In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.

Appellees.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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Key:

The conventions used in the Initial Brief will be continued here:

- "The Bank" refers to Deutsche Bank National Trust Company.
- "[redacted] refers to [redacted]
- "App." refers to [redacted] Appendix.

ARGUMENT

I. This Court has jurisdiction to consider this case, either as an appeal of a non-final order, a writ of mandamus, or both.

A. Jurisdiction under direct appeal from a non-final order.

The Bank argues that an order entitled "Order Denying Motion to Quash" and which states that "said Motion is: **DENIED**"[1] is not an order determining that the court has personal jurisdiction over [redacted][2] The Bank claims that, because [redacted] was ordered to answer (as is nearly always the case when a motion to dismiss for lack of jurisdiction is denied) this converted the order into one that was without prejudice to raising the issue again, and therefore, made it premature to appeal as a non-final order.[3]

But the court's order requiring [redacted] to answer is an exercise of the jurisdictional mantle that it had just assumed. There is nothing about the order that suggests that it is without prejudice or inherently different than any other appealable non-final order. Indeed, under the interpretation peddled by the Bank, there could never be a non-final appeal from an order denying a motion to quash, because the defense could always be raised in an answer.[4]

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[1] App. 53 (emphasis original).

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

[3] Answer Brief, p. 8.

[4] *See*, Answer Brief, p. 21, arguing that a defendant who loses a motion to quash can continue to defend without waiving the issue for a final appeal; and Answer

Nor is this Court's jurisdiction shaped by Judge's Bailey's casual supposition that defenses that have been denied as abandoned may simply be raised again and again without any adverse consequences for the defendant.[5] Of course, one adverse consequence is forcing an improperly served defendant to undergo the time and expense of trial—the prevention of which was presumably why the Florida Supreme Court gave special "non-final" (immediate appeal) status to orders determining personal jurisdiction. *See*, Committee Notes to 1977 Amendment of Fla. R. App. P. 9.130 (stating that the purpose of review for non-final orders is "to eliminate useless labor").

Accordingly, the trial court did not, by (improperly) basing its ruling in part on Administrative Order 12-E, single-handedly extinguish this Court's jurisdiction to review non-final orders nor prevent this Court from reviewing that part of the decision said to be based on the merits. The reference to the Administrative Order does, however, require this Court to determine whether a trial judge can close its eyes to a well-taken objection to its jurisdiction, merely because that resolution is recommended—and requested—by an Administrative Judge.

Brief, p. 33, arguing that [redacted] is not precluded from seeking review through "proper appellate channels"—meaning: final appeal.

[5] App. 135, referenced at Answer Brief, p. 20.

B. Jurisdiction to issue writs of certiorari.

In addition, the Court also has jurisdiction—as an exercise of its power to issue writs—to remedy the impropriety of the Administrative Order directly. The Bank claims that only the Florida Supreme Court may review Circuit Court administrative orders.[6] But as the Bank well knows—having cited the case several times in its Brief—this Court rejected that same argument in the pending similar case, *Frau v. JPMorgan Chase Bank*, Case No. 3D13-2712.[7] In another pending case, the Fourth District accepted jurisdiction to review an administrative order of the Fifteenth Circuit which attempted to create a similar abandonment rule for pre-answer motions.[8]

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[6] Answer Brief, pp. 9-14.

[7] Order denying Appellee's motion to dismiss the appeal dated April 28, 2014. *Frau v. JPMorgan Chase Bank*, Case No. 3D13-2712 and Appellants' response citing cases in which District Courts have stricken administrative orders that contradict the procedural rules promulgated by the Supreme Court: *Blalock v. Pena*, 569 So.2d 778 (Fla. 1st DCA 1990); *Melkonian v. Goldman*, 647 So. 2d 1008, 1010 (Fla. 3d DCA 1994); *Valdez v. Chief Judge of Eleventh Judicial Circuit of Florida*, 640 So. 2d 1164, 1165 (Fla. 3d DCA 1994); *Hatcher v. Davis*, 798 So. 2d 765, 767 (Fla. 2d DCA 2001).

[8] *See*, Order, dated June 4, 2014, in *Katz. v. Chief Circuit Judge, Fifteenth Judicial Cir.*, Case No. 4D14-1691, requiring the Chief Judge of the Circuit to show cause why the requested relief should not be granted. *See*, Clerk's Docket Notes at: http://199.242.69.70/pls/ds/ds_docket?p_caseyear=2014&p_casenumber=1691&psCourt=4&psSearchType=. The order being reviewed in *Katz* was referenced by [redacted] in its Initial Brief in this case (p. 13, n. 17) as a "copycat" order inspired by the Eleventh Circuit's administrative order.

