

2012 IL App (2d) 110390-U  
No. 2-11-0390  
Order filed May 3, 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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BANKUNITED, FSB,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CH-5338
	)	
ISELA SANCHEZ,	)	
	)	
Defendant-Appellant	)	
	)	
(Armando Sanchez, Unknown Heirs and	)	
Legatees of Armando Sanchez, Unknown	)	
Heirs and Legatees of Isela Sanchez,	)	Honorable
Unknown Owners, and Nonrecord	)	Robert G. Gibson,
Claimants, Defendants).	)	Judge, Presiding.

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

**ORDER**

*Held:* Because the parties filed competing affidavits on whether proper service occurred, the trial court erred in denying defendant's substantive section 2-1401 petition without an evidentiary hearing, and we reversed and remanded for a hearing.

¶ 1 Defendant, Isela Sanchez, appeals the denial of her petition under section 2-1401 of the Code of Civil Procedure (the 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, BankUnited, FSB. Because defendant's petition created an issue of fact regarding service, the trial court erred in denying her petition without an evidentiary hearing. Therefore, we reverse and remand for further proceedings.

¶ 2

## I. BACKGROUND

¶ 3 On November 6, 2009, plaintiff filed a complaint to foreclose on the property at 2480 Blue Spruce Lane in Aurora. The named defendants were "Isela Sanchez" and "Armando Sanchez." The complaint also named "unknown heirs and legatees of Isela Sanchez, if any," "unknown heirs and legatees of Armando Sanchez, if any," and "unknown owners and non record [sic] claimants." Attached to the complaint were copies of the mortgage instrument and other documents, which reflected that the borrowers were "Isela Sanchez and Armando Sanchez, wife and husband." The documents appear to bear the signatures of "Isela Sanchez" and "Armando Sanchez."

¶ 4 The summons is on a Du Page County-provided form. It has the case caption, in a standard format, at the top with defendant's name and the others in the appropriate position. 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 or other information could go. The underscored area was blank. The names of defendant and Armando Sanchez also appeared on a list of parties to be served.

¶ 5 On February 8, 2010, plaintiff filed a motion for default judgment. On March 2, 2010, it filed an affidavit of counsel that a special process server served both defendant and Armando Sanchez on November 11, 2009. The affidavit indicated that the mode of service was "MOH." At that point,

there was no return of service in the record. The trial court entered a judgment of foreclosure on March 2, 2010. It approved the sheriff's report of sale on October 26, 2010.

¶ 6 On December 15, 2010, defendant filed a motion to quash service. She asserted that service on her was insufficient for two reasons. First, she noted that, according to the return of service, special process server Rich Sylvester served her through her "son, Armando Sanchez, Jr.," at the Blue Spruce Lane property. She stated that her son's name was "Armando Sanchez III" and no one served him with a summons and complaint. She further asserted that, because Illinois Supreme Court Rule 101(a) (eff. May 30, 2008) requires that a summons be "directed to each defendant," and because the "To Defendant:\_\_\_\_" area on the summons was blank, the summons did not comply with Rule 101(a) and was therefore "fatally flawed on its face." The exhibits were as the motion implied, except that, instead of a return-of-service relating to defendant, the exhibit was a "Summons and Complaint Affidavit" relating to a defendant in a different case. Defendant also attached an affidavit from Armando Sanchez III, and bearing the signature "Armando Sanchez," in which he averred that no one served him with the documents.

¶ 7 On January 11, 2011, plaintiff responded, noting the use of the wrong exhibit. However, it alleged that the correct affidavit of the special process server described service on a 13-year-old Hispanic male "Armando Jr.," who was five feet eight inches tall and who weighed 151 to 175 pounds. It asserted that the difference in names was not sufficient to throw the server's affidavit into doubt, especially given that the affidavit of Armando Sanchez III showed that he signed his name simply "Armando Sanchez." It further argued that the blank on the summons form did not mean that it had failed to "direct [the summons] to" defendant. It attached as an exhibit a form similar to a

sheriff's return-of-service form that described substitute service on "Armando Jr," relationship "son," age 13, height "5'7," weight "160."

¶ 8 Defendant responded by filing a corrected exhibit. The exhibit was an "Affidavit of Special Process Server." The information is similar to the form provided by plaintiff except that it gives a height of "5-8" and a weight of "151-175" for the recipient of the documents.

¶ 9 On March 18, 2011, the trial court conducted a hearing. At the hearing, the court asked defense counsel where he thought the special process server could have learned that a 13-year-old named Armando, the son of defendant, lived at the Blue Spruce Lane address if the special process server had no contact with defendant's son. Counsel replied that the affidavit described too high a weight and that the special process server could have made up the other information. The trial court rejected defendant's arguments that the process server's affidavit did not describe defendant's son or that the process server could have obtained an accurate description without having given the documents to the son. As a result, the trial court denied defendant's motion to quash service.

¶ 10 We granted defendant's motion to file a late notice of appeal, and this appeal follows.

¶ 11 **II. ANALYSIS**

¶ 12 In support of her contention that the trial court erred in denying her motion, defendant asserts that (1) the heading and caption of the summons were not properly directed to her, and (2) plaintiff did not have adequate evidence of the substitute service. We discuss the proper procedure for the resolution of defendant's filing and then consider each of her claims in turn. We hold that the caption was acceptable, but that the court improperly resolved a question of fact based solely on the affidavits.

