No. 3–10–0526

Order filed April 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

U.S. NATIONAL ASSOCIATION, AS TRUSTEE FOR THE CMLTI ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-AMC3,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,	)	No. 09–CH–125
v.	)	
IRMA MACIAS L. DE RUEDA a/k/a IRMA MACIAS DE RUEDA, JUAN RAMON MORALES, WESMERE LAKES HOMEOWNERS ASSOCIATION, WESMERE COUNTRY CLUB ASSOCIATION, UNKNOWN OWNERS and NONRECORD CLAIMANTS,	)	Honorable Richard J. Siegle, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

Held: The trial court's denial of Irma Macias L. DeRueda's motion to quash service was not against the manifest weight of the evidence based upon the facts presented in the record on appeal. The judgment for foreclosure and sale entered by the circuit court of Will County is affirmed.

Plaintiff filed a complaint to foreclose mortgage on January 8, 2009. Plaintiff served De Rueda by publication after filing an affidavit with the court on January 30, 2009, claiming that De Rueda could not be found after diligent investigation. The trial court entered a judgment for foreclosure and sale by default on September 2, 2009. On May 19, 2010, De Rueda filed a motion to quash service which the trial court denied on July 1, 2010. On appeal, De Rueda claims that the trial court erred in denying her motion to quash service because plaintiff did not make due inquiry and did not act with due diligence in attempting to serve De Rueda with service of process. We affirm the trial court's denial of De Rueda's motion to quash service.

FACTS

On January 8, 2009, plaintiff filed a complaint to foreclose mortgage on the property located at 2203 Wesmere Lakes Drive in Plainfield, Illinois. According to the complaint and attached mortgage, Irma Macias L. De Rueda, a single woman, signed the mortgage on the property on December 12, 2006. On that same date, January 8, 2009, the clerk of the court issued summons for the named defendants.

On January 30, 2009, plaintiff's counsel filed an affidavit to allow service by publication pursuant to section 2-206 of the Code of Civil Procedure (735 ILCS 5/2-206 (West 2008)). According to the affidavit, defendants, De Rueda, Morales and unknown owners and nonrecord claimants "reside or have gone out of this State, or on due inquiry cannot be found, or are concealed within this State, so that process cannot be served upon them." Also according to the affidavit, plaintiff had made diligent inquiry as to the whereabouts of the named defendants and that upon diligent inquiry the place of residence of the named defendants could not be

ascertained. Plaintiff's attorney signed the affidavit in the presence of a notary public.

On February 3, 2009, plaintiff filed a copy of the newspaper publication notice with the court. On February 6, 2009, the clerk of the court filed a certificate of mailing notice by publication showing that the clerk sent notice to De Rueda, Morales and unknown owners and nonrecord claimants at the residence located at 2203 Wesmere Lakes Drive in Plainfield, Illinois.

On February 13, 2009, Terrie Skouras, an employee with a licensed private detective agency, filed an affidavit of special process server with the court. According to the affidavit, she was appointed by the court to serve a summons and complaint on De Rueda. Skouras stated that she did not serve De Rueda with the documents at the residence located at 2203 Wesmere Lakes Drive in Plainfield, Illinois, on January 20, 2009, because:

> "Attempts were made at this address; however, no contact could be made with the defendant at this address. There is no evidence that the property is vacant. Per neighbor, who refused to give name, states hasn't seen defendants since before christmas."

In the affidavit, Skouras also stated that she attempted service on the following dates and times: "1/11/2009 3:04:00 PM, 1/13/2009 11:30:00 AM, 1/15/2009 7:05:00 PM, 1/17/2009 12:46:00 PM, 1/19/2009 8:45:00 AM, 1/20/2009 2:30:00 PM."

On June 10, 2009, plaintiff filed an amended complaint to foreclose mortgage which added an additional defendant, Wesmere Country Club Association. On August 28, 2009, plaintiff sent notice to all named defendants of a scheduled hearing on plaintiff's motion for default and judgment of foreclosure and sale for September 2, 2009. On that same date, plaintiff

filed a statement of service with the court which stated that De Rueda, Morales and unknown owners and nonrecord claimants were served by publication on February 12, 2009, and that the other named defendants were served via their registered agents. Plaintiff also filed on August 28, 2009, a motion for entry of an order of default.

On September 2, 2009, plaintiff's counsel appeared before the court on plaintiff's motion for entry of order of default. Defendants failed to appear. According to the minute entry, the court found "[d]ue proof of service." Also according to the minute entry, the court found proofs by affidavit sufficient. The trial court entered an order of default against De Rueda, finding that she failed to answer or appear, and the trial court entered a judgment for foreclosure and sale for the property in question and set forth a redemption date of December 3, 2009.

