2014 IL App (2d) 130984-U
No. 2-13-0984
Order filed September 29, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WELLS FARGO BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CH-1198
	)	
ROYAL J. LINCOLN and	)	
MARILYN LINCOLN,	)	
	)	
Defendants-Appellants,	)	
	)	Honorable
(Fairfield Way Homeowners Association;	)	Leonard J. Wojtecki,
Wells Fargo Bank, N.A., Defendants.).	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendants' motion to dismiss the complaint, quash service, and vacate the foreclosure judgment for lack of personal jurisdiction.

¶ 2 The trial court entered a default foreclosure judgment in favor of plaintiff Wells Fargo Bank, N.A., and against defendants, Royal J. Lincoln and Marilyn Lincoln, and entered a confirmation of sale. Defendants moved to dismiss the complaint, quash service, and vacate the foreclosure judgment for lack of personal jurisdiction. Defendants filed affidavits denying that

they were served process, and plaintiff responded with evidence that Royal was served personally and Marilyn received substitute service. The trial court denied defendants' motion without a hearing.

¶ 3 Defendants appeal, arguing that (1) they corroborated their affidavits with clear and convincing evidence that plaintiff's description of the person allegedly served does not resemble Royal; (2) the trial court applied the wrong burden of proof to the affidavit of substitute service; (3) the court erred in denying defendants an evidentiary hearing on the motion; and (4) the ruling violates public policy. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Foreclosure Action

¶ 6 On June 11, 2007, defendants signed a promissory note with plaintiff for $272,000. Defendants also executed a mortgage securing the note against their primary residence at 3169 Kennedy Drive in Montgomery. A loan modification was completed on September 9, 2010. According to plaintiff, defendants stopped paying their mortgage in December 2010.

¶ 7 On March 22, 2011, plaintiff filed the complaint to foreclose the mortgage, alleging that defendants had defaulted on the mortgage loan by failing to make a payment on December 1, 2010. Plaintiff sought to foreclose on the primary residence.

¶ 8 On April 26, 2011, plaintiff filed affidavits of special process server Rich Sylvester, an employee of Firefly Legal, Inc. Sylvester stated that, on March 29, 2011, he attempted to serve defendants at 323 Hill Avenue in North Aurora. Sylvester did not serve defendants because they did not reside there. The resident, Romana Kittle, who identified herself as Marilyn's daughter, told Sylvester that defendants resided at 3169 Kennedy Drive in Montgomery.

¶ 9 Sylvester stated in a subsequent affidavit of special process server that, at 8:44 a.m. on March 30, 2011, he served the summons and complaint at 3169 Kennedy Drive in Montgomery. Sylvester stated that he served Royal personally and that Royal confirmed he resided at the address. Sylvester's affidavit described the person served as 64 years old, male, Caucasian, five-feet-eight-inches tall, weighing 176 to 200 pounds, with gray hair, and wearing glasses. The affidavit also stated "[t]his is the defendant's usual place of abode."

¶ 10 Sylvester executed another affidavit of special process server stating that he served Marilyn by substitute service. The affidavit states that service was made by leaving a copy of the summons and complaint with Royal. The description of the person served and the time and location of the service matched the affidavit of personal service on Royal. The affidavit also stated that a copy of the summons and complaint was mailed to Marilyn at her usual abode on April 5, 2011.

¶ 11 Nineteen months later, on December 12, 2012, plaintiff moved for a default judgment of foreclosure and served a copy of the motion on defendants at their home. On December 17, 2012, the trial court granted plaintiff's motion. Defendants did not appear for the hearing.

¶ 12 On May 2, 2013, the Kane County Sheriff held a sale for 3169 Kennedy Drive in Montgomery, and plaintiff made the highest bid. On May 13, 2013, the sale was confirmed in the trial court.

¶ 13 B. Motions to Vacate the Judgment

¶ 14 On July 25, 2013, defendants filed a special and limited appearance in the trial court. Citing lack of personal service, defendants also moved to dismiss the complaint, quash service, and vacate the judgment of foreclosure and the confirmation of sale. Defendants filed affidavits denying that they were served and disputing the description of Royal in Sylvester's affidavit.

Defendants offered no other evidence in support of their motion. On August 7, 2013, the trial court denied the motion without prejudice.

¶ 15 On August 29, 2013, defendants renewed their motion with supporting affidavits. In his affidavit, Royal denied being served on March 30, 2011, and stated that, since March 2011, he had red hair and weighed 241 pounds. Royal also stated that he is six feet tall. Defendants also attached the report of a physical examination performed by Dr. Steven Sapyta, which indicated Royal is six feet tall and weighed 232 pounds on May 9, 2011. Royal also included a color copy of a photograph showing his appearance in late 2011. Marilyn's affidavit contained a description of Royal that matched the affidavits of Royal and Dr. Sapyta.

