

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
SECOND DISTRICT

WEST SUBURBAN BANK,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
v.)	No. 10-CH-2609
)	
2340 FRANKLIN PARK, LLC,)	
)	
Defendant-Appellant)	
)	
(J. William Carlson, Small Business Growth)	
Corporation, The United States Small)	
Business Administration, Demco, Inc.,)	
Hazchem Environmental Corporation, The)	
Finishing Company, Unknown Owners and)	
Nonrecord Claimants, Defendants; Giagnorio)	
& Robertelli, Ltd., Alfred J. Chiappano,)	
MPSI, Inc., Fred Bucholz, not personally, but)	Honorable
as Du Page County Recorder of Deeds, TFC)	Bonnie M. Wheaton,
Properties LLC, Third-Party Defendants).)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Because notice of the foreclosure was not properly served, the trial court erred in dismissing the defendant's section 2-1401 petition. Instead, it should have vacated the default judgment. The trial court correctly determined that the defect in service was not apparent from the face of the record.

¶ 2 The plaintiff, West Suburban Bank, issued a commercial mortgage loan to the defendant, 2340 Franklin Park, LLC. The defendant defaulted on the loan, and the plaintiff filed a foreclosure action against the property. After the plaintiff obtained judgments and the property was sold, the defendant filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) to set aside the judgment for lack of personal jurisdiction. The defendant further argued that the jurisdictional defect appeared on the face of the record. The plaintiff filed a motion to dismiss the defendant's petition. The trial court granted the plaintiff's motion to dismiss and the defendant appealed. We reverse in part, affirm in part and remand.

¶ 3 **BACKGROUND**

¶ 4 On September 24, 2007, the defendant entered into a commercial loan with the plaintiff secured by a mortgage on the property located at 136 Commercial Avenue in Addison. The defendant defaulted on the loan. On May 10, 2010, the plaintiff filed a complaint for commercial foreclosure. On May 11, 2010, the plaintiff filed a motion to appoint MPSI, Inc., License No. 117-000774, as the special process server for the case. The affidavit from MPSI in support of the motion was signed by "Alfred J. Chiappano, Pres." On May 11, 2010, the trial court granted the plaintiff's motion and appointed MPSI as the special process server.

¶ 5 Chiappano served process upon the defendant. The affidavit of service stated as follows: "I, Alfred J. Chiappano, being duly sworn on oath state that I am an Illinois Licensed Private Detective, License # 115-001110." Chiappano stated in his affidavit that service of the summons and complaint was made on the defendant through its registered agent on June 9, 2010, at 630 Dundee Road, #120, in Northbrook.

¶ 6 On August 10, 2010, the plaintiff filed a motion for an order of default against the defendant. The trial court granted the motion and entered an order of default the same day. On

September 16, 2010, the property was sold at a judicial auction to a third party. The plaintiff filed a motion to confirm the sale. On October 16, 2010, the trial court entered an order approving the sale. The third party purchaser ultimately conveyed the property to a fourth party, who subsequently conveyed the property to a fifth party, TFC Properties, LLC, the owner as of May 2014.

¶ 7 In December 2015, about five years after the foreclosure sale, the defendant filed a section 2-1401 petition for relief from judgment. The petition alleged that service was defective because MPSI was not certified to act as a process server, as its license had expired, at the time the defendant was served. Accordingly, the defendant argued that the trial court had never acquired personal jurisdiction and the orders subsequently entered in the foreclosure action were void. The defendant further argued that the defect appeared on the face of the record because the affidavit of service indicated that Chiappano, in his individual capacity as an Illinois Licensed Private Detective, had served the defendant, rather than the appointed process server, MPSI. Finally, the defendant argued that since the jurisdictional defect appeared on the face of the record, the subsequent purchasers were not *bona fide* purchasers. The defendant requested that all orders in the foreclosure action be vacated; that the trial court make a finding that all subsequent purchasers were not *bona fide* purchasers; and that it be awarded damages, attorneys' fees and costs.

¶ 8 On January 4, 2016, the plaintiff filed a motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)). The plaintiff conceded that the underlying default judgment was void because MPSI's license had expired at the time it was appointed as process server. However, the plaintiff argued that any further relief requested by the defendant was barred by section 2-1401(e) (735 ILCS 5/2-1401(e) (West 2014))

because the lack of personal jurisdiction did not appear on the face of the record and, thus, subsequent purchasers' rights could not be affected.

