In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellant,

v.

WACHOVIA BANK, NATIONAL ASSOCATION, et al.,

Appellee.

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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. [redacted] Did Not Waive Her Right to Object to Defective Service of Process.

A. The BANK's claim that [redacted] asked the trial court to use its equitable power is misleading.

WACHOVIA BANK, NATIONAL ASSOCIATION (the "BANK) states twice in its Brief – once in its Statement of Facts – that "the Defendant asks the trial court to utilize its equitable power to 'reduce[] or modif[y]' the monthly payments due under the loan."[1] The BANK's emphasis on this point suggests not only that the BANK wishes it to be true, but that the truth of the BANK's statement is critical to its argument.

In reality, [redacted] [redacted] ("[redacted] never mentioned the word "equitable" in her letter; nor does she mention the word "court" or "judge." To tell this Court that [redacted] asked the trial court to do anything, without mentioning that the letter is not addressed to the court, but to the BANK's counsel, is misleading. Moreover, such rhetorical argument has no place in the Statement of Facts. *See Greenfield v. Westmoreland*, 2007 WL 518637, *1 (Fla. 3d DCA 2007).

If the BANK needs a finding that [redacted] was actually addressing the trial court, then at best, the matter becomes one of factual interpretation of the letter

[1] Answer Brief of Plaintiff/Appellee, Wachovia Bank, National Association ("the BANK's Answer Br."), pp. 3, 10.

itself. Because the BANK carries the burden of establishing that jurisdiction has been obtained (in this case, through waiver), then it carries the burden of establishing that the letter is, in fact, a request for the court to take action on [redacted] behalf. *See Anthony v. Gary J. Rotella & Assocs.*, 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005); *Schupak v. Sutton Hill Assocs.*, 710 So. 2d 707, 708 (Fla. 4th DCA 1998). The BANK has failed to carry that burden.

B. The *Pro Se* Hardship Letter to the BANK is Not a "Responsive Pleading."

Tellingly, the BANK makes a wholesale retreat from the position it argued below – the position accepted by the trial court – that the hardship letter was an "answer." Instead, the BANK fashioned a new argument for the appeal based upon a footnote in a federal, trial court decision interpreting the term "responsive pleading" in the rule regarding amending pleadings without leave of court: *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Four Ambassadors*, 599 F.Supp. 534, 536 n. 4 (S.D. Fla. 1984).

The *Four Ambassador* footnote concluded that a document filed by the defendant entitled "Affirmative Defenses and First Amended Counterclaim" was a "responsive pleading" that precluded the plaintiff (under Fla. R. Civ. P. 1.250(c) and 1.190(a)) from amending its complaint without leave of court. The federal court looked to Black's Law Dictionary to define "responsive pleading" rather than

Rule 1.100 which limits the "pleadings" which shall be allowed. But the correctness of federal trial court ruling need not concern this Court since: 1) the test for determining waiver of jurisdiction is not whether a document is a "responsive pleading" under the amendment-without-leave rule; and 2) the hardship letter is not a "responsive pleading" under that rule.

The BANK also cites *Heg, Inc. v. Bay Bank & Trust Co.*, 591 So. 2d 1011, 1012 n. 1 (Fla. 1st DCA 1991), which cites by footnote, the footnote in *Four Ambassadors*. There, the appellate court mentioned that the defendant's response to an order to show cause "may have constituted a responsive pleading," (emphasis added) that prohibited amendment of the complaint without leave of court. But the appellate court declined to decide the issue. It is informative that NO case deciding whether the filing of a document waives personal jurisdiction cites to either *Four Ambassadors* or *Heg*.

