In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.)

JOSE E. VIDAL,

Appellant,

v.

SUNTRUST BANK,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is an action to collect a debt filed by Plaintiff/Lender, SUNTRUST BANK ("the BANK"), against Defendant/Borrower, [redacted] E. [redacted] ("[redacted]

II. Appellant's Statement of the Facts

When serving substituted process upon [redacted] the BANK's process server failed to write the time of service on the summons as required by both Florida Statute § 48.031(5) and Florida Rule of Civil Procedure 1.070(e).[1] [redacted] moved to quash service of process based upon the process server's non-compliance.[2]

The BANK did not dispute that the required information was missing from the Summons. Nevertheless, the Bank filed a memorandum in opposition to the motion arguing that "Florida courts do not even entertain the argument advanced by Defendant," and that the motion to quash should be denied because Defendant had notice of the proceeding.[3]

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[1] *See*, copy of Summons attached as Exhibit A to Defendant, [redacted] E. [redacted] Mot. to Quash Service of Process. (App. to IB, Ex. A, 2.)

[2] Defendant, [redacted] E. [redacted] Mot. to Quash Service of Process. (App. to IB, Ex. B, 4.)

[3] *See*, Pl.'s Mem. in Opp'n to Def.'s Mot. to Quash Service of Process, ¶¶ 7-8. (App. to IB, Ex. C, 14.)

A hearing on [redacted] motion was held before Judge Lewis on June 24, 2009. At that hearing, the BANK argued that the process server's inclusion of the time of delivery of process on the Return of Service filed with the court satisfied the requirement to write the time on the original Summons delivered to [redacted][4]

Judge Lewis commented that [redacted] motion – which sought enforcement of the statute and procedural rule – amounted to "quibbling."[5] Demonstratively, she wrote "11:33" on a copy of the Summons (in the apparent belief that this was the time that the process server had neglected to write) and asked if that would make defense counsel "happy."[6] Judge Lewis then advised the BANK's attorney that they should talk to their process server about complying with the statute because "people like this" will ask that it be enforced.[7]

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[4] Transcript. of Proceedings Held Before the Honorable Diana Lewis, June 24, 2009 (App. to IB, Ex. E, 21.; hereinafter "Hrg. Tr.," 5.)

[5] (Hrg. Tr., 8; App. to IB, Ex. E, 28.)

[6] (Hrg. Tr., 5; Copy of Summons upon which the Court inscribed "11:33;" App. to IB, Ex. F, 34.) According to the Return of Service, the delivery of process occurred at 4:00 p.m. The time of 11:33 a.m. mentioned in the Return of Service was the date the process server received the process. If the statutory requirement could be satisfied by the Court simply writing in the missing information itself, the correct time should have been 4:00 p.m.

[7] (Hrg. Tr., p. 8; App. to IB, Ex. E, 28.)

Ultimately, the court denied the motion to quash because, in the opinion of the court, placing the time on the Summons was an unimportant feature of the statute and rule, and because the Return of Service –which was not at issue – was complete:

> THE COURT: If you were quibbling over something else other than the time not being on the document, we might have something to discuss, but being that service, the return of service is totally complete and that's not been your argument.[8]

timely appeals this non-final order.[9]

[8] (Hrg. Tr., 8; App. to IB, Ex. E, 28.)

[9] (App. to IB, Ex. D, 19.)

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 and the Rules of Civil Procedure. The BANK did not carry its burden, or even argue that the actual service of process was proper. Instead, the BANK argued, and the lower court held, that a process server can, with the facile, but magical, expedient of completing a return of service, erase past mistakes in the service itself.

However, the mere act of supplying the court with required information cannot substitute for the obligation to provide that same information to the defendant at the time of service. Simply put, defective service cannot be cured *nunc pro tunc* by the return of service.

