In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

WACHOVIA BANK, NATIONAL ASSOCIATION, et al.

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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ARGUMENT

I. Recent Developments

After the BANK filed its Answer Brief, the Florida Supreme Court issued an opinion entitled *In Re: Amendments to the Florida Rules of Procedure*, Case No. SC09-1460 (Fla. February 11, 2010) in which the Court addressed various problems arising in foreclosure cases such as this one. The Court approved a new form Affidavit of Diligent Search and Inquiry which had been proposed by the Task Force on Residential Mortgage Foreclosure Cases ("Task Force") because "many foreclosure cases are served by publication." *Id.* at 4. Aside from standardization, the new form was meant to "provide information to the court regarding the methods used to attempt to locate and serve the defendant." *Id.*

The Florida Supreme Court's decision to modify the Affidavit of Diligent Search form, therefore, stemmed from a perceived widespread misuse of service by publication in foreclosure cases. Due process concerns guiding the Florida Supreme Court should also guide the result in this case, where resort to service by publication was made too hastily and without a due diligent search.

Almost simultaneously with the release of the Florida Supreme Court opinion, this Court decided the case of *Lewis v. Fifth Third Mortgage Company*, Case No. 3D09-294 (Fla. 3d DCA February 10, 2010). *Lewis* upheld service by publication in a foreclosure action. *Lewis*, however, involved an element of concealment not present in this case. Specifically, this Court was concerned that the defendant maintained a

post office box to receive her mail and, in contravention of the Rules Regulating the Florida Bar, did not disclose her physical address of employment to the Bar. *Id.* at 2, 5, and fn. 1. The Court also found it significant that the defendant admitted on deposition that, because she was an attorney who "worked on contracts and did closings, she did not want to be found." *Id.* at 4.

Additionally, in *Lewis*, the process server actually spoke with a resident at the subject property who confirmed that the defendant lived in the Bahamas. The process server also made more than one attempt at service at an "old address." *Id.* at 3. Unlike the instant case, in *Lewis*, all resources consulted during the due diligent search pointed towards the post office box (rather than the property address) as the defendant's only known address.

Moreover, the Court's decision in *Lewis* ultimately turned on the fact that the rights of a bona fide purchaser were involved, which made the judgment of foreclosure voidable, rather than void. *Id.* at 7, fn. 4 and fn. 5. Here, [redacted] has timely raised her objection to service and no bona fide purchase rights are implicated.

II. The BANK's Statement of Case and Facts is Unduly Argumentative.

In its Statement of Case and Facts, the BANK claims that the process server described the house as "vacant,"[1] a [redacted] that is repeated three more times throughout the brief. In reality, the process server described the property as

[1] Bank's Brief, p. 2.

"unoccupied."[2] While the terms are often used interchangeably, the term "vacant" often implies the absence of furniture, and therefore, confers more of a sense that the property is uninhabited or abandoned.[3] Given that the reasonable inference from affidavit was that house was furnished, any implication otherwise that may have been engendered by the BANK's substitution of the word "vacant" should be rejected.

Additionally, the BANK repeatedly represents that it attempted to personally serve the Defendant at "several" or "multiple" addresses.[4] "Several," however, commonly means more than two[5] and multiple is generally synonymous with "many."[6] In reality, the BANK attempted personal service only twice.

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[2] Appendix to Initial Brief, ("**A.**"), **A. 6.**

[3] "Courts have sometimes distinguished *vacant* from *unoccupied*, holding that *vacant* means completely empty while *unoccupied* means not routinely by the presence of human beings." Black's Law Dictionary (2004); *see also Independent Fire Ins. Co. v. Butler*, 362 So. 2d 980 (Fla. 1st DCA 1978) (interpreting the terms in an insurance policy differently such that "vacant," unlike "unoccupied," implied the absence of inanimate objects such as furniture).

[4] *See e.g.*, Bank's Brief, p. 3.

[5] Webster's New World Dictionary and Thesaurus (1996), p. 567 ("more than two but not many").

[6] Webster's New World Dictionary and Thesaurus (1996), p. 406.

Likewise, the BANK's repeated use of the word "multiple"[7] to describe the number of "neighbors" to which the process server allegedly spoke unfairly exaggerates his assertion. While "neighbors" (plural) implies he spoke to more than one, since they were limited to the "next door neighbors," it cannot be a fairly inferred that he consulted a multitude of people. Of course, regardless of the number of neighbors involved, since the information allegedly imparted by these neighbors is classic, unmitigated hearsay, it had no legitimate part to play in the hearing on motion to quash.

