

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-010957

06/05/2020

HONORABLE DAVID W. GARBARINO

CLERK OF THE COURT
L. Brown
Deputy

CROSS RIVER HOMEOWNERS
ASSOCIATION

CHANDLER W TRAVIS

v.

YOUNG SIN KIM, et al.

C ADAM BUCK

LAWRENCE K LYNDE
COMM. GARBARINO

MINUTE ENTRY

The Court received and reviewed Defendants' Motion for Relief from Judgment (the "Motion") filed by Defendants Young Sin Kim and Bun Hee Kim (collectively, "Defendants"), Plaintiff's Response to the Motion filed by Plaintiff Cross River Homeowners Association ("Plaintiff"), Defendants' Reply in Support of the Motion, and Response of Maricopoly, LLC to Order to Show Cause. Defendants argue that they were not served with the Summons and Complaint, and therefore, the Judgment and Decree of Foreclosure by default (the "Default Judgment") is void under Rule 60(b)(4) of the Arizona Rules of Civil Procedure. The Court held oral argument on the Motion on April 15, 2020, and an evidentiary hearing on May 29, 2020. Counsel for Plaintiff, Defendants, and Maricopoly, and the Defendants appeared by video conference for the hearing. Defendants were assisted by a Korean interpreter who called into the video conference. Both Defendants were subject to direct, cross, and redirect examinations.

The Court entered the Default Judgment against Defendants on November 21, 2018. On July 11, 2018, and in accordance with the Default Judgment, the Sheriff held a sheriff's sale of

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the residential property located at 12034 W. Morning Dove,¹ Sun City, Arizona (the “Subject Property”). Maricopoly, LLC (“Maricopoly”) purchased the Subject Property at the sheriff’s sale. The sheriff’s sale resulted in excess proceeds of \$54,687.91, which the Sheriff deposited with the Clerk of Court. Defendants applied to recover the excess proceeds on March 3, 2020 (the “Application”). Six days later, Defendants withdrew their application, and then filed the Motion the day after the withdrawal.

Defendants argue that the Default Judgment is void for lack of service. Specifically, the person served was not either Defendant, and the Defendants did not reside at the Subject Property. Defendants are in their seventies, assert that they have resided at their home located at 4342 N. 107th Lane, Phoenix, Arizona for many years, and have never resided at the Subject Property. Defendants claim that they purchased the Subject Property as an investment, and that they allowed their adult son and his family to reside at the Subject Property. Defendants’ son was to pay the mortgage and homeowners association assessments. Plaintiff attempted to serve the Summonses and Complaint upon Defendants at the Subject Property. The Certificate of Service states that the process server served both Defendants by leaving the Summonses and Complaint with Young Sin Kim in person, and describes Mr. Kim as 35-year old male. Defendants claim that the process server served their adult son. Plaintiff asserts that the son identified himself as Young Sin Kim.

When “a defendant is not properly served with process, any resulting judgment is void and must be vacated upon request.” *Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, 218, ¶ 8, 994 P.2d 1030, 1033 (App. 2000). Nevertheless, “[s]ervice of process can be impeached only by clear and convincing evidence.” *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 194, 836 P.2d 404, 407 (App. 1992). An individual may be served in Arizona by “delivering a copy of the summons and the pleading being served to that individual personally,” by “leaving a copy of each at that individual’s ***dwelling or usual place of abode*** with someone of suitable age and discretion who resides there,” or by “delivering a copy of each to an agent authorized by appointment or by law to receive service of process.” Ariz. R. Civ. P. 4.1(d)(1)-(3) (emphasis added). Defendants argue that service was ineffective because (1) Defendants were not personally served, (2) their adult son was not served at Defendants’ “dwelling or usual place of abode,” and (3) their son was not authorized to accept service on their behalf. *Id.* 4.1(d)(2).

