In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted] and [redacted]

Appellants,

v.

COUNTRYWIDE HOME LOANS SERVICING, L.P., et al.,

Appellees.

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

INITIAL BRIEF OF APPELLANTS

Respectfully submitted,

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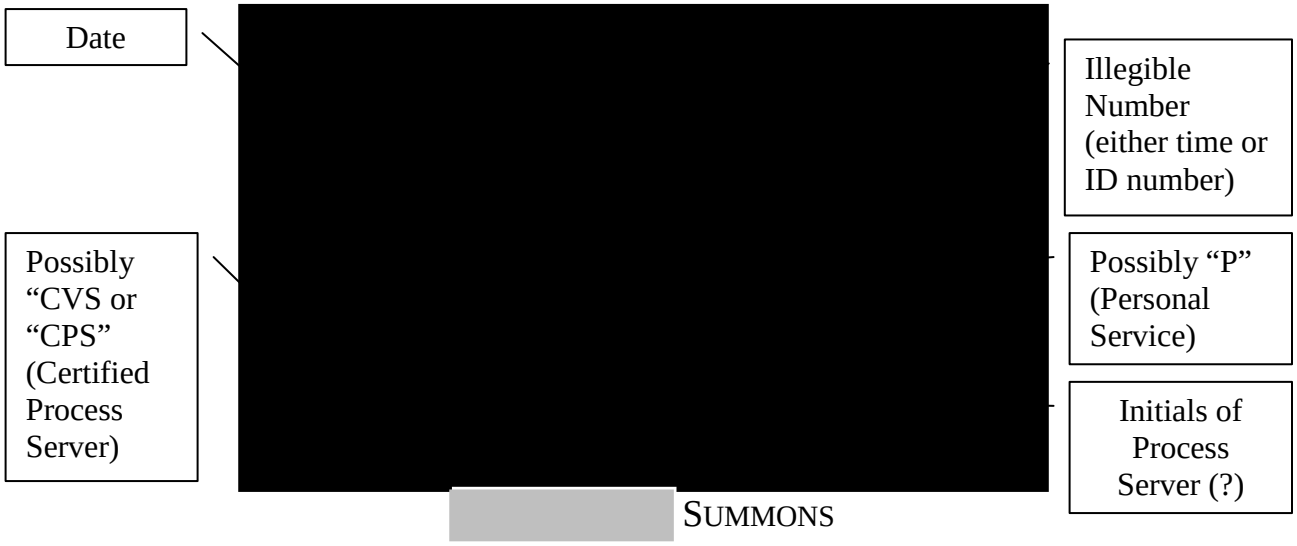
STATEMENT OF THE CASE AND FACTS

