2020 IL App (2d) 190820-U
No. 2-19-0820
Order filed December 14, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PARKVALE SAVINGS BANK, Plaintiff-Appellee, v. SIDNEY C. TAYLOR; CHICAGO TITLE LAND TRUST COMPANY, as Trustee UTA DTD 10/7/08 Trust No. 8002351835; JP MORGAN CHASE BANK N.A.; UNKNOWN BENEFICIARIES OF CHICAGO TITLE LAND TRUST COMPANY, as Trustee UTA DTD 10/7/08 a/k/a Trust No. 002351835; UNKNOWN OWNERS AND NON RECORD CLAIMANTS, Defendants (Chicago Title Land Trust Company, as Trustee UTA DTD 10/7/08 Trust No. 8002351835, Defendant-Appellant).	)	Appeal from the Circuit Court of Du Page County. No. 09-CH-5033 Honorable Robert W. Rohm, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Bridges and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: In a mortgage foreclosure action, dismissal of section 2-1401 petition filed by foreclosure defendant was affirmed on the basis of laches where defendant's

several-year delay in filing the petition was unreasonable and caused prejudice to foreclosure plaintiff.

¶ 2 Defendant, Chicago Title Land Trust Company, as Trustee UTA DTD 10/7/08 Trust No. 8002351835 (the Trust), appeals the denial of its amended petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2018)) seeking to quash service in a foreclosure case, which had been brought by plaintiff, Parkvale Savings Bank (Parkvale), in October 2009 and which resulted in a default judgment against the Trust. For the reasons that follow, we hold that the Trust's amended petition was barred by the doctrine of *laches* and we affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 22, 2009, Parkvale filed a foreclosure complaint against Sidney C. Taylor, the Trust, and others, seeking foreclosure of the real estate located at 691 East Hickory Avenue, Addison, Illinois 60101 (the Property). Attached to the complaint was a copy of the mortgage, which listed Taylor as the mortgagor. The Trust was named as the present owner of the property. (Taylor had transferred his interest in the Property to the Trust via warranty deed recorded on October 8, 2008.)

¶ 5 On November 12, 2009, Parkvale filed an "Affidavit of Special Process Server." According to the affidavit, the Trust was served by "an employee of Firefly Legal, Inc., a licensed private detective agency," on October 27, 2009, at "208 S Lasalle [*sic*] Street Ste 814 Chicago, IL 60604." Taylor was later served by publication; he filed his appearance and a responsive pleading on January 8, 2010.

¶ 6 On March 16, 2010, summary judgment was entered against Taylor, a default judgment was entered against the Trust and other defendants, and a judgment of foreclosure and sale was entered for Parkvale.

¶ 7 On April 14, 2010, Taylor filed a Chapter 7 bankruptcy in the Northern District of Illinois. In his bankruptcy petition, Taylor listed the Property as an asset, indicating that his interest in the property was "1/1" He attested that he intended to surrender all interest in the Property. On August 20, 2010, Taylor was granted a discharge of his debts.

¶ 8 On March 15, 2011, a final judgment of foreclosure was entered and the sale of the Property to Parkvale was approved, with a deficiency of $446,829.39. Thereafter, the Property was sold to Andrzej Scigacz and Bozena Scigacz (the Current Owners) and a corporate warranty deed was recorded on May 2, 2012. They later transferred the property, via quit claim deed filed on December 30, 2015, into their respective revocable living trusts.

¶ 9 On January 24, 2017, the Trust filed a "Petition to Quash Service and Vacate All Void Orders," under section 2-1401 of the Code (735 ILCS 5/2-140(f) (West 2016)). The Trust argued that the trial court did not have personal jurisdiction over the Trust in the underlying foreclosure action, because service took place in Cook County and no special process server was appointed. The Trust asked the court to quash service, vacate all orders entered on or before March 15, 2011, and restore possession of the Property to the Trust. The Trust also asked that the court find invalid all deeds entered in the Du Page County Recorder's Office after March 15, 2011, with respect to the Property.

