

In the District Court of Appeal  
Fourth District of Florida

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CASE NO. [REDACTED]  
(Circuit Court Case No. CACE [REDACTED])

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[REDACTED] and [REDACTED]

Appellants,

v.

HSBC BANK USA, N.A. AS TRUSTEE FOR  
DEUTSCHE MORTGAGE SECURITIES,  
INC. MORTGAGE LOAN TRUST, SERIES  
2004-5,

Appellees.

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ON APPEAL FROM THE 17TH JUDICIAL  
CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

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**INITIAL BRIEF OF APPELLANTS**

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Respectfully submitted,

**ICE APPELLATE**

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## STATEMENT OF THE CASE AND FACTS

### *Introduction*

This is a foreclosure action filed by HSBC Bank USA, N.A. in its capacity as the Trustee for Deutsche Mortgage Securities, Inc. Mortgage Loan Trust, Series 2004-5 to take the home owned by Frank Plati and [REDACTED] [REDACTED] as collateral for an unpaid debt.

The question presented is whether the trial court erred in denying [REDACTED] [REDACTED] an evidentiary hearing on her Motion to Quash service of process where the motion and supporting affidavits alleged facts establishing that the Bank did not effect valid substitute service of process as required by § 48.031, Fla. Stat.

### *The Pleadings and Service of Process*

Ten years ago, Frank Plati<sup>1</sup> borrowed money from First National Bank of Arizona, which was secured by a Mortgage executed by both Mr. Plati and his daughter, [REDACTED] [REDACTED] (collectively, “the Owners”).<sup>2</sup> Four years ago, a stranger to that transaction, HSBC Bank USA (“the Bank”) filed a foreclosure suit


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<sup>1</sup> Mr. Plati passed away during the pendency of this case. *See*, Ms. [REDACTED] reference to herself as her “late father’s, Frank Plati, agent” in her affidavit (App. 144). No suggestion of death was filed and he was not substituted by his estate as the proper party defendant.

<sup>2</sup> Mortgage attached to the Complaint, filed March 4, 2010 (App. 16).

against the Owners claiming that it was now the owner of the Note—a copy of which was not attached to the Complaint.<sup>3</sup>

The Returns of Service for the Owners indicates that they were served at the subject property by leaving a copy at their “usual place of abode,” with a person residing therein—specifically, [REDACTED] [REDACTED] the grandson and son of Mr. Plati and Ms. [REDACTED] respectively:<sup>4</sup>



DEFENDANT TO BE SERVED: <u>MARCELENE P. CAIDRY</u>	
CASE NO <u>ccc10010574</u>	TYPE OF PROCESS <input checked="" type="checkbox"/> SUMMONS & COMPLAINT <input checked="" type="checkbox"/> LIS PENDENS
DIVISION <u>12</u>	<input type="checkbox"/> OTHER
Received this process on the <u>03/04/2010</u> at <u>11:00 AM</u>	
I <input checked="" type="checkbox"/> served <input type="checkbox"/> not served the within named defendant.	
DATE/TIME: <u>3/9/2010 2:50:00 PM</u>	ADDRESS WHERE SERVED (OR ATTEMPTED) [REDACTED]
<input checked="" type="checkbox"/> SUBSTITUTE SERVICE: By leaving a true copy of this process with the date and hour of service endorsed by me and a copy of the complaint by leaving the copies at (his/her) usual place of abode, with some person residing therein who is fifteen years of age or older to wit, (Name) [REDACTED] (Relationship) SON, and informing such person of their contents, pursuant to F.S. 48 0.11.	

A return of service for “Unknown Tenant” indicated that [REDACTED] [REDACTED] occupied the residence as a tenant.<sup>5</sup>

<sup>3</sup> Complaint, filed March 4, 2010 (App. 11).

<sup>4</sup> Returns of Service, dated March 10, 2010 (App. 34, 35).

<sup>5</sup> Return of Service, dated March 10, 2010 (App. 37).

Nineteen days later, an attorney filed a Notice of Appearance for the Owners,<sup>6</sup> as well as a Motion for Extension of Time to respond to the Complaint.<sup>7</sup> The Owners' attorney, however, never filed a response and the Bank never set the Motion for Extension of Time for hearing or moved to default the Owners. Instead, the Bank moved for summary judgment.<sup>8</sup>

*The motion for summary judgment.*

The Bank's Motion for Summary Judgment was accompanied by an Affidavit of Indebtedness, executed by a "Limited Signing Officer" of an unnamed "servicing agent."<sup>9</sup> The employee was none other than the infamous Jeffrey Stephan—the GMAC Mortgage Co. affiant who precipitated the national "robo-signing" debacle.<sup>10</sup> Mr. Stephan made no representations about the ownership of the Note and no documents were attached to the affidavit.

