

¶ 1 *Held:* The trial court's denial of the defendant's motion to quash service of process by publication was not against the manifest weight of the evidence.

¶ 2 Defendant-appellant, Ernest J. Cotton, appeals the circuit court's denial of his motion to quash service of process by publication. On appeal, he argues that the trial court's findings were against the manifest weight of the evidence and that the service by publication is void because the motion to appoint a special process server was granted before the case was filed. For the following reasons, we affirm the circuit court.

¶ 3 **BACKGROUND**

¶ 4 This appeal arises out of an action filed by plaintiff-appellee Citimortgage, Inc. (Citimortgage) against the defendant to foreclose on his property at 8429 South Paulina Street, Chicago, Illinois (main residence).

¶ 5 On June 2, 2009, the trial court appointed special process servers through August 21, 2009 for all of Citimortgage's counsel's mortgage foreclosure cases, pursuant to General Administrative Order 2007-03. On July 20, 2009, Citimortgage filed a complaint to foreclose on the defendant's main residence. On August 31, 2009, the trial court granted Citimortgage's motion for service by publication, which alleged that upon due inquiry, the defendant could not be found. Following service of process by publication, the trial court entered a default judgment of foreclosure against the defendant and ordered the sale of the main residence.

¶ 6 The defendant filed a motion to vacate the judgment of foreclosure and judicial sale and a motion to quash service of process by publication. The trial court denied the defendant's motions and entered an order confirming the sale of the main residence. The defendant then filed a motion to reconsider the denial of his motion to quash service of process by publication and requested an evidentiary hearing to determine whether Citimortgage executed due diligence in attempting to find and serve him. The trial court denied both his motion to reconsider and his

request for an evidentiary hearing. The defendant then appealed to this court.

¶ 7 On appeal, we reversed the trial court's order denying the defendant's motion to quash service of process by publication and remanded the matter back to the trial court for an evidentiary hearing. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 33 [hereinafter referred to as *Cotton I*]. We found several factual issues regarding Citimortgage's unsuccessful attempts to locate and serve the defendant which should be resolved by an evidentiary hearing. *Id.* at ¶ 29.

¶ 8 On remand, the trial court held an evidentiary hearing to determine whether Citimortgage executed due diligence to find and serve the defendant, focusing on the factual issues we identified in *Cotton I*.¹

¶ 9 The defendant testified that he lived at the main residence, but that he occasionally spent weekends at 8324 South Paulina Street, Chicago, Illinois (alternate residence), where his mother lived. The defendant further testified that he had a large birthday party in the backyard of the main residence on August 2, 2009, a date that process server Charles Eskra (Charles) claimed to have attempted to serve him.

¶ 10 The defendant's mother also testified that the defendant had a birthday party in the backyard of the main residence on August 2, 2009. She testified that she was at the main residence preparing for the party until about 8:30 or 9:00 p.m., when guests began arriving.

¶ 11 Charles testified that he attempted to serve the defendant at the main residence on August 2, 2009, around 7:45 p.m. He rang the doorbell, but no one responded, and he left a few minutes

¹ This was the second evidentiary hearing held by the trial court. Following the first hearing, the trial court denied Ernest's motion to quash service of process by publication. Ernest filed a motion to reconsider on the basis that Citimortgage's prior counsel and representatives were not excluded from the hearing. The court granted Ernest's motion and set a second evidentiary hearing.

later. He did not see or hear a birthday party.

¶ 12 Process server Don Eskra (Don) testified that he attempted to find and serve the defendant twice a day on eight different dates at the alternate residence and that each time, he rang the doorbell, but no one ever responded. When shown a picture of the alternate residence's doorbell with the name "Cotton" next to it and asked if the name was next to the doorbell when he attempted service, Don responded that he could not remember. When asked about testifying two years prior and stating that no names had been next to the doorbells at the alternate residence, Don responded that he could not recall.

¶ 13 Jill Hackman testified that she is a business operations analyst for Citimortgage, and that Citimortgage had no documentation or evidence about the defendant's workplace.

