2012 IL App (1st) 113310-U

No. 1-11-3310

SIXTH DIVISION
December 28, 2012

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAPITAL ONE BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 M1 168935
	)	
ADRIANA M. KOPECKA,	)	The Honorable
	)	Rhoda Davis Sweeney,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Robert E. Gordon concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court's decision finding substitute service of process was proper was not against the manifest weight of the evidence.

¶ 2 Defendant, Adriana Kopecka, appeals the circuit court's order denying her motion to quash service of summons and her subsequent motion to reconsider that order. Defendant contends plaintiff, Capital One Bank, N.A., failed to provide proper service of process. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On August 26, 2008, plaintiff filed a complaint against defendant seeking recovery of a credit card debt. A summons was issued in defendant's name on that date. After unsuccessful attempts to serve defendant, an alias summons was issued on October 24, 2008. Because of continued lack of success in serving defendant, the trial court continued to issue alias summons'. Then, according to a return of service dated July 29, 2010, substitute service was completed at 6:15 p.m. on that date by special process server, Rosa M. Narvaez, on John Moran at defendant's address. The return of service described Moran as a 45-year-old white male standing five feet six inches tall and weighing 200 pounds with brown eyes and black hair. On August 24, 2010, a default order was entered against defendant with a date of October 19, 2010, set for a prove-up hearing.

¶ 5 On October 14, 2010, defendant filed a special and limited appearance and filed a motion to quash service of summons. However, on October 19, 2010, an *ex parte* default judgment was entered against defendant in the amount of $15,359.77. A subsequent order dated October 25, 2010, continued defendant's motion to quash service and vacated the default judgment. On November 23, 2010, the trial court granted defendant's motion to quash the July 29, 2010, service. No record of the proceedings held on that date appears in the record.

¶ 6 On December 14, 2010, an alias summons was issued with a return date of January 25, 2011.[1] According to a return of service dated January 15, 2011, substitute service was completed

[1]On October 1, 2010, the trial court entered an order appointing a standing special process server for the quarter ending December 31, 2010.

at 1:35 p.m. on that date by special process server Narvaez on a 40-year-old white male standing five feet six inches tall and weighing 200 pounds with brown eyes and black hair. The alias summons bears two file stamps from the clerk of the court, one dated January 10, 2011, and one dated January 20, 2011.

¶ 7 On February 8, 2011, the trial court entered an order finding defendant in default with a prove-up hearing scheduled for April 12, 2011. On April 12, 2011, the trial court entered an *ex parte* default judgment against defendant in the amount of $16,481.89.

¶ 8 Then, on June 27, 2011, defendant filed a motion to quash service, attaching thereto a personal affidavit and the affidavit of her husband, Jaroslav Kopecky. Plaintiff did not file an answer to the motion.

¶ 9 In defendant's affidavit, she attested that she lived at 628 Harrison Street, #2, in Oak Park, Illinois, and had resided there for more than 2 years. According to defendant's affidavit, she lived at the address with her husband and two daughters, ages 7 and 12, and she did not reside with anyone named John Doe. Defendant attested that none of the residents in her home fit the description provided in the return of service and that no such person ever lived at the address. Moreover, defendant did not have any family members who fit the description. According to the affidavit, defendant had never been personally served with the summons or complaint and she did not receive any copies of those documents from her husband. In his affidavit, defendant's husband, Jaroslav, attested that he lived at 628 Harrison Street, #2 in Oak Park, Illinois, and had for over 2 years; that no member of his family living at the address was named John Doe or fit the description provided in the return of service; that he, his wife, and two daughters, ages 7 and

12, lived at the address; that he did not match the description provided in the return and his name was not John Doe; that he had never been served with a summons and complaint in the underlying case; and that he was not served on January 15, 2011.