Just as did the appellant in *Frau*, the Bank here relies upon the case of *1-888-Traffic Sch. v. Chief Circuit Judge, Fourth Judicial Circuit*, 734 So. 2d 413 (Fla. 1999) for the proposition that the Florida Supreme Court has exclusive jurisdiction over the review of the Administrative Order in this case. The principal holding of that case, however, was just the opposite—that the Supreme Court does not have exclusive jurisdiction over administrative order challenges.

In *1-888-Traffic Schools*, the Supreme Court clarified that its earlier holding in *Wild v. Dozier*, 672 So. 2d 16 (Fla. 1996) regarding the exclusivity of its jurisdiction "was limited to administrative orders making judicial assignments." *Id*. at 415. The Court rejected the notion that it had exclusive jurisdiction over the review of administrative orders (with the exception of those relating to judicial assignments) and recognized that "challenges to administrative orders … routinely have been made by petition for writ of common law certiorari in the district courts of appeal." *Id*. It therefore declined to exercise its "all writs" power to review the order in that case and returned the petition to the district court for consideration on the merits *Id*. at 417.

While there may be administrative orders sufficiently nocuous to persuade the Supreme Court to exercise its "all writs" power to accept review—and the Order here may well qualify—there is nothing in *1-888-Traffic Schools* to suggest

that the Supreme Court's ability to do so strips this Court of concurrent jurisdiction to review such orders.

Likewise, *United Services Auto. Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002),[9] does not support the Bank's position. By concluding that the Supreme Court had jurisdiction to review orders that encroach on its power to adopt rules for the courts, it did not hold that it had exclusive jurisdiction.

Accordingly, this Court has (at least concurrent) jurisdiction to consider the order denying motion to quash on its merits (as an appeal from a non-final order). It also has jurisdiction (under a writ of certiorari) to remedy the larger problem posed by the Administrative Order—so as to obviate the rash of appeals that it will undoubtedly engender.

II. The Trial Court Erred in Denying Motion to Quash.

A. Leaving the summons with a mailbox attendant is not service on a registered agent.

In addressing the merits of the motion to quash, the Bank conflates an "authorized agent" with a "business agent" or "registered agent" and fails to address the single point raised by that the Bank cannot serve a

[9] Answer Brief, p. 13.

complaint by leaving it at a mailbox unless it is the only address discoverable in the public records. § 48.031(6), Fla. Stat.[10]

Instead, the Bank cites to § 48.081(3)(a), Fla. Stat. which permits service on a registered agent. If a company fails to comply with the statute regarding designation of a registered agent—not applicable here—it may serve employees of either the corporation or its registered agent—also not applicable here. The Bank then cites to § 48.081(3)(b), Fla. Stat. which permits service on a registered agent, officer or director in accordance with § 48.031, Fla. Stat., if one of them, or the business, maintains a private mailbox.

Section 48.031, however, requires personal service on the registered agent, officer, or director, or substitute service on a spouse or on a co-resident who is at least fifteen years old—none of which are applicable here. The only potentially pertinent section is § 48.031(6), Fla. Stat.—the statute cited by originally—which permits substitute service on the person in charge of a private mailbox—but only if that mailbox is the only address for the person to be served discoverable through the public records.

On appeal, the Bank has not disputed that a physical address of the registered agent was discoverable in the public records. Indeed, the process server

[10] Initial Brief, pp. 6-7.

was actually given that address, but inexplicably crossed it out and left the summons with the mailbox attendant at an entirely different address.[11]

The Bank contends that, because the process server wrote on the Return of Service that the mailbox attendant was an "authorized agent," leaving the summons with him satisfied the statute. However, there is no evidence that he was authorized for anything, except perhaps, to accept service when permitted under the service statutes. An authorized agent is not a term used by the service statutes and is something quite different from either a "registered agent," which is defined by § 607.0501, Fla. Stat., or a "business agent" defined by case law.[12]

Lastly, the Bank argues that actual notice of the lawsuit absolves them of complying with the statutes. In reality, actual notice is irrelevant—as it must be to prevent a complete evisceration of the rules. The cases that hold that actual notice is not sufficient are legion—none of which the Bank

[11] Initial Brief, p. 8.

