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No. 3-10-0254

Order filed March 2, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD JUDICIAL DISTRICT

A.D., 2011

LASALLE BANK NATIONAL ASSOCIATION,	)	Appeal from the Circuit Court
as Trustee for Certificate holders of Bear Sterns	)	of the 12 <sup>th</sup> Judicial Circuit,
Asset Back Securities I LLC Asset Backed	)	Will County, Illinois
Certificates, Series 2004-FR3,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 08-CH-571
	)	
UNKNOWN HEIRS AND LEGATEES OF	)	Honorable
CANDICE WILLIS, DECEASED, AVANTA R.	)	Richard J. Siegel,
WILLIS, ENRICO D. WILLIS, MORTGAGE	)	Judge Presiding.
ELECTRONIC REGISTRATION SYSTEMS,	)	
INC., as nominee for Fremont Investment & Loan,	)	
UNKNOWN OWNERS and NON-RECORD	)	
CLAIMANTS,	)	
	)	
Defendants-Appellants.	)	

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice Carter and Justice Lytton concurred in the judgement.

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**ORDER**

*Held:* The trial court erred in finding defendant Avanta R. Willis waived the issue of personal jurisdiction by filing documents with the court after entry of a default judgment and therefore, the trial court improperly denied defendant's motion to

vacate judgment and to quash service of summons. The judgment of foreclosure and confirmation of judicial sale are vacated. The cause is remanded to the trial court for further proceedings.

On February 4, 2008, plaintiffs filed a complaint to foreclose mortgage against defendants. The trial court entered a default judgment for foreclosure on April 28, 2008. Following entry of the default judgment, defendant Avanta R. Willis filed a written appearance and *pro se* petitions to vacate judgment for lack of standing. After retaining counsel, defendant obtained leave of court to withdraw her petitions to vacate, and then filed a motion to vacate judgment and to quash service on December 1, 2009.

The trial court denied defendant's motion to vacate judgment and to quash service on February 18, 2010. We reverse the trial court's denial of defendant's motion to vacate judgment and to quash service of summons on the basis that the trial court erroneously found defendant waived the issue of personal jurisdiction. The default judgment of foreclosure and sale and the subsequent confirmation of judicial sale are vacated, and the cause is remanded to the trial court for further proceedings on plaintiffs' complaint to foreclose mortgage.

#### FACTS

On February 4, 2008, plaintiffs filed a complaint to foreclose mortgage against defendants. On that same day, the clerk of the court issued an original summons, a first duplicate original summons and a second duplicate original summons at plaintiffs' request. The summons advised each defendant that failure to file an answer or appearance with 30 days of service of summons would result in a judgment by default for the relief requested in the complaint.

On April 2, 2008, plaintiffs filed an affidavit of service with the court. According to the affidavit, Karen Crohan stated that she was a special process server appointed by the court and

that she served a copy of plaintiffs' summons and complaint on Avanta R. Willis (defendant) on February 7, 2008, at 957 Charles Street in Crete, Illinois. The affidavit described defendant as a white female between the ages of 31 and 35 years.

On April 18, 2008, plaintiffs filed a motion for default order and judgment of foreclosure claiming defendant was personally served with summons and complaint but failed to file an answer or appearance. The minute entry of April 28, 2008, states: "Due proof of service. Order of default is entered. Motion for judgment for foreclosure and sale is presented. Proofs by affidavit found to be sufficient." The trial court granted plaintiffs' motion for default and entered a judgment of foreclosure and sale against defendant.

On October 6, 2008, plaintiffs filed a notice of foreclosure sale with the court showing that plaintiffs sent notice to defendant of a judicial sale on October 15, 2008. Thereafter, plaintiffs filed additional notices of foreclosure sale on the property in question on April 24, 2009, and September 28, 2009. On October 8, 2009, the Will County sheriff's department filed a report of sale and distribution with the court which indicated that the sheriff's department held a judicial sale on the property on October 7, 2009.