I. Introduction

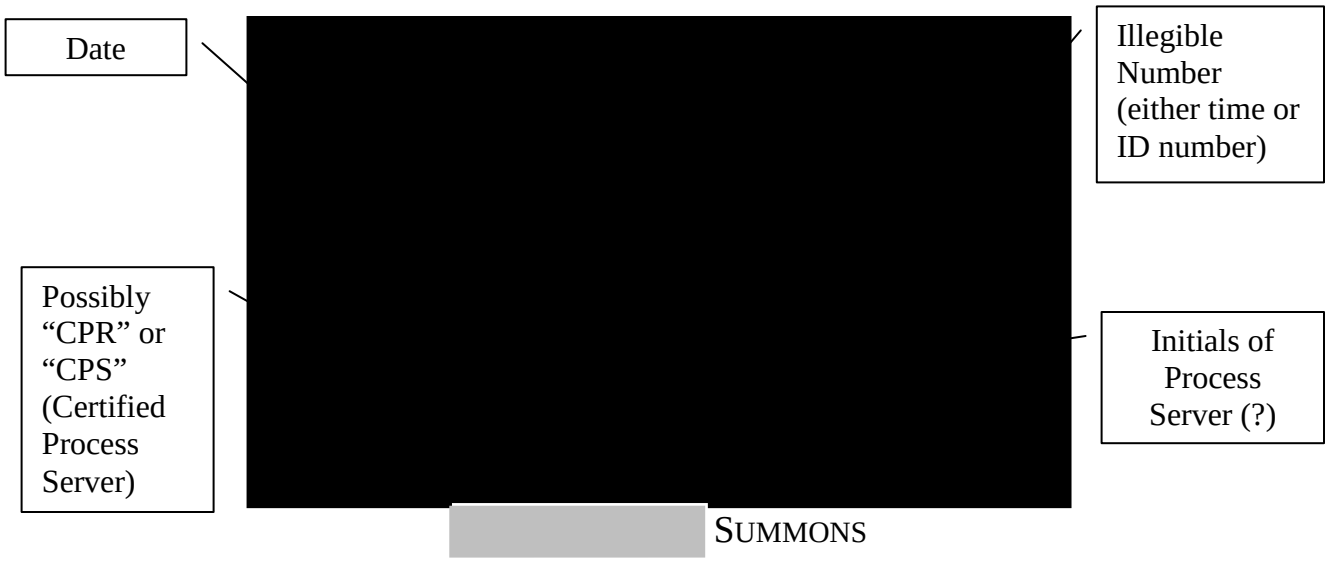
This is a foreclosure action filed by Appellee, COUNTRYWIDE HOME LOANS SERVICING, L.P. ("the BANK"), to take the home of [redacted] and [redacted] (the "[redacted] in satisfaction of an unpaid debt.

II. Appellants' Statement of the Facts

When serving the [redacted] the BANK's process server failed to write one or more of the informational disclosures required by both Florida Statute § 48.031(5) and Florida Rule of Civil Procedure 1.070(e).[1] Specifically, the information scrawled by the process server on the two summonses was as follows:



[1] *See*, copy of summonses attached as Exhibit A to Defendants, [redacted] AND [redacted] Motion to Quash Service of Process, April 13, 2009 ("Mot. to Quash") **(A. 4, 5)**.



The [redacted] moved to quash service of process based upon the process server's failure to write all four of the required elements on each summons: the date, the time of service, his or her identification number and initials for all service of process.[2]

In its written response, the BANK did not dispute that some of the required information (the process server's ID number) was missing from the summonses, conceding that the above two summonses clearly indicate only three of the four, "the date, the time and the initials of the process server."[3] The BANK also argued

[2] Mot. to Quash, p. 1. **(A. 1).**

[3] Motion and Memorandum of Law to Strike [redacted] Motion to Quash Service of Process, August 12, 2009 ("Opposing Memo.") p. 2 **(A. 7)** (The BANK's motion incorrectly refers to [redacted] counsel as the movant, such as: "Ice's Motion," "Ice relies…" and "Ice simply has an issue with the legibility…" *Id*.)

that the [redacted] had waived their jurisdictional objection by defending the case on the merits.[4]

At the hearing on the motion to quash,[5] the trial court judge interrupted the argument of [redacted] counsel to say that she had a copy of a summons on which all the required information had been written:

> THE COURT: Have you seen this, Mr. Immel?
>
> MR. IMMEL [[redacted] counsel]: Yes, Your Honor. I just recently saw that today. That is the return of service. That's not the actual service that our -- that's, actually, proof of service which is a completely different statute than what we are going under here today.
>
> The Fourth District Court of Appeals --
>
> THE COURT: This is not the return of service. This is the summons.
>
> MR. IMMEL: That is the summons that was -- that is not the summons that was served to our client.
>
> THE COURT: Yes, it is.
>
> MR. IMMEL: That is a copy of the summons that was served to our client, Your Honor. If you look at Exhibit A to our motion to quash, that is the actual service that our clients received. If you look on that, the process server is supposed to write the date and time, their initials, and their identification number.
>
> THE COURT: For the record, the Court file has summons with the date, time, initials, and ID number on it.[6]

---

[4] Opposing Memo., at 3 **(A. 7)**.

