2014 IL App (2d) 140193-U
No. 2-14-0193
Order filed September 26, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY (as TRUSTEE FOR SAXON ASSET SECURITIES TRUST 2005-1),	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1560
DONALD CAMPBELL and TERESE D. CAMPBELL,	)	
Defendants-Appellants.	)	
(Anthony Campbell and JPMorgan Chase, Bank, NA, Defendants).	)	Honorable Suzanne C. Mangiamele, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Defendants forfeited their hearsay objection to an affidavit of service by failing to raise it contemporaneously with its admission, and in any event it lacked merit, as the affidavit, a business record, contained only the affiant's statements, not any third party's.

¶ 2 Donald and Terese D. Campbell appeal a judgment foreclosing a mortgage held by plaintiff, Deutsche Bank National Trust Company, as trustee for Saxon Asset Securities Trust

2005-1, and awarding plaintiff possession based on the foreclosure sale (see 735 ILCS 5/15-1508 (West 2008)). The Campbells contend that the judgment is void because the trial court never obtained personal jurisdiction over Terese. We affirm.

¶ 3 On September 4, 2008, plaintiff filed a complaint to foreclose a mortgage on real estate located at 1551 Glacier Parkway in Algonquin. Named as defendants were Donald and Terese D. Campbell; JPMorgan Chase Bank, NA; and Anthony V. Campbell. Also named were unknown owners and nonrecord claimants, whom plaintiff voluntarily dismissed later.

¶ 4 Norman Minarik, a special process server employed by Excel Innovations, signed three affidavits of service dated September 11, 2008. The first affidavit stated that, on September 10, 2008, at 11:27 a.m., he served a summons and a copy of the complaint personally on Donald Campbell at 1551 Glacier Parkway in Algonquin. The affidavit gave Donald's personal information. The second affidavit named Terese Campbell as the person to be served at 1551 Glacier Parkway in Algonquin on September 10, 2008, at 11:27 a.m. However, it listed no personal information and stated, "no attempts made. Served at property. Per your office, we have cancelled this job." The third affidavit stated that, on September 10, 2008, at 11:27 a.m., Anthony V. Campbell received substituted service at 1551 Glacier Parkway in Algonquin in that Minarik left copies of the summons and complaint with Donald Campbell, who confirmed Anthony's residence there; Minarik informed Donald Campbell of the contents of the documents; and he mailed a copy of the documents to Anthony V. Campbell at 1551 Glacier Parkway.

¶ 5 On January 6, 2009, the trial court found all of the defendants in default and entered a foreclosure judgment, including an order for a judicial sale of the property. On October 13, 2009, the court confirmed the sale and awarded possession to plaintiff.

¶ 6 On July 25, 2012, Donald and Terese Campbell entered a special and limited appearance and moved to quash the service of process and vacate the foreclosure judgment. They contended that they had not been properly served per section 2-203(a) of the Code of Civil Procedure (735 ILCS 5/2-203(a) (West 2008)), which, as pertinent here, stated:

> "Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (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 sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode ***."

¶ 7 The Campbells' motion attached their affidavits. Each affiant stated that he or she had never been served with a summons or complaint in the case; that he or she never received a copy of the summons or complaint by mail; and that he or she first learned of the trial court's actions when he or she was notified of the foreclosure sale.

¶ 8 Plaintiff responded to the Campbells' motion by conceding that the return of service for Terese Campbell was "clearly defective" but alleging that she had in fact received proper substitute service from Minarik on September 10, 2008, although the accurate return of service that Minarik had executed had not been filed in the trial court. Plaintiff asked leave to file a corrected return of service, observing that, under Illinois Supreme Court Rule 102(d) (eff. Jan. 1, 1967), the failure to file the return did not invalidate the summons or the service. Plaintiff's motion attached an affidavit of service, dated September 11, 2008, and signed by Minarik, stating that, on September 10, 2008, he effectuated substituted service on Terese by leaving a

copy of "this process" at 1551 Glacier Parkway, her usual place of abode, with Donald, her husband, who confirmed that Terese resided there, and by mailing a copy of the process, in conformity with section 2-203(a), to Terese at 1551 Glacier Parkway on September 11, 2008.

