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FIFTH DIVISION
February 10, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF NEW YORK MELLON TRUST COMPANY,)	Appeal from the
NATIONAL ASSOCIATION, as Grantor Trustee of)	Circuit Court of
Protium Master Grantor Trust,)	Cook County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 14 M1 720009
)	
NICHOLAS CERNIAUSKAS,)	The Honorable
)	Orville E. Hambright, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶1 *HELD:* Jurisdiction was proper for the circuit court’s *ex parte* order of possession where defendant failed to successfully challenge the Bank’s affidavit demonstrating sufficient due inquiry of defendant’s whereabouts as justification for constructive service by posting.

¶2 Defendant, Nicholas Cerniauskas, appeals the circuit court’s order denying his motion to quash service of process and to dismiss the forcible entry and detainer action filed by plaintiff, Bank of New York Mellon Trust Company, National Company, as grantor trustee of Protium

Master Grantor Trust (Bank), for lack of jurisdiction. Defendant contends that plaintiff's service via posting was improper; therefore, the circuit court erred in entering an *ex parte* order of possession for the subject property. Based on the following, we affirm.

¶3

FACTS

¶4 On September 3, 2014, the Bank filed a forcible entry and detainer action (735 ILCS 5/9-101 *et seq.* (West 2014)) against defendant for possession of the subject property located on S. Homan Avenue in Chicago, Illinois. Prior to that date, the Bank served defendant, by special process server, with a notice of an intent to file a forcible entry and detainer action and a demand for possession. An affidavit dated January 8, 2014, provided that a special process server executed substitute service of process of the notice of intent and demand for possession at the subject address on January 2, 2014, at 9:17 a.m. with Camis Cerniaukas,¹ defendant's father.

¶5 On October 3, 2014, an alias trial summons was issued for defendant listing the subject address as the location for service. On October 22, 2014, an affidavit of attempted service of process was filed providing that service was attempted five times at the subject address. Specifically, the affidavit attested that service was attempted: (1) on October 6, 2014, at 8:34 p.m. with the following remarks: "yellow brick house, fair condition, per occupant male white defendant not home, he won't accept documents"; (2) on October 12, 2014, at 2:39 p.m. with the following remarks: "no answer, Jeep in driveway [with] Illinois Registration"; (3) on October 14, 2014, at 1:36 p.m. with the following remarks: "no answer, note left for defendant"; (4) on October 15, 2014, at 2:25 p.m. with the following remarks: "no answer, no neighbor contact made"; and (5) on October 16, 2014, at 11:49 a.m. with the following remarks: "no answer, someone looked out."

¹ The surname of defendant's father, as reflected on the special process server's affidavit, is spelled incorrectly.

¶6 Then, on November 17, 2014, the Bank filed an affidavit for service by posting. The affidavit, authored by the Bank's attorney, attested that defendant "on due inquiry cannot be found so that process cannot be served upon defendant." The subject property was listed as defendant's place of residence. In response, the clerk of the circuit court issued a notice naming defendant and the subject property, and requiring an appearance in a pending action. The notice was posted in three public locations, namely, the County Building located at 118 N. Clark Street, City Hall located at 121 N. LaSalle, and the Daley Center located at 50 W. Washington, Room 701. In addition, the notice was mailed to the subject property by the Sheriff's Office of Cook County on November 21, 2014.

¶7 On December 11, 2014, the circuit court entered an *ex parte* order of possession in favor of the Bank and against defendant for the subject property. The enforcement of the judgment was stayed until December 18, 2014.

¶8 Then, on December 17, 2014, defendant filed a *pro se* "motion for extension of time," stating that he "never was served with any summons or the complaint in this case, nor was I even aware that there was a court hearing on December 11, 2014." In the motion, defendant added that he "found out afterwards that [the court] entered an Order of Possession against [him], again, [he] had not [*sic*] notice, and that [he] must be out of the house by tomorrow, December 18, 2014." Defendant requested an extension to remain in the subject property until "after the holidays and to extend [his] time to stay, because [he] did not know of the Court date of December 11, 2014."