The BANK also the search for the defendant with the subjective term "exhaustive"[8] and improperly describes defense of this case with the negative, subjective phrase "aggressively litigat[ing]."[9]

The BANK also states that "the process server conducted a skip trace and discovered an alternative address (6039 Alton Road, #302, Miami Beach, FL 33140) for the Defendant."[10] The Return of Service cited by the BANK does not mention a skip trace. Indeed, there is nothing in the record to explain why the process server decided to attempt service at that address. The distinction is

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[7] *See e.g.,* Bank's Brief, p. 2.

[8] BANK's Brief, p. 3.

[9] Bank's Brief, p. 4.

[10] Bank's Brief, p. 3. (citing to Plaintiff's Appendix, p. 24.)

important because the record is silent as to whether [redacted] had any ownership interest – or any relationship at all – to that property when the "undaunted" process server spoke to a "current tenant" there.

The BANK's unduly argumentative terminology and deviation from the record facts listed above are inappropriate for inclusion in the BANK's Statement of Case and Facts. *See Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1st DCA 1989).

III. The BANK Incorrectly States the Standard of Review.

The case law in Florida is crystal clear that the standard of review of a non-final order denying a motion to quash is *de novo*. *Wendt v. Horowitz*, 822 So. 2d 1252 (Fla., 2002). Despite such clarity, the BANK asserts that the standard of review is whether there is substantial competent evidence to support the trial court's decision, citing to *Giron v. Ugly Mortgage Inc.*, 935 So. 2d 580, 582 (Fla. 3d DCA 2006) and *Hudson v. Pioneer Fed. Sav. & Loan Ass'n.*, 516 So. 2d 339 (Fla. 1st DCA 1987). However, the issues in *Giron* and *Hudson* were based on post-judgment motions to set aside a foreclosure sale and to vacate a final judgment. In both cases an evidentiary hearing was held and the court was under a different standard to evaluate factual evidence arising from the hearings.

Ironically, even if the applicable standard was "whether there was competent substantial evidence to support the decision" [redacted] should still prevail, because much of the key "evidence" relied upon by the BANK was not admissible. Specifically, the purported statements of the next door neighbors – the only reason offered by the BANK for not attempting service at the subject address more than once – was inadmissible double hearsay. When the investigator quoted the process server in his own affidavit, the alleged statements of next door neighbors was hearsay upon hearsay. Accordingly, the only competent evidence before the judge was that: 1) the process server attempted to serve [redacted] at her residence (the subject property) only once;[11] 2) he attempted service at one other address never shown to have any current connection to [redacted][12] and 3) [redacted] lived at the property at the time of the process server's sole attempt at personal service at that address.[13]

IV. The BANK Did Not Reasonably Employ The Knowledge At Its Command.

To support its argument that exhaustive efforts were taken to serve [redacted] the BANK points to an attempt at service at another address – the 6039 Alton Road

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[11] **A. 6.**

[12] **A. 7.**

[13] **A. 3-4.**

property address. However, there is no evidence – much less competent evidence – that [redacted] owned, or had some other connection to, the property at the time.

Notably, while the process server referred to the resident of the 6039 Alton Road property as the "current tenant," there is no evidence in the record to support his use of that nomenclature to mean anything other than: "current resident" or "current occupant." Contrary to the implication the BANK would suggest by repeatedly referring to the resident as "a tenant,"[14] there is no record evidence that [redacted] owned this property, much less that she was a landlord. With no evidence – admissible or otherwise – that [redacted] had any relationship to this property, the attempt at service there was no more reasonable than simply knocking on the doors of randomly selected homes in hopes that [redacted] might be at one of them.

Despite all the signs indicating that [redacted] lived at the subject property (which was within walking distance of the 6039 Alton Road property),[15] the BANK abandoned efforts to personally serve her there and instead sought to serve by publication. Having all the knowledge the process server had under these

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[14] Bank's Brief, pp. 3, 6, 10, 11, 15.

[15] It is perplexing that the BANK's counsel swore under oath that he was unable to determine whether [redacted] was "living or dead" **(A. 17)** when there was a telephone listing for her at the subject property and the Social Security Administration, as well as [redacted] creditors, were reporting her address as that of the subject property.

circumstances, there should have been further attempts to personally serve the homeowner at the property which – as all the evidence indicated – was her home. Therefore, the BANK did not reasonably employ the knowledge at its disposal and failed to demonstrate that service by publication was necessary.

