

No. 1-11-2941

**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  
FIRST JUDICIAL DISTRICT

---

WELLS FARGO BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CH 13620
	)	
MARCELLA DAVIS,	)	Honorable
	)	Darryl Simko,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE EPSTEIN delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court correctly denied defendant's section 2-1401 petition to vacate a mortgage foreclosure judgment where: (1) plaintiff demonstrated due inquiry in attempting to personally serve defendant prior to serving by publication, and defendant failed to file an affidavit showing that upon due inquiry she could have been found; and (2) defendant's section 2-1401 petition failed to set forth any facts supporting the existence of a meritorious defense or claim.

¶ 2 Defendant, Marcella Davis, appeals from an order of the circuit court of Cook County which denied her motion to vacate a judgment of foreclosure pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2008). The issue on appeal is whether

1-11-2941

plaintiff, Wells Fargo Bank, N.A., (Wells Fargo) demonstrated “due inquiry” in attempting to personally serve defendant before serving by publication. For the reasons that follow, we affirm.

¶ 3

### BACKGROUND

¶ 4 At the outset, we note that Supreme Court Rule 341(e)(6) requires an appellant's statement of facts “contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal.” 166 Ill. 2d R. 341(e)(6) (July 1, 2008). Although defendant's four-sentence statement of facts fails to meet this standard, we shall address the appeal because the record is short and the issue is not complex.

¶ 5 On April 1, 2010, Wells Fargo Bank, N.A. (Wells Fargo), filed a complaint to foreclose against defendant, Marcella Davis, and other defendants who had an interest in the property commonly known as 3750 West 87th Street in Chicago (the subject property). Previously, on the application of plaintiff's counsel, the court had entered an order on February 17, 2010 appointing a standing special process server for the law firm for the service of process in mortgage foreclosure cases. The court later granted an order appointing a special process server in the instant case.

¶ 6 The record contains an affidavit of special process server, Gary Somerville, dated April 14, 2010, describing his attempts to personally serve defendant at the subject property as follows:

“4/2/2010 8 a.m. - single family home not for sale rang bell no answer

4/3/2010 8:20 a.m. - no lights on rang bell no answer

4/3/2010 6:30 p.m. - blinds closed no lights on rang bell no answer. Taped note on door

1-11-2941

4/4/2010 8:10 a.m. - note still on door rang bell no answer

4/5/2010 8:40 a.m. - note gone rang bell no answer

4/6/2010 12:00 p.m. - note on door stating day care customers we will be on vacation until 4-12-10. Rang bell no answer

4/12/2010 10:10 a.m - sign advising people they would be back 4-12-10 is gone drapes closed rang bell no answer

4/12/2010 6:10 p.m. - blinds closed lights on rang bell no answer. Day Care phone # 773-767-5693 left message

4/13/2010 7:45 a.m. - blinds closed no lights on rang bell no answer

4/13/2010 6:50 p.m. - blinds closed no lights on rang bell no answer

4/14/2010 7 a.m. - blinds closed rang bell no answer.”

Somerville attempted personal service during the time period that the sign had indicated was a vacation period. The record contains Somerville's affidavit showing that, on April 8, 2010 at 6:05 p.m., he attempted to serve defendant at 3752 West 87th Street in Chicago, which is the address where Johnnie Lee Davis, defendant's father, resides. Mr. Somerville also attempted to serve Johnnie Lee Davis at the subject property, but noted that Mr. Davis had been served at 3752 West 87th Street in Chicago.

¶ 7 In addition to Somerville's affidavits, the record contains an affidavit of special process server, Lynda Hansell, dated April 15, 2010, stating that she made a diligent search to discover the residence of defendant. Hansell states in her affidavit that she made a diligent search to find defendant's address and the results were that the last known address for defendant was 3750 West

1-11-2941

87th Street in Chicago. This is the address of the subject property, the address that defendant concedes is the one where she lived and worked, and, notably, the address at which Somerville attempted personal service as detailed in his affidavit.

