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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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STATEMENT OF FACTS
(Response to the BANK's "Statement of Facts")

SUNTRUST MORTGAGE, INC. (the "BANK") asserts in a footnote that, despite the listing of both [redacted] AND [redacted] ("[redacted] as appellants, "only [redacted] seeks relief herein."[1] While the error of failing to hold a hearing on the motion to quash pertains to TIWANNA, if service had been quashed, then the case was not at issue and it was error to proceed to trial. [redacted] therefore, is entitled to participate in the new trial for TIWANNA whenever she is properly served and the case against her is ready to be tried. But even if TIWANNA were the only defendant entitled to a new trial in those circumstances, if she proves that foreclosure was improper as against her, then the judgment of foreclosure was improper as against both [redacted] In short, the [redacted] home cannot go to judicial auction while the case is still pending against TIWANNA. Accordingly, the judgment must be reversed as to both [redacted]

The BANK asserts in another footnote that, although the order being appealed denies a motion that sought to quash process as well as vacate a clerk's

[1] Answer Brief, p. 1, fn. 1.

default, "only the Motion to Quash Service of Process is before this Court."[2] In reality, the Motion to Vacate the Clerk's Default was based upon the same fact upon which the Motion to Quash was based—that TIWANNA was never served and was unaware of the case. Because these two requests are inextricably bound together, it is nonsensical to suggest that this Court could remand for a hearing on the Motion to Quash Service of Process, but that the default would remain standing even if TIWANNA prevails at that hearing.

And in yet another footnote argument, the BANK asserts that the proper Appellee should be Nationstar Mortgage, LLC due to an *ex parte* substitution of party plaintiff.[3] The order substituting Nationstar Mortgage LLC, however, does not command the clerk to change the style of the case. More importantly, [redacted] challenged this *ex parte* order in his Motion to Vacate the default against him[4] and both [redacted] challenged Nationstar's standing at trial. The judgment from that trial is the subject of a separate appeal.[5]

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[2] Answer Brief, p. 1, fn. 2.

[3] Answer Brief, p. 1, fn. 3.

[4] 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).

[5] Case No. 3D12-2994.

SUMMARY OF THE REPLY ARGUMENT

The BANK has cited no cases that directly address the issue of whether an evidentiary hearing is required when a party has challenged the truthfulness of the process server's return of service. The BANK instead has cited cases where such hearings were held and has even cited one in which this Court remanded a case for an evidentiary hearing in circumstances similar to this case (except that the trial court had granted the motion to quash). The BANK made no effort to address the cases cited by the

Contrary to the suggestions of the BANK, the trial court did not base its denial of the motion to quash based upon "evidence" in the file, nor would such a procedure be a substitute for an evidentiary hearing. Nor can the trial itself be substituted for a properly noticed hearing because the were given no opportunity to conduct discovery and marshal their evidence.

At stake is the home which they were diligently attempting to save by making payments on a loan modification with the BANK. The should have their day in court.

ARGUMENT

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

A. The BANK cites to binding authority that an evidentiary hearing on the motion to quash was required.

The BANK cites this Court to *Koniver Stern Group v. Layfield*, 811 So. 2d 812 (Fla. 3d DCA 2002) for the uncontroversial proposition that a simple denial of service [in a motion] does not constitute clear and convincing evidence.[6] What the BANK neglects to mention is that, in *Koniver*, the trial court had granted a motion to vacate a default following a non-evidentiary hearing. *Id.* Tellingly, this Court reversed and remanded "for an evidentiary hearing," not for entry of an order denying the motion to vacate. *Id.* Thus, *Koniver* does not hold that an evidentiary hearing is unnecessary when a "simple" denial of service is juxtaposed against a facially "regular" return of service—it holds just the opposite. This single case is so damaging to the BANK's position that perhaps it should have presented the opinion along with a confession of error.