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<sup>6</sup> Notice of Appearance, dated March 29, 2010 (App. 39).

<sup>7</sup> Defendants Frank Plati & [REDACTED] Motion for Extension of Time to Respond to Plaintiff's Complaint, dated March 29, 2010 (App. 41).

<sup>8</sup> Motion for Summary Final Judgment of Foreclosure, served August 10, 2010.

<sup>9</sup> Affidavit of Indebtedness, dated May 7, 2010 (App. 46).

<sup>10</sup> Robbie Whelan, *GMAC Spotlight On 'Robo-Signer,'* The Wall Street Journal, September 22, 2010 (available at: <http://online.wsj.com/news/articles/SB10001424052748703399404575506303831235126>).



*The Owners' attorney moves to withdraw.*

Three days after service of the Bank's Motion for Summary Judgment, the Owners' attorney moved to withdraw from his representation of "defendant, Frank Plati, et al."<sup>11</sup> The motion was never set for hearing.

The Bank, however, set a hearing on its Motion for Summary Judgment and sent the notice to the Owners' attorney. Approximately a month later, Final Judgment was entered.<sup>12</sup> The attached mailing list suggests that, if the Final Judgment was served, it was sent to the Owners at the property address, rather than to their absentee attorney.<sup>13</sup> The documents purporting to be the original Note and mortgage were filed that same day and also mailed to the property address.<sup>14</sup>

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<sup>11</sup> Motion to Withdraw as Counsel, dated August 13, 2010 (App. 57).

<sup>12</sup> Final Judgment of Mortgage Foreclosure, dated September 24, 2010 (App. 71).

<sup>13</sup> Final Judgment of Mortgage Foreclosure, dated September 24, 2010, p. 7 (App. 76)

<sup>14</sup> Notice of Filing, filed September 24, 2010 (App. 77).

*The Bank questions the veracity of its affiant.*

Apparently responding to the public furor over robo-signing, four days after the judgment, the Bank filed a Notice of Intent to File a Supplemental Affidavit of Indebtedness stating that “[t]he information in the Affidavit may not have been properly verified by the Affiant.”<sup>15</sup> For the same reason, the Bank also moved to cancel the sale and the court granted the motion.<sup>16</sup> According to the certificates of service, the motion and order were served upon the attorney whose motion to withdraw from representing the Owners was still pending.

According to the record, the Bank did not file a new affidavit. Instead, two years after it had filed its original summary judgment, it moved to reset the foreclosure sale, now representing to the court that the reason it had canceled the sale was “to allow the defendant additional time for Loss Mitigation efforts through the Home Affordable Modification Program.”<sup>17</sup> The court granted the motion.

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<sup>15</sup> Notice of Intent to File a Supplemental Affidavit of Indebtedness, served September 27, 2010 (App. 87).

<sup>16</sup> Plaintiff’s Motion to Cancel the Foreclosure Sale, dated December 3, 2010 (App. 89); Order on Plaintiff’s Motion to Cancel Foreclosure Sale, dated December 7, 2010 (App. 91).

<sup>17</sup> Motion to Reset Foreclosure Sale Date, served August 6, 2012 (App. 97).

The new sale date was briefly stayed during a Chapter 13 Bankruptcy filing,<sup>18</sup> after which the property was sold to Signature RE Holdings I, LLC (“Signature”) in April of 2013.<sup>19</sup>

*Ms. [REDACTED] objects to the sale and moves to quash service and vacate the judgment.*

That same month, Ms. [REDACTED] filed a motion, *pro se*, asserting that the property where her son, [REDACTED] was handed the Complaint and summons was neither her “usual place of abode” nor [REDACTED] residence.<sup>20</sup> The motion included a sworn affidavit executed by Ms. [REDACTED] stating that she had been residing at an address different than the subject property address where process

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<sup>18</sup> Notice of Bankruptcy Case Filing, filed October 8, 2012 (App. 107); Motion to Reset Foreclosure Sale Date, dated January 25, 2013 (App. 108); Order on Motion to Reset Foreclosure Sale Date, dated February 6, 2013 (App. 112).

<sup>19</sup> Certificate of Sale, dated April 11, 2013 (App. 118).