¶ 10 On December 1, 2017, the Trust filed an "Amended Petition to Quash Service," under section 2-1401(f) of the Code (*id.*) (the Amended Petition). The Trust again argued that the trial court did not have personal jurisdiction over it in the foreclosure proceedings, but in its request for relief, the Trust now asked only that service be quashed.

¶ 11 On January 12, 2018, the Current Owners were granted leave to intervene and thereafter filed a motion to dismiss. On May 1, 2018, the trial court granted the motion to dismiss. The order

provided that the matter was "heard" and that the court was "fully advised that the [Trust] has agreed to dismiss the [Current Owners] with prejudice." The court found that, "by the reason of adverse possession," the Current Owners were "entitled to possession of the [P]roperty," that neither the Trust nor any party to the foreclosure had any rights of possession to the Property, and that the "sole remedy" to any remaining party was monetary.

¶ 12 On April 30, 2019, Parkvale filed a motion to dismiss the Amended Petition with prejudice under section 2-619 of the Code (*id.* § 2-619). Parkvale argued: (1) the Amended Petition was barred by the doctrine of *laches*; (2) the Amended Petition should be dismissed under Supreme Court Rule 103(b) (eff. July 1, 2007), due to the Trust's unreasonable delay in serving Parkvale with the Amended Petition; and (3) the Trust is estopped from asserting any rights in the property due to Taylor's surrender of the Property in his bankruptcy petition.

¶ 13 In response, the Trust argued: (1) the doctrine of *laches* did not apply; (2) the matter should not be dismissed under Rule 103(b) (eff. July 1, 2007); and (3) the Trust is not estopped from asserting any rights due to Taylor's surrender of the Property in his bankruptcy petition, because "Taylor is not the sole beneficiary of the Trust."

¶ 14 A hearing took place on August 20, 2019, and thereafter the trial court granted Parkvale's motion to dismiss with prejudice "for reasons stated on the record." At the hearing, the trial court found that "service was bad," stating "[t]here can be no question that [Parkvale was] serving Cook County without leave of court." Nevertheless, the court found that, based on Taylor's bankruptcy, the Trust's claim was barred by judicial estoppel and otherwise moot. The court expressly declined to rule on Parkvale's argument that the Trust's petition was barred by the doctrine of *laches*.

¶ 15 The Trust timely appealed.

¶ 16 II. ANALYSIS

¶ 17 The Trust argues that the trial court erred in granting Parkvale's motion to dismiss the Amended Petition. According to the Trust, the court's ruling effectively went beyond the scope of the prayer for relief in the Amended Petition, which sought only to quash service. The Trust argues that if, as the trial court found, "service was bad," then the default judgment was void and subject to attack in perpetuity, yet the court, by finding the matter moot, treated the judgment as voidable rather than void. The Trust also argues that Taylor's bankruptcy does not estop the Trust from asserting its rights.

¶ 18 In response, Parkvale first argues that a "jurisdictional defect" is "not apparent on the face of the record." Next, Parkvale argues that, even if the judgment against the Trust was void for lack of jurisdiction, two recent cases decided by this court after the trial court's ruling make clear that the doctrine of *laches* bars the Amended Petition. Parkvale also argues that, because the Current Owners were dismissed with prejudice, the Trust was not entitled to any relief and that the Trust is estopped from asserting any rights in the property based on Taylor's surrender of the property in his bankruptcy proceedings.

¶ 19 Section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)) allows for a party to challenge a default judgment as void more than 30 days after entry of the judgment. See *PNC Bank, National Ass'n v. Kusmierz*, 2020 IL App (2d) 190521, ¶ 22.

> " 'In order to have a valid judgment the court must have both jurisdiction over the subject matter of the litigation and jurisdiction over the parties. [Citation.] Personal jurisdiction may be acquired either by the party's making a general appearance or by service of process as statutorily directed. [Citation.] A judgment rendered by a court which fails to acquire jurisdiction over the parties is void and may be attacked and vacated at any time,

> either directly or collaterally. [Citations.]' " *Id.* ¶ 23 (quoting *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989)).

