

**In the District Court of Appeal
Third District of Florida**

CASE NO. [REDACTED]

(Circuit Court Case No. [REDACTED])

AMELIA [REDACTED]

Appellant,

v.

WACHOVIA BANK, NATIONAL ASSOCIATION, et al.

Appellee.

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

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a foreclosure action filed by Plaintiff/Appellee, WACHOVIA BANK, NATIONAL ASSOCIATION (“the BANK”), against Defendant/Appellant, [REDACTED] (“[REDACTED]”).

II. Appellant’s Statement of the Facts

[REDACTED] is the resident and owner of the home located at 5185 Alton Road, in Miami, which is the property upon which the BANK seeks to foreclose.¹ On November 21, 2008 at 3:44 p.m., personal service was attempted at that address.² [REDACTED] was living there on that date although she was not home at that time.³ According to the process server, the neighbors said that they had not seen anyone for a while.⁴ Based on this information the process server concluded that this address was unoccupied.⁵

The process server also attempted service a week later (November 28, 2008) at 9:15 p.m. at a house located at 6039 Alton Road (the “alternate address”).⁶

¹ Affidavit of [REDACTED] (“[REDACTED] Affidavit”). (A. 4.)

² Return of Non-Service, [REDACTED] Residence. (A. 6.)

³ [REDACTED] Affidavit. (A. 4.)

⁴ Return of Non-Service, [REDACTED] Residence. (A. 6.)

⁵ *Id.* (A. 6.)

⁶ Return of Non-Service (alternate address). (A. 7.)

According to the process server, tenants stated that [REDACTED] did not reside there.⁷ Although the two properties are [REDACTED] by only a mile,⁸ there is no evidence the process server returned to the subject property that evening to make a second attempt at personal service.

Ten days later on December 8, 2008, Justin Lebron executed an affidavit of Due & Diligent Search and Inquiry for the BANK.⁹ The affidavit shows that the only address for [REDACTED] that was unearthed from the “Due & Diligent Search and Inquiry” was that of the subject property (5185 Alton Road). In fact, that same address came up for each [REDACTED] inquiry: 1) the homeowner’s social security number; 2) credit file; 3) the telephone company’s directory; 4) the postal service inquiry; 5) and the address where property tax [bills] are sent.¹⁰ No further attempts at personal service were made.¹¹

⁷ *Id.* (Public records indicate that [REDACTED] sold the property in 2004. *See*, OR BK 22851 Pg 0927, Official Records of Miami-Dade County).

⁸ A fact which may be judicially noticed. §§ 90.202 (11), (12) Fla. Stat.

⁹ *See* the Affidavit of Due & Diligent Search and Inquiry by Justin Lebron (“the BANK’s Affidavit”). (A. 10.)

¹⁰ *Id.* (A. 10-12.)

¹¹ *Id.* (A. 12.)

Subsequently, the BANK attempted to serve Defendant by publication.¹² [REDACTED] then moved to quash service of process on the grounds that the BANK was not entitled to serve Defendant by publication because it failed to perform a due and diligent search.¹³

A hearing on [REDACTED]'s motion was held before Judge Schlesinger on. At the hearing, the issue was whether two attempts at personal service in this case (only one of which was at the subject property) were sufficient to constitute a diligent search.¹⁴ The court denied the motion to quash.¹⁵ [REDACTED] timely appeals this non-final order.

¹² See Affidavit of O.V. Ferbeyre, Miami Daily Business Review. (A. 15.)

¹³ Defendant, [REDACTED] [REDACTED]'s Mot. to Quash Constructive Service of Process. (A. 20.)

¹⁴ Tr. of Proceedings Held Before the Honorable John Schlesinger, October 21, 2009 ("Hrg. Tr."), pp. 4-5. (A. 32-33.)

¹⁵ Order Denying Defendant's Mot. to Quash. (A. 41.)

SUMMARY OF THE ARGUMENT

The BANK's burden in the lower court was to show it effectuated valid service of process by strictly complying with the service of process statute. [REDACTED] was never personally served in this case. Instead, the BANK constructively served [REDACTED] by publication. The BANK, however, is not entitled to serve initial process by publication, unless it first establishes that it has performed a due and diligent search for the defendant. Constructive service is only available when regular service of process cannot be had.