<sup>20</sup> Defendant's, [REDACTED] [REDACTED] Objection to Sale and Motion to Quash Certificate of Sale, Vacate Final Judgment of Foreclosure, and Dismiss Complaint for Insufficiency of Service of Process, Lack of Jurisdiction, Void Judgment, Lack of Complaint Verification, Failure to State a Cause of Action, and for Fraud Upon the Court, Evidentiary Hearing Requested, docketed April 22, 2013 (“Motion to Quash”) ¶ 2 (App. 121).

was served.<sup>21</sup> She attached a printout from the Broward County Appraiser's website and a copy of her driver's license to support her assertion.<sup>22</sup>

1. I am [REDACTED], the Defendant in the above styled cause.
2. I am over the age of 18, and have personal knowledge of the statements set forth herein.
3. I have been residing continuously at [REDACTED], since 1991.
4. A copy of my property record from the Broward County Appraiser's website and a copy of my driving license showing my current address are attached herewith.
5. I was never at any time personally served with a copy of the Summons or Complaint filed

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EXHIBIT "F"

Affidavit of Ms. [REDACTED]

See Affidavit in Addendum ([click here](#)).

The motion was also accompanied by a sworn affidavit of [REDACTED] [REDACTED] in which he attested to the fact that he did not reside at the subject property where

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<sup>21</sup> [Affidavit of [REDACTED] [REDACTED] in Support of] Defendant's, [REDACTED] [REDACTED] Objection to Sale and Motion to Quash Certificate of Sale, Vacate Final Judgment of Foreclosure, and Dismiss Complaint for Insufficiency of Service of Process, Lack of Jurisdiction, Void Judgment, Lack of Complaint Verification, Failure to State a Cause of Action, and for Fraud Upon the Court. Evidentiary Hearing Requested ("Ms. [REDACTED] affidavit"), ¶ 3 (App. 143).

<sup>22</sup> Ms. [REDACTED] affidavit, ¶ 4 and attachments (App. 143, 146, 145).

process was handed to him.<sup>23</sup> He too, included a printout from the Broward county Appraiser's office to bolster his testimony.<sup>24</sup> He further averred that his grandfather, Frank Plati, did not live at the subject property.<sup>25</sup> He explained that he had been in the process of checking on the vacant property, as he was wont to do from time to time, when he was approached by the process server outside the home. He identified himself to the process server and disclosed his relationship to Ms. [REDACTED] and Frank Plati, but never represented that any of the three actually lived at the property.<sup>26</sup> See Affidavit in Addendum ([click here](#))

In addition to these sworn statements regarding service, Ms. [REDACTED] pointed out in her motion that she had never filed an answer and never been defaulted.<sup>27</sup> She pointed out that the Bank had never filed a supplemental affidavit as promised,

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<sup>23</sup> Affidavit of [REDACTED] [REDACTED] in Support of Defendant's, [REDACTED] [REDACTED] Objection to Sale and Motion to Quash Certificate of Sale, Vacate Final Judgment of Foreclosure, and Dismiss Complaint for Insufficiency of Service of Process, Lack of Jurisdiction, Void Judgment, Lack of Complaint Verification, Failure to State a Cause of Action, and for Fraud Upon the Court. Evidentiary Hearing Requested (" [REDACTED] [REDACTED] affidavit"), ¶ 4 (App. 155).

<sup>24</sup> *Id.*

<sup>25</sup> [REDACTED] [REDACTED] affidavit, ¶¶ 5-8 (App. 156).

<sup>26</sup> [REDACTED] [REDACTED] affidavit, ¶¶ 8-12 (App. 156).

<sup>27</sup> Motion to Quash, ¶¶ 5, 6 (App. 122).

but rather, misrepresented the reason it had canceled the sale.<sup>28</sup> She pointed out that the Complaint was not verified as required by the newly amended Fla. R. Civ. P. 1.110(b).<sup>29</sup> And she pointed out that the Complaint did not state a cause of action without an attached Note or other document showing ownership.<sup>30</sup>

The court vacated the Certificate of Title to provide time to schedule a hearing on Ms. [REDACTED] motion,<sup>31</sup> and Ms. [REDACTED] noticed the hearing to take place August 7, 2013.<sup>32</sup> However, the docket indicates that two orders were issued in the interim without corresponding notices of hearing. The first of these was on the motion of the third-party buyer (Signature) to refund the funds it paid at auction. The order deferred ruling on Signature's motion based on the pending Objection to Sale filed by Ms. [REDACTED].<sup>33</sup> Although Ms. [REDACTED] had already noticed the hearing to take place in August, the order set the Objection to Sale to be heard

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<sup>28</sup> Motion to Quash, ¶¶ 8-11 (App. 122).

<sup>29</sup> Motion to Quash, ¶¶ 55-56 (App. 132).

<sup>30</sup> Motion to Quash, ¶¶ 66-69, 74-75 (App. 134).

<sup>31</sup> Order dated April 24, 2013 (App. 164).

<sup>32</sup> Docket Entry dated May 14, 2013, indicating an 8:45 hearing scheduled for August 7, 2013 (App. 3).

