

No. 1-13-2860

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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HSBC MORTGAGE SERVICES, INC.,	)	Appeal from the
	)	Circuit Court of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08 CH 19528
	)	
IRENEUSE MARCINIEC, MORTGAGE	)	
ELECTRONIC REGISTRATION SYSTEMS,	)	
INC., MERCANTILE MORTGAGE COMPANY,	)	Honorable Robert Senechalle,
SHORELINE TOWERS CONDOMINIUM	)	Judge Presiding.
ASSOCIATION, and UNKNOWN OWNERS and	)	
NONRECORD CLAIMANTS,	)	
	)	
Defendant-Appellant.	)	

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PRESIDING JUSTICE SIMON delivered the judgment of the court.  
Justices Neville and Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held:* Dismissal of defendant's 2-1401 petition to vacate and quash service in foreclosure action was proper where defendant did not provide corroborating evidence that he was not served other than a conclusory affidavit from defendant stating that he was not served and is a male when the proof of service indicated that defendant was a female.

¶ 2 Plaintiff filed a foreclosure action on May 30, 2008, to foreclose the mortgage of defendant Ireneuse Marciniac on a property located at 6301 North Sheridan Road, Unit 16V,

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Chicago, Illinois. Plaintiff filed an affidavit of service by its process server that defendant was served with a summons and copy of the complaint on June 2, 2008. On November 19, 2008, a default judgment of foreclosure was entered and a judicial sale deed on the property was approved on April 15, 2009.

¶ 3 On December 2, 2011, defendant filed the underlying petition to vacate pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Defendant moved to quash service and vacate all orders as void because he allegedly was not served. Defendant attached an affidavit stating that he was, and always had been, male, and the proof of service indicated that a female was served. Plaintiff moved to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)) and, following a hearing, the circuit court granted the motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) and struck the petition to vacate.

¶ 4 Defendant appealed the dismissal. On appeal, defendant argues that dismissal was improper because he proved that he was male, lived alone, and had not been served in the foreclosure action. For the following reasons we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 On July 6, 2005, defendant executed a mortgage and note for property located at 6301 North Sheridan Road, Unit 16V, Chicago, Illinois. Defendant subsequently defaulted on the terms of the mortgage and note by failing to make required payments. On May 30, 2008, plaintiff filed the underlying foreclosure action. Plaintiff filed an affidavit of service by its process server that defendant was personally served at the address above with a summons and copy of the complaint on June 2, 2008, at approximately 6:15 p.m. The affidavit of service further indicates that defendant served was a white female approximately 36-40 years old.

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¶ 7 Defendant failed to appear in the action and on November 19, 2008, a default judgment of foreclosure was entered and a judicial sale of the property was conducted on February 23, 2009. On April 15, 2009, the circuit court confirmed the judicial sale and entered a final order. On April 23, 2009, the judicial sale deed was recorded and ultimately a third party purchased the property and recorded the deed on September 10, 2009.

¶ 8 On December 2, 2011, defendant filed the underlying petition to vacate pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS5/2-1401 (West 2010)). Defendant moved to quash service and vacate all orders as void because he allegedly was not served. Defendant attached an affidavit stating that he was, and always had been, male, and the proof of service indicated that a female was served. Plaintiff moved to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)) and, following a hearing, the circuit court granted the motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) and striking the petition to vacate. This appeal followed.

¶ 9

## II. ANALYSIS

¶ 10 We begin by noting that we are unfortunately without the benefit of a reply brief to provide any response to plaintiff's argument. Furthermore, we note that defendant failed to provide any authority for his position other than citing to, and distinguishing, *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, which the circuit court relied on in dismissing defendant's petition. However, this matter involves a single issue on appeal that is easily resolved and we consider the parties' arguments.

¶ 11 Defendant argues on appeal that the trial court erred in granting plaintiff's motion to dismiss defendant's 2-1401 petition to vacate. A reviewing court reviews the dismissal of a

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section 2-1401 petition *de novo*. *Id.* at ¶ 12. Both parties agree that *Ted & Paul* is largely on point with defendant arguing that a governmentally issued identification, such as defendant's driver's license, is sufficient corroboration that he is male and not the person that the process server served. We agree that *Ted & Paul* is on point and supports the circuit court's dismissal of defendant's petition to vacate.

¶ 12 Section 2-1401 allows a party to challenge and avoid final judgment more than 30 days from the date of entry where the party can prove the existence of a meritorious claim, due diligence in pursuing the claim before judgment, and due diligence in pursuing the claim or defense after judgment. *Id.* at ¶15. While section 2-1401(c) also requires a petition to be filed within two years of the entry of the original order or judgment, a challenge based on invalid service asserts that the judgment is void and may be challenged at any time, and the general requirements need not be proven. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002). Accordingly, defendant's failure to file his petition within two years' of final judgment is not fatal and we consider defendant's argument and evidence presented.

¶ 13 In *Ted & Paul*, the foreclosing bank filed and served a complaint for foreclosure and eventually was granted a default order after no appearances or answers were filed by the defendants. *Ted & Paul, supra* at ¶¶ 3-5. Over two years later, the defendants filed a 2-1401 petition to vacate the judgment of foreclosure and sale, asserting that they were not served with the complaint. *Id.* at ¶ 7. Defendants attached affidavits with one male defendant averring that he was not served and was a male while the return of service relating to the defendant indicated that a 38-year-old Hispanic female was served. *Id.*

¶ 14 The *Ted & Paul* court rejected the defendant's argument that service was fraudulent and the trial court did not have jurisdiction to enter the order. *Id.* at ¶ 25. First, the court noted for

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cases of personal service, the return of summons is *prima facie* proof of personal service and "[c]ourts are required to indulge in every reasonable presumption in favor of the return, and the uncorroborated testimony of the party upon whom service is made is not enough to set aside this evidence." *Id.* at ¶ 24, citing *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834, 838 (1992); accord *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998). That proof of service can be overcome only by clear and convincing evidence. *Winning Moves*, 238 Ill. App. 3d at 838. The only evidence presented by the defendant in *Ted & Paul* was the defendant's "uncorroborated, incredibly brief affidavit stating, conclusorily, that he was not served in the 61 case and he is male." *Id.* The court concluded that the bare affidavit was insufficient to set aside the default judgment and order. *Id.*

¶ 15 In the instant matter, defendant simply distinguishes this case from *Ted & Paul* because he attached proof that he was male in the form of his government issued identification, his Illinois driver's license. Defendant's affidavit consists of five sentences averring that: defendant is the named party in the case; his address; he is and always has been male; and he never received service or summons and complaint in this case. This is similarly brief and conclusory like the affidavit supplied in *Ted & Paul*.

¶ 16 Defendant argues that because a driver's license is "good enough to allow someone to gain access to an airport, Court[] House, to vote, to claim special rights such as senior citizen discounts, etc., [it is] sufficient corroboration that a person served is not the person described by the process server." Defendant does not cite any authority for this proposition. Defendant does not provide any corroboration that he was not served, only his affidavit and drivers license were provided for corroboration that he is male and not female. This is not sufficient to meet the corroboration requirement addressed in *Ted & Paul* and rebut the *prima facie* evidence of service

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of summons by clear and convincing evidence. Accordingly, the trial court properly dismissed defendant's petition.

¶ 17

### III. CONCLUSION

¶ 18 For the reasons stated, we affirm the judgment of the circuit court.

¶ 19 Affirmed.