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2013 IL App (3d) 120409-U

Order filed February 13, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

JULIE BLECK,) Appeal from the Circuit Court
) of the 13th Judicial Circuit,
Plaintiff-Appellee,) La Salle County, Illinois,
)
v.) Appeal No. 3-12-0409
) Circuit No. 10-CH-185
KIMBERLY D. NELSON, Individually and)
as Executor of the Estate of Karola Michele)
Foster, a/k/a Michele Foster, Deceased) Honorable
) Joseph P. Hettel,
Defendants-Appellants.) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court's finding that defendant was served at her usual place of abode was not against the manifest weight of the evidence where there was conflicting evidence regarding where defendant lived and defendant listed the address where she was served as her home address on several documents. Service of summons on defendant vested the court with jurisdiction over defendant in her representative capacity as executor of her mother's estate where the complaint made claims against defendant in her representative capacity.
- ¶ 2 Plaintiff filed a complaint against defendant individually and as executor of their mother's

estate. The trial court issued a summons. The summons and complaint were served on defendant's ex-husband at an address defendant listed as her own in court documents. Defendant did not answer the complaint, and a default judgment was entered against her. Defendant filed motions to vacate the default judgment, arguing that (1) the address where the summons and complaint were served was not her usual place of abode, and (2) the summons did not vest the court with jurisdiction over her as the executor of her mother's estate. The trial court denied defendant's motions. We affirm.

¶ 3 Plaintiff Julie Bleck and defendant Kimberly Nelson are half sisters. Their mother, Karola Michele Foster, died in June 2009. Defendant was named executor of Foster's estate. On April 9, 2010, plaintiff filed a complaint to quiet title, alleging that Foster conveyed real property, located at 1322 Center Street, Peru, to her in a deed signed in December 1996. Plaintiff's complaint sought relief from the defendant individually and as executor of Foster's estate in the form of a declaration that plaintiff was the sole owner of the property.

¶ 4 The court issued a summons to defendant: "Kimberly D. Nelson, 2616 Main St., Peru, IL 61354." A special process server served the complaint and summons on April 18, 2010, by giving a copy to Brian Mondoni at 2616 Main Street, Peru. The process server's affidavit identifies Mondoni as defendant's spouse. The process server mailed a copy of the summons and complaint to defendant at 2616 Main Street, Peru.

¶ 5 Defendant did not respond to the complaint. As a result, plaintiff filed a motion for default judgment on June 4, 2010. On June 22, 2010, the trial court found defendant to be in default and declared that plaintiff was the lawful title holder of the real property located at 1322 Center Street, Peru.

¶ 6 On August 17, 2010, a fire occurred at 1322 Center Street, Peru, and destroyed the home. The

home was insured by State Farm Fire Insurance. State Farm paid the insurance policy proceeds to the defendant as the executor of Foster's estate. Plaintiff filed suit against defendant, seeking the insurance proceeds. The court consolidated that action with the default action and prohibited defendant from distributing the fire insurance proceeds.

¶ 7 On March 4, 2011, defendant filed a motion to vacate the default judgment and a motion to reopen the cause. Defendant's motions alleged that the court lacked jurisdiction over the Estate of Karola Michele Foster because no summons or complaint was served on the estate. Defendant filed an affidavit from Brian Mondoni, which stated that he and defendant divorced in 2003, and that only he and his children live at 2616 Main Street, Peru. He stated that when he received the summons and complaint against defendant on April 18, 2010, he did not give the papers to defendant but threw them away. He further stated that he told the process server who came to his home on April 18, 2010, that defendant did not live there. Defendant also filed her own affidavit stating that she never received service as executor of her mother's estate and that she only recently became aware that plaintiff's action was filed and that a default judgment had been entered against her.

¶ 8 Plaintiff filed a motion to dismiss defendant's motions to vacate default judgment and reopen the cause. Attached thereto was an affidavit from Frank Sadnick, the process server who served the summons and complaint on Mondoni. His affidavit stated that Mondoni identified himself as defendant's spouse and never said that defendant did not live at 2616 Main Street, Peru. Plaintiff also attached to the motion to dismiss court documents filed by defendant in February and December 2010, in which defendant listed her address as 2616 Main Street, Peru.

¶ 9 In August 2011, defendant filed an amended motion to vacate default judgment, alleging that she was not properly served with the summons or complaint either individually or as executor of

Foster's estate. Attached thereto was an affidavit from defendant stating that 2616 Main Street, Peru, was never her usual place of abode, and an affidavit from Mondoni stating that he did not identify himself to the process server as defendant's husband.