That [redacted] had actual notice of these proceedings is of no consequence. Actual notice is not, and cannot be, the standard in Florida, because such a standard would vitiate the service statutes and procedural rules. Nor is it the province of the trial court to substitute its own judgment for that of the legislature or the Florida Supreme Court as to the relative importance of writing the time of service on the summons itself.

The lower court's denial of [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 Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i), 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 & Associates*, 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). The Plaintiff bears the burden of demonstrating "[s]trict compliance with the statutes governing service of process…" *Schupak v. Sutton Hill Assocs.*, 710 So. 2d 707, 708 (Fla. 4th DCA 1998).

ARGUMENT

I. Plaintiff's Process Server Failed to Comply with Florida Statutes and the Florida Rules of Civil Procedure

The BANK's process server failed to comply with the statutory law of Florida and the Florida Rules of Civil Procedure governing service of process. Specifically, the process server did not place the time of service on the Summons for [redacted] Florida Statute § 48.031(5) provides:

> **Service of process generally; service of witness subpoenas.**-- (5) A person serving process shall place, on the copy served, the date and time of service and his or her identification number and initials for all service of process.

(emphasis added). This requirement is underscored in Florida Statute § 48.29(6) which adopts § 48.031(5) as the standard for certified process servers.

Additionally, Florida Rule of Civil Procedure 1.070(e) provides that "[t]he date and hour of service shall be endorsed on the original process and all copies of it by the person making the service." (emphasis added). Notably, of the four items of information required by the statute, the Florida Supreme Court emphasized half of them by including them in its Rules of Procedure. The time of service is one of those – one of the two items of information required by both the statute and the procedural rule. In other words, it represents half the information that both the

legislature and the Supreme Court thought important enough to specifically mention.

The BANK has never denied that the Summons is missing this required information or that the process server failed to perform the fundamental task which he was sworn to perform. Unable to postulate a legally cognizable excuse for this non-compliance, the BANK resorted to empty rhetoric, labeling reliance upon the statute and rule as "outrageous" and "against well established Florida law."[10]

The absence of a factual or legal basis for advocating (much less, holding) that service had been properly performed is fatal to the BANK's cause. "The burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court…" *Carlini v. State Dep't. of Legal Affairs*, 521 So. 2d 254, 255 (Fla. 4th DCA 1988).

II. Florida Courts Demand Strict Compliance with § 48.031 and Other Statutes Governing Service of Process

This Court holds that "[s]trict compliance with the statutes governing service of process is required." *Schupak v. Sutton Hill Assocs.*, 710 So. 2d at 708 (Fla. 4th DCA 1998) (leaving process at the door is insufficient service); s*ee also Sierra*

[10] (Pl.'s Mem., ¶ 4; App. to IB, Ex. C, 15.)

Holding, Inc. v. Inn Keepers Supply Co., 464 So. 2d 652, 655 (Fla. 4th DCA 1985) ("Since…the statute requiring that alternative service be made on an 'employee' must be strictly construed, mere 'connections' with the corporation are insufficient"); *Baraban v. Sussman*, 439 So. 2d 1046 (Fla. 4th DCA 1983) (service by an employee of an appointed process server insufficient); *Carlini v. State Dep't. of Legal Affairs*, 521 So. 2d at 256 (attempted substituted service on a person who was not a resident of the abode was insufficient). The BANK, therefore, had the burden of showing strict compliance with the statute and procedural rule mandating that the time of service be written on the Summons delivered to

III. "Actual Notice" Is Not – And Cannot Be – the Standard.

The BANK argued below that service was sufficient because "Defendant obviously has notice,"[11] but that is not the applicable standard in Florida. Indeed, "actual notice" of the lawsuit could never be the standard, because it would completely eviscerate the service statutes. Process servers could deliver the summons in any manner they see fit (serving on Sunday, dropping the summons on the defendant's doorstep or mailbox, or even tossing it through an open window)

[11] (Pl.'s Mem., ¶8; App. to IB, Ex. C, 16.)

and then later claim that these violations should be excused because the defendant had "actual notice."

