

No. 1-13-1534

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST)	Appeal from the
COMPANY as Trustee for GSR 2007-OA1,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CH 39096
)	
KRZYSZTOF KARBOWSKI,)	
)	
Defendant-Appellant,)	
)	
(1548 NORTH LEAVITT CONDOMINIUM)	
ASSOCIATION UNKNOWN OWNERS;)	
NON-RECORD CLAIMANTS.))	Honorable
)	Daniel P. Brennan,
Defendants.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of defendant's motion to quash service was not against the manifest weight of the evidence when the record revealed that plaintiff strictly complied with the requirements for service by publication.

¶ 2 In this mortgage foreclosure action, defendant Krzysztof Karbowski appeals from the trial court's order denying his motion to quash service. On appeal, defendant contends that

plaintiff Deutsche Bank National Trust Company, as Trustee for GSR 2007-OA1, did not strictly comply with the requirements for service by publication. We affirm.

¶ 3 On February 27, 2007, defendant executed a note to Countrywide Bank, N.A, secured by a mortgage on a residence located at 1548 North Leavitt Street in Chicago (the property). The note was subsequently assigned to plaintiff. As of October 1, 2009, defendant was in default on the loan. Plaintiff, in the capacity of mortgagee, then filed the instant foreclosure action against defendant and certain other defendants that are not parties to this appeal.

¶ 4 In November 2009, plaintiff filed an affidavit to allow service by publication pursuant to section 2-206 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-206 (West 2008)). The affidavit was executed by one of plaintiff's attorneys and averred that defendant upon due inquiry could not be found such that process could not be served upon him. The affidavit further averred that upon diligent inquiry, the place of residence of defendant could not be ascertained and that his last known address was the property. Attached in support was an affidavit dated October 27, 2009, executed by Ryan Ben, averring that four unsuccessful attempts were made to serve defendant at the property between October 15 and October 21, 2009. The affidavit further averred that an unsuccessful attempt was made to serve defendant at 1000 North Milwaukee, Unit #2 in Chicago. The affidavit also listed other efforts undertaken to locate defendant which included searches of the Social Security Death Index, property tax rolls, voter and vehicle registration databases, and other governmental and professional databases. Ben averred that evidence was found indicating that defendant had or was believed to have resided at the property.

¶ 5 Thereafter, defendant was served by publication in the *Chicago Daily Law Bulletin* on November 9, 16, and 23, 2009. On January 28, 2010, plaintiff filed a motion for a default order and judgment of foreclosure and a sale of the property. Attached to the motion in support was

the affidavit of Kurt Sederman, who averred that he had unsuccessfully attempted to serve defendant at the property four times in October 2009. The trial court granted the motion, and entered a judgment of foreclosure and sale on April 6, 2010. A judicial sale was held, and the court subsequently entered an order approving the report of sale and distribution, confirming the sale, and ordering possession to the successful bidder.

¶ 6 On March 21, 2012, defendant filed an appearance and a motion to quash service by publication. Defendant argued that plaintiff failed to exercise due diligence when plaintiff never attempted to serve him at his home at 2201 Martin Lane in Northfield. Attached to the motion in support was a page from the loan application for the property, listing defendant's address as 2201 Martin Lane. Also attached was defendant's affidavit in which he averred that he had lived at the Martin Lane address for five years. A supplemental motion to quash was subsequently filed. This motion argued that plaintiff's attempts to ascertain defendant's whereabouts for personal service were not based upon personal knowledge in violation of *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213.

¶ 7 In its response to the motion, plaintiff alleged that it made a diligent effort to personally serve defendant when its process server attempted to serve defendant five times at two different addresses. Plaintiff further alleged that the Ben affidavit explained, in detail, the searches undertaken in an effort to locate defendant and that defendant failed to submit a counter-affidavit indicating that he could have been found. Attached in support was the supplemental affidavit of Ben, which averred that he personally performed the database searches listed in his affidavit.

¶ 8 The matter proceeded to an evidentiary hearing where Ben testified that prior to preparing his affidavit in this case, he compiled the information gained by the process servers in the field, and confirmed that he had performed a "skip trace" on defendant. He explained that a

skip trace involved running an individual's name through, among other databases, the Department of Motor Vehicles, public records, and property databases in order to find alternative addresses. He did not personally attempt to serve defendant.

¶ 9 In denying defendant's motion to quash, the court stated that due diligence had been established in that plaintiff's process server went to the property and attempted to serve defendant. The court further stated that Ben conducted the public record searches as enumerated in his affidavit, and that Ben's affidavit was not "invalidate[d]" by the fact that Ben included reference to the attempts by another person to serve defendant. The court concluded that the fact that Ben did not "dig deep enough" to find a four-year-old mortgage application containing the Martin Lane address did not mean that Ben did not make an adequate inquiry into defendant's whereabouts. Therefore, based upon Ben's testimony and his two affidavits, there was a sufficient due inquiry to justify service by publication in the instant case.

¶ 10 On appeal, defendant contends that the motion to quash should have been granted because plaintiff failed to strictly comply with the requirements for service by publication. Specifically, defendant argues that plaintiff's affidavits in support of the motion to permit service by publication did not contain the signature of the person who personally attempted to serve defendant. He also argues that a diligent inquiry should have located the Martin Lane address.

¶ 11 When reviewing a decision on a motion to quash service of process, this court determines whether the trial court's findings of fact are against the manifest weight of the evidence.

Deutsche Bank National Trust Co. v. Brewer, 2012 IL App (1st) 111213, ¶ 17.