¶ 10 In October 2011, plaintiff filed an amended complaint containing two counts. Count I was directed against defendant individually and sought an order requiring defendant to transfer the State Farm insurance proceeds to plaintiff. Count II was against defendant as executor of Foster's estate and sought the same relief as count I.

¶ 11 Hearings were held on February 8 and 9, 2012. Keith Foster, defendant's father testified that he lives at 1302 Center Street, Peru. He testified that defendant lives with him and has done so continuously since December 2003. He did not believe that defendant ever spent the night at 2616 Main Street, Peru. Foster testified that he had never been to 1616 Main Street, Peru. A friend of Foster's testified that defendant has lived with Foster at 1302 Center Street for five or six years.

¶ 12 Brian Mondoni, defendant's ex-husband, testified that defendant has lived with Foster since he and defendant divorced in 2003. He said that defendant lived with Foster at 1302 Center Street on April 18, 2010. On that date, a process server came to his house at 2616 Main Street and asked for defendant. He told the process server that defendant did not live there but agreed to sign the paper the process server gave him. He placed the papers on his coffee table and did not mention them to defendant.

¶ 13 Mondoni testified that he lived at 2616 Main Street from approximately December 2009 to February 2011. Defendant signed the lease for that property because he has bad credit. Defendant also paid the rent for that property because Mondoni does not work. Defendant received mail at 2616 Main Street. He threw away some of that mail for a two-month period beginning in April

2010.

¶ 14 Defendant testified that she currently lives at 1302 Center Street and has lived there with her father for the past five years. Defendant keeps all of her belongings at 1302 Center Street. She receives all of her personal mail at 1302 Center Street but receives mail related to her mother's estate at 2616 Main Street. She filled out a change of address card at the post office in 2010, so that she would receive mail regarding her mother's estate at 2616 Main Street. Defendant testified that she never received the complaint and summons that were served on Mondoni and mailed to her at 2616 Main Street. It is her understanding that Mondoni threw away those documents.

¶ 15 Several documents were admitted into evidence, including (1) a notice of hearing for Plaintiff's Motion for Default Judgment, mailed on June 2, 2010, to defendant at 2616 Main Street, (2) an affidavit filed by a process server on December 15, 2010, indicating that he served a notice of hearing on defendant at 2616 Main Street, (3) a Request for Change of Address filed by defendant, dated May 17, 2011, changing her address from 2616 Main Street to 1302 Center Street, (4) a Petition for Probate of Will filed by defendant on February 11, 2010, listing her address as 2616 Main Street, (5) defendant's 2009 income tax return, listing defendant's address as 1302 Center Street, (6) checks signed by defendant from February to September 2010, listing her address as 1302 Center Street, (7) a driver's license issued to defendant in August 2010, listing her address as 1302 Center Street, and (8) a voter's registration card issued to defendant in September 2006, listing her address as 1302 Center Street.

¶ 16 Frank Sadnick testified that he attempted to serve process on defendant at 2616 Main Street, Peru on April 18, 2010. He went to that address and spoke to Brian Mondoni, who told him that defendant lived there but was at work. Sadnick then served Mondoni with the summons and

complaint, and he accepted them. On the same day, Sadnick mailed a copy of the summons and complaint to 2616 Main Street, Peru.

¶ 17 Brian Cherpeske testified that he served process on defendant at 2616 Main Street, Peru on December 15, 2010. Defendant testified that she was served there when she came to the house to pick up her children.

¶ 18 Ralph Gapol, defendant's half-brother, testified that he believed defendant and Mondoni lived together. He visited them at various homes between 2006 and 2009, and they appeared to live together. He never visited defendant or Mondoni at 2616 Main Street, Peru.

¶ 19 Mario Gaeta, the owner of the home located 2616 Main Street, Peru, testified that he rented the home to Mondoni and defendant. Mondoni introduced defendant to Gaeta as his wife. Gaeta testified that he visited the property approximately 20 times while Mondoni and defendant rented it. He testified that defendant "was living in that house." When Gaeta went to the house to make repairs, defendant was present. He also noticed women's clothing in the laundry room. He saw defendant's father, "Keith," at the home on 2616 Main Street "many times."

¶ 20 On February 22, 2012, the trial court denied defendant's motion to vacate based on improper abode service, finding that "defendant failed to prove the abode service improper." In so holding, the court found that Foster's testimony that defendant lived with him was biased and that Mondoni's testimony was "incredibly incredible." The court found that because defendant held herself out to the world as residing at 2616 Main Street, Peru, defendant failed to meet her burden of proving that was not her abode. Five days later, the trial court denied the Estate's motion to vacate, finding that the summons served on defendant was sufficient to vest the court with jurisdiction over defendant in her representative capacity as executor of Foster's estate.