<sup>33</sup> Order on 3rd Party Motion to Return Funds, dated April 26, 2013 (App. 164).

May 7, 2013. It also required the Bank to notice all parties,<sup>34</sup> but the docket does not disclose that any notice was filed.

The second order was issued at the May 7th hearing. It ordered an “Attorney Maya Semaan” to appear for a hearing to be held two days later (May 9th) on Ms. [REDACTED] Objection to Sale.<sup>35</sup> It further stated:

This Court attempted to contact Atty Semaan by telephone and left a voice mail message advising of the May 9th hearing. Failure to appear @ the May 9th hearing will result in the Objection being denied.<sup>36</sup>

The docket does not have any entry for May 9th.<sup>37</sup>

Nevertheless, on May 14th, Signature posted an eviction notice on the door of the subject property which referenced (and attached) a May 9th order which had denied Ms. [REDACTED] motion.<sup>38</sup> The order stated that her motion was denied

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<sup>34</sup> *Id.*

<sup>35</sup> Order on 3rd Party Motion to Return Funds, dated May 7, 2013 (App. 182).

<sup>36</sup> *Id.* Maya Semaan is not an attorney of record. Based on information and belief, it is thought that she had spoken to Signature’s attorneys on behalf of [REDACTED] but never made an appearance in the case on any party’s behalf.

<sup>37</sup> Docket (App. 3).

<sup>38</sup> Order on 3rd Party Motion to Return Funds and Defendant’s Objection to Sale, dated May 9, 2013, attached as Exhibit D (App. 203) to Ms. [REDACTED] Verified Emergency Motion to Stop Issuance of Certificate of Title or in the Alternative Void Certificate of Title If Issued, and Motion to Vacate and Reverse Court Order Issued On May 9th, 2013, dated May 16, 2013 (“Motion to Vacate”) (App. 187).

because “Defense counsel failed to appear despite direct prior Notice from the Court.”<sup>39</sup>

*Ms. [REDACTED] moves to vacate the May 9th Order as ex parte.*

Ms. [REDACTED] filed another motion, *pro se*, this time to vacate the May 9th order (“Motion to Vacate”).<sup>40</sup> In it, she states, under oath, that she had not hired a new attorney and “is not represented by counsel since she found out that her attorney of record...filed a withdrawal motion and, never attended to her case since his withdrawal.”<sup>41</sup> The May 9th Order was, she argued, *ex parte*.<sup>42</sup>

As a result of the Motion to Vacate, the trial court entered an order granting the overripe motion to withdraw filed by Ms. [REDACTED] counsel and scheduling a hearing on Ms. [REDACTED] motion.<sup>43</sup> At that non-evidentiary hearing (apparently attended by new counsel<sup>44</sup> for Ms. [REDACTED] both of her motions were denied.<sup>45</sup>

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<sup>39</sup> Order on 3rd Party Motion to Return Funds and Defendant’s Objection to Sale, dated May 9, 2013 (App. 184).

<sup>40</sup> Motion to Vacate (App. 187).

<sup>41</sup> Motion to Vacate, ¶ 8 (App. 188).

<sup>42</sup> Motion to Vacate, ¶ 7 (App. 188).

<sup>43</sup> Order on Defendant’s Verified Motion to Stop Issuance of Certificate of Title, or in the alternative, to Vacate May 9, 2013 Order, dated May 17, 2013 (App. 182); Notice of Emergency Hearing, docketed May 20, 2013 (App. 185).

<sup>44</sup> Not the undersigned appellate counsel.



*Ms. [REDACTED] new counsel moves for reconsideration—which was granted.*

New counsel for Ms. [REDACTED] then filed a motion entitled Motion for Rehearing which asked the court to reconsider its ruling on Ms. [REDACTED] original Objection to Sale and Motion to Vacate Final Judgment.<sup>46</sup> The trial court entered an order which granted the “rehearing,” but did not specifically rule on the motions sought to be reheard.<sup>47</sup>

In an abundance of caution,<sup>48</sup> Ms. [REDACTED] and [REDACTED] [REDACTED] (who had been defaulted to the summary judgment)<sup>49</sup> brought this non-final appeal of the

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<sup>45</sup> Order on Defendant’s Objection to Sale, Motion to Vacate Final Judgment and Quash Service, dated July 1, 2013 (App. 206).

<sup>46</sup> Defendant's Motion for Rehearing On Objection to Sale and Issuance of Certificate of Title; Motion to Vacate Final Judgment; and Motion Quash Service, served July 11, 2013 (“Reconsideration Motion”) (App. 209).

