No. 126290

IN THE

SUPREME COURT OF ILLINOIS

MUNICIPAL TRUST AND SAVINGS BANK Plaintiff-Appellee, v. DENIS J. MORIARTY, MUNICIPAL TRUST AND SAVINGS BANK, as Trustee Under Provisions of a Trust Agreement Dated January 8, 2014, and Known as Trust No. 2487; LUCIEN SHERROD; THE CITY OF KANKAKEE; KANKAKEE ENVIRONMENT UTILITY SERVICE; UNKNOWN OWNERS; and NONRECORD CLAIMANTS, Defendants. (Denis J. Moriarty, Defendant-Appellant)	) Appellate Court, Third Judicial) Case No. 3-19-0016))) Circuit Court, Kankakee Co. IL) Twenty-first Judicial Circuit) Circuit Court Number: 16-CH-258))))))))) The Honorable Ronald J. Gertz,) Judge Presiding.

Defendant-Appellant Denis J. Moriarty's Reply Brief

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I. Introduction and Framework for the Analysis.

Against this Goliath, Moriarty seeks a finding by this Court that the service of process was improper. Service of summons was not proper or effective to obtain personal jurisdiction over Moriarty because the Bank failed to have a special process server appointed by the Trial Court, with "service" occurring in Cook County. The Bank makes the feeble argument that service was proper under 735 ILCS 5/2-202, contrary to the plain language of the statute, the 2nd and 1st Districts, and even the concurrence in the Appellate Court's Opinion.

Moriarty never submitted to the Trial Court's personal jurisdiction and consistently objected to same, orally and in written motions before the Trial Court. Even if he did submit to personal jurisdiction prior to entry of the confirmation order, jurisdiction is prospective, which means that the judgement of foreclosure and sale, required for the sale and the confirmation, would need to fall, as would the confirmation order. As a result of the void judgment, affirmatively placed on the record, demonstrating that the Trial Court lacked personal jurisdiction to enter the confirmation order, Moriarty was not required to join any third-party purchaser, because there was no *bona fide* purchaser. The Bank purchased the property pursuant to a void final judgment at the Sheriff's sale (C363, 367) and is also a party to this litigation.

II. Moriarty never submitted to personal jurisdiction.

The Bank argues that even if the Court finds that service of summons was not effective, the Court should dismiss the appeal because Moriarty submitted to the Trial

Court's jurisdiction before entry of the order confirming sale. The Bank's argument is belied by the record.

The Bank cites to *U.S. Bank National Association v. Prabhakaran* in support of its argument that the final foreclosure judgment was valid and bars Moriarty's 2-1401 petition. (Appellee's Brief, p. 7). The issue in *Prabhakaran* had nothing to do with process of service and instead dealt with the issue of whether or not the confirmation of sale was void because the plaintiff had accepted additional payments from the mortgagor after the judgment of foreclosure was entered. *U.S. Bank National Association v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 1. In that case, the trial court had jurisdiction over the mortgagor and the defendant filed an answer to the complaint, denying that she was in default on the mortgage. *Id.* ¶ 4. There was no argument as to whether the trial court had personal jurisdiction over the defendant, which is the issue here.

The Bank suggests that it is a "considerable inconvenience" to have a process server appointed by the trial court to serve someone in Cook County. (Appellee's Brief, p. 9) 735 ILCS 5/2-202 does not discuss any "inconvenience," nor does the Bank explain how there is any "inconvenience," let alone "considerable inconvenience," or, even if there is, how that would justify noncompliance with the law. The Bank had summons issued for Moriarty for an address in Cook County. (C 18) The Note attached to the Complaint set forth a Cook County address. (C 62) And Moriarty was "served" in Cook County (C 244), by which time Moriarty had been in Cook County for more than two months. (R 9) The Bank clearly knew or had reason to know that Moriarty was in Cook County - especially because the typed

Summons listed the Cook County address (C 215). It would seem that all plaintiffs must be "inconvenienced" to some degree or another as to locating a defendant before filing suit.

