In the District Court of Appeal
Fourth District of Florida

CASE NO.

(Circuit Court Case No.

AND

Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, etc., 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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other Authorities

QUESTIONS PRESENTED

1. Florida Statute §48.031(5) requires a process server to place the date and time of service on the summons. When the process server writes a date other than the date of service on a summons, is service of process just as defective as if he had written no date at all?

2. Under Florida Law, a party that timely objects to service of process does not waive jurisdiction when it actively defends the case on the merits. Is such an objection waived by discovery in furtherance of a defense on the merits, or by coercive motions to obtain such discovery?

STATEMENT OF THE CASE AND FACTS

I. Introduction

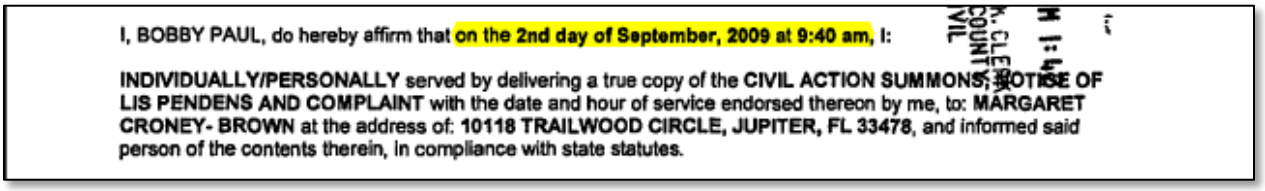
Appellee, U.S. BANK NATIONAL ASSOCIATION ("the BANK") instituted foreclosure proceedings seeking to take the home of [redacted] and his wife, [redacted] (individually, "MR. [redacted] and "MRS. [redacted] collectively, "HOMEOWNERS"). This interlocutory appeal arises from the trial court's denial of Appellant, MRS. [redacted] Motion to Quash Service of Process.

II. Statement of the Facts

When the BANK served MRS. [redacted] the process server wrote down the date and time of service on the Summons[1] as September 1, 2009, at 9:40pm:

[1] App. 1 (Summons).

Contrastingly the date and time on the return of service[2] indicated not only a different time, but a completely different date—September 2, 2009, at 9:40am:



I, BOBBY PAUL, do hereby affirm that on the 2nd day of September, 2009 at 9:40 am, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the CIVIL ACTION SUMMONS; NOTICE OF LIS PENDENS AND COMPLAINT with the date and hour of service endorsed thereon by me, to: MARGARET CRONEY- BROWN at the address of: 10118 TRAILWOOD CIRCLE, JUPITER, FL 33478, and informed said person of the contents therein, in compliance with state statutes.

Consequently, upon her initial appearance in the case, MRS. [redacted] moved to quash service of process.[3]

In furtherance of the defense of the case, HOMEOWNERS thereafter propounded discovery[4] aimed at disproving the BANK's standing. The BANK failed to respond for over 80 days. Due to the BANK's non-response, HOMEOWNERS moved *ex parte*[5] to compel discovery. The BANK thrice-ignored the trial court's orders[6] to produce discovery before HOMEOWNERS second motion for sanctions prodded the BANK to finally respond—some nine

[2] App. 34, (Margaret [redacted] Return of Service).

[3] App. 36, ([redacted] Motion to Quash Service).

[4] App. 42-66, (Mortgage Loan Ownership Interrogatories, Request for Production Regarding MERS Tracking, and Request for Production Regarding Trust Documentation).

[5] App. 67, (Defendants' *Ex Parte* Motion to Compel Discovery dated February 24, 2011). App. 73, (Defendants' *Ex Parte* Motion to Compel Discovery dated March 30, 2011).

[6] App.79, (Order on Defendants' *Ex Parte* Motion to Compel, dated March 02, 2011). App. 81, (Order on Defendants' *Ex Parte* Motion to Compel, dated April 05, 2011). App. 86, (Order on Defendants' Motion for Sanctions for Failure to Comply with Court Order).

months after HOMEOWNERS served the discovery. When the BANK finally responded, the BANK objected to the majority of the discovery requests. This engendered further litigation wherein the majority of the BANK's objections were overruled.[7]

At the hearing on MRS. [redacted] motion to quash, the BANK conceded that the date on the Summons was incorrect,[8] and instead argued that the failure to comply with the requirement was attributable to a scrivener's error. The main thrust of the BANK's argument was that HOMEOWNERS' Motion to Compel discovery and subsequent Motion for Sanctions—a motion that only yielded a further deadline—waived any objection MRS. [redacted] had to personal jurisdiction. The trial court ruled in favor of the BANK, stating "the court record does demonstrate that [MRS. [redacted] submitted herself to the jurisdiction of the Court."[9] This appeal follows.