[5] Transcript of Hearing Before the Honorable Meenu Sasser, March 4, 2010 ("Hrg.") **(A. 20)**.

In reality, the judge was looking at a copy of a summons that was filed with the return of service, not at a copy that was served on the [redacted] The returns of service were ostensibly signed by a Jorge Lopez with an identification number of 1202.[7] Attached to each return of service was a copy of the summons for the respective defendant. Each summons was imprinted on the front with a stamp containing blanks for all the information required to be written by the process server, but which had not been filled out:[8]

The inscription which the trial court declared "for the record" to be on the summons was handwritten on the back and appeared as shown below:[9]

---

[6] Hrg., pp. 4-5 **(A. 23-24)**.

[7] Return of Service filed April 9, 2009 **(A. 11, 16)**.

[8] Excerpt of summons attached to return of service for [redacted] filed April 9, 2009 **(A. 12)**. A similar stamp is on the summons attached to the return of service for Lifen [redacted] **(A. 17)**.

[9] Excerpt of back-side of summonses attached to returns of service for [redacted] and LIFEN [redacted] filed April 9, 2009 **(A. 13, 18)**.

BACK SIDE OF SUMMONSES FILED WITH THE COURT

SUMMONS FOR [redacted]

SUMMONS FOR LIFEN [redacted]

The handwritten notations on these court-filed versions were plainly those of a process server with the initials of D.N. and a Palm Beach County identification number of 1152—corresponding to a licensed process server by the name of Douglas E. Nelson.[10] Mr. Nelson's handwritten notes (brandished by the trial court at the hearing) indicated that the summons was served at 11:07 in the morning of March 25, 2009 (for [redacted] and oddly, at the exact same time the following day for LIFEN), not 9:50 in the evening of March 24, 2009, as sworn on the returns of service by Jorge Lopez.

After further argument, the trial court denied the motion to quash, apparently on the grounds that the [redacted] had requested affirmative relief (and thus

[10] Fifteenth Judicial Circuit official list of Certified Process Servers, available at: http://15thcircuit.co.palm-beach.fl.us/c/document_library/get_file?folderId=124&name=DLFE-1277.pdf

waived their jurisdictional objection) when they asked the court to sanction the BANK as a means of coercing it to provide discovery responses:

> THE COURT: When you're seeking sanctions from a Court, are you seeking affirmative relief; yes or no?
>
> MR. IMMEL: Well, that affirmative relief is out of the defense on the merits here.
>
> * * *
>
> THE COURT: Sanctions are not part of a case?
>
> MR. IMMEL: Well, Your Honor, we believe that we have simply attempted to defend the case on the merits. And in seeking that discovery, any applicable standards that we need to pursue to pursue that discovery is aiding us in defending the case on the merits and not asking for affirmative relief. We haven't asked for the case to be dismissed. We haven't asked for the case -- for anything of that sort. We've, simply, asked for Plaintiff's counsel to be required to comply with the Florida Rules of Civil Procedure.
>
> THE COURT: And sanctions, sanctions.
>
> MR. IMMEL: Which arose directly out of the case.
>
> THE COURT: The motion to quash is denied.[11]

The [redacted] timely appeal this non-final order.

[11] Hrg., pp. 14, 17 **(A. 33, 36)**.

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, but argued that the return of service filed with the court contained the required information. A process server cannot, however, erase a mistake in serving the [redacted] with the facile expedient of completing a return of service. The mere act of supplying the court with the required information cannot substitute for the obligation to provide that information to the defendant at the time of service. Simply put, defective service cannot be cured *nunc pro tunc* by the return of service.

Nor did the [redacted] waive the jurisdictional defect by defending the case on the merits. It is black letter law that, once a party has raised the jurisdictional objection, it may then defend the case and even participate at trial. Permission to defend, however, is meaningless if the defending party cannot propound discovery and seek court enforcement of the discovery rules.

