In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] & [redacted]

Appellants,

v.

SUNTRUST MORTGAGE, INC.

Appellee.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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I. Introduction

Appellants TIWANNA and [redacted] (the [redacted] appeal the trial court's refusal to conduct an evidentiary hearing on TIWANNA's motion to quash service of process prior to conducting a foreclosure trial and ordering the sale of their home. The trial court's refusal to conduct an evidentiary hearing into the service of process issue violated the [redacted] due process rights. Instead, the trial court held the [redacted] to an artificial case management deadline—of which they also did not have adequate notice—and summarily denied their challenge to the trial court's jurisdiction over them. Because due process requires a court to conduct an evidentiary hearing in the face of a challenge to service of process, this Court should reverse and remand for a hearing on the [redacted] Motions to Quash.

II. Appellants' Statement of The Facts

TIWANNA and [redacted] are joint borrowers and joint mortgagors on their home.[1] The [redacted] first learned of the foreclosure suit pending against them in mid-September when they received an order setting trial

[1] Complaint, dated Feb. 22, 2010 (App. 1).

for October 17, 2012 (the "Trial Order").[2] The [redacted] had previously made payments toward a loan modification on their home, yet Appellee SUNTRUST MORTGAGE, INC. (the "BANK") never told them that it had filed suit.[3] TERRANCE [redacted] attempted to comply with the trial order and, acting *pro se*, filed a witness and exhibit list on behalf of himself. But the [redacted] also expeditiously sought and retained counsel.[4]

Because the [redacted] were never served with the summons and complaint, [redacted] filed a Motion to Quash service of process upon her a week before the trial date, and also sought to continue the trial.[5] [redacted] who had already appeared by way of his witness and exhibit list, filed a motion to

[2] Notice of Service for Order Setting Cause for Non-Jury Trial, dated Sept. 12, 2012 (App. 32); Defendant, [redacted] Affidavit, dated Oct. 16, 2012 (App. 38, ¶ 4). Although the Trial Order was executed in August, the Plaintiff did not serve the order on the [redacted] for over two weeks.

[3] Defendant, [redacted] Affidavit, dated Oct. 16, 2012 (App. 38, ¶¶ 6-10).

[4] Notice of Appearance for [redacted] dated Oct. 16, 2012 (App. 40); Defendant, [redacted] Motion to Quash and Motion to Vacate, dated Oct. 10, 2012 (App. 43).

[5] Defendant, [redacted] Motion to Quash and Motion to Vacate, dated Oct. 10, 2012 (App. 43); Defendant, [redacted] Motion to Continue Trial, dated Oct. 11, 2012 (App. 47).

vacate the default that had been entered against him.[6] In support of the Motion to Quash, [redacted] filed an affidavit in which she swore that she had not been served with the complaint in this matter, either for herself or for her husband.[7]

Notably, the returns of service filed in this matter indicate that the process server worked for ProVest, LLC—the same entity that just this year entered into a settlement with the Florida Attorney General amidst allegations that the company regularly engaged in "sewer service" by filing falsified returns of service.[8]

The [redacted] attempted to have their motion for continuance heard prior to the trial date so that their motions to quash could be heard, but the administrative judge refused to hear the motion to continue, instead deferring the motion to the trial judge.[9]

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[6] Defendant, [redacted] Motion to Vacate Clerk's Default, and Motion to Dismiss Complaint, and Motion to Vacate *Ex Parte* Substitution Of Party Plaintiff, dated Oct. 16, 2012 (App. 50).

[7] Defendant, [redacted] Affidavit, dated Oct. 11, 2012 (App. 65, ¶¶ 3-4).

[8] *See In the Matter of ProVest, LLC*, AG Case No. L10-3-1197, Assurance of Voluntary Compliance (effective July 20, 2012) at 5-7, available at http://myfloridalegal.com/webfiles.nsf/WF/JMEE-8WTJ3R/$file/ProVest.pdf.

[9] Transcript of Trial before Hon. Eugene J. Ferro, dated Oct. 17, 2012 (App. 67, 10:12-22).

