2021 IL App (1st) 201232

SECOND DIVISION
September 30, 2021

No. 1-20-1232

U.S. BANK TRUST NATIONAL ASSOCIATION, as Trustee for Towd Point Master Funding Trust 2015-LM4, Plaintiff-Appellee, v. RICHARD J. ZOFKIE; KATHLEEN M. ZOFKIE; WELLS FARGO BANK, N.A., as Indenture Trustee for Mortgage Lenders Network Home Equity Loan Trust 1999-1; UNKNOWN OWNERS; and NONRECORD CLAIMANTS, Defendants (Richard J. Zofkie and Kathleen M. Zofkie, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 16 CH 11970 Honorable William B. Sullivan, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court, with opinion.
Justices Lavin and Cobbs in the judgment and opinion.

OPINION

¶ 1 This case presents an interesting and important issue of statutory interpretation: Can substitute service be effectuated under the Code of Civil Procedure (735 ILCS 5/1-101 *et seq.* (West 2020)) when the summons is left with an adult who has a cognitive mental impairment?

¶ 2 Defendants [1] Richard J. Zofkie and Kathleen M. Zofkie were served at their home by substitute service. The process server left a copy of the summons with their adult son, and the process server explained the content of the summons to the son. After a final judgment in the case, defendants presented evidence that their son has diagnosed autism, and they moved to quash service. In our limited role in cases that concern pure questions of statutory interpretation, we lack the authority to add a minimum mental competency requirement to the statute—a requirement that does not presently exist in the statute. Accordingly, we affirm the circuit court's judgment which includes its order denying defendants' motion to quash service.

¶ 3 BACKGROUND

¶ 4 Plaintiff U.S. Bank Trust, N.A. filed this foreclosure case after defendants allegedly defaulted on their mortgage obligations as a result of nonpayment. In connection with its initiation of this case, U.S. Bank set out to serve process onto defendants. Defendants were served by substitute service: delivering a copy of the summons to the defendants' home and leaving the summons with the defendants' adult son, Kevin Zofkie. As would later come to light, Kevin Zofkie has diagnosed autism. Defendants claim that their son did not inform them about the lawsuit, and they claim that they had no knowledge of the suit before a default judgment was entered against them.

¶ 5 The special process server filed an affidavit indicating that he served defendants by substitute service on September 17, 2016. On May 1, 2017, plaintiff filed a motion for a default judgment, explaining that defendants failed to file an appearance or otherwise respond to the suit. On June 6, 2017, an order for a judgment by default was entered in plaintiff's favor against

[1]Wells Fargo, N.A., was named as a defendant in the case because it held a junior lien against the subject property. For purposes of this opinion, "defendants" excludes Wells Fargo and any unknown owners and nonrecord claimants; it includes only the defendant-appellants Richard and Kathleen Zofkie.

defendants. The property was scheduled to be sold at a judicial foreclosure sale on June 19, 2018. On the day of the scheduled judicial sale, defendant Kathleen Zofkie filed for bankruptcy. After the bankruptcy case was closed, the judicial sale was rescheduled. The property was sold at auction on September 30, 2019.

¶ 6 Plaintiff moved for confirmation of the judicial sale. Thirty days after the judicial sale occurred, on October 30, 2019, defendants filed an emergency motion to quash service. The motion was stricken because it was improperly presented to the court. On the same day that the trial court struck the motion to quash service, it entered an order confirming the judicial sale. After the judicial sale was confirmed, defendants filed an amended motion to quash service. In their motion, defendants detailed that Kevin Zofkie has autism and they averred that they were not provided with any paperwork about the case before the default judgment was entered against them. After the motion to quash service was briefed, the trial court held a hearing on the motion. At the conclusion of the hearing, the trial court denied the motion to quash service. Defendants filed this appeal.

¶ 7 ANALYSIS

¶ 8 On appeal, defendants argue that the service of process in this case was ineffective because service was effectuated by delivering a copy of the summons to a someone with a cognitive mental impairment. Defendants contend that the service of process in this case was insufficient to satisfy due process, and they ask that we vacate the judgment of foreclosure for lack of personal jurisdiction.

¶ 9 The Code of Civil Procedure (*id.*) allows for the use of "substitute service" or "abode service" as a method for serving notice of a lawsuit on a defendant. See *id.* § 2-203. To effectuate substitute service, process can be served by "leaving a copy [of the summons] at the

defendant's usual place of abode, with some person of the family or a person residing there." *Id.* § 2-203(a)(2). The person to whom a copy of the summons is provided must be "of the age of 13 years or upwards." *Id.* In addition to delivering a copy of the summons with the person, the process server must "inform[ ] that person of the contents of the summons." *Id.* As a final requirement, the process server must "send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode." *Id.*

¶ 10 Apparently, the issue of whether service can be considered proper when a plaintiff serves a defendant by substitute service by delivering the summons to a person with a cognitive mental impairment is an issue of first impression in Illinois. Defendants argue that the trial court erred in holding that the Code does not contain a certain mental competency requirement. Defendants' challenge requires us to construe the Code to determine if there is a mental competency requirement for the recipient of substitute service under Illinois law.

¶ 11 When we are required to construe a statute, our primary objective is to ascertain and give effect to the legislature's intent. *Whitaker v. Wedbush Securities, Inc.*, 2020 IL 124792, ¶ 16. The language used by the legislature is the best indicator of what the legislature intended. *Id.* If a statute is unambiguous, we look only to the plain language of the statute. *Lawler v. University of Chicago Medical Center*, 2017 IL 120745, ¶ 12. Only when the legislature's intent is unclear from examining the statutory language itself do we look beyond the language employed to interpret its meaning. *Midkiff v. Gingrich*, 355 Ill. App. 3d 857, 861 (2005). Courts are not entitled to rewrite a statute to add provisions or limitations the legislature did not include. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 28.