Here, the BANK's search was inadequate. It is undisputed that service was attempted on only two occasions, only one of which was attempted at [REDACTED] actual residence. Florida courts hold that making just two attempts at service is insufficient to show diligent search. Moreover, the BANK must reasonably employ the knowledge at its command to effectuate personal service of process. Given the information that the BANK undeniably had, the homeowner could have and should have been personally served.

The BANK did not meet its burden of showing that personal service of process could not be had. Accordingly, the lower court's denial of the [REDACTED] motion to quash service of process should be reversed.

STANDARD OF REVIEW

This Court has jurisdiction to review the non-final order denying the motion to quash under Rule 9.130(a)(3)(C)(i) Fla.R.App.P, which permits review of non-final orders that determine the jurisdiction of a person. *See Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470 (Fla. 5th DCA 2007) (citing *Fisher v. Int'l Longshoremen's Ass'n*, 827 So. 2d 1096, 1097 (Fla. 1st DCA 2002)); *see also Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n*, 546 So. 2d 764, 765 (Fla. 5th DCA 1989). The standard of review is *de novo*. *Anthony v. Gary J. Rotella & Assocs.*, 906 So. 2d 1205 (Fla. 4th DCA 2005); *Re-Employment Servs.*, 969 So. 2d at 470. As such, absolutely no deference is to be accorded the decision of the lower court. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). Florida courts hold that there must be strict compliance with the requirements of service of process by publication. *Shepherd v. Deutsche Bank Trust Co. Ams.*, 922 So. 2d 340, 343 (Fla. 4th DCA 2006); *see also Godsell v. United Residential Guar. Ins.*, 923 So. 2d 1209, 1213 (Fla. 5th DCA 2005) (citing *Tindal v. Varner*, 667 So. 2d 890 (Fla. 2d DCA 1996)).

ARGUMENT

I. The Lower Court Erred in Denying the Motion to Quash.

A. Florida Courts demand strict compliance with the service statutes.

The party invoking the court's jurisdiction has the burden of proving the validity of service of process. *Shepherd*, 922 So. 2d at 343. Florida courts have long recognized that there must be strict compliance with the requirements of service of process by publication. *See Id.*; *Godsell*, 923 So. 2d at 1213; *Floyd v. Fed. Nat'l Mortgage Ass'n*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998).

B. Service by publication is disfavored and only available after more than two failed attempts at personal service.

Service by publication is disfavored and used only in extreme circumstances. For example, when a defendant is a nonresident of the state of Florida or if a resident is absent from the state or concealed so that personal service cannot be obtained, our statutes authorize constructive service by publication. *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986). Florida Statute § 49.021 states: “[w]here personal service of process . . . cannot be had, service of process by publication may be had upon any party” In other words, service by publication should only be used when absolutely necessary. *See Shefer v. Shefer*, 440 So. 2d 1319 (Fla. 3d DCA 1983) (denying motion to quash because the parties never maintained a marital domicile in the state, therefore,

defendant could not be personally served by law); *Cf. Taylor v. Lopez*, 358 So. 2d 69 (Fla. 3d DCA 1978) (quashing constructive service because personal service could have been had).

If the constructive service is disputed, then the lower court has the duty of determining if the affidavit of diligent search is legally sufficient; and whether the plaintiff conducted an adequate search to locate the defendants. *Giron v. Ugly Mortgage, Inc.*, 935 So. 2d 580, 582 (Fla. 3d DCA 2006). In this case, the BANK's efforts at personal service fell short of what is required for a diligent search.

II. The BANK Did Not Conduct a Diligent Search.

The test to determine whether a plaintiff conducted a diligent search and inquiry is whether he "reasonably employed the knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstance to acquire the information necessary to enable him to effect personal service on the defendant." *Shepherd*, 922 So. 2d at 343-44 (citing *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n*, 625 So. 2d 1219, 1224 (Fla. 4th DCA 1993) quoting *Canzoniero v. Canzoniero*, 305 So. 2d 801, 803 (Fla. 4th DCA 1975)); see also *McAlicie v. Kirsch*, 368 So. 2d 401 (Fla. 3d DCA 1978) ("[t]he

plaintiff must reasonably employ the knowledge at his command, so that, if possible the defendant will have notice of the suit.”).

