In the District Court of Appeal
First District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

BANK OF AMERICA, N.A.,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT IN AND FOR CLAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is an appeal from a foreclosure action brought by BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP ("the Bank")[1] to recover on a loan to the defendant, [redacted] ("the Homeowner").

II. Statement of the Facts

A. The pleadings.

The Bank filed its Complaint naming the Homeowner as one of the defendants.[2] After process was delivered to the Homeowner, he filed a motion to quash service on the grounds that the process server failed to place the correct date of service on the summons.[3] The Bank nevertheless moved for, and obtained, a default against the Homeowner,[4] but then succeeded in having the default set aside, recognizing that the Homeowner had filed a motion to quash.[5]

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[1] The Plaintiff's name was later amended to Bank of America, N.A. Notice of Readiness for Non-Jury Trial and Motion for Date and Time Certain Trial and Pretrial Deadlines, December 16, 2013 (R. 272); Order Amending Plaintiff Name and Case Style, December 18, 2013 (R. 279).

[2] Complaint to Foreclose Mortgage, June 22, 2009 (R. 1).

[3] Defendant, [redacted] Motion to Quash Service of Process, August 7, 2009 (R. 58).

[4] Motion for Default, August 18, 2009 (R. 74); Default, August 18, 2009 (R. 75).

[5] Motion to Set Aside Default, August 26, 2009 (R. 78); Order Vacating Default, August 26, 2009 (R. 80).

B. The pre-trial litigation.

Having preserved his jurisdictional objection, the Homeowner then began conducting discovery.[6] Rather than re-serve the Homeowner, or ask the court to address the motion to quash, the Bank filed a Notice of Readiness for Non-Jury Trial, representing that the case was at issue.[7] Apparently misled by this representation, the court entered an order setting the matter for trial.[8] The Bank also noticed the trial as a fifteen minute hearing.[9]

The Homeowner moved to vacate the trial order on the grounds that setting a case for trial when it is not at issue is a legal nullity.[10] The Homeowner also

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[6] Defendant's Notice of Production from Non-Party, September 14, 2009 (R. 85); Mortgage Loan Ownership Interrogatories and Notice of Service, September 14, 2009 (R. 93); Plaintiff's Response to Defendant's Request for Production, October 15, 2009 (R. 144); Notice of Service of Unverified Answers to Interrogatories, October 15, 2009 (R. 148); Defendant's Request for Production Regarding Indebtedness, November 12, 2009 (R. 158); Plaintiff's Response to Defendant's Request for Production, December 7, 2009 (R. 168); Defendant's Motion to Compel Answers to Mortgage Loan Ownership Interrogatories, March 17, 2010 (R. 174); Notice of Taking Deposition (Duces Tecum), March 22, 2010 (R. 177); Notice of Service of Answers to Interrogatories, August 20, 2012 (R. 243).

[7] Notice of Readiness for Non-Jury Trial and Motion for Date and Time Certain Trial and Pretrial Deadlines, December 16, 2013 (R. 276)

[8] Order Setting Non-Jury Trial and Pretrial Deadlines, January 24, 2014 (R. 288).

[9] Notice of Order Setting Cause for Non-Jury Trial, February 3, 2014 (R. 296).

[10] Defendant, [redacted] Motion to Vacate Trial Order, March 19, 2014 (R. 299).

moved *in limine* to exclude the Bank's witnesses and exhibits that were not timely disclosed.[11]

C. The "trial."

For reasons not apparent in the record, the Homeowner's counsel was not in attendance on the day of trial. Counsel did advise the Bank's counsel of that fact in advance, as well as the expectation that the Bank's counsel would advise the court about the case law supporting the motion to vacate so as not to "lead the court into error."[12] The Homeowner's counsel arranged for a court reporter to attend.[13]

On the day of trial, the Bank's counsel appeared and argued that the motion to vacate the trial order should be denied because the Homeowner somehow waived his objection to jurisdiction by propounding discovery and entering into an agreed order with the Bank.[14] The court responded, "Okay. Send me an order on that."[15]

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[11] Sasha M. [redacted] Motion in Limine, March 28, 2014 (R. 312).