On November 2, 2009, defendant filed a *pro se* petition to vacate the judgment of foreclosure. The *pro se* petition alleged the judgment order was void because plaintiffs were not the assignee of the mortgage in question and lacked standing to seek the judgment of foreclosure. Defendant also claimed that she did not learn of these facts until October 31, 2009 and asserted the judgment was entered without fault or negligence on her part. Defendant also claimed that she had a meritorious affirmative defense based on plaintiff's lack of standing.

On November 3, 2009, defendant appeared in court, and the trial court entered an order

striking defendant's motion to vacate because defendant failed to file an appearance with the court and failed to provide proper notice to plaintiffs. On that same day, the trial court confirmed the sheriff's report of sale and distribution.

On November 5, 2009, defendant filed an appearance with the court *pro se*. Although defendant filed the document *pro se*, defendant checked the box on the form indicating that she filed her appearance as co-counsel. On November 5, 2009, defendant filed a second *pro se* petition to vacate which alleged the same facts as those contained in her November 2, 2009, petition. Defendant also filed an affidavit in support of her second *pro se* petition to vacate which stated that she secured a loan on the property in question with EMC Mortgage Corporation and that she occupied the property in question. She stated that she believed plaintiffs lacked the capacity to foreclose the mortgage. On November 18, 2009, defendant filed a third *pro se* petition to vacate and affidavit in support claiming that plaintiffs lacked standing to foreclose on the mortgage.

On November 24, 2009, an attorney filed a general appearance on behalf of defendant with the court. On that same day, the trial court entered an order allowing defendant to withdraw her multiple *pro se* petitions to vacate. Further, the trial court granted defendant's counsel leave to file a motion to vacate judgment for improper service of process by December 1, 2009.

On December 1, 2009, defendant's attorney filed a motion to vacate judgment and to quash service requesting the court to vacate any and all orders of judgment and quash the defective service pursuant to sections 2-203 and 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-203, 2-301 (West 2006)). The motion included defendant's assertion that she was not a white woman as set forth in the proof of service, that she was not personally served with

process in this case, and that a copy of the summons was “stuffed into her mail box.”

Defendant attached an affidavit to the motion verifying that she was not served in this case, that she lived alone at the property in question, and that she was a 32-year old African-American female. Defendant also attached an exhibit to her motion and affidavit which included copies of defendant’s current, government issued State of Illinois identification card and defendant’s previously issued State of Illinois driver’s license showing that defendant was an African-American female.

On December 22, 2009, plaintiffs filed a response to defendant’s motion to vacate judgment and to quash service. Plaintiffs claimed that it filed an affidavit of service showing personal service on defendant and that defendant’s affidavit was insufficient to rebut plaintiffs’ proof of service. Plaintiffs also claimed that since defendant’s pending motion was not the first motion filed in this proceeding, plaintiffs asserted that defendant waived any objection to the court’s lack of personal jurisdiction.

On January 12, 2010, new counsel entered his appearance on defendant’s behalf, and the court continued the cause for hearing. On January 26, 2010, defendant’s new counsel filed a reply to plaintiffs’ response to defendant’s motion to vacate judgment and quash service. In the reply, defendant stated that Karen Crohan, listed as the special process server on plaintiffs’ affidavit of service, was not a licensed detective in the State and was not appointed by the court to serve defendant. According to the reply, Crohan was an employee of Proveset LLC, a licensed detective agency. Also according to the reply, defendant again claimed that she was not served with summons, that plaintiffs failed to rebut defendant’s affidavit that she was not served, and that the trial court’s *ex parte* order of default was void.

On February 18, 2010, the trial court conducted a hearing on defendant's motion to vacate judgment and quash service. Defense counsel argued to the court that plaintiffs' affidavit of service indicated that the process server served a white female, that defendant was African American, that no one else lived with defendant and that the special process server did not comply with the relevant statutes. Plaintiffs' counsel responded that defendant had waived the issue because defendant filed two prior petitions to vacate and that neither petition attacked personal jurisdiction.