¶ 20 Section 2-619(a)(9) of the Code permits dismissal of an action where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018)); see *Kusmierz*, 2020 IL App (2d) 190521, ¶ 19. We review *de novo* the dismissal of a complaint pursuant section 2-619(a)(9). *Kusmierz*, 2020 IL App (2d) 190521, ¶ 19. Moreover, we review *de novo* a judgment on a section 2-1401 petition claiming voidness due to a lack of personal jurisdiction. *Id.* We may affirm on any basis appearing in the record, regardless of whether the trial court relied on that basis. *Bankunited, National Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶ 14. For the reasons that follow, we conclude that dismissal was proper because Parkvale's Amended Petition was barred by the doctrine of *laches*.

¶ 21 We first consider whether the trial court properly concluded that the "service was bad," such that the court did not have jurisdiction over the Trust in the underlying foreclosure action, thereby rendering the default judgment entered against the Trust void. "Personal jurisdiction must be established with service of process or voluntary submission to the court's jurisdiction." *U.S. Bank National Ass'n v. v. Rahman*, 2016 IL App (2d) 150040, ¶ 24. We review *de novo* a judgment on a section 2-1401 petition claiming voidness due to a lack of personal jurisdiction. *Id.* ¶ 27. "Strict compliance with the statutes governing service of process is necessary." *Id.* ¶ 24. Here, according to the affidavit of special process server, the Trust was served with process on October 27, 2009, at "208 S Lasalle [*sic*] St Ste 814 Chicago, IL 60604." At the time of service, section 2-202(a) of the Code (735 ILCS 5/2-202(a) (West 2008)), provided, in relevant part, as follows:

> "(a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. *** In counties with a population of less than 1,000,000,

> process may be served, without special appointment, by [certain licensed or registered persons]."[1]

Thus, under section 2-202(a), process could be served by special process server, but in a county of 1 million or more, the special process server must first have been appointed by the court. See *Rahman*, 2016 IL App (2d) 150040 ¶ 33. We may take judicial notice that the address where the Trust was served is located in Cook County and that Cook County has a population of 1 million or more. See *Cigna v. Illinois Human Rights Commission*, 2020 IL App (1st) 190620, ¶ 17 (taking judicial notice that Lisle is located in Du Page County); *Rahman*, 2016 IL App (2d) 150040, ¶ 33 (taking judicial notice that Cook County has a population of 1 million or more). Therefore, an order appointing a special process server was required and, because the record does not contain such an order, service was not proper.

¶ 22 We decline Parkvale's invitation to reinterpret section 2-202(a) to hold that an order appointing a special process server was not required here because the case was *filed* in Du Page County. Parkvale's argument is based on the Third District's recent decision in *Municipal Trust and Savings Bank v. Moriarty*, 2020 IL App (3d) 190016. In *Moriarty*, the Third District found that, "subsection 2-202(a), read out of its context, appears ambiguous in cases where the summons was issued in a county with a population less than 2,000,000 but the defendant was personally served in Cook County." *Id.* ¶ 19. The court stated that "[t]he term 'in counties' can refer to either the location at which the defendant is served or the venue where the case is pending." *Id.* The court

[1] The population was changed from "1,000,000" to "2,000,000" with a subsequent amendment. See Pub. Act 96-1451, § 5 (eff. August 20, 2010).

found, however, that the plain language of section 2-202(b) was "clear and unambiguous." *Id.* ¶ 20. It provides:

> "(b) Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process. An officer may serve summons in his or her official capacity outside his or her county, but fees for mileage outside the county of the officer cannot be taxed as costs. The person serving the process in a foreign county may make return by mail." 735 ILCS 5/2-202(b) (West 2016).