¶ 9 Plaintiff's response to the Campbells' motion argued as follows. First, the return of service showed that both Campbells had been served properly. In Illinois, the return is *prima facie* proof of service that depends not on whether the service is personal or substituted but on whether the facts set forth in the return are within the server's personal knowledge. The *prima facie* proof can be rebutted only by clear and satisfactory evidence. Here, Minarik's statement that he served Donald could not be rebutted merely by Donald's uncorroborated statement that he had not been served. In response to Donald's statement that he became aware of the action only when he was notified of the sale, plaintiff submitted the affidavit of an employee of plaintiff's law firm stating that records (copies of which were attached) showed that Donald had called the office numerous times as early as September 11, 2008, at 11:38 a.m.

¶ 10 Plaintiff also argued that Minarik's new affidavit established that Terese Campbell had received proper substituted service. Plaintiff noted that the Campbells' motion did not deny that Terese had resided at 1551 Glacier Parkway on September 10, 2008. Also, the Campbells' uncorroborated affidavits did not rebut the presumption of proper service.

¶ 11 The trial court held a hearing on the Campbells' motion. Donald Campbell testified as follows. He first learned of the foreclosure when he came home (on what day he did not say) and found three envelopes taped to his door. He mailed them back unopened and did not know what was inside them. At the time, Anthony, his son, had not resided there for a year. Donald had never been personally served in this case.

¶ 12 Terese Campbell testified that she first learned of the foreclosure when Donald told her. However, she had "no idea" when that was. Nobody ever served her any papers, and she knew that nobody ever served Donald or Anthony either. Terese had no evidence that, on September 10 and 11, 2008, she resided somewhere other than 1551 Glacier Parkway with Donald.

¶ 13 Plaintiff called Dennis McMaster, the operations manager for Excel Innovations, now known as Firefly Legal. He testified on direct examination as follows. After papers are filed with the circuit court clerk, they are also entered into the company's case management database. The company then prepares a service packet, containing the summons, complaint, and other necessary documents and sends it to the process server, who then attempts to serve the defendant. After doing so, the server updates the system via the online database, and an affidavit of service is generated from the server's notes. An affidavit is always prepared, generally within 24 hours of service, whether or not service is completed. After the affidavit is filed with the court, the server does not bring anything back to the company for its records.

¶ 14 McMaster testified that his responsibilities included collecting and maintaining various business records. He identified plaintiff's exhibit No. 1 as Minarik's affidavit of service on Donald Campbell. McMaster explained generally that a server executes the affidavit, which is based on his or her personal knowledge, at or near the times of the events described. After the affidavit is executed, the original is sent to the court along with the original file-stamped summons. The original affidavit remains with the court; the server does not bring a file-stamped copy back to the office. There, the service affidavits are stored electronically indefinitely.

¶ 15 McMaster identified plaintiff's exhibit No. 2 as Minarik's corrected affidavit of service on Terese Campbell and plaintiff's exhibit No. 3 as the original and defective affidavit of service on Terese. Asked why the note on plaintiff's exhibit No. 3 said that no attempts had been made

on Terese, McMaster testified, "I believe it was just a mix-up with the addresses. There was a similar address on the same case, you know, pretty much a couple houses down." Plaintiff's first three exhibits were admitted without objection.

