

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

FIRST CHICAGO BANK AND TRUST,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff,)	
)	
v.)	No. 08-CH-3987
)	
SURGEEN DEVELOPMENT LLC,)	
)	
Defendant-Appellant)	
)	
(Christopher J. Geen, Bryan Hanson, Unknown)	Honorable
Owners and Non-Record Claimants,)	Robert G. Gibson,
Defendants; Linda Kirby, Intervenor-Appellee).)	Judge, Presiding.)

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in ruling that intervenor was a *bona fide* purchaser under section 2-1401(e): because the affidavit of service on defendant showed that the person served was the secretary of its registered agent, the record affirmatively showed that the service was improper and that the court lacked jurisdiction of defendant.

¶ 2 Defendant Surgeen Development LLC (Surgeen), appeals from a ruling of the circuit court of Du Page County finding that intervenor, Linda Kirby, was entitled to protection as a *bona fide* purchaser (BFP) under section 2-1401(e) of the Code of Civil Procedure (735 ILCS

5/2-1401(e) (West 2014)). Because the record affirmatively showed that jurisdiction was lacking, Kirby was not entitled to protection under section 2-1401(e), and we therefore reverse and remand.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff, First Chicago Bank and Trust (First Chicago), filed a foreclosure action against, among others, Surgeen. On October 8, 2008, First Chicago issued an alias summons that named, among others, Surgeen's registered agent, Michael Konewko.

¶ 5 Mary Jo Brooks, an employee of Midwest Process Service & Investigations, filed her affidavit of service. The affidavit of service stated that Midwest Process Service & Investigations was a licensed Illinois detective agency. Further, the affidavit of service identified the person to be served as "Surgeen Development LLC Michael R. Konewko R/A." However, it named the person actually served as Kelly Mullay, the "Secretary for [the] Registered Agent."

¶ 6 On December 9, 2008, the trial court granted First Chicago's motion for a default judgment of foreclosure and sale. On May 9, 2009, First Chicago purchased the property at a judicial sale, and the court approved the sale.

¶ 7 On or about March 26, 2010, First Chicago sold the property to Kirby. Kirby obtained a mortgage and moved into the property.

¶ 8 On December 14, 2014, Surgeen filed a petition to quash service under section 2-1401 (735 ILCS 5/2-1401 (West 2014)). Kirby filed a motion to intervene and a response to the petition to quash service. The trial court allowed Kirby to intervene.

¶ 9 At the June 22, 2015, hearing, the only issue was whether Kirby was a BFP entitled to protection under section 2-1401(e). Surgeen contended that she was not, because the record affirmatively showed that service of process had been defective in two respects. First, Surgeen

maintained that, although the affidavit of service stated that the process server was licensed, the license in fact was invalid. Second, it argued that the affidavit of service stated that service was made on the registered agent's secretary, who was not designated to accept service.

¶ 10 In ruling that Kirby was a BFP entitled to protection under section 2-1401(e), the trial court found that, because Kirby was required to conduct "further investigation as to the process server's licensing and whether the secretary for the registered agent was authorized to accept that service," the lack of jurisdiction did not "affirmatively appear from the record proper." The court denied Surgeen's motion to reconsider, and Surgeen filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, Surgeen contends that Kirby was not a BFP protected by section 2-1401(e), because the affidavit of service affirmatively showed a lack of jurisdiction, in that: (1) the process server was not licensed; and (2) service was made upon a person not authorized to accept service on behalf of Surgeen. Kirby responds that: (1) Surgeen's docketing statement and brief should be stricken because they fail to set forth clearly the issues on appeal; and (2) she is entitled to relief as a BFP under section 2-1401(e), because the record did not affirmatively show that the process server's license was invalid or that the secretary was not designated to accept service. We review *de novo* the section 2-1401 petition, as it is based on a purely legal claim challenging a final judgment as void. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 49.

¶ 13 Initially, we address Kirby's contention regarding Surgeen's docketing statement and brief. In doing so, we note that Kirby does not specify a violation of a particular supreme court rule. Even if she had, where violations of supreme court rules regarding briefs are not so flagrant as to hinder or preclude effective review, the striking of such a brief will not be warranted.