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 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. The BANK'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. Florida Statute § 48.031(5) requires that the process server, when serving the summons, record four facts on the face of the summons:

> **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.

This requirement is underscored in Florida Statute § 48.29(6) which adopts § 48.031(5) as the standard for certified process servers. Here, the process server did not write on the summonses at least one of these four required confirmatory facts.

The process server's handwriting is so illegible that it is difficult to determine which of the four is missing. But it cannot be disputed that only one number appears on the summonses other than the date, which can only mean that one of the two other required numbers (the time or the identification number) is missing.

While it might have been assumed that the process server's identification number is that which is missing (because it does not resemble "1202"—Jorge Lopez's number), the fact that a different process server annotated the court-filed versions of the summonses with completely different service information casts doubt as to what the correct identification number should be. In any event, the illegibility of the writing means that neither the time nor the identification number was recorded in a way that actually imparted the information, effectively thwarting the very purpose of the statute.

The BANK did not deny that the summonses are missing the process server's identification number,[12] and thus, that the process server failed to perform this fundamental task which he was sworn to perform. Although the BANK later argued at the hearing that "the required documentation is on the summons,"[13] it appears to have been referring to the summonses attached to the court-filed returns of service.[14] Not only were those copies of the summonses never given to the

[12] Opposing Memo., p. 2 **(A. 7)**.

[13] Hrg., p. 11 **(A. 30)**.

[14] The trial court judge, not the BANK, was the first to suggest that the handwriting on the back of the copies of the summonses attached to the returns of service somehow satisfied the requirement that the information be written "on the copy served." The judge's interjection of an argument against the [redacted] that the BANK had never made was improper (*see Blackpool Associates, Ltd. v. SM-106,*

the dates, times and identity of the process server written on those summonses did not match the sworn return of service.

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).

A. 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 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.*

Ltd., 839 So. 2d 837, 838 (Fla. 4th DCA 2003) and cases cited therein) and confirmed the fear that they would not be treated fairly by this judge. *See*, the Motion for Disqualification, dated February 16, 2010 **(A. 44)**, which was denied February 18, 2010.

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 and the process server's identification number be written on the summonses delivered to the

B. Completing a return of service does not cure a failure to comply with § 48.031 or Rule 1.070(e).

The BANK next argued 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:

> MS. SCOTT [the BANK's counsel]: …And, furthermore, the return of service which is required to be filed with the Court clearly states all of the information it has been required. It's got the date of the service, the time, the name of the server, as well as the server's number and the number of the -- the summons number. There's a document number, clearly, for each one of the Defendants. Your Honor, under the Rules of Civil Procedure this is all that's required to effectuate service. There is no other basis being raised here to quash service.[15]

Meeting the requisites of the return of service statute, however, 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).

[15] Hrg. p. 11 **(A. 30)**.

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 or his identification number on the original summonses cannot be cured by including that information in the Return.

C. Excusing the BANK'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.

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 at first blush, 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 or process server's identification number and excusing a failure to affix the his initials or the date. The trial 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.

II. The [redacted] Did Not Waive the Defect in Service.

The argument upon which the BANK placed the most stress (and that upon which the trial court apparently relied in denying the motion to quash) was that the [redacted] had waived their objection to jurisdiction by defending the case:

> Through the act of submitting two sets of Interrogatories in a Request to Produce, [redacted] has "actively participated" in the action by engaging in the discovery process and additionally filing the Motion to Compel the Discovery and has thereby submitted themselves to the jurisdiction of the Court. Having submitted to the jurisdiction of the Court, [redacted] has waived issues regarding service of process.[16]

[16] Opposing Memo., p. 3 **(A. 8)**; *see also*, Hrg., pp. 11-12 **(A. 30-31)**.

The argument that defending a case on the merits waives a previously filed motion to quash service of process is not merely incorrect, but is frivolous to the point of being sanctionable.