At trial, the [redacted] repeatedly asked the court to continue the trial so that the court could hold an evidentiary hearing on the motion to quash.[10] The [redacted] counsel also explained that [redacted] was prepared to testify that she was never served with the Complaint.[11] The trial court denied the motion to quash without taking evidence on the service issues, relying on the Trial Order's admonition that all pre-trial motions "shall have been completed" 15 days prior to trial.[12] The trial court also precipitously rebuffed any attempts to argue other pending motions, such as the [redacted] motion to vacate the default based on excusable neglect.[13]

This timely interlocutory appeal of the trial court's determination that it had personal jurisdiction over [redacted] follows.[14]

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[10] *Id*. at 6:9-12; 9:23-12:22.

[11] *Id.*

[12] *Id*. at 10:1-7.

[13] *Id*. at 6:9-12; 9:23-12:22. The trial court's summary denial of [redacted] Motion to Vacate the Default without a hearing will be the subject of a subsequent appeal. *See*, n. 14, *infra*.

[14] Notice of Appeal, dated Nov. 13, 2012 (App. 158). The [redacted] appeal of the ensuing final judgment—which was erroneously entered after this appeal had been filed—is also before this Court, *see* Case No. 3D12-2994.

SUMMARY OF THE ARGUMENT

This Court has long held that "proper service of process is indispensable to the jurisdiction of a court to adjudge the competing claims of parties to a litigation." *MAC Org., Inc. v. Harry Rich Corp.*, 374 So. 2d 81, 82 (Fla. 3d DCA 1979). Where, as here, a defendant specially appears and requests the trial court to quash service of process, the court as a matter of law must conduct an evidentiary hearing prior to making any further rulings adverse to the defendant. *Travelers Ins. Co. v. Davis*, 371 So. 2d 702, 703 (Fla. 3d DCA 1979). timely moved to quash service of process and properly supported her motion. The trial court erred in denying the motion without conducting an evidentiary hearing. *Fern, Ltd. v. Rd. Legends, Inc.*, 698 So. 2d 364, 365 (Fla. 4th DCA 1997).

Moreover, a trial court cannot refuse to hear a motion to quash based upon case management deadlines. Because an improperly-served complaint renders a judgment void and susceptible to attack at any time, the trial court erred in citing case management deadlines as the basis for its refusal to conduct an evidentiary hearing. *Outler v. Berman*, 234 So. 2d 724 (Fla. 3d DCA 1970); *Illanes v. Gutierrez*, 972 So. 2d 222, 223 (Fla. 3d DCA 2007).

STANDARD OF REVIEW

"The determination of whether the trial court properly ruled on a motion to quash service of process for lack of personal jurisdiction is a question of law" that the court reviews *de novo*. *Mecca Multimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007), citing *Alvarado v. Cisnero*s, 919 So. 2d 585, 587 (Fla. 3d DCA 2006); *Labbee v. Harrington*, 913 So. 2d 679, 681 (Fla. 3d DCA 2005).

ARGUMENT

I. The Trial Court Denied [redacted] Due Process By Refusing to Conduct an Evidentiary Hearing on the Motion to Quash Service of Process.

Service of process is the cornerstone of a trial court's jurisdiction over defendants in a court action. *McKelvey v. McKelvey*, 323 So. 2d 651, 653 (Fla. 3d DCA 1976). "Strict compliance with service of process procedures is required in order to insure that a defendant receives sufficient notice of the legal action brought against him in this state." *Electro Eng'g Products Co., Inc. v. Lewis*, 352 So. 2d 862, 865 (Fla. 1977); *see also Bennett v. Christiana Bank & Trust Co*., 50 So. 3d 43, 45 (Fla. 3d DCA 2010) (reversing denial of motion to quash). Because the failure to properly serve a party deprives that party of notice, a "judgment entered without due service of process is void." *Falkner v. Amerifirst Federal Savings and Loan Association*, 489 So. 2d 758 (Fla. 3d DCA 1986); *see also*

McAlice v. Kirsch, 368 So. 2d 401, 404 (Fla. 3d DCA 1979) (defective service of process voids judgment).