The Bank argues that the Court should find the defect of not serving Moriarty in compliance with the statute a "mere technical deficiency." (See Appellee's Brief, p. 10). The Bank's failure to comply with the law was not a "mere technical deficiency." It was a violation of Moriarty's due process rights that illegally deprived him of his properties since 2017.

III. Even if Moriarty submitted to personal jurisdiction before entry of the Confirmation Order, the Judgment of Foreclosure and Sale and Confirmation Order Must Fall.

The Bank contends that Moriarty submitted to the Trial Court's jurisdiction over him "...by entering his appearance, participating in the hearing, and requesting relief from the court, without objecting to service of summons or jurisdiction" (Appellee's Brief, p. 11). It appears from this that the Bank is arguing that Moriarty submitted to personal jurisdiction only after all three of those things occurred (after all, if it only takes one to result in submission, there would be no need to address the other(s)).

Moriarty never filed any motions other than objections to jurisdiction. (See Motion to Quash Service Judication [sic] (stating: "In order to serve in Chicago with over a million people, you have to be appointed)." (C382-4); Petition Pursuant to Rule §2-1401 of the Illinois Code of Civil Procedure with Affidavit (C402-410); and Motion to Reconsider (C457-461).1 All of his objections have been regarding the lack of jurisdiction – not on any other issue. As such, Moriarty never submitted to the Trial Court's jurisdiction. Moriarty did appear in court on July 17, 2017, and objected to the Trial Court's jurisdiction, but the Trial

Court interrupted him and would not let him speak further. "They didn't serve me –" Moriarty stated to the Judge. (R12) Although it appears that the Trial Court then shut him down: "Mr. Moriarty, you used your – what I'm going to do is work up the Court of Civil Procedure to see whether this is a – if mailing a notice is a – is a requirement of going ahead with the sale." (R12) The Trial Court also stated, "What I'm doing is looking up the statute right now to see whether the proper steps in – in giving notice of the sale were followed." (R13). To which Moriarty then inquired of the Trial Court, "So can I ask a question?" The Trial Court responded: "Not at the moment." (R13) There was no submission to the Trial Court's jurisdiction by hearing what the Judge read and stating that he heard what the Judge said, and further telling the Trial Court (though the Trial Court disagreed), that "they didn't serve me —" before getting cut off by the Trial Court and not being allowed to speak any further. (R13)

Moriarty did file an "Appearance Pro-Se" on July 17, 2017. (C379) However, "[f]iling a written appearance and paying an appearance fee do not waive an objection to personal jurisdiction, because neither of those acts involves a responsive pleading or a motion (which are the only kinds of acts that can cause a waiver under section 2-301 (a-5))." *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill.App.3d 593, 596 (2nd Dist. 2006) (citing K. Beyler, The Death of Special Appearances, 88 Ill. B.J. 30, 33 (2000)).

The Bank claims that Moriarty, by responding "Okay" when the Trial Court read the statutes, was submitting to the Trial Court's personal jurisdiction over him. The Trial Court stated, "Okay. Mr. Moriarty, the lawsuit was filed last year, and the record of service shows

that you were served at an address on East Harrison – better find the right service – at an address 1620 East Harrison in Chicago. After that, you didn't file any appearance in the case." The "Okay" was, just as the Trial Court stated at the beginning of his statement to Moriarty, reciting the record. (R14) It was not an "Okay" to admit he submitted to jurisdiction or accepted anything else. It was an "Okay" to hearing what the Judge had said. The Bank does not advance anything to the contrary. And there is no indication that the Trial Court based its jurisdiction over Moriarty on that "Okay."

There was no submission to the Court's jurisdiction by hearing what the Trial Court read and stating that he heard what the Trial Court said, and further telling the Trial Court (though the Trial Court disagreed), that "they didn't serve me —" before getting cut off by the Trial Court and not being allowed to speak any further. (R13)

The Bank further argues that when Moriarty filed his "Motion to Quash Serive Judication" [sic] on August 17, 2017 (31 days after the Order confirming sale was entered) stating in his motion "In order to serve in Chicago, with over a million people, you have to be appointed." was "too late." (See Appellee's Brief, page 11). The Bank again confuses the issue. Moriarty's objection to jurisdiction was not filed too late. An objection to jurisdiction can be filed at any time. "Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *People v. Davis*, 156 Ill.2d 149, 156 (1993) (internal citations omitted).

