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2016 IL App (3d) 150854-U  
Order filed October 31, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

COAL CITY REDI-MIX, INC.	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois.
	)	
v.	)	
	)	
PASQUINELLI-THE ESTATES AT CEDAR	)	
CREEK, LLC; KDK CONTRACTORS, INC.;	)	
R & J CONSTRUCTION SUPPLY CO., INC.;	)	
WELLS FARGO BANK, N.A.; MORTGAGE	)	Appeal No. 3-15-0854
ELECTRONIC REGISTRATION SYSTEM;	)	
PLATINUM HOME MORTGAGE CORP.;	)	
BENNIE COBLE; VICKIE COBLE; MANUEL	)	
DIAZ; HAWTHORN LANDSCAPE, INC.,;	)	
NUMARK CREDIT UNION, INC.; CLYDE	)	
SNAPP; MARIA HERNANDEZ; RICHARD	)	
WOLFE; TANYA WOLFE; NICHOLE	)	
JOHNSON; JOSEPH P. DESILVA; MAHIN S.)	)	
DESILVA; JACOB USALIS; GATEWAY	)	Circuit No. 09-CH-2215
FUNDING DIVERSIFIED MORTGAGE	)	
SERVICES; UNKNOWN OWNERS and	)	
UNKNOWN NECESSARY PARTIES,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
GREEN TREE SERVICING, LLC,	)	Honorable
	)	John Anderson
Intervening Petitioner-Appellant.	)	Judge, Presiding.

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GREEN TREE SERVICING, LLC,	)	Appeal from the Circuit Court of the
	)	12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois
	)	
v.	)	
	)	
BENNIE G. COBLE, VICKIE SUE COBLE,	)	
ESTATES AT CEDAR CREEK	)	Appeal No. 3-16-0245
HOMEOWNERS ASSOCIATION, COAL	)	
CITY REDI-MIX COMPANY, a/k/a COAL	)	
CITY REDI-MIX, INC., UNKNOWN	)	Circuit No. 14-CH-2329
OWNERS and NON-RECORD CLAIMANTS,	)	
	)	
Defendants	)	
	)	
(Coal City Redi-Mix Company, a/k/a Coal City	)	
Redi-Mix, Inc.,	)	Honorable
	)	Daniel Rippy
Defendants-Appellants).	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and Schmidt concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court erred in dismissing complaint for foreclosure and declaratory relief filed by assignee of mortgagee, seeking to void default judgment entered against mortgagee in prior foreclosure action where mortgagee was served with summons in Cook County by private detective not appointed by trial court.

¶ 2 Green Tree Servicing, Inc. (Green Tree) filed a two-count complaint for foreclosure and declaratory relief, attacking a default judgment entered against its assignor, Mortgage Electronic Registration Systems, Inc. (MERS), in a prior foreclosure action filed by Coal City Redi-Mix Company, a/k/a Coal City Redi-Mix, Inc. (Coal City). Coal City filed a motion to dismiss, which the trial court granted. Thereafter, Green Tree filed a petition, pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)), seeking to vacate the default judgment entered against MERS in Coal City’s foreclosure action. Coal City filed a

motion to dismiss Green Tree's petition, which the trial court granted. Green Tree appeals the dismissal of both its complaint and petition, and we consolidated the appeals. We reverse the trial court's dismissal of Green Tree's complaint and remand for further proceedings. We dismiss as moot Green Tree's appeal of the dismissal of its section 2-1401 petition.

¶ 3 In August 2007, three corporations entered into a contract with Pasquinelli-The Estates at Cedar Creek, LLC to improve property located in Joliet. In September 2007, the corporations recorded mechanics' liens against the property, including real property located at 3811 Monte Carlo Way, Joliet, and assigned their lien rights to Coal City.

¶ 4 On October 31, 2007, Bernie G. Coble and Vickie Sue Coble executed a promissory note to Platinum Home Mortgage Corporation in the amount of \$278,650. The note was secured by a mortgage on 3811 Monte Carlo Way, Joliet. The mortgage was assigned to MERS, which recorded its mortgage on the property in November 2007.

¶ 5 In June 2009, Coal City filed a complaint for foreclosure against MERS and others, seeking to foreclose a mechanic's lien on 408 Conover Drive, Joliet. On June 17, 2009, Alfonso A. Becerra, Jr. of Elite Process Serving & Investigations served MERS with the complaint and summons at its business address in Chicago, Cook County. Neither Becerra nor Elite Process Serving & Investigations, Inc. was appointed by the court as a special process server in the case. In July 2009, Coal City filed an amended complaint, seeking to foreclose mechanics' liens on seven additional lots, including 3811 Monte Carlo Way, Joliet. Coal City mailed the amended complaint to MERS but never served MERS with it. In August 2009, Coal City published notice of the foreclosure in the Free Press Advocate three times.

