2017 IL App (2d) 160481-U
No. 2-16-0481
Order filed March 24, 2017



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| PNC BANK, N.A., | ) | Appeal from the Circuit Court |
| | ) | of Du Page County. |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 14-CH-2225 |
| | ) | |
| RONALD J. PODULKA; HOLLY A. PODULKA; WINDING CREEK ESTATES UNITS II and III HOMEOWNERS ASSOCIATION; UNKNOWN OWNERS and NON RECORD CLAIMANTS, | ) | |
| | ) | |
| Defendants, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| G10 CONSTRUCTION, INC., | ) | |
| | ) | |
| Intervenor-Appellee | ) | Honorable |
| | ) | Robert W. Rohm, |
| (Ronald J. Podulka, Defendant-Appellant.) | ) | Judge, Presiding. |

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

**ORDER**

¶ 1 *Held:* the trial court's order confirming the judicial sale was affirmed where the court obtained personal jurisdiction over the defendant and where the sheriff gave

sufficient notice of the postponement of the sale by posting the new date on his website.

¶ 2 Defendant, Ronald J. Podulka, appeals from an order of the circuit court of Du Page County confirming the judicial sale of his residence in this mortgage foreclosure action brought by plaintiff, PNC Bank, N.A. (bank). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 12, 2014, the bank filed a complaint to foreclose a mortgage on property commonly known as 1442 Terrance Drive, Naperville, Illinois (the property). Defendant and his then-wife, Holly, were the mortgagors. At the time of the foreclosure proceedings, defendant and Holly were divorced.

¶ 5 A summons was issued to defendant at the property, and the court appointed a private process server. The process server unsuccessfully attempted to serve defendant both at the property and at Holly's address. Holly informed the server that defendant did not reside at her address, and she also stated that she did not know defendant's current whereabouts. The process server's return of service further indicated that he attempted service on defendant at the property seven times between December 15 and December 22, 2014, at different times of the day or evening, on weekdays and one weekend. On six occasions, no one answered the door. On one occasion, an unknown male spoke with the server through a window. The man stated that he was defendant's brother and that defendant was not home. The unidentified male refused to open the door or provide any further information.

¶ 6 The bank's attorney filed an affidavit with the circuit clerk stating that defendant's present residence could not be ascertained upon diligent inquiries. The bank also filed the affidavit of Juliann Pawlowski of Elite Process Serving and Investigations, Inc., averring that she

had performed a "skip trace" consisting of a search of social security records, employment records, credit records, telephone records, utilities records, voter registration records, jail records, and vessel records. The only addresses Pawlowski found for defendant were the property and Holly's residence. Pawlowski further stated that a vehicle that the process server observed at the property was registered to someone other than defendant. The circuit clerk then served defendant by publication on January 28, 2015, February 4, 2015, and February 11, 2015. On April 21, 2015, the bank gave defendant notice by regular mail at the property address that it would seek a default judgment against him. On April 28, 2015, the court entered an order providing for service on defendant by regular and certified mail. An alias summons and complaint were sent to defendant by both regular and certified mail on May 12, 2015. On June 9, 2015, the court set the motion for default for hearing on June 25, 2015. The court entered a default judgment against defendant on June 25, 2015. On that date, the court also entered a judgment of foreclosure and sale.[1]

¶ 7 On December 14, 2015, defendant filed an emergency motion to quash service and to stay the sale on the basis that the court lacked personal jurisdiction over him. Defendant contended that service by publication was void, because he was living at the property but was traveling back and forth to Springfield to settle his mother's estate "during the time" that the bank attempted service. Defendant argued that the bank's efforts to effect personal service lacked diligence. The court denied that motion on December 15, 2015, and it denied defendant's motion to reconsider on February 9, 2016. On February 11, 2016, the property was sold at a judicial sale.

[1] The bank obtained summary judgment against the remaining defendants.

¶ 8 On March 1, 2016, the bank sought an order approving the sale of the property. Defendant objected on the ground that the sheriff gave notice of the continued sale date by posting the postponement on his website instead of orally announcing the new date at the site of the sale. A representative of the sheriff testified that the bank notified her that the sale was postponed from January 5, 2016, to February 11, 2016. She testified that it was the sheriff's policy to post the new date on his website, rather than announce it orally at the site of the sale, except where the sheriff received less than two days' notice of a postponement. The court found that the sheriff's conduct in publishing the new date on his website was proper notice.

