

2013 IL App (2d) 120964-U
No. 2-12-0964
Order filed March 21, 2013

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
SECOND DISTRICT

| | | |
|---|---|-------------------------------|
| BMO HARRIS BANK, N.A., f/k/a |) | Appeal from the Circuit Court |
| Harris, N.A., f/k/a Harris Bank Roselle, |) | of Kane County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 11-CH-3648 |
| |) | |
| ZOFIA RUSNARCZYK, |) | |
| |) | |
| Defendant-Appellant |) | |
| |) | |
| (Stanislaw Rusnarczyk, Carrington Reserve |) | |
| Homeowners' Association, Unknown |) | Honorable |
| Owners, and Nonrecord Claimants, |) | Leonard J. Wojtecki, |
| Defendants). |) | Judge, Presiding. |

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to quash service: her affidavits averring a lack of service were not uncontested, as the process server's return averred facts within the server's knowledge, and defendant's affidavits, one of which only minimally corroborated the other, did not constitute the necessary clear and satisfactory evidence to the contrary; defendant's argument that the return was defective for the process server's failure to identify her employer was rejected as being without any merit.

¶ 2 Zofia Rusnarczyk, the defendant in a foreclosure action as a property owner and mortgagor, appeals from the confirmation of the judicial sale of the foreclosed property after a judgment of foreclosure in favor of plaintiff, BMO Harris Bank, N.A. (f/k/a Harris, N.A., f/k/a Harris Bank Roselle). She argues that the trial court erred in denying her motion to quash service. She asserts that, because she filed her affidavit and that of Stanislaw Rusnarczyk (her husband, codefendant, and co-mortgagor), averring that service on her was improper, and because plaintiff filed no counteraffidavits, the court had to rule that service had been improper. We conclude that the special process server's affidavit was evidence of proper service and further that, under the rule in *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983), the special process server's return of service, because it stated matters within the server's knowledge, could be set aside only on clear and satisfactory evidence, which the Rusnarczyks' affidavits were not. We therefore conclude that the trial court did not err in denying the motion to quash, and we thus affirm the confirmation.

¶ 3 I. BACKGROUND

¶ 4 On October 11, 2011, plaintiff filed a foreclosure suit relating to the property at 2858 Dartmouth Lane in West Dundee. It named as defendants the borrowers (Zofia and Stanislaw Rusnarczyk), the Carrington Reserve Homeowners' Association, and unknown owners and nonrecord claimants. Plaintiff filed two returns of service from Jennifer I. Magida, "a registered employee of a Private Detective Agency licensed by the Illinois Department of Financial and Professional Regulation." Under Magida's signature, at the bottom left-hand corner, the following appeared: "Metro Detective Agency, LLC" with a post office address in De Kalb, Illinois, and a telephone number. In the returns, executed pursuant to section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2010), Magida averred that she had personally served Stanislaw

with the summons and associated documents on October 17, 2011. She further averred that she had served Zofia by leaving a copy of the summons and associated documents with Stanislaw and by mailing them to Zofia.

¶ 5 The court, on December 15, 2011, ruled that the Rusnarczyks and the homeowners' association were in default. It entered a foreclosure judgment the same day. The judgment did not include a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). The judicial sale was set for June 7, 2012.

¶ 6 On May 24, 2012, Zofia filed a motion to quash service, in which she asserted that she did not receive the summons and associated documents by mail and that Stanislaw received only one copy of them from the process server. Attached to the motion was a signed "Verification" citing section 1-109 of the Code. In this document, Stanislaw averred that the process server had given him only one copy of the documents. He further averred that he was "the person in [his] household that gets the mail" and had not received a copy of the summons or complaint in the mail. Zofia signed a similar "Verification" in which she averred that she "was never served with process in case 2011 CH 3648" and further that she had "never received a Summons and Complaint in the mail." On August 9, 2012, the court entered an order denying the motion.

¶ 7 The sale took place. The court confirmed it and entered an order for possession and deed on August 20, 2012. Zofia timely appealed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, Zofia cites *Sterne v. Forrest*, 145 Ill. App. 3d 268, 274 (1986), for the proposition that "once an affidavit is filed[,] *** the original return is not even evidence[,] and the un rebutted affidavit is taken as true." Thus, she argues, Stanislaw's affidavit was un rebutted and the court was

bound to accept it. (The brief claims to be on behalf of both Rusnarczyks, but, as noted, only Zofia filed a notice of appeal.)

