2019 IL App (1st) 180680-U

THIRD DIVISION
March 27, 2019

No. 1-18-0680

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TBI URBAN HOLDINGS, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff/Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CH 16332
	)	
DAVID TERRELL, et al.,	)	
	)	
Defendant/Petitioner-Appellant,	)	
	)	
and	)	
	)	
CHICAGO TITLE LAND TRUST COMPANY TRUST # 8002371729 dated July 7, 2016 and NOWAR AL-NAFFOURI,	)	Honorable
	)	Anna M. Loftus,
Respondents-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting respondents' motions to dismiss petitioner's petition to vacate default judgment of foreclosure of receiver's lien and judgment of sale is reversed; petitioner raised a substantial question as to whether a transferee of the property was a *bona fide* purchaser and whether the efforts to personally serve petitioner prior to service by publication were adequate; therefore an evidentiary hearing on the petition is required.

¶ 2 Petitioner, David Terrell, filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)) to vacate a default judgment of foreclosure and order confirming judicial sale of property on the basis that petitioner, the former owner of the property, was not properly served notice of the complaint to foreclose a receiver's lien that had been placed on the property. (Terrell participated in the proceedings that led to the receiver's lien.) Respondents, TBI Urban Holdings, LLC (TBI), Chicago Title and Land Trust Company, as Trustee under Trust Agreement dated July 7, 2016 and known as Trust No. 8002371729 (Chicago Title), and Nowar Al-Naffouri, filed motions to dismiss the 2-1401 petition on multiple grounds, including that Al-Naffouri was a *bona fide* purchaser of the property and thus protected by section 2-1401(e) of the Code (735 ILCS 5/2-1401(e) (West 2016)). The circuit court of Cook County held section 2-1401(e) applied and granted the motions to dismiss. For the following reasons, we reverse.

¶ 3 BACKGROUND

¶ 4 In November 2016 TBI filed a complaint to foreclose a claim for a receiver's lien on real estate located in Chicago. The complaint named as defendants Terrell, the City of Chicago, Portfolio Recovery Associates, LLC, unknown owners, and nonrecord claimants. Terrell, the petitioner, is the only named defendant who is a party to this appeal. Attached to the complaint was a Receiver's Certificate issued to Community Initiatives, Inc. stating Community Initiatives was awarded $5,530 to recover attorney fees and costs incurred as receiver of the real estate. Also attached to the complaint was Community Initiatives' assignment of the Receiver's Certificate to TBI, and TBI's notice of claim for a receiver's lien based on the Receiver's Certificate. TBI's notice of claim for receiver's lien states the circuit court of Cook County appointed Community Initiatives (CII) receiver of the property in *City of Chicago v. GMB Financial Group*, LLC, et al., No. 13 M1 402002. The complaint to foreclose the lien listed Terrell as the then-current owner of the real estate. A Mortgage Foreclosure Summons dated

November 6, 2015, is attached to the complaint and begins by stating: "To each defendant: SEE ATTACHED FOR SERVICE." The summons lists information that is not in dispute, and the attachment lists Terrell as one of the defendants to be served. The address listed on the attachment is the address of the real estate that is the subject of the receiver's lien and complaint to foreclose the lien.

¶ 5 On November 19, 2015, an affidavit of special process server Lamont W. Lee was filed stating that Lee is employed by Stern Process & Investigation LLC (Stern), he attempted to serve Terrell at the real estate in question, and he had been unable to serve Terrell at the real estate because the "[p]roperty is vacant [and] boarded up." The affidavit states November 13, 2015, as the date service was last attempted at the real estate in question. The record contains another copy of the summons in the foreclosure action, which lists Terrell's address as the real estate being foreclosed and includes as an attachment an affidavit by Michael Moriarty. The affidavit is sworn pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)) and states Moriarty works for Stern, and that Moriarty states upon oath that he "performed a diligent inquiry to discover the place of residence of the Subject/Defendant named below [(Terrell)] by doing the acts which are described with particularity below. Upon inquiry by me, the Affiant, the place of residence of the Subject/Defendant cannot be ascertained." Moriarty's affidavit lists Terrell's last known address as the real estate at issue. The affidavit lists several databases followed by the notation "NO RECORDS FOUND." The affidavit states a social security number could not be located, no voter registration information could be located from national or statewide database searches, and no change of address from the real estate in question. Moriarty's affidavit states "[s]earches for the subject/defendant were conducted on 12/3/15." The affidavit does not specify if the preceding statement is referencing the database searches listed in the affidavit. Moriarty's affidavit also attached Lee's November 16, 2015, affidavit stating Terrell could not be served at the real estate in question because the property is vacant and boarded up.

¶ 6 The copy of the summons also has attached affidavits by Megan McGillivary. McGillivary averred that the unknown owners and nonrecord claimants of the real estate were unknown and could not be ascertained "upon diligent inquiry." McGillivary completed an "Affidavit to Allow Service by Publication Pursuant to Local Rule 7.3" (Publication Affidavit). The affidavit requesting service by publication states, in full, as follows:

> "I, the undersigned attorney, on oath, state as to Defendant DAVID TERRELL:
>
> 1. Defendant resides or have 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 them.
> 2. Diligent inquiry has been made as to the whereabouts of all the aforesaid Defendant.
> 3. That upon diligent inquiry, the place of residence of the aforesaid Defendant cannot be ascertained and their last known place of residence is: 3263 W. Fulton Blvd., Chicago, IL 60624.
> 4. Service upon the Defendant has been attempted by the Court Appointed Special Process Servicer (see attached Exhibits)."

McGillivary's Publication Affidavit had attached Moriarty's affidavit.

¶ 7 McGillivary also filed an "Affidavit for Service by Publication" on Terrell, unknown owners, and nonrecord claimants. The McGillivary affidavit states, in part:

> "The defendant, DAVID TERRELL, place of address: 3263 W. Fulton, Blvd., Chicago, IL 60624, was not served November 13, 2015. This address is vacant. Through a skip trace, Stern Process and Investigation, LLC was unable to locate an additional address. To avoid jurisdictional issues, DAVID TERRELL is being served by publication."

¶ 8 The matter was set for an initial case management conference on January 5, 2016. On that date, the trial court entered a case management order striking the case from the case management call. On March 3, 2016, TBI filed a motion for default judgment of foreclosure and sale. On April 12, 2016, the court found Terrell and the other defendants in default and entered a judgment of foreclosure and sale of claim for receiver's lien. Terrell's right to redeem the judgment expired on June 12, 2016. On June 14, 2016, TBI filed a motion for an order approving the report of sale for the real estate, confirming the sale, and for possession. The report of sale states that TBI was the highest bidder for the real estate. On June 28, 2016, the trial court entered an order approving the report of sale and distribution and confirming the sale and an order of possession.