¶ 9 The intervenor, G10 Construction, Inc. (G10),[2] purchased the property at the judicial sale for $385,000. There was a surplus of $72,753.74, to which Holly was entitled by virtue of a recorded lien on the property. The record shows that G10 was not a party, or a nominee of any party, to the foreclosure proceedings. On June 7, 2016, the court entered an order confirming the sale, and it also entered an order of possession in favor of G10. Defendant filed a notice of appeal on June 22, 2016. Defendant did not obtain a stay of the judgment within the time for filing the notice of appeal. The record shows that defendant did not move the trial court for a stay until September 8, 2016. The trial court denied the stay. On October 13, 2016, defendant filed an unopposed emergency motion for a stay in this court. On October 19, 2016, this court granted a stay pending appeal. We conditioned the stay on defendant's timely payment of monthly rent to the bank's attorney, who acted as escrowee until further order of court.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant contends that the judgment of foreclosure should be vacated because (1) the court lacked personal jurisdiction over him, (2) the sheriff's notice of the

[2] On December 13, 2016, this court allowed G10 leave to intervene.

continuance of the sale was improper, and (3) the sale price was inadequate. Before we consider those issues, we must address G10's argument that this appeal is moot. Appellate courts generally do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected. *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). An appeal is moot if no actual controversy exists, or if events have occurred which make it impossible to grant the complaining party effectual relief. *Fisch v. Loews Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 539 (2006).

¶ 12 Illinois Supreme Court Rule 305(k) (eff. July 1, 2004) protects a third-party purchaser of property from appellate court reversals or modifications of judgments regarding that property. *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 3. Rule 305(k) provides:

> "(k) Failure to Obtain Stay; Effect on Interests in Property. If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted ***, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed." Ill. S. Ct. R. 305(k) (eff. July 1, 2004).

¶ 13 The property was sold to G10 at the foreclosure sale, and a certificate of sale was issued. Title to the property passed pursuant to the final judgment on June 7, 2016, when the court entered the order confirming the sale. See *Margaretten & Co., Inc. v. Martinez*, 193 Ill. App. 3d

223, 227-28 (1990) (order approving sheriff's sale terminated the foreclosure litigation by conclusively establishing the purchaser's rights to the property; order confirming the sale was a final judgment). The record establishes that G10 was not a party, or the nominee of a party, to the foreclosure litigation. See *Pinnacle Corp. v. Village of Lake in the Hills*, 258 Ill. App. 3d 205, 208 (1994) (Rule 305(k) does not apply unless the record discloses that the third-party purchaser of the property is not a party, or a nominee of a party, to the litigation). The record also establishes that defendant did not obtain a stay within the time for filing the notice of appeal.

¶ 14 However, Rule 305(k) is inapplicable, because defendant asserts that the judgment is void for lack of personal jurisdiction. A judgment that is entered without personal jurisdiction is void and lacks legal effect. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 25. In *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 518-19 (2001), the majority of the court, in responding to the dissent's argument that Rule 305(k) would not apply to a void judgment, held that the judgment at issue was only voidable, and Rule 305(k) applied.[3] If defendant is correct that the judgment is void, we could grant effectual relief by vacating the judgment, notwithstanding his failure to perfect a stay within the time for filing the notice of appeal. Accordingly, we reject G10's argument that this appeal is moot.

¶ 15 Turning to the merits, we first address defendant's argument that the court lacked personal jurisdiction over him. The record indicates that defendant was served by publication on three different dates. If service by publication is defective, the court does not have personal jurisdiction over the party that was served. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st)

[3] The rule was cited as 305(j) in *Steinbrecher*. The rule was amended on June 15, 2004, and is now 305(k).

102438, ¶ 12. We review *de novo* whether the trial court obtained personal jurisdiction. *JPMorgan Chase Bank, N.A. v. Ivanov*, 2014 IL App (1st) 133553, ¶ 45.

¶ 16 Section 2-206 of the Code of Civil Procedure (Code) permits service by publication in actions affecting property. 735 ILCS 5/2-206 (West 2014). Section 2-206 requires the plaintiff to file an affidavit showing that the defendant "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. 735 ILCS 5/2-206 (West 2014). The statutory prerequisites for service by publication, including due diligence and due inquiry, must be strictly adhered to for a court to obtain jurisdiction over a defendant. *Bankunited v. Velcich*, 2015 IL App (1st) 132070, ¶ 30. These statutory prerequisites do not countenance mere perfunctory performance but require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as the circumstances permit. *Velcich*, 2015 IL App (1st) 132070, ¶ 30. A defendant can challenge the bank's affidavit by filing an affidavit demonstrating that upon due inquiry he could have been found. *Ivanov*, 2014 IL App (1st) 133553, ¶ 59. Upon the defendant's challenge, the plaintiff must either successfully question the conclusory nature of the defendant's affidavit, or produce evidence establishing due inquiry. *Cotton*, 2012 IL App (1st) 102438, ¶ 18.