¶ 8 On April 21, 2010, plaintiff 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). The affidavit stated that the defendants resided or had gone out of this State, or on due inquiry could not be found and that plaintiff had conducted a “diligent inquiry” in ascertaining all defendants' residences and whereabouts. This affidavit also attached the affidavits of both special process servers, Somerville and Hansell.

¶ 9 Pursuant to section 2-206(a) of the Code of Civil Procedure (735 ILCS 5/2–206(a) (West 2008)), plaintiff effected service by publication by publishing notice of the lawsuit against defendant in the Chicago Daily Law Bulletin from April 27, 1010 through May 11, 2010. On April 29, 2010, the clerk of the circuit court of Cook County certified that she mailed a notice of the publication to all defendants, which included sending a copy to defendant at the subject property.

¶ 10 On August 11, 2010, plaintiff filed a motion for entry of an order of default and judgment of foreclosure and sale. Plaintiff stated in its motion that more than 60 days had passed since the date of service, and defendants had failed to appear and answer. Notice of the motion was sent to defendant at the subject property on August 10, 2010.

¶ 11 On August 20, 2010, the circuit court entered a judgment for foreclosure and sale. The judgment provided that the redemption period, pursuant to section 5/15-1603(b) of the Code of

1-11-2941

Civil Procedure (735 ILCS 5/15-1603(b) (West 2008)), would expire on November 28, 2010.

¶ 12 On January 13, 2011, one day before the judicial sale, defendant's prior counsel entered an appearance and filed an emergency motion to quash service and to set aside judgment of foreclosure pursuant to 735 ILCS 5/2-203(a) and 735 ILCS 5/2-1401. In her emergency motion, defendant argued that the court never obtained personal jurisdiction over her because she was “in fact not served with a summons and complaint in this case.” Defendant's affidavit, attached to the motion, stated “she was not served with a summons or complaint in this case,” she had a meritorious defense to the claim being made by plaintiff in the action, and she desired her day in court.

¶ 13 On January 14, 2011, the circuit court denied defendant's motion and allowed plaintiff to proceed to judicial sale. The court's order notes that counsel for both parties were present in court and that the court was “fully advised.”

¶ 14 The subject property was sold on January 14, 2011. On January 19, 2011, plaintiff filed a motion for an order approving the report of sale and distribution. On February 25, 2011, plaintiff sent a notice of the motion to defendant. On March 10, 2011, the circuit court entered an order approving the sale.

¶ 15 On April 1, 2011, defendant's prior counsel filed a second motion to quash service and set aside judgment of foreclosure pursuant to 735 ILCS 5/2-203(a) and 735 ILCS 5/2-1401. The motion stated that “[a]fter the hearing and denial of defendant's emergency motion the defendant obtained a copy of the file and ascertained that the plaintiff alleged service by publication.” However, defendant cited section 2-306 and argued that the court never obtained personal

1-11-2941

jurisdiction over her. She supported her argument with an affidavit of Talibah Kareem, a care provider for the home day care operated at the subject property. Kareem stated that the home provides 24-hour day care service and a care provider is present and available for child drop off and pickup service. She also averred that she was present at the home providing child care services on April 2, 3, 4, 5, 6, 12, 13, and 14 of 2010 and that, on those dates, “no one attempted to serve a summons and or complaint from 8:00 a.m. to 6:00 p.m.” Plaintiff notes that, “[a]lthough a notice of hearing was included with the motion, it did not include a date and time for the hearing (the 'notice' attempted to set the hearing for 'April \_\_\_\_, 2010' instead of 2011) \*\*\* (blank included in notice).” Defendant did not notice the motion for hearing. Consequently, the circuit court did not rule on the motion.