¶ 12 Personal jurisdiction acquired by publication is only allowed in limited cases where personal service could not be achieved, and then, only after strict compliance with statutory requirements. *Bell Federal Savings & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 926-27 (1978);

see also *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 475-76 (2006) (strict compliance with the statute governing service by publication is required). Section 2-206 of the Code permits service by publication in actions affecting property. 735 ILCS 5/2-206 (West 2008). Pursuant to section 2-206 of the Code, a plaintiff must file an affidavit showing that the defendant "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." 735 ILCS 5/2-206(a) (West 2008). The circuit court of Cook County has adopted a rule that elaborates on this requirement. Rule 7.3 provides that:

"Pursuant to 735 ILCS 5/2-206(a), due inquiry shall be made to find the defendant(s) prior to service of summons by publication.

In mortgage foreclosure cases, all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such 'due inquiry' setting forth with particularity the action taken to demonstrate an honest and well directed effort to ascertain the whereabouts of the defendant(s) by inquiry as full as circumstances permit prior to placing any service of summons by publication." Cook Co. Cir. Ct. R. 7.3 (Oct. 1, 1996).

¶ 13 A diligent inquiry means that the efforts to ascertain the defendant's whereabouts were honest and well-directed, and as full as the circumstances of the case permitted. *Bank of New York*, 369 Ill. App. 3d at 476. Where a party's efforts were casual, routine, or spiritless, service by publication is not justified. *Id.*

¶ 14 In the instant case, we find that plaintiff complied with section 2-206 and Rule 7.3. Here, the record contains affidavits from Sederman and Ben detailing the unsuccessful attempts to serve defendant at the property and the Milwaukee address, as well as the database searches undertaken in an attempt to locate defendant. Specifically, Ben averred in his affidavits that he personally performed searches of the Social Security Death Index, property tax rolls, voter and vehicle registration databases, and other governmental databases. He also testified, at the evidentiary hearing, that he personally performed these database searches. The record also contains the affidavit of Sederman who averred that he unsuccessfully attempted to serve defendant at the property four times in October 2009.

¶ 15 Although defendant correctly argues that Sederman's affidavit, that is, the affidavit of the person who actually attempted to serve defendant, was not attached to the affidavit to allow service by publication, this court notes that Ben's affidavit, which specifically describes the prior attempts to serve defendant, was attached. Additionally, the Sederman affidavit was attached to plaintiff's motion for a default order and judgment of foreclosure. These affidavits, taken together with Ben's supplemental affidavit, fully described the inquiry made by plaintiff to locate defendant, and satisfy the requirement that "all affidavits for service of summons by publication must be accompanied by a sworn affidavit by the individual(s) making such 'due inquiry.' " Cook Co. Cir. Ct. R. 7.3 (eff. Oct. 1, 1996). In reaching this conclusion, we rely upon section 2-301(b) of the Code, which states that "[i]n disposing of a motion objecting to the court's jurisdiction over the person of the objecting party, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon contested issues of fact." 735 ILCS 5/2-301(b) (West 2008).

¶ 16 Here, the record sufficiently demonstrates that plaintiff acted with due diligence in its unsuccessful attempts to locate defendant to effectuate personal service upon him; this is not a case where the plaintiff's efforts were casual or spiritless. See *Bank of New York*, 369 Ill. App. 3d at 476. Accordingly, we find that plaintiff strictly complied with the requirements of section 2-206 and Rule 7.3, and conclude that the trial court's denial of defendant's motion to quash service was not against the manifest weight of the evidence. See *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 17.

¶ 17 We consequently reject defendant's argument that plaintiff's failure to discover the Martin Lane address establishes a lack of due inquiry. The loan application listing that address was presumably from 2007 and defendant did not specifically aver in his counter-affidavit that he could have been found at Martin Lane address in October 2009, the period during which plaintiff attempted to serve him. Rather, defendant generally averred that his family had lived at that address for five years. In the affidavit for service by publication, an attorney for plaintiff averred that defendant's place of residence, upon diligent inquiry, could not be ascertained, and Ben detailed his unsuccessful attempts to locate additional addresses for defendant. Section 2-206 requires that a plaintiff must state "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 2008). Here, the affidavits submitted by plaintiff listed its numerous unsuccessful attempts to locate additional addresses for defendant. The fact that plaintiff's efforts were ultimately unsuccessful does not nullify those efforts.

¶ 18 This court is similarly unpersuaded by defendant's reliance on *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, as in that case, the plaintiff bank failed to present any affidavits in which the affiant was specifically identified and swore that he or she

had personally attempted to serve the defendant homeowner or had attempted to locate the defendant by searching available databases. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶¶ 23-25. There, the process server's affidavit was written in the passive voice and stated that "[a]ttempts were made" to serve the defendant, and the affidavit for service of publication stated "it was discovered that no contact could be made" with the defendant after "we" attempted to locate the defendant by searching various databases. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶¶ 6, 7, 23. The court therefore found that the trial court erred in denying the defendant homeowner's motion to quash because the plaintiff bank did not comply strictly with the requirements of Rule 7.3. *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 25.

¶ 19 The case at bar is distinguishable from *Deutsche Bank*. Unlike *Deutsche Bank*, where the affidavit indicated that "someone" attempted to serve the defendant, Sederman identified himself in as the person who attempted to serve defendant at the property. See *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 6. In addition, Ben averred in his affidavits and testified at the evidentiary hearing that he searched numerous databases in an attempt to locate defendant. This differs from *Deutsche Bank*, where the affiant stated that "we" searched databases and "it was discovered that no contact could be made." See *Deutsche Bank*, 2012 IL App (1st) 111213, ¶ 7.

¶ 20 Accordingly, for the foregoing reasons, we affirm the judgment of the trial court denying the defendant's motion to quash service by publication.

¶ 21 Affirmed.