

No. 1-15-2276

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

H & R BLOCK BANK)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CH 47967
)	
LALI KATAMADZE; OPTION ONE MORTGAGE)	
CORP; NON-RECORD CLAIMANTS)	
)	
Defendants,)	
)	
and)	
)	
UNKNOWN OWNERS,)	Honorable
)	Michael Otto,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

- ¶ 1 *Held:* Order of the circuit court striking defendant's petition to quash service and vacate all orders in mortgage foreclosure action affirmed.
- ¶ 2 This cause concerns a mortgage foreclosure action in which the trial court granted a judgment of foreclosure and sale to plaintiff H & R Block Bank (H & R Block) in its action

against, *inter alia*, defendant Lali Katamadze and "unknown owners." BV Hotels, Inc. (BV Hotels) claims it is an "unknown owner." It appeals the court's order striking its petition to quash service of process and vacate all orders pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). BV Hotels contends that the court erred in striking its petition where H & R Block improperly served BV Hotels by publication without conducting due diligence and due inquiry to locate the names of any unknown owners. We affirm.

¶ 3 The record shows that, on January 18, 2007, Lali Katamadze secured a mortgage with Option One Mortgage Corporation for the property located at 5349 West Van Buren Street in Chicago in the sum of \$375,200. On the same date, Gocha Gogoladze executed a warranty deed conveying the property to Katamadze. Both the mortgage and warranty deed were recorded with the Cook County Recorder of Deeds on January 25, 2007. On November 20, 2009, Katamadze deeded the property via a quit claim deed to BV Hotels.

¶ 4 On December 2, 2009, H & R Block, acting as the agent for the holder of the mortgage, filed a complaint to foreclose the mortgage against, *inter alia*, Katamadze and "unknown owners and non-record claimants." On the same day, it filed an "affidavit as to unknown owners and non-record claimants," in which its attorney averred that the names of these persons were unknown and, upon diligent inquiry could not be ascertained.

¶ 5 An affidavit of service dated December 10, 2009, shows that special process server Karl Brown went to the property on December 8, 2009, to serve Katamadze with the complaint. Brown averred that he was unable to serve Katamadze because, according to first floor tenant

George Mack, Katamadze did not live at that address. Mack indicated that the property was owned by Gogoladze and provided a phone number for Gogoladze.

¶ 6 On December 29, 2009, H & R Block filed a "*Lis Pendens*/Notice of Foreclosure" with the Cook County Recorder of Deeds regarding the property. On January 13, 2010, BV Hotels recorded its quit claim deed with the Cook County Recorder of Deeds, showing that it was deeded the property from Katamadze on November 20, 2009.

¶ 7 On January 26, 2010, H & R Block filed its affidavit for service by publication. James Bernhard, attorney for H & R Block, averred that, on due inquiry, Katamadze and unknown owners could not be located. He listed the actions taken to locate them, including reviewing credit reports on November 9, 2009, the deed on November 19, 2009, and probate court records on November 20, 2009. He referenced the many attempts to serve Katamadze as shown by the attached affidavit of special process server.

¶ 8 In an affidavit of service dated January 5, 2010, special process server John Cali went to 9128 W Terrace Drive in Niles on seven different days in December 2009 to serve Katamadze with the complaint. He was unsuccessful. Although Katamadze's name appeared on a bell at the door, no one opened the door. In an affidavit of due and diligent search, notarized on January 11, 2010, Daniel Walton of ProVest LLC averred that Katamadze's residence was unknown. He listed the databases searched, including social security, employment, creditors, telephone company and motor vehicle department. Motor vehicle records disclosed Katamadze owned at vehicle registered to 9128 W Terrace Drive in Niles.

¶ 9 H & R Block served all defendants via publication in the Chicago Daily Law Bulletin on January 28, 2010, February 4, 2010, and February 11, 2010.