¶ 9 On March 9, 2016, following a hearing, the trial court found that there was nothing on the face of the record that would have indicated that service was improper and thus any subsequent purchasers were *bona fide* purchasers. The trial court entered an order granting the plaintiff's motion and dismissing the defendant's section 2-1401 petition with prejudice.¹

¶ 10 Thereafter, the defendant filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 At the outset, we note that the plaintiff argues that we lack jurisdiction to address this appeal. The plaintiff notes that the Notice of Appeal indicates that the defendant is appealing from "the Order entered on March 1, 2015 denying Defendants section 2-1401 petition *** to quash service." The plaintiff argues that the Notice of Appeal is deficient as there was neither a court order dated March 1, 2015, nor a ruling denying a section 2-1401 petition. The plaintiff argues that there was only a March 9, 2016 order granting a section 2-619 motion to dismiss the defendant's section 2-1401 petition.

¶ 13 Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. Sept. 1, 2006). "The filing of a notice of appeal 'is the jurisdictional step which initiates appellate review.'" *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (quoting *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998)).

¹ The defendant's section 2-1401 petition also contained a second count, based on fraud, against certain third-party defendants. That count was also dismissed and is not part of this appeal.

Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obliged to dismiss the appeal. *Id.*

¶ 14 A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979). However, a notice of appeal must be liberally construed. *Id.*

As stated by our supreme court:

“The notice of appeal serves the purpose of informing the prevailing party in the trial court that the unsuccessful litigant seeks a review by a higher court. Briefs, and not the notice of appeal itself, specify the precise points to be relied upon for reversal. Courts in this State and the Federal courts have repeatedly held that a notice of appeal will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal. [Citations.] Unless the appellee is prejudiced thereby, the absence of strict technical compliance with the form of the notice is not fatal, and where the deficiency in the notice is one of form only, and not of substance, the appellate court is not deprived of jurisdiction. [Citations.]” *Id.* at 433-34.

¶ 15 In the present case, reading the notice of appeal liberally, as we must, the defendant made clear that it was appealing from the order denying its section 2-1401 petition to quash service. The defendant only filed one section 2-1401 petition. The only order entered that denied the relief requested in that petition was the March 9, 2016, order granting the plaintiff’s motion to dismiss the section 2-1401 petition. Accordingly, we hold that the notice of appeal was sufficient to advise the plaintiff of the nature of the appeal and thus sufficient to confer jurisdiction on this court to review the propriety of the trial court’s March 9, 2016 order.

¶ 16 On appeal, the defendant argues that the trial court erred in dismissing its section 2-1401 petition. The defendant notes that the plaintiff conceded that service of process was improper. The defendant argues that the trial court, due to the defective service, should have entered an order vacating the default judgment, not dismissing its petition. The defendant further argues that the trial court erred in finding that the defect in service was not apparent on the face of the record. The defendant asserts that the defective service was apparent on the face of the record because the affidavit of service indicated that it was served by Chiappano, not the appointed process server, MPSI, and, thus, any subsequent purchaser would not be a *bona fide* purchaser.

¶ 17 “Section 2-1401 establishes a comprehensive, statutory procedure that allows for the *vacatur* of a final judgment older than 30 days.” *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The purpose of a section 2-1401 petition is to bring to the attention of the trial court facts that, if known at the time of judgment, would have precluded its entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). When a trial court enters a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, review is *de novo*. *Vincent*, 226 Ill. 2d at 18. Additionally, appeals from dismissals pursuant to section 2-619 of the Code are also subject to *de novo* review. *Rogalla v. Christie Clinic, P.C.*, 341 Ill. App. 3d 410, 413 (2003).

¶ 18 Typically, to be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). In general, a section 2-1401 petition must be filed within two years of the entry of judgment. 735 ILCS 5/2-1401(c) (West 2014). However, when the petitioner alleges that the judgment is void, the allegation of voidness “substitutes for and negates the need to allege a meritorious defense and due diligence” and the two-year limitations period does not apply. *Sarkissian v. Chicago*

Board of Education, 201 Ill. 2d 95, 103-104 (2002). A judgment that is entered without personal jurisdiction over a party is void and can be attacked directly or collaterally at any time. *Citimortgage, Inc. v. Cotton*, 2012 IL App (1st) 102438, ¶ 13.

¶ 19 Personal jurisdiction may be established by service of process in accordance with statutory requirements. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 18. Strict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served. *Sarkissian*, 201 Ill. 2d at 109. A foreclosure judgment entered without valid service of process is void. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112, ¶ 12. “Where service of process is not obtained in accordance with the requirements of the statute authorizing service of process, it is invalid, no personal jurisdiction is acquired, and any default judgment rendered against a defendant is void.” *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 998 (1988).

¶ 20 Subsection (a) of the statute that governs who may service process in Illinois provides that “[p]rocess shall be served by a sheriff” or, in counties with populations of less than 2 million, “process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 [(Private Detective Act) (225 ILCS 447/5-5 *et seq.* (West 2008))] or by a registered employee of a private detective agency certified under that Act as provided in Section (a-5).” (Emphasis added.) 735 ILCS 5/2–202(a) (West 2008).

