2017 IL App (1st) 160459-U

FIRST DIVISION
March 20, 2017

No. 1-16-0459

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO, Plaintiff-Appellee, v. JERMAINE LEDBETTER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, No. 12 M1 401035 Honorable Pamela Gillespie, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Order of the circuit court denying defendant's section 2-1401 petition to vacate a judgment against him on the basis of a lack of personal jurisdiction is affirmed where (1) the defendant failed to present clear and satisfactory evidence to impeach affidavits of service establishing a *prima facie* case of both personal and substitute service, (2) the defendant failed to demonstrate that the summonses at issue were deficient, and (3) no issue of contested fact necessitated an evidentiary hearing.

¶ 2 Pursuant to court order, the City of Chicago demolished a dangerous and unsafe building and obtained a judgment against the building's owner for the cost of the demolition. The owner

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 judgment on the grounds that he was not properly served with a summons and did not learn of the suit until the City took steps to enforce the judgment. The circuit court denied his petition and the owner now appeals. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record reflects that, on April 2, 2012, the City filed a complaint seeking to "abate dangerous and unsafe conditions" at the residential property located at 4744 West Maypole Avenue in Chicago (Maypole Avenue Property). Jermaine Ledbetter, alleged to be the record owner of the property, was named as a defendant. The City alleged that, since at least February 23, 2012, the two-story brick residential building on the property had been left "vacant and open," lacking electrical service, with "stripped or inoperable" heating and plumbing systems, and with a damaged roof, rotting rafters, broken or missing plaster, and holes in its flooring. The City sought equitable and other relief under various statutory provisions, including an order of demolition.

¶ 5 Mr. Ledbetter never filed an appearance in the case and, on July 1, 2013, the circuit court entered an order of demolition against the Maypole Avenue Property. The City demolished the structure just over a year later, on July 18, 2014. To recoup the cost of demolition, the City recorded a demolition lien against the property in the amount of $29,497. On January 9, 2015, the City sent Mr. Ledbetter demand letters for the lien at two addresses: 3025 West Arthington, Chicago, Illinois 60612 (Arthington Address) and 8842 South Normal Avenue, Chicago, Illinois 60620 (Normal Avenue Address). On January 27, 2015, the circuit court entered a judgment against Mr. Ledbetter in the amount of the lien and, on the following day, the City again sent Mr.

Ledbetter demand letters to both the Arthington Address and the Normal Avenue Address. On September 14, 2015, in supplementary collection proceedings to enforce the judgment, the City issued a citation to discover Mr. Ledbetter's assets.

¶ 6 On October 6, 2015, Mr. Ledbetter filed his initial motion to vacate the judgment against him, which was stricken by the circuit court on October 19, 2015.

¶ 7 On November 10, 2015, Mr. Ledbetter filed the instant petition, pursuant to section 2-1401, which he titled an "Amended Motion to Vacate." In his petition and accompanying affidavit, Mr. Ledbetter argued that the circuit court lacked personal jurisdiction over him because he was never served with a summons and complaint and did not receive notice of the suit until his bank account was frozen pursuant to the City's citation. Mr. Ledbetter attached to his motion multiple notices of administrative hearings relating to the Maypole Avenue Property that he received at the Normal Avenue Address and had appeared in connection with, arguing that, if he had also received the summons in this case at that address, he would likewise have appeared in this case. Mr. Ledbetter also argued that no return of summons against him appeared in the record and that an affidavit of personal service presented in open court by the City on October 19, 2015, was defective, both because it did not describe specific identifying characteristics of Mr. Ledbetter and because it was never made a part of the record.

¶ 8 In response to Mr. Ledbetter's motion, the City argued that summonses bearing the seal and signature of the clerk of the circuit court were issued on April 2, 2012, to both the Arthington Address and the Normal Avenue Address. The City attached photocopies of the summonses and, although the embossed seal was not discernible in those copies, the City offered to present the original, sealed documents to the court or to Mr. Ledbetter for inspection upon request. Accompanying the summonses were affidavits of service completed and signed by

Chicago police officers stating that substitute service pursuant to section 2-203(a)(2) of the Code (735 ILCS 5/2-203(a)(2) (West 2012)) was made at the Arthington Address to Janie Ledbetter on April 4, 2012, and personal service pursuant to section 2-203(a)(1) of the Code (735 ILCS 5/2-203(a)(1) (West 2012)) was made to Mr. Ledbetter himself at the Normal Avenue Address on April 9, 2012.

¶ 9 No hearing was held and, on February 9, 2016, the circuit court denied Mr. Ledbetter's motion.

