tyk that defendants were "out of the country right now." This person refused to give a name. The affidavits also indicated that a car parked in the driveway was discovered to be registered to ABC Financial Corporation and Parvez Shirazi, at an address in Grayslake, Illinois. Tyk's affidavits further stated that defendants could not be served at the address.

¶ 5 Also on October 22, 2009, Shannon Wieland, an investigator employed by Firefly Legal, filed affidavits of due diligence date October 19, stating that

> "[D]uring the investigation we attempted to locate [each] defendant by searching public, online, and confidential databases, calling Directory Assistance, and searching by means of other various data resources. These resources include the Social Security Death Index, property tax rolls and sales information, records containing voters, DMV, deed transfers and real estate ownership, active U.S. Military personnel, professional licenses, significant shareholders, trademarks, service marks, and UCC filings."

The affidavits further stated that "evidence was found" that defendants no longer resided at the property address; defendants could not be served at the address; and it was a family member's house. Further, defendants' "family member (name refused) states the defendants are out of the country right now. A car in the driveway [with a current plate was] registered to ABC Financial Corp. and Parvez Shirazi" at an address in Grayslake, Illinois.

¶ 6 On October 29, November 5, and November 12, 2009, service by publication was effected by notice in the Daily Herald newspaper and in Suburban Life Publications with circulation in the Village of Westmont. The notice stated that unless an answer or appearance was filed on or before November 30, 2009, a default judgment would be entered. On February 22, 2010, Wells Fargo filed

a motion for "Default and Judgment of Foreclosure and Sale." That same day, the trial court entered an order of default and judgment for foreclosure and sale because defendants had failed to appear in court.

¶ 7 On September 14, 2010, a sheriff's sale was held. On September 20, 2010, Wells Fargo filed a motion for an "Order Approving the Report of Sale and Distribution" pursuant to section 15-1508 of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1508 (West 2008). Thereafter, the matter was continued to October 18, 2010.

¶ 8 On October 1, 2010, defendants filed a "Motion to Quash Service by Publication and Vacate Orders of Default and Judgment for Foreclosure and Sale." The motion alleged that: (1) defendants owned and occupied the subject property; (2) "since at least 2008 [they had] never been outside the continental United States"; (3) they had never been away from their residence for any extended period; and (4) they resided, occupied and lived in the residence during the entire month of October 2009. The motion further alleged that defendants were never served with process and were unaware of the foreclosure action until September 18, 2010, when they received, via United States mail, a motion filed by Wells Fargo Bank for an "Order Approving Report of Sale and Distribution."

¶ 9 On November 1, 2010, Wells Fargo filed its response to the motion to quash; attached as exhibits were: (1) the affidavits of the process server, Bia Tyk, and the investigator, Shannon Wieland; (2) the attorney's affidavit to allow service by publication averring due diligence under the statute (735 ILCS 5/2-206 (West 2008)); (3) the Daily Herald's publisher's certificate of publication for 10/29/2009, 11/05/2009, and 11/12/2009; and (4) the notice of motion and "Motion for Default and Judgment of Foreclosure and Sale."

¶ 10 On December 2, 2010, defendants filed their reply contending that they had properly challenged Wells Fargo's affidavits with the information contained in their own affidavits, and that Wells Fargo failed to make diligent inquiry as to defendants' whereabouts.

¶ 11 On March 14, 2011, a hearing was held on the motion to quash service by publication. Defendants each testified that: (1) they had owned the residence since 1993; (2) they had lived there continuously since 1993; (3) they were almost always at home; (4) in October 2009 they were residing at the residence; and (5) they had never seen the notice of motion for entry of default and judgment or the notice of motion for judicial sale, but they did receive the motion for the order approving the judicial sale and notice of motion. On cross-examination, Mr. Chaudhry was asked if he "relocated outside the State of Illinois or outside the country for a period of in excess of two years [*sic*]." He answered "that's true." Mr. Chaudhry also stated that he had borrowed a car from his brother-in-law, Dr. Parvez Shirazi.