¶ 16 In the motion, defendants argued that the trial court lacked personal jurisdiction because they were not served at 8:44 a.m. on March 30, 2011, as asserted in Sylvester's affidavit. Defendants emphasized the inaccuracy of Sylvester's description of Royal, contending that, "[i]f service was in fact made, it was made on someone other than Royal."

¶ 17 On September 11, 2013, the trial court heard defendants' motion, but no additional evidence was introduced and the court decided the motion based on the documents on file. The parties disputed the significance of the discrepancies in the description of Royal's height, weight, and hair color. Plaintiff pointed out that defendants had addressed only Royal's appearance without even alleging that Royal was elsewhere at the time of service or identifying who might have been served in Royal's absence.

¶ 18 The trial court denied the motion with prejudice, concluding that defendants had failed to satisfy the clear and convincing burden of proof. The court observed that the photograph showed that Royal had both red and gray hair and that he was a big man with glasses. The court also

denied defendants' request for a full evidentiary hearing. Defendants filed a timely notice of appeal on September 23, 2013.

¶ 19 II. ANALYSIS

¶ 20 Defendants appeal from the denial of their second motion to dismiss the complaint, quash service, and vacate the judgment. As a preliminary matter, we note that defendants filed their motion more than 30 days but less than 2 years after the judgment of foreclosure. Defendants did not (1) file their motion as a formal section 2-1401 petition collaterally attacking the judgment or (2) comply with the requirements for a section 2-1401 proceeding. 735 ILCS 5/2-1401 (West 2012).

¶ 21 Section 2-1401 provides litigants a means of obtaining relief from judgments older than 30 days if the petition is filed not later than two years after the entry of the order or judgment at issue, notwithstanding tolling for time during which the petitioner was under legal disability or duress or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012). Furthermore, a typical section 2-1401 petition must allege a meritorious defense to the original action and show that the petition was brought with due diligence. *Sarkissian v. Chicago Board of Education,* 201 Ill. 2d 95, 103 (2002).

¶ 22 In *Sarkissian,* our supreme court held that a pleading to challenge a void judgment based on invalid service must be brought under section 2-1401. *Sarkissian,* 201 Ill. 2d at 104-05. Recognizing that a void judgment may be attacked at any time, even more than two years after its entry, the supreme court held that some of the general requirements for a valid section 2-1401 petition cannot, and do not, apply to a petition to invalidate service of process. See *Sarkissian,* 201 Ill. 2d at 104. In particular, the court held that a party who files a section 2-1401 petition challenging a void judgment in the nature of a motion to quash (*i.e.*, attacking the validity of

service) does not need to allege the general elements of either a meritorious defense or due diligence, and may bring the petition at any time, not just within the two-year limitations period set forth in section 2-1401(c). See *Sarkissian*, 201 Ill. 2d at 104. Under *Sarkissian*, we need not decide whether defendants satisfied the general elements to prove their section 2-1401 petition.

¶ 23 We now turn to the issue of whether the evidence established that defendants were properly served. To enter a valid judgment, a court must have jurisdiction over the subject matter and jurisdiction over the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 17. We review *de novo* whether the circuit court obtained personal jurisdiction. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 17; see also *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 12 (*de novo* standard of review applies to motion to quash service and a 2-1401 proceeding where the trial court relied only on the documents on record without holding an evidentiary hearing,).

¶ 24 Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 18; *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 32. Sections 2-203(a)(1) and (a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-203(a)(1), (a)(2) (West 2012)) provide for service of process on individuals by leaving a copy of the summons with the defendant personally, or by leaving a copy at the defendant's usual place of abode with a family member or person residing there over the age of 13. *O'Halloran*, 2013 IL App (1st) 113735, ¶ 32.

¶ 25 To determine whether the circuit court had personal jurisdiction over the defendants, we must consider the whole record, including the pleadings and the return of service. *Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 28. The process server's return is *prima facie* evidence of personal service that cannot be set aside based upon an uncorroborated affidavit from the person served. *Central Mortgage Co.*, 2012 IL App (1st) 112353, ¶ 28. The return can only be set aside if it is impeached by "clear and satisfactory evidence." *Central Mortgage Co.*, 2012 IL App (1st) 112353, ¶ 28 (citing *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983)). This rule applies, however, only to matters that are within the knowledge of the process server, such as the fact that service was made, his actions involved in doing so, where service was made, and who accepted the service. *Central Mortgage Co.*, 2012 IL App (1st) 112353, ¶ 28.