<sup>47</sup> Order On Defendant's Motion for Rehearing On Objection to Sale and Issuance of Certificate of Title; Motion to Vacate Final Judgment and Motion to Quash Service, dated July 23, 2013 (App. 215).

<sup>48</sup> The thirty-day deadline for appealing the non-final order denying the motion to quash was approaching and the motion for reconsideration did not extend the deadline. Without a definitive ruling vacating the order, the most prudent course of action was to preserve the appeal.

<sup>49</sup> As shown by the affidavits, [REDACTED] [REDACTED] has his own claim of improper service that has not yet been reduced to a post-trial motion. Additionally, he would be entitled to move to vacate the default on the grounds that the Complaint does not state a cause of action. He is included in this appeal as an Appellant because his interests, as a potential heir to the property, are aligned with those of Ms. [REDACTED]

underlying denial of Ms. [REDACTED] Motion to Dismiss Complaint for Insufficiency of Service of Process [and] Lack of Jurisdiction.<sup>50</sup>

Ms. [REDACTED] then asked this Court to relinquish jurisdiction so that the trial court could hold the evidentiary hearing as it apparently intended when it granted the “rehearing.”<sup>51</sup> That motion was denied.

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<sup>50</sup> Notice of Appeal (App. 216).

<sup>51</sup> Appellants’ Motion to Relinquish Jurisdiction, dated January 21, 2014.

## **SUMMARY OF THE ARGUMENT**

Ms. [REDACTED] was not properly served by substitute service because process was delivered to her son, [REDACTED] while outside of the then-vacant subject property that was neither her usual place of abode nor her son's residence. She properly raised the issue in a motion to quash filed before she or her attorney filed anything substantive. Her motion was properly supported by affidavits demonstrating facts that would entitle her to the requested relief. The trial court, therefore, erred in denying her motion to quash without an evidentiary hearing.

Because Ms. [REDACTED] was not properly served and not defaulted, she need not show excusable neglect and a meritorious defense to vacate the judgment. Yet, this case is replete with proof of both. Excusable neglect is evident in what the record suggests was an abandonment of this case by her attorney. Her meritorious defenses would include, among others, failure to state a cause of action, standing (at the inception of the case), failure to comply with conditions precedent, and numerous procedural and evidentiary irregularities with the summary judgment motion, the affidavit, and the hearing itself.

The order denying her Motion to Dismiss Complaint for Insufficiency of Service of Process should be reversed and the case remanded for an evidentiary hearing.

## STANDARD OF REVIEW

This Court has jurisdiction to review the non-final order denying Ms. [REDACTED] Motion to Dismiss Complaint for Insufficiency of Service of Process 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). 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). The Bank 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 Trial Court Erred in Ruling on the Motion to Dismiss Complaint for Insufficiency of Process Without Holding an Evidentiary Hearing.**

Taken together, the two motions and affidavits filed by Ms. [REDACTED] show that:

- Although an attorney filed a notice of appearance on her behalf, she was effectively without counsel throughout the litigation. The attorney did not file a response to the Complaint, did not defend against the summary judgment motion, did not appear at the summary judgment hearing (or the hearing on Ms. [REDACTED] *pro se* Objection to Sale), and did not keep her apprised of developments.
- She was not properly served with process because substitute service was purportedly accomplished at the subject property as her “usual place of abode,” although she did not live there. Additionally, the process was handed to her son who did not reside there.
- She did not learn about the final summary judgment until after the time period for rehearing or appeal had expired.
- She raised the service issue at the first opportunity.
- She was never served and never defaulted, so she need not show a meritorious defense to be given an opportunity to respond to the Complaint.

- Nevertheless, the record is replete with possible defenses. Not the least of these is the Bank’s own unkept promise that it would be filing a “properly verified” affidavit to support the judgment already entered. And because she had not yet answered, the Bank was required to disprove any possible defense that could be raised at summary judgment. Just on the face of the record—without any discovery—those defenses would include: 1) the failure to state a claim because no note was attached to the Complaint;<sup>52</sup> 2) the Bank’s lack of standing at the inception of the case since the allonge that appeared for the first time on the day of the summary judgment hearing was never authenticated;<sup>53</sup> 3) the lack of personal knowledge of the Bank’s summary judgment affiant;<sup>54</sup> 4) the affiant’s failure to attach sworn and certified copies of the “business records” upon which he relied;<sup>55</sup> 5) the Bank’s failure to provide its summary judgment evidence (the original Note) twenty days before the hearing;<sup>56</sup> 6) the Bank’s failure to comply with conditions

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<sup>52</sup> Fla. R. Civ. P. 1.130(a); *See Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990).

<sup>53</sup> *Booker v. Sarasota, Inc.*, 707 So. 2d 886 (Fla. 1st DCA 1998).