The law is long-settled that when a defendant appears for the first time in an action by means of a motion to quash service, due process requires that the trial court hold an evidentiary hearing. *Travelers Ins. Co. v. Davis*, 371 So. 2d 702, 703 (Fla. 3d DCA 1979) (reversing order on motion to quash for failure to provide requested evidentiary hearing). An evidentiary hearing is required to "insure adequate consideration of the motion."[15] Without an evidentiary hearing, the BANK "could not rebut appellant's affidavit." *Fern, Ltd. v. Rd. Legends, Inc.*, 698 So. 2d 364, 365 (Fla. 4th DCA 1997) (reversing and remanding for an evidentiary hearing).

The trial court here, however, refused to hold an evidentiary hearing or continue the trial so one could be had, despite numerous requests by the counsel.[16] Even assuming *arguendo* that the returns of service on file were facially adequate, an evidentiary hearing was required to allow the the opportunity to show the trial court clear and convincing evidence

[15] *Id.*

[16] Transcript of Trial before Hon. Eugene J. Ferro, dated Oct. 17, 2012 (App. 67, 11:1-12; 12:18-22).

that service of process was defective. *Travelers Ins. Co. v. Davis*, 371 So. 2d 702, 703 (Fla. 3d DCA 1979) (requiring evidentiary hearing even where returns of service are facially valid).

Although there is no indication on the record that the trial court reviewed the returns of service on file, any review of those materials would not have protected the [redacted] due process rights. An evidentiary hearing requires the court to allow the parties the opportunity to proffer admissible evidence, and "neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing." *Linville v. Home Sav. of Am., FSB*, 629 So. 2d 295, 296 (Fla. 4th DCA 1993). Here, as in *Linville*, the "unrebutted allegations contained in appellant's motion to quash service of process and the supporting affidavit, if proven by clear and convincing evidence, would establish appellee's failure to effect valid service of process." *Id.* Because [redacted] proffered a sworn affidavit based upon her own personal knowledge and appeared to testify in support of her motion, she was entitled to a hearing. This case is thus distinguishable from *Smith v. Cuban Am. Nat. Found.*, 657 So. 2d 86, 87 (Fla. 3d DCA 1995) (no evidentiary hearing required where defendant proffers only inadmissible evidence to rebut return of service).

Moreover, [redacted] challenge to service is no mere delay tactic. First, the Court had before it evidence that the [redacted] had not been told about the suit by the very BANK with which they were attempting to negotiate a loan modification.[17] This kind of dual tracking behavior by banks has been harshly criticized during congressional hearings[18] and is restricted by the attorney generals' settlement with the country's five largest mortgage servicers[19] as well as by new rules promulgated by the Consumer Financial Protection Bureau.[20] This case exemplifies why dual tracking has garnered such universal condemnation: because the [redacted] thought they were negotiating a solution with their lender, they had no reason to expect that a suit had been filed against them.

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[17] Defendant, [redacted] Affidavit, dated Oct. 16, 2012 (App. 38, ¶¶ 6-10).

[18] *See*, *House and Senate Committees Address Foreclosure Crisis and Loan Modification Problems*, National Council of State Housing Agencies, November 24, 2010, available at https://www.ncsha.org/blog/house-and-senate-committees-address-foreclosure-crisis-and-loan-modification-problems.

[19] *See*, EXECUTIVE SUMMARY OF MULTISTATE/ FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS at 3, available at https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf.

[20] *See*, *Dual-Track Foreclosure Limited Under Consumer Bureau Rules*, Carter Dougherty, Bloomberg Businessweek, January 17, 2013, available at http://www.businessweek.com/news/2013-01-17/dual-track-foreclosures-limited-under-u-dot-s-dot-consumer-bureau-rules.

Second, the process serving company utilized by the Plaintiff's counsel in this case, ProVest, LLC (ProVest), has demonstrated a pattern and history of filing falsified returns of service. *See, e.g., Bennett v. Christiana Bank & Trust Co.*, 50 So. 3d 43 (Fla. 3d DCA 2010) (reversing for lack of service where the ProVest process server lied about effecting service of process). ProVest's at best "sloppy" practices have been dubbed "sewer service," referring to the alleged practice of "simply tossing foreclosure notices in a sewer then claiming the papers were personally handed to the homeowner."[21] And although they have not admitted liability, ProVest, just this summer, entered into a settlement with the Florida Attorney General, requiring it to pay a fine of more than $460,000 and significantly reform its process serving practices.[22]

In sum, there is good reason to carefully examine the evidence surrounding service of process in this case. For all of these reasons, the trial court's refusal to

[21] *See* Robert Trigaux, "Tampa foreclosure process server ProVest LLC under state investigation for sloppy practices dubbed 'sewer service,'" *St. Petersburg Times*, December 15, 2010, *available at* http://www.tampabay.com/blogs/venturebiz/content/tampa-foreclosure-process-server-provest-llc-under-state-investigation-sloppy-practices-dubb (visited December 13, 2012).

