

2012 IL App (2d) 110389-U  
No. 2-11-0389  
Order filed May 31, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CITIMORTGAGE, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-6046
	)	
BEATA B. NIEMIRSKI, a/k/a Beata B.	)	
Niemirska,	)	
	)	
Defendant-Appellant	)	
	)	
(Jaroslaw Niemirski, a/k/a Jaroslaw	)	
Niemirska, JPMorgan Chase Bank, N.A.,	)	
as successor by merger to Bank One, N.A.,	)	
Harris, N.A., f/k/a Harris Trust & Savings	)	Honorable
Bank, Unknown Owners, and Nonrecord	)	Robert G. Gibson,
Claimants, Defendants).	)	Judge, Presiding.

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JUSTICE BOWMAN delivered the judgment of the court.  
Justices Burke and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court erred in denying defendant's section 2-1401 petition to vacate a judgment against her: as the summons did not name her as a defendant, she was not properly served, and the court never obtained personal jurisdiction over her.

¶ 1 Defendant, Beata B. Niemirska, appeals the denial of her petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) in which she sought vacatur of a judgment of foreclosure and approval of a sheriff's report of sale and distribution in favor of plaintiff, CitiMortgage, Inc. She asserts that the trial court erred when it ruled that the form of the summons was proper; because of the improper summons, she contends the court never obtained jurisdiction over her. We agree that the summons was fatally flawed by the error she describes. We therefore reverse the denial of the section 2-1401 petition and remand the matter for further proceedings in the now-reopened foreclosure case.

¶ 2 I. BACKGROUND

¶ 3 On December 10, 2009, plaintiff filed a complaint to foreclose on the property at 4N153 Catalpa Street in Bensenville. The named defendants were "Jaroslaw Niemirski a/k/a Jaroslaw Niemirska" and "Beata B. Niemirska a/k/a Beata B. Niemirski." The complaint also named JPMorgan Chase Bank, Harris, N.A., and "Unknown Owners and Nonrecord Claimants." Jaroslaw was the mortgagor and obligor on the note. Beata signed the mortgage solely to waive homestead.

¶ 4 The summons is on a Du Page County-provided form. It has the case caption, in a standard format; it shows the defendants as "Jaroslaw Niemirski a/k/a Jaroslaw Niemirska, et al." Below the caption is a heading: "SUMMONS (Real Estate Mortgage Foreclosure)." Following the heading is a salutation, "To Defendant," followed by a colon and an underscored area in which a name could go. The underscored area says, "See attached." Both Niemirskis' names appear on a list of parties to be served that is appended to a copy of the summons in the record.

¶ 5 On December 22, 2009, plaintiff served (or purported to serve) Beata by substituted service on her husband, Jaroslaw. It showed this by the affidavit of the special process server.

¶ 6 No defendant appeared within 30 days. On April 26, 2010, the trial court entered a judgment of foreclosure and sale. The court approved the report of the sheriff's sale on August 20, 2010. This judgment included an order of possession.

¶ 7 Beata filed a "motion" to quash service on November 22, 2010, purportedly under section 2-301 of the Code (735 ILCS 5/2-301 (West 2010)). She asserted that service on her had been insufficient for two reasons and that the court therefore had lacked personal jurisdiction over her. First, she asserted that, because a summons must be "directed to each defendant," and because neither the caption nor the "To Defendant" area on the summons listed her, the summons did not comply with Illinois Supreme Court Rules 101(a) and 101(d) (eff. May 30, 2008). As a result, the summons was "fatally flawed on its face." She further asserted that the special process server's affidavit stated that he had mailed the summons to her at her "usual place of abode," but did not state what that place was. (This was incorrect: the special process server's affidavit plainly stated that Beata's abode was the Catalpa Street address.) Further, she averred that she did not receive the mailed copy of the summons.

¶ 8 The trial court denied the "motion" on March 18, 2011. At the hearing, the court noted that Beata was named in the caption of the complaint. The court ruled that the summons and the complaint must be "looked at together in conjunction." Beata filed a motion for leave to file a late notice of appeal, and this court granted it.