¶ 10 No defendants appeared in the foreclosure litigation and H & R Block filed motions for an order of default and a judgment for foreclosure and sale. On July 8, 2010, the trial court granted the motions, entering an order of default and judgment for foreclosure and sale in favor of H & R Block in the amount of \$414,583.59.

¶ 11 Pursuant to the judgment for foreclosure and sale, public notice was given that on December 5, 2011, the property would be sold to the highest bidder. The property was sold, and H & R Block filed its motion to approve the sale. On June 8, 2012, the trial court entered an order confirming the sale of the property and awarding possession to H & R Block, as the successful bidder .

¶ 12 On September 30, 2014, BV Hotels filed its initial appearance and a "2-1401 petition to quash service and vacate all orders for lack of jurisdiction and dismiss the case" (petition to quash service). On December 5, 2014, the court struck the petition on H & R Block's motion.

¶ 13 BV Hotels refiled the petition on December 9, 2014. It asserted that it was a defendant in the cause under the designation of "unknown owners" and that, upon due diligence and due inquiry, its identity could have been discovered. BV Hotels also argued that H & R Block's service by publication was improper as it failed to identify the steps it took to discover the identity of any unknown owners, and did not comply with the due diligence and due inquiry requirements of service by publication.

¶ 14 BV Hotels attached an affidavit from Gogoladze to its petition. In the affidavit, Gogoladze averred that he was the president, secretary, and director of BV Hotels, and that BV Hotels received a quit claim deed on November 20, 2009, from Katamadze, which was recorded on January 13, 2010. Gogoladze rented the apartments and collected the rents from tenants of

5349 West Van Buren Street in 2009 and 2010, including tenant George Mack. According to Gogoladze, if someone had called him inquiring about the ownership of the property in December 2009 or January 2010, BV Hotels could have been easily identified as the owner. Gogoladze listed his phone number in the affidavit, which matched the phone number Mack had provided to the special process server.

¶ 15 H & R Block filed a motion to strike the petition to quash service. During briefing, BV Hotels argued that, because it held a quit claim deed to the property that was executed on November 20, 2009, H & R Block's notice of foreclosure recorded on December 29, 2009, was ineffective against it. H & R Block, however, maintained that BV Hotels had a duty at the time it took an alleged ownership interest in the property to provide notice by recording the deed, which it failed to do until January 2010, after H & R Block had recorded its notice of foreclosure. H & R Block thus maintained that it had no duty to name BV Hotels in its complaint as it was unaware of its alleged ownership interest.

¶ 16 On May 15, 2015, the trial court granted H & R Block's motion, striking BV Hotel's petition to quash service and vacate all orders.

¶ 17 BV Hotels filed a motion to reconsider, reiterating that H & R Block made no showing of a due and diligent inquiry to ascertain unknown ownership. On July 9, 2015, the trial court denied BV Hotels' motion to reconsider. BV Hotels filed a timely notice of appeal on August 7, 2015, challenging the orders striking its petition to quash service and denying its motion to reconsider.

¶ 18 On appeal, BV Hotels contends that H & R Block failed to execute an affidavit of due and diligent search to describe what steps it took to ascertain whether there were unknown

owners of the property before it proceeded to serve unknown owners by publication. BV Hotels also contends that H & R Block failed to conduct due diligence to discover the names of any unknown owners before serving notice of its complaint to foreclose mortgage on the property via publication. In particular, BV Hotels maintains that H & R Block did not conduct due diligence and due inquiry into unknown owners where it was on notice through its process server that a party other than Katamadze (Gogoladze) owned the property, but took no further action to uncover the owner. BV Hotels thus maintains that the record failed to establish that the trial court ever obtained personal jurisdiction over it.