[12] The Bank cites a federal case, *Woodham v. Nw. Steel & Wire Co.*, 390 F.2d 27 (5th Cir. 1968) and *H. Bell & Associates, Inc. v. Keasbey & Mattison Co.*, 140 So. 2d 125, 127 (Fla. 3d DCA 1962) which address minimum contacts to obtain jurisdiction over a foreign corporation. Although *Woodham* involved service on a "business agent," the term is defined as someone who has general authority to act for the corporation within the state and has duties closely related to those of the corporate officers. An agent appointed for a limited or particular purpose is not a "business agent" under the service statutes. *Bank of Am., N.A. v. Bornstein*, 39 So. 3d 500, 504 (Fla. 4th DCA 2010). A mailbox attendant, therefore, is not a business agent.

cites or attempts to distinguish.[13] *E.g.*, *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986) ("that the defendant received actual notice of this lawsuit does not render the service of process valid"); *Panter v. Werbel-Roth Sec., Inc.*, 406 So. 2d 1267, 1268 (Fla. 4th DCA 1981) (same); *Cheshire v. Birenbaum*, 688 So. 2d 430, 430 (Fla. 3d DCA 1997) (same). *See also Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 954 (Fla. 2001), which was cited by the Bank impliedly for the proposition that actual notice is a substitute for proper service of process, but which instead holds that statutes governing service of process are to be strictly construed and enforced.

B. A jurisdictional objection cannot be waived through inaction.

The Bank claims that the denial of motions to quash as a result of inaction is not a "waiver" because defendants could simply reassert the same request for relief by motion or pleading.[14] But plaintiffs will argue—as the Bank does in its Brief—that "the effect of the abandonment is as if the motion never existed in the first place."[15] Thus, if a defendant has conducted discovery or otherwise participated in

[13] "[A]ppellate counsel … has an independent ethical obligation to present both the facts and the applicable law accurately and forthrightly. … The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. …" *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571-573 (Fla. 2005).

[14] Answer Brief, p. 20.

[15] Answer Brief, p. 31.

the litigation after filing of the original motion but before its denial as abandoned (as in *Frau*), the plaintiff will argue that the defendant waived the jurisdictional objection by failing to raise it at the first opportunity.

Stated differently, the only way the denial could not result in a waiver in that circumstance is if a re-filed motion could relate back to the filing of the original motion. This relation-back problem promises even more disputes and collateral litigation—a predictable inevitability when one cavalierly tinkers with procedural rules that were carefully developed and vetted as a cohesive whole.

And it is disingenuous, at best, to pretend that foreclosure plaintiffs would simply stand by and permit "do-overs" without objection. The very fact that the banks have chosen to invest in trying to convince this Court to uphold the rulings here and in *Frau*, rather than simply concede error, is proof that they view these rulings as inuring to their advantage in a substantive way.

C. Deeming motions "abandoned" contradicts existing Rules of Procedure.

To be sure, parties may abandon motions by expressly declaring them so or by taking, or allowing, actions inconsistent with them. But there is no support for the notion that the rules authorize a court to deem motions abandoned by the mere passage of time. The case cited by the Bank, *Bridier v. Burns*, 200 So. 355 (Fla. 1941), was decided more than ten years before the adoption of the Rules of Civil

Procedure (in 1954). It simply ruled that an appellant had abandoned appeals where the "appeals have not been perfected or brought to the attention of the Court by counsel entering the appeals; and briefs have not been filed on the part of counsel, or request made for oral argument thereof as required by the rules of this Court…" *Id*. at 356. Thus, this case comports with the structure of the current procedural rules that failure to prosecute will result in dismissal. It did not shift the burden to the appellee to perfect the appeals for the appellant.

The Bank case of *State, Dept. of Revenue v. Kiedaisch*, 670 So. 2d 1058 (Fla. 2d DCA 1996) also did not involve a trial court declaring a motion abandoned, but just the opposite. There, the trial court ruled on a two-and-a-half–year-old motion, the hearing for which had never been set—or more importantly—never been noticed. Even the appellate court did not "deem" it abandoned, but merely came to the conclusion that the petitioner had abandoned the requested relief. The appellate court even acknowledged the possibility that it had not been abandoned:

> He, however, never set that Petition for hearing; thus, we conclude that he abandoned the Petition. Even if he did not abandon it, the father still did not give the mother notice that his Petition would be heard at this hearing.
>
> *Id*. at 1060 (emphasis added).

Citing to *Dep't of Health & Rehabilitative Services v. Johnson*, 504 So. 2d 423 (Fla. 5th DCA 1987), the Bank argues that the Administrative Order was an appropriate exercise of the court's authority to manage its dockets.[16] In *Johnson*, however, the court held that the Chief Judge could order the Department of Health and Rehabilitative Services to do what it was already obligated to do by law (not by judicial decree). The administrative order did not shift the burden of prosecution away from the party who, by law, bore that burden. At best, the case would be analogous only if the Administrative Judge here had ordered the banks to prosecute their cases.

D. The Orders are contrary to Fla. R. Civ. P. 1.140(d) because "application" means "motion."

[redacted] pointed out that Rule 1.140(d) requires a hearing on pre-answer motions. The Bank asserts that the rule only requires a hearing "on application" which, according to the Bank (without citation to authority), means requesting a hearing rather than filing a motion.[17] This interpretation flies in the face of Fla. R. Civ. P. 1.100(b) which equates an "application" with a "motion" ("an application for an order shall be by motion"). *See also*, Black's Law Dictionary, 9th Ed., defining "motion" as "[a] written or oral application requesting a court to make a

[16] Answer Brief p. 24.