A. Propounding discovery does not waive an objection to personal jurisdiction.

Florida law is abundantly clear that, if a party timely raises an objection to personal jurisdiction or service of process, then that party may plead to the merits and actively defend the lawsuit without waiving the objection:

> A defendant who timely asserts a challenge to the court's jurisdiction over the person of the defendant is not prejudiced by participation in the trial of the suit and defending the matter thereafter on the merits. His challenge is preserved and he may obtain a review of the question of personal jurisdiction upon appeal should he suffer an adverse final judgment in the cause. State ex rel. Eli Lilly and Co. v. Shields, 83 So.2d 271 (Fla.1955)....

Babcock v. Whatmore, 707 So. 2d 702, 704 (Fla. 1998) (Florida Supreme Court held that a motion for relief from judgments was not a plea for affirmative relief that would waive a jurisdictional challenge.). *See also Florida Department of Children and Families v. Sun-Sentinel, Inc.,* 865 So. 2d 1278 (Fla. 2004) (Florida Supreme Court held that motion for change of venue was not a plea for affirmative relief that would waive a jurisdictional challenge.) *Hollowell v. Tamburro,* 991 So. 2d 1022 (Fla. 4th DCA 2008) (Defendant's requesting and participating in

mediation, as well as filing a motion for protective order did not waive right to contest jurisdiction.); *Arch Aluminum & Glass Co., Inc. v. Haney*, 964 So. 2d 228, 235 (Fla. 4th DCA 2007) ("A compulsory counterclaim does not waive a personal jurisdiction defense.").

Here, the [redacted] challenged the efficacy of the service of process, and therefore challenged the Court's jurisdiction. Serving discovery is not only part of that defense, but a necessary part. If merely serving discovery waives a jurisdictional defense, then the Florida Supreme Court's pronouncement that a defendant may actively defend a case without such a waiver is meaningless.

B. Obtaining an order compelling discovery did not waive an objection to personal jurisdiction.

Just as clearly, securing an *ex parte* order compelling responses to defensive discovery that the BANK had ignored did not waive the [redacted] objections to personal jurisdiction. If the [redacted] are to defend the case, not only must they be permitted to propound discovery, and they must be permitted to obtain that discovery through a motion seeking enforcement of the Rules of Procedure. The issuance of the *ex parte* Order on the [redacted] Motion to Compel did not amount to affirmative relief. "Affirmative relief" is the redress, assistance, or protection which the Defendant could have sued upon independently:

> *affirmative relief*. The relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action.

Black's Law Dictionary (2004) (emphasis added); *see also*, Merriam-Webster's Dictionary of Law ("Affirmative relief (n): relief requested by the defendant to a lawsuit for injury which he or she claims to have suffered during the same factual situation the plaintiff claims to have been injured in and for which he or she could also bring a lawsuit." (emphasis added)); *B E & K, Inc. v. Seminole Kraft Corp*., 583 So. 2d 361 (Fla. 1st DCA 1991) ("Affirmative relief" is that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it.).

Since the [redacted] could not independently sue the BANK for its failure to respond to discovery in this case, the relief requested in the [redacted] Motion to Compel cannot, by definition, amount to a request for "affirmative relief" that would waive the objection to jurisdiction.

C. Asking the trial court to sanction the BANK for disregarding a discovery order did not waive an objection to personal jurisdiction.

Because the BANK did not comply with the trial court's order compelling discovery, the [redacted] filed a Motion for Sanctions for Failure to Comply with

Court Order Compelling Discovery, in which they asked the court to take coercive measures:

> Defendant respectfully requests this Court enter an Order compelling the outstanding discovery and compliance with this Court's prior Order which already required the production of this discovery. Additionally, pursuant to Florida Rule of Civil Procedure 1.380(b)(2)(E), Defendants request that the Court enter an Order granting such sanctions against Plaintiff as the Court may deem appropriate. In addition, Defendants request an award of attorneys' fees and costs for having to bring this Motion and the previous motion to compel.[17]

Again, a request for sanctions "as the Court may deem appropriate" is not a request for affirmative relief. Even the request for the reimbursement of fees and costs expended in bringing the motions is not a request affirmative relief because it could not be brought by way of a separate action. *Heineken v. Heineken*, 683 So. 2d 194, 197 (Fla. 1st DCA 1996) (Since the defendant's motion only sought to recover the attorney's fees incurred in defending the action, the request for fees was purely defensive in nature and did not waive jurisdictional objection).