V. "Actual Notice" Is Not the Standard For Determining Whether the BANK Complied With Constructive Service Requirements.

Lastly, the BANK argues that any deficiencies in its search for [redacted] should be excused because [redacted] "has not been prejudiced."[16] Specifically, the BANK claims that because [redacted] received actual notice of the lawsuit, "any error in constructive service is considered harmless."[17] Actual notice is not, and cannot be, the standard in Florida, since such a standard would vitiate the service statutes and procedural rules. Process servers could deliver the summons in any manner they see fit (attempting service at addresses with no nexus to the defendant, serving on Sunday, dropping the summons on the defendant's doorstep or mailbox, or even tossing it through an open window) and then later claim that these violations should be excused because the defendant had "actual notice," and thus, was not prejudiced.

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[16] BANK's Brief, p. 17.

[17] *Id.*

The Florida Supreme Court has directly addressed this very issue and steadfastly holds that a defendant's actual notice of the proceedings is irrelevant. "The fact that the defendant received actual notice of this lawsuit does not render the service of process valid." *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225 (Fla. 1986); *Napolean B. Broward Drainage Dist. v. Certain Lands Upon Which Taxes Were Due*, 33 So. 2d 716, 718 (Fla.1948) (the fact that the defendant had actual knowledge of the attempted service cannot justify the failure of the plaintiff to strictly observe the service statute); *see also S.H. v. Dep't of Children and Families*, 837 So. 2d 1117 (Fla. 4th DCA 2003); *Panter v. Werbel-Roth Sec., Inc.*, 406 So. 2d 1267, 1268 (Fla. 4th DCA 1981). Accordingly, any argument that the lack of prejudice to a defendant excuses non-compliance with the service statute and rule is completely without merit and not supported by the law.

The cases cited by the BANK for its "lack of prejudice" argument, do not hold that actual notice excuses non-compliance; they hold that a party can waive a objection to defective service. In *Solmo v. Friedman*, 909 So. 2d 560, 564 (Fla. 4th DCA 2005), the defendant participated *pro se*, without objection, in two hearings and submitted a proposal for the supplement to the final judgment. Unlike the defendant in *Solmo*, [redacted] moved to quash at her first opportunity.

Similarly, the BANK's case of *Edmonson v. Green*, 755 So. 2d 701 (Fla. 4th DCA 1999) involved a challenge to constructive service after the defendant had already appeared and contested a motion to enter a judgment on a default. *Id.* at 703. While the court found that "actual notice" of the proceedings would excuse the plaintiff's failure to allege the defendant's residency in the constructive service affidavit (because such an allegation is not an essential statutory prerequisite), it did not hold that "actual notice" would excuse the failure to conduct a due diligent search. Instead, the appellate court addressed the contention that the trial court had not addressed the challenge to due diligence. The appellate court found that the trial court had. *Id.* at 705.

The court in *Goodlett v. Locke Timber Co.*, 328 So .2d 483 (Fla. 1st DCA 1976) affirmed the trial court's decision not to vacate default judgments against several parties because they "neglected to present to the trial court a factual basis for their claimed meritorious defenses." *Id.* at 484. The court also found that a additional measures would not be required to locate a defendant, solely because a notice mailed to the defendant was returned by the post office as undeliverable.

The court in *Goodlett* bolstered its decision with the comment that the defendant and his attorney also "received actual notice of the proceedings prior to the return date." *Id.* (emphasis added). Aside from being dicta, the comment

concerning actual notice pertained only to the defendant's failure to act diligently to prevent the default. In contrast, [redacted] did not sit idly on her right to challenge service of process. *See Gore* v. *Chillingworth,* 171 So. 649, 652 (Fla. 1936) ("In order that a person complaining of the defective service may avoid the consequences of a judgment based thereon, he is required to move diligently by either plea in abatement to the jurisdiction or motion to dismiss.").

VI. The BANK's Cases are Inapplicable.

The BANK claims that *First Home View Corp. v. Guggino*, 10 So. 3d 164 (Fla. 3d DCA 2009) is "virtually identical"[18] and "substantively identical."[19] In reality, the *Guggino* case involved a homeowner who sought to vacate a final judgment of foreclosure over a year after the judgment was entered and after the property was sold. The bona fide purchaser appealed the trial court's order vacating the final judgment. The procedural posture in *Guggino*, therefore, is manifestly different from this case. And, unlike this case, *Guggino* did not contain evidence that the homeowner was actually living at the subject address when service was attempted. Even putting aside these dissimilarities, the *Guggino* plaintiff made at least three attempts at personal service – 33 percent more effort

[18] BANK's Brief, p. 11.