[22] *See In the Matter of ProVest, LLC*, AG Case No. L10-3-1197, Assurance of Voluntary Compliance (effective July 20, 2012) at 5-7, available at http://myfloridalegal.com/webfiles.nsf/WF/JMEE-8WTJ3R/$file/ProVest.pdf.

conduct an evidentiary hearing on [redacted] Motion to Quash was a denial of fundamental due process rights.

II. Because [redacted] Had Not Yet Appeared, the Trial Court Could Not Deny the Motion Based Upon the Case Management Deadlines Found in the Trial Order.

In denying the Motion to Quash, the trial court relied in part on the Trial Order's admonishment that "all pre-trial motions…shall have been completed" fifteen days prior to the noticed trial date.[23] This case management statement does not, however, relieve the trial court of its obligation to properly hear [redacted] challenge to the Court's jurisdiction over her.

First, the [redacted] would not be required to submit to deadlines established by an order entered in the absence of personal jurisdiction over them. Until it is established that the [redacted] had been served, the Trial Order was simply without force and effect as to them. "Absent strict compliance with the statutes governing service of process, the court lacks personal jurisdiction over the defendant," *Anthony v. Gary J. Rotella & Associates, P.A.*, 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005) *quoting Sierra Holding v. Inn Keepers Supply*, 464 So.2d 652 (Fla. 4th DCA 1985). To assume the court had jurisdiction to enforce its Trial

[23] Transcript of Trial before Hon. Eugene J. Ferro, dated Oct. 17, 2012 (App. 67, 10:1-7).

Order—and thereby thwart a challenge to the very exercise of that jurisdiction—puts the cart before the horse.

Stated differently, there can be no court order that could shorten the time that the [redacted] have to challenge jurisdiction. The [redacted] could have attacked the judgment as void for lack of service of process a year or more after the judgment, and the trial court still must consider the motion and, if it is well-taken, vacate the judgment. *Del Conte Enterprises, Inc. v. Thomas Pub. Co.*, 711 So. 2d 1268, 1269 (Fla. 3d DCA 1998). There simply is "no time limit for attacking a void judgment." *M.L. Builders, Inc. v. Reserve Developers, LLP*, 769 So. 2d 1079, 1082 (Fla. 4th DCA 2000).

Ironically, here, the trial court turned the [redacted] diligence on its head, making it a detriment to bring the issue to the court's attention early. The [redacted] did not wait until after judgment was entered to challenge the court's jurisdiction. Instead, they hired counsel and raised their challenge to service (and the default) within weeks of learning of the suit against them.[24] Rather than reward this diligence, the court did the opposite. It ignored the jurisdictional challenge based on the notion that they were not diligent—that the motion was untimely.

[24] Defendant, Terrance [redacted] Affidavit, dated Oct. 16, 2012 (App. 38, ¶¶ 6-10); Certificate of Service of Notice of Service for Order Setting Cause for Non-Jury Trial, dated Sept. 12, 2012 (App. 33).

Second, even if the trial court could rightfully enforce the Trial Order, it was error to do so in a manner that violated the [redacted] due process rights. *Illanes v. Gutierrez*, 972 So. 2d 222, 223 (Fla. 3d DCA 2007) (reversing trial courts use of a case management conference to determine party's rights without notice); see also *Smith v. Smith*, 964 So. 2d 217, 219 (Fla. 2d DCA 2007) (party denied "fundamental constitutional right to procedural due process" where court refused to hear from him under the guise of docket management).

CONCLUSION

This Court should vindicate [redacted] due process rights and REVERSE, REMANDING with directions to the trial court to conduct an evidentiary hearing into whether service of process was properly effectuated on [redacted]

Dated: January 23, 2012

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 23, 2013 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this January 23, 2013.

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