<sup>54</sup> *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780 (Fla. 4th DCA 2011).

<sup>55</sup> Fla. R. Civ. P. 1.510(e); *Zoda v. Hedden*, 596 So. 2d 1225 (Fla. 2d DCA 1992).

<sup>56</sup> *Verizzo v. Bank of New York*, 28 So. 3d 976 (Fla. 2d DCA 2010).

precedent, such as the mailing of a default letter;<sup>57</sup> and 7) the Bank's failure to verify the Complaint.<sup>58</sup> Indeed, coupled with the service irregularities, it is difficult to think of an evidentiary or procedural rule that was not trampled on the way to summary judgment. These were exacerbated by what appears to be a professionalism lapse by her own counsel, inaccurate statements by the Bank as to the reasons that it cancelled the sale, and mistakes by the court as to who represented Ms. [REDACTED]

Accordingly, the final judgment should be reversed and the case remanded for an evidentiary hearing on Ms. [REDACTED] Motion to Dismiss Complaint for Insufficiency of Service of Process.

***Service of process was defective.***

Section 48.031(1)(a), Fla. Stat., provides for substitute service of process by leaving a copy of the Complaint at the "usual place of abode" of the person to be served. *Cordova v. Jolcover*, 942 So. 2d 1045, 1046 (Fla. 2d DCA 2006). The "usual place of abode" means "the place where the defendant is actually living at the time of service." *State ex rel. Merritt v. Heffernan*, 142 Fla. 496, 195 So. 145, 147 (1940); *see also Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952 (Fla.

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<sup>57</sup> *Kurian v. Wells Fargo Bank, Nat. Ass'n*, 114 So. 3d 1052 (Fla. 4th DCA 2013).

<sup>58</sup> Fla. R. Civ. P. 1.110(b).

2001) (Inmate’s “usual place of abode” for service of process in foreclosure action was prison, not house where prisoner formerly lived with his wife); *Panter v. Werbel-Roth Sec., Inc.*, 406 So. 2d 1267, 1268 (Fla. 4th DCA 1981).

Moreover, § 48.031(1)(a), Fla. Stat. requires that, for substitute service (delivery to someone other than the person to be served), the copies must be left with “a person residing” at the same address. For service to have been proper, therefore, both Ms. [REDACTED] and her son, [REDACTED] needed to live at the subject property where service was attempted. However, the unrebutted sworn allegations of Ms. [REDACTED] and her son are that the subject property was vacant—that neither lived at that address. The process server encountered [REDACTED] [REDACTED] in front of the home during [REDACTED] regular visit and handed him process for his grandfather and his mother, as well as process for himself as an “Unknown Tenant.”

Statutes governing substituted service of process must be strictly construed and strictly complied with. *Wakeman v. Farish*, 356 So.2d 1323 (Fla. 4th DCA 1978). The court lacks *in personam* jurisdiction to enter judgment when the service is insufficient. *Schupak v. Sutton Hill Associates*, 710 So. 2d 707, 708 (Fla. 4th DCA 1998).



Ms. [REDACTED] did not waive the argument that service of process was insufficient because she raised it by motion before responding to the Complaint. *Cf. Johnston v. Hudlett*, 32 So. 3d 700, 705 (Fla. 4th DCA 2010) (holding that foreclosure defendant waived service issue by failing to move to quash service in the trial court). *See also Vives v. Wells Fargo Bank, N.A.*, 128 So. 3d 9, 14 (Fla. 3d DCA 2012) (foreclosure defendant did not waive defense of lack of service of process because her emergency motion to cancel the sale contested service). Her attorney's notice of appearance did not waive service. *Pub. Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1027 (Fla. 1982). Likewise, her attorney's motion for extension of time to respond to the Complaint did not waive service. *Byers v. FIA Card Services, N.A.*, 82 So. 3d 1166, 1168 (Fla. 4th DCA 2012).

***“Actual notice” does not excuse the Bank from complying with the service of process requirements.***

That Ms. [REDACTED] had actual notice of these proceedings—as can be inferred from the fact that she engaged an attorney—is of no consequence. *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225 (Fla. 1986) (“The fact that the defendant received actual notice of this lawsuit does not render the service of process valid.”); *Napoleon B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due*, 33 So. 2d 716, 718 (Fla.1948) (the fact that the defendant

had actual knowledge of the attempted service cannot justify the failure of the plaintiff to strictly observe the service statute); *S.H. v. Dep't of Children and Families*, 837 So. 2d 1117 (Fla. 4th DCA 2003) (Father's mere knowledge of dependency proceeding was insufficient to waive requirement that he be served with process with respect thereto; *Panter v. Werbel-Roth Sec., Inc.*, 406 So. 2d at 1268 (“[T]he appellant's actual knowledge of the attempted service cannot be used to justify the appellee’s failure to strictly observe and substantially comply with service requirements.”)).