¶ 21 A court acquires jurisdiction over a person only after proper service of summons. *LaMotte v. Constantine*, 92 Ill. App. 3d 216, 217 (1980). Where service of summons is improper, the trial court has no jurisdiction to enter a default judgment. *Id.* at 217-18. A judgment entered without jurisdiction over the defendant is void. *Id.* at 218.

¶ 22

I

¶ 23 Defendant first argues that the summons served on Mondoni at 2616 Main Street, Peru did not vest the trial court with jurisdiction over her because 2616 Main Street is not her usual place of abode.

¶ 24 Section 2-203 of the Code of Civil Procedure provides that service of summons shall be made by (1) leaving a copy of the summons with the defendant personally, or (2) leaving a copy at the defendant's usual place of abode with a family member at least 13 years of age, informing them of its contents, and thereafter mailing a copy of the summons to defendant at his usual place of abode. 735 ILCS 5/2-203(a) (West 2008).

¶ 25 A defendant's "usual place of abode" is a question of fact. *United Bank of Loves Park v. Dohm*, 115 Ill. App. 3d 286, 289 (1983). No hard and fast definition of "usual place of abode" exists. *Id.* Each case must turn on its particular facts. *Id.* The underlying consideration is whether substituted service at the chosen dwelling place is reasonably likely to provide the defendant with actual notice of the proceedings. *Id.*

¶ 26 A defendant's usual place of abode may be the address he uses for numerous purposes even if he occasionally stays elsewhere. See *Sterne v. Forrest*, 145 Ill. App. 3d 268 (1986) (address listed on defendant's IRS filing, change of address form provided to employer, driver's license, utility bills, and checking account was defendant's "usual place of abode"); *Dohm*, 115 Ill. App. 3d at 291

(address listed on defendant's driver's license, social security registration and mailing address was defendant's "usual place of abode").

¶ 27 When a defendant claims that a certain address is not her usual place of abode and witnesses rebut such a claim, it is within the province of the trial court to determine the weight to give the defendant's assertions and the testimony of the witnesses. *Sterne*, 145 Ill. App. 3d at 276. This court should not disturb the trial court's findings and substitute its own opinion unless the holding of the trial court is manifestly against the weight of the evidence. *Id.*

¶ 28 Here, there was conflicting testimony as to defendant's usual place of abode. Defendant, her father and her ex-husband all testified that defendant did not reside at 2616 Main Street but lived at 1302 Center Street. However, other individuals, including defendant's half-brother and the owner of the Main Street property testified that they believed Mondoni and defendant lived together at 2616 Main Street.

¶ 29 There was also conflicting documentary evidence regarding defendant's place of abode. Defendant listed 2616 Main Street as her address with the postal service and on court documents related to her mother's estate. However, she listed the Center Street address on her income tax return, her personal checks, her driver's license, and her voter's registration card.

¶ 30 Because the testimony and evidence in this case was conflicting, the trial court's decision that 2616 Main Street was defendant's usual place of abode was not against the manifest weight of the evidence. See *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 863 (2008) (where the parties present conflicting evidence, a reviewing court cannot say the trial court's decision is against the manifest weight of the evidence). We affirm that decision.

¶ 31

II

¶ 32 Defendant next argues that the summons issued against her did not vest the court with jurisdiction over her as representative of Foster's estate because the summons did not mention the estate.

¶ 33 Illinois Supreme Court Rule 101(a) provides that a summons "shall be directed to each defendant." Ill. S. Ct. R. 101(a) (eff. May 30, 2008). The purpose of a summons is to advise a defendant of the fact that suit has been commenced, of the names of the parties, and the time and place, when and where he must appear and plead, answer or demur. *Wessel v. Eilenberger*, 2 Ill. 2d 522, 537 (1954).

¶ 34 Where the representatives of an estate are served with summons and properly made parties to a suit in their individual capacities, the summons' failure to designate them in their representative capacities is not fatal as long as the omission is cured by the complaint that accompanies the summons. *Wessel*, 2 Ill. 2d at 537. Where the complaint served with the summons names the individuals in their representative capacities and makes claims against them in such capacities, the purpose of the summons is accomplished and any error in failing to serve them in their representative capacities is cured. *Id.*

¶ 35 Here, the summons issued against defendant did not designate her representative capacity as executor of Foster's estate. However, the complaint, which accompanied the summons, named defendant in her individual and representative capacities and made claims against her in both capacities. Thus, the purpose of the summons was accomplished, and the court obtained jurisdiction over defendant in her representative capacity, as well as her individual capacity.

¶ 36 The judgment of the circuit court of LaSalle County is affirmed.

¶ 37 Affirmed.