¶ 12 Bia Tyk, special process server, testified that her job entailed serving court papers to addresses given to her. She stated that she serves between 5 and 700 summonses per month. She stated that on October 15, 2009, she attempted service on defendants at their home address but was unsuccessful. Two days later, on October 17, she returned to attempt service and "someone" opened the door and told her that defendants were not there. This person would not give a name but told her "they were a family member." She also stated that she did not serve this person because she was told that defendants did not reside there. As she was leaving the address, she took down the license plate number of a car parked in the driveway. Later investigation revealed that the car was registered to a different person at a different address. Tyk testified that she had no independent knowledge about the registered owner of the car. Her affidavit indicated that the car was registered to ABC Financial

Corporation, Parvez Shirazi, at an address in Grayslake, Illinois. Tyk also stated that, in October 2009, as a process server she was paid more by the detective agency if the papers were actually served than if service of process was not effectuated.

¶ 13 Immediately after the evidentiary hearing, the trial court found that Tyk was believable in her testimony that she went to the property. The trial court further found it "incredible to believe" that an individual did not answer the door and say that defendants were absentee owners who did not reside at the property. The trial court stated that such a fabrication would be against Tyk's "economic interest and her practical interest." The trial court then found that, once the information was related by an occupant of the home, "with the additional information that the car registered at the site was not one of the defendants[']s, there was enough information for the process server to believe that [they] did not reside at the property so that further efforts of service there would be ineffective." Therefore, defendants' motion to quash service was denied. Defendants' motion for reconsideration, filed April 6, 2011, was denied on May 2, 2011, and the order confirming sale and order of possession was entered. Defendants timely appealed from these orders.

¶ 14 II. ANALYSIS

¶ 15 Defendants challenge the validity of the service of process by publication, asserting that the process server's attempts at personal service did not meet the standard of due inquiry and diligence required under section 2-206 of the Code. See 735 ILCS 5/2-206 (West 2010)). Defendants argue that, without the due diligence requirement satisfied, Wells Fargo was not justified in serving them by publication.

¶ 16 Section 2-206(a) provides:

"§ 2-206. Service by publication; affidavit; mailing; certificate.

> (a) Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, 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.* * * The clerk shall also, within 10 days of the first publication of the notice, send a copy thereof by mail, addressed to each defendant whose place of residence is stated in such affidavit. The certificate of the clerk that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so." (Emphases added.) 735 ILCS 5/2-206(a) (West 2010).

¶ 17 Generally, diligence in locating and serving a defendant is a question of fact, and the trial court's determination will not be reversed on appeal unless it is against the manifest weight of the evidence. *Gacki v. La Salle National Bank*, 282 Ill. App. 3d 961, 964 (1996). In an evidentiary hearing on a motion to quash service of summons, the weight to be given to the assertions in the affidavits and the testimony of the witnesses is peculiarly within the province of the trial court. *Sterne v. Forrest*, 145 Ill. App. 3d 268, 276 (1986). We will not disturb the trial court's finding and substitute our own opinion unless the holding of the trial court is against the manifest weight of the evidence. *Id.* A decision is against the manifest weight of the evidence where the opposite

conclusion is clearly evident or where the finding is unreasonable, arbitrary, or not based on the evidence presented. *Brynwood Co. v. Schweisberger*, 393 Ill. App.3d 339, 351 (2009).

¶ 18 Diligence depends on the facts of the specific case, and whether a party has been diligent does not depend upon the sheer number of attempts at service. *People ex rel. Waller v. Harrison*, 348 Ill. App.3d 976 (2004). Where a plaintiff showed that it had exhausted all of its leads in its attempt to locate defendant, the statute does not require futile attempts to serve a defendant at an address where he does not live or at an address that does not exist. *Id.*

¶ 19 The process server testified, and her affidavit attested, that she had attempted service on defendants on two different dates in October 2009, and that the second time someone answered the door and told her that defendants were out of the country. Defendants testified that they were present at the address continuously during October 2009, excepting brief absences, *e.g.*, medical appointments. The issue was the credibility of the witnesses, and the trial court stated that it "gives no weight to the fact that the process server cannot independently recall the facts of service. That will almost always be the case in these situations." The trial court further found that the process server did not lie about going to the property twice and having a third person answer the door. This person told the process server that defendants were out of the country. The court found that this information, together with the information that the car parked on the driveway did not belong to defendants, was enough for the process server to believe that defendants did not reside at the property and that further efforts toward personal service at that address would be ineffective. "In close cases, where findings of fact must necessarily be determined from the credibility of the witnesses, a reviewing court will defer to findings of the trial court unless they are against the manifest weight of the evidence." *Beeding v. Miller*, 167 Ill. App.3d 128, 143-144 (1988). We defer

to the trial court's determination regarding this issue. Therefore, we find that the trial court's judgment regarding the credibility of the witnesses at the evidentiary hearing was not against the manifest weight of the evidence.

