

SECOND DIVISION  
June 10, 2014

No. 1-13-0160

**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  
FIRST JUDICIAL DISTRICT

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BANK OF AMERICA, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CH 17420
	)	
MILAN ANTIC,	)	Honorable
	)	Alfred M. Swanson
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Liu concurred in the judgment.

**ORDER**

**Held:** Consistent with our supreme court's recent reaffirmation in *BAC Home Loans Servicing, LP v. Mitchell* that a party's submission to the jurisdiction of the court is prospective only, and does not retroactively validate prior orders entered without jurisdiction (*BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 43); we hold defendant did not waive his jurisdictional challenge to orders entered by the circuit court prior to the filing of his initial motion in this matter. We remand the matter for a hearing on defendant's motion to quash contesting the circuit court's jurisdiction because the circuit court never reached the merits of the motion.

¶ 1 Plaintiff, Bank of America, N.A., brought this mortgage foreclosure action against defendant, Milan Antic, who had executed a promissory note with plaintiff secured by a mortgage on his home. The circuit court entered an order of default and a judgment of foreclosure and sale. After the property was sold at auction, but prior to confirmation of the sale, defendant filed a *pro se* motion seeking to deny the confirmation of the sale and to dismiss the case. The court set the motion for hearing, but never ruled on it. Rather, on the hearing date, defendant, with the assistance of counsel, filed an appearance and a motion to quash service. In response, plaintiff argued defendant waived any jurisdictional challenge in his motion to quash service pursuant to section 2-301(a-5) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-301(a-5)(West 2012)) because his earlier filed *pro se* motion seeking to deny the confirmation of sale and to dismiss the case did not contest jurisdiction. The circuit court found defendant had waived his jurisdictional challenge by filing a motion other than a motion for an extension of time prior to filing his motion to quash.

¶ 2 Defendant raises three issues for our review. Because of our conclusion, however, we need only address one of those issues.<sup>1</sup> Accordingly, at issue is whether defendant's *pro se* motion to deny the confirmation of the sale and to dismiss the case resulted in the waiver of his argument that he was not properly served in his subsequently filed motion to quash service. Consistent with our supreme court's recent reaffirmation in *BAC Home Loans Servicing, LP v. Mitchell* that a party's submission to the jurisdiction of the court is prospective only, and does not retroactively validate prior orders entered without jurisdiction (*BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 43); we hold defendant did not waive his jurisdictional challenge

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<sup>1</sup> Defendant additionally argues that plaintiff failed to properly serve him, and that the sale of the property violated section 15-1508(d-5) of the Illinois Mortgage Foreclosure Law. 735 ILCS 5/15-1508(d-5) (West 2012).

to orders entered by the circuit court prior to the filing of his initial motion in this matter. We remand the matter for a hearing on defendant's motion to quash service because the circuit court never reached the merits of defendant's motion.

¶ 3 JURISDICTION

¶ 4 On December 6, 2012, the circuit court denied defendant's motion to set aside the sale of the property and to vacate the default judgment entered against him. On January 3, 2013, defendant timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 Defendant executed a promissory note with plaintiff in the amount of \$350,000. The note was secured by a mortgage on the property located at the common address of 4200 North Whipple Street, in Chicago, Illinois, 60618. On May 12, 2011, plaintiff filed a complaint to foreclose the mortgage.<sup>2</sup> On May 15, 2011, plaintiff served defendant with the summons and complaint by way of substitute service. The affidavit provided by the special process server attested David Pecanak accepted service on defendant's behalf at 4024 North California Avenue, Chicago, Illinois.

¶ 7 On November 10, 2011, plaintiff moved for an order of default and judgment of foreclosure and sale, stating defendant had not answered or appeared. On December 2, 2011, the circuit court granted plaintiff's motions and entered an order of default and a judgment of foreclosure and sale in the amount of \$391,221.10.

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<sup>2</sup> BAC Home Loans Servicing, LP, filed the complaint. The record shows that plaintiff is the successor by merger to BAC Home Loans Servicing LP, and was substituted as party plaintiff on December 2, 2011.

¶ 8 On April 18, 2012, defendant, *pro se*, filed a motion titled "motion to deny confirmation of sale and to dismiss case."<sup>3</sup> Absent from the record is any appearance filed by defendant. The circuit court scheduled the motion to be heard on May 15, 2012.

¶ 9 On April 9, 2012, the property sold at auction. On April 20, 2012, plaintiff filed a motion for entry of an order approving the selling officer's report of the sale of the property and for an order of possession.