*Ms. [REDACTED] was entitled to an evidentiary hearing on her motion to dismiss for insufficiency of service of process.*

This Court has previously expressed its view that neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing. *Sperdute v. Household Realty Corp.*, 585 So.2d 1168, 1169 (Fla. 4th DCA 1991). The unrebutted allegations contained in Ms. [REDACTED] motion to quash service and supporting affidavits, if proven by clear and convincing evidence, would establish the Bank’s failure to effect valid service of process as required by § 48.031, Fla. Stat. *See Slomowitz v. Walker*, 429 So.2d 797 (Fla. 4th DCA 1983). Therefore, Ms. [REDACTED] was entitled to an evidentiary hearing on her motion to quash service of process. *Linville v. Home Sav. of Am., FSB*, 629 So. 2d 295, 296 (Fla. 4th DCA

1993); *Talton v. CU Members Mortg.*, 126 So. 3d 446, 447 (Fla. 4th DCA 2013) (Where the allegations of the mortgagor’s motion to quash service of process, if true, would entitle her to relief, then the trial court errs in denying the motion without first affording her an evidentiary hearing.)

Accordingly, the trial court’s order denying Ms. [REDACTED] motion to quash (Motion to Dismiss Complaint for Insufficiency of Service of Process [and] Lack of Jurisdiction) should be reversed and the case remanded for an evidentiary hearing. (This disposition may be in accordance with what the trial court possibly signaled was its own inclination when it granted [REDACTED] Motion for “Rehearing.”)<sup>59</sup>

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<sup>59</sup> While the Motion to Relinquish Jurisdiction was made to, and denied by, this Court, after this more detailed exposition of the facts, the panel may wish to order interim relinquishment to give the trial court the opportunity to self-correct.

## CONCLUSION

The Appellants request that the order denying Ms. [REDACTED] Motion to Dismiss Complaint for Insufficiency of Service of Process [and] Lack of Jurisdiction be reversed and the case remanded for an evidentiary hearing.


Dated March 7, 2014

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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 AND FILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this March 7, 2014 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this March 7, 2014.

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ADDENDUM

[\(return to brief\)](#)

Exhibit 1

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA  
CIVIL DIVISION

HSBC BANK USA, N.A. AS TRUSTEE FOR  
DEUTSCHE MORTGAGE SECURITIES, INC.  
MORTGAGE LOAN TRUST, SERIES 2004-5

CASE NO.: CACE10-10574

Plaintiff,

v.

FRANK PLATI; [REDACTED] et al.

Defendant(s)

DEFENDANT'S, [REDACTED], OBJECTION TO SALE AND MOTION TO QUASH  
CERTIFICATE OF SALE, VACATE FINAL JUDGMENT OF FORECLOSURE, AND DISMISS  
COMPLAINT FOR INSUFFICIENCY OF SERVICE OF PROCESS, LACK OF JURISDICTION,  
VOID JUDGMENT, LACK OF COMPLAINT VERIFICATION, FAILURE TO STATE A CAUSE OF  
ACTION, AND FOR FRAUD UPON THE COURT, EVIDENTIARY HEARING REQUESTED

STATE OF FLORIDA

COUNTY OF BROWARD

Before me, the undersigned authority, personally appeared [REDACTED] who,  
by me first being duly sworn, deposes and says:

1. I am [REDACTED], the Defendant in the above styled cause.
2. I am over the age of 18, and have personal knowledge of the statements set forth herein.
3. I have been residing continuously at [REDACTED]  
since 1991.
4. A copy of my property record from the Broward County Appraiser's website and a copy  
of my driving license showing my current address are attached herewith.
5. I was never at any time personally served with a copy of the Summons or Complaint filed



in the above styled lawsuit.

6. And as my late father's, [REDACTED], agent I was never served, at any time since the start of this lawsuit, with any Copy of the Summons and Complaint addressed to him.
7. The Plaintiff's Return of service filed with the Clerk of Court attached herewith, attesting that substitute service was made upon me at my residence is incorrect and not true.
8. Furthermore, on May 6<sup>th</sup>, 1999, I was appointed by my father, the late [REDACTED], as his Designated Care Health Surrogate and also his agent through a Durable Power of Attorney. The Designated Care Health Surrogate and Durable Power of Attorney were never revoked at any time since the appointment. Copies of both documents are attached herewith.

**FURTHER AFFIANT SAYETH NAUGHT**

*Marcelene Lundy*  
[REDACTED]

The foregoing instrument was sworn to before me this 7 day of October 2012,  
by [REDACTED], who is personally known or who produced

*Driver License* as identification.