¶ 20 Defendants assert that "It is the efforts and actions of [plaintiff] in strict compliance with section 2-206 [of the Code] that controls," citing *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923 (1978). The question presented in *Horton* was whether the plaintiff-bank was justified in resorting to service by publication and mailing. In *Horton*, no effort was made to personally serve the defendant; rather, the plaintiff's counteraffidavit stated that upon "due inquiry" the defendants could not be found. The court held that "in order to resort to service by publication and mailing in that class of cases where permissible, there must be more than a cursory effort made by the plaintiff to locate the defendants." *Id*. at 925. Thus, the court held that service by publication could not be predicated on the affidavit asserting "due and diligent inquiry," and, therefore, the judgment was void as to defendant-property owners. *Id*. at 930.

¶ 21 *Horton* is distinguishable from this case in that, here, an evidentiary hearing was held at which the specific issue was whether the notice by publication was justified after "due diligence" of the process server. The husband and wife property owners each testified that they were at their home almost all the time during October 2009. The process server's testimony involved her efforts to personally serve defendants at the property address in October 2009. The trial court found the process server was credible, and that her attempts to personally serve defendants, together with the information given her by someone at the property address, was sufficient to constitute "due diligence." The situation differs greatly from that in *Horton*, where *no* effort to serve the property owners was made.

¶ 22 Defendants also rely on *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26 (2006), which involved the notice requirements prescribed by the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-107 (West 2004). In that case, the defendant's primary contention on appeal was that the plaintiff did not make sufficient efforts toward personal service before resorting to constructive service pursuant to the statute. The Act provided for constructive service by the posting and mailing of notices to a defendant whom the affiant, after diligent inquiry, has been unable to locate. Because there was an unresolved question as to whether the plaintiff made due and diligent inquiry as required when relying on constructive service, the cause was remanded for an evidentiary hearing. *Nasolo*, 364 Ill. App. 3d at 37. The court stated: "The party claiming benefit of constructive service bears the burden of showing strict compliance with every requirement of the statute, and nothing else will confer jurisdiction to the court or grant validity to the court's judgment." *Nasolo*, 364 Ill. App. 3d at 32. Again, the procedural posture of this case differs from *Nasolo*, in that an evidentiary hearing was held and the trial court heard testimony and ruled on the evidence presented. Thus, *Nasolo* is distinguishable from the case at bar.

¶ 23 Defendants next assert that the trial court's orders are void *ab initio* because the trial court lacked personal jurisdiction over them. They argue that "[a]bsent from the trial record is any indication that the Circuit Court Clerk mailed, in conformity with the statute, the publication notice," and they conclude that, *ergo*, service of process was defective.

¶ 24 Section 2-206(a) of the Code requires the clerk of the court to mail, within 10 days of the first publication, a copy of the publication notice addressed to each defendant. 735 ILCS 5/2-206(a) (West 2010). Citing *Horton*, 59 Ill App. 3d 923, defendants argue that strict compliance with the statute governing service by publication is required. However, the record reflects that defendants

never sought to challenge the service by publication by invoking this section of the statute in the trial court. Defendants did not raise this issue in their motion to quash, at the hearing on the motion to quash, or in their motion for reconsideration. Instead, defendants present this argument for the first time in this appeal. The claim should have been raised before the trial court, which would have given Wells Fargo the opportunity to rebut the *non sequitur* that the absence of evidence is evidence of absence, by either producing the certificate or presenting other competent evidence. Defendants are attempting to establish the lack of a certificate, failing to realize that the claim must be made in the trial court so that a perfected record could and would establish the merit of the claim. We find that defendants are precluded from claiming that the publication notice was never mailed because this issue is procedurally defaulted before this court. See *Daniels v. Anderson*, 162 Ill.2d 47, 59 (1994) (allowing a new theory for the first time on appeal would weaken the adversarial process, our system of appellate jurisdiction, and cause prejudice, since opponents may have been able to present evidence to discredit the theory had it been raised in the trial court).