¶ 19 In response, H & R Block argues that BV Hotels is bound to the trial court's judgment by the *lis pendens* doctrine, which generally provides that a party who acquires interest in property during the pendency of a lawsuit concerning the property is bound by the result of that lawsuit. *Wagemann Oil Co. v. Marathon Oil Co.*, 306 Ill. App. 3d 562, 572 (1999). H & R Block further contends that BV Hotels was properly served by publication where H & R block conducted a diligent inquiry to locate unknown owners and BV Hotels failed to demonstrate that it could have been found, particularly because it did not record any interest in the property until over one month after the foreclosure action was filed.

¶ 20 H & R Block also asserts that BV Hotels failed to provide this court with a complete record on appeal as BV Hotels did not provide us with a bystander's report, transcript of proceedings, or agreed statement of facts of the hearing on the petition to quash and motion to strike, as required by Illinois Supreme Court 323 (eff. Dec. 13, 2005). It asserts the petition to quash service was fully briefed, set for hearing on May 15, 2015, and the trial court's order striking the petition indicated that it was "fully advised in the premises."

¶ 21 We initially address the contents of the record before us. The record shows that BV Hotels' motion to vacate was fully briefed and set for a hearing on May 15, 2015. The one-page written order from that date striking BV Hotels' petition to quash service indicated that the cause was heard with counsel for both H & R Block and BV Hotels present, due notice was provided, and the court was fully advised in the premises. However, there is nothing further in the record showing what occurred at the May 15, 2015, hearing, as BV Hotels failed to provide a bystander's report, transcript of proceedings, or agreed statement of facts as required by Rule 323. We thus cannot determine if the court received any evidence, or what factual findings the trial court made. In the absence of such a record, this court must resolve any doubts as to the incompleteness of the record against BV Hotels, and presume that the order had a sufficient legal and factual basis. *BankUnited v. Velcich*, 2015 IL App (1st) 132070, ¶ 25. Moreover, where, as here, the trial court noted that it was "fully advised in the premises," there is a strong presumption that the trial court was correct in its ruling. *Id.* (citing *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 758 (2006)).

¶ 22 Nevertheless, even if we assume, as maintained by BV Hotels, that this issue is reviewed *de novo* because the trial court's decision to strike its section 2-1401 petition to quash service was based on documentary evidence alone (see *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 25), we see no reason in the record to upset its determination. As discussed below, H & R Block properly served unknown owner BV Hotels via service by publication, and we thus affirm the trial court's judgment on that basis. See *id.* (stating that, when reviewing an issue *de novo*, a reviewing court may affirm the judgment of the trial court on any basis in the record).

¶ 23 In order to enter a valid judgment, a court must have subject matter and personal jurisdiction over the parties. *Id.* ¶ 26 As pertinent to this appeal, personal jurisdiction may be established by service of process in accordance with statutory requirements. *Id.*

¶ 24 Service by publication is governed by section 2-206(a) of the Code (735 ILCS 5/2-206(a) (West 2014)). It specifically provides:

"Whenever, in any action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation, or rescission of a contract for the conveyance of land, plaintiff or his or her attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing 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, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending." 735 ILCS 5/2-206(a) (West 2014).

¶ 25 In addition, in actions involving mortgage foreclosures in Cook County, as here, local rule 7.3 states:

"Pursuant to 735 ILCS 5/2-206(a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication. In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such "due inquiry" setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the

whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication." Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 26 As service by publication is considered to be the least satisfactory method of providing notice (*Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 13), a party defending such notice must show strict compliance with the statutory requirements, including due diligence and due inquiry (*Velcich*, 2015 IL App (1st) 132070, ¶ 30). "Accordingly, before a plaintiff can conduct service by publication, the plaintiff must present an affidavit stating a defendant cannot be located based on a diligent inquiry in ascertaining the defendant's residence and a due inquiry in ascertaining the defendant's whereabouts." *Richards*, 2016 IL App (1st) 152083, ¶ 30 (citing *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 18).