[12] Email from Steven Brotman, Esq. to Ryan Sciortino, Esq. March 27, 2014 (R. 361).

[13] *Id*.

[14] Transcript of Hearing March 31, 2014 (R. 336) ("T. __"), p. 4. Apparently, the referenced agreed order is the one dated April 8, 2010 (R. 182) in which the Homeowner agreed to reschedule the deposition of the Bank's summary judgment

The Bank then moved *ore tenus* to have the Homeowner defaulted "for lack of filing any responsive pleading," to which the court replied, "Okay."[16] The Bank then stated it "would like to move forward with the judgment," to which the court again said "Okay."[17] Then, in the space of the next five minutes, the Bank called its witness, asked a handful of leading questions, and concluded its case by asking him to read the requested total judgment amount from a proposed judgment.[18] No documents were admitted or even proffered as exhibits, although the court took judicial notice of the Note and Mortgage in the file.[19]

There is nothing in the transcript of trial, or anywhere else in the record, to suggest that the court, as the fact-finder, reviewed any documents. The court apparently signed the proposed judgment, which made specific findings as to the amount of principal and interest due (as well as court costs, taxes, insurance, and

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affiant and the Bank agreed not reschedule the summary judgment hearing until after the deposition.

[15] *Id*.

[16] *Id*.

[17] T. 4-5.

[18] T. 5-8.

[19] T. 6.

inspections) even though those numbers were never mentioned in any testimony or exhibit at trial.[20]

D. The motion for rehearing.

Upon learning of the judgment, the Homeowner moved for rehearing, explaining once again, that the case had not been at issue when the trial order was entered.[21] The Homeowner also pointed out that he had not waived his objection to service because he is permitted to defend the case after timely raising the issue.[22] The Homeowner also reiterated the authorities favoring his motion to quash.[23] Lastly, the Homeowner called attention to the fact that the *ore tenus* motion for judicial default was improper because such motions must be served on any party that has "filed or served any paper in the action."[24]

The Bank responded with the assertion that the case was at issue because the court had disposed of the motion directed to the last pleading.[25] The "last pleading," according to the Bank, was the Homeowner's motion to compel answers

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[20] Final Judgment for Foreclosure, March 31, 2014 (R. 323).

[21] Defendant, [redacted] Motion for Rehearing of Final Judgment, April 10, 2014 (R. 347).

[22] *Id*. at 2-3.

[23] *Id*. at 3-4.

[24] *Id*. at 4-5.

[25] Plaintiff's Response in Opposition to Defendant's Motion for Rehearing, April 14, 2014 (R. 353).

to interrogatories.[26] The Bank argued that the case was, therefore, at issue because it had served answers to those interrogatories.[27]

As for the alleged waiver of the objection to service, the Bank claimed that the discovery "would possibly give rise to 'offensive' as opposed to 'defensive tactics.'"[28] According to the Bank, the Homeowner's discovery regarding fees being sought in the foreclosure waived his objection because "claims under TILA, FDCPA or FCCPA would undoubtedly have followed" (even though the discovery never mentioned those words).[29] The Bank also claimed (without citation to case law) that the Homeowner's motion *in limine* and suggestion that the case be dismissed were requests for affirmative relief.[30]

As for the Motion to Quash itself, the Bank agreed that the summons must have the date and time of service clearly printed on the documents being served, but argued that the Homeowner had "willfully or negligently misconstrue[d] the

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[26] *Id*. at ¶ I.g. (R. 354).

[27] *Id*.

[28] *Id*. at ¶ II.g. (R. 356).

[29] *Id*. at ¶ II.h. (R. 356). TILA is the acronym for the Truth in Lending Act (15 U.S.C. §§ 1601–1667). FDCPA Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p). FCCPA is the Florida Consumer Collections Practices Act (§§ 559.55–.785, Fla. Stat.).

Beach v. Great W. Bank, 692 So. 2d 146, 147 (Fla. 1997) *aff'd sub nom. Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998).