¶ 10 On May 15, 2012, defendant, with the assistance of counsel, filed an appearance and a motion pursuant to section 2-203 of the Code (735 ILCS 5/2-203 (West 2012)), seeking to quash service. Defense counsel's appearance indicated he was the initial counsel of record. Defendant alleged substitute service upon him was defective because it occurred on David Pecanak at 4024 North California, in Chicago. According to his motion, defendant resided at 4200 North Whipple in Chicago and never lived with Pecanak. Defendant further alleged plaintiff never served him personally or by mail in this matter. Defendant attached an affidavit attesting to his allegations. The court entered a scheduling order on the motion to quash. Absent from the record is any ruling on defendant's April 18, 2012, *pro se* motion seeking to deny confirmation of the sale and to dismiss the case.

¶ 11 In response to defendant's motion to quash, plaintiff argued defendant waived his right to contest jurisdiction pursuant to section 2-301(a-5) of the Code for filing a motion before filing his motion to quash service that did not contest jurisdiction. 735 ILCS 5/2-301(a-5) (West 2012). Alternatively, plaintiff argued defendant could not overcome the presumption that service upon him was valid.

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<sup>3</sup> As discussed *infra*, the parties dispute whether this motion consisted of only one page, with only the title and no argument; or whether it also contained an additional two pages of argument that did not address the court's jurisdiction.

¶ 12 On June 28, 2012, the circuit court denied defendant's motion to quash finding defendant had waived the right to contest jurisdiction by filing a motion other than a motion for extension of time prior to the filing of his motion to quash. The circuit court did not make any findings as to the merit of defendant's motion to quash.

¶ 13 On August 21, 2012, defendant, *pro se*, filed a motion titled "motion to vacate foreclosure and de[n]y approval of sale and distribution." On August 21, 2012, the circuit court denied the motion. On that same day, the circuit court entered an order approving the report of sale and distribution, confirmed the sale, and entered an order of possession.

¶ 14 On September 10, 2012, new counsel filed an additional appearance on defendant's behalf. On that same day, defendant filed a motion to set aside the sale of the property and to vacate the default judgment entered against him pursuant to section 15-1508 of the Illinois Mortgage Foreclosure Law and section 2-1301 of the Code. 735 ILCS 5/15-1508 (West 2012); 735 ILCS 5/15-1301 (West 2012). On December 6, 2012, the circuit court denied defendant's motion. On January 3, 2013, defendant timely filed his notice of appeal.

¶ 15 ANALYSIS

¶ 16 Before this court, defendant argues he did not waive his right to contest the circuit court's jurisdiction in his May 15, 2012, motion to quash when he filed his April 18, 2012, *pro se* motion seeking to deny the confirmation of sale and to dismiss the case. Defendant contends the April 18, 2012, motion did not constitute a responsive pleading under section 2-301(a-5) of the Code because it contained only one page and was never ruled upon or called to the attention of the court.<sup>4</sup> In response, plaintiff argues the circuit court properly found defendant waived

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<sup>4</sup> The parties dispute the contents of defendant's April 18, 2012, motion. According to plaintiff, the motion contains an additional two pages of substantive argument that did not raise any jurisdictional challenges. Defendant argues plaintiff relies on matters outside the appellate record

his right to contest the court's jurisdiction pursuant to section 2-301(a-5) of the Code because defendant failed to challenge the court's jurisdiction in the first motion he filed before the court.<sup>5</sup>

¶ 17 Jurisdiction over both the subject matter and the parties is required to have a valid judgment. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). "Personal jurisdiction is established either by effective service of process or by a party's voluntary submission to the court's jurisdiction." *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 35. A judgment entered without jurisdiction over the parties is void and may be challenged, directly or collaterally, at any time. *Verdung*, 126 Ill. 2d at 547. Our review of whether the circuit court obtained personal jurisdiction over the parties is *de novo*. *Mitchell*, 2014 IL 116311, ¶ 17.

¶ 18 Section 2-301(a) of the Code allows a party to challenge the circuit court's personal jurisdiction over it "on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process." 735 ILCS 5/2-301(a) (West 2012). Such a challenge must be made "[p]rior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear." 735 ILCS 5/2-301(a) (West 2012). This motion may be made alone or in a combined motion. 735 ILCS 5/2-301(a) (West 2012). Subsection (a-5) of section 2-301, however, provides the following in regards to waiver:

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and maintains the motion contained a title, but no substantive argument. We need not, however, address this dispute because of our ultimate conclusion in this case.

<sup>5</sup> We note that plaintiff, in its brief before this court, cited an order entered pursuant to Illinois Supreme Court Rule 23 as authority. Ill. S. Ct. R. 23 (eff. July 1, 2011). Orders filed under Illinois Supreme Court Rule 23 may not be cited as precedent by any party except under the limited circumstances allowed by Rule 23(e)(1). Ill. S. Ct. R. 23 (e)(1) (eff. July 1, 2011). Plaintiff has not made any effort to abide by the requirements of Rule 23(e)(1) in its brief before this court. Ill. S. Ct. R. 23 (e)(1) (eff. July 1, 2011). Therefore, we have not considered this order cited by plaintiff.

"If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5) (West 2012).