¶ 25 Procedural default aside, defendants' argument is not availing. In this case, the trial court's judgment was not proven void *ab initio* as argued by defendants. "Where it is alleged that the evidence presented was actually insufficient to support the court's finding, the burden of preserving said evidence rests with the party who appeals from said order." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 394 (1984). Under *Foutch*, defendants have failed to meet their burden of presenting a complete record to support their contentions. Unless there is a contrary indication in the order or in the record, we presume that the court heard adequate evidence to support the decision that was rendered. *Id.* Thus, we presume and conclude that the certificate of mailing or evidence to support the existence of the mailing was in fact presented.

¶ 26 Furthermore, the clerk's certificate of mailing is not required to establish proper service; in fact, it would prove nothing more than that the clerk actually mailed a copy of the newspaper publication to the same address to which all other communications were sent. The common law record includes the Paddock Publication's certificate of publication appended to Wells Fargo's "Statement of Service," filed in the trial court on February 22, 2010. This certificate includes the actual notice and indicates it was published in the Daily Herald on October 29, November 5, and November 12, 2009. Additionally, an affidavit from Suburban Life Publications, circulated in the Village of Westmont, is appended to the "Sheriff's Report of Sale and Distribution," filed May 2, 2011. The affidavit certifies that the notice was published once each week for three successive weeks, beginning on July 21, 2010, and ending on August 4, 2010, and the actual notice is also attached. Thus, the record supports Wells Fargo's position that defendants were notified. Since the trial court found necessary facts to establish jurisdiction, the absence of a certificate of mailing does not necessitate a contrary finding. See *Eddy v. Eddy*, 302 Ill. 446, 452 (1922) ("In the files there was found a certificate of publication of notice to him and other nonresidents, but none showing the mailing of notice to appellee ***. The absence of such a notice would not show want of jurisdiction, if the chancellor in the decree had found the necessary facts constituting jurisdiction.")

¶ 27 The technical requirement of a certificate of mailing is not substantive because, as stated in the statute, it is merely evidence of mailing.[1] See 735 ILCS 5/2-206(a) (West 2010) ("The certificate of the clerk that he or she has sent the copy in pursuance of this Section is evidence that

[1]The irony here is that the certificate of publication would have been mailed to the address where defendants claim they lived continuously but at which they never received any mailings before September 18, 2010.

he or she has done so."). There is nothing in the record to establish the lack of the mailing certificate. Defendants' claim does not establish there is no evidence; rather, we are presented with a mere allegation that was neither presented nor established in the court below. We determine that the record before us does not establish lack of jurisdiction in the trial court to render the judgment it did.

¶ 28 Defendants cite *Gacki*, 282 Ill. App. 3d 961, involving notice under the Property Tax Code (35 ILCS 200/22-15 (West 1996)) to a trustee of a land trust *vis-a-vis* notice to a beneficiary of the trust. In *Gacki*, the beneficiary of a land trust had built a residence on a lot adjacent to the property at issue. This court agreed with the trial court that diligent inquiry would have revealed that the beneficiaries occupied the property in issue as their back yard. The "strict compliance" with the notice requirements pertained to the tax purchaser's obligation to attempt personal service on the beneficiaries and other parties having an interest in the property. The statute involved was section 22-15 of the Property Tax Code. *Gacki* is inapposite.

¶ 29 Defendants also cite *Clinton Co. v. Eggleston*, 78 Ill. App. 3d 552 (1979), a suit brought under the Forcible Entry and Detainer Act (735 ILCS 5/9-107 (West 2004) where the court found the abode service was invalid and, therefore, the judgment was void. In *Eggleston*, the deputy serving the summons testified that he left the summons with someone named "Murk Mary Roe" who answered the door at Apartment 1510; the defendants' affidavit contradicted the deputy's testimony in that, *inter alia*, they resided at Apartment 1510N and that no one by that name resided with them. This case is inapposite as it has nothing to do with a certificate of mailing the notice of publication. Defendants in this case fail to cite to evidence in the record contradicting the affidavits that would

render the trial court's finding against the manifest weight of the evidence. Thus, this case is distinguishable from *Eggleston*.

¶ 30 For these reasons, we find support for the trial court's decision in the record, and, therefore, we affirm.

¶ 31 III. CONCLUSION

¶ 32 We affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.