A foreclosure judgment entered without service of process is void. *Bank of New York Mellon v. Karbowski*, 2014 IL App (1st) 130112 ¶ 12.

If the Court does determine that Moriarty submitted to the Court's jurisdiction when he appeared in Court and advised the Court that "They didn't serve me" – and then said "Okay" when the Judge recited the law, that still does not make the order confirming sale valid because jurisdiction is *prospective* only – and the orders entered prior to July 17, 2017, including the default judgment, were entered when the Trial Court had no personal jurisdiction over Moriarty.

A party who submits to the court's jurisdiction does so only prospectively and the appearance does not retroactively validate orders entered prior to that date. The settled law prior to the amendment to section 2–301 provided that "where a judgment is void when entered, it remains void," despite subsequent submission by a party to the circuit court's jurisdiction. *BAC Home Loans Servicing, LP v. Mitchell*, ¶ 36 (citing *In re: Marriage of Verdung,* 126 Ill.2d 542, 547 (1989)) This Court further held, "[t]o the extent that Illinois appellate court decisions, including *Marzano* and *Flores*, hold to the contrary, they are overruled." *BAC Home Loans Servicing, LP v. Mitchell*, ¶ 43.

The Court had and has jurisdiction to consider Moriarty's §2-1401 Petition and should grant the Petition. The Bank claims that even if the order confirming sale was entered without jurisdiction, the Circuit Court did not have jurisdiction to consider Moriarty's §2-1401 Petition. (Appellee's Brief, p. 20) The Bank's arguments are again without merit.

"[A] foreclosure proceeding ...premised on a void judgment may be raised at any time."

Deutsche Bank Nat. Tr. v. Cichosz, 2014 IL App (1st) 131387, 14. Additionally,

> a motion requesting confirmation of a judicial sale invokes section 15–1508(b), which mandates that a circuit court hold a hearing and then confirm the judicial sale unless one of four stated exceptions applies, including that "justice was otherwise not done." 735 ILCS 5/15–1508(b)(iv). The justice provision under section 15–1508(b)(iv) acts as a safety valve to allow the court to vacate the judicial sale and, in rare cases, the underlying judgment, based on traditional equitable principles. An interested party seeking to oppose the judicial sale bears the burden of proving that sufficient grounds exist to disapprove a judicial sale. This standard requires both a meritorious defense to the underlying judgment and proof that justice was not otherwise done because the lender, through fraud or misrepresentation, prevented the borrower from raising his meritorious defenses to the complaint at an earlier time in the proceedings, or the borrower has equitable defenses that reveal he was otherwise prevented from protecting his property interests. The provisions of section 15–1508 confer on circuit courts broad discretion in approving or disapproving judicial sales, and as a result, a court's decision to confirm or reject a judicial sale under the statute will not be disturbed absent an abuse of that discretion.

Deutsche Bank Nat. Tr. v. Cichosz, 2014 IL App (1st) 131387, ¶ 13, 19 N.E.3d 134, 137 (Internal citations omitted.)

The *Deutsche Bank National Trust Company v. Hall-Pilate's* holding does not bar Moriarty's §2-1401 petition. *Deutsche Bank National Trust Company v. Hall-Pilate* 2011 IL App (1st) 102632. The Bank cites to *Deutsche Bank National Trust Company v. Hall-Pilate* in support of its claim that Moriarty participated in the case after the default judgment of foreclosure but before entry of the confirmation order and therefore Moriarty submitted to jurisdiction, and waived his right to object to personal jurisdiction by the Trial Court. (Appellee's Brief, p. 21) *Deutsche Bank National Trust Company v. Hall-Pilate* is distinguishable from the Instant case in numerous ways and its holding does not require the same result in the instant case. First, defendants filed an emergency motion to stay approval

of the property sale. *Id.* at ¶ 5 That motion, filed before the final judgment (order confirming sale) had been entered, did not object to personal jurisdiction over the defendants. *Id.* ¶ 8.