¶ 10 JURISDICTION

¶ 11 On February 24, 2016, Mr. Ledbetter timely appealed the circuit court's order denying his section 2-1401 petition. Pursuant to Rule 304(b)(3), this court has jurisdiction to review orders granting or denying relief sought pursuant to section 2-1401 of the Code. See Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016).

¶ 12 ANALYSIS

¶ 13 The sole issue on appeal is whether the circuit court erred in denying Mr. Ledbetter's petition to vacate the judgment against him for the cost of demolishing the structure at the Maypole Avenue Property. Mr. Ledbetter insists that the petition should have been granted because service of process was not carried out in the manner provided by law, and the court thus lacked personal jurisdiction to enter a judgment against him. Mr. Ledbetter denies that he was personally served and contends that the record in the circuit court contains no indicia that he was ever served. In response, the City argues that the summonses and accompanying affidavits of personal and substitute service complied with all applicable statutory requirements and vested the circuit court with personal jurisdiction over Mr. Ledbetter. The City argues that Mr. Ledbetter's petition was properly denied because Mr. Ledbetter failed to offer affirmative

evidence contradicting the affidavits of service.

¶ 14 Section 2-1401 of the Code establishes a statutory procedure for litigants seeking to vacate a final judgment entered more than 30 days prior. 735 ILCS 5/2-1401(a) (West 2014). Proceedings under this section constitute a collateral attack on the judgment and are not a continuation of the underlying litigation. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. "[A] section 2-1401 petition can present either a factual or legal challenge to a final judgment order" and "the nature of the challenge presented *** dictates the proper standard of review on appeal." *Id.* Where a petitioner contends that a judgment is void on the basis of a purely legal challenge, our review is *de novo*. *Id.* ¶ 47.

¶ 15 The legal challenge at the heart of Mr. Ledbetter's motion to vacate was that no proper service was made in the underlying litigation. The parties agree that where, as here, no evidentiary hearing was held, the sufficiency of service of process is a question of law that we review *de novo*. *Illinois Service Federal Savings & Loan Ass'n of Chicago v. Manley*, 2015 IL App (1st) 143089, ¶ 36.

¶ 16 Service of process provides a defendant with notice and an opportunity to be heard; in so doing, it "vests jurisdiction in the court over the person whose rights are to be affected by the litigation." (Internal quotation marks omitted.) *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 12. "Failure to effect service as required by law deprives a court of jurisdiction over the person and any default judgment based on defective service is void." *Id.* Section 2-203 of the Code contemplates two primary methods of service on an individual. 735 ILCS 5/2-203(a) (West 2012). Personal service may be made "by leaving a copy of the summons with the defendant personally," and substitute service—sometimes called abode service—may be made "by leaving a copy at the defendant's usual place of abode, with some person of the family

or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons," provided the person making service also mails a copy of the summons to the defendant "at his or her usual place of abode." 735 ILCS 5/2-203(a) (West 2012).

¶ 17 The person making either personal or substitute service must, in a certificate or affidavit of service, "identify as to sex, race, and approximate age the defendant or other person with whom the summons was left" and "state the place where (whenever possible in terms of an exact street address) and the date and time of the day when the summons was left with the defendant or other person." 735 ILCS 5/2-203(b) (West 2012). "The affidavit of service should be considered *prima facie* evidence that the process was properly served" and "should not be set aside unless the return has been impeached by clear and satisfactory evidence." *In re Jafree*, 93 Ill. 2d 450, 455 (1982).

¶ 18 Although evidentiary facts asserted in an affidavit and filed in support of a motion are typically taken as true if not refuted by a counteraffidavit (*In re Marriage of Kohl*, 334 Ill. App. 3d 867, 877 (2002)), where a defendant challenges an affidavit of service, the facts asserted in the defendant's uncorroborated affidavit are not taken as true and will be considered insufficient to impeach a statutorily compliant affidavit of service (*Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983)). We are aware of cases holding that this presumption of validity applies only to affidavits documenting personal service and not to those documenting substitute service (see, *e.g.*, *West v. H.P.H., Inc.*, 231 Ill. App. 3d 1, 4-5 (1992)). However, we believe the correct rule, as explained by our supreme court in *Nibco*, is that the presumption applies to both types of affidavit, but "only [as] to matters within the knowledge of the officer making the return, such as the facts that service was made, that it was made upon a person who gave [a particular name], and that service was made at a particular place." *Nibco*, 98 Ill. 2d at 172.