¶ 6 MERS never appeared nor responded to Coal City's complaint. In 2010, the court entered default judgment against MERS and a judgment of foreclosure and sale for the property

located at 3811 Monte Carlo Way, Joliet. The property was sold to Coal City at a Sheriff's Sale, and the sale was confirmed in March 2011.

¶ 7 On December 15, 2012, MERS assigned its mortgage interest in 3811 Monte Carlo Way, Joliet to Bank of America, N.A. In April 2013, Bank of America filed a complaint to foreclose mortgage on 3811 Monte Carlo Way, Joliet, that named Coal City as a defendant. Bank of America voluntarily dismissed the complaint. One month later, Bank of America, assigned its mortgage interest in the property to Green Tree.

¶ 8 In October 2014, Green Tree filed a two-count complaint against Bennie G. Coble, Vickie Sue Coble, Estates at Cedar Creek Homeowners Association, and Coal City. In count I, Green Tree sought to foreclose its mortgage on 3811 Monte Carlo Way, Joliet. In count II, Green Tree sought declaratory judgment, seeking a declaration that all orders entered in Coal City's foreclosure action "are void and of no effect" as to MERS, its successors and assigns because Coal City did not properly serve MERS with its complaint for foreclosure. Coal City filed a combined motion to dismiss, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), arguing that count I was barred by *res judicata* and count II was improper because Green Tree was required to file a petition, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)), in Coal City's foreclosure action to attack the default judgment entered against it. The trial court granted defendant's motion to dismiss. Green Tree filed a motion to reconsider, which the trial court denied.

¶ 9 In May 2015, Green Tree filed a petition to vacate the default judgment and judgment of foreclosure against MERS, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)), alleging lack of personal jurisdiction. The petition was not verified, and no affidavit was attached to it. However, many exhibits were attached to the petition, including the assignments

of the mortgage for 3811 Monte Carlo Way, Joliet from MERS to Bank of America and Bank of America to Green Tree. Coal City filed a combined motion to dismiss, pursuant to section 2-619.1 of the Code (735 ILCS 5/619.1 (West 2014)). The trial court granted the motion to dismiss with prejudice.

¶ 10 Green Tree appeals both the trial court’s dismissal of its complaint and its section 2-1401 petition. We have consolidated those appeals.

¶ 11 I. Dismissal of Green Tree’s Complaint

¶ 12 A section 2-619.1 motion to dismiss is a combined motion that incorporates sections 2-615 and 2-619 of the Code. See 735 ILCS 5/2-619.1 (West 2014). In reviewing a motion to dismiss, “we accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party.” *Balmoral Racing Club, Inc. v. Gonzales*, 338 Ill. App. 3d 478, 484 (2003). We review *de novo* a trial court’s dismissal of complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009).

¶ 13 A. Count I

¶ 14 Green Tree first challenges the trial court’s dismissal of its foreclosure action on *res judicata* grounds. The doctrine of *res judicata*, which is set forth in section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2014)), requires dismissal with prejudice when an action is barred by a prior judgment. *Singer v. Brookman*, 217 Ill. App. 3d 870, 875 (1991). Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been reached by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *U.S. Bank National Ass’n v.*

*Johnston*, 2016 IL App (2d) 150128, ¶ 25. If any requirement is not met, *res judicata* does not apply. *Id.* The burden of showing that *res judicata* applies is on the party invoking it. *Id.*

¶ 15 To enter a valid judgment, a court must have personal jurisdiction over the parties. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17. A judgment entered by a court without jurisdiction over the parties is void and may be attacked at any time. *Id.*

¶ 16 Personal jurisdiction may be established either by service of process in accordance with statutory requirements or by a party's voluntary submission to the court's jurisdiction. *Id.* ¶ 18. Service of process protects an individual's right to due process by providing notification and an opportunity to be heard. *Johnston*, 2016 IL (2d) 150128, ¶ 28. Effective service of process vests jurisdiction in the court over the person whose rights are to be affected by the litigation. *Id.* A failure to effect service of process in a manner prescribed by statute deprives a court of jurisdiction over the person, and any default judgment based on defective service is void. *Id.*

¶ 17 Section 2-202 of the Code sets forth who is authorized to serve process in Illinois. See 735 ILCS 5/2-202 (West 2014). A licensed or registered private detective is authorized to serve process without court appointment in counties with populations of less than two million. 735 ILCS 5/2-202 (West 2014). The rule for Cook County, which has a population of over two million, is different. See *id.* "Section 2-202 of the Code requires that private detectives serving process in Cook County be appointed by the trial court." *C.T.A.S.S.&U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 912 (2008). If a defendant is served with process in Cook County by a private detective who has not been appointed by the court, any default judgment entered against the defendant is void and must be vacated. See *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 998 (1988).