B. The remaining cases cited by the BANK do not hold otherwise.

The BANK also cites to *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 178 (Fla. 3d DCA 2011) for the rule—which is not disputed here—that the

[6] Answer Brief, p. 6.

Return of Service shifts the burden to the [redacted] to prove by clear and convincing evidence that service of process was not properly effectuated. Notably, this Court articulates the rule as a presumption that is to be overcome at an evidentiary hearing:

> This presumption shifted the burden to Appellants to establish at the evidentiary hearing, by clear and convincing evidence, that service of process was not properly effectuated.

Id. at 180.

The BANK also relies upon *Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 294 (Fla. 1st DCA 2013) in which an evidentiary hearing was actually held. The First District affirmed a denial of defendant's request to continue the hearing (which had been set by defendant) in order to find and present more evidence. *Id.* at 292-93. It also held that the trial court should have held another evidentiary hearing upon a motion for reconsideration. *Id.* at 293. Here, the [redacted] were afforded no evidentiary hearing.

The BANK also cites a number of other cases, none of which address whether an evidentiary hearing was required or even requested. In fact, the word "hearing" does not appear anywhere in the BANK-cited cases.[7] One such case,

[7] *Telf Corp. v. Gomez*, 671 So. 2d 818 (Fla. 3d DCA 1996), *Seltzer v. Key West Bank*, 34 So. 3d 83 (Fla. 3d DCA 2010), *SunTrust Bank v. Electronic Wireless*

Emmer v. Brucato, 813 So. 2d 264 (Fla. 5th DCA 2002)[8] implies that an evidentiary hearing was, in fact, held in the trial court given that it mentions no affidavits and describes one person as having "testified." *Id*. at 265.

Moreover, in cases such as *Telf Corp.*, *Seltzer*, *SunTrust*, and *Stewart*, the defendants never specifically denied that they had received actual notice of the lawsuit. They alleged only that service was defective or invalid due to technical violations of the service statutes.[9] Because the threat to due process is much greater when it is alleged, under oath, that the defendants were completely unaware of the suit, these cases are particularly unhelpful.

C. The BANK does not address the cases cited by the

Evoking the proverbial ostrich with its head firmly entrenched in the sand, the BANK completely ignores the cases cited by the such as *Linville v.*

Corp., 23 So. 3d 774 (Fla. 3d DCA 2009); *Stewart v. Julana Dev. Corp.*, 678 So. 2d 1385 (Fla. 3d DCA 1996); Answer Brief, pp. 5-6.

[8] Answer Brief, pp. 5-6.

[9] In *Telf*, the defendant claimed he did not live at the address where service was accepted. In *Seltzer*, the defendant claimed only that he had a different mailing address than the residence where service was accepted. *SunTrust* involved a number of alleged technical defects, including the fact that the summons was not in Creole. The defendant apparently did not deny that his wife had been served in his stead as stated in the Return. In *Stewart*, the defendant argued that extra-territorial service was improper and that he had been served with papers from a different lawsuit.

Home Sav. of Am., FSB, 629 So. 2d 295, 296 (Fla. 4th DCA 1993); *Travelers Ins. Co. v. Davis*, 371 So. 2d 702, 703 (Fla. 3d DCA 1979); and *Fern, Ltd. v. Rd. Legends, Inc.*, 698 So. 2d 364, 365 (Fla. 4th DCA 1997), all of which find that evidentiary hearings were required.

D. The Brief does not concede that evidentiary hearings are not required.

The BANK claims that the conceded in their Initial Brief that there are "certain circumstances" where an evidentiary hearing is not required.[10] The however, made no such concession. They merely pointed out that the always-required hearing may be obviated or moot, where, as in *Smith v. Cuban Am. Nat. Found.*, 657 So. 2d 86, 87 (Fla. 3d DCA 1995), no admissible evidence had been proffered. The evidence proffered in *Smith* was hearsay; the evidence proffered in this case was based upon personal knowledge.