C. This Court Has Already Held that *Pro Se* Settlement Letters to Banks do Not Waive Jurisdictional Objections.

There is no need to look to footnotes in federal decisions or footnotes citing to footnotes to determine the issue *sub judice*. Indeed, this Court has already decided against an argument virtually identical to that presented by the BANK in this case when it was presented by another bank in *Nationsbank, N.A. v. Ziner*, 726 So. 2d 364 (Fla. 4th DCA 1999). In *Nationsbank*, the plaintiff attempted to serve

one of the defendants by sending him the summons and complaint in the mail. That defendant responded with a letter to the bank, in which he offered to settle the case. The defendant later challenged personal jurisdiction by motion, which was at first denied. Ultimately, the trial court found that service by mail was improper, and dropped the defendant as a party because service had not been perfected within 120 days as prescribed by Fla. R. Civ. P. 1.070(j).

Although this Court reversed the ruling that the defendant should be entirely dropped from the case, it rejected the plaintiff bank's argument that the defendant's letter, written in response to receiving the complaint, waived his jurisdictional objection:

> Here, Nationsbank does not dispute that serving [the defendant] with the summons and complaint by mail was improper service of process. See, generally, Fla.R.Civ.P. 1.070(i); Fla. Stat. § 48.161 (1997). It argues, however, that [the defendant] waived his objection that the court lacked personal jurisdiction. We disagree. [The defendant] never sought affirmative relief in this action, and continually protested the court's assertion of personal jurisdiction over him throughout the proceedings.[2] See *Montero v. Duval Fed. Sav. & Loan Ass'n of Jacksonville*, 581 So.2d 938 (Fla. 4th DCA 1991); *Cumberland Software, Inc. v. Great American Mortg. Corp.*, 507 So.2d 794, 795 (Fla. 4th DCA 1987).
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> [2]The fact that [the defendant] did not raise the jurisdictional challenge in his first June, 1993 letter to Nationsbank is not dispositive, for the letter was not a formal pleading.

Nationsbank, N.A. v. Ziner, 726 So.2d at 367 (emphasis added).

Accordingly, this Court has already held that a *pro se* letter to a bank, written in response to receiving the summons and complaint, and offering to settle the matter in dispute, is not a pleading that waives a jurisdictional challenge. A hardship letter, such as that sent to the bank in this case, is nothing more than the homeowner's plea to settle the foreclosure case through loan modification. This Court should reject the BANK's invitation to add insult to injury by holding that these final desperate efforts of homeowners to save their home and avert the uprooting of their families should operate as a waiver of their legal rights.

D. Courts Look To Substance Rather Than Form and Construe *Pro Se* Filings in Favor of the *Pro Se* Filer.

The BANK's attempt to graft the term "responsive pleading" upon the waiver standard to be applied in this case is apparently calculated to permit the BANK to make much ado about [redacted] use of the word "response" in the letter's introductory sentence.[2] ("In response to the civil action filed against me on January 28, 2009 which I received on February 9, 2009, I wish to state the following..."). Of course, beginning a letter by identifying that which has prompted the communication is not just commonplace, but commonsense. Doing so with the phrase, "This is in response to...," or its equivalent would also seem to be routine letter-writing technique. The phrase does not carry any particular legal

[2] The BANK's Answer Br., p. 11.

significance even among lawyers and provides no insight as to whether a *pro se* author was seeking to provide the court with the defenses that she intended to formally pursue in the judicial arena.

When determining the character of an appearance, the court must look to the substance not the form. *McKelvey v. McKelvey*, 323 So. 2d 651 (Fla. 3d DCA 1976). Substantively, all of the information provided in the hardship letter relates to a request for a loan modification directed at the Bank, not to any relief from the court. Moreover, the Court should liberally construe filings of *pro se* litigants in a light favorable to the person unrepresented by counsel. *Martinez v. Fraxedas*, 678 So. 2d 489, 491 (Fla. 3d DCA 1996) (construing defendant's *pro se* letter to court favorably to defendant, court determined that it should have been treated as a motion for appointment of counsel, not an answer that admitted liability). Accordingly, this Court should construe the letter, not as an answer or responsive pleading, but a settlement negotiation and a "paper" that would have prevented a default judgment without notice.