¶ 26 First, defendants argue that they impeached Sylvester's return affidavits by corroborating their own affidavits with clear and convincing evidence that plaintiff's description of the person allegedly served does not resemble Royal. We disagree. Sylvester's affidavits of service stated that Marilyn's daughter directed Sylvester to 3169 Kennedy Drive, which was the residence foreclosed upon. Sylvester stated that he served Royal personally and Marilyn by substitute service by leaving a copy of the summons and complaint with Royal. There is no dispute that, at the time of service, Royal was 64 years old, male, Caucasian, and wore glasses.

¶ 27 Sylvester described Royal as five-feet-eight-inches tall, weighing 176 to 200 pounds, with gray hair. However, defendants averred that, on the date of service, Royal was six feet tall, weighed at least 230 pounds, and had red hair. The photograph that defendants presented to establish that Royal had red hair shows a large man with red hair on the top of his head and gray

hair on the sides. To describe Royal's hair as gray is not unreasonable, and the photograph does not impeach Sylvester's description of Royal's hair.

¶ 28 Defendants further argue that service is invalid because the return affidavits state he is 5-feet-8-inches tall and weighed 175 to 200 pounds, while he presented evidence that he is actually six feet tall and weighed at least 230 pounds. Like his description of Royal's hair color, Sylvester's estimates of Royal's height and weight are not unreasonable.

¶ 29 Defendants rely on *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834 (1992), in which this court concluded that the evidence supported the trial court's invalidation of service of process. In *Winning Moves*, the process server testified that, at the defendant's home on three different dates, she personally served the defendant with a summons, a citation to discover assets, and a rule to show cause. The process server identified the defendant in court as the woman whom she served on all three of those occasions. The three return affidavits described the defendant as 5-feet-7-inches tall, weighing 145 pounds, approximately 31 years old, and with blond hair. On cross-examination, the process server estimated that the defendant was 5-feet-5 inches or 5-feet-5 1/2-inches tall, 135 pounds, approximately 31 years old, and had dirty blond hair. In turn, the defendant testified that she was 27 years old, 5-feet-3-inches tall, and 110 pounds. She testified that she was served with only a notice of a motion to change the name of the complaint and that there was no complaint attached to it. The defendant further denied being served with any other summons or complaints. She testified that, on one date of service, she was entertaining guests at home and was not served with papers; and on another date, she was at work and could not have been served at home as alleged. *Winning Moves*, 238 Ill. App. 3d at 837.

¶ 30 In its ruling, the trial court noted that it originally issued a rule to show cause against the process server because there were discrepancies in her affidavits of return. The court explained that the process server's estimate of the defendant's age was a fairly easy mistake and that it was reasonable to consider the defendant's hair as dirty blond, but " 'to say that she's 5'7 when she's *** 5'3" *** that's pretty hard to misconstrue somebody [*sic*] by four inches." *Winning Moves*, 238 Ill. App. 3d at 837-38. The trial court also expressed doubt concerning the process server's estimate of the defendant's weight at 145 pounds, observing that " '[s]he's a bit of a thing.' " *Winning Moves*, 238 Ill. App. 3d at 838. The trial court ordered the service of process vacated and held the process server in contempt of court, finding that she lied on her return affidavits. *Winning Moves*, 238 Ill. App. 3d at 838.

¶ 31 On appeal, this court noted that, although a return of service cannot be set aside merely upon the uncorroborated testimony of the party upon whom service was made, the trial court had been in a privileged position where it not only could hear the testimony, but also could view the defendant and compare the process server's prior description in her affidavits against its own impressions of the defendant's appearance. *Winning Moves*, 238 Ill. App. 3d at 838. Emphasizing that the trial court assesses the credibility of witnesses, we left it to the trial court to determine whether the defendant's appearance in court adequately corroborated her claim regarding her lack of service given the discrepancies in the process server's affidavits. *Winning Moves*, 238 Ill. App. 3d at 838-39. Accordingly, we concluded that the defendant presented sufficient evidence to support the trial court's ruling on the validity of the service of process. *Winning Moves*, 238 Ill. App. 3d at 839.

¶ 32 Defendants point out that *Winning Moves* and this case are alike in that the height and weight descriptions in the return affidavits were each off by four inches and about 35 pounds.