¶ 9

## II. ANALYSIS

¶ 10 On appeal, Beata makes three arguments that go to the validity of service: (1) that because plaintiff failed to submit a counteraffidavit, it had no effective evidence for its claim that it had properly served her; (2) that the affidavit of the special process server failed to state her "usual place

of abode” for purposes of stating that he had mailed the summons and complaint to her; and (3) that Beata was not properly named in the summons, so that the summons was invalid. Arguments (1) and (2) are without merit, but argument (3) is correct.

¶ 11 Beata’s “motion” was a petition under section 2-1401 of the Code. Under the rule in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002), the proper vehicle to challenge the sufficiency of service, when the underlying judgment is fully final—final and past the time for appeal—is a section 2-1401 petition. Beata brought her “motion” under such circumstances, so the “motion” could be effective only as a section 2-1401 petition. The *Sarkissian* court determined that a filing, which the defendant had described as a “motion to vacate the default judgment as void” (*Sarkissian*, 201 Ill. 2d at 98), was, because of the relief it sought, a section 2-1401 petition (*Sarkissian*, 201 Ill. 2d at 102). The *Sarkissian* court therefore endorsed such reclassification. That endorsement is in a degree of tension with the holding in *Keener v. City of Herrin*, 235 Ill. 2d 338 (2009), which, in holding that a late motion to reconsider could not be deemed a section 2-1401 petition, points out, among other things, that service requirements are different for motions and section 2-1401 petitions. However, when a “motion” challenges the trial court’s jurisdiction to enter the original judgment and when all involved parties appear, we see no reason to depart from the approach taken by the *Sarkissian* court.

¶ 12 When section 2-1401 pleadings are complete (a petition, a response, and, where the petitioner obtains leave, a reply), the court should review them in a procedure akin to the deciding of a motion for summary judgment. *Klein v. La Salle National Bank*, 155 Ill. 2d 201, 205 (1993). “[R]elief should be granted on the basis of the pleadings, affidavits, and the record of the prior proceeding alone if no factual dispute is raised and the allegations of the petition are thereby proven.” *Klein*,

155 Ill. 2d at 205. If any of the “central facts” are controverted, the court must hold an evidentiary hearing. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 286 (1982). “Central facts are those that are sufficient to support an order vacating the judgment, not those that must be proven to succeed in the underlying action on its merits.” *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001).

¶ 13 Review is *de novo*. Under *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009), when a court grants or denies a petition in summary-judgment-like fashion, with no evidentiary hearing and considering only the pleadings and associated exhibits, review is *de novo*. *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 326-27 (2010), which disagrees with *Mills* on the standard of review for some section 2-1401 dispositions, accepts that that is the appropriate standard for reviewing the disposition of a voidness claim. (A claim of no personal service is a voidness claim.)

¶ 14 “[T]he return of the officer or other authorized person making service of a summons on a defendant by delivering a copy to another person, that is, by substituted service, must show strict compliance with every requirement of the statute authorizing such substituted service, since the same presumption of validity that attaches to a return reciting personal service does not apply to substituted service.” *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986).

¶ 15 Beata’s first argument—that because plaintiff failed to submit a counteraffidavit, it had no effective evidence for its claim that it had properly served her—is without merit because the case on which it relies, *Sullivan v. Bach*, 100 Ill. App. 3d 1135 (1981), is inapplicable here. *Sullivan* holds that “[w]hen the return is challenged by affidavit and there are no counteraffidavits, the return itself is not even evidence and, absent testimony by the deputy, the affidavit must be taken as true and

purported service of summons quashed.” *Sullivan*, 100 Ill. App. 3d at 1139-40. *Sullivan* concerned a sheriff’s return of service, which is not typically an affidavit, whereas here the record contains an affidavit of service. No reason exists to deny an affidavit of service the evidentiary value of any other affidavit.

¶ 16 Beata’s second argument—that the affidavit of the special process server failed to state her “usual place of abode” for purposes of stating that he had mailed the summons and complaint to her—is without merit because it misstates the facts. The affidavit of service states in one paragraph that Beata’s usual place of abode is the Catalpa Street residence and in the next paragraph that the process server sent a copy of the summons and complaint to her usual place of abode.

¶ 17 Beata’s third argument—that she was not properly named in the summons, so that the summons was invalid—is correct. Rule 101 prescribes the form for summonses; it requires that they be “directed to each defendant.” Ill. S. Ct. R. 101(a) (eff. May 30, 2008). The section applicable when, as here, an answer must be filed within 30 days requires that such summonses “shall be in substantially the \*\*\* form” of a model that appears in the rule. Ill. S. Ct. R. 101(d) (eff. May 30, 2008). The model specifies a format for naming parties:

“A.B., C.D., *etc.*

(naming all plaintiffs),

Plaintiffs

v.