Gaston v. City of Danville, 393 Ill. App. 3d 591, 601 (2009). Here, we are able to discern and resolve the issues on appeal. Thus, we deny Kirby's request to strike Surgeen's docketing statement and brief.

¶ 14 We next address the merits. A party attacking a judgment for lack of personal jurisdiction based on defective service of process is restricted by neither the time limitations nor the due-diligence requirements of section 2-1401. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308-09 (1986). Accordingly, a judgment rendered by a court that did not have personal jurisdiction may be attacked and vacated at any time or in any court. *Thill*, 113 Ill. 2d at 309.

¶ 15 A BFP is a person who takes title to real property in good faith for value without notice of the outstanding rights or interests of others. *Daniels v. Anderson*, 162 Ill. 2d 47, 57 (1994). A purchaser is not *bona fide* if he has constructive notice of an outstanding right or interest of another person. *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 634 (2008). Additionally, a purchaser having notice of facts that would put a prudent person on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry. *Gipson*, 379 Ill. App. 3d at 634.

¶ 16 Where the rights of an innocent third-party purchaser have attached, a judgment can be collaterally attacked only if an alleged jurisdictional defect affirmatively appears in the record. *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 33 (citing *Thill*, 113 Ill. 2d at 312-13). In determining whether a lack of jurisdiction is apparent from the record, the court must look to the whole record, including the pleadings, the return of process, the jury's verdict, and the judgment. *Malarz*, 2015 IL App (3d) 140639, ¶ 33. A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record. *Thill*, 113 Ill. 2d at 314; *U.S. Bank National Ass'n v. Rahman*, 2016 IL App (2d) 150040, ¶ 27.

¶ 17 Section 2-204 of the Code (735 ILCS 5/2-204 (West 2008)) provides that a corporation may be served via its registered agent or any “agent” of the corporation. Generally, a return of service is *prima facie* evidence of proper service, which can be set aside only by clear and satisfactory evidence. *MB Financial Bank v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 29. When a corporation is served, however, a return of service does not conclusively establish the fact of agency. *Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 29. That is so because, to effectively serve a corporation via its agent, the agent must have actual authority to accept service on behalf of the corporation. *Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 29. Moreover, service on a secretary of a registered agent is not proper service on the corporation. *Knapp v. Bulin*, 392 Ill. App. 3d 1018, 1030-31 (2009); *Mason v. Freeman National Printing Equipment Co.*, 51 Ill. App. 3d 581, 583-84 (1977); see also *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 725 (1980) (service on the employee of an agent is inadequate where the employee has not been designated as an agent to receive process).

¶ 18 In this case, the record affirmatively showed a lack of jurisdiction for improper service. As noted, service on a secretary of a registered agent is not proper service on the corporation. *Knapp*, 392 Ill. App. 3d at 1030-31. The affidavit of service in this case stated clearly that service had been made upon Mullay in her capacity as the secretary of the registered agent. Therefore, on its face, the affidavit of service affirmatively showed that jurisdiction was lacking.

¶ 19 Kirby maintains, however, that the lack of jurisdiction was not apparent from the record, because it was necessary to look beyond the face of the record to determine whether the secretary had been designated as an agent to accept service. We disagree. The affidavit of service did not indicate that service had been made upon Mullay as an agent of the corporation; it stated that she had been served as the secretary of the registered agent, and thus it showed that jurisdiction was

lacking. Although further inquiry might have revealed that, by sheer coincidence, Mullay was an agent of the corporation, the fact remains that, per the record, jurisdiction was lacking.

¶ 20 Because we reverse the trial court on this basis, we need not decide whether the affidavit of service affirmatively showed that the process server did not have a valid license.

¶ 21 In closing, we emphasize the need for third-party purchasers to thoroughly review the record for any affirmative showing of a jurisdictional defect. Because the law allows a party to challenge jurisdiction at any time, a third-party purchaser should always proceed cautiously.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we reverse the judgment of the circuit court of Du Page County and remand for further proceedings.

¶ 24 Reversed and remanded.