A. The BANK did not reasonably employ the knowledge at its command.

It is undisputed that the information available to the BANK overwhelming pointed to the subject address as [REDACTED] residence. The BANK’s affidavit contains repeated references to the homeowner’s address as being that where she actually resided (5185 Alton Rd, Miami):

1. Inquiry of credit information shows the address of 5185 Alton Rd, Miami, FL 33140.
2. Inquiry of creditors shows the address of 5185 Alton Rd, Miami, FL 33140.
3. Directory assistance search showed a listing for 5185 Alton Rd, Miami, FL 33140.
4. U.S. postal service shows no change of address since the last known.
5. Property address is 5185 Alton Rd, Miami, FL 33140.
6. Property taxes are being sent to 5185 Alton Rd, Miami, FL 33140.¹⁶

Yet, personal service was only attempted once at this address.¹⁷ Despite all the signs pointing to the fact that the homeowner resides at this address, the BANK

¹⁶ See the BANK’s Affidavit. (A. 10-12.)

abandoned efforts to personally serve the homeowner. The BANK cannot seek constructive service while ignoring the clear evidence pointing to the homeowner's address.

Additionally, the first (and only) attempt to serve [REDACTED] at her actual residence was made on a work day at 3:44 in the afternoon.¹⁸ A single attempt to personally serve a defendant at such a time would seem to invite failure and cannot be said to rise to the level of "due diligence." The only other attempt to serve the homeowner was at the nearby alternate address which showed that the homeowner was not living there per the current tenants.¹⁹

At this point, the BANK should have made another attempt at service at the subject property (which was within walking distance of the alternate address). Instead, the BANK sought to serve the homeowner by publication. Having all the knowledge the process server had under these circumstances, there should have been further attempts to personally serve the homeowner at the property which – as the all the evidence indicated – was her home. Therefore, the BANK did not reasonably employ the knowledge at its disposal and failed to demonstrate that service by publication was necessary.

¹⁷ *Id.* (A. 12.)

¹⁸ Return of Non-Service, [REDACTED] Residence. (A. 6.)

¹⁹ Return of Non-Service (alternate address). (A. 7.)

B. [REDACTED] was living at the subject address when the process server attempted service.

In Mr. Lebron's Affidavit, he reported that, according to the process server, the subject property was "unoccupied per neighbors."²⁰ However, as shown by [REDACTED] affidavit, the address of the subject property is [REDACTED] only residence —the home where she lives.²¹ The [REDACTED] affidavit further states that [REDACTED] was living there on the date that personal service was sought even though she was not home at that time.²²

[REDACTED] information is based on personal knowledge, unlike Mr. Lebron's representation which was based on the hearsay of the process server, Mr. Ceballos. Worse, Mr. Ceballos's statement that the property was "currently unoccupied" was itself a mere parroting what neighbors allegedly said. Even the BANK admitted that this was hearsay.²³ Since neither the Lebron affidavit nor the Ceballos Return of Non-Service is based upon personal knowledge of the affiant or [REDACTED] both are legally flawed.

At the hearing, the BANK's counsel argued that he had "never seen it done" and that it was unrealistic to require process servers to secure affidavits from

²⁰ See the BANK's Affidavit. (A. 12.)

²¹ [REDACTED]'s Affidavit. (A. 4.)

²² *Id.* (A. 4.)

²³ Hrg. Tr. p. 9 (A. 37.)

neighbors.²⁴ [REDACTED] however, made no such suggestion. A determination that a residence is unoccupied, in the appropriate circumstances, can be made upon personal knowledge and observation.

More importantly, the claim that the house is unoccupied is being proffered to justify a shortcut for the BANK and the process server – to make it appear unnecessary to visit the property more than once. If they wish to avail themselves of that shortcut (rather than make multiple attempts to personally serve at that address), then due process considerations would certainly counsel that the BANK obtain affidavits of the alleged “neighbors.” On this record, the individuals upon whose statements the BANK relied are not identified by names, addresses, or even descriptions. Even the number of neighbors surveyed by the process server is not divulged.