Distinguishable from the instant case, in *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate,* "the Defendants had previously submitted themselves to jurisdiction by filing motions other than insufficiency of process or insufficiency of service of process, which waived all objections to the court's jurisdiction over the [sic?] party's person." *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate,* 2011 IL App (1st) 102632, ¶ 14, citing 735 ILCS 5/2-301(a), (a-5). Failure by the defendants to comply with the requirements of section 2-301 of the Illinois Code of Civil Procedure caused the objection to the trial court's jurisdiction to not be preserved "because they filed a motion to stay the approval of the property sale without also challenging the court's jurisdiction." *Id. at* ¶ 9. "The motion did not mention or raise any kind of objection as to the trial court's jurisdiction over either of the defendants nor did the motion seek an extension of time to answer or otherwise appear." *Id.* at ¶ 17.

By participating in the case without raising an objection to personal jurisdiction, the trial court found that the defendants voluntarily submitted to the trial court's jurisdiction and waived any objection they may have had to it. *Id.* at ¶ 18. The Appellate Court noted, "when the entire motion is considered in context, it shows that defendants specifically sought a stay to assess the mortgage value and amounts, not an extension of time to answer the complaint or otherwise appear, the only type of motion permitted under section 2–301(a–5)." *Id.* at ¶ 18. Additionally, the motion to stay filed by the defendants (which is the motion that the Appellate Court points to for having waived any objection to jurisdiction) was filed before the final judgment was entered in the case. *Id.* at ¶ 20.

The Appellate Court distinguished *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate*, from *C.T.A.S.S. & U. Fed. Credit Union v. Johnson, 383 Ill. App. 3d 909, 910 (2008)*, where the Defendants had been served by a special process server before one had been appointed by the Court. *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate* ¶ 21, citing *Johnson* at 910. *Johnson*, which is akin to the instant case, and distinguishable from *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate*, the defendants had not submitted to jurisdiction before the final Judgment was entered.

Moriarty's case is distinguishable on additional grounds from *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate*. In the instant case, Moriarty has never filed any motions other than objections to jurisdiction. (See Motion to Quash Serive Judication, [sic] stating: "In order to serve in Chicago, with over a million people, you have to be appointed." (C382-4); Petition Pursuant to Rule §2-1401 of the Code of Civil Procedure with Affidavit (C402-410), and Motion to Reconsider (C457-461).

All of his objections have been regarding the lack of personal jurisdiction the Trial Court has over Moriarty. As such, and distinguishable from *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate*, Moriarty has complied with the requirements of 735 ILCS 5/2-301 and did not submit to the Trial Court's jurisdiction. In this case, and distinguishable from *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate*, Moriarty had not filed any motions prior to the entry of the order confirming sale – he had only filed an "Appearance Pro-Se" (C379) Moriarty had appeared at the hearing on July 17, 2017 and objected, saying that the Bank had not served him correctly. (R12) The Bank did not have jurisdiction over Moriarty because Moriarty had not filed a motion or pleading prior to the order confirming sale submitting to personal

jurisdiction (which defendants in *Deutsche Bank Nat. Tr. Co. v. Hall-Pilate* did do., and so the Judgment entered against Moriarty is void.

These factual differences necessitate a different result here because of the fact that defendants in *Deutsche Bank* submitted to personal jurisdiction prior to the final judgment by filing a motion that did not object to jurisdiction – and in the instant case Moriarty did no such thing.

IV. The issue before the Court has not been rendered *res judicata*.

The Bank argues that Moriarty's Motion to Quash Judication [sic] filed on August 17, 2017, bars him from filing his 2-1401 Petition under the Bank's claim of *res judicata*. (Appellee's Brief, pp. 24-31)

The Bank waived this argument by failing to address the issue before. But even if this Court were to address the Bank's argument of *res judicata*, it should deny the same.

Moriarty's Motion to Quash filed August 17, 2017 does not preclude the filing of his 2-1401 Petition. First, the Bank did not object to the Court hearing Moriarty's Motion to Quash that was filed 31 days after the order confirming sale was entered, and as such has waived this argument.