[30] *Id*. at ¶ II.n., p. (R. 356).

caselaw" by claiming the date and time must be on the Return of Service.[31] The Bank also argued (for the first time) that the ruling was justified by the trial order's admonition that failure to comply would result in sanctions.[32]

Lastly, the Bank argued that the default entered against the Homeowner was proper because its *ore tenus* motion for default was not the application for default which Fla R. Civ. P. 1.500 requires to be served on the Homeowner. Rather, it was the court's trial order which was the "motion," the service of which satisfied the rule.[33]

The same day that the Bank filed this memorandum, the court entered the Order for Entry of Default, which, although prepared by the Bank's counsel,[34] stated that it was granting Plaintiff's motion (not the court's motion).[35] It also stated that it was granting the default against the Homeowner "for failure to serve or file any paper as required by law."[36] This order, as well as an Order denying the

[31] *Id*. at ¶ III.f. (R. 358).

[32] *Id*. at ¶ III.b., c. (R. 357-58).

[33] *Id*. at ¶ IV.c. (R. 359).

[34] *Compare*, the file number used by Bank's counsel (B&H # 273469) in the lower right corner or the Order (R. 369) with that appearing on its memorandum (R. 353).

[35] Order for Entry of Default, April 14, 2014 (R. 369).

[36] *Id*.

Homeowner's Motion to Quash and Motion to Vacate Trial Order, were entered two weeks after the Judgment.[37]

The trial court denied the Homeowner's motion for rehearing[38] and this appeal ensued.[39]

[37] Order, April 14, 2014 (R. 371).

[38] Order, April 28, 2014 (R. 380).

[39] Notice of Appeal, May 2, 2014 (R. 392).

SUMMARY OF THE ARGUMENT

The entry of judgment against the Homeowner was the result of the trial court being led into error on three rulings, all within such a short time span that it occupies a single page of the trial transcript. First, the Bank led the court to believe that the Homeowner's discovery had waived his objection to jurisdiction. Second, the Bank led the court to believe that a defendant could be defaulted for lack of filing a responsive pleading, even though a written order denying the motion to quash had not yet been issued. Third, the Bank led the court to believe that, even though it had assented to deny the motion to quash only seconds before and to enter a default only moments after that, the case could proceed to trial without the thirty days' notice required by Fla. R. Civ. P. 1.440(c).

The Bank compounded the problem by continuing to prop up the error-riddled judgment with arguments that misrepresented the motion to quash and even the basis of the court's decision to enter the default.

Aside from all the reasons it was error to hold trial, the judgment itself was not supported by the evidence. The record is devoid of exhibits such as a payment history or a breach letter—or anything from which the figures in the proposed judgment can be derived. The trial court erred in simply executing the proposed judgment without making its own factual determinations from the evidence.

STANDARD OF REVIEW

Issue I

Whether the trial court complied with the requirements of Fla. R. Civ. P. 1.440 is a pure question of law reviewed *de novo*. *See Mourning v. Ballast Nedam Const., Inc.*, 964 So. 2d 889, 892 (Fla. 4th DCA 2007) (*de novo* review of decision applying Rule 1.440(c)). Appellate courts apply a *de novo* standard of review when the construction of a procedural rule is at issue. *Strax Rejuvenation & Aesthetics Inst., Inc. v. Shield*, 49 So. 3d 741, 742 (Fla. 2010).

Similarly, the review of a trial court's ruling on a motion to dismiss for lack of personal jurisdiction is *de novo*. *Wendt v. Horowitz*, 822 So. 2d 1252, 1256 (Fla. 2002); *Vidal v. SunTrust Bank*, 41 So. 3d 401, 402 (Fla. 4th DCA 2010).

While a decision granting a default is reviewed for abuse of discretion, a trial court abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous view of the facts. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007).

Issue II

The standard of review applicable to the trial court's factual findings is whether they are supported by competent, substantial evidence. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003).