NOTARY PUBLIC



PATRICIA A. POITIER  
MY COMMISSION # EE 118804  
EXPIRES: December 4, 2015  
Bonded Thru Budget Notary Services

(SEAL)

*Patricia A. Poitier*

(Print)

Page 2 of 2

EXHIBIT "F"

**App. 144**

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA  
CIVIL DIVISION

HSBC BANK USA, N.A. AS TRUSTEE FOR  
DEUTSCHE MORTGAGE SECURITIES, INC.  
MORTGAGE LOAN TRUST, SERIES 2004-5

CASE NO.: CACE10-10574

Plaintiff,

v.

\_\_\_\_\_, et al.

Defendant(s)

AFFIDAVIT OF \_\_\_\_\_ IN SUPPORT OF DEFENDANT'S, \_\_\_\_\_,  
OBJECTION TO SALE AND MOTION TO QUASH CERTIFICATE OF SALE, VACATE FINAL  
JUDGMENT OF FORECLOSURE, AND DISMISS COMPLAINT FOR INSUFFICIENCY OF  
SERVICE OF PROCESS, LACK OF JURISDICTION, VOID JUDGMENT, LACK OF COMPLAINT  
VERIFICATION, FAILURE TO STATE A CAUSE OF ACTION, AND FOR FRAUD UPON THE  
COURT, EVIDENTIARY HEARING REQUESTED

STATE OF FLORIDA

COUNTY OF BROWARD

Before me, the undersigned authority, personally appeared \_\_\_\_\_ who, by  
me first being duly sworn, deposes and says:

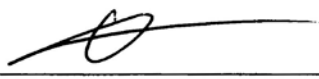
1. I am \_\_\_\_\_ Unknown Tenant-Defendant in the above styled cause.
2. I am over the age of 18 and reside in Broward County.
3. I have personal knowledge of the statements set forth herein.
4. When the above styled lawsuit commenced in March 2010, my residence and homestead,  
as the property record from the Broward County Property Appraisal public website  
shows, was at \_\_\_\_\_ I resided at that address since the end  
of 2008. Copies of the Margate property record from the Broward County Appraiser's

public website showing my address at that time are attached to the current Motion.

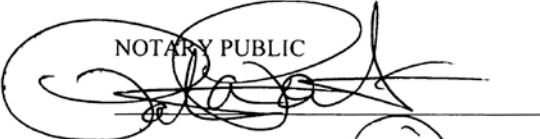
5. In August of 2009 my grandfather was no longer living at his residence in Fort Lauderdale. His health deteriorated, he was very ill and was not able to take care of himself any longer.
6. Due to the nature of his illness he was mentally incapacitated and we couldn't attend to him ourselves; He needed continuous medical monitoring and that was the reason my mother, [REDACTED], placed him at the Bay Pointe Terrace, an Assisted Living Facility in Hollywood, Florida.
7. In March 2010 my Grandfather's property was still vacant and in a state of disrepair.
8. Since my Grandfather's move to the Assisted Living Facility, I was keeping an eye on his property and would visit it from time to time.
9. In the afternoon of March 9, 2010, the day the alleged service was made upon me; I was checking on my Grandfather's property, when I was approached by a man in front of my grandfather's house.
10. He inquired if I knew anyone by the names of [REDACTED] and [REDACTED], I responded positively and said [REDACTED] is my Grandfather and [REDACTED] is my mother.
11. He inquired about my name and I told him who I was, and before I can ask him any questions about who he was, he handed me a packet which he described as important legal papers to be given to my grandfather and mother and he left.
12. At no time during that short encounter he inquired about my residence or asked me anything else.
13. The Return of Service filed with the Clerk of Court attached herewith, attesting that

service was made upon me at my residence is incorrect and not true. The property at [REDACTED] [REDACTED] was not my residence at that time, I was not a tenant of that property and I was visiting it. It became my current residence only since May 2012 as I am attending to the necessary repairs to that property.

**FURTHER AFFIANT SAYETH NAUGHT**

  
\_\_\_\_\_  
[REDACTED]

The foregoing instrument was sworn to before me this 7 day of October, 2012, by [REDACTED], who is personally known or who produced Driver License as identification.

  
\_\_\_\_\_  
(Print Name)  
Patricia A. Portier

 PATRICIA A. PORTIER  
MY COMMISSION # EE 118804  
EXPIRES: December 4, 2015  
Bonded Thru Budget Notary Services

 PATRICIA A. PORTIER  
MY COMMISSION # EE 118804  
EXPIRES: December 4, 2015  
Bonded Thru Budget Notary Services