¶ 18 Here, Alfonso A. Becerra, Jr. of Elite Process Serving & Investigations served MERS with Coal City’s foreclosure complaint and summons at its business address in Cook County. Neither Becerra nor Elite Process Serving & Investigations, Inc. was appointed by the court as a special process server. Thus, Coal City failed to properly effectuate service on MERS, and the default judgment entered against MERS is void and must be vacated. See *id.*

¶ 19 Despite its failure to properly serve MERS with its complaint and summons, Coal City argues that it properly served MERS with notice by publication by publishing notice of the foreclosure action three times in the Free Press Advocate.

¶ 20 Personal jurisdiction acquired by publication is only allowed in certain limited cases and only after strict compliance with the statutory prerequisites governing such service. *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476 (2006). For a trial court to obtain personal jurisdiction over a defendant by publication, section 2-206(a) of the Code requires a plaintiff to file an affidavit stating 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 2014). Notice by publication is insufficient to afford due process with respect to a party whose name and address is known or easily ascertainable. *Rodriguez v. Koschny*, 57 Ill. App. 3d 355, 360 (1978).

¶ 21 Here, Coal City knew MERS’s address and delivered a summons to MERS at its business address in Cook County. However, the summons was not delivered by an appointed process service, so the service was ineffective. See *Johnson*, 383 Ill. App. 3d at 912; *Schorsch*, 172 Ill.

App. 3d at 998. Because Coal City knew MERS's address, notice by publication was not a substitute for proper service on MERS. See *Rodriguez*, 57 Ill. App. 3d at 360.

¶ 22 Coal City also argues that the court's failure to appoint a special process server was a technical defect that should not result in a lack of personal jurisdiction over MERS. It is well established that defects in the service of process are neither technical nor insubstantial. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 20. "[S]trict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served." *Id.* Where a private detective who is not appointed as required by section 2-202 of the Code serves process on a defendant in Cook County, the court lacks personal jurisdiction over the defendant and any default judgment entered against the defendant is void. See *Schorsch*, 172 Ill. App. 3d at 998. We reject Coal City's argument that the defects in its service of process were merely technical and did not divest the court of jurisdiction over MERS.

¶ 23 MERS never received proper service of Coal City's foreclosure complaint. Therefore, the default judgment entered against MERS in Coal City's foreclosure action is void. The trial court erred by granting Coal City's motion to dismiss count I of Green Tree's complaint.

¶ 24 II. Count II

¶ 25 Green Tree also challenges the trial court's dismissal of its declaratory judgment action. It contends that it was not required to file a section 2-1401 petition to challenge the court's judgment in the mechanic's lien action as void for lack of personal jurisdiction.

¶ 26 A section 2-1401 petition is one means to attack a void judgment. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002). However, it is not the only way to do so. "[I]t is well settled that '[a] judgment, order or decree entered by a court which lacks

jurisdiction of the parties \*\*\* is void, and may be attacked at any time or in any court, either directly or collaterally.’ ” *Id.* at 103 (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)).

¶ 27 A plaintiff may file a complaint for declaratory judgment seeking a declaration that a prior judgment is void. See *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2014 IL App (1st) 123654, ¶¶ 26-28; *Parrish v. Glen Ellyn Savings & Loan Ass’n*, 193 Ill. App. 3d 629, 630-31 (1990); *Andrykowski v. Theis*, 40 Ill. App. 2d 182, 194-95 (1963). A declaratory judgment action is a permissible collateral attack on a void order. See *Andrykowski*, 40 Ill. App. 2d at 195. A declaratory judgment action seeking a declaration that a prior judgment is void need not comply with the requirements of section 2-1401 of the Code. *Parrish*, 193 Ill. App. 3d at 636.

¶ 28 Here, Green Tree was not required to attack the void judgment entered in Coal City’s foreclosure action by filing a section 2-1401 petition. Green Tree’s declaratory judgment action was proper. See *Stone Street Partners, LLC*, 2014 IL App (1st) 123654, ¶¶ 26-28; *Parrish*, 193 Ill. App. 3d at 630-31; *Andrykowski*, 40 Ill. App. 2d at 194-95. Thus, the trial court erred in dismissing count II of Coal City’s complaint.

¶ 29 II. Dismissal of Green Tree’s 2-1401 Petition

¶ 30 Because we reverse the trial court’s dismissal of Green Tree’s complaint, we need not consider the propriety of the trial court’s dismissal of Green Tree’s section 2-1401 petition. That issue is now moot. See *Levine v. Levin*, 339 Ill. App. 149 (1949). As a result, we dismiss Green Tree’s appeal of the dismissal of its petition. See *Save-At Builders Products Co., Inc. v. American Federation of State, County, & Municipal Employees*, 13 Ill. App. 3d 846, 848 (1973).

¶ 31 No. 3-15-0854, Reversed; cause remanded.

¶ 32 No. 3-16-0245, Appeal dismissed.