Defense counsel then emphasized that defendant filed initial pleadings *pro se* and attempted to frame the argument, but the court struck her prior pleadings. Further, defense counsel argued that the court entered the default judgment in this case without service of process and that defendant's subsequent motions, filed after entry of judgment, would not correct a lack of jurisdiction.

The court concluded that defendant waived personal jurisdiction by filing her petitions to vacate the judgment based upon lack of standing. Accordingly, the trial court denied defendant's motion to vacate. On February 18, 2010, the trial court entered a written order stating that defendant's motion to vacate judgment and to quash service was denied.

On February 24, 2010, defendant filed a document entitled "MOTION TO VACATE JUDGMENT" in which defendant asked the court to reconsider and vacate the judgment entered on February 18, 2010. Defendant argued that all of defendant's original motions were stricken and withdrawn by the court and that thereafter, defendant filed a motion to quash service. Defendant further argued that she had not waived the issue of personal jurisdiction and asked the court to reconsider its order of February 18, 2010.

On March 16, 2010, the trial court conducted a hearing on defendant's motion to reconsider. Defense counsel argued that by striking defendant's pleadings, those pleadings became a nullity and therefore, the court could not consider those documents in finding defendant waived the issue of personal jurisdiction. The court stated that it did not matter that defendant's petitions were withdrawn. The court further stated the filing of the documents was "the trigger" to waiving jurisdiction. After hearing arguments of counsel, the trial court denied the motion to reconsider. On March 26, 2010, defendant filed a notice of appeal.

#### ANALYSIS

On appeal, defendant argues that the trial court erred by denying defendant's motion to vacate judgment and to quash service. First, defendant claims that the trial court erroneously found that defendant waived her right to challenge personal jurisdiction by filing *pro se* petitions to vacate which were later stricken or withdrawn. Second, defendant claims that the trial court failed to conduct a hearing on defendant's motion to vacate judgment and to quash service prior to denying the motion. Plaintiffs respond that the trial court correctly found that defendant waived the issue of personal jurisdiction and that the trial court properly denied defendant's motion to vacate judgment and quash service.

In this case, after the default judgment was entered, defendant's counsel filed a petition to vacate the judgment on the grounds that she was not served with summons prior to the default judgment of foreclosure. According to her affidavit, defendant was not a white female, and the return on the summons showed the process server served a white female. To corroborate this allegation, defendant attached to her motion and affidavit, copies of a State of Illinois issued driver's license and a current State of Illinois issued ID Card. Further, defendant's affidavit

alleged she did not reside with a white female or anyone else.

Assuming first that plaintiffs' affidavit of service attempted to show personal service upon defendant, then it is well established that the return is *prima facie* proof of service which can be overcome only by clear and convincing proof. *Harris v. American Legion John T. Shelton Post No. 838*, 12 Ill. App. 3d 235, 237 (1973). In this case, defendant filed government issued documents with her motion and affidavit which clearly established that defendant was not a white female, contrary to the allegations contained in plaintiffs' affidavit of service.

Next, assuming that plaintiffs' affidavit attempted to show substitute service, as defendant argues, by serving a white female at defendant's residence (735 ILCS 5/2-203(a)(2) (West 2006)), we observe that plaintiffs did not file any counter-affidavits or offer any testimony disputing defendant's affidavit that she did not reside with a white female. Under such circumstances, the trial court was required to accept defendant's allegations in her affidavit regarding improper substitute service as true. *Sterne v. Forrest*, 145 Ill. App. 3d 268, 274 (1986); *Clinton County v. Eggleston*, 78 Ill. App. 3d 552 (1979).