¶ 16 On August 11, 2011, defendant's current counsel filed a motion for substitution of counsel. On August 29, 2011, defendant filed a third motion to vacate pursuant to section 2-1401 (section 2-1401 petition). Defendant argued that any affidavit submitted to the court regarding a request for service by publication would be improper because defendant “is and always has been at her residence as she works from home.” Defendant contended that plaintiff “could not possibly have complied” with section 2-206 because defendant “is there everyday all day.” Defendant attached her own affidavit to her third motion to vacate. She stated she was never given proper notice and “[n]otice was placed in the newspaper without anyone sending notice to my home or to me in any way.” She also stated “I work and live in my home as I run a daycare center, and no one from the bank ever served me.” She also stated that she was never given notice of the sale of the subject property. She additionally averred that she acted diligently

1-11-2941

in presenting her defense, had a valid defense of fraud, and her 2-1401 petition was diligently presented. On September 23, 2011, the circuit court denied defendant's motion to vacate after “hearing oral argument.” The record contains no transcript of the hearing. Defendant filed a timely notice of appeal on October 4, 2011.

¶ 17

#### ANALYSIS

¶ 18 On appeal, defendant argues that the trial court incorrectly denied her section 2-1401 petition to vacate because the service by publication did not comply with section 2-206 of the Code of Civil Procedure. 735 ILCS 5/2–206 (West 2008). Our review is *de novo*. See *People v. Vincent*, 226 Ill. 2d 1, 14–17 (2007).

¶ 19 Plaintiff now argues that defendant is now “[b]arred from re-litigating the circuit court's proper finding that there were no errors with service.” The record contains no transcript of the hearing on defendant's first (emergency) motion to quash service and there was no hearing or ruling on her second motion to quash service. Since it appears that defendant's emergency motion was based solely on the fact that she was not “personally” served with a summons or complaint, it is unclear whether the circuit court considered defendant's arguments that service by “publication” was improper. As noted below, when defendant filed a second motion to quash, she stated that “[a]fter the hearing and denial of defendant's emergency motion the defendant obtained a copy of the file and ascertained that the plaintiff alleged service by publication.”

¶ 20 As this court has noted: “ ‘Every defendant in an action filed against him in this State is entitled to receive the best possible notice of the pending suit and it is only where personal service of summons cannot be had, that substituted or constructive service may be permitted.’

1-11-2941

[Citation.].” *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31

(2006). As the *Nasolo* court further explained:

“[I]f the statutorily mandated inquiries are not made, a plaintiff’s affidavit for constructive service ‘does not speak the truth and cannot confer jurisdiction.’

[Citations.]. The party claiming benefit of constructive service bears the burden of showing strict compliance with every requirement of the statute, and nothing else will confer jurisdiction to the court or grant validity to the court’s judgment.

[Citation.] When a defendant has not been served with process as required by law, the court has no jurisdiction over that defendant and a default judgment entered against him or her is void. [Citation.] *A petition attacking a judgment as void may be brought at any time, in either a direct or collateral proceeding.* [Citation.]”

(Emphasis added.) *Id.*

Additionally, as subsection (f) of section 2-1401 of the Code of Civil Procedure states, “[n]othing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.” 735 ILCS 5/2-1401(f) (West 2008).

¶ 21 “If a party is not properly served with summons, the trial court does not obtain personal jurisdiction over that party.” *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 367 (2001).

“Where a trial court does not have personal jurisdiction over a party, any order entered against him is void *ab initio* and subject to direct or collateral attack at any time.” *Id.* Thus, the issue of whether the circuit court obtained personal jurisdiction over defendant is properly before us and we shall consider defendant’s argument that the service by publication did not comply with

1-11-2941

section 2-206 of the Code of Civil Procedure.

¶ 22 Section 2–206 of the Code of Civil Procedure (735 ILCS 5/2–206 (West 2008)) provides for service by publication in actions affecting property:

“(a) Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, plaintiff or his or her 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, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending.” 735 ILCS 5/2–206(a) (West 2008).