However, defendants exaggerate the similarity of the discrepancies in those two cases, as the remaining facts explain the opposite results. For instance, Royal is much larger than the diminutive defendant in *Winning Moves*, such that an inaccurate estimate of four inches and 35 pounds is less significant when describing Royal. Sylvester's estimate of these identifiers is not so inaccurate as to rise to the level of clear and convincing evidence.

¶ 33 Moreover, in *Winning Moves*, the trial court heard the testimony, viewed the defendant in court, and compared the process server's description against the court's own impressions of the defendant's appearance. In this case, the trial court did not hear testimony from Royal or Sylvester but rather compared Royal's appearance as depicted in the photograph to the description in the return affidavits.

¶ 34 The *Winning Moves* court concluded, based on the totality of the circumstances, that the evidence, including the defendant's alibi testimony, was sufficient to support the trial court's invalidation of the service of process. Here, the trial court reached a different conclusion on different facts. The discrepancies between defendants' affidavits and Sylvester's description of Royal's height and weight do not rise to the level of disproving service by clear and convincing evidence, especially where the affidavits contain no other information about defendants' alibi, where defendants lived at the time, or who else might have been served.

¶ 35 Second, defendants argue that the trial court applied the wrong burden of proof when assessing the affidavits of substitute service on Marilyn. Specifically, defendants argue that the trial court erroneously found the affidavits of substitute service to be *prima facie* evidence of service on Marilyn. Ordinarily, where a defendant is served by means of substitute service, the process server's return of service must demonstrate strict compliance with every requirement in section 2-203(a) as the presumption of validity that attaches to a return for personal service does

not apply in cases of substitute service. *Central Mortgage Co.*, 2012 IL App (1st) 112353, ¶ 28. However, a party challenging service faces a lower burden only when he contests facts that are not within the personal knowledge of the server, such as whether the individual served was a member of the defendant's household. *Nibco*, 98 Ill. 2d at 172. In this case, Sylvester's affidavit states that he made the substitute service on Marilyn by leaving a copy with Royal, which is a matter within Sylvester's personal knowledge. Thus, Sylvester's affidavit of substitute service on Marilyn is *prima facie* evidence of her service. Because we have concluded that the personal service on Royal was valid, the simultaneous substitute service on Marilyn was valid too.

¶ 36 Third, defendants argue that the court erred in denying defendants a full evidentiary hearing on the motion. We disagree. Several types of final dispositions are possible in section 2-1401 litigation: the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding a hearing at which factual disputes are resolved. *People v. Vincent*, 226 Ill. 2d 1, 9 (2007). Where a material issue of fact exists, summary judgment is inappropriate and an evidentiary hearing, a trial in effect, is required in ruling on the 2-1401 petition. *Vincent*, 226 Ill. 2d at 9. In this case, there is no dispute over a material issue of fact, only a dispute over the application of the law to those facts.

¶ 37 Plaintiff argues that Sylvester's estimates of Royal's height and weight describe him within an acceptable margin of error, given the remaining undisputed facts, such as Royal's race, age, and use of glasses. Defendants respond that an evidentiary hearing is required so the trial court can hear testimony, but they do not explain how that testimony would provide the court with any additional insight into the truthfulness of the return affidavits. Defendants have yet to indicate what additional evidence they would have the trial court consider. As plaintiff

emphasized in the trial court, defendants addressed only Royal's appearance without alleging that Royal was elsewhere at the time of service or identifying who might have been served in Royal's absence. Even on appeal, defendants fail to specify what evidence they would present at a new hearing on their motion. Defendants cite no authority for the proposition that the denial of a full evidentiary hearing on a motion to vacate a default judgment, especially without any indication of what, if any, evidence would be presented, is reversible error. Under the totality of the circumstances, the return affidavits' inaccuracies regarding Royal's appearance are minor, and we reject defendants' bald assertion that an evidentiary hearing is necessary. Their allegations do not create a genuine question of material fact regarding the truthfulness of Sylvester's affidavits. We conclude that the trial court did not err in denying defendants a full evidentiary hearing.

¶ 38 Finally, defendants argue that the trial court's ruling violates public policy in that their property rights and right to notice were violated, which must be remedied by vacating the judgment. Defendants refer to several laudable policy considerations that weigh in favor of foreclosure defendants, but the "clear and satisfactory evidence" standard for evaluating the evidence of service strikes a balance between a property owner's rights and the stability of judicial proceedings. See *Nibco*, 98 Ill. 2d at 171 (quoting *Marnik v. Cusuck*, 317 Ill. 362, 364 (1925)) ("The stability of judicial proceedings, however, requires that the return of an officer made in the due course of his official duty and under the sanction of his official oath should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served but only upon clear and satisfactory evidence").

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 41 Affirmed.