Thus, the court concluded that, based thereon, "a duly licensed or registered private detective may serve process, 'without special appointment,' anywhere in the state so long as the summons was issued from a county with a population less than 2,000,000." *Moriarty*, 2020 IL App (3d) 190016, ¶ 22.

¶ 23 We reached a different outcome in *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993 (1988). We noted that section 2-202(a) was concerned with *who* is authorized to serve process, while section 2-202(b) was concerned with the *place* of service. *Id.* at 997. We further noted that section 2-202(b)'s reference to " 'any person authorized to serve process' " necessarily referred back to the provisions of section 2-202(a). *Id.* (quoting Ill. Rev. Stat. 1985, ch. 110, ¶ 2-202(b)). We thus concluded that "from a plain reading of section 2-202, a licensed or registered private detective is authorized to serve process without court appointment only in counties with a population of less than 1 million." *Id.* at 998.

¶ 24 We reaffirmed this holding in *Rahman*, stating:

> "*Schorsch* rightly held that, under the plain language of section 2-202(a), service by a special process server was authorized without a court appointment only in a county with a population of less than 1 million. Section 2–202(a) provided that '[i]n counties with a

> population of less than 1,000,000, process may be served, without special appointment,' by certain licensed or registered persons. 735 ILCS 5/2-202(a) (West 2008). The plain language of the statute was clearly concerned with where the service takes place—'In counties with a population of less than 1,000,000'—not where the case is pending. There was no reference in section 2-202(a) to the county in which the case is pending." *Rahman*, 2016 IL App (2d) 150040, ¶ 34.

We agree with the analysis set forth in *Schorsch* and reaffirmed in *Rahman*, and we find no compelling reasons to depart from it.

¶ 25 We also note that Parkvale's argument—that a jurisdictional defect is not apparent on the face of the record—is misplaced. Parkvale's argument stems from the provisions contained in section 2-1401(e) of the Code, which protects innocent third-party purchasers "[u]nless lack of jurisdiction affirmatively appears from the record proper." See 735 ILCS 5/2-1401(e) (West 2018). Because Parkvale is the original foreclosing party, section 2-1401(e) protections are not relevant. See *PNC Bank v. National Ass'n v. Kusmierzi*, 2020 IL App (2d) 190521¶ 29.

¶ 26 Accordingly, based on the foregoing, we hold that service of process on the Trust was improper and that, therefore, the trial court lacked personal jurisdiction over the Trust. Thus, the default judgment against it was void.

¶ 27 However, our analysis does not end there. Parkvale asserts, as it did below, that the doctrine of *laches* bars the Amended Petition. We agree. Although the trial court declined to rule on Parkvale's primary argument for dismissal below, this court's recent decision in *Kusmierzi*, (which was issued after the Trust filed its opening brief on appeal but before Parkvale filed its response), makes clear that the doctrine of *laches* is applicable here.

¶ 28 In *Kusmierzi*, we were asked to examine the dismissal of a 2-1401 petition, based on the doctrine of *laches*, under circumstances very similar to those presented here. In that case, the plaintiff bank filed a foreclosure complaint against the defendants in March 2011, which ultimately resulted in a default judgment against the defendants, and the plaintiff purchased the property at a judicial sale in February 2012. *Id.* ¶¶ 4, 8. In 2013, the plaintiff sold the property to third parties. *Id.* ¶ 11. Approximately six years after the default judgment and judicial sale of the property, the defendants filed a section 2-1401 petition arguing improper service in violation of section 2-202(a) of the Code (735 ILCS 5/2-202(a) (West 2016)). *Kusmierzi*, 2020 IL App (2d) 190521, ¶ 9. The plaintiff filed a motion to dismiss (as did subsequent purchasers), arguing that the defendants' 2-1401 petition was barred by the doctrine of *laches*. *Id.* ¶ 10. The trial court dismissed the petition because of *laches* (*id.* ¶ 12), and we affirmed the dismissal, agreeing with the trial court's rationale. We began our analysis with respect to the plaintiff's motion to dismiss by rejecting the defendants' claim that, because a void judgment may be attacked at any time, *laches* did not apply. *Id.* ¶ 31. We then considered whether the requisite elements to bar relief based on *laches* were satisfied. "*Laches* is an affirmative defense that is equitable, and it requires the party raising it to show that there was an unreasonable delay in bringing an action and that the delay caused prejudice." *Id.* We agreed with the plaintiff that there was an unreasonable delay in the defendants' petition and that the delay caused prejudice. *Id.* ¶ 33. We stated:

> "For six years, [the defendants] did nothing to protect their rights in the property and, had they participated in court proceedings, they might have earlier discovered the alleged defect in service. Again, they do not dispute receiving service or that constructive notice of the property sale, via the recording of deeds and the purchasers' payment of real estate taxes, would impute knowledge upon them. Nevertheless, they did not bring this cause of action

> until six years and two transfers of title later. To permit relief against the Bank at this juncture and under these circumstances would be inequitable, as the Bank has no ability to recover the property and, depending on statutes-of-limitations issues, might have no recourse against other parties or counsel. Further, nothing suggests that [the] defendants' delay in bringing this action was reasonable. Accordingly, providing relief to [the] defendants, despite their unreasonable delay in seeking relief, would prejudice the Bank." *Id.*

¶ 29 *Kusmierz* controls the outcome here. The Trust was served with the complaint and summons and had actual notice of the proceedings as early as October 27, 2009, when its registered agent accepted service. The Trust does not argue that it was not served or that it had no knowledge of the foreclosure action. The Trust also does not dispute that constructive notice of the property sale, via the recording of deeds, would impute knowledge upon it. Yet, the Trust did nothing about the allegedly defective service until filing its initial petition on January 24, 2017, over seven years later. As in *Kusmierz*, we find this delay unreasonable. We also find, based on the reasoning in *Kusmierz*, that the unreasonable delay caused prejudice to Parkvale. The delay allowed the Trust to increase the damages it could claim without any detriment to itself, and it resulted in the Property's transfer to the Current Owners, such that Parkvale is irreparably damaged and unable to recover the Property. Accordingly, based on this court's recent holding in *Kusmierz*, we hold that the Trust's Amended Petition is barred by *laches*. We note that, despite Parkvale's citation to *Kusmierz* in its response brief to support the application of *laches*, the Trust cites *Kusmierz* in reply only with respect to Parkvale's claim that the lack of jurisdiction was not apparent on the face of the record. The Trust makes no argument that *Kusmierz* is not controlling on the issue of *laches*. With respect to *laches*, the Trusts argues in reply only that, because void judgments may be

attacked in perpetuity, *laches* is inapplicable. However, as noted, *Kusmierz* held otherwise. So did another recent decision of this court, *Federal National Mortgage Ass'n v. Altamirano*, 2020 IL App (2d) 190198, which, like *Kusmierz*, was issued after the Trust filed its opening brief on appeal but before Parkvale filed its response. In *Altamirano*, we rejected the same argument that the Trust makes here—that *laches* does not apply when a void judgment is involved, because a void judgment can be attacked at any time. *Id.* ¶¶ 17-28. We found that "the mere fact that [the defendants] contend that the underlying judgment is void does not render *laches* inapplicable" (*id.* ¶ 19) and held that the defendant's petition—asserting that a foreclosure judgment entered against them was void for lack of personal jurisdiction—was "barred by *laches* regardless of whether the trial court's judgment was void because the court lacked personal jurisdiction over [the defendants]" (*id.*¶ 28). We agree with *Altamirano*, which we note was not acknowledged by the Trust in its reply brief despite being relied on by Parkvale.

¶ 30 Based on this court's holdings in both *Kusmierz* and *Altamirano*, we hold that the Trust's Amended Petition is barred by the affirmative defense of *laches*, as raised in Parkvale's motion to dismiss. As noted above, we may affirm on any basis supported by the record. Because our holding is dispositive, we do not consider the Trust's arguments regarding mootness or judicial estoppel.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.