¶ 23 The Illinois Supreme Court has said that the phrases “due inquiry” and “diligent inquiry” in the statute governing service by publication “are not intended as useless phrases but are put there for a purpose.” See *First Federal Savings and Loan Ass'n of Chicago v. Brown*, 74 Ill. App. 3d 901, 907 (1979), quoting *Graham v. O'Connor*, 350 Ill. 36, 40-41 (1932). “A perfunctory inquiry does not comply with the provisions of the statute.” *Id.* “An honest and well directed effort must be made to ascertain the names and addresses of unknown parties.” *Id.* “The inquiry must be as full as the circumstances of the particular situation will permit.” *Id.* If a

1-11-2941

plaintiff provides the affidavit pursuant to section 2-206, a defendant may challenge such affidavit by filing an affidavit showing that upon due inquiry he could have been found; upon defendant's challenge, plaintiff must produce evidence establishing due inquiry. *First Bank & Trust Co. of O'Fallon v. King*, 311 Ill. App. 3d 1053, 1056 (2000), *Household Finance Corp., III v. Volpert*, 227 Ill. App. 3d 453, 454-55 (1992); *First Federal Savings & Loan Association v. Brown*, 74 Ill. App. 3d 901 (1979).

¶ 24 Here, plaintiff provided the affidavit required under the statute. Therefore, it was incumbent on defendant to file a counteraffidavit showing that upon due inquiry, she could have been found. Defendant has failed to do so.

¶ 25 As plaintiff correctly notes, apart from irrelevant statements, defendant's affidavit contains conclusory statements. Although defendant criticizes the plaintiff's efforts to locate her, she fails to adequately argue that she could have been found with a diligent inquiry. Defendant stated in her affidavit that "I work and live in my home as I run a daycare center, and no one from the bank ever served me." However, she fails to aver that she was present at that location and she fails to aver that she could have been served. In her section 2-1401 petition to vacate, defendant criticizes plaintiff's attempts to locate her by noting that the loan application listed her home and work address as one in the same and that "[w]ith a simple click of the mouse, the plaintiff could have easily discovered [defendant's] whereabouts." Moreover, defendant concedes that she lived and worked at the subject property. Defendant's residence, however, is a nonissue. It is undisputed that plaintiff attempted service numerous times at *that* address. Defendant again fails to aver that she was actually present at that address and fails to suggest how

1-11-2941

she *could have* been found. Instead, she merely argues that “in theory she was available to receive process nearly 24 hours a day.”

¶ 26 We conclude that the service by publication was proper and the circuit court had personal jurisdiction over defendant. Therefore, we need not address plaintiff's additional argument that defendant subjected herself to the circuit court's jurisdiction because she entered a general appearance before the circuit court entered its final order.

¶ 27 Having addressed defendant's arguments regarding jurisdiction, we turn to defendant's remaining assertions in her section 2-1401 petition that she acted diligently in presenting her defense, had a valid defense of fraud, and her section 2-1401 petition was diligently presented.

¶ 28 As we recently explained:

“Our supreme court clarified the law pertaining to section 2–1401 motions in *People v. Vincent*, 226 Ill. 2d 1 (2007). The party seeking relief from a judgment must plead and prove (1) that he had 'a defense or claim that would have precluded entry of the judgment in the original action' and (2) that he acted with 'diligence in both discovering the defense or claim and presenting the petition.' [Citation.] The party opposing the 2–1401 petition may move to dismiss it as insufficient at law, or the party may dispute the factual assertions of the petition. [Citation.] Where the parties dispute a material issue of fact, the trial court should hold an evidentiary hearing before ruling on the petition. [Citation.] '[W]hen a court enters either a judgment on the pleadings or a dismissal in a section 2–1401 proceeding, that order will be reviewed, on appeal, *de novo*.' [Citation.]” *LVNV*

1-11-2941

*Funding, LLC v. Trice*, 2011 IL App (1st) 092773, ¶ 8.