E. The Cases Cited by the BANK are Not Instructive.

Nearly all the cases cited by the BANK stand for the undisputed general proposition that service of process can be waived. Because the cases do not involve *pro se* letters, or do not specifically describe the document or activity that

waived jurisdiction, they are not instructive: *Thomas v. Bank of New York*, 7 So. 3d 574 (Fla. 1st DCA 2009) (cited six times; defendant filed "responsive pleading"); *De Ardila v. Chase Manhattan Mortgage Corp.*, 826 So. 2d 419 (Fla. 3rd DCA 2002) (footnote cited six times; appeal dismissed as untimely making waiver comment dicta); *Leipuner v. F.D.I.C.*, 860 So. 2d 1027 (Fla. 5th DCA 2003) (alternative basis for jurisdiction was waiver based on attorney's notice of appearance and "participation in the proceedings"); *Lennar Homes, Inc. v. Gabb Const. Services, Inc.*, 654 So. 2d 649 (Fla. 3d DCA 1995) (defendant waived service by filing a motion to dismiss and an answer, neither of which raised the issue); *Solmo v. Friedman*, 909 So. 2d 560 (Fla. 4th DCA 2005) (alternative basis for jurisdiction was waiver based on participation without objection in two hearings and submitting proposal for a supplement to the final judgment).

Lastly, the BANK relies upon *Kirshner v. Shernow*, 367 So. 2d 713 (Fla. 3d DCA 1979) in which the Third District found in an undefended appeal that jurisdictional objections had been waived by the filing of an answer. Although the "answer" in *Kirshner* was a handwritten letter, this characterization of the letter was an unchallenged assumption, not a decision by the court with precedential value.

F. That the BANK Resorts to Strained Interpretations of the Letter Proves that it Was Never Intended to Convey Specific Legal Positions.

The BANK argues that, in the first sentence of the letter, [redacted] "readily admits she was personally served 'on February 9, 2009.'"[3] In reality, she simply stated that she "received" the civil action filed against her. Just as in *Nationsbank*, the fact that [redacted] received a copy of the summons and complaint was never in dispute. The issue is whether the process server properly served the documents, which was not admitted in the letter. (As an aside, the BANK emphasizes that five weeks passed before [redacted] Motion to Quash was served and four months before it was amended. This passage of time, however, is irrelevant because nothing occurred in the interim. *See Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470-71 (Fla. 5th DCA 2007)).

The BANK also argues that, because [redacted] mentioned that her ex-husband was obligated to pay a line of credit "taken out with Wachovia," she should be deemed to have admitted the allegations of Paragraphs 7, 9, 24, 25 of the Complaint.[4] Two of those paragraphs claimed that the BANK is the current owner and holder of both the Note and the Mortgage.[5] Of course, [redacted] would have

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[3] The BANK's Answer Br., p. 13.

[4] The BANK's Answer Br., p. 11.

[5] Complaint, ¶¶ 9, 25 (App. to IB, 3, 7).

no way of knowing what entity currently owns the note and mortgage. Even if [redacted]'s comment – made in the course of a settlement request – could be considered an admission, at best, it would admit only that Wachovia was the original lender and mortgagee.

Similarly, the BANK would have this Court construe [redacted] statement that, "[d]ue to recent circumstances unbeknownst to me, [my ex-husband] has stopped payment to the line of credit" as admissions that: 1) no payment was made on June 14, 2008; 2) no payment was made at anytime thereafter; and 3) the BANK elected to accelerate the payment of the balance.[6] In context, the "admission" that her ex-husband stopped repaying the loan appears to be nothing more than [redacted] acknowledgement of information that the BANK's representatives have told her. It certainly does not concede how many payments have been missed; nor does it concede that the BANK properly accelerated the balance.

The BANK's constant overreaching as to what allegations were purportedly conceded by the letter lays bare the core problem with imbuing informal hardship letters with the binding properties of a formal pleading – it requires interpretation. The strained interpretations offered by the BANK are necessary for its argument

[6] The BANK's Answer Br., p. 11; Complaint ¶¶ 11, 26 (App. to IB, 3, 7).

because, in reality, the letter was never intended to communicate the legal positions [redacted] intended to take with respect to the allegations in the Complaint. To say (repeatedly) that the letter "joins issue" with the Complaint[7] when, according to the BANK itself, the letter consists of no denials, but only inferred or completely tacit "admissions," is self-serving and hollow.