ARGUMENT

I. The Trial Court Erred in Entering Judgment Before the Case Was At Issue.

A. The case was not at issue at the time the trial order was entered nor at the time of trial.

Fla. R. Civ. P. 1.440(a) provides that an action is at issue after any motions directed to the last pleading[40] served have been disposed of. An action is not at issue until the pleadings are closed. *Precision Constructors, Inc. v. Valtec Construction Corp*., 825 So. 2d 1062 (Fla. 3d DCA 2002) (a notice for trial was no longer viable when the case is not at issue). An order setting trial when the case is not at issue is a legal nullity and reversible error. *Alech v. General Ins. Co.,* 491 So. 2d 337, 338 (Fla. 3d DCA 1986) ("[A] notice of or motion for trial filed at a time when the case is not at issue, as here, is a nullity…"); s*ee also Fallschase Development Corp. v. Sheard*, 655 So. 2d 214, 215 (Fla. 1st DCA 1995) (same); Most importantly, "[f]ailure to adhere strictly to the mandates of Rule 1.440 is reversible error." *Precision Constructors, Inc. v. Valtec Const. Corp.,* 825 So. 2d at 1063; *Citimortgage, Inc. v. Hill*, 140 So. 3d 703, 704 (Fla. 1st DCA 2014) ("This

[40] In opposition to the motion for rehearing, the Bank argued that the case was at issue because the "last pleading" was the Homeowner's motion to compel answers to interrogatories. (Plaintiff's Response in Opposition to Defendant's Motion for Rehearing, April 14, 2014, at ¶ I.g. (R. 354)). Needless to say, a motion is not a pleading. Fla. R. Civ. P. 1.100(a).

court views strict compliance with rule 1.440 [to be] mandatory." [internal quotations omitted])

Here, the case was not at issue at the time the trial order was entered or on the day of trial since the Homeowner had a pending motion to quash service of process as permitted under Fla. R. Civ. P. 1.140(b)(5). And even if the court's oral ruling (without a written order) was sufficient to deny the motion to quash, the case was still not at issue because, without an answer, the pleadings are still not closed. *Davis v. Davis*, 123 So. 2d 377, 380 (Fla. 1st DCA 1960) ("Pleadings in a civil action are not closed until after the complaint and counterclaim, if any, have been answered by the opposing party."); *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 726-27 (Fla. 1st DCA 1986) (en banc) ("although appellants served the notice of [final] hearing following the alleged disposition of the motion to dismiss directed to the last pleading, no answer had yet been filed crystallizing the issues, thus making the notice premature"); *Scarbrough v. Meeks*, 582 So. 2d 95, 96 (Fla. 1st DCA 1991) (because the defendant never had the opportunity to file an answer to the plaintiff's allegations, the action was not yet "at issue").

And even if it were appropriate to default the Homeowner without notice and without providing him an opportunity to answer, the case would still not be at issue until that very moment. *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d at 727,

n. 1 ("An answer must be served by or a default entered against all defending parties before the action is at issue." [internal quotations omitted]). Because the trial order could not be properly entered until then, the Rules would not permit the trial to take place until another thirty days had elapsed. Fla. R. Civ. P. 1.440(c) ("Trial shall be set not less than 30 days from the service of the notice for trial."). Even a defaulted party has a due process entitlement to notice of trial, at least as to the determination of unliquidated damages. *Belcourt v. Haraczka*, 987 So. 2d 175, 176 (Fla. 1st DCA 2008); *BAC Home Loans Servicing L.P. v. Parrish*, ___ So. 2d. ___, Case No. 1D13-4150 (Fla. 1st DCA September 10, 2014)[41] (dismissal of case because plaintiff's counsel did not appear for trial reversed where trial order scheduled trial only twenty-eight days from the date the trial order was rendered).

B. The Bank's *ore tenus* motion for default violated Rule 1.500(b).

But the default was not properly granted. Fla. R. Civ. P. 1.500(b) mandates that notice be given to any party of the application for a judicial default:

> (b) By the Court. When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of the court, the court may enter a default against such party; provided that is such party has filed or served any paper in the action, that party shall be served with notice of the application for default.

[41] Available at: https://edca.1dca.org/DCADocs/2013/4150/134150_DC13_09102014_100331_i.pdf.