There are two actions here – the motion to quash filed on August 17, 2017 and denied, and the 2-1401 motion, from which this appeal is taken. A defendant is not precluded from filing a 2-1401 motion after a motion to quash or similar motion attacking jurisdiction has been filed.

This Court has explained the doctrine of *res judicata*.

> The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided. Three requirements must be satisfied for res judicata to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions.

Hudson v. City of Chicago, 228 Ill. 2d 462, 467, 889 N.E.2d 210, 213 (2008) (Internal citations omitted.)

The doctrine of *res judicata* does not bar Moriarty from filing his 2-1401 petition. "It is fundamental that a judgment ordinarily may be attacked at any time by a necessary party who is not given proper notice of the proceedings." *Rockford v. Lemar*, 157 Ill.App. 3d 350, 352 (1987). "As to the Foreclosure Law, ... the statutes governing the setting aside of foreclosure judgments apply only to valid judgments entered with jurisdiction over the parties and the subject matter. *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146 ¶ 25. As a result, the Foreclosure Law does not preclude a collateral attack on the judgment based on a lack of personal jurisdiction. West Suburban Bank v. Advantage Financial Partners, LLC, 2014 IL App (2d) 131146 ¶ 25. See also *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 19 (which states that the Foreclosure Law cannot protect a *bona fide* purchaser when the underlying foreclosure and sale orders are void because mortgagor was not properly served).

V. There was no necessary record titleholder in this case, but if the Court determines that there was one, Moriarty gave notice to the record title-holder: Municipal Bank.

The Bank argues that the Court should deny Moriarty's Section 2-1401 Petition because he failed to joint a necessary party, to wit: the record titleholder. (Appellee's Brief, p. 29) The Bank's argument ignores reality.

As noted in the Sheriff's Sale documentation filed with the Court, when the Bank sold Moriarty's property, they sold it at a very low price to, who else? Themselves. (C363, 367, 371) Moriarty's Motion for Quash filed August 17, 2017, the Petition Pursuant to Rule §2-1401 of the Illinois Code of Civil Procedure and all subsequent motions were served on the record title holder, Municipal Bank. The Bank has owned the properties ever since?

However, Moriarty was not required to provide notice to any purchaser because there was no *bona fide* purchaser. The record was clear and affirmatively demonstrated that service had been improperly made on Moriarty, and as such, any purchaser of the property would have had notice that they were not a *bona fide* purchaser.

The Bank additionally argues that there was a third-party purchaser who was not a party in the foreclosure lawsuit, and includes an affidavit that appeared nowhere before the Trial Court. (See Appendix of the Appellee, A4) Should be stricken? Ignored?

Not only is the alleged third party not a *bona fide* party, but the insertion of such documentation and allegations into the Appellee's Brief and Appendix are improper and objectionable under Supreme Court Rule 329 and Moriarty objects to the same.

The third-party purchaser was not a *bona fide* purchaser because the record affirmatively demonstrated that service was not properly done because service was completed in Chicago, Cook County, by a process server and no process server had been appointed.

VI. The third-party purchaser was not a bona fide purchaser.

The Illinois courts have interpreted Section 2-1401(e) as intending to protect *bona fide* purchasers for value. *Mortgage Electronic Systems v. Gipson*, 379 Ill.App.3d 622, 633 (1st Dist. 2008) The bank argues that there was no jurisdictional defect that affirmatively appeared on the record, making a third-party buyer a protected *bona fide* purchaser and rendering the appeal moot. (Appellee's Brief, p. 32)

No matter how many times the bank argues to the contrary, the facts and the precedent do not change.

Initially, Moriarty notes that the Bank includes a document ("Affidavit") at A3-4 of the Bank's brief appears nowhere in the record on appeal in support of its claim that the property was sold by Municipal (after it bought the property at the Sheriff's Sale) to a third party. (Appellee's Brief at pg. 35)

Moriarty objects to this. Appellee has not requested leave to supplement the record but simply includes it in its appendix.