¶ 14 Ira Nevel (Nevel) testified that his law firm was retained by Citimortgage to locate and serve the defendant in this case. Nevel testified that his law firm's search for information to locate the defendant resulted in the main residence address and the alternate residence address as valid locations in order to serve him, but that the search did not result in any information on the defendant's employment. Nevel's firm searched for a pending bankruptcy, whether the defendant was in the military, and in the defendant's divorce decree in order to find additional possible service addresses. Nevel also performed a workplace search for the defendant using the LexisNexis database, Accruint. None of these searches disclosed where the defendant worked. Nevel further testified that he later learned that the defendant was employed by the Chicago Fire Department (CFD), but based on past experiences with other cases, the CFD would not disclose where or when one of its employees worked.

¶ 15 The defendant testified that he had been served in other cases at work, including a case filed by Ford Motor Credit Company and a case in which he was served by an investigator that

worked for CFD.

¶ 16 Robert Zidek, a process server, testified that he served the defendant in a separate case for Ford Motor Credit Company at the defendant's alternate residence, and not at CFD.

¶ 17 The defendant testified that he retained Matthew Wildermuth (Wildermuth) for loss mitigation purposes. The retention letter directed Wildermuth not to share personal information with non-affiliated third parties. Nevel testified that he was not aware of Wildermuth during his search for the defendant's contact information. Wildermuth did not testify.

¶ 18 At the conclusion of the hearing, the trial court made detailed findings of fact and of credibility which span eleven single-spaced transcript pages. The court found the defendant to be an incredible witness and to have evaded service, stating, "I don't believe [the defendant], and I don't believe his testimony. *** Common sense says *** there was some evasion going on."

¶ 19 The court noted that the defendant's mother testified that the birthday party began around 8:30 or 9:00 p.m., that Charles testified he arrived around 7:45 p.m., rang the doorbell, stayed a few minutes and then left, and that reasonably explained why Charles did not see or hear the birthday party in the backyard of the main residence when he attempted service on that date.

¶ 20 Regarding the names on the doorbells at the alternate residence, the trial court stressed that it believed Don's testimony that he rang the doorbells with no response, regardless of whether the doorbells had names on them or not.

¶ 21 On the issue of whether Citimortgage could have located the defendant at his workplace, the court stated, "Could [the defendant] be found working for the [CFD]? It really doesn't matter. I say this because [the process servers] didn't attempt to serve [him] once, twice, five times at one location and then give up. They tried to serve [him] at two different locations anywhere between 19 and 21 times and at different times of the day."

¶ 22 Finally, the court noted that the defendant retained Wildermuth for loss mitigation only, and that the defendant, and not Wildermuth, contacted Citimortgage and Nevel after learning about the foreclosure action. This led the court to believe that the relationship between Wildermuth and the defendant had ceased prior to the foreclosure action, and that contacting Wildermuth would likely not have helped Citimortgage locate the defendant.

¶ 23 The court concluded by finding that the process servers performed reasonable diligence to serve the defendant at the main residence and the alternate residence, and that they did not need to go to the defendant's workplace because they already had two good locations for him. The court then entered an order denying the defendant's motion to quash service of process by publication.

¶ 24 The defendant filed a motion to reconsider, which was denied by the trial court. This appeal followed.

¶ 25 ANALYSIS

¶ 26 We note that we have jurisdiction to review the trial court's order denying the defendant's motion to quash as there was a final order in this case confirming the sale of the main residence, and the defendant filed a timely notice of appeal following the denial of his motion for reconsideration. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015).

¶ 27 The defendant presents the following issue for review: whether the trial court erred by denying the defendant's motion to quash service of process by publication because either (1) the trial court's findings were against the manifest weight of the evidence or (2) the service by publication is void because the motion to appoint a special process server was granted before the foreclosure case was filed.

¶ 28 The defendant first argues that the trial court erred in denying his motion to quash service of process by publication because the trial court's findings were against the manifest weight of the evidence. He claims that the process servers's testimony were contradicted by his and his mother's testimony. He also argues that Citimortgage, through Nevel's law firm, should have been able to find out where he worked based on his divorce and mortgage documents, and that the process servers could have served him at work because he had been served at work in other cases.

¶ 29 Section 2-206 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-206 (West 2014)) allows a plaintiff to serve process on a defendant by publication, but it restricts this kind of service to limited cases and only when the plaintiff has strictly complied with the requirements for such service. *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 18. Both Section 2-206 and Cook County Circuit Court Rule 7.3 (Oct. 1, 1996) require sworn affidavits by the individuals who tried to serve process on the defendant and ascertain the defendant's whereabouts, and those individuals must set forth with particularity the action they took to find and serve process on the defendant. *Id.* at ¶ 20. It is well settled in this court that multiple attempts to serve a defendant at a valid residential address is sufficient to allow service of process by publication. See *Household Finance Corporation, III v. Volpert*, 227 Ill. App. 3d 453, 456 (1992); *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 33. A defendant may challenge the plaintiff's affidavit by filing a motion to quash service of process by publication and setting forth that upon due inquiry, he or she could have been found. *Richards*, 2016 IL App (1st) 152083, ¶ 31.