(emphasis added)

Of course, the Homeowner had not failed to plead or otherwise defend and, in fact, it is indisputable that he had a properly filed motion to quash pending at the time of trial. Moreover, the Homeowner had filed and served a plethora of other "papers" in the action. It is these very papers—the Homeowner's discovery requests—that the Bank claims waived the objection to service.

The Homeowner, therefore, was actively defending the case and was entitled to notice of an application for default. *Cardet v. Resolution Trust Corp.*, 563 So. 2d 167, 168 (Fla. 3d DCA 1990) ("Once a litigant has appeared and is actively defending the main claim, he or she is entitled to notice of all hearings, including hearings on a motion for default…"); *Iteka Intern. v. Hinson*, 671 So. 2d 204, 205 (Fla. 4th DCA 1996) (reversing judgment based on *ore tenus* motion for default because no written motion was served and because motion to quash was pending); *Maranto v. Dearborn*, 687 So. 2d 940, 941 (Fla. 3d DCA 1997) ("Any default entered in violation of the due process notice requirement of Rule 1.500 must be set aside without any regard as to whether a meritorious defense is presented or excusable neglect is established.")

Not only must the request for default be written and served on the defendant, it must be served sufficiently in advance of the order granting the default to

provide the defendant an opportunity to avoid the default. *Cohen v. Barnett Bank of S. Florida, N.A.*, 433 So. 2d 1354, 1355 (Fla. 3d DCA 1983) ("[I]t is obvious that the 'notice of application' provided by 1.500(b) would be purposeless unless given in sufficient time to permit some meaningful action to be taken upon it after its receipt—here, to file a pleading before the default so as to preclude its being entered. Rule 1.500(c)").

The actual entry of the order of default was two weeks after the judgment—which (ironically) was after the court had lost jurisdiction. The proposed written order prepared by the Bank misstated the facts, representing that the Homeowner had failed to serve or file any paper.[42] Because this view of the facts was clearly erroneous, the trial court's entry of the order was an abuse of discretion.

Notably, the trial transcript reveals that the Bank had argued a slightly different reason—that the Homeowner should be defaulted "for lack of filing any responsive pleading."[43] In other words, the Bank argued that the Homeowner was required to file a response to the Complaint in the seconds between the verbal denial of the motion to quash and the *ore tenus* motion for default. The answer, however, would not have been due until ten days after the Homeowner was given

[42] Order for Entry of Default, April 14, 2014 (R. 369).

[43] T. 4.

notice of the court's ruling on the quash motion. Fla. R. Civ. P. 1.140(a)(3). Thus, if the order was based on this erroneous view of the law, then its entry constituted reversible error.

But the post-judgment order (drafted by the Bank) and the Bank's actual argument at trial are still relevant to another point—they both belie the Bank's later argument that the court defaulted the Homeowner on the court's own motion.[44] Neither the court nor the bank itself believed that a default had been entered as a sanction to punish a perceived indifference to the trial order. Default was entered on the mistaken belief that the Homeowner had missed a deadline to respond to the Complaint.

Even if the default had been entered as a sanction, such a draconian penalty for the absence of counsel at one hearing would also have been reversible error. *Hetherington v. Donner*, 786 So. 2d 9, 11 (Fla. 3d DCA 2001) ("Courts require that the record demonstrate a party's deliberate and contumacious disregard of the trial court's authority, bad faith, or willful disregard or gross indifference to the trial court's orders before going to the ultimate sanction-dismissal of a cause of action or striking a defendant's defenses…"). Such an order would require express

[44] Plaintiff's Response in Opposition to Defendant's Motion for Rehearing, April 14, 2014, ¶ IV.c.-d. (R. 359).

written findings of fact with respect to the "*Kozel*"[45] factors. *Smith v. City of Panama City*, 951 So. 2d 959, 962 (Fla. 1st DCA 2007) (reversal of sanctions for reconsideration and entry of order containing findings of fact and conclusions of law with respect to each of the six *Kozel* factors); *Belcourt v. Haraczka*, 987 So. 2d 175, 176 (Fla. 1st DCA 2008); *BAC Home Loans Servicing L.P. v. Parrish*, ___ So. 2d. ___, Case No. 1D13-4150 (Fla. 1st DCA September 10, 2014) (dismissal of case because plaintiff's counsel did not appear for trial reversed where trial court did not apply *Kozel* factors).