¶ 21 Subsection (a-5) governs the service of process through special process servers appointed by the court, and it provides:

“Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective * * * Act * * *. Under the appointment, any employee of the private detective agency who is registered under that

Act may serve the process. The motion and the order of appointment must contain the number of the certificate issued to the private detective agency by the Department * * *. A private detective or private detective agency shall send, one time only, a copy of his, her, or its individual private detective license or private detective agency certificate to the county sheriff in each county in which the detective or detective agency or his, her, or its employees serve process, regardless of size of the population of the county. As long as the license or certificate is valid and meets the requirements of the Department * * *, a new copy of the current license or certificate need not be sent to the sheriff.” (Emphasis added.) 735 ILCS 5/2-202(a-5) (West 2008).

The provision also defines who is a “registered employee” of a private detective agency and requires the agency to maintain a list of such employees and to provide the list under certain circumstances. *Id.*

¶ 22 Here, the plaintiff conceded that service on the defendant was improper. As MPSI’s license had expired before the plaintiff moved to appoint it as special process server, its certificate was invalid. It therefore was not eligible for appointment under section 2-202(a-5) of the Code. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 18. Accordingly, MPSI could not legally act as a licensed private detective agency at the time of its appointment as a special process server, and any service by MPSI or any of its employees upon the defendant was invalid. *Id.* ¶¶ 18-19. The defect in the service of process was sufficient to render the default judgment void. *Id.* ¶ 21. Accordingly, the trial court erred in dismissing the defendant’s section 2-1401 petition. To the extent the petition sought to have the default judgment vacated, it should have been granted.

¶ 23 The defendant further argues that the trial court erred in finding that the defect in service was not apparent on the face of the record. This is important because section 2-1401(e) of the

Code provides that where the underlying judgment is void but the lack of jurisdiction did not affirmatively appear in the record when judgment was entered, the subsequent vacating of the judgment does not affect any “right, title or interest” in any real property acquired by third parties. 735 ILCS 5/2-1401(e) (West 2012). A *bona fide* purchaser, one who takes title “in good faith for value,” takes “free of any interests of third persons, except such interests of which he has notice.” *Daniels v. Anderson*, 162 Ill. 2d 47, 57 (1994). If *bona fide* purchasers were not so protected, “our laws requiring the registration of deeds would be useless if not worse.” *Petta v. Host*, 1 Ill. 2d 293, 304 (1953).

¶ 24 The defendant argues that the defect was apparent on the face of the record because the affidavit of service was signed by Chiappano in his individual capacity, and not as an employee of MPSI. The defendant contends that because the affidavit of service did not indicate that Chiappano was an employee of MPSI, the appointed process server, the defect was apparent to a third-party purchaser.

¶ 25 We agree with the trial court that the defect in service was not apparent on the face of the record. Under section 2-202 of the Code, a private detective agency can be appointed as a special process server and any employee of that private detective agency may serve process. 735 ILCS 5/2-2-2(a-5) (West 2014). However, section 202 does not require that a process server state, in the affidavit of service, in what capacity he or she served the summons. Moreover, the May 11, 2010, order appointing MPSI as process server, was signed by “Alfred J. Chiappano, Pres.” The face of the record thus indicated that Chiappano was an employee of MPSI. As such, the affidavit of service signed by Chiappano appeared on its face to comply with the provision in section 2-202(a-5) that allowed an employee of the appointed private detective agency to serve process.

¶ 26 Further, the affidavit of service in this case complied with section 2-204. Pursuant to section 2-204 of the Code (735 ILCS 5/2-204 (West 2008)), service upon a private corporation is obtained “(1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law.” 735 ILCS 5/2-204 (West 2012). In the present case, the affidavit of service indicated that the defendant’s registered agent was served with the summons and complaint. Accordingly, on the face of the record, the service of process appeared to comply with the requirements of sections 2-202 and 2-204, and nothing in either of those sections required the process server’s employment status to be included in the affidavit of service.

¶ 27 In arguing that the defect in service appeared on the face of the record, the defendant relies on *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639. In *Malarz*, service was attempted on the wrong person at the wrong address, with the defect evident from the materials filed along with the plaintiff’s affidavit of nonservice. *Id.* at ¶ 44. *Malarz* is easily distinguished on the facts because the issue in the present case is not whether the proper person was served. Rather, the issue is the legal status of the process server. Unlike *Malarz*, the defect in service in the present case was not apparent on the face of the record.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we reverse the trial court’s order granting the plaintiff’s motion to dismiss and remand for an order vacating the default judgment of foreclosure. However, we affirm the trial court’s finding that the defect in service was not apparent on the face of the record and that the subsequent purchasers were *bona fide*. The cause is remanded for further proceedings consistent with this order.

¶ 30 Affirmed in part and reversed in part; cause remanded.