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IN THE APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

94265478



Hon. Carl McCormick, Justice

Hon. Allen Hartman, Justice

Hon. Gene L. Dwyer, Justice 10 6

Gilbert S. Marchman, Clerk

Michael F. Sheahan, Sheriff

On the Twenty-Fifth day of August, 1992, the Appellate Court, First District, issued the following judgment:

No. 1-91-2376

FELIKS SZTRUGULEWSKI,
Plaintiff-Appellant,

APPEAL FROM COOK COUNTY
Circuit Court No. 8313937

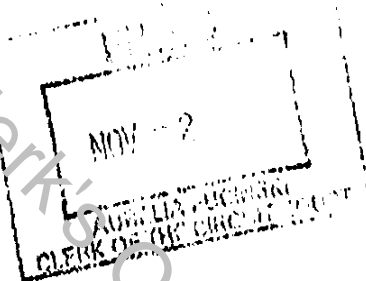
v.

WIESLAW GIZYNSKI,
Defendant-Appellee.

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. DEPT-01 \$33.50
. T04444 TRAN 6549 03/23/94 16154100
. 07425 # L.C. # -94-265478
. COOK COUNTY RECORDER

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As Clerk of the Appellate Court, in and for the First District of the State of Illinois, and the keeper of the Records, Files and Seal thereof, I certify that the foregoing is a true copy of the final order of said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Appellate Court, at Chicago, this Second day of November, 1992.

Gilbert S. Marchman

Clerk of the Appellate Court
First District, Illinois

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SECOND DIVISION
August 25, 1992

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-91-2376

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FELIKS SZTRUGULEWSKI,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County.
v.)	No. 85 L 3937
WIESLAW GIZYNSKI,)	Honorable
Defendant-Appellee.)	Willard Lassars,
)	Judge Presiding.

ORDER

Plaintiff, Feliks Sztrugulewski, filed a complaint seeking \$150,000 for damages from certain injuries he sustained resulting from a battery committed by defendant Wieslaw Gizynski. Defendant failed to appear or answer, and a default judgment of \$125,000 was entered against him. Thereafter, defendant filed a motion to quash return of summons which had been made by substitute service pursuant to section 2-203 of the Code of Civil Procedure. (Ill. Rev. Stat. 1989, ch. 110, par. 2-203.) Following an evidentiary hearing, the trial court granted the motion and also vacated the prior default judgment. On appeal, plaintiff contends that the trial court erred in failing to consider the service of summons on defendant as personal service,

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in granting defendant's motion to quash service of summons and in denying plaintiff's motion to amend the return of service.

Defendant testified that in 1974 he purchased a three-flat building located at 4818 North Central Avenue in Chicago and moved into the first-floor apartment where he lived alone. Defendant denied that he was served with summons on March 12, 1985, and added that he learned of the litigation when he was recently contacted regarding the garnishment of his bank account.

Marzena Chrzastowski testified that she is defendant's niece. From 1984 through 1986, Chrzastowski and her mother lived first in the garden apartment and then the third-floor apartment at 4818 North Central Avenue. Chrzastowski further testified that she frequently visited and cooked for defendant in his first-floor apartment and denied that anyone had lived with defendant at any time.

James Sopart testified that he lived in the Chicago area for 10 years and was a friend of defendant. From 1979 through 1986, when Sopart visited defendant around three times a week, defendant lived alone.

James Hodges testified that he worked as a deputy sheriff in Cook County for 10 years. On March 12, 1985, he served a summons at 4818 North Central. After Hodges rang the bell, a man who spoke "broken English" opened the door and accepted the summons. Hodges could not determine if the man was defendant because he could not communicate with the man. Hodges wrote "Mr. Gizynski/member of household" on the return.

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Plaintiff asserts that the trial court erred when it found that defendant was not personally served with summons and granted defendant's motion to quash summons. Personal or substitute service on a defendant is required to submit defendant to the jurisdiction of the court. Where the sheriff's return indicates personal service of summons upon defendant, there is a presumption of validity. However, there is no presumption of validity in the case of substitute service. (Prudential Property & Casualty Insurance Co. v. Dickerson (1990), 202 Ill. App. 3d 180, 184, 559 N.E.2d 354.) Even in the case of substitute service, the sheriff's return is evidence that he has performed the acts recited therein, and the party challenging the service has the burden of presenting contradictory affidavits or personal testimony. (Mid-America Federal Savings v. Kosiewicz (1988), 170 Ill. App. 3d 316, 324, 524 N.E.2d 663.) In the case of substitute personal service, the return of an officer will not be set aside merely upon the uncorroborated testimony of the person on whom process has been served, but only upon clear and satisfactory evidence. (Alvarez v. Feiler (1988), 174 Ill. App. 3d 320, 323, 528 N.E.2d 354.)