¶ 9 On October 7, 2016, Terrell filed *pro se* a motion to vacate the order of possession. On October 11, 2016, the trial court denied Terrell's motion "for the reasons stated in court." On April 7, 2017, Terrell, through counsel, filed a petition pursuant to section 2-1401 of the Code to quash service of process and to vacate the default judgment and order approving sale. Terrell's petition alleged he had participated in the case that led to the issuance of the receiver's lien ("the city case") but he was never served summons in the foreclosure case because the service by publication did not comply with section 2-206 of the Code or Cook County Circuit Court Local Rule 7.3. Terrell also alleged that tax bills on the property were mailed to his home in Skokie, Illinois and plaintiff through its agents knew he did not reside on the subject property but resided in Skokie. Terrell also alleged that McGillivary represented CII in the city case. Terrell learned that the City of Chicago had filed the city case based on building violations at the real estate and CII was appointed limited receiver of the real estate to board up and secure the property. According to Terrell's 2-1401 petition in the foreclosure case, during the proceeding on the city case, the circuit court discharged CII as receiver and CII was allowed to file a petition for fees, which the circuit court granted. Terrell's 2-1401 petition noted that McGillivary

charged for her attendance at two of Terrell's motions in the city case. The 2-1401 petition argues McGillivary did not conduct a diligent inquiry to locate Terrell as she had averred because McGillivary was on notice of his address in Skokie from his appearances in the city case. Terrell argued plaintiff did not strictly comply with the requirements for service by publication because McGillivary's "false affidavits" fail to establish "an honest and well-directed effort to ascertain" Terrell's whereabouts by an inquiry "as full as circumstances permitted" because McGillivary's "knowledge gained in the City case is studiously ignored" and plaintiff's attempt to serve Terrell at the real estate, which was known to be vacant was a "sham." Terrell also argued that Moriarty's affidavit contains nothing to show that court records or real estate tax records were checked. (Terrell's motion alleges he received tax bills for the real estate at issue at his Skokie address. He attached a copy of a tax bill for the real estate that lists a mailing address for the bill in Skokie.) Finally, Terrell's petition asserted that CII is the managing member of TBI, and that CII's vice-president verified the foreclosure complaint as TBI's vice-president. Terrell argued that assignment of the receiver's certificate to TBI does not operate to destroy the knowledge the vice-president gained in the city case, and McGillivary's knowledge of his address is chargeable to TBI as her client.

¶ 10 On May 11, 2017, Terrell withdrew his 2-1401 petition.[1] On May 12, 2017, Terrell refiled the petition. On July 6, 2017, TBI filed a motion to dismiss the petition pursuant to section 2-615 and 2-619(a)(9) of the Code (735 ILCS 5/2-615, 2-619(a)(9) (West 2016)). TBI's motion to dismiss argued Terrell waived any objections to jurisdiction by filing a motion to vacate the default judgment of foreclosure, a third-party currently owns the real estate and the third-party's interest cannot be affected based on application of section 2-1401(e) of the Code, and the petition to quash is legally insufficient.

[1] TBI objected that Terrell's attorney had not filed an appearance. Terrell's attorney filed an appearance and re-noticed the petition.

TBI attached an affidavit by McGillivary to its motion to dismiss. In this affidavit McGillivary averred that prior to 2014 she "was not assigned to manage cases filed by the City of Chicago for housing court violations where [her firm's] client [CII] was either a named defendant or a court-appointed receiver." McGillivary took over those responsibilities in November 2014. McGillivary also averred she did not appear on behalf of CII on one of the court dates relied upon by Terrell and that she did not meet Terrell until October 11, 2016, when she appeared as TBI's attorney on Terrell's emergency motion to vacate. Finally, McGillivary averred she had no personal knowledge of Terrell's address until Terrell filed his motion to quash on April 7, 2017.

¶ 11 On August 23, 2017, Chicago Title filed a motion to dismiss Terrell's petition pursuant to section 2-619 of the Code. Chicago Title argued it is entitled to the protection afforded by section 2-1401(e) of the Code because "nothing appearing in the record suggests the existence of the jurisdictional defect of which [Terrell] complains" and the affidavits in the foreclosure case "more than satisfy the requirements for effectuating service upon [Terrell] by publication." Chicago Title also argued Terrell's jurisdictional challenge was untimely. Chicago Title attached the affidavit of David Sweis to its motion to dismiss. Sweis averred that he was the attorney for the "initial beneficiary" of the land trust for which Chicago Title is trustee and that he was hired to assist in the trust's acquisition of the real estate at issue. Sweis averred that he learned that after the judicial sale the certificate of sale was issued to TBI. TBI assigned the certificate of sale to the trust in exchange for cash consideration paid by the initial beneficiary. Sweis averred: "On June 28, 2016, an order (the 'Confirmation Order') was entered in the Foreclosure confirming the Judicial Sale. The Confirmation Order further authorized [Judicial Sales Corporation] to issue a Judicial Sale Deed (the 'Sale Deed') vesting the Trust with title to the [real estate.]" On July 8, 2016, Judicial Sales Corporation issued the Sale Deed to Chicago Title as trustee and "[a]t or about the same time," the "initial beneficiary" entered into a written agreement for the trust

to assign the trust's beneficial interest in the real estate to Al-Naffouri for $62,000. Sweis averred that on August 3, 2016, the "initial beneficiary" assigned the beneficial interest in the trust to Al-Naffouri. Sweis averred that "[n]either of the Trust's beneficiaries is or was affiliated with TBI." The written assignment of the beneficial interest to Al-Naffouri is attached to Chicago Title's motion and states, in part, that "for value received, the assignor(s) hereby sell, assign, transfer, and set over unto assignee(s) all of the assignor's rights, power, privileges, and beneficial interest in and to that certain trust agreement."

¶ 12 On October 3, 2017, Terrell filed a response to TBI's and Chicago Title's motions to dismiss "solely related to the Issue of the Application of Section 735 ILCS 5/15-1505.6[2], as Ordered by the Court on August 29, 2017." On October 24 and 26, 2017, Chicago Title and TBI, respectively, filed replies in support of their motions to dismiss limited to the section 15-1505.6 argument. On October 31, 2017, the trial court denied Chicago Title's and TBI's motions to dismiss solely as to section 15-1505.6 and granted Al-Naffouri leave to file an amended motion to dismiss. The court established a briefing schedule for all parties and set a date for hearing on Terrell's 2-1401 petition.

¶ 13 On November 16, 2017, Al-Naffouri filed an amended motion to dismiss based primarily on section 2-1401(e) of the Code and arguing that:

> "Even if successful in his efforts to vacate the Judgment of Foreclosure and the Order Confirming Sale, Terrell's 2-1401 Motion cannot affect Al-Naffouri's and the Trust's right, title or interest in the Property *** as (A) neither the Trust nor Al-Naffouri were parties to the original action; (B) both the Trust and Al-Naffouri acquired their interest in

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[2] "(a) In any residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process that objects to the court's jurisdiction over the person, unless extended by the court for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance." 735 ILCS 5/15-1505.6(a) (West 2016).

> the Property for value after the entry of both the Judgment of Foreclosure and Confirmation Order and before the filing of Terrell's 2-1401 Motion; and (C) no jurisdictional defect 'affirmatively' appears in the 'record proper.' "

In support of that argument Al-Naffouri argued, in part, that the Sweis affidavit establishes that Al-Naffouri paid value for the purchase of the beneficial interest in the trust. Al-Naffouri also argued that nothing in the "record proper" revealed any defects in service of process on Terrell. As to Terrell's argument McGillivary had actual knowledge of Terrell's address, Al-Naffouri argued that even if that is true, "there is absolutely nothing in the case record to put *** Al-Naffouri on notice of this alleged fact." Al-Naffouri also argued that Terrell's argument that his address could have been found in the tax records for the property was specifically rejected in *Greenwald v. McCarthy*, 402 Ill. 135 (1948), where our supreme court "upheld the innocent purchasers' rights to the property" in the face of a petitioner's claim that "she could have been found by a review of tax records;" and, regardless, "Al-Naffouri and the Trust were not required to look beyond the case records, which in all respects conformed to the statute."