¶ 10 We agree with the parties that a dispute over personal jurisdiction presents a question of law, which is reviewed *de novo*. *Jayko v. Fraczek*, 2012 IL App (1st) 103664, ¶ 3.

¶ 11 Section 2-202(a) of the Code provides that in counties of less than 2 million, process may be served, without special appointment, by a person who is licensed or registered as a private detective or by a registered employee of a private detective agency. 735 ILCS 5/2-202(a) (West 2010). If a return is made by a private person, as opposed to a sheriff or coroner, the return shall be by “affidavit,” whereas a sheriff’s or coroner’s return requires an “endorsement.” 735 ILCS 5/2-202(a) (West 2010). Here, Magida’s returns were verified under penalties of perjury pursuant to section 1-109. By its express terms, section 1-109 provides that whenever the Code requires a document to be sworn to or verified under oath, then verification under section 1-109 is an acceptable substitute. *People v. Tlatenchi*, 391 Ill. App. 3d 705, 715 (2009). A court will not acquire jurisdiction of a defendant unless the return of the officer or “other person” shows that service was effected in some manner provided by law. *State Bank of Lake Zurich v. Thill*, 135 Ill. App. 3d 747, 754 (1985).

¶ 12 *Sterne*, the case on which Zofia relies, held that, unlike personal service, no presumption of validity of service arises from substitute service. *Sterne*, 145 Ill. App. 3d at 274. *Sterne* then set forth the general rule, as follows:

“ ‘[W]here [the] return is challenged by affidavit and there are no counteraffidavits, the return itself is not even evidence, and, absent testimony by the deputy, the affidavits must be taken as true and the purported service of summons quashed.’ ” *Sterne*, 145 Ill. App. 3d at

274 (quoting *Harris v. American Legion John T. Shelton* Post No. 838, 12 Ill. App. 3d 235, 237 (1973)).

¶ 13 However, Zofia's reliance on this passage from *Sterne* is misleading, because *Sterne* discussed the quoted general rule in the context of *Nibco*, which was decided three years before *Sterne*. In *Nibco*, our supreme court interpreted the general rule to mean that where there is substitute personal service or service upon an agent of a corporation, the rule applies only to matters within the knowledge of the person making the return. *Nibco*, 98 Ill. 2d at 172. In those situations, the return is *prima facie* evidence of service that cannot be set aside upon the uncorroborated affidavit of the person served. *Nibco*, 98 Ill. 2d at 172. The return can be set aside only by clear and satisfactory evidence. *Nibco*, 98 Ill. 2d at 172. The court in *Sterne* applied *Nibco*. *Sterne*, 145 Ill. App. 3d at 275.

¶ 14 Here, both the number of documents served and the fact of mailing were facts within the process server's knowledge, and Zofia's contrary affidavit was not clear and satisfactory. Stanislaw averred that (1) the process server had given him only one copy of the documents and (2) that he was "the person in [his] household that gets the mail," but that he had not received a copy of the summons or complaint in the mail. Zofia averred (1) that she "was never served with process in case 2011 CH 3648" and (2) that she "never received a Summons and Complaint in the mail." Zofia's statement adds almost nothing to Stanislaw's. Her averment that she was never served with process either is consistent with Magida's statement that service on Zofia was by abode service or else is a pure conclusion of law. Her averment that she did not receive the documents in the mail either (1) contradicts Stanislaw's statement that he was the one who got the mail or (2) is merely an assertion that Stanislaw never passed along any documents that he got from the mail. Thus, on the issue of

whether the process server delivered one or two copies of the documents, Zofia has only Stanislaw's uncorroborated affidavit. On the issue of whether the process server mailed the documents, Zofia's affidavit, even if read to agree that he was the one who would get the mail, could not corroborate Stanislaw's assertions of what he received in the mail. In any event, any slight corroboration that Zofia's affidavit provides to Stanislaw's cannot transform his affidavit into clear and satisfactory evidence. This is particularly so given that both affidavits had identical weaknesses in being self-serving. Moreover, Magida was present in court prepared to testify, and defendants did not appear at the hearing. Accordingly, we hold that the trial court did not err in denying the motion to quash service.

¶ 15 Zofia's second contention is that Magida's returns are defective because they do not state by what private detective agencies she was employed. Setting aside that she makes a one-sentence argument without citation to authority, the argument is patently without merit. "Metro Detective Agency, LLC" is clearly printed on the returns with an address and telephone number.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we affirm the confirmation of the judicial sale.

¶ 18 Affirmed.