¶9 Thereafter, on January 20, 2015, defendant, now represented by counsel, filed a notice for a "motion for leave to file *nunc pro tunc*, as of December 11, 2014, amended motion of defendant to quash service of process and to dismiss this case for lack of jurisdiction and if said

motion is denied then to vacate default judgment pursuant to section 735 ILCS 5/2-1301 or 5/2-1401.” In the motion for leave, defense counsel argued that the circuit court lacked jurisdiction to enter its order of possession where the Bank failed to provide proper service of process on defendant. An affidavit authored by defendant was also attached. In relevant part, defendant attested that he was a co-tenant in the subject property, that the subject property was his full-time residence, that he had “not concealed himself within the State of Illinois at any time,” and that he had “not avoided service of any notices of Summonses in this matter.”

¶10 Ultimately, on January 22, 2015, the circuit court denied defendant’s motion for leave, thereby denying his motion to quash service and to dismiss for lack of jurisdiction and denying his motion to vacate the order of possession. This appeal followed.

¶11

ANALYSIS

¶12 Defendant contends the Bank failed to execute proper service of process and, therefore, the circuit court erred in denying his motion to quash the inadequate service and denying his motion to dismiss the forcible entry and detainer action for lack of jurisdiction. Defendant additionally contends the circuit court erred in denying his motion to vacate the default judgment.

¶13 Personal jurisdiction may be obtained either by effective service of process in accordance with the applicable statutory requirements or by a party’s voluntary submission to the court’s jurisdiction. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). “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.” *Bell Federal Savings & Loan Ass’n v. Horton*, 59 Ill. App. 3d 923, 927 (1978). That said, “[j]urisdiction acquired by means of publication is only

allowable in certain limited cases, and then only after strict compliance with the Statutes governing such service.” *Id.* at 926. If service of process by publication is deemed defective, then the circuit court lacked personal jurisdiction over the party that was served. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 12. We review *de novo* whether personal jurisdiction was conferred. *Id.*

¶14 Section 9-107 of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-107 (West 2014)), in relevant part, provides:

“if a plaintiff, his or her agent, or attorney files a forcible detainer action, with or without joinder of a claim for rent in the complaint, and is unable to obtain personal service on the defendant or unknown occupant and a summons duly issued in such action is returned without service stating that service can not be obtained, then the plaintiff, his or her agent or attorney may file an affidavit stating that the defendant or unknown occupant is not a resident of this State, or has departed from 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 also stating the place of residence of the defendant or unknown occupant, if known, or if not known, that upon diligent inquiry the affiant has not been able to ascertain the defendant’s or unknown occupant’s place of residence, then in all such forcible detainer cases whether or not a claim for rent is joined with the complaint for possession, the defendant or unknown occupant may be notified by posting and mailing of notices.” 735 ILCS 5/9-107 (West 2014).

¶15 In other words, prior to executing an affidavit stating the defendant cannot be found, the plaintiff must conduct both “diligent inquiry” in ascertaining the defendant’s residence and “due inquiry” in ascertaining the defendant’s whereabouts. *Cotton*, 2012 IL App (1st) 102438, ¶ 18.

Here, there is no dispute that defendant lived at the subject address on S. Homan Avenue.

Accordingly, we need not ascertain whether the Bank conducted “diligent inquiry” in ascertaining defendant’s residence. What remains is whether the Bank conducted “due inquiry” in ascertaining defendant’s whereabouts.

¶16 “Due inquiry” requires “ ‘an honest and well-directed effort to ascertain the whereabouts of a defendant by an inquiry as full as circumstances can permit.’ ” *Id.* ¶ 20 (quoting *City of Chicago v. Leakas*, 6 Ill. App. 3d 20, 27 (1972)). The defendant may respond by challenging the plaintiff’s affidavit with a counteraffidavit showing that upon “due inquiry” he could have been found. *Id.* At that point, the plaintiff must either successfully challenge the conclusory nature of the defendant’s counteraffidavit or produce evidence demonstrating the plaintiff actually made “due inquiry” to locate the defendant in order to serve process. *Id.* If the defendant presents a significant issue as to the truthfulness of the affidavit filed by the plaintiff’s agent for substitute service, then the circuit court should hold an evidentiary hearing. *Id.*

¶17 In this case, the Bank attempted to personally serve defendant on five occasions spanning the course of 10 days. One of those attempts was on a Sunday at 2:39 p.m. and one of those attempts was on a Monday during the evening, namely, at 8:34 p.m. The remaining service attempts took place on Tuesday at 1:36 p.m., Wednesday at 2:25 p.m., and Thursday at 11:49 a.m. During the Monday, October 6, 2014, attempted service, a white male answered the door and informed the special process server that defendant was not home. The sheriff’s affidavit added that “he won’t accept documents.” During the attempted service on Sunday, October 12, 2014, the special process server noted in his affidavit that a Jeep with an Illinois license plate was parked in the driveway, but no one answered the door. Then, after attempting service on Tuesday, October 14, 2014, the special process server attested that he left a note for defendant.