¶ 12 The statutory requirements for the person receiving substitute service are that the person (1) is a family member or a person who resides at the location with the defendant and (2) is 13

years of age or older. 735 ILCS 5/2-203(a)(2) (West 2020). The Code contains no other requirements for the person receiving the service in a substitute capacity. There is no statutory requirement that the recipient of substitute service be proved to be mentally competent in a legal sense, and we lack authority to add such a requirement to the statute.

¶ 13 Courts "are not at liberty to depart from the plain language and meaning of a statute by reading into it exceptions, limitations or conditions that the legislature did not express." *Illinois State Treasurer*, 2015 IL 117418, ¶ 21. " 'No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include.' " *People v. Clark*, 2019 IL 122891, ¶ 47 (quoting *People v. Smith*, 2016 IL 119659, ¶ 28). Our beliefs about whether it might be sound policy to include a competency requirement on the person receiving substitute service are irrelevant to the analysis. The requirement defendant urges us to impose is not included in the statute, and we lack authority to include an additional requirement that is not expressed by the legislature.

¶ 14 There is no genuine dispute that all of the explicitly expressed requirements for proper substitute service were met in this case. The special process server's affidavit details that Kevin Zofkie is defendants' son and is 31 years of age, and the affidavit contains his birthdate and a general description of his physical appearance. The special process server avers that he confirmed with Kevin Zofkie that defendants reside at the subject address, that he informed Kevin Zofkie of the contents of the process, and that the summonses were accepted by Kevin Zofkie. The special process server further avers that he mailed a copy of the process to defendants at the subject address. All indications from the record suggest that the statutory requirements for substitute service were met.

¶ 15 Defendants, however, argue that the Code contemplates the mental capacity of the person receiving the service of process because it requires the person to be 13 years of age or older and it requires the person to be informed about the contents of the summons. Defendants contend that those two requirements are in place to ensure that the person receiving the process can understand what is transpiring and then inform the defendant that an active court case exists. Defendants argue that the age requirement and the requirement that the process server explain the content of the summons "clearly reflect[s] that there is a competence requirement imposed upon the person receiving service." Defendants attached evidence to their motion to quash service to show that Kevin Zofkie has diagnosed autism, that he lacks some of the intellect or skills to act independently, and that he cannot make personal, financial, or legal decisions for himself.

¶ 16 All the points defendant makes are valid. However, while the Code does speak to the age of the recipient, it does not speak to the requisite level of mental capacity the recipient must have for service to be valid. Although the parties did not provide any authority from other jurisdictions on the specific question presented, our inquiry reveals that some other states' substitute service laws require a level of mental competency on the part of the recipient of the substitute service. See, *e.g.*, Wis. Stat. Ann. § 801.11(1)(b)(1) (West 2021) (substitute service can be made by leaving the summons at the abode "[i]n the presence of some competent member of the family at least 14 years of age"); Cal. Civ. Proc. Code § 415.20(b) (West 2018) (substitute service can be made by leaving the summons at the abode "in the presence of a competent member of the household *** at least 18 years of age"). The federal rule for substitute service contains a provision that the recipient of the service of process must be of "suitable age and discretion."

Fed. R. Civ. P. 4(e)(2)(B). The Illinois rule contains no such requirement for valid substitute service.

¶ 17 We find defendants' arguments to be reasonable and appealing on a logical and emotional level, but the arguments do not prevail in an exercise of statutory construction. The Code is clear in what it requires for proper substitute service to be effectuated, and we cannot add a requirement to the statute as defendant urges us to do. On the other hand, we also share some of plaintiff's concerns about requiring a process server to potentially assess the mental capacity of a person accepting substitute service, as it would add a new dimension to serving process beyond the ascertainment of objectively verifiable facts. Perhaps at some point the General Assembly will look to the substitute service requirements, as other states have done, and conclude that a minimum mental competency requirement for an adult who accepts substitute service is a sound matter of policy. At present, the Code does not contain such a requirement. See *Prazen v. Shoop*, 2013 IL 115035, ¶ 35 ("We must construe and apply statutory provisions as they are written and cannot rewrite them to make them consistent with the judiciary's view of orderliness and public policy.").

¶ 18 In this case, defendants do not argue that the special process server knew or should have known that Kevin Zofkie did not or could not understand the implications of receiving the service of process. Instead, defendants rely simply on the fact that Kevin Zofkie subjectively could not understand the importance of the documents. A special process server's affidavit is *prima facie* evidence of proper service. *Illinois Service Federal Savings & Loan Ass'n of Chicago v. Manley*, 2015 IL App (1st) 143089, ¶ 37. The process server in this case avers that he explained the contents of the process to Kevin and that Kevin accepted the summons. The process server made no statement regarding any suspicion that Kevin Zofkie lacked capacity to

understand what transpired. The special process server's affidavit, specifically, and the return of service, generally, are not impeached in any way. There is no indication in the record that defendants sought leave to question the process server about what he knew regarding Kevin Zofkie's capacity.

¶ 19 Perhaps the circumstances of another similar case could lead to a different result in which substitute service on a person lacking mental capacity would not satisfy due process. We do not need to grapple with those questions to decide this appeal. As the statute is written, the mere fact that a recipient of substitute service does not have the subjective mental capacity to understand its import is not a justification for quashing service of process, particularly where there is no allegation that the process server knew or should have known about the recipient's lack of capacity.

¶ 20 CONCLUSION

¶ 21 Accordingly, we affirm.

¶ 22 Affirmed.