¶ 16 McMaster identified plaintiff's exhibit No. 4 as a "screen shot" of Excel's case management system. The screen shot, admitted without objection, showed that there had been two "service jobs" on Terese, at 1557 Glacier Parkway and at 1551 Glacier Parkway. The screen shot implied that no attempt at service had been made at 1557 Glacier Parkway, because service had been obtained at 1551 Glacier Parkway. Thus, at plaintiff's request, Excel had canceled out any other addresses that it had had for Terese. This accorded with Excel's policy; once the company knew that a defendant had been served at a given address, other "jobs" created for the defendant would be canceled out. Based on the screen shot, McMaster knew that the second job had been canceled. He testified that Excel had searched its electronic records for the original affidavit of service (plaintiff's exhibit No. 2) but had been unable to find it.

¶ 17 McMaster testified on cross-examination as follows. He did not enter records into the system and did not personally know whether the affidavits in Minarik's name had been "effectuated" by Minarik. McMaster did not personally know for sure whether Minarik had actually served the documents.

¶ 18 The trial court granted the Campbells' motion as it applied to Terese Campbell, holding that she had not been served properly. The court found that Donald had been properly served. The court explained as follows. Substituted service requires strict compliance with section 2-203(a), and the presumption of validity that attaches to a return reciting personal service does not apply to one reciting substituted service. See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986). Here, plaintiff conceded that the originally filed return of service for Terese

Campbell was defective, and plaintiff relied on the corrected affidavit (plaintiff's exhibit No. 2). Although the corrected affidavit satisfied section 2-203(a), the presumption of validity did not apply, and Terese's testimony and affidavit, "albeit minimal, affirmatively refute[d] elements of abode service." Plaintiff did not overcome this evidence, as it filed no counteraffidavit by Minarik, Minarik did not testify, and McMaster knew nothing personally about the service on the Campbells. Thus, Terese had not been properly served, and the judgment was void.

¶ 19 Plaintiff moved to reconsider, arguing as follows. Minarik's corrected affidavit, which the trial court had admitted into evidence without objection, had supplied all the information that section 2-203(a) required. The return was *prima facie* proof of service and could not be rebutted merely by the uncorroborated testimony of the person served (see *In re Jafree*, 93 Ill. 2d 450, 455 (1982)). The Campbells had not rebutted the *prima facie* case: they had failed to prove that Terese had not been a member of Donald's household at the time, or that she was not his wife, or that copies of the summons and complaint had not been mailed to her at the proper address. Instead, they had offered only their uncorroborated statements that they were never served, and their testimony about when they learned of the foreclosure was not only internally inconsistent but refuted by the records of Donald's calls to plaintiff's lawyer's office.

¶ 20 Plaintiff argued further that the court had misconstrued the law: the presumption in favor of the process server's return depends not on whether service is personal or substituted, but on whether the facts set forth in the return are within the server's personal knowledge (see *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983)). The Campbells had not rebutted any statements that Minarik had based on his personal knowledge. Also, McMaster had testified only to lay the foundation to admit the affidavits of service as business records. He did not have to testify in

support of the affidavits' reliability, because Illinois law had already provided the criteria by which the affidavits were shown to be reliable.

¶ 21 In response, the Campbells argued in part that the corrected affidavit had been admitted under the business-records exception to the hearsay rule. However, under that exception, as codified in Illinois Rule of Evidence 805 (eff. Jan. 1, 2011), hearsay within the affidavit was inadmissible unless it came within an exception to the hearsay rule. Thus, the corrected affidavit was admissible only to prove that plaintiff had "received a document or made a note," but not to prove the contents of the affidavit. Therefore, the Campbells' testimony was "unrebutted."

¶ 22 The trial court granted plaintiff's motion to reconsider and reinstated the judgment. The court's memorandum opinion explained as follows. Terese Campbell's argument that Minarik's corrected affidavit contained inadmissible hearsay was untimely, as she had not objected to the admission of the affidavit at the hearing. Moreover, according to the case law, Minarik's corrected affidavit was *prima facie* proof of service. Although the court had previously held that Terese Campbell's affidavit rebutted this proof, that was incorrect. The presumption of service applied insofar as Minarik's corrected affidavit had been based on matters within his personal knowledge (see *Nibco*, 98 Ill. 2d at 172; *Harris v. American Legion, John P. Shelton Post No. 838*, 12 Ill. App. 3d 235 (1973)). The Campbells' affidavits and testimony were uncorroborated and did not rebut any of the assertions that Minarik had based on his personal knowledge. In this respect, the trial court's memorandum opinion incorporated the reasoning in plaintiff's motion. The court denied the Campbells' motion to quash service and vacate the judgment. They timely appealed.