¶ 14 On January 29, 2018, Terrell filed his combined response to the motions to dismiss his 2-1401 petition. Al-Naffouri and Chicago Title filed replies to Terrell's response, and TBI adopted the arguments and positions set forth by them. Following arguments, on March 7, 2018, the trial court granted all motions to dismiss with prejudice.

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 Section 2-1401 of the Code permits a party to attack a final judgment more than 30 days after but within two years of its entry. 735 ILCS 5/2-1401 (West 2016); *Urban Partnership Bank v. Ragdale*, 2017 IL App (1st) 160773, ¶ 16. "However, this two-year period does not apply where the petitioner alleges that the judgment is void." *Id.* A judgment is void if the trial court did not have personal

jurisdiction over the party against whom judgment is entered. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17 ("To enter a valid judgment, a court must have both jurisdiction over the subject matter and jurisdiction over the parties. [Citation.] A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally."); *Corlis v. Edelberg*, 2018 IL App (1st) 170049, ¶ 17 ("As with all civil actions, a plaintiff must properly serve an individual defendant with process in order to vest the trial court with the personal jurisdiction necessary to enter judgment."). A petition brought pursuant to section 2-1401 may raise "a purely legal challenge to a judgment by alleging that it is void." *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 47. Where, as here, the 2-1401 petition raises the purely legal question of whether the judgment is void for lack of personal jurisdiction, our standard of review is *de novo*. *Id.*; *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 12 ("[r]eview of a judgment on a section 2-1401 petition that is requesting relief based on the allegation that the judgment is void shall be *de novo*." (Internal quotation marks omitted.)).

¶ 18 In this appeal, Terrell argues the trial court's judgments foreclosing the receiver's lien and confirming the judicial sale of the real estate are void because the trial court lacked personal jurisdiction over him. However, section 2-1401(e) of the Code provides that

> "[u]nless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment." 735 ILCS 5/2-1401(e) (West 2016).

¶ 19 Terrell specifically argues the judgments are void and his 2-1401 petition should be granted because TBI did not strictly comply with every requirement of section 2-206(a) of the Code (735 ILCS 5/2-206(a) (West 2016)) for service by publication in a foreclosure action in that "both McGillivary's Affidavits clearly fail to establish that she conducted an honest and well-directed effort to ascertain [Terrell's] whereabouts by an inquiry as full as circumstances permitted;" the affidavits for service by publication do not comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013); the failure to attempt to serve Terrell at his Skokie address and the failed service by publication are fatal to the trust's and Al-Naffouri's claims of *bona fide* purchaser status entitled to the protection of section 2-1401(e) of the Code as is the fact the record "establishes several defects relating to publication service;" and the trust and Al-Naffouri are not entitled to the protection of section 2-1401(e) because they received their interests in the real estate by assignment traceable to CII, and thus are chargeable with CII's knowledge of Terrell's address. Section 2-206(a) of the Code allows publication service on a defendant when the defendant has gone out of state or on due inquiry cannot be found or is concealed in the State:

> "(a) 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 2016).

However, the first question we must address is whether Chicago Title and Al-Naffouri are entitled to the protection afforded *bona fide* purchasers for value by section 2-1401(e) of the Code. Pursuant to section 2-1401(e),

> "even if the judgment is void for lack of jurisdiction, section 2-1401(e) may protect a *bona fide* purchaser for value. [Citation.] Section 2-1401(e) embodies the public policy respecting third-party purchasers of property and protecting them from the effects of an order setting aside a judgment affecting title to property. [Citation.] In particular, section 2-1401(e) protects a *bona fide* purchaser's interest in real property where the defect in service is not apparent from the record and the *bona fide* purchaser was not a party to the original action but acquired title before the filing of the petition. [Citations.]
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> In determining whether a lack of jurisdiction is apparent from the record, we look at the whole record, including the pleadings, the return of process, and the judgment of the trial court. [Citation.] A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record. [Citation.]" *U.S. Bank National Ass'n v. Rahman*, 2016 IL App (2d) 150040, ¶¶ 26-27.

¶ 20 Terrell argues "the defect in service" by publication is apparent from the record because (1) McGillivary's affidavit to allow service by publication pursuant to Cook County Local Rule 7.3 states service was first attempted by a special process server but no motion to appoint or order appointing a special process server appears in the record, nor "was there any service attempt by the Sheriff of Cook County;" (2) the first page of the summons did not identify Terrell as a defendant on its face in violation of Illinois Supreme Court Rule 101(a) and section 2-201(a) of the Code; (3) the failure of TBI's affidavits for service by publication to comply with Rule 191(a) is apparent on the face of its three

affidavits thereby providing notice they were defective; and (4) Moriarty's affidavit that Terrell could not be found lacked the requisite specificity to comply with section 2-206.

¶ 21 Al-Naffouri responds any knowledge of Terrell's address or lack of good faith by TBI is irrelevant as the only inquiry is whether the record disclosed a jurisdictional defect. Chicago Title similarly argues any purported knowledge of TBI "is not something that would affirmatively appear in the record of the Foreclosure."[3] Al-Naffouri also responds no defect in service by publication is disclosed by the record because the affidavits pertaining to service by publication are facially compliant with section 2-206 of the Code and Cook County Local Rule 7.3. (Although the parties agree Local Rule 7.3 does not apply to this proceeding, prior to service by publication TBI filed a superfluous affidavit pursuant to Local Rule 7.3.) Al-Naffouri states that (1) McGillivary's affidavit for service by publication "track[s] the very language of Section 2-206(a)" and a form affidavit published by the circuit court for obtaining service by publication; and (2) Moriarty's affidavit specifically states the databases Moriarty searched, that he searched them on December 3, 2015, and whether the search was county, state, or national where appropriate. Chicago Title similarly argues the publication affidavits "are facially compliant with the statute for service by publication such that any party reviewing the Foreclosure record would find that publication service was proper." Chicago Title notes the "skip trace" Moriarty conducted and asserts there is nothing in section 2-206 "that requires a plaintiff to review certain databases or conduct a specific search." Chicago Title further argues the publication affidavits "more than satisfy" the statutory requirements and also notes that the affidavits track the language of the sample form for obtaining service by publication; thus, the "documents demonstrate that service by publication was proper" and a lack of jurisdiction did not "affirmatively appear in the record proper at the time the Trust acquired its interest in the Sale Certificate and title to the [real estate]."

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[3] This court granted TBI's motion to join Al-Naffouri's and Chicago Title's briefs on appeal.