In order for the court to have had personal jurisdiction in this case at the time of its entry of the default judgment, either Willis must have been properly served with summons or alternatively, must have submitted herself to the court's personal jurisdiction. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). Personal jurisdiction can only be obtained by complying with the precise manner of service of process set forth by statute. *Forest Preserve District of Cook County v. Industrial Commission*, 305 Ill. App. 3d 657, 663-64 (1999) (citing *Miller v. Town of Cicero*, 225 Ill. App. 3d 105, 110 (1992)). Based on these pleadings and the attached documentation, the record reveals defendant was not served with summons on February 7, 2008,



as set forth in plaintiffs' affidavit of service. We conclude that the trial court did not acquire personal jurisdiction over Willis by personal service prior to entry of the default judgment on April 28, 2008.

Next, we consider whether defendant waived her right to object to personal jurisdiction and voluntarily subjected herself to the retroactive application of personal jurisdiction by filing a *pro se* appearance and petition to vacate after the default judgment was entered. Even though defendant filed a *pro se* appearance and pleadings in 2009, defendant argues that these pleadings did not operate to create retroactive personal jurisdiction or waive her meritorious objections to the court's jurisdiction over her person. In other words, defendant asserts that challenging the void judgment after the entry of judgment did not subject her to the court's personal jurisdiction retroactively based on the provisions of section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301(a), (a-5) (West 2006)).

The parties agree that we must consider whether the trial court properly determined that defendant waived personal jurisdiction within the meaning of section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301(a), (a-5) (West 2006)). The parties also agree that this issue presents a question of law. We review *de novo* such determinations. *Higgins v. Richards*, 401 Ill. App. 3d 1120, 937 N.E.2d 215, 219 (2010).

We begin by reviewing the provisions of Section 2-301(a) of the Illinois Code of Civil Procedure which currently provides as follows:

“Objections to jurisdiction over the person.

(a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise

appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, but the parts of a combined motion must be identified in the manner described in Section 2-619.1. Unless the facts that constitute the basis for the objection are apparent from papers already on file in the case, the motion must be supported by an affidavit setting forth those facts.

(a-5) If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person.” 735 ILCS 5/2-301(a), (a-5) (West 2006).

This statutory provision was amended in 2000. Before this amendment, a defendant seeking to challenge personal jurisdiction was required to file a special and limited appearance for that purpose and could not include requests for any other relief. 735 ILCS 5/2-301 (West 1998). Failure to do so would result in a general appearance and waiver of all objections to

personal jurisdiction. 735 ILCS 5/2-301 (West 1998).

However, prior to the legislature's amendment in 2000, our supreme court held that a judgment that is void when entered, remains void notwithstanding subsequent general appearances and that a general appearance or motions filed postjudgment did not serve to retroactively validate a judgment that was void when entered. *In re Marriage of Verdung*, 126 Ill. 2d at 547. Accordingly, a defendant's subsequent attempt to set aside a void judgment, after entry of that judgment, would not serve to validate a previous order entered without personal jurisdiction. *J.C. Penney Co., Inc. v. West*, 114 Ill. App. 3d 644, 646 (1983).

Since the amendment to section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301 (West 2000)), a conflict has arisen between the appellate courts in this State. The first district appellate court has continued to follow the reasoning employed by our supreme court prior to the 2000 amendment and held that the filing of a postjudgment motion confers jurisdiction prospectively alone. *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d 909, 910 (2008) (citing *In re Marriage of Verdung*, 126 Ill. 2d at 547); *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 628-30 (2008).

In contrast, when addressing a waiver issue premised upon failure to comply with pleading requirements of section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2008)) where a defendant filed a combined motion to set aside default judgment and a motion to dismiss for lack of personal jurisdiction, the fifth district appellate court stated that it believed section 2-301(a-5) (735 ILCS 5/2-3019(a-5) (West 2008)) codified "the long-standing rule that 'a party may waive a defect in jurisdiction over the person by proceeding without objection.'" *Higgins v. Richards*, 401 Ill. App. 3d 1120, 937 N.E.2d at 221 (quoting *Mullaney*,