¶ 27 Here, H & R Block fully complied with statutory and local rules for service by publication. Despite BV Hotels' arguments that H & R Block failed to provide an affidavit of due and diligent search for unknown occupants, the record contains two affidavits verifying that H & R Block made due and diligent inquiry in an effort to locate and serve unknown owners prior to serving them by publication. In particular, the "affidavit for service by publication" stated that defendants, including unknown owners, "on due inquiry [could not] be found so that service [could not] be served upon them." The affidavit further provided that in an effort to ascertain the whereabouts of all defendants, including unknown owners, the affiant reviewed the mortgagee's foreclosure information package and the deed to defendants on or about November 19, 2009, reviewed the Cook County Probate Court records on or about November 20, 2009, and ordered and reviewed a property inspection report on or about December 2, 2009. In addition, the

"Affidavit as to unknown owners and non-record claimants" verifies that there may be unknown owners who "upon diligent inquiry cannot be ascertained."

¶ 28 Moreover, the record demonstrates that BV Hotels did not record any deed for the property until two weeks after H & R Block filed its notice of foreclosure/*lis pendens*. As correctly pointed out by H & R Block in its brief on appeal, had BV Hotels promptly recorded its purported interest in the property, the deed would have been part of the records H & R Block reviewed during its search to find anyone with a property interest. However, BV Hotels took no such action, and thus its status as an alleged owner could not be found despite the due and diligent inquiry of H & R Block. Therefore, H & R Block's investigative efforts to ascertain any unknown names or addresses fulfilled the requirements of section 2-206(a) and local rule 7.3 where they were "honest" and "well directed." See *Marathon Finance Co. v. Pioneer Bank & Trust Co.*, 168 Ill. App. 3d 148, 151 (1988).

¶ 29 We further find that Gocha Gogoladze's affidavit, which was attached to BV Hotels' petition to quash service, failed to rebut H & R Block's affidavits. See *Cotton*, 2012 IL App (1st) 102438, ¶ 18 (stating that a defendant may challenge the plaintiff's affidavits by filing an affidavit showing that upon due inquiry, it could have been found). In the affidavit, Gogoladze gave his phone number and averred he was the president of BV Hotels, BV Hotels received the quitclaim deed on November 20, 2009, no one called him regarding the ownership of the property, BV Hotels would have been easily identified as the owner had anyone called him in December 2009 and January 2010 and George Mack was a tenant of the property. BV Hotels maintains that because H & R Block never contacted Gogoladze, H & R Block failed to demonstrate that BV Hotels could not be located upon due inquiry. BV Hotels asserted that this

was particularly true where the record shows a special process server spoke to tenant George Mack who stated that Gogoladze was the owner of the property and provided Gogoladze's phone number, the same phone number listed in Gogoladze's affidavit.

¶ 30 We agree with H & R Block that the information provided by Mack to the special process server did not require further investigation. Mack did not state that BV Hotels was the owner. Instead, he stated that Gogoladze was the owner. The record shows that, as a result of its search of the records of the Recorder of Deeds, H & R Block was already aware that Gogoladze was the previous owner of the property, who had transferred his interest to Katamadze in January 2007. Mack was mistaken in his belief that Gogoladze was still the owner of the property, as the property records showed otherwise. H & R Block was entitled to rely on the property records, and BV Hotels fails to cite to any authority to suggest that BV Hotels had a duty to contact Gogoladze based on Mack's erroneous statement as to who owned the property.

¶ 31 We again emphasize that BV Hotels could have avoided its "unknown owner" status had it recorded its deed when it was allegedly executed on November 20, 2009, instead of waiting until January 13, 2010, to record its purported interest. BV Hotels' assertion that another records search conducted prior to the filing of H & R Block's affidavit of service would have uncovered BV Hotels' ownership interest in the property does not persuade us that H & R Block failed to comply with the due diligence and due inquiry requirements of service by publication. Therefore, service by publication was proper and the trial court had personal jurisdiction over BV Hotels when it entered orders and the judgment of foreclosure.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 33 Affirmed.