No. \_\_\_\_\_

H.J., K.L., *etc.*

(naming all defendants),

Defendants.” Ill. S. Ct. R. 101(d) (eff. May 30, 2008).

Note that the model places the names of all defendants in the caption; the rule thus requires a summons that has the substantial equivalent of all defendants' names. Here, Beata's name appeared nowhere on the summons. Her name did appear in the caption of the complaint—which, because it is the complaint, cannot be the summons. Her name also appeared on a list of defendants to be served, which is directed to the process server: its heading is “Please serve the following defendants at the following addresses,” and it ends with “Thank you.” This, because its format directs it to the process server, not the defendants, is not part of the summons.

¶ 18 Consistent with what the model shows, Illinois case law holds that the failure to include a defendant's name anywhere on a summons will invalidate that summons, at least as to that defendant. The rule is an old one. In *Ohio Millers Mutual Insurance Co. v. Inter-Insurance Exchange of the Illinois Automobile Club*, 367 Ill. 44, 56 (1937), the supreme court held that “a summons which does not name a person on its face and notify him to appear, is no summons at all, so far as the unnamed person is concerned.” Illinois courts continue to follow that rule. In 1990, a First District panel reached the same result:

“Illinois Supreme Court rules provide that a summons is to be directed to each defendant [citation], and that in all entitling papers *except a summons* it is sufficient to name the first named plaintiff and the first named defendant with the usual indication of other parties. [Citation.] The rules further provide that the use of the wrong form of summons will not affect the jurisdiction of the court. [Citation.] Nonetheless, *a summons which does not name a party on its face and notify that party to appear is no summons at all insofar as the unnamed person is concerned.* [Citation.] When a defendant is not properly served, any order entered against that defendant is void *ab initio* regardless of whether he had knowledge

of the proceedings.” (Emphases in original and added.) *Theodorakakis v. Kogut*, 194 Ill. App. 3d 586, 588 (1990).

Another First District panel reached an essentially identical result in *Central States Trucking Co. v. Department of Employment Security*, 248 Ill. App. 3d 86, 89 (1993).

¶ 19 Plaintiff suggests that *Central States Trucking* is distinguishable because plaintiff put Beata’s name in the caption of the complaint, unlike the *Central States Trucking* plaintiff, who failed to name the defendant at issue in the complaint. Plaintiff correctly describes the facts of *Central States Trucking*; a similar situation obtained in *Theodorakakis*, which neither party cites. However, plaintiff fails to address the holding of *Ohio Millers Mutual*, which Beata does cite, and in which the supreme court, though not stating how the defendants were listed in the complaint, flatly holds that, for a summons to be valid, the defendants’ names must appear on its face. Illinois precedent thus does not support the trial court’s conclusion that the summons and the complaint must be “looked at together in conjunction.” Jurisdictional rules are most functional when they are as unambiguous and straightforward as possible. The sort of flexibility that the court read into Rule 101 might appear reasonable in individual cases, but, made a general rule, could lead only to confusion.

¶ 20 Plaintiff also asserts that jurisdiction over Beata was not necessary to adjudicate the foreclosure complaint, as she signed the mortgage only to waive homestead. To the extent that this is a suggestion that Beata lacked standing to bring the section 2-1401 petition, the argument is misdirected. If nothing else, the effectiveness of the order of possession against her depends on whether service on her was proper. That she was not an obligor or mortgagor might make a great difference in what relief is available to her once the court has reopened the judgment. However, that only *limited* relief might be available is not a basis for declining to grant that relief. Moreover, lack

of standing is an affirmative defense; generally, a party must raise it in a motion to dismiss or lose it. *E.g.*, *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 13. Plaintiff, having attempted to make Beata a defendant, is in no position to question her standing. To the extent that plaintiff has some other point, we have not identified it.

¶ 21

### III. CONCLUSION

¶ 22 For the reasons stated, we hold that the trial court erred in denying Beata's section 2-1401 petition. We therefore reverse the judgment in favor of plaintiff and remand the matter for proceedings in the original action.

¶ 23 Reversed and remanded.