2015 IL App (2d) 150344-U
No. 2-15-0344
Order filed December 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROUTE 31, LLC,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-LM-296
	)	
COLLISION CENTERS OF AMERICA,	)	Honorable
	)	John D. Bolger,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's section 2-1401 petition to vacate a judgment due to improper service: plaintiff had the burden to establish that the person served was an "agent" of defendant, as opposed to a mere employee, and the conflicting affidavits on which the parties stood established only a question of fact on that point.

¶ 2 Defendant, Collision Centers of America, appeals the denial of its "motion" to quash service, filed under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), in an underlying eviction case brought by plaintiff, Route 31, LLC. Defendant contends that the trial court lacked jurisdiction over it because process was served on an employee who was not an "agent" who could be properly served. See 735 ILCS 5/2-204 (West

2012). We hold that plaintiff had the burden to show that service was proper and that the evidence does not establish that it was. Accordingly, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On April 17, 2014, plaintiff filed a forcible entry and detainer complaint against defendant. A summons was issued directing service on defendant's in-house counsel and registered agent, Mark Kehoskie, in Woodridge, Illinois. That summons was not served and, on May 1, 2014, an alias summons was issued. That summons was not directed to any specific person. The summons was then served at the same Woodridge location on Rachel Hvizdos. The affidavit of service listed Hvizdos as "Manager/Agent."

¶ 5 Defendant did not appear and, on June 12, 2014, the court entered a default judgment against it. On February 6, 2015, defendant filed a "motion" to quash service under section 2-1401. Defendant included an affidavit from Kehoskie, who averred that he was defendant's registered agent and that he did not delegate that status to Hvizdos or otherwise authorize her to accept service on his behalf.

¶ 6 Plaintiff provided an affidavit from the process server, Steven Hoff, who averred that the Woodridge address was a business location of defendant. Hoff asked for Kehoskie and was informed that he was not available. Hvizdos identified herself as the "office manager" and was hesitant to accept service. She made a phone call and spoke to someone who Hoff speculated could have been her boss or Kehoskie, and she then told Hoff that she had been directed to accept the papers. She also told Hoff that she was aware of plaintiff and the substance of the lawsuit. Plaintiff also provided, among other things, a copy of defendant's entry on the Better Business Bureau's website, which listed Hvizdos as "Manager" under the heading "Contact Information."

¶ 7 In response, defendant provided an affidavit from Hvizdos, who averred that she was the general manager of the auto-body shop located at the Woodridge address and that defendant's corporate offices were on the second floor. The body shop was one of 24 locations, and she did not have any responsibilities or duties at the corporate headquarters. When Hoff arrived, she tried to call Kehoskie but could not reach him. She told Hoff that she had not been authorized to "sign for" Kehoskie, but Hoff replied that he "wasn't leaving until someone signed for some papers he had." Hvizdos averred, "I signed the papers just to get [Hoff] to go away and leave me alone."

¶ 8 On March 9, 2015, a hearing was held. No additional evidence was provided. Noting its uncertainty as to "[w]ho has the burden of proof," and stating that this is a "very difficult" case, the trial court denied the "motion." Defendant appeals.

¶ 9 II. ANALYSIS

¶ 10 Defendant contends that it was not properly served, resulting in a void order that can be attacked at any time under section 2-1401.

¶ 11 Although it labeled its pleading as a "motion," defendant raised the matter as a claim for relief under section 2-1401. "Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The purpose of a section 2-1401 petition is to bring to the attention of the trial court facts that, if known at the time of judgment, would have precluded its entry. *Paul v. Gerald Adelman & Associates, Ltd*., 223 Ill. 2d 85, 94 (2006).

¶ 12 Typically, to be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3)

due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). Further, in general, a section 2-1401 petition must be filed within two years of the entry of judgment. 735 ILCS 5/2-1401(c) (West 2012). However, when the petitioner alleges that the judgment is void, the allegation of voidness "substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Further, the two-year limitations period does not apply. *Id.* at 103. A judgment that is entered without personal jurisdiction over a party is void and can be attacked directly or collaterally at any time. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 13.

¶ 13 "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, LP v. Mitchell*, 2014 IL 116311, ¶ 18. Strict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served. *Sarkissian*, 201 Ill. 2d at 109; *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 912 (2008). "Where service of process is not obtained in accordance with the requirements of the statute authorizing service of process, it is invalid, no personal jurisdiction is acquired, and any default judgment rendered against a defendant is void." *Schorsch v. Fireside Chrysler-Plymouth, Madza, Inc.*, 172 Ill. App. 3d 993, 998 (1988).

¶ 14 Section 2-204 of the Code provides that a private corporation may be served by leaving a copy of the process with its registered agent or any officer or "agent" of the corporation found anywhere in the state or in any other manner permitted by law. 735 ILCS 5/2-204 (West 2012). Substitute service of a corporation may be made by serving the Secretary of State. 805 ILCS 5/5.25(b) (West 2012). "Generally, the sheriff's return of service is *prima facie* evidence of service, which can be set aside only by clear and satisfactory evidence." *Dei v. Tumara Food*

Mart, Inc., 406 Ill. App. 3d 856, 862 (2010). However, when a corporation is sued, the sheriff's return as to the fact of agency is not conclusive. *Id*.