¶ 22 Terrell responds Chicago Title and Al-Naffouri failed to cite any authority stating that section 2-1401(e) "limits their responsibilities solely to the record in the Receiver's lien foreclosure." Terrell cites *U.S. Bank N.A. v. Johnston*, 2016 IL App (2d) 150128, ¶ 45, for the proposition that a purchaser with notice of facts that would put a prudent man on inquiry is chargeable with other facts which a diligent inquiry might have disclosed. He then argues Chicago Title's attorney (Sweis) should have checked the records of the city case in which the receiver's lien was issued based on the fact a receiver was appointed and the first attempt at service at the real estate revealed it was vacant and boarded up, and yet TBI continued to try to serve Terrell at the real estate. Terrell also notes the defective summons that failed to show Terrell's address on its face and the absence of any motion to appoint a special process server or corresponding orders by the court approving the appointment of a special process server or service by publication. Terrell implies the foregoing gave Chicago Title and Al-Naffouri notice of facts "that would put a prudent man on inquiry" that service by publication may have been defective. In sum, he argues "[t]he Record, at the time the trust and Al-Naffouri were assigned their interests, establish that the efforts to serve [Terrell] were casual, that they were on notice of its glaring deficiencies, that this knowledge stripped them of their claimed Section 2-1401(e) protection and requires reversal of the trial court's order."

¶ 23 The law is clear that "[i]n determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, which includes the pleadings, the return on the process, the verdict of the jury, and the judgment or decree of the court." *State Bank of Zurich v. Thill*, 113 Ill. 2d 294, 313 (1986). In that case, our supreme court also stated the rule that "[i]n determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, which includes the pleadings, the return on the process, the verdict of the jury, and the judgment or decree of the court." *Thill*, 113 Ill. 2d at 313. In this case, however, Chicago Title and Al-Naffouri have pointed to no more than the

affidavits TBI submitted in support of service by publication and cited numerous examples in which the court relied upon the facial sufficiency of such documents to find that no jurisdictional defect was apparent from the face of the record. Al-Naffouri argues that in "those cases, such as *Thill*, where a third-party purchaser was found not to be entitled to protection, the defects appears [*sic*] on the face of the *service of process documents*." (Emphasis added.) Further, Chicago Title relies on this court's decision in *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 37, in support of its argument the service affidavits in this *ca*se comply with section 2-206 of the Code. In *Richards*, the defendant argued the plaintiff's affidavits for service by publication failed to comply with section 2-206(a) of the Code because the plaintiff's process servers never spoke to the defendant's neighbors and the plaintiff lacked a good faith effort because it was aware of a municipal case in which the plaintiff and the defendant were both parties. *Richards*, 2016 IL App (1st) 152083, ¶ 32. This court held the plaintiff in that case "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." *Id*. ¶ 33. Thus, Chicago Title argues the affidavits in this case "are facially compliant with the statute for service by publication such that any party reviewing the Foreclosure record would find that publication service was proper." However, *Richards* is distinguishable from this case. In *Richards*, the defendant averred she lived at the property address where the plaintiff attempted to serve the defendant "on numerous occasions" (14 times) "when it appeared [the defendant] was at home, but was not answering." *Id*. ¶ *35*. The *Richards* court held the plaintiff "was not required to speak with [the] defendant's neighbors regarding her whereabouts to fulfill the due inquiry requirement." *Id*. On the contrary, this is not a case where "the plaintiff knew that the defendant resided at the address where service was attempted and made repeated attempts to serve him there." *Id*. ¶ 35 (citing *Household Finance Corp. v. Volpert*, 227 Ill. App. 3d 453, 455 (1992)). Additionally, in *Richards*, the defendant's

argument she could have been located through the municipal action was not persuasive because, "while the record [in *Richards*] establishes that [the] plaintiff was aware of [the] defendant's municipal action, the record does not demonstrate that [the] defendant's whereabouts could be ascertained through an inquiry into that action" because the record did not contain an appearance by the defendant in that action. *Id*. ¶ 36.

¶ 24 In this case, Terrell has alleged his address could have been located through the original city case and this court has been directed to nothing to the contrary.

¶ 25 Al-Naffouri argues *U.S. Bank National Association v. Rahman*, 2016 IL App (2d) 150040, is instructive on the question of when a defect is affirmatively shown by the "record proper." *Rahman* does not stand for the proposition Al-Naffouri suggests—that a defect is affirmatively shown by the "record proper" only when the defect appears on the face of the service affidavits. See *Rahman*, 2016 IL App (2d) 150040, ¶ 27 ("In determining whether a lack of jurisdiction is apparent from the record, we look at the whole record ***. [Citation.] A lack of jurisdiction is apparent from the record if it does not require inquiry beyond the face of the record."). In *Rahman*, the defendant argued the lack of jurisdiction was apparent from the face of the record because the service lists evidenced that the plaintiff served the defendant in Cook County using a special process server and the record contained no order appointing a special process server as was required in Cook County (735 ILCS 5/2-202(a) (West 2008)). *Id*. ¶ 28. The defendant contended that designations on the service lists stood for addresses outside of DuPage County and therefore the record was clear that the plaintiff served the defendant in Cook County "in contravention of section 2-202(a)." *Id.* The *Rahman* court agreed service was improper and thus the trial court lacked personal jurisdiction because service was made in Cook County via special process server but the plaintiff had not sought the appointment of a special process server as required by the statute. *Id*. ¶ 33. Nonetheless, the court found the jurisdictional defect "did not affirmatively appear

on the face of the record." *Id*. The *Rahman* court rejected the defendant's contention that certain designations on the summonses indicated service outside of DuPage County (and, consequently, that a court order appointing a special process server was required). The court found that nothing on the summonses or the corresponding service lists showed that the designations "necessarily designated summonses to be served outside of DuPage County." *Id.* ¶ 38. Further, the court found that, "[l]ike with the summonses, it was impossible to determine in which county service occurred from the face of the affidavits—outside materials were necessary." *Id.* ¶ 39. Therefore, the court could not say that the jurisdictional defect affirmatively appeared on the face of the record. *Id.*

¶ 26 Nothing in *Rahman* suggests that the affidavit for service by publication must be defective on its face to defeat the protection provided by section 2-1401(e) if the defect is otherwise affirmatively shown on the face of the record as a whole. The *Rahman* court found only that "a simple review of the record would not have revealed a jurisdictional defect." *Rahman*, 2016 IL App (2d) 150040, ¶ 42. Nor does the decision in *Mid-America Federal Savings and Loan Ass'n v. Kosiewicz*, 170 Ill. App. 3d 316 (1988), also cited by Al-Naffouri, expressly limit consideration to the service of process documents as opposed to the "whole record." In *Kosiewicz*, the trial court initially denied the defendant's 2-1401 petition to vacate a judgment of foreclosure. *Id.* at 319. "The basis of the petition was that the court had no jurisdiction to enter the orders complained of because [the] defendant had never been served with process." *Id.* The defendant had allegedly been served by substitute service on his wife. *Id.* at 318. The defendant filed a motion to reconsider and the trial court held an evidentiary hearing. After the evidentiary hearing, the trial court, relying on *Thill*, granted the petition, quashed the summons, and vacated the judgment of foreclosure. *Id.* at 319-20. The parties who purchased the property at a sheriff's sale appealed, arguing the sheriff's return of service was "not facially defective, thus precluding [the] defendant's challenge." *Id.* at 320.

¶ 27 The *Kosiewicz* court held "the return of service *** was not facially defective." *Id.* at 323. Importantly, however, the *Kosiewicz* court framed the question as "whether a third-party purchaser at a judicial sale would reasonably be put on notice that there was a jurisdictional defect in the underlying proceedings." *Kosiewicz*, 170 Ill. App. 3d at 321. The court also held "[i]t was improper for the court to hold a hearing to permit [the] defendant to challenge the facially valid service against *bona fide* purchasers of the property." *Id.* at 324 (citing *City of Rockford v. Lemar*, 157 Ill. App. 3d 350, 352-53 (1987)). That holding does not imply that only defects appearing on the face of the service documents will defeat section 2-1401(e) protection.