C. The Homeowner did not waive his motion to quash

The Bank led the trial court into error when it asserted that somehow the Homeowner had waived his motion to quash and submitted himself to the court's jurisdiction. Jurisdictional objections, once made, can only be waived by seeking affirmative relief. *See Brown v. U.S. Bank Nat. Ass'n*, 117 So. 3d 823, 824 (Fla. 4th DCA 2013) (making discovery requests and moving for sanctions were not

[45] *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993) (the six factors are: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. *Id*. at 818.).

requests for affirmative relief that would waive service); *Am. Exp. Ins. Services Europe Ltd. v. Duvall*, 972 So. 2d 1035, 1040 (Fla. 3d DCA 2008) (attendance at deposition did not waive challenge to personal jurisdiction); *Alvarado v. Cisneros*, 919 So. 2d 585, 588 (Fla. 3d DCA 2006) ("[I]f a defending party timely raises an objection to personal jurisdiction or service of process, then that defendant may plea to the merits and actively defend the lawsuit without waiving the objection."), *quoting*, *Berne v. Beznos,* 819 So.2d 235, 238 (Fla. 3d DCA 2002). As such, actively participating in the litigation, including conducting discovery and entering into an agreed order on pending motions, did not waive the Homeowner's jurisdictional objection. *Heineken v. Heineken*, 683 So. 2d 194, 198 (Fla. 1st DCA 1996) (finding that "affirmative relief" is that which could have been brought by separate action and noting that no affirmative relief is sought, and hence no waiver occurs, when a defendant requests a change of venue, moves to quash a deposition subpoena, moves for a protective order, objects to a codefendant's motion to share in the proceeds of a foreclosure sale, files an answer and compulsory counterclaim, or requests attorneys' fees.)

Not surprisingly, the Bank cited no case law for its unique proposition that the Homeowner's discovery might have been used as a basis to later seek affirmative relief and that alone is sufficient to waive an objection. At the risk of

lending credence to the argument by pausing to counter it, suffice it to say that all the discovery was directed to issues either raised in the Complaint or in an eventual answer to that Complaint. The causes of action mentioned by the Bank in its opposition to the motion for rehearing (which could, in any event, provide defenses as well) do not appear anywhere in the discovery.

D. The court erred in denying the Homeowner's motion to quash.

The process server's failure to include the full and correct date on the summons required dismissal for insufficiency of 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. *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).

Where the process server has not complied with the statutory requirements of service—such as those contained in § 48.031(5), Fla. Stat.[46] (and echoed in Fla.

[46] "A person serving process shall place, on the first page of at least one of the processes served, the date and time of service and his or her identification number and initials for all service of process." § 48.031(5), Fla. Stat.

R. Civ. P. 1.070(e)[47])—service is defective and must be quashed. *Vidal v. SunTrust Bank*, 41 So. 3d 401, 402 (Fla. 4th DCA 2010) (reversing an order denying a motion to quash where the process server failed to note the time of service on the copy of the summons served); *Kwong v. Countrywide Home Loans Servicing, L.P.*, 54 So. 3d 1033 (Fla. 4th DCA 2011) (reversing an order denying a motion to quash where the process servicer failed to note, among other things, the time of service on the process served); *Walker v. Fifth Third Mortg. Co.*, 100 So. 3d 267 (Fla. 5th DCA 2012) (service of process was required to be quashed due to process server's failure to include time and date of service or his identification number on served documents).

In *Brown v. U.S. Bank Nat. Ass'n*, 117 So. 3d 823 (Fla. 4th DCA 2013), the process server provided the wrong date on the defendant's summons. The trial court denied a motion to quash service of process and the appellate court reversed after a confession of error by the plaintiff bank. Citing to § 48.031(5) Fla. Stat., as well as Fla. R. Civ. P. 1.070(e) (requiring that the "date and hour of service shall be endorsed on the original process and all copies of it by the person making the

[47] "**Copies of Initial Pleading for Persons Served.** At the time of personal service of process a copy of the initial pleading shall be delivered to the party upon whom service is made. The date and hour of service shall be endorsed on the original process and all copies of it by the person making the service. …" Fla. R. Civ. P. 1.070(e).

service"), the court reiterated that "[w]hen a process server fails to strictly comply with these rules, service must be quashed." *Id*. at 824.