¶ 10 A hearing on the motion was held on August 23, 2011. At the hearing, special process server Narvaez testified over defendant's objection. According to the bystander's report entered by the trial court pursuant to Supreme Court Rule 323(c) (eff. Dec. 13, 2005), Narvaez testified that she was employed by Legal Process Service and, on January 15, 2011, she went to 628 Harrison, Unit 2, in Oak Park, Illinois to serve process on defendant. Narvaez said she had been to the same address on a prior date to serve process on defendant. On the date in question, Narvaez said she accessed the building by requesting that "a resident" buzz her through the secure front door. According to Narvaez, she proceeded to defendant's unit in the building and a man answered the door. Narvaez provided the man with the summons and complaint in the underlying matter; however, the man refused to share his name. As a result, when completing the service return, Narvaez recorded the man's name as "John Doe" and described him as a 40-year-old white male standing five feet six inches tall and weighing around 200 pounds with brown eyes and black hair. Narvaez testified that she mailed a copy of the summons and complaint to the address on January 16, 2011.

¶ 11 After the close of Narvaez's testimony, defendant requested a continuance in order to present the testimony of defendant and her husband. This was defendant's second requested continuance on this basis where she initially made the request prior to Narvaez's testimony. The trial court again denied the requested continuance, finding that all parties were aware of the

hearing date. The trial court then denied defendant's motion to quash service, finding that Narvaez testified credibly and that the prior July 29, 2010, service that had been quashed listed the same individual as accepting service on both occasions, which the trial court did not believe would have occurred had the individual not lived at the address. According to the bystander's report, the trial court found the individual that accepted service would not have "allowed entry to the building and been in that particular unit twice if he did not live there."

¶ 12 On September 21, 2011, defendant filed a motion to reconsider the trial court's August 23, 2011, order denying her motion to quash service. The parties appeared before the court on October 5, 2011, and defendant presented her husband, who was six feet three inches tall with sandy brown hair. No further testimony was allowed and the trial court denied the motion to reconsider. Defendant filed a notice of appeal on November 4, 2011.

¶ 13 Then, on January 10, 2012, over plaintiff's objection, the trial court reopened the evidence to allow defendant's husband to testify. On January 11, 2012, defendant's husband testified that he was six feet four inches tall and 40 years old. Defendant's husband added that he lived at the address in question with his wife and two daughters, now ages 8 and 13, in a two bedroom home. Defendant's husband testified that he was never served in the underlying case; rather, he was at work on both days of alleged service. Defendant's husband stated that no individual fitting the description provided in the returns of service resided at his address on the dates of service and no person fitting that description had ever been at the address. Moreover, defendant's husband added that none of the building residents matched the description provided in the returns and he did not know anyone with the name John Moran. According to defendant's husband, there was

no babysitter present at the address on January 15, 2011. Moreover, on days when both he and his wife were not present, defendant's husband said his daughters were watched by his mother-in-law at another location nearby. Finally, defendant's husband testified that he did not open his wife's mail and that there were no problems with mail delivery at the address. The trial court ultimately ruled that its earlier ruling denying defendant's motion to quash service stood, finding that after viewing "all witnesses including their demeanor and assess[ing] their credibility, *** the testimony of Narvaez was credible and reliable to find that service of process was properly made on the Defendant."

¶ 14 DECISION

¶ 15 Defendant contends the trial court erred in denying her motion to quash substitute service of process and her motion to reconsider that ruling where the service at issue failed to comply with section 2-203(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-203(a) (West 2008)).

¶ 16 In order for a judgment to be valid, the court must have both subject matter and personal jurisdiction over the parties. *Dec & Aque v. Manning*, 248 Ill. App. 3d 341, 347 (1993). Unless waived by a party by entering a general appearance in the matter at issue, personal jurisdiction over the party can be obtained only by service of process as provided for in the statute. *Id*. Section 2-203(a) of the Code provides:

> "Except as otherwise expressly provided, service of summons upon an individual defendant shall be made *** (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the

> summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode, ***." 735 ILCS 5/2-203(a) (West 2008).