¶ 28 In *Lemar*, the court held the affidavit used by the plaintiff for service by publication was improperly worded and, therefore, was insufficient as a matter of law. *Lemar*, 157 Ill. App. 3d at 353. The court found the language of the affidavit suggested a reasonable inquiry had failed to reveal the names and addresses of interested persons other than the defendant but was not sufficient to allege a reasonable inquiry to obtain the address of the defendant. *Id.* at 353-54. The court held that "based upon the affidavit filed, the third-party purchaser should have been on notice that service by publication on [the] defendant was not proper." *Id.* at 354. The *Lemar* court relied solely on a defect in the affidavit for service by publication to find that a lack of jurisdiction appeared from the record proper (*Lemar*, 157 Ill. App. 3d at 354), but the court did not hold that section 2-1401(e) protection applies whenever the service documents appear to confer jurisdiction regardless of the status of the remainder of the record (see *id.*). The *Lemar* court cited *Thill* for the proposition that "innocent purchasers cannot rely on jurisdictional recitals in a foreclosure judgment to defeat a mortgagor's collateral attack where defective substituted service is apparent from the face of the record." *Lemar*, 157 Ill. App. 3d at 354 (citing *Thill*, 113 Ill. 2d at 316-17). The *Lemar* court further held that the plaintiff "did not fulfill the obligation of 'due inquiry' under section 2-206." *Lemar*, 157 Ill. App. 3d at 354. In that case, the plaintiff's attorney

merely examined the telephone directory for the defendant's address." *Id.* The defendant argued that "if [the] plaintiff had reviewed court records, the recorder's office would have shown [the] defendant's address from a warranty deed. Similarly, a trust deed from [the] defendant *** would have also revealed [the] defendant's address. In addition, a search of the [county] treasurer's office would have revealed defendant's address pursuant to his payment of 1983 real estate taxes." *Id.* at 354. The *Lemar* court acknowledged that "similar arguments attacking 'due inquiry' were rejected" in a case where "an affidavit affirmatively established reasonable inquiry in conformity with the statute." *Id.* (citing *Greenwald v. McCarthey*, 402 Ill. 135 (1948)). But in *Lemar*, the affidavit did not affirmatively establish "due inquiry." *Id.* at 354.

¶ 29 The "whole record" for purposes of the inquiry at hand is not limited to the service of process documents. It is true that in *Thill*, 113 Ill. 2d at 313-14, our supreme court held that the alleged jurisdictional defect in that case was apparent from the record where an affidavit of substitute service failed to state that the person making service left a copy of the summons *for the defendant* where the affidavit stated only that the summons was delivered to the defendant's wife, who was also named as a defendant, or that a copy was mailed to the defendant in a sealed envelope with postage prepaid addressed to the defendant at his usual place of abode." Nonetheless, in that case, our supreme court also stated the rule that "[i]n determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, which includes the pleadings, the return on the process, the verdict of the jury, and the judgment or decree of the court." *Id*. at 313. The fact our supreme court did not need to look beyond the service of process affidavits in *Thill* does not equate to a holding that the "whole record" need not be examined to determine whether a jurisdictional defect is apparent.

¶ 30 In *Thill*, the third-party purchasers relied on the finding in the foreclosure judgment that the defendant was personally served and the circuit court had jurisdiction over all of the parties and argued

that those jurisdictional findings are presumptively valid and "conclusive upon collateral attack unless [they are] *irreconcilable* with the facts disclosed in the record." (Emphasis in original.) *Thill*, 113 Ill. 2d at 316. Our supreme court found the return of service, "which is a part of the record, *contradicts* the jurisdictional findings of the circuit court in that it does not show that substituted service was had on the defendant." (Emphasis in original.) *Id.* at 316-17. The court held that "[b]ecause a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record, the intervenors' argument, that jurisdictional findings in a collateral proceeding must be regarded as conclusive and binding upon all parties to the record, is therefore without merit." *Id.* at 317. For the following reasons, we reject Chicago Title's and Al-Naffouri's assertion that a *bona fide* purchaser need look no further than the affidavits for service of process to be entitled to the protections under section 2-1401(e). In this case Terrell argues that the record as a whole upon circumspect scrutiny reveals irregularities that cast doubt on the legitimacy of the service by publication in this case. Terrell's primary authority for looking beyond affidavit for the service by publication is *In re Application of the County Collector v. Miller*, 397 Ill. App. 3d 535, 550-51 (2009), in which the court held that "[w]here the purchaser's inquiry reveals the possibility that the trial court may not have had personal jurisdiction to enter a judgment necessary to his taking good title to property, that purchaser cannot be a *bona fide* purchaser unless the purchaser has resolved those issues. [Citation.]" (citing *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 477 (2006)).

¶ 31 In *Miller*, the holder of legal title to property filed a 2-1401 petition to set aside a tax deed issued to a tax purchaser. *Miller*, 397 Ill. App. 3d at 536. The title holder argued the tax deed was void because the tax purchaser "failed to conduct a diligent inquiry to determine who owned the property and failed to serve any notice whatsoever of the sale." *Id.* at 537. The tax purchaser had sold the property to a third-party buyer. *Id.* The third-party buyer argued "that he was a *bona fide* subsequent purchaser of

the property for value and that because a lack of jurisdiction did not affirmatively appear on the face of the tax deed proceeding record, under section 2-1401(e) of the Code ***, he had a superior right to the property." *Id.* at 537. The title holder argued that under section 2-1401(e) the third-party buyer could not be considered a *bona fide* purchaser because the circuit court's lack of jurisdiction to enter the tax deed was apparent from the face of the tax deed proceeding record. *Id.* The title holder attached to its petition the tax purchaser's application for a tax deed. *Id.* at 538. The application for tax deed stated the tax purchaser sent notice to a different entity, which was not involved in the appeal. *Id.* The tax purchaser's attorney submitted an affidavit in support of the application for a tax deed in which the attorney averred a tract index search was conducted, but a printout of the search revealed the search was conducted from the Chicago Title Insurance Company's computerized tract index rather than the Cook County Recorder of Deeds' grantor-grantee index. *Id.* A disclaimer at the bottom of the search stated the search "would not disclose any recorded instruments not containing the legal description to the property, including deeds or mortgages." *Id.* The legal description of the property used for the search "included several lots, rather than only the property in question." *Id.* The legal description of the property used in the "tract index search" seemed to have been taken from a tax deed issued for property adjacent to the property at issue. The tax deed for the adjacent property described the property differently from the property at issue and identified that property with a Parcel Identification Number ("PIN") that was different than the PIN for the property at issue. *Id.* at 538-39.