Even the Bank conceded that the process server must annotate the date and time on the summons:

> It is true, under the caselaw that the statutory requirements of service require the summons to have the date and time of service clearly printed on the documents being served.[48]

In yet another example of the Bank's deliberate misdirection, however, it represented that the Homeowner was seeking to extend this requirement to the return of service:

> However, Defendants misconstrue such caselaw to state the date and time of service must be listed on the Return of Service. Such is not the requirement. The Return of Service requires no such facts. The only document which must be so notated is the document handed to Defendants on the date of service.[49]

Given that the Homeowner's motion was all of three paragraphs long, it is difficult to imagine how the Bank could accidentally get this wrong. Not only are the words "Return of Service" never mentioned in the motion, it is unmistakably aimed at the summons:

> The Plaintiffs process server failed to place the correct date of service on the **summons** to Defendant [redacted] The date

[48] Plaintiff's Response in Opposition to Defendant's Motion for Rehearing, April 14, 2014, ¶ III.f. (R. 358).

[49] *Id*. at ¶ III.f. (R. 358)

> listed on the **summons** is "6/7" and no year is listed. Service on this date would have been impossible as the Clerk of Court issued the **summons** on 6/22/2009, over 2 weeks after the summons was supposedly served. (See copy of **Summons** for Defendant, Exhibit A).[50]

In addition to agreeing with the Homeowner's position regarding what information must be on the summons, the Bank never disputed the fact that this required information was missing. Thus, had the trial court considered the merits of the Homeowner's motion, it would have had no choice but to quash service of process.

The Bank also argued (for the first time in its opposition to the motion for rehearing) that the court was within its discretion to deny the motion to quash due to the Homeowner's "failure to diligently [d]efend."[51] Ignoring the fact that the Homeowner had diligently defended throughout the case, the Bank claimed that the Homeowner's absence from this single hearing justified the court's exercise of its jurisdiction regardless of whether service was proper.[52] In short, the Bank's position (unsupported by citation to case law) was that the court's personal jurisdiction over a defendant could be self-generating—that the trial order itself

[50] Defendant, [redacted] Motion to Quash Service of Process, August 7, 2009 (R. 58-59) (emphasis added).

[51] Plaintiff's Response in Opposition to Defendant's Motion for Rehearing, April 14, 2014, at ¶ III.b.-e. (R. 357-58)

[52] *Id*..

could substitute for service on the defendant even when the trial order was issued in error (and even when that error was traceable to the plaintiff's own misrepresentations about the state of the pleadings). This notion runs counter to Florida case law, as well as logic and reason.

II. The Judgment Was Unsupported By The Evidence.

If it had been appropriate to proceed to trial against the Homeowner, the Bank, unencumbered by opposition to any evidence or testimony it might wish to present, still failed to adduce evidence to support the judgment.

The record on appeal reveals that the Bank did not have the witness introduce a single document—nothing was marked for identification and moved into evidence. Instead, the witness, Lindsay West, testified that, in preparation for the trial, she had reviewed a servicing "platform," as well as "a copy of the original note and mortgage, a copy of the breach letter, the judgment figures, the payment history, and the final judgment."[53]

The Bank's attorney then asked the court "to take judicial notice that the originals were filed with this court in September of 2009"—a request granted by

[53] T. 6.

the court.[54] However, the only documents mentioned by the witness that the Bank had filed in September of 2009 were the Note and Mortgage.[55] Therefore, none of the other documents purportedly reviewed by the witness were judicially noticed. No servicing "platform." No breach letter. No judgment figures. No payment history.

The Bank then handed the witness a document unmarked for identification described as a "copy of the final judgment."[56] The witness agreed that the document accurately reflected the total amount due according to the recordkeeping system of Bank of America and read off the total of $339,417.99.[57] The Bank then rested its case.