The uncontroverted evidence herein established that the deputy sheriff could not recall whom he served with summons at defendant's residence. The deputy testified that he served summons upon a man who had difficulty communicating in English, but the deputy did not know who the man was. Other evidence established that defendant lived alone at the time summons was alleged to have been served. However, defendant denied that he

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had been served with summons on March 12, 1985, or that he had any knowledge of the litigation until he was contacted regarding garnishment proceedings. Although defendant appeared in court after judgment was entered during the garnishment proceedings, he did not waive his right to contest jurisdiction through his motion to quash service of summons. (United Bank v. Dohn (1983), 115 Ill. App. 3d 286, 288, 450 N.E.2d 974.) The record does not reveal that defendant voluntarily submitted to the jurisdiction of the court. Instead it discloses that defendant has consistently challenged jurisdiction since he learned of the litigation. Under the circumstances, we cannot conclude that the trial court erred when it determined that defendant presented sufficient evidence to sustain his motion to quash summons where proper service was not established.

Plaintiff also maintains that the trial court erroneously denied his motion to amend the deputy's return. More specifically, plaintiff seeks to amend the return to conform with the evidence presented which according to plaintiff, showed that the deputy served summons by personal service upon defendant. Although we agree with plaintiff's assertion that former law specifically allowed for the amendment of a return by a sheriff or other officer, "according to the truth of the matter," (Ill. Rev. Stat. 1975, ch. 7, par. 4, repealed effective October 1, 1977; State Bank of Lake Zurich v. Thill (1985), 135 Ill. App. 3d 747, 756, 481 N.E.2d 974, aff'd (1986), 113 Ill. 2d 294, 497 N.E.2d 1156), that principle, even were it presently effective, would not assist plaintiff under the circumstances. The evidence

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presented in the this case does not establish that summons was personally served upon defendant. As the trial court noted, the deputy did not recall that he ever saw defendant or served him with summons. Further, defendant denied that he had been served or had knowledge of the litigation. Thus, it would be improper to amend the return to show personal service where the evidence was insufficient to establish that this had occurred.

Accordingly, for the reasons stated, the judgment of the circuit court is affirmed.

Affirmed.

McCormick, J., with Hartman, P.J., and Davito, J.,
concurring.

WRITTEN BY: 14036

Address of Property: 4818 N. Central Avenue, Chicago Cook County

Generic Tract: NOT ORDERED

Permanent Real Estate Index Number: 13-08-432-026

Legal Description: Lot 2 in Block 6 in Free's Addition to Jefferson, said addition being a subdivision of the SE 1/4 of the Indian Boundary Line of Section 5, Township 40 North, Range 13, East of the Third Principal Meridian, in Cook County, Illinois.

Record Owner: Chicago Title and Trust Company as Trustee, U/T/A dated 9/1/81, Trust #1080588

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Clerk's Office
APPELLATE COURT FIRST DISTRICT
State of Illinois
Richard J. Daley Center, Rm. 2830
Chicago, Illinois 60602

11/02/92

Honorable Aurelia Pucinski
Circuit Court of Cook County
Chicago, Illinois

Re: Sztregulowski, Folka v. Gizynski, Wieslaw
Appellate Court No.: 1-91-2376
Trial Court No. 95L3937

Dear Ms. Pucinski:

Attached is the Mandate of the Appellate Court in the above entitled cause.

We are sending the attorneys of record a copy of this letter to inform them that the mandate of the Appellate Court has been filed with you.

Gilbert S. Mazehman
Clerk of the Appellate Court
First District, Illinois

Attachment

I HEREBY CERTIFY THE ABOVE TO BE CORRECT.

DATE MAR 23 1994

Aurelia Pucinski

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILL.

THIS ORDER IS THE COMMAND OF THE CIRCUIT

COURT AND VIOLATION THEREOF IS SUBJECT TO THE
PENALTY OF THE LAW

cc: All attorneys of record

FILED
NOV - 2
APPELLATE COURT
FIRST DISTRICT
CHICAGO, ILL.

94265478

MAR 23 1994

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JAN 29 1999
[Signature]