¶ 32 The title holder sought to have the tax deed declared void because (1) the errors in the tax deed proceeding showed a complete lack of diligence on the part of [the tax purchaser] in ascertaining [the title holder's] identity as the owner of the property and in failing to give [the title holder] any notice of the tax deed proceedings, (2) the title holder's recorded interest in the property was readily ascertainable from examination of the official public records, and (3) the third-party buyer could not be a *bona fide*

purchaser within the meaning of section 2-1401(e) because he was also charged with knowledge of the contents of the public records. He also should have known that [the tax purchaser] failed to conduct a diligent inquiry and failed to give proper notice. *Id.* at 539. The third-party buyer argued he was a *bona fide* purchaser because the lack of jurisdiction did not appear from the face of the record of the tax deed proceeding. *Id.* at 540. "Specifically, [the third-party buyer] claimed that [the title holder] had to look to extrinsic evidence to establish the jurisdictional defect in the tax deed proceedings. [The third-party buyer] also argued that the notice procedures used comported with due process." *Id.*

¶ 33 The *Miller* court first held that the tax purchaser failed to make a diligent inquiry and effort to ascertain the identity of and to serve the title holder as required by the Property Tax Code. *Id.* at 545-46. The tax purchaser failed to consult the public records, relied upon an unofficial index "upon which a party conducting a title search should never rely," and "did not use a correct legal description of the property" when it did so. *Id.* at 545-46. As a result, the title holder received no notice whatsoever in violation of his due process rights and the tax deed was void. *Id.* at 548. The *Miller* court then had to determine what impact that had on the third-party buyer's rights as a subsequent purchaser for value. The court noted that "to be entitled to that protection from an order setting aside a tax deed, the circuit court's lack of jurisdiction to enter the deed cannot have appeared on the face of the record at the time the purchaser acquired its interest in the property." *Id.* at 549. The court explained that "a purchaser is not a *bona fide* purchaser if he had constructive notice of an outstanding title or right in another person." *Id.* Additionally, "a purchaser having notice of facts that would put a prudent person on inquiry is chargeable with knowledge of other facts the person might have discovered by diligent inquiry." *Id.*

¶ 34 In *Miller*, the court found, in part, that the third-party buyer's title inquiry should have revealed that the tax purchaser had purchased the property at a tax sale which would have placed him on inquiry notice "to investigate the record of the tax deed proceeding." *Id.* at 550. There, another party who had

been interested in purchasing the property at issue had consulted the public records and learned the title holder owned the property in a land trust. *Id.* at 540. The *Miller* court found that an investigation of the tax deed proceeding record would have disclosed numerous deficiencies, including that the tax purchaser never conducted a search of the public records to determine ownership of the property but instead had relied on "a tract index search based on an incorrect legal description." *Id.* at 550. The *Miller* court held "[w]here the purchaser's inquiry reveals the possibility that the trial court may not have had personal jurisdiction to enter a judgment necessary to his taking good title to property, that purchaser cannot be a *bona fide* purchaser unless the purchaser has resolved those issues." *Id.* at 550 (citing *Bank of New York*, 369 Ill. App. 3d at 477).

¶ 35 In *Bank of New York*, 369 Ill. App. 3d at 473, the plaintiff filed a foreclosure complaint naming as defendants "the unknown heirs and legatees, if any, of Ruth Hatch, a/k/a Ruth Slater, unknown owners and nonrecord claimants." The plaintiff filed an affidavit for service by publication pursuant to section 2-206(a) of the Code and then served the unknown heirs of Ruth Hatch by publication. *Id*. After service was published and before any judgment on the foreclosure complaint, the defendant filed a motion to dismiss the complaint alleging he was an heir of Ruth Hatch "and that service by publication was insufficient as to him because [the] plaintiff failed to conduct a proper investigation to locate his whereabouts and effect personal service upon him prior to service by publication." *Id*. The defendant was incarcerated, and he attached to his motion an affidavit stating the defendant mailed a copy of the motion to plaintiff's attorney's office. *Id*. The defendant later filed a supplemental motion to dismiss. *Id*. at 474. The trial court entered summary judgment in favor of the plaintiff and against two of the defendant's brothers, both of whom appeared in the case, without ruling on the defendant's motion to dismiss or supplemental motion to dismiss. *Id*. at 473-74. The property was sold at a judicial sale; and after the judicial sale, the defendant filed a motion to vacate the judgment of foreclosure and sale. *Id*. at

474. The trial court maintained that it only became aware of the defendant after he wrote a letter to the court after filing the motion to vacate and a subsequent motion for a hearing or ruling on the motion. *Id*. After the date the trial court stated it first became aware of the defendant the purchaser at the tax sale sold the property to a third-party buyer. *Id*. The trial court initially granted the defendant's motion for relief from judgment but later granted a motion to reconsider after the third-party purchasers intervened. *Id*. at 475. The trial court determined that the third-party purchasers were protected by section 2-1401(e) of the Code. The defendant appealed, and this court reversed. *Id*. at 475, 478.

¶ 36 First, this court held the trial court failed to obtain personal jurisdiction over the defendant based on service by publication prior to entry of the judgment of foreclosure and sale. *Id*. The court began by noting that "due inquiry and due diligence are statutory prerequisites for service by publication." *Id*. Further,

> "[o]ur courts have determined that these statutory prerequisites are not intended as *pro forma* or useless phrases requiring mere perfunctory performance, but, on the contrary, require an honest and well-directed effort to ascertain the whereabouts of a defendant by inquiry as full as circumstances permit. [Citations.] Where the efforts to comply with these statutory provisions have been casual, routine, or spiritless, service by publication is not justified. [Citations.]
>
> A defendant may challenge a plaintiff's section 2-206(a) affidavit by filing an affidavit showing that upon due inquiry, he could have been found. [Citation.] Upon such a challenge, a plaintiff must produce evidence establishing due inquiry. [Citation.]" *Id*. at 476.

The *Bank of New York* court held the record revealed "no more than a cursory inquiry" prior to the filing of the affidavit for service by publication. *Id*. The plaintiff "was in contact with at least two of the

decedent's heirs, ***, yet failed to question either of them as to [the] defendant's existence or whereabouts prior to seeking service by publication." *Id.* Moreover, the plaintiff became aware of the defendant prior to the judgment of foreclosure and sale but failed to serve the defendant personally. *Id.* The court held the plaintiff's affidavit for service by publication did not "affirmatively establish due inquiry and diligence, and was therefore insufficient to give the trial court personal jurisdiction over [the] defendant." *Id.*

¶ 37 The court went on to hold that the trial court "erred in holding that the [third-party purchasers] were *bona fide* purchasers *** entitled to protection under section 2-1401(e)." *Id.* at 477. The court found that the trial court's lack of jurisdiction affirmatively appeared in the record. *Id.* The court noted that "[i]n determining whether a lack of jurisdiction is apparent from the record, reviewing courts look to the whole record, which includes the pleadings, the return on process, *** and the [trial] court's judgment or decree." *Id.* "A subsequent purchaser cannot be a *bona fide* purchaser for value if he has actual or constructive notice of the outstanding rights of other parties. [Citation.] Moreover, a purchaser having notice of facts that would put a prudent man on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry. [Citation.]" *Id.* The *Bank of New York* court held the "lack of jurisdiction affirmatively appears in the record in the form of [the] plaintiff's defective affidavit and the allegations set forth in [the] defendant's motions to dismiss for insufficiency of service." Those allegations "were sufficient to put the [third-party purchasers] on notice that service by publication on [the] defendant might have been improper." *Id.*