¶ 23 On appeal, the Campbells contend that the trial court erred in denying their motion to quash service of process and vacate the foreclosure judgment. They rely solely on the issue that

they raised only after plaintiff moved the trial court to reconsider the grant of their motion: that Minarik's corrected affidavit was defective because it contained "hearsay within hearsay" that did not fall within an exception to the hearsay rule. We agree with plaintiff that (1) the trial court correctly held that the Campbells forfeited this argument; and (2) the argument lacks merit anyway. Therefore, we affirm.

¶ 24 We turn first to forfeiture. At the hearing on the Campbells' motion, plaintiff introduced Minarik's corrected affidavit as plaintiff's exhibit No. 2. Plaintiff used the testimony of McMaster to lay the needed foundation for the admission of the affidavit under the business-records exception to the hearsay rule. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 6, 2012) The Campbells did not object at all to the admission of the affidavit (or to the admission of the other two affidavits of service), much less object that any statements within the affidavit were hearsay within hearsay.

¶ 25 By failing to object contemporaneously to the admission of the corrected affidavit in the trial court, the Campbells have procedurally defaulted their objection in the trial court and have forfeited their argument on appeal. See *Snelson v. Kamm*, 204 Ill. 2d 1, 34 (2003) (holding that an objection to the admission of evidence was waived by the failure to make specific contemporary objections at trial "so that any defect could have been cured"). In acquiescing in the admission of the evidence, the Campbells denied plaintiff and the trial court any opportunity to address the alleged infirmities that the Campbells now rely on. Moreover, even were we to disregard forfeiture, we would find no error.

¶ 26 The Campbells are correct that, even if hearsay is admissible, "hearsay within hearsay" is inadmissible unless each part of the combined statements fits within an exception to the hearsay rule. Ill. R. Evid. 805 (eff. Jan. 1, 2011). The Campbells assert, without specificity, that there

are "multiple levels of hearsay" within the affidavit, and they contend that it was admissible only to prove that the affidavit "had been recorded in the regular course of business" and not "to show the truth of the matters asserted." We agree with plaintiff that this argument is untenable.

¶ 27 The Campbells do not explain why any of Minarik's statements were "hearsay within hearsay" merely because they were placed into his affidavit. The Campbells merely assert that his statements were "third party hearsay statements." This argument is so conclusional and vague that we could consider it waived. See *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010) ("Ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived."); see also Ill. 2d S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring a clear statement of contentions with supporting citation of authorities and pages of the record relied on). In any event, we agree with plaintiff that the Campbells' argument is unsound. The Campbells rely on *Thakore v. Universal Machine Co. of Pottstown, Inc.*, 670 F. Supp. 2d 705, 726 (N.D. Ill. 2009), which, aside from being a nonprecedential foreign case (see *County of Du Page v. Lake Street Spa, Inc.*, 395 Ill. App. 3d 110, 122 (2009)), involved statements by a third party, not by the declarant himself. *Thakore*, 670 F. Supp. 2d at 726. Here, the Campbells assert that Minarik's statements were "third party hearsay statements," but that is simply incorrect—Minarik was the affiant who prepared the business record. (The Campbells do not contend that any other person, such as Donald, made third-party hearsay statements that found their way into Minarik's affidavit. Thus, any such argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). Therefore, besides being forfeited, the Campbells' argument is simply unsound.

¶ 28 The judgment of the circuit court of McHenry County is affirmed.

¶ 29 Affirmed.