Finally, during the Thursday, October 16, 2014, attempted service, the special process server observed an individual look out from the property, but no one answered the door. Following the five attempts at conducting service, the Bank filed its affidavit for service by posting, claiming “on due inquiry” plaintiff could not be found so that process could not be served on him. We find the Bank satisfied the statutory requirements for service by posting.

¶18 Defendant, however, argues that the Bank failed to demonstrate “due inquiry” where it failed to ascertain from others when he would be at the subject property, failed to inquire regarding his place of employment, and failed to attempt substitute service. In defendant’s “counteraffidavits,” for which we will consider both plaintiff’s *pro se* motion for extension of time and his affidavit attached to counsel’s motion for leave to file an amended motion to quash service of process and dismiss the case or, in the alternative, a motion to vacate the default judgment, defendant alleged he was never served process; he lived at the subject property; he never concealed himself; and he never avoided service of process. Accordingly, it is clear that, in his “affidavits,” defendant makes no attestation that further investigation by the Bank could have revealed his whereabouts. Rather, unlike the defendant in *Cotton*, defendant here did not raise factual conflicts with the Bank’s affidavit. See *Cotton*, 2012 IL App (1st) 102438, ¶ 19 (the defendant’s counteraffidavit having raised sufficient factual statements differing from the plaintiff’s assertions that were highly suggestive of conflict). Moreover, unlike the defendants in *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 32 (2006), and *First Federal Savings & Loan Ass’n v. Brown*, 74 Ill. App. 3d 901, 903-05 (1979), there was no doubt as to where defendant resided. Furthermore, unlike in *Leakas*, the sheriff in this case did not file an affidavit for service by publication after noting, while never having exited his vehicle, that the building where service was attempted looked boarded up. *Leakas*, 6 Ill. App. 3d at 23. In

contrast to our defendant, the *Leakas* defendant demonstrated that at the time in question he had been living at the address for 10 years and was using the building as a workshop, and that a sign posted outside the building stated his name, telephone number, and address. *Id.* at 23-24.

¶19 Instead, the facts of this case are most similar to those in *Household Finance Corp. III v. Volpert*, 227 Ill. App. 3d 453 (1992). In *Volpert*, this court affirmed the denial of the defendant's motion to quash service where it found the plaintiff made a well-directed effort to serve the defendant. *Id.* at 456. In so finding, this court considered that the deputy sheriff initially attempted to serve the defendant at his last known residence 9 times over a 10-day period and then a special process server repeatedly attempted to serve the defendant during the day, night, and weekend over a four-month period. *Id.* at 454-55. Although we recognize that the special process server's attempts to serve defendant here were far less than in *Volpert*, the court's reasoning for finding proper service equally apply to this case. As with *Volpert*, because the Bank knew where defendant lived, "due inquiry" did not require the plaintiff to ask neighbors of his whereabouts, or, as our defendant suggests, his daily schedule. *Id.* at 456. Moreover, like *Volpert*, defendant cites no authority for his argument, and his affidavit does not state, that the Bank could have found him at his place of employment. *Id.* Finally, the *Volpert* court made note that during the attempts at service it appeared that someone was home, but refused to answer the door. *Id.* at 455. Here, the special process server attested that the individual who answered the door on the first attempt of service refused to accept substitute service and that on later attempts either a car appeared in the driveway or someone peeked out from the home, but refused to answer the door.

¶20 Simply stated, defendant failed to challenge the truthfulness of the Bank's affidavit establishing "due inquiry." We, therefore, conclude that jurisdiction was proper for the default

judgment and that the circuit court properly denied plaintiff's motion for leave to file an amended motion to quash service by publication and dismiss the case or, in the alternative, to vacate the default judgment.

¶21

CONCLUSION

¶22 We affirm the judgment of the circuit court.

¶23 Affirmed.