¶ 15 Employment and agency are generally not considered identical. *Id*. at 864. That is, a mere employee is not an "agent." Thus, in *Dei*, service on a "cashier," who did not "understand what it means to be an authorized agent for purposes of accepting legal papers," was insufficient. *Id.* at 865. Likewise, "service on a receptionist who does not understand her duty to deliver the summons to her employer may be insufficient." *Island Terrace Apartments v. Keystone Service Co.*, 35 Ill. App. 3d 95, 99 (1975). However, in *Megan v. L. B. Foster Co.*, 1 Ill. App. 3d 1036, 1038 (1971), "service upon an intelligent clerk of a company who acts as a receptionist and who understood the purport of the service of summons was sufficient under the above quoted statutory provision dealing with service upon an agent."

¶ 16 As the trial court's confusion reflected, there has been disagreement among the Illinois appellate courts as to which party has the burden to show the presence or absence of an agency relationship. *Dei*, 406 Ill. App. 3d at 863. Here, plaintiff relies on *Cleeland v. Gilbert*, 334 Ill. App. 3d 297, 301 (2002), for the proposition that the burden is on the defendant. However, most courts place the burden on the plaintiff. *Dei*, 406 Ill. App. 3d at 863. Accordingly, in *Sarkissian*, 201 Ill. 2d at 113, the supreme court placed on the plaintiff the burden to show that a receptionist had been delegated the authority to accept service on the defendant's behalf. Thus, likewise, plaintiff here had the burden to show that Hvizdos was defendant's "agent."

¶ 17 Further, we agree with defendant that our standard of review is *de novo*. Generally, we review *de novo* whether a trial court had personal jurisdiction. *Illinois Service Federal Savings & Loan Ass'n of Chicago v. Manley*, 2015 IL App (1st) 143089, ¶ 36. In addition, where, as here, the trial court held no evidentiary hearing and based its decision entirely on documentary

evidence, our review is *de novo*. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 10; see also *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325, ¶ 23 (applying *de novo* review to ruling made solely on basis of affidavits).

¶ 18 Plaintiff asserts that our review should be deferential, "as if the Defendant/Appellant had an evidentiary Hearing," because "Defendant/Appellant was offered by the Trial Court to have the opportunity for an evidentiary Hearing" but declined the opportunity, choosing to "stand on the Affidavits submitted to the Court." According to plaintiff, "[t]his Court cannot permit the Defendant/Appellant to decline an evidentiary Hearing, when offered by the Trial Court, *** thereby evoking the higher standard of de novo. Instead, this Court should state that the Defendant; by giving up the right to an evidentiary hearing: permits this Court to use the standard of against the manifest weight of evidence or abuse of discretion."

¶ 19 Plaintiff cites no authority for this strange proposition. We must review what the trial court *did*, not what it *might have done*. The trial court did not conduct an evidentiary hearing; we cannot pretend instead that it did. We note further that defendant was not the only party with a potential interest in an evidentiary hearing. As noted, it was plaintiff, not defendant, that had the burden of proof. Thus, if an evidentiary hearing was necessary for plaintiff to establish that Hvizdos was defendant's "agent"—and, as we will explain, it was—it was incumbent on plaintiff to request one. Plaintiff stood on the affidavits just as much as defendant did.

¶ 20 And those affidavits painted starkly different pictures of Hvizdos's status. According to Hoff's affidavit, Hvizdos held herself out as the "office manager," and, upon speaking to a person who must have been an authority figure, she told Hoff that she had been directed to accept the service. Upon receiving it, Hvizdos indicated that she was aware of the substance of the matter. However, in her own affidavit, Hvizdos averred that she was the manager of one of

defendant's 24 body shops. Although Hvizdos's shop happened to be at the same location as defendant's corporate headquarters, she had no corporate responsibilities. When Hoff came in and asked for Kehoskie, Hvizdos tried but failed to reach him. Although she told Hoff that she was not authorized to "sign for" Kehoskie, Hoff insisted that he "wasn't leaving until someone signed for some papers he had." Ultimately, Hvizdos "signed the papers just to get [Hoff] to go away and leave [her] alone." For his part, Kehoskie averred that he had never delegated his status to Hvizdos.

¶ 21 Under the facts as described by Hoff, Hvizdos was likely defendant's "agent": "an intelligent clerk of a company who acts as a receptionist and who understood the purport of the service of summons." *Megan*, 1 Ill. App. 3d at 1038. However, under the facts as described by Hvizdos, she had no corporate authority, as a receptionist or otherwise, and she had no appreciation for the nature of the papers. Rather, she was a body-shop manager, no different from the managers of defendant's 23 other body shops, whom Hoff badgered into accepting "some papers." Thus, under Hvizdos's affidavit, though she was perhaps a more responsible employee than, say, a mechanic in one of those body shops, she was a mere employee *vis a vis* the acceptance of service.[1]

¶ 22 Clearly, the affidavits do not resolve whether Hvizdos was defendant's "agent." A resolution would have required an evidentiary hearing. See *Madison Miracle Productions, LLC v. MGM Distribution Co.*, 2012 IL App (1st) 112334, ¶ 35. However, as noted, plaintiff did not seek such a hearing in the trial court, and it does not seek one, even alternatively, on appeal. As

[1] Hvizdos's having been listed as defendant's "Contact" on the Better Business Bureau's website, though suspicious, does not resolve the factual conflict.

plaintiff had the burden of proof, and as plaintiff, like defendant, stood on the conflicting affidavits, we must hold that the trial court erred in denying defendant's petition.

¶ 23 III. CONCLUSION

¶ 24 The judgment of the circuit court of McHenry County is reversed, and the cause is remanded.

¶ 25 Reversed and remanded.