Moreover, the motion for sanctions has not been granted or even heard. Because the [redacted] may always amend their motion or even withdraw it before it is heard, it cannot be said at this juncture that the [redacted] have even asked the

[17] Motion for Sanctions for Failure to Comply with Court Order Compelling Discovery, dated October 6, 2009, p. 2 **(A. 42)**.

court for sanctions. *See Astra v. Colt Indus. Operating Corp*., 452 So. 2d 1031, 1032 (Fla. 4th DCA 1984) (amending motion prior to hearing prevented waiver of jurisdictional objection). The BANK's argument, therefore, is premature.

D. The BANK should not benefit from its own noncompliance with the rules of civil procedure.

"Pretrial discovery is not intended as a game." *Robinson v. Weiland*, 988 So. 2d 1110, 1113 (Fla. 5th DCA 2008). Yet, here, the BANK (with no apparent sense of irony) seeks to use its own deliberate and contumacious disregard for the discovery orders of the court to excuse its failure to comply with the service statute and rule. It would have the court cast its jurisdiction over the [redacted] even in the absence of proper service, by way of the BANK's own defiance of the court's authority.

Had the BANK simply responded to the [redacted] discovery requests within the thirty-day deadline mandated by the rules, the [redacted] would not have been forced to seek the court's assistance. The BANK chose to ignore the Rules of Civil Procedure and should not benefit from doing so. Nor should the [redacted] be penalized for asking this Court to enforce those rules.

E. The BANK's cases are inapposite.

The BANK cited several cases for the proposition that The [redacted] waived their objections to this Court's jurisdiction.[18] However, these cases are inapposite.

1. ***Cumberland Software, Inc. v. Great American Mortgage Corp.*, 507 So.2d 794 (Fla. 4th DCA 1987)**

The Court in *Cumberland* ruled that filing a compulsory defensive counterclaim "did not waive [Cumberland's] right to challenge the court's jurisdiction." *Cumberland*, 507 So.2d at 796. Hence, the case offers no support for the BANK's position, but rather, supports the [redacted] position.

2. ***Solmo v. Friedman*, 909 So.2d 560 (Fla. 4th DCA 2005)**

The Court in *Solmo* ruled that Solmo waived his right to contest jurisdiction because he "clearly made a general appearance in the trial court prior to challenging personal jurisdiction" by participating in two hearings without objection and submitting his own proposal for the supplement to the final judgment. *Solmo*, 909 So.2d at 564. Here, the [redacted] did not attend any hearings or submit proposed judgments—or take any other action in the case—before objecting to jurisdiction. *See Johnson v. State, Dept. of Revenue ex rel.*

[18] Opposing Memo., p. 3 **(A. 8)**.

Lamontagne, 973 So. 2d 1236, 1239 (Fla. 4th DCA 2008) (distinguishing *Solmo* because defendant had made no "general appearance or other action conceding even by implication the validity of service of process").

3. ***Brivis Enterprises, Inc. v. Von Plinski*, 976 So.2d 1244 (Fla. 3rd DCA 2008)**

The court in this case ruled that Brivis waived its right to contest personal jurisdiction because it did not raise those objections until after it had "answered, moved to set aside a default, and engaged in discovery." *Brivis*, 976 So.2d at 1244. Here, the [redacted] raised their objections to service and personal jurisdiction at the first opportunity. Accordingly, *Brivis* is yet another case that is not applicable to the instant case.

CONCLUSION

The lower court's denial of the KWONGS' 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 April 23, 2010 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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