¶ 17 When the service of summons has been executed by delivering a copy to a person other than defendant, *i.e.*, substitute service, the return must demonstrate strict compliance with every requirement of section 2-203 of the Code. *Dec & Aque*, 248 Ill. App. 3d at 348. Unlike with a return reciting personal service, a return reciting substitute service does not have a presumption of validity. *Id*. However, the return is *prima facie* evidence of service as to matters within the personal knowledge of the individual executing service of summons, and it cannot be set aside upon the uncorroborated affidavit of the individual served. *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). In cases where a party challenging the substitute service attacks the sheriff's return with affidavits that are deemed sufficient, and no counter-affidavits are filed, the affidavits must be taken as true absent contrary testimony by the individual that executed the service, and the purported service of process be quashed. *Prudential Property & Casualty Insurance Co. v. Dickerson*, 202 Ill. App. 3d 180, 184 (1990).

¶ 18 As an initial matter, the parties dispute the proper standard of review. Defendant argues that, because there was no evidence presented that the individual served resided at defendant's abode, the question before us is not one of fact, but one of law subject to *de novo* review. Plaintiff argues, instead, that the trial court's decision was rendered after considering the credibility of the witness testimony and resolving conflicts in the evidence, and, therefore, is

entitled to deference such that it may not be overturned unless it was against the manifest weight of the evidence.

¶ 19 When a trial court determines a jurisdictional question solely on the basis of documentary evidence, the appellate question is addressed *de novo.* *Rosier v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 561 (2002). However, as was the case here, when, in resolving the service dispute, the trial court holds an evidentiary hearing, the reviewing court should defer to the trial court's findings and reverse the trial court's determination only where it is contrary to the manifest weight of the evidence. *Ruprecht Co. v. Sysco Food Services of Seattle, Inc.*, 309 Ill. App. 3d 113, 119 (1999).

¶ 20 Turning to the substance of defendant's contention, we consider whether there was compliance with section 2-203(a) of the Code. We first note that there is no dispute that defendant lived at the address where Narvaez executed the service. Narvaez completed two returns of service related to the underlying proceeding, one on July 29, 2010, and the second on January 15, 2011. The July 29, 2010, substitute service was quashed by the trial court on November 23, 2010, for unknown reasons. However, both returns of service provided the same description of the individual served with the exception that the age on the first return was 45 years old and the age on the second return was 40 years old. The returns further provided that the summons and a copy of the complaint were left at the address "with a person of his family, of the age of 13 years or upward, informing that person of its contents and also by sending a copy in sealed envelope with postage fully prepaid, addressed to each individual defendant at his usual place of abode." The January 15, 2011, return is *prima face* evidence as to matters within

Narvaez's personal knowledge. *Nibco, Inc.*, 98 Ill. 2d at 172. Accordingly, the description of the individual, the fact that she left the summons and a copy of the complaint, informed him of the contents thereof, and that she subsequently mailed copies to defendant's address are all *prima facie* evidence demonstrating service.

¶ 21 Defendant challenged the January 15, 2011, substitute service by attaching to her motion to quash a personal affidavit and her husband's affidavit, both of which provided that only they and their two daughters, ages 7 and 12 at the time, lived at the residence, that no family member fit the description provided in the return, and that no one fitting the description provided in the return of service ever lived at the address. Although plaintiff did not file counter-affidavits, plaintiff did not rely solely on the return of service. Cf. Dec & Aque, 248 Ill. App. 3d at 348; Dickerson, 202 Ill. App. 3d at 185. Rather, Narvaez testified before the court and was subject to cross-examination. See Nibco, Inc., 98 Ill. 2d at 173 ("[w]hen the question of the validity of the recitals in the return was raised, evidence of the deputy who made the service was presented in support of those recitals. The question of fact was thus presented to the trial court as to whether the person whom the deputy served was a member of the defendant's household on the date that service was made").

¶ 22 Narvaez testified that she served summons' to the same address on two occasions and testified that, on January 15, 2011, she served a white male standing five feet six inches tall and weighing 200 pounds with brown eyes and black hair. Because plaintiff presented the contradictory testimony, the affidavits in which defendant and her husband attested that no one matching the description ever lived in their home, that they had no family members matching the

description, and defendant never received a copy of the summons and complaint were not to be taken as true. See Dickerson, 202 Ill. App. 3d at 184. Instead, as the trier of fact, it was the trial court's duty to observe the conduct of the witness, Narvaez, to determine her credibility, and weigh the evidence. Nibco, Inc., 98 Ill. 2d at 173 (quoting Schulenburg v. Signatrol, Inc., 37 Ill. 2d 352, 356 (1967) (describing the proper standard of review for questions of fact following a bench trial). According to the report of proceedings, the trial court found "the testimony of Narvaez was credible" and that it belied probability that an individual matching the description of the earlier quashed return of service would be at the same location on the date of the second return of service without living at the residence. The trial court's conclusions of fact are entitled to deference. Id.