[7] App. 132, (Amended Order on Plaintiff's Objections to Request for Production Regarding MERS tracking, Request for Production Regarding Trust and Mortgage Loan Ownership, and Objections to Defendants' Mortgage Loan Ownership Interrogatories).

[8] App. 140, (Hr'g Tr. 3:11-24, November 28, 2012).

[9] App. 148, (Hr'g Tr. 11:3-5, November 28, 2012).

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 statutes. The BANK did not carry this burden, or even argue that service of process was proper. Indeed, the discrepancy on MRS. [redacted] summons and the BANK's return-of-service confirms that MRS. [redacted] was improperly served.

The BANK's only argument, that MRS. [redacted] waived the jurisdictional defect by defending the case, is without merit. It is black letter law that once a party has raised the jurisdictional objection, it may then defend the case and even participate in trial. Permission to defend, however, is meaningless if the defending party cannot propound discovery and seek court enforcement of the discovery rules. To hold otherwise is to permit the BANK to gain from its misconduct—first stonewalling discovery, then using motions arising from that obstruction to deny MRS. [redacted] her right to proper service of process.

The lower court's denial of MRS. [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, no deference is accorded to 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. On The Face of The BANK's Summons and Return of Service, The BANK Failed to Properly Serve MRS.

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). "The major purpose of the constitutional provision which guarantees 'due process' is to make certain that when a person is sued he has notice of the suit and an opportunity to defend." *Haney v. Olin Corp.*, 245 So. 2d 671, 673 (Fla. 4th DCA 1971). Absent strict compliance with statutes governing service of process, courts lack personal jurisdiction over a defendant. *Abbate v. Provident Nat. Bank*, 631 So. 2d 312, 314 (Fla. 5th DCA 1994).

A. The BANK Failed to Strictly Comply with Statutes Governing Service of Process

Statutes governing service of process are strictly construed to ensure defendants are given notice of the proceedings. *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992). When service of process is conducted without exacting adherence to these statutes, courts lack jurisdiction over the defendant. *Sierra Holding, Inc. v. Inn Keepers Supply Co., a div. of Holiday Inns, Inc.*, 464 So. 2d 652, 654 (Fla. 4th DCA 1985). Here, §48.031(5) require the process server to note the actual date and time of service on the summons:

> **48.031 Service of process generally; service of witness subpoenas.—**
> …
> (5) A person serving process shall place, on the first page of at least one of the process served, the date and time of service and his or her identification number and initials for all service of process. The person serving shall list on the return-of-service form all initial pleadings delivered and served along with process. The person issuing the process shall file the return-of-service form with the court.

(emphasis added). Rule 1.070 (e) Fla. R. Civ. P. also requires that the "date and hour of service shall be endorsed on the original process and all copies of it by the person making the service." When a process server fails to strictly comply with these rules, service must be quashed. *Vidal v. Suntrust Bank*, 41 So. 3d 401, 402-03 (Fla. 4th DCA 2010); *Kwong v. Countrywide Home Loans Servicing, L.P.*, 54 So. 3d 1033 (Fla. 4th DCA 2011); *Schofield v. Wells Fargo Bank, N.A.*, 95 So. 3d 1051, 1052 (Fla. 5th DCA 2012).

In this instance, the BANK's process server placed the wrong date on MRS. [redacted] summons. The BANK never denies that the date listed on the summons is incorrect:[10]

> THE COURT: U.S. National Bank Association versus [redacted]

[10] App. 140, (Hr'g Tr. 3:11-24, November 28, 2012).

MS. ATCHANAH (HOMEOWNERS' COUNSEL):

> What happened was, your honor, the date and time on the summons is different from the dates and the time on the return of service.
>
> I spoke with counsel earlier today, and he informed me that the information on the summons is the incorrect information, and the information on the return of service is allegedly the correct information.
> …
> Here, counsel has even admitted that the information on the summons is incorrect.

Thus, it cannot be disputed that the information on the summons is not the actual "date and time of service" as required under §48.031(5), Fla. Stat. Indeed, the BANK never argued that service of process was proper.[11]

The error in the BANK's summons cannot be excused by a mere claim of scrivener's error. First, remembering that counsel's statements are not evidence, the BANK adduced no sworn testimony or other admissible evidence that the failure to write the correct date and time on the summons was the result of a clerical error—i.e. an innocent mistake rather than an intentional misrepresentation.