¶ 17 In the present case, defendant argues that the bank did not file a motion for leave to effect service by publication. The statute does not require such a motion. Section 2-206 requires only that the plaintiff file the necessary affidavits with the circuit clerk. Defendant also argues that the bank's service by publication did not meet the standards of "due inquiry" and "diligent inquiry." The bank responds that (1) defendant submitted to the court's jurisdiction by moving to stay the judicial sale; (2) defendant's affidavit in support of his motion to quash service was

insufficient to challenge the bank's affidavits; and (3) even if publication were erroneous, defendant was served by regular and certified mail. G10 contends that service by publication was proper.

¶ 18 We first examine whether defendant submitted to the court's jurisdiction by requesting a stay of the judicial sale. Section 15-1505.6(b) of the Mortgage Foreclosure Law (Law) (735 ILCS 5/15-1505.6(b) (West 2014)) provides that, in any residential foreclosure action, if the party objecting to the court's jurisdiction files a motion other than one for an extension of time to answer or otherwise appear *prior to* filing a motion to contest jurisdiction, that party waives all objections to the court's jurisdiction over his or her person. Defendant filed a motion entitled "Defendant's Emergency Motion to Quash Service & Stay/Cancel Sheriff's Sale." Defendant set forth his grounds for quashing service in the body of the motion. He included a paragraph requesting the court to stay or cancel the sale pending the resolution of the motion to quash service. Under these circumstances, we do not believe that the motion to stay or cancel the sale was filed "prior" to the motion to quash service. They were both part of the same motion, and the request to stay or cancel the sale was made to preserve the jurisdictional issue.

¶ 19 We turn now to whether publication was proper. The bank filed four affidavits pertaining to its efforts to effect personal service on defendant. The process server's first affidavit indicated that he attempted to serve defendant at the property seven times over an eight-day period, between December 15, 2014, and December 22, 2014. The December 20 attempt was made on a Saturday at 7:45 a.m. The times of the weekday attempts varied from early-to-late mornings to late afternoon and into the dinner hour. On the first attempt, the process server spoke with a man through a window. The man identified himself as defendant's brother and stated that defendant was not home. The man refused to give any further information and would not open the door.

The remaining attempts revealed that no one was home, no one answered the door, a light was on some of the time, and on one occasion a vehicle was present. The process server's second affidavit showed that he also attempted to serve defendant at Holly's address, but Holly denied knowing defendant's whereabouts. Juliann Pawlowski, of Elite Process Serving and Investigations, Inc., filed an affidavit detailing her "skip trace." Although she stated that the affidavit was made upon information and belief, it is clear that Pawlowski herself performed the "skip trace." She averred that she had two addresses for defendant: the property and Holly's. Her check of defendant's credit information, social security number, employment history, credit history, and her inquiry with utility companies and check of voter registration and vehicle records revealed no other addresses and no telephone number. The vehicle that the process server saw parked at the address was not registered to defendant. The bank's attorney filed an affidavit stating that, "upon diligent inquiries," the present place of defendant's residence could not be ascertained.

¶ 20 The bank and G10 argue that these facts demonstrate the bank's diligence. We agree.[4] The facts of the present case are almost identical to those in *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, where the court found that the bank's affidavits established due inquiry and due diligence in its attempts to locate and serve the defendant. In *Richards*, the bank's private process servers attempted service on the defendant on multiple occasions at her only known address. *Richards*, 2016 IL App (1st) 152083, ¶ 33. The process servers' affidavits detailed the times of the attempted service and the reasons why defendant could not be served,

[4] In his reply brief, defendant presents a raft of new arguments attacking the bank's affidavits and service. We will not address arguments raised for the first time in a reply brief. *CCP Limited Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 485 (2006).

including statements that they were unable to gain access to the property and no one answered the doorbell. *Richards*, 2016 IL App (1st) 152083, ¶ 33. The affidavits also revealed that, at times, lights were on inside the property and dogs were in the yard. *Richards*, 2016 IL App (1st) 152083, ¶ 33. In addition, the bank filed an affidavit detailing a "skip trace" that substantially mirrored the one conducted in the present case. *Richards*, 2016 IL App (1st) 152083, ¶ 33.