E. The denial of a hearing was not harmless error.

The trial itself cannot substitute for the hearing to which the were entitled.[11] The reason is perhaps best demonstrated by the BANK's own comment that the "made no attempt to introduce the testimony of the process

[10] Answer Brief, pp. 7-8.

[11] Answer Brief, pp. 9-10.

server himself."[12] Given that the [redacted] knew nothing about this litigation until a few short weeks before trial and that the Motion to Quash, although promptly raised, was filed only a week before trial, it is farcical to suggest that the [redacted] had any real opportunity to conduct discovery or subpoena the process server. Unlike the defendant in *Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 294 (Fla. 1st DCA 2013), the [redacted] had no control over the timing of when their evidence would need to be marshaled and presented.

That the BANK points out that the [redacted] could call the process server as a witness at an evidentiary hearing proves the [redacted] point. While the [redacted] must overcome a presumption, they are entitled to discovery of records from ProVest, LLC as to the process server's whereabouts and schedule the day of the purported service. They are entitled to obtain entry records from the gated community to disprove the process server's presence. They are entitled to present corroborating evidence of their own whereabouts. And most of all, they are entitled to cross-examine the process server with this information. Thus, whether the [redacted] have presented clear and convincing evidence is not to be judged on the basis of hastily drawn affidavits or ambush trials, but upon the evidence they can adduce after being afforded the due process of discovery.

[12] Answer Brief, pp. 9-10.

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.

The BANK does not dispute that the trial court's case management deadlines do not apply to persons over which it has no jurisdiction. Instead, the BANK seeks to avoid this simple truth by re-characterizing the court's dismissive disregard for the motion to quash as one of thoughtful consideration of purported "evidence" in the file.[13] But obviously, there is no admissible evidence in the file that would be helpful to either party. Indeed, the BANK does not even attempt to identify what that evidence might be.

Any documents to be found there are unauthenticated, and any testimonial documents, such as the affidavits and returns of service are hearsay. *Avi-Isaac v. Wells Fargo Bank, N.A.*, 59 So. 3d 174, 177 (Fla. 2d DCA 2011) ("'[n]either the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.'"), *quoting* S*perdute v. Household Realty Corp.*, 585 So.2d 1168, 1169 (Fla. 4th DCA 1991); *see also Demaso v. Demaso*, 345 So. 2d 391, 392 (Fla. 3d DCA 1977) (attorney fees may not be determined on affidavits; the court must conduct an evidentiary hearing).

* * *

[13] Answer Brief, p. 8.

In the end, this case asks the Court to strike a balance between two competing public policies. The public policy behind a presumption of valid service is based upon a desire to avoid "chaos in the judicial system" where longstanding judgments could be erased by simple denials of service. *See Slomowitz v. Walker*, 429 So. 2d 797, 799 (Fla. 4th DCA 1983). But it was also based in part on a trust in our official process servers to act in the "regular routine of duty without a motive to misrepresent…" *Id.* This secondary assumption has surely become attenuated by the recent wave of reports of fraudulent service of which this Court can take judicial notice.[14]

The public policy behind the requirement of an evidentiary hearing is Constitutional due process. Both policies may be observed by a rule that requires that the presumption be applied in the context of an evidentiary hearing, not in the context of competing sworn documents. Taking a page from Rule 1.540 Fla. R. Civ. P. caselaw, it should be clearly delineated that litigants may show "colorable entitlement" to an evidentiary hearing by proffering sworn testimony by way of affidavit—just as the [redacted] have done here.

[14] *See* Initial Brief, p. 4 and n. 8.

In this case, the [redacted] proffered sworn testimony that they were never actually served which, if corroborated at an evidentiary hearing with "clear and convincing" evidence, would overcome the presumption of valid service. They were, therefore, entitled to such a hearing.

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: June 30, 2013

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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 July 1, 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 July 1, 2013.

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