Plaintiff filed a notice of sheriff's sale of real estate on February 2, 2010, which provided that a sale would be held on February 17, 2010. On February 26, 2010, the Will County Sheriff's department filed a report of sale and distribution with the court. On April 27, 2010, plaintiff filed a motion for order approving report of sale and distribution and set the motion for hearing on May 5, 2010. Plaintiff sent notice of the motion to the named defendants.

On May 5, 2010, an attorney filed an appearance on DeRueda's behalf. On that same day, the trial court entered an order granting De Rueda leave to file a response to plaintiff's motion for order approving report of sale and distribution.

On May 19, 2010, De Rueda filed a motion to quash service. In the motion, DeRueda stated plaintiff's affidavit of service showed six attempts at service and claimed that three of those attempts were "unreasonable because the attempts were made when Defendant was transporting her children to/from school." She further claimed that the attempt on January 13,

2009, "was not a real attempt, as this was close to when Defendant's daughter's Kindergarten class ends" and it would be unlikely that De Rueda would be present at the Wesmere Lakes Drive location. She called the attempts on January 19, 2009, and January 20, 2009 "not a real attempt" because the attempts were close in time to when her children's school either started or ended. Therefore, according to De Rueda, these three attempts "were facially unreasonable."

De Rueda claimed that as to all of the attempts, plaintiff did not properly attest the facts set forth in the affidavit. De Rueda stated that the process server only stated that she attempted service but did not indicate what she did in attempting to serve the documents.

In the section of the motion entitled "LAW AND ARGUMENT," De Rueda cited, in part, to the Circuit Court of Cook County Local Rules in support of her contention that plaintiff's affidavit was insufficient. De Rueda claimed that plaintiff's affidavit set forth inappropriate times, and therefore did not amount to due inquiry to find De Rueda.

De Rueda attached an affidavit to the motion stating that her current address was located at 2203 Wesmere Lakes Drive and that she made no attempts to conceal herself. De Rueda stated that she left her residence at 11:15 a.m. to pick up her daughter from school and that typically, she was not at her residence during the weekday afternoons.

On June 2, 2010, plaintiff filed a response to the motion to quash service. Plaintiff argued that the motion to quash service should be denied for two reasons. First, plaintiff asserted that De Rueda did not properly challenge plaintiff's affidavit with a counter-affidavit stating that on due inquiry, she could have been found. Second, plaintiff asserted that it made diligent inquiry as to De Rueda's whereabouts and complied with the requirements of section 2-206 of the Code of Civil Procedure.

On July 1, 2010, the trial court denied De Rueda's motion to quash service. That same day, the trial court entered an order confirming sale and order of possession. The record on appeal does not contain a report of proceedings from that date. The minute entry of July 1, 2010, states in part that defendant's motion was denied and that the court found "[d]ue proof of service." On July 15, 2010, De Rueda filed a timely notice of appeal.

ANALYSIS

On appeal, De Rueda claims that the trial court erred in denying her motion to quash service because plaintiff's affidavit of service failed to establish due diligence and due inquiry in attempting to serve De Rueda. Plaintiff responds that the trial court correctly denied De Rueda's motion to quash. Alternatively, plaintiff argues that De Rueda provided an insufficient record on appeal, and therefore, this court should presume the trial court correctly ruled in denying De Rueda's motion to quash service.

Section 2-206 of the Code of Civil Procedure provides that in an action affecting property, a person may be served by publication provided that certain requirements are met. 735 ILCS 5/2-206 (West 2008). The Code of Civil Procedure provides that either plaintiff or its 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." 735 ILCS 5/2-206(a) (West 2008).

The parties agree that in reviewing the trial court's decision on a motion to quash service, we must determine whether the trial court's decision is against the manifest weight of the evidence. *Household Finance Corporation, III v. Volpert*, 227 Ill. App. 3d 454, 461 (1992). This standard of review has been interpreted to mean that the opposite conclusion is " 'clearly evident' or the finding is 'unreasonable, arbitrary or not based on the evidence.' " *Farmers Auto Insurance Ass'n v. Gitelson*, 344 Ill. App. 3d 888, 892 (2003), (quoting *1350 Lake Shore Associates v. Mazur-Berg,* 339 Ill. App. 3d 618, 628-29 (2003), citing *Brody v. Finch University of Health Sciences/The Chicago Medical School,* 298 Ill. App. 3d 146, 153 (1998)). In simple terms, we consider whether "there was plain, clear, and undisputable error in the factual findings." *Wakeland v. City of Urbana*, 333 Ill. App. 3d 1131, 1139 (2002), (citing *In re Estate of Ferguson,* 313 Ill. App. 3d 931, 938 (2000)).