¶ 23 We recognize that Narvaez never expressly testified that she informed the individual served of the contents of the summons; however, the return stating as much was within the personal knowledge of Narvaez and thus is prima facie evidence that service was completed. See Alvarez v. Feiler, 174 Ill. App. 3d 320, 324 (1988). Whether plaintiff complied with section 2-203(a) was a question of fact that the trial court resolved in plaintiff's favor. We cannot say the trial court's determination that substitute service was properly executed was against the manifest weight of the evidence. We, therefore, conclude that the trial court had jurisdiction to enter the ex parte default judgment on April 12, 2011.

¶ 24 We find Clinton Co. v. Eggleston, 78 Ill. App. 3d 552 (1979), a case cited by defendant for support, to be distinguishable. In Clinton Co., this court found that the defendant's motion to quash substitute service should have been granted where the return of service and the deputy's

testimony failed to demonstrate that service was properly executed under a prior version of the statute. Id. at 556. In particular, the defendant's affidavit called into question the address of service, whether that address was the defendant's place of abode, and whether the individual allegedly served was a "person of his family" as required by the prior statute. Id. Because the "essential allegations" of the defendant's affidavit were not contradicted by the deputy's return of service or testimony, this court found service should have been quashed. Id. at 556-57.

¶ 25 In the case before us, there is no question that the address in the returns of service and the address where Narvaez executed service, namely, 628 Harrison, Unit 2, in Oak Park, Illinois , is defendant's usual place of abode. Moreover, after assessing the credibility of the witnesses and resolving conflicts in the evidence, the trial court here determined that the individual served must have resided at the address in order to have been present on both occasions that service was executed by Narvaez, thereby fulfilling the requirement of "leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there" as required by the current version of the statute. See 735 ILCS 5/2-203(a) (West 2008).

¶ 26 Turning to defendant's arguments regarding the expiration of the standing order appointing a special process server (on December 31, 2010) prior to alleged execution of service (on January 15, 2011), the filing of the alias summons (containing a file stamp of January 10, 2011) prior to the alleged execution of service (on January 15, 2011), the alleged execution of service 30 days after the issuance of the summons (on December 14, 2010) in violation of Supreme Court Rules 101(b)(1) (eff. Feb. 1, 1996) and 102(b) (eff. July 1, 1971), and the return date having been set over 40 days after the issuance of the summons in violation of Supreme

Court Rule 101(b)(1), we find the arguments have been waived. Defendant concedes that the arguments were not raised before the trial court; however, she maintains that the arguments can and should be considered by this court because the arguments are extensions of her prior raised challenges to the propriety of service. We disagree. Before the trial court, defendant challenged whether substitute service was properly executed on defendant. Defendant's arguments did not relate to Narvaez's authority to execute the substitute service or to the validity of the summons.

¶ 27 In general, "a court of review should not and will not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented in the trial court." People ex rel. Wilcox v. Equity Funding Life Insurance Co., 61 Ill. 2d 303, 313 (1975). We find that, if defendant had raised her challenges to the authority of Narvaez to complete service and the propriety of the summons itself, evidence may have been presented to resolve those questions. Alvarez, 174 Ill. App. 3d at 325. We, therefore, find defendant waived the challenges by raising them for the first time on appeal. Cf. Citimortgage, Inc. v. Cotton, 2012 IL App (1st) 102438, ¶13-14 (finding the defendant did not waive new contentions raised for the first time on appeal where those contentions similarly challenged the propriety and authority of the service as it had been challenged previously).

¶ 28 CONCLUSION

¶ 29 We affirm the judgment of the trial court in denying defendant's motion to quash substitute service and her motion to reconsider that order.

¶ 30 Affirmed.