The only case the BANK cited in support of their proposed "actual notice" standard was *Shurman v. Atlantic Mortgage. & Inv. Corp*., 795 So. 2d 952, 956 (Fla. 2001) ("the object of all process is to impart to the person affected notice of the proceeding and opportunity to defend his rights"[12]). However, the *Shurman* Court held that the defendant was **not** properly served. The court agreed with the defendant that service at his home, even though he was incarcerated at the time, did not comply with a strict construction of the statutory requirement that he be served at his "dwelling house or usual place of abode." The *Shurman* decision turned on a strict construction of the statute, not on excusing noncompliance with the statute based on "actual notice."

In reality, the Florida Supreme Court has directly addressed this very issue and steadfastly holds that a defendant's actual notice of the proceedings is irrelevant. "The fact that the defendant received actual notice of this lawsuit does not render the service of process valid." *Bedford Computer Corp. v. Graphic Press, Inc*., 484 So. 2d 1225 (Fla. 1986); *Napolean B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due*, 33 So. 2d 716, 718 (Fla.1948) (the

[12] (Pl.'s Mem., ¶8; App. to IB, Ex. C, 16.)

fact that the defendant had actual knowledge of the attempted service cannot justify the failure of the plaintiff to strictly observe the service statute).

Likewise, this Court has repeatedly held that actual notice of the proceedings does not excuse compliance with service statutes. *S.H. v. Dep't of Children and Families*, 837 So. 2d 1117 (Fla. 4th DCA 2003); *Panter v. Werbel-Roth Securities, Inc.*, 406. So. 2d 1267, 1268 (Fla. 4th DCA 1981). Accordingly, the BANK's argument that actual notice of the proceedings excused their compliance with the service statute and rule is completely without merit and not supported by the law.

IV. Completing a Return of Service Does Not Cure a Failure to Comply with § 48.031 or Rule 1.070(e).

The decision of the court below was grounded in the belief that a return of service that complies with the statutory provisions governing returns is all that is needed for a court to assume personal jurisdiction over a defendant. However, meeting the requisites of the return of service statute is only one of the process server's obligations. He must first comply with the separate and distinct requirements of Florida Statute § 48.031(5) and Rule 1.070(e).

Clearly, "[f]ailure to make proof of service shall not affect the validity of the service." Fla. R. Civ. P. 1.070 (b). Just as clearly, the converse is also true.

Making proof of service – i.e. filing the return of service – does not affect the *in*-validity of service. A return of service in the court file, therefore, does not cure defects in the actual procedure used to attempt service, especially when those defects are admitted.

In *Russell v. Zulla*, 556 So. 2d 1241 (Fla. 5th DCA 1990), the Fifth District addressed a failure to comply with the same procedural rule at issue in this case (then, Rule 1.070(f)). In *Russell*, the defendant was served twice, the first time by a process server who had not been properly appointed. The second time service was attempted the process server failed to attach a copy of the complaint as required by Rule 1.070(f), and also failed to note required information in the return of service.

When the defendant moved to quash the second attempted service, the process server provided an affidavit which contained the information missing from the return. The process server also attached a copy of the complaint to the affidavit. The lower court denied the second motion to quash, holding that the copy of the complaint attached to the affidavit satisfied the requirement that a copy be delivered at the time of service.

Although not discussed by the court in *Russell*, in addition to the copy of the complaint belatedly provided by the process server, the defendant undoubtedly had

access to the complaint in the court file, and presumably, had even received a copy during the first service attempt. Yet, the Fifth District reversed on the grounds that service had not been effected:

> The procedures providing for proper service are clear and explicit. . . . It is fundamental that a copy of the initial pleading be delivered at the time of personal service of process. …While the trial court could properly deem the return of service amended by the affidavit of the process server which set out the required information, the trial court erred in holding that the complaint attached to the affidavit cured the failure to originally serve a copy of the complaint on Russell.