¶ 19 Here, the affidavit of service documenting personal service on Mr. Ledbetter at the Normal Avenue Address stated that it was served on "Def," a black male over the age of 21, at 11:52 a.m. on April 9, 2012. Mr. Ledbetter initially contends that the information provided in this affidavit was insufficient because it "failed to indicate any specifics of Defendant as to his personal characteristics." Mr. Ledbetter posits that, because there are many black males over the age of 21 living in Chicago, one can consider this information alone sufficient only by interpreting the requirements of section 2-203(b) more broadly than the legislature can have intended. We disagree. Section 203(b) unambiguously requires an affidavit of service to contain only the "sex, race, and approximate age of the defendant or other person with whom the summons was left." 735 ILCS 5/2-203(b) (West 2012). It does not require a detailed description of the individual. Our function "is to interpret the law as it is enacted by the legislature" and "not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning." (Internal quotation marks omitted.) *In re Estate of Swiecicki*, 106 Ill. 2d 111, 120 (1985).

¶ 20 The affidavit of service at issue here complied with the plain language of the statute. It included defendant's sex and race and, although something more precise than "over the age of 21" could perhaps have been provided for defendant's age, we cannot say that a lack of specificity in this regard rendered the affidavit deficient. See *Countrywide Home Loans Servicing, LP v. Clark*, 2015 IL App (1st) 133149, ¶ 33 (concluding that an alleged 8-year discrepancy between the age noted in an affidavit of service and the actual age of the person served was "insignificant"); *Pineschi v. Rock River Water Reclamation District*, 346 Ill. App. 3d 719, 724 (2004) (finding a 12-year discrepancy "not particularly remarkable"). Mr. Ledbetter has not provided any information regarding his actual age and, as in *Countrywide* and *Pineschi*, has

made no argument that a discrepancy between the description given and his actual age is material to a determination of whether statutory service requirements were complied with.

¶ 21 Relying on the affidavit he submitted with his section 2-1401 petition, Mr. Ledbetter also denies that he was personally served. In his affidavit, Mr. Ledbetter averred that, although he received a "plethora" of other summonses from the City regarding administrative hearings for building code violations at the Maypole Avenue Property, he was never personally served in the underlying litigation and was never notified that a lawsuit was filed. However, "the uncorroborated account of the party served does not suffice" to set aside an affidavit of service. *Manley*, 2015 IL App (1st) 143089, ¶ 37. The circuit court did not err in denying Mr. Ledbetter's motion to vacate because Mr. Ledbetter presented no affirmative evidence beyond his own assertions to refute the statutorily compliant affidavit of personal service presented by the City.

¶ 22 Even if we agreed with Mr. Ledbetter that the City failed to personally serve him in the underlying litigation, section 2-203(a) permits either personal *or* substitute service, and Mr. Ledbetter makes no challenge to the sufficiency of the affidavit of service documenting substitute service at the Arthington Address. That affidavit states that the summons was left with Janie Ledbetter, a black female in her 70s, at 12:40 p.m. on April 4, 2012, with a duplicate copy mailed to Mr. Ledbetter at his usual place of abode the following day. In his reply brief, Mr. Ledbetter confusingly concedes that he has made no argument on appeal regarding the sufficiency of the substitute service but then, in the same sentence, argues that the City mailed the requisite copy of the summons to the wrong address: "We agree with the CITY that no issue was raised on appeal as to the substitute service since such service was defective pursuant to 735 ILCS 5/2-203(b) as the Plaintiff knew that defendant's usual place of abode was not the Arthington's [*sic*] address but the 8842 South Normal address where they alleged to serve him."

This argument is forfeited. Not only was it not made in Mr. Ledbetter's opening brief (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing")), but there is no indication in the record either that Mr. Ledbetter raised the issue in the circuit court or that he offered any evidence to refute the claim made in the affidavit of substitute service that the requisite mailing was made to Mr. Ledbetter's usual place of abode (*Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, LLC*, 376 Ill. App. 3d 185, 188 (2007) ("[i]ssues not presented to or considered by the trial court are waived [forfeited] on appeal")).

¶ 23 We likewise reject Mr. Ledbetter's argument that handwritten notations on the half-sheet of the circuit court somehow indicate that other parties in the case were served while Mr. Ledbetter was not. It is not at all clear which of the shorthand notations Mr. Ledbetter is referring to and he cites no authority for the proposition that such notations, even if clearly decipherable, would be sufficient to rebut the City's *prima facie* case of service.