In any event, the admissible record evidence ([REDACTED] affidavit) conclusively belies the “neighbors” statements. Since the subject property was [REDACTED] residence, she could have been personally served there. *Taylor*, 358 So. 2d at 70. In *Taylor*, the affidavit listed the resident and mailing address of the defendant. *Id.* The court found that “[i]f [the address] was, in truth, the residence address of the appellant, he could have been personally served there.” *Id.* Likewise, the BANK’s

²⁴ Hrg. Tr. p. 9 (A. 37.)

affidavit in this case lists [REDACTED]'s home address as the property address and mailing address.²⁵ There is no reason she could not be personally served.

C. The BANK's two attempts at personal service were legally insufficient.

The BANK's two attempts at personal service fall short of what is required to seek constructive service. Proof of only two attempts at personal service is, as a matter of law, insufficient to prove diligent search. *Demars*, 625 So. 2d 1219 (Fla. 4th DCA 1993); *see also*, *Tulpere v. Duval Fed. Sav. & Loan Ass'n*, 548 So. 2d 1190 (Fla. 4th DCA 1989) (finding an affidavit listing only one attempt at service at defendant's residence insufficient); *Robinson v. Cornelius*, 377 So. 2d 776 (Fla. 4th DCA 1979).

In *Demars*, the affidavit stated that a diligent search and inquiry was made to discover the residence of defendant. The affidavit listed two attempts to serve process upon the defendant but claimed that defendant did not reside at such address. It also stated that defendant's place of residence was unknown. Based on the affidavit, publication of the notice of a lawsuit was filed. The defendant challenged constructive service based upon the affidavit of diligent search and inquiry. The court stated that two attempts at service of process are insufficient to prove diligent search by stating: "[w]e have held many times that proof of a few

²⁵ See the BANK's Affidavit. (A. 10-12.)

attempts at service of process are insufficient to prove a diligent search.” *Demars*, 625 So. 2d 1219.

The affidavit here, like the one in *Demars*, lists two overall attempts to personally serve the homeowner. Significantly, only one attempt was made to serve defendant where all of the evidence said she lived. Moreover, this one attempt was made at 3:44 p.m. on a weekday, which common sense dictates would not be the most likely time to find someone at home.

At the hearing, the BANK relied on *First Home View Corp. v. Guggino*, 10 So. 3d 164 (Fla. 3d DCA 2009). In *Guggino*, however, the mortgage lender made at least three attempts at personal service. First, the mortgage lender unsuccessfully tried to serve the defendant at the subject address. *Id.* The mortgage lender then hired an investigator and attempted service at two additional New York addresses. *Id.* at 165. This case is unlike *Guggino* in that, here, there were only two overall attempts at service of process, only one of which was at [REDACTED] residence, and even then, only on a weekday afternoon. Also, unlike *Guggino*, all the information available to the BANK indicated that [REDACTED] did, in fact, live at the subject residence.

III. Liberally Construing the Service Statute Erodes Due Process.

A holding that permits service by publication where the process server made such feeble attempts at personal service erodes due process. This is true no matter what type of case. *See Dep't of Children and Families v. J.E.E.*, 953 So. 2d 659, 663 (Fla. 5th DCA 2007) (stating that “[t]he Constitution requires and we fully expect those seeking to terminate parental rights to comply rigorously with the applicable laws, including very importantly the laws governing service of process.”). For that reason, Florida courts strictly construe the service of process statutes, especially those governing service by publication. *Shepherd*, 922 So. 2d at 343; *Godsell*, 923 So. 2d at 1213. The property rights at issue in this case are a fundamental interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, termination of those rights may not be accomplished in a perfunctory fashion. U.S. Const. amend. XIV, § 2.

CONCLUSION

The BANK did not meet its burden of showing that personal service of process could not be had. Accordingly, the lower court's denial of [REDACTED] motion to quash service of process should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this November 9, 2009 to all parties on the attached service list.

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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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