Illinois Supreme Court Rule 329 (134 Ill.2d R. 329) allows the record on appeal to be supplemented only with evidence actually before the trial court. *In re: Estate of Albergo*, 275 IL.App.3d 439, 444, 211 Ill.Dec. 905, 656 N.E.2d 97 (1995). Similarly, evidence not in existence at the time of the lower court proceeding is outside the record on appeal. *In re: Estate of Albergo*, 275 IL.App.3d 439, 444, 211 Ill.Dec. 905, 656 N.E.2d 97 (1995)

The record on appeal shows that the Bank sold the property to itself. (See Sheriff's Certificate of Sale, Jun 28, 2017, C363-370), Sheriff's Report of Sale, June 28, 2017, C371-

The Bank wants to claim that because it allegedly sold Moriarty's properties when it did not have legal authority to do so (to themselves), that they had no responsibility in advising a third party (themselves? And anyone they chose to sell it to thereafter), that the property was the subject of litigation because the Bank (the seller) failed to comply with proper service of process. (Appellee's Brief, p. 36)

The Bank sold Moriarty's property to itself. (C363) It had notice – even prior to selling Moriarty's property to itself – that what it had done was without authority and without jurisdiction because the defect appeared affirmative on the record. The Bank continued to receive notice throughout these proceedings, reminding them that they had not complied with the statutory requirements.

The Bank clearly had notice that it was no *bona fide* purchaser of the properties because it was the one that returned the summons showing that service on Moriarty was done at 16020 E. Harrison #703 South JRB, Chicago Illinois; and further stated that he was served at Rush Hospital. (C242)

Even if the Court were to consider a subsequent purchaser of the property, there is no *bona fide* purchaser in this case because there affirmatively appeared on the record the lack of jurisdiction the Trial Court had when the Order Confirming Sale was entered.

The Appellate Court in *Bank of New York v. Unknown Heirs and LegateesSchorsh* found that ""the lack of jurisdiction affirmatively appears in the record in the form of plaintiff's defective affidavit and the allegations set forth in defendant's motions to dismiss

for insufficiency of service, which were sufficient to put the intervenors on notice that service by publication on defendant might have been improper. " *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 477, 860 N.E.2d 1113, 1118 (2006)

As such, the Appellate Court found that the Petition should not have been denied because there was no *bona fide* purchaser of the property. the lack of jurisdiction affirmatively appears in the record in the form of plaintiff's defective affidavit and the allegations set forth in defendant's motions to dismiss for insufficiency of service, which were sufficient to put the intervenors on notice that service by publication on defendant might have been improper. *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 477, 860 N.E.2d 1113, 1118 (2006).

The Appellate Court in *Bank of New York* found that the court failed to obtain personal jurisdiction over defendant prior to entering the judgment of foreclosure and sale, and therefore the judgment was void ab initio. *Bank of New York v. Unknown Heirs & Legatees*, 369 Ill. App. 3d 472, 477, 860 N.E.2d 1113, 1119 (2006)

The same holding is required in the instant case, given the similarity in facts.

In the instant case, the purchaser is not a *bona fide* purchaser because the purchaser had constructive notice of an outstanding title or right of another party when the Proof of Service filed by the Bank in the instant case showed that service was made by a private process server at an address in Chicago, Cook County, and further listing "Served at Rush Hospital," and there was no appointment of a special process server by the Court.

Where there is constructive notice of an outstanding title or right of another party as in the instant case, which is affirmatively stated on the record with the proof of service filed

by the Bank showing service in Chicago, and specifically at Rush Hospital, there is no bona fide purchaser.

As the Appellate Court held: the reviewing court looks to the whole record, including the pleadings, the return on process, the jury verdict, and the court's judgment or decree to determine whether a lack of jurisdiction is apparent from the record. *State Bank of Lake Zurich v. Thill*, 113 Ill.2d 294, 313, 100 Ill.Dec. 794, 497 N.E.2d 1156 (1986).

In the instant case, there was no *bona fide* purchaser because the jurisdictional defect affirmatively appeared on the record, showing that service of summons on Moriarty was made in Chicago, by a process server who had not been appointed by the Court. Furthermore, the Bank, having sold Moriarty's property to itself, was joined as a party and received notice of all proceedings in this case, even though it was not a *bona fide* purchaser.