¶ 21 Defendant relies on the distinguishable cases of *Cotton* and *Ivanov*. In *Cotton*, the defendant's affidavit and motion to reconsider raised factual conflicts that questioned the truthfulness of the bank's affidavits. *Cotton*, 2012 IL App (1st) 102438, ¶ 19. In *Ivanov*, the bank's three attempts at service were made during traditional working hours on a holiday weekend, when travel was not uncommon. *Ivanov*, 2014 IL App (1st) 133553, ¶ 50. Here, defendant's affidavit did not dispute the factual assertions made by the bank's process server. Nor did defendant furnish an address, other than the property, at which he could have been served. Thus, defendant's affidavit did not challenge the bank's affidavits. Accordingly, service by publication was proper.

¶ 22 Moreover, service by regular and certified mail was proper. The court's order of April 28, 2015, allowed alternate service. However, it does not appear that the bank filed a motion requesting alternate service pursuant to section 2-203.1 of the Code (735 ILCS 5/2-203.1 (West 2014)). Therefore, defendant concludes that the court improperly entered the order *sua sponte*. Defendant also speculates that the court did so because it believed that service by publication was improper. Section 2-203.1 provides that, if personal or substitute service is impractical, the plaintiff may move, without notice, for an order directing a comparable method of service. The motion must be accompanied by an affidavit stating the nature and extent of the investigation to determine the defendant's whereabouts, diligent inquiry as to the defendant's location, and the

reasons why service is impractical. 735 ILCS 5/2-203.1 (West 2014). There is no transcript of the April 28, 2014, hearing, so we do not know what preceded the court's written order. It is well established that it is the appellant's burden to present a sufficiently complete record to support a claim of error, including presenting a transcript, bystander's report, or an agreed statement of facts. *Velcich*, 2015 IL App (1st) 132070, ¶ 25. In the absence of such a record, we will not speculate as to whether the trial court committed errors. *Velcich*, 2015 IL App (1st) 132070, ¶ 25. Any doubts as to the record's incompleteness are resolved against the appellant. *Velcich*, 2015 IL App (1st) 132070, ¶ 25. Certainly, the bank's affidavits were sufficient to invoke section 2-203.1, and, significantly, defendant does not deny that he received service.[5]

¶ 23 Defendant next contends that the order confirming the sale should be vacated where the sheriff gave improper notice of the postponement of the sale. Section 15-1508(b) of the Law (735 ILCS 5/15-1508(b) (West 2014)) provides that the court shall confirm the sale unless the court finds that (1) proper notice was not given pursuant to section 15-1507 of the Law (735 ILCS 5/15-1507 (West 2014)); (2) the terms of the sale were unconscionable; (3) the sale was conducted fraudulently; or (4) justice was otherwise not done. The party opposing the sale bears the burden of proving that sufficient grounds exist to disapprove of the judicial sale. *Bayview Loan Servicing, LLC v. 2020 Real Estate Foreclosure, LLC*, 2013 IL App (1st) 120711, ¶ 35. At issue is the meaning of section 15-1507(c)(4), which provides, in relevant part, that the person

[5] The bank argues that defendant included proof that the alias summons and complaint were successfully delivered to him as exhibit 2 in the appendix to his brief. However, exhibit 2 is the order denying the motion to reconsider the denial of defendant's motion to quash service and denying defendant's request for immediate appealability. The "green card" showing receipt does not appear in the appendix, and is not part of the record.

conducting the sale shall, upon adjournment, "announce the date, time and place upon which the adjourned sale shall be held." Defendant contends that the announcement must be made orally, while the bank and G10 argue that the sheriff's posting on his website was sufficient.

¶ 24 The construction of a statute is a question of law that we review *de novo*. *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 16. The fundamental rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hayashi*, 2014 IL 116023, ¶ 16. The most reliable indication of legislative intent is the language of the statute itself. *Hayashi*, 2014 IL 116023, ¶ 16. Where the language is clear and unambiguous, a court cannot depart from the plain language by reading into the statute exceptions, limitations, or conditions not expressed by the legislature. *Hayashi*, 2014 IL 116023, ¶ 16. In determining the plain meaning of the statute, the court must consider the statute in its entirety, the subject it addresses, and the legislature's apparent intent in enacting it. *Hayashi*, 2014 IL 116023, ¶ 16.

¶ 25 The judicial sale was initially scheduled for December 15, 2015. On that date, upon a reconsideration of defendant's motion to stay or cancel the sale, the court stayed the sale. Also on that date, the sheriff, both orally at the site of the sale and on his website, announced that the sale was continued to January 5, 2016. On December 29, 2015, the bank notified the sheriff that the sale was postponed from January 5, 2016, until February 11, 2016. On the same day, the sheriff posted the rescheduled date on his website. His representative testified that the sheriff's policy was to post a continuance on his website without also announcing it orally, unless the notice of postponement was given to him two days prior to the scheduled sale.