G. Treating Hardship Letters as "Answers" is Against Public Policy.

Although the BANK retreated from its position that the hardship letter is an "answer," it seeks to trivialize the far-reaching effects that would flow from such a decision. It first argues that "a *pro se* litigant can avoid the entry of a default (and preserve the right to subsequently contest personal jurisdiction) by simply filing a paper that requests additional time to respond to the complaint."[8] This presupposes, of course, that *pro se* litigants would know the legal consequences of filing a written settlement overture rather than something that specifically articulates a need for additional time.

More importantly, the BANK's argument also presumes that *pro se* litigants would know that simply mailing a letter could have the same legal effect even if it is never filed with the court. *See Monte Campbell Crane Co., Inc. v. Hancock*, 510 So.2d 1104, (Fla. 4th DCA 1987). Tracing the BANK's argument to its natural

[7] The BANK's Answer Br., pp. 11-12, 16.

[8] The BANK's Answer Br., p. 17.

conclusion, therefore, means that homeowners finding themselves in foreclosure should avoid any correspondence with their lenders regarding their cases lest it be used against them in court. This result being advocated by the BANK should be rejected as discouraging settlement dialogue between the parties.

Next, the BANK contends that treating hardship letters as answers would not waive defenses (other than jurisdictional defenses), because these "answers" could always be amended "as facts are developed through discovery and other means."[9] [redacted] argument, however, was that treating the multitude of hardship letters as answers would effectively default thousands of *pro se* homeowners.[10] To simply respond that *pro se* defendants will employ discovery or "other means" to resurrect their defenses is facile and unrealistic.

The staggering number of "*pro se* handwritten letters" filed in the foreclosure cases of Palm Beach County alone[11] strongly suggests that there is a popular belief that filing a hardship letter will avoid a default while one retains an attorney or attempts to negotiate a solution with the bank. The hardship letter in this case, asking the BANK to modify the loan, should have been interpreted in

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[9] The BANK's Answer Br., pp. 17-18.

[10] Initial Brief of Appellant [redacted] p. 9.

[11] Transcript. of Proceedings Held Before the Honorable Meenu Sasser, October 05, 2009 ("Hrg. Tr."), p. 12. (App. to IB, 43, 54.); [redacted] Initial Brief, p. 9.

accord with that belief. Just as the court in *Martinez* held that the *pro se* letter should have been treated as a motion for appointment of counsel (rather than an answer), the *pro se* letter here should have been treated as a request for more time to respond to the Complaint or to negotiate a loan modification.

II. This Court should Rule on the Sufficiency of Service of Process and the Return of Service.

The BANK maintains that this Court cannot review the sufficiency of service of process or the deficiency of the return of service because the trial court did not rule on those issues.[12] [redacted] agrees that the lower court did not put a ruling on the record.[13] [redacted] however, briefed the issues on appeal in the event this Court would consider them as an alternative means of upholding the trial court ruling. *See Butler v. Yusem*, 3 So. 3d 1185 (Fla. 2009) (approving the affirmance of trial court decisions that reach the right result for the wrong reasons under the "Tipsy Coachman" doctrine).

Nevertheless, [redacted] opposes the BANK's request that the case be "remanded for further proceedings" so that it can reargue the issues regarding service of process and the return of service. The parties fully argued these issues

[12] The BANK's Answer Brief, p. 19.

[13] Hrg. Tr., p. 28 (App. to IB, 70).

to the trial court, all of which is before this Court by way of the motions, memoranda, and the transcript of the hearing. Because the BANK never disputed the underlying facts – that the required information was missing from both the summons and the return of service – there is nothing left for the trial court to decide but pure issues of law. And since the standard of review is *de novo* (*Anthony*, 906 So. 2d at 1207), the Court should rule on the issues in the interests of efficiency and judicial economy.

CONCLUSION

The trial 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 and the attached appendix was served by U.S. Mail this December 3, 2009 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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