The final judgment entered by the court contained specific findings regarding the amounts due and owing that were not contained in the September 2009 filings:[58]

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[54] T. 6.

[55] Notice of Filing Original Note, Mortgage and Assignment of Mortgage, September 17, 2009 (R. 96).

[56] T. 7.

[57] T. 8.

[58] Final Judgment for Foreclosure, March 31, 2014, ¶ 4 (R. 323).

4. **DAMAGES:**

There is now due and owing to Plaintiff under the note and mortgage sued upon herein, the following sums of money, to-wit:

PRINCIPAL BALANCE DUE	$226,980.67
Court Costs Due	$1,453.65
ADVANCES BY MORTGAGEE: (ITEMIZED)	
Taxes for the years of 2008, 2009, 2010, 2011, 2012 & 2013	$21,619.42
Hazard or Property Insurance	$3,175.00
Property Inspections/ Preservation	$380.00
Interest on loan from October 1, 2008 to March 31, 2014	$85,809.25
TOTAL DUE	**$339,417.99**

With the exception of the total, none of the figures were mentioned by the Bank's only witness, Ms. West. Nor can the figures be computed from the judicially noticed original Note and Mortgage. While the amounts for taxes, insurance and inspections are obvious, even the principal balance and the interest cannot be computed from the original documents.[59]

To the extent that a proposed judgment could ever serve as substantive evidence in a case, here, it was neither marked nor introduced as an exhibit. *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___ So. 3d ___, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014) (a document never admitted into evidence as an exhibit is not competent evidence to support a judgment). In *Wolkoff*, the

[59] Under the Note, interest is computed as a percentage of the unpaid principal, which in turn, cannot be computed without knowledge of the payments made. See InterestFirst Note, ¶ 2 (R. 97).

Second District rejected a bank's attempt to prove indebtedness with a proposed final judgment because it was never moved into evidence (and because it recognized that the document was "not likely" an admissible business record, in any event). Although the bank in *Wolkoff* had also introduced payment records (which is more than can be said for the Bank, here), the court reversed for entry of involuntary dismissal because the records did not support the dollar amounts awarded for interest, taxes, property inspections and other expenses.

Additionally, the trial court abdicated its fact-finding role by simply signing a proposed judgment without determining whether the documents in evidence supported the amounts awarded. *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) (trial court's verbatim adoption of proposed final judgment suggested that trial court did not independently make factual findings and legal conclusions, created appearance of impropriety, and was reversible error); *see Justice Admin. Com'n v. Taylor*, 50 So. 3d 753, 754-55 (Fla. 1st DCA 2010) ("It is error for a trial court to adopt verbatim a proposed final judgment without giving the opposing party an opportunity to comment."); *Walker v. Walker*, 873 So. 2d 565, 566 (Fla. 2d DCA 2004) (a proposed judgment cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge).

Accordingly, the judgment is not supported by competent evidence and must be reversed.[60] When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment. Fla. R. Civ. P. 1.530(e); *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, ___ So. 3d ___, 39 Fla. L. Weekly D1159 (Fla. 2d DCA May 30, 2014).

[60] Even if the Homeowner had been properly defaulted, the portion of the judgment representing unliquidated damages—such as taxes, insurance, and inspections—was unsupported by the evidence. *Pierce v. Anglin*, 721 So. 2d 781, 783 (Fla. 1st DCA 1998) ("If testimony must be taken to determine the exact amount of damages, the claim is unliquidated."); *Sloan v. Freedom Sav. & Loan Ass'n*, 525 So. 2d 1000, 1001 (Fla. 5th DCA 1988) (unliquidated damages are those which cannot be mathematically determined and are not specified in the defaulted pleading).

CONCLUSION

The judgment—as well as the rulings on the motion to vacate and the *ore tenus* default motion—should be reversed on the grounds that they are contrary to the applicable Rules of Procedure and the case remanded for further proceedings.

Alternatively, the judgment should be reversed on the grounds that it is unsupported by the evidence and the case remanded for entry of judgment in favor of the Homeowner.

Dated: September 10, 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 10, 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 10, 2014.

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