[19] BANK's Brief, p. 14.

than put forth by the BANK in this case. In *Demars v. Vill. of Sandahvood Lakes Homeowners Ass'n*, 625 So. 2d 1219, 1224 (Fla. 4th DCA 1993) the Fourth District reversed the trial court's denial of a motion to vacate the final judgment where plaintiff had made only two attempts of service. *Guggino* is consistent with that holding in that the plaintiff there made more than two attempts. The BANK in this case did not.

The BANK also argues that *Bodden v. Young*, 422 So. 2d 1055 (Fla. 4th DCA 1982) involved a virtually identical search.[20] However, in *Bodden*, as in *Lewis* discussed above, there was an aura of concealment not present here. In *Bodden*, the process server actually spoke to someone living at the defendant's last known address who stated the defendant was "unknown." Another defendant, an acquaintance of the absent defendant, stated under oath that the absent defendant lived at the address at which service had previously been attempted. In stark contrast, the undisputed evidence in this case is that [redacted] lived at, and was available for service at, the address where the process server went once during business hours, and that all investigative inquiries pointed to this same address.

The BANK also cites *Bodden* as condemning a motion to quash constructive service that "gave no information as to how the asserted defects in service could be

[20] Banks Brief, p. 11.

cured."[21] From this, the BANK argues that [redacted] motion to quash was insufficient because it did not explain why the BANK's process server should have tried her actual residence more than once.[22] Of course, unlike the motion in *Bodden*, [redacted] motion did give information as to how the defect of service could be cured – it stated that [redacted] lived at the address in question, and thus could have been served there.[23]

Next, the BANK argues that two cases (*Demars* and *Floyd v. Federal National Mortgage Association*, 704 So. 2d 1110, 1112 (Fla. 5th DCA 1998)) stand for the proposition that an affidavit need only "allege that a diligent search and inquiry was made and need not include specific supporting facts".[24] In reality, *Demars* held that an affidavit that is facially sufficient to comply with the statute is not enough, by itself, to prove adequacy of the search when it is challenged. "[I]t is still the duty of the court to determine whether the appellee actually conducted an adequate search." *Demars*, at 1223, *see also Lewis v. Fifth Third Mortgage Company*, at 7.

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[21] Bank's Brief, p. 16.

[22] *Id.*

[23] **A. 4-5; 21.**

[24] Bank's Brief, pp. 11-12.

Similarly, *Floyd* held that, while the affidavit need only allege that a diligent search and inquiry was made, the underlying facts must show that "the complainant reasonably employed the knowledge at his command, made diligent inquiry and exerted an honest and conscientious effort appropriate to the circumstance to acquire the information necessary to enable him to effect personal service on the defendant." *Id.* at 1112.

The BANK repeatedly cites *Redfield Invs. v. Village of Pinecrest*, 990 So. 2d 1135 (Fla. 3d DCA 2008) throughout its Brief.[25] *Redfield*, however, reversed an order denying defendant's motion to quash, declaring that the plaintiff must strictly comply with the statutory requirements and that the trial court has the duty to determine whether the plaintiff conducted an adequate search. *Id.* at 1138.

And while *Redfield* does indeed state that "case law has not drawn a bright line between efforts that show due diligence and those that are insufficient" (*Id.* 1139),[26] the case law has drawn a bright line as to how many attempts at service should be made – more than two. *Compare*, *Demars* and *Guggino*. In fact, the current trend is towards strict, "bright line" interpretation and enforcement of provisions to create rules that are clear-cut and easy to apply. *See Stowe v.*

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[25] BANK's Brief, pp. 8, 12, 13, 15.

[26] BANK's Brief, p. 15.

Universal Property & Cas. Ins. Co., 937 So. 2d 156, 158 (Fla. 4th DCA 2006); *Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724, 728 (Fla. 1st DCA 1986) ("[W]e are adopting the bright line approach so as to avoid appeals, such as this, that would not or should not have materialized if the rule had been strictly observed.").

The BANK also claims that [redacted] is focusing on the quantity of the BANK's service attempts and not the quality. To the contrary, both are deficient. The BANK made two attempts. Looking at each attempt individually, it is no surprise that personal service was not accomplished. The first attempt was at the correct address but it occurred in the afternoon on a work day. The other attempt was at an address for which there is no evidence of a current connection to [redacted] Therefore, the attempts at service were deficient in quality and quantity. That being said, the BANK did perform a quality search which repeatedly yielded the correct address. Unfortunately, the BANK did not bother to sufficiently follow up and serve [redacted] at this address.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this February 24, 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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