Personal jurisdiction acquired by publication is only allowed in limited cases and only after strict compliance with the statutory prerequisites. *Bell Federal Savings & Loan Association v. Horton,* 59 Ill. App. 3d 923, 926 (1978). Due inquiry and due diligence are statutory prerequisites for service by publication. *Home State Savings Association v. Powell,* 73 Ill. App. 3d 915, 917 (1979). These "statutory prerequisites are not intended as *pro forma* or useless phrases requiring mere perfunctory performance, but, on the contrary, require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit." *Bank of New York v. Unknown Heirs and Legatees*, 369 Ill. App. 3d 472, 475 (2006). These requirements are premised on the fact that every defendant is entitled to receive the best possible notice of a pending suit. See *Equity Residential Properties Management Corp. v.*

Nasolo, 364 Ill. App. 3d 26, 32 (2006); *Bell Federal Savings & Loan v. Horton,* 59 Ill. App. 3d at 926.

Depending upon the particular circumstances of a case, inquiring with neighbors, inquiring with known counsel, checking court records, and investigating employment information may be part of the "due inquiry" and " diligent inquiry" required of a plaintiff intending to rely on constructive service. See *Bell Federal Savings & Loan v. Horton*, 59 Ill. App. 3d at 927; *First Federal Savings & Loan Ass'n of Chicago v. Brown,* 74 Ill. App. 3d 901, 904 (1979); *Eckberg v. Benso,* 182 Ill. App. 3d 126 (1989). Diligence depends on the facts of the specific case. "In particular, 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, 981 (2004).

In order to challenge a plaintiff's section 2-206(a) affidavit, a defendant must file an affidavit showing that upon due inquiry, he or she could have been found. *First Bank & Trust Co. of O'Fallon, Illinois v. King,* 311 Ill. App. 3d 1053 (2000); *Household Finance Corp. III v. Volpert,* 227 Ill. App. 3d at 455; *First Federal Savings & Loan Association v. Brown*, 74 Ill. App. 3d 901. Upon such a challenge, a plaintiff must then produce evidence showing that it conducted a due inquiry. *First Bank & Trust Co. of O'Fallon v. King,* 311 Ill. App. 3d at 1056.

In this case, De Rueda filed an affidavit with her motion to quash service. In her affidavit, De Rueda made statements regarding her schedule, presumably to show why she was not available for service of process at certain times of the day. She also indicated that she did not conceal herself and that she lived at the residence in question. However, De Rueda never stated that upon due inquiry, she could have been found by plaintiff. Assuming De Rueda's affidavit was sufficient to require plaintiff to produce evidence to the court that it conducted due inquiry in

attempting to serve De Rueda, we still find that De Rueda's argument on appeal fails.

De Rueda, as appellant, has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error. *Midstate Siding & Window Co.,Inc. v. Rogers,* 204 Ill. 2d 314, 319 (2003). Any doubts arising from the incompleteness of the record are resolved against the appellant. *Wackrow v. Niemi*, 231 Ill. 2d 418, 429 (2008); *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d at 319. "[In] the absence of such a record on appeal, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis." *Midstate Siding & Window Co. v. Rogers,* 204 Ill. 2d at 319. "[W]hen the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment.' " *Smolinski, v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006), (quoting *People v. Majer,* 131 Ill. App. 3d 80, 84 (1985)).

De Rueda states in her brief that a court reporter was not present at the time of the hearing on De Rueda's motion to quash service on July 1, 2010, and therefore, there is no report of proceedings. However, De Rueda could have provided this court with a bystander's report of the proceedings pursuant to Supreme Court Rule 323(c) (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)).

In reviewing the record presented on appeal, the minute entry of July 1, 2010, indicated "[d]ue proof of service," and the court denied De Rueda's motion to quash service. Further, the mortgage contained in the record listed De Rueda as a single woman with no other address or employment information. Plaintiff's affidavit of service indicated that the process server attempted service on six different occasions during a ten-day time period from January 11, 2009, until January 20, 2009. These attempts at service occurred on a Sunday, a Saturday, and a holiday, being Martin Luther King's birthday, as well as different weekdays. The process server

made attempts in the early morning hour, midday, mid-afternoon and evening. Further, the process server spoke with a neighbor who indicated that De Rueda had not been seen for approximately one month, despite the fact the house did not appear vacant.

Under these circumstances and based upon the record presented on appeal, we cannot conclude that the trial court's denial of De Rueda's motion to quash service was against the manifest weight of the evidence. Accordingly, we affirm the trial court's ruling.

CONCLUSION

The judgment of the circuit court of Will County is affirmed.

Affirmed.