*Wells & Co. v. Savage*, 31 Ill. App. 3d 343, 347 (1975)). The *Higgins* court believed that “compliance with subsection (a)” referred to the time that a motion to dismiss for lack of personal jurisdiction should be filed and was not meant to impose a strict mandate regarding section 2-619.1's pleading requirements. The *Higgins* court went on to say that even if strict pleading requirements applied, the court could not conclude that a party's failure to comply “would be sufficient to waive the party's otherwise timely objection to a court's lack of personal jurisdiction.” The *Higgins* court believed that such an interpretation of section 2-301(a-5) “would allow a technical pleading requirement to ‘obliterate due process concerns.’ ” *Higgins v. Richards*, 401 Ill. App. 3d 1120, 937 N.E.2d at 221.

Yet another approach was adopted by the second district appellate court in *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978 (2008), which concluded that the language of section 2-301(a-5) (735 ILCS 5/2-301(a-5) (West 2006)) should be “naturally taken as comprehensive, applying both prospectively and retroactively.” *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d at 993.

Our supreme court has not decided whether the amended version of section 2-301 should apply retroactively, contrary to its holding in *In re Marriage of Verdung*. 126 Ill. 2d 542 (1989). We turn to the legislative debates to gain some insight on this issue.

When discussing the amendment to section 2-301 of the Illinois Code of Civil Procedure (735 ILCS 5/2-301 (West 1998)), Senator Hawkinson said:

“This bill amends the Code of Civil Procedure dealing with special appearances. It is not an initiative of the Illinois State Bar Association but it was suggested by the Bar Association. It's a

cleanup. It is designed to prevent an unknowing waiver. When you file a motion in court, before you file your special appearance, it allows you to file your special appearance and other motions at the same time.” 91st Ill. Gen. Assem., Senate Proceedings, March 11, 1999, at 42-43 (statements of Sen. Hawkinson).

Contrary to the views of our respected colleagues of the second district, who considered the same language used by the senator, we do not believe that the legislature intended to create a stricter or more harsh version of the statutory provision which would now allow a defendant’s due process rights to be waived retroactively.

Based on these comments by Senator Hawkinson, we conclude that defendant’s filing of a *pro se* general appearance and multiple *pro se* petitions to vacate judgment based upon standing, following the entry of a default judgment by the court, did not confer personal jurisdiction upon the trial court retroactively. Consistent with the decisions from the first district, we will follow the approach adopted by our supreme court in *In re Marriage of Verdung*, 126 Ill. 2d 542.

Therefore, we conclude that the trial court erred in finding defendant waived her right to challenge the court’s jurisdiction over her person by filing a general appearance and petitions to vacate judgment based on lack of standing after the trial court entered a default judgment. Further, the trial court erred by denying defendant’s motion to vacate the default judgment entered on April 28, 2008, as the trial court had not acquired personal jurisdiction of defendant prior to that date and defendant was not in default.

However, by filing a general appearance, along with her second *pro se* petition to vacate judgment based upon lack of standing on November 5, 2009, defendant submitted herself to the

jurisdiction of the trial court prospectively. See *C.T.A.S.S. & U. Federal Credit Union v. Johnson*, 383 Ill. App. 3d at 910 (citing *In re Marriage of Verdung*, 126 Ill. 2d at 547); *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d at 628-30. This cause is therefore remanded to the trial court for further proceedings on plaintiffs' complaint to foreclose mortgage. Upon remand, defendant shall have an opportunity to file any other responsive pleadings, including affirmative defenses, to plaintiffs' complaint to foreclose mortgage.

#### CONCLUSION

The trial court's order denying defendant's motion to vacate judgment and quash service is reversed. The service of summons dated February 7, 2008, is quashed. The judgment of foreclosure and order confirming sale entered by the circuit court of Will County are reversed and vacated. The cause is remanded to the trial court for further proceedings on plaintiffs' complaint to foreclose mortgage.

Orders vacated, reversed and remanded.