¶ 13 Initially, we note that defendant’s motion was substantively a petition brought pursuant to section 2-1401 of the Code. See 735 ILCS 5/2-1401 (West 2010). “Section 2-1401 provides a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days.” *Mills v. McDuffa*, 393 Ill. App. 3d 940, 945 (2009). Relief pursuant to section 2-1401 is predicated upon proof by a preponderance of the evidence of a meritorious claim or defense in the original action, and diligence in pursuing both the original action and the section 2-1401 petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). In *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), our supreme court held that the proper vehicle to challenge the sufficiency of service, when the underlying judgment is final, is a section 2-1401 petition. *Id.* at 102-03. Defendant 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 described as a “motion to vacate the default judgment as void” (*id.* at 98), was in substance a section 2-1401 petition due to the relief sought. *Id.* at 102 (holding that, in the context of a section 2-1401 petition, a motion’s content determines its character, not the motion’s caption).

¶ 14 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 that 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.” *Id.* 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).

¶ 15 Our review is *de novo*. See *Mills*, 393 Ill. App. 3d at 946-48 (holding that when a court grants or denies a section 2-1401 petition on the pleadings alone, *de novo* review applies). However, the reviewing court in *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 326-27 (2010), distinguished *Mills* on the standard of review for some section 2-1401 issues, but accepted that the appropriate standard for reviewing the disposition of a voidness claim was *de novo*. See *id.* at 327 (“The issue of a meritorious defense is a question of law, and it is properly subject to summary judgment and *de novo* review.”).

¶ 16 We now turn to the matter of the summons’s form. Defendant asserts that the failure to place her name in the underscored area rendered the summons ineffective. This presents a legal issue subject to *de novo* review. See *People ex rel. Waller v. Harrison*, 348 Ill. App. 3d 976, 979-80 (holding that, where the trial court resolves an issue pertaining to personal service without making factual findings, *de novo* review is proper).

¶ 17 We hold that the summons complied with Illinois Supreme Court Rule 101 (eff. May 30, 2008). Illinois Supreme Court Rule 101(d) (eff. May 30, 2008) prescribes the form for summonses to which a defendant must respond within 30 days. The rule requires the summons to be in “substantially the following form” and then provides an example. Ill. S. Ct. R. 101(d) (eff. May 30, 2008). The example has a caption in standard form, noting that all parties are to be named. Below the caption is a heading, “SUMMONS,” followed by a salutation: “To each defendant,” with “defendant” followed by a colon. Ill. S. Ct. R. 101(d) (eff. May 30, 2008). No blank for naming individual defendants follows the colon in the example’s salutation. Therefore, the example

provided in Rule 101(d) illustrates that a summons can substantially comply with the requirement that the summons be directed to each defendant if every defendant's name appears in the caption only.

¶ 18 On the form in question, the existence of the blank area makes the naming of defendants in the caption alone less clear than had the blank not existed, and we emphasize that the appropriate defendant's name in the blank is the preferred practice. However, the failure to do so does not make the summons so unclear that it is not substantially in the form required by Rule 101(d). The summons was proper, and the court did not err in declining to quash service of process based on the form of the summons. See Ill. S. Ct. R. 101(d) (eff. May 30, 2008).

¶ 19 We now turn to the evidence for proper substituted service. “[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). Here, the pleadings contain an affidavit of the special process server, not merely an unsworn return of service. Therefore, defendant's reliance on *Sullivan v. Bach*, 100 Ill. App. 3d 1135 (1981), is inapplicable here. See *Sullivan*, 100 Ill. App. 3d at 1139-40 (“When 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.”).

¶ 20 Plaintiff here asserts that “the trial court reviewed the affidavits submitted by the [d]efendant and the affidavit of the process server and found that no additional affidavits or evidentiary hearing was necessary.” Further, according to plaintiff:

“[T]he trial court was asked to determine which of two competing propositions, each supported by affidavit, was more likely: whether Plaintiff’s special process server delivered the summons and complaint to Defendant’s son; or whether Plaintiff’s special process server guessed or somehow learned that Defendant’s [sic] had a son, either guessed or somehow learned that Defendant’s son was named Armando, fabricated a reasonably accurate description of Defendant’s son, and filed a false sworn return of service with the court. When weighing evidence, the trier of fact is not required to disregard inferences which flow normally from evidence before it.”

Plaintiff argues that, applying the principle of Occam’s Razor, it was simpler to assume that the process server served defendant’s son.

¶ 21 Plaintiff essentially argues that the special process server’s affidavit was more credible than that of defendant’s son. However, as we noted in *Mills*, resolution of defendant’s petition on the pleadings is akin to the resolution of a motion for summary judgment. See *Mills*, 393 Ill. App. 3d at 948. Moreover, a trial court’s sole function in acting upon a motion for summary judgment is to determine whether a question of material fact exists, not resolve that question of fact. *Id.* Here, conflicting affidavits were before the trial court on defendant’s petition—Armando Sanchez III’s affidavit averring that he was never served, along with plaintiff’s affidavit from the special process server. Therefore, because a material issue of fact exists, an evidentiary hearing is required in ruling on defendant’s section 2-1401 petition. See *Id.* at 951 (citing *Vincent*, 226 Ill. 2d at 9).

¶ 22

III. CONCLUSION

¶ 23 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand for further proceedings consistent with this order.

¶ 24 Reversed and remanded.