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2019 IL App (3d) 180222-U

Order filed May 29, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

U.S. BANK TRUST, N.A.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	
	)	
ZENA ALLEYNE,	)	Appeal No. 3-18-0222
	)	Circuit No. 16-CH-2129
Defendant-Appellant	)	
	)	
(William Alleyne,	)	Honorable
	)	Susan T. O’Leary,
Defendant).	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Carter and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court did not err as a matter of law when it denied Zena’s motion objecting to personal jurisdiction nor did it abuse its discretion when it denied Zena’s motion to vacate the foreclosure judgment, order of sale, confirmation of the report of sale and distribution, and order of possession
- ¶ 2 The plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, brought a foreclosure action against the defendants, Zena Alleyne and William Alleyne. After

the trial court granted the plaintiff's motion to confirm report of sale and distribution and for possession, Zena filed a combined motion objecting to personal jurisdiction and to vacate the foreclosure judgment, order of sale, confirmation of the report of sale and distribution, and order of possession. The court denied the combined motion. Zena appeals.

¶ 3

### FACTS

¶ 4

On December 2, 2016, the plaintiff filed a foreclosure complaint against the defendants. The plaintiff alleged that the subject mortgage was in default due to the defendants' failure to pay the regular monthly mortgage payment due July 1, 2015, and those monthly mortgage payments due and accruing thereafter pursuant to the terms of the mortgage and note at issue. The plaintiff filed a motion to appoint a special process server, which the court granted.

¶ 5

On January 4, 2017, the plaintiff's attorney filed an affidavit for service by publication. The affidavit provided that the defendants could not be found so that process could not be served upon them. The affidavit also stated that the special process server made seven attempts to serve Zena. Attached to the affidavit was an affidavit from the special process server, which provided the attempted service dates ranging from December 8, 2016, to December 14, 2016, and times as early as 7:45 a.m. and as late as 8:47 p.m. at the subject property. Last, the affidavit provided that the defendants' place of residence could not be ascertained upon diligent inquiry and their last known place of residence was at the subject property.

¶ 6

On January 27, 2017, the plaintiff mailed a notice by publication to the defendants.

¶ 7

On March 7, 2017, the plaintiff filed a motion for entry of judgment of foreclosure and sale. The plaintiff also filed a motion for default against the defendants. The trial court granted both motions.

¶ 8

On September 7, 2017, the subject property was sold at the foreclosure sale and the

plaintiff was the highest bidder.

¶ 9 On September 25, 2017, the plaintiff filed its motion to confirm report of sale and distribution and for possession.

¶ 10 On October 16, 2017, the trial court granted the plaintiff's motion to confirm report of sale and distribution and for possession.

¶ 11 On March 6, 2018, Zena filed a *pro se* combined motion objecting to personal jurisdiction and to vacate the foreclosure judgment, order of sale, confirmation of the report of sale and distribution, and order of possession. Zena argued that she had been living open and notoriously at the subject property since November 2006 and she had been in contact with the plaintiff since August 2016 for the purpose of modifying the loan.

¶ 12 On March 26, 2018, the trial court denied Zena's motion.

¶ 13 Zena appeals.

¶ 14 ANALYSIS

¶ 15 On appeal, Zena proceeds *pro se* and argues that the trial court erred when it denied her combined motion objecting to personal jurisdiction and to vacate the foreclosure judgment, order of sale, confirmation of the report of sale and distribution, and order of possession.

¶ 16 I. Motion Objecting to Personal Jurisdiction

¶ 17 Zena argues that the plaintiff's service attempts lacked due and diligent inquiry. Specifically, she argues that the plaintiff's seven service attempts were "ineffectual and not designed to be effective for a person that works 8 or more hours per day." The plaintiff argues that (1) Zena improperly challenged service by publication where she failed to attach an affidavit to her motion demonstrating she could have been found upon due inquiry and (2) it engaged in a due and diligent inquiry to serve Zena. We review the trial court's decision to deny Zena's

motion objecting to personal jurisdiction *de novo*. See *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31 (2006).

¶ 18 Section 2-206(a) of the Code of Civil Procedure (Code) allows service by publication in actions affecting property where the plaintiff files an affidavit showing that a defendant “on due inquiry cannot be found \*\*\* 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.” 735 ILCS 5/2-206(a) (West 2016). Due inquiry and due diligence are statutory prerequisites for service by publication. *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 476 (2006). “A defendant challenging service by publication *must file a counteraffidavit stating that he could have been found upon due inquiry.*” (Emphasis added.) *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 19.

¶ 19 Here, the record shows that the plaintiff’s counsel’s affidavit complied with section 2-206(a) of the Code. The affidavit provided, that on due inquiry, Zena could not be found so that process could not be served, Zena’s last known place of residence was the subject property, and Zena’s place of residence could not be ascertained. In Zena’s motion, she argued that the plaintiff’s service attempts lacked due and diligent inquiry. However, she failed to file a counteraffidavit stating, that upon due inquiry, she could have been found. See *id.* For this reason, the trial court did not err as a matter of law when it denied this portion of Zena’s motion and we need not address whether the plaintiff exercised due inquiry and due diligence in attempting to serve her.

¶ 20 II. Motion to Vacate

¶ 21 Next, Zena argues that the trial court erroneously denied the portion of her motion requesting the court to vacate its orders granting a foreclosure, order of sale, confirmation of the

report of sale and distribution, and possession because it violated section 15-1508(d-5) of the Code (735 ILCS 5/15-1508(d-5) (West 2016)) as she was in communication with the plaintiff regarding loan modification. The plaintiff argues that (1) section 15-1508(d-5) required Zena to file her motion to vacate prior to the confirmation of sale and her motion was untimely and (2) no violation of the Code occurred.

¶ 22 A trial court’s decision to grant or deny a motion to vacate will only be reversed if it was an abuse of discretion. *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001). An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view. *Pavnica v. Veguilla*, 401 Ill. App. 3d 731, 740 (2010).

¶ 23 Section 15-1508(d-5) of the Code provides, in relevant part, as follows:

“The court that entered the judgment shall set aside a sale held pursuant to Section 15-1507, upon motion of the mortgagor at *any time prior to the confirmation of the sale*, if the mortgagor proves by a preponderance of the evidence that (i) the mortgagor has applied for assistance under the Making Home Affordable Program established by the United States Department of the Treasury pursuant to the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009, and (ii) the mortgaged real estate was sold in material violation of the program's requirements for proceeding to a judicial sale.” (Emphasis added.) 735 ILCS 5/15-1508(d-5) (West 2016).

¶ 24 Here, the record demonstrates that the trial court entered its order confirming the report of sale and distribution on October 16, 2017. Nearly five months later, Zena filed her motion to vacate on March 6, 2018. See *id.* It is evident from the record that Zena’s motion to vacate was

untimely and failed to comply with the statutory requirements. Therefore, we cannot say that the court's decision to deny her motion to vacate was arbitrary, fanciful, or unreasonable or that no reasonable person would take the same view. Thus, the court did not abuse its discretion.

¶ 25

#### CONCLUSION

¶ 26

The judgment of the circuit court of Will County is affirmed.

¶ 27

Affirmed.