Second, there is no basis in the law or logic for permitting "mistakes" to be an excuse for improper service. Indeed, there is no logical distinction between

[11] App. 144, (Hr'g Tr. 7:19, November 28, 2012, "…my first argument Judge, is waiver." The BANK never makes any other argument).

placing no date and time on the summons and placing the wrong date and time on the summons, except that the latter may be more misleading. But because both could be claimed to be the result of an innocent lapse on the part of the process server, opening the door to such an excuse would eviscerate the appellate decisions requiring strict compliance with the service rules and statutes. *Vidal v. Suntrust Bank*, 41 So. 3d 401, 402-03 (Fla. 4th DCA 2010) ("strict observance is required in order to assure that defendant receives notice of the proceedings filed."); *see also Re-Employment Services, Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467 (Fla. 5th DCA 2007) (quashing service of process because the return of service "failed to accurately note the date and time the process came to hand.").

The absence of a factual or legal basis for advocating—or holding—that service had been properly performed is fatal to the BANK's service of process. "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. MRS. [redacted] Did Not Waive the Defect in Service.

The only argument that the BANK advanced (and upon which the trial court relied in denying the motion to quash) was that MRS. [redacted] had waived her objection to jurisdiction by defending the case:

> MR. LAGOS [the BANK's Counsel]: Judge, if I may respond, I will get to that argument in a moment. But my first argument, Judge, is waiver. This is a 2009 case. The docket, Judge, I did get a chance to take a look at the docket, and the docket entry is No. 25 [the first *Ex Parte* Motion to Compel Discovery] and 32 [HOMEOWNERS' Motion for Sanctions].

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, MRS. [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 HOMEOWNERS' objections to personal jurisdiction. If the HOMEOWNERS are to defend the case, not only must they be permitted to propound discovery, 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 HOMEOWNERS' 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 is 'relief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it.'"

Faller v. Faller, 51 So. 3d 1235, 1236 (Fla. 2d DCA 2011) (emphasis added). *See also*, Black's Law Dictionary (2004) (*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.") (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 HOMEOWNERS could not independently sue the BANK for its failure to respond to discovery in this case, the relief requested in the HOMEOWNERS' 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, HOMEOWNERS filed Motions for Sanctions for Failure to Comply with Court Order Compelling Discovery, in which they asked the court to take coercive measures:

> Defendants respectfully request 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.[12]

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 for 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).

[12]App. 84, (Motion for Sanctions for Failure to Comply with Court Order Compelling Discovery, dated March 30, 2011, p. 2).

Similarly, the HOMEOWNERS' Second Motion for Sanctions[13] (brought about by the BANK's disregard of the trial court's two previous orders compelling discovery) was purely defensive in nature. The relief requested sought to strike the pleadings and dismiss the case:

> Defendants request that the Plaintiff's pleadings be stricken and the case be dismissed. In addition, Defendants request the award of attorneys' fees previously ordered by this court.

Because the HOMEOWNERS sought only to dismiss the claim and recover fees associated with their defense of the case, this Motion cannot be characterized as anything but defensive in nature. *Heineken*, 683 So. 2d 198.[14]

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 MRS. [redacted]

[13] App. 88, (Defendants' Second Motion for Sanctions, dated June 3, 2011).

[14] "A motion for attorney's fees incurred in defendant plaintiff's suit, of course, is dependent on the plaintiff's claim; the defendant would have no right to attorney fees if the plaintiff had not brought his claim. Because the defendant was not seeking affirmative relief, its actions did not constitute a waiver of its arguments on the jurisdiction issue." (quoting *Grange Insurance Assoc. v. State*, 757 P. 2d 933, 940 (Wash. 1988)).

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 HOMEOWNERS' discovery requests within the thirty-day deadline mandated by the rules, the HOMEOWNERS 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 MRS. be penalized for asking the Court to enforce those rules.

CONCLUSION

The lower court's denial of MRS. motion to quash should be reversed. The record clearly demonstrates—and the BANK did not dispute—that service of process was improper. Moreover, the BANK's contention that MRS. waived jurisdiction is without merit. MRS. discovery requests and motions for sanctions (made necessary by the BANK's contumacious disregard of the trial court's authority) are purely defensive in nature. These motions to compel discovery and motions for sanctions cannot be maintained "independently of plaintiff's claim." As such, they are not requests for affirmative relief, and the trial court erred in ruling otherwise. The order denying MRS. motion to quash must be reversed.

Dated: January 14, 2013

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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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this January 14, 2013 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.

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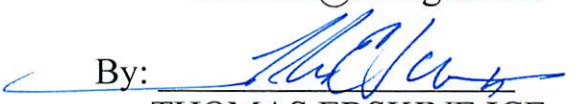
By: 
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