¶ 24 Mr. Ledbetter additionally argues that, regardless of the sufficiency of the affidavits of service, the summonses issued in this case were deficient because "[n]owhere in the Record of Proceedings is [*sic*] there any indicia of the Summons in this cause, and whether it indeed was issued under the seal of the Clerk, tested or signed." Illinois Supreme Court Rule 101(a) provides that a "summons shall be issued under the seal of the court, tested in the name of the clerk, and signed with his name." Ill. S. Ct. R. 101(a) (eff. May 30, 2008). The summonses at issue here appear in the record attached to the City's response to Mr. Ledbetter's section 2-1401 petition. Of the two affidavits of service, only the one documenting personal service on Mr. Ledbetter appears to have been independently filed in the underlying litigation. But Mr. Ledbetter cites no authority for the proposition that the failure to file an affidavit of service or associated summons

invalidates otherwise valid service of process. Indeed, although Rule 102(d) states that "[t]he officer or person making service shall make a return by filing proof of service immediately after service on all defendants has been had," it also clearly states that a failure to do so "does *not* invalidate the summons or the service thereof, if had." (Emphasis added.) Ill. S. Ct. R. 102(d) (eff. July 1, 1971).

¶ 25 The summonses themselves are compliant. On each, the name of the clerk of the circuit court and the date are stamped in the area reserved for the clerk's signature. We have held that summonses stamped in this manner are "signed" as contemplated by Rule 101(a). *National City Bank v. Majerczyk*, 2011 IL App (1st) 110640, ¶ 3. Although the City acknowledges that the embossed seal of the clerk's office is not visible on the photocopies of the summonses that appear in the file, it points out that in its response to Mr. Ledbetter's petition it offered to make the originals available for inspection by Mr. Ledbetter or the court. Mr. Ledbetter neither argues that he sought and was denied such an inspection nor that an inspection was made and the summonses were found to be lacking the requisite seal. Mr. Ledbetter has accordingly failed to demonstrate that the summonses were deficient. His reliance on *City of Chicago v. Yellen*, 325 Ill. App. 3d 311, 316 (2001), is misplaced because the summons at issue in that case bore "neither the seal nor the signature of the clerk of court" and was thus deficient on its face.

¶ 26 For the first time in his reply brief, Mr. Ledbetter also argues that the circuit court abused its discretion by failing to hold an evidentiary hearing on the sufficiency of service of process. Mr. Ledbetter insists that, "where jurisdiction is in issue, the [court's] ruling should have been based on live testimony." Once again, this argument is forfeited because Mr. Ledbetter failed to raise the issue in his opening brief (Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016)).

¶ 27 Even if it were not forfeited, the argument is without merit. The purpose of an evidentiary

hearing is to resolve material conflicts in the evidence. *TCA International, Inc. v. B&B Custom Auto, Inc.*, 299 Ill. App. 3d 522, 532 (1998). In the context of a challenge to the court's personal jurisdiction over a defendant, the court first determines whether the plaintiff has made a *prima facie* case in favor of jurisdiction. *Id.* If the plaintiff has failed to meet this burden, the inquiry ends. *Id.* There is likewise no reason to proceed further if the defendant fails to contradict the plaintiff's case, *i.e.*, by making a *prima facie* case of a *lack* of jurisdiction. *Id.* A hearing is only necessary where "there exists on the face of the affidavits a factual dispute, which if resolved in defendant's favor would preclude the imposition of jurisdiction." *Id.* In such cases, the circuit court "must hear the testimony, evaluate its credibility, and resolve any material conflicts in the evidence." (Internal quotation marks omitted.) *Id.*

¶ 28 Here, the City established a *prima facie* case in favor of the court's personal jurisdiction over Mr. Ledbetter when it presented statutorily compliant affidavits of service. Mr. Ledbetter responded only with his own, uncorroborated statement denying that he was personally served. Even if the circuit court believed Mr. Ledbetter, his uncorroborated account was legally insufficient to establish a *prima facie* case that service was improper. *Nibco*, 98 Ill. 2d at 172. Under these circumstances, the circuit court did not abuse its discretion by failing to conduct an evidentiary hearing.

¶ 1 CONCLUSION

¶ 2 The circuit court did not err in denying Mr. Ledbetter's section 2-1401 petition to vacate the judgment against him on the basis of a lack of personal jurisdiction. The affidavits of service proffered by the City provided the statutorily required information for both personal and substitute service. Through those affidavits, the City established a *prima facie* case of adequate service of process that Mr. Ledbetter failed to impeach with clear and satisfactory evidence. Mr.

Ledbetter likewise failed to demonstrate that the summonses at issue in this case were deficient. Because Mr. Ledbetter failed to rebut the City's *prima facie* case of proper service, the circuit court did not err in denying his motion without an evidentiary hearing.

¶ 3 Affirmed.