¶ 30 When we review a trial court's grant or denial of a motion to quash service of process by publication following courtroom testimony, we must determine whether the trial court's findings

of fact are against the manifest weight of the evidence. *Brewer*, 2012 IL App (1st) 111213, ¶ 17; *Gaidar v. Tippecanoe Distribution Service, Inc.*, 299 Ill. App. 3d 1034, 1039 (1998). A judgment is against the manifest weight of the evidence where the opposite result is clearly evident from the record. *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358, ¶ 61.

¶ 31 Here, Citimortgage submitted affidavits which stated that the process servers attempted to locate the defendant at not one, but two valid addresses over multiple dates and times. The evidence established the particular steps they took to find and serve the defendant, and how they were unsuccessful each time. And the testimony from the evidentiary hearing resolved the factual conflicts we identified in *Cotton I*. We agree with the trial court that Citimortgage complied with the statutory and local rule requirements for service by publication by filing affidavits which established due inquiry and due diligence in attempts to locate and to serve the defendant at his two residences, and that they did not need to try and serve him at his work.

¶ 32 The trial court believed the process server's testimony from the evidentiary hearing and found the defendant to be an incredible witness. It is within the trial court's discretion to determine how much weight to give each witness's testimony. See *In re Davon H.*, 2015 IL App (1st) 150926, ¶ 47 (the trial court is in the best opportunity to observe the parties and witnesses and is therefore in the best position to determine the credibility and weight to be given to the witnesses's testimony). There is nothing in the record to indicate to us that the opposite result is clearly evident. Therefore, the trial court's findings were not against the manifest weight of the evidence.

¶ 33 The defendant next argues that service by publication is void here because the motion to appoint a special process server was granted before the case was filed. Specifically, he argues this process conflicts with section 202(a-5) of the Code (735 ILCS 5-202(a-5) (West 2014)),

which allows a court to appoint a special process server upon motion in its discretion. He claims in order for a motion to be filed, a complaint needs to be filed first. Hence, he argues that because the motion to appoint a special process server was filed on June 2, 2009, but the foreclosure complaint was not filed until July 20, 2009, that the trial court lacked the inherent power to enter the order granting a special process server.

¶ 34 General Administrative Order 2007-03 (GAO), entered on June 22, 2007, by Judge Dorothy Kirie Kinnaird, the then-presiding judge of the chancery division of the circuit court of Cook County, permits law firms handling mortgage foreclosure actions to seek by motion a standing order for the appointment of special process servers for a three-month duration. “Prior to entry of the GAO, a law firm would have had to file a separate motion for appointment of a special process server and obtain an order appointing such in each mortgage foreclosure action it handled.” *OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶ 4. However, the GAO addressed the high amount of mortgage foreclosure filings and insufficient resources to respond to all the filings, and provided an alternate means to effectuate service of process promptly and accurately in mortgage foreclosure actions. See the GAO.

¶ 35 The motion to appoint a special process server in this case was filed in accordance with the GAO. The process servers were appointed for all of Nevel’s firm’s foreclosure cases over a three-month duration, and not for any party in particular. This court has already rejected the defendant’s argument that the GAO conflicts with section 202(a-5). See *OneWest Bank, FSB*, 2012 IL App (1st) 111187, ¶ 22. In *OneWest Bank, FSB*, we held that the GAO does not circumvent any of the required procedures for service of process. *Id.* ¶ 28. We stated that the GAO “merely sets forth an alternate procedure for appointment of a special process server, who must naturally meet the requirements of section 2–202. Further, even if the GAO did conflict

with provisions in the Code, the GAO would prevail because it is a procedural rule, albeit an optional one and the court's procedural rules governing service of process prevail over conflicting statutes." *Id.* ¶ 22 (citing *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 27).

We see no grounds to depart from that reasoning.

¶ 36

CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court denying the defendant's motion to quash service of process by publication.

¶ 38 Affirmed.