VII. Moriarty was not required to obtain a stay of the order confirming sale, and the absence of a stay does not render this appeal moot.

The Bank argues that Moriarty was required to obtain a stay of the order confirming Sale, and without it, this appeal is moot. (Appellee's Brief, p.35) In support of its claim, the Bank turns to *Town of Libertyville v. Moran*, 179 Ill.App.3d 880 (2nd Dist. 1989). That case involved a condemnation of property which the plaintiff sought under the Township Open Space Act. *Id.* at 83.

Town of Libertyville is distinguishable in numerous was from the instant case. The Trial Court did not have jurisdiction over Moriarty at any point in the proceedings – not when he objected to jurisdiction in Court; not when he filed his motion to quash, and not when he filed his petition pursuant to 735 ILCS 5/2-1401. Without submitting to jurisdiction, Moriarty could not request – and was not required to request - a stay of the proceedings.

Additionally, Illinois Supreme Court Rule 305(k) states that if a stay is not perfected within the time for filing the notice of appeal ... the reversal or modificatno of the judgment does not affect the right, title or interest of any person who is not a party to theaction in or to any real or personal property that is acquired after hte judgment becomes final. At the time Moriarty filed his appeal of the denial of his 2-1401 Petition, the Bank, a party to this action, had purchased the property (despite the lack of personal jurisdiction the Court had to order the sale of his property).

In *Steinbrecher v. Steinbrecher*, this Court noted that Rule 305 requires (1) the property passed pursuant to a final judgment; (2) the right, title and interest of the property passed to a person or entity who is not part of the proceeding; and (3) the litigating party failed to perfect stay of judgment within the time allowed for filing a notice of appeal. 155 Ill.2d R. 305(j). *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523–24, 759 N.E.2d 509, 515 (2001). In this case, there was no valid final judgment because it was void as noted hereinabove. Additionally, the title and interest of the property passed to an entity who is a party to the proceeding: the Bank, who purchased hte property at the sheriff's sale. As such, Illinois Supreme Court Rule 305 does not apply.

With the Bank having purchased Moriarty's property at the Sheriff's Sale, the Bank also received all notices and was joined as a party, since it was an original party in the case, despite the fact that they were not a *bona fide* purchaser.

In this case, rather than serve Moriarty in compliance with 735 ILCS 5/2-202, especially after he brought it to their attention that the Bank had not complied with the jurisdictional requirements the Bank decided to ignore their obligations. The Bank was a

third-party purchaser who was joined in this case and received notice – even though they were not a *bona fide* purchaser. Any subsequent purchaser the Bank elected to sell the property to, was also not a *bona fide* purchaser.

The Bank appears to argue facts not in the record that suggest that while this case was pending and on appeal, if the Bank sold the properties, despite the record showing that Summons had not been served properly on Moriarty and being apprised of that as a joined party, it can be relieved of its legal obligations. It appears the Bank wants to now claim that they have no responsibility for their action if they sell or sold the properties which they took from Moriarty without the Court providing due process.

The Bank argues that Moriarty, over whom the Trial Court had no jurisdiction, and for whom there was no *bona fide* purchaser of his properties, was required to file a motion to stay the action to protect the properties that the Bank had purchased, in case the Bank decided to cash in on its sale of properties that it knew was taken without personal jurisdiction over the Moriarty.

Any party who purchased Moriarty's property was not a *bona fide* purchaser because they had actual or constructive notice of the outstanding rights of Moriarty to the property.

> A *bona fide* purchaser of an interest in property takes that interest free and clear from all claims except those of which he has notice. However, a purchaser cannot be a *bona fide* purchaser if he had actual or constructive notice of the outstanding rights of other parties to the property. Actual notice is knowledge that the purchaser had at the time of the conveyance, and constructive notice is knowledge that the law imputes to the purchaser. There are two types of constructive notice: record notice and inquiry notice. Record notice is what is shown in the records of the office of the recorder of deeds, whereas inquiry notice is that which appears in the records of the courts in the county where the property is located. In addition, "a purchaser having notice

> of facts that would put a prudent man on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry.