At oral argument, the Court determined that a factual issue existed. Specifically, the Court set an evidentiary hearing to receive evidence as to whether Defendants “actually resided” at the Subject Property at the time of service. *See Bowen v. Graham*, 140 Ariz. 593, 597, 684 P.2d 165, 169 (App. 1984) (“We agree that constitutional due process notice requires that

¹ The word “Morning” is not a typographical error. While “mourning” dove are a species of dove commonly found in Arizona, the street bears the name “Morning” Dove.

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substituted service at the defendant's 'usual place of abode' must be at the place where the defendant normally actually resides so that service will be 'substantially ... likely to bring home notice' to the party affected." (Quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). Further, the Court ordered Maricopoly to appear and show cause why the Default Judgment should not be set aside. The purpose of the order to show cause was to give Maricopoly notice that Defendants had challenged the Default Judgment giving rise to the sheriff's sale, and to give Maricopoly an opportunity to participate in the proceedings.

Plaintiff argues that the Motion is untimely. There is, however, "no time limit in which a motion for a void judgment must be brought under Rule 60(c)(4)[, now 60(b)(4)], and the court must vacate such a judgment even in the case of unreasonable delay by the party seeking relief." *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 74, ¶, 90 P.3d 1236, 1240 (App. 2004), as amended (citations omitted). The twist added by Maricopoly, i.e., that the Motion was untimely in light of the sale of the property by Maricopoly to a third-party, is not material. Maricopoly does not cite any legal authorities that would permit the Court to disregard *Master Fin., Inc. v. Woodburn*, even if a sheriff's sale had been held and the Subject Property had been conveyed after the sheriff's sale.

Plaintiff argues that service upon Defendant's son was proper, i.e., they were served at their dwelling via a person of suitable age and discretion, and that Defendants failed to impeach service by clear and convincing evidence as required under *General Electric Capital Corp.*, 172 Ariz. at 194, 836 P.2d at 407. As explained in *Bowen*, "constitutional due process notice requires that substituted service at the defendant's 'usual place of abode' must be at the place where the defendant normally actually resides so that service will be 'substantially ... likely to bring home notice' to the party affected." 140 Ariz. at 597, 684 P.2d at 169 (quoting *Mullane*, 339 U.S. at 315). First, Plaintiff and Maricopoly did not dispute that the physical description of the person served in the Certificate of Service did not match the physical description of Mr. Kim, that is, the process server did not serve either Defendant in person. The Court concludes that Defendants satisfied the burden of proof that they were not personally served. Second, despite some inconsistent testimony regarding their declarations, the Court concludes that the inconsistencies were the result of language barriers, not the credibility of the Defendants. Defendants proved, by clear and convincing evidence that they did not actually reside at the Subject Property at the time of service. Further, there was no evidence that Defendants' adult son was authorized to accept service on behalf of his parents.

Plaintiff argues that the Court should not reward a bad actor by setting aside the Default Judgment. The Court agrees that if Defendants' son told the process server that he was Young Sin Kim that was improper and unfortunate. Nevertheless, that misrepresentation does not alter the Defendants' due process rights afforded by Rule 4.1 of the Arizona Rules of Civil Procedure.

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Finally, Maricopoly argues that Defendants' failure to redeem the property terminated Defendants' interests in the property, and Defendants ask the Court to vacate the sheriff's sale. Neither Maricopoly nor Defendants have directed the Court to any specific legal authority supporting their positions. A brief amount of research, however, revealed the case of *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 798 P.2d 395 (App. 1990). Sprang holds that "[w]hen a judgment is void, the execution of the judgment is void, and title to land does not pass." *Id.* at 262, 798 P.2d at 400. Even a bona fide purchaser for value is not shielded from the consequences of a void judgment *Id.* at 263, 798 P.2d at 401. Neither Plaintiff nor Maricopoly suggested or argued that the Restatement (Second) of Judgments § 66 (1982) applied in this case.

For the reasons stated above,

IT IS ORDERED that the Default Judgment is set aside and vacated.

IT IS FURTHER ORDERED that the sheriff's sale is set aside and vacated.