Id. at 1243 (emphasis added). Similarly, in this case, the failure of the process server to note the hour of service on the original Summons cannot be cured by including that information in the Return. Nor can the lower court judge simply cure the defect by writing the information – much less the incorrect information – on a copy of the Summons.

V. Excusing Plaintiff's Non-Compliance With One of the Provisions of the Service Statute Would Completely Vitiate the Statute and Violate the Constitutional Separation of Powers Requirement.

It may be inferred from the lower court's use of the term "quibbling" that its decision was based, in part, upon the perception that placing the time of service was a mere trifle that can be ignored with impunity by the process server. However, the Florida Supreme Court has held that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part

of a statute meaningless." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (citing *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002)).

Excusing a failure to comply with a portion of the statute, however trifling it may seem to the lower court, is to leap with great abandon upon the slippery slope. There is no discernible difference between excusing a failure to affix the hour of service and excusing a failure to affix the date . . . or the process server's identification number or initials. The lower court's refusal to enforce a part of the statute provides future violators an excuse for ignoring all of the statute.

Avoidance of the slippery slope, however, is not the only reason that the decision cannot turn on a jurist's opinion of the importance of a particular statutory provision. A court's refusal to enforce such a provision effectively legislates the statute out of existence – a direct violation of the separation of powers doctrine. Under this doctrine, the courts of Florida are compelled to respect the will of the legislature as codified in the Florida Statutes (regardless of how meritless or trivial it may seem to the court). Florida Constitution in Article II, Section 3.

In *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953), the Florida Supreme Court held that a lower court's refusal to apply the residency requirement of a divorce statute was, in effect, an unlawful statutory amendment by the court. As

such, it constituted an unlawful encroachment by the judiciary on the legislative branch:

> There are many laws of the State of Florida which are not in conformity with the views of all of the people of the State or even some members of the judiciary.
>
> * * *
>
> The Judicial Department is not concerned with the wisdom of such legislation as that involved in the present litigation. Whether divorces should be granted, and if granted, only for the cause of adultery; whether the residence requirement should be three months, six months, or two years, are matters for the Legislature to decide; and when the decision has been made, it becomes incumbent upon the Judicial branch to enforce it.

Id. at 283-84 (emphasis added). Similarly, neither the lower court nor this Court should be concerned with the wisdom of the legislative enactment involved in the present litigation. Whether process servers should be required to place certain information on the summons, and what that information should be, are matters for the legislature to decide; and the decision having been made, it is incumbent upon this Court to enforce it. *See Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) ("courts may not reweigh the competing policy concerns underlying a legislative enactment"); *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976) ("The propriety and wisdom of legislation are exclusively matters for legislative determination."), *quoting In re Apportionment Law, Senate Joint Resolution No.*

1305, 263 So. 2d 797 (Fla. 1972); *Kahn v. Shevin*, 416 U.S. 351 (1974), (courts do not substitute their beliefs for the judgment of legislative bodies which are elected to pass the laws).

Nor is the lower court free to pick and choose those parts of a statute it believes need not be enforced. The Florida Supreme Court has instructed that "[i]n construing statutes, we must, to the extent possible, give effect to all parts of a statute." *Kepner v. State*, 577 So. 2d 576, 578 (Fla. 1991); *see also State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, n.5 (Fla. 1978) ("[a] statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts."). Accordingly, no portion of the statute may be arbitrarily deemed too unimportant to enforce.

Finally, the notion that writing the time of service on the summons is of little or no importance is belied by the fact that the Florida Supreme Court also promulgated a rule of procedure which contains the same requirement. The lower court's ruling, therefore, not only defied the will of the legislature, but the will of the Florida Supreme Court.

CONCLUSION

The lower court's denial of VIDAL's motion to quash service of process should be reversed.

Respectfully submitted,

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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 July 23, 2009 to all parties on the attached service list.

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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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