[17] Answer Brief, p. 25.

specified ruling or order" and defining "application" as a "motion." Thus the rule requires a hearing upon motion. The Bank having offered no other reason why the Administrative Order does not conflict with Rule 1.140(d), it should be quashed on this basis alone.

E. The Plaintiff bears the burden of prosecuting its case, not the court or the Defendant.

The Bank mischaracterizes [redacted] position as "advocat[ing] that it is the trial court's responsibility, rather than the litigant's responsibility to ensure that motions are set for hearing."[18] [redacted] actual position was that it is plaintiff's burden to prosecute its case; it is the court's responsibility to prevent cases from languishing on its docket.[19] The case quoted and emphasized by the Bank, *Sewell Masonry Co. v. DCC Const., Inc.*, 862 So. 2d 893, 899 (Fla. 5th DCA 2003), indeed held that: "Litigants have an affirmative obligation to move their cases to resolution and not sit back and rely on the trial court to set their hearings for them."[20] But the "litigants" the court was talking about were plaintiffs.

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[18] Answer Brief, p. 26.

[19] Initial Brief, p. 20. Notably, the Bank repeatedly tells this court that [redacted] "was content to let the motion languish on the docket for months…" (Answer Brief, p. 3, 25, 28), without once acknowledging that it, too, allowed the motion—and its entire case—to "languish" for months.

[20] Answer Brief, p. 28.

In fact, in *Sewell*, the court affirmed a dismissal for lack of prosecution despite the plaintiff's argument that two pending motions—one of which was the defendant's motion to dismiss—had never been set for hearing. In short, in the case cited by Bank, the court properly punished the plaintiff, not the defendant, for failing to set a hearing on a defense motion.

And obviously, setting a hearing on a defense motion is a step that is "within Plaintiff's control."[21] There is no suggestion in the cases cited by the Bank that Plaintiff is burdened with taking those steps only if they are exclusively in its control. And the Bank's insinuation that [redacted] "refused" to set the motion for hearing—as if it had failed to cooperate with the Bank in scheduling—is completely baseless and improper.[22]

[21] Answer Brief, pp. 29-31.

[22] Answer Brief, p. 30.

F. The permissive language of the Administrative Order is irrelevant here, because the court expressly relied upon it.

The Bank disputes that the Circuit Judges were cajoled, if not coerced, into declaring motions abandoned[23] because the Administrative Order states only that the judges "may" declare motions abandoned. Whether this particular judge felt compelled or simply persuaded to abdicate his judicial discretion is irrelevant because he expressly relied upon the Administrative Order. If the new rule created

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[23] In the course of making this argument, the Bank casts aspersions on reliance on judicial emails as "flagrant" references to evidence outside the record (Answer Brief, p. 34). It also accused of failing to file a motion requesting permission to include the emails in the Appendix as it did in *Frau*, because it supposedly knew that it would be denied as it was denied in *Frau*. (Answer Brief, p. 36). It even states that did not disclose how it obtained them, insinuating it did so improperly (Answer Brief, p. 35).

did file such a motion in this case on April 9, 2014—this was even mentioned in the Initial Brief, at p. 24, n. 19. This Court ruled that the motion would be "carried with the case." Order, April 25, 2014. The motion explains that the records were obtained by a Public Records Request.

In response to the arguments that the emails are "outside the record," adopts the points and authorities in its motion (essentially that the appellate record in an "original proceeding" consists of more than what was filed in the docket below). also adds that the *Frau* motion differed significantly because the trial court judge in that case did not specifically reference the Administrative Order when denying the motion to quash as abandoned. Additionally, the Fourth Circuit in *Katz* granted a similar motion, such that judicial emails concerning the administrative order under review in that case are now part of the record. Order dated July 1, 2014. *See*, Clerk's Docket Notes at:

http://199.242.69.70/pls/ds/ds_docket?p_caseyear=2014&p_casenumber=1691&psCourt=4&psSearchType=

by the Administrative Order exceeds the authority of an Administrative Judge, then the denial of the motion to quash must be reversed.

In the end, the Bank offered no rationale for shifting its burden for prosecuting its case to the defendant. Nor did it ever explain why the court's objectives could not be accomplished by other means less destructive to due process, such as: lack of prosecution dismissals (which at least require a "warning shot across the bow"), or case management conferences.

CONCLUSION

Accordingly, the order appealed should be reversed and the case remanded for further proceedings. Additionally, the Court should quash the portion of the Administrative Order that creates a new abandonment rule.

Dated: September 25, 2014

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby 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 AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this September 25, 2014 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 September 25, 2014.

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