U.S. Bank Nat. Ass'n v. Johnston, 2016 IL App (2d) 150128, ¶ 45, 55 N.E.3d 742, 752–53 (Internal citations omitted.)

"When service is challenged following a judicial sale, the relief sought by a property owner and a junior lienholder is different. A prevailing property owner is allowed to retain ownership and possession of the property, while a prevailing junior lienholder would recover repayment of a debt secured by the property." *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 49.

In *Concord Air, Inc. v. Malarz*, where the property had already been sold to a third party who was not a *bona fide* purchaser, the Court did not dismiss the proceedings. It ruled:

> [i]n this case, the judicial sale did not result in a surplus, so plaintiff was not entitled to any of the sale proceeds. In challenging the judicial sale in the Harris foreclosure, plaintiff argued that vacating the judgment and reselling the property would result in a higher price, which would entitle plaintiff to a share of the surplus. Here, Chicago Title argues that, if plaintiff's alleged damages are measured by the amount of a potential surplus, plaintiff could prove those damages and recover from Harris Bank as the foreclosure proceeds, without dispossessing an innocent third-party purchaser. The value of the property and the status of the Harris foreclosure inform a balancing of the equities, but we express no opinion as to where the equities lie. On remand, the parties may present their arguments on this point for the trial court to consider.

Concord Air, Inc. v. Malarz, 2015 IL App (2d) 140639, ¶ 50.

In reversing the dismissal of plaintiff's complaint in *Concord Air., Inc.* the Court expressed no opinion as to the appropriate remedy after finding that the third-party purchaser was not *bona fide*, but left that as an issue in remand. *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, ¶ 51

The Bank claims Moriarty was required to file a motion to stay while he appealed this case. However, at the time of the appeal, the Bank had already purchased Moriarty's property at the sheriff's sale. The Court had not obtained personal jurisdiction over Moriarty at any point, and even a ruling that the Court obtained personal jurisdiction over Moriarty when he appeared in Court on July 17, 2017, and told the Court that he had not been served, the confirmation sale was entered without authority since the prior default judgment (and subsequent

orders) were entered without jurisdiction over Moriarty.

The Bank failed to properly serve Moriarty, and, despite being told over and over again by Moriarty, the Bank chose to go on its merry way – selling Moriarty's property to itself, and, who knows, perhaps to others, believing that the inconvenience of following the law would allow it to do as it pleased.

The only way to stop the Bank from violating Moriarty's rights is to enforce the law. This court should reverse the Appellate Court's ruling affirming the Trial Court and remand the case with specific direction to the Circuit Court on the manner in which this case should be resolved, including but not limited to lost rent since the property was taken from Moriarty and attorney fees.

Respectfully Submitted,

DENIS J. MORIARTY, Defendant-Appellant

By: /s/ Ruth E. Wyman
Ruth E. Wyman Law Office LLC, his attorney

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 315(h), Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Ruth E. Wyman
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PROOF OF SERVICE (By Attorney)

I, as the attorney for the Defendant-Appellant Denis J. Moriarty, under penalties of perjury as provided by Section 1-109 of the Illinois Code of Civil Procedure, certify that I caused to be served the original of the Defendant-Appellant Denis J. Moriarty's Reply Brief, upon the following person(s):

Clerk of the Supreme Court of
Illinois Supreme Court Building
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By: Efile on February 10, 2021

and a copy of the same to the following person(s):

Marc J. Ansel Meyer Capel, PC
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Champaign, IL 61820
By: Efile on February 10, 2021

Attorney Kendra Karlock
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and a copy of the same to the following person(s):

Municipal Trust & Savings Bank Trust #2487 as
Trustee
720 Main Street, NW
Bourbonnais, IL 60914
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850 N. Hobbie Ave.
Kankakee, IL 60901
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City of Kankakee c/o City Clerk
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Kankakee, IL 60901
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/s/ Ruth E. Wyman

Verification

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in his instrument are true and correct.

/s/ Ruth E. Wyman

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