¶ 26 We note that the statute did not require that the sheriff give notice of the adjournment of the sale from January 5, 2016, to February 11, 2016, because the February 11 sale date was less

than 60 days after the January 5 date. Section 15-1507(c)(4) specifically provides that the person who gives notice of public sale need not again give notice of any adjourned sale, where the adjourned sale is to occur "less than 60 days after the last scheduled sale." Here, the February 11 date was only 38 days from the January 5 sale date. Accordingly, the trial court first ruled that no notice was necessary: "[N]otice of the adjourned sale need not be given pursuant to [section 15-1507(c)(4)], period." Nevertheless, the sheriff gave notice via his website, so the trial court considered and rejected defendant's argument that the sheriff's notice was deficient. We agree.

¶ 27 The plain language of the statute does not require that the announcement of the postponement be made orally. Rather, the statute requires that the announcement be given "upon adjournment." Thus, the legislature's concern was the timing of the announcement, not its method of delivery. The obvious purpose of the announcement is to advise the public of the sale date. The record shows that the sheriff received notice on December 29, 2015, that the sale was postponed until February 11, 2016. On the same day, the sheriff's website posted a notice of the postponement. Consequently, the purpose of the notice requirement was fulfilled. To the extent that defendant argues that he should have received notice of the postponement by mail, we reject the argument, because the statute does not so mandate. Accordingly, we hold that the sheriff complied with section 15-1507(c)(4).

¶ 28 Next, defendant argues that the sale price was insufficient. G10 was the highest bidder at the sale at $385,000. Defendant maintains that the fair market value of the property was $550,000. Defendant bases this figure on his own estimate which the divorce court used in fashioning the judgment of dissolution of marriage (JDOM) in February 2012. According to the JDOM, one expert had valued the property at $440,000. The JDOM also established that defendant rejected an offer to purchase the property for $475,000. Defendant does not explain

how his February 2012 estimate of $550,000 established the fair market value of the property in 2016.

¶ 29 Defendant contends that justice "otherwise was not done," requiring the sale to be set aside pursuant to section 15-1508(b) of the Law. Defendant argues that the court's lack of personal jurisdiction, the lack of notice of adjournment of the sale, and the inadequacy of the sale price, rendered the sale unconscionable. A trial court exercises broad discretion in approving or disapproving a judicial sale. *BCGS, L.L.C. v. Jaster*, 299 Ill. App. 3d 208, 213 (1998). Thus, the standard of review is normally abuse of discretion. *NAB Bank v. LaSalle Bank, N.A.*, 2013 IL App (1st) 121147, ¶ 14. However, where, as here, the trial court heard no testimony and based its decision entirely on documentary evidence, our review is *de novo*. *NAB*, 2013 IL App (1st) 121147, ¶ 14.

¶ 30 Because we have determined that the court had jurisdiction over defendant and that the sheriff gave proper notice of the adjournment of the sale, the only issue is the sale price. Standing alone, inadequacy of the sale price is not a sufficient reason to deny confirmation of a judicial sale. *NAB*, 2013 IL App (1st) 121147, ¶ 20. Consequently, defendant's reliance on *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105 (1993), is misplaced. In *Holtzman*, there was a deficiency judgment of almost $400,000 against one of the defendants. *Holtzman*, 248 Ill. App. 3d at 107. The appellate court held that the sale price of the subject multiunit apartment building was not unconscionable, but nevertheless remanded the matter to the trial court for an evidentiary hearing regarding the defendants' allegation that buyers were available at prices that would have fully satisfied the mortgage obligation. *Holtzman*, 248 Ill. App. 3d at 115. The court in *Holtzman* acknowledged that, under normal circumstances, property does not bring its full value at forced sales, and that the price depends on many factors for which the

debtor must expect to suffer a loss. *Holtzman*, 248 Ill. App. 3d at 114. The court also noted that the legislature did not intend to impose commercial reasonableness upon foreclosure sales. *Holtzman*, 248 Ill. App. 3d at 114. Furthermore, we recognize that, when there is no fraud or other irregularity in the foreclosure proceeding, the sale price of the property is the conclusive measure of its value. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 35.

¶ 31 Defendant finally contends that the sale should not have been confirmed because he was not notified of the surplus in accordance with Illinois Supreme Court Rule 113(f)(3) (eff. May 1, 2013), which provides that the plaintiff's attorney shall send a "special notice" advising the mortgagors of the surplus funds. The record shows that defendant knew of the surplus, and he objected to it being paid to Holly in satisfaction of her lien. Moreover, as defendant was not entitled to the surplus, he has not demonstrated prejudice. Accordingly, we hold that the court did not err in confirming the sale.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 34 Affirmed.