The legislature amended section 2-301 to include the above waiver provision in 2000. *Mitchell*, 2014 IL 116311, ¶¶ 30-31.<sup>6</sup>

¶ 19 After the parties submitted their briefs in this matter, our supreme court issued its opinion in *BAC Home Loans Servicing, LP v. Mitchell*. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311. In *Mitchell*, our supreme court addressed whether the waiver provision in section 2-301(a-5) applied retroactively to validate an order entered without personal jurisdiction in a foreclosure case. *Id.* at ¶ 35. The court first noted that caselaw prior to the amendment of section 2-301 in 2000 established that due process mandated that voluntary submission to the court's jurisdiction is prospective only. *Id.* at ¶¶ 26-31. As such, judgments entered without personal jurisdiction could be challenged as void despite a party's subsequent voluntary submission to the court's jurisdiction. *Id.* at ¶¶ 26-27. Regarding the amended statute, the court held that it "is ambiguous as to the effect of a party's waiver on prior orders entered without personal jurisdiction." *Id.* at ¶ 38. After reviewing the legislative history of the amendment, which showed the legislature's intent to prevent inadvertent waivers regarding objections to personal jurisdiction, and the statutory language of the amendment; the court concluded "section

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<sup>6</sup> The 2000 amendment to section 2-301 also abolished the previous distinction between a special appearance to contest jurisdiction, and a general appearance for all other matters. *Mitchell*, 2014 IL 116311, ¶¶ 30-31 (quoting 735 ILCS 5/2-301(a) (West 1998)).

2-301(a-5), as amended, codified the law on waiver as it existed before the amendment." *Id.* at ¶¶ 38-43. The court reaffirmed the "longstanding rule that 'a party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date.' " *Mitchell*, 2014 IL 116311, ¶ 43 (quoting *Verdung*, 126 Ill. 2d at 547).

¶ 20 In this matter, the circuit court entered an order of default and a judgment of foreclosure and sale against defendant on December 2, 2011. Defendant, *pro se*, filed his motion seeking to deny confirmation of the sale and to dismiss the case on April 18, 2012, which the circuit court set for hearing on May 15, 2012. On the hearing date, defendant, then with the assistance of counsel, who filed an appearance on defendant's behalf, filed a motion to quash service. According to defendant's motion, plaintiff did not serve him prior to the entry of the order of default and the judgment of foreclosure and sale. The circuit court did not address whether plaintiff properly served defendant finding defendant waived his objection to jurisdiction for "filing a motion other than a motion for extension of time prior to the motion to quash."

¶ 21 Applying the rule reaffirmed in *Mitchell* that a party's voluntary submission to the court's jurisdiction applies prospectively only leads us to conclude that defendant did not waive his challenge to jurisdiction according to section 2-301(a-5) of the Code in this case. *Mitchell*, 2014 IL 116311, ¶ 43; 735 ILCS 5/2-301(a-5). According to *Mitchell*, defendant's *pro se* motion on April 18, 2012, resulted in his voluntary submission to the court's jurisdiction from that point forward only. *Id.* It did not validate any orders or judgments entered without the court having personal jurisdiction over defendant prior to April 18, 2012. A judgment entered without jurisdiction over the parties is void and may be challenged at any time. *Verdung*, 126 Ill. 2d at 547. Therefore, defendant's April 18, 2012, motion did not cause defendant to forfeit



his argument raised in his May 15, 2012, motion that the order of default and judgment of foreclosure and sale that predate his voluntary submission to the court's jurisdiction were entered without personal jurisdiction. Accordingly, the circuit court erred when it found defendant had waived his jurisdictional challenge.

¶ 22 The circuit court in this case denied defendant's motion to quash on the basis of waiver. Unlike in *Mitchell*, where the parties agreed that the defendant had not been served properly (*Mitchell*, 2014 IL 116311, ¶12); in this case the circuit court never determined whether defendant had been properly served. Accordingly, we reverse the circuit court's order entered on June 28, 2012, in which it found that defendant had waived the right to contest jurisdiction by filing a motion other than a motion for extension of time prior to the filing of his motion to quash. Although we conclude that defendant did not waive his jurisdictional challenge, we are not in a position to determine whether or not plaintiff properly served defendant. Therefore, we remand this cause for a hearing consistent with this order to determine the jurisdictional basis for the entry of the order of default and the judgment of foreclosure and sale. That hearing must be held within 90 days of the issuance of our mandate, and the clerk of the circuit court is instructed to transmit the transcripts of that hearing, and any other new pleadings or orders related to the hearing, to this court as a supplemental record. All orders entered in this case are stayed pending the hearing. Should the circuit court find that service was properly effectuated on defendant, we retain jurisdiction to determine the issues raised in defendant's appeal of the December 6, 2012, order denying defendant's motion to set aside the sale and to vacate the default judgment.

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

The cause is remanded to the circuit court for further proceedings. Jurisdiction retained.

¶ 25 Reversed and remanded with instructions; jurisdiction retained.