But see *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10 (stating that the *de novo* standard applied in reviewing whether [the defendant] presented a meritorious defense in his section 2–1401 petition, but applying the abuse of discretion standard in reviewing whether he complied with the due diligence requirements of section 2–1401).”

¶ 29 Section 2–1401 provides “a comprehensive statutory procedure” by which a party may seek relief from final orders and judgments “after 30 days from the entry thereof.” *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986). “To be entitled to relief under section 2–1401, the petitioner *must affirmatively set forth specific factual allegations* supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2–1401 petition for relief.” (Emphasis added.) *Id.* at 220-21. The circuit court correctly denied defendant's third petition to vacate the foreclosure judgment because defendant failed to set forth any facts supporting the existence of a meritorious defense or claim.

¶ 30 A section 2-1401 petition “must be supported by affidavit or other appropriate showing as to matters not of record.” 735 ILCS 5/2-1401(b). To satisfy this statutory mandate, the affidavit must be a sufficient and competent affidavit. *People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994); *Amerco Field Office v. Onofrio*, 22 Ill. App. 3d 989, 991 (1974). Although defendant attached her affidavit to her section 2-1401 petition, she failed to affirmatively set forth specific allegations regarding the existence of a meritorious defense or claim. The majority of defendant's averments went to the issue of personal jurisdiction, an issue we have already

1-11-2941

decided. The only statement in defendant's affidavit pertaining to the existence of a meritorious defense or claim is “I acted diligently in presenting my defense, *I have a valid defense of fraud* and a 2-1401 was diligently presented.” (Emphasis added.)<sup>1</sup>

¶ 31 A section 2–1401 petition is essentially a complaint inviting a responsive pleading and is subject to dismissal for want of legal or factual sufficiency.” *People v. Vincent*, 226 Ill. 2d 1, 8, (2007); see also *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 207 (2010) (“As an initial pleading, a section 2–1401 petition is procedurally the counterpart of a complaint and subject to all the rules of civil practice that that character implies). “An initial pleading must allege specific facts that support each element of the cause of action; conclusions of law or allegations unsupported by specific facts cannot be considered in deciding the pleading's sufficiency.” *Id.* at 208. See *In re Estate of Barth*, 339 Ill. App. 3d 651, 664 (2003) (unsupported, conclusory allegations of fraud were inadequate to meet the requirements of section 2–1401 where defendant did not attach an affidavit or other supporting evidence to his motion and there was no evidence in the record to support his fraud allegations); *cf. Green v. Rogers*, 234 Ill. 2d 478, 494 (2009) (explaining that fraud demands a “higher standard” when it comes to pleading, *i.e.* facts must be pleaded with sufficient “specificity, particularity and certainty” to apprise the opposing party of what he is called upon to answer). We agree with plaintiff that defendant's affidavit contains conclusory statements, does not satisfy the requirements of section 2-1401, and is insufficient to warrant relief.

---

<sup>1</sup>Although defendant also stated “[b]ecause I was not joined in the action, I was unable to exercise my right to reinstatement or redemption,” we agree with plaintiff that this conclusory statement does not support the existence of a meritorious defense to the mortgage foreclosure.

1-11-2941

¶ 32 In view of our determination that defendant failed to set forth any facts supporting the existence of a meritorious defense or claim, we need not address the issue of defendant's diligence in presenting her section 2-1401 petition. Also, as noted earlier, the trial court denied defendant's 2-1401 petition after hearing oral argument, but defendant has failed to include a transcript of the hearing. Thus, to the extent that the trial court based its ruling on factual determinations, we are unable to review the trial court's findings. In any event, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Thus, in the absence of a transcript from the trial court proceedings, we must presume that the trial court's denial of defendant's section 2-1401 petition was in conformity with the law and had a sufficient factual basis. *Id.* at 392. ("Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.")

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the circuit court's order denying defendant's motion to vacate the default judgment entered against her.

¶ 35 Affirmed.