¶ 38 Based on the foregoing authorities, we clearly may not restrain our examination of the record for purposes of determining whether a jurisdictional defect is apparent to the affidavits for service by publication. *First Federal Savings & Loan Ass'n of Chicago v. Brown*, 74 Ill. App. 3d 901, 906 (1979) ("The fact that the affidavit is filed does not foreclose further inquiry into the accuracy of the statements

contained therein. 'Courts will, if necessary, look behind the document's allegations and if they do not speak the whole truth, jurisdiction will not obtain.' [Citation.]"). For the reasons stated above, we find the cases cited by Chicago Title and Al-Naffouri are not antagonistic to that view. We find it would be inconsistent with *Thill* to hold that a third-party purchaser may rely on form affidavits for service by publication for valid jurisdiction where the record as a whole contradicts a finding the circuit court properly obtained personal jurisdiction over all of the parties. The *Thill* court concluded that "a purchaser is not entitled to rely on a judicial proceeding the record of which evinces a lack of jurisdiction." Nor is our supreme court's decision in *Greenwald* inconsistent with our holding. The *Greenwald* court was concerned with "parol testimony" that a service affidavit was falsely made. See *Greenwald*, 402 Ill. at 141 (citing *Rivard v. Gardner*, 39 Ill. 125 (1866); see also *Uptown Federal Savings & Loan Ass'n of Chicago v. Vasavid*, 94 Ill. App. 3d 531, 535 (1981) ("The *Greenwald* court noted that the alleged jurisdictional defect required inquiry beyond the face of the record and thus concluded that the innocent purchaser's right could not be affected."). We need not rely on parol evidence in this case. Upon examination of "the whole record" an issue with personal jurisdiction based on service by publication becomes immediately apparent on the face of the record from the absence of a motion or order concerning a special process server.

¶ 39 "Section 2–202 of the Code requires that private detectives serving process in Cook County be appointed by the trial court. [Citations.]" *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 912 (2008). "[F]rom a plain reading of section 2-202, a licensed or registered private detective is authorized to serve process without court appointment only in counties with a population of less than [2] million. 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). Chicago Title's only response to Terrell's argument that a jurisdictional defect is apparent from the face of the record on this basis is that Terrell waived this argument by failing to raise it in the trial court. Al-Naffouri also argues Terrell waived any argument concerning the lack of an order appointing the special process server in this case. Al-Naffouri adds: "The Court can take judicial notice of the General Administrative Order 2007-03 relating to Standing Orders for the appointment of special process servers, and the orders which were entered thereunder."

¶ 40 "While we *may* consider issues not raised in the trial court waived, waiver is not a limitation on the reviewing court." (Emphasis added.) *Perez v. Chicago Park District*, 2016 IL App (1st) 153101, ¶ 11. "We may relax the harsh mandates of the waiver doctrine if we feel that the particular issue would aid in maintaining a uniform body of precedent or if the interests of justice require the issue's consideration." *Skidmore v. Throgmorton*, 323 Ill. App. 3d 417, 420 (2001). We find this case presents a situation in which the interests of justice require us to consider the allegedly waived issue. "Parties are not to be prejudiced of their rights or deprived of their property, without notice. When that notice is constructively given, the party claiming benefits under it must show a strict compliance with every requirement of the statute. Nothing less will invest the court with jurisdiction or give validity to the decree which may be rendered." *Boyland v. Boyland*, 18 Ill. 551, 553 (1857). "Although the Code contemplates service by publication, the appellate court long ago recognized that such service is 'an extraordinary means of serving notice—one unknown to the common law' and that, from the perspective of the person to be notified, it is the 'least satisfactory method' of giving notice and 'often it is no notice at all.' [Citation.] A party defending notice by publication 'must show a strict compliance with every requirement of the statute.' [Citation.]" *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 34; see also *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 20 ("strict compliance with the statutes governing the service of process is required before a

court will acquire personal jurisdiction over the person served"). Defects in service of process are "neither 'technical' nor insubstantial." *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 20. The failure to strictly comply with the requirement that a private entity be appointed by the circuit court before serving process deprives the court of personal jurisdiction. See *Schorsch*, 172 Ill. App. 3d at 998. Because of the importance of issues concerning the jurisdiction of the court and the deprivation of a party's right to property, we will consider the issue of the absence of an order appointing a special process server.

¶ 41 As previously discussed, in *Rahman*, 2016 IL App (2d) 150040, ¶ 28, the defendant argued a jurisdictional defect was apparent on the face of the record where the plaintiff served the defendant via a special process server in Cook County, "but the record contain[ed] no order appointing a special process server." The third-party purchasers in that case referred the court "to the standing order, filed in Cook County chancery court, that permitted [the special process server] to serve process for [the plaintiff's attorney] for a period of three months, including [when the defendant was served.] Therefore, they argue[d], service on [the] defendant in Cook County was authorized by a court order and did not violate section 2-202(a)." *Rahman*, 2016 IL App (2d) 150040, ¶ 30. The *Rahman* court rejected the argument "that the standing order appointing [the firm in that case as a] special process server, issued by a Cook County circuit court pursuant to [General Administrative Order (GAO)] 2007-03, made service proper." *Id*. ¶ 35. In *Rahman*, because the "case originated in DuPage County, GAO 2007-03 was inapplicable." *Id*. The *Rahman* court noted that "the language of GAO 2007-03 *** provided that law firms handling mortgage foreclosure cases in the Cook County chancery division may move for standing orders for the appointment of designated special process servers." *Id*.

¶ 42 The GAO did not dispense with the requirement that the law firm handling a foreclosure obtain an order from the court appointing a special process server; it merely provided a different process for

doing so. "The only difference the GAO makes in the service of process procedure is that a law firm may, if it chooses, obtain a standing order appointing special process servers instead of having to file a motion for such appointment separately in each mortgage foreclosure case." *OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶ 28. The standing orders are of limited duration. *Id.* ¶ 40 ("any order entered pursuant to the GAO can only be for one quarter, for a definite three-month period"). In this case, nothing in the record indicates whether plaintiff's attorney had obtained a standing order or, if it did, the duration of the order; nor do the parties allege one existed. Al-Naffouri's allusion to GAO 2007-03 is not persuasive—a review of the record by Chicago Title and Al-Naffouri would have revealed that Terrell was purportedly served by publication after a failed attempt at personal service by a special process server and the absence of any order appointing a special process server. The significance of those facts, which affirmatively appear from the record, is that service by publication was defective and, consequently, there was a lack of personal jurisdiction over Terrell. See *U.S. Bank, N.A. v. Dzis*, 2011 IL App (1st) 102812, ¶ 18 ("The trial court should not lend credence to an assertion that process cannot be served on a defendant if the plaintiff has not even attempted proper service of process. If the GAO did not validly permit Codilis to obtain an order for appointment of special process servers for all mortgage foreclosure cases Codilis filed between August 25, 2009, and November 30, 2009, then the trial court here should not have permitted service on Dzis by publication."). Based on the record before this court, we find that Chicago Title and Al-Naffouri's "interests in the subject property was not protected by section 2-1401(e) of the Code because a lack of jurisdiction affirmatively appears from the record." *Id.*

¶ 43 In this case, the trial court initially granted the motions to dismiss based solely on section 2-1401(e) but upon further discussion with TBI's attorney, the court found that "part and parcel of my determination as to whether there was a defect *** I had to evaluate the sufficiency of the affidavit."

The court stated it did find that the affidavits of due diligence were proper. However, the court did so without an evidentiary hearing. As the trial court noted in this case, in *Thill*, our supreme court found a jurisdictional defect affirmatively appeared on the record, therefore the third-party purchaser was not a *bona fide* purchaser under section 2-1401(e) and the collateral attack could occur. The court held that "[b]ecause the record affirmatively shows that service on the defendant was not had in the manner provided by statute, the intervenors, notwithstanding their purported status as innocent third-party purchasers, cannot rely on the jurisdictional recital in the foreclosure judgment to prevent a collateral attack on that judgment." *Thill*, 113 Ill. 2d at 314. Our supreme court held "the defendants' challenge to the service in the present case and the filing of the affidavits of the process servers in response to this challenge created an issue of fact as to the service which should have been resolved by the circuit court" and remanded for "an evidentiary hearing on the validity of the purported substituted service of summons." *Thill*, 113 Ill. 2d at 311-12, 317. We also find that an evidentiary hearing is required in this case.

¶ 44 "[A]n evidentiary hearing is warranted only if the defendant is able to present a significant issue with respect to the truthfulness of the affidavit filed by the plaintiff's agent for service by publication." (Internal quotation marks and citations omitted.) *Neighborhood Lending Services, Inc. v. Griffin*, 2018 IL App (1st) 162855, ¶ 25. In *Griffin*, this court held the defendant's arguments failed to establish that an evidentiary hearing was warranted on his motion to quash service by publication. *Griffin*, 2018 IL App (1st) 162855, ¶ 25. This case is distinguishable. In *Griffin*, a process server attempted to serve the defendant at what the defendant later admitted was his residence, but the process server was told by the defendant's wife that the defendant did not live there and the wife refused to provide any information to the process server. *Id*. ¶¶ 5, 10. The defendant's motion was based on the fact he lived at the address where the process server attempted to serve him. *Id*. ¶ 10. This court held it could not find that "the

plaintiff engaged in a 'casual, routine, or spiritless' [citation] effort[] to comply with the statutory requirement." *Id*. ¶ 21 (citing *Bank of New York*, 369 Ill. App 3d at 476). The court found "[t]his is a case in which the defendant's spouse—a resident of the single-family home at issue—directly informed the process server that [the] defendant did not reside at that address and no alternate address could be found." *Id*. The defendant argued the trial court should have conducted an evidentiary hearing to determine whether the defendant lived at the address at the time the process server attempted to serve him there and whether the affidavits for service by publication were filed prior to the actual service by publication. *Id*. ¶ 25. As to the latter argument, the court found the defendant failed to "point to any authority stating that [the] plaintiff's affidavits must be filed prior to the publication of the notice." *Id*. ¶ 27. As to the former argument, the court held "it is irrelevant whether [the] defendant actually lived at the *** property at the time service was attempted." (Emphasis omitted.) *Id*. ¶ 26. "The question is whether [the] plaintiff diligently attempted to find [the] defendant to serve him personally." *Id*. On that question, the defendant failed to present "a significant issue with respect to the truthfulness [citation] of the process server's affidavit." *Id*. In this case, however, we find Terrell has presented a significant issue with respect to whether there was "an honest and well-directed effort to ascertain" Terrell's whereabouts as fully as circumstances permitted. See *id*. ¶¶ 20-21 (citing *Bank of New York*, 369 Ill. App. 3d at 476). In *Griffin*, the inquiries by the process server discovered the defendant's actual residence. *Griffin*, 2018 IL App (1st) 162855, ¶ 6 (detailing efforts to discover the place of residence of the defendant).[4] Unlike *Griffin*, in this case the process server did not discover Terrell's residential address and there was never an attempt to serve Terrell at his actual residence. *Id*. ¶ 22. Nor is this a case where Terrell's allegations fail to refute the process server's averments. *Id*. ¶ 22.

[4] We also note the electronic inquiries by the special process server in *Griffin* were more extensive than those conducted in this case; but see *infra* ¶ 46.

¶ 45 We also find *First Federal Savings and Loan Ass'n of Chicago v. Brown*, 74 Ill. App. 3d 901, 903 (1979), instructive. There, the plaintiff attempted to serve the defendants by publication in a mortgage foreclosure action. After the trial court entered a default judgment of foreclosure one of the defendants filed a petition alleging the plaintiff could have found the defendant by due inquiry through his employer, which was listed on the mortgage application and "by making due inquiry of his attorney of record in his *** divorce action, of which [the] plaintiff was aware at the time of service by publication." *Id*. at 904. The defendant later filed an amended petition seeking to quash the service by publication and a purported substitute service at his abode. *Id*. at 904-05. This court vacated the trial court's order denying the defendant's amended petition and remanded the cause for an evidentiary hearing on the petition. *Id*. at 905. This court held "[w]ith respect to the service by publication, the trial court should have conducted a hearing on [the] defendant's amended petition." *Id*. at 906. This court held "[t]he fact that the affidavit is filed does not foreclose further inquiry into the accuracy of the statements contained therein. Courts will, if necessary, look behind the document's allegations and if they do not speak the whole truth, jurisdiction will not obtain." (Internal quotation marks omitted.) *Id*. at 906. After reciting the defendant's allegations concerning how the plaintiff could have been located, this court wrote:

> "Our supreme court has said that the phrases 'due inquiry' and 'diligent inquiry' in the statute governing service by publication 'are not intended as useless phrases but are put there for a purpose. *** A perfunctory inquiry does not comply with the provisions of the statute. An honest and well directed effort must be made to ascertain the names and addresses of unknown parties. The inquiry must be as full as the circumstances of the particular situation will permit.' [Citation.] Moreover, checking employment records

> and *court records* may be part of the 'due inquiry' required of a plaintiff relying on service by publication, depending on the circumstances. [Citations.]
>
> It is apparent that defendant by his amended petition and affidavit presented a significant issue with respect to the truthfulness of the affidavit filed by plaintiff's attorney for service by publication. It became incumbent upon plaintiff to either challenge the accuracy of defendant's assertions or to produce evidence showing that 'due inquiry' had been made to locate defendant so that process could be served on him." (Emphasis added.) *Id*. at 907.

This court held the plaintiff "should answer [the] defendant's amended petition as to the factual matters there alleged and the trial court should hold an evidentiary hearing, with the burden of proof on plaintiff to establish that 'due inquiry' was made to locate [the] defendant." *Id*. at 907-08.[5] See also *Richards*, 2016 IL App (1st) 152083, ¶ 31.

¶ 46 In this case, having found that Chicago Title and Al-Naffouri are not *bona fide* purchasers under section 2-1401(e), we hold that a result similar to that in *Brown* and contrary to that in *Griffin* is warranted here. We make no findings and offer no suggestion as to how the inquiry to find Terrell or his place of residence should have been conducted. The inquiry for the trial court after hearing the evidence is whether TBI complied with all of the statutory requirements for service by publication including the appointment of a special process server and, if necessary, whether TBI made an honest and well-directed effort to ascertain Terrell's whereabouts as fully as circumstances permitted. In light of our holding we have no need to address Terrell's remaining arguments on appeal. Accordingly, the trial

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[5] We note that in *Brown*, no 2-1401(e) issue arose because the record did not indicate whether the property had been conveyed to a third party. *Brown*, 74 Ill. App. 3d at 908.

court's judgment granting defendants' motions to dismiss is reversed and the cause remanded for an evidentiary hearing on Terrell's petition pursuant to section 2-1401.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed, and the cause